

**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 RENEWED MOTION TO
BERGDAHL, ROBERT BOWDRIE)	DISMISS (APPARENT UCI)
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	20 October 2017
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

I. RELIEF SOUGHT

The Court has already ruled that the statements made by then-Candidate Trump regarding SGT Bergdahl did not constitute Unlawful Command Influence (UCI). AE 36. The mere fact that President Trump has acknowledged the existence of those statements does nothing to alter that conclusion. As such, the Government requests the Court deny the Defense Renewed Motion to Dismiss (Apparent UCI).

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

In the context of a motion claiming unlawful command influence (UCI), the initial burden is on the Defense to "show facts which, if true, constitute unlawful command influence." *United States v. Biagase*, 50 M.J. 143, 150 (1999). Second, the Defense must show "that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.* "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Id.* The Defense is required to present "some evidence" of unlawful command influence. *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 300 (1995)). Third, if the Defense has made the requisite showing under the first two steps, the burden shifts to the Government to: (1) disprove "the predicate facts on which the allegation of unlawful command influence is based"; (2) persuade the military judge "that the facts do not constitute unlawful command influence"; or (3) prove at trial "that the unlawful command influence will not affect the proceedings." *Id.* at 151. "Whichever tactic the Government chooses, the quantum of proof is beyond a reasonable doubt." *United States v. Stoneman*, 57 M.J. 35, 41 (2002) (citing *Biagase*, 50 M.J. at 151).

III. FACTS

The Government incorporates by reference the facts as alleged in G App 68, the Government Response to the Defense Motion to Dismiss, and G App 96, the Government Response to the Eighth Defense Motion to Compel.

On 27 September 2017 the Court denied the Eighth Defense Motion to Compel during an Article 39(a) session. Although no written ruling was issued, the Court did recognize what it described as a “logical fallacy” in the Defense argument that the theoretical¹ failure to disclaim statements which had already been determined to not constitute UCI could somehow transform them into UCI.

On 16 October 2017 the Accused entered pleas of guilty to both charges,² a providence inquiry was conducted, and the Court entered findings of guilty.

Later that day, President Trump conducted an unrelated press conference with Senate Majority Leader Mitch McConnell, during which he addressed a wide variety of issues. During that press conference, President Trump answered approximately 43 questions from reporters, including the following:

QUESTION: Do you believe that your comments in any way affected Bowe Bergdahl's ability to receive a fair trial? And can you respond to his attorney's claims that...

TRUMP: Well, I can't comment on Bowe Bergdahl, because he's -- as you know, they're -- I guess he's doing something today, as we know. And he's also -- they're setting up sentencing, so I'm not going to comment on him. But I think people have heard my comments in the past.

On 20 October 2017 the White House issued the following statement:

Military justice is essential to good order and discipline, which is indispensable to maintaining our armed forces as the best in the world. Each military justice case must be resolved on its own facts. The President expects all military personnel who are involved in any way in the military justice process to exercise their independent professional judgment, consistent with applicable laws and regulations. There are no expected or required dispositions, outcomes, or sentences in any military justice case, other than those resulting from the individual facts and merits of a case and the application to the case of the fundamentals of due process of law by officials exercising their independent judgment.

Encl. 3.

¹ As the Government explained in its response, no request for any such statement was ever made, and as such, no one ever actually declined to disclaim the President's prior statements.

² The Accused entered a plea by exceptions and substitutions to Charge I. The Court ultimately convicted the Accused of the substituted words and figures.

IV. EVIDENCE

- Enclosure 1. Affidavit of GEN Robert B. Abrams
- Enclosure 2. Affidavit of COL Vanessa A. Berry
- Enclosure 3. Statement by The White House Office of the Press Secretary

V. LAW AND ARGUMENT

The prohibition against Unlawful Command Influence is found in Article 37, Uniform Code of Military Justice (“UCMJ”), which states:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Unlawful command influence can occur in two forms: actual or apparent.³ The question of whether there is apparent UCI is determined "objectively." *United States v. Lewis*, 63 MJ 405, 416 (2006). The test for apparent UCI is whether an "objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceedings." *Id.*

a. The Defense has not alleged any new facts which would constitute UCI

The President’s statements during the 16 October 2017 press conference are the only new facts that the Defense has averred in their Renewed Motion. The President explicitly stated that he would not comment regarding SGT Bergdahl because there was a proceeding occurring that day and because sentencing was approaching. The final line of his answer is nothing more than an acknowledgment of the existence of his prior comments. He did not repeat or adopt his prior statements.

Despite the Defense’s efforts to cast the statement “[b]ut I think people have heard my comments in the past” as some sort of turning point moment, the reality is that the statement is a truism in the highest sense of the word. The prior statements were not UCI at the time they were made and were not transformed into UCI upon his election. It would be absurd to conclude that the statements have now become UCI simply because he acknowledged having made them (a point that was never in contention).

³ The Defense has only alleged apparent UCI.

The Court has already concluded that the prior comments, made in his capacity as a candidate, did not “rise to the level of ‘some evidence’ required for the defense to meet its initial burden.” AE 36 at 6. Those comments remain what they have always been, “statements of a private citizen” that were “clearly made to enflame the passions of the voting populace against his political opponent and in Mr. Trump’s favor.” *Id.*

The Defense concludes from the last line of the President’s answer that “his views now, months after Inauguration Day, are no different from what they were before then.⁴ Had they changed, he would have said so.” D App 108 at 3. Implicit in this argument is a recognition that the President’s 16 October 2017 statement did not, in and of itself, contain any objectionable content. Thus, as a threshold matter, the Defense has not alleged any new facts which, if true, would themselves constitute UCI.

Instead, the Defense’s Renewed Motion is based on the same flawed premise that the Court has already rejected: that the President’s failure to disclaim his prior statements, which the Court has already determined were not UCI, transforms those statements into UCI. The Court appropriately recognized and rejected this logical fallacy when the Defense raised it as part of their Eighth Defense Motion to Compel and should do so again here. Put simply, the Defense has not alleged any new fact which, if true, would constitute UCI, and as such, has not met the threshold burden.

b. Assuming arguendo that the President’s comments rise to the level of “some evidence” no objective disinterested observer would harbor any doubts about the fairness of the proceedings

The Defense advances a claim of apparent UCI only; they have not alleged that any of the proceedings to date or any of the participants have been impacted in any manner by any comments made by President Trump. The test for apparent UCI is based on an analysis of an objective, disinterested observer fully informed of all the facts and circumstances. Definitionally, such a person would already be aware of the prior comments made by then-Candidate Trump, such that the mere acknowledgment of their existence by now-President Trump would in no way add to the universe of information that an objective observer would have in evaluating the fairness of the military justice system. The facts surrounding the prior comments made by Candidate Trump remain the same as they did when the Defense raised their original motion. The comments were all made in the context of the 2016 Presidential campaign, they constituted a small fraction of what Mr. Trump said on the campaign trail and a miniscule portion of what was covered overall in the context of the election. Any objective, disinterested observer would continue to recognize the comments for what the Court has already concluded they were, “nothing more than inflammatory campaign rhetoric.” AE 36 at 6.

⁴ This line also reveals an error in the manner in which the Defense approaches the issue of UCI. Contrary to their belief that the existence of apparent UCI can be established by attempting to discern what the President’s subjective feelings are, the actual standard relies on the question of what a disinterested objective observer would believe about the fairness of the proceedings.

The statement made by the President on 16 October 2017 was nothing more than an acknowledgment that he made statements previously as a candidate. The 20 October 2017 statement from the White House makes clear that “[t]he President expects all military personnel who are involved in any way in the military justice process to exercise their independent professional judgment, consistent with applicable laws and regulations.” Encl. 3. Moreover, “[t]here are no expected or required dispositions, outcomes, or sentences in any military justice case, other than those resulting from the individual facts and merits of a case and the application to the case of the fundamentals of due process of law by officials exercising their independent judgment.” Encl. 3.

The law has long recognized and supported the use of such statements to remove the alleged taint—both actual and apparent—of UCI from the proceedings. See e.g. *United States v. Jessup*, 1992 CMR Lexis 736. To the extent that there was any question regarding the President’s position based on his 16 October 2017 press conference, the statement clearly resolves it: the President expects that all personnel involved in the military justice system will exercise independent judgment to ensure fairness.

In addition to this unequivocal statement from the President, an objective, disinterested observer would also be aware of the procedural posture of this case as it presently exists, otherwise they would not be fully informed of all the facts and circumstances. The single comment made by the President occurred after findings had been entered. Thus, all that remains is sentencing and post-trial proceedings. Indeed, the Defense specifically limits their allegations to the appearance of influence over the participants in the post-findings phase, specifically the Court, the SJA and GCMCA, and the Judges of the Army Court of Criminal Appeals or The Judge Advocate General as appropriate. The Defense offers no evidence to suggest that any of those individuals are aware of, or would be impacted by, the President’s press conference, other than the generic assertion that as commissioned officers they are ultimately under the command of the President. This, by itself, is not enough to cause an objective, disinterested observer who is fully informed of all facts and circumstances to harbor significant⁵ doubts about the fairness of these proceedings for a variety of reasons.

The Court previously recognized the value of *voir dire* on panel members as it relates to this issue, concluding that “[i]t could easily be that each and every panel member questioned in *voir dire* will honestly and convincingly say they have either never heard the comments or, having heard them, would not be prejudiced against the accused by them.” AE 36 at 6. The Court, having already dealt with the prior litigation regarding this issue, is of course fully aware of the prior statements made by Candidate Trump. The Defense has not sought to either *voir dire* the Court or move to disqualify as a result of that knowledge, nor has the Court *sua sponte* done so, as presumably it would if it believed that it had been

⁵ In their pleading, the defense uses the phrase “substantial doubt.” This is not the standard articulated in *United States v. Boyce*, 76 M.J. 242. Noticeably, they also limit the scope of the information received by the objective, disinterested observer to the most recent comment made by President Trump. That is also not the standard.

improperly influenced.⁶ Similarly, the affidavits of both GEN Abrams, in his capacity as General Court Martial Convening Authority, and COL Berry, the Staff Judge Advocate, make clear that neither were impacted in any manner.

This conclusion is even clearer when taking into consideration the current procedural posture of this court-martial. The Accused has already pled guilty, and that plea has already been accepted by the Court. The sentencing authority in this case is also the Court. “Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.”⁷ *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) *citing United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). There is no evidence, much less clear evidence to the contrary, that the presumption will not hold here. The Navy Marine Court of Appeals used this presumption as one of their factors in finding no apparent UCI when the accused selected a judge alone trial in a case concerning President Obama’s May 2013 comments concerning sexual assaults in the military. *United States v. Guin*, 75 M.J. 588, 597 (N.M.C.C.A. 2016) (unpublished). The standard at issue is one where “an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a *significant doubt* about the fairness of the proceeding.” (emphasis added) *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017) *citing United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). Accordingly, even if the Defense has shifted the burden to Government, the Government has clearly proved beyond a reasonable doubt that the disinterested objective observer would not harbor any doubt, much less significant doubt, as to the fairness of the proceedings.

Finally, one of the factors the United States Court of Appeals for the Armed Forces has used in the past in determining whether there was apparent UCI is whether there has been “the extensive ventilation of the unlawful command influence allegations at trial through testimony, documentary evidence, briefs, arguments of counsel, and a detailed written decision by the military judge....” *United States v. Simpson*, 58 M.J. 368, 376 (C.A.A.F. 2003). The fact that this motion will be litigated in open court where both the public and the press will be present, and there will be a complete record of the facts, to include no impact on any party, forces that disinterested, objective observer to only one inevitable conclusion—the proceedings are fair.

VII. CONCLUSION

In denying the Defense’s first attempt to have this case dismissed for apparent UCI, the Court concluded that “[n]o reasonable member of the public, apprised of all the facts and circumstances and seeing campaign rhetoric for what it is, would believe that because Candidate Trump said those troubling things and is now President Trump, the accused has been or will be denied a fair trial.” It strains credulity to suggest that the President’s statement acknowledging that which was already publicly known would alter that conclusion. The Defense has failed to offer any new evidence which, if true, would

⁶ Though Defense has not requested *voir dire* of the Court, the Government intends to do so. The Government is confident once that *voir dire* is complete as part of presenting evidence concerning this motion, the lack of impact on the Court by the statement will be absolutely clear to any outside observer.

⁷ This same presumption would also apply to the Judges on the Army Court of Criminal Appeals.

constitute UCI. As such, they have failed to meet the initial burden. Even if the comments made by the President on 16 October 2017 did constitute some evidence, no disinterested objective observer would harbor any doubts about the fairness of the proceedings for all of the reasons already outlined by the Court in its prior rulings and in addition, as a result of the statement from the White House on 20 October 2017. As such, the Defense Renewed Motion to Dismiss should be denied.

//Original Signed//
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 20 October 2017.

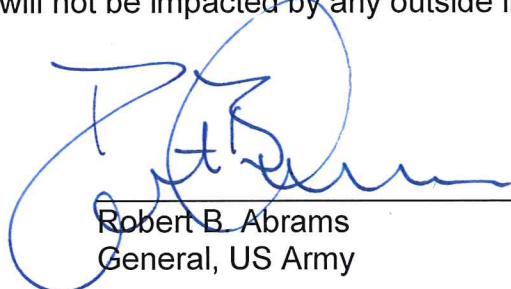
//Original Signed//
JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

AFFIDAVIT OF GENERAL ROBERT B. ABRAMS

TO THE HONORABLE JUDGE JEFFREY NANCE OF THE UNITED STATES
MILITARY COURT FOR THE SECOND JUDICIAL DISTRICT, FORT BRAGG, NC:

I, GEN Robert B. Abrams, after being sworn upon my oath, make the following statement concerning my knowledge in the case of United States v. Sergeant Robert Bergdahl.

1. I am currently the Commanding General, U.S. Army Forces Command ("FORSCOM") and the General Court-Martial Convening Authority (GCMCA) in United States v. Sergeant Robert Bergdahl. I assumed command of FORSCOM on 10 August 2015.
2. I am not aware of any comments that President Trump may or may not have said concerning Sergeant Bergdahl since he assumed the Office of the President.
3. My role as a GCMCA is one of the most important authorities I have as the Commanding General of FORSCOM. I fully understand my role and responsibilities in executing this authority. As a GCMCA it is essential that I remain fair and impartial in every legal action where I execute GCMCA authority. It is my duty to ensure that all proceedings are guided only by the laws and regulations that govern the military justice system. This is my solemn duty that I take with the utmost seriousness and steadfast commitment. This is crucial to ensure a fair and just system. Decisions I make are mine alone in the execution of my GCMCA authority.
4. As I previously testified, all decisions already made by me and any future ones as the GCMCA are within my own discretion based only on the law and materials properly submitted to me for my review. I will continue to vigilantly guard my independent decision making as the GCMCA as required under the Uniform Code of Military Justice. My decisions will not be impacted by any outside influence.



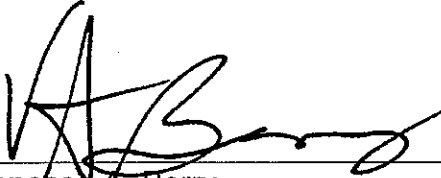
Robert B. Abrams
General, US Army

AFFIDAVIT OF COLONEL VANESSA A. BERRY

TO THE HONORABLE JUDGE JEFFREY NANCE OF THE UNITED STATES
MILITARY COURT FOR THE SECOND JUDICIAL DISTRICT, FORT BRAGG, NC:

I, COL Vanessa A. Berry, after being sworn upon my oath, make the following statement concerning my knowledge in the case of United States v. Sergeant Robert Bergdahl.

1. I am currently the Staff Judge Advocate (SJA), U.S. Army Forces Command ("FORSCOM"). I assumed the position in February 2013.
2. I am aware of the comment made by President Trump on 16 October 2017 concerning the case of United States v. Sergeant Robert Bergdahl.
3. I take the role and responsibilities as the SJA under the Uniform Code of Military Justice with the utmost seriousness. I understand that my candor in providing advice solely based on the law and appropriate underlying facts is critical to a just and fair administration of military justice. I have done so throughout my tenure and will continue to do so.
4. No outside influence—including any statements by the President—will impact my recommendations or actions that I will take as the SJA in SGT Bergdahl's court-martial. All actions by me are my own and will be independently made based on my understanding of the law and the underlying relevant facts. I have done this throughout my career and this will not change in my continued service to my client—the U.S. Army.



Vanessa A. Berry
Colonel, Judge Advocate

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The White House

Office of the Press Secretary

For Immediate Release

October 20, 2017

Statement Regarding Military Justice

Military justice is essential to good order and discipline, which is indispensable to maintaining our armed forces as the best in the world. Each military justice case must be resolved on its own facts. The President expects all military personnel who are involved in any way in the military justice process to exercise their independent professional judgment, consistent with applicable laws and regulations. There are no expected or required dispositions, outcomes, or sentences in any military justice case, other than those resulting from the individual facts and merits of a case and the application to the case of the fundamentals of due process of law by officials exercising their independent judgment.