UNITED STATES ARMY TRIAL JUDICIARY
SECOND JUDICIAL CIRCUIT, FORT BRAGG, NORTH CAROLINA

UNITED STATES OF AMERICA v. SGT Robert B. Bergdahl HHC, STB, U.S. Army FORSCOM Fort Bragg, NC 28310	**Findings of Fact, Conclusions of Law and Ruling -- Defense Motion to Disqualify Convening Authority and Vacate Referral and for Other Relief** 30 September 2016

1. The accused moves this court disqualify the convening authority and vacate the referral, and order that, in the event the charges are re-referred to court-martial and any findings of guilty are entered, the sentence may not exceed "no punishment." Before the court could rule on this motion, the defense submitted a supplemental motion and requested the court also adduce further evidence on the issue of disqualification of the convening authority. This ruling will address both the motion (D APP 38) as well as the supplement and motion to adduce further evidence (D APP 46). The defense bears the burden of persuasion on all issues.

FINDINGS OF FACT

2. I considered the pleadings of the parties, the testimony of SGT Destiny Daughtrey and General Robert Abrams, as well as all appellate exhibits submitted on the matter and not objected to by the parties. I find the following facts by a preponderance of the evidence:

a. Prior to taking command of U.S. Army Forces Command (FORSCOM) General Abrams served as the senior military assistant to the Secretary of Defense. In this position, General Abrams was present at briefings regarding the efforts to recover SGT Bergdahl from the Haqqani Network[1] and was aware of the negotiations to do so. These briefings concerned the feasibility and risk associated with the plans to recover SGT Bergdahl. After SGT Bergdahl was returned to U.S. control, General Abrams briefed the Secretary of Defense concerning SGT Bergdahl's condition while SGT Bergdahl was being treated and evaluated at a military hospital. General Abrams was not present when the AR 15-6 investigation report by MG Dahl was briefed to the Secretary of Defense. He did read the executive summary of that report.

[1] The Haqqani network is an Afghan guerilla insurgent group fighting against US-led NATO forces and the government of Afghanistan.

b. From September 2012 to July 2013, then Major General Abrams, serving as the Commanding General, 3rd Infantry Division, deployed to Afghanistan and served as the Regional Command South commander under the International Security Assistance Force (ISAF-RC South). In that position, he received briefings on efforts to recover SGT Bergdahl. However, he was never personally involved, nor were any soldiers under his command ever involved, in any efforts to recover SGT Bergdahl.

c. In his duties prior to taking command of FORSCOM, General Abrams never made a decision, exercised any command discretion or chose a course of action regarding SGT Bergdahl or efforts to recover him. He never advocated for any position regarding SGT Bergdahl or efforts to recover him. And, he never took any direct action nor ordered soldiers under his command to take direct action to recover SGT Bergdahl.

d. In approximately September 2015, after taking command of FORSCOM, General Abrams began receiving unsolicited letters from members of the public, whom he did not know advocating their opinions as to what should happen to SGT Bergdahl. Most of these letters were received after General Abrams referred the charges against SGT Bergdahl to general court-martial on 14 December 2015. After receiving the first letter, General Abrams consulted his Staff Judge Advocate who told him he was not required to retain the letters. From that time forward, General Abrams would look at the letters and, once he determined that they related to this case and were not a letter from a concerned parent regarding one of the soldiers under his command, placed the letters in the burn bag to be destroyed by one of his aides. It has been his practice for many years to treat all material for destruction as if it were top secret so as to avoid any accidental disclosure of classified material. Though he did not destroy the letters himself, he is confident they were shredded and burned according to common practice with all matter placed in the burn bag.

e. General Abrams received approximately 100 such letters. None of them claimed any first or even second hand knowledge about any facts in the case or about SGT Bergdahl personally. All of the letters, as General Abrams recalls, were from older American citizens who had served in WWII or Korea. None of the letters made any threats against SGT Bergdahl or General Abrams if he did not follow their recommendations. General Abrams did not follow up or direct any of his staff to follow up on any of the letters. He did not reflect upon them or contemplate their content. He did not consider them at all in making his decision to refer the charges in this case to general court-martial. General Abrams is very experienced with the military justice system, particularly as a General Court-martial Convening Authority (GCMCA), and is committed to his duty to be fair and impartial. Thus, he applied that principle and "tuned out the outside noise" with respect to the letters.

f. On 9 October 2015, the defense submitted objections to the Article 32 Hearing Officer's report and recommendations to the Special Court-martial

Convening Authority (SPCMCA). This four page document was included in matters submitted to General Abrams to consider as he decided whether to refer the charges in this case to court-martial or to take some other action. General Abrams read the document before making his decision.

g. Prior to referring this case to trial, General Abrams never had any communication of any kind with Senator McCain or members of his staff regarding SGT Bergdahl or efforts to recover him. Neither Senator McCain nor members of his staff have ever even attempted to contact General Abrams or members of General Abrams' staff. Though aware of Senator McCain's comments to the effect that if SGT Bergdahl were not court-martialed and sent to jail he would hold hearings on the matter, General Abrams was not affected by those comments and did not consider them in making his decision as to the disposition of the charges against SGT Bergdahl. In fact, General Abrams thought the comments were inappropriate and that Senator McCain should not have made them.

h. General Abrams has no fear of retribution to himself or his career if action he has taken or may take in this case is not consistent with Senator McCain's apparent views about what should be done. Neither Senator McCain nor anyone else has threatened or otherwise tried to forcefully influence General Abrams decisions in this case. Though several members of the general public have expressed their opinions (mostly favoring referral to court-martial) to him by mail, General Abrams did not consider nor was he influenced by any of those opinions.

i. On 19 August 2016, in response to defense motion on this matter, General Abrams prepared, swore to and signed an affidavit setting forth his recollection of what he said in an 8 August 2016 interview with defense counsel. This document was produced after his SJA asked if he would be interested in providing a statement about what transpired in the interview to be used to answer the defense motion to disqualify him (the subject of this motion). He said he would be glad to do so, he provided guidance to the SJA, the SJA office drafted the affidavit based on his guidance, General Abrams edited it between four and six times to ensure it accurately reflected his recollection of the interview and then he reviewed and signed and swore to the final version. All the words in the affidavit are his own. During the course of the production of this affidavit, General Abrams occasionally dealt directly with trial counsel without any member of the defense team being present.

j. No member of the prosecution team has ever given General Abrams legal advice. He has received his legal advice on this and all other military justice matters before him from his Staff Judge Advocate.

k. In October and November of 2015, trial counsel submitted, thru the Staff Judge Advocate, requests to General Abrams that 10 additional attorneys be appointed to the prosecution team on temporary duty status. General Abrams

approved those requests. The requests were not provided to the defense until after they were approved.

l. On 14 December 2015, General Abrams referred the charges against SGT Bergdahl to General Court-martial. This decision was contrary to the advice of the Article 32 PHO but consistent with the pre-trial advice of his SJA. That pretrial advice was provided to the defense along with the referred charges and other papers normally accompanying the charge sheet when served upon the defense.

m. Between January and May 2016, General Abrams approved several requests for expert assistance from the prosecution. These requests and approvals were not provided to the defense until after they were approved. Defense objected to trial counsel about what they characterized as *ex parte* communications with the GCMCA about the case.

n. At some point during the pendency of the Article 32 preliminary hearing in 2015, the government sent some *ex parte* emails to the Article 32 PHO, LTC Burke. Some of these emails concerned certain defense requests about the Article 32 hearing and included draft responses to the defense requests for LTC Burke to sign. He signed them unedited denying the defense requests.

o. When defense first requested to interview General Abrams, he denied the request. Later, at the Court's suggestion, he agreed to be interviewed by the defense. However, he stipulated that trial counsel must be present. On 8 August 2016, the interview was conducted with trial counsel present.

p. The defense has requested to interview the SJA about trial counsel contacts with General Abrams. The SJA has denied these requests.

LAW AND ANALYSIS

3. The military justice system has a unique construct. This construct was put in place by Congress decades ago to ensure that the balance between the rights of the accused and good order and discipline in the armed forces of this nation were properly balanced. As with every other endeavor to balance such interests, certain adjustments have been made through the years to better accomplish both goals. One aspect of the court-martial process that has never changed is that no commander with the authority to convene a court-martial may do so in a case where he is an accuser. Rule for Courts-Martial (RCM) 601; Uniform Code of Military Justice (UCMJ), Article 22. An accuser is defined by the UCMJ as: ". . . a person who signs or swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any person who has an interest other than an official interest in the prosecution of the accused." UCMJ, Article 1(9). Thus, a commander,

who is the person who swore the charges and signed the DD Form 458 preferring the charges, cannot be the same person who refers those charges to court-martial. This is known as a "statutory disqualification." ***United States v. Hill,*** **46 MJ 870 (ACCA 1997). It also goes without saying that a person serving as trial counsel in a case cannot also refer the case to trial and otherwise serve as convening authority pre or post-trial.[2] Likewise, a person who is the victim of a crime or has such a personal interest in the outcome of a case that a reasonable person could impute to him a personal interest or feeling in the outcome of the case, may also be considered an accuser and, thus, disqualified from acting as a convening authority in that particular matter.** ***United States v. Ashby 68 MJ 108, 130 (2009); United States v. Jeter,*** **40 MJ 6 (CMA 1992).[3] A personal or other than official interest in the prosecution of a particular case has not been ascribed to a commander who testified on a dispositive suppression motion. He was not disqualified from taking post-trial action in the case.** ***United States v Gudmundson,*** **57 MJ 493 (2003). In** ***Gudmundson,*** **the court stated that a convening authorities' testimony at trial is not** ***per se*** **disqualifying but may be so if it indicates that he has a personal connection to the case or is other than of an official or disinterested nature.** ***Id.*** **No case has held that a convening authority loses his objective non-personal status if he has** ***ex parte*** **communications with the trial counsel or the defense counsel. In fact, quite the opposite is true by analogy. In** ***United States v. Fisher*****, 45 MJ 159 (1996), the convening authority was not found to be a personal accuser and, thus, disqualified as the convening authority in a case where he made statements critical of the defense counsel during the trial and after the convening authority had testified for the government on a suppression motion. If not a personal accuser when he criticizes the defense counsel as if he were a prosecutor, one is left to wonder how he could be considered an accuser (or prosecutor) in a case where he has had** ***ex parte*** **communications with the trial counsel.**

4. The consideration of the law on accuser disqualification is important to the defense's contention that General Abrams, because he is the GCMCA, is precluded from having ***ex parte*** **communications with the parties to this proceeding. The defense cites no law for this proposition. And, the law discussed above points the other way. In order to sustain a motion to disqualify the convening authority, the defense needs to prove that he has lost (or never had) a neutral and detached position and instead has become personally involved in the prosecution of the case. Nothing about** ***ex parte*** **communications with the prosecutors in this case, in-and-of themselves, proves that to be the case. Even if one assumes for the sake of argument that such** ***ex parte*** **communications are prohibited by law, there is no**

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[2] Article 6(c), UCMJ.

[3] A convening authority suspected of a similar offenses may be disqualified out of an abundance of caution to preserve the appearance of fairness. *United States v. Kroop,* 34 MJ 628 (AFCMR 1992), *aff'd* 38 MJ 470 (CMA 1993), *United States v Anderson 36 MJ 963 (AFCMR 1993);* Convening authority disqualified from taking post-trial action in a drug case where he made public comments indicating an inelastic attitude concerning his post-trial responsibilities. *United States v Davis,* 58 MJ 100 (2003); *see also, United States v Thomas,* 22 MJ 388, 394 (CMA 1986) (Listing examples of unofficial interests that have disqualified convening authorities.) .

indication that, even if they occurred, they converted General Abrams into just another member of the prosecution team. What is more, the only communications the defense can point to involve the prosecution interview of General Abrams as a witness to prepare an affidavit on a motion and requests for him to take favorable action regarding resourcing this case for the government and the defense. The defense contends that those are *ex parte* communications to him in his role as convening authority, which the defense contends is a quasi-judicial role. Assuming, without deciding, that is true, this Court is left wondering how any of that has or could prejudice the rights of the accused unless those communications can be said to have converted him into a *de facto* trial counsel -- a conclusion wholly unsupported by the evidence.

5. The defense contends that General Abrams is disqualified because of "prior involvement" in the case. This prior involvement consists of his receiving briefings about actions being taken to recover the accused when General Abrams was the two-star commander of ISAF-RC South in 2012 and again when he served as senior military advisor to the Secretary of Defense from September 2012 - June 2015. General Abrams testified plainly, and there is zero contradictory evidence, that he was never personally involved, nor were any soldiers under his command ever involved, in any efforts to recover SGT Bergdahl from enemy control. Additionally, in none of his duties prior to taking command of FORSCOM, did General Abrams ever make a decision, exercise any command discretion or chose a course of action regarding SGT Bergdahl or efforts to recover him. He never advocated for any position regarding SGT Bergdahl or efforts to recover him. And, he never took any direct action nor ordered soldiers under his command to take direct action to recover SGT Bergdahl. In short, all of his involvement regarding SGT Bergdahl at the time were tangential, official, are highly unlikely to make him a fact witness and evince absolutely zero "personal interest in the matter or interest relating to matters that effect his ego, family and personal property." *Ashby*, at 130. And, to reiterate, no case has ever held that a commander who was also a witness was *per se* disqualified because of personal interest.[4]

6. The defense contends the General Abrams must be disqualified because he "referred the charges without considering defense objections to and comments on the report of the (Article 32) preliminary hearing officer. Here again, the defense cites no legal authority for the proposition that a convening authority is required to consider the document to which they refer before he makes his decision whether to

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[4] In D APP 46, the defense contends that a classified document discovered by the defense after their initial motion on this matter (D APP 34) indicates that General Abrams was not completely forthcoming when he characterized is involvement in the recovery of the accused when he was ISAF RC South Commander. The court has reviewed that classified document in camera and is completely satisfied that rather than contradict, that document (now marked as D APP 48 and secured in an appropriate CI storage facility) supports General Abrams characterization of his exposure to issues relating to this case when he served in that capacity. Furthermore, trial counsel averred in open court without contradiction from the defense that they had spoken to General Abrams about D APP 48 and the briefing referred to in that document never occurred.

refer charges to court-martial. The document to which the defense refers is a document the RCM allows them to provide to the Article 32 appointing authority (LTC Burke) for him to consider and take action to correct deficiencies if he deems necessary. RCM 405 (j)(4). The document in question in this case was appropriately addressed to LTC Burke, not General Abrams. Additionally, RCM 405 (j)(4) allows the GCMCA to take action even before the deadline for submission of this document has passed. Finally, In spite of some initial confusion on the issue and defense's contentions to the contrary, the court is persuaded that General Abrams did read this document before making his decision on referral. He testified convincingly that he had read it and had been misunderstood at the interview with the defense on 8 August in which the defense took him to say that he had not read the submission. The fact that he found it poorly written and unpersuasive, as he testified, is no more basis for challenging his impartiality than if he hadn't read it all. Whatever the case, he was not required to read it or consider it in making his decision. That he did so only indicates that he and the SJA wanted to give the defense a fair shake to try to persuade him in writing that he should follow the recommendations of the Article 32 HO and not refer the case to a General Court-martial. Nothing about the facts and circumstances of this event indicate in the least that General Abrams had an interest in this matter affecting his ego, family or personal property such that any reasonable person could conclude that he had a persona interest in the matter. *Id.*

7. The defense also contends that General Abrams should be disqualified because he destroyed evidence favorable to the defense when he allowed certain letters he received from private citizens expressing their opinions about this case to be burned. General Abrams testified convincingly that these letters were from private citizens, not members of the military, that they were split nearly evenly in their opinions about what should be done, that he destroyed them because he found them irrelevant and because he applied a precaution in his office to shred and burn all discarded paper to prevent potential leakage of classified information, and that nothing about anything that was written in any of those letters affected his decision in the least. In fact, most of the letters were received after he had already referred the case to court-martial. He further testified convincingly that none of the letters contained any information of first or even second hand knowledge about the facts in the case or about SGT Bergdahl. They were all letters from citizens expressing their personal opinions. The defense contention that these letters, had they been provided to the defense, might have been used as mitigation evidence in a sentencing case, should one be necessary here, is unsupported by the law. The cases defense cites for this proposition (*United States v. Gaskins,* 69 MJ 569, 570 (ACCA 2010) and *United States v. Ryan,* 2014 CCA LEXIS 217 (AFCCA Mar. 28, 2014)) stand only for the proposition that letters of support reference the accused's character were admitted during sentencing. They do not stand for the proposition that the defense is allowed to have anyone provide any type of evidence that expresses an opinion as to the disposition of the charges or the punishment the accused should receive, should he be found guilty. In fact, such evidence is not admissible from either the government or the

defense. *United States v. Eslinger*, 70 MJ 193, 198 (2011). The defense speculation that the letters could have contained evidence admissible in sentencing beyond such improper opinions is not supported by the evidence. First, General Abrams testified that none of them contained any firsthand knowledge of the facts of the case or the accused. Second, the one letter that he received of which a copy was preserved supports this testimony. Finally, presumably, anyone who might have written General Abrams who knows the accused well enough to have the knowledge to speak to his character certainly should be known by the accused and his defense counsel. Surely, there are a plethora of individuals who can provide such evidence if needed. Any chance that there is one among the letters received by General Abrams who knows the accused, expressed a favorable opinion as to his character and, yet, is unknown to the accused or his counsel and thus, his or her favorable testimony lost to the defense, will certainly be overcome by other similar, more reliable evidence the defense may produce on this issue. Whatever the case, the court has heard no evidence or law that stands for the proposition that the defense posits on this issue.

8. Also, in its prayer for relief in D APP 46, the defense urges this court to:

1.) Hold the Motion to Disqualify (D APP 34) in abeyance until new evidence can be taken and a hearing held. The Court held its ruling in abeyance until a 39(a) session could be held on 28 September 2016. Because the Court does not believe additional evidence is necessary on this issue and will not order the SJA to make herself available for an interview, further abeyance is not necessary.

2.) Order the government to disclose all of its *ex parte* communications with the GCMCA. The court declines to do so. In its pleadings on this matter, the government has represented as officers of this court that no member of the prosecution has ever provided any legal advice to General Abrams or advocated any position to him concerning referral of these charges, appointment of experts or other members of the trial and defense teams, the extension of the accused's ETS date or the decision regarding the accused's request for administrative action (see D APP 44). The defense has presented no evidence to this court to indicate otherwise. Simply put, not all contacts with the convening authority are prohibited and some are even required by the law. Contacting him *ex parte* as a witness on a motions hearing is not evidence that other more nefarious and potentially improper contacts have occurred.

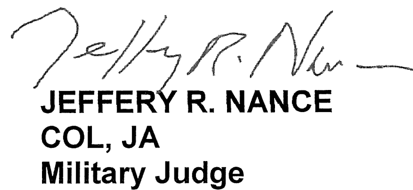
3.) Direct the SJA make herself available for an interview. Nothing submitted by the defense supports this request.

9. In summary, nothing about General Abrams involvement in this matter to date disqualifies him in any way from serving in the capacity of convening authority in this case. He has no personal knowledge of the facts of the case, he has not destroyed

evidence in the case, he has not been improperly influenced by Senator McCain, letters from the public or the trial counsel in the performance of his duties as convening authority, and he did not improperly ignore the defense submissions to the Article 32 appointing authority as he was deciding whether to refer the charges to trial. Any *ex parte* communications he may have had with trial counsel were not inappropriate and do not disqualify him as the convening authority. And, he is not disqualified merely because he was a witness in the motions hearing to resolve the facts surrounding this defense motion to disqualify him.

RULING

10. Defense motion is DENIED.



JEFFERY R. NANCE
COL, JA
Military Judge