

**IN A GENERAL COURT-MARTIAL  
IN THE SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY  
FORT BRAGG, NORTH CAROLINA**

UNITED STATES	)	
	)	
v.	)	GOVERNMENT RESPONSE TO
	)	DEFENSE MOTION TO DISMISS AND
BERGDAHL, ROBERT BOWDRIE	)	TO LIMIT THE SENTENCE THAT MAY
(BOWE)	)	BE ADJUDGED TO NO PUNISHMENT
SGT, U.S. Army	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	2 AUGUST 2016
Fort Bragg, North Carolina 28310	)	

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**I. RELIEF SOUGHT**

The Government requests the Court deny the Defense Motion to Dismiss and to Limit the Sentence That May Be Adjudged to No Punishment. The Court should also deny the Defense request for oral argument on a Motion that cites no legal precedent in the history of this country that has granted relief on the basis they advance.

**II. BURDEN OF PERSUASION AND BURDEN OF PROOF**

The Accused, as the moving party, has the burden of persuasion in accordance with R.C.M. 905(c)(2), and the burden of proof is preponderance of the evidence in accordance with RCM 905(c)(1).

**III. FACTS**

On 30 June 2009, the Accused deserted from his place of duty at Observation Post Mest Afghanistan, while deployed as part of Task Force Yukon, Combined Joint Task Force-82/Regional Command-East. After leaving the Observation Post, he was captured by enemy forces, where he remained in captivity until 31 May 2014, when he was returned to military control.

Between 30 June 2009 and 31 May 2014, multiple entities from the United States Government gathered intelligence, physically searched for the Accused and attempted diplomatic solutions to effect his return.

Charges were preferred against the Accused on 25 March 2015, and an Article 32 Preliminary Hearing was conducted on 17 and 18 September 2015. The matter was referred to trial on 14 December 2015.

### III. EVIDENCE

While not conceding the relevance of any of the facts that Defense cites, the Government stipulates that the news articles are accurately quoted. As such, the government agrees that there is no need for any additional witnesses or evidence.<sup>1</sup>

### IV. LAW AND ARGUMENT

The Defense proposes an unprecedented remedy - dismissal of charges or a limitation on punishment based on the comments of a Member of Congress – but once again cites no law to support such a proposition. Quite the opposite, the Defense has now been reduced to citing a single blog entry and an *unpublished* LL.M paper in support of their novel claims. The Defense motion borders on the quixotic, needlessly quoting Mayor LaGuardia and making the outlandish claim that Senator McCain's comments regarding this case have "indelibly placed [Senator McCain] in the annals of military justice."<sup>2</sup> D App 27 at 11.

The dearth of authority supporting the Defense position speaks volumes and leaves the Government in a difficult position. There is no law on point that the Government can cite, mainly because the Defense's proposition is totally unsupported.

On the rare occasion that the Defense cites a case, they do not stand for the propositions the Defense claims. For instance, while *United States v. Murphy*, 2008 CCA Lexis 511 (AFCCA 2008) is a case that resulted in a limitation on punishment, it had absolutely nothing to do with comments made by a Member of Congress (or anyone else), and was instead entirely about a discovery dispute.

There is no question the Accused has a right to due process under the Constitution. It is notable, however, that aside from a cite to the Fifth Amendment, the Defense has offered no analysis, and certainly no support in the form of any precedent, for the notion that Senator McCain's comments constitute a due process violation. The Defense has had the opportunity to interview LTC Peter Burke, the Accuser and Special Court-Martial Convening Authority, and is scheduled to interview GEN Robert Abrams, the General Court-Martial Convening Authority, yet they do not even allege that either of them were influenced in any way by the comments made by Senator McCain.

Apart from the conclusory statement that Senator McCain's comments violate the Accused's due process rights, the Defense offers absolutely no analysis as to *how* such a violation has occurred. Instead, they launch into a strange discussion over whether Senator McCain should be removed as Chairman, censured, or otherwise punished by

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<sup>1</sup> As previously stated, because there is no legal basis to support the Defense's motion, the Government does not believe that a hearing is necessary at all.

<sup>2</sup> Senator McCain is not the only windmill the Defense seeks to battle; apparently confusing this Court-Martial for a civil proceeding in District Court, the Defense attaches a self-created "Trump Defamation Log," continuing their bizarre fixation with Donald Trump. In keeping with the rest of their motion, Defense cites no authority for the proposition that a Presidential candidate is either subject to the code or capable of committing UCI (because there is none).

the Senate. D App 27 at 15. They follow this utterly irrelevant discussion with an even more shocking diatribe on who would have the authority to *court-martial* him. D App 27 at 16. The Defense concedes that action in the Senate "is for that body to decide," and that "no one has ever been tried for a violation of Article 98."<sup>3</sup> The Government can only conclude, therefore, that Defense counsel has included these discussions in an attempt to incite interest among the press. In any event, as they are totally irrelevant to any issue before the Court, the Government will not respond substantively to such absurdities.

The Defense also devotes a significant portion of their motion to discussing emails between the Senate and House Armed Services Committees and the Army Office of Congressional Legislative Liaison. Again, it is unclear how internal communication between these offices has anything to do with the Accused's due process rights. Moreover, the Defense fails to distinguish between documents provided subject to a Freedom of Information Act (FOIA) request and documents provided in the context of criminal discovery. To the extent that the Defense complains that documents were improperly redacted in response to their FOIA request, this court-martial is not the appropriate venue to resolve such complaints.

The novelty of the Defense's position is clear in their final paragraph, where they write "[w]hile garden variety UCI<sup>4</sup> can in theory be deterred by the risk (however slight) of prosecution under Article 98, the congressional variant that violates the Constitution itself cannot." The "congressional variant" is a misnomer; it is not a variation, it is an invention.

Despite the Defense's repeated rhetoric regarding this case, it is not the first time that the military has dealt with a high-profile case. Numerous cases have attracted national attention and attention from Congress. In fact, in *United States v. Calley* and *United States v. Hasan*, far from simply making an off the cuff comment to a reporter, the House and Senate Armed Services Committees actually held hearings prior to the respective courts-martial. See, *Calley* 46 C.M.R. 1131 at FN 10 (C.M.R. 1973); Senate Homeland Security and Governmental Affairs Committee, *Report on the Activities of the Committee on Homeland Security and Governmental Affairs, United States Senate, 113th Congress*, S. REP. NO. 113-115 (2013). As the Court of Military Review noted in *Calley*, when rejecting the claim that comments made by high ranking officials and contact between officials at Fort Benning and the Department of the Army had prejudiced the case to the point that reversal was required:

This argument if carried to its logical extension is tantamount to asserting that Lieutenant Calley or any other person subject to the Code whose

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<sup>3</sup> The Government agrees with the Defense that it is unaware of any case where a prosecution has been brought under Article 98. It is also unaware of any instance where a sitting United States Senator was recalled to Active Duty 35 years after retiring to be court-martialed for anything, let alone an Article 98 violation.

<sup>4</sup> In order to avoid confusion with the concept of actual UCI (as opposed to apparent UCI) with the Defense's invented "Congressional variant" when discussing Unlawful Command Influence, the Government will refer to it as "real UCI."

case attracts national interest or is of national significance may not be brought to trial. This we cannot accept.

*Id* at 1156-1157.

Similarly, there have been numerous civilian criminal cases that have garnered public and Congressional interest, including *United States v. McVeigh* (the 1995 Oklahoma City bombings); *United States v. Moussaoui* (the September 11, 2001 attacks); and *United States v. Skilling* (the Enron collapse). Just as in *Calley* and *Hasan*, each of these cases generated significant publicity, and in the case of *Moussaoui* and *Skilling*, had hearings conducted by Congressional committees prior to trial. See National Commission on Terrorist Attacks Upon the United States, *Final Report of the National Commission on Terrorist Attacks Upon the United States*, July 22, 2004; Permanent Subcommittee on Investigations of the Committee on Government Affairs, *The Role of the Board of Directors in Enron's Collapse, United States Senate, 113th Congress*, S. REP. NO. 80-393 2012. And yet none of these cases, nor any other case, has ever been dismissed or resulted in a reduction in the potential sentence as a result. This lack of precedent in the civilian authorities is telling; unlike real UCI, which is based on the statutory authority of Title 10 and is therefore unique to the military, the Defense's invented "Congressional variety" is rooted generically in the Due Process Clause of the Fifth Amendment, which of course applies to civilian criminal cases. Surely if this "variety" existed some court somewhere would have referenced it at some point. Once again, the silence in this area is deafening.


### CONCLUSION

The Defense motion seeks to have the Court boldly go where no court has gone before. There simply is no such legal principle as Unlawful Congressional Influence. Essentially Defense is asking the Court to create new law, a function reserved for the legislative process. As such, the Government requests that the Court Deny the Defense Motion to Dismiss or to Limit Sentencing to No Punishment and further deny the request for oral argument.



JUSTIN C. OSHANA  
MAJ, JA  
Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 2 August 2016.

A handwritten signature in black ink, appearing to read 'J. Oshana', with a stylized flourish at the end.

JUSTIN C. OSHANA  
MAJ, JA  
Trial Counsel