IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In re ROBERT B. BERGDAHL,	)	PETITION FOR A
	)	WRIT OF MANDAMUS
Petitioner.	)	
	)	Crim. App. Misc. Dkt.
	)	No. ARMY 20160650
	)	USCA Misc. Dkt. No.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Index

Table of Authorities

Cases:

Constitution and Statutes:

Rules and Regulations:

Miscellaneous:

I

Preamble

This original mandamus petition raises an important question that directly implicates public confidence in the administration of justice: is it lawful for the chairman of the Senate Armed Services Committee (SASC) to publicly brand a specific accused as "clearly" guilty of a serious offense and threaten to conduct a hearing if he is not punished at a court-martial?[1] Without addressing due process, the military judge found no violation of Article 37(a), UCMJ.[2] The U.S. Army Court of Criminal Appeals failed to act in a timely fashion on a mandamus petition seeking to overturn that decision. *See* § II *infra*.

The circumstances require this Court to exercise its original-writ authority under the All Writs Act, 28 U.S.C. § 1651 (2012), and defend the military justice system from flagrantly illegal interference by the single most powerful member of SASC, John S. McCain.

Pursuant to Rules 4(b)(1), 18(b) and 27(a), the All Writs Act, and Article 67(a), UCMJ, SGT Robert B. Bergdahl therefore respectfully prays that the Court

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[1] The military judge's decision, a copy of which is attached in accordance with Rule 27(a)(2)(C), mischaracterized SGT Bergdahl's claim. His objection is to Sen. McCain's comment and threat, not to anything said or done by retired Captain Steve Barney, who is not to be faulted for having a client who does not take advice.

[2] The portion of Article 37(a) reproduced in the military judge's decision, AE 19, at 3 n.2, is incomplete. It omits the last clause of the second sentence.

issue an Order to Show Cause, reverse the military judge's decision and direct the entry of appropriate relief.

II

History of the Case

Sergeant Bergdahl is charged with violations of Articles 85 and 99, UCMJ. The charges have been referred to a general court-martial. Trial is currently scheduled to begin on 6 February 2017, although the government has suggested that that date be put off until 1 May 2017. On 1 August 2016, invoking the Fifth Amendment's Due Process Clause, D App 27, at 15 n.5, SGT Bergdahl moved to dismiss the charges and specifications and in any event to limit the sentence that may be adjudged to No Punishment. The military judge denied that motion on 28 September 2016.[3]

On 6 October 2016, SGT Bergdahl sought a writ of mandamus or other appropriate writ from the Army Court and suggested that his petition be considered *en banc*. He also objected to the participation of any judge who is also a judge of the U.S. Court of Military Commission Review (CMCR). *See United States v. Dalmazzi*, No. 16-0651/AF (C.A.A.F.) (pending).

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[3] The motion, all related pleadings, and the decisions below may be conveniently found on the defense's website, *The Bergdahl Docket*, https://bergdahldocket.wordpress.com/basic-case-documents/, and the Army's FOIA Reading Room, https://www.foia.army.mil/ReadingRoom/Detail.aspx?id=103.

III

Reasons Relief Not Sought Below

Rule 4(b)(1) requires petitioners for original writs to seek relief in the first instance from the service court, absent good cause. We did seek relief below, but nothing happened. As the Rules Advisory Committee commented in explaining the 1995 rules change, "It is presumed . . . that extraordinary writ cases will be addressed expeditiously by the Court of Criminal Appeals. *Cf.* Rule 19(d)-(e)." EUGENE R. FIDELL & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 4.02, at 14 (15th ed. 2016) (RULES GUIDE).[4]

On 6 October 2016 petitioner filed a Petition for a Writ of Mandamus or Other Appropriate Writ. *Bergdahl v. Nance*, Misc. Dkt. No. ARMY 20160650. With it he filed a Suggestion for Consideration *En Banc*, in accordance with the Army Court's rules. On 18 October 2016, he moved to recuse the Chief Judge of the Army Court and to vacate a 12 October 2016 order that had been issued "for" the Chief Judge altering the membership of the panel to which the mandamus petition had been referred. To date, the Army Court has taken no action on either the

[4] A further reason not to wait any longer for the Army Court to act on petitioner's mandamus petition is that all judges of that court are serving officers whose future promotions are subject to confirmation by the Senate upon recommendation by SASC. Additionally, the Issue Presented is properly framed, nothing about it calls for them to "bring their experience to bear," and nothing the Army Court can do will lead to an improved record. *See* 1995 Rules Advisory Committee Comment, *supra*.

Petition for a Writ of Mandamus, the Suggestion for Consideration *En Banc*, or the Motion to Recuse and Vacate Panel Assignment.

Over a month having elapsed without so much as an order by the Army Court calling on the government to respond to his mandamus petition, there is good cause to deem petitioner relieved of any further obligation to exhaust his All Writs Act remedy before that court.

IV

Relief Requested

Sergeant Bergdahl seeks a writ of mandamus dismissing the charges and specifications and in any event limiting the punishment that may be adjudged to No Punishment.

V

Issue Presented

DID THE MILITARY JUDGE ERR IN REFUSING TO DISMISS THE CHARGES AND SPECIFICATIONS AND IN ANY EVENT TO LIMIT THE PUNISHMENT THAT MAY BE ADJUDGED TO NO PUNISHMENT IN LIGHT OF SENATOR McCAIN'S PUBLIC DESCRIPTION OF SERGEANT BERGDAHL AS "CLEARLY A DESERTER" AND HIS THREAT TO CONDUCT A HEARING IF SERGEANT BERGDAHL IS NOT PUNISHED?

VI

Statement of Facts

Sen. McCain and Steve Barney are retired regular Navy captains. They are the chairman and general counsel, respectively, of SASC.

SASC is responsible for confirmation of presidential appointments of Secretaries of Defense, service secretaries, and their respective assistants and general counsels, the service chiefs and other senior commanders, commissioned officers in the armed forces (to include trial and appellate military judges and court members), the Judge Advocates General, and the judges of the service courts.

The chairman wields great power over SASC's decision making, and has hire-and-fire power over the committee's general counsel. SASC has broad power to conduct hearings. Sen. McCain has been its chairman since January 2015. Before that, he was the ranking minority member and Mr. Barney was minority counsel. Sen. McCain was re-elected yesterday and will presumably remain as chairman because his party will retain control of the Senate.

The following chronology forms the factual basis for this petition. Matters of particular significance appear in **bold**.

- 2 June 2014, Sen. McCain states to *Politico*'s Burgess Everett and another journalist (http://www.politico.com/story/2014/06/john-mccain-bowe-berghdal-107331):

"I would not have made this deal [exchanging SGT Bergdahl for five Taliban leaders held at Guantanamo Bay, Cuba]. I would have done everything in my power to repatriate him and I would have done everything I possibly could. But I would not have put the lives of American servicemen at risk in the future," McCain said, **raising concerns about Bergdahl's record in the military. "There's some really damning things about the reaction of the military on this."**

- 16 July 2014, the Army checks "J Drive" for responses to Mr. [redacted]'s Requests for Information (RFIs). AE 12, at 39; *see* AE 12, at 42-45.
- 25 August 2014, the SASC minority counsel asks the Army for an update on the AR 15-6 investigation and SGT Bergdahl's current pay status, captivity related pay, and other entitlements ("good to know before the Members return"). AE 12, at 10-12, 14.
- 26 August 2014, the Army's legislative counsel sends SASC information on SGT Bergdahl's pay and allowances and the pending AR 15-6 investigation. AE 12, at 9.
- 28 September/18 December 2014 [divergent dates on first and last pages], then-MG Kenneth R. Dahl submits his AR 15-6 investigation to the Director of Army Staff.
- 19 December 2014, the Army receives a House Armed Services Committee (HASC) inquiry to the Office of the Secretary of Defense, Legislative Affairs, via Joint Staff Legislative Affairs. AE 12, at 15.
- 19 December 2014, the Army acknowledges receipt of SASC's inquiry about case status. AE 12, at 8.
- 22 December 2014, the SASC minority counsel emails the Army concerning a briefing on the case, and refers to a planned 23 December 2014 Army briefing at the White House. AE 12, at 7.
- 7 January 2015, the SASC general counsel emails the Army and HASC about the "15-6 brief." AE 12, at 19.
- 28 January 2015, the Army advises the SASC general counsel that "no one is authorized to be speaking publicly about the way ahead on SGT Bergdahl's case. I have confirmed with FORSCOM; there is no charge sheet or even a decision to go that way." AE 12, at 18.

- 23 March 2015, the SASC general counsel requests information by close of business on when FORSCOM will announce action on the charges. **"Trying to manage Chairman's desire to make a statement but need info."** AE 12, at 5.
- **25 March 2015, charges are preferred**. Charge Sheet. The Army notifies SASC. AE 12, at 16-17.
- 5 May 2015, the SASC general counsel asks the Army whether the preliminary hearing is "still on for 8 July." AE 12, at 8, 26.
- 5 May 2015, the SASC general counsel emails the Army (AE 12, at 25-26):

  Thanks. I mentioned to MG Richardson today that Chairman McCain is interested in a hearing on Bergdahl & the Taliban 5 [redacted]. I am concerned about a Senate hearing on this issue while there is an ongoing military justice case. Please provide the Army's views on the implications of conducting a hearing during an ongoing investigation that would help me inform the Chairman of his options.

- 7 May 2015, the Army replies (AE 12, at 25):

  [First name redacted], **thank you for the opportunity to provide our thoughts on this very important issue.**

  The Army strongly opposes any Congressional event at this time and, in particular, a hearing focused on matters related to SGT Bergdahl. A hearing will create legal issues during the UCMJ process, including giving the appearance of the denial of the fair administration of justice for SGT Bergdahl. With charges preferred against SGT Bergdahl, and an Article 32 preliminary hearing scheduled for July 8, 2015, the Army opposes any public airing of the facts of the investigation or the pre-decisional disciplinary process. Commanders must be free of outside influence in making disciplinary decisions. The same holds true for empaneling court members for a court-martial should a decision to refer the case for trial by court-martial be made. Court members must only apply the facts presented at the court-martial and legally admitted by the presiding Military Judge. Excessive pre-trial publicity and, more importantly, statements by elected officials with oversight responsibilities at a hearing will have an impact and may give the appearance of pres-

suring court members/finders of fact to make decisions consistent with a pre-determined result; this would equate to a denial of due process and the right to a fair trial. The Court of Appeals of [*sic*] the Armed Forces has often said that unlawful command influence (UCI) is the mortal enemy of military justice and has often applied corrective action when UCI is found. The Army has taken great care to avoid any actual impropriety or appearance of impropriety in the disciplinary decision making process in this case. Any hearing focused on SGT Bergdahl would raise significant legal issues and may undermine our judicial process. To this end, the Army opposes any Congressional hearings that cover matters related to SGT Bergdahl; any requirements to produce documents or evidence; and any requirements for personnel involved in the UCMJ process, to include the administrative and criminal investigations, to testify at a hearing. To do so, or be compelled to do so, would be unprecedented and deviate from defense oversight committees' longstanding practice of deference to allow on-going military justice matters to proceed to completion without direct congressional involvement.

- 8 June 2015, the Army emails the SASC general counsel about the defense's extraordinary writ (*Bergdahl v. Milley*, 75 M.J. 9 (C.A.A.F. 2016) (mem.), https://bergdahldocket.wordpress.com/bergdahl-v-milley/) seeking the recusal of GEN Mark A. Milley as convening authority (GCMCA) because of the pending SASC consideration of GEN Milley to be Chief of Staff of the Army. AE 12, at 22, 31.
- 8 June 2015, the SASC general counsel responds: "Thanks, [first name redacted]. **Welcome to my world.**" AE 12, at 31.
- 18 June 2015, *Army Times* reports (http://www.armytimes.com/story/military/2015/06/18/chief-of-staff-bowe-bergdahl-eugene-fidell/71062074/):

  Sen. John McCain, R-Ariz., told Army Times last week that the Senate Armed Services Committee would begin its official examination of the Bergdahl case "as soon as the final decision is rendered" and that Milley's confirmation won't be affected. The SASC confirmation hearing would be sched-

uled "as soon as they send [Milley] over," McCain said, but didn't offer a date.

- 18 September 2015, MG Dahl testifies at the Art. 32 preliminary hearing that confinement "would be inappropriate." Art. 32 Tr. 310 (https://ccrjustice.org/sites/default/files/attach/2015/09/Sanitized%20Article%2032%20Transcript.pdf).
- 5 October 2015, LTC Mark A. Visger, preliminary hearing officer, recommends that the charges be referred to a special court-martial not empowered to adjudge a bad-conduct discharge, and observes that neither confinement nor a punitive discharge are warranted (https://bergdahldocket.files.wordpress.com/2016/03/article203220preliminary20hearing20report.pdf).
- 10 October 2015, *Stars and Stripes* reports on the results of the preliminary hearing (http://www.stripes.com/news/us/bergdahl-should-get-no-prison-time-another-army-official-says-1.372652).
- 11 October 2015, while campaigning with and for Sen. Lindsey Graham, who was at the time still a candidate for the 2016 Republican presidential nomination, in Pelham, NH, Sen. McCain is asked by Laurel J. Sweet, a reporter for *The Boston Herald*, about the preliminary hearing officer's recommendation in SGT Bergdahl's case. She quotes Sen. McCain as follows in the next day's newspaper (in an article that is circulated by the Tribune News Service and reprinted in *Stars and Stripes*, http://www.stripes.com/news/us/mccain-wants-tough-penalty-for-deserter-1.372896?utm_source=dlvr.it&utm_medium=twitter):

  If it comes out that [SGT Bergdahl] has no punishment, we're going to have to have a hearing in the Senate Armed Services Committee. ... And I am not prejudging, OK, but 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 is clearly a deserter. We need to have a hearing on that.

- 12 October 2015, as reported the following day in *The New York Times*:

  In an emailed statement, Dustin Walker, a spokesman for the Armed Services Committee, said the committee "will continue its longstanding oversight of the entire matter of Sergeant Bergdahl, *not just his conduct*, but also the administration policy that led to the release of five high-value Taliban detainees without congressional notification, as required by law."

  "Chairman McCain," the statement added, "wants the legal proceedings to run their course before making a determination how best to continue the committee's oversight work."

  http://www.nytimes.com/2015/10/13/us/john-mccains-comments-on-bowe-bergdahl-bring-rebuke-from-lawyer.html?_r=0 (emphasis added).

- 13 October 2015, the Army emails the SASC general counsel (labeled "attorney work product") as follows (AE 12, at 20, 35):

  Need some assistance. As you are likely aware, Chairman McCain has publicly announced he will "hold a hearing" if SGT Bergdahl does not go to jail.

  As we both know, UCI technically requires a commander to make a comment. However, in this case, coming from the Chairman of the oversight committee has raised some serious concerns across the Army (including from SGT Bergdahl's defense counsel, along the lines of "if Bergdahl goes to jail, we're raising a UCI motion and will call SEN McCain as a witness."[)]

  Obviously, the Chairman's statement is out there. But if it is at all possible to have him issue a curative statement (e.g., "...faith in the UCMJ process and senior commanders to make the right decisions...") that could be tremendously helpful, even if just posted to his or the Committee's website. If in the realm of the possible, I can send you a statement we think would work.

- 13 October 2015, the SASC general counsel responds (AE 12, at 35):
  "Thanks, [first name redacted]. We will consider options."

- 14 October 2015, *The New York Times* runs an editorial, *Mr. McCain's Irresponsible Remarks About Sgt. Bergdahl*, http://www.nytimes.com/2015/10/14/opinion/senator-john-mccains-irresponsible-remarks-about-sgt-bowe-bergdahl.html.
- 15 October 2015, the Army sends the SASC general counsel the text of the *New York Times* editorial on Sen. McCain's comments, "FYI." AE 12, at 23, 33-34. The general counsel responds: "Thanks, [first name redacted]. We saw it." AE 12, at 33.
- 15 October 2015, civilian defense counsel submits a Freedom of Information Act (FOIA) request to the Army, seeking

  "copies of all communications between the Army and [SASC] (to include the committee's leadership, members, staff and congressional fellows) from May 31, 2014 to the date of your response that relate in any way to SGT Bergdahl, as well as any documents summarizing, memorializing or reflecting oral communications."

- 4 November 2015, the SASC general counsel requests a status report on SGT Bergdahl's case. AE 12, at 1-3, 41.
- 5 November 2015, the Army provides SASC with a status report on SGT Bergdahl's case. AE 12, at 1, 37.
- 9 December 2015, HASC issues its "Report on the Inquiry into The Department of Defense's May 2014 Transfer to Qatar of five law-of-war detainees in connection with the recovery of a captive U.S. soldiers" (https://lawfare.s3-us-west-2.amazonaws.com/staging/Final%20Report%20Compiled%20with%20Dissent.pdf). The report recites (at 5):

  [T]he Committee is confident that the U.S. Army will appropriately and fairly consider the actions which resulted in Sgt. Bergdahl's capture. In keeping with its oversight responsibilities, the Committee will, however, remain abreast of the disciplinary process which is underway. The Committee will ensure that standard procedures are properly implemented and administered, and that Sgt. Bergdahl's behavior is adjudicated as required.

- **14 December 2015, the charges are referred.** Charge Sheet.
- 19 February 2016, the Army emails SGT Bergdahl's civilian defense counsel 50 pages of records that contain a host of redac-

tions, ostensibly under FIOIA Exemptions 5, 6 and 7. D App 23 encl 4.

- 20 February 2016, civilian defense counsel appeals the redactions.
- 5 April 2016, civilian defense counsel files a FOIA complaint in U.S. District Court for the District of Connecticut challenging the redactions (https://bergdahldocket.files.wordpress.com/2016/04/fidell-v-da-complt.pdf).
- 30 June 2016, the defense seeks an order compelling the production of the unredacted versions of the documents relating to Army/SASC interactions about this case. D App 23, at 41-44.
- 6 July 2016, the government opposes the defense motion to compel as to the FOIA documents on the grounds that Sen. McCain, a retiree subject to the Code, cannot engage in UCI because he does not act with the mantle of command authority and no case has ever held that congressional actions can constitute UCI. G App 25, at 5-6.
- 7 July 2016, in an Art. 39(a) session on motions to compel, the military judge directs the government to submit to him unredacted copies of the documents civilian defense counsel had obtained under FOIA.
- 18 July 2016, the military judge reduces to writing several rulings he had made from the bench at the 7 July 2016 Art. 39(a) session, including this (AE 11, at 1):

  "The government will provide the court with un-redacted versions of Enclosure 4 to D APP 23 for an in camera inspection."

- 21 July 2016, the Army, via the Department of Justice, sends civilian defense counsel a further set of documents in response to his FOIA request, disclosing for the first time significant information—highly damaging to the government's legal position—that had been redacted in the version previously released.
- 28 July 2016, trial counsel provides the FOIA case emails to the military judge for *in camera* inspection. AE 12.
- 29 July 2016, the military judge completes his *in camera* inspection and releases to the defense additional information that the Army had sought to withhold in its first and second responses to the FOIA request. AE 13.

The government stipulated (*see* D App 28 encl 1) to the accuracy of the pertinent news accounts and to the following anticipated testimony:

> That Sen. McCain, at the VFW Hall in Pelham, NH, where he was campaigning with and on behalf of then-presidential candidate (and SASC member) Sen. Lindsey Graham, told Ms. Sweet on 11 October 2015 (as she reported in the next day's *Boston Herald*):
>
> > If it comes out that [SGT Bergdahl] has no punishment, we're going to have to have a hearing in the Senate Armed Services Committee. . . . And I am not prejudging, OK, but 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 is clearly a deserter. We need to have a hearing on that.
>
> That Mr. Walker, on behalf of Sen. McCain, emailed *The New York Times* on 12 October 2015. As reported in the following day's newspaper:
>
> > In an emailed statement, Dustin Walker, a spokesman for the Armed Services Committee, said the committee "will continue its longstanding oversight of the entire matter of Sergeant Bergdahl, not just his conduct, but also the administration policy that led to the release of five high-value Taliban detainees without congressional notification, as required by law."
> >
> > "Chairman McCain," the statement added, "wants the legal proceedings to run their course before making a determination how best to continue the committee's oversight work."

The GCMCA, GEN Robert B. Abrams, testified that he was aware of Sen. McCain's comments and that they were "inappropriate." He claimed that the comments had no effect on him but admitted that he was concerned that they could have an impact on potential panel members. GEN Abrams insisted that he was not

concerned about future dealings with SASC since he had already reached the highest officer pay grade. He neglected to mention that any future assignments to even more responsible positions would require Senate confirmation.[5]

VII

Reasons for Granting the Writ

A. Jurisdiction

The jurisdictional basis for the relief sought is the Court's potential appellate jurisdiction under Article 67(a), UCMJ, *see F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966), since the authorized maximum punishment for the offenses with which SGT Bergdahl has been charged qualifies for mandatory appellate review. MCM ¶¶ 9e, 23e. The All Writs Act applies because the Court was established by Act of Congress. 28 U.S.C. § 1651(a). Together, therefore, the Code and All Writs Act confer jurisdiction. *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013).

B. The Military Judge's Decision Rests on Incorrect Premises

Mayor Fiorello H. LaGuardia of New York (a former Congressman and World War I U.S. Army aviator), speaking 75 years ago of what had proved to be a disastrous judicial appointment, famously observed, "when I make a mistake, it's a

[5] The relevant proceedings have not been transcribed. The Court may wish to direct preparation of a partial record of trial to aid in its consideration of this petition.

beaut."[6] So it is with Sen. McCain, whose comments concerning SGT Bergdahl's case have earned him an indelible place in the annals of military justice. Unlike LaGuardia, however, and despite the passage of more than a year, Sen. McCain has never repudiated the comments that give rise to this petition.

Three questions are presented: what went wrong, who is to blame, and what is the proper remedy?

1. What Went Wrong?

It is not difficult to see what *was* wrong with Sen. McCain's comments. "Oversight turns to influence when Congress demands that commanders take specific actions on cases." Major Misti E. Rawles, *Congressional Oversight: The New Mortal Enemy of Military Justice?* 90 (unpublished LL.M. thesis, The Judge Advocate General's School of the Army 2000);[7] *see also id.* at 126. More broadly, the military justice system's credibility is squandered whenever Congress interferes in the individual operation of a court-martial case. *Id.* at 126.

Prof. Andrew M. Wright and Megan Graham highlighted the problem in an unanswerable 6 November 2015 post on the respected *Just Security* blog:

> Notwithstanding McCain's protest that he is "not prejudging" the issues, he also asserts Bergdahl is "clearly a deserter." Members of

[6] *Mayor Admits O'Brien Appointment a Mistake*, N.Y. Times, Feb. 12, 1941, at 9, col. 3; *see also* William Safire, *On Language: When I Make a Mistake*, N.Y. Times Sunday Magazine, Feb. 22, 1987, at 10 (quoting Sen. Lloyd Bentsen, "I'm not known to make many mistakes, but when I do, it's a doozie").

[7] Major Rawle's these can be found online at http://www.dtic.mil/dtic/tr/fulltext/u2/a439865.pdf.

> Congress, like ordinary citizens, have been known to act like armchair jurors in criminal cases. Like all of us, McCain enjoys First Amendment protection for his opinions. Unlike most of us, he enjoys Speech or Debate Clause protections for his statements made in connection with legislative proceedings. He also serves as the powerful chairman of the Senate committee with legislative authorization and oversight jurisdiction over the military. When McCain speaks, people at all levels of the Pentagon and in uniform around the world pay attention — perhaps including uniformed military judges.
>
> More troubling than his opinion of guilt, though, is McCain's threat to hold a hearing if Bergdahl receives "no punishment." A Senate Armed Services Committee spokesman later said that the committee has been conducting oversight not just of Bergdahl's conduct, but also of the policies that led to the prisoner swap without prior congressional notice. He added that McCain "wants the legal proceedings to run their course before making a determination how best to continue the committee's oversight work." But both McCain's original comments and the follow-up clarification do little to assuage concerns over the threatened hearing. Instead, they suggest that McCain may use his committee's oversight function in a coercive manner — to threaten and, in the face of a court-martial judgment not to punish, to bring Bergdahl's tribunal to a congressional hearing to face an unpleasant exercise in public shaming. Further, given that a hearing is only necessary if the result does not fit his perception of a just outcome, it maximizes the threat's potential to improperly influence the court-martial itself.

Andrew M. Wright & Megan Graham, *McCain's Hearing Threat and the Bergdahl Court-Martial*, Just Security, Nov. 6, 2015, *available at* https://www.justsecurity.org/27437/mccains-hearing-threat-bergdahl-court-martial/, D App 41, at 3. Sen. McCain's comment was not an idle threat. As every current and recent general and senior officer (or aspirant) knows, SASC is perfectly capa-

ble of punishing officers. Just ask U.S. Air Force Lt Gens Susan J. Helms and Craig A. Franklin, each of whom is now retired.[8]

Sen. McCain's comments were widely reported, including within the Pentagon. *The New York Times* account was summarized in the Army's *Daily News Clips*, published by the Office of the Chief of Public Affairs (OCPA), for 13 October 2015. The *Times*'s story was reproduced in full in that day's DoD *Morning News of Note*. *Army Times* published an *Associated Press* story the same day, and it was noted in the Army's 14 October 2015 *Daily News Clips*.

It is difficult to imagine a more blatant threat to the fair administration of military justice than the one Sen. McCain uttered. That he never carried through on it – or hasn't *yet* or may actually *never* do so – is of no moment. The threat itself *is* the problem. Neither he nor any member of SASC – *majority or minority* – has ever repudiated it.

The military judge's decision focused on Article 37 and rests on seven premises. Applying the pertinent standards of review, they do not withstand scrutiny:

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[8] *See* Craig Whitlock, *General's promotion blocked over her dismissal of sex-assault verdict*, Wash. Post, May 6, 2013, *available at* https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html; Darren Samuelsohn, *General out over sex case decisions*, Politico, Jan. 8, 2014, *available at* http://www.politico.com/story/2014/01/air-force-sexual-assault-craig-franklin-101900.

1. Sen. McCain is not subject to Article 37(a) even though he is a retired regular officer and as such is subject to the Code under Article 2(a)(4). Military Judge's Decision ("Decision") at 6-7 (¶ 10).

Whether Sen. McCain is a retired regular is a question of fact reviewable for clear error. Whether retired regulars are subject to the Code (including Article 37(a)) is a question of law subject to *de novo* review. *United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F. 2008).

The government did not err when it conceded that Sen. McCain is subject to the Code. G App 25, at 6, *cited in* D App 27, at 16. The text of Article 2(a)(4) leaves no room for interpretation. Nor does anything in Article 37(a) suggest that only some subset of those persons who are subject to the Code are in turn subject to Article 37(a). There simply is no daylight between the two classes.

A statute that is unambiguous is to be enforced according to its terms. *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016).

> [I]t is axiomatic that "[i]n determining the scope of a statute, we look first to its language." *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). Where the language of the statute is clear and "Congress has directly spoken to the precise question at issue," we must "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). As further stated by the Supreme Court, "It is well established that 'when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms.'" *Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)) (internal quotation marks and

> citations omitted). There is no rule of statutory construction that allows for a court to append additional language as it sees fit. *Fides, A.G. v. Comm'r*, 137 F.2d 731, 734-35 (4th Cir. 1943) ("[C]ourts should be extremely cautious not to add words to a statute that are not found in the statute.").

United States v. Kearns, 73 M.J. 177, 181 (C.A.A.F. 2014). The military judge's first premise cannot be reconciled with these elementary rules.

> 2. Retired regulars are subject to the Code "for Article 37 purposes" only if they have been recalled to active duty "to face court-martial (or for any other reason [for] which a retired service member may be recalled to active duty)." Decision at 7 (¶ 10).

This premise entails a question of law and is therefore subject to *de novo* review. *Reed*. It is incorrect. Article 2(a)(4) subjects all retired regulars to the Code, not only those who have been recalled for trial or any other purpose. A retired regular may be ordered to active duty "if necessary to facilitate courts-martial action," AR 27-10, Legal Services: Military Justice ¶ 5-2b(3) (2005), but may certainly be tried by court-martial without having been recalled. *Hooper v. United States*, 326 F.2d 982, 983-84 (Ct. Cl. 1964); *United States v. Hooper*, 9 C.M.A. 637, 640-41, 26 C.M.R. 417, 420-21 (1958); *see* LTC J. Mackey Ives & LTC Michael J. Davidson, *Court-Martial Jurisdiction Over Retirees Under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?*, 175 Mil. L. Rev. 1, 22 & n.124 (2003). Army MG (Ret) David R.E. Hale was tried by court-martial in 1999 without having been recalled to active duty. *See also United States v. Allen*, 33 M.J.

209, 215 & n.11 (C.M.A. 1991) (noting that retired accused was tried without having been recalled to active duty).

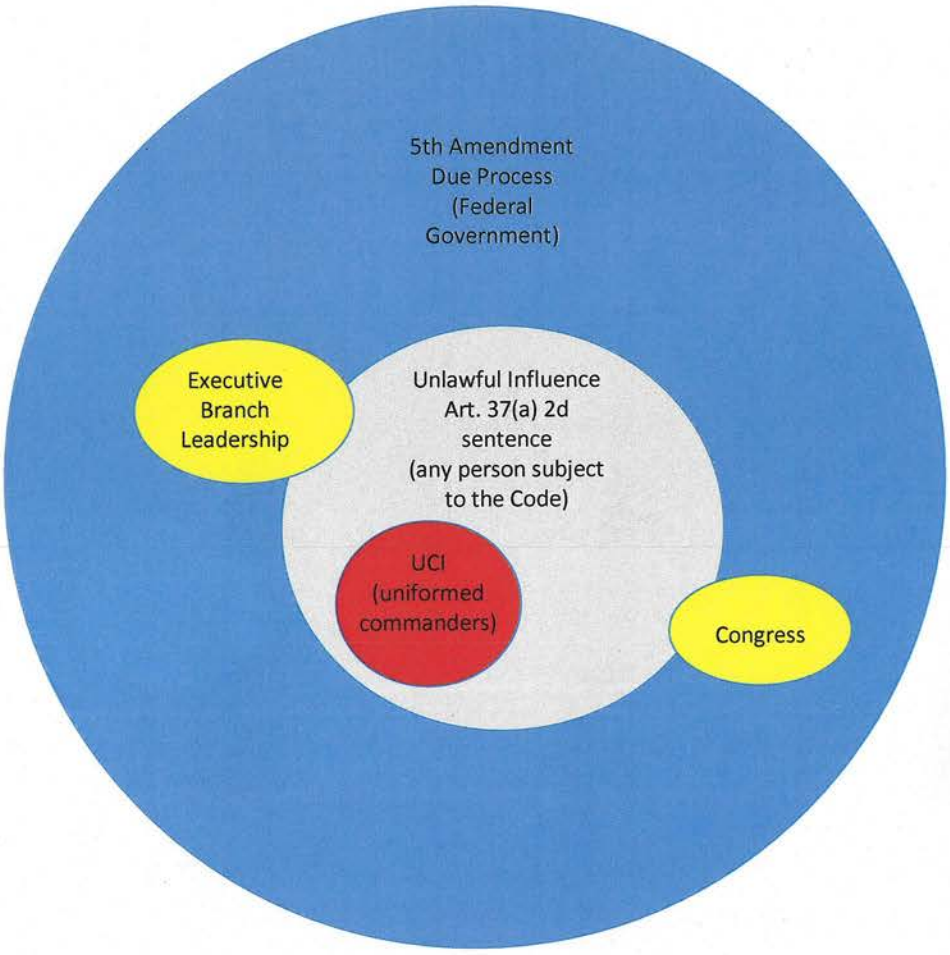
3. Article 37(a) can only be violated by a person who exercises command authority. Decision at 7 (¶ 11).

Whether only those who exercise command authority are subject to Article 37(a) is a question of law and therefore subject to *de novo* review. *Reed.* The case law does not support the military judge's third premise. For example, both *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013), and *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006), sustained findings of UCI committed by non-commanders. In neither case were the offending officials found to have acted under a mantle of command authority. They were not commanders. In any event, nothing in the second sentence of Article 37(a) – the fount of UCI jurisprudence – requires that the person subject to the Code be acting under such a mantle; it applies to "*any* person subject to the Code" (emphasis added).

The Court has at times referred to "unlawful command influence" and at other times to "unlawful influence" *simpliciter*. The alternative formulations are of no moment because both of the categories they describe run afoul of Article 37(a). As indicated in the following Venn diagram (which was submitted during the Article 39(a) hearing on SGT Bergdahl's motion to dismiss, D App 39, but is nowhere referred to in the military judge's decision), federal legislators and Executive Branch personnel are subject to Article 37(a) if they are – like Sen. McCain – "sub-

ject to the Code." Except for those who are in command positions, their Article 37(a) violations are not UCI. They are simply "unlawful influence" or violations of due process.[9]

[9] The left-hand yellow disc on the Venn diagram covers the possibility that a retired regular might hold office in the Executive Branch. (Sen. McCain would have moved over to that category had he defeated Sen. Obama in 2008 rather than the other way around.) To be truly exhaustive, the diagram would include a third yellow disc covering retired regulars who are Article III judges or other Judicial Branch personnel. Like the other two yellow discs, that one would straddle the Due Process/Article 37(a) line. Article 37(a) violations by Article III judges or other Judicial Branch personnel are difficult to envision, unlike violations by retired regulars serving in the Executive and Legislative Branches.



Article 37(a), UCMJ

. . . 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. . . .

4. Sen. McCain "simply has no authority over the military services or its members." Decision at 7 (¶ 11).

It is difficult to tell whether this assertion is one of fact (and hence subject to review for clear error), one of law (and hence subject to *de novo* review), or some combination of the two. *United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000). In any event, it is an "appeal to unreality," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting), and runs counter to the general understanding of SASC's role and conduct. SASC's power over the military is part and parcel of the constitutional design for ensuring civilian control of the military. No one who has read the Army's email exchanges with SASC's general counsel (reproduced above but nowhere addressed in the military judge's decision) or is familiar with the notorious experience of LTGs Helms and Franklin (both of whom were referred to in the trial court proceedings, D App 27, at 12) could accept the military judge's fourth premise, for which he cited no evidence.

5. No member of the public "could ever reasonably conclude that the proceedings were unfair – no matter what [Sen. McCain] said or did." Decision at 8 (¶ 12).

This sounds like a legal conclusion (and hence is subject to *de novo* review), but it reflects nothing more than the military judge's personal "take" on public opinion. *See United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997) (*de novo* review of military judge's legal conclusion). It suggests that the public will tol-

erate literally anything. We give the American people more credit for critical thinking and an intolerance for intrusion on the legal process. The Court should as well.

The military judge's suggestion that a reasonable member of the public would necessarily hear Sen. McCain's threat as simply political posturing with a view to scoring points against President Obama[10] finds no support in the record and is a far cry from anything that can be judicially noticed, even if the military judge had followed the procedure set forth in Mil. R. Evid. 201(e). In any event, Sen. McCain's ultimate *purpose* is immaterial: it is the description of SGT Bergdahl as "clearly a deserter" and the hearing threat that count.

To the extent the record contains any evidence pertinent to the military judge's fifth premise, it does not support that premise. Thus, the Army's contemporaneous response to Sen. McCain's threat – which the prosecution understandably but unsuccessfully sought to keep from the defense – was hardly dismissive of the

[10] The military judge observed (at 8 n.7) that "[i]t 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." Passing over the fact that Sen. McCain never mentioned the President in the remarks quoted by the *Boston Herald* (and the fact that Mr. Obama was barred from seeking a third term, U.S. Const. amend. 22), to treat those facts as even relevant would mean that members of the party out of (Executive) power could say and do literally anything – be it ever so false, irresponsible, and prejudicial -- with respect to pending cases and the accused would have no recourse. If public officials' words no longer have consequences because everyone dismisses them as mere "political posturing," Decision at 8 & n.6, it will be a sad day for due process of law. That day has not come, *cf. Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 228 (1953) (Jackson, J., dissenting) ("No one can make me believe that we are that far gone"), and the Court should not help bring it about by embracing an it's-just-politics approach to a matter that goes to the heart of an individual's right to fair treatment as well as the good name of the military justice system.

threat. Quite the reverse: alarm bells were going off. Even GEN Abrams thought Sen. McCain's comments created a significant problem vis-à-vis the ability of panel members to perform their important function fairly and in accordance with the law. Neither OCLL's nor GEN Abrams' stated concerns – nor those of Mr. Barney – were unreasonable.

Similarly, Sen. McCain's threat has been taken seriously by respected observers across the country. They include Prof. Wright and Ms. Graham, *supra* & D App 41, at 3; the 16-person Editorial Board of *The New York Times*, D App 41, at 1; conservative legal scholar Bruce Fein,[11] retired Air Force Col. Morris D. Davis, D App 41, at 7; a former Colorado Bar Association president,[12] and the various professional journalists (starting with Ms. Sweet and Mr. Oppel) who covered the threat as news.[13]

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[11] Bruce Fein, *Sen. John McCain, the Constitution and Sgt. Bowe Bergdahl*, Wash. Times, Aug. 23, 2016, *available at* http://www.washingtontimes.com/news/2016/aug/23/sen-john-mccain-constitution-and-sgt-bowe-bergdahl/; Bruce Fein, *Military Justice, Senator John McCain, and SGT Robert Bergdahl*, Huffington Post, Oct. 9, 2016, *available at* http://www.huffingtonpost.com/bruce-fein/military-justice-senator_b_12415988.html.

[12] Christopher Brauchli, *Abrams, Bergdahl and McCain*, Huffington Post, Dec. 22, 2015, *available at* http://www.huffingtonpost.com/christopher-brauchli/abrams-bergdahl-and-mccai_b_8859024.html.

[13] *E.g.*, Dan Lamothe, *How John McCain found himself more involved in the Bowe Bergdahl case than he probably wants*, Wash. Post, Aug. 5, 2016, *available at* https://www.washingtonpost.com/news/checkpoint/wp/2016/08/05/how-john-mccain-found-himself-more-involved-in-the-bowe-bergdahl-case-than-he-probably-wants/; Paul McLeary, *The Politics of Military Justice, Bowe Bergdahl Edition*, Foreign Policy, Oct. 29. 2015, *available at* http://foreignpolicy.com/2015/10/29/the-politics-of-military-justice-bowe-bergdahl-edition/. None of the recognized military justice experts quoted in these articles evinced the slightest doubt that Sen. McCain's threat was to be taken seriously.

The proposition that no reasonable observer could have taken Sen. McCain's threat seriously is unfounded. Regardless of which standard of review the Court were to apply, it has to be rejected.

> 6. "Because he had no command authority or present ability to influence the decision whether or not to refer the case to trial, [Sen. McCain] could not possibly be reasonably viewed as exercising unlawful influence." Decision at 8 (¶ 12).

This premise, which is a legal conclusion and therefore reviewable *de novo*, *Reed*, reflects an incorrect assessment of the reach of Article 37(a) and materially underestimates Sen. McCain's power as SASC chairman. An unwelcome hearing is one of the numerous potent tools SASC wields to influence the armed forces and their leadership. It is the legislative equivalent of saying "If you do not sign over the deed to your house, I will make your life miserable." That is a present threat, intended to influence present conduct by promised future action.

> 7. Congressional hearings "are not a review or check on a particular court-martial." Decision at 8 (¶ 12).

The military judge's seventh premise is yet another assertion of law and therefore freely reviewable here. *Reed.*

Congressional hearings are *in theory* not supposed to be a form of appellate or collateral review of outcomes in individual courts-martial, but Sen. McCain's threat is *the reality*, and speaks for itself. Nor is the question whether the hearing

he threatened[14] will in fact ever be conducted or, if it is, whether any resulting legislation would be generic or inapplicable to SGT Bergdahl. *See* Decision at 8. *The problem is the threat itself*, which explicitly focused on this case. How more logical a connection can there be than to refer *in haec verba* to a specific case?

Summing up: contrary to the military judge's decision (at 8-9 (¶ 12)), SGT Bergdahl met his obligation to adduce "some evidence" of apparent unlawful influence. As a result, the government had the burden of demonstrating beyond a reasonable doubt that the proceedings were untainted. *Lewis*, 63 M.J. at 413; *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). It never attempted to carry that burden, resting instead on a flat denial that what Sen. McCain did constituted UCI and a claim that there is no such thing as unlawful congressional influence.

Whether constitutional error is harmless beyond a reasonable doubt is reviewed *de novo*. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). Similarly, UCI issues are subject to *de novo* review. *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). A court reviewing the effect of such violations must necessarily consider not only whether actual UCI was cleansed from the proceedings, but also whether any *perceived* UCI has been eradicated. *United States v.*

[14] The military judge correctly acknowledged that it was Sen. McCain's prerogative as SASC chairman to hold hearings. Decision at 8 (¶ 12). His comments were thus no idle threat or mere bravado.

Simpson, 58 M.J. 368, 374 (C.A.A.F. 2003); *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002).

The standard for remedying cases with an appearance of UCI is that the appearance "has been ameliorated and made harmless beyond a reasonable doubt." *Lewis*, 63 M.J. at 415.

The standard for addressing the appearance the unlawful influence is clear from *Salyer*:

> We hold that the Government's conduct raised some evidence of an appearance of unlawful influence. We further hold that the Government has not demonstrated beyond a reasonable doubt that the appearance of unlawful influence did not affect the findings or the sentence, and that dismissal of the charges with prejudice is appropriate under the circumstances of this case.

72 M.J. at 417.

2. Who is to Blame?

Sen. McCain is a distinguished citizen and former nominee of his party for the Nation's highest office. He has been a United States Senator since 1987 (and was just elected to another 6-year term in that august body). Before that he was a Member of Congress for two terms. His captivity in North Vietnam is the stuff of legend. Nonetheless, it must be said that he is to blame because his comments – as the Army's own emails demonstrate – constituted impermissible meddling in a pending criminal case and a serious abuse of his authority as chairman of a powerful Senate committee.

The chronology set out above reveals that Sen. McCain was warned by his general counsel of the dangers of conducting a hearing. Within a month he was telling the news media he would conduct a hearing once SGT Bergdahl's case was over. And only a few months after that, while on a campaign trip for another senior member of SASC, he made the undisguised threat that has impelled SGT Bergdahl, who as it happens was *also* held in captivity for a very long time (but, unlike Sen. McCain, without companions),[15] to move to dismiss and in due course seek a writ of mandamus. This is on Sen. McCain.

Sen. McCain must also take responsibility for failing to "walk the cat back." Rather than doing so when asked for clarification, Sen. McCain's staff member, presumably after consultation with him, effectively reiterated that the whole matter would be the subject of a hearing in due course. By using the phrase "not just his conduct," the staffer made it clear that SGT Bergdahl's "conduct" would indeed be a subject of the hearing. Thus, that staffer's email to *The New York Times* only confirmed Sen. McCain's error.

The Army offered to help Sen. McCain fashion some kind of statement that would at least attempt to unravel the problem. So far as we are aware, however, he

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[15] *See* Art. 32 Tr. 340-41 ("Sergeant Bergdahl didn't have any of that. He was an organization of one. He had to fight the enemy alone for 4 years and 11 months.") (testimony of Terrence D. Russell, Joint Personnel Recovery Agency), *available at* https://ccrjustice.org/sites/default/files/attach/2015/09/Sanitized%20Article%2032%20Transcript.pdf.

never took the Army up on that offer, and in any event never either withdrew or repudiated his threat. The explanation for this failure is unknown to us, but Mr. Barney's rueful "welcome to my world" comment to OCLL, AE 12, at 31, suggests that client control was a challenge.[16]

To its credit, OCLL realized the shoal water into which Sen. McCain gave signs of wanting to steer starting in early May 2015. OCLL remonstrated with his general counsel in the strongest terms against conducting a hearing while SGT Bergdahl's case was pending. When Sen. McCain put his foot in his mouth in New Hampshire, the Army was quick to offer help to try to extract it. This too was to its credit, even though the offer was, for reasons that remain unknown, never taken up.

Unfortunately, the Army's hands are not as clean as one would have expected given the explosive nature of Sen. McCain's threat (not to mention the seemingly limitless manpower and vast sums of taxpayer money the government has continued to invest in this prosecution). Thus, the Army could have, but never did, make its own statement attempting to neutralize his threat. (GEN Abrams was

[16] HASC obviously has influence over the armed services as well, although, lacking confirmation responsibilities, the appropriation power would be central. Its 9 December 2015 report, quoted in the Statement of Facts, p. 11 *supra*, includes a very clear indication that it would be looking over the Army's shoulder, arrogating to itself a power it lacks: "ensur[ing] that standard procedures are properly implemented and administered" in a particular case, "and that Sgt. Bergdahl's behavior is adjudicated as required." It is difficult not to view this language as a variation on Sen. McCain's theme, and equally out of the committee's lane. HASC's choice of words may have been subtler, but the "we're watching you" message is still perfectly audible.

completely silent on the matter until he had to testify, and even then all he could bring himself to say was that Sen. McCain's comments were "inappropriate.")[17]

One can only assume that the power dynamic between the Army and Sen. McCain was such that it was politically unthinkable to embarrass him in public by issuing such a corrective without his consent. The result was that the Army maintained the peace with its imperious Senate overseer and SGT Bergdahl's due process rights were disregarded.[18]

This scenario is in stark contrast with earlier situations where official "curative" statements (of doubtful efficacy) were made when Secretary of Defense Leon Panetta, Commandant of the U.S. Marine Corps General James F. Amos, and even President Obama wandered into the minefield of commenting on pending and future cases.

This case is far worse. Gen. Amos's comments were addressed to an incident that involved several accused (the urologically challenged Marine snipers)

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[17] The military judge's decision is even tamer, blandly referring to Sen. McCain's statements as "ill-advised." Decision at 8 (¶ 12).

[18] Sen. McCain is unfortunately not the only Republican leader out for SGT Bergdahl's head. As we noted in an earlier case, *see* Writ-Appeal Petition at 11-13, *Bergdahl v. Burke*, 75 M.J. 35 (C.A.A.F. 2015) (mem.), *available at* https://bergdahldocket.files.wordpress.com/2016/03/bergdahl-burke-wap.pdf, Donald J. Trump, who yesterday became President-Elect, irresponsibly described SGT Bergdahl as a traitor at rally after rally across the country over the course of his campaign. *See* Trump Defamation Log, D App 27 encl 8. At these same rallies he falsely insisted that soldiers died searching for SGT Bergdahl and stressed both in words and by pantomime that deserters used to be shot, implying that SGT Bergdahl deserves the death penalty. The adverse effect of Sen. McCain's threat must be viewed against the backdrop of Mr. Trump's indefatigable campaign of vilification, against which the Army never pushed back.

and those of the President and Secretary Panetta were generic. Sen. McCain's threat, on the other hand, focuses like a laser on the prosecution of a single NCO, SGT Bergdahl.

In an effort to hide the ball, the Army went so far as to claim that one critical email was subject to the attorney work product privilege even though it had been sent to SASC (thus waiving any even arguable privilege). *See* AE 12, at 35-36. It then redacted the clear contemporaneous evidence surrounding Sen. McCain's threat when SGT Bergdahl's civilian defense counsel sought it under FOIA. D App 23 encl 4; *compare* first and second [final] versions included in AE 12.

Trial counsel resisted discovery of the pertinent documents in reliance on a single transparently inapposite case, *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). G App 25, at 6. Their legal claim was irreconcilable with the stern warnings the Army itself had communicated to Sen. McCain through his general counsel.

Only after Judge Nance, at our request, ordered an *in camera* inspection of the FOIA documents did the Army revisit the redactions in the context of the civil action SGT Bergdahl's civilian defense counsel filed in the U.S. District Court for the District of Connecticut. *See* AE 12 (version provided to the Military Judge in connection with 29 July 2016 *in camera* inspection). In fact, whether or not the emails between SASC and the Army fall within *Brady v. Maryland*, 373 U.S. 83

(1963), they certainly are discoverable under R.C.M. 701 and the Army should have supplied them to the defense voluntarily when asked. Instead, it had to be sued in federal district court.

These parts are therefore on the Army.

The Court is not called upon to allocate fault between Sen. McCain and the Army. Its only function is to determine whether, at the end of the day, Article 37(a) and SGT Bergdahl's due process rights have been violated. Which arm of the government is responsible is of interest – and indeed, important – from the standpoint of lessons learned and accountability, but the legal issue regarding the effect on the prosecution of SGT Bergdahl remains unchanged.

3. What is the Proper Remedy?

Finding no violation of law, the military judge never reached the question of remedy. In fact, he should have dismissed with prejudice both charges and the specifications thereunder because any other action would leave a cloud over the independence of the proceedings and deny SGT Bergdahl due process of law as guaranteed by the Fifth Amendment.[19] Absent such relief, public confidence in the administration of justice is compromised and a clear signal will have been sent to current and future leaders of SASC and other congressional committees that they

[19] Military personnel have a right to due process. *E.g., United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011).

may meddle in specific courts-martial with impunity.[20] Congressional efforts to exert influence over specific cases are even more pernicious than garden variety UCI because legislators' actions or statements reach and affect the thoughts of more people than those of commanders. Rawles, *supra*, at 46, 103, 105-06.

Dismissal of both charges is warranted even though Sen. McCain referred to SGT Bergdahl only as "clearly a deserter" rather than also referring to him as a person who was guilty of misconduct before the enemy. This is because the desertion referred to in the specification to Charge I is part and parcel of the specification to Charge II. While Sen. McCain's comments run directly to Charge I, therefore, they also relate to Charge II.

If the Court is, for any reason, not disposed to order the dismissal of both charges (*i.e.*, if it leaves either one undisturbed), then it should rule that the only sentence that may be adjudged in the event of a conviction is that SGT Bergdahl "suffer no punishment," as authorized under R.C.M. 1002. Such an order, for which Col. Michael D. Murphy's case is precedent, *see United States v. Murphy* (U.S. Air Force GCM) (Henley, C.J.), *gov't appeal denied*, 2008 CCA Lexis 511 (A.F. Ct. Crim. App. 2008) (per curiam), would map closely onto Sen. McCain's

[20] Overlooking the fact that it is possible for a legislator to be subject to the Code, Major Rawles wrote that "[w]ithout a broader reading of [Article 37]'s coverage by the Courts, or an amendment to the UCMJ specifically making actions and statements made by Congressional members covered under Article 37, they will continue to go unchecked." Rawles, *supra*, at 46 n.138. That an experienced legislator like Sen. McCain would be oblivious to the corrosive effect of his threat underscores her point.

unlawful statement, since the hearing he threatened was predicated on SGT Bergdahl's receiving no punishment. We strongly believe, however, that broader relief is required in the interest of preserving public confidence in the integrity of the military justice system and underscoring the impermissibility of congressional interference in particular cases. But at a bare minimum a "No Punishment" order is required both to drive the point home and to safeguard SGT Bergdahl's due process rights.

Whether Sen. McCain's improper conduct warrants his removal as chairman, censure, or other adverse action by the Senate is for that body to decide in accordance with its settled procedures and standards. *See* U.S. Const. art. I, sec. 5, cl. 2; *see also* Jack Maskell, *Expulsion and Censure Actions Taken by the Full Senate Against Members* (Cong. Research Svc. Nov. 12, 2008) (collecting cases). It is no more appropriate for the Court to address these matters than it was for him to meddle with SGT Bergdahl's case.

Are there other remedies? The government properly conceded in its 6 July 2016 response to SGT Bergdahl's third motion to compel (G App 25, at 6) that Sen. McCain is subject to the UCMJ as a retired regular. Art. 2(a)(4), UCMJ. His conduct violated the second sentence of Article 37(a) and therefore Article 98(2). The statute of limitations has not expired. Art. 43(b), UCMJ.

No purpose would be served, however, by SGT Bergdahl or anyone else who is on active duty putting Sen. McCain on report. It is common ground that no one has ever been tried for a violation of Article 98. *See also* G App 34, at 3 n.3 (same). And even if that weren't the case, swearing to charges would be futile: the sole Department of the Navy official with power to authorize the referral of charges against Sen. McCain to a court-martial — the Secretary of the Navy, *see* U.S. Navy, Manual of the Judge Advocate General § 0123a(1) (JAGINST 5800.7F, June 26, 2012) (JAGMAN) — is subject to his oversight as SASC chairman (as is every other UCMJ convening authority in the armed forces). The Secretary of Defense is a convening authority, Art. 22(a)(2), UCMJ, and is presumably not bound by the JAGMAN, but he too is subject to SASC oversight. The only official authorized to convene courts-martial who is not subject to SASC oversight in the way appointed officials are is the President, Art. 22(a)(1), UCMJ, but even as to the Commander in Chief SASC wields significant power by such familiar means as legislating (or refusing to do so), conducting oversight hearings, stalling nominations through "holds," contempt citations, and a host of other formal and informal means. *See also* U.S. Const. art. I, § 3, cl. 6 (power to try impeachments).

No Executive Branch official, therefore, is realistically in a position to exercise the quasi-judicial judgment that would be required to make a credible disposi-

tion decision if charges were preferred against Sen. McCain for his violation of Article 98.

There are thus no other forums in which the compelling interests referred to above can be vindicated. While garden variety UCI can in theory be deterred by the risk (however slight) of prosecution under Article 98, the congressional variant, whether founded in Article 37(a) or the Constitution itself, cannot. As a result, meddling such as Sen. McCain's presents an *a fortiori* case for decisive remedial action.

C. The Circumstances Warrant Extraordinary Relief

While the writ of mandamus should be invoked only in truly extraordinary situations, it is appropriate when a lower court's decision is "characteristic of an erroneous practice which is likely to recur." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (citations and internal quotation marks omitted). That is this case.

Three conditions must be met before mandamus is granted: (1) the party seeking the writ must have "no other adequate means to attain the relief"; (2) the party seeking the relief must show that the "right to issuance of the relief is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. United States Dist. Court*, 542 U.S.

367, 380-81 (2004) (quotation marks omitted); *see also Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012).

These factors strongly militate in favor of mandamus. SGT Bergdahl has no other means to obtain relief. Relegating the issue to the normal course of appellate review is insufficient because his fundamental rights to due process and a fair trial are at stake. He faces the prospect of life imprisonment and lasting stigma if convicted as charged. Given the complexity of the case and the associated costs (including the review of hundreds of thousands of pages of classified documents), it would be a prodigious waste of resources to defer a decision on the critical issue presented here, especially because *the record on the issue at bar will be no richer after a trial than it is now*.

Unless the requested writ is issued, a major trial will be conducted under the dark cloud of unlawful congressional influence. The trial will very likely not even begin until six months from now, at the earliest. After that, in the event of a conviction and jurisdictional sentence, the case will not come here from the Army Court on direct review (whether by petition or certificate) until months later, probably in mid- to late-2018. The strong interest in fostering public confidence in the administration of justice weighs heavily in favor of grasping this nettle now, rather than two or more years hence. Failure to do so will only mean that members of the Sen-

ate and House will continue to treat interference with courts-martial as business as usual.

VIII

Respondent's Contact Information

The United States is the respondent.

In accordance with Rule 27(a)(1), a copy of this petition is being provided to Colonel Jeffery R. Nance, the military judge whose decision is the subject of the petition. Judge Nance is not a respondent. RULES GUIDE § 27.02, at 254 (1998 Rules Advisory Committee Comment).

Conclusion

For the foregoing reasons, an Order to Show Cause should issue. On the merits, a writ of mandamus should issue dismissing the charges and specifications or, failing that, directing that the maximum punishment that may be adjudged is No Punishment, or granting such other and further relief as may, in the circumstances, be just and proper.

Respectfully submitted,

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Certificate of Compliance with Rule 24(d)

This brief complies with the type-volume limitation of Rule 24(d) because it contains 10,060 words. It also complies with the typeface and type style requirements of Rule 37.

Matthew D. Bernstein
Captain, JA

Certificate of Filing and Service

I certify that I have, this 9th day of November, 2016 filed and served the foregoing Petition for a Writ of Mandamus by emailing copies to the Clerk of the Court, the military judge whose decision is the subject of the petition, and the Government Appellate Division at the following email addresses:

efiling@armfor.uscourts.gov
usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@mail.mil
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A copy of the petition has also been delivered to the Clerk of Court, U.S. Army Court of Criminal Appeals.

Matthew D. Bernstein
Captain, JA

APPENDIX

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 Taliban[1], 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.

APPELLATE EXHIBIT 19

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. *Unites 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 wo 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 ones 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.

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[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 posturing[6] 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

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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