

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

UNITED STATES	)	
	)	
v.	)	GOVERNMENT RESPONSE TO THIRD
	)	DEFENSE MOTION TO COMPEL
BERGDAHL, ROBERT BOWDRIE	)	(UNLAWFUL COMMAND INFLUENCE)
(BOWE)	)	
SGT, U.S. Army	)	
HHC, Special Troops Battalion	)	6 JULY 2016
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	

---

**I. RELIEF SOUGHT**

The Government requests the Court deny the Third Defense Motion to Compel (Unlawful Command Influence) as the Defense has not shown, by a preponderance of the evidence, that the items requested are material to the preparation of the defense.

**II. BURDEN OF PERSUASION AND BURDEN OF PROOF**

The Defense, as the moving party, has the burden of persuasion in accordance with R.C.M. 905(c)(2). The burden of proof is a preponderance of the evidence in accordance with R.C.M. 905(c)(1).

**III. FACTS**

On 30 June 2009, the Accused deserted from his place of duty at Observation Post Mest, Afghanistan, while deployed as part of Task Force Yukon, Combined Joint Task Force-82/Regional Command-East (CJTF-82). After leaving the observation post, he was captured by enemy forces and remained in captivity until 31 May 2014, when he was returned to military control.

After his return to military control on 31 May 2014, charges were preferred against the Accused on 25 March 2015 by LTC Peter Burke, and an Article 32 Preliminary Hearing was conducted on 17 and 18 September 2015. The Preliminary Hearing was also directed by LTC Burke in his capacity as the Special Court-Martial Convening Authority. The matter was referred to trial on 14 December 2015 by GEN Robert Abrams in his capacity as the General Court-Martial Convening Authority.

**III. EVIDENCE**

No additional evidence is necessary to resolve the motion.

#### IV. LAW AND ARGUMENT

The Defense attempts to justify their discovery request by pointing to their duty to investigate, arguing that they can only learn about possible Unlawful Command Influence (UCI) by reviewing the requested material. Effectively, their argument treats the duty to investigate as granting them a virtual all access pass to seek evidence in places they hope it might possibly exist, with no requirement that they offer anything beyond their own speculation. The military justice discovery process, however, is "not designed to permit an accused to fish blindly for evidence with only hope for a tackle and prayer for bait." *United States v. Calley*, 46 C.M.R. 1131, 1187 (A.C.M.R. 1973) (quoting the trial judge's rationale for denying a defense motion for discovery). To the contrary, "these rules are themselves grounded on the fundamental concept of relevance." *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010); see also R.C.M. 703(f)(1) ("Each party is entitled to the production of evidence which is relevant and necessary."). The "relevance" of the requested material is measured by the standard set forth in M.R.E. 401 and "relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." R.C.M. 703(f)(1) at discussion. Where the defense fails to present an adequate theory of relevance to justify the production of a given piece of evidence, a military judge properly acts within his or her discretion in denying such a request. See *Graner*, 69 M.J. at 107-08.

While relevant evidence should be produced, evidence requested based on conjecture and speculation should be denied. For example, in *Graner*, the defense sought documents purportedly written by high ranking government officials that allegedly may have authorized abuses done by the accused in the Abu Ghraib detainee facility. *Id.* at 106. Defense, however, could never show their client was aware of such documents at the time of the abuse. *Id.* at 108. Under those fact, the Court of Appeals of the Armed Forces held the trial judge was well within his discretion to deny the defense discovery request. *Id.* Likewise in *Calley v. Callaway*, 519 F. 2d 184, 217 (5th Cir. 1975), when no one at the local installation had been pressured to bring charges against Lieutenant Calley, the trial judge was well within his discretion not to subpoena high ranking government officials who defense alleged wanted to pressure the bringing of charges.

The Defense's request for email correspondence from more than 70 individuals, only two of whom have actually taken any action relating to this case, is based almost entirely on speculation, and in certain cases seeks information that is protected by attorney work product or attorney client privilege. Additionally, the Defense seeks information relating to communications by and between the Department of Defense and Members of Congress. Finally, the Defense seeks information regarding the decision to detail certain Trial Counsel.

a. Correspondence Among Members of the Department of Defense (D App 23, #1-43, #45-56<sup>1</sup>)

The Defense begins by seeking correspondence sent to a variety of high ranking officials in the Department of Defense, including, *inter alia*, the four Secretaries of Defense who served from 2009 to present, the Chairmen and Vice Chairmen of the Joint Chiefs of Staff, the Secretaries and Undersecretaries of the Army, and the Chiefs and Vice Chiefs of Staff of the Army. Additionally, the Defense seeks information from a variety of subordinate commands, including U.S. Central Command, European Command, and ISAF Regional Command East.<sup>2</sup> In support of the request for this group of individuals, the Defense claims that they have “personal knowledge”<sup>3</sup> of issues relating to this case. The Defense has no evidence, and does not even allege, that the vast majority of these people took any action or communicated with anyone involved in this case.<sup>4</sup> They seem to believe that simply by virtue of being senior officials and possibly having sent or received an email regarding SGT Bergdahl that they have become witnesses or have potentially discoverable material relating to Unlawful Command Influence.

The Defense’s argument fails for two reasons. First, there is no evidence that any of the individuals were witnesses to anything related to this case. The mere receipt of an email by a high ranking officer or a senior member of the DoD does not make that communication relevant in the absence of any claim that the individual took any action or was otherwise a witness. The existence of these emails is entirely speculative, as the Defense effectively admits through the repeated use of the word “likely” and its failure to cite any specific facts for the vast majority of its requests. Second, despite the Defense assertion that these individuals have “personal knowledge” of issues related to this case, they can point to nothing more than their respective duty positions and a guess that they might have sent or received an email.

The Defense repeatedly offers conclusory rhetoric about the discoverability of these materials based on appeals to “common sense” or “logic.” D App 23 at 11-12. They fail, however, to cite to a single rule or any case which has held that the receipt of an email by an individual utterly unconnected to the case is discoverable. Indeed, if the Defense’s position is correct, the Government would be required to conduct similar expansive searches in all cases, as the mere possibility of having been the recipient of an email, briefing, or update alone would be a sufficient justification. Such an expansive

---

<sup>1</sup> The Defense appears to have withdrawn their request for the individuals listed in paragraphs 40, 41 and 52

<sup>2</sup> Because the Government’s position on each of these individuals is the same, the Government has consolidated its response, rather than repeat its position for each numbered paragraph of the Defense Motion to Compel. The referenced paragraph numbers refer to the paragraph numbers in the Analysis of Specific Request section of the Third Defense Motion to Compel.

<sup>3</sup> Contrary to their assertion, receiving an email relating to a subject does not necessarily equate to “personal knowledge” of anything. Quite the opposite, such a scenario would likely result in nothing more than communication of hearsay. By the same logic, any senior member of the Department of Defense who views a television news report regarding this case would have gained “personal knowledge.”

<sup>4</sup> The Government notes that for those individuals, including GEN Abrams, GEN Scaparroiti and LTC Burke, who did take some action relating to this case, the Government has turned over responsive materials.

discovery obligation is precisely the type of fishing expedition that Courts have repeatedly ruled are not permitted. See generally *Calley*, 46 C.M.R. at 1187.

b. The Defense Claims Relating to Unlawful Command Influence

The Defense claim that the requested discovery is related to Unlawful Command Influence (UCI) is also unsupported. Of the more than 70 individuals listed in their requests, only two, GEN Robert Abrams as the General Court-Martial Convening Authority and LTC Peter Burke as the Accuser and Special Court-Martial Convening Authority, have actually taken any action relating to this case, and the Government has agreed to disclose all material responsive to the discovery request for those individuals. The Defense has no evidence, and has not alleged, that any of the other individuals listed have attempted to influence the proceedings in any way, shape, or form.

By contrast, in *United States v. Calley*, 46 C.M.R. 1131, the Defense was offered the opportunity to interview certain individuals within the Department of Defense, but only after presenting evidence of statements made by the President and the Secretaries of the Defense and Army which indicated a desire to have charges preferred against Lieutenant Calley. *Id.* at 1155. There is no support for the notion that the Defense can require the Government to search for evidence of UCI totally absent anything to indicate that it might exist beyond the Defense's speculation. Military Courts have rejected similar Defense tactics as they relate to speculative claims of possible UCI in the post-trial context. *United States v. Williams*, 2005 CCA LEXIS 289 (NMCCA 2005) (rejecting a Defense motion for a Dubay hearing on UCI as "simply a fishing expedition"); *United States v. Descombes*, 1989 CMR LEXIS 1005 (AFCCA 1989) (finding that "[t]he appellant has furnished no evidence to support the alleged suggestion of unlawful command influence and we see no reason to order a post-trial session fishing expedition to look for the possibility of such evidence").

If the Defense position is correct, and the need to investigate potential UCI absent any particular indication or articulable suspicion is sufficient to justify searching the files of anyone who might have received or sent an email, the Government would be required to do so in every case, which would grind the military justice process to a halt. Once again, this is simply not the law.

c. Correspondence by the Staff Judge Advocate and Trial Counsel (D App 23 – #62-63)

The Defense also seeks information from a number of attorneys involved in this matter, including the FORSCOM Staff Judge Advocate (SJA) and each member of the prosecution team. The Defense cites no authority that the correspondence of the SJA is discoverable. Indeed, the Rules for Courts-Martial specifically make certain material produced by the SJA subject to mandatory disclosure, but does not include any such requirement for all correspondence generally. See R.C.M. 406(c), R.C.M. 1106. Once again, the Defense fails to identify with any specificity what would be discoverable in the

SJA's correspondence, and again, their position would result in such a request being made in every case.

With regard to the request for the correspondence of Trial Counsel, although the Defense now appears to claim that they are only seeking emails that were sent to the convening authority or are evidence of Unlawful Command Influence, the actual request that was made was for emails that included "**ANY THIRD PARTY (NON-TRIAL COUNSEL OR PROSECUTION EXPERT OR PARALEGAL).**" D App 23 at 39 (emphasis in original). In yet another example of the Defense's fishing expedition, they seem to take the position that they are entitled to search the correspondence of opposing counsel, based solely on the mere chance that there is evidence of UCI. As with the remainder of their motion, the Defense cites no rule or case which would support this request.

- d. Correspondence between the Department of Defense and Congress (D App 23 #65-69).

The Defense request for information on emails sent within the Office of the Congressional Legislative Liaison (OCLL), between the Department of Defense and both the House and Senate Armed Services Committees, between the House of Representatives or the Senate and the Office of the Secretary of Defense, and the names of all personnel assigned to OCLL should be denied.

In a novel argument, the Defense claims that such material is necessary to investigate "improper influence of Congress." The Defense cites no law for the notion that the concept of UCI can be extended to actions by Members of Congress. At the outset, under the Separation of Powers, the President, not Congress, is the Commander in Chief. See U.S. Const. art. II, § 2. Article 37, UCMJ, the statutory basis for the prohibition against UCI, states:

- (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. 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.

Members of Congress are not among the category of individuals subject to the code under Article 2, UCMJ. No case has ever held that actions by Congress can constitute UCI.

Even Senator John McCain, a person who is subject to the code as a retiree, cannot engage in UCI, as he is not acting with a mantle of command authority. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994).

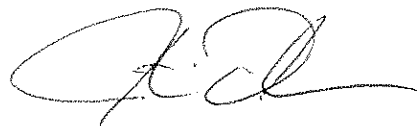
- e. Correspondence relating to the detailing of LTC Beese and MAJ Kurz (D App 23 #70)

The Defense request for information and correspondence regarding the detailing of LTC Beese and MAJ Kurz, both former Trial Counsel assigned to the case, should be denied. The Defense claim that the detailing of counsel "before any convening authority had decided whether preferral of charges was warranted" somehow justifies this request is baffling. First, convening authorities are not required to decide that charges should be preferred, rather the only requirement is that the Accuser be subject to the code and that the charges be sworn to before a commissioned officer authorized to administer oaths. Article 30, UCMJ. Moreover, a convening authority who "decided that preferral of charges was warranted" would be disqualifying themselves as convening authority. Article 22, UCMJ. The Defense claim also ignores the fact that attorneys are routinely detailed to cases prior to preferral. It would be a remarkable departure from normal practice to expect that charges would be considered and preferred by an Accuser without the advice of an attorney.

The Defense cites no authority for the proposition that the internal decisions to detail trial counsel are subject to discovery, and as such, the request should be denied.

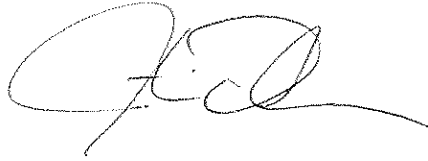
### CONCLUSION

The Defense has failed to meet their burden for any of the items requested, and the dearth of authority for any of their propositions is clear evidence that the request is nothing more than an attempt to engage in a "fishing expedition." Therefore, the Government requests the Court deny the Third Defense Motion to Compel.



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 6 July 2016.

A handwritten signature in black ink, appearing to read 'J. Oshana', with a long horizontal flourish extending to the right.

JUSTIN C. OSHANA  
MAJ, JA  
Trial Counsel