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Response

Unlawful Command Influence and the President's Quasi-Personal Capacity

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As Professor Kate Shaw makes clear in her brilliant (and brilliantly timed) article on presidential speech in the courts,¹ the question is not *whether* a President's own statements can and should ever be admissible against him in judicial proceedings, it's *when*. Thus, whatever one thinks about judicial reliance on President Trump's statements to prove that the "Travel Ban" was motivated by anti-Muslim animus,² it is all-but given that there will be *some* circumstances in which there's common cause that it is appropriate (if not necessary) for courts to consider a President's own statements in assessing the legality of particular government actions. For Professor Shaw, at least, those three contexts are (1) "speech that manifests some intent to enter the legal arena"; (2) "presidential speech touch[ing] on matters of foreign affairs"; and (3) "where government purpose is a component of a legal test, and presidential statements may supply relevant evidence of that purpose."³ Otherwise, she concludes, "for the most part it is a category error for a court to give legal effect to presidential statements

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1. Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEXAS L. REV. 71 (2017).

2. See, e.g., Jeffrey Toobin, *The Courts and President Trump's Words*, NEW YORKER (Mar. 17, 2017), <https://www.newyorker.com/news/daily-comment/the-courts-and-president-trumps-words> [<https://perma.cc/5EA9-BB45>].

3. Shaw, *supra* note 1, at 76.

whose goals are political storytelling, civic interpretation, persuasion and mobilization—not the articulation of considered legal positions.”⁴

There is no question that Professor Shaw’s article performs an important (and timely) service, and that it comprehensively identifies the multitude of ways in which presidential speech *has* entered into judicial consideration, for better or for worse. The harder question, and the focus of this short response, is why it is *these* three contexts in which presidential speech should have legal effect and no others. That is to say, is there a unifying principle behind Professor Shaw’s “general proposition and three tidy exceptions,” or are they “but landmarks on a judicial ‘darkling plain’ where ignorant armies have clashed by night”?⁵

To ask (and hopefully answer) this question, this short response uses the rather specific example of “unlawful command influence” (UCI)—a concept specific to our military justice system under which it is unlawful for commanders in the military to “attempt to coerce or, by any unauthorized means, influence the actions of a court-martial . . . or any member thereof.”⁶ As the Court of Appeals for the Armed Forces (CAAF) has explained, “While statutory in form, the prohibition can also raise due process concerns, where for example unlawful influence undermines a defendant’s right to a fair trial or the opportunity to put on a defense.”⁷ Indeed, “[u]nlawful command influence has often been referred to as ‘the mortal enemy of military justice,’”⁸ so much so that “[e]ven the mere appearance of unlawful command influence may be ‘as devastating to the military justice system as the actual manipulation of any given trial.’”⁹

UCI is such a central issue to the military justice system because of those courts’ unique structure—in which virtually all of the key players in a criminal trial, from the lawyers to the witnesses to the members of the jury to the judge, are uniformed servicemembers who could have both legal and professional reasons not to act against the wishes of those above them in the chain of command. Even the specter that commanders *might* exercise such influence is a sufficient threat to the public perception of the fairness of courts-martial that unlawful command influence raises both statutory problems under the UCMJ and constitutional concerns under the Fifth Amendment’s Due Process Clause.¹⁰ After all, as Judge Baker wrote in 2010, “[i]f allowed in practice, unlawful command influence will have a

4. *Id.*

5. *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring in the judgment).

6. 10 U.S.C. § 837(a) (2016).

7. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013).

8. *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009).

9. *Id.*

10. Steve Vladeck, *President Trump’s Careless Rhetoric, Unlawful Command Influence, and the Bergdahl Court-Martial*, JUST SECURITY (Apr. 5, 2017), <https://www.justsecurity.org/39541/president-trump-bowe-bergdahl-unlawful-command-influence/> [https://perma.cc/JM8P-DFJ6].

corroding effect that could prove deadly to the confidence members of the Armed Forces and the public have in the military justice system.”¹¹

And although there is some debate as to whether Presidents can commit UCI, some military judges have (correctly, in my view) concluded that the answer is yes, such as the Navy judge who ruled in 2013 that general comments made in a public speech by President Obama constituted “unlawful command influence” insofar as he had alluded to the specific “consequences” he deemed appropriate for members of the military convicted of sexual assault—and even though Obama’s comments were not directed at any specific case. As a remedy, the judge ruled in two sexual assault cases that the ultimate punishment could not include discharge.¹² Other examples of UCI abound.

In her article, Professor Shaw flags presidential speech *qua* UCI as an example of “statements with direct legal effect” that falls into the category of “speech that manifests some intent to enter the legal arena,” and is therefore appropriate for judicial consideration.¹³ I agree that presidential speech *can* give rise to a UCI claim, but I disagree that it fits within the specific category Professor Shaw proposes—or, indeed, within her article’s broader framework. After all, unlike presidential statements about the end of a war¹⁴ or the existence of hitherto secret national security programs,¹⁵ UCI can occur even if the speech has no relation whatsoever to government policy. That is to say, UCI is a rare example of presidential speech of legal significance that can arise even in the President’s *personal* capacity because the issue has nothing to do with whether the statement was somehow reflective of broader Executive Branch decision-making. In that regard, it is more analogous to slander (an offense no President would *ever* commit, of course) than to Professor Shaw’s other examples of “statements with direct legal effect.” If anything, presidential speech *qua* UCI is typically reflected in statements with *indirect* legal effect.

The reason why this distinction may seem elusive—if not illusory—is because we almost never *see* suits against the President for what we’d normally describe as “personal capacity” malfeasance. Shortly after the Civil War, the Supreme Court cryptically held in *Mississippi v. Johnson*¹⁶ that federal courts lack the power “to enjoin the President in the performance of his official duties,”¹⁷ and more recently, the Court in *Nixon*

11. *United States v. Douglas*, 68 M.J. 349, 358 (C.A.A.F. 2010) (Baker, J., dissenting).

12. *See* Findings and Conclusions re: Defense Motion to Dismiss for Unlawful Command Influence, *United States v. Johnson*, 13–14 (N-M. Trial Jud., Haw. Jud. Cir. June 12, 2013), <https://scribd.com/doc/147972097/United-States-v-Ernest-Johnson-Ruling> [<https://perma.cc/G272-GBG8>].

13. *See* Shaw, *supra* note 1, at 113–14.

14. *See id.* at 110–12.

15. *See id.* at 113.

16. 71 U.S. (4 Wall.) 475, 501 (1867).

17. *Id.* For a discussion of *Johnson* and its (significant) contemporary limits, see Steve Vladeck, *Do Federal Courts Lack the Power To Directly Enjoin the President?*, JUST SECURITY

*v. Fitzgerald*¹⁸ held that the President is entitled to “absolute immunity” from civil liability for *all* acts falling within the “outer perimeter” of his official duties.¹⁹ And although both cases referred to official duties, that concept has been interpreted quite capaciously (if not entirely convincingly) to encompass virtually everything a sitting President does while he is in office.²⁰ Thus, there just aren’t a lot of examples (*besides* UCI) of contexts in which the President’s speech can have *indirect* legal effect. What, then, can we learn from the rare cases where it should?

Consider the case of Army Sergeant Bowe Bergdahl, the former Taliban prisoner who was court-martialed on charges of desertion and misbehavior before the enemy last year.²¹ During the 2016 election cycle, then-Candidate Trump repeatedly suggested loosening the laws on treason while ominously promising to review Bergdahl’s case; he asserted that Bergdahl had defected to the enemy, saying “he went to the other side” and “negotiated with terrorists,” and described him as a “dirty rotten traitor,” called him “the worst,” “no good,” “this bum,” a “whack job,” “this piece of garbage,” and a “son of a bitch.” He referred to Bergdahl as “a very bad person who killed six people”—variously five, six, or either five or six in number (the number shifted from rally to rally)—who died searching for Bergdahl. He repeatedly observed that deserters used to be shot, implying and at times saying outright that Bergdahl should meet a similar fate (with or without a trial). And he repeatedly pantomimed executions of Bergdahl by rifle, complete with sound effects, to the same apparently anticipated end.²²

Leaving aside the (not insignificant) problem that virtually all of these factual claims are materially false,²³ they also arguably became textbook

(Aug. 14, 2017), <https://www.justsecurity.org/44201/federal-courts-lack-power-enjoin-president/> [<https://perma.cc/R4WK-94MX>]. As I argued there,

the best way to understand *Mississippi* today is as standing for the proposition that equity will not resolve a political question, which is a heck of a lot more defensible (and less inconsistent with our entire understanding of the separation of powers) than the proposition for which it is now being invoked—that equity can never enjoin the King.

Id.

18. 457 U.S. 731 (1982).

19. *Id.* at 732.

20. See, e.g., Steve Vladeck & Benjamin Wittes, *Can a President’s Absolute Immunity Be Trumped?*, LAWFARE (May 9, 2017), <https://lawfareblog.com/can-presidents-absolute-immunity-be-trumped> [<https://perma.cc/T2T3-9M5J>] (explaining why “*Fitzgerald* does not quite say what it’s cited to mean”).

21. Richard A. Oppel, Jr., *Bergdahl is Spared Prison, to President’s Chagrin*, N.Y. TIMES (Nov. 4, 2017), <https://www.nytimes.com/2017/11/03/us/bowe-bergdahl-sentence.html> [<https://perma.cc/34PP-W6RL>].

22. For all of these statements (and more), see Writ-Appeal Petition for Review of U.S. Army Court of Criminal Appeals Decision on Petition for Writ of Mandamus, *Bergdahl v. Nance*, 76 M.J. 342 (C.A.A.F. 2017) (mem.), <https://bergdahldocket.files.wordpress.com/2017/02/bergdahl-v-nance-writ-appeal-petition.pdf> [<https://perma.cc/EQ9X-6EB3>].

23. See, e.g., Michael Ames, *What the Army Doesn’t Want You to Know About Bowe*

examples of UCI once President Trump was inaugurated. Not only did Trump refer to Bergdahl on dozens of occasions as a “traitor,” someone who should be “executed,” and (falsely, as) someone who was directly responsible for the death of five (or six) servicemembers; he also promised to review Bergdahl’s case specifically—and to consider relaxing the laws on treason, a not-so-subtle insinuation that such relaxation might also be directed at Bergdahl.²⁴

In the context of a civilian criminal prosecution, such comments would be a serious breach of protocol—implicating the kind of interference with the Justice Department for which previous Presidents, at least, have gotten into a fair amount of (political) hot water.²⁵ In the context of the military justice system, especially with a President who seems disinterested in respecting established norms and protocols for institutional independence, they raise an incredibly serious UCI issue, and one that may well provide the basis for a successful post-conviction appeal.

The government’s response focused on two substantive arguments: that (1) contra the Obama example, Presidents are not “subject to the UCMJ” under 10 U.S.C. § 837 and so can’t commit UCI; and (2) that, even if President Trump could commit UCI, statements made prior to taking office can’t (and shouldn’t) be relevant.²⁶ Both of these arguments are at least superficially plausible. But to my mind, both of these arguments are ultimately based upon an unduly cribbed understanding of what UCI actually is—and largely miss the broader purpose of the prohibition.

After all, imagine if Bergdahl had ultimately been acquitted. Do we really think, given his prior comments, that President Trump would not have commented publicly on the proceeding, or have sought to blame whomever he holds responsible for that outcome, be it the prosecutors, the trial judge, or some other actor? So long as that’s even a reasonable possibility, isn’t there at least the prospect that certain participants in the

Bergdahl, NEWSWEEK (Jan. 27, 2016), <http://www.newsweek.com/2016/02/05/serial-bowe-bergdahl-mystery-pow-419962.html> [perma.cc/L7G4-RUUR] (stating that Bergdahl “did not defect,” “no one in [his] platoon was killed after Bergdahl was captured.”).

24. See Richard A. Oppel, Jr., *Bowe Bergdahl, Called a ‘Traitor’ by President Trump, Pleads Guilty*, N.Y. TIMES (Oct. 16, 2016), <https://www.nytimes.com/2017/10/16/us/bowe-bergdahl-guilty.html> [perma.cc/NM7K-BRQF]; Richard A. Oppel, Jr., *Judge Says Trump’s Statements Did Not Prejudice Case Against Bergdahl*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/us/bowe-bergdahl-donald-trump.html> [perma.cc/EF2X-35GX].

25. Dylan Matthews, *Richard Nixon also Fired the Person Investigating his Presidential Campaign*, VOX (May, 10, 2017), <https://www.vox.com/policy-and-politics/2017/5/10/15603886/saturday-night-massacre-explained-nixon-watergate-archibald-cox> [https://perma.cc/WN3R-RG9E].

26. See Response to Writ-Appeal Petition for Review of U.S. Army Court of Criminal Appeals Decision on Petition for Writ of Mandamus at 33, *Bergdahl v. Nance*, 76 M.J. 342 (C.A.A.F. 2017) (No. 20170114), <https://bergdahldocket.files.wordpress.com/2017/02/answer-to-writ-appeal-petition-corrected.pdf> [https://perma.cc/A6YR-E8E4].

proceeding might have been influenced (or might, at least, *appear* to have been influenced) by the brooding omnipresence of such a large shadow?

Thus, whatever the merits of the government's arguments in Bergdahl's case specifically, it seems to me that UCI is another context in which presidential speech could well be of material legal relevance. And yet, it meets none of Professor Shaw's criteria: it does not necessarily reflect a manifestation of *intent* on the President's part to enter the legal arena; it does not touch on foreign affairs or international law; and it is not a case in which the government's "purpose" constitutes an element of the relevant legal test (UCI itself isn't really about intent, to say nothing of apparent UCI). Instead, UCI is a context in which presidential speech is relevant because of concerns that the President, because he is also *a military commander*, might unduly influence the course of military judicial proceedings, whether intentionally or otherwise, even when speaking in his purely personal capacity.

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For most other government officers, there would be other contexts in which their speech could give rise to legal liability. The unique problem that arises with respect to the President is the specter of his immunity—from injunction, damages, and perhaps even criminal prosecution. But one of the most interesting points to emerge from the litigation that has been sparked to date by the presidency of Donald Trump is how overstated these immunities may well be: it turns out that there are plenty of modern examples of courts issuing coercive relief against sitting Presidents.²⁷ For example, we've now learned of a well-argued memorandum prepared in the lead-up to President Clinton's impeachment arguing that a sitting President *can* be indicted,²⁸ and, perhaps most importantly for present purposes, *Nixon v. Fitzgerald* doesn't really say what it's often represented as holding. As Ben Wittes and I explained last May,

Justice Powell's suggestion that immunity applies to "acts within the 'outer perimeter' of [the President's] official responsibility" is normally cited . . . to show how capacious such presidential immunity is (and should be). But there's a flip side to that point, which is that it implies that there *is* a perimeter—in other words, that the President is not categorically immune to all civil litigation for conduct taking place while he is in office. Powell simply borrowed this phrase from the Court's far less interesting discussion of official immunity in an earlier 1959 ruling. In other words, absolute immunity under *Fitzgerald* comes with an (admittedly broad) scope-of-employment requirement—pursuant to which it's at least *possible*

27. See Vladeck, *supra* note 17.

28. See Charlie Savage, *Can the President Be Indicted? A Long-Hidden Legal Memo Says Yes*, N.Y. TIMES (July 23, 2017), <https://www.nytimes.com/2017/07/22/us/politics/can-president-be-indicted-kenneth-starr-memo.html>. [<https://perma.cc/H2WS-VW84>].

that some actions a sitting President takes would not be within the outer perimeter of his official responsibility.²⁹

In other words, it may have been nothing more than fortuitous that courts, historically, have had so few opportunities to reflect upon legally relevant presidential speech undertaken in a quasi-personal capacity, because the doctrines ostensibly protecting such speech from ever having judicial significance may not actually do so.

That conclusion, if true, has two sets of implications—one for Professor Shaw’s article and one for much of the litigation already underway against President Trump. Taking the former first, it suggests that there’s another potential universe of legally relevant presidential speech—speech that is undertaken by a President, but that is not meant to be official in any sense of the word. More superficially, it suggests that there may well be meaningful distinctions to draw between speech by the President as an individual, and speech by the President as the personification of the Executive Branch. Professor Shaw may well be correct about the circumstances in which the latter should and should not have judicial relevance. But fully exploring the former category might provide broader insights into *why* the specific contexts Shaw identifies in the latter category are the *only* ones in which the speech should “count.”

Turning to the ongoing litigation, it suggests that, insofar as these cases are raising novel questions about the scope of presidential immunity doctrines, decisions that *cabin* those doctrines could open the door to other new insights about the President versus the presidency. If, all of a sudden, we begin to recognize additional contexts in which sitting Presidents can in fact be sued, there may be far more work to do beyond ascertaining, as Professor Shaw has, when and how their *speech* should matter in such cases. In that regard, the most tantalizing aspect of Professor Shaw’s article is the door it opens rather than the debate it seeks to resolve.

29. Vladeck & Wittes, *supra* note 20 (citing *Burr v. Matteo*, 360 U.S. 564 (1959)).