

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

UNITED STATES)	
)	
v.)	GOVERNMENT REPLY TO DEFENSE
)	RESPONSE TO GOVERNMENT
BERGDAHL, ROBERT BOWDRIE)	MOTION FOR PARTIAL EXTENSION
(BOWE))	OF MRE 505(h) DEADLINE AND
SGT, U.S. Army)	RESPONSE TO DEFENSE CROSS-
HHC, Special Troops Battalion)	MOTION TO REMOVE CASE FROM
U.S. Army Forces Command)	THE CALENDAR
Fort Bragg, North Carolina 28310)	

29 JULY 2016

I. RELIEF SOUGHT

The Government requests the Court grant the Government request for a 90-day extension as outlined in G APP 30. Further, the Government requests the court deny the Defense Cross- Motion to remove the case from the docket.

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

The Government, as the moving party for the 90-day extension, has the burden of persuasion. The Defense, as the moving party, on the cross motion has the burden of persuasion. R.C.M. 905. The burden of proof for both motions is a preponderance of the evidence in accordance with R.C.M. 905(c)(1).

III. FACTS

The Government adopts the facts as previously identified in the Government Motion for Partial Extension (G APP 30). Throughout the Defense Response (D APP 26), the Defense has made assertions of fact that are incorrect, confusing, or misleading.

The Defense alleges that "SGT Bergdahl has already been denied a speedy trial." D APP 26 at 1. The Defense has never demanded speedy trial; to the contrary, the Defense not only agreed to the Government's proposed December trial date (ENCL 1) but requested an additional month long delay during the Article 39(a) session to accommodate Civilian Defense Counsel's schedule.

In a footnote, the Defense alleges that no military authorities who reviewed the underlying facts have categorized SGT Bergdahl as "AWOL or deserter." D APP 26 at

2. The military authorities Defense recognizes are only CJTF-82 Commander, MG Curtis Scaparrotti in 2009 and a Board of Inquiry (BOI) conducted in 2010. *Id.* Neither MG Scaparrotti nor the BOI had the benefit of a complete AR 15-6 investigation. Defense fails to recognize other military authorities that have examined the underlying facts. For example, in his findings and recommendations MG Dahl, the 2014 AR 15-6 investigator, explicitly states “consistent with my findings in Part IV, paragraph 3, above, PFC Bergdahl’s duty status should be retroactively corrected to reflect that he was a deserter effective 30 June 2009 until 31 May 2014.”

Defense alleged that the Government provided inconsistent dates for when it would be ready for trial. D APP 26 at 3. However in the Electronic Docketing Request the Government stated that it “anticipates having met its discovery obligation by May 2016,” then referenced the previously provided Motion for Pretrial Conference and Docketing Order. In that motion the Government more fully laid out the timeline expectations providing 31 October 2016 as the “earliest estimated trial date.” The date the Government expects to complete its discovery obligation [under 701(a)(6) as no 701(a)(2) request existed at the time] is not the same as the date Government estimates for the earliest possible trial date.

The Defense states that the Government requested more time “on the basis that government lawyers were scheduled to attend training on litigating cases involving classified information.” D APP 26 at 3. This request was made by Government Appellate Division in a filing before the Army Court of Criminal Appeals. It is hard to imagine how this information is relevant to either of the current motions at issue, as it never formed the basis of any proposal regarding the trial schedule. Moreover, the Defense was not simply “there as well.” The Government informed Defense counsel of the course, secured seats for Defense counsel, and funded Defense counsel’s travel.

Defense also alleges SGT Bergdahl’s local command “requires that he be accompanied by NCOs when leaving the installation for any purpose.” D APP 26 at 2. SGT Bergdahl has been repeatedly counseled on the issue and continues to request the NCOs accompany him off post [ENCL 2, 3].

Defense states that they do not have a reliable sense of how many documents are involved in the case or when the process will come to a final halt. D APP 26 at 4. The Government notes that its breakdown of outstanding disclosable CI in the case provided numbers and agency names when possible, while protecting classified and/or privileged information. The Government provided its estimate, 90 days, of how long agencies would need to assert the CI privilege. This information was provided in good faith and was based upon information from the original classification authorities to give defense a point of reference as to the disclosable CI remaining in the case.

Additionally, the Defense misstates the timeline with regard to documents provided by the Federal Bureau of Investigation. The Government received 2,200 documents from the FBI on 30 June 2016, however those documents were requested on 31 July 2015 (not 30 June 2016 as stated by the Defense). D APP 26 at 5.

As addressed in the Government's Motion and again below, the Government is not seeking a continuance, so there is no need to make any finding on the Defense's position that any delay is attributable to the Government. The Government notes, however, that Defense currently has possession of 15,000 documents containing disclosable CI, can expect approximately 10,000 more over the next 30 days, and will receive more documents on a rolling basis. The Defense claims about their inability to review these documents are simply incorrect. They have had access to a secure workspace in the FORSCOM Headquarters building since February with a standalone computer. On 18 March 2016, Defense was supplied with an additional four laptops. Though that space remains available to the Defense they have simply refused to utilize it.

III. EVIDENCE

No additional evidence is necessary to resolve the motion.

IV. LAW AND ARGUMENT

The Government's request for an extension is not a request for a continuance. In the Government's proposal for a new docketing order the Government recommended 1 August 2016 as the date for 505(h) motions. The Government also proposed a trial in December 2016. G APP 17. The Defense responded, concurring with our trial date proposal and the 1 August 2016 date. The Court ultimately docketed the trial for February 2017, but kept the 505(h) deadline as 1 August 2016. Thus, at the outset, there is a two month window between the trial date that the parties both proposed and the date that was ultimately docketed that would alleviate any need for a continuance. Moreover, as the Government made clear in the request for an extension, the anticipated volume of material subject to M.R.E. 505 will continue to shrink, thus reducing the potential workload of both the Defense and the Court in conducting potential review.

Under Military Rule of Evidence 104(a) for preliminary questions, such as scheduling issues, the Court is "not bound by the rules of evidence except those with respect to privileges." M.R.E. 104(a). The undersigned counsel, as an officer of the court – extremely cognizant of the ethical obligation for candor – averred the facts set forth in the motion. No further evidence is necessary or required.

Removal from the docket is not simply unwarranted, it is utterly unsupported by the rules. The Defense cites no authority for this novel suggestion and as such, the cross motion should be denied. The request is clear evidence of the Defense's incongruous positions, in that they both complain (for the first time) about speedy trial and simultaneously propose removing the case from the docket, which would needlessly delay resolution of issues unrelated to classified information. There is no

reason, for instance, to not address potential Defense motions to compel expert assistance, presently scheduled for 22-24 August 2016.

CONCLUSION

The Defense has failed to meet their burden on the cross-motion. The Government, in its motion for an extension, met the burden and no further evidence or hearing is required. Therefore, the Government requests the Court grant the Government motion and deny the Defense Cross-Motion.



JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 29 July 2016.



JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

Scheduling Worksheet – U.S. v. Bergdahl

<u>Event</u>	<u>Proposed Date</u>
<p>Trial Dates (List voir dire/empanelment dates separate from trial date if believed necessary)</p>	<p>G: 5-18 December 2016</p> <p>D: 5-18 December 2016</p> <p>This trial schedule is doable if we receive: (1) expedited processing of TS clearances for MAJs Thomas, Gleich, and CPT Banks. We just learned that the case involves 20,000 TS documents so we must seek TS clearance for all defense counsel on the case; (2) access to CI in the case without extensive delay. Based on the volume of CI documents expected (a number still uncertain but by all accounts hundreds of thousands and growing) we will request CA funding for travel costs of reservist augmentation so that we can process the case materials expeditiously. The trial schedule may be jeopardized if we do not receive such assistance.</p> <p>The defense requests that court be in session only during normal duty hours and not during weekends. Nights and weekends will be needed for trial preparation. Our client suffers back pain when he sits for prolonged periods and we will seek breaks and reasonable accommodations as appropriate.</p>
<p>Motions Hearing Dates – MRE 505(j). (Use CI in Trial/Pretrial Proceedings)</p>	<p>G: The Government requests motions due by 3 November 2016 with responses due 10 November 2016. (Note: MRE 505(j) also applies to pretrial proceedings, therefore additional hearings and motions may be required depending on the subject matter of the Article 39(a) sessions.)</p> <p>D: concur</p>
<p>Trial and Defense Notice of Expert Testimony</p>	<p>G: Notice by 30 September 2016. The Government requests Defense submit all requests for expert assistance by 1 August 2016 to ensure contracting actions can be completed.</p> <p>D: Defense notice of expert testimony by 28 October 2016 (or a month after the date set for government notice).</p>
<p>Notice of Request for Daubert Hearing – Both sides.</p>	<p>G: N/A</p> <p>D: N/A</p>
<p>Defense Notice of defenses required by RCM 701(b)(2) (MR/PLMR)</p>	<p>G: The Government requests notice by 30 September 2016 to ensure any expert witness requests can be completed by contracting.</p> <p>D: 28 October 2016 (the same deadline as notice of expert testimony)</p>

Defense Forum Election	<p>G: The Government requests forum selection by 4 November 2016.</p> <p>D: The Defense requests 10 November 2016.</p>
Defense Discovery Requests	<p>G: The Defense has already provided an initial discovery request.</p> <p>D: 08 June 2016.</p> <p>Defense submitted its first discovery request on 20 January 2016 IAW the previous PTO. Trial counsel submitted their response on 29 April 2016. The Defense has additional classified and unclassified discovery requests, based in part on the government's 29 April response.</p> <p>We reserve our right to submit additional discovery requests after the deadline. This is based primarily on the volume of evidence in the case and the fact that the majority of that evidence has not yet been viewed by the Defense.</p>
Defense Notice requirement under MRE 505 (e) & (h) (i)	<p>G: 30 September 2016 (for use of classified information) (Note: Defense may have need for several additional notice dates based on subsequent discovery requests.)</p> <p>D: concur</p>
Government Motion Under 505(h) (h)	<p>G: 1 August 2016 (Note: The Government may file additional motions under MRE 505(h) depending on the extent of the discovery and assertions of privilege and potential requirements to provide adequate substitutes).</p> <p>D: concur</p>
Defense Motion to Compel Discovery and Government Response	<p>G: The Government requests any Motions to Compel on 1 June 2016, and for submission of supplemental requests corresponding with CI views.</p> <p>D: 01 July 2016, with the same understanding that additional access to CI and new materials may require supplemental requests</p>
Defense Request Expert Assistance (if any) to TC	<p>G: Government requests Defense provide all requests for expert assistance by 1 Aug 2016.</p> <p>D: concur</p>
Defense Motion to Compel Expert Assistant (Gov. Response within 3 duty days)	<p>G: ___3___ days after receipt of CA action on requests.</p> <p>D: ___5___ days after receipt of CA action on requests.</p>

Motions for Appropriate Relief under RCM 903, 905, 906, 907 and Article 10.	G: 1 August 2016 (all parties) D: 16 September 2016 (all parties)
Government 404(b) notice to defense.	G: 1 August D: concur
MRE 404(b) MIL by Defense (if any) and any other Evidentiary Motions.	G: 14 days after the Government provides notice pursuant to MRE 404(b) D: 30 days after Gov submission of their witness list and 404(b) notice
Defense request for production of Afghan witnesses, if any.	G: Government requests notice by 1 August 2016 D: concur
Defense Request for Production of Other Witnesses.	G: Government requests notice by 15 August 2016 D: 01 September 2016
Gov. Response to Defense Afghan Witness Production Request	G: 8 August 2016 D: 22 Aug 2016
Gov. Response to Defense Other Witness Production Request	G: 22 August 2016 D: 16 Sept 2016
Defense Motion to Compel Production Afghan Witnesses	G: 15 August 2016 D: 09 Sept 2016
Defense Motion to Compel Production Other Witnesses	G: 3 October 2016 D: 14 Oct 2016

Motions Hearing on Witness Production	G: 12 October 2016 D: 26 Oct 2016
Final Witness Lists IAW RCM 701 (Both Parties)	G: 17 October 2016 D: 01 Nov 2016
Government Provide Proposed Security Plan, PA Plan and Logistics Plan	G: 15 July 2016, with Defense response, if any, due 20 July 2016 D: concur
Motions Hearing to Address Proposed Security, PA and Log Plan (if any)	G: 22 July 2016 D: Unnecessary, but we recommend preserving this date for a 39(a). We recommend reserving several days of the docket around this time for evidentiary hearings on the defense's expected motions for unlawful command influence and lack of personal jurisdiction.
Additional Member Questionnaire Proposal	G: 1 November 2016 D: 01 September 2016. Members completed questionnaires due back to trial counsel NLT 28 September 2016.
General Voir Dire Question proposals	G: 1 December 2016 D: concur
TC provide seating chart, flyer and F&S Worksheets	G: 30 November 2016 D: concur

DEVELOPMENTAL COUNSELING FORM

For use of this form, see FM 6-22; the proponent agency is TRADOC.

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 5 USC 301, Departmental Regulations; 10 USC 3013, Secretary of the Army.
PRINCIPAL PURPOSE: To assist leaders in conducting and recording counseling data pertaining to subordinates.
ROUTINE USES: The DoD Blanket Routine Uses set forth at the beginning of the Army's compilation of systems or records notices also apply to this system.
DISCLOSURE: Disclosure is voluntary.

PART I - ADMINISTRATIVE DATA

Name (Last, First, MI)	Rank/Grade	Date of Counseling
Bergdahl, Bowe	SGT	14 July 2014
Organization	Name and Title of Counselor	
HBBN, US ARMY NORTH, Fort Sam Houston, Texas	LTC Steve Fabiano, Battalion Commander	

PART II - BACKGROUND INFORMATION

Purpose of Counseling: (Leader states the reason for the counseling, e.g. Performance/Professional or Event-Oriented counseling, and includes the leader's facts and observations prior to the counseling.)

Initial Counseling

Safeguards to ensure and promote your health and welfare.

Initiation of suspension of favorable personnel action IAW AR 600-8-2

PART III - SUMMARY OF COUNSELING

Complete this section during or immediately subsequent to counseling.

Key Points of Discussion:

Welcome to United States Army North (USARNORTH) and the Guardian Battalion. Discussed: mission, assigned duties, expectations, living area provided, contact information for battle buddies, sponsors, and chain of command, first 48 hours.

Based not only on the information provided to me concerning your current state of health, but also on the negative perceptions that may exist in the general public, I have determined that it is necessary to implement a series of safeguards that are solely designed to ensure your health, safety, and general welfare. Specifically, while on the installation you will have complete, unhindered freedom of movement to conduct any activity that promotes your morale, health, and welfare. You have access to any religious, medical, recreational, educational, or other support facility on Fort Sam Houston. Furthermore, you are free to leave Fort Sam Houston at any time, for any reason; however, you may not leave the installation unless you are accompanied by two of your assigned battle buddies or sponsors. Should you find it necessary to leave Fort Sam Houston you must first notify one of your assigned battle buddies or sponsors. Upon your personal notification, two of your battle buddies will accompany you to any lawful destination off the installation.

As you know, an informal investigation conducted pursuant to Army Regulation 15-6 was initiated on 16 June 2014 to determine the facts and circumstances surrounding the events that led to your captivity. Army regulations require commanders to temporarily suspend favorable personnel actions when they initiate an investigation or inquiry related to a specific Soldier. However, this action is not initiated as punishment or restriction; instead, this is an administrative tool to ensure the efficient and effective execution of all personnel actions in accordance with established Army policies and procedures. The conditions upon which we will remove the flag, and the details of what the flag prohibits are attached on a separate document for your awareness and understanding. In addition, a copy of the flag (DA Form 268) is being provided to you today.

I will periodically reassess all available information to determine whether the aforementioned safeguards continue to be necessary to ensure your health, safety, and welfare. At a minimum, on a weekly basis, I will sit down with you and your chain of command to formally review the conditions that prompted me to implement these measures. My intent is that this will be a cooperative effort between you, the chain of command, and a host of other people who are all focused on ensuring your health, safety and welfare. Your input to this process is valued, but I will make decisions based on all of the inputs that I receive. Our first review will be conducted on 17 July.

OTHER INSTRUCTIONS

This form will be destroyed upon: reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement. For separation requirements and notification of loss of benefits/consequences see local directives and AR 635-200.

Plan of Action (Outlines actions that the subordinate will do after the counseling session to reach the assigned goal(s). The actions must be specific enough to modify or maintain the subordinate's behavior and include a specified time line for implementation and assessment (Part IV below)

Session Closing: (The leader summarizes the key points of the session and checks if the subordinate understands the plan of action. The subordinate agrees/disagrees and provides remarks if appropriate.)

Individual counseled: agree disagree with the information above.
Individual counseled remarks:

Signature of Individual Counseled:

Bowe Bergdahl

Date:

14 JUL 2014

Leader Responsibilities: (Leader's responsibilities in implementing the plan of action)

Signature of Counselor:

[Signature] FABIANO LTC

Date:

14 JUL 2014

PART IV - ASSESSMENT OF THE PLAN OF ACTION

Assessment: (Did the plan of action achieve the desired results? This section is completed by both the leader and the individual counseled and provides useful information for follow-up counseling.)

Counselor: _____

Individual Counseled: _____

Date of Assessment: _____

Note: Both the counselor and the individual counseled should retain a record of the counseling.



DEPARTMENT OF THE ARMY
HEADQUARTERS AND HEADQUARTERS BATTALION
UNITED STATES ARMY NORTH (FIFTH ARMY)
FORT SAM HOUSTON, TEXAS 78234-7000

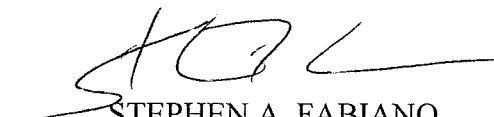
ARNO-HHBN-CDR

24 September 2015

MEMORANDUM FOR RECORD

SUBJECT: 24 September Weekly SGT Bergdahl Meeting

1. This memorandum for record serves as the method to capture discussion points during my meeting with SGT Bergdahl.
2. Attendees at this meeting included the following personnel: CPT Bradley Glosser, SFC Kelley Williams, and SGTs Loeschen, Halprin, Cortese, and Bergdahl.
3. During the first portion of this meeting, I provided comments to SGT Bergdahl on the current threat assessment pertaining to his personal safety. While there are no direct threats, there continue to be multiple individuals that communicate indirect threats or hateful language directed at SGT Bergdahl and his situation. The spike in these comments over the last week can be attributed to the recent Article 32 hearing that occurred here at Fort Sam Houston from 17-18 September. I also asked questions pertaining to his health, access to care, and if he had any other issues. SGT Bergdahl reported no issues. His work environment is positive, he has access to care, and he reported no negative approaches either on or off the installation.
4. At that point, I asked all to depart except CPT Glosser and SGT Bergdahl. I then asked SGT Bergdahl the following questions: Has anyone told you no with respect to any activities that you wanted to conduct off post? Do you still feel you need or want the continued presence of the sponsors and battle buddies? SGT Bergdahl stated that he had wanted to go to the family reunion of John Deeley (the ARNORTH stable master) in the spring of 2015, but it was too close to the original Article 32 date and while I never said no, it never came to fruition. Besides this event, and the roller derby that his legal team advised him against going to, there have been no other instances of someone telling him no. SGT Bergdahl believes that having the battle buddies and sponsors accompany him off post are required due to the situation. While he would love to do things like "go to a coffee shop off post and sit and read a book by himself" he understands the potential ramifications of a verbal or physical altercation and believes having people with him prevents this from happening. The bottom line is that he still wants and appreciates the team being with him.
5. The point of contact for this memorandum is the undersigned at (210) 221-4115 or by email at stephen.a.fabiano.mil@mail.mil.


STEPHEN A. FABIANO
LTC, LG
Commanding