

**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 in Limine  
(Inability to Return)**

**22 June 2017**

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1. The defense moves this Court *in limine* pursuant to RCM 906(b)(13) for a determination that a period of desertion or unauthorized absence ends when a soldier is prevented from returning to military control because he has been taken prisoner or abducted. I considered the written motions of the parties, all matters appended thereto, and the oral arguments of counsel.

**FINDINGS OF FACT**

2. I find the following facts by a preponderance of the evidence:

a. On 25 March 2015, the accused was charged with one charge, one specification of desertion with intent shirk important service and avoid important duty beginning on 30 June 2009 and ending when he was returned to military control on or about 31 May 2014.<sup>1</sup>

b. Very soon after he left his OP and during almost the entirety of his absence, the accused was held captive/hostage by the Haqqani Network, a Taliban affiliated organization. During the entirety of the time in question, the United States (along with coalition forces) was engaged in combat operations against the Taliban and the Haqqani network.

**LAW AND ANALYSIS**

3. The defense urges that in order for them to be able to advise SGT Bergdahl and in order for him to make an informed decision about how he should plea and the possible maximum punishment for that plea, they need to know whether a period of desertion or unauthorized absence ends when a soldier is prevented from returning because he is taken prisoner or abducted at some point after the period of absence

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<sup>1</sup> The accused was also charged with one charge, one specification of misbehavior before the enemy in violation of Article 99, UCMJ. That charge is not relevant to this motion.

begins. The Court is not persuaded that such a determination is necessary or appropriate at this time or for the purposes the defense cites.


4. If the accused were to plead guilty to the lesser included offense to Charge I of Absence Without Leave or Going From His Place of Duty for the period of time when he left until the period of time he was captured/abducted by the Taliban, the Court would conduct a providence (Care) inquiry to determine beyond a reasonable doubt, whether the accused committed every element of whichever lesser offense to which he pled. In either case, the maximum punishment, at that point, for the offense to which the accused would have pled guilty, is clearly set forth in the MCM. See ¶ 10.e.(1), (2)(a). Of course, since the government has charged the greater offense, they have the option of going forward in an effort to prove that greater offense. If they do "go forward" and contend that the accused was absent longer than the period of time to which he has pled guilty, they must prove, beyond a reasonable doubt, that he was voluntarily absent for that period of time. If they are unable to do so, the accused cannot be found guilty of the greater offense. If they are able to do so, the maximum punishment for that offense is also plainly set forth in the MCM. See ¶ 9.e.(1).

5. What the defense is really seeking is a determination by this Court that, under the circumstances described above, the accused was not voluntarily absent once he was captured and, therefore, the government cannot prove any greater offense beyond a reasonable doubt. But, this is a question of fact for the trier of fact to determine after being properly instructed on the applicable law. This is not a question for the Court to determine at this point in the proceedings.

6. However, if the defense would like to offer a motion to urge the Court to give certain specific tailored instructions to the trier of fact at the appropriate time, the Court will be glad to consider such a motion and to instruct the trier of fact consistent with applicable law. In the alternative, the Court will consider this motion as such a motion and provide tailored instructions on the law as the Court deems appropriate.

#### **RULING**

7. Defense motion *in limine* is DENIED.

  
JEFFERY R. NANCE  
COL, JA  
Military Judge