

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 Dismiss
v.	)	Charge I and Its Specification
	)	(Condonation of Desertion)
SGT Robert B. Bergdahl	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	1 September 2017

SUMMARY

The motion to dismiss provided a detailed analysis of the governing Army Regulation. D APP 98 at 6-9. The government has pitched its response on three points, none of which is well-taken. The motion should therefore be granted.

EVIDENCE AND HEARING

The government has stipulated to the matters noted in the motion. G APP 97 at 1 n.1. It quibbles about one of them, but what it has agreed to in that regard is sufficient for present purposes. Its claim that SGT Bergdahl's restoration to duty was conditional is a legal conclusion for the Court to determine and not a matter of fact. In light of footnote 2 of the government's response, G APP 97 at 4 n.2, similar orders should be issued to GEN (R) Odierno, who refused to submit to a defense interview.

ARGUMENT

1. The government argues that the Commanding General, US Army North, did not personally restore SGT Bergdahl to regular duty. G APP 97 at 3-4. Personal action can be inferred from a commander's personal knowledge and ratification of the restoration of a Soldier to duty. The government's position leaves the Court with no alternative but to call LTG (R) Wiggins to the stand. We request that appropriate orders be issued.

2. The government's claim that there was no constructive condonation because US Army North lacked certainty as to whether SGT Bergdahl had deserted is without merit. The cases do not require certainty. "Full knowledge of the facts and circumstances" does not require the kind of months-long investigative juggernaut the Army elected to commission in 2014. The language reproduced from the 2009 AR 15-6 on p. 2 of the government's response shows a sufficient basis. See *also* G APP 97 Encl 1. The government never claims that LTG Wiggins was unaware of that 2009 conclusion when SGT Bergdahl was restored to regular duty nearly five years later following his release from captivity and the completion of the required debriefing and reintegration.

3. The government's contention that SGT Bergdahl's return to duty was not unconditional, G APP 97 at 4-5, nowhere responds to the detailed analysis the motion provided with respect to the governing Army Regulation. See D APP 98 at 6-9. The government's failure to engage on this critical aspect can only mean that it has no answer to that analysis.

### CONCLUSION

For the foregoing reasons and those previously stated, a hearing should be conducted and orders issued for the witnesses noted above. Charge I and its specification should be dismissed with prejudice. If the Court grants the Motion to Dismiss (Unreasonable Multiplication of Charges for Findings), D APP 94, and the government elects to drop that Charge and specification, the Court need not rule on the condonation motion.

  
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### CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 1 September 2017.

  
EUGENE R. FIDELL