

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

| | | |
|----------------------------------|---|-------------------------------|
| UNITED STATES |) | Supplement to Seventh Defense |
| |) | Motion to Compel |
| v. |) | |
| |) | |
| SGT Robert B. Bergdahl |) | |
| HHC, Special Troops Battalion |) | |
| U.S. Army Forces Command |) | |
| Fort Bragg, North Carolina 28310 |) | 2 August 2017 |

The Defense supplements the Seventh Defense Motion to Compel (D APP 75) with the attached Enclosure 1. As indicated, an Assistant General Counsel for Time Warner, Inc. has confirmed that CNN possesses unaired footage from Anderson Cooper's 2015 interview with SCPO (Ret.) Hatch. We were told that Time Warner will assert privilege with respect to the footage and that a subpoena would be necessary to compel its production.

The interview in question aired on 11 September 2015. We are advised that the Government is still waiting for CNN to provide a copy of the video of the aired material on DVD for the Court. In the interim period, and as the Government has previously indicated, it can be viewed at the following links:

Part 1 – Duration: 6:16 - <http://www.cnn.com/videos/us/2015/09/11/navy-seal-speaks-bergdahl-mission-part-1-ac.cnn/video/playlists/bowe-bergdahl-hero-or-deserter/>

Part 2 – Duration: 6:24 - <http://www.cnn.com/videos/us/2015/09/11/navy-seal-speaks-bergdahl-mission-part-2-ac.cnn/video/playlists/bowe-bergdahl-hero-or-deserter/>

Even just the first few minutes of Part 1 make it completely clear that the CNN interview is directly related to the subject matter on which SCPO (Ret.) Hatch will testify. It is equally clear that the unaired portions are directly related as well. Conversations between Mr. Cooper and SCPO Hatch are interspersed with footage that is not part of the interview. The points at which the conversation is cut off make clear that additional matters related to this case were discussed but not broadcast. CNN has now confirmed that it has retained that relevant material.

CNN having confirmed its possession of relevant unaired footage, the Court should direct the Government to issue a subpoena forthwith, with an early date certain

for compliance, given the scheduled trial date. If CNN timely elects to assert some privilege, the matter should be set down for expedited briefing and argument.*



OREN GLEICH
MAJ, JA
Defense Counsel


For

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CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to Trial Counsel on 2 August 2017.



OREN GLEICH
MAJ, JA
Defense Counsel

* Under Art. 46, UCMJ, and R.C.M. 703(a), the prosecution and defense and the court-martial have “equal opportunity” to obtain witnesses and evidence, including the benefit of compulsory process. In this connection, the Defense invites the Court’s attention to Trial Counsel’s 4 August 2016 declaration in *Boal v. United States*, Civil No. 15-5407 (C.D. Cal. 2016) (dismissed per stipulation), a copy of which is attached as Enclosure 2. It and the related pleadings reveal the lengths to which the Government was willing to go a year ago when the Government was the party seeking outtakes *for use in this very case*. Those untiring efforts are in stark contrast to the approach it has taken now that the shoe is on the other foot and it is the Defense that requires an outtakes subpoena. It is difficult to imagine a clearer case for application of the Code and *Manual’s* “equal opportunity” principle. (The *Boal* pleadings can be found on PACER and at <https://bergdahldocket.wordpress.com/boal-v-united-states-c-d-cal-2016-17/>.)



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
TRIAL DEFENSE SERVICES, XVIII AIRBORNE CORPS
2-1731 ARMISTEAD AND MACOMB
FORT BRAGG, NORTH CAROLINA 28310

AFZA-JA-TDS

2 August 2017

MEMORANDUM FOR Major Oren Gleich, Defense Counsel, Trial Defense Services,
Fort Bragg, North Carolina 28310

SUBJECT: Follow-Up Phone Conversation Regarding Hatch Interview Outtakes

1. On 1 August 2017, I received a call from Kelly Black-Holmes, Assistant General Counsel for Time Warner, Inc. She was following up on an inquiry made during a phone conversation between us that took place on 27 July 2017.
2. Ms. Black-Holmes was able to confirm that CNN is in possession of unaired footage from Anderson Cooper's interview with SCPO (Ret.) James Hatch, which aired on 11 September 2015.
3. Ms. Black-Holmes was unable to give a duration amount for the footage, but described it alternatively as "not de minimis", and "a good chunk".
4. Ms. Black-Holmes stated unequivocally that Time Warner would assert privilege on the footage, and a subpoena would be necessary to compel production of it.
5. Ms. Black-Holmes stated she was available for re-contact, if we determine that she could be of assistance in the future. She gave [REDACTED] as her direct number.
6. The point of contact for this memorandum is undersigned and can be contacted at [REDACTED]

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14 *Attorneys for Defendants*

15 UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
17 WESTERN DIVISION

18 MARK BOAL, et al.
19 Plaintiffs,

20 v.

21 UNITED STATES OF AMERICA, et
22 al.
23 Defendants.

No. CV 16-05407 GHK (GJSx)

**EXHIBIT A:
DECLARATION OF
MAJOR JUSTIN C. OSHANA,
SUBMITTED IN SUPPORT OF
DEFENDANTS' OPPOSITION
TO PLAINTIFFS' EX PARTE
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND FOR
ORDER TO SHOW CAUSE**

Honorable George H. King

DECLARATION OF JUSTIN C. OSHANA

I, Justin C. Oshana, do hereby declare and state as follows:

1. I am a Major and a Judge Advocate in the United States Army, as well as the Trial Counsel assigned to prosecute United States v. Bergdahl. I make the following factual statements based on my personal knowledge and information available to me in my capacity as Trial Counsel. If called as a declarant, I could and would competently testify thereto.

2. On June 30, 2009, then-Private First Class (PFC) Robert "Bowe" Bergdahl disappeared from his place of duty at Observation Post (OP) Mest, in Paktika province, Afghanistan. When PFC Bergdahl could not be located, notification was sent through his chain of command, resulting in extensive search operations throughout the province.

3. PFC Bergdahl was captured by enemy forces at some point after leaving the OP, and he remained in captivity until May 31, 2014, when he was returned to United States military control.

4. There were two investigations conducted regarding the facts and circumstances of PFC Bergdahl's disappearance; both were conducted in accordance with Army Regulation 15-6, Procedures for Administrative Investigations and Boards of Officers. The first, conducted and completed in 2009, concluded that PFC Bergdahl intentionally deserted his post, but PFC Bergdahl's status was left in military records as "missing-captured." The second investigation, conducted and completed in 2014, after now-Sergeant Bergdahl was returned to United States military control, also concluded that SGT Bergdahl deserted his post.

5. Charges were preferred against SGT Bergdahl on March 25, 2015, and an Article 32 (Uniform Code of Military Justice (UCMJ)) Preliminary Hearing was conducted on 17 and 18 September 2015. Before a court-martial may be referred to a general court-martial, the charges must first be reviewed by an impartial officer for his recommendation as to appropriateness of the charges and disposition.

1 6. The charges against SGT Bergdahl were referred by the General Court-
2 Martial Convening Authority, General Robert B. Abrams, to a general court-martial on
3 14 December 2015.

4 7. Trial is scheduled for February 6-17, 2017. Motions hearings are scheduled
5 for August 22-24, 2016; September 28-30, 2016; October 26, 2016; December 1-2,
6 2016; and December 16, 2016.

7 8. SGT Bergdahl is charged with one specification of Desertion with intent to
8 avoid hazardous duty or shirk important service, in violation of Article 85, UCMJ, and
9 one specification of Misbehavior Before the Enemy, in violation of Article 99, UCMJ.
10 SGT Bergdahl's intent is a critical element to both charges.

11 9. SGT Bergdahl participated in 25 hours of telephone interviews with Mr.
12 Mark Boal, a film producer. Portions of the interviews were aired in the *Serial* podcast.
13 However, the vast majority of the interviews were not publicly released.

14 10. While preparing for the court-martial, I determined that unaired audio
15 recordings of interviews between Mr. Boal and Sergeant Bergdahl contained information
16 relevant and necessary to prosecution of Sergeant Bergdahl's court-martial. To that end,
17 I reached out to Plaintiffs' counsel. From approximately March 31, 2016 to
18 approximately 20 July 2016, I engaged in negotiations with Plaintiffs' counsel regarding
19 release of unaired portions of the audio recordings at issue and the issuance of a
20 subpoena calling for the production of those materials.

21 11. During those negotiations, I provided Plaintiffs' counsel a draft subpoena,
22 along with a letter outlining the prosecution's position on the state of the law regarding
23 requests from the media, and discussed the potential for an *in camera* review by the
24 military judge. At counsel's request, I agreed to postpone the issuance of the subpoena
25 until July 1, 2016. Then, due to changes of Plaintiffs' counsel, I agreed to further delay
26 issuance of the subpoena to July 22, 2016.

27 12. On 20 July 2016, Plaintiffs filed their Complaint, and on 21 July 2016,
28 following a conversation with me, Plaintiffs filed their Ex Parte Application. On 25 July

1 2016, we stipulated that the subpoena will not issue until after the Court's resolution of
2 the Plaintiffs' Application.

3 13. The prosecution remains amenable to working with the Plaintiffs regarding
4 the scope of the contemplated subpoena to reach an accommodation that is acceptable to
5 all parties.

6
7 I declare under penalty of perjury that the foregoing is true and correct.

8
9 Executed this 4th day of August, 2016, at Washington, D.C.

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12 Justin C. Oshana

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