



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
9275 GUNSTON ROAD
FORT BELVOIR, VIRGINIA 22060

09 October 2015

MEMORANDUM FOR Lieutenant Colonel Mark A. Visger, Preliminary Hearing Officer, Staff Judge Advocate, Headquarters, Division West, First Army, 761st Tank Battalion Avenue, Fort Hood, Texas 76544

SUBJECT: Defense Comments on Article 32 Report, *United States v. Bergdahl*

1. In accordance with R.C.M. 405(i)(8), (j)(5), and (k), the defense respectfully submits the following comments on and objections to your 05 October 2015 Article 32, UCMJ preliminary hearing report. We are grateful for the balanced, judicious, and humane approach you have taken to this complex case, and for the evenhanded way you conducted the public hearing. Your report should be made public so the American people can be fully informed of your findings, conclusions and recommendations now, and not some unknowable date long into the future. This is only right given that the hearing itself was required to be – and was – conducted in public under the *Manual for Courts-Martial*.

2. R.C.M. 306(b) requires that offenses be disposed of at “the lowest appropriate level of disposition.” Given your conclusion – with which we agree – about whether confinement or a punitive discharge are warranted, and the factors you cited in support of that conclusion, nonjudicial punishment under Article 15, UCMJ, is the appropriate disposition.

3. Early in the case, the defense requested the preservation and production of evidence from other branches of the armed forces and other government agencies. The prosecutors reported that they received thousands of pages of evidence in response. R.C.M. 405(f)(1)(C) requires prosecutors to disclose to defense any evidence in their possession that negates or reduces the degree of guilt for an offense charged. The prosecutors wrote on 03 September 2015 that much of the evidence they had received still had not been reviewed, but concluded that “[t]here are no documents in the possession of the trial counsel which could reduce or negate the degree of guilt of the Accused.” The prosecutors opposed a defense request for delay based in part on our need to access this evidence before the preliminary hearing. They also opposed a request that we be allowed to view this evidence. We object to these actions, to include the denial of our request to delay the preliminary hearing for these purposes.

4. We object to the failure to conduct a jurisdictional inquiry as required by Article 32(a)(2)(B), UCMJ. Four jurisdictional issues should have been addressed:

(a) The report should have considered whether LTC Peter Q. Burke was disqualified from serving as the special court-martial convening authority because he is a Type 1 accuser.

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(b) The report should have considered the unusual and unexplained steps by which the question of possible disciplinary action against SGT Bergdahl was shifted, in turn, from U.S. Army Alaska to U.S. Army North to the Department of the Army Staff to FORSCOM.

(c) The report should have considered the Secretary of the Army's explicit non-delegation provision in assigning the case to FORSCOM for disposition, and the FORSCOM Commander's subsequent partial delegation of powers to LTC Burke.

(d) The report should have considered whether the Army has Article 2(a), UCMJ jurisdiction over SGT Bergdahl because his enlistment expired while he was held captive.

5. We object to the form of the charges as overbroad. In preparation for the preliminary hearing, the prosecutors proffered more specific details to narrow the charges, which in turn narrowed the scope of requests for evidence, witnesses, and areas of inquiry. The charges were never amended to reflect the more specific offenses considered at the preliminary hearing.

6. Four potential defense witnesses told us that they could fully discuss pertinent facts about the search and recovery aspect of Charge II at the Top Secret level. We object to the Office of the Judge Advocate General's short-circuiting Mr. Fidell's TS(SCI) clearance request so that it would never even reach the cognizant clearance-granting officials at Army G2. We further object to the prosecutors' refusal to disclose an unclassified document related to this prejudicial matter.

7. We object to the prosecution imposing conditions on our ability to speak with four witnesses and their demand that any topics we wished to discuss with those witnesses be disclosed to the prosecution first. The prosecutors sought and obtained an order from the CENTCOM Chief of Staff limiting defense access to a material witness. The prosecution based these conditions on a misreading of M.R.E. 505(i), which concerns defense disclosures of (not access to) classified evidence. This error materially and prejudicially affected our ability to interview witnesses and prepare for the preliminary hearing.

8. We object to the prosecution's insistence that the defense present any requests for classified evidence to the convening authority. They relied on a misinterpretation of M.R.E. 505(e)(1), which only requires convening authority action for classified evidence over which a claim of privilege has been asserted. In this case, no such claim was ever asserted. The prosecution's misinterpretation undermined your ability to order the production of defense-requested classified evidence. Relatedly, the prosecution earlier this week caused the convening authority to send us a letter claiming that we must share with the prosecution any plans to consult classified information prior to any referral of charges. This is an improper effort either to invade our confidential preparations or chill or impede our representation, or both. We have stated our position to LTC Burke in separate correspondence.

9. We object to the prosecution's refusal to share the contact information of witnesses that was known to them (including the listed government witnesses and a potentially material fact witness, Cody Full) and then opposing a delay request based in part on our need to speak with those

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witnesses before the preliminary hearing. As a result of the prosecution's refusal to furnish us contact information, our ability to interview Mr. Full before the hearing was thwarted. His attorney advised us, without elaboration, that his client was unavailable until *after* the date of the hearing.

10. The defense objects to LTC Burke's role. *See generally* para. 4a above. He selected the charges to bring against SGT Bergdahl and is the named accuser. He also served in the quasi-judicial role of special court-martial convening authority, in which capacity he engaged in frequent *ex parte* communications with the prosecutors and made important decisions limiting SGT Bergdahl's access to evidence, witnesses, investigative assistance, delay, and TS(SCI) security clearance for his civilian defense counsel. The defense objects to the preliminary hearing having been conducted under LTC Burke's authority and supervision and we object, in particular, to his making any recommendation on disposition. Having already sworn to the charges, he cannot plausibly claim impartiality. If, notwithstanding the objections we have stated, he does submit a recommendation, we request that it be furnished to us immediately so we can submit our comments to GEN Abrams.

11. We object to the government's failure to provide us with investigative assistance, in sharp contrast with the ample investigative resources the government had available to it, to include the resources impressively committed last year to the AR 15-6 investigation. You have correctly ruled that the defense had demonstrated the need for investigative assistance.

12. In their cross-examination of a defense witness and in closing argument, the prosecution sought to downplay concerns about SGT Bergdahl's mental health. The same prosecutors were privy to his privileged behavioral health file as a direct result of a HIPAA violation by government officials. We object to the prosecutors having engaged in advocacy about SGT Bergdahl's mental health after the breach of his private behavioral health information. The prosecution has refused to provide us with the documents by which confidential information was improperly provided to them in violation of HIPAA.

13. Two critical pieces of evidence came to the attention of the defense in August 2015: a classified 30-page report describing the military's five-year effort to recover SGT Bergdahl and a classified video showing him in near-death conditions late in his captivity. The defense did not have access to this evidence and requested government assistance to locate it. We requested a delay, in part, to find this evidence, but the prosecutors opposed that request. *See also* para. 3 above. The delay should have been granted and these materials should have been furnished to us before the hearing in any event.

14. As noted in the report, our cleansing-warnings objection to the consideration of SGT Bergdahl's interview has been preserved. We renew it here out of an abundance of caution given the waiver provision in R.C.M. 405(k).

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15. The report misreads *United States v. Gonzalez*. Charge I and its specification cannot be sustained given the uncontroverted evidence presented at the preliminary hearing with respect to SGT Bergdahl's subjective intent.

16. The report misunderstands our analysis of the interaction between Articles 99(2) and (3), UCMJ. Article 99(2) is the predicate referred to by the word "such" in Article 99(3). SGT Bergdahl's duty was to protect Observation Post Mest, not Task Force Yukon much less any other larger unit or command.

17. The report fails to take account of the fact that any unauthorized absence for which probable cause was shown was terminated by the criminal act of third parties – a circumstance not addressed by the *Manual for Courts-Martial* provision cited in the report.

18. The report suggested further factual development on the question of death or injury. This would require re-opening the preliminary hearing and affording SGT Bergdahl the full panoply of procedural rights. Doing so would materially delay completion of the case.

19. If he has not already done so, GEN Abrams should examine the classified report referred to in para. 13 above before making any decision on the disposition of the charges. We are informed that a copy is available at Fort Bragg. We examined a copy at the Pentagon after the preliminary hearing was concluded.



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