

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

UNITED STATES)	
)	
v.)	
)	Government Request for Clarification
BERGDAHL, ROBERT BOWDRIE)	
(BOWE))	
SGT, U.S. Army)	21 January 2016
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

During an Article 39(a) session on 12 January 2016, the parties presented oral argument regarding, *inter alia*, whether the Defense in this case is required to gain original classification authority ("OCA") consent prior to seeking access to classified information from any Government agency, employee, information system, or entity. On 14 January 2016, the Court issued a protective order to the parties that does not address whether such OCA consent is required. Because the parties disagree as to the proper interpretation of the OCA consent requirement, the Government respectfully requests that the Court provide clarifying guidance on this matter.

The Government's position on this issue is that Defense Counsel and other members of the Defense team must gain consent from all OCAs (as that term is defined in Section 1.3 of Executive Order 13526 and Paragraph 1c(7) of the Protective Order) who originally classified the particular information sought by the Defense before seeking access to classified information directly from any Government agency or department, any current or former Government employee, any Government information system, or any other United States entity. The Government's basis for this position includes Military Rule of Evidence 505(h), permitting government agencies and military departments to invoke a classified information privilege to prevent or limit the discovery of or access to classified information by the Accused during the discovery phase of a court-martial. During argument, the Government articulated that failure to acquire OCA consent prior to the Defense accessing classified information would deprive the OCA from having a meaningful opportunity to invoke the United States' classified information privilege before its information was disclosed to the Defense. The Government also bases its position on Sections 4.1(i)(1) and (3) of Executive Order 13526, Classified National Security Information, particularly considering that the Defense team currently includes a civilian attorney with no arguable status within the Department of Defense and will likely include civilian experts in the future. The Government described the application of Executive Order 13526 and Military Rule of Evidence 505(h) in its Motion for Article 39(a) Pretrial Conference and Docketing Order Pursuant to Military Rule of Evidence 505(f).

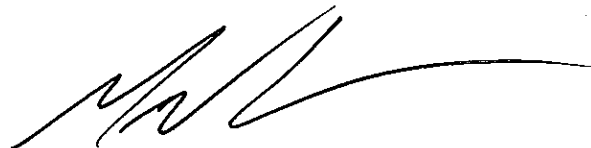
The Government understands that the Defense interpretation on this issue is that Defense Counsel and members of the Defense team can seek access to classified information from any Government agency, employee, entity, or information system without seeking prior consent from the OCAs that originally classified that information, and that such classified information could then be accessed by, or further disseminated to, all members of the Defense team, including civilians who are not Department of Defense employees.

Although Trial Counsel understand based on discussions with Defense Counsel that the Defense intends to file a motion whose resolution may address this issue, the Government is concerned that unauthorized dissemination of classified information may occur before that motion is decided. The Government respectfully requests that the Court provide a ruling specifying that Military Rule of Evidence 505(h) and Executive Order 13526 require that the Defense gain consent from all OCAs who originally classified the particular information sought by the Defense before seeking access to classified information directly from any Government agency or department, any current or former Government employee, any Government information systems, or any other United States entity.



MICHAEL PETRUSIC
CPT, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above Government Request for Clarification to Defense Counsel via email on 21 January 2016.



MICHAEL PETRUSIC
CPT, JA
Trial Counsel