

**IN A GENERAL COURT-MARTIAL
IN THE SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
FORT BRAGG, NORTH CAROLINA**

UNITED STATES)	
)	
v.)	GOVERNMENT PROPOSAL FOR NEW
)	PRETRIAL ORDER
BERGDAHL, ROBERT BOWDRIE)	
(BOWE))	
SGT, U.S. Army)	11 MAY 2016
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

Comes now the Government and proposes a trial date of 8 December 2016 and a revised pretrial order consistent with that date.

FACTS

On 30 June 2009, the Accused deserted from his place of duty at Observation Post Mest Afghanistan, while deployed as part of Task Force Yukon, Combined Joint Task Force-82/Regional Command-East. After leaving the Observation Post, he was captured by enemy forces, where he remained in captivity until 31 May 2014, when he was returned to military control.

Between 30 June 2009 and 31 May 2014, multiple entities from the United States Government gathered intelligence, physically searched for the Accused and attempted diplomatic solutions to effect his return. Upon the Accused's return, he underwent a three phase re-integration process that lasted approximately a year and involved dedicated physical and mental health treatment.

An investigation pursuant to Army Regulation 15-6 was completed by MG Kenneth Dahl on 18 December 2014 (hereinafter "the 2014 AR 15-6").¹ As part of that investigation, MG Dahl identified 28 agencies which potentially possessed relevant documents. Charges were preferred against the Accused on 25 March 2015, and an Article 32 Preliminary Hearing was conducted on 17 and 18 September 2015. The matter was referred to trial on 14 December 2015.

INITIAL GOVERNMENT DISCOVERY EFFORTS

The unclassified portions of the 2014 AR 15-6 Investigation which formed the basis for the charging decision were provided on 25 March 2015, and additional

¹ In 2009 an AR 15-6 investigation was conducted in theater into the circumstances surrounding the Accused's disappearance. As necessary, that will be referred to as "the 2009 AR 15-6."

discovery, as required by the Rules, was provided on 14 December 2015, at referral. On 30 December 2015, the Court issued a Pretrial Order setting out various deadlines. On 5 February 2016, the Government filed a Notice of Appeal under Article 62, Uniform Code of Military Justice. The proceedings were stayed until 28 April 2016, when the Army Court of Criminal Appeals issued its opinion on the Article 62 appeal.

Concurrent with preferral the Government began working with the 28 agencies identified by MG Dahl, to comply with the Government's discovery obligations. Between April and May 2015, counsel contacted the agencies and entities, obtained discovery contact information, began the process of understanding the entities role with relation to the Accused, and Requests for Information² (hereinafter "RFIs").

On 7 April 2015, the Defense submitted a request for the Government to submit discovery preservation orders to fifteen agencies, including two not previously identified by the 2014 AR 15-6 investigation. The Government submitted the appropriate request to all entities requested by the Defense.

The Government began receiving classified responses to the RFIs in July 2015. The Government established a document database, PDF conversion process and Bates stamping system and conducted a preliminary review of the documents to sample the type and substance of documents received. In August 2015, a team of eight support personnel began the full-time process of converting documents to PDF form for review, redaction and disclosure. In parallel, attorneys began the review process of the converted PDFs.

From August to September, due to the increasing volume of classified responses, the Government also built a classified closed computer network and purchased Relativity, a commercial document review software package to install on that network. Relativity scans documents and initially performs two functions: "deduplication," where duplicate documents are identified and removed, and file extraction, where files which contain embedded files are separated.³ The initial discovery provided by the agencies resulted in approximately 330,000 documents for review, totaling approximately 1,500,000 pages. United States Central Command (CENTCOM) produced the largest number of documents, totaling approximately 300,000 documents and 750,000 pages.

² The RFIs were not requests for the agencies to review documents for Defense access or use or to consider whether to assert privilege under the provisions of Military Rule of Evidence 505. The documents were provided for an initial review by Trial Counsel to determine whether the documents were disclosable under R.C.M. 701. Once that determination is made, those documents which have been determined to be disclosable are sent to the OCAs to provide them "the opportunity to assert the government privilege under Mil. R. Evid. 505(h)(1)(A) before any classified information is released..." United States v. Bergdahl, ARMY MISC 20160118 (A.C.C.A. 2016).

³ By way of example, a Microsoft Powerpoint slide may contain image files. Relativity extracts those images, and produces them for review as a separate document. As a result, the number of documents which Relativity produces for review may be significantly different from the number of documents produced by an agency.

In September, the Government issued a tasker to FORSCOM units to provide 10 Judge Advocates to perform classified document review for 60 days. Those attorneys began their review on the Relativity system on 19 October 2015 and ended on 18 December 2015. The purpose of the review was both to determine whether a document was disclosable and to apply redactions to those portions of the documents which were unrelated to the case.⁴ These determinations and the application of redactions are consistent with the Army Court of Criminal Appeals holding that "trial counsel is only required to disclose to the defense classified information that is material under R.C.M. 701." United States v. Bergdahl, ARMY MISC 20160118 (A.C.C.A. 2016).

In addition, Government attorneys had to travel to off-site locations to review documents when agencies would not physically release the documents to the prosecution, including a significant volume of material classified at the Top Secret level.

DISCOVERY DISCLOSED TO THE DEFENSE

In January 2016, the the first set of disclosable CENTCOM documents were Bates stamped and sent to CENTCOM with a request for review under the provisions of M.R.E. 505. In February 2016, CENTCOM granted view and use permission for the Defense, choosing not to invoke privilege over these documents under M.R.E. 505(h)(1)(A). On 23 February 2016, the Government provided the first batch of 4,000 documents, totaling approximately 32,000 pages, to the Defense on a hard drive, along with a secure room with cipher lock dedicated to Defense use, classified computer terminals to perform review, and a SIPR phone line. The Government also arranged for all members of the Defense team at Fort Bragg to receive FORSCOM building access badges so that they could enter the secure building without notice or escort, 24 hours per day, seven days per week.

On 8 March 2016 the Government provided the Defense with 4,000 unclassified documents to review on the Defense hard drive. In early April, the Government was prepared to disclose another 4,000 classified documents to Defense.

To date, the Government has disclosed or made available approximately 12,000 documents, which totaled approximately 40,000 unclassified pages and 89,000 classified pages. Of the classified information, documents frequently covered a wide range of unrelated topics. Consistent with the ACCA opinion on the Government's Article 62 Appeal, classified information that was not material under R.C.M. 701 was redacted.

ONGOING DISCOVERY EFFORTS

On 20 January 2016, the Defense submitted a request for discovery. In response to that request, the Government submitted additional RFIs to three agencies, none of which had been the subject of a prior RFI.

⁴ Frequently, documents which included disclosable material also contained classified information about matters totally unrelated to this case, including operations in different theaters. The Government redacted that material, as the Defense did not have a need to know the information.

The Government anticipates sending the eighteen remaining OCAs individual disclosure requests for a total of 3,500 classified documents by 13 May 2016. The Government will simultaneously send a request to CENTCOM for the remaining 4,300 Secret documents.

One remaining agency from the original RFIs provided responsive documents on 5 May 2016, totaling approximately 20,000 documents classified Secret. That agency has also indicated that it will produce an additional 20,000 documents classified Top Secret. Preparation of the documents in Relativity and substantive review on the Secret level information began immediately upon receipt. FORSCOM issued a tasker for 5 additional Judge Advocates to review this additional material.

The Government received documents classified at the top secret level from three OCAs. As of this date, the Government has submitted disclosure requests to those OCAs for approximately 8,300 top secret documents. The Government believes that two of the agencies will likely invoke privilege for all the material. Military Rule of Evidence 505(h)(2)(ii) allows the Government to substitute a summary for classified information. In anticipation of an invocation of privilege, the Government has already prepared approximately 900 summaries reducing each Top Secret document to a Secret level classification, and submitted them for OCA review and approval. Once the OCA reviews and approves the summaries at the Secret level, the Government, in compliance with M.R.E. 505, will notify the Court. Specifically, when an OCA formally invokes privilege, and the Government utilizes one of the methods under M.R.E. 505(h)(2)(ii), the Court, under M.R.E. 505(h)(2)(B), must conduct an in camera review of the privileged documents and the proposed alternate measures. The Government anticipates receiving the formal invocation of privilege by 15 June 2016 and will submit a motion under M.R.E. 505(h)(2)(B) immediately asking for judicial review of the summaries.

As previously discussed, as a result of the Defense discovery request, the Government submitted requests to three additional agencies. One of those agencies required that the review of approximately 30,000 pages that were responsive to the RFI be done at their facilities in Washington, D.C., and will only provide those documents determined to be disclosable in paper form, whereupon they will be scanned, processed into Relativity, reviewed and redacted as necessary, and then submitted for OCA consent for Defense access. The Government anticipates having this second round of Defense requested discovery completed, along with any privilege determinations, by the beginning of August.

Review time and privilege decision-making process varies by OCA, but the Government anticipates permission for disclosure to Defense or notice of an assertion of privilege from all the OCAs by August 2016. Consistent with the proposed timelines in the enclosed worksheet, the Government proposes a trial date beginning 8 December 2016. The Government would note that additional discovery requests from the Defense, particularly for classified information, may result in a request for delay.

CONCLUSION

The Government respectfully proposes a trial date of 8 December 2016 and a revised pretrial order consistent with that date.

A handwritten signature in black ink, appearing to read 'J. Oshana', with a stylized, flowing script.

JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 11 May 2016.

A handwritten signature in black ink, appearing to read 'J. Oshana', with a stylized, flowing script.

JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

Scheduling Worksheet – U.S. v. Bergdahl

<u>Event</u>	<u>Proposed Date</u>
Trial Dates (List voir dire/empanelment dates separate from trial date if believed necessary)	G: 5-18 December 2016 D:
Motions Hearing Dates – MRE 505(j). (Use CI in Trial/Pretrial Proceedings)	G: The Government requests motions due by 3 November 2016 with responses due 10 November 2016. (Note: MRE 505(j) also applies to pretrial proceedings, therefore additional hearings and motions may be required depending on the subject matter of the Article 39(a) sessions.) D:
Trial and Defense Notice of Expert Testimony	G: Notice by 30 September 2016. The Government requests Defense submit all requests for expert assistance by 1 August 2016 to ensure contracting actions can be completed. D:
Notice of Request for Daubert Hearing – Both sides.	G: N/A D:
Defense Notice of defenses required by RCM 701(b)(2) (MR/PLMR)	G: The Government requests notice by 30 September 2016 to ensure any expert witness requests can be completed by contracting. D:
Defense Forum Election	G: The Government requests forum selection by 4 November 2016. D:
Defense Discovery Requests	G: The Defense has already provided an initial discovery request. D:
Defense Notice requirement under MRE 505 (e) & (h) (i)	G: 30 September 2016 (for use of classified information) (Note: Defense may have need for several additional notice dates based on subsequent discovery requests.) D:

Government Motion Under 505(h) (h)	G: 1 August 2016 (Note: The Government may file additional motions under MRE 505(h) depending on the extent of the discovery and assertions of privilege and potential requirements to provide adequate substitutes). D:
Defense Motion to Compel Discovery and Government Response	G: The Government requests any Motions to Compel on 1 June 2016, and for submission of supplemental requests corresponding with CI views. D:
Defense Request Expert Assistance (if any) to TC	G: Government requests Defense provide all requests for expert assistance by 1 Aug 2016. D:
Defense Motion to Compel Expert Assistant (Gov. Response within 3 duty days)	G: ___3___ days after receipt of CA action on requests. D: ___5___ days after receipt of CA action on requests.
Motions for Appropriate Relief under RCM 903, 905, 906, 907 and Article 10.	G: 1 August 2016 (all parties) D:
Government 404(b) notice to defense.	G: 1 August D:
MRE 404(b) MIL by Defense (if any) and any other Evidentiary Motions.	G: 14 days after the Government provides notice pursuant to MRE 404(b) D:
Defense request for production of Afghan witnesses, if any.	G: Government requests notice by 1 August 2016 D:
Defense Request for Production of Other Witnesses.	G: Government requests notice by 15 August 2016 D:

Gov. Response to Defense Afghan Witness Production Request	G: 8 August 2016 D:
Gov. Response to Defense Other Witness Production Request	G: 22 August 2016 D:
Defense Motion to Compel Production Afghan Witnesses	G: 15 August 2016 D:
Defense Motion to Compel Production Other Witnesses	G: 3 October 2016 D:
Motions Hearing on Witness Production	G: 12 October 2016 D:
Final Witness Lists IAW RCM 701 (Both Parties)	G: 17 October 2016 D:
Government Provide Proposed Security Plan, PA Plan and Logistics Plan	G: 15 July 2016, with Defense response, if any, due 20 July 2016 D:
Motions Hearing to Address Proposed Security, PA and Log Plan (if any)	G: 22 July 2016 D:
Additional Member Questionnaire Proposal	G: 1 November 2016 D:

General Voir Dire Question proposals	G: 1 December 2016 D:
TC provide seating chart, flyer and F&S Worksheets	G: 30 November 2016 D: