

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

UNITED STATES)
)
 v.) Eighth Defense Motion to Compel
) (Apparent Unlawful Command Influence)
)
)
 SGT Robert B. Bergdahl)
 HHC, Special Troops Battalion)
 U.S. Army Forces Command)
 Fort Bragg, North Carolina 28310) 25 August 2017

RELIEF SOUGHT

The Defense moves to compel production of unredacted copies of the attached emails in Enclosure 1 and for an order directing Trial Counsel, MAJ Justin Oshana, to make himself available to interview with the Defense. The Defense requests oral argument for this motion.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As moving party, the Defense has the burden of proof. The applicable standard for questions of fact is proof by a preponderance.

WITNESSES/EVIDENCE

The Defense requests the court consider the following evidence for purposes of this motion:

- Enclosure 1: Emails between Trial Counsel and the White House
- Enclosure 2: Emails between Defense Counsel and Trial Counsel
- Enclosure 3: Defense Fourteenth Discovery Request
- Enclosure 4: Government Response to Defense Fourteenth Discovery Request
- Enclosure 5: Secretary Hagel's Statement

The Defense intends to call MAJ Oshana as a witness for purposes of this motion. The Defense may be willing to stipulate to certain facts pertinent to this motion should Trial Counsel make himself available for interview by Defense Counsel prior to oral argument on this issue.

FACTS

1. On 24 May 2017, the Court, in AE 36, denied the defense's 20 January 2017 Motion to Dismiss for apparent Unlawful Command Influence (UCI), D APP 56. Thereafter, the defense unsuccessfully sought a writ of mandamus from the U.S. Army Court of Criminal Appeals and pursued a writ-appeal at the U.S. Court of Appeals for the Armed Forces. The issue is preserved for appellate review.

2. Since his inauguration, President Trump has to our knowledge made no further public statements vilifying SGT Bergdahl. His failure either to withdraw or remediate his earlier statements indicates that his views about SGT Bergdahl have not changed. Even if President Trump's silence were treated as drawing a line between his pre- and-post-inauguration views (a position we reject for the reasons we have previously stated), new evidence makes it impossible to view his silence that way. Rather, the new evidence, drawn from the government's own files, shows that, post-inauguration, the White House affirmatively rejected suggestions for remediation. That refusal is evidence that the pre-inauguration statements continue to reflect President Trump's views.

3. On 4 May 2017, counsel for SGT Bergdahl made a FOIA request seeking communications between the Army and others concerning SGT Bergdahl. On 15 August 2017, in response to this request, counsel received, via email, a letter dated 8 August 2017, that transmitted 113 heavily-redacted emails from FORSCOM's files. They were unmistakably emails to and from Trial Counsel, including a number between Trial Counsel and White House personnel. Selected emails from that package that are relevant to the matter at hand are attached as Enclosure 1 to this motion. These emails confirm, first, that after President Trump became President and during the pendency of D APP 56, his staff was in substantial contact with Trial Counsel by email, telephone and in person, about D APP 56, and, second, that Trial Counsel¹ sought to persuade the Trump administration to issue a statement along the lines of the one Secretary of Defense Chuck Hagel issued on 6 August 2013 after President Obama stated, in public, that any member of the Armed Forces found to have committed sexual harassment should receive a dishonorable discharge. D APP 56 at 16 & n.29.² Trial Counsel distinguished the generic situation that impelled Secretary Hagel to act and the person-specific issue created by Mr. Trump's campaign of vilification:

Attached is the memo that Secretary Hagel signed after President Obama's comments on sexual assault. As you can see, it also includes a reference to a statement by the White House Counsel. Obviously this is a different

¹ Several of the emails make it clear that Trial Counsel was the individual interacting with the White House, and Trial Counsel has not claimed otherwise in his communications with the Defense. The Department of Justice was also consulted, presumably because of the pendency of the "Muslim ban" cases in the Fourth and Ninth Circuits. The pertinence of President Trump's campaign-trail statements is at issue in *Trump v. Int'l Refugee Assistance Proj.*, No. 16-1436 (U.S.) (certiorari granted 26 June 2017).

² Trial Counsel supplied the White House with a copy of Secretary Hagel's statement. A copy is attached.

situation as these comments are directed at a particular individual, but the general idea would be the same.

The clear implication -- a correct one in our view -- is that this is a more problematic UCI case than the one Secretary Hagel was called upon to remediate.

4. Neither President Trump nor any member of his administration issued the kind of statement Trial Counsel suggested. The purpose of that suggestion -- reminiscent of the damage-control offer OCLL made in vain to the general counsel of the Senate Armed Services Committee on 13 October 2015 after Senator McCain publicly threatened a hearing if SGT Bergdahl was not punished, see D APP 27 at 6-7 -- was transparently to blunt SGT Bergdahl's apparent UCI case by trying to build a wall between Mr. Trump's campaign statements and his views after taking the Oath of Office. Instead of taking Trial Counsel's advice, the White House adopted a wait-and-see attitude, likely hoping that D APP 56 would be denied (as it and subsequent efforts to obtain a writ of mandamus both were).

5. Trial Counsel's failure to persuade the White House to *Hagelize* President Trump's campaign statements shows that -- whatever other campaign positions the President has abandoned since 20 January 2017 -- so far as SGT Bergdahl is concerned, he has not only not changed his tune but passed up an explicit opportunity to do so. Silence may be golden, but this silence speaks volumes.

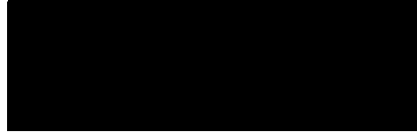
LEGAL AUTHORITY AND ARGUMENT

The prosecution and defense and the court-martial have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process. Rule for Court-Martial (RCM) 703(a). Each party is entitled to the production of evidence which is relevant and necessary. RCM 703(f)(1).

The emails in their unredacted form are absolutely relevant and necessary in evaluating apparent UCI in Sergeant Bergdahl's case. The Defense promptly requested additional discovery and attempted to interview Trial Counsel about the substance of the emails, but he declined, placing yet another obstacle to the defense's access to information that is relevant and necessary for purposes of evaluation of apparent UCI. (Enclosure 2) Without the entirety of the emails and an interview with Trial Counsel with regard to the full details of his conversations with the White House personnel, the Defense cannot fully and adequately evaluate the issue of apparent UCI in this case.

CONCLUSION

The Defense requests that the Court order the Government to produce unredacted copies of the emails and an order directing Trial Counsel to make himself available for an interview.



NINA S. BANKS
CPT, JA
Individual Military Counsel

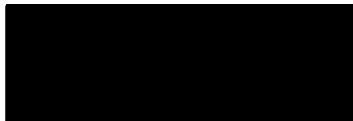
For

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

P. SABIN WILLETT
CAITLIN M. SNYDACKER
CHRISTOPHER L. MELENDEZ

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 25 August 2017.



NINA S. BANKS
CPT, JA
Individual Military Counsel

From: (b) (6) EOP/NSC
To: (b) (6) USARMY FORSCOM (US)
Date: Tuesday, January 31, 2017 9:02:27 PM

Hi (b) (6) -- thanks again for coming down tonight, and nice to meet you. I flagged the issue we discussed for (b) (6), and (b) (6)'s going to raise it up our chain tomorrow. Also wanted to see whether you had a draft of the brief to share yet. Thanks again, (b) (6)

From: (b) (6) EOP/NSC
To: (b) (6) USARMY FORSCOM (US)
Subject: RE:
Date: Wednesday, February 22, 2017 12:10:10 PM

Perfect -- want to give me a call then?

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

From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) .mil@mail.mil]
Sent: Wednesday, February 22, 2017 10:39 AM
To: (b) (6) EOP/NSC (b) (6) @nsc.eop.gov>
Subject: Re:

No worries. I'm actually on my way to DC. Just landed in Charlotte and should be in DC around 1. If that works we could talk around 1:30?

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

Original Message
From: (b) (6) EOP/NSC
Sent: Wednesday, February 22, 2017 9:59 AM
To: (b) (6) USARMY FORSCOM (US)
Subject:

Hi (b) (6) -- sorry for the radio silence. Do you have time for a quick call today? I should be around other than ~1030-1130 and ~3-330.

From: (b) (6) EOP/NSC
To: (b) (6) USARMY FORSCOM (US)
Subject: Re: ARMY MISC 20170114 Bergdahl Writ
Date: Monday, March 13, 2017 5:40:47 PM

Thanks (b) (6) !

Sent from my iPhone

> On Mar 13, 2017, at 4:59 PM, (b) (6) USARMY FORSCOM (US)
(b) (6) @mail.mil> wrote:

>

> (b) (6),

> (b) (6)

> The writ was denied earlier today. I expect that there will be a follow on petition to the Court of Appeals for the Armed Forces.

>

> v/r,

>

> (b) (6)

> (b) (6)

> (b) (6)

> US Army Forces Command

> Fort Bragg, NC

> (b) (6) (Office)

> (b) (6) (Blackberry)

>

> (b) (6) mil@mail.mil

> (b) (6)

>

> The information contained in this e-mail and any accompanying attachments may constitute attorney work product and/or client advice, which are legally privileged. This information is for official use only. It should not be released to unauthorized persons, and should be maintained in a separate file. If you are not the intended recipient of this information, any disclosure, copying, distribution, or the taking of any action in reliance on this information is prohibited. If you received this e-mail in error, please notify me immediately by return e-mail or by calling (b) (6)

(b) (6)

> Original Message

> From: (b) (6) USARMY FORSCOM (US) <(b) (6) @mail.mil>

> Sent: Monday, March 13, 2017 4:09 PM

> To: (b) (6) USARMY FORSCOM (US); (b) (6) USARMY FORSCOM (US);

(b) (6) USARMY 16 MP BDE (US)

> Subject: FW: ARMY MISC 20170114 Bergdahl Writ

>

>

> FYSA

>

> -----Original Message-----

> From: (b) (6) USARMY HQDA OTJAG (US)

> Sent: Monday, March 13, 2017 4:09 PM

> To: (b) (6) USARMY FORSCOM (US) <(b) (6) @mail.mil>

> Subject: FW: ARMY MISC 20170114 Bergdahl Writ

>

> Thx again for your help

>

> -----Original Message-----

> From: (b)(6) USARMY HQDA OTJAG (US)

> Sent: Monday, March 13, 2017 12:19 PM

> To: (b)(6) USARMY HQDA OTJAG (US) <(b)(6)@mail.mil>

> Cc: (b)(6) USARMY HQDA OTJAG (US) <(b)(6)@mail.mil>

> Subject: ARMY MISC 20170114 Bergdahl Writ

>

> (b)(6)

> Here is the scanned copy of Bergdahl, ARMY MISC 20170114.

>

> I will serve at 1600 today.

>

> v/r

>

> (b)(6)

[Redacted signature block]

>

>

> <20170114 Bergdahl Writ Denied.pdf>

From: (b) (6) EOP/NSC
To: (b) (6) USARMY FORSCOM (US)
Subject: RE: BERGDAHL - AE 36
Date: Friday, February 24, 2017 5:38:46 PM

Thanks (b) (6)! Will give you a call on Monday to discuss. Have a great weekend!

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

From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6)@mail.mil]
Sent: Friday, February 24, 2017 4:31 PM
To: (b) (6) EOP/NSC (b) (6)@nsc.eop.gov>
Subject: Fw: BERGDAHL - AE 36

(b) (6)

The motion to dismiss was denied and the ruling is attached.

(b) (6)

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

Original Message

From: (b) (6) (US) (b) (6)@mail.mil>
Sent: Friday, February 24, 2017 3:20 PM
To: (b) (6) USARMY XVIII ABN CORPS (US); (b) (6) USARMY (US); Fidell, Eugene; (b) (6) USARMY (US); (b) (6) USARMY XVIII ABN CORPS (US); (b) (6) USARMY 1 CD (US); (b) (6) USARMY IMCOM HQ (US); (b) (6) (b) (6) USARMY 16 MP BDE (US); (b) (6) USARMY FORSCOM (US); (b) (6) (b) (6) USARMY FORSCOM (US); (b) (6) USARMY XVIII ABN CORPS (US)
Cc: (b) (6) USARMY HQDA (US)
Subject: BERGDAHL - AE 36

Appellate Exhibit 36 is attached.

(b) (6)

Clerk of Court/Court Reporter
XVIII Airborne Corps and Fort Bragg
Fort Bragg, NC 28310

(b) (6)@mail.mil
(b) (6)

From: (b) (6) EOP/NSC
To: (b) (6) USARMY FORSCOM (US)
Subject: RE: Defense appeal
Date: Tuesday, February 28, 2017 1:30:22 PM

Sure. Want to give me a call then?

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

From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) mil@mail.mil]
Sent: Tuesday, February 28, 2017 1:29 PM
To: (b) (6) EOP/NSC (b) (6) @nsc.eop.gov>
Subject: Re: Defense appeal

Can we shoot for 3:30?

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

Original Message
From: (b) (6) EOP/NSC
Sent: Tuesday, February 28, 2017 1:28 PM
To: (b) (6) USARMY FORSCOM (US)
Subject: RE: Defense appeal

Thanks, and sorry for missing your calls. Can we find a time to discuss this afternoon or tomorrow morning? I should generally be around after ~230.

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

From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) mil@mail.mil]
Sent: Monday, February 27, 2017 8:27 PM
To: (b) (6) EOP/NSC (b) (6) @nsc.eop.gov>
Subject: Defense appeal

(b) (6),

Just FYSA, the Defense filed a writ appeal today. Not really a surprise as they have done this six times already on other issues. I'm traveling tomorrow morning but should be back in NC by 2:00 if you want to talk about what's likely to happen from here.

Thanks,

(b) (6)

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: (b) (6) EOP/NSC
To: (b) (6) USARMY FORSCOM (US)
Subject: RE: Example memo
Date: Wednesday, February 15, 2017 5:11:10 PM

Would you have some time to discuss tomorrow? I should be around other than ~930-10 and ~330-5.

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

From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) .mil@mail.mil]
Sent: Wednesday, February 15, 2017 11:07 AM
To: (b) (6) EOP/NSC (b) (6) @nsc.eop.gov>
Subject: Example memo

(b) (6)

Attached is the memo that Secretary Hagel signed after President Obama's comments on sexual assault. As you can see, it also includes a reference to a statement by the White House Counsel. Obviously this is a different situation as these comments are directed at a particular individual, but the general idea would be the same.

(b) (6)

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.
From: (b) (6) USARMY FORSCOM (US) <(b) (6) .mil@mail.mil>
Sent: Tuesday, February 14, 2017 6:55 PM
To: (b) (6)
Subject: Fw: Scanned Document (Signed)

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: (b) (6) EOP/NSC
To: (b) (6) USARMY FORSCOM (US)
Subject: Re: Example memo
Date: Wednesday, February 15, 2017 12:53:20 PM

Thanks.

Sent from my iPhone

On Feb 15, 2017, at 11:06 AM, (b) (6) USARMY FORSCOM (US)
(b) (6) .mil@mail.mil <mailto:(b) (6) .mil@mail.mil>> wrote:

(b) (6)

Attached is the memo that Secretary Hagel signed after President Obama's comments on sexual assault. As you can see, it also includes a reference to a statement by the White House Counsel. Obviously this is a different situation as these comments are directed at a particular individual, but the general idea would be the same.

(b) (6)

(6)
Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: (b) (6) (b) (6) USARMY FORSCOM (US)
(b) (6) .mil@mail.mil <mailto:(b) (6) .mil@mail.mil>>
Sent: Tuesday, February 14, 2017 6:55 PM
To: (b) (6)
Subject: Fw: Scanned Document (Signed)

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

<scannedDoc.pdf>

From: (b) (6) EOP/NSC
To: (b) (6) USARMY FORSCOM (US)
Subject: Re: Judge approved changes
Date: Wednesday, February 01, 2017 12:31:15 AM

Thanks for sending. I'll try to get our assistant to submit the info for 9 am tomorrow (only he can do it), but if that doesn't work, I'll swing down and give you the disc.

Sent from my iPhone

> On Jan 31, 2017, at 10:32 PM, (b) (6) USARMY FORSCOM (US)
(b) (6) .mil@mail.mil> wrote:

>

> (b) (6),

> (b) (6)

> Thanks again for meeting with me. If you could WAVE me in for tomorrow at 9 that would be great. I need to take that disc to another agency before I go to NEOB.

>

> I am trying to get my computer setup and will send you the motion tonight.

>

> (b) (6)

> (b) (6)

> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

> Original Message

> From: (b) (6) EOP/NSC

> Sent: Tuesday, January 31, 2017 10:48 AM

> To: (b) (6) USARMY FORSCOM (US)

> Cc: (b) (6) EOP/NSC

> Subject: RE: Judge approved changes

>

>

> Thanks (b) (6). (b) (6) has WAVED you in for 630, if that still works. The visitor's entrance is at 17th St. and State(St.), NW -- there's a booth there, and they'll direct you into the compound. We're in 394 in the OEOB/EEOB. If easier, I'm of course glad to come down and bring you in -- just let me know. My office number is (b) (6). Thanks again for coming down, and looking forward to meeting.

>

> -----Original Message-----

> From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) .mil@mail.mil]

> Sent: Monday, January 30, 2017 8:16 PM

> To: (b) (6) EOP/NSC (b) (6) @nsc.eop.gov>

> Cc: (b) (6) EOP/NSC <(b) (6) @nsc.eop.gov>

> Subject: Re: Judge approved changes

>

> Great.

>

> (b) (6)

> (b) (6) in Philadelphia, PA

> (b) (6)

> Current place of legal residence remains Philadelphia, though I am stationed in Fayetteville, NC

>

> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

> Original Message

> From: (b) (6) EOP/NSC

> Sent: Monday, January 30, 2017 7:58 PM

> To: (b) (6) USARMY FORSCOM (US)

> Cc: (b) (6) EOP/NSC
> Subject: Re: Judge approved changes

>
>
> Great, thanks. I'll check in with (b) (6) (the legal adviser) and send your information in tomorrow morning. Can you please provide (b) (6) (cc'ed) with full name, DOB, SSN, place of birth, and current city of residence? (b) (6), could you please submit (b) (6)'s information for 630 pm tomorrow? Thanks!

> Sent from my iPhone

>> On Jan 30, 2017, at 7:54 PM, (b) (6) USARMY FORSCOM (US)
(b) (6).mil@mail.mil> wrote:

>> The motion itself is unclassified, but if we are in a secure space we could also discuss some other small issues that will eventually need to be resolved. 6:30 works for me. I have not previously been waved into OEOB so let me know if there is something additional I need to do.

>> For your own situational awareness, (b) (6) from DOJ has also reached out to the legal advisor on this. I don't think they have actually connected yet though.

>> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

>> Original Message

>> From: (b) (6) EOP/NSC
>> Sent: Monday, January 30, 2017 7:50 PM
>> To: (b) (6) USARMY FORSCOM (US)
>> Subject: Re: Judge approved changes

>> Either works for me. If it needs to be secure, that's probably easier? If so, I could WAVE you into the building around 6 or 630 pm?

>> Sent from my iPhone

>>> On Jan 30, 2017, at 7:42 PM, (b) (6) USARMY FORSCOM (US)
(b) (6).mil@mail.mil> wrote:

>>> Sure. If you'd like we can meet in person tomorrow. I get to Dulles at 4:30 and am staying at 15th and Pennsylvania. Should be to the hotel by 5:30.

>>> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

>>> Original Message

>>> From: (b) (6) EOP/NSC
>>> Sent: Monday, January 30, 2017 7:24 PM
>>> To: (b) (6) USARMY FORSCOM (US)
>>> Subject: Re: Judge approved changes

>>> Hi (b) (6) -- would be glad to discuss. Can we connect tomorrow? I'm in meetings from around 11 to 1230, but could otherwise make myself available.

>>> Sent from my iPhone

>>>> On Jan 30, 2017, at 7:19 PM (b) (6) USARMY FORSCOM (US)
(b) (6).mil@mail.mil> wrote:

>>>> (b) (6)
>>>> (b) (6)

>>>> If you have time I'd like to discuss the Government's response to the Defense Motion to Dismiss on the basis

of the President's comments during the campaign. The response is due on Wednesday.

>>>>

>>>> Thanks,

>>>>

>>>> (b) (6)

>>>> (6)

>>>> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

>>>> Original Message

>>>> From: (b) (6) EOP/NSC

>>>> Sent: Tuesday, January 17, 2017 10:14 PM

>>>> To: (b) (6) USARMY FORSCOM (US)

>>>> Cc: (b) (6) EOP/NSC

>>>> Subject: RE: Judge approved changes

>>>>

>>>>

>>>> Thanks (b) (6) -- that sounds great. I'll be around next week, hopefully with some more free time, and would also be glad to jump on the phone whenever you're available.

>>>>

>>>> -----Original Message-----

>>>> From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) .mil@mail.mil]

>>>> Sent: Tuesday, January 17, 2017 10:06 PM

>>>> To: (b) (6) EOP/NSC <(b) (6) @nsc.eop.gov>

>>>> Cc: (b) (6) EOP/NSC <(b) (6) @nsc.eop.gov>

>>>> Subject: Re: Judge approved changes

>>>>

>>>> No worries, getting stuck in DC an additional night isn't the worst thing. I need to come back up next week to courier some material back to North Carolina so if you'd like to meet then that would work. Otherwise I'll just contact you via email in the event that we have anything new come up.

>>>>

>>>> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

>>>> Original Message

>>>> From: (b) (6) EOP/NSC

>>>> Sent: Tuesday, January 17, 2017 9:50 PM

>>>> To: (b) (6) USARMY FORSCOM (US)

>>>> Cc: (b) (6) EOP/NSC

>>>> Subject: RE: Judge approved changes

>>>>

>>>>

>>>> Hi (b) (6) -- with many, many apologies for the delay in replying and being so difficult to schedule with the past couple days, I was wondering if you thought it'd be easier and just as helpful to connect via phone over the next couple of days. I'm also happy to clear you in for tomorrow morning and meet in person, but given the craziness of this week, I'm wondering if finding a mutually convenient time to discuss (secure or otherwise) wouldn't be just as worthwhile. Just let me know, as I'm happy to do either. Thanks again, (b) (6)

>>>>

>>>> -----Original Message-----

>>>> From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) .mil@mail.mil]

>>>> Sent: Tuesday, January 17, 2017 4:30 PM

>>>> To: (b) (6) EOP/NSC <(b) (6) @nsc.eop.gov>; (b) (6) EOP/WHO

>>>> (b) (6) @who.eop.gov>; (b) (6) EOP/WHO <(b) (6) @who.eop.gov>

>>>> Cc: (b) (6) EOP/NSC <(b) (6) @nsc.eop.gov>

>>>> Subject: Re: Judge approved changes

>>>>

>>>> Great. Just let me know what you need from me.

>>>>

>>>> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

>>>> Original Message

>>>> From: (b) (6) EOP/NSC

>>>> Sent: Tuesday, January 17, 2017 4:28 PM
>>>> To: (b) (6) USARMY FORSCOM (US); (b) (6) . EOP/WHO; (b) (6)
EOP/WHO
>>>> Cc: (b) (6) EOP/NSC
>>>> Subject: RE: Judge approved changes
>>>>
>>>>

>>>> Perfect. Glad to WAVE you into the EEOB if that works (we can meet in NSC/Legal's space), or meet somewhere else if more convenient.

>>>> -----Original Message-----
>>>> From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) .mil@mail.mil]
>>>> Sent: Tuesday, January 17, 2017 4:26 PM
>>>> To: (b) (6) EOP/NSC (b) (6) @nsc.eop.gov; (b) (6) EOP/WHO
(b) (6) @who.eop.gov; (b) (6) EOP/WHO <(b) (6) @who.eop.gov>
>>>> Cc: (b) (6) . EOP/NSC <(b) (6) @nsc.eop.gov>
>>>> Subject: Re: Judge approved changes
>>>>

>>>> Can we do 9:30 tomorrow morning?

>>>> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.
>>>> Original Message

>>>> From: (b) (6) EOP/NSC
>>>> Sent: Tuesday, January 17, 2017 4:17 PM
>>>> To: (b) (6) USARMY FORSCOM (US); (b) (6) EOP/WHO; (b) (6)
EOP/WHO
>>>> Cc: (b) (6) EOP/NSC
>>>> Subject: RE: Judge approved changes
>>>>

>>>> Thanks, (b) (6) -- very much appreciate the flexibility. Tomorrow morning is wide open for me, so that would probably work better if just as easy for you. If so, more than happy to work around your schedule and find a time that allows you to get on the road.

>>>> -----Original Message-----
>>>> From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) .mil@mail.mil]
>>>> Sent: Tuesday, January 17, 2017 3:45 PM
>>>> To: (b) (6) EOP/NSC (b) (6) @nsc.eop.gov; (b) (6) EOP/WHO
(b) (6) @who.eop.gov; (b) (6) EOP/WHO <(b) (6) @who.eop.gov>
>>>> Cc: (b) (6) . EOP/NSC (b) (6) @nsc.eop.gov>
>>>> Subject: Re: Judge approved changes
>>>>

>>>> I am flexible today, and can either come back between your meetings or try to meet tomorrow morning before I drive back to North Carolina.

>>>> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.
>>>> Original Message

>>>> From: (b) (6) EOP/NSC
>>>> Sent: Tuesday, January 17, 2017 3:42 PM
>>>> To: (b) (6) EOP/WHO; (b) (6) USARMY FORSCOM (US); (b) (6)
EOP/WHO
>>>> Cc: (b) (6) . EOP/NSC
>>>> Subject: RE: Judge approved changes
>>>>

>>>> Thanks, (b) (6) Sorry for the delay in replying; I've unfortunately been running around today, but am hopeful that tomorrow will be calmer. (I'm likely headed into another meeting around 4, and then have something at 6, but could also try to run over there in between if that might work.) (b) (6), it'd be great to meet you before (b) (6)

(6)

(b) (6) jump ship, or at least chat on the phone -- just let me know what might work.

>>>>

>>>> Thanks,

>>>> (b) (6)

>>>> (b) (6)

>>>> -----Original Message-----

>>>> From: (b) (6) EOP/WHO

>>>> Sent: Tuesday, January 17, 2017 12:27 PM

>>>> To: (b) (6) USARMY FORSCOM (US) (b) (6) mil@mail.mil>; (b) (6) EOP/WHO <(b) (6) @who.eop.gov>; (b) (6) EOP/NSC (b) (6) @nsc.eop.gov>

>>>> Cc: (b) (6) EOP/NSC (b) (6) @nsc.eop.gov>

>>>> Subject: RE: Judge approved changes

>>>>

>>>> Yes, if we can swing it, it would be good to connect you with (b) (6), who I've added here. ((b) (6) copied for her visibility.) It probably makes sense for this group to try to meet up to discuss next steps at some point this afternoon. I know (b) (6) has been tied up on some time-sensitive matters, so defer to him on timing.

>>>> (b) (6)

>>>>

>>>>

>>>> -----Original Message-----

>>>> From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) mil@mail.mil]

>>>> Sent: Tuesday, January 17, 2017 10:26 AM

>>>> To: (b) (6) EOP/WHO (b) (6) @who.eop.gov>; (b) (6) EOP/WHO (b) (6) @who.eop.gov>

>>>> Subject: Re: Judge approved changes

>>>>

>>>> Do we need to meet at all today? I know we had talked about meeting with the NSC legal contact. I am still at NEOB and am generally available all day.

>>>>

>>>> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

>>>> Original Message

>>>> From: (b) (6) EOP/WHO

>>>> Sent: Tuesday, January 17, 2017 10:10 AM

>>>> To: (b) (6) USARMY FORSCOM (US); (b) (6) EOP/WHO

>>>> Subject: RE: Judge approved changes

>>>>

>>>>

>>>> Thanks, yes! Good to hear.

>>>>

>>>> -----Original Message-----

>>>> From: (b) (6) USARMY FORSCOM (US) [mailto:(b) (6) mil@mail.mil]

>>>> Sent: Tuesday, January 17, 2017 10:07 AM

>>>> To: (b) (6) EOP/WHO <(b) (6) @who.eop.gov>; (b) (6) EOP/WHO (b) (6) @who.eop.gov>

>>>> Subject: Judge approved changes

>>>>

>>>> So that's a relief.

>>>>

>>>> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: Oshana, Justin C MAJ USARMY FORSCOM (US)
To: Rosenblatt, Franklin D LTC USARMY (US); Fussnecker, Jerrod B MAJ USARMY FORSCOM (US); Ulrich, Nicole K CPT USARMY FORSCOM (US); Rutherford, Ann S CPT USARMY FORSCOM (US)
Cc: Fidell, Eugene; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US); Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US); Norvell, Jennifer D CPT USARMY IMCOM HQ (US); Banks, Nina S CPT USARMY 1 CD (US)
Subject: RE: fourteenth discovery request
Date: Thursday, August 24, 2017 12:41:06 PM

LTC Rosenblatt,

I decline.

v/r,

MAJ Oshana

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

From: Rosenblatt, Franklin D LTC USARMY (US)
Sent: Thursday, August 24, 2017 1:40 PM
To: Oshana, Justin C MAJ USARMY FORSCOM (US) [REDACTED]; Fussnecker, Jerrod B MAJ USARMY FORSCOM (US) [REDACTED]; Ulrich, Nicole K CPT USARMY FORSCOM (US) [REDACTED]; Rutherford, Ann S CPT USARMY FORSCOM (US) [REDACTED]
Cc: Fidell, Eugene [REDACTED]; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US) [REDACTED]; Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US) [REDACTED]; Norvell, Jennifer D CPT USARMY IMCOM HQ (US) [REDACTED]; Banks, Nina S CPT USARMY 1 CD (US) [REDACTED]
Subject: RE: fourteenth discovery request

MAJ Oshana,

Our understanding is that you are the trial counsel in the redacted emails. I therefor need to interview you about your interactions with the Trump White House. This is relevant to UCI.

Sincerely,

Franklin D. Rosenblatt
LTC, JA
Deputy Chief
U.S. Army Trial Defense Service
[REDACTED]

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

From: Oshana, Justin C MAJ USARMY FORSCOM (US)
Sent: Thursday, August 24, 2017 10:07 AM
To: Rosenblatt, Franklin D LTC USARMY (US) [REDACTED]; Fussnecker, Jerrod B MAJ USARMY FORSCOM (US) [REDACTED]; Ulrich, Nicole K CPT USARMY FORSCOM (US) [REDACTED]; Rutherford, Ann S CPT USARMY FORSCOM (US) [REDACTED]
Cc: Fidell, Eugene [REDACTED]; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US) [REDACTED]; Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US) [REDACTED]; Norvell, Jennifer D CPT USARMY IMCOM HQ (US) [REDACTED]; Banks, Nina S CPT USARMY 1 CD (US) [REDACTED]
Subject: RE: fourteenth discovery request

LTC Rosenblatt,

Attached is the Government's response to the fourteenth discovery request.

v/r,

MAJ Oshana

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

From: Rosenblatt, Franklin D LTC USARMY (US)

Sent: Wednesday, August 23, 2017 4:39 PM

To: Oshana, Justin C MAJ USARMY FORSCOM (US) <[REDACTED]>; Fussnecker, Jerrod B MAJ USARMY FORSCOM (US) <[REDACTED]>; Ulrich, Nicole K CPT USARMY FORSCOM (US) <[REDACTED]>; Rutherford, Ann S CPT USARMY FORSCOM (US) <[REDACTED]>

Cc: Fidell, Eugene <[REDACTED]>; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US)

<[REDACTED]>; Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US)

<[REDACTED]>; Norvell, Jennifer D CPT USARMY IMCOM HO (US)

<[REDACTED]>; Banks, Nina S CPT USARMY 1 CD (US) <[REDACTED]>

Subject: fourteenth discovery request

Gov't,

Attached please find a discovery request. It references 13 pages of redacted emails, also attached.

Sincerely,

Franklin D. Rosenblatt

LTC, JA

Deputy Chief

U.S. Army Trial Defense Service

[REDACTED]

From: Oshana, Justin C MAJ USARMY FORSCOM (US)
To: Rosenblatt, Franklin D LTC USARMY (US); Fussnecker, Jerrod B MAJ USARMY FORSCOM (US); Ulrich, Nicole K CPT USARMY FORSCOM (US); Rutherford, Ann S CPT USARMY FORSCOM (US)
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Subject: RE: fourteenth discovery request
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To: Oshana, Justin C MAJ USARMY FORSCOM (US) [REDACTED]; Fussnecker, Jerrod B MAJ USARMY FORSCOM (US) [REDACTED]; Ulrich, Nicole K CPT USARMY FORSCOM (US) [REDACTED]; Rutherford, Ann S CPT USARMY FORSCOM (US) [REDACTED]
Cc: Fidell, Eugene [REDACTED]; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US) [REDACTED]; Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US) [REDACTED]; Norvell, Jennifer D CPT USARMY IMCOM HQ (US) [REDACTED]; Banks, Nina S CPT USARMY 1 CD (US) [REDACTED]
Subject: RE: fourteenth discovery request

MAJ Oshana,

Our understanding is that you are the trial counsel in the redacted emails. I therefor need to interview you about your interactions with the Trump White House. This is relevant to UCI.

Sincerely,

Franklin D. Rosenblatt
LTC, JA
Deputy Chief
U.S. Army Trial Defense Service
[REDACTED]

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

From: Oshana, Justin C MAJ USARMY FORSCOM (US)
Sent: Thursday, August 24, 2017 10:07 AM
To: Rosenblatt, Franklin D LTC USARMY (US) [REDACTED]; Fussnecker, Jerrod B MAJ USARMY FORSCOM (US) [REDACTED]; Ulrich, Nicole K CPT USARMY FORSCOM (US) [REDACTED]; Rutherford, Ann S CPT USARMY FORSCOM (US) [REDACTED]
Cc: Fidell, Eugene [REDACTED]; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US) [REDACTED]; Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US) [REDACTED]; Norvell, Jennifer D CPT USARMY IMCOM HQ (US) [REDACTED]; Banks, Nina S CPT USARMY 1 CD (US) [REDACTED]
Subject: RE: fourteenth discovery request

LTC Rosenblatt,

Attached is the Government's response to the fourteenth discovery request.

v/r,

MAJ Oshana

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From: Rosenblatt, Franklin D LTC USARMY (US)

Sent: Wednesday, August 23, 2017 4:39 PM

To: Oshana, Justin C MAJ USARMY FORSCOM (US) [REDACTED]; Fussnecker, Jerrod B
MAJ USARMY FORSCOM (US) [REDACTED]; Ulrich, Nicole K CPT USARMY
FORSCOM (US) [REDACTED]; Rutherford, Ann S CPT USARMY FORSCOM (US)

Cc: Fidell, Eugene [REDACTED]; Gleich, Oren MAJ USARMY XVIII ABN CORPS (US)

[REDACTED]; Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US)

[REDACTED]; Norvell, Jennifer D CPT USARMY IMCOM HQ (US)

[REDACTED]; Banks, Nina S CPT USARMY 1 CD (US) [REDACTED]

Subject: fourteenth discovery request

Gov't,

Attached please find a discovery request. It references 13 pages of redacted emails, also attached.

Sincerely,

Franklin D. Rosenblatt

LTC, JA

Deputy Chief

U.S. Army Trial Defense Service

[REDACTED]

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

UNITED STATES)	
)	
v.)	Fourteenth Defense Discovery
)	Request
BERGDAHL, ROBERT BOWDRIE)	
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	23 August 2017
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

This is the Defense's fourteenth general discovery request. This request supplements and does not supersede the Defense's previous discovery requests.

1. The Accused, by and through his defense attorneys, hereby requests that the Government provide the following information with:

- a. A written response to this request; and
- b. Production of the requested matters; or
- c. Notice of an inability or intent not to comply.

2. This requested evidence is relevant and material to the preparation of the defense and/or is exculpatory. The accused cannot properly provide effective assistance of counsel nor prepare for trial without the production of the documents and items requests. Requested information is information known, or should, with the exercise of due diligence, be known to the United States or its agents. Production includes the opportunity to inspect, photograph, and photocopy.

3. Unredacted copies of the attached emails between an unnamed White House official and the Trial Counsel for *U.S. v. Bergdahl* that took place after the Inauguration of President Trump on 20 January 2017.

4. Complete written summaries and details of conversations between Trial Counsel and any White House officials that took place after the inauguration of President Trump on 20 January 2017, even if the conversations have not previously been reduced to writing.

5. On 31 January 2017, the unnamed White House official wrote that another unnamed official would "raise it up our chain tomorrow." This appears to refer to some combination of the defense's motion to dismiss for apparent unlawful command influence by President Trump, the Trial Counsel's planned response to that motion, and the Trial Counsel's proposal that the White House take action to ameliorate the effect of the improper statements in line with Secretary Hagel's statement about UCI. We request complete written summaries of any conversations about this issue, even if not previously reduced to writing.

6. Copies of correspondence or complete written summaries of conversations between Trial Counsel and the FORSCOM Staff Judge Advocate or Convening Authority about any information or instructions that the Trial Counsel received from the White House after President Trump's inauguration on 20 January 2017.

7. Copies of correspondence or complete written summaries of conversations between the FORSCOM Staff Judge Advocate and the FORSCOM Convening Authority about any information or instructions from the White House pertaining to the Bergdahl case at any point after President Trump's Inauguration on 20 January 2017.

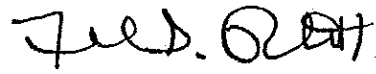
8. Copies of correspondence or complete written summaries of conversations between FORSCOM officials and outside U.S. Army, Department of Defense, or Department of Justice officials about the Bergdahl case and information or instructions from the White House that took place after the Inauguration of President Trump on 20 January 2017.

9. Copies of correspondence or complete written summaries of conversations between FORSCOM officials and White House officials that took place on or before 20 January 2017 about SGT Bergdahl's pardon request to President Obama.



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 23 July 2017.

A handwritten signature in black ink, appearing to read "F. D. Rosenblatt".

FRANKLIN D. ROSENBLATT
LTC, JA
Defense Counsel

**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
)	Fourteenth Defense Discovery Request
BERGDAHL, ROBERT BOWDRIE)	
(BOWE))	
SGT, U.S Army)	
HHC, Special Troops Battalion)	24 August 2017
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

The Government responds as follows to the Fourteenth Defense Discovery Request, dated 23 August 2017. Paragraph numbers correspond to the Defense requests.

3. Unredacted copies of the attached emails between an unnamed White House official and the Trial Counsel for *U.S. v. Bergdahl* that took place after the Inauguration of President Trump on 20 January 2017.

Response: Denied. The Government objects to production of the requested evidence on the grounds that the evidence would be irrelevant, cumulative or unnecessary.

4. Complete written summaries and details of conversations between Trial Counsel and any White House officials that took place after the inauguration of President Trump of 20 January 2017, even if the conversations have not previously been reduced to writing.

Response: Denied. No such summaries exist. The Government objects to the creation of such summaries on the grounds that the evidence would be irrelevant, cumulative or unnecessary.

5. On 31 January 2017, the unnamed White House official wrote that another unnamed official would "raise it up our chain tomorrow." This appears to refer to some combination of the defense's motion to dismiss for apparent unlawful command influence by President Trump, the Trial Counsel's planned response to ameliorate the effect of the improper statements in line with Secretary Hagel's statement about UCI. We request complete written summaries of any conversations about this issue, even if not previously reduced to writing.

Response: Denied. No such summaries exist. The Government objects to the creation of such summaries on the grounds that the evidence would be irrelevant, cumulative or unnecessary.

6. Copies of correspondence or complete written summaries of conversations between Trial Counsel and the FORSCOM Staff Judge Advocate or Convening Authority about any information or instructions that the Trial Counsel received from the White House after President Trump's inauguration on 20 January 2017.

Response: Denied. The Government objects to the request for "any information" as vague and overbroad. Trial Counsel has never received any instructions from the White House.

7. Copies of correspondence or complete written summaries of conversations between the FORSCOM Staff Judge Advocate and the FORSCOM Convening Authority about any information or instructions from the White House pertaining to the Bergdahl case at any point after President Trump's Inauguration on 20 January 2017.

Response: Upon information and belief, no such responsive material exists.

8. Copies of correspondence or complete written summaries of conversations between FORSCOM officials and outside U.S. Army, Department of Defense, or Department of Justice officials about the Bergdahl case and information or instructions from the White House that took place after the Inauguration of President Trump on 20 January 2017.

Response: Upon information and belief, no such responsive material exists.

9. Copies of correspondence or complete written summaries of conversations between FORSCOM officials and White House officials that took place on or before 20 January 2017 about SGT Bergdahl's pardon request to President Obama.

Response: Upon information and belief, no such responsive material exists.

JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

CF:
Defense Counsel



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 06 2013

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Integrity of the Military Justice Process

This memorandum reiterates my expectations and those of the President regarding the integrity of the military justice process. Every military officer and enlisted member of the Department of Defense is to be made aware of its contents.

Military justice is an essential element of good order and discipline, the indispensable ingredient that allows our Armed Forces to be the best in the world. Central to military justice is the trust that those involved in the process base their decisions on their independent judgment. Their judgment, in turn, must be based purely on the facts of each individual case, not personal interests, career advancement, or an effort to produce what is thought to be the outcome desired by senior officials, military or civilian.

Service members and the American people must be confident that the military justice system is inherently fair and adheres to the fundamental principle of due process of law. Everyone who exercises discretionary authority in the military justice process must apply his or her independent judgment. Military judges, commanders, convening authorities, criminal and administrative investigators, staff judge advocates, supervisors, Article 32 investigating officers, trial counsel, defense counsel, members of court-martial panels, and witnesses in military justice cases are among those included in this mandate.

Senior military and civilian leaders in the Department have an obligation to establish the standards of conduct expected of all military personnel. Drug abuse, sexual assault, hazing, and other criminal misconduct are not acceptable; senior leaders have made that clear and will continue to do so. But those comments are not made with the intent to indicate in any way what should or should not occur in any case. As Kathryn Ruemmler, the Counsel to the President, emphasized, "The President expects all military personnel who are involved in any way in the military justice process to exercise their independent professional judgment."

To be clear, each military justice case must be resolved on its own facts. Those who exercise discretionary authority in the military justice process must exercise their independent judgment, consistent with applicable law and regulation. There are no expected or required dispositions, outcomes, or sentences in any military justice case, other than what result from the individual facts and merits of a case and the application to the case of the fundamentals of due process of law.

Please ensure that this message is widely and immediately disseminated throughout your organizations. The integrity of the military justice process is too important to risk any misunderstanding of what the President and I expect from those involved in it.

Thank you.

A handwritten signature in black ink, appearing to read "Asa Carter", with a flourish underneath.

DISTRIBUTION:

SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEFS OF THE MILITARY DEPARTMENTS
COMMANDERS OF THE COMBATANT COMMANDS
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
DIRECTOR, OPERATIONAL TEST AND EVALUATION
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
DEPARTMENT OF DEFENSE CHIEF INFORMATION OFFICER
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES