


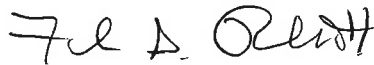
whether any person should be granted or denied a security clearance. Delete the last sentence: "These requests must be coordinated through Trial Counsel." Trial Counsel are not neutral; they are our adversaries. For example, Trial Counsel helped to scuttle Mr. Fidell's access to a TS-SCI in July 2015 (see attached), thereby hindering our preparation for the preliminary hearing. Trial Counsel then reversed course and requested a TS-SCI for Mr. Fidell on the same justification safely after the Article 32 was over and charges referred in December 2015.

11. In paragraph 3(h)(7) on page 6, after "United States" add ", and the Military Judge will determine whether the case should be abated." Add at the end of the paragraph: "If Defense Counsel determine that the provision of effective assistance of counsel means disclosing classified evidence to the accused for which the accused is not cleared, the defense will promptly bring the matter to the attention of the Trial Counsel and Military Judge."
12. In paragraph 3(i)(2) on page 7, delete "with advance and express authorization of the Court or". Such a matter is properly handled by the Defense security officer and does not require the involvement of the Military Judge.



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 31 December 2015.



FRANKLIN D. ROSENBLATT
LTC, JA
Defense Counsel



DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY FORCES COMMAND
4700 KNOX STREET
FORT BRAGG, NORTH CAROLINA 28310-5000

AFCG-JA

31 July 2015

MEMORANDUM FOR LTC Peter Q. Burke, Commander, U.S. Army Forces Command
Special Troops Battalion, Fort Bragg, NC 28310

SUBJECT: Government Response to Civilian Defense Counsel Request for Top
Secret-Sensitive Compartmented Information Security Clearance—*United States v.
Robert (Bowe) Bowdrie Bergdahl*

1. I reviewed Mr. Eugene Fidell's 22 July 2015 request that he be granted a Top Secret-Sensitive Compartmented Information (TS-SCI) security clearance in connection with his representation of SGT Bergdahl. I also reviewed the addendum by LTC Frank Rosenblatt sent via e-mail on 24 July 2015, listing an additional witness they wish interview. I recommend that you forward the request and the additional supporting information to the Office of The Judge Advocate General (OTJAG) without endorsement using the enclosed memorandum in accordance with Army Regulation 380-67. The Government recommends that you forward this request to OTJAG without endorsement because the request does not provide sufficient information to fully review and consider the request.

2. Because Defense Counsel has not provided a sufficient notice of what classified information he seeks to discuss with LTC Jason Amerine, LTC(R) Paul Edgar, Ms. Amber Dach, or Ms. Melani Richardson, the Government has not yet been able to consult with the original classification authorities to determine whether those individuals are authorized to discuss that classified information with Mr. Fidell. Without knowing whether these individuals are even authorized to discuss information classified at either the Secret or TS-SCI level with Mr. Fidell, it would be speculative to endorse that he requires a TS-SCI clearance to adequately represent SGT Bergdahl.

3. On 25 March 2015, you preferred court-martial charges against SGT Bergdahl, and the Article 32 preliminary hearing in this case is scheduled for 17 September 2015. Mr. Fidell was authorized access to classified information made available to him as part of this court-martial up to the Secret NOFORN level on 5 May 2015. On 22 July 2015, Mr. Fidell requested that he be granted a TS-SCI clearance via email to Government Trial Counsel, you, and the Preliminary Hearing Officer (PHO) for SGT Bergdahl's upcoming preliminary hearing. He requested this level of clearance "to represent SGT Bergdahl effectively" and to facilitate interviews with potential witnesses who "may have critical information concerning aspects of the charges."

4. As the convening authority, you do not have the authority to certify that Mr. Fidell requires a TS-SCI security clearance. Rather, attorneys representing Department of

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Defense Servicemembers “shall normally be investigated by DIS and cleared... upon certification of the General Counsel of the DOD component involved in the litigation or the Office of The Judge Advocate General that access to specified classified information, on the part of the attorney concerned, is necessary to adequately represent their client.” Army Reg. 380-67, Personnel Security Program, para. 3-23f (24 January 2014). Therefore, you are limited to forwarding Mr. Fidell’s request to OTJAG so that OTJAG may certify whether Mr. Fidell’s access to TS-SCI information is necessary to adequately represent SGT Bergdahl.

5. The Government recommends that you forward Mr. Fidell’s request to OTJAG without endorsement because the request currently contains insufficient information to evaluate whether the requested security clearance is necessary to adequately represent SGT Bergdahl. In his request, Mr. Fidell states that he requires a TS-SCI clearance in order to fully interview LTC Amerine, Ms. Dach, and Ms. Richardson, who “may have critical information” regarding aspects of the charges against SGT Bergdahl presumably classified at the TS-SCI level. The additional information submitted by LTC Rosenblatt states that LTC(R) Edgar has relevant information at the TS-SCI classification level. (See enclosed Memorandum For Record of my interview of LTC(R) Edgar) The request is insufficient because it is vague as to what information Mr. Fidell wishes to discuss with these individuals and is premature because it assumes that these individuals would be authorized to discuss the classified information with Mr. Fidell. Mr. Fidell’s access to any classified information (including both Secret and TS-SCI) possessed by these individuals is dependent on two prerequisites: (1) his ability to properly access the information, which includes having the proper security clearance and a need to know the information; and (2) these individuals’ authorization from the original classification authority to discuss the classified information with Mr. Fidell. If these individuals do not have the proper authority to discuss the information classified at the TS-SCI level that Mr. Fidell is seeking, then he will not be able to discuss the information with them anyway, which would nullify any need for a TS-SCI clearance.

6. In accordance with Executive Order 13526, any witness requires approval from the original classification authority that originally classified any information they have previously received to discuss that classified information with Mr. Fidell. They are not free to do so based solely on the fact that Mr. Fidell has a sufficient security clearance. See Executive Order 13526, Classified National Security Information, para. 4.1 (29 December 2009). Therefore, prior to any witness discussing any classified information with Mr. Fidell, they would be required to identify the original classification authority for each piece of classified information he wants to discuss, and gain permission to discuss each entity’s classified information with Mr. Fidell (if not already received or granted).

7. In military justice practice, this process to seek an original classification authority’s consent to further disseminate classified information, or to seek an agency or department’s assertion of privilege over that classified information, is governed by Military Rule of Evidence (MRE) 505. This rule requires that prior to referral of charges,

“upon a showing by the accused that the classified information sought is relevant and necessary to an element of the offense or a legally cognizable defense, the convening authority must respond in writing to a request by the accused for classified information if the privilege in this rule is claimed for such information.” Inherent in the rule is the requirement that the notice must include an adequate description of the classified information sought to not only obtain the original classification authority approval or denial, but also for you as the convening authority to determine whether an alternate substitute is appropriate in the event privilege is claimed. MRE 505(e), (i). Therefore with regard to any classified information possessed by a witness that has not already been authorized for viewing by Defense Counsel, the first step is that the Defense must describe the classified information sought; this description should be specific enough to allow the Government to identify the original classification authorities for the information sought and then engage those authorities to determine whether they authorize the Defense to have access via a witness to the information or whether those authorities wish to assert privilege over the information.

8. In addition to the fact that it is currently unclear whether any of the witnesses will even be able to discuss information classified at the TS-SCI level with Mr. Fidell, the Government believes Mr. Fidell will be able to sufficiently interview these witnesses at the Secret level. Government Counsel who are also not cleared to access TS-SCI information were able to interview Ms. Dach and Ms. Richardson about their work relevant to this case at the Secret level. The Government also contacted LTC (R) Edgar who stated that an interview could be conducted at the Secret level. (See enclosed Memorandum For Record of my interview of LTC(R) Edgar) The Government recommends that Defense Counsel interview these witnesses at the Secret level both to establish whether this level of clearance is sufficient to adequately represent SGT Bergdahl in this case, and to identify with specificity what additional classified information classified above the Secret level Defense Counsel needs to discuss with these witnesses. This additional detail will allow the original classification authority the ability to determine whether the Defense Counsel will be granted access to the classified information.

9. Although Mr. Fidell copied LTC Mark Visger, the PHO for the Article 32 hearing scheduled to commence on 17 September 2015, please note that in accordance with MRE 505(e), the PHO may not rule on any objection by the accused to the release of classified documents or information. Rather, any objections must be made to the military judge through a motion for appropriate relief at a pretrial conference. See MRE 505(e).

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10. Point of contact for this memorandum is CPT Michael Petrusic at 910-570-5925 or michael.petrusic.mil@mail.mil.

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CHRISTIAN E. BEESE
LTC, JA
Trial Counsel

CF:

MAJ Margaret Kurz, Trial Counsel
MAJ Michelle Dexter, Trial Counsel
Mr. Eugene Fidell, CDC
LTC Franklin Rosenblatt, IMC
CPT Alfredo Foster, Detailed Counsel