

**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 Article 39(a)
)	Pretrial Conference and Docketing Order
BERGDAHL, ROBERT BOWDRIE)	Pursuant to Military Rule of Evidence
(BOWE))	505(f)
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 hold a pretrial conference under Article 39(a) to consider matters related to classified information that may arise in connection with this court-martial. The Government further requests that the Court establish the scheduling of subsequent actions during this pretrial conference.

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 classified 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. In the weeks following this request, Trial Counsel sought consent from U.S. Central Command and the Joint Personnel Recovery Agency to use these documents during the Article 32 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 in anticipation of 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. Original Classification Authority Declarations from U.S. Central Command and Joint Personnel Recovery Agency, dated 27 August 2015 and 28 August 2015 (without enclosures and tabs).

LEGAL AUTHORITY AND ARGUMENT

I. A Pretrial Conference is Required in this Case

The Government requests that the Court conduct a pretrial conference to set a docketing order for these proceedings, issue a protective order, and resolve other initial matters regarding classified information that may arise in this case. The established relevance of classified information in these proceedings justify a pretrial conference. “At any time after referral of charges, any party may move for a pretrial conference under Article 39(a) to consider matters relating to classified information that may arise in connection with the trial.” Military Rule of Evidence [hereinafter “M.R.E.”] 505(f)(1). Following such a motion, “the military judge must promptly hold a pretrial conference.” *Id.* At the pretrial conference required by M.R.E. 505(f), the Military Judge must establish the timing of discovery requests, and the timing of required Defense notifications to the Trial Counsel and Military Judge for review and use of classified information. M.R.E. 505(f)(3)(A). The Military Judge may also consider any other matters that relate to classified information. M.R.E. 505(f)(3)(B).

Classified information has already arisen in connection with this court-martial, and a pretrial conference pursuant to M.R.E. 505(f)(1) is therefore warranted. The Trial Counsel already arranged for Defense Counsel review of the classified documents that were contained as exhibits in MG Dahl’s AR 15-6 investigation. See Enclosure 1. The Trial Counsel further arranged for Defense Counsel review of other classified information specifically requested by the Defense. See *id.* In addition to the Defense’s specific requests to review classified information related to the Accused, Defense Counsel also 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, the Defense specifically sought to use eight documents containing classified information during the Article 32 preliminary hearing. See Enclosures 5, 6.

The results of Trial Counsel's due diligence efforts further establish that classified information will continue to be a factor in this court-martial. 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. Classified information has been, and will continue to be, at issue in this court-martial.

II. These Court-Martial Proceedings Warrant a Docketing Order

The Government requests that this Court issue a docketing order during the pretrial conference pursuant to M.R.E. 505(f) because the complex nature of court-martial proceedings where classified information will be disclosed during discovery or potentially introduced at trial or pretrial proceedings justify established scheduling to organize these proceedings. The Rules for Courts-Martial and Military Rules of Evidence provide ample authority for the Military Judge to enter a docketing order setting forth the timing of discovery, motions practice, and procedures required under M.R.E. 505. See, e.g., R.C.M. 701(g)(1) ("The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just."); R.C.M. 801(a) ("The military judge shall: (1) Determine the time and uniform for each session of a court-martial; . . . (3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual...."). Specifically regarding classified discovery and evidence procedures, the Military Rules of Evidence state that at a pretrial conference, "the military judge must establish the timing of" requests for discovery and the timing of required Defense notifications to the Trial Counsel and Military Judge for review and use of classified information. M.R.E. 505(f)(3)(A). In addition to these required timings, the "military judge may also consider any matter that relates to classified information or that may promote a fair and expeditious trial." M.R.E. 505(f)(3)(B).

A detailed docketing order is warranted to ensure efficient proceedings in this case because of the inherent complexity of courts-martial involving classified discovery and evidence procedures. Unlike with most unclassified documents and information, the Trial Counsel cannot simply turn over classified information to the Defense Counsel

or to the court as part of its disclosures, in response to discovery requests, or for any other purpose. Instead, any disclosure or dissemination of classified information in this case must be done in accordance with the restrictions and requirements of Executive Order 13526, Classified National Security Information, dated 29 December 2009, and M.R.E. 505. Executive Order 13526 establishes that classified information may not be freely distributed by an agency with access to that information. See Executive Order 13526, sec. 4.1(i)(1) (permitting the dissemination of classified information originally classified on or after 27 June 2010 only to another Executive Branch agency by any agency to which it has been made available and permitting the originating agency to require prior consent before any further dissemination); Executive Order 13526, sec. 4.1(i)(3) (stating that classified information created prior to 27 June 2010 cannot be disseminated outside any agency to which it has been made available without the consent of the originating agency).¹

The impact of this order to these proceedings is that Trial Counsel and any potential witnesses cannot disclose classified information to Defense Counsel, and neither counsel (Government and Defense) nor witnesses can disclose classified information during court-martial proceedings, without the approval of the original classification authority [hereinafter "OCA"].² This requirement is in addition to Executive Order 13526, section 4.1(a) requirements that a person accessing classified information must have a security clearance, has signed a nondisclosure agreement, and has a "need to know" the information. These requirements are not superseded by the Rules for Courts-Martial or the Military Rules of Evidence. See M.R.E. 505(a) ("Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information."). The cited provisions of Executive Order 13526 warrant a docketing order setting forth specific dates for Defense discovery requests. These discovery request deadlines are required to allow Trial Counsel to verify the Defense Counsel and all members of the Defense team that will require access to classified information have appropriate clearances, that they have signed required nondisclosure agreements, and that the OCAs have provided consent to disclose the classified information to the Defense.

Military Rule of Evidence 505 provides additional procedural guidance for the disclosure or use of classified information during UCMJ proceedings that further warrant the establishment of a detailed docketing order. The rule also establishes that an agency or military department can assert a privilege over classified information. M.R.E. 505(a) ("Classified information must be protected and is privileged from disclosure if disclosure would be detrimental to the national security."). The rule sets detailed procedures for both access to classified information by the Accused and Defense Counsel, and the use of classified information in trial and pretrial proceedings by either

¹ Because the Accused's misconduct occurred on 30 June 2009, which is well before 27 June 2010, most of the classified information at issue in this case will likely be subject to the Executive Order 13526, sec. 4.1(i)(3) requirement that any further dissemination of classified information requires the express consent of the originating agency.

² In accordance with Executive Order 13526, sec. 1.3, only specified individuals within the Executive Branch are permitted to originally classify information. These individuals—senior personnel within Executive Branch agencies and military commands—are known as original classification authorities.

party. See M.R.E. 505(h) (governing discovery and access by the accused); M.R.E. 505(j) (governing procedures for use of classified information in trial and pretrial proceedings).

The first step to facilitating the disclosure of classified information in any manner in connection with these proceedings is that the Defense must notify the Trial Counsel in writing. M.R.E. 505(i)(1) ("If an accused reasonably expects to disclose, or to cause the disclosure of, classified information in any manner in connection with any trial or pretrial proceeding involving the prosecution of such accused, the accused must, within the time limit specified by the military judge or, where no time is specified, prior to arraignment of the accused, notify the trial counsel and the military judge in writing."). This notification "must include a brief description of the classified information." M.R.E. 505(i)(2).³ The M.R.E. 505(i) notification requirement applies both "when the defense seeks classified information from the Government or when the defense has determined that it reasonably expects to disclose classified information in the course of a proceeding." *U.S. v. Schmidt*, 60 M.J. 1, 2 (C.A.A.F. 2004).⁴ The M.R.E. 505(i) notice requirement logically must apply to both Defense requests to review classified information and expected use of classified information at trial because the originating agency or military department can assert the United States' classified information privilege during discovery. M.R.E. 505(h)(1)(A). Without proper notice in accordance with M.R.E. 505(i), the Trial Counsel would be unable to consult with the appropriate officials within the agency or military department that originated the classified information to determine whether those officials will seek to assert the classified information privilege. The Defense requirement to notify is a continuing duty, and the Defense must provide supplementary notifications as soon as possible after it learns of additional classified information that it reasonably expects to disclose or cause the disclosure of. M.R.E. 505(i)(3). A docketing order must therefore address and set deadlines and requirements for M.R.E. 505(i) notifications to ensure Trial Counsel can consult with the appropriate officials to determine whether they will assert the United

³ In order to efficiently proceed in this court-martial, the Defense notification should be sufficiently detailed to allow the Trial Counsel to identify the specific classified information the Defense seeks, identify the OCAs responsible for that information, and seek OCA consent to permit disclosure of the classified information to the Defense and during UCMJ proceedings. Without this information, Trial Counsel will not know exactly what classified information the Defense seeks access to, will not be able to determine from which agency or military department to seek approval to further disseminate the information, and will not be able to articulate to the OCAs why the classified information is relevant and necessary to the proceedings (which could influence the agency's or department's decision whether to assert the classified information privilege or approve dissemination of the classified information). Failure to provide sufficient notification therefore sufficiently increases the risk that the Trial Counsel inadvertently seeks approval to further disseminate the wrong information, or that the agency or military department that originally classified the information will assert privilege. Because the OCA consent process could take months to complete in some cases, insufficient notification will only result in significant needless delay.

⁴ The court in this case refers to M.R.E. 505(h)(1) in an earlier version of the Military Rules of Evidence. This rule is substantively identical to M.R.E. 505(i)(1) in the renumbered current version of M.R.E. 505. See M.R.E. 505(h)(1) (2002 edition) ("If the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of such intention and file a copy of such notice with the military judge. Such notice shall be given within the time specified by the military judge under subdivision (e) or, if no time has been specified, prior to arraignment of the accused.").

States' classified information privilege and facilitate Defense access to any requested classified information over which privilege will not be asserted. See M.R.E. 505(f)(3)(A) ("At the pretrial conference, the military judge must establish the timing of...the provision of notice required by subdivision (i) of this rule....").

After receiving sufficient M.R.E. 505(i) notification from the Defense, the Trial Counsel must request the classified information contained in the Defense notification from the applicable agencies or military departments that originated the information and review it to ensure it is responsive (if the Trial Counsel do not already have access to the classified information), and then seek those organizations' OCA consent to permit Defense Counsel and the Accused to view the classified information in accordance with the requirements of Executive Order 13526. If the classified information is responsive to a proper Defense discovery request and the OCA consents to Defense view of the information, then Defense Counsel and the Accused can review the information in accordance with the requirements of Army Regulation 380-5, Department of the Army Information Security Program, and the protective order the Military Judge is required to issue in this case. See M.R.E. 505(g) ("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."). Alternately, the originating agency or military department may choose to assert the United States' classified information privilege at this stage of the proceedings. M.R.E. 505(h)(1)(A) (permitting the Government to "delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any classified information"). If privilege is asserted, the Trial Counsel will be required to submit a declaration, signed by the head or designee of the executive or military department or government agency concerned, invoking the classified information privilege and setting forth the damage to national security that the discovery of or access to the information reasonably could be expected to cause. *Id.* Regardless of whether the applicable agencies or military departments consent to the disclosure of classified information to the Defense or assert privilege over that information, it will take a significant amount of time to submit the request to the organization, recover the documents, review the documents, submit the request to disclose the information to the Defense, and seek either the OCA consent to disclose the information or the organization head (or designee) assertion of the classified information privilege. The Court should consider this in setting the timing in the docketing order.

If privilege is asserted, motions practice and Article 39(a) sessions will likely be required to address the classified information at issue. Upon an assertion of the classified information privilege in accordance with M.R.E. 505(h)(1)(A) and a motion to compel the production of the information requested by the Defense, the Military Judge will have to consider whether each individual item of classified information at issue would be "noncumulative and relevant to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing." M.R.E. 505(h)(1)(B). If the Military Judge determines the classified information is noncumulative and relevant, then the Military Judge may authorize discovery of the information, but must consider alternatives to

discovery specified in M.R.E. 505(h)(2). *Id.* The alternatives the Military Judge may authorize the Government to use include: deleting or withholding specified items of classified information; substituting a summary for the classified information; or substituting a statement admitting relevant facts that the classified information would tend to prove if disclosure of the classified information itself is not necessary to enable the Accused to prepare for trial. M.R.E. 505(h)(2)(A). The Military Judge must grant the Trial Counsel's request for an alternative to full discovery if the judge finds that the alternative "would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information." M.R.E. 505(h)(2)(C). If requested by the Trial Counsel, the Military Judge must conduct an in camera review of the Government motion for an alternative to full discovery under M.R.E. 505(h)(2)(A) and any materials submitted in support, and may not disclose this information to the Defense. M.R.E. 505(h)(2)(B). The volume of classified information at issue in this case increases the likelihood of discovery disputes that will have to be resolved pursuant to M.R.E. 505(h), and the complexity of the M.R.E. 505(h) process—which must be conducted for each item of classified information at issue—will render this a time-consuming aspect of these proceedings. The Military Judge should therefore establish deadlines for M.R.E. 505(h) motions and corresponding Article 39(a) sessions to ensure a fair and expeditious trial. See M.R.E. 505(f)(3)(B).

In addition to establishing dates for discovery and related motions practice, the docketing order in this case should also establish dates for notice and motions arising in relation to use of classified information at trial and pretrial proceedings. As previously discussed, the M.R.E. 505(i) notification requirement applies both during discovery and with regard to expected disclosure of classified information in the course of UCMJ proceedings. *Schmidt*, 60 M.J. at 2.⁵ Therefore the docketing order should set deadlines and requirements for M.R.E. 505(i) notification requirements for expected disclosure of classified information in sessions during UCMJ proceedings. See M.R.E. 505(f)(3)(A) (requiring the Military Judge to establish the timing of M.R.E. 505(i) notifications). In addition to this notification by the Defense, the Trial Counsel is required to notify the Accused of any classified information that is at issue, including the specific classified information expected to be used in trial and pretrial proceedings when that information has previously been made available to the Defense. M.R.E. 505(j)(1)(C). The Military Judge may also order the Trial Counsel to notify the Accused of information the Government expects to use to rebut any classified information to be presented by the Defense. M.R.E. 505(j)(5). The docketing order should also set deadlines for these notifications required of the Trial Counsel.

After all required notifications have been submitted, either party can move for a hearing regarding the use of classified information within the time specified by the Military Judge. M.R.E. 505(j)(1)(A) (stating that the Military Judge must conduct this

⁵ The Accused may not disclose or cause the disclosure of any classified information during trial or Article 39(a) sessions until M.R.E. 505(i) notice has been given and "the government has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in subdivision (j)." M.R.E. 505(i)(4). The Military Judge may preclude the disclosure of classified information if the Defense fails to give proper notification with respect to that information. M.R.E. 505(i)(5).

hearing and rule on the issue prior to conducting any further proceedings). At such a hearing, the Military Judge must determine whether the classified information is subject to disclosure in the proceedings because it is "relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence." M.R.E. 505(j)(1)(D).⁶ These determinations must be in writing. M.R.E. 505(j)(1)(E). If the Military Judge determines that the classified information at issue is relevant, necessary, and otherwise admissible, the Military Judge (upon motion from the Trial Counsel) may order an alternative to full disclosure, including a statement admitting relevant facts the classified information at issue would tend to prove, a summary of the classified information at issue, or any other procedure or redaction limiting the disclosure of specific classified information. M.R.E. 505(j)(2). The Military Judge must grant this motion if the alternative to full discovery would "provide the accused with substantially the same ability to make his or her defense as would disclosure of the specific classified information." M.R.E. 505(j)(2)(D). Because it is possible that classified information may be used by either or both the Government and Defense during these court-martial proceedings, the Military Judge should establish deadlines for M.R.E. 505(j) motions and corresponding Article 39(a) sessions to ensure a fair and expeditious trial. See M.R.E. 505(f)(3)(B).

The requirements discussed above apply to both documents and media, and to witness interviews and testimony. Military Rule of Evidence 505 speaks only in terms of "classified information" and does not limit this definition to any particular form. See M.R.E. 505(b)(1) ("'Classified information' means any information or material that has been determined by the United States Government...to require protection against unauthorized disclosure for reasons of national security...."). Further, the language of M.R.E. 505 addresses sanctions for failure to provide proper notifications of potential witness disclosure of classified information. See M.R.E. 505(i)(5) (stating that the Military Judge may prohibit the examination by the Accused of any witness with respect to classified information regarding which the Defense failed to provide proper notification); M.R.E. 505(k)(2) ("During the examination of a witness, trial counsel may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible"). Without consent of the applicable OCAs, potential witnesses will be barred from discussing classified information with Defense Counsel, or from testifying during court-martial proceedings. See Executive Order 13526, sec. 4.1 (discussion *supra*); M.R.E. 505(a) ("Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information."). Consequently, the docketing order in this case should also address the timing and content of witness lists and production requests to ensure a fair and expeditious trial. See M.R.E. 505(f)(3)(B).

⁶ During presentencing proceedings, relevant and necessary classified information can only be admitted if no unclassified version of the information is available. M.R.E. 505(j)(1)(D). If the classified information at issue is not provided to the Military Judge after a reasonable period of time to allow the judge to make a determination under M.R.E. 505(j), the Military Judge must dismiss the charges or specifications to which the classified information relates if "proceeding with the case without such information would materially prejudice a substantial right of the accused." M.R.E. 505(f)(5).

III. Government's Proposed Timing for Docketing Order

Based on its experience to date in facilitating Defense reviews of classified information in the course of this case, Trial Counsel request that the Court adopt the proposed scheduling detailed below in its docketing order. Trial Counsel have previously executed the process of collecting classified information from different custodians throughout the Government, reviewing that information, compiling the information (in some cases in response to Defense request), identifying the OCAs responsible for that information, seeking OCA consent to disclose that information to Defense Counsel and the Accused, and arranging Defense Counsel review of the information at a central secure facility during these UCMJ proceedings. Based on this experience and its understanding of the volume of classified information in this case, the Government proposes the initial timing estimates below for the docketing order in this case. Trial Counsel will potentially disclose to the Defense information from a diverse set of agencies, departments, and commands, several of which are outside of the Department of Defense. Although the Trial Counsel will work diligently with these entities to facilitate Defense Counsel views according to the timeline below, the timing will ultimately be subject to those agencies' ability to respond to Government requests for consent to disseminate classified information to the Accused and the Defense team in a timely manner. Further, the proposed scheduling below does not account for additional Defense requests to review classified information which may occur after the initial Defense discovery requests. Although Trial Counsel will endeavor to expeditiously collect, review, and seek OCA consent for these documents, any additional Defense requests for discovery or witness interviews could require additional reviews, motions practice, and Article 39(a) sessions, therefore delaying the anticipated earliest available date for trial in this case. These factors may necessitate adjustment of any scheduling in the Court's docketing order.

Government Proposed Scheduling for Docketing Order:

Action	Proposed Scheduling
Defense Review of Section III Classified Information	Prior to Arraignment
Defense Discovery and Witness Interview (Regarding Classified Information) Requests (M.R.E. 505(i); R.C.M. 701; R.C.M. 703)	20 January 2016
Initial Defense Review of Classified Information; Initial Available Dates for Witness Interviews Regarding Classified Information ⁷	Week of 22 February 2016
Second Defense Review of Classified Information; Second Available Dates for Witness Interviews Regarding	Week of 28 March 2016

⁷ The Government proposes several scheduled dates for Defense reviews of classified information at a central secure facility convenient to Defense Counsel. In addition to these scheduled dates, the Trial Counsel will also work with Defense Counsel to schedule additional dates for Defense reviews of classified information that are convenient to Defense Counsel's schedule and trial preparation. This initial Defense review of classified information will focus on mandatory disclosures required by the Trial Counsel, including initial disclosures under R.C.M. 701(a)(6).

Classified Information ⁸	
Initial M.R.E. 505(h) Motions	25 April 2016
Responses to Initial M.R.E. 505(h) Motions	2 May 2016
Initial M.R.E. 505(h) Motions Article 39(a) Session	16 May 2016
Second Defense Discovery and Witness Interview (Regarding Classified Information) Requests (M.R.E. 505(i); R.C.M. 701; R.C.M. 703)	6 June 2016
Third Defense Review of Classified Information; Third Available Dates for Witness Interviews Regarding Classified Information	Week of 20 June 2016
Secondary M.R.E. 505(h) Motions	27 June 2016
Responses to Secondary M.R.E. 505(h) Motions	5 July 2016
Secondary M.R.E. 505(h) Motions Article 39(a) Session	18 July 2016
Defense Notifications for Use of Classified Information at Trial and Witness Lists/Production Requests (M.R.E. 505(i); R.C.M. 701; R.C.M. 703)	25 July 2016
Trial Counsel M.R.E. 505(j)(1)(C) Notifications to Defense	25 July 2016
R.C.M. 806 and Classified Sessions Procedures Motion ⁹	1 August 2016
Response to R.C.M. 806 and Classified Sessions Procedures Motion	8 August 2016
R.C.M. 806 and Classified Sessions Procedures Motion Article 39(a) Session	22 August 2016
Fourth Defense Review of Classified Information; Fourth Available Dates for Witness Interviews Regarding Classified Information	Week of 26 September 2016
M.R.E. 505(j) Motions	3 October 2016
Responses to M.R.E. 505(j) Motions	10 October 2016
M.R.E. 505(j) Motions Article 39(a) Session	24 October 2016
Trial Counsel M.R.E. 505(j)(5) Notification of Classified Rebuttal Information to Defense	26 October 2016
Earliest Estimated Trial Date	31 October 2016

⁸ The Government estimates it will take approximately two months following Defense notifications under M.R.E. 505(i) to collect and review any classified information requested, interview any proposed witnesses to determine the proper OCAs for the classified information they possess, identify all OCAs for the requested classified information, prepare review requests for these OCAs, give the OCAs sufficient time to review the classified information (including verifying current classification of the materials, ensuring there is no information classified by another OCA within the materials, and making a determination as to whether to assert privilege), receive OCA responses to these review requests, and prepare the materials requested by the Defense for Defense review at a pre-determined secure facility. This process may require longer in some instances if the OCA is required to review a large volume of documents or consider disclosure of particularly sensitive classified information.

⁹ This motion may be submitted earlier than scheduled if it becomes likely that an Article 39(a) session will require discussion of classified information.


CONCLUSION

Based on the above, the Government respectfully requests that the Court hold a pretrial conference under Article 39(a) to consider matters related to classified information that may arise in connection with this court-martial. The Government further requests that the Court establish a docketing order consistent with the proposed Government scheduling in Part III of this motion during this pretrial conference.

A handwritten signature in black ink, appearing to read 'M. 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 Article 39(a) Pretrial Conference and Docketing Order Pursuant to Military Rule of Evidence 505(f) to Defense Counsel via email on 14 December 2015.

A handwritten signature in black ink, appearing to read 'MPetrusic', with a long horizontal flourish 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 _____"

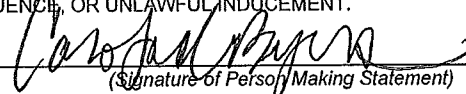
THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT, AND PAGE NUMBER. MUST BE INDICATED.

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

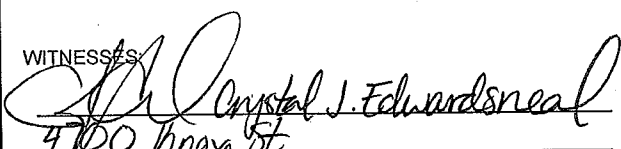
9. STATEMENT (Continued)

AFFIDAVIT

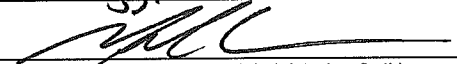
I, Carolyn M. Byers, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1, AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT.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


(Signature of Person Making Statement)

WITNESSES:


Crystal J. Edwardsneal
4700 Innex 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 of Person Administering Oath)

CPT Michael Petrusic
(Typed Name of Person Administering Oath)

Article 136, UCMJ
(Authority To Administer Oaths)

ORGANIZATION OR ADDRESS



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

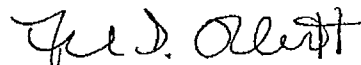
2. Discussion

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 2005

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.

Encl



LAJOY ASSENT
Chief, Security Division

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

SECRET//NOFORN

UNCLASSIFIED WHEN SEPARATED FROM ENCLOSURES

UNITED STATES)

v.)

BERGDAHL, ROBERT (BOWE))

BOWDRIE)

Headquarters and Headquarters Company)

Special Troops Battalion)

U.S. Army Forces Command)

Fort Bragg, North Carolina 28310)

DECLARATION REGARDING
PROPER CLASSIFICATION OF
INFORMATION

27 August 2015

1. I am the Chief of Staff of United States Central Command (USCENTCOM). Pursuant to Executive Order 13526, *Classified National Security Information*, and the May 5, 2011 memorandum from the Deputy Secretary of Defense, SUBJECT: *Delegation of Top Secret Original Classification Authority*, (Tab A) I am a TOP SECRET original classification authority (OCA) for all documents that originate within or are classified by Headquarters USCENTCOM and/or its subordinate units. I have reviewed the classified information enclosed with this declaration. The enclosed information was originally classified by my organization and material classified by other organizations.
2. Based on the review of the enclosed information, I declare that the information was appropriately classified SECRET at the time it was generated based on my personal experience and knowledge and in accordance with Executive Order 13526 and applicable organization regulations. At no time has this information been declassified. The enclosed information is currently and properly classified SECRET.
3. Based on the classification of the enclosed information, unauthorized disclosure or access to the information reasonably could be expected to cause serious damage to the national security of the United States because such disclosure would expose sources and methods or compromise ongoing intelligence collection activities or operations.
4. I authorize counsel in this case to offer the enclosed information during criminal proceedings pursuant to the Uniform Code of Military Justice (UCMJ), and to elicit classified testimony from witnesses with previous access to this information at proceedings closed to the public. This includes all information enclosed to this authorization, and all of the documents previously approved for review. Any information offered into evidence during UCMJ proceedings must maintain its classification level, and be marked, stored, accessed, and handled in accordance with applicable law, regulations, and executive order. Personnel involved in the UCMJ proceedings may only have access to this information or any discussions regarding this information if they have appropriate security clearances, have signed a SF 312, and have been deemed to have a need-to-know by the convening authority, preliminary hearing officer, or a

SECRET//NOFORN

UNCLASSIFIED WHEN SEPARATED FROM ENCLOSURES

SECRET//NOFORN
UNCLASSIFIED WHEN SEPARATED FROM ENCLOSURES

military judge. Classified information that becomes part of the record of the proceedings should be sealed, and may be reviewed by appellate counsel or judicial authorities who have requisite clearances and a need-to-know.

5. My point of contact for this matter is Mr. William B. Jennings within our legal office (CCJA), reachable on 813-529-0302.

6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the information provided herein is true and correct to the best of my belief and knowledge.



MICHAEL X. GARRETT
Major General, U.S. Army

Enclosures:

TAB A: (U) Delegation of Top Secret Original Classification Authority

TAB B: [REDACTED]

Encl a: [REDACTED] (SE271)

Encl b: [REDACTED] (SE338)

Encl c: [REDACTED] (SE467-479)

Encl d: [REDACTED] (S803-808)

Encl e: [REDACTED] (S813-816)

Encl f: [REDACTED] (S894-898)

Encl g: [REDACTED] (S905-909)

Encl h: [REDACTED] (S910)

Encl i: [REDACTED]

Encl j: [REDACTED]

TAB C: [REDACTED]

Encl a: [REDACTED]

TAB C: [REDACTED]

Encl a: [REDACTED]

Encl b: (U) CENTCOM Use Request Paragraph Reference (use previously authorized)

Classified by: Mr. William B. Jennings, CCJA
Derived from: Reviewed Documents (S//NF)
Declassify on: 20250827

UNCLASSIFIED

UNITED STATES)

v.)

BERGDAHL, ROBERT (BOWE))

BOWDRIE)

Headquarters and Headquarters Company)

Special Troops Battalion)

U.S. Army Forces Command)

Fort Bragg, North Carolina 28310)

DECLARATION REGARDING
PROPER CLASSIFICATION OF
INFORMATION

28 August 2015

1. I am the Director of the Joint Personnel Recovery Agency. Per DoD Directive 3002.01, Personnel Recovery in the Department of Defense, dated April 16, 2009 (incorporating Change 1, April 4, 2013) and Executive Order 13526, Classified National Security Information, dated December 29, 2009, I am an original classification authority (OCA) for Personnel Recovery information up to and including SECRET. As the Director of the Joint Personnel Recovery Agency, I have reviewed the classified information enclosed within the four documents forwarded to us by the United States Army Trial Counsel on 14 August 2015 (SE 381, SE 414-423, SE 467-479, and SE 480). The information enclosed within these four documents contains material originally classified by my organization and material classified by other organizations.

2. Based on the review of the four documents, I declare the information classified by my organization was appropriately classified SECRET at the time it was generated based on my personal experience and knowledge, and in accordance with Executive Order 13526 and applicable organization regulations. At no time has this information been declassified. The enclosed information is currently and properly classified SECRET.

3. Based on the classification of the enclosed information, unauthorized disclosure or access to the information reasonably could be expected to cause serious damage to the national security of the United States because such disclosure would expose assessments of SERE tactics, techniques, and procedures used by personnel held in captivity; whether the captive was trained in them or not.

4. I authorize counsel in this case to offer the enclosed information classified by my organization into criminal proceedings pursuant to the Uniform Code of Military Justice (UCMJ), and to elicit classified testimony from witnesses with previous access to this information at proceedings closed to the public. Any information offered into evidence during UCMJ proceedings must maintain its classification level, and be marked, stored, accessed, and handled in accordance with applicable law, regulations, and executive order. Personnel involved in the UCMJ proceedings may only have access to this

UNCLASSIFIED

UNCLASSIFIED

information or any discussions regarding this information if they have appropriate security clearances, have signed a SF 312, and have been deemed to have a need-to-know by the convening authority, preliminary hearing officer, or a military judge. Classified information that becomes part of the record of the proceedings should be sealed, and may be reviewed by appellate counsel or judicial authorities who have requisite clearances and a need-to-know.

5. My point of contact for this matter is Mr. Daniel Shea, Chief of Staff, 703-704-2335.

6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the information provided herein is true and correct to the best of my belief and knowledge.



STEPHEN R. MOYES, Colonel, USAF
Director

Executed this 28 day of August, 2015