

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

UNITED STATES	)	Defense Reply to Government
	)	Response to Motion to Disqualify
v.	)	
	)	
SGT Robert B. Bergdahl	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	19 August 2016

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GLOSSARY

ACCM.....	Alternate Compensatory Control Measures
AR.....	Army Regulation
ARIMS.....	Army Records Information Management System
CA.....	Convening Authority
C.A.A.F.....	U.S. Court of Appeals for the Armed Forces
cmt.....	comment
DAS.....	Department of the Army Staff
DD.....	Department of Defense
DoD.....	Department of Defense
DoDI.....	Department of Defense Instruction
ERB.....	Enlisted Record Brief
FORSCOM.....	U.S. Army Forces Command
MCM.....	Manual for Courts-Martial, United States (2012 ed.)
NARA.....	National Archives and Records Administration
R.C.M.....	Rules for Courts-Martial
SOP.....	Standard Operating Procedures
SPCMCA.....	Special Court-Martial Convening Authority
STB.....	Special Troops Battalion
UCMJ.....	Uniform Code of Military Justice
USARMDA.....	U.S. Army Records Management and Declassification Agency

SUPPLEMENTAL STATEMENT OF FACTS<sup>1</sup>

22. On 26 May 2016, the defense sent the government a Second Defense Discovery Request. D APP 22, Encl 6, at 35 *et seq.* Paragraph 1c of the Instructions requested “[n]otice of an inability of intent not to comply.” *Id.* at 35.

23. Paragraph 9 requested:

Any materials from any persons provided to GEN Abrams in advance of the referral decision with information about SGT Bergdahl, Serial, victim impact, or whether a court-martial was warranted.

*Id.* at 36.

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<sup>1</sup> The numbering resumes from the Statement of Facts in the original motion.

24. On 14 June 2016, the government responded to ¶ 9 as follows:

9. All information responsive to this request has been provided, which includes:

1. Charge Sheet
2. Article 32 Report
3. DD Form 457
4. Article 32 Transcript
5. Article 32 Defense Objections
6. Article 32 Exhibit List
7. Article 32 Government Exhibits
8. Article 32 Defense Exhibits
9. Article 32 Preliminary Hearing Officer Exhibits
10. 9 Jan 15 - Orders FORSCOM (UCMJ)
11. 22 Dec 14 - Memorandum (DAS)
12. 20 Jan 15 - Memorandum (FORSCOM to STB and STB as SPCMCA)
13. Flags (25 March 2015, 27 March 2015)
14. ERB (23 Nov 2015)
15. Administrative Exhibits (A001-A225)
16. 2014 AR 15-6 Executive Summary and Findings and Recommendations
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18. Defense Post 32 R.C.M. 405(j)(5) Submission (9 Oct 15, 21 Oct 15, CA review 22 Oct 15)
19. "Recovery of SGT Bergdahl" (Secret/ACCM)
20. SPCMCA Transmittal

25. The government's response to ¶ 9 made no reference to the 100+ letters GEN Abrams burned or caused to be burned. D APP 22, Encl 7, at 44.

26. Paragraph 47 of the Second Defense Discovery Request provided:

Immediate notification is requested on all items the Government is unable or unwilling to produce.

*Id.* Encl 6, at 42.

27. The government did not respond to ¶ 47, but stated that it recognized "its continuing duty to disclose." *Id.* Encl 7, at 48.

28. On 10 October 2015, LTG Kenneth R. Dahl, who conducted the AR 15-6 investigation in 2014 and was a defense witness at the Article 32, UCMJ preliminary hearing, checked with LTG Flora D. Darpino, The Judge Advocate General of the Army,

concerning the propriety of his contacting GEN Abrams. D APP 25, Encl 2, at 23. He included a link to a *Stars and Stripes* article.

29. On 11 October 2015 LTG Darpino responded that there was “[n]o issue with you discussing it with him if he wants to speak to you.” *Id.* at 22.<sup>2</sup>

30. On 8 November 2015, LTG Dahl emailed GEN Abrams in pertinent part:

My main concern is that my views and position on [the Bergdahl case] have not been fairly represented in the media, and I would want you to benefit from an accurate understanding before exercising judgment on next steps.

*Id.* at 22.

31. He also wrote: “So I do not wish to influence, only to fully inform.” *Id.*

32. The defense was not copied on the email, *id.*, and GEN Abrams did not provide copies to us for comment or any other purpose before referral.

33. On 5 July 2016, trial counsel forwarded to the defense copies of these emails and emails to and from a member of the public (hostile to SGT Bergdahl and President Obama) concerning the case. D APP 25, at 1.

34. The defense filed those emails with the Court on 7 July 2016. D APP 25.

## ARGUMENT

### 1. *General Abrams must testify*

Trial counsel’s email forwarding the government’s response to the motion to disqualify states: “our position is that GEN Abrams should not be required to testify. Should the Court direct that he appear, we request to the extent possible that Your

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<sup>2</sup> We agree with LTG Darpino. The issue her email to LTG Dahl unfortunately neglected to address is whether defense counsel could, as a matter of simple fairness, be kept in the dark about any such interaction. In contrast, LTC Visger, who conducted the preliminary hearing, had the right approach for matters brought to light after the preliminary hearing and before referral: “If in fact there is evidence of casualties in this or any other investigation, I recommend that the defense be provided an opportunity of notice and opportunity to comment before the convening authority makes a disposition decision.” Art. 32 Report at 2 n.3. “In my opinion, an open and public accounting of casualties should be conducted prior to a final decision on disposition.” *Id.* at 3. (Our response, which GEN Abrams told us he did not read, observed (at 4 ¶ 18) that the preliminary hearing would have to be reopened for such evidence.)

Honor designate a time certain for his testimony to accommodate his schedule. As we notified Ms. Craver [the court reporter], GEN Abrams is TDY and unavailable on 22 and 23 August, but will be back at Fort Bragg and is available on the 24th.”

General Abrams must testify. His self-serving affidavit is inconsistent in material respects with what he stated when interviewed last week in the presence of three defense attorneys and a defense paralegal. That the government would even suggest that he not be required to testify casts doubt on its response as a whole.

*2. The government has failed to rebut the defense showing that General Abrams' prior awareness of the circumstances surrounding Sergeant Bergdahl's case was disqualifying*

Because the power to dispose of charges under the UCMJ is quasi-judicial, the disqualification rule prescribed by R.C.M. 902(b)(1) for military judges who have “personal knowledge of disputed evidentiary facts” applies by analogy. Cf. Art. 1(9), UCMJ (definition of accuser, to include “type 3” accusers); R.C.M. 504(c)(1), 601(c) (accuser disqualified from convening or referring charges to a general or special court-martial). The government would plainly like to underplay GEN Abrams’ prior knowledge of facts pertinent to Charge II (the more serious of the charges), but the information we obtained by interviewing him puts his prior involvement clearly over the line. The matter can be fully developed when he testifies.

The 1954 Air Force Board of Review decision on which the government relies is obviously distinguishable. There the CA’s prior knowledge came from his review of the pretrial investigation (as it was then called) as well as his obligatory post-trial review of the record in a companion case in which he was also the CA. See *United States v. Schreiber*, 16 C.M.R. 639, 657 (A.F.B.R. 1954).<sup>3</sup> This is a far cry from the circumstances set forth in our Statement of Facts based on what GEN Abrams told us face to face. Moreover, the government omitted the key word “such” that the Air Force Board used to introduce the very language on which it relies. “[S]uch” obviously narrows the language that follows since it refers to the particular circumstances the opinion had just cited. The case must therefore be read with that critical limitation in mind.

The government also cites the “Discussion” to R.C.M. 601(c). As the *Manual* points out, this “does not have the force of law.” MCM at 1 (Preface).

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<sup>3</sup> *Schreiber* was affirmed without reference to this part of the Air Force Board’s decision. *United States v. Schreiber*, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955). The case arose from the same murder as the landmark case of *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

3. *An officer who refuses either to read or consider a key defense submission cannot serve as convening authority*

GEN Abrams told us he did not read SGT Bergdahl's comments on and objections to LTC Visger's preliminary hearing report. His affidavit—which admits only that he had been “imprecise,” Abrams Aff. ¶ 9—not only recants what he told us (seeming to draw a distinction between “reading” and “considering,” *compare id.* ¶¶ 7 & 9), but claims that he read the defense submission “several times.” Abrams Aff. ¶ 7. Not content with that U-turn, the government says that “GEN Abrams decided not to give any weight to the document.” Response at 4. What *he* says is that he “did not find [the defense's] objections persuasive or their writing style effective.” Abrams Aff. ¶ 9. Despite the ample time he has had to review the matter with trial counsel and the SJA since his interview and receipt of SGT Bergdahl's motion, he offers no insight as to *what* he found unpersuasive or *why*. GEN Abrams' reference to “writing style” directly corroborates our account of the interview.<sup>4</sup>

It makes a mockery of not only the right to be *heard*, see U.S. Army, Code of Conduct for Army Trial and Appellate Judges R. 2.6 (16 May 2008) (“Army Judges Rules”), reproduced in NAT'L INST. OF MIL. JUST., MILITARY COURT RULES OF THE UNITED STATES: PROCEDURE, CITATION, PROFESSIONAL RESPONSIBILITY, CIVILITY, AND JUDICIAL CONDUCT § 4.9 (Eugene R. Fidell & Sparky Abraham eds., 3d ed. LexisNexis 2015), but also the duty to be diligent, Army Judges R. 2.5(A), and thorough, *id.* cmt. 1, if the decision maker has no corresponding duty to *listen*. It is no more proper to *disregard* one side's submission than it is to *copy* another's. See *United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004).

4. *General Abrams' destruction of correspondence violated applicable law and regulations and was prejudicial*

The government concedes (at 4): “The Defense is certainly entitled to access anything that the [CA] considered in making his decision.” That is clearly true. But it is no answer to the defense's spoliation claim.

“[T]he right of an opposing party . . . to obtain evidence through discovery . . . is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed.” U.S. Army, Rules of Professional Conduct for Lawyers R. 3.4 cmt. (1 May 1992), AR 27-26, at 21.

Sergeant Bergdahl's motion explained why GEN Abrams' destruction of the letters was prejudicial. It goes far beyond simply whether the letters themselves would be admissible in evidence, which is all the government argues. We know from GEN

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<sup>4</sup> The government suggests (at 3) that the defense's account is internally inconsistent since GEN Abrams would not have had occasion to criticize the defense's writing had he not read the submission. But there is no inconsistency: a person who finds the first paragraph of a document impenetrable may well stop reading.

Abrams himself that there were, among the 100+ letters, some that were favorable. Who were they from? What did they say? How many were from individuals with personal knowledge of SGT Bergdahl's conduct in Afghanistan or captivity in Pakistan? Might the letters have been (or led to) the kind of information that would logically bear on disposition or, in the event of conviction, the sentence? Might they have had some bearing on clemency? We will never know.

Conversely, what if the correspondence included vituperative letters calling upon GEN Abrams to "throw the book" at SGT Bergdahl (which, given LTC Visger's recommendation, is what he did)? What if the letters were critical of SGT Bergdahl's attorneys?

Could the hostile letters have been of interest and possible use to the defense from the standpoint of whether SGT Bergdahl has, as we have repeatedly complained, been the subject of adverse pretrial publicity such as to interfere with his right to a fair trial?

How will the defense ever know what GEN Abrams read and absorbed? The underlying best evidence is irretrievably lost, and all we have as a substitute is the months-after-the-fact self-serving claim of the very individual who improperly caused the documents to be destroyed in the first place. This is intolerable.<sup>5</sup>

As the Second Circuit noted only a few months ago, "[i]t is well established that the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence the party had an obligation to produce did so in order to conceal damaging information from the adjudicator." *Nat'l Football League Mgt. Council v. Nat'l Football League Players Ass'n*, 2016 U.S. App. LEXIS 7405 (2d Cir. 2016), slip op. at 25 (citations omitted). Adverse inferences are fine when the wrongdoer is a party, but here the wrongdoer is an official with quasi-judicial responsibilities. That difference means that the issue goes beyond merely whether one side has secured an unfair advantage. Rather, it goes to the integrity of the process itself.

What should GEN Abrams have done about the 100+ letters he received?

The Army Judges Rules do not govern CAs, see § I, at 6, cmt. 2, but to the extent that they "have been formulated to address the ethical obligations of any person who serves a judicial function," *id.* at 6 cmt. 1, they are instructive when CAs exercise

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<sup>5</sup> GEN Abrams' failure to share important documents with the defense is not confined to the 100+ letters. He never told us that LTG Dahl, a highly respected and insightful general officer, felt *Stars and Stripes* had mischaracterized his views. Had we known that at the time, we could have commented before GEN Abrams made the disposition decision. He may not have known with any precision what LTG Dahl felt *Stars and Stripes* had mischaracterized, but the email alone was enough – *completely unbeknownst to us* – to undermine to an unknowable degree the weight that might be afforded to LTC Visger's favorable report.

quasi-judicial or judicial functions. See MCM (2012 ed.) App. 21, at A21-21 (analysis of R.C.M. 306(b) (referring to “the [CA]’s judicial function”). Army Judges R. 2.9(B) covers *ex parte* communications (at 16) and is fatal to what GEN Abrams did (or failed to do):

If a judge inadvertently receives an unauthorized *ex parte* communication bearing upon the substance of the matter, the judge shall [1] make provision *promptly* to notify the parties of the substance of the communication and [2] provide the parties with an opportunity to respond. [Bracketed numbering and emphasis added.]

There is no reason for the Court to cast its net wider than the simple fact that pertinent defense-favorable and other potentially useful evidence has been destroyed by an official with sweeping authority over the case. SGT Bergdahl’s spoliation claim does not turn on whether the burned letters had to be retained under the Federal Records Act and implementing regulations; military justice and the Constitution impose their own standards and requirements which transcend mere housekeeping matters such as these, essential though they are for the orderly conduct of official business. Even so, the Court may wish to be aware of the legal framework for preserving government records. If anything, it confirms the clear impropriety of GEN Abrams’ long-undisclosed destruction of the many letters he received. (Paragraph 10 of his affidavit employs the past tense and does not reveal what he has been doing with correspondence about the case now. Did the flow of mail suddenly dry up, even though the case remains? Is he still putting the “incoming” in the burn bag?)

The governing authorities for record retention and destruction include provisions of the federal criminal code (title 18, U.S. Code), the Uniform Code of Military Justice, the *Manual for Courts-Martial*, a Department of Defense Instruction, an Army Regulation, and a regulation issued by the National Archives and Records Administration (NARA).

Title 18, U.S. Code provides:

§ 2071. Concealment, removal, or mutilation generally

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both;

and shall forfeit his office and be disqualified from holding any office under the United States. As used in this subsection, the term "office" does not include the office held by any person as a retired officer of the Armed Forces of the United States.

We invite the Court's attention to the clause in subparagraph (b) that provides for forfeiture of office. Whether GEN Abrams should be prosecuted in district court for a violation of 18 U.S.C. § 2071 is of course none of this Court's business. Similarly, although violations of that provision are triable by court-martial under clause 3 ("crimes and offenses not capital") of the General Article, art. 134, UCMJ, and destruction of records is a "listed" offense, MCM ¶ 99 ("Public record: altering, concealing, removing, mutilating, obliterating, or destroying"), no charges have been preferred against him. Still, these provisions underscore the seriousness with which the federal government treats the preservation of its records.

Criminal sanctions aside, therefore, what is the regulatory landscape?

The DoD Records Management Program is governed by DoDI 5015.02 (Feb. 24, 2015). "It is DoD policy that: . . . Effective and efficient management of records provides the information foundation for decision making at all levels, mission planning and operations, personnel and veteran services, *legal inquiries*, business continuity, and preservation of U.S. history." *Id.* ¶ 3a (emphasis added). One of the responsibilities of DoD component heads is to "[e]nsure all personnel complete annual overview training. . . . The training will educate . . . DoD personnel . . . on their records management responsibilities using the DoD records management overview training developed by the DoD CIO [Chief Information Officer]. Augment the overview training with Component-specific information to address: (1) Maintenance of personal papers separately from organizational records in compliance with" 36 C.F.R. ch. XII, subch. B. DoDI 5015.02, *supra*, Encl 2 ¶ 3j(1). Another responsibility is to "[a]dvice senior leaders of their record management responsibilities within the first 30 days of assumption of duties." *Id.* ¶ 3k.

The Army Records Information Management System (ARIMS) is governed by AR 25-400-2 (2 Oct 2007). Among other things, that regulation "[p]reserves those records needed to protection the rights and interests of the Army and its current and former members . . . ; *id.* ¶ 1-1e, and "[e]nsures records related to matters involved in administrative or legal proceedings are retained until the staff judge advocate or legal advisor authorizes resumption of normal disposition." *Id.* ¶ 1-1f. Paragraph 1-5a provides: "b. Sections 3301-3314, Title 44 United States Code (44 USC 3301-3314), establishes [*sic*] the legal basis for the disposal of records of the U.S. Government. The Director, USARMDA (JDRP-RDR), 7701 Telegraph Road, Alexandria, VA 22315-3860, develops retention and disposal authorizations that meet Army needs and obtains approval from the Archivist of the United States. Approval by the archivist is legal authority for the retention and disposal of all Army records."

Records are defined as "[a]ll books, papers . . . or other documentary materials regardless of physical form or characteristics, made or received by an agency of the

United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the . . . policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.” *Id.* § II, at 28. Commanders of Army Commands such as FORSCOM are required to “[s]upervise and manage recordkeeping systems within their agencies and commands.” *Id.* ¶ 1-4e(1). Paragraph 1-8a governs “accidental loss or destruction of records by fire or other cause.” Subparagraph (1) requires the records custodian to “[r]econstruct as much of the lost or destroyed records as possible.”

“K” (or Keep) records, *see generally id.* ¶ 1-7c, are saved only to serve “business needs.” *Id.* ¶¶ 1-7d, 7-1a. “The disposition and retention of K records are applied in the office of record according to business needs or according to the prescribing directive if the business needs are specified therein. These records are kept in the office until they are no longer needed to support the business process for which they were created or received, but not longer than 6 years or 6 years after an event occurs.” *Id.* ¶ 7-1b (emphasis in original). “Records with dispositions based on an event may need to be kept in the office for a total period of time longer than 6 years. These records remain in an ‘open’ or ‘active’ status until a specific event occurs; after that, they are kept for a period of up to 6 years to serve the business use.” *Id.* (emphasis in original). Under ¶ 1-1f, quoted above, “records related to matters involved in . . . legal proceedings are retained until the staff judge advocate or legal advisor authorizes resumption of normal disposition.”

We have looked in vain for a FORSCOM implementing regulation. If one exists, perhaps the government can submit it to the Court. The closest we have come is FORSCOM Administrative SOP: Administration, Staff Administrative Procedures (25 June 2014), § II of which deals with mail and distribution. Paragraph 2-6 (General) states that the Mail and Distribution Center “provides for proper processing of all incoming and outgoing official mail.”

NARA regulations require heads of federal agencies to “[t]ake adequate measures to inform all employees and contractors of the provisions of the law relating to unauthorized destruction, removal or defacement of records,” “[i]mplement and disseminate policies and procedures to ensure that records are protected against unlawful or accidental removal and destruction,” and “[d]irect that any unauthorized remove or destruction be reported to NARA.” 36 C.F.R. § 1230.10(b)-(d). “Upon receiving any credible information that records are at risk of actual, impending, or threatened damage, alienation, or unauthorized destruction, NARA will contact the agency as follows: . . . (b) If records have allegedly been . . . destroyed, NARA will notify the agency in writing promptly with a request for a response within 30 days.” *Id.* § 1230.16.

GEN Abrams’ destruction of correspondence ran roughshod over one requirement after another. Far more to the point, it was deeply unfair. Whether viewed in isolation or cumulatively with the other matters addressed in SGT Bergdahl’s motion, it reveals a surprising indifference to basic procedural rights for an officer with his educa-

tion, experience, training, seniority and available legal resources. The circumstances that have come to light leave the Court no alternative if public confidence in the administration of justice is to be preserved.

#### CONCLUSION

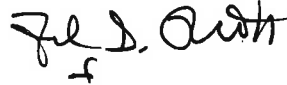
The motion to disqualify GEN Abrams and vacate the referral and for other relief should be granted.



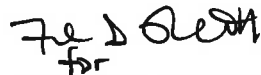
EUGENE R. FIDELL  
Civilian Defense Counsel



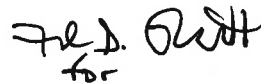
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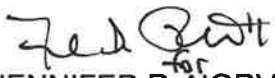
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CERTIFICATE OF SERVICE

I certify that I emailed the foregoing reply to the Court and Trial Counsel on 19 August 2016.

  
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Defense Counsel