

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

UNITED STATES)	Defense Response to Government
)	Motion for Partial Extension of MRE
v.)	505(h) Pretrial Order Deadline and
)	Cross-Motion to Remove Case from
SGT Robert B. Bergdahl)	the Calendar
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	28 July 2016

RELIEF SOUGHT

The government's motion is a mislabeled request for a continuance. The prosecution should be required to provide an evidentiary basis for the relief it seeks. Because it is clear that the requested extension does not offer reasonable assurance that the parties will be ready for trial on the appointed day, the case should be removed from the calendar and the parties should be directed to report to the Court when they are ready for trial.

The defense's cross-motion is without prejudice to its position that Sergeant Bergdahl has already been denied a speedy trial. Any additional time required for the prosecution to fulfill its obligations under the pretrial order is chargeable to the government.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The government, as moving party, has the burden of persuasion on the motion for partial extension of the M.R.E. 505(h) pretrial order deadline. The defense has the burden of persuasion on the cross-motion to remove the case from the docket. Proof by a preponderance of the evidence is required as to factual matters. R.C.M. 905(c)(1).

ACRONYMS

CI Classified Information
DIA Defense Intelligence Agency
FBI Federal Bureau of Investigation
ICO Intelligence Community Organization
OCA Original Classification Authority

FACTS¹

Sergeant Bergdahl is charged with single specifications under Articles 85 and 99(3), UCMJ. The charges, which plead misconduct occurring in 2009, were preferred on 25 March 2015 and referred for trial on 14 December 2015. SGT Bergdahl was a captive of the Haqqani network from 30 June 2009 to 31 May 2014, when he was released in a prisoner exchange. For over two years he has been performing regular duty at Fort Sam Houston. He has not been in pretrial confinement. He is receiving medical attention. For his own protection, his local command requires that he be accompanied by NCOs when leaving the installation for any purpose. He has requested the correction of his military records and the issuance of an Honorable discharge retroactive to the expiration of his enlistment contract on 01 October 2011.

WITNESSES AND EVIDENCE

The government maintains (at 3) that no evidence is required for the resolution of its motion, even though the motion elsewhere (at 2-3) recites a variety of facts that the defense cannot independently verify. In addition, the government claims (at 2-3 nn.1-3) that the very names of two intelligence community organizations and one military unit are classified. We do not accept those unsupported claims, which are reminiscent of the government's preposterous (and apparently now-abandoned) claim before the Army Court of Criminal Appeals that even the number of OCAs concerned with this case is classified.

The government should identify witnesses and submit documentary evidence in support of its factual contentions, rather than rely on mere assertions of counsel.

No evidence is required in connection with our cross-motion to remove the case from the docket. All pertinent materials, to include the docket, the pretrial order, and the parties' previously filings may be judicially noticed.

Copies of the documents referred to in the argument section of this submission are attached.

LEGAL AUTHORITY

1. R.C.M. 801(3)
2. R.C.M. 906(b)(1)
3. Art. 40, UCMJ

¹ The Facts section of the government's motion improperly refers to SGT Bergdahl as having "deserted from his place of duty." Both military authorities who have previously reviewed the underlying facts of the allegations that SGT Bergdahl intentionally walked off his post have to date twice declined to administratively categorize SGT Bergdahl as AWOL or deserter: his commanding general MG Curtis Scaparrotti in Afghanistan in 2009 and a Board of Inquiry convened at Human Resources Command in 2010.

ARGUMENT

The government has created a mare's nest of problems that have materially impeded the prompt administration of justice in SGT Bergdahl's case. At the threshold, it elected to tack on to the desertion charge a bespoke charge under Article 99(3), the effect of which was to generate a raft of issues that can only be examined by access to the highest levels of classified information. Why the government chose to go down this path is unknown to us, but the consequences are all too apparent. This case could have been completed long ago had the government not elected to get fancy in charging the same act in two separate charges.

The single largest cause of delay has been the government's handling of classified information. To recap:

Before the court entered its initial pretrial order, the government submitted inconsistent dates for when it would be ready for trial. In December 2015, depending on which member of the prosecution one listened to, that date was either the end of May 2016 or October 2016. The court set a date of February 29, 2016 for the government to make its M.R.E. 505(h) submissions, and indicated that it would entertain requests for adjustment of that date. Instead of requesting an adjustment, the government took an appeal under Article 62, UCMJ, and insisted on a stay of all proceedings. The Army Court disposed of that appeal on 28 April 2016. The government then sought reconsideration (waiting until the last permissible day to do so), and predictably the Army Court denied that request on 17 June 2016. We have asked whether the Government Appellate Division has asked that the case be certified for review by the U.S. Court of Appeals for the Armed Forces. Our inquiries have been ignored.²

In the course of the proceedings before the Army Court, the government repeatedly claimed that it needed more time because of the need, among other things, to coordinate with other Executive Branch agencies. It also sought more time on the basis that government lawyers were scheduled to attend training on litigating cases involving classified information. Such a program was indeed conducted at the Washington Navy Yard on 19 and 20 July 2016. Members of the defense team were there as well. One of the presenters observed that the Department of Justice does not indict until fully fleshing out discovery pitfalls and obligations.

There have been two security breaches, each of which is the government's fault. We called the first of these to the government's attention; the second one the government discovered itself and let us know about it. Both of these breaches were the subject of government notices to the Court in accordance with the Classified Information Protective Order the government itself proposed. In addition, the defense was compelled to halt

² We have also asked for a copy of any such request and for an opportunity to comment on it. Those requests also have been ignored. We mention this solely for the Court's situational awareness.

classified information work and change security officers when we fortuitously learned that our security officer was also working for the prosecution. The government was completely at fault for placing our security officer, an outstanding individual, in an insoluble conflict of interest. We are still waiting for work to be completed on a secure defense office separate from the command's workspaces.

The automatic stay did not prevent the government from continuing its efforts to complete the review and release of classified documents. We do not know which agencies have been consulted in this regard, nor do we have a reliable sense of how many documents are actually involved or when, in fact, the process will come to a final halt.³ The government refers at times to documents and at other times to pages. We are talking about hundreds of thousands of pages, obviously.

The government's motion, submitted on the last permissible day before the current 1 August 2016 deadline, offers no comfort.

ICO 1 seems to have three batches of documents. The first batch looks like it will be the subject of a claim of privilege by the 1 August 2016 deadline. The second will not meet the deadline, and the government's motion does not hazard a guess as to when privilege might be claimed for it. There is a third batch of "disclosable CI" that originated with some other (unnamed) OCA, which the government anticipates sending to ICO 1 in the next month. The motion offers no prediction as to when OC1 will function on that third batch, the size of which the government has not even hinted at. Trial counsel does not state any basis that requires withholding the names of the ICO.

ICO 2 also seems to have three batches of documents. Here again, the government asserts that it will meet the 1 August 2016 deadline for privilege claims in respect of the first batch. It will, however, miss the deadline for a second batch of documents. The motion hazards no prediction as to when a privilege claim might arise for the second batch. There is also a third batch, once again obtained from some other (unnamed) OCA – is it the same one as is referred to in connection with ICO 2's third batch? – but that will not even be sent to ICO 2 until sometime in the next month, and the government offers no information as to when ICO 2 might function on it.

The Military Unit Without a Name (MUWN) has some 5000 documents, consisting of an unknown number of pages, under review. Some part of the 5000 documents were not even provided to it by the prosecution until 30 June 2016. The government says it is "unlikely" that MUWN will meet the 1 August 2016 deadline for completing its review and invoking the privilege, but offers no insight into when it will invoke the privilege.

³ It should be noted that in their request for a new pretrial order, dtd. 11 May 2016, the Government stated that they anticipated "receiving the formal invocation of privilege by 15 June 2016" and would "submit a motion under M.R.E. 505(h)(2)(B) immediately asking for judicial review of the summaries."

In the two and a half months since the prosecution sent DIA 1300 disclosable CI documents (how many pages is not stated) on 13 May 2016, DIA has reviewed over half. Assuming a steady rate of review, that means that DIA will be able to decide on whether to invoke the privilege sometime in October. The government admits that it is unlikely DIA will be done by the 1 August deadline.

The government sent the FBI a prudential search request on 30 June 2016. The FBI sent 2200 documents (how many pages is not stated) to the government on an undisclosed date. These are currently under review by the government, but the government does not estimate how long its own review will take. After that, evidently, documents must go back to the FBI to determine whether to invoke the privilege. The government says the FBI will not meet the 1 August deadline but offers no estimate of when this process will come to an end.

The State Department will “likely” not meet the 1 August deadline for the batches of documents the prosecution provided to it in 17 and 22 June 2016. The government has offered no estimate of when the Department will complete its further review and make a decision on whether to assert the privilege.

The state of affairs outlined in the government’s motion makes it clear that the current pretrial schedule is unworkable. Downstream tasks are manifestly a function of upstream deliverables. As a result, when the government misses the 1 August 2016 deadline, it impacts on subsequent deadlines. The government insists (at 4) that it is not seeking a continuance, but that is precisely what it is doing, albeit under a different label. In our view, the underlying reality is what must govern, and not the label a party seeks to paste on things.

Additionally, nothing until the latest government motion contemplated that the volume of materials potentially subject to a claim of privilege would be so high, up to 10,000 documents of an uncertain number of pages. Furthermore, the government did not contemplate the amount of time that would be needed to generate substitutions, have the military judge complete *in camera* reviews, and allow defense the opportunity to act on those substitutions. This is careful work that cannot be rushed or treated slapdash. Litigation at the Military Commissions is analogous since it also involves similarly large-scale classified evidence privilege assertions. There, such review processes are measured in *years*, not *months*.

The question, given the state of affairs, is what is to be done?


The case should be removed from the Court’s calendar until all invocations of M.R.E. 505(h) have been made and the process completed, rather than doing things piecemeal. Once all named and unnamed agencies and units have completed their work, the Court can make the necessary rulings, and the remainder of the pretrial process, with revised dates that will make sense, can proceed in a rational, organized fashion. But so long as there are holdout agencies that may afford lower priority to their M.R.E. 505(h)

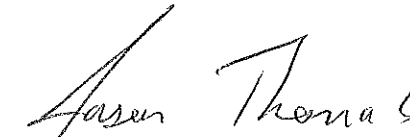
rights "in balance with their continuing missions and functions," Motion at 4, the Court's and the parties' ability to prepare for trial in an efficient, effective and logical way will be seriously compromised.


Because the government is at fault for not having gotten its ducks in a row to include appropriate training, and for the other miscues noted above, the resulting delay must be laid at its doorstep.


CONCLUSION

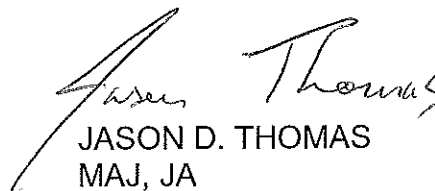
For the foregoing reasons, the Court should (1) treat the government's motion as a request for a continuance. The government should (2) be required to provide an evidentiary basis for its motion. In any event, in light of the current posture of the case, (3) the case should be removed from the calendar and the parties should be directed (4) to report to the Court when they are ready for trial.


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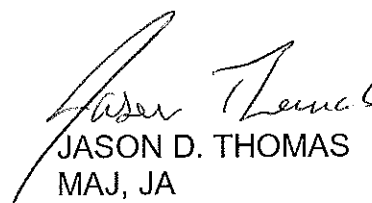

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CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to Trial Counsel on 28 July 2016.


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