

**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 Continuance
BERGDAHL, ROBERT BOWDRIE)	
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	27 October 2016
Fort Bragg, North Carolina 28310)	

RELIEF SOUGHT

The Government requests that the deadline for invocation of privilege under Military Rule of Evidence (MRE) 505(h) be extended from 1 November 2016 to 1 February 2017. Accordingly, the Government also requests that the Court grant a continuance under Rule for Courts-Martial (RCM) 906(b)(1) and docket this case for trial beginning on 1 May 2017. The Government does not request oral argument.

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. RCM 905(c).

FACTS

The Government incorporates the facts alleged in previous filings. In addition, the Government alleges the following.

Between 30 June 2009 and 31 May 2014, multiple governmental organizations gathered intelligence, physically searched for the Accused, and attempted diplomatic solutions to effect his release. Due to the duration of the Accused's captivity, these organizations generated an enormous amount of information, most of it classified, pertaining to the Accused.

To date, the Government has reviewed over 300,000 documents comprising over 1.3 million pages it received from organizations in response to prudential search requests (PSRs). In the course of its review of those documents, the Government has identified approximately 35,000 unclassified, Secret, and Top Secret (TS) documents that are disclosable to the Defense and which total approximately 300,000 pages. The

Government returned those documents to the organizations responsible for the classified information (CI) so that those organizations could review the CI and determine whether they would provide consent for Defense to view the documents or whether they would invoke the United States' CI privilege in accordance with MRE 505(h).

Of the approximately 35,000 disclosable documents, the Government has already disclosed over 20,000 documents to the Defense (including 5,000 documents since the previous MRE 505(h) deadline of 1 August 2016) and has consent from Original Classification Authorities (OCAs) to disclose approximately 8,400 additional unclassified, Secret, and TS documents. The process of disclosing TS documents to the Defense after receiving approval from agencies is particularly time intensive. It requires the Government to save the documents to a pdf format, apply redactions of nondisclosable information, and then bates number each page before moving the document to a TS portal for the Defense to access. Of the 35,000 disclosable documents, approximately 6,000 Secret and TS documents are currently under review by governmental organizations to determine if they will invoke the CI privilege. The Government expects the organizations will invoke privilege over these documents or will provide permission to disclose these documents to the Defense on a rolling basis over the next 90 days.

A significant number of the documents that the Government has reviewed and deemed disclosable contain information derived from multiple organizations. Because some documents contain information compiled from multiple agencies, the Government must notify each agency involved for a particular document in order to allow each agency the opportunity to invoke privilege. Some documents contain extremely voluminous link network charts. Each link may be comprised of several reports originating from a variety of agencies. A document cannot be made available to the Defense until all agencies provide consent to disclose the document. The Government must analyze each of these enormous files, identify disclosable information and the originating agencies, and coordinate with each of the agencies for approval to disclose the information.

Additionally, the Government must also review documents that will be provided by the National Security Council (NSC). These documents were not the subject of any of the initial PSRs, but were identified after reviewing material from the Department of State. The Government is currently coordinating with the NSC for review of those documents.

Of the 28 OCAs, the Government anticipates that the following four organizations will invoke the CI privilege IAW MRE 505(a):

1. Organization 1¹ has already invoked the CI privilege on documents it provided the Government in response to a PSR. Organization 1 will invoke the CI privilege on a second batch of approximately 850 documents provided by

¹ The Government is submitting contemporaneously with this motion a classified, *ex parte* notice to the Court identifying Organizations 1, 2, and 3.

different agencies but containing Organization 1 equities. Due to the coordination necessary to invoke the CI privilege over these documents, Organization 1 will invoke privilege over some, but not all, of the 850 documents by the 1 November deadline. The Government expects a more detailed explanation will be provided to the Court in a declaration from Organization 1 filed *in camera* and *ex parte* on or before 1 November.

2. Organization 2 has already invoked the CI privilege on the disclosable documents it provided to the Government in response to a PSR. Organization 2 will invoke the CI privilege on a second batch of approximately 550 documents provided by different agencies but containing Organization 2 equities. Due to the coordination necessary to invoke the CI privilege over these documents, this invocation will not occur prior to the 1 November deadline. For a small number of the documents, Organization 2 has informed the Government that it will take eight weeks or more to meet the statutory requirements necessary to invoke the CI privilege. A more detailed explanation will be provided to the Court in a declaration from Organization 2 filed *in camera* and *ex parte* on or before 1 November.
3. Organization 3 will invoke the CI privilege on three disclosable documents provided by other agencies but containing Organization 3 equities. The Government expects this invocation will occur on or before 1 November.
4. The Department of State may invoke the CI privilege on an undetermined number of documents provided to it by the Government. The Department of State will likely not complete its determination of whether to invoke privilege prior to the 1 November 2016 deadline.

The most recent statement to the Court made by the Defense concerning its progress in reviewing documents noted that the Defense had reviewed less than 10 percent of the documents that had been disclosed to them and that the Defense required e-discovery software to assist in their review of the documents. On 14 October 2016, the Defense submitted a request to the convening authority for e-discovery software and associated hardware. The request was approved the same day. The Government is now coordinating with the Fort Bragg Mission and Installation Contracting Command office to ensure that all applicable contracting requirements are fulfilled. To the extent possible, the Government continues to expedite the processing of this action.

WITNESSES/EVIDENCE

No evidence is required for the resolution for this motion.

LEGAL AUTHORITY AND ARGUMENT

“The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just.” Discussion to RCM 906(b)(1).

MRE 505(h)(1)(A) states that “the trial counsel must submit a declaration invoking the United States’ classified information privilege and setting forth the damage to the national security that the discovery of or access to such information reasonably could be expected to cause.” The Army Court of Criminal Appeals has held that “the agency head or designee must be provided with the opportunity to assert the government privilege under Mil. R. Evid. 505(h)(1)(A) before any classified information is released to any party.” *United States v. Bergdahl*, 2016 CCA LEXIS 274, 10 (Army Ct. Crim. App. 2016).

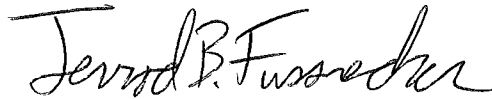
For over 80% of the documents (nearly 29,000 of 35,000 documents), the OCAs will have either granted view permission or will have invoked privilege by the current deadline of 1 November 2016. Several OCAs have determined that more time is required to ensure that they are given the opportunity to assert the CI privilege over their remaining information. The Government requests an extension of the MRE 505(h) deadline to 1 February 2017 to accommodate timelines provided by the OCAs.

Given that the Defense must still review the vast majority of documents in this case and is in the process of procuring e-discovery software to assist in their review, the Government believes that an extension of the 505(h) deadline to 1 February 2017 will not significantly delay discovery in this case, nor prejudice the Accused, because the Defense will need the intervening time to review the approximately 20,000 documents already provided to it and the 8,400 documents the Government is in the process of turning over to the Defense. The Government has enclosed a new scheduling worksheet outlining proposed dates for the remaining deadlines, culminating in a 1 May 2017 trial date.

After the MRE 505(h) deadline, the Defense’s MRE 505(i) notice and a corresponding MRE 505(j) hearing, if necessary, could potentially impact the projected trial date. MRE 505(i) and (j) require the Government to coordinate with the OCAs for permission for the Defense to use any classified information at trial or at a pretrial proceeding. The amount of time the Government requires to coordinate with OCAs between when 505(i) notice is provided by Defense that it intends to use CI and a 505(j) hearing or subsequent use at trial or a pretrial hearing is dependent on the volume of materials requested by the Defense and the sensitivity of the material. The Government therefore requests that for the documents the Defense receives access to prior to 1 November 2016, the Defense provide MRE 505(i) notice by 17 January 2017. In addition, the Government requests the Court schedule discovery status updates for 16 December 2016 and 18 January 2017.

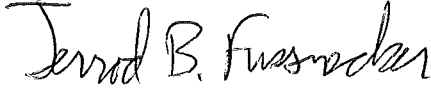
CONCLUSION

The Government has already completed the majority of its discovery obligations. However, an extension to the 505(h) deadline is necessitated by the need for OCAs to finalize their decisions to either invoke privilege over or disclose the remaining minority of documents pending OCA review. Additionally, the Government would use the extension to conduct review of documents that will be provided by the NSC. The Government believes this additional time will also allow the Defense to review the material already provided to it. Therefore, the Government requests that the Court extend the 505(h) deadline to 1 February 2017 and grant a continuance to move the start date of the trial to 1 May 2017.



JERROD B. FUSSNECKER
MAJ, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above Government Motion for Continuance to Defense counsel via email on 27 October 2016.


JERROD B. FUSSNECKER
MAJ, JA
Trial Counsel

Scheduling Worksheet – U.S. v. Bergdahl

<u>Event</u>	<u>Proposed Date</u>
Notice of Request for Daubert Hearing – Both sides	G: N/A D:
Defense Discovery Requests	G: The Defense has already submitted a number of discovery requests. D:
Defense Motion to Compel Discovery and Government Response	G: Complete, understanding that newly disclosed CI or other materials may require supplemental requests. D:
Defense Request of Expert Assistance (if any) to TC	G: Complete D:
Defense Motion to Compel Expert Assistant (Gov. Response within 3 duty days)	G: Complete D:
Government 404(b) notice to defense	G: Complete D:
MRE 404(b) MIL by Defense (if any) and any other Evidentiary Motions	G: Complete D:
Government Provide Proposed Security Plan, PA Plan and Logistics Plan	G: Complete D:

Motions Hearing to Address Proposed Security, PA and Log Plan (if any)	G: Complete D:
Government Motion Under 505 (h)	G: 1 February 2017 Note: The Government may file additional motions under MRE 505(h) depending on the extent of the discovery and assertions of privilege and potential requirements to provide adequate substitutes. D:
Defense request for production of Afghan witnesses, if any	G: 1 February 2017 D:
Gov. Response to Defense Afghan Witness Production Request	G: 8 February 2017 D:
Defense Forum Election	G: 15 February 2017 D:
Defense Request for Production of Other Witnesses	G: 15 February 2017 D:
Defense Motion to Compel Production of Afghan Witnesses	G: 15 February 2017 D:
Additional Member Questionnaire Proposal	G: 15 February 2017 D:

Gov. Response to Defense Other Witness Production Request	G: 22 February 2017 D:
Gov. and Defense Notice of Expert Testimony	G: 1 March 2017 D:
Defense Notice of defenses required by RCM 701(b)(2) (MR/PLMR)	G: 1 March 2017 D:
Defense Notice requirement under MRE 505 (i)	G: 1 March 2017 (17 January 2017 for documents received before 1 November 2016) Note: The amount of time the Government requires from 505(i) notice to a 505(j) hearing and a trial/pretrial proceeding hearing involving CI is dependent on the volume of materials requested and the sensitivity of the material. D:
Motions for Appropriate Relief under RCM 903, 905, 906, 907 and Article 10.	G: 1 March 2017 (all parties) D:
Defense Motion to Compel Production of Other Witnesses	G: 1 March 2017 D:
Motions Hearing Dates – MRE 505(j). (Use CI in Trial/Pretrial Proceedings)	G: 13 March 2017 Note: The amount of time the Government requires from 505(i) notice to a 505(j) hearing and a trial/pretrial proceeding hearing involving CI is dependent on the volume of materials requested and the sensitivity of the material. D:

Motions Hearing on Witness Production	G: 14 March 2017 D:
Final Witness Lists IAW RCM 701 (Both Parties)	G: 24 March 2017 D:
General Voir Dire Question proposals	G: 7 April 2017 D: concur
TC provide seating chart, flyer and F&S Worksheets	G: 14 April 2017 D: concur
Trial Dates (List voir dire/empanelment dates separate from trial date if believed necessary)	G: Voir dire/empanelment from 1-3 May 2017 D: