
UNITED STATES)	Defense Response to Government
)	R.C.M. 801(a)(6) Notice
v.)	
)	
SGT Robert B. Bergdahl)	
HHC, STB, US Army FORSCOM)	
Fort Bragg, NC 28310)	27 January 2016

The government's R.C.M. 801(a)(6) notice asks that the court approve Mrs. Shannon Allen as her husband's representative. The notice is deficient because it fails to address, much less constitute the requisite proof by a preponderance of the evidence with respect to the threshold issue of whether MSG(R) Mark Allen is a victim within the meaning of art. 6(b), UCMJ, R.C.M. 801(a), and AR 27-10 ¶ 17-5a. The order it has proposed is therefore unwarranted. MSG(R) Allen and his family are of course entitled to attend all proceedings that are open to the public.

Because victim's rights are important to public confidence in the administration of military justice, the government's casual approach to the key threshold issue is surprising. Nothing in its notice in any way demonstrates that MSG(R) Allen's injuries were the direct result of the charged offenses. That requirement is found in every definition of victim in the UCMJ, AR 27-10, and DoD Directives. In fact, the materials accompanying the government's notice are, if anything, compelling evidence that several intervening causes occurred between any act or omission of SGT Bergdahl and MSG Allen's injuries. The government's own evidence precludes the required finding of "direct" harm. The following matters appear from the government's papers:

1. SGT Bergdahl was captured and held by enemy forces soon after he left Observation Post Mest (CPT Whipple, Facts section, first page of motion)
2. "Leaders failed to implement control measures to mitigate the following risk factors: inexperience, lack of communications equipment, knowledge and or familiarity of the enemy, terrain and weather. Leaders and Soldiers at all levels are responsible and accountable for managing risks by ensuring that hazards and associated risks are identified during planning, preparation, and execution of operations." (MAJ Aymat, AR 15-6 findings, page 5875)
3. "No fire support plan was develop[ed] by the patrol leaders nor was any information provided to the patrol leader by their HHQ [higher headquarters] in regard to fire support coverage and assets available." (MAJ Aymat, AR 15-6 findings, page 5876)
4. "The ETTs [embedded training team – the unit to which MSG(R) Allen belonged] security posture while at the patrol base was poor, most of the ETTs fell asleep upon arrival. . . A general lack of security is the reason units get caught unaware on the battlefield. . . These are the basics taught in our schools. But time and time again, units disregard them when out in the field." (MAJ Aymat, AR 15-6 findings, page 5876)

5. "Patrols must have redundant means of communication, long range as well as short range while operating in the battlefield." (MAJ Aymat, AR 15-6 findings, page 5876). The team's long-range radio ran out of batteries during the battle, delaying fire support and medical evacuation. (MAJ Aymat, page 5874).
6. "Due to air assets not being available, we were unsure of our exact location prior to executing our mission." (Capt Marx statement, page 5881).
7. "The QRF (quick reaction force) out of Kushamond was also inadequate since they . . . did not have the means to get from the FOB to any location quickly since again they had to rely on air assets and the base did not have any vehicles to support them." (Capt Marx statement, page 5883).
8. "[T]his was not my first mission since being in country where we have been told to go outside of our AO [area of operations] and have not been provided adequate maps or intel in an area." (Capt Marx statement, page 5883).
9. "Basic items such as maps and comms should have been more available for the different teams." (Capt Marx statement, page 5883).
10. "The only intel we got was that out kheyl was 'friendly'". When asked whether an up-to-date threat analysis was conducted before the mission: "NO!!" (SGT Walters statement, page 5889).
11. When asked whether the unit had an appropriate force ratio for the mission: "NO!!!!!! . . . We were sent into two (2) villages with grossly inadequate, out dated intel. . ." (SGT Walters statement, page 5890).
12. "We were told that all we needed to do was call the toc and they would give us fire support. When we asked about predesignated target's we were told there were none and again all we had to do was call the toc and they would support us. The entire time we were in contact and I was requesting then demanding then finally begging for cas, medevac, qrf, and exfil kushmond toc kept telling me that our water supply would be delivered shortly, they even went as far as telling us to assault the village, when I informed them that A. A.N.A. advised infil of another fifty men before they would even consider this action and B. that we were surrounded and pinned down, kushmond toc again advised me that the water resupply was going to be delivered shortly." (SGT Walters, page 5890).
13. "THE WAY THE BATTLE SPACE OWNERS ARE TREATING E.T.T. AND A.N.A. IS APPALLING, THEY TREAT US LIKE A RED-HEADED STEP CHILD WHOSE ONLY PURPOSE THERE IS TO BE USED AT THEIR CONVIENCE AND FOR MISSIONS THEY DON'T WANT TO RISK THEIR OWN MEN ON.!!!!" (SGT Walters, page 5891). [Capitalization in original.]
14. "We kept telling them [TOC] we had been black on water since midnight and tried to get resupplied before we even stepped off for the second village but was denied. Not to mention that we had to call in our grid several times because they weren't tracking us and to find out later that their S2 or intel guys had no idea that we were even going to that area." (SSG Elmore, page 5897).

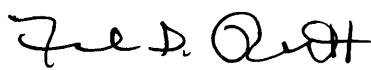
15. "There was no OORDER or intel brief." (SSG Elmore, page 5897).
16. "There was no up to date analysis before the mission. They tried to send us out to the same village again and that's when we were told that they expect 150 taliban fighters in that village." (SSG Elmore, page 5897).
17. "I felt like we did have the appropriate force ratio until they tried to send us back out and told us that they expect 150 tali ban in that area then I was like what in the hell were we doing out there the first time with 50 ANA and just 6 ETT." (SSG Elmore, page 5897).
18. "If the landowners knew that there were 150 taliban fighters in that town before we conducted our mission then we should have never went out there in the first place and we would not have lost three of our guys in the process. That is the only thing that I am upset about." (SSG Elmore, page 5898)
19. "The Army never fights unless the have 3 to 1 odds and that definitely isn't the case in this situation. Especially when they tell you that they expect 150 tali ban fighters in the same town you got hit in and didn't get that information bfore the previous mission. We didn't have the man power and that was the first mission that our ETT team has ever conducted with an ANA element. I don't know about Cpt Marx but for the rest of us we got tasked out in a hey you, take this ANA and do a Dust. We didn't even make to our own FOB yet and met our ANA that we are suppose to be mentoring before that mission went down." (SSG Elmore, page 5898).

The court's attention is also invited to the devastating last paragraph of the statement of SGT Jason Walters, included within the government's submission at pages 5890-91.

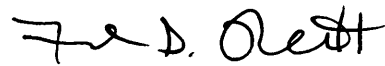
MSG Allen suffered terrible injuries at the hands of the enemy on 8 July 2009. His unit was sent into harm's way without anything even remotely approximating the necessary planning, preparation, coordination, threat analysis, risk assessment, communications, maps, equipment, and intelligence. The mission was further plagued by a dysfunctional and toxic relationship between the ETT and the battalion to which they were attached. MSG(R) Allen's injuries were directly caused by the Taliban, not by SGT Bergdahl. Under the governing statute and regulations MSG Allen is not a victim of a charged offense of SGT Bergdahl.

The evidence adduced by the government demonstrates by a preponderance that MSG Allen's injuries were not the direct result of any offense with which SGT Bergdahl is charged, and the court should so rule. If the court affords the government the opportunity it has requested to adduce additional evidence or call witnesses on the threshold issue of victim status, then we request an opportunity to identify evidence and witnesses of our own.

EUGENE R. FIDELL
Civilian Defense Counsel


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 27 January 2016.

Handwritten signature of Franklin D. Rosenblatt in black ink.

FRANKLIN D. ROSENBLATT
LTC, JA
Defense Counsel