

**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
)	DEFENSE MOTION TO ADDUCE
BERGDAHL, ROBERT BOWDRIE)	ADDITIONAL EVIDENCE, TO COMPEL,
(BOWE))	AND TO SUPPLEMENT MOTION TO
SGT, U.S. Army)	DISQUALIFY THE GCMCA
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	13 SEPTEMBER 2016

I. RELIEF SOUGHT

The Government requests that the Court deny the Defense Motion to Adduce Additional Evidence, to Compel, and to Supplement Motion to Disqualify the GCMCA.¹

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

The Defense, as the moving party, has the burden of persuasion in accordance with Rule for Courts-Martial [hereinafter R.C.M.] 905(c)(2), and the burden of proof is preponderance of the evidence in accordance with R.C.M. 905(c)(1).

III. FACTS

The Government incorporates by reference the facts alleged in the Government Response to the Defense Motion to Vacate Referral. G App 37. In addition, the Government offers the following facts.

General Robert Abrams has multiple roles in this proceeding; he is the General Court-Martial Convening Authority ("GCMCA"), the Commander of United States Army Forces Command ("FORSCOM") (the unit to which the Accused, the prosecution, and the panel are all ultimately assigned or subordinate), and as a result of the Defense listing him, was a witness at an Article 39(a) session.

No member of the prosecution has ever provided legal advice to GEN Abrams. All legal advice that GEN Abrams has received has been furnished by the Staff Judge

¹ The Government does not object to the Court considering the document referenced in the Defense motion. As a factual matter, and as discussed below, the document provides no basis for the Court to disqualify GEN Abrams as convening authority.

Advocate, COL Vanessa Berry. General Abrams' actions in his capacity as the convening authority are limited to referral of the charges, the appointment of various experts and other members of both the Government and Defense teams, the extension of the Accused's ETS, and the decision to defer decision on an administrative request by the Accused. No member of the prosecution has provided any legal advice or advocated a position regarding any of these decisions.

The contacts that members of the prosecution have had with GEN Abrams have been limited to areas outside of his potential quasi-judicial responsibilities as a convening authority.² For example, in his capacity as a witness at an Article 39(a) session, Trial Counsel assisted GEN Abrams in preparing his affidavit, and advised him of the Court's orders regarding the limitation on his contact with the Staff Judge Advocate after his testimony.

The Defense Motion includes a request to include a single page of classified material,³ which the Defense claims was "not previously disclosed to [them]." D App 46 at 3. Although the Defense may not have reviewed the document in question until recently, it was, in fact, disclosed to the Defense on 6 July 2016. See Enclosure One. The subject of the document is a potential briefing and mission for then MG Abrams, in his capacity as the Commander of Regional Command South. Neither the briefing nor the mission ever actually occurred.⁴ As such, the document provides no additional basis for disqualifying GEN Abrams.⁵

The Defense requests that the Government "state in its response which of the following facts it will stipulate to." D App 46 at 4. The Government responds as follows (paragraph numbers correspond to the Defense Motion).

35. The Government stipulates that MAJ Paul Carlson was assigned as the Chief of Justice at FORSCOM in 2014 and 2015. In that capacity he advised LTC Peter Burke on all Uniform Code of Military Justice (UCMJ) matters, and was his advisor when LTC Burke initially received the Army Regulation 15-6 investigation from GEN Mark Milley, the former FORSCOM Commander. The Defense assertion that "[a]fter the Bergdahl case was sent to the FORSCOM commander, and then to the SPCMCA (LTC Peter Q. Burke) in January 2015, MAJ Carlson was assigned to be LTC Burke's legal advisor. The purpose of that assignment was to "keep the legal advice to the convening authority separate from the prosecution" is incorrect. Major Carlson's role as LTC Burke's legal advisor began before SGT Bergdahl's case was sent to FORSCOM. His continuing role as a legal advisor to LTC Burke was not designed to "keep the legal advice to the convening authority separate from the prosecution."

² As explained in more detail below, it is questionable whether a convening authority continues to have a quasi-judicial role.

³ The Government is pursuing declassification of the document pursuant to the Defense's request.

⁴ This is an example of appropriate *ex parte* communication that the Government has had with GEN Abrams. The Defense alleged, by implication, that GEN Abrams was a potential witness as a result of the referenced document. In order to respond to the Defense allegation, the Government did what any attorney would do. We asked him.

⁵ As discussed in G App 37, even if GEN Abrams had participated in some way in the past, that would not disqualify him as convening authority.

36. The Government stipulates the MAJ Carlson departed FORSCOM as a result of Permanent Change of Station orders. As discussed above, as there was never an intentional segregation of the prosecutors from LTC Burke, there was not a decision made to transfer the responsibilities of providing him with legal advice.

37. The Government stipulates to the facts as alleged.

38. The Government stipulates to the facts as alleged.

39. The Government stipulates to the facts alleged. The Government notes, however, that there is no requirement that a convening authority explain a decision to refer a case to court-martial, regardless of whether that decision is different from the recommendation of the preliminary hearing officer. Moreover, there is no requirement that the Staff Judge Advocate pre-trial advice be provided to the Defense in advance.

40. The Government stipulates to the facts as alleged.

41. While not agreeing to the Defense characterization of the communication between LTC Burke and Trial Counsel as "frequent" the Government stipulates to facts themselves as alleged.

42. The Government stipulates that GEN Abrams initially declined to be interviewed by the Defense, but later agreed to do so after the Court's suggestion. The Government also stipulates that the interview took place on 8 August 2016, and that the Defense cited several statements allegedly made by GEN Abrams in their Motion Disqualify the Convening Authority. D App 34. The Government does not stipulate to the accuracy of the statements as alleged in Defense Appellate Exhibit 34.

43. The Government stipulates that GEN Abrams executed an affidavit and that the affidavit was enclosed to the Government's response to the Defense motion.

44. The Government stipulates that GEN Abrams testified that MAJ Justin Oshana and a Lieutenant⁶ assisted in the preparation of his affidavit. The Government does not stipulate that GEN Abrams testified that both officers assisted in "4-6 drafts of the affidavit before he signed it."⁷

45. The Government stipulates to the facts as alleged.

46. The Government stipulates to the facts as alleged.

47. The Government stipulates to the facts as alleged

⁶ The Lieutenant referenced is First Lieutenant Ann Rutherford, a member of the prosecution team.

⁷ Major Oshana was TDY during the period when the affidavit underwent revisions at the direction of GEN Abrams. He was present when the affidavit was ultimately executed.

48. The Government stipulates to the facts as alleged

49. The Government stipulates to the facts as alleged

50. The Government stipulates that the Staff Judge Advocate has declined to be interviewed by the Defense. The Government does not stipulate that COL Berry has been a “witness” to the “GCMA’s (sic) interactions” with the prosecution.

IV. EVIDENCE

1. Enclosure One – Memorandum to Defense Counsel accompanying discovery disclosure dated 6 July 2016.

V. LAW AND ARGUMENT

There is no rule prohibiting *ex parte* communication between the trial counsel and the convening authority, nor has any case ever held that such communication is improper or discoverable. Undeterred by the total absence of any authority, the Defense moves forward based on a fundamentally flawed premise; the belief that all of the acts of a convening authority are “judicial” and that consequently the rules that apply to judges should apply to convening authorities. The Defense relies on the use of the phrase “judicial acts” in Article 37, UCMJ in support of this position.⁸ The same argument was advanced in a concurring opinion by Judge William Cook in *United States v. Hardin*, 7 M.J. 399 (C.M.A. 1979), and was rejected by the Court.

Decades of precedent have recognized that a convening authority has multiple roles, only some of which have been considered quasi-judicial. The Defense apparently recognizes this fact when they write “[i]f he were a judge, GEN Abrams would be removed or otherwise disciplined, and his actions set aside.” D App 46 at 7. The Government agrees wholeheartedly with the fact implicit in that statement; GEN Abrams is not a judge. This principal has been recognized for years. As Judge Robert Duncan appropriately observed, “[a] convening authority, although he has a function which is judicial in nature, is simply not a judge.” *United States v. Lallande*, 46 C.M.R. 170 (A.C.M.R. 1973) (Duncan, J., concurring in part, dissenting in part).

Congress has consistently reduced the role of the convening authority in the one area that was ever held to be quasi-judicial, post-trial review, to such a degree that it is not clear that a convening authority continues to have any quasi-judicial responsibilities at all.

⁸ This continues a now familiar pattern with the Defense. They cite to a provision of a statute and then demand relief, ignoring any case law that is contrary to their position. It is for this reason that they continue to claim that Article 37 “mandates relief because Sen. McCain is a retired regular and therefore subject to the Code,” completely ignoring decades of precedent requiring that an individual must have a “mantle of command authority” in order to establish Unlawful Command Influence. *See e.g. United States v. Denier*, 47 M.J. 253 (C.A.A.F. 1997).

The Court should not require the Staff Judge Advocate to submit to an interview or to testify as a witness. The only basis that the Defense advances is that the Staff Judge Advocate is a “material witness” to the *ex parte* contacts that the prosecution has had with the convening authority. Since there is nothing impermissible about the contact that the prosecution has had with GEN Abrams, there is no reason to compel COL Berry to be interviewed or testify.

a. There is no rule prohibiting *ex parte* communication between the trial counsel and the convening authority

At the outset, it is critical to recognize that the Defense has no direct authority to support their position. There is no rule prohibiting *ex parte* communication between the convening authority and the trial counsel in the Uniform Code of Military Justice, the Rules for Courts-Martial, Army Regulation (“AR”) 27-10 or anywhere else. No Court has ever held that such contact is prohibited or discoverable.

The Defense claim that “the SJA or legal officer who advises a CA cannot be someone who has served as a trial counsel or assistant trial counsel in the case” is simply incorrect. D App 46 at 8. Article 6(c), UCMJ, the provision that the Defense cites in support of this position, limits that prohibition on advice provided to “any *reviewing authority* upon the same case.” (emphasis added). “The plain language of the provision states that it applies to a staff judge advocate acting for a reviewing authority.” *United States v. Stirewalt*, 60 M.J. 297, 303 (C.A.A.F. 2004). Moreover, “[a]ll of the instances where Courts “have found violations of Article 6(c) involve subsequent actions for a reviewing authority.” *Id.*

It is unquestionable that a part of the duties and responsibilities of a trial counsel include advising commanders on military justice issues, and that frequently those commanders are convening authorities by virtue of their position. See *e.g. United States v. Peters*, 74 M.J. 31 (C.A.A.F. 2015). In *Peters* the Court considered a challenge for cause against a panel member who, in his capacity as a battalion commander (and therefore as a Summary Court Martial Convening Authority), “regularly relied upon [the trial counsel] for legal advice on military justice matters.” *Id.* at 35. Notably, the Court did not find that the professional relationship between the trial counsel and the prospective member was improper because of the existence of *ex parte* communications. Similarly, in *United States v. Gray*, 14 M.J. 816 (A.C.M.R. 1982) the Court, in addressing the denial of an Accused’s Individual Military Counsel request discussed the fact that the requested counsel had previously served as trial counsel and “advised the company commander, the battalion commander, and brigade commander on the case.” *Id.* at 817. Once again, there was no discussion about any impropriety surrounding an attorney having had *ex parte* communications with the summary and special courts-martial convening authorities.

Army Regulation 27-26, Rules of Professional Conduct for Lawyers, is a further source of support for the fact that there is no blanket prohibition on *ex parte* communication between a convening authority and a trial counsel. Rule 3.5 prohibits a

lawyer from seeking “to influence a judge, court member, member of a tribunal, prospective court member or member of a tribunal, or other official by means prohibited by law” and further prohibits a lawyer from “communicat[ing] *ex parte* with such a person except as permitted by law.” AR 27-26, Rule 3.5(a)(b). The convening authority is not one of the individuals with whom *ex parte* communication is prohibited. That absence is significant given that the convening authority is specifically discussed in other portions of the Rules. In fact, far from prohibiting contact between the trial counsel and the convening authority, the Rules *mandate* communication under certain circumstances. The Comment to Rule 1.4 requires “[a] lawyer representing the Government who receives from the accused an offer for a pretrial agreement must communicate that offer, and should provide advice as to that offer, to the convening authority.” Rule 3.8 requires “[a] trial counsel shall ... recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn.”

The faculty of The Army Judge Advocate General’s Legal Center and School recognizes that trial counsel “advise commanders on a wide variety of military justice and administrative law issues outside of the courtroom.” Faculty, The Judge Advocate General’s School, U.S. Army, *The Art of Trial Advocacy*, The Army Lawyer, DA PAM 27-50-350 (March 2002). The publication goes on to *encourage* trial counsel to meet with the commanders they advise (“There is no substitute for face-to-face contact with commanders.”). *Id.* at 2. Notably absent is any warning to bring a defense counsel with them during such meetings. The advice is not limited to trial counsel. The 2015 Commander’s Legal Handbook advises commanders to seek advice from their trial counsel on numerous occasions. 2015 Commander’s Legal Handbook, Misc. Pub 27-8. Again, no warning is included that they should invite defense counsel.

b. The convening authority has multiple roles which are not quasi-judicial

Since there is no direct authority of any kind in support of their motion, the Defense attempts to move forward on the theory that all acts of a convening authority are “judicial.” It is a well-established principal of military law, however, that a convening authority has multiple roles and responsibilities. “In the military justice system, the convening authority plays a central role as both quasi-judicial decision maker and as commander, the custodian of good order and discipline.” *United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012) (Baker, J. concurring).

1. The convening authority’s prosecutorial role

Courts have repeatedly recognized the prosecutorial role that a convening authority plays. “A convening authority functions in different ways. ‘In referring a case to trial, a convening authority is functioning in a prosecutorial role.’ *United States v. Hibbard*, 2001 CCA Lexis 304 (quoting *United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987); See also *Cooke v Orser*, 12 M.J. 335, 338 (C.M.A. 1982) (“A convening authority and his staff judge advocate in their prosecutorial roles in the court-martial system act on behalf of our federal government”); *United States v. Loving*, 41 M.J. 213, 218-19 (C.A.A.F. 1994) (“A convening authority exercises prosecutorial discretion by

deciding, with the advice of his or her SJA, whether a case will be prosecuted and whether the death penalty will be authorized for a capital offense.”); *United States v. Hardin*, 7 M.J. 399, 404 (C.M.A. 1979) (“Of course, the convening authority himself must act in good faith in exercising his prosecutorial discretion...”); *United States v. Kelly*, 40 M.J. 558, 570 (N.M. Ct. Crim. App. 1994) (“Discretion that is exercised in the area of the selection of the appropriate forum for disposition of charges is a part of prosecutorial discretion. Convening authorities are accorded broad discretion in deciding whether a case should be dismissed, handled administratively, such as through an art. 15 of the Unif. Code Mil. Justice proceeding, or by court-martial.”); *United States v. Banks*, 37 M.J. 700, 702 (A.C.M.R. 1993) (“There is the power of prosecutorial discretion by the convening authority before trial to prevent unjust prosecution. R.C.M. 306(b).”); *United States v. Wiesen*, 57 M.J. 48 (C.A.A.F. 2002) (“Who may serve on a court-martial is governed instead by Article 25, Uniform Code of Military Justice, 10 USC § 825, which permits the convening authority - the official who has exercised prosecutorial discretion in the case - personally to select the members of the court-martial panel.”); *United States v. Benedict*, 55 M.J. 451, 456 (C.A.A.F. 2001) (“The convening authority, who is not a judicial official, exercises command authority and responsibility over the accused, over the members of the panel, and over the discretionary prosecutorial decision to refer the charges to a court-martial.”) (Efron, J. dissenting).

2. The convening authority’s role as a commander

Convening authorities are almost always also military commanders, a role that carries with it the responsibility to ensure good order and discipline. “It is important to remember that the ‘authority to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority.’ This authority is based on the commander’s responsibility for good order and discipline within his or her organization.”) *United States v. Kittle*, 56 M.J. 835, 837 (A.F. Ct. Crim. App. 2002) (citing *United States v. Finster*, 51 M.J. 185, 186 (C.A.A.F. 1999)). See generally, *United States v. Giles*, 59 M.J. 374, 378 (C.A.A.F. 2004) (“A military commander is responsible for maintaining good order and discipline within his or her unit. Military commanders not only exercise law enforcement powers, they also exercise considerable responsibility for the administration of military justice as forwarding and convening authorities.”); *United States v. Gonzales*, 1998 CCA LEXIS 323 (N.M. Ct. Crim. App. 1998) (“The convening authority, whose interests in good order and discipline in the unit are most important, has reviewed and approved appellant’s sentence, including an unsuspended punitive discharge.”); *United States v. O’Flaherty*, 1998 CCA LEXIS 299 (N.M. Ct. Crim. App. 1998) (“The convening authority, whose interests in good order and discipline in the unit are most important, has reviewed and approved appellant’s punitive discharge.”).

Finster recognized the dual hatted responsibility that a convening authority had in being able to modify the findings and sentence.

One of the distinguishing features of the military justice system is the broad authority of the commander who convened a court-martial to modify

the findings and sentence adjudged at trial. Although frequently exercised as a clemency power, the commander has unfettered discretion to modify the findings and sentence for any reason -- without having to state a reason -- so long as there is no increase in severity. This power dates from the earliest Articles of War and Articles for the Government of the Navy. *It is based upon the responsibility of a military commander for the state of discipline and justice the command.*

Id. at 186 (emphasis added). The command responsibilities of a convening authority are recognized in the Discussion to R.C.M. 1107(b)(1), which suggests that the basis for action should include “the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons.” These suggested factors are significant in illustrating the multiple non-judicial roles that a convening authority occupies, as it would surely be inappropriate for a Court to reach a decision based on “mission requirements.”

Consequently, even the convening authority’s powers to grant clemency are a matter of “command prerogative” and are not a “judicial function.”⁹ See *United States v. Reed*, 51 M.J. 559 (N.M. Ct. Crim. App. 1999) (“Clemency, however, is a not a judicial function at all, it is the prerogative of the convening authority.”). See also *United States v. Cook*, 2015 CCA Lexis 25 (N.M. Ct. Crim. App. 2015) (“The convening authority may exercise ‘sole discretion’ as a matter of ‘command prerogative’ in deciding whether to set aside or modify the findings or sentence.”) (citing *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988) (“Article 66, UCMJ, 10 USC § 866, assigns to the Court of Military Review only the task of determining sentence appropriateness: doing justice. Of course, a judicial body is especially suited to perform this task. The responsibility for clemency, however, was placed by Congress in other hands. Thus, the convening authority may grant mercy by not referring charges to trial or, after trial, by reducing the accused’s sentence pursuant to ‘command prerogative.’”); *United States v. Parker*, 71 M.J. 594, 626 (N.M. Ct. Crim. App. 2012) (“As a matter of ‘command prerogative’ a convening authority ‘in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.’”); *United States v. Banks*, 37 M.J. 700, 702 (A.C.M.R. 1993) (“After trial, the convening authority may, as a matter of command prerogative within his sole discretion, disapprove a conviction.”)

c. Congress has significantly limited, and perhaps eliminated altogether, the quasi-judicial role of the convening authority

The evolution of the role of the convening authority is of importance in deciding this issue. Prior to 1983, the convening authority’s role as a reviewer – the primary area in which a convening authority has been referred to as a quasi-judicial actor – included

⁹ In 2013 Congress amended Article 60, UCMJ to, *inter alia*, eliminate the language from Article 60(c)(1) granting the convening authority the ability to modify the findings and sentence as “a matter of command prerogative involving the sole discretion of the convening authority.” Pub. L. No. 113-66. Although the amendment went into effect on 24 June 2014, it does not apply to crimes committed prior to that date. Since the Accused’s misconduct occurred prior to the amendment, the convening authority retains the ability to grant clemency in this case in accordance with the pre-2014 law.

a requirement that "... the convening authority may approve only such findings of guilty ... as he finds correct in law and fact..." UCMJ art. 64 (1950).¹⁰ As a result, the convening authority was required to "to act like an appellate court and, like [appellate courts], to assess facts and law impartially." *United States v. Ralbovsky*, 32 M.J. 921 (A.F.C.M.R. 1991). See also *United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987) ("In referring a case to trial, a convening authority is functioning in a prosecutorial role. In stark contrast, when he is performing his post-trial duties, his role is similar to that of a judicial officer.").

Congress removed the provision requiring the convening authority to make a determination that the findings were "correct in law and fact" in the Military Justice Act of 1983. The reasons for the change were reported by the House as follows:

Under current law, the convening authority makes a legal review of the proceedings, which may involve extremely complicated appellate issues. Advice from the staff judge advocate is required ... Court decisions have significantly encumbered the staff judge advocate's review. As a result, it has become a complex document that consumes substantial judge advocate resources, often is too lengthy to be of use to the convening authority, and can constitute an independent source of appellate litigation even when the underlying case is free of error.

H.R. Rep. No. 98-549, 98th Cong., 1st Sess., reprinted in 1983 U.S.C.C.A.N. 2177, 2180. Similarly, the legislative history of the Act in the Senate includes the following:

[T]his amendment is a substantial change from present law, which is based upon the current responsibilities of the convening authority to conduct a legal review of the case. Under current law, the staff judge advocate's review has become a cumbersome document which produces a substantial strain on legal resources. It can be a source of appellate litigation even when the trial is otherwise free of error. It has become unnecessary and redundant in view of the substantial effort now devoted to appellate review by the Courts of Military Review and the Court of Military Appeals. Under the proposal, the responsibility to review the case for legal errors is assigned to appellate authorities, making it unnecessary for the convening authority to receive a legal review of the case prior to taking action. Under the proposal, the staff judge advocate or legal officer will provide the convening authority with a concise written communication, reflecting the views and recommendation of the convening authority's principal advisor on military justice matters; *it will not be a legal review of the proceedings.*

S.Rep. No. 53, 98th Cong., 1st Sess. 20 (1983) (emphasis added). The Rules for Courts-Martial were amended to conform to the change in the requirements. "The staff

¹⁰ Article 64 was previously titled "Approval by the convening authority." Under the current Code, the rules regarding action by the convening authority are found in Article 60.

judge advocate or legal officer is not required to examine the record for legal errors.” R.C.M. 1106(d)(4). “The convening authority is not required to review the case for legal errors or factual sufficiency.” R.C.M. 1107(b)(1).

The Air Force Court of Military Review discussed the significance of the Military Justice Act of 1983 changes in *United States v. Ralbovsky*, 32 M.J. 921 (A.F.C.M.R. 1991).

The convening authority's prior role as a reviewer has been changed. The convening authority is no longer required to act in a quasi-judicial role, as though he had a magistrate's training and impartiality. A convening authority now has the power of command without the duties of a judge or the restrictions and obligations of a judge: He may reduce findings or a sentence for any reason or for no reason, as a matter of prerogative. If he wishes, he may give relief from errors, but he has no obligation to do so. He therefore has no need to be acquainted with the rules that govern procedure and evidence at trial: The proof testing is over before he sees the record. Accordingly, it is difficult to imagine circumstances under which a convening authority might be disqualified, other than those mentioned by the discussion that accompanies R.C.M. 1107(a).

Id. at 923 (internal citations omitted). The Court of Military Appeals also recognized that “[t]he changes to Article 60 wrought by the Military Justice Act have largely relieved the convening authority of any judicial role. He is no longer required to examine the record for legal error; and his staff judge advocate or legal officer is not required to provide a legal review of the case.” *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988) (internal citations omitted). See generally, *United States v. Gregg*, 1991 CMR LEXIS 745 (A.F.C.M.R. 1991); *United States v. Blodgett*, 20 M.J. 756 (A.F.C.M.R. 1985). In the nearly thirty years since *Hill* the Court of Appeals for the Armed Forces has never held that a convening authority continues to have a quasi-judicial role.¹¹

The wealth of authority cited above makes one point abundantly clear; contrary to the Defense’s position, not all acts of the convening authority are “judicial.” Quite the contrary, based on the Court of Military Appeals ruling in *Hill*, the quasi-judicial role of the convening authority that existed prior to 1983 may have been eliminated entirely. There is no doubt, however, that a convening authority exercises responsibilities in a prosecutorial role and as a matter of command prerogative. Consequently, because the convening authority has multiple roles, the blanket prohibition against *ex parte* communications that applies to judges cannot be said to apply to a convening authority (which is, presumably, why no court has ever said that it does).¹²

¹¹ The only reference to such a role in any C.A.A.F. decision came in Judge Sullivan’s dissent in *United States v. Cornwall*, 49 M.J. 491 (C.A.A.F. 1998).

¹² The statement from Lawrence Fox, the Defense “expert,” is fundamentally flawed for the same reasons as the Defense’s position. Mr. Fox, apparently relying on assertions by the Defense rather than actually conducting his own research into military law, relies on a variety of assumptions about the role of the convening authority that are simply incorrect. His ultimate opinion that GEN Abrams violated the Judicial Code of Conduct is, therefore, meaningless.

d. The prosecution has not had any unauthorized or inappropriate contact with the convening authority

Assuming *arguendo* that a convening authority still has certain quasi-judicial responsibilities, the contact that members of the prosecution have had with GEN Abrams in this case have been totally unrelated to those areas. No member of the prosecution has provided any legal advice to GEN Abrams of any kind. Contrary to the Defense's claims, no member of the prosecution has advised GEN Abrams regarding the decision to refer the case,¹³ his decision to not act on a pending administrative matter, or any decisions relating to the funding or personnel requests for the Government.¹⁴ D App 46 at 8. All legal advice that GEN Abrams has received has come from the Staff Judge Advocate.

The contacts that Trial Counsel have had with GEN Abrams have been authorized and appropriate.¹⁵ For instance, after the Defense filed a motion to vacate the referral and disqualify GEN Abrams as convening authority and requested that GEN Abrams be called as a witness, members of the prosecution interacted with him in that capacity, to confirm certain factual assertions to ensure accurate filings with the Court, to assist in the preparation of his affidavit, and to convey the Court's orders regarding his contact with the Staff Judge Advocate after his testimony. There is nothing unauthorized or improper about any of this; quite the opposite, these are among the most basic responsibilities of a lawyer.

Even if there were areas which were inappropriate for a trial counsel to have *ex parte* communications with the convening authority about, the Defense request amounts to nothing more than an attempt to once again "check the Government's work." By analogy, a trial counsel (or any attorney for that matter) is certainly allowed to interview potential witnesses. It would be impermissible under Article 46, UCMJ, for a trial counsel to instruct a witness not to speak with the Defense. This prohibition does not mean that the Defense is entitled to require the Government to disclose every conversation that a trial counsel has ever had with a witness, simply to ensure that nothing improper was said. Trial Counsel are all licensed attorneys, qualified under Article 27(b), UCMJ and sworn under both Article 42(a), UCMJ and our respective State bars, and are well aware of our ethical and legal obligations.

¹³ The Defense's continued fixation on the fact that the decision to refer the case to a General Court-Martial is "still unexplained" is strange. There is no requirement that a convening authority justify or explain a decision to refer a case.

¹⁴ In raising the funding and personnel manning related to the prosecution, the Defense highlights the multiple roles that GEN Abrams holds. Decisions relating to the funding and manning of the prosecution are made in GEN Abrams' capacity as the FORSCOM Commander, not in his capacity as the GCMCA.

¹⁵ The Defense urges the Court to draw an adverse inference regarding the nature of the Government's contacts with GEN Abrams based on the refusal to disclose the details of contacts. Since the Defense is not entitled to discover the information, no such inference is warranted.

e. The role of an preliminary hearing officer is distinct from that of a convening authority

The Defense reliance on *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977) is misplaced. *Payne* dealt entirely with an investigating officer who, unlike a convening authority, does not fulfill multiple and distinct roles. Moreover, the nature of an investigating officer's duties is significantly more aligned with that of a judicial officer, whereas the single area in which a convening authority has been held to exercise a quasi-judicial role has been continually degraded by Congress. It is again noteworthy that no court has ever extended the holding in *Payne* to apply to a convening authority. As the Government has now repeatedly pointed out, the silence when it comes to the Defense's positions is deafening.

f. There is no basis to compel the Staff Judge Advocate to be interviewed

The Defense's requested relief includes a request that the Court order that the Staff Judge Advocate make herself available for an interview. The Defense offers no analysis of why such an interview should be compelled, apart from a generic assertion that the Staff Judge Advocate is a "material witness" to the communications between members of the prosecution and the convening authority. Since there is nothing inappropriate or prohibited about such communications, there is no reason to compel the Staff Judge Advocate to participate in an interview.

VI. CONCLUSION

General Abrams functions in multiple capacities as a convening authority; a commander, and as a result of the Defense, a witness in an Article 39(a) session. There is no prohibition on the Trial Counsel communicating with him for a variety of reasons, and no requirement that the Defense be notified of such communication, particularly when they fall outside of what is arguably his "quasi-judicial" role. Once again, the Defense has failed to cite any authority in support of their position. For all those reasons, the Government requests that the Court deny the Defense motion.



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 13 September 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



DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY FORCES COMMAND
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AFCG-JA

6 July 2016

MEMORANDUM TO LTC Frank Rosenblatt, Trial Defense Counsel, United States v. Robert Bowdrie (Bowe) Bergdahl

SUBJECT: Government Production of Documents

1. The following pages are enclosed on the external hard drive marked ACCM:
 - a. CENTCOM I with Bates range S000000944 to S000033124 (re-disclosed as searchable .pdf)
 - b. CENTCOM II with Bates range S000033127 to S000089094
 - c. Unclassified II with Bates range _000040674 to _000042995
2. The above listed Bates ranges do not include pages listed in the following enclosures, attached in hard copy:
 - a. CENTCOM I Bates Excluded
 - b. CENTCOM II Bates Excluded
 - c. Unclassified II Bates Excluded
3. The following pages are enclosed on the CD marked ACCM:
 - a. Bates S000045220 to S000045226
4. This disclosure should not be construed as a formal discovery response under the provisions of RCM 701. Nothing in this memorandum should be construed as an agreement to provide any additional document, or as a denial of production of any document.
5. Point of contact for this memorandum is the undersigned at 910-570-5922 or justin.c.oshana.mil@mail.mil

Encls

//original signed//
JUSTIN C. OSHANA
MAJ, JA
Trial Counsel