

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

UNITED STATES)	
)	
v.)	Government Motion for Protective Order
)	for Classified Information
BERGDAHL, ROBERT BOWDRIE)	
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	14 December 2015
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

RELIEF SOUGHT

The Government requests that the Court issue an order to protect against the unauthorized disclosure of classified information in this case.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Government as the moving party bears the burden of persuasion on any factual issue whose resolution is necessary to decide this motion. The burden of proof is a preponderance of the evidence. Rule for Courts-Martial [hereinafter "R.C.M."] 905(c).

FACTS

On 30 June 2009, the Accused, an Infantryman (MOS 11B) deployed to Paktika Province, Afghanistan, as part of Task Force Yukon, Combined Joint Task Force-82/Regional Command-East, deserted from his place of duty at Observation Post Mest. The Accused was captured by enemy forces shortly after he departed. Over the following months, Task Force Yukon and other elements of the United States Armed Forces engaged in extensive search and recovery operations to recover the Accused. The Accused was released back to the custody of the United States on 31 May 2014.

On 18 December 2014, MG Kenneth Dahl completed his findings and recommendations as the investigating officer for an administrative investigation pursuant to Army Regulation 15-6 [hereinafter "AR 15-6"] regarding the circumstances of this case. Many of the exhibits to this AR 15-6 investigation were classified at the SECRET level, and the Trial Counsel facilitated Defense Counsel viewings of this and other classified information specifically requested by the Defense prior to the Article 32 preliminary hearing in July and September 2015. These viewings totaled more than 900 pages of documents.

Court-martial charges were preferred against the Accused on 25 March 2015. The case was referred to a General Court-Martial on 14 December 2015. The Accused is charged with one specification of desertion with intent to avoid hazardous duty or to shirk important service in violation of Article 85, Uniform Code of Military Justice [hereinafter "UCMJ"], and one specification of misbehavior before the enemy-endangering the safety of the unit in violation of Article 99, UCMJ.

On 7 April 2015, Defense Counsel sent a memorandum to the Special Court-Martial Convening Authority requesting the preservation of potential evidence from numerous Department of Defense and Executive Branch agencies, including the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, U.S. Central Command, the Defense Intelligence Agency, and U.S. Army Intelligence and Security Command. The Defense request states that "classified intelligence gathered about his departure from his duty station and subsequent capture by the Taliban will be relevant to each charge. Signal intercepts, human intelligence, imagery, and classified operational reporting might reveal additional statements by SGT Bergdahl, statements by his captors about SGT Bergdahl, SGT Bergdahl's mental state, escape attempts, conditions of captivity and health, and SGT Bergdahl's conduct as a Soldier while in captivity."

On 22 July 2015, the Accused's Civilian Defense Counsel, Mr. Eugene Fidell, requested that he be granted a Top Secret security clearance with access to Sensitive Compartmented Information in connection with his representation of the Accused. In his request, Mr. Fidell stated "TS-SCI access is required for me to represent SGT Bergdahl effectively.... I must have the same access to classified information as is enjoyed by government counsel...." Mr. Fidell had previously been granted access to information classified up to the SECRET//NOFORN level in connection with his representation of the Accused on 5 May 2015.

The Article 32 preliminary hearing in this case was conducted on 17-18 September 2015. Prior to the Article 32, Defense Counsel requested that the preliminary hearing officer consider eight classified documents during the preliminary hearing.

To date, the Government has collected information from 26 Department of Defense elements and Executive Branch agencies in order to facilitate the Trial Counsel's due diligence requirements and respond to anticipated Defense discovery and production requests. As of the date of this motion, more than 25,000 purportedly classified documents have been identified containing information that the Trial Counsel will seek original classification authority consent to disclose to the Defense.

WITNESSES/EVIDENCE

The Government encloses the following documents as evidence:

1. DA Form 2823, Sworn Statement of PFC Carolyn M. Byers, dated 11 December 2015.
2. Memorandum from LTC Franklin D. Rosenblatt, Subject: United States v. SGT Bergdahl, Request to Preserve Evidence, dated 7 April 2015.
3. Email Correspondence from Mr. Eugene Fidell, Subject: Top Secret Clearance with access to Sensitive Compartmented Information ICO SGT Robert B. Bergdahl (UNCLASSIFIED), dated 22 July 2015.
4. Memorandum from Lajoya Assent, Subject: Access to Classified Information – Civilian Attorney (Mr. Eugene R. Fidell), dated 5 May 2015.
5. Email Correspondence from LTC Franklin D. Rosenblatt, Subject: classified exhibits, dated 7 August 2015.
6. Government's Proposed Protective Order for Classified Information.

LEGAL AUTHORITY AND ARGUMENT

The Government requests that the Court issue an order to protect against the disclosure of classified information in this case because classified information has already been disclosed to the Accused, and the Trial Counsel will disclose significant amounts of additional classified information to the Accused in the course of these proceedings. "Upon motion of the trial counsel, the military judge must issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused in any court-martial proceeding or that has otherwise been provided to, or obtained by, any such accused in any such court-martial proceeding." Military Rule of Evidence [hereinafter "M.R.E."] 505(g). As noted in the Government Motion for Article 39(a) Pretrial Conference and Docketing Order Pursuant to Military Rule of Evidence 505(f), classified information has already arisen in connection with this court-martial. The Trial Counsel have already arranged for Defense Counsel to review the classified documents that were contained as exhibits in MG Dahl's AR 15-6 investigation. See Enclosure 1. The Trial Counsel have further arranged for Defense Counsel to review other classified information specifically requested by the Defense. See *id.* The over 900 pages of classified information already reviewed by the Defense warrants the issuance of a protective order in this case.

In addition to the classified information that has already been disclosed to the Defense, significant additional classified information will be provided to the Defense in the course of these proceedings. Defense Counsel has requested that the Government request preservation of potential evidence from numerous Department of Defense elements and Executive Branch agencies, including several focused solely on intelligence gathering and analysis whose information would presumably be classified. The Defense stated in its request that "classified intelligence gathered about [the Accused's] departure from his duty station and subsequent capture by the Taliban will be relevant to each charge." See Enclosure 2. Furthermore, the Accused's Civilian Defense Counsel—who had already been granted access to information classified up to the SECRET//NOFORN level—has requested a higher security clearance, stating that he "must have the same access to classified information as is enjoyed by government

counsel.” See Enclosures 3, 4. Finally, from its review of documents made available by 26 Department of Defense elements and Executive Branch agencies, Trial Counsel have—to date—identified more than 25,000 purportedly classified documents that the Trial Counsel will seek original classification authority consent to disclose to the Defense. See Enclosure 1. A protective order is necessary to facilitate the disclosure of this additional classified information.

The Government requests that the Court issue the enclosed proposed Protective Order for Classified Information. See Enclosure 6. Military Rule of Evidence 505(g) states that the terms of a protective order to protect classified information may include, but are not limited to, provisions:

- “(1) prohibiting the disclosure of the information except as authorized by the military judge;
 - (2) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;
 - (3) requiring controlled access to the material during normal business hours and at other times upon reasonable notice;
 - (4) mandating that all persons requiring security clearances will cooperate with investigatory personnel in any investigations that are necessary to obtain a security clearance;
 - (5) requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;
 - (6) regulating the making and handling of notes taken from material containing classified information; or
 - (7) requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.”
- M.R.E. 505(g).


The terms of the enclosed proposed protective order are consistent with these recommended provisions in M.R.E. 505(g). The terms of the enclosed proposed protective order are also consistent with the requirements of Executive Order 13526, Classified National Security Information, dated 29 December 2009, M.R.E. 505(i), Army Regulation 380-5, Department of the Army Information Security Program, and Army Regulation 380-67, Personnel Security Program. They are reasonably tailored to protect against any unauthorized disclosure of classified information in the course of these proceedings.

The Government requests that the Court issue the enclosed proposed protective order during the Article 39(a) pretrial conference to consider matters relating to classified information in this case. M.R.E. 505(f)(1). The Trial Counsel intend to seek original classification authority consent to disclose to the Defense more than 25,000 documents containing purportedly classified information. Prior to disclosing this material, the Government requires a protective order to ensure that reasonable measures are in place to help protect against the unauthorized disclosure of any of this

significant amount of classified information. The issuance of a protective order at the earliest possible opportunity will ensure that the Trial Counsel are able to commence with this disclosure process in an expeditious manner. See M.R.E. 505(f)(1)(B) (stating that the Military Judge "may also consider any matters that relate to classified information or that may promote a fair and expeditious trial" during the pretrial conference).

CONCLUSION

Based on the above, the Government respectfully requests that the Court issue the Government's proposed Protective Order for Classified Information during the pretrial conference under Article 39(a), or at the earliest opportunity thereafter.

A handwritten signature in black ink, appearing to read 'Michael Petrusic', with a long horizontal flourish extending to the right.

MICHAEL PETRUSIC
CPT, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above Government Motion for Protective Order for Classified Information to Defense Counsel via email on 14 December 2015.

A handwritten signature in black ink, appearing to be 'MP' with a long horizontal stroke extending to the right.

MICHAEL PETRUSIC
CPT, JA
Trial Counsel

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is PMG.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10, USC Section 301; Title 5, USC Section 2951; E.O. 9397 Social Security Number (SSN).
PRINCIPAL PURPOSE: To document potential criminal activity involving the U.S. Army, and to allow Army officials to maintain discipline, law and order through investigation of complaints and incidents.
ROUTINE USES: Information provided may be further disclosed to federal, state, local, and foreign government law enforcement agencies, prosecutors, courts, child protective services, victims, witnesses, the Department of Veterans Affairs, and the Office of Personnel Management. Information provided may be used for determinations regarding judicial or non-judicial punishment, other administrative disciplinary actions, security clearances, recruitment, retention, placement, and other personnel actions.
DISCLOSURE: Disclosure of your SSN and other information is voluntary.

1. LOCATION Building 4700 Knox St., Fort Bragg, NC 28307	2. DATE (YYYYMMDD) 20151211	3. TIME 0940	4. FILE NUMBER
5. LAST NAME, FIRST NAME, MIDDLE NAME Byers, Carolyn Marie	6. SSN	7. GRADE/STATUS E3/AD	
8. ORGANIZATION OR ADDRESS HQ, FORSCOM			

9. I, Carolyn M. Byers, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I am a paralegal currently assigned to the US Army Forces Command Headquarters. I have worked on the US v. Bergdahl case since January 2015. As of 11 December 2015, the Government Counsel has received documents related to the case from 26 agencies. I have personally been involved in the receipt, processing, and attorney review of those documents. As of the date of this statement more than 25,000 documents received via classified media have been marked disclosable by attorney reviewers.

I was also involved in processing classified information for Defense review in this case. The Defense has reviewed classified exhibits from MG Kenneth Dahl's AR 15-6 investigation, which was completed on 18 December 2014, and other classified material requested by Defense. These reviews occurred on 22 July 2015 and 2 September 2015 at Fort McNair, Washington D.C. and totaled approximately 926 pages.

-----Nothing Follows-----

10. EXHIBIT	11. INITIALS OF PERSON MAKING STATEMENT <i>CMB</i>	PAGE 1 OF <u>2</u> PAGES
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ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____"

THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT, AND PAGE NUMBER MUST BE INDICATED.

STATEMENT OF Carolyn M. Byers TAKEN AT Fort Bragg, NC DATED 20151211

9. STATEMENT (Continued)

AFFIDAVIT

I, Carolyn M. Byers, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1, AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Carolyn M. Byers
(Signature of Person Making Statement)

WITNESSES

Crystal J. Edwardsneal
4700 Innis St.
Fort Bragg, NC 28307
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 11th day of December, 2015 at Fort Bragg, NC

[Signature]
(Signature of Person Administering Oath)

CPT Michael Petrusic
(Typed Name of Person Administering Oath)

Article 136, UCMJ
(Authority To Administer Oaths)

ORGANIZATION OR ADDRESS

CMB

INITIALS OF PERSON MAKING STATEMENT

PAGE 2 OF 2 PAGES

07 April 2015

MEMORANDUM FOR LTC Peter Q. Burke, Commander, Special Troops Battalion, United States Army Forces Command, Fort Bragg, North Carolina 28310

SUBJECT: United States v. SGT Bergdahl, Request to Preserve Evidence

1. Request: the Defense team requests that the U.S. military issue or seek orders to preserve evidence from the following organizations pertaining to SGT Bergdahl and his captivity:

- a) Central Intelligence Agency
- b) National Security Agency
- c) Federal Bureau of Investigation
- d) Naval Criminal Investigation Service
- e) U.S. Army Criminal Investigation Command
- f) United States Central Command
- g) Defense Intelligence Agency
- h) Joint Special Operations Command
- i) Joint Personnel Recovery Agency
- j) Combined Joint Task Force – 10
- k) Regional Command East
- l) Personnel Recovery Team, Kabul, Afghanistan
- m) Joint Improvised Explosive Device Defeat Organization
- n) United States Forces – Afghanistan
- o) U.S. Army Intelligence and Security Command

2. Discussion

a) Based on media reports, finding Sergeant Bergdahl was a top priority intelligence requirement for several U.S. military organizations and agencies of the U.S. government from 2009 to 2014. As a result, it is possible that the U.S. government currently has a larger casefile on SGT Bergdahl than any other criminally accused person in the United States. The amount of evidence in possession of the government that is relevant to SGT Bergdahl's case might include tens of thousands of pages of additional documents.

b) SGT Bergdahl is charged with criminal conduct spanning a period from 2009 to 2014. Much of the evidence currently held by other U.S. military organizations and agencies will be relevant to SGT Bergdahl's defense. For example, classified intelligence gathered about his departure from his duty station and subsequent capture by the Taliban will be relevant to each charge. Signal intercepts, human intelligence, imagery, and classified operational reporting might reveal additional statements by SGT Bergdahl, statements by his captors about SGT Bergdahl, SGT Bergdahl's mental state, escape attempts, conditions of captivity and health, and SGT Bergdahl's conduct as a Soldier while in captivity. All of these will be relevant to the sentencing authority in a case for which the government can presently seek the UCMJ's most severe punishments of Death or confinement for life. Adding to the importance of this evidence is that there are currently no known available witnesses who can corroborate SGT Bergdahl's statements which might be admitted into evidence; such an uncorroborated account may be viewed as self-serving by a sentencing authority and result in a far more severe punishment.

c) Currently, it appears that very little or none of the relevant material held by other U.S. government and military organizations is in FORSCOM's possession. The FORSCOM trial counsel MAJ Kurz wrote to the defense on 07 April 2015 that no classified evidence in the possession of trial counsel negates or reduces degree of guilt for an offense charged. (The defense has not yet been provided access to these classified materials so cannot verify this). The absence of any relevant classified evidence described by the trial counsel is understandable given that the Army 15-6 investigation conducted by MG Dahl only asked for extremely narrow and specific responses from outside agencies, and did not seek any information about SGT Bergdahl's capture or five-year captivity. The evidence that defense will seek from these other agencies will be broader in order to obtain matters relevant to his defense.

d) Before the defense gains a power to seek to compel discovery of evidence later in the proceedings, potentially relevant evidence must necessarily first be preserved. MG Dahl's AR 15-6 investigation contains evidence that at least one organization (Personnel Recovery Team, Kabul, Afghanistan) has already destroyed evidence concerning SGT Bergdahl. Immediate preservation orders are the most appropriate means for the government to ensure that evidence held by government entities outside of FORSCOM is preserved and remains accessible.



FRANKLIN D. ROSENBLATT

LTC, JA

Individual Military Counsel for SGT Bergdahl

Beese, Christian E LTC USARMY HQDA TJAGLCS (US)

From: Fidell, Eugene <eugene.fidell@yale.edu>
Sent: Wednesday, July 22, 2015 11:07 AM
To: Kurz, Margaret V MAJ USARMY FORSCOM (US)
Cc: Burke, Peter Q LTC USARMY FORSCOM (US); Visger, Mark A LTC USARMY FIRST ARMY DIVWEST (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US); Rosenblatt, Franklin D LTC USARMY (US); Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US); Dexter, Michelle A MAJ USARMY USARC HQ (US); Santiago, Luisa LTC USARMY FORSCOM (US)
Subject: Top Secret Clearance with access to Sensitive Compartmented Information ICO SGT Robert B. Bergdahl (UNCLASSIFIED)

For Lieutenant Colonel Peter Q. Burke, Special Court-Martial Convening Authority, through Major Margaret V. Kurz, government counsel

1. BLUF. I request renewal of my Top Secret security clearance with access to Sensitive Compartmented Information in connection with my representation of SGT Robert B. Bergdahl.
 - a. I have previously held TS-SCI clearances as a civilian attorney in connection with other military justice matters. If memory serves, my first clearance (SECRET) was issued when I was on active duty in 1969-72. I have never had a clearance suspended or revoked.
 - b. TS-SCI access is required for me to represent SGT Bergdahl effectively. SGT Bergdahl's individual military counsel has a TS-SCI clearance. I am lead counsel.
 - c. Among the witnesses we need to interview fully are LTC Jason Amerine, civilian Amber Dach, and civilian Melani Richardson. Each of them may have critical information concerning aspects of the charges, to include the proper duration of the charged period of absence as well as whether and for how long the government's claimed search efforts are properly attributable to SGT Bergdahl's conduct.
 - d. Unless I am afforded full opportunity to interview these witnesses (and any others of whom we subsequently become aware) with respect to matters that are classified above SECRET, my client's right to civilian counsel will have been nullified. I must have the same access to classified information as is enjoyed by government counsel, two of whom have interim TS clearances. Your attention is respectfully invited to the "equal opportunity" clause of Article 46, UCMJ.
 - e. Prompt action on this request will minimize the chance that the preliminary hearing currently scheduled for 17 September 2015 will have to be delayed. The Court of Appeals has previously stayed an Article 32 pending issuance of a clearance to civilian defense counsel.
2. Reservation of rights. The validity of the conditions under which SGT Bergdahl's case has been referred to you by FORSCOM is a matter of dispute. Nothing in this request should be viewed in any way as acquiescence in those conditions. This request as well as any further interaction the defense may have with you is without prejudice to the claims we have asserted before the U.S. Army Court of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces. Our objection to the arrangements under which this case was sent to FORSCOM to serve as GCMCA and then delegated to you to serve as SPCMCA without the critical power to dispose of the charges is a continuing one.
3. I request to be copied on the email that forwards this to LTC Burke.
4. For situational awareness, I am copying LTC Visger on this email.

5. Advance copy to LTC Burke

Sincerely,

Gene Fidell

Eugene R. Fidell
Senior Research Scholar in Law and
Florence Rogatz Visiting Lecturer in Law Yale Law School
(o) (203) 432-4852
[REDACTED]

Skype efidell
globalmjreform.blogspot.com

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DEPARTMENT OF THE ARMY
OFFICE OF THE DEPUTY CHIEF OF STAFF, G-2
1000 ARMY PENTAGON
WASHINGTON, DC 20310-1000

DAMI-CDS

5 MAY 2015

MEMORANDUM FOR UNITED STATES ARMY FORCES COMMAND-UNITED STATES ARMY RESERVE COMMAND, 4745 KNOX STREET, BLDG 1-1460, FORT BRAGG, NC 28310-5000

SUBJECT: Access to Classified Information - Civilian Attorney (Mr. Eugene R. Fidell)

1. References:

a. Memorandum, DAJA-IO, 9 April 14, subject: Request for Access to Classified Information for a Civilian Attorney.

b. Memorandum, AFCS-STB-BC, 8 April 14, subject: Request for Access to Classified Information for a Civilian Attorney (enclosed).

2. In accordance with the provisions of AR 380-67, paragraph 3-23f, the Headquarters Department of the Army, Office of the Judge Advocate General, certifies Mr. Eugene Fidell, requires access to classified information to properly represent his client, SGT Bowe R. Bergdahl, in pending court-martial proceedings. Our records confirm that a background investigation was completed on 24 October 2008, and he has a valid Secret security clearance. Mr. Fidell is authorized access to classified information, but is limited to information contained in the AR 15-6 investigation and other classified information/materials which may be made available pursuant Rules of Court Martial (RCM) 701, 703 and any other applicable laws or procedures pursuant to discovery and disclosure of information - up to the SECRET NOFORN level. Third party agency rules must be adhered to for the release of any information for which the Army is not the sole proponent and/or classification authority.

3. Prior to granting access to classified information, the Command Security Manager will provide Mr. Fidell an initial security briefing and have him sign a Classified Information Nondisclosure Agreement (SF 312).

4. This authorization remains valid through completion of all judicial proceedings. A copy of this memorandum will be filed with the SF 312 until the access authorization is rescinded. At that time, Mr. Fidell will be provided a termination security briefing (DA Form 2962) and the termination section of the SF 312 must be completed. The briefing will stress the constraints on release of classified information and requisite protection

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DAMI-CDS

SUBJECT: Access to Classified Information - Civilian Attorney (Mr. Eugene Fidell)

measures, to include prohibition on the release of classified information to other members of the Feldesman, Tucker, Leifer and Fidell law firm.

5. The Office of the Deputy Chief of Staff, G-2 point of contact is Mr. Eric L. Novotny (703) 695-2523, e-mail: Eric.L.Novotny.civ@mail.mil.



LAJOYA ASSENT
Chief, Security Division

Encl

CF:

U.S. Army Judge Advocate General (DAJA-IO/Mr. David Mayfield) (wo/encl)

Exempt from the mandatory disclosure provisions
of the Freedom of Information Act
Exemption Six applies

Petrusic, Michael CPT USARMY FORSCOM (US)

From: Rosenblatt, Franklin D LTC USARMY (US)
Sent: Friday, August 07, 2015 6:05 PM
To: Visger, Mark A LTC USARMY FIRST ARMY DIVWEST (US)
Cc: Kurz, Margaret V MAJ USARMY FORSCOM (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US); Fidell, Eugene; Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US); Gardner, Donald G CIV USARMY FORSCOM (US)
Subject: classified exhibits

LTC Visger,

Defense has now viewed classified evidence. Out of what we've viewed, we request that you consider the following as defense submissions of evidence:

SE271
SE338
SE381
SE414-423
SE467-479
SE480
SE789
SE910

Among the classified materials was some evidence responsive to your order for operational & intel reporting about SGT Bergdahl's whereabouts. However, the evidence only came from TF Yukon. Government did not produce the classified evidence that you ordered from CJTF-82, USFOR-A, or CENTCOM. We believe this reporting, which was more informed by national intelligence and diplomatic reporting, will cast doubt on the reasonableness of the government's position that months of searches in Afghanistan were done with a realistic expectation of finding Bergdahl.

For example, the following open-source account from Robert Young Pelton from 21 July 2014 (<http://www.vice.com/read/finding-bergdahl-081>) shows TF Yukon's salience:

"In 2009 I was in Afghanistan and was involved in the search for Bergdahl from that first June morning he went missing. Tasked by a secretive military group to provide minute-by-minute information on his location using my network of local contacts, I quickly pinpointed Bergdahl's whereabouts. We then predicted which routes Bergdahl would be taken along, knowing full well he would be sold to the Haqqanis in Miranshah, Pakistan, and whisked across the Pakistani border. Thankfully, the military's Task Force was able to put a spy plane on target and monitor two phone calls made by Bergdahl's kidnappers.

"Strangely, after a few days of gathering granular data in real time, my team and the eager group of hunter-killers tracking Bergdahl were told to "wave off." We were ordered to stand down and let the 501st, the paratrooper unit who "owned" Bergdahl, take over the search. The directive was bewildering given that we had already confirmed Bergdahl was being held in Pakistan, a captive of the same group (the Haqqanis) and at the same location as the previously kidnapped New York Times journalist David Rohde."

We request that you enforce your order for the government to produce operational and intelligence reporting from these organizations.

There are several other issues related to classified evidence and clearances to inform you of that may be better handled by phone conference. Given that the government has begun or soon will begin logistical preparations for the 32 and these issues are still unresolved, I suggest we arrange a phone conference as soon as possible.

Respectfully,

LTC Frank Rosenblatt
Executive Officer
U.S. Army Trial Defense Service
office: 703-693-0283

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

UNITED STATES)	
)	
v.)	[PROPOSED] Protective Order for
)	Classified Information
BERGDAHL, ROBERT BOWDRIE)	
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	___ January 2016
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

1. This matter comes before the Court upon motion by the Government for a Protective Order pursuant to Military Rule of Evidence (MRE) 505(g) to protect against the unauthorized disclosure of any classified information that has been disclosed by the United States to the Accused in these court-martial proceedings, or that has otherwise been provided to, or obtained by, the Accused during these proceedings.

2. The Court finds this case will involve information that has been appropriately classified in the interest of national security. The safeguarding, handling, and control of this information will require special security precautions mandated by statute, executive orders, and regulations.

3. Pursuant to the authority granted under MRE 505(g), the general supervisory authority of the Court under the Rules for Courts-Martial, and in order to protect the national security, it is hereby ORDERED that the Government's Motion for Protective Order for Classified Information is GRANTED, and it is further ORDERED that:

a. PURPOSE. The purpose of this Protective Order is to safeguard, and prevent the unauthorized disclosure or dissemination of, classified information in this case. The terms of this Order may be modified by further order of this Court under MRE 505 and the Court's general supervisory authority over these proceedings. This Order is not intended to impede the Defense's ability to represent the Accused. Defense Counsel who meet the requirements for access set forth in this Order shall—consistent with the terms of MRE 505—be given access to classified information to the extent required by the Trial Counsel's disclosure and discovery obligations, and as otherwise directed by the Court.

b. APPLICABILITY. This Protective Order applies to all classified information provided to, or otherwise obtained by, the Accused during these proceedings, both prior to and subsequent to the date of this Order. The following persons are subject to the terms of this Order: the Accused; all Defense Counsel (civilian and military) and support staff and assistants working on behalf of Defense Counsel; members of the

Defense team; all other counsel involved in this case, and support staff and assistants working on their behalf; security officers; all Court personnel; and all other individuals who receive access to, or are otherwise in possession of, classified information provided in connection with this case. The terms of this Order shall apply to all pre-trial, post-trial, and appellate aspects of this case, as supplemented by the requirements of the Rules for Courts-Martial and the Military Rules of Evidence.

c. DEFINITIONS. The following definitions apply to this Protective Order:

(1) Access to Classified Information: the ability to review, discuss, learn, become aware of, or create notes or other written products regarding classified information in electronic, documentary, or oral format in a facility and using procedures consistent with subparagraphs 3.h, i, and j of this Protective Order; "access to classified information" does not include authority to copy or reproduce classified information, remove that information from a secure government facility, or electronically send or otherwise disseminate that information outside of a secure government facility, except by the terms of this Order.

(2) Classified Information: any information or material in any form that has been determined by the United States Government pursuant to Executive Order 13526, Classified National Security Information, dated 29 December 2009, or its predecessor orders, to require protection against unauthorized disclosure for reasons of national security of the United States, or any information derived from such information. Classified information is designated and will normally be marked as CONFIDENTIAL (C), SECRET (S), or TOP SECRET (TS), and can additionally be controlled as SENSITIVE COMPARTMENTED INFORMATION (SCI), as part of a SPECIAL ACCESS PROGRAM (SAP) as that term is described in Executive Order 13526, or subject to an ALTERNATIVE COMPENSATORY CONTROL MEASURE (ACCM). All persons subject to this Protective Order shall consider any information which they have been notified may constitute classified information or which could reasonably be believed to constitute classified information to be classified information subject to this definition until it is confirmed to be unclassified by competent authority.

(3) Court Security Officer: an individual designated for this case to supervise security arrangements necessary to protect against the unauthorized disclosure of classified information submitted or made available to the Court. The court security officer is subject to the terms of this Protective Order.

(4) Document: any recorded information, regardless of the nature of the medium, or the method or circumstances of recording, including originals and copies of any type.

(5) Information: any knowledge that can be communicated in any manner, regardless of its form or characteristics.

(6) National Security: the national defense or foreign relations of the United States.

(7) Need-to-Know: a determination within the executive branch in accordance with directives issued pursuant to Executive Order 13526 that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function. The only personnel with a need-to-know the classified information at issue in this case are the Military Judge, appropriately cleared United States Government personnel supporting these proceedings as designated by the Military Judge, Trial Counsel, members of the prosecution team (including support staff), security officers, personnel of the originating agency, Defense Counsel, the Accused, and members of the Defense team (including support staff).

(8) Original Classification Authority (OCA): an individual authorized in writing, either by the President, the Vice President, or by agency heads or other officials designated by the President or in accordance with Executive Order 13526, to classify information in the first instance.

(9) Secure Government Facility: a United States Government building that is approved for the handling and storage of classified information in accordance with military service or agency regulations up to the SECRET level.

(10) Security Officers: experts detailed to the Trial Counsel and Defense Counsel to provide advice concerning the proper procedures for appropriate storage, safeguarding, handling, and transmittal of classified information or presumptive classified information pursuant to this Protective Order and all applicable statutes, orders, and regulations.

(11) Unauthorized Disclosure: a communication or physical transfer of classified information to an unauthorized recipient or in an unauthorized manner.

d. UNAUTHORIZED DISCLOSURE. Direct or indirect unauthorized disclosure, retention, or negligent handling of classified information could cause serious and, in some cases, exceptionally grave damage to the national security of the United States, or may be used to the advantage of a foreign nation against the interests of the United States. The procedures in this Protective Order are designed to ensure that persons subject to this Order will not divulge classified information to anyone who is not authorized to receive it or in an unauthorized manner. Any disclosure of classified information in these proceedings must be done with prior written consent from the OCA, and in conformity with the procedures in this Order.

(1) Persons subject to this Protective Order are obligated by law, regulation, and the terms of this Order not to disclose any classified information in an unauthorized manner or to an unauthorized recipient.

(2) Any breach of the security procedures in this Protective Order may result in the termination of a person's access to classified information. Any unauthorized disclosure, possession, or handling of classified information may constitute violations of United States criminal laws and the Uniform Code of Military Justice.

e. SECURITY OFFICERS. Security officers will be assigned to the Court, the Trial Counsel, and the Defense.

(1) Trial Counsel and Defense Counsel will consult with detailed security officers regarding any matter that could reasonably be believed to relate to classified information, including security clearance verifications, marking of classified documents, derivative classification, marking of attorney work product and filings, and proper handling of classified information or presumptive classified information. Trial Counsel and Defense Counsel will not seek classification determinations (i.e., whether a piece of information is classified due to the nature of the information) from their security officers. Such determinations must be made by the appropriate OCA.

(2) The Defense security officer is part of the Defense team and will generally maintain the confidentiality of all discussions with other members of the Defense team, and any observations made during Defense reviews or access to classified information. The Defense security officer is not required to inform Defense Counsel or receive Defense Counsel's permission to report a violation of either this Protective Order, or applicable statutes, orders, or regulations concerning the safeguarding, handling, and dissemination of classified information. All security violations will be reported in accordance with Army Regulation 380-5, Department of the Army Information Security Program, and other applicable regulations.

f. DECLASSIFICATION. All classified information shall remain classified and will be handled accordingly unless such classified information contains clear evidence that it has been properly declassified by the appropriate OCAs.

g. PUBLIC DOMAIN. Information in the public domain is ordinarily not classified. However, if classified information is reported in the press or otherwise enters the public domain, the information does not lose its classified status merely because it is in the public domain. Such classified information remains subject to MRE 505 and the terms of this Protective Order until such time as it is properly declassified by the appropriate OCA. Any attempt by the Accused or Defense Counsel to have classified information that has been reported in the public domain confirmed or denied at trial or in any public proceeding in this case shall be governed by MRE 505 and all provisions of this Order.

h. PERSONNEL ACCESS TO CLASSIFIED INFORMATION.

(1) In order to protect classified information in this case, no persons, except the Military Judge, appropriately cleared United States Government personnel supporting these proceedings as designated by the Military Judge, Trial Counsel,

members of the prosecution team (including support staff), security officers, personnel of the originating agency, Defense Counsel, the Accused, and members of the Defense team (including support staff) shall have access to the classified information in this case. Personnel will only be given access to classified information to the extent authorized by Executive Order 13526 or as authorized by the appropriate OCA.

(2) The Accused and the Defense team may gain access to classified information (including, but not limited to, documents from Government agencies and departments, and classified information provided by potential witnesses) in this case only through Government disclosures required by the Rules for Courts-Martial or Military Rules of Evidence, or through a notification to Trial Counsel in accordance with MRE 505(i). Defense Counsel and other members of the Defense team may not seek access to classified information in furtherance of their representation of the Accused directly from any Government agency or department, any current or former Government employee, or any other United States entity.

(3) The Defense shall not disclose classified information to any personnel—including potential witnesses in this court-martial—not listed above or in the definition of “need-to-know” in subparagraph 3.c without the consent of the Trial Counsel or authorization from the Military Judge following notice to, and an opportunity to be heard by, the United States. The Defense shall provide the Trial Counsel with the names of any intended recipients of classified information, and written notice of the classified information expected to be disclosed pursuant to the requirements of MRE 505(i). Under no circumstances will classified information be disseminated to an individual who does not meet the requirements of subparagraph 3.h(4) below. Personnel will only be given access to classified information to the extent authorized by Executive Order 13526 or as authorized by the appropriate OCA. If preparation of the defense requires that classified information be disclosed to persons not named in this Protective Order, the Trial Counsel shall promptly seek to obtain any required security clearances and OCA consent to disclose information to such personnel.

(4) No person shall have access to any classified information in this case unless that person has a valid security clearance at the appropriate level, a signed Standard Form 312 Classified Information Nondisclosure Agreement, a need-to-know, and has executed the Memorandum of Understanding enclosed to this Protective Order agreeing to comply with the terms of the Order. In addition to these requirements, some classified information in this case may be compartmented (SCI), part of a SAP, or subject to an ACCM; no person may access that information without first having conducted any required “read on” or additional nondisclosure forms required for that compartment, SAP, or ACCM. Once a person subject to this Order with a need-to-know obtains a security clearance at the appropriate level, executes a Standard Form 312, and conducts any required read on, that person is eligible for access to classified information associated with this case only to the extent authorized by Executive Order 13526 or as authorized by the appropriate OCA.

(5) The executed Memorandum of Understanding for each person signing the document will be filed with the Court and added to the appellate record. The substitution, departure, or removal of any person from this case will not release that person from the provisions of this Protective Order or the Memorandum of Understanding executed in connection with this Order, or from their obligations as listed in the Standard Form 312.

(6) Any person seeking access to classified information who does not have the requisite level of security clearance must execute all necessary forms and prerequisites in accordance with Army Regulation 380-67, Personnel Security Program, so that the Department of the Army may complete any required personnel security investigation to make a determination whether to grant access. Persons other than Court support personnel designated by the Military Judge, Trial Counsel, members of the prosecution team, security officers, and personnel of the originating agency must coordinate gaining the required security clearance through the Trial Counsel. The Trial Counsel will take all reasonable steps to facilitate the processing of security clearance applications. Pursuant to the procedures and requirements of Army Regulation 380-67, Personnel Security Program, paragraph 3-23f, any Defense Counsel requiring access to classified information to properly represent the Accused who does not currently hold the required security clearance must submit their requests through the Office of The Judge Advocate General to the Office of The Deputy Chief of Staff for Intelligence. These requests must be coordinated through the Trial Counsel.

(7) The Accused may only access classified information in this case in accordance with the requirements of subparagraph 3.h of this Protective Order. If Trial Counsel informs the Defense in writing that certain classified information cannot be disclosed to the Accused, then the Defense shall not disclose that information to the Accused without prior consent of the Trial Counsel or authorization from the Military Judge following notice to, and an opportunity to be heard by, the United States. Under no circumstances will classified information be disseminated to the Accused if he does not meet the requirements of subparagraph 3.h(4) above. The Accused will only be given access to classified information to the extent authorized by Executive Order 13526 or as authorized by the appropriate OCA.

i. PROCEDURES FOR SAFEGUARDING AND PROTECTION OF CLASSIFIED INFORMATION.

(1) Trial Counsel and Defense Counsel will agree on a secure government facility where the Accused and members of the Defense team may access classified information. In addition to this location, Trial Counsel will ensure appropriate secure government facilities for Defense access to classified information are available at Fort Bragg. Trial Counsel will also ensure that space is available in a sensitive compartmented information facility (SCIF) where Defense Counsel may confidentially discuss, store, review and otherwise access materials classified as TOP SECRET or SCI. The Trial Counsel will ensure that the secure government facilities used by Defense Counsel contain any secure office equipment requested by the Defense that is

reasonable and necessary to the preparation of the Accused's Defense in this case. The security officer detailed to the Defense shall establish procedures to ensure that the secure government facilities are maintained and operated in the most efficient manner consistent with the protection of classified information against unauthorized disclosure.

(2) The Defense team and the Accused will only discuss, store, review, and otherwise access classified information made available to the Defense in this case in a secure government facility certified by the Defense security officer. All classified information will be stored in a United States Government-approved storage container. Classified information will only be disclosed or accessed by the Defense team outside this location, or removed from a secure government facility, with advance and express authorization of the Court or in accordance with the terms of this Protective Order, and applicable statutes, executive orders, and regulations, and only after proper physical and information security measures have been implemented in consultation with the Defense security officer.

(3) No persons subject to this Protective Order shall discuss any classified information over a telephone, an inter-office communication system, computer system, computer or communications network, other communication method, or other electronic device that has not been approved to transmit or store classified information at the level of classification of the information at issue. No persons subject to this Order shall discuss any classified information outside of a secure government facility or in the presence of any person who is not authorized to possess or receive such information.

(4) Defense Counsel and other members of the Defense team will prepare all filings, documents, or communications that contain or may contain classified information in an approved secure government facility, using computers, printers, and other electronic office devices certified for classified information as provided by the Government. Members of the Defense team may take notes and prepare documents with respect to classified information, however, any notes or documents that are themselves classified cannot be removed from the secure government facility without advance and express authorization from the Court unless otherwise permitted by this Protective Order. All classified information possessed, created, or maintained by the Accused or any member of the Defense team must be properly marked, and stored, maintained, and accessed only in a secure government facility. The Defense security officer will ensure appropriate physical security protection for any materials prepared or compiled by any member of the Defense team in relation to the preparation of the Accused's defense or submissions under MRE 505.

(5) All material or notes created or drafted by any member of the Defense team while reviewing, discussing, or accessing classified information must be reviewed by the Defense security officer to determine whether the information therein is classified. There may be instances where the OCA for the classified information contained in a document will require the agency's security officers to conduct the review of any material or notes derived from that material. All classified material or notes created by any member of the Defense team will be retained in a secure government

facility under the control of the Defense security officer and cannot be removed from the secure government facility without advance and express authorization from this Court unless otherwise permitted by this Protective Order. Unclassified notes can be removed from the secure government facility and retained by Defense Counsel or any other member of the Defense team.

(6) No member of the Defense team shall copy or reproduce any classified information in any form, except under the direct and on-site supervision of the Defense security officer.

(7) Defense Counsel shall have access to classified information made available to them in a secure government facility subject only to reasonable notification requirements when counsel seek to access a facility. Upon reasonable advance notice to the Trial Counsel or the Defense security officer, persons subject to this Protective Order shall be given access to the classified information which the Trial Counsel has made available to the Defense, or that the Defense has otherwise acquired, during normal business hours and at other times upon reasonable request to Trial Counsel. Security logs are required to be maintained regarding access by all persons authorized to have access to the classified information in connection with the preparation of the Defense.

(8) Persons subject to this Protective Order shall not disclose, disseminate, or otherwise transmit classified information to any individual who does not meet the requirements to access classified information, including a valid security clearance at the required level, a signed Standard Form 312, any applicable read ons, and a need-to-know. The Defense security officer will verify any potential recipient's security clearance, Standard Form 312, and read on status prior to any disclosure.

j. **FILINGS WITH THE COURT.** Any pleading, document, or other substantive communication filed by Trial Counsel or Defense Counsel that contains classified information shall be filed with the Court through the Court security officer either by approved courier or through SIPRNET email. The date and time of submission to the Court security officer shall be considered the date and time of filing. At the time of making a submission to the Court security officer, Trial Counsel or Defense Counsel shall notify the Court and the other party via unclassified email on the NIPRNET that a submission was made to the Court security officer and shall provide a title to the document(s) that does not disclose any classified information. The Court security officer shall promptly cause delivery of the classified pleading, document, or other substantive communication to the Court and the other party (unless such filing is *ex parte* in accordance with MRE 505).

k. **PROPERTY OF THE UNITED STATES.** All persons given access to classified information pursuant to this Protective Order are advised that all classified information to which they obtain access by the terms of this Order, and any documents, notes, or other material produced as a result of such access which are classified are now, and will remain, the property of the United States Government until such time as

they are declassified. All persons will return all materials which may have come into their possession, or for which they are responsible because of such access, and any classified documents, notes, or other materials derived from such access, upon demand by a security officer. At the conclusion of this case, any attorney notes, summaries, work product, or other documents which the Defense Counsel want to be retained will be sealed and provided to the Office of the Staff Judge Advocate, U.S. Army Forces Command, for proper storage during the appellate process, if applicable. Any such documents the Defense Counsel do not wish to be retained will be destroyed by the Defense security officer in the presence of Defense Counsel. Nothing in this Order shall be construed to authorize Trial Counsel access to any attorney-client privileged information or Defense work product.

I. VIOLATIONS. Any unauthorized disclosure of classified information may constitute a violation of this Protective Order, and of the Uniform Code of Military Justice and/or the criminal laws of the United States. Any violation of the terms of this Order will immediately be brought to the attention of the Military Judge and may otherwise be reported in accordance with Army Regulation 380-5, Department of the Army Information Security Program, and other applicable regulations. Any breach of this Order may also result in the termination of an individual's access to classified information.

m. DURATION. This Protective Order shall remain in effect until superseded or amended by the Military Judge. The provisions of this Order apply during the time persons subject to the Order are granted access to classified information and at all times thereafter consistent with their obligations pursuant to the nondisclosure agreement, and applicable statutes, orders, and regulations. Nothing contained in this Order shall be construed as a waiver of any right of the Accused.

ORDERED, this ____ day of January 2016.

[JUDGE NAME]
COL, JA
Military Judge

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

UNITED STATES)

v.)

BERGDAHL, ROBERT BOWDRIE)
(BOWE))
SGT, U.S. Army)
HHC, Special Troops Battalion)
U.S. Army Forces Command)
Fort Bragg, North Carolina 28310)

Memorandum of Understanding Regarding
Protective Order for Classified Information

1. I, _____ understand that I have already received or may become the recipient of classified information in the above-captioned case. I understand that this information pertains to the national security of the United States and remains the property of the United States. This information, together with the methods of collecting it, are classified according to security standards set by the United States Government.

2. I have received, read, and understand the provisions of the Protective Order entered in this case, including the procedures for proper safeguarding, storage, handling, access, and dissemination of classified information. I agree that I am subject to the terms of the Protective Order and that I will comply with the provisions contained therein, and understand the potential repercussions of violations of the Protective Order and of applicable statutes and regulations governing the safeguarding of classified information. I agree that I will not divulge, publish, or otherwise disseminate, in any manner, such classified information except as authorized by the terms of the Protective Order, or as authorized by the Military Judge in accordance with the procedures of Military Rule of Evidence 505.

3. I understand and agree that I will remain bound to this Memorandum of Understanding and any other nondisclosure agreement signed by me in connection with this case after the conclusion of proceedings in this case.

Signature: _____

Name: _____

Date: _____