

Daily Journal

www.dailyjournal.com

FRIDAY, JANUARY 19, 2018

Command influence tainted Bergdahl case

By William Bruzzo

In 2015, while Sergeant Bowe Bergdahl's court martial was pending, I wrote an article in these pages arguing that the five years he spent a captive of the Taliban, where he was subject to torture and permanently impaired as a result, should be deemed sufficient and that Bergdahl should be released from the Army without further punishment.

My argument was based on Bergdahl's mental health history, which included a diagnosis of schizotypal personality disorder, a schizophrenia-type condition which affects the ability of a person to assess the consequences of their actions, among other things.

However, the most damning revelation to come out of the Bergdahl matter was that Bergdahl had washed out of the Coast Guard for mental health reasons two years prior to joining the Army — and that the Army was aware of this when they enlisted him.

In 2008, with the Iraq/Afghanistan war becoming increasingly unpopular, military standards were lowered in an effort to boost enlistment numbers. Lower standards included permitting recruits to join with criminal records, mental health histories, lower IQs and no high school degree.

Bergdahl joined in 2008. His previous mental health history, and what would have been a negative discharge from the Coast Guard, had to be cleared through the Army HQ before he would have been permitted to serve. I believe the Army knew what they were getting in 2008 and, desperate for bodies, they enlisted Bergdahl.

Bergdahl, for his part, wanted to serve his country and, contrary to many press reports, did not leave his post because he was a coward. Rather, Bergdahl saw "leadership issues" that existed in his command that could "only" be resolved by his journeying, unarmed, through hos-



New York Times News Service

In an undated handout photo, U.S. Army Sgt. Bowe Bergdahl, who was taken prisoner in Afghanistan in June of 2009.

tile Taliban territory and reporting his concerns to a general. Clearly not a rationale statement, although perhaps not unexpected from someone with a mental health defect. Notably, Major General Kenneth Dahl, who investigated the Bergdahl matter, said he found these beliefs of Bergdahl to be genuinely held and he recommend against further incarceration; the preliminary hearing officer who heard the case agreed.

Like so many things in the past two years, Donald Trump loomed large, even in this case. Candidate Trump publicly berated Bergdahl as a "dirty, rotten, traitor" and stated that he should be "shot for deserting his post." Trump also said Bergdahl should be dropped from an airplane without a parachute. Trump, always big on bluster if not accurate on the facts, appeared unaware or unconcerned about the nuances of the matter. He gleefully joined in giving a sound kick to the already well-kicked Bergdahl horse.

Like other instances of Trump's bluster, this one had consequences: In military law, a case may be dismissed if a person in authority expresses an opinion as to what the outcome of a case should be. This doctrine is called "unlawful command influence," and it is a basic tenet of military law that helps guar-

antee the fairness and impartiality of the military justice system.

After Trump became president, Bergdahl's defense team attempted to dismiss the case against Bergdahl under the doctrine. The military law judge shot down the argument, claiming that since Trump was just a candidate at the time of his comments, he was not in a position of authority and therefore the doctrine did not apply.

The judge's reasoning was unsound: To any judge or jury hearing the case and deciding the sentence (military juries can sentence defendants), Trump's opinion was clear and had likely not changed since he had become president.

After his election, Trump initially declined to comment on a reporter's question about Bergdahl who was then going through his sentencing hearing, but then intoned as an aside "but I think people have heard my comments in the past." That reaffirmation of his previous statements put unlawful command influence firmly back in play and Bergdahl's defense team reargued their motion to dismiss. The military judge denied it again, but this time said he might consider it for sentencing purposes.

That decision defies the notion that unlawful command influence,

once found, requires a dismissal, not a half measure.

In the end the judge decided not to give Bergdahl any additional incarceration time although he did give him a dishonorable discharge and a \$10,000 fine. The court was silent on whether the president's statements influenced his decision. The judge's rulings on the pretrial motions notwithstanding, his decision not to sentence Bergdahl to additional incarceration time represented the difference between a democracy ruled by laws and an autocracy ruled by one man's authority. In a Putinesque country, the autocrat may dictate all facets of life from the legal system to the economy. But in our country, for the time being, even a president may be defied and the rule of law prevail.

After the Bergdahl sentencing, Trump tweeted, "The decision on Sergeant Bergdahl is a complete and total disgrace to our Country and to our Military." But is a man who did not bother to learn the facts of the case, and who deferred the draft five times and never served, in a position to comment at all?

William Bruzzo is criminal defense lawyer in Orange County practicing civilian and military criminal law. He is a 1994 Graduate of the Naval Justice School and spent seven years in the United States Marine Corps which included positions as a judge advocate, company commander and the executive officer of an H&S Company in the 4th Tank Battalion. He was honorably discharged as a major. He is also a mentor at the Veteran's Court in the Orange County Superior Court.



WILLIAM BRUZZO