

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

UNITED STATES)	
)	
v.)	Government Position Regarding the
)	Effect of the R.C.M. 908 Notice of Appeal
BERGDAHL, ROBERT BOWDRIE)	on the Court-Martial
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	8 February 2016
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

On 5 February 2016, the Government filed a Notice of Appeal Pursuant to R.C.M. 908 (G APP #12), regarding the Court's 2 February 2016, Ruling and Order: Defense Access to Classified Information. On the same day, the Court sent an email to the parties stating that parties should continue to comply with the Court's Pretrial Order, and continue to file motions and responses. The Court further requested the parties' positions regarding the effect of this notice on the court-martial. The Defense responded on 5 February, and by this document, the Government is providing its response.

The Government's position is that, in an abundance of caution, no session of the court may be held, and no rulings should be issued by the Court until the conclusion of the appeal. In the interim, the Government will continue to work closely with Defense to comply with its discovery obligations, and to move forward, as expeditiously as possible, on all matters not involving the Court. The Government bases its position on R.C.M. 908 and case law which indicates that the Court must stay matters related to the subject of the appeal while the appeal is pending. Upon the filing of a notice of appeal,

... the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Criminal Appeals of the appeal, except that solely as to charges and specifications not affected by the ruling or order: (A) Motions may be litigated, in the discretion of the military judge.... R.C.M. 908(b)(4).

The analysis of the rule elaborates that:


...a ruling or order which is appealable by the Government may affect only some charges and specifications. As to those offenses, the pendency of an appeal under this rule necessarily halts further proceedings. It does not necessarily have the same effect on other charges and specifications unaffected by the appeal.... Subsection (4)(A) permits motions to be litigated as to unaffected

charges and specifications, regardless of the stage of the proceedings.” R.C.M. 908 analysis at A21-59.

In this case, the Government has filed notice that the subject of the appeal is the “Military Judge’s order to immediately provide defense access to classified information without the original classification authorities’ approval,” specifically citing to Article 62(a)(1)(C) and Article 62(a)(1)(E). The anticipated subject of the appeal is the regulation of classified discovery in this case, and the Court’s 2 February 2016, order touches all aspects of classified discovery. The most cautious and conservative approach to R.C.M. 908 in this case, given that the two charged offenses both arise out of an incident commencing on 30 June 2009, is that the appeal is applicable to both of the charged offenses. The Government offers that the best course of action is for no rulings to be issued and no session of the court-martial proceed pending conclusion of the appeal.

The Army Court of Criminal Appeals has previously addressed the ability of a trial court to proceed with aspects of a court-martial pending an appeal by the United States, and has stated “Article 62, UCMJ, creates a process whereby the trial is essentially paused until such time as the government withdraws its appeal, or files the appeal with the Court of Criminal Appeals and the appellate court disposes of the issue.” *U.S. v. Hill*, 71 M.J. 678, 681 (Army Ct. Crim. App. 2012). Although the Court in that case addressed circumstances where charges were dismissed in total, the Court’s reasoning is instructive because there, as in this case, the trial court’s ruling affected all of the charged offenses. Based on R.C.M. 908(b)(4) and the Army Court of Criminal Appeals decision in *Hill*, the Government would argue that any sessions held by the Court or motions decided during the pendency of the appeal would touch on all charged offenses. Therefore, to avoid future issues, no Article 39(a) sessions should be held, no motions should be litigated, and no motion should be decided by the Court until the conclusion of the appeal.

If the Court does decide to litigate motions and issue decisions while the appeal is pending, the Government respectfully requests that the Court allow the Defense liberal leave to file motions for reconsideration, afford the parties the opportunity to conduct any supplemental oral argument, and reconsider all decisions once the appeal is resolved.


MARGARET V. KURZ
MAJ, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above Government Position Regarding the Effect of the R.C.M. 908 Notice of Appeal on the Court-Martial to Defense Counsel via email on 8 February 2016.

A handwritten signature in cursive script, appearing to read "Margaret V. Kurz".

MARGARET V. KURZ

MAJ, JA

Trial Counsel