

**UNITED STATES ARMY TRIAL JUDICIARY  
SECOND JUDICIAL CIRCUIT, FORT BRAGG, NORTH CAROLINA**

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**UNITED STATES OF AMERICA**

**v.**

**SGT Robert B. Bergdahl  
HHC, STB, U.S. Army FORSCOM  
Fort Bragg, NC 28310**

**Findings of Fact, Conclusions of Law  
and Ruling -- Defense Motion to  
Dismiss - Lack of Personal Jurisdiction  
(D App 97)**

**2 October 2017**

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1. The defense moves this Court dismiss all Charges and specifications because they believe the Court lacks personal jurisdiction over the accused. I considered the written motions of the parties, all matters appended thereto, if any, and oral arguments of counsel. The burden of persuasion is on the government to prove the facts related to this matter by a preponderance of the evidence.

**FINDINGS OF FACT**

2. I find the following facts by a preponderance of the evidence<sup>1</sup>:

a. On 25 March 2015, the accused was charged with one charge, one specification of desertion with the intent to avoid hazardous duty or to shirk important service in violation of Article 85, UCMJ, and one charge, one specification of misbehavior before the enemy in violation of Article 99, UCMJ. Each of these charges alleged that the accused was a member of the United States Army both at the time of the alleged commission of the offenses (on or about 30 June 2009) and at the time of preferral of charges.

b. On 12 June 2008, the accused enlisted in the Army for a term of three years and 16 weeks. His end term of service (ETS) date at that time was o/a 1 October 2011.

c. On or about 30 June 2009, while serving with his assigned unit in Afghanistan, the accused went missing and was captured by the Taliban o/a 1 July 2009. He returned to military control on 31 May 2014.

d. SGT Bergdahl's enlistment was extended one year as his 1 October 2011 ETS date approached and he was, as far as the Army knew, still under the control of

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<sup>1</sup> By email dated 13 September 2017 and marked as AE 61, the government agreed to the facts alleged in the defense motion (D App 97) but not to the defense's conclusions associated with those facts.

the Taliban. One year later, while he was still under the control of the Taliban, his enlistment was extended by 10 more years - to 1 October 2022.

e. On 4 August 2010 a Board of Inquiry convened to consider the accused's status. That board recommended that his status remain "missing-captured." The board also discussed whether the accused had violated the UCMJ but ultimately decided to wait until they had an opportunity to interview the accused to reach a conclusion on this issue. AE 62.

f. On 14 July 2014, after the accused had gone through medical examination incident to his return to military control and had participated in debriefings by other Army personnel, he was assigned to his present unit and a FLAG was initiated. AE 62.

g. In July 2015, the accused applied for and received access to his Savings Deposit Plan account. AE 62.

h. On 24 June 2016 the accused requested that Army Human Resources Command issue a discharge certificate with a 1 October 2011 discharge date and an honorable characterization of service.

i. The accused has never been issued a DD 214 nor had a final accounting of pay.

j. After he went through the first two phases of re-integration,<sup>2</sup> the accused was re-assigned to 5th Army, U.S. Army North. This happened sometime in July 2014. When the accused was about to be assigned to his unit, LTG Percy Wiggins, Commander of U.S. Army North and 5th Army, received a telephone call from the Secretary to the Army General Staff. He was told that the accused was being assigned to his unit and that he was responsible to take care of the accused but that UCMJ would be retained at a higher level. His SJA, who was present at the conversation, commented that he thought that meant FORSCOM would exercise jurisdiction. LTG Wiggins assumed that was true as well. When the accused came to him the Dahl<sup>3</sup> AR 15-6 investigation was still under way. LTG Wiggins did not get involved in the FLAG process. That was done by his BN Commander. LTG Wiggins emphasized that his people focus on re-integrating the accused, making sure that he was safe, and ensuring that he was treated like every other soldier. Though he was aware of significant media attention regarding the accused, he did not pay much attention to it and did not really give their reports of desertion much credit.

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<sup>2</sup> Re-integration in this instance is a three phase process which usually begins in country and progresses quickly back to CONUS. It involves medical care, debriefing, decompressing, support, return to duty and other necessary aspects. The Army unit responsible for this process is U.S. Army South -- located at Fort Sam Houston, TX.

<sup>3</sup> Referring to Major General Dahl, the AR-15-6 investigating officer.

## LAW AND ANALYSIS

3. Personal jurisdiction under the UCMJ is set forth in Article 2. Paragraph (a)(1) provides that: "The following persons are subject to this chapter: (1) Members of the regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment . . ." Paragraph (b) describes what constitutes becoming a valid "member" of an armed force per paragraph (a) as a "voluntary enlistment of any person who has the capacity to understand the significance of enlisting . . ." Paragraph (c) was added to Article 2 in 1979 to overrule case law that found a lack of jurisdiction where there was a defective enlistment. *United States v. Russo*, 1 MJ 137 (CMA 1975). This amendment codified the concept of constructive enlistment as a way of establishing personal jurisdiction where the mutual intent of the parties can be established by certain factors and which contain the two same basic elements, voluntariness and competency, that exist in paragraph (a). The language of paragraph (c) is broad and general and serves as a catch all to allow personal jurisdiction over individuals who might be serving under otherwise defective enlistments. Paragraph (c) cannot be read in any way to limit paragraph (a).<sup>4</sup> It expands it.

4. Personal jurisdiction does not necessarily terminate at the end of a contractual term of service. *Rules for Courts-Martial (RCM) 202(a)* discussion, (c)(1). There must be delivery of a discharge certificate (commonly referred to as a DD 214) and a final accounting of pay. 10 U.S.C. § 1168(a); *United States v. Nettles*, 74 MJ 289 (2015); *United States v. Melanson*, 53 MJ 1 (2000); *Smith v. Vanderbush*, 47 MJ 56 (1997); *United States v. King*, 27 MJ 327 (CMA 1989).<sup>5</sup> Such jurisdiction continues despite even unreasonable delay by the government in discharging a service member at the end of an enlistment -- even if that service member objects. *United States v. Poole*, 30 MJ 149 (CMA 1990). And, jurisdiction continues even if the government fails to comply with service regulations requiring affirmative action to extend his enlistment. *United States v. Hutchins*, 4 MJ 190 (CMA 1978); *United States v. Williams*, 21 MJ 254 (ACMR 1985). However, if, after expiration of his enlistment, the service member demands a discharge and no action is taken to discharge or try him within a reasonable time, jurisdiction may expire. *United States v. Douse*, 12 MJ 473 (CMA 1982).

5. The defense basic contention is that because the accused was unlawfully retained for 11 years beyond his original ETS date in October 2011 the government lost jurisdiction over him on that date and cannot try him for the charged offenses. In

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<sup>4</sup> See generally, Fredrikson, "The Unsheathing of a Jurisdiction Sword: The Application of Article 2(c) to Reservists," Army Lawyer, July 2004.

<sup>5</sup> The number of cases that establish this fundamental legal principle are legion. For the sake of economy, the Court has only mentioned a few.

support of this proposition the defense cites several Article III<sup>6</sup> court opinions dealing with the validity of enlistment contracts when the government failed to follow its own regulations. This Court does not dispute the validity of those cases. However, even assuming without deciding that the extension of the accused for 11 years beyond his ETS date was not valid, that is not determinative of court-martial jurisdiction. The cases the defense cites simply do not apply to the question of personal court-martial jurisdiction. Jurisdiction, as has been previously stated, is established by a valid enlistment and continues until there is delivery of a DD 214 and a final accounting of pay.<sup>7</sup>

6. In this case, there is no dispute that in June 2008 the accused voluntarily enlisted in the United States Army.<sup>8</sup> In June or July of 2009 he went missing and soon was believed, based on solid intelligence, to be in the hands of the enemy. Soon thereafter and well before his 2011 ETS date, the accused was listed on military roles as "missing/captured." His ETS date was first extended by one year and then by an additional ten years. After he was returned to military control in May 2014, the accused was properly processed through the Army's re-integration process. Simultaneously, an AR 15-6 investigation was begun into the facts and circumstances concerning the accused's falling into the hands of the enemy. The accused was interviewed and provided a statement as part of this investigation. The accused was FLAGd almost as soon as he returned to military control. And, soon after the AR 15-6 investigation was completed, court-martial charges were preferred against him. Over a year later, two years after he returned to military control and more than five years after his 2011 ETS date, the accused requested to be discharged retroactive to June 2011. That request was denied.

7. There is nothing about the facts and circumstances surrounding either the accused's original enlistment, the extension of his ETS date while in the control of the enemy, or the processing of the accused after he was returned to military control that shows any evidence that he was ever discharged from the service as that term is defined in court-martial jurisdiction statutes, regulations, or jurisprudence. His enlistment was voluntary and valid. The extension of his ETS date was appropriate under the circumstances. He was never discharged from the service for purposes of

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<sup>6</sup> Referring to Article III of The Constitution of the United States of America. Defense references include United Supreme Court cases as well as Federal Circuit and District Court cases.


<sup>7</sup> And, even beyond that, where a service member received his DD 214 and final accounting of pay in a foreign country and was told how much money he would receive but still had not accessed that money in his bank account in the United States, jurisdiction was held to still apply to him and he was brought back to Germany to face trial. *United States v. Brevard*, 57 MJ 789 (ACCA 2002).

<sup>8</sup> During the hearing on this motion, defense counsel in-artfully referred to the accused's "capacity" to enlist when he meant to argue that his enlistment was not voluntary because it was extended for 11 years without his consent or request. When the Court sought clarification, the defense consulted with the accused and discussed amongst themselves and then assured the Court that they had no evidence and no reason to believe that the accused was not competent to enlist when he enlisted in 2008. The defense affirmatively eschewed any claim of lack of capacity.

court-martial jurisdiction. Accordingly, this court-martial has personal jurisdiction to try the accused for the charges against him.

**RULING**

8. The defense motion to dismiss for lack of personal jurisdiction is DENIED.

  
JEFFERY R. NANCE  
COL, JA  
Military Judge