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Congress of the United States
House of Representatives
Washington, DC 20515-3303

September 29, 2015

Secretary Ash Carter
Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1400

Dear Secretary Carter,

In light of the recent articles detailing the sexual assault of young Afghan boys at the hands of the Afghan army and police force, I have to say it is absolutely unacceptable and disgusting to hear that our service members have been instructed by their commanding officers to ignore these actions as it is part of the Afghan "culture." Not only have our service members been instructed to ignore the screams of little boys being brutally raped, but now they are facing punishment or removal from service if they interfere. Why would anyone within DoD defend the actions of child rapists over the actions of their own brave service members?

This brings up the case of Major Jason Brezler. The Marine Corps has a pending recommendation to separate Major Brezler from service for trying to warn his commanding officers and fellow Marines about an Afghan police chief, Mr. Jan, who was known for sexually abusing young boys and using them to carry out attacks. Sadly, Major Brezler's warning was not heeded and three young Marines lost their lives at the hand of one of Mr. Jan's young boys. Major Brezler should be commended for trying to warn his commanding officers and protect his fellow Marines, but instead, the USMC has retaliated against Major Brezler by claiming that the background information on Mr. Jan may have been classified. This is beyond despicable. I am sick and tired of high ranking Marine Corps officials throwing their Marines under the bus. What message are we sending to our service members? Come join the service and we may or may not protect you?

Mr. Secretary, my request is twofold. First, I am asking for your position on how our service members are being trained to ignore child rape. Do you believe we should train our young men and women to ignore such detestable acts? Second, I am asking for you to decline the USMC recommendation to remove Major Jason Brezler from service. Major Brezler is a hero; someone our nation should be proud to have defending us. I have enclosed a letter from Major Brezler's attorneys to Secretary Mabus on September 15, 2015 for your reference. The attorneys are still awaiting a response from Secretary Mabus.

If someone does not take a stand and do what is morally and ethically right, this country and our military are doomed. I thank you for your service, Mr. Secretary, and pray that you can be the strong leader that our nation desperately needs. I eagerly look forward to your response.

Respectfully,

A handwritten signature in black ink that reads "Walter B. Jones". The signature is written in a cursive, slightly slanted style.

Walter B. Jones
Member of Congress

Cc: Secretary Ray Mabus

Enclosure

September 15, 2015

The Honorable Ray Mabus
Secretary of the Navy
1000 Navy Pentagon, Room 4D652
Washington, DC 20350

Dear Secretary Mabus:

The undersigned are pro bono counsel for Marine Reserve Major Jason Brezler. We write to convince you that the Marine Corps' pending recommendation to separate Major Brezler from service (the "Recommendation") should not be endorsed for a host of compelling reasons.

First, the Recommendation is the obvious product of illegal retaliation against Major Brezler's statutorily and constitutionally protected right to speak to his congressional representative. Indeed, no objective person considering the undisputed facts could conclude otherwise. Major Brezler was directed to a Board of Inquiry (the "BOI") immediately after the MARINE CORPS TIMES revealed that he had engaged in protected communication with Congressman Peter King. Congressman King had requested to talk to Major Brezler as part of the congressman's effort to secure information for a Gold Star family concerning the high-profile murder of three Marines in Afghanistan's Helmand Province by the "chai boy" of the local Afghan police chief. The MARINE CORPS TIMES revealed this information at a time when the Marine Corps was under intense scrutiny for the Camp Bastion attack that had occurred under the same Marine command in Helmand Province just a month after the murders. Upon reading the story, then-Commandant Amos expressed concern to senior Marine generals at HQMC and the Marine Reserves, including General Charles Gurganus who commanded Helmand Province at the time of both incidents. Five days of emails, calls, and meetings among this group followed. The sole by-product of this exchange was that Major Brezler was directed to a BOI ostensibly for alleged misconduct that had occurred over a year earlier and been resolved many months before. Nothing, however, was done to address the requests of Congressman King or the Gold Star family he and Major Brezler were attempting to help.

It is apparent that the alleged misconduct underlying the BOI was a pretext for unlawful retaliation. The day the MARINE CORPS TIMES story was published, neither Commandant Amos

nor any of the generals he engaged about the story even knew who Major Brezler was. None were considering any action against him, nor was anyone else in the Marine Corps. Major Brezler's unit had almost a year earlier investigated his conduct and concluded no further action was warranted. The Naval Criminal Investigative Service ("NCIS") had done the same. Major Brezler had moved on to a new unit and received stellar Fitness Reports. No other Marine Reservist had been sent to a BOI for comparable actions since the War on Terror began. And the general who ordered the BOI had never done so to another Marine in his entire career. Plainly, the BOI was ordered not because of the alleged year-old misconduct but in direct response to the news that Major Brezler was talking to Congressman King about a matter the Marine Corps wanted no one talking about, least of all to a senior Member of Congress.

This is an abuse of the BOI and separation processes and, more important, a blatant violation of the Military Whistleblower Protection Act and associated naval regulations. Not only should you not endorse such conduct, your Department should immediately investigate the unlawful retaliation against Major Brezler which, as set forth more fully below, continued throughout the entire BOI process and in the materially false and misleading Recommendation the Marine Corps has submitted for your approval.

Second, apart from the blatant retaliation, endorsing the Recommendation would endorse a proceeding in which the Marine Corps ignored, or worse made up, its own rules in the over two years it took to complete the BOI process. This kangaroo court approach is particularly unfair and hypocritical because the Marine Corps argued at the BOI that Major Brezler should be punished because he did not "follow the rules." Most egregious, the Recommendation, purportedly reviewed and endorsed by two levels of Marine commanders, is based on two incomplete and contradictory transcripts that collectively contain over 2,000 designated omissions and many other undesignated omissions that directly contradict each other in numerous material ways. Multiple witnesses have submitted affidavits disclaiming their reported testimony as materially incomplete and inaccurate. The transcripts also omit multiple improper statements by the Marine Corps Recorder that plainly revealed Major Brezler was subjected to a BOI because of media coverage about his communications and not any alleged misconduct. Incredibly, the Recommendation misrepresents to you that these improper statements were never made because they do not appear in these materially deficient "transcripts" even though the press attending the BOI reported on the now missing statements at the time.

This putative "record" and the manner in which it was prepared and used is at best an embarrassment, and at worst much more. It is entirely inconsistent with naval regulations, due process, and the minimum standards necessary to maintain confidence and credibility in the BOI process. No Recommendation based on such shoddy and suspicious processes should receive your personal endorsement.

Third, on the merits, the Recommendation is utterly at odds with the evidence of Major Brezler's fitness to serve. Indeed, the Marine Corps produced not a single witness to testify that Major Brezler should be separated. In contrast, Major Brezler produced so many witnesses to attest to his fitness to serve that the Board began excluding such witnesses as "cumulative" over Major Brezler's objection. In addition, witnesses who were plainly not cumulative because they were more qualified to speak to the issues under consideration than anyone in the room were

improperly excluded. Among those excluded was a two-star general who was the former Marine Corps Director of Intelligence and Deputy Director of the Central Intelligence Agency's National Clandestine Service -- whose opinion on Major Brezler's conduct and fitness to serve could not have been more relevant and compelling.

Fourth, other powerful considerations weigh heavily in favor of rejecting the Recommendation. Brezler communicated with Congressman King because the congressman asked for his assistance in King's efforts to secure answers for the Gold Star family of Lance Corporal Gregory Buckley Jr, who was one of the three Marines murdered at FOB Delhi by Jan's "chai boy". Although the Marine Corps has never held anyone accountable for the egregious lapses that led to those murders, it has spent enormous time, attention, and resources targeting Major Brezler for responding to Congressman King's request for assistance. The Buckley family has stated publicly that the immeasurable pain they feel over the death of Greg Jr. is compounded by the realization that the only Marine who tried to save Greg Jr. and help his family get answers is losing his career as a result. The Buckley family should only be forced to bear this terrible additional burden based on a Recommendation that is compelling, substantiated by compelling evidence, and the product of a fair, proper, and legal process. This Recommendation is not even close to meeting that standard.

For detailed background, we attach as Ex. A the Amended Complaint filed on Major Brezler's behalf in the United States District Court for the Eastern District of New York; Ex. B, Major Brezler's motion papers seeking a preliminary injunction in that action; Ex. C, the transcript of the initial hearing on that motion in which U.S. District Judge Bianco expresses clear skepticism with the BOI transcript and his intent to provide judicial review if, and when, you endorse a separation recommendation based on that "transcript"; Ex. D, the affidavits of witnesses attesting to gross inaccuracies and omissions in the purported "transcripts" upon which the Recommendation is based; Ex. E, the recent opposition to the Marine Corps' motion to dismiss the amended complaint in that action; Ex. F, the complaint filed by the Buckley family in the same federal court seeking to compel the Marine Corps to comply with its statutory duties of disclosure to that Gold Star family; Ex. G, the transcript of the BOI offered by the Marine Corps on Oct. 9, 2014; and other pertinent exhibits

We respectfully request the opportunity to meet with you or your representative to present the substantial evidence of abuse in this matter, outlined below, and answer any and all questions concerning the same. We are confident that any fair review of this matter and the actual facts will result in a rejection of the Recommendation and an investigation into the circumstances leading to its presentation to you.

A. Major Brezler Was Subject to Blatantly Illegal Retaliation.

As you are aware, the Military Whistleblower Protection Act (10 U.S.C. § 1034), Department of Defense Directive 7050.06 (July 27, 2007), and naval regulations (SECNAVINST. 5370.7D) explicitly prohibit any effort to restrict a service member's ability to communicate with Congress, an inspector general, or law enforcement, or any retaliation against the service member for such communications. *See, e.g.*, SECNAVINST 5370.7D at 5(d)-(f). These important statutory and regulatory protections must be strictly adhered to if they are to be

effective. A single high-profile case of retaliation chills all other Marines and sailors from exercising their right to such protected speech. The chronology makes plain that Major Brezler was targeted for retaliation, this retaliation is plain to anyone familiar with this matter, and to permit that retaliation to stand would illegally punish Major Brezler and send a message to all other Marines and sailors that they cannot safely exercise their protected right to communicate with Congress, inspectors general, and law enforcement.

1. THE FOB DELHI MURDERS

On August 10, 2012, Lance Corporal Gregory T. Buckley, Jr., Corporal Richard A. Rivera, and Staff Sergeant Scott E. Dickinson were murdered in the gymnasium of Forward Operating Base (“FOB”) Delhi, Helmand Province, Afghanistan by an Afghan “chai boy” in the company of a notorious Afghan police chief named Sarwar Jan (“Jan”). Ex. A at ¶ 8. Two years earlier, then Marine Captains Andrew Terrell and Jason Brezler had expelled Jan from another Afghan village for extortion, kidnapping, sexual abuse of children, drug trafficking, and Taliban collaboration, and they detailed these reasons to senior commanders, including in a dossier. *Id.* Nevertheless, in July 2012, Jan was inexplicably reassigned as police chief at FOB Delhi. *Id.* at ¶ 10.

After Jan arrived, a Marine officer directly responsible for FOB Delhi requested information about Jan from Major Terrell, who immediately asked Major Brezler to forward the dossier they jointly prepared, and which they both believed in good faith to be unclassified. Major Brezler did so because he understood the immediate threat Jan posed. *Id.* Tragically, nothing was done. Seventeen days later Buckley, Rivera, and Dickinson were murdered just days before they were to return home. *Id.* at ¶¶ 11 & 12. Brezler emailed his warning over an unsecured service because he was sitting in a graduate school classroom 1500 miles from his reserve unit, with no other means of sending the information, and accurately assessed that it was an urgent matter of force protection. Ex. G at 329 and 341-42. When the officer who received that warning complained that Major Brezler’s email contained information marked as Secret, minutes later, at the very first break in class, Major Brezler immediately reported his possible error to his commander. *Id.* at 185, 238 and 344. Brezler’s battalion commander counseled him and considered the matter closed. *Id.* at 237-38, 240 and 250. Brezler’s regiment conducted a preliminary investigation, and NCIS also conducted an investigation. Both entities concluded that no further action against Major Brezler was warranted, and took no such action. *Id.* at 174, 186, 239-41 and 264.

2. The Buckley Family Seeks Congressional Assistance.

From the start, the Marine Corps attempted to avoid scrutiny of the lapses and circumstances that led to the FOB Delhi murders just as it would do with the devastating attack at Camp Bastion a month later. Indeed, in 2014, Greg Buckley Jr.’s family was forced to commence an action in United States District Court for the Eastern District of New York to compel the Marine Corps to comply with its Title 10 disclosure obligations concerning Greg Jr.’s murder. Ex. F. Before filing suit, the Buckley family spent two-and-a-half years seeking answers through their Congressman, Peter King. As part of those efforts, in spring 2013, King learned about Major Brezler’s warning about Jan through a mutual connection in the New York City Fire Department,

in which Major Brezler is also a decorated member. Congressman King asked if Major Brezler would talk with him, and Brezler agreed to do so.

That cooperation was revealed in an August 25, 2013 MARINE CORPS TIMES story following-up on previous stories about the FOB Delhi murders and the Buckley family's efforts to get answers. Ex. A at ¶ 40. By that time, over a year had passed since Brezler's email warning and the subsequent murders. *Id.* at ¶ 41. Approximately eleven months had passed since Brezler's unit had determined not to take further action against Major Brezler. At least eight months had passed since NCIS had reached the same conclusion. And not one of the generals in HQMC or MARFORRES was contemplating any action against Brezler, or appeared to have even known who he was or anything about the events leading up to the murders. *Id.* Indeed, Brezler had moved on to a new unit where he received stellar FitReps. Ex. G at 260-61 and 263.

However, then-Commandant Amos expressed immediate concern about the story to senior Marine commanders, including Lieutenant General Richard Mills, who was about to assume command of the Marine Reserves. *Id.* at ¶ 42. The email exchanges over the next several days between these Marine generals and their staffs make clear that (1) Major Brezler was not known to any of these generals and no action was being contemplated against him before the MARINE CORPS TIMES story; and (2) the direct and only outcome of this flurry of communications Commandant Amos precipitated was that immediately upon assuming command of the Marine Reserves days later, General Mills directed Major Brezler to a BOI based on Brezler's alleged misconduct over a year earlier. *Id.* at ¶¶ 43-46; *see also* Exs. H-I, (Aug. 26, 2013 emails of J. Amos, J. Paxton, S. Hummer, R. Mills, R. Neller, C. Gurganus, W. Miller, C. Shelton and R. Turner, *NEED GROUND TRUTH*). Among the Marine commanders involved in the communications leading to Brezler's BOI was General Gurganus, the Helmand Province commander during the FOB Delhi murders and the Camp Bastion attack, who days before the MARINE CORPS TIMES story learned that U.S. Central Command had opened an investigation into the Camp Bastion attack. Ultimately, General Gurganus would be relieved from command as a result of that investigation, but at the time it is safe to assume he and his close colleagues did not welcome further scrutiny of the FOB Delhi debacle that immediately preceded the devastating Camp Bastion attack and stemmed from the same basic force protection failures for which General Gurganus would be relieved from command.

A subsequent Department of Defense Inspector General ("DOD IG") investigation found that General Mills was not truthful when he denied he even knew Major Brezler had talked to Congress at the time he ordered the BOI – despite Mills receiving and even *responding to* emails from Commandant Amos about that story. *Id.* at ¶ 47. The DOD IG stated,

Although LtGen Mills denied that he read the article, we find it more likely than not he would have reviewed an article the Commandant of the Marine Corps sent to him, which LtGen Mills testified had been discussed at a General Officers' meeting at Quantico the day before it ran. Accordingly, we found that LtGen Mills had knowledge of the Complainant's March 22, 2013 communication with U.S. Representative King.

Id.

Moreover, the investigation determined that Mills had never before ever referred another Marine officer to a BOI. *Id.* Indeed, Brezler's BOI referral was the first BOI referral of a Marine Reservist for such purported "spillage" during the entire War on Terror despite an average of 83 Marine spillages reported annually and 280 reported violations by U.S. forces in Afghanistan in 2012 alone. *Id.* at ¶ 48.¹ According to the Inspector General for U.S. Central Command, "discipline for such spillages is almost always limited to counseling or a temporary suspension of computer privileges," and punitive action is recommended for only "the most severe and/or repeat" offenders. Brezler's disparate treatment could not be clearer. *Id.*

From this chronology, it is apparent to any reasonable and objective observer, and we are confident to any judge or juror, that Major Brezler was ordered to a BOI not because of an email he sent over a year earlier or any other alleged misconduct that had long ago been investigated without any adverse action having been taken. Rather, Brezler was retaliated against as an immediate response to the MARINE CORPS TIMES story revealing his legally protected communication with Congressman King.

Even if the chronology leading up to the BOI did not prove its illegitimate purpose, the arguments made by the Reporter at the BOI certainly did. Even the incomplete transcripts show that the Recorder repeatedly referenced the media coverage in advocating for Major Brezler's separation (*see* Ex. G, at 33, 39, 42, 191, 349, 351-52, 369-70, 372, 391, 393, 398 and 435), including asserting that Brezler should be punished because so many people had read press stories about him and the FOB Delhi murders. *Id.* at 420-21. Numerous other Reporter references to media coverage were omitted from the transcripts, including most egregiously the Recorder's use of a Google demonstrative in his closing showing the number of internet "hits" on Brezler's name coupled with the wholly improper argument that the amount of public interest reflected in those hits necessitated punishing Brezler to send a message. *Id.* Although this dramatic closing argument disappeared from the transcripts produced -- which the Recorder reviewed and approved -- the press present at the BOI observed and reported on it in specifically given its significance: "In his closing argument, Hodge pulled up a Google page showing all the news search results under Brezler's name, suggesting the media coverage following the case should play into the board's deliberation." H. Seck, *Brezler should be separated, board finds*, MARINE CORPS TIMES, Dec. 19, 2013. *Id.* at ¶ 52.²

¹ Although the DOD IG held that General Mills had not *personally* retaliated against Major Brezler, that investigation very narrowly and improperly focused on Mills to the exclusion of his superior, Commandant Amos, who the emails plainly show directed this effort, and whom the DOD IG scrupulously avoided discussing just as it did the role of General Gurganus. Major Brezler intends to request that this investigation be reopened and if not will seek judicial review of the DOD investigation and conclusions.

² *See also* Major Brezler's civilian counsel's argument, *id.* at 433, stating "Something that the [G]overnment said during this summation which disturbed me was that basically for policy reasons related to the amount of press coverage of this case, you have a special duty to take it out on Major Brezler. And in fact, put up what appeared to me to be a listing of the number of Google hits on it. That is not a legal standard we have in the United States. That depending on the number of Google hits a person has that he should be held to a different standard. I mean, I just ask you to reject that out of hand as being [inaudible]."

Of course, there was no evidence Major Brezler was responsible for the understandable media interest in the FOB Delhi murders, which occurred just a month before the Camp Bastion attack under the same command, or the Buckley family's fight for answers. Moreover, even if Major Brezler had spoken to the press, there was no lawful basis to punish him for doing so. But what the Recorder's central and repeated argument makes clear is that the motivation for sending Brezler to the BOI and separating him was not his fitness to serve, but the Marine Corps desire to retaliate against him for his communications – both actual and perceived -- about a topic they did not want anyone to talk about, especially to Congress.

Indeed, immediately after the BOI panel issued its recommendation, General Mills' own public affairs officer ("PAO") issued an on-the-record statement directly tying Brezler's punishment, not to his conduct related to FOB Delhi, but to his perceived communications. *See* H. Seck, *Did media exposure backfire for Marine officer in classified-info case?*, MARINE CORPS TIMES, Dec. 22, 2013. Remarkably, the Recommendation attempts to disclaim these statements by noting that the PAO for General Mills "stress[ed] that 'his opinion does not represent that of the Marine Corps.'" This is too cute by half. Nothing could represent the opinion of the Marine Corps more than an on-the-record statement by a full Marine colonel serving as the PAO for the Commanding General of Marine Reserves.

Even worse, General Mills' PAO and the Recorder obviously colluded in an outrageous stunt plainly intended to manufacturing "proof" of Brezler's desire to generate media attention. Specifically, at a break in the BOI's testimony, the PAO asked Major Brezler to pose for a picture for the MARINE CORPS TIMES. Major Brezler did as his superior officer ordered. The next day the Recorder produced the resulting photo that appeared as part of the MARINE CORPS TIMES report about the BOI and proceeded to use it in a dramatic cross-examination of Major Brezler to show Major Brezler was seeking to generate media coverage of the case. In fact, this trick even began the Recorder's examination of Brezler. When Major Brezler answered that he had simply followed orders, the Recorder objected that the PAO had not physically "restrained" Brezler and forced him to take the photo. Ex. G at 352-53, 393 and 399.

A clearer example of illegal retaliation for statutorily protected speech and all-around abusive and unprofessional legal misconduct could not be set forth. Not only must you reject the recommendation that issued from this illegal retaliation and unprofessional misconduct, you should investigate the retaliation, and take steps to ensure it is not repeated and does not chill other Marines and sailors from exercising their constitutional, statutory, and regulatory rights to communicate with Congress, inspectors general, and law enforcement.

B. The BOI and Recommendation Is Procedurally Improper and Insufficient.

Consistent with its pretextual basis, the BOI failed to follow the most basic procedural requirements mandated by due process and Defense Department, Navy, and Marine Corps regulations.

1. Relevant Evidence Was Suppressed and Excluded.

Although controlling regulations required the BOI to consider all material submissions made,³ the BOI excluded substantial portions of Major Brezler's defense. For example, the most material, weighty, and exculpatory evidence on the central issue of Major Brezler's conduct and fitness to serve was to be offered by a two-star general who was the former Marine Director of Intelligence and Deputy Director of CIA's Clandestine Service. Among other things, this witness, as or more qualified than any on the very issue the BOI was purportedly considering, would have opined that Brezler should "be allowed to continue to serve" because "getting [threat-related] information to those who need it in a timely fashion" was "the overriding priority" and that his email warning was "a very minor mistake" "motivated by a concern for the safety of Marines and their partners" and reflecting an intent "I fully support and applaud." This statement could not more directly address the specific question the BOI was directed to consider, and it was offered by a senior officer who could not have been more qualified to address that issue. There is no defensible reason for its exclusion. Ex. G at 190-95 and 218-19.

Similarly, before the BOI commenced, the convening authority, Lieutenant General Mills, took the extraordinary step of challenging the decision by a subordinate and material witness, Brigadier General Paul Kennedy, to provide a statement on Major Brezler's behalf (*see* Ex. J, Oct. 22, 2013 email from R. Mills to P. Kennedy, *Re: Intent to support a Marine in Need*), and after that intervention, Kennedy ultimately decided not to submit a statement on Brezler's behalf.

The BOI panel also refused to compel the attendance of essential witnesses despite multiple written requests and regulations requiring "the appearance before the Board of any witness whose testimony is considered to be pertinent to the case." *See* SECNAVINST 1920.6C Enclosure (8) at §§ 6(g) and 9(a); and Exs. K-L, Dec. 16, 2013 email from K. Carroll to C. Gurganus, J. Hartsell, C. Hodge, A. Kays, A. Markopolous, S. Gibbons, *Brezler BOI*; and Nov. 22, 2013 email from C. Hodge to K. Carroll and A. Kays, *BOI ICO Maj Brezler_12-13 December 2013_NOLA*. Major Brezler's requests were then improperly excluded from the BOI record. *See infra* at 17.

Likewise, despite military regulations guaranteeing Brezler "[f]ull access to, and copies of, records relevant to the case", SECNAVINST 1920.6C, Enclosure (8) at § 8(d), every one of Brezler's written and acknowledged discovery requests were summarily denied in their entirety. Ex. M, Dec. 13, 2013 letter from C. Hodge to K. Carroll, *Respondent's request for discovery pending receipt of response to Respondent's FOIA requests in the Board of Inquiry for Major Jason C. Brezler, USMCR*. Major Brezler's requests were then improperly excluded from the BOI record. *See infra* at 16.

While these exclusions were plain error and prejudiced Major Brezler's defense, their greater significance is in reinforcing the already apparent fact that the BOI was never about Major Brezler's alleged misconduct or fitness to serve, but about the Marine Corps' intent to discredit, punish and make an example of Major Brezler for speaking on a matter the Marine Corps did not want discussed.

³ *See* the Recorder's instructions to the Board, Ex. G at 5.

2. There Was No Evidence for the Proffered Grounds for Separation.

Implicitly acknowledging the fact that no other Marine Reservist had been separated for alleged infractions comparable to those alleged against Major Brezler,⁴ the Marine Corps Recorder proffered purported extenuating circumstances that he argued justified making an exception of Major Brezler. But none of these were supported by any evidence. In fact, each was contradicted by the only evidence in the record. Put simply, the Marine Corps failed to prove up the very facts it proffered as the basis for separating Major Brezler.

First, the Marine Corps Recorder argued that Major Brezler intentionally brought the Jan dossier home for personal use, to use a single paragraph of it in a 130-page, unpublished manuscript that Brezler drafted – at his commander's encouragement – about his combat experience in Afghanistan. The Recorder mentioned this manuscript approximately *eighty-seven* times; *see, e.g.*, Ex. G at 41-42, 47, 365-66, 372-73, 385-89, 414, 417. But there was not a shred of evidence of any such intent. Rather, the only evidence was that Brezler had to use his own personal computer to store these materials because the Marines had no military computers available to handle such documents at the time, and the materials were inadvertently left on the device when he returned home as an individual reservist. Ex. G at 199, 228, 311 and 335-38.

Second, the Marine Corps Recorder repeatedly argued, especially in his opening and closing statements, that Brezler should be separated because he did not immediately self-report his email warning to his commander and did not cooperate with the NCIS investigation. *See, e.g.*, Ex. G at 42, 412, 417, 420 and 422. There is no such evidence. The actual evidence directly contradicted this assertion. The only evidence was that Major Brezler immediately self-reported the transmission within minutes, immediately upon taking a break from the class he was in, and the NCIS agent who the Recorder called as witnesses testified unequivocally that Major Brezler cooperated fully and willingly, including consenting to a warrantless search of his residence and computers, a forensic examination of his files, and calling NCIS back to alert them to files they may have missed. Ex. G at 59, 62-63, 93, 163-64, 171, 179, 181, 185, 238, 241 and 344.

Third, the Marine Corps Recorder argued repeatedly that Major Brezler should be separated because he was responsible for the substantial adverse media coverage associated with the FOB Delhi murders and the Buckley family's efforts through Congressman King to secure information to which they were legally and morally entitled. Ex. G at 33, 39, 42, 191, 349, 351-52, 369-70, 372, 391, 393, 398, 420-21 and 435. As discussed elsewhere, this was an entirely improper and illegal argument for separation and the putative transcripts produced by the Marine Corps, which were reviewed by the Recorder, were largely scrubbed of the most offensive parts of this argument. However, even if it was a legitimate basis for separation, there was not a single shred of evidence that Major Brezler sought, generated, or actively participated in any such coverage, nor any reason to believe that such coverage was anything other than the natural product of the tragic and avoidable murders, the Gold Star families efforts to get answers, and the involvement of a high-profile Member of Congress.

⁴ Ex. N, Dec. 2, 2013 letter from R. Bald to K. Carroll, *YOUR FREEDOM OF INFORMATION ACT CASE MARFORRES 2014F000004*.

The fact that the Marine Corps provides you with a recommendation for separation when it could not even substantiate the bases it offered to justify separation under these facts -- facts under which no other Marine Reservist has been separated -- is further proof that the alleged misconduct was a pretext for illegal retaliation.

3. The Marine Corps Failed to Properly Process the BOI Record and Recommendation.

Further evidencing that the BOI's purpose was to punish Major Brezler for his communication and not his alleged misconduct, the Marine Corps ignored governing regulations concerning the preparation and review of the BOI record and recommendation.

For example, Marine Corps regulations require that in "all cases where misconduct and/or substandard performance of duty is substantiated, a verbatim transcript shall be completed within 30 calendar days." Marine Corps Order ("MCO") P5800.16A at ¶ 4007(g) (emphasis in original). Within the next thirty (30) calendar days, the BOI panel "shall" endorse the BOI report, authenticate the record, and serve the report and record on the respondent, which in this case meant a verbatim transcript was required by February 27, 2014. *Id.*; Am. Cmpl. at ¶ 61. However, the purported verbatim transcript was not delivered until October 9, 2014, eight months later.

Thereafter, regulations required that the two intermediate reviewing authorities before the Secretary of the Navy -- in Brezler's case the Marine Reserve Commander and the Commandant's designee -- "shall have 20 Calendar days to forward the Report of BOI." MCO P5800.16A at ¶ 4007(i). Thus, had these generals and their counsel complied with regulations, this matter would have been submitted to you in April 2014. However, the report and record was not forwarded to you until July 2015 -- fifteen (15) months after the regulations required.

The Recommendation attempts to explain away these gross deficiencies in two ways. First, the Recommendation simply declares that its production to you more than a year after your regulations provided that it "shall" have been produced was nevertheless a recommendation produced "with deliberate speed." The Marine Corps brushes aside your "shall" directives by asserting that "shall" is really meant as an "aspirational" "may."

Second, the Recommendation attempts to blame the delay on the Inspector General's retaliation investigation. However, the Marine Reserves sat on the BOI report for eight months before the IG investigation was even commenced and then sat on it two more months after that investigation concluded. In fact, General Mills only finally acted on the BOI recommendation the same day he learned that Major Brezler was seeking affidavits from his Marine Corps witnesses for his impending federal lawsuit. Even then, after Mills endorsed the BOI report, Lieutenant General Brilakis took another nine months to submit the Recommendation to you.

Much worse, even the record submitted to you fifteen (15) months late does not comply with mandatory regulatory requirements for a BOI record. The SECNAVINST requires either a summary record or a "verbatim transcript." SECNAVINST 1920.6C, Enclosure (8), ¶ 12.a.(2). The Naval JAG Manual directs that all BOI witness testimony be "recorded verbatim."

JAGINST 5800.7E, 2010.c.(3). Both the members of the BOI and the show-cause authority explicitly cited Marine Corps regulations requiring a “verbatim transcript” as the authority under which the BOI Report was issued and endorsed; the Marine Corps followed those regulations in the preparation and presentation of the BOI record, including in denying Major Brezler rights and protections he would have otherwise had under the immediately preceding version of those regulations⁵; the only purported record upon which the BOI Report was ever based is that purportedly “verbatim transcript”; and Government’s counsel has repeatedly conceded to federal Judge Bianco that the Marine Corps had “endeavored” to provide a “verbatim transcript” and was (at that time) continuing to do so. Ex. C (January 30, 2015 Transcript of Proceedings before United States District Court at 27-28.⁶)

However, there is simply no question that the Marine Corps has never produced any real transcript let alone a “verbatim” transcript. Instead, the initial putative “verbatim” transcript for just three days of proceedings contained 1,548 missing portions designated “inaudible” and numerous other omissions or obviously mistranscribed statements that were not designated at all. The cumulative effect of these errors renders the transcript a useless tool to review and understand the proceeding below. See Ex. D (Affidavits of Witnesses attesting to gross inaccuracies and omissions in transcript). Whatever can now be reviewed, it is not the proceeding that took place.

After Major Brezler filed suit to challenge the use of that purported “verbatim transcript,” the Marine Corps produced a “corrected” second “verbatim transcript” prepared by a different court reporter (who was not present in the courtroom) from a different audio source. Am. Cmpl. ¶ 63. This second “verbatim transcript” also contains hundreds of omitted sections designated as “inaudible,” many hundreds more missing or obviously mistranscribed with no designation, and hundreds still that are plainly wrong, nonsensical, or hopelessly garbled. *Id.* Worst of all, the second “verbatim transcript” contradicts the first in numerous material instances. *Id.*

The Government has long since conceded that these inaccurate, incomplete, and contradictory “transcripts” are the best the Marine Corps can provide, they have destroyed the original audio tapes and text files, and no improvements, therefore, are possible.⁷ *Id.* ¶ 64.

⁵ See Ex. O, Oct. 9, 2014, email from E. Kleis to K. Carroll, A. Kays and A. Thomas, *RE: Service of the report of the Board of Inquiry*.

⁶ See January 30, 2015 Transcript of Proceedings before United States District Court at 27-28 (“we provided a verbatim transcript . . . I think the navy has endeavored to provide a verbatim transcript . . . and we’re attempting to provide a revised transcript and a transcript that can be supplemented with audio to the extent Major Brezler wishes to do so.”); see also *id.* at 23 (“the navy has now agreed to provide audio recordings of the transcript so that Major Brezler can, and his counsel, can review those audio recordings, attempt to create – attempt to revise the transcript further . . .”).

⁷ Although the Marine Corps explicitly cited the Marine regulation requiring a “verbatim transcript” in the report and record at issue; relied on that regulation in denying Brezler a review period; and “endeavored” for almost a year to provide a “verbatim transcript,” it has also suggested that no transcript at all was necessary. However even if that were true – which it is not – the alternative they propose (a summary record) was also never provided. Either way, the required record is missing.

These two transcripts, both certified as accurate by Marine Corps personnel, materially contradict one another. For example, as noted to the District Court, in one transcript a witness identifies a document as "classified" while in the other transcript the same witness' testifies that document as "unclassified." In another instance, in the first transcript a witness denies covering something up, and in the second transcript the witness admits to a cover-up. Ex. C at 3-4.

The fact that the Marine Corps nevertheless proceeded to submit a recommendation to you on this basis evidences further its real motive is retaliation.

C. The Recommendation Ignore the Evidence of Retaliation and Misrepresents the Procedural and Substantive Facts Concerning the BOI.

The Recommendation utterly fails to overcome Major Brezler's serious and substantial challenges to the legality and sufficiency of the BOI proceeding and exploits the lack of a real record to manufacture facts not supported by, or contradicted by, the existing record.

1. The Marine Corps Ignores The Obvious Evidence of Retaliation.

Major Brezler's most serious threshold challenge to separation is the overwhelming evidence that he was only ordered to a BOI in response to media stories that he was talking to Congressman King. In challenging the BOI recommendation, Major Brezler three times submitted substantial evidence and argument of that obvious retaliation, including the chronology of events demonstrating that retaliation. The Recommendation does not dispute this evidence, explain the evidence, or even address the evidence. Were these facts wrong, the Marines Corps certainly would have so stated. Were these facts subject to an innocent explanation, the Marine Corps certainly would have so stated. But the facts are undisputed, speak for themselves, and the Marine Corps has not even tried to explain otherwise.

It is indisputable that Brezler was only ordered to a BOI more than a year after his purported misconduct; almost a year after his own command investigated that conduct and took no further action; eight months after NCIS likewise completed its own investigation without recommending any action;⁸ and six months after Major Brezler had joined a new unit where he received stellar FitReps. It is indisputable that separation for similar conduct is extremely rare if not unprecedented and that General Mills had never before even directed a Marine to a BOI. It is indisputable that the day before the August 25, 2013 MARINE CORPS TIMES story revealed Major Brezler's communications with Congressman King, no one at Headquarters Marine Corps or the Marine Forces Reserve command was interested in Major Brezler or his alleged misconduct from over a year earlier. It is indisputable that the only thing that changed between August 25 and 30, 2013 is that a news story revealed Major Brezler's protected communications with Congress and the Justice Department. It is indisputable that this story sufficiently troubled then-Commandant Amos that he directed his most senior generals to take action, the direct and only

⁸ Five months earlier Major Brezler received a highly unusual, procedurally improper, unobserved FitRep that was issued only after the Marine Corps learned that the first MARINE CORPS TIMES story on FOB Delhi would be published the next day. Nevertheless, no further action was taken until he was directed to the BOI immediately after the second MARINE CORPS TIMES story revealed his protected communications with Congress and the Justice Department.

result of which was General Mills ordering an unprecedented BOI immediately upon assuming command of Marine Reserves five days later. And it is indisputable that the Inspector General found that General Mills was untruthful when asked whether he was aware of the news story when he issued that order. Based on these facts, to deny that Major Brezler was directed to a BOI because of that MARINE CORPS TIMES story would be to deny the undeniable.

The Recommendation ignores all these facts. Much worse, it misrepresents to you that no such facts exist by asserting incredibly that “[t]here is no evidence that Major Brezler was directed to show cause for any improper reason.” (Rec. at 3). It then misrepresents that “Major Brezler’s misconduct was fully substantiated by the [25th Marines’ Preliminary Investigation, or PI] and the NCIS investigation, and each recommended administrative adjudication” *Id.* Actually, no evidence was presented at the BOI of any such recommendation and its existence in both instances was contradicted by the only testimony that was presented. *See supra* at 16.

More important, under the Federal Military Whistleblower Statute and governing Defense Department and naval regulations it is irrelevant whether there may have been some basis to impose some form of punishment on Major Brezler if the reason for the punishment he did receive -- here the draconian and highly unusual sanction of separation -- is in retaliation for his statutorily protected communications. This is particularly so where, as here, the punishment is pursued so long after the alleged misconduct, is so disproportionate and historically unprecedented, and was not even being contemplated for over a year and then imposed immediately after, and as a direct response to, disclosure of the protected communication.

Third, the recommendation seeks shelter in the fact that the Inspector General did not find that General Mills *personally* retaliated against Major Brezler (even though the IG also found that Mills lied about what he knew at the time he ordered the BOI). But whether Mills personally retaliated is not the issue. The issue is whether the Marine Corps illegally retaliated, and on this question the facts make clear that the issue was being driven by General Mills’ superior and his ordering the BOI immediately upon assuming command makes clear it was preordained prior to him assuming that command. The facts speak for themselves and if the DOD IG missed those facts or otherwise failed to draw the obvious conclusions from those facts, they still are the facts and make crystal clear that Major Brezler was targeted not because of any alleged year-old misconduct but because the Marine Corps was unhappy he was talking to Congress.

2. The Marine Corps Misrepresents Its Own Regulations and the Facts in Attempting to Overcome Brezler’s Valid Objections.

a. The Deficient “Verbatim Transcripts”

The Recommendation relies on extreme mental gymnastics to explain how two transcripts, which collectively contain over 2,000 designated omissions and many other undesignated omissions, and which contradict each other in material ways, constitute a “verbatim” transcript, a “substantially verbatim” transcript or, alternatively, a “summary record.” Incredibly, the Recommendation includes neither of these transcripts. Rather, the Marine Corps has instead only provided the barely and sometimes completely inaudible recordings from which one of those transcripts was prepared. Although no regulation provides for a recoding as opposed to a

transcript, the Marine Corps obviously is not prepared to stand by either document, or provide them to you, and apparently hopes you can better discern what happened at the BOI by listening to the recordings than reading either or both of the transcripts the Marine Corps took two tries to prepare, over the course of more than a year, with two separate stenographers, and two separate recordings. Having listened to these recordings, the undersigned know neither of the recordings will permit you to do so, and, in any event, this is not what your regulations provide. The fact is the Marine Corps was obliged to produce a record that it cannot produce, and the Recommendation should be rejected for that reason alone.

Because the Marine Corps has failed to produce any form of record recognized by naval and Marine regulations, its strained arguments as to why a verbatim transcript was not technically required are ultimately irrelevant. But there is no question that a verbatim transcript was required.

The Marine Corps argues that “only a summarized transcript was required” because Marine Corps regulations only required a “summarized transcript” before February 10, 2014, after which time the regulations were changed to require a verbatim transcript. In making this argument the Marine Corps offers no authority or rationale other than it “might reasonably be concluded” to be so: “Because neither version of the LEGADMINMAN expressly addresses which one applies to a case, such as this, where the hearing has adjourned and transcription has already commenced, it may reasonably be concluded that the version in effect when transcription began governs.” Having “reasonably [and conveniently] concluded” that the older regulations applied, the Marine Corps simply asserts *ipse dixit* that transcription “began” before February 10, 2014, and thus no “verbatim transcript was required.”

However, the Marine Corps provides no evidence that the transcription began before February 10, 2014 and since not even the initial transcript was produced for this three-day proceeding for almost a year after the BOI concluded, it is dubious that transcription began before February 2014. Moreover, the “correct” transcript that the Marine Corps is actually relying on was not even begun until over a year after the BOI in response to Major Brezler’s lawsuit.

More important, although the Marine Corps is correct that an agency’s interpretation of its own regulations is accorded deference, its contemporaneous interpretation, the one it actually applied during the preparation of the report and before the litigation, was that the updated regulation requiring a verbatim transcript governed the preparation of the BOI report which was issued August 21, 2014 (eight months after the new regulation took effect).

Specifically, that report explicitly stated that it was prepared and issued under the new regulation: “This report is submitted per enclosure (8) of reference (a) and paragraph 4007.2.h of reference (b) [the LEGADMINMAN].” Paragraph 4007.2.h is only found in the version of the regulations that became effective February 2014 and that requires a verbatim transcript. Moreover, after this report was issued, the Marine Corps informed Major Brezler’s counsel that the new regulations governed such that, for example, the period Major Brezler had to review and comment on the proposed transcript was no longer applicable. *See* Ex. O. This contemporaneous interpretation of which of its regulations applied is entitled to deference, and required a “verbatim transcript.” The subsequent interpretation that the Marine Corps did not

follow when it prepared the BOI report but adopted after Major Brezler sued is entitled to no deference and is, instead, a tacit admission that the Marine Corps did not and cannot comply with the regulation under which the BOI report was prepared.

But even if a "summarized transcript" was all that was required, the result would be the same. The Marine Corps makes no effort to actually address the 2,000 designated omissions in the two conflicting transcripts it produced, or the many other undesignated omissions or obvious mistranscriptions, except to unbelievably dismiss all of these as "neither qualitatively nor qualitatively substantial." It is difficult to think of a more ridiculous assertion -- which Judge Bianco made clear in his questions to the government's lawyers -- especially since several witness have provided sworn statements that the transcript they read bears little resemblance to the testimony they gave.

Moreover, the Recommendation misrepresents to you that the "corrected" second transcript, which was prepared from a different audio source by a different stenographer, is materially better than the first. This transcript continues to contain hundreds of designated inaudibles and many other missing portions that are simply not designated at all or obviously mistranscribed. Even worse, there are portions of the two transcripts that now contradict each other with witnesses being reported to have said two entirely different things. Moreover, a careful review of the recordings and purported transcripts reveals that much of the decrease in designated omissions in the second transcript is attributable to the second stenographer simply omitting the testimony without designating it as missing at all (perhaps because they heard nothing at all on the second audio recording).

To inform you that these transcripts are not "quantitatively or qualitatively" deficient is to misrepresent what happened at the BOI and is reflected on these transcripts, which is obviously why the Marine Corps included neither transcript in its submission to you.

Moreover, certain of the deficiencies are particularly troubling and suggest tampering. For example, the Recorder at the hearing made multiple high profile references to the media coverage involving Major Brezler, including the use of a demonstrative in closing to argue Major Brezler should be punished to send a message to all the people who have been reading the coverage. Much of this highly improper argument is conveniently omitted from both transcripts without any designation that there is a portion missing. It is as if it never happened despite the fact that it did and was, in fact, contemporaneously reported on by the press and commented upon in the Record by defense counsel.

Although the Marine Corps says none of the omissions were "qualitatively" significant, these numerous inappropriate references to the media coverage are critical evidence for Major Brezler's claim that he was targeted for an improper purpose and otherwise show that he was being separated not because he was unfit but because of media coverage. Indeed, in its Recommendation the Marine Corps asserts that this objection is based on "Major Brezler's misleading paraphrasing of the transcript of the BOI" and that in the "actual" transcript "the BOI Recorder did not 'repeatedly blame [Major Brezler] for media coverage' and press coverage was not a 'central argument for separation.'" Except that this was a central argument that everyone who was there, including the press who witnessed and then reported on it, understood. But the

Marine Corps is correct that the “transcript” does not reflect any such argument, but only because -- contrary to the Recommendation’s claim – the transcript is “qualitatively” and “quantitatively” incomplete and inaccurate.

Obviously, this is not how any proceeding should be conducted in the United States, certainly not by the United States military, certainly not by the Marine Corps, and not in a case in which they argued Major Brezler should be separated because “rules need to be followed.” If you endorse this recommendation, you will explicitly endorse this abject failure by the Marine Corps to provide the most basic procedural due process and its apparent belief that it need not follow your regulations or its own regulations when conducting a BOI to separate one of its members for not following regulations.

b. Major Brezler’s Denied Information Requests

The Recommendation dismisses Major Brezler’s claim that the BOI panel improperly denied his information requests with the blanket conclusion that “documents not provided were not relevant, did not exist, or were not in the control of COMARFORRES.” (Rec. 17.) This conclusory assertion, however, is not explained and there is no finding, explanation, or anything else in the BOI record to support this assertion. It is simply made up out of whole cloth because Major Brezler’s information requests were dismissed summarily. Moreover, it is not credible to claim, certainly without compelling support, that no responsive documents existed that were relevant and in the control of the Marine Reserves, particularly since FOIA requests subsequently revealed the existence of such documents that were suppressed at the time of the BOI. For example, the 2013 CENTCOM Inspector General report which considered the 280 “cross-domain violations” in 2012 in Afghanistan, only two of which resulted in punishment. This key piece of evidence, indicative of the pretextual and impermissibly selective nature of Brezler’s BOI, was only received eleven days after the BOI concluded.

Moreover, the BOI record and Recommendation improperly excluded Major Brezler’s acknowledged, written document requests of December 3, 2013, seeking Marine Corps emails since July 1, 2012 regarding Jason Brezler, Sarwar Jan, Ainuddin Khudairaham or the August 10, 2012 attack between Lieutenant Generals George Flynn and Richard Mills, or any commander or principal staff officer within the 3rd Battalion, 8th Marines from July 1 to August 10, 2012. *See* Ex. M. Had these request been included they would have demonstrated their relevance and propriety.

Even more compelling, the Marine Corps did not produce the actual PI report from Brezler’s unit in response to these requests, and did not introduce it at the hearing, even though it is obviously responsive and in their control. Despite the fact that it was not produced or introduced at the BOI hearing, and thus Major Brezler was afforded no opportunity to challenge, cross-examine, or argue based on the document, it was subsequently inserted into the BOI Record without notice to Major Brezler and is cited repeatedly in the Recommendation to you. The withholding of relevant evidence and then selective insertion of that evidence into a trial record *after the proceeding has been concluded* obviously violates every regulation, rule, and code concerning the proper way to conduct proceedings and is an offense for which lawyers can be and are disbarred.

c. **Major Brezler's Denied Witness Requests**

The Recommendation also summarily dismisses Major Brezler's claim that the BOI panel improperly denied his request for witnesses by asserting "there is no evidence in the record demonstrating that Major Brezler properly requested but was denied the relevant testimony of witnesses who were reasonably available and within [Marne Reserve] jurisdiction where written, recorded, telephonic, or video conferencing testimony would be insufficient." However, the fact that there is no "record" is one of Brezler's major challenges to this entire BOI proceeding. There is "no record" of such things because Major Brezler requests were summarily denied and not included in the "record." Thus, there is also no record reflecting any findings that any requested witnesses were unavailable or would be made available via statement, telephone or video conference. Indeed, no such findings were made. Again, this explanation is made up out of whole cloth.

Had Major Brezler's acknowledged submission been included in the BOI record -- as they were required to be -- they would show that Major Brezler's counsel did properly request these witnesses and that some, if not all of them, were available. *See, e.g.*, Exs. K-L, requesting on November 22 and December 13, 2013, the testimony of Colonel Michael LeSavage and Major Generals Charles Gurganus and James Hartsell (who was assigned at the time to the Marine Forces Reserve Command in New Orleans where the BOI occurred).

d. **The Exclusion of Major Brezler's Witness Statements**

Ironically, after dismissing Major Brezler's challenges to the denial of his request for witnesses by arguing he could have presented those witnesses by statement, video, or phone, the Recommendation then dismisses his objection to the exclusion of witness statements on the basis that the BOI Panel can impose "reasonable restrictions as to authenticity, relevance, materiality and competence." However, there is nothing in the Recommendation or the existing record indicating that the summary exclusion of Major Brezler's witness statements on December 13, 2013 were based on any of these grounds. This again is just made up in the Recommendation and stated as if it were so without any record of any such finding. Indeed, each of these statements were directed at precisely the issue before the BOI: Whether Major Brezler should be retained by the Marine Corps. They could not have been more relevant or material and there was no challenge to their authenticity or to any excluded witnesses' competence of speak on that topic.

e. **The Lack of Evidence Supporting Separation**

In dismissing Major Brezler's objection that the Staff Judge Advocate of the Marine Reserves failed to accurately report the record below to the Commander of the Marine Reserves, the Recommendation asserts that "in his endorsement, COMMARFORRES noted that he had reviewed the entire record, including the transcript of the three days of proceedings. . . ." (Rec. at 18). That transcript, however, was the initial transcript that not even the Marine Corps is attempting to defend as sufficient now. A transcript that designated over 1,500 omissions and contained many more that were not identified. A transcript that omitted the most improper parts of the Recorder's argument for separation that is a central part of Major Brezler's challenge to

the Recommendation. No person reading that “transcript” would know what actually happened at the BOI. And the fact that General Mills claims to have read that obviously deficient transcript and nevertheless permitted the Recommendation to proceed to the Deputy Commandant and yourself is yet more proof that the BOI was always a pretext and Brezler’s fate was determined irrespective of what occurred at the BOI or how it was conducted.

f. The Omission of Major Brezler’s Unlawful Command Influence Challenge

The Recommendation dismisses Major Brezler’s complaint that his motion to dismiss the proceeding for unlawful command influence was not included in the BOI record by asserting that “a motion is not evidence, nor does it constitute any of those items requires to be included in the BOI’s record of proceedings.” As a threshold matter, this is simply incorrect.

SECNAVINST 1920.6C, encl. (8), which the Recommendation relies on this point, explicitly requires that the BOI record include “(4) the position taken by the respondent with respect to the allegations, reports, and other circumstances in question” and “(7) a copy of all documents and correspondence relating to the convening of the board (e.g., witness requests).” Obviously, Major Brezler’s central defense that he was being illegally retaliated against and the BOI was the product of unlawful command influence was a “position taken by the respondent” and also part of “all documents and correspondence” relating to the BOI. There is no question that these submissions should have been included and the fact the Marine Corps chose to ignore this requirement and then misrepresent it is further evidence of its bad faith. The same is true for these documents and witness requests, which were also omitted from the record.

Moreover, the fact is this submission did contain evidence in the form of statements and documents and it did not cease to do so simply because the BOI Panel chose to summarily dismiss the challenge without considering that evidence on the BOI record. Simply because the BOI Panel summarily dismissed this challenge cannot mean that the entire issue disappears from the case and from review. Indeed, that is precisely why your own regulations require that such materials be included in the record.

Apparently realizing this, the Recommendation misrepresents that unlawful command influence “does not apply to” Boards of Inquiry. In fact, Milas v. United States, 42 Fed. Cl. 704, 712; aff’d, 217 F.3d 854 (Fed. Cir. 1999), discusses the requirements to show unlawful command influence in a Board of Inquiry. The case law supporting the assertion that the concept of unlawful command influence applies to Boards of Inquiry was repeatedly raised with the Marine Corps in motion papers, and again at oral argument at page 35 of the transcript, and in the Letter of Deficiencies at page 39, n.13. Not surprisingly, the citation to this authority at the BOI hearing is designated “inaudible” on the BOI transcript.

g. The Reporter’s Improper Argument

The Recommendation dismisses Major Brezler challenge to the Recorder’s improper argument concerning media coverage as follows: “After a thorough review of the transcript, and the evidence, the Staff Judge Advocate concluded that the Recorder’s arguments did not exceed ‘the

bounds of propriety for a BOI. And I agree.” It is beyond credulity to rely on a transcript that was never properly prepared and which omits the most serious parts of the Recorder’s improper conduct to conclude the challenged conduct did not “exceed the bounds of propriety,” especially when the person’s whose conduct is at issue was involved in preparing that transcript. Worse, the transcript that was “reviewed” for this purpose is the initial transcript that the Marine Corps does not even attempt to defend now or in federal court.

More important, because the media coverage was entirely irrelevant to Major Brezler’s fitness to serve, especially since there was no evidence he was responsible for any of that coverage, any argument that it should factor into the BOI recommendation was highly improper, especially one that was featured so prominently. Even the record that does exist demonstrates that these were not passing or inadvertent references, but persistent and central themes of the Recorder’s case. They were improper and fatally taint the BOI hearing and the Recommendation that resulted from it.

3. The Recommendation’s Other Material Misrepresentations

The Recommendation is also based on a series of other misrepresentations that are either not found in the record or contradicted by the record that does exist. For example, on the Recommendation’s first page it asserts that “more than 100 additional classified documents were discovered by the Naval Criminal Investigative Service (NCIS)” but no such evidence was presented at the BOI. The only evidence presented at the BOI hearing was that NCIS identified thirteen arguably classified documents. *See* Ex. O, Dec. 9, 2013 affidavit of Yvonne Melchior of Marine Forces Central Command. That same page reports that Major Brezler’s email “was detected by a Marine Corps Network Operations and Security Center (MCNOSC) filter” and that “on 20 July 2012 the Commanding General (CG), I Marine Expeditionary force (Forward) (I MEF (FWD)) was notified of the incident by MCNOSC.” However, no such evidence was presented at the BOI hearing, none appears in either of the transcripts, and it would have been impossible for the CG of I MEF to have been notified of anything on July 20, 2012 because the email was not even sent until July 24, 2012. Ex. Q, July 24, 2012 email from J. Brezler to B. Donlon and A. Terrell, “*IMPORTANT! Sawar Jan is back!*”

Likewise, on page 1-2, the Recommendation reports that “A 25th Marine preliminary inquiry (PI) dated 16 September 2012 substantiated the spillage and recommended administrative action in Major Brezler’s case.” This recommendation is not reflected in any documents produced to Major Brezler’s counsel before the BOI, or in any evidence introduced during the BOI, and it was contradicted by the only testimony to address this point. Later the Recommendation inaccurately reports “the PI and NCIS investigation [] each recommended administrative adjudication.” (Rec. 11) These assertions that administrative action against Major Brezler was recommended from the beginning by his command and NCIS are obviously intended to deflect the compelling evidence that over a year later Brezler was ordered to a BOI because of the MARINE CORPS TIMES. But there not only is no support in the BOI record for these assertions, they are flatly contradicted by the record that does exist. Specifically, the only evidence presented on this point was from Lieutenant Colonel Daniel Whisnant who testified concerning the PI that “I MEF had closed it and there was no major concerns.” Ex. G at 239-41. Concerning NCIS, their special agent witnesses testified that they did not recommend any action

against Brezler when they concluded their investigation. Moreover, although the Recommendation states several times that NCIS found “probable cause” that Brezler has violated the law, the NCIS case agent testified to just the opposite at the BOI hearing. *See id.* at 174 and 186.

D. The Recommendation Improperly Dismisses the Equitable Arguments for Major Brezler’s Retention.

The Recommendation without justification or comment, summarily dismisses all equitable and other arguments for Major Brezler’s retention.

Major Brezler made an error in 2010 when he accidentally took home from Afghanistan thirteen arguably classified documents in a copy of the turnover folder he prepared for his replacement there. There is no evidence he did so intentionally or of any other conduct that would justify treating him so disproportionately from others who have made similar mistakes. And, in fact, this is precisely what everyone who looked at this issue concluded before the MARINE CORPS TIMES story revealed Major Brezler’s communications with Congressman King.

Those communications were statutorily and constitutionally protected speech. The obvious retaliation against him for that speech is illegal. It is also extremely harmful to the naval service.

Jason Brezler is a Naval Academy graduate, and was a varsity baseball player at Annapolis. He is a Marine officer who earned a Navy Commendation Medal for Valor in Fallujah, Iraq in 2006 and a Bronze Star Medal in Helmand, Afghanistan in 2010. He earned top fitness reports for assignments up to and including headquarters company commander in an infantry battalion, and operations officer of a Chemical-Biological Incident Response Force battalion. He is a special operations firefighter with the elite Rescue Company Two of the Fire Department of the City of New York, and has been both decorated and injured for his service with the FDNY. Over sixty subordinates, peers and superiors submitted letters to Major Brezler’s Board of Inquiry, asking that he be retained, including from within the Marine Corps, Lieutenant General (Select) Lawrence Nicholson and Major General Richard Simcock, who commanded Brezler in combat in Afghanistan and Iraq.

It is undisputable that had Major Brezler declined Congressman King’s request for assistance with respect to the Gold Star Buckley family, he would never have been sent to a BOI or recommended for separation from the Marine Corps. No honorable Marine or American would have declined that request. And none should be adversely affected by doing what morally was the right thing to do. Certainly, not based on conduct for which no similarly situated Marine has been similarly treated since the beginning of the War on Terror.

For all these reasons, we respectfully request that you decline to endorse the Recommendation to separate Major Brezler from the Marine Corps, and direct that the facts and circumstances leading to this improper retaliation be investigated and sanctioned to ensure it does not happen again and that the ability of members of the naval service to speak with their congressional representatives is not chilled.

We also request the opportunity to brief you or your designated representative on the evidence set forth in this letter, and to answer any questions you may have.

Respectfully submitted,

/s/

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