

IN A GENERAL COURT-MARTIAL
 SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
 FORT BRAGG, NORTH CAROLINA

UNITED STATES)	
)	
v.)	Motion to Disqualify Convening Authority and Vacate Referral and for Other Relief
)	
SGT Robert B. Bergdahl)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	12 August 2016

TABLE OF CONTENTS

Relief Sought.....	1
Burden of Persuasion and Burden of Proof.....	2
Acronyms	2
Facts.....	2
Witnesses and Evidence	4
Legal Authority.....	4
Argument.....	5
1. Given his substantial prior involvement with Sergeant Bergdahl's case, General Abrams is disqualified	5
2. General Abrams is also disqualified and the referral must be vacated because he referred the charges without considering defense objections to and comments on the report of the preliminary hearing officer	7
3. General Abrams' spoliation of evidence favorable to the defense is irreconcilable with his quasi-judicial role as convening authority, and requires not only his disqualification but also a <i>Murphy</i> order.....	7
Conclusion.....	8
Certificate of Service	10

RELIEF SOUGHT

Sergeant Bergdahl moves to disqualify the convening authority and vacate the referral, and for an order that, in the event the charges are re-referred to a court-martial and any findings of guilty are entered, the sentence may not exceed "no punishment." An evidentiary hearing and oral argument are requested.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The defense, as moving party, has the burden of persuasion. Proof by a preponderance of the evidence is required as to factual matters. R.C.M. 905(c)(1).

ACRONYMS

AR	Army Regulation
A.C.C.A.	Army Criminal Court of Appeals
A.F.C.C.A.	Air Force Court of Criminal Appeals
CA	Convening Authority
C.M.A.	Court of Military Appeals
CAAF	Court of Appeals for the Armed Forces
FORSCOM	U.S. Army Forces Command
GCMCA	General Court-Martial Convening Authority
ISAF	International Security Assistance Force
JPRA	Joint Personnel Recovery Agency
N-M.C.C.A.	Navy-Marine Court of Criminal Appeal
PHO	Preliminary Hearing Officer
RC	Regional Command
R.C.M.	Rules for Courts-Martial
SJA	Staff Judge Advocate
STB	Special Troops Battalion
UCI	Unlawful Command Influence
UCMJ	Uniform Code of Military Justice

FACTS

1. On 16 June 2016, the defense requested an interview with the CA, GEN Robert B. Abrams. On 20 June 2016, through his Staff Judge Advocate, GEN Abrams declined to be interviewed. At a motions hearing on 7 July 2016, the Military Judge urged the government to consider advising the GEN Abrams to agree to a defense interview, stressing that at that time it was only a suggestion. Later that week, arrangements were made for such an interview. After rescheduling to accommodate GEN Abrams' schedule, the interview took place on 8 August 2016. Three of SGT Bergdahl's attorneys and a defense paralegal were present, as were trial counsel and the SJA. At the government's request, defense counsel provided an advance list of the areas they planned to explore. The interview lasted approximately one hour and was unsworn. So far as we know, it was not recorded.
2. GEN Abrams was briefed about the Bergdahl rescue and recovery effort in August 2012 in his capacity as Commanding General, 3rd Infantry Division and ISAF-RC South Commander;

3. That briefing included information about how to respond to reported information about SGT Bergdahl or his whereabouts;
4. He received additional Bergdahl-related briefings when he served as Senior Military Assistant to the Secretary of Defense from August 2013 to May 2015;
5. As Senior Military Assistant, he provided daily updates to the Secretary, prepared and advised him regarding military matters, and attended most of his meetings;
6. According to *Stars and Stripes*, <http://www.stripes.com/news/marine-corps-1-star-tapped-as-carter-s-senior-military-assistant-1.381993>, “[t]he senior military adviser to the defense secretary is a powerful position in the Pentagon that carries substantial access to the secretary. The senior military adviser’s desk is located next to [the Secretary’s] office, travels frequently with the secretary and is trusted to provide advice on a broad range of topics from military strategy and policy to budgeting”;
7. As Senior Military Assistant, GEN Abrams had first-hand knowledge of planning for the recovery of SGT Bergdahl;
8. He was acutely aware of the efforts to gain SGT Bergdahl’s release in early May 2014;
9. Secretary Hagel sought GEN Abrams’ opinion regarding the feasibility of the recovery effort from a military, equipment, asset and personnel perspective;
10. After SGT Bergdahl was rescued and flown to Landstuhl for medical treatment and debriefing on 31 May 2014, GEN Abrams was in charge of receiving all updates regarding his health status and the reintegration process and updating Secretary Hagel on those matters;
11. GEN Abrams was aware of then-MG Kenneth R. Dahl’s AR 15-6 investigation, read the executive summary, and prepared the report for review by Secretary Hagel;
12. GEN Abrams assumed command of FORSCOM on 10 August 2015;
13. On 17-18 September 2015, an Article 32, UCMJ preliminary hearing was conducted at Joint Base San Antonio by LTC Mark A. Visger;

14. LTC Visger recommended the case be referred to a special court-martial not authorized to adjudge a punitive discharge and that SGT Bergdahl not receive any jail time;
15. The defense submitted timely objections to and other comments on LTC Visger's report;
16. GEN Abrams received LTC Visger's report in October 2015;
17. GEN Abrams did not read the defense's objections and comments, noting that the document was not written for him but for "the lawyers" because it was not written in "plain speak";
18. On 14 December 2015, contrary to LTC Visger's recommendation, GEN Abrams referred the case to a general court-martial and telephoned GEN Milley to let him know what he had done;
19. GEN Abrams received over 100 letters concerning the case;
20. The letters ranged the full spectrum on both sides of the case;
21. GEN Abrams cannot provide the letters to the defense because he burned them.

WITNESSES AND EVIDENCE

GEN Abrams is the only necessary witness, although the defense reserves the right to call additional witnesses in light of his anticipated testimony, especially about his destruction of evidence. Defense documentary evidence on the motion will include:

- MG Dahl's AR 15-6 investigative report
- PHO report
- Defense comments on and objections to the PHO report
- SJA's pretrial advice
- Charge Sheet (including the referral endorsement)
- 2014 email string showing cc's to GEN Abrams (<https://serialpod-cast.org/maps/emails-about-the-bergdahl-deal>) at 6

LEGAL AUTHORITY

1. *United States v. Jackson*, 3 M.J. 153 (C.M.A. 1977)
2. *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986)
3. *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986)

4. *United States v. Hagen*, 25 M.J. 78, 86-87 (C.M.A. 1987)
5. *United States v. Dix*, 40 M.J. 6, 7 (C.M.A. 1994)
6. *United States v. Simmermacher*, 74 M.J. 196 (C.A.A.F. 2015)
7. *United States v. Gaskins*, 69 M.J. 569, 570 (A.C.C.A. 2010)
8. *United States v. Schweitzer*, 2007 CCA LEXIS 164 (N-M.C.C.A. May 10, 2007)
9. *United States v. Ashby*, 2007 CCA LEXIS 235 (N-M.C.C.A. June 27, 2007)
10. *United States v. Ryan*, 2014 CCA LEXIS 217 (A.F.C.C.A. Mar. 28, 2014)
11. *United States v. Murphy* (U.S. Air Force GCM) (Henley, C.J.), *gov't appeal denied*, 2008 CCA Lexis 511 (A.F. Ct. Crim. App. 2008) (per curiam)
12. Art. 46, UCMJ
13. R.C.M. 407
14. R.C.M. 703(f)(2)
15. R.C.M. 1001(c)

ARGUMENT

According to the *Commander's Handbook* published by the Judge Advocate General's Legal Center and School, "[t]he disciplinary system in the military is a Commander owned and operated system." Misc. Pub. 27-8 (Mar. 2015), [https://www.jagcnet.army.mil/Sites/jagc.nsf/0/EE26CE7A9678A67A85257E1300563559/\\$File/Commanders%20Legal%20HB%202015%20C1.pdf](https://www.jagcnet.army.mil/Sites/jagc.nsf/0/EE26CE7A9678A67A85257E1300563559/$File/Commanders%20Legal%20HB%202015%20C1.pdf), at 11. "The Commander plays a quasi-judicial role in the system, making decisions that in the civilian sector would be made by professional prosecutors or judges." *Id.* Whether the military justice system should continue to be "Commander owned and operated" is a question with which Congress has repeatedly wrestled, especially in the last several years. So long as that principle remains this country's policy, it is incumbent on all who are concerned with the administration of justice in the armed forces to scrupulously enforce the limits that come with extending quasi-judicial powers to persons without legal training. Public confidence in the administration of justice is directly at stake.

An officer who has had extensive prior personal involvement in a politically-charged controversy should not serve as a CA. An officer who refuses to read defense submissions and destroys documents potentially favorable to the defense has forfeited the right to serve as a CA. The Army must find some other commander to "own and operate" the military justice system for this case.

1. *Given his substantial prior involvement in Sergeant Bergdahl's case, General Abrams is disqualified*

A person who is a fact witness cannot convene a court-martial. GEN Abrams is such a witness because of his substantial prior involvement.

Before assuming command of FORSCOM, he served as principal military assistant to the Secretary of Defense. He held that position while the administration was successfully negotiating SGT Bergdahl's release from Taliban captivity. He told us he was "acutely aware" of the negotiations in early May 2014 that involved the release of five Taliban prisoners from Guantanamo Bay in exchange for SGT Bergdahl.

GEN Abrams was involved in "every meeting" the Secretary of Defense attended except for purely political meetings. The Secretary relied on his advice and opinions regarding the military capabilities and personnel needed to rescue SGT Bergdahl. The more serious of the two charges GEN Abrams referred for trial alleges that SGT Bergdahl "wrongfully caused search and recovery operations." But GEN Abrams was deeply aware of those efforts. He has first-hand knowledge of those operations, including the costs, planning, risks, time and tradeoffs directly related to that charge. A reasonable member of the public knowing these facts would question whether he was able to judge the matter impartially, especially in light of LTC Visger's recommendation to refer the case to a special court-martial not authorized to impose a punitive discharge. Whether as a matter of actual partiality or the appearance of partiality, GEN Abrams cannot serve as CA.

Equally concerning is the fact that GEN Abrams continued to be the source of military information regarding SGT Bergdahl during the reintegration process. From the time SGT Bergdahl was rescued until he was returned to the United States, he was at Landstuhl Regional Medical Center for medical evaluation and treatment as well as debriefing by the Joint Personnel Recovery Agency (JPRA). The JPRA was responsible for debriefing and interviewing him daily. GEN Abrams was responsible for the daily briefings to the Secretary of Defense during the reintegration process. Those briefings only began to taper off after SGT Bergdahl was returned to the United States on about June 12, 2016. There is no way to know how the classified and unclassified information on which GEN Abrams briefed the Secretary shaped GEN Abrams' opinion of the case and its proper disposition before he assumed command at FORSCOM. What we do know is that he saw reams of evidence long before anyone thought GEN Milley would leave FORSCOM to become Chief of Staff and be succeeded by GEN Abrams at Fort Bragg.

Finally, while he was still military assistant to the Secretary of Defense, GEN Abrams received and prepared the AR 15-6 investigation for review by the Secretary. This task included reading MG Dahl's lengthy executive summary of the investigation, packaging the investigation and summarizing it on a "buck slip."

GEN Abrams' pre-FORSCOM involvement in pertinent events and access to information makes him a fact witness and disqualifies him from acting as CA. Someone in authority should have thought of this before he was picked to relieve GEN Milley as FORSCOM Commander and thereby succeed him as CA.

- 2. General Abrams is also disqualified and the referral must be vacated because he referred the charges without considering defense*

objections to and comments on the report of the preliminary hearing officer

After the completion of a preliminary hearing, the defense is afforded an opportunity to submit objections. This is an important right and not a mere formality.

On 9 October 2015, the defense submitted four pages of objections and comments on LTC Visger's report. The 19 paragraphs objected to various aspects of the investigation and requested action by the CA. The document was an attachment to the Article 32 report but GEN Abrams did not review it. When interviewed, he claimed that it was written for "the lawyers" and suggested that if the defense wanted him to read the submission, it should be written in "plain-speak."¹ Neither he nor the SJA he inherited from GEN Milley nor trial counsel informed the defense of this refusal (or *a fortiori* the reason for it) at the time so that – had GEN Abrams' point had any merit (it doesn't) – the defense could cure it. The SJA and trial counsel may simply not have known about it until GEN Abrams dropped this bombshell (*see also* Point 3 *infra*) during our interview with him.

Despite the style of prose the defense employs in drafting its submissions, a CA has a duty to consider all matters contained in the PHO's report and allied papers such as defense submissions before deciding on a disposition. That GEN Abrams chose to ignore the defense submission is disturbing evidence that he was not impartial or, in the alternative, that he could not be bothered to hear from the defense when exercising a critical quasi-judicial function. Neither is acceptable. Failure to consider the defense submissions on *Strunk & White* grounds is preposterous. It renders the referral improper and flatly requires GEN Abrams' disqualification.

Unfortunately, as we now explain, it gets worse.

3. General Abrams' spoliation of evidence favorable to the defense is irreconcilable with his quasi-judicial role as CA and requires not only his disqualification but also a Murphy order

GEN Abrams admitted having received over 100 letters about SGT Bergdahl's case. These were addressed to him and sent through the mail. He said they spanned the full spectrum of opinion, and came from all types of people and on both sides of the case. When defense counsel asked to see the letters, GEN Abrams revealed that he had destroyed them by burning. From the interview, it is certain that many of the letters were received after referral and that many of *those* letters were favorable to the accused.

¹ GEN Abrams holds a bachelor's degree from the United States Military Academy at West Point as well as two master's degrees. He is a highly educated person. Moreover, he had legally-trained personnel on his staff who could have translated the defense submissions had they been incomprehensible to him. He has served as a GCMCA in the past.

Under R.C.M. 1001(c), SGT Bergdahl has a right to offer evidence in extenuation and mitigation. Letters from members of the public expressing their opinions about factors that bear on why he should be spared jail time or why a minimal or no punishment should be imposed, as both MG Dahl and LTC Visger recommended, are relevant for sentencing, and should not have been destroyed. Letters of support are routinely admitted on sentencing. See generally *United States v. Gaskins*, 69 M.J. 569, 570 (A.C.C.A. 2010); *United States v. Ryan*, 2014 CCA LEXIS 217 (A.F.C.C.A. Mar. 28, 2014). Conversely, we will never know what things hostile to our client were in the unfavorable letters GEN Abrams read.

The destruction of evidence implicates Article 46, UCMJ and R.C.M. 703(f)(2). That rule "is an additional protection the President granted to servicemembers whose lost or destroyed evidence fall within the rule's criteria." *United States v. Simmermacher*, 74 M.J. 196 (C.A.A.F. 2015). *Simmermacher* overruled *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986), which had rejected the notion that R.C.M. 703(f)(2) is stricter than due process requires. *Id.* *Simmermacher* explained that in *Kern* the court-martial occurred on 30 April 1984 where as R.C.M. 703(f)(2) did not take effect until 1 August 1984. *Id.* at 200. In *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986), the court said, "[U]nder Article 46, the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory Thus, the better practice is to inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present."

There is no substitute for the letters GEN Abrams destroyed. The spoliation prevents both the Court and the defense from knowing precisely how many such letters there were, what they actually said, and, importantly, who wrote them and how we might get in touch with those individuals. This damage is irreparable.

GEN Abrams' inexcusable and baffling conduct plainly disqualifies him from serving as a CA and requires that the referral be vacated so some officer who will take the time to read defense submissions and not destroy evidence can function on LTC Visger's measured report.

CONCLUSION

GEN Abrams should be disqualified and the referral vacated. The Charge Sheet and preliminary hearing report and defense submissions thereon should be sent to the Secretary of the Air Force for transmission to a proper Army CA (presumably the GCMCA at SGT Bergdahl's regular duty station, Fort Sam Houston) for a fresh decision on disposition by some officer who has not had any previously involvement in the case. In light of GEN Abrams' irremediable destruction of correspondence favorable to SGT Bergdahl, the Court should further order that the sentence in any further trial, in the event of a conviction, be limited to "no punishment." *United States v. Murphy* (U.S. Air Force GCM)

(Henley, C.J.), *gov't appeal denied*, 2008 CCA Lexis 511 (A.F. Ct. Crim. App. 2008) (per curiam).



EUGENE R. FIDELL



WILL M. HELIXON

Civilian Defense Counsel



FRANKLIN D. ROSENBLATT
LTC, JA



OREN GLEICH
MAJ, JA



JASON D. THOMAS
MAJ, JA



JENNIFER D. NORVELL
CPT, JA
Defense Counsel

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 12 August 2016.



FRANKLIN D. ROSENBLATT
LTC, JA
Defense Counsel