

CORRECTED COPY

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

UNITED STATES )  
 )  
 v. ) Defense Motion to Adduce Additional  
 ) Evidence, to Compel, and to  
 ) Supplement Motion to Disqualify  
 ) the GCMCA  
SGT Robert B. Bergdahl )  
HHC, Special Troops Battalion )  
U.S. Army Forces Command )  
Fort Bragg, North Carolina 28310 ) 08 Sept 2016

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## GLOSSARY

ABA .....	American Bar Association
ALI .....	American Law Institute
CA .....	Convening Authority
CG .....	Commanding General
GCM .....	General Court-Martial
GCMCA .....	General Court-Martial Convening Authority
OCA .....	Original Classification Authority
OSJA .....	Office of the Staff Judge Advocate
PHO .....	Preliminary Hearing Officer

R.C.M.	Rules for Courts-Martial
SJA	Staff Judge Advocate
SPCMCA	Special Court-Martial Convening Authority
TC	Trial Counsel
UCMJ	Uniform Code of Military Justice

## RELIEF SOUGHT AND SUMMARY

The defense moves to adduce newly-discovered evidence in support of the Motion to Disqualify (D APP 34). The instant motion will require the Court to examine a classified document, as explained in Point I below.

This motion is also in the nature of a supplement to the Motion to Disqualify, as explained in Point II below. That motion advanced three reasons that mandate GEN Robert B. Abrams’ disqualification and vacation of the referral. The instant motion adds a fourth: he has had (and, unless forbidden to do so, is likely to continue to have) substantive *ex parte* contacts with the prosecution in flagrant disregard of his obligations as an official statutorily charged with the performance of “judicial acts.” Art. 37(a), UCMJ. *This raises fundamental questions that go directly to the integrity of the military justice system and, as a consequence, public confidence in the administration of justice.*

The Motion to Disqualify should be held in abeyance pending discovery and further proceedings with respect to the *ex parte* contacts issue. Trial counsel should be ordered to disclose all of their *ex parte* communications with the GCMCA and the SJA should be directed to make herself available for an interview. GEN Abrams must be disqualified and the referral vacated. The charge sheet and case file should be returned to the Secretary of the Army.

Oral argument and an evidentiary hearing are requested.

## BURDEN OF PERSUASION AND BURDEN OF PROOF

As moving party, the defense has the burden of persuasion. Proof by a preponderance of the evidence is required as to factual matters. R.C.M. 905(c)(1).

### I. NEWLY-DISCOVERED EVIDENCE

GEN Abrams has repeatedly confirmed his personal involvement in efforts to recover SGT Bergdahl. He did so during a defense interview, in an affidavit (G APP 37 encl 1), and in his 24 August 2016 testimony. His admission on the stand regarding the advice he gave Secretary Hagel concerning the feasibility of recovery plans is sufficient for a finding that he is a fact witness with respect to Charge II and is therefore disqualified for the reasons we have previously stated. On 26 August 2016, however, the defense learned in the course of its ongoing review of classified documents of an additional involvement GEN Abrams appears to have had that was not previously disclosed to us. The page at issue

bears Bates page number 36557 and is classified Secret. We move that it be made an additional (and, in this instance, sealed) defense appellate exhibit next in order in support of the Motion to Disqualify. By copy hereof we request the government to promptly ask the cognizant OCA to declassify the page. If the OCA refuses to declassify it, defense counsel at Fort Bragg will coordinate with the Clerk of the Court and opposing counsel concerning submission of a copy under seal. See M.R.E. 505(j); Pretrial Order para. 2e.

It may be necessary to close the hearing discuss this exhibit fully.

## II. GENERAL ABRAMS' *EX PARTE* CONTACTS

### LEGAL AUTHORITY

Bryan A. Garner, *Black's Law Dictionary* 1440 (10th ed. 2014)  
Bryan A. Garner, *Garner's Dictionary of Legal Usage* 742 (3d ed. 2011)  
ABA Model Code of Judicial Conduct: Canon 2, R. 2.9  
ALI, Restatement (Third) of the Law Governing Lawyers § 113  
Art. 6(b), UCMJ  
Art. 6(c), UCMJ  
Art. 15(a), UCMJ  
Art. 32, UCMJ  
Art. 34, UCMJ  
Art. 37(a), UCMJ  
Art. 39(a), UCMJ  
*United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997)  
*United States v. Collins*, 6 M.J. 256 (C.M.A. 1979)  
*United States v. Dresen*, 47 M.J. 122 (C.A.A.F. 1997)  
*United States v. Engle*, 1 M.J. 387 (C.M.A. 1976)  
*United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012)  
*United States v. Newman*, 14 M.J. 474 (C.M.A. 1983)  
*United States v. Payne*, 3 M.J. 354, 356 (C.A.A.F. 1977)

### FURTHER SUPPLEMENTAL STATEMENT OF FACTS<sup>1</sup>

The defense requests that the government state in its response which of the following facts it will stipulate to. For those it will not stipulate to, we request an opportunity to present evidence and testimony at an Article 39(a), UCMJ session.

35. Major Paul D. Carlson is an Army judge advocate who was assigned to FORSCOM OSJA until 2015. After the Bergdahl case was sent to the FORSCOM commander, and then to the SPCMCA (LTC Peter Q. Burke) in January 2015, MAJ Carlson was assigned to be LTC Burke's legal advisor. The purpose of that assignment was to

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<sup>1</sup> The numbering resumes from the Supplemental Statement of Facts in our reply to the government's response to the Motion to Disqualify.

keep the legal advice to the convening authority separate from the prosecution. The prosecution team then included trial counsel MAJ Margaret V. Kurz and assistant trial counsel then-MAJ Christian E. Beese, each of whom was specially brought to FORSCOM to prosecute SGT Bergdahl's case.

36. MAJ Carlson departed FORSCOM on a normal change of station in 2015. Once he left, the task of providing legal advice to LTC Burke on his convening authority duties was taken over by the prosecutors, MAJ Kurz and LTC Beese. The defense is unaware of what prompted the prosecutors to take over this duty, or who ordered this arrangement.
37. On 09 October 2015, the defense submitted a four-page memorandum to the Article 32, UCMJ preliminary hearing officer (PHO) with comments on and objections to his report. The memorandum included an objection to LTC Burke's role in the case, including the fact that he "served in the quasi-judicial role of special court-martial convening authority, in which capacity he engaged in frequent *ex parte* communications with prosecutors and made important decisions limiting SGT Bergdahl's access to evidence, witnesses, investigative assistance, delay, and TS(SCI) security clearance for his civilian defense counsel." (G APP 40 at 3, para. 10). GEN Abrams testified on 24 August 2016 that he read the defense memorandum several times. (We respectfully request that the Court cause GEN Abrams' testimony, which was not extensive, to be transcribed.)
38. In October and November 2015, trial counsel submitted requests for two 30-day periods of excludable delay to GEN Abrams so that the prosecution could bring in 10 additional lawyers on temporary duty to sort through evidence. He approved each request. The defense was not given copies of these requests until after they were approved. The defense objected to these *ex parte* requests. Encl 2.
39. On 14 December 2015, contrary to the PHO's recommendation, GEN Abrams referred the charges to a general court-martial. He acted in accordance with the SJA's pretrial advice, which was devoid of any explanation. That advice, which was dated the same day as the referral, was not furnished to the defense until after referral.
40. Between January and May 2016, GEN Abrams approved several requests for expert assistance for the prosecution. For months these requests and approvals were not provided to the defense. Defense objected to trial counsel about these *ex parte* requests and approvals between the trial counsel and GEN Abrams. Encl 3.
41. In 2016 LTC Burke's emails concerning the case were sent to the defense. They confirmed that he engaged in frequent *ex parte* communications with trial counsel rather than a neutral legal advisor, and that trial counsel sent him draft documents denying defense requests which he signed as submitted. An example is at Encl 1.

42. GEN Abrams initially denied requests for a defense interview. At the court's urging, he eventually relented. During that interview, which took place on 08 August 2016, he made several statements that became bases for the Motion to Disqualify. These are set forth in D APP 34.
43. On 19 August 2016 GEN Abrams executed an affidavit in which he claimed to clarify several of the statements he made during the 08 August 2016 interview and which were referred to in the Motion to Disqualify. His affidavit is Enclosure 1 to G APP 37. The government sought to use the affidavit to buttress its contention that he should not be disqualified.
44. When cross-examined on 24 August 2016 GEN Abrams admitted that he prepared the affidavit with the assistance of lead trial counsel MAJ Justin C. Oshana and a lieutenant (apparently also a member of the prosecution team). GEN Abrams said these officers personally worked with him on the 4-6 drafts of the affidavit before he signed it.
45. Until GEN Abrams' testimony, the defense was not informed of this, or any other, personal *ex parte* personal contact between him and the prosecution team.
46. On 26 August 2016 defense counsel MAJ Jason D. Thomas emailed trial counsel seeking information on all prior *ex parte* contacts between GEN Abrams and the prosecution team. The request sought names, dates, and the substance of conversations, to include meetings with GEN Abrams in advance of his referral decision.
47. On 29 August 2016 MAJ Oshana denied MAJ Thomas's request. He wrote, "**There is no rule preventing the Government from having contact with the CG [GEN Abrams], nor is there any requirement that we notify the Defense of such contact.**" (emphasis added)
48. On 30 August 2016 defense counsel LTC Franklin D. Rosenblatt emailed MAJ Oshana asking that the prosecution immediately cease *ex parte* contacts with GEN Abrams.
49. On 31 August 2016 MAJ Oshana denied LTC Rosenblatt's request. This string of emails is attached as Encl 5.
50. The SJA, who is a material witness to some if not all of the GCMA's interactions with the prosecution, has repeatedly refused to be interviewed.

## WITNESSES AND OTHER EVIDENCE

Copies of the emails and other documents referred to above are annexed to this motion, along with an expert declaration from Lawrence J. Fox. Testimony by the SJA, whose communications with the GCMCA and trial counsel are not privileged, may be required.

## ARGUMENT

### GENERAL ABRAMS' *EX PARTE* CONTACTS WITH THE PROSECUTION MANDATE HIS DISQUALIFICATION

No provision of the Code is more central to this case than the second sentence of Article 37(a): “No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.” Just as its first clause mandates relief because Sen. McCain is a retired regular and therefore subject to the Code, see D APP 27, so too, its last clause mandates relief because it recognizes *in haec verba* that the acts of a convening authority are judicial. See *generally* D APPs 34, 37. This is in direct contrast with Article 15(a), UCMJ, which explicitly grants commanders “non-judicial” powers.

Congress did not intend Article 37(a) to be window-dressing.

1

The supplemental facts set forth above go to the heart of the fair administration of justice in the military. In a case as closely-watched as this, one would have assumed the government would have taken extra pains to show that the military justice system both is and appears to be impartial and fair. Instead, it has elected to embrace the profoundly disturbing proposition that the course of justice may be shaped in secret coordination between the Command Suite and the prosecution.

If he were a judge, GEN Abrams would be removed or otherwise disciplined, and his actions set aside. Because his acts as a GCMCA are judicial, he must be disqualified, and the case restored to the status quo that existed prior to referral.

The position espoused in lead trial counsel's 29 August 2016 email – in effect, that he and his colleagues are free to have whatever contact they (or the GCMCA) wish with the GCMCA, and that the defense may be kept in the dark either forever or until safely after official action has been taken – provides context for several aspects of the case:

- The still unexplained decision to refer the case to a GCM,<sup>2</sup> since the TCs would have been free to explain personally to GEN Abrams the Article 32 results in a way that put their case in the best light
- The nearly three months it has taken GEN Abrams to (not) act on an administrative matter, for which there is no plausible explanation other than an attempt to provide tactical assistance to the prosecution
- The decision to authorize funding and personnel requests to support the largest and best-resourced prosecution team in any single-accused court-martial in memory.

It would have been easy enough for trial counsel to respond to our request for production by saying there had been no *ex parte* contacts, if that had been the case. Instead, he wrote, “There is no rule preventing the Government from having contact with the CG, nor is there any requirement that we notify the Defense of such contact.” Since the government will not let the defense know, even now, about the *ex parte* contacts they have had with GEN Abrams, an adverse inference is warranted.

## 2

The avoidance of substantive *ex parte* contacts is the cornerstone of proper judicial conduct. A convening authority who engages in such contacts, which may be written as well as oral, has forfeited any claim to impartiality and must be disqualified.

Congress has defined the work of convening authorities with respect to courts-martial as “judicial acts.” Art. 37(a), UCMJ. The GCMCA’s weighty responsibilities include deciding whether charges warrant court-martial or other disciplinary action; entering into plea bargains; handpicking the members who will decide guilt or innocence and sentence; granting or withholding immunity; making investigative, expert and other resources available to the parties; and taking post-trial action, including whether a sentence or any part of it should be suspended and whether any sentence to confinement should be deferred.

In performing their codal duties, convening authorities shall communicate “directly” with their SJA or legal officer. Art. 6(b), UCMJ. Importantly, the SJA or legal officer who advises a CA cannot be someone who has served as a trial counsel or assistant trial counsel in the case. Art. 6(c), UCMJ. That statutory requirement insulates the CA from the opposing parties in courts-martial. The SJA “is not a prosecutor.” *United States v. Argo*, 46 M.J. 454, 459 (C.A.A.F. 1997).

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<sup>2</sup> The sole explanation the command has ever provided for rejecting LTC Visger’s recommendation is found in ¶ 9 of GEN Abram’s affidavit, which indicates that he sent the case to a GCM rather than a non-BCD SPCM because (“[c]onsequently”) “I did not find their [the defense’s] objections persuasive or their writing style effective.” The Art. 34, UCMJ advice, which cannot have taken the GCMCA long to read, is utterly conclusory.

Both the convening authority and staff judge advocate must “be, and appear to be, objective.” *United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997). See also *United States v. Newman*, 14 M.J. 474, 482 (C.M.A. 1983); *United States v. Collins*, 6 M.J. 256, 257-58 (C.M.A. 1979); *United States v. Engle*, 1 M.J. 387, 389 (C.M.A. 1976). A convening authority who becomes directly involved in the prosecution of a case violates this bedrock principle of military law.

Military law often describes the convening authority as a “quasi-judicial” official. *E.g.*, *United States v. Nealy*, 71 M.J. 73, 78 (C.A.A.F. 2012) (Baker, C.J., concurring). See generally D APP 38, at 8-9. *Black’s Law Dictionary* defines a “quasi-judicial act” as “1. A judicial act performed by an official who is not a judge.” “Quasi” does not alter the nature of an official act that is *judicial*, it simply denotes that the official performing the act is not a *judge*.

3

Whether or not the current controversy of a GCMCA managing a case in direct and active coordination with prosecutors is unprecedented either within the Army or more broadly within the armed forces, military courts have weighed in on the judicial acts of other officials in cases with far lower stakes. In reviewing a pretrial investigation (as it was then called), the Court of Military Appeals found that the investigating officer violated his “judicial function” when, despite the ready availability of an impartial legal advisor, he chose to conduct *ex parte* communications with the officer he knew would ultimately prosecute the case. *United States v. Payne*, 3 M.J. 354, 356 (C.M.A. 1977). The court held that non-lawyers performing judicial acts must conduct themselves in accordance with “proper judicial standards,” and must remain neutral and independent. *Id.* at 355. If *ex parte* contacts are impermissible for a mere investigating officer whose powers are narrowly constrained and ultimately merely advisory, *a fortiori* such contacts are impermissible for a GCMCA whose powers are broad and, in critical respects, decisive. The court put everyone squarely on notice that it viewed this matter with the utmost seriousness: “In future cases when testing for prejudice, we will resolve doubts against the judicial officer who participates in such a practice.” *Id.* at 358.

*Payne* requires non-lawyers performing judicial acts (in other words, “quasi-judicial” authorities) to adhere to judicial standards. The prohibition against *ex parte* contacts is such a standard, as reflected in ABA Model Code of Judicial Conduct: Canon 2, R. 2.9. This is a widely known and utterly uncontroversial standard. “*Ex parte* communication with a judicial official before whom a matter is pending violates the right of the opposing party to a fair hearing and may constitute a violation of the due-process rights of the absent party.” ALI, Restatement (Third) of the Law Governing Lawyers § 113, cmt. B.

General Abrams worked directly with prosecutors to prepare several drafts of an affidavit that attempted to cast some of his earlier comments about his involvement in this case in a light more favorable to the government. By doing so, the prosecutors gained useful

evidence, which they then attached to a motion in hopes of advancing their litigation strategy against SGT Bergdahl. G APP 37 encl 1.

The government has prevented both the Court and the defense from knowing the full extent of GEN Abrams' *ex parte* contacts. In addition, the SJA refuses to make herself available for an interview, even though she is a material witness to those contacts.

4

The pattern and practice revealed in the supplemental facts set forth in this motion and the attached documents, coupled with the government's refusal to commit not to engage in *ex parte* contacts in the future, constitutes a compelling additional basis for disqualification and related remedial action. A reasonable observer informed of the circumstances would find it impossible to understand how a system of criminal justice that can adjudge death sentences or, as here, lengthy prison terms and punitive discharges that carry a life-long stigma, can diverge so far from our country's accepted norms for the exercise of judicial functions.

Whether viewed separately or (more appropriately) as a whole, the four grounds the defense has now identified for GEN Abrams' disqualification are overwhelming. Public confidence in the military justice system is at stake.

#### RELIEF REQUESTED

1. The Court should hold the Motion to Disqualify in abeyance until the *ex parte* contacts issue can be resolved, to include the taking of evidence at the next Article 39(a) session.
2. The government should be ordered to disclose all of its past *ex parte* communications with the GCMCA.
3. The SJA should be directed to make herself available for an interview.
4. Considerable time and effort have already been invested in this case by the Court and the parties. Nonetheless, unless the case is dismissed because of Sen. McCain's blatantly improper threat (which GEN Abrams delicately described as "inappropriate" when he was on the witness stand), it is nowhere near the far turn, much less the finish line. Not only must the improper *ex parte* contacts that have already occurred be laid on the public record and rectified, therefore, but further such contacts must be forbidden.
5. For the foregoing reasons and those previously stated, GEN Abrams must be disqualified and the referral vacated. The charge sheet and case file should be returned to the Secretary of the Army.

*Franklin D. Rosenblatt*

FRANKLIN D. ROSENBLATT  
LTC, JA

*for*

EUGENE R. FIDELL  
WILL M. HELIXON  
LTC FRANKLIN D. ROSENBLATT  
MAJ OREN GLEICH  
MAJ JASON D. THOMAS  
CPT JENNIFER D. NORVELL

*Defense Counsel*

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 08 September 2016.

*Franklin D. Rosenblatt*

FRANKLIN D. ROSENBLATT  
LTC, JA

## LIST OF ENCLOSURES

- Encl 1 – LTC Burke emails, memo draft, signed memo (4 pages)
- Encl 2 – email from LTC Rosenblatt to MAJ Kurz, 23 Nov 2015 (1 page)
- Encl 3 – email from LTC Rosenblatt to MAJ Kurz, 09 March 2016 (1 page)
- Encl 4 – emails seeking interview with COL Berry (7 pages)
- Encl 5 – email chain between MAJ Oshana, MAJ Thomas, and LTC Rosenblatt (4 pages)
- Encl 6 – Lawrence J. Fox, “Bergdahl Expert Declaration” (18 pages)

**From:** [Kurz, Margaret V MAJ USARMY XVIII ABN CORPS \(US\)](#)  
**To:** [Burke, Peter Q LTC USARMY FORSCOM \(US\)](#)  
**Subject:** action memo  
**Date:** Saturday, September 05, 2015 1:17:28 PM  
**Attachments:** [CA Response to Def Request for Delay 3 September 2015.docx](#)

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Sir,

Attached is a draft action memorandum.

V/R  
MAJ Kurz

MAJ Margaret V. Kurz  
Chief, Complex Litigation  
Office of the Staff Judge Advocate  
FORSCOM  
Fort Bragg, North Carolina 28310  
(910) 570-8128 direct  
(910) 570-5915 main  
[Margaret.v.kurz.mil@mail.mil](mailto:Margaret.v.kurz.mil@mail.mil)

\_000043128

\_000043036



DEPARTMENT OF THE ARMY  
SPECIAL TROOPS BATTALION  
UNITED STATES ARMY FORCES COMMAND-UNITED STATES ARMY RESERVE COMMAND  
4745 KNOX STREET, BLDG 1-1460  
FORT BRAGG, NORTH CAROLINA 28310-5000

AFCS-STB-BC

6 September 2015

MEMORANDUM FOR

Mr. Eugene Fidell, Civilian Defense Counsel  
LTC Mark Visger, Preliminary Hearing Officer, Office of the Staff Judge Advocate, First  
Army Division West, Fort Hood, Texas

SUBJECT: Defense Request for Delay of the Article 32 Preliminary Hearing of Court  
Martial Charges in the matter of SGT Robert (Bowe) Bergdahl, dated 5 September 2015

1. I have reviewed your request for delay of the Article 32 Preliminary Hearing dated 5 September 2015, and the Government Response to the Defense request for delay dated 3 September 2015.
2. Your request for delay of the proceedings is denied. The Article 32 Preliminary Hearing will proceed on 17 September 2015, as I directed in my memorandum dated 29 May 2015, and as agreed to by the parties.
3. Point of Contact is the undersigned.

PETER Q. BURKE  
LTC, AG  
Commanding

CF:  
LTC Franklin Rosenblatt  
CPT Alfredo Foster  
LTC Chris Beese  
MAJ Margaret Kurz

\_000043129

\_000043037

**Rosenblatt, Franklin D LTC USARMY (US)**

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**From:** Kurz, Margaret V MAJ USARMY FORSCOM (US)  
**Sent:** Monday, September 07, 2015 3:05 PM  
**To:** Rosenblatt, Franklin D LTC USARMY (US)  
**Cc:** Fidell, Eugene; Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US)  
**Subject:** Convening Authority response to request for Delay  
**Attachments:** CA Response to Def Request for Delay 3 September 2015.pdf

Sir,

Attached is the Convening Authority's response to the request for delay.

V/R  
MAJ Kurz

MAJ Margaret V. Kurz  
Chief, Complex Litigation  
Office of the Staff Judge Advocate  
FORSCOM  
Fort Bragg, North Carolina 28310  
(910) 570-8128 direct  
(910) 570-5915 main  
Margaret.v.kurz.mil@mail.mil



DEPARTMENT OF THE ARMY  
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4745 KNOX STREET, BLDG 1-1460  
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AFCS-STB-BC

6 September 2015

MEMORANDUM FOR

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LTC Mark Visger, Preliminary Hearing Officer, Office of the Staff Judge Advocate, First  
Army Division West, Fort Hood, Texas

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Martial Charges in the matter of SGT Robert (Bowe) Bergdahl, dated 5 September 2015

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2. Your request for delay of the proceedings is denied. The Article 32 Preliminary Hearing will proceed on 17 September 2015, as I directed in my memorandum dated 29 May 2015, and as agreed to by the parties.
3. Point of Contact is the undersigned.

BURKE.PETER.QUINN.1

PETER Q. BURKE  
LTC, AG  
Commanding

CF:  
LTC Franklin Rosenblatt  
CPT Alfredo Foster  
LTC Chris Beese  
MAJ Margaret Kurz

## **Rosenblatt, Franklin D LTC USARMY (US)**

---

**From:** Rosenblatt, Franklin D LTC USARMY (US)  
**Sent:** Monday, November 23, 2015 1:41 PM  
**To:** Kurz, Margaret V MAJ USARMY FORSCOM (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US)  
**Cc:** Fidell, Eugene; Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US)  
**Subject:** excludable delay

Major Kurz:

Last week you sent us a copy of your request to GEN Abrams to exclude certain time for speedy trial purposes, but did not do so until after he had acted. You did the same thing in October.

These ex parte requests unfairly and improperly deny us a prior opportunity to object or comment. We object to any and all such requests, past or future, that have not been furnished to us prior to action by the GCMCA.

This is a continuing objection. We reserve the right as well to object on substantive grounds to all delay exclusion decisions by the GCMCA.

Sincerely,

Franklin D. Rosenblatt  
LTC, JA  
Deputy Chief  
U.S. Army Trial Defense Service  
office: 703-693-0283  
blackberry: [REDACTED]

## **Rosenblatt, Franklin D LTC USARMY (US)**

---

**From:** Rosenblatt, Franklin D LTC USARMY (US)  
**Sent:** Wednesday, March 09, 2016 4:53 PM  
**To:** Kurz, Margaret V MAJ USARMY FORSCOM (US)  
**Cc:** Whipple, Eileen C CPT USARMY 16 MP BDE (US); Petrusic, Michael CPT USARMY FORSCOM (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US); Oshana, Justin C MAJ USARMY FORSCOM (US); 'Fidell, Eugene'; Banks, Nina S CPT USARMY XVIII ABN CORPS (US)  
**Subject:** actions taken by the GCMCA

MAJ Kurz,

I received your response yesterday that on 11 January GEN Abrams approved Dr. Saathoff as an expert consultant to the prosecution. We still have not yet seen GEN Abrams' action approving this request. There are potentially many other actions taken by GEN Abrams that have not been delivered on the defense.

In all other Army jurisdictions, GCMCAs mandate through their OSJAs that all "CG actions" be delivered to both parties in court-martial cases. This practice shields against concerns that the convening authority is engaged in ex parte communications with the prosecutors by only sending decisions to one side.

Could you please promptly send to us this and any other court-martial actions that were approved by persons acting under the mantle of a convening authority in this case, including any actions taken to request or approve additional prosecutors or resources for the prosecution.

Sincerely,

Franklin D. Rosenblatt  
LTC, JA  
Deputy Chief  
U.S. Army Trial Defense Service  
office: 703-693-0283  
blackberry: [REDACTED]

## Rosenblatt, Franklin D LTC USARMY (US)

---

**From:** Fidell, Eugene <eugene.fidell@yale.edu>  
**Sent:** Tuesday, August 23, 2016 7:24 PM  
**To:** Oshana, Justin C MAJ USARMY FORSCOM (US)  
**Cc:** helixonw@gmail.com; Rosenblatt, Franklin D LTC USARMY (US); Gleich, Oren MAJ USARMY XVIII ABN CORPS (US); Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US); Norvell, Jennifer D CPT USARMY ICOE (US); Fussnecker, Jerrod B MAJ USARMY FORSCOM (US); Whipple, Eileen C CPT USARMY 16 MP BDE (US)  
**Subject:** [Non-DoD Source] Letter to GEN Abrams

MAJ Oshana,

Thank you for phoning me about this. As I mentioned when we spoke, I'm sure you will want to speak with COL Berry and I would appreciate if you could let me know how you want to proceed with respect to this letter. In the circumstances I know you will understand that we will need to interview COL Berry. Would you please arrange for her to be at the courthouse at or before 0830 tomorrow for this purpose. Thank you.

Gene Fidell

Eugene R. Fidell  
Florence Rogatz Visiting Lecturer in Law Yale Law School  
[REDACTED] (cell)  
(203) 432-4852 (office)  
efidell (Skype)  
globalmjreform.blogspot.com

> On Aug 23, 2016, at 6:03 PM, Oshana, Justin C MAJ USARMY FORSCOM (US) <justin.c.oshana.mil@mail.mil> wrote:  
>  
> Mr. Helixon,  
>  
> Attached is a scanned letter to GEN Abrams that was sent in September 2015. GEN Abrams turned the letter over to COL Berry after receiving it. I have confirmed that this is the only such letter in her possession. I will bring the original to Court tomorrow morning.  
>  
> v/r,  
>  
> Justin C. Oshana  
> MAJ, JA  
> Trial Counsel  
> US Army Forces Command  
> Fort Bragg, NC  
> (910) 570-5922  
> justin.c.oshana.mil@mail.mil  
> justin.c.oshana.mil@mail.smil.mil  
>  
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prohibited. If you received this e-mail in error, please notify me immediately by return e-mail or by calling (910) 570-5922.

>

><Letter to GEN Abrams.pdf>

## **Rosenblatt, Franklin D LTC USARMY (US)**

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**From:** Will M. Helixon <will@helixongroup.com>  
**Sent:** Saturday, August 27, 2016 2:27 PM  
**To:** Berry, Vanessa A COL USARMY FORSCOM (US)  
**Cc:** 'Eugene Fidell'; Rosenblatt, Franklin D LTC USARMY (US); Gleich, Oren MAJ USARMY XVIII ABN CORPS (US); Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US); Norvell, Jennifer D CPT USARMY ICOE (US)  
**Subject:** [Non-DoD Source] Request for Interview - US v. SGT Bergdahl

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

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COL Berry:

As noted below, on 28 June 2016, I requested to interview you in your capacity as the SJA of FORSCOM. I received no response to that request.

Again, on Tuesday evening, 23 August 2016, Mr. Fidell sent a request to MAJ J. Oshana to interview you by 0830 the following morning, the day GEN Abrams was scheduled to testify. We received no response to that request.

I am again formally requesting to interview you as the SJA of FORSCOM. As you know, there is no attorney-client relationship between the Commander and the SJA. The defense believes you have personal knowledge relevant to many issues in this case, including the advice given GEN Abrams regarding what to do with letters he received from the public concerning this case.

I would like an opportunity to discuss that and other issues with you at your convenience.

Respectfully,

w

WMH

913.839.9762 (Kansas)

469.444.0020 (Texas)

719.421.8686 (Colorado)

360.200.4490 (Washington)

669.235.9455 (California)

██████████ (cell)

From: Will M. Helixon [Caution-mailto:will@helixongroup.com]

Sent: Tuesday, June 28, 2016 4:35 PM

To: 'vanessa.a.berry.mil@mail.mil'

Cc: 'Rosenblatt, Franklin D LTC USARMY (US)'; 'Fidell, Eugene'; 'Banks, Nina S CPT USARMY XVIII ABN CORPS (US)';

'Crocker, Michael T SSG USARMY HQDA OTJAG (US)'

Subject: Request for Interview - US v. SGT Bergdahl

Dear COL Berry:

Ma'am, the defense acknowledges notice of GEN Abrams denial of our request to interview him related to SGT Bergdahl.

I request the opportunity to interview you before 6 July 2016.

We believe you have personal, non-privileged, knowledge of facts that are relevant to SGT Bergdahl's defense as the FORSCOM SJA. We are interested in discussing relevant facts you may have including any briefings you received, participated in, or gave related to SGT Bergdahl as the FORSCOM SJA. Additionally, we believe you have relevant information about how the FORSCOM commander was selected as the convening authority and the Preferral and Referral process in this case.

If you received or sent any emails related to SGT Bergdahl, please preserve a copy of those e-mails and attachments, and provide a copy to the defense.

This interview and the requested correspondence is material to the preparation of the defense. I look forward to speaking with you and receiving the requested e-mails.

WMH

Will M. Helixon, Esq.

Caution-www.helixongroup.com < Caution-http://www.helixongroup.com/ >

will@helixongroup.com < Caution-mailto:will@helixongroup.com >

will@helixongroup.eu < Caution-mailto:will@helixongroup.eu >

844.HELIXON (Toll-Free)

(4 3 5 - 4 9 6 6)

(0800) 180.2518 (Germany Toll-Free)

LOCAL NUMBERS

913.839.9762 (Kansas)

469.444.0020 (Texas)

816.399.5893 (FAX)

435 Nichols Road

Suite 200

Kansas City, MO 64112

\*\*\*\*\*NOTICE\*\*\*\*\*

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## **Rosenblatt, Franklin D LTC USARMY (US)**

---

**From:** Oshana, Justin C MAJ USARMY FORSCOM (US)  
**Sent:** Monday, August 29, 2016 9:29 AM  
**To:** Will M. Helixon  
**Cc:** Eugene Fidell (eugene.fidell@yale.edu); Rosenblatt, Franklin D LTC USARMY (US); Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US); Gleich, Oren MAJ USARMY XVIII ABN CORPS (US); Norvell, Jennifer D CPT USARMY ICOE (US); Fussnecker, Jerrod B MAJ USARMY FORSCOM (US); Whipple, Eileen C CPT USARMY 16 MP BDE (US)  
**Subject:** Request to interview COL Berry

Mr. Helixon,

COL Berry has asked me to let you know that she declines your request for an interview.

v/r,

Justin C. Oshana  
MAJ, JA  
Trial Counsel  
US Army Forces Command  
Fort Bragg, NC  
(910) 570-5922  
justin.c.oshana.mil@mail.mil  
justin.c.oshana.mil@mail.smil.mil

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**Rosenblatt, Franklin D LTC USARMY (US)**

---

**From:** Oshana, Justin C MAJ USARMY FORSCOM (US)  
**Sent:** Wednesday, August 31, 2016 1:03 PM  
**To:** Rosenblatt, Franklin D LTC USARMY (US); Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US); Fussnecker, Jerrod B MAJ USARMY FORSCOM (US); Whipple, Eileen C CPT USARMY 16 MP BDE (US); Gleich, Oren MAJ USARMY XVIII ABN CORPS (US); 'Fidell, Eugene'; helixonw@gmail.com; Norvell, Jennifer D CPT USARMY ICOE (US)  
**Subject:** RE: Request for Information (UNCLASSIFIED)

LTC Rosenblatt,

That is correct on both counts.

v/r,

MAJ Oshana

-----Original Message-----

**From:** Rosenblatt, Franklin D LTC USARMY (US)  
**Sent:** Wednesday, August 31, 2016 9:56 AM  
**To:** Oshana, Justin C MAJ USARMY FORSCOM (US) <justin.c.oshana.mil@mail.mil>; Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US) <jason.d.thomas62.mil@mail.mil>; Fussnecker, Jerrod B MAJ USARMY FORSCOM (US) <jerrod.b.fussnecker.mil@mail.mil>; Whipple, Eileen C CPT USARMY 16 MP BDE (US) <eileen.c.whipple.mil@mail.mil>; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US) <oren.gleich.mil@mail.mil>; 'Fidell, Eugene' <eugene.fidell@yale.edu>; helixonw@gmail.com; Norvell, Jennifer D CPT USARMY ICOE (US) <jennifer.d.norvell2.mil@mail.mil>  
**Subject:** RE: Request for Information (UNCLASSIFIED)

MAJ Oshana,

I think I understand your denial but let me get your confirmation:

First, I understand that you continue to deny our request to discover the ex parte communications that your prosecution team has already had with the GCMCA.

Second, I understand that you deny the defense's request that the prosecution team cease all future ex parte communications with the GCMCA.

Please confirm as soon as you can.

Sincerely,

Franklin D. Rosenblatt  
LTC, JA  
Deputy Chief  
U.S. Army Trial Defense Service  
office: 703-693-0283  
blackberry: [REDACTED]

-----Original Message-----

From: Oshana, Justin C MAJ USARMY FORSCOM (US)

Sent: Tuesday, August 30, 2016 4:24 PM

To: Rosenblatt, Franklin D LTC USARMY (US) <franklin.d.rosenblatt.mil@mail.mil>; Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US) <jason.d.thomas62.mil@mail.mil>; Fussnecker, Jerrod B MAJ USARMY FORSCOM (US) <jerrod.b.fussnecker.mil@mail.mil>; Whipple, Eileen C CPT USARMY 16 MP BDE (US) <eileen.c.whipple.mil@mail.mil>; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US) <oren.gleich.mil@mail.mil>; 'Fidell, Eugene' <eugene.fidell@yale.edu>; helixonw@gmail.com; Norvell, Jennifer D CPT USARMY ICOE (US) <jennifer.d.norvell2.mil@mail.mil>  
Subject: RE: Request for Information (UNCLASSIFIED)

LTC Rosenblatt,

Your response is predicated on an incorrect premise; convening authorities are not judicial officials, they are "quasi-judicial." See *United States v. Nealy*, 71 M.J. 73 (CAAF 2012) ("In the military justice system, the convening authority plays a central role as both quasi-judicial decision maker and as commander, the custodian of good order and discipline.") You recognized this well-established legal principle repeatedly in the Motion to Disqualify Convening Authority and Vacate Referral and for Other Relief. See D APP 34 at 1, 5, 7.

The two cases you cite, *Stirewalt* and *Argo*, both dealt with communications involving investigating officers, not convening authorities. You have not cited to any rule prohibiting the trial counsel from having "ex parte" communication with the convening authority. Similarly you have not cited a single case where any court has prohibited such contact. The Government continues to deny your request.

I did not read MAJ Thomas' email as requesting to know what LTC Beese's role was within the trial team. His statement "[p]lease also include contacts by LTC Chris Beese, whose status as a member of the prosecution is not clear to the defense" was a request to include LTC Beese within the universe of individuals whose contact with the convening authority you were seeking information on. LTC Beese continues to be involved in assisting the Government. I am not aware of any requirement to provide details on his duties beyond that.

v/r,

Justin C. Oshana  
MAJ, JA  
Trial Counsel  
US Army Forces Command  
Fort Bragg, NC  
(910) 570-5922  
justin.c.oshana.mil@mail.mil  
justin.c.oshana.mil@mail.smil.mil

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-----Original Message-----

From: Rosenblatt, Franklin D LTC USARMY (US)

Sent: Tuesday, August 30, 2016 3:27 PM

To: Oshana, Justin C MAJ USARMY FORSCOM (US) <justin.c.oshana.mil@mail.mil>; Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US) <jason.d.thomas62.mil@mail.mil>; Fussnecker, Jerrod B MAJ USARMY FORSCOM (US)

<jerrod.b.fussnecker.mil@mail.mil>; Whipple, Eileen C CPT USARMY 16 MP BDE (US) <eileen.c.whipple.mil@mail.mil>; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US) <oren.gleich.mil@mail.mil>; 'Fidell, Eugene' <eugene.fidell@yale.edu>; helixonw@gmail.com; Norvell, Jennifer D CPT USARMY ICOE (US) <jennifer.d.norvell2.mil@mail.mil>  
Subject: RE: Request for Information (UNCLASSIFIED)

MAJ Oshana,

The prohibition against parties having ex parte communications with judicial officials on substantive matters of cases is well-established. Section 113 of the Restatement (Third) of the Law Governing Lawyers effectively summarizes this:

"Ex parte communication with a judicial official before whom a matter is pending violates the right of the opposing party to a fair hearing and may constitute a violation of the due-process rights of the absent party."

and

"A lawyer may not knowingly communicate ex parte with a judicial officer before whom a proceeding is pending concerning the matter, except as authorized by law."

and

"The prohibition [concerning ex parte contacts] applies to communications about the merits of the case and to communications about a procedural matter the resolution of which will provide the party making the communication substantial tactical or strategic advantage."

Please also refer to Model Code of Judicial Conduct, Canon 2, Rule 2.9; Model Rule of Prof'l Conduct R. 3.5 (2012); Model Code of Prof'l Responsibility DR 7-110(B) (1980); AR 27-26 rules 3-3, 3-5, and comment to rule 3-8; UCMJ arts. 6(b), (c), 37(a), and 38(a); U.S. v. Stirewalt, 54 M.J. 376 (C.A.A.F. 2000); and U.S. v. Argo, 46 M.J. 454 (C.A.A.F. 1997).

We must first learn the facts of any ex parte contacts before we can evaluate the merits of a new basis to disqualify GEN Abrams as GCMCA, whether to disqualify COL Berry from continuing to act as the Staff Judge Advocate for the case per U.S. v. Gutierrez, 57 M.J. 148 (C.A.A.F. 2002), and for the defense to seek other relief as appropriate.

Please let us know whether you will provide us the information requested by MAJ Thomas (the trial counsel's previous ex parte contacts with GEN Abrams, the status of LTC Beese as a member of the prosecution team) voluntarily.

We ask trial counsel to immediately cease any further ex parte contacts with GEN Abrams about this case, and to let us know immediately that you intend to comply with this request.

Sincerely,

Franklin D. Rosenblatt  
LTC, JA  
Deputy Chief  
U.S. Army Trial Defense Service  
office: 703-693-0283  
blackberry: [REDACTED]

-----Original Message-----

From: Oshana, Justin C MAJ USARMY FORSCOM (US)  
Sent: Monday, August 29, 2016 9:27 AM

To: Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US) <jason.d.thomas62.mil@mail.mil>; Fussnecker, Jerrod B MAJ USARMY FORSCOM (US) <jerrod.b.fussnecker.mil@mail.mil>; Whipple, Eileen C CPT USARMY 16 MP BDE (US) <eileen.c.whipple.mil@mail.mil>; Rosenblatt, Franklin D LTC USARMY (US) <franklin.d.rosenblatt.mil@mail.mil>; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US) <oren.gleich.mil@mail.mil>; 'Fidell, Eugene' <eugene.fidell@yale.edu>; helixonw@gmail.com; Norvell, Jennifer D CPT USARMY ICOE (US) <jennifer.d.norvell2.mil@mail.mil>  
Subject: RE: Request for Information (UNCLASSIFIED)

MAJ Thomas,

There is no rule preventing the Government from having contact with the CG, nor is there any requirement that we notify the Defense of such contact. If you are aware of some authority for your request please provide it. We will, of course, continue to notify you of any actions taken as required by the applicable rules.

v/r,

MAJ Oshana

-----Original Message-----

From: Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US)  
Sent: Friday, August 26, 2016 3:11 PM  
To: Oshana, Justin C MAJ USARMY FORSCOM (US) <justin.c.oshana.mil@mail.mil>; Fussnecker, Jerrod B MAJ USARMY FORSCOM (US) <jerrod.b.fussnecker.mil@mail.mil>; Whipple, Eileen C CPT USARMY 16 MP BDE (US) <eileen.c.whipple.mil@mail.mil>; Rosenblatt, Franklin D LTC USARMY (US) <franklin.d.rosenblatt.mil@mail.mil>; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US) <oren.gleich.mil@mail.mil>; 'Fidell, Eugene' <eugene.fidell@yale.edu>; helixonw@gmail.com; Norvell, Jennifer D CPT USARMY ICOE (US) <jennifer.d.norvell2.mil@mail.mil>  
Subject: Request for Information (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

MAJ Oshana,

On 24 August the GEN Abrams testified that he prepared his affidavit with the assistance of a lieutenant and a member of the prosecution. This was the first time the defense heard about the prosecution having ex parte contact with the CG concerning the case.

We request that you disclose to the defense any prior ex parte contacts the GCMCA has had with members of the prosecution concerning this case. Please let us know the names, dates, and substance of the conversations, including those before GEN Abrams made his referral decision. Please also include contacts by LTC Chris Beese, whose status as a member of the prosecution is not clear to the defense.

Please respond as soon as possible as the information requested may be a new basis to supplement our motion to disqualify GEN Abrams as the GCMCA.

Jason Thomas  
MAJ, JA  
Trial Defense Service  
910-907-1428 (o)

CLASSIFICATION: UNCLASSIFIED

## BERGDAHL EXPERT DECLARATION

### **Declaration of Lawrence J. Fox**

#### **Introduction**

1. I am a lawyer duly admitted to practice in the Supreme Court of the Commonwealth of Pennsylvania; the Appellate Division, Second Department of the Supreme Court of New York; the Supreme Court of Connecticut; the United States Supreme Court; and numerous federal district courts and circuit courts of appeal. Currently, I am a Visiting Lecturer in Law and the Crawford Lecturer at Yale Law School, teaching legal ethics and professional responsibility. I am also the Supervising Lawyer of the Ethics Bureau at Yale (EBaY), a clinic whose students assisted me in the preparation of this report as part of the clinic's activities. In addition, I am a partner and former managing partner of Drinker Biddle & Reath LLP, a general practice law firm of approximately 650 lawyers with its principal office in Philadelphia and branch offices in New Jersey, New York, California, Delaware, the District of Columbia, Illinois, and Wisconsin.

2. I have been asked to opine about the ethical and professional responsibility issues implicated in the general court-martial of the accused, Sgt. Robert B. Bergdahl. The facts, as presented to me, are as follows: Gen. Robert Abrams, the convening authority, referred this case to a general court-martial where Sgt. Bergdahl faces a sentence of up to life imprisonment. Although the proceedings are now directly adjudicated by a military judge, Gen. Abrams continues to make judicial decisions, including appointing panel members, approving requests for independent investigators, psychiatrists, and other expert assistance, and the ability to negotiate a pre-trial

agreement with the accused. On August 24, 2016, Gen. Abrams was called to testify before the Court about certain irregularities in the handling of Sgt. Bergdahl's case. During his testimony, he revealed that his corresponding affidavit had been prepared with the assistance of a prosecutor who even made several revisions to the affidavit. Although Gen. Abrams is authorized to speak about the case with his Staff Judge Advocate, he continues to be required to act in a judicial capacity. Gen. Abrams, for example, retains the prerogative to amend the court-martial's sentence. *See* 10 U.S.C. § 860(c)(2)(B) (“[T]he convening authority . . . may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.”).

3. It is my understanding that the prosecution denied Sgt. Bergdahl's requests for the *ex parte* communications and to cease all future *ex parte* communications with Gen. Abrams. Sgt. Bergdahl's counsel requested discovery of those *ex parte* communications because the accused is entitled to know the substance and form of the communications he has requested. As long as the information remains secret the defendant is thwarted from going forward with objections or a motion to disqualify Gen. Abrams, which such *ex parte* communications clearly justify.

4. Based on my review of the facts and relevant case materials, I have concluded, to a reasonable degree of professional certainty, that Gen. Abrams committed multiple ethical violations by engaging in substantive *ex parte* communications with the prosecutors. Gen. Abrams' continuing judicial role as the convening authority creates not only the appearance of impropriety and partiality, but creates impropriety itself, which, in turn, tarnishes the proceedings and calls into question their fairness. Therefore, it is my view that the prosecution and Gen. Abrams

must disclose the substance of these *ex parte* communications and show cause why their existence or substance do not require Gen. Abrams' recusal in order to restore the integrity and impartiality the canons of judicial ethics require.

### **Background**

5. I have regularly been consulted and have testified about the ethics and professional responsibility of lawyers in various proceedings in both state and federal courts throughout the United States, including Texas, Georgia, Florida, South Carolina, Pennsylvania, Kentucky, the District of Columbia, Illinois, New York, Ohio, and Massachusetts. I was a lecturer in law at Harvard Law School, teaching legal ethics and professional responsibility from 2007 through 2010. As the I. Grant Irely, Jr. Adjunct Professor of Law, I taught the same topic at the University of Pennsylvania Law School from 2000 through 2008. I have lectured on legal ethics at more than 35 law schools throughout the country, have been a visiting professor at Cornell University Law School, and was the Robert Anderson Fellow at the Yale Law School in 1997.

6. I have produced and participated in more than 350 continuing legal education seminars and have written extensively in the field of legal ethics. I am a former member and Chair of the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility and a former Chair of the ABA Section of Litigation, the largest section of the ABA, representing almost 60,000 trial lawyers. I was an advisor to the American Law Institute's twelve-year project, "The Restatement of the Law Governing Lawyers." I am a Fellow of the American College of Trial Lawyers. I was also a member of Ethics 2000, the ABA Commission established to review the Model Rules of Professional Conduct. Neither I, nor EBay, are receiving any compensation for this undertaking.

## The Requirements for a Constitutional Judiciary

7. An independent, impartial, and competent judiciary is essential to the effective functioning of our legal system. Preserving fair and impartial courts is so fundamental to our system of justice that this requirement is codified in 28 U.S.C. § 455 (governing federal judges), is enshrined in the ABA Model Code of Judicial Conduct,<sup>1</sup> and is considered a basic requirement of Due Process under the Fourteenth and Fifth Amendments. *See Marshall v. Jerrico, Inc.*, 446 U. S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.”); *In re Murchison*, 349 U. S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”). Over the years, courts have “jealously guarded” this right by mandating judicial recusal in cases in which a judge might appear to be biased against a party. *Marshall*, 446 U.S. at 242.

8. It is equally well settled that a fundamental tenet of our adversarial system is the purposeful separation of the prosecutorial and judicial roles. *See Marshall*, 446 U.S. at 250 (“[T]he strict requirements of neutrality cannot be the same for . . . prosecutors as for judges . . . whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime.”); *Gay v. United States*, 411 U.S. 974, 975 (Douglas, J., dissenting) (“[It is a] basic concept of due process of law that a person should not serve as both prosecutor and judge.”). Judges who wear “two hats” at the same time, especially a prosecutor’s hat, violate this requirement of judicial impartiality. *Mistretta v. United States*, 488 U.S. 361, 404 (1989); *In re Bulger*, 710 F.3d 42, 49 (1st Cir. 2013) (Souter, J.) (holding that a

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<sup>1</sup> The ABA Model Code of Judicial Conduct is the authoritative source on the appropriate behavior required of judges and judicial officers. *See infra* ¶ 11.

reasonable person might question whether a judge who bore supervisory responsibility for prosecutorial activities during some of the time at issue could remain impartial). Just this year, the Supreme Court questioned whether a judge could ever truly be impartial when confronted with a role as both judge and prosecutor in a case. *Williams v. Pennsylvania*, 579 U.S. \_\_\_\_ (2016) (questioning whether “when a judge has served as an advocate for the State in the very case the court is now asked to adjudicate . . . the judge, even with the most diligent effort, could set aside any personal interest in the outcome.”).

9. The judge-prosecutor relationship is uniquely susceptible to the appearance of impropriety in the context of the military justice system. The institutional structure of the military justice system permits stakeholders to perform both judicial and prosecutorial functions, requiring a heightened degree of diligence to ensure propriety. *See, e.g., United States v. Greatting*, 66 M.J. 226, 230 (C.A.A.F. 2008); *United States v. Klawuhn*, 33 M.J. 941, 943-45 (N-M. Ct. Crim. App. 1991).

10. Beyond these minimum constitutional requirements, professional standards of conduct provide guidance on how judges must conduct themselves to uphold these important process values. In the military justice system, the President of the United States has promulgated Rule 902, Disqualification of military judge in the *Manual for Courts-Martial*. That rule provides that “a judge *shall disqualify* him or herself in any proceeding in which the judge’s impartiality might reasonably be questioned” (emphasis added). R.C.M. 902(a). Notably, this is the exact same standard as applied under the federal civilian statute, 28 U.S.C. § 455. Under Rule 902, either bias or the appearance of bias requires judicial recusal. *See United States v.*

*Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001) (“The rule also serves to reassure the parties as to the fairness of the proceedings, because the line between bias in appearance and in reality may be so thin as to be indiscernible.”).

11. Helpful in interpreting the scope and meaning of Rule 902 is the Model Code of Judicial Conduct promulgated by the ABA to maintain and enhance public confidence in those tasked with administering justice. *See* Model Code of Judicial Conduct Preamble (Am. Bar Ass’n 2010); *see also* Code of Judicial Conduct for Army Trial and Appellate Judges Preamble (2008) (“Inherent in all Rules contained in this Code are the precepts that Army judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the military justice system.”); *Quintanilla*, 56 M.J. at 42 (“The Army has expressly adopted the ABA Code to the extent that it does not conflict with the UCMJ.”). Forty-nine states and the federal judiciary have adopted the Code, which establishes standards for the ethical conduct of judges. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonable Be Questioned,”* 14 Geo. J. Legal Ethics 55, 55 (2000). The Code does not establish mere aspirational guidelines, but strict, enforceable standards for the ethical conduct of judges and judicial candidates. *See* Model Code of Judicial Conduct Preamble.

12. These standards govern Gen. Abrams’ conduct because, as the convening authority in this case, he performs judicial acts defined by federal law. Gen. Abrams violated the first three canons of the Model Code of Judicial Conduct by engaging in substantive *ex parte* communications with the prosecution. First, Gen. Abrams violated the judicial standard of independence, integrity, and impartiality by

engaging in substantive communications, which went well beyond administrative or managerial concerns, with the prosecution. Second, Gen. Abrams violated the rule that judges must perform their duties impartially, competently, and diligently by putting himself in the position of being influenced by the prosecution and compounding the error through his failure to disclose the conversations once they occurred. Third, Gen. Abrams, by preparing an affidavit with the assistance of the prosecution, violated the requirement that extrajudicial activities must be undertaken, if at all, so as to minimize the risk of conflict. *A fortiori*, these ethical violations create the appearance of impropriety, warranting Gen. Abrams' disqualification.

**I. Gen. Abrams' status as the convening authority authorizes him, as a matter of law, to perform judicial acts.**

13. As a threshold matter, Gen. Abrams' professional duties in this case include judicial functions defined by federal law. *See, e.g.*, 10 U.S.C. § 837(a) ("No person . . . may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any *convening . . . authority with respect to his judicial acts.*") (emphasis added). For example, Gen. Abrams' judicial acts include the ability to grant clemency on the sentence of a court-martial. *See* 10 U.S.C. § 860(c)(2)(B) ("[T]he convening authority or another person authorized to act under this section may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part."). Gen. Abrams also has the authority to bind the military to pretrial agreements, select panel members for trial, and grant immunity to witnesses. In performing these judicial duties as the convening authority, Gen. Abrams "is required to fill a neutral role in the court-martial process and he abandons that role if

he himself is an accuser.” *United States v. Allen*, 31 M.J. 572, 584 (N-M. Ct. Crim. App. 1990).

14. The fact that the convening authority has been referred to as both a judicial officer and a quasi-judicial officer is immaterial. The *Klawuhn* court astutely explained why even quasi-judicial officers must be held to the same, if not higher, standards than judicial officers:

The judges who, in applying the Uniform Code of Military Justice, chose to define those functions as judicial were not ignorant of their resemblance to prosecutorial functions. Rather, they understood that defining them as judicial served an interest analogous to defining certain civil relationships as “fiduciary”: It subjected them to closer scrutiny by the courts and imposed a standard of fair dealing higher than the mere absence of fraud.

33 M.J. at 943. Even if the unique features of the military justice system obscure the precise role of the convening authority, military courts should apply “judicial standards of behavior, and concomitant court supervisions, to the functions of staff judge advocates and convening authorities in the processing of court-martial cases so as to hold them to a standard of officiality and fair dealing . . . .” *Id.* at 944.

## **II. Gen. Abrams’ *ex parte* communications with prosecutors violated the ethical standards required of him under the Model Code of Judicial Conduct.**

15. Gen. Abrams failed to meet his ethical obligations and duties under the ABA Model Code of Judicial Conduct and its close counterpart, the Code of Judicial Conduct for Army Trial and Appellate Judges. The Model Code consists of four canons, see Model Code of Judicial Conduct Preamble cmt. 1, which together “state overarching principles of judicial ethics that all judges must observe,” *id.* at Preamble cmt. 2. Each Canon is further distilled into Rules, the violation of which should result in discipline for the offending judge. *Id.* The Rules are accompanied by Comments

that provide guidance on the application of the Rules, *id.* at Preamble cmt. 3, and identify “aspirational goals” for the ethical conduct of judges, *id.* at Preamble cmt. 4. Taken together, these parts of the Code provide a basic framework of judicial ethics principles.

**A. Gen. Abrams’ conduct violated Canon 1 of the Code because he failed to uphold the independence, integrity, and impartiality of the judiciary.**

16. Canon 1 of the ABA Model Code of Judicial Conduct provides that “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” Model Code of Judicial Conduct Canon 1; *see also* Code of Judicial Conduct for Army Trial and Appellate Judges Canon 1 (same). More specifically, Rule 1.2 mandates that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” Code of Judicial Conduct for Army Trial and Appellate Judges R. 1.2. Prohibiting even the appearance of impropriety is essential because courts cannot maintain legitimacy if the public does not believe the courts to be models of independence and impartiality. The comments to Rule 1.2 make clear that public confidence is tied to judicial conduct, both professional and personal. *See id.* at R. 1.2 cmt. 1. The test for determining whether the appearance of impropriety could undermine this confidence is if reasonable people would see the misconduct as an adverse reflection on the judge. *Id.* at R. 1.2 cmt. 7. Thus, it is essential to examine not only whether Gen. Abrams has conducted himself in accordance with these standards, but also whether, to an objective and outside observer, it appears that the Gen. Abrams has behaved appropriately.

17. Applying these principles to the present case, Gen. Abrams' unnecessary *ex parte* communications with the prosecution created both actual impropriety and an appearance of impropriety. His ongoing communications with prosecutors were not merely incidental, limited to "non-controversial matters such as routine scheduling discussions." *Quintanilla*, 56 M.J. at 44; *see also United States v. Alis*, 47 M.J. 817, 824 (A.F. Ct. Crim. App. 1998) ("When circumstances require, *ex parte* communications for scheduling or administrative purposes that do not deal with substantive issues are authorized provided no party gains a tactical advantage as a result of the communication and the judge makes provision promptly to notify all other parties of the substance of the communication."). Rather, Gen. Abrams participated in substantive communications with the prosecution in order to prepare his affidavit. This mutual support creates the impression of collusion and behind-the-scenes manipulation. To the extent these communications addressed the merits and irregularities of the case, the prosecution may have also gained a tactical advantage over the defense. Therefore, Gen. Abrams' extensive and undisclosed involvement with prosecutors, transcending mere administrative supervision, constitutes actionable impropriety. And, even if misconduct is claimed not to have occurred despite appearances to the contrary, the appearance of collusion, alone, is sufficient to warrant disqualification.

18. Beyond the appearance of impropriety, Gen. Abrams' misconduct engendered uncertainty about his integrity as a judicial officer. Already under scrutiny for his handling of the case, Gen. Abrams, without notice to the defense, prepared a substantive affidavit with the assistance of members of the prosecution team, yet failed to inform the defense in a timely manner. If Gen. Abrams had fully disclosed his *ex*

*parte* communications or if the prosecution were to produce those communications, it would give the defense the fair opportunity to potentially object and evaluate the merits of a disqualification motion. This lack of transparency with the defense was not only inconsistent with Gen. Abrams' obligations to act with integrity, but also ran afoul of the duty of the tribunal to be candid with litigants treating both sides equally.

**B. Gen. Abrams did not perform his judicial duties impartially, competently, or diligently as required by Canon 2 of the Code.**

19. Canon 2 of the ABA Model Code of Judicial Conduct provides that “[a] judge shall perform the duties of judicial office impartially, competently, and diligently.” Model Code of Judicial Conduct Canon 2; *see also* Code of Judicial Conduct for Army Trial and Appellate Judges Canon 2 (same). Rule 2.2 of the Code deals directly with judicial impartiality, explaining that “[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” Code of Judicial Conduct for Army Trial and Appellate Judges R. 2.2. The comments to Rule 2.2 emphasize that “judge[s] must be objective and open-minded,” *id.* at R. 2.2 cmt. 1, not allowing background experiences to color their legal interpretations, *id.* at R. 2.2 cmt. 2. In the present case, Gen. Abrams' misconduct raises the serious question of whether his substantive *ex parte* communications with prosecutors will color or bias the performance of his judicial duties.

20. Additionally, Rule 2.4 of the Code focuses on the problems that can be created by extrajudicial influences on a judge's conduct. It provides, in pertinent part: “A judge shall not convey . . . the impression that any person or organization is in a position to influence the judge.” Code of Judicial Conduct for Army Trial and Appellate Judges R. 2.4(C). Similarly, Rule 2.9 expressly prohibits judges from

engaging in *ex parte* communications: “(A) A judge *shall not* initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending matter . . . .” *Id.* at R. 2.9(A) (emphasis added); *see also* Restatement (Third) of the Law Governing Lawyers § 113 (“*Ex parte* communications with a judicial official before whom a matter is pending violates the right of the opposing party to a fair hearing and may constitute a violation of due-process rights of the absent party.”). As previously discussed, the substantive and potentially collusive communications between Gen. Abrams and the prosecution regarding Sgt. Bergdahl’s case violate the plain terms of Rule 2.9. The failure to disclose these communications compounded the error and, as such, the public could reasonably conclude that Gen. Abrams is too closely and inextricably connected with the prosecution.

**C. Gen. Abrams’ substantive communications with prosecutors created a risk of conflict and therefore violated Canon 3.**

21. Canon 3 of the Code provides that “[a] judge shall conduct the judge’s personal and extrajudicial activities so as to minimize the risk of conflict with the obligations of judicial office.” Model Code of Judicial Conduct Canon 3; *see also* Code of Judicial Conduct for Army Trial and Appellate Judges Canon 3 (same). Gen. Abrams’ extensive communications with prosecutors not only violated the first two canons of judicial conduct, but also contravened the rule that requires judges to avoid participating in extrajudicial activities that would conflict with his judicial duties. Rule 3.1 specifies, in relevant part, that “when engaging in extrajudicial activities, a judge shall not: (A) participate in activities that will interfere with the proper performance of the judge’s judicial duties; . . . [or] (C) participate in activities that would appear to a

reasonable person to undermine the judge’s independence, integrity, or impartiality.” Code of Judicial Conduct for Army Trial and Appellate Judges R. 3.1. The fact that Gen. Abrams’ affidavit was prepared and revised with the assistance of the prosecution constituted an extrajudicial activity with the risk of conflict—an activity that was completely unnecessary and unwarranted.

22. Moreover, the Code of Conduct for United States Judges provides a useful analog for understanding the problematic conduct of Gen. Abrams. In Canon 3, the code mandates that judges should not “initiate, permit, or consider *ex parte* communication,” unless authorized by law. Code of Conduct for United States Judges, Canon 3(A)(4) (U.S. Jud. Conf. 2014). Situations authorized by law are extremely limited, and include only non-substantive matters, such as scheduling. When judges do receive *ex parte* communication, they are mandated to “promptly notify parties of the subject matter of the communication and allow the parties an opportunity to respond.” *Id.* Failure to do so undermines “the full right to be heard according to law” and can lead to the disciplining of the judge. *Id.* Therefore, Gen. Abrams conduct not only created the potential for conflict, but is actually a punishable offense under other codes for judicial officers.

23. As a result of Gen. Abrams’ substantive *ex parte* communications with the prosecution, he likely had access and was privy to extrajudicial information, acquiring personal knowledge and partisan advocacy beyond the established record. Extrajudicial knowledge is proper grounds for recusal because this type of special insight into the facts of a case, without more, may prevent a judge from impartially weighing the evidence and arguments. *See In re Murchison*, 349 U.S. at 136-39;

*United States v. Craven*, 239 F.3d 91, 103 (1st Cir. 2002) (disqualifying a sentencing judge who based a sentence on improper *ex parte* communications with a court-appointed expert). Judges should not rely upon or even consider information outside the official record because “the reliability of that information may not be tested through the adversary process” and it would be “difficult, if not impossible, for a judge, no matter how sincere, to purge that information from her mind. *Id.* at 103. Judges are also expressly obligated to recuse themselves in cases where they possess “personal knowledge of facts that are in dispute in the proceeding.” Model Code of Judicial Conduct R. 2.11(A)(1); *see also* Code of Judicial Conduct for Army Trial and Appellate Judges R. 2.11. This is especially true where, as here, the case has not yet been tried on the merits and the convening authority, acting in a judicial capacity, retains the command prerogative to amend the court-martial’s sentence.

**III. *A fortiori*, Gen. Abrams’ judicial role in this case creates the appearance of impropriety and partiality.**

24. Considering his *ex parte* communications with prosecutors, Gen. Abrams’ conduct has raised serious questions about whether he can act as an unbiased and impartial decision maker. Gen. Abrams violated the ethical standards required under the Model Code of Judicial Conduct, failing to uphold the independence, integrity, and impartiality required of those performing judicial acts. His conduct has created a strong appearance of impropriety, calling into question the fairness of the proceedings against Sgt. Bergdahl and warranting judicial disqualification.

25. In evaluating the need for disqualification, “[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral . . . .” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868,

881 (2009); *see also In re Murchison*, 349 U.S. at 136 (“[O]ur system of law has always endeavored to prevent even the *probability* of unfairness.”) (emphasis added); Model Code of Judicial Conduct R. 2.11(A) (requiring a judge to recuse him or herself if his or her “impartiality might reasonably be questioned”). Courts therefore apply an objective standard for recusal, *i.e.*, whether a reasonable and informed person would question a judge’s impartiality or integrity. This objective standard serves two purposes. First, it obviates the impossible task of making unreliable, subjective evaluations of bias. As the Court explained in *Caperton*, the objective assessment must turn on a “realistic appraisal of psychological tendencies and human weakness” to determine if the conflict poses “a risk of actual bias or prejudgment.” 556 U.S. at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Second, an objective assessment gives appropriate weight to the harm that the appearance of impropriety does to public confidence in a neutral judiciary. Judges must scrupulously adhere to ethical standards if the legitimacy of the judiciary is to be maintained.

26. *United States v. Quintanilla* makes clear that a decision on disqualification for *ex parte* communications is a multi-factor, case-specific inquiry, “depend[ing] on the nature of the communication; the circumstances under which it was made, what the judge did as a result of the *ex parte* communication; whether it adversely affected a party who has standing to complain . . . .” 56 M.J. at 44 (quoting Richard E. Flamm, *Judicial Disqualification* § 14.3.1 at 411-12 (1996)). Applying this standard, Gen. Abrams’ extrajudicial conduct leads an independent observer to reasonably question his impartiality and integrity. Already under scrutiny for irregularities in handling this case, Gen. Abrams exacerbated the problem by allowing a

member of the prosecution team to assist in the crafting of his affidavit. Given the critical nature of the testimony, the *ex parte* communications surely reached the substantive and procedural merits. Gen. Abrams would have been forced to evaluate his handling of the case with the prosecutor, who most likely had an incentive to downplay any irregularity or error in the proceedings. *Cf. United States v. Greatting*, 66 M.J. 226 (C.A.A.F. 2008) (holding that military judge who presided over four companion cases abused his discretion by not recusing himself after his *ex parte* conversation with the staff judge advocate provided a critique of the prosecutions).

27. Moreover, where a convening authority's testimony on a speedy trial issue "made it necessary for him to review his own diligence in processing the case," the Court of Appeals for the Armed Forces held that the testimony was disqualifying. *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002) (citing *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976)). The present case is no different. By testifying on the accuracy and regularity of the proceedings, in collaboration with the prosecution, Gen. Abrams developed a biased predisposition toward his own conduct that should disqualify him from reviewing any sentence in this case. *See Reed*, 2 M.J. at 68.

28. As a final point, Gen. Abrams and the prosecution also failed to ensure the full and complete disclosure of the *ex parte* communications in a timely fashion, "depriv[ing] the parties of an adequate foundation for their decisions on whether or not to request recusal." *Quintanilla*, 56 M.J. at 79. On balance, these circumstances suggest that Gen. Abrams' ability to approach his judicial responsibilities with the requisite degree of impartiality could reasonably be questioned. Accordingly, Gen. Abrams should be disqualified as the convening authority.

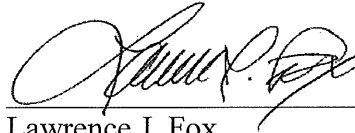
29. Even if disqualification is not the appropriate remedy, this Court should, at the very least, compel discovery of the *ex parte* communications so the present record, which today leaves so much unknown, can be fully developed. *See* Code of Judicial Conduct for Army Trial and Appellate Judges R. 2.11 cmt. (“A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.”). The defense has been disadvantaged to its great detriment without knowing what actually transpired during the *ex parte* communications between the prosecution and Gen. Abrams, and whether those communications adversely affected or will affect the proceedings against Sgt. Bergdahl. Thus, the full disclosure of Gen. Abrams’ involvement with the prosecution would give Sgt. Bergdahl a fair opportunity to evaluate the merits of any potential objection or motion.

#### **IV. Conclusion**

30. A judicial officer wields awesome power in our system and with that power comes the responsibility embodied in the ethical standards of conduct governing Gen. Abrams. Gen. Abrams irresponsibly engaged in *ex parte* communications with prosecutors, creating the appearance of impropriety and undermining the public’s confidence in fair and impartial proceedings. The only acceptable remedy is to disqualify Gen. Abrams as the convening authority or, at the very least, to order the discovery of the *ex parte* communications. To hold otherwise would cast a specter of partiality over the proceedings. Ultimately, approaching these issues from a professional responsibility perspective will not only prevent any miscarriage of justice in Sgt. Bergdahl’s case, but will also prevent public confidence in the judiciary from

being undermined and enable courts-martial to properly adjudicate future judicial misconduct.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lawrence J. Fox", written over a horizontal line.

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