
UNITED STATES)	Defense Motion for an Order
)	Concerning Defense's Access to
v.)	Classified Evidence in Possession of
)	Trial Counsel
SGT Robert B. Bergdahl)	
HHC, STB, US Army FORSCOM)	
Fort Bragg, NC 28310)	26 January 2016

RELIEF SOUGHT

Because the prosecution has improperly denied the defense access to nearly all of the classified evidence in its possession, we move that the Court enter an order in the terms set forth below in order to afford the parties equal access to evidence.

If the prosecution does not comply with that order forthwith, we will ask that the Court grant one of the remedies for discovery violations from R.C.M. 701(g) and M.R.E. 505(j) (listed later in this motion).

The issue is now ripe since defense sought and was denied access to classified materials on 13 January 2016, one day after the last Article 39(a) session. The prosecutors disclaimed any obligation to share classified evidence they already possess with the defense unless cognizant Original Classification Authorities (OCAs) explicitly bless the disclosure. A formal judicial order is therefore required.

WITNESSES AND EVIDENCE

Donald G. Gardner, defense security manager (present at Fort Bragg)

CPT Michael Petrusic, Assistant Trial Counsel (present at Fort Bragg)

Court record to date, including marked appellate exhibits and the record of the 12 January 2016 Article 39(a) session

Protective Order for Classified Information, 14 January 2016

Government Request for Clarification, CPT Petrusic, 21 January 2016

Encl 1 – Email from Colonel Nance, 12 January 2016

Encl 2 – Email from Colonel Nance, 22 January 2016

Encl 3 – Email from LTC Rosenblatt, 22 January 2016

FACTS

The four listed Trial Counsel in the case, with the assistance of 10 additional unlisted Trial Counsel drawn from across the Army, spent nearly two months between the Article 32 preliminary hearing and referral reviewing classified evidence with the aid of specially-purchased discovery management software. After referral, the four listed Trial Counsel were augmented by six additional unlisted Trial Counsel. That team has enjoyed continuous access to all classified materials to aid their case preparation. (The extraordinarily large team of prosecutors creates other fair trial concerns which we will address at another time.)

During the Article 39(a) session on classified evidence on 12 January 2016, Assistant Trial Counsel CPT Petrusic stated that the government possessed a significant amount of classified materials that are potentially relevant to the case. He estimated that this included 25,000 classified documents totaling over 300,000 pages. Trial Counsel had previously given defense access to 900 pages of materials before the preliminary hearing and approximately 20 pages of additional materials after arraignment. In other words, the defense to date has had access to less than 0.3% of the classified materials in the case.

On 13 January 2016, the day after the Article 39(a) session, defense counsel LTC Rosenblatt visited FORSCOM headquarters to meet with his security manager and begin viewing classified evidence. A team of three Trial Counsel and one additional unlisted Trial Counsel told LTC Rosenblatt that they would not give the defense further access to any additional classified materials based on their continuing belief that the OCAs could share information freely with prosecutors but not defense counsel. Despite prefferal of charges in March 2015 and a defense request for preservation and access to classified materials in April 2015, Trial Counsel informed defense that to date no additional OCA reviews had been completed.

Trial Counsel have not yet made any *Brady* disclosures of classified information to the defense.

All defense counsel and the accused have at least Secret security clearances, have executed non-disclosure agreements, and have signed acknowledgment memoranda of the Military Judge's classified protective order dated 14 January 2016.

The trial is scheduled to commence on 8 August 2016.

LEGAL AUTHORITY AND ARGUMENT

The government's fanciful interpretation of its right to keep all classified evidence to itself and not disclose it to defense is contrary to the plain language of applicable rules:

M.R.E. 505(c) is the rule about access to classified evidence. It requires that any information admitted into evidence or by order of the military judge "must be provided to the accused." There is no caveat requiring OCA approval.

M.R.E. 505(d) covers declassification of classified materials. If the defense cannot see the same materials as the prosecutors, we will be unable to intelligently ask that certain items

be declassified. This affords agencies an opportunity to withhold from defense information that is merely embarrassing and improperly classified.

The crux of the prosecution's misunderstanding concerns the invocation of privilege, which is M.R.E. 505's *only* listed limitation on a properly cleared accused's rights of access and discovery. M.R.E. 505(h)(1) makes clear that limits on discovery or access come *after* a claim of privilege is made, not *before*: the limitation is triggered "[u]pon the submission of a declaration under subsection (h)(1)(A) [government claim of privilege]." These requirements are reflected in the recommended order set out in the next section of this motion.

In its request for clarification, the prosecution proposes that a reason why the defense team has an inferior right of access to classified information is because SGT Bergdahl has a civilian defense attorney. However, no rule, learned treatise, or published or unpublished case supports that claim. This idea not only runs counter to Article 46, UCMJ and SGT Bergdahl's constitutional right to the effective assistance of counsel, but also ignores the fact that, as civilian defense counsel, Mr. Fidell is an officer of the court and an official participant in his Article 38 representation of a Soldier at a court-martial convened by an Army general officer, holds a DoD security clearance, has executed a DoD non-disclosure agreement, and is subject to a protective order by a Military Judge. The prosecution's suggestion that the defense team may soon have a non-DoD civilian expert that would further remove the defense team from being a part of DoD ignores that the prosecution also seeks to employ a civilian expert. Under the same rationale, the prosecution would forfeit its own right to possess classified evidence once the civilian expert joins their team. Nothing the government cites justifies this kind of mutual assured destruction of both legal teams.

The prosecutors have repeatedly insisted that they enjoy a right of access to classified information superior to that the accused. Lengthy though they are, the prosecution motions are unsupported. We invite the prosecutors to quote any language from the *Schmidt* case, E.O. 13526, M.R.E. 505, or any source other than their "druthers" that supports their claim that the presence of classified evidence trumps both Article 46 and the Sixth Amendment.

Aside from violating the accused's rights to due process, the prosecutors' demand for an OCA to submit to a needlessly cumbersome double-check process is completely unworkable. To date, less than than 1% of evidence has been cleared by OCAs for disclosure to defense, *even though many of the requests were originally made nearly a year ago*. The non-standard processing steps invented by the government for this case may explain the glacial pace exhibited by the various agencies, who are used to handling evidence by either releasing it for use at court or denying it, not making an initial determination that evidence is suited for release to *prosecutors* and a later determination that some narrower category of evidence can be released to *defense attorneys*. At the current leisurely pace and using the government's unnecessarily complicated process, it will be not *months*, but *years*, before this case is ready for trial, thus adding to the already considerable time SGT Bergdahl's life has been put on hold (on top of the nearly five years he was a POW in the hands of the Haqqani Network). It is fundamentally unfair to let prosecutors, with their platoon of lawyers and paralegals, rummage through a large body of evidence for anything favorable to their case while denying defense all access.

The defense relies on its email response to the Military Judge (enclosure 3 to this motion) and this motion as responses to the government's request for clarification.

PROPOSED ORDER

The following proposed order substantially restates the requirements of M.R.E. 505(h):

“When the Trial Counsel seeks to delete, withhold, or otherwise obtain relief from the Defense’s discovery of or access to classified information, the Trial Counsel must submit a declaration to the Military Judge invoking the United States’ classified information privilege setting forth the damage to national security that the discovery of or access to such information reasonably could be expected to cause. The declaration must be signed by the head, or designee, of the executive or military department or government agency concerned.

“Absent such a declaration, the parties shall enjoy equal access to and discovery of evidence in a manner substantially similar to discovery of and access to unclassified evidence, although all other rules and procedures to protect classified evidence, to include the Court’s 14 January 2016 protective order, still apply. I expect the parties to work cooperatively in implementing open-file discovery of both classified and unclassified materials.”

“Trial Counsel will promptly correct any instructions or guidance to any potential witnesses or government organizations placing additional limitations on the defense’s access to and discovery of classified information, and shall report compliance with this order NLT 10 February 2016.”

REMEDIES FOR NONCOMPLIANCE

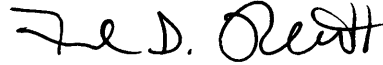
Rule for Court-Martial 701(g) governs the regulation of discovery and sanctions for discovery violations, but notes that M.R.E. 505 governs remedies for failure to disclose classified evidence. M.R.E. 505(j)(4) enumerates sanctions to be applied when the “prosecution continues to object to disclosure of the [classified] information”:

- i. Striking or precluding all or part of the testimony of a witness.
- ii. Declaring a mistrial;
- iii. Finding against the government on any issue as to which the evidence is relevant and material to the defense;
- iv. Dismissing the charges, with or without prejudice; or
- v. Dismissing the charges or specifications or both to which the information relates.

If Trial Counsel do not follow an order from the Military Judge granting the Defense immediate access to classified information in the possession of the Trial Counsel, the Military Judge should apply one or more of these listed remedies.

CONCLUSION

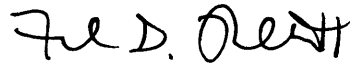
An order should be issued in the terms set forth above. Trial Counsel must observe the privilege requirement of M.R.E. 505(h) in order to afford the parties the requisite equal access to evidence.



EUGENE R. FIDELL
Civilian Defense Counsel

FRANKLIN D. ROSENBLATT
LTC, JA
Defense Counsel

I certify that I have served or caused to be served a true copy of the above on the Trial Counsel on 26 January 2016.



FRANKLIN D. ROSENBLATT
LTC, JA
Defense Counsel

RE: US v. Bergdahl G APP #__ - Subject: Supplement to GOV Motion for Protective Order for Classified Information

Nance, Jeffery R COL USARMY (US)

Sent: Tuesday, January 12, 2016 2:16 PM
To: Petrusic, Michael CPT USARMY FORSCOM (US)
Cc: Fidell, Eugene [eugene.fidell@yale.edu]; Rosenblatt, Franklin D LTC USARMY (US); Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US); Kurz, Margaret V MAJ USARMY FORSCOM (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US); Whipple, Eileen C CPT USARMY 16 MP BDE (US); Craver, Stacy C CIV (US); Walls, Patricia A CIV USARMY IMCOM (US)

Attachments: Protective Order -- Bergd~1.docx (45 KB)

Counsel,

I have considered your positions on the matter and decided that -- on the issue of whether a notice requirement applies to information that may be classified which the defense seeks to obtain thru other sources than the discovery/production rules under RCM -- no such notice requirement applies. That notice requirement only applies to the disclosure provision. Of course, all other rules designed to protect classified information still apply to any such information which the defense may obtain or to which they may unwittingly be exposed. I expect all parties to carefully comply with those rules.

Thus, I have made my final changes to the Protective Order. I am sending it to you one more time for you to look at two things before I issue it. 1. Have I made any typos, etc.? 2. Have a corrected all the locations where the government had inserted that notice requirement? I know I said I wasn't going to do this, but I decided to get you to help me make sure the document is correct, considering that so many changes have been made to it.

Please get this back to me ASAP so that I may issue it.

COL Nance

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

From: Petrusic, Michael CPT USARMY FORSCOM (US)
Sent: Monday, January 11, 2016 4:38 PM
To: Nance, Jeffery R COL USARMY (US)
Cc: 'Fidell, Eugene'; Rosenblatt, Franklin D LTC USARMY (US); Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US); Kurz, Margaret V MAJ USARMY FORSCOM (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US); Whipple, Eileen C CPT USARMY 16 MP BDE (US); Craver, Stacy C CIV (US); Walls, Patricia A CIV USARMY IMCOM (US)
Subject: RE: US v. Bergdahl G APP #__ - Subject: Supplement to GOV Motion for Protective Order for Classified Information

Good afternoon Sir,

I am resending the Supplement to Government Motion for Protective Order for Classified Information in accordance with Ms. Craver's directions regarding marking.

v/r,
CPT Petrusic

MICHAEL PETRUSIC
CPT, JA
Office of the Staff Judge Advocate
U.S. Army Forces Command
Fort Bragg, North Carolina

Office: 910-570-5925
VoSIP: 302-238-3441

Encl 1
D APP 5
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Cell: [REDACTED]

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

From: Petrusic, Michael CPT USARMY FORSCOM (US)
Sent: Monday, January 11, 2016 4:46 PM
To: Nance, Jeffery R COL USARMY (US) <jeffery.r.nance.mil@mail.mil>
Cc: 'Fidell, Eugene' <eugene.fidell@yale.edu>; Rosenblatt, Franklin D LTC USARMY (US) <franklin.d.rosenblatt.mil@mail.mil>; Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US) <alfredo.n.foster.mil@mail.mil>; Kurz, Margaret V MAJ USARMY FORSCOM (US) <margaret.v.kurz.mil@mail.mil>; Beese, Christian E LTC USARMY HQDA TJAGLCS (US) <christian.e.beese.mil@mail.mil>; Whipple, Eileen C CPT USARMY 16 MP BDE (US) <eileen.c.whipple.mil@mail.mil>; Craver, Stacy C CIV (US) <stacy.c.craver.civ@mail.mil>; Walls, Patricia A CIV USARMY IMCOM (US) <patricia.a.walls8.civ@mail.mil>
Subject: US v. Bergdahl G APP #__ - Subject: Supplement to GOV Motion for Protective Order for Classified Information

Good afternoon Sir,
Please find attached the enclosed Supplement to Government Motion for Protective Order for Classified Information. This supplement attempts to address 7 of the 12 points raised in the Defense Response to the Government Motion, in addition to making edits in the Definitions section to remove unnecessary text.

We have not labeled this motion with a number yet as we are unsure whether you'd prefer to include this as a supplement to the existing G APP filing, or as its own filing next in order. If you have a preference, please let us know and we will mark it accordingly in preparation for tomorrow's hearing.

Please let us know if you have any questions or concerns.

v/r,
CPT Petrusic

MICHAEL PETRUSIC
CPT, JA
Office of the Staff Judge Advocate
U.S. Army Forces Command
Fort Bragg, North Carolina

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VoSIP: 302-238-3441
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RE: US v. Bergdahl G APP #7 - Subject: Request for Clarification

Nance, Jeffery R COL USARMY (US)

Sent: Friday, January 22, 2016 8:59 AM

To: Petrusic, Michael CPT USARMY FORSCOM (US)

Cc: Fidell, Eugene [eugene.fidell@yale.edu]; Rosenblatt, Franklin D LTC USARMY (US); Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US); Kurz, Margaret V MAJ USARMY FORSCOM (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US); Whipple, Eileen C CPT USARMY 16 MP BDE (US); Craver, Stacy C CIV (US); Walls, Patricia A CIV USARMY IMCOM (US)

All,

I thought this was pretty clear from the protective order and what I said on the record. Nevertheless:

Defense,

When you respond, please inform the court and the government of your understanding of your obligations under the protective order and applicable law and regulations regarding to notify trial counsel and/or seek OCA authorization:

1. When you seek to disclose to a third party, classified information provided to you by TC thru discovery/disclosure obligations.
2. When you seek to disclose to a third party, classified information you obtain thru your own case preparation efforts.
3. When you seek to discover classified information from other governmental agencies thru your own case preparation efforts.
4. When you unintentionally obtain classified information from other governmental agencies or from the public domain thru your own case preparation efforts.

Thanks,

COL Nance

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

From: Petrusic, Michael CPT USARMY FORSCOM (US)

Sent: Thursday, January 21, 2016 9:34 PM

To: Nance, Jeffery R COL USARMY (US)

Cc: 'Fidell, Eugene'; Rosenblatt, Franklin D LTC USARMY (US); Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US); Kurz, Margaret V MAJ USARMY FORSCOM (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US); Whipple, Eileen C CPT USARMY 16 MP BDE (US); Craver, Stacy C CIV (US); Walls, Patricia A CIV USARMY IMCOM (US)

Subject: US v. Bergdahl G APP #7 - Subject: Request for Clarification

Good evening Sir,

Please find attached a Government request for clarification regarding the Protective Order.

v/r,

CPT Petrusic

MICHAEL PETRUSIC

CPT, JA

Office of the Staff Judge Advocate

U.S. Army Forces Command

Fort Bragg, North Carolina

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RE: US v. Bergdahl G APP #7 - Subject: Request for Clarification

Rosenblatt, Franklin D LTC USARMY (US)

Sent: Friday, January 22, 2016 4:52 PM**To:** Nance, Jeffery R COL USARMY (US); Petrusic, Michael CPT USARMY FORSCOM (US)**Cc:** Fidell, Eugene [eugene.fidell@yale.edu]; Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US); Kurz, Margaret V MAJ USARMY FORSCOM (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US); Whipple, Eileen C CPT USARMY 16 MP BDE (US); Craver, Stacy C CIV (US); Walls, Patricia A CIV USARMY IMCOM (US)

Colonel Nance,

We'll address the larger issues in more detail in our response but we wanted to send you quick, specific responses to your questions:

1. Before we seek to disclose classified information to any third party in any manner in connection to the trial we will notify Trial Counsel and Military Judge as required by MRE 505(i) and Protective Order paragraphs 1(h)(2) and (3).
2. Same notice requirement as #1 before disclosure, regardless of how we obtained the classified information.
3. No notice requirement to the TC. We have the same ability and requirements to access information from OGAs as the TCs. There is no per se requirement to get OCA approval for our access since agencies can share classified information with other agencies without OCA approval, as explained in EO 13526 para 4.1(i)(1). Withholding approval by the OCA is the exception. The interpretation the TCs seem to have adopted that 13526 requires OCA approval every time is not supported, and, if implemented, would effectively shut down information sharing between DoD and the rest of government.
4. We will safeguard the information, notify our security manager, report security violations as required by AR 380-5, and notify the Military Judge if the violation is also a violation of the PO. We may request that the TC seek OCA determination of proper classification. No defense requirement to notify OCA, though the OCA will almost certainly be notified through reporting channels of security violations.

Sincerely,

Franklin D. Rosenblatt
LTC, JA
Deputy Chief
U.S. Army Trial Defense Service
office: 703-693-0283
blackberry: 571-723-1162

From: Nance, Jeffery R COL USARMY (US)**Sent:** Friday, January 22, 2016 8:59 AM**To:** Petrusic, Michael CPT USARMY FORSCOM (US)**Cc:** 'Fidell, Eugene'; Rosenblatt, Franklin D LTC USARMY (US); Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US); Kurz, Margaret V MAJ USARMY FORSCOM (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US); Whipple, Eileen C CPT USARMY 16 MP BDE (US); Craver, Stacy C CIV (US); Walls, Patricia A CIV USARMY IMCOM (US)**Subject:** RE: US v. Bergdahl G APP #7 - Subject: Request for Clarification

All,

I thought this was pretty clear from the protective order and what I said on the record. Nevertheless:

Defense,

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1. When you seek to disclose to a third party, classified information provided to you by TC thru discovery/disclosure obligations.
2. When you seek to disclose to a third party, classified information you obtain thru your own case preparation efforts.
3. When you seek to discover classified information from other governmental agencies thru your own case preparation efforts.
4. When you unintentionally obtain classified information from other governmental agencies or from the public domain thru your own case preparation efforts.

Thanks,

COL Nance

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

From: Petrusic, Michael CPT USARMY FORSCOM (US)

Sent: Thursday, January 21, 2016 9:34 PM

To: Nance, Jeffery R COL USARMY (US)

Cc: 'Fidell, Eugene'; Rosenblatt, Franklin D LTC USARMY (US); Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US);

Kurz, Margaret V MAJ USARMY FORSCOM (US); Beese, Christian E LTC USARMY HQDA TJAGLCS (US); Whipple,

Eileen C CPT USARMY 16 MP BDE (US); Craver, Stacy C CIV (US); Walls, Patricia A CIV USARMY IMCOM (US)

Subject: US v. Bergdahl G APP #7 - Subject: Request for Clarification

Good evening Sir,

Please find attached a Government request for clarification regarding the Protective Order.

v/r,

CPT Petrusic

MICHAEL PETRUSIC

CPT, JA

Office of the Staff Judge Advocate

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