

UNITED STATES ARMY TRIAL JUDICIARY
SECOND JUDICIAL CIRCUIT, FORT BRAGG, NORTH CAROLINA

UNITED STATES OF AMERICA)

v.)

SGT Robert B. Bergdahl)
HHC, STB, U.S. Army FORSCOM)
Fort Bragg, NC 28310)

) Findings of Fact, Conclusions of Law
) and Ruling -- Defense Motion to
) Dismiss and, in any Event, to Limit the
) Sentence That May be Adjudged to No
) Punishment
)

28 September 2016

1. The accused moves this Court to dismiss the charges against the accused with prejudice because Senator John McCain and Mr. Steve Barney (General Counsel to the Senate Armed Services Committee (SASC)) made public and other comments indicating that SGT Bergdahl was a deserter and that if he wasn't court-martialed and sent to jail the SASC would hold hearings to determine why.

FINDINGS OF FACT

2. I considered the pleadings of the parties, the testimony General Robert Abrams, as well as all appellate exhibits submitted on the matter and not objected to by the parties. I find the following facts by a preponderance of the evidence:

a. On or about 30 June 2009, the accused went missing from his unit while deployed to Afghanistan. Between 30 June 2009 and 31 May 2014, numerous efforts were made by multiple government interties to locate and recover SGT Bergdahl.

b. On or about 31 May 2014, in an apparent prisoner exchange deal with the Taliban¹, the United States exchanged five Taliban detainees held at Guantanamo Bay, Cuba for SGT Bergdahl.

c. On or about 2 June 2014, Senator John McCain (Republican from Arizona and chairman of the SASC since January 2014) began making public statements about the propriety of the exchange and the efforts to recover SGT Bergdahl. Then began a regular dialog between the SASC general counsel's office and the Army with the SASC asking for information and updates about what was being done about investigating and charging SGT Bergdahl. It was clearly communicated to the Army that Senator McCain wanted to make a statement and clearly communicated by the

¹ Specifically the Haqqani network is a group of guerilla fighters in Afghanistan who are loosely affiliated with the Taliban.

Army that they would prefer that Senator McCain not make a statement about the matter until all investigations and proceedings were completed. These exchanges continued right up until 23 March 2015. (See generally, DAE 27, Statement of Facts, p. 2-4).

d. On 25 March 2015, charges of desertion and misbehavior before the enemy were preferred against SGT Bergdahl. The dialog between the SASC and the Army concerning timing and the next step in the proceedings continued. (See generally, DAE 27, Statement of Facts, p. 4-7).

e. On 5 October 2015, after the Article 32 Preliminary Hearing was completed, the hearing officer (PHO), LTC Mark Visgar submitted his report and recommendation to the Special Court-martial Convening Authority (SPCMCA) recommending the charges be referred to a Special Court-martial not empowered to adjudge a Bad Conduct Discharge (BCD) and observing that neither confinement nor a punitive discharge are warranted in his opinion. These recommendations were made public on 10 October 2015.

f. On 11 October 2015, while campaigning in New Hampshire for Presidential candidate Senator Lindsey Graham, Senator McCain, when asked by a reporter for comments about the PHO's recommendations, commented that: " if it comes out that he has no punishment, we're going to have to have a hearing in the Senate Armed Services Committee . . . it is well known that in the searches for Bergdahl, after -- we know now -- he deserted, there are allegations that some American soldiers were killed or wounded, or at the very least put their lives in danger, searching for what clearly is a deserter. We need to have a hearing on that."

g. After that comment, there were several efforts by legal representatives of the Army to have Senator McCain make a clarifying comment disavowing any intent to improperly influence the outcome of the legal process. No such comment was ever made by Senator McCain or any of his representatives. In fact, the SASC requests for updates and information continued. (See generally, DAE 27, Statement of Facts, p. 8-9).

h. On 14 December 2015, General Abrams referred the charges to General Court-martial.

i. Prior to referring this case to trial, General Abrams never had any communication of any kind with Senator McCain or members of his staff regarding SGT Bergdahl, efforts to recover him or the disposition of charges against him. Neither Senator McCain nor members of his staff have ever even attempted to contact General Abrams or members of General Abrams' staff. Though aware of Senator McCain's public comments to the effect that if SGT Bergdahl were not court-martialed and sent to jail he (Senator McCain) would hold hearings on the matter, General

Abrams was not affected by those comments and did not consider them in making his decision as to the disposition of the charges against SGT Bergdahl. In fact, General Abrams thought the comments were inappropriate and that Senator McCain should not have made them.

j. General Abrams has no fear of retribution to himself or his career if action he has taken or may take in this case is not consistent with Senator McCain's apparent views about what should be done. Neither Senator McCain, nor anyone else, has threatened or otherwise tried to forcefully influence General Abrams decisions in this case. General Abrams decision as to the disposition of the charges in this case were his own.

k. Senator McCain retired from the U.S. Navy in 1981.

LAW AND ANALYSIS

3. Unlawful Command Influence (UCI) is the “mortal enemy of military justice.” *United States v. Thomas*, 22 MJ 388, 393 (C.M.A. 1986). Article 37, of the Uniform Code of Military Justice (UCMJ) was enacted by Congress to prohibit commanders and convening authorities from attempting to coerce, or by unauthorized means, influence the action of a court-martial, or any member thereof in reaching the findings or sentence in any case. Article 37(a), UCMJ. Unlawful command influence (UCI) is the improper use, or perception of use of superior authority to interfere with the court-martial process. See, Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00 (2d Ed. 1999).² Unlawful command influence is most often exerted on members of any of the following populations: (1) Subordinate commanders, (2) Potential panel members, and (3) Potential witnesses. It can be exerted by commanders as well as those acting with the “mantle of command authority,” and can be intentional or inadvertent.

4. UCI can manifest in a multitude of different situations and can affect the various phases of the court-martial process. See *United States v. Gore*, 60 MJ 178, 185 (C.A.A.F. 2004). Furthermore, “[t]he term ‘unlawful command influence’ has been used broadly in our jurisprudence to cover a multitude of situations in which superiors have unlawfully controlled the actions of subordinates in the exercise of their duties under the UCMJ.” *United States v. Hamilton*, 41 MJ 32, 36 (C.M.A. 1994). Courts “draw a distinction between the accusatorial process and the adjudicative

² 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 exercises of its or his functions in the conduct of the proceedings. 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. Article 37(a), UCMJ, 10 U.S.C. § 837(a) (2012).

stage, that is, the difference between preferral, forwarding, referral, and the adjudicative process, including interference with witnesses, judges, members, and counsel.” *United States v. Weasler*, 43 MJ 15, 17-18 (C.A.A.F. 1995). UCI can occur in one of two ways; either through 1) Actual UCI or 2) Apparent UCI. Thus, even if there is no actual UCI, there may still be apparent UCI, and the military judge must take affirmative steps to ensure that both forms are eradicated from the court-martial in question. *United States v. Lewis*, 63 MJ 405, 416 (C.A.A.F. 2006). The “appearance of unlawful command influence is as devastating to the military as the actual manipulation of any given trial.” *Lewis*, 63 MJ at 407. The question of whether there is apparent UCI is determined “objectively.” *Id.* This objective test for apparent UCI is similar to the tests that are applied in determining questions of implied bias of court members or in reviewing challenges to military judges for an appearance of a conflict of interest. *Id.* The focus must be on the “perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public.” *Id.* The central question to ask is whether an “objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding.” *Id.*

5. In *United States v. Biagase*, the U.S. Court of Appeals for the Armed Forces set forth the analytical framework to be applied to allegations of UCI. The Court placed the initial low burden on the defense to raise the issue by “some evidence.” *United States v. Biagase*, 50 MJ 143, 150 (C.A.A.F. 1999). To meet this “some evidence” standard of proof, the defense must show some facts which, if true, would constitute UCI, and it must show that such evidence has a “logical connection” to the court-martial at issue in terms of potential to cause unfairness in the proceedings. *United States v. Stoneman*, 57, MJ 35, 41 (C.A.A.F. 2002). Once the issue has been raised, the burden then shifts to the government. To meet its burden, the Government may show either that there was no UCI, or that any UCI will not taint these particular proceedings. If the government elects to show that there was no UCI, then it may do so either by disproving the predicate facts on which the allegation of UCI is based, or by persuading the Military Judge that the facts do not constitute UCI. The government may choose not to disprove the existence of UCI, but prove that the UCI will not affect these specific proceedings. Whichever tactic the government chooses, the required quantum of proof is beyond a reasonable doubt. *Stoneman*, 57 MJ at 41 (citing *Biagase*, 50 MJ at 151).

6. Even if actual or apparent UCI is found to exist, the Military Judge “has broad discretion in crafting a remedy to remove the taint of unlawful command influence,” and such a remedy will not be reversed on appeal, “so long as the decision remains within that range.” *United States v. Douglas*, 68 MJ 349, 354 (C.A.A.F. 2010). The Military Judge should attempt to take proactive, curative steps to remove the taint of UCI, and therefore ensure a fair trial. *Id.* The CAAF has long recognized that, once UCI is raised “...it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the

confidence of the general public in the fairness of the court-martial proceedings.” *United States v. Gore*, 60 MJ 178, 186 (C.A.A.F. 2004) (citations omitted).

7. The remedies available to this Court include but are not limited to; 1) transfer of responsibility for disposition of charges to commanders not subject to the influence, 2) orders protecting service members from retaliation, 3) changes in venue, 4) liberal grants of challenges for cause, and 5) the use of discovery and pretrial hearings to delineate the scope and impact of the UCI. *United States v. Simpson*, 58 MJ 368, 373 (C.A.A.F. 2003). Courts, in the effort to determine whether the trial has been infected by UCI, should conduct extensive voir dire of (anyone) that (is) alleged to have been influenced by UCI. *United States v. Reed*, 65 MJ 487, 491 (C.A.A.F. 2008). Lastly, Courts, by “forcefully and effectively” discharging its duties as the “last sentinel” to protect courts-martial from the UCI, may also take extraordinary steps. *Biagase*, MJ at 152.

8. In *United States v. Simpson*, the C.A.A.F. ruled that dozens of pretrial statements and actions by practically the entire Army civilian and military command structure concerning sexual harassment allegations at the Aberdeen Proving Grounds did not constitute unlawful command influence and that the accused had received a fair trial. Statements about the investigation and remarks about policy issues related to trainee abuse were made by the Secretary of Defense, the Secretary of the Army, the Assistant Secretary of the Army for Manpower and Reserve Affairs, the Chairman of the Joint Chiefs of Staff, the Chief of Staff of the Army, and other senior civilian and military officials. During the same period, the Secretary of the Army established a Senior Review Panel to review actions related to the prevention of sexual harassment. The Chief of Staff of the Army sent a personal letter to all general officers communicating the Army's existing policy on sexual harassment. In addition, the Chief of Staff mandated that all active duty personnel receive instruction on the Army's sexual harassment policy. *Id.* at 371-2.

News reports quoted senior officials constantly referring to the Army's “zero tolerance” policy on sexual harassment, demanding “no leniency” and “severe punishment” for offenders, asserting as a factual conclusion that there had been an “abuse of power”; and articulating an incorrect legal conclusion - that “there is no such thing as consensual sex between drill sergeants and trainees.” *Id.* at 376. Nevertheless, the trial court, service court and Court of Appeals for the Armed Forces found that there was no nexus between the comments made by the senior officials and the convening authority's decision to refer the case.

Also, in *United States v. Ayers*, 54 MJ 85, 95 (C.A.A.F. 2000), the Court focused not only the senior leadership comments in general, (including comments about “light sentences”, “lower end of the [punishment] range is probably not going to be considered”, and referred to SECDEF's order to “weed out sex offenders”), but specifically whether they had any nexus to the accused's case. While the court

acknowledged that, like the case at bar, there was no dispute about what was said by senior leadership; it found that the comments had no logical connection to the court-martial and therefore was not UCI.

In *United States v. Rockwood*, 52 MJ 98, 130 (C.A.A.F. 1999), (cited in *Simpson*) the Court noted that “public criticism of military operations – including withering critiques of strategy, tactics, personnel policies, and human rights concerns – is inherent in a democracy.” The Court further noted that the prohibition against UCI does not require senior military and civilian officials to refrain from addressing such concerns, though it does prohibit those “with the mantle of command authority from deliberately orchestrating pretrial publicity with the intent to influence the results in a particular case or a series of cases, as the pretrial publicity itself may constitute unlawful command influence. Even the perception that pretrial publicity has been engineered to achieve a prohibited end – regardless of the intent of those generating the media attention – may lead to the appearance of unlawful command influence.”

9. Article 37 applies broadly. It prohibits everyone "subject to this chapter" from influencing or seeking to influence the court martial process inappropriately or "unlawfully." "Subject to this chapter" has applied to commanders involved in the processing of charges against a member of their command, SJAs acting under the color of command authority, senior officers and NCOs in a command repressing witnesses favorable to the accused, convening authorities "stacking" court-martial panels in order to secure convictions and/or stiff sentences and other military personnel and situations.³ There is no case law cited by the parties or ascertained by the court that holds that a member of congress or a person on the military retired roles is a person "subject to this chapter" who could violate Article 37. Even in cases where significant public statements were made by active duty, national level, military leaders, the courts have held that the statements did not constitute Article 37 violations because they had no nexus to the particular case. See, e.g., *United States v. Simpson*, *Supra*.

10. It is also difficult to reconcile the defense contention that Senator McCain is "subject to this chapter" as contemplated by Article 37 because he retired from active duty in 1981 and could be recalled to active duty to face court-martial charges. The defense cites no authority for this proposition but, rather, urges the court to rely on the "plain meaning" of the phrase. The Court is unprepared to give the phrase "plain meaning" the defense divined from it. The object of Article 37 is to ensure that active duty military personnel (commanders and others) do not improperly seek to influence

³ See, eg, *United States v. Gerlich*, 45 MJ 309 (1996) (GCMCA tells SPCMCA who tells SCMCA who tells Company Commander that Article 15 was not sufficient for offenses and then Company Commander prefers charges.); *United States v. Gore*, 60 MJ 178 (2004) (Witness intimidation by Convening Authority.); *United States v. Stombaugh*, 40 MJ 208 (CMA 1994) (NCO found to have had mantel of command authority in witness intimidation UCI case.); *United States v. Yeager*, 7 MJ 171 (CMA 1979)(Systematic exclusion of panel members from court based upon rank found to be court-packing).

the court-martial process. This concern is tied to the potential to influence that springs from one's military status. Though a retiree is subject to recall to active duty in order to be court-martialed, that does not make him "subject to this chapter" for Article 37 purposes until and unless he is recalled to active duty to face court-martial (or for any other reason which a retired service member may be recalled to active duty). By the plain language of Article 37, in his status at the time of referral and still today, because he is retired, Senator McCain is not on active duty and only "subject to this chapter" if he is recalled to active duty. To be recalled he would have to have committed an violation of the UCMJ either; while he was on active duty over 35 years ago and the offense would have to be so serious that the statute of limitations applicable at the time it was committed would not have run; or Senator McCain would have to commit a civilian offense for which state or federal authorities declined to prosecute or waived jurisdiction to the Navy and the Navy would have to determine that extraordinary circumstance exist which make recall for prosecution of the civilian offenses appropriate.⁴ None of these scenarios is evident or even remotely likely concerning Senator McCain based on the evidence submitted to this Court. Certainly, congress, in enacting Article 37, did not contemplate such a tenuous connection between the service member and the service when it sought to prevent that person from improperly influencing the due administration of military justice. Senator McCain's lack of connection belies any ability by him to accomplish the very thing that Article 37 seeks to proscribe.

11. Even if Senator McCain can be deemed to be "subject to this chapter," the Court is still not convinced that his statements constitute actual command influence in violation of Article 37. Congress is responsible to "raise and support Armies" and ". . . make rules for the government and regulation of the land and naval forces." *The Constitution of the United States*, Article I, Section 8. However, the executive, not the legislative branch, has civilian command authority over the military. In spite of their daily ability to effect the lives of service members, no member of congress, not even the Chairman of the SASC, holds command authority over the military. Since Senator McCain holds not command authority over anyone involved in this case, he simply does not have the ability to control this case or to exercise command control of any kind over those who do. Senator McCain is an elected public official who has one vote in one chamber of congress among 535 votes that may be cast on any issue effecting the funding or regulation of the military.⁵ He simply has no authority over the military services or its members.

⁴ While not controlling, the Articles of the UCMJ which set forth jurisdiction are illustrative on this point. Article 2(a)(4) states that "Retired members of the regular component who are entitled to pay" are "subject to this chapter." Article 3(a) states that a person in a status "subject to this chapter . . . who commits an offense against this chapter while formerly in status in which the person was subject to this chapter I not relieved from . . . jurisdiction of this chapter for that offense by reason of a termination of the person's former status." Taken together, these provisions show clearly that the entire purpose of maintaining jurisdiction over retirees is so that they may be tried by court-martial after they retire for offenses which occurred while on active duty. In other words, jurisdiction follows the person in spite of their change in status.

⁵ The Court is cognizant of the fact that as Chairman (for the present and since 2014) of the SASC, Senator McCain holds more power than a simple vote among many on issues affecting the Armed Services. He has much say about what bills

12. Potentially more troubling in this context is the possibility of apparent UCI. Apparent UCI consists of actions and/or statements taken or made by individuals in positions of authority that appear so manipulative on their face that are likely to cause a reasonable member of the public, aware of all the facts, to harbor significant doubts about the fairness of the military justice system. Here, however, the defense contention fails for the same reasons as it does for actual UCI. No reasonable member of the public knowing that Senator McCain has absolutely no command authority or color of command authority over SGT Bergdahl's court-martial, or any other court-martial for that matter, could ever reasonably conclude that the proceedings were unfair -- no matter what he said or did. No doubt, Senator McCain is a powerful man -- in his sphere. But, he is, at the end of the day, a public servant with authority limited by the Constitution to specific areas. None of those areas involve command authority over any one in any military service. The prohibition against UCI does not require even senior civilian officials of the department of defense to refrain from expressing concerns and criticisms about policy and actions of the military as part of the democratic or even political process. Though the prohibition does prohibit those "with the mantle of command authority from deliberately orchestrating pretrial publicity . . . engineered to achieve a prohibited end -- regardless of the intent of those generating the media attention -- (which may, nonetheless) lead to the appearance of unlawful command influence," Senator McCain's statements and actions do not rise to this level. *Rockwood*, at 130. A reasonable member of the public knowing all the facts and circumstances would recognize Senator McCain's ill-advised statements for just what they were -- political posturing⁶ designed to embarrass a political opponent (President Obama)⁷ and gain some political advantage. Because he had no command authority or present ability to influence the decision whether or not to refer the case to trial, he could not possibly be reasonably viewed as exercising unlawful influence. Certainly it is true that, as he said, he could hold hearings at the SASC; as the Chairman, that is certainly his prerogative. But, such hearings are designed to uncover malfeasance or misfeasance by public officials in the exercise of the public trust and are not a review or check on a particular court-martial. The SASC simply has not ability to oversee the trial of this case in particular or trials by court-martial in general. They can certainly hold hearings, gather information and draft and submit changes to the UCMJ to the congress for vote. However, such changes would be: 1) Prospective and 2) Not tied to or effecting a particular case that has already been disposed of. The defense has simply failed to provide some evidence which, if true, would

make it to the senate floor for a vote, what hearings are held and who testifies at those hearings and many other issues regarding the legislative process. Nevertheless, there is absolutely no evidence that he has attempted or threatened to use any such power to control the discretion of those in SGT Bergdahl's military justice chain of command.


⁶ The most worrisome comments were made at a campaign event.

⁷ It is common knowledge that not only does Senator McCain not belong to the same party as the Obama administration but he was defeated by then Senator Obama for election to the Presidency of the United States in 2008.

constitute UCI which would have a logical connection to this court-martial in terms of potential to cause unfairness in the proceedings. *Stoneman*, at 41.

RULING

13. Defense motion is DENIED.


JEFFERY R. NANCE
COL, JA
Military Judge