IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

ROBERT B. BERGDAHL Sergeant, U.S. Army, *Petitioner,* v. PETER Q. BURKE Lieutenant Colonel, AG U.S. Army, in his official capacity as Commander, Special Troops Battalion, U. S. Army Forces Command, Fort Bragg, NC, and Special Court-Martial Convening Authority, and UNITED STATES, *Respondents.*	)	PETITIONER'S REPLY TO GOVERNMENT RESPONSE TO PETITION FOR WRIT OF MANDAMUS Misc. Dkt. No. 20150624

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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Pertinent Parts of the Record and Exhibits

The transcript of the preliminary hearing was unavailable when the petition was filed. It is now available, and is awaiting the parties' submission of errata and authentication by the preliminary hearing officer. A copy of the uncorrected transcript is filed herewith in accordance with this Court's Rule 20(a)(3).[1] Because we now have the transcript, we can point the Court to two specific portions of interest:

> CDC: I do have this question: It is my understanding -- and this relates to the interview. It is my understanding that the preliminary hearing officer does not rule on things like public access to that document.
>
> PHO: That is correct. That is outside of my authority as I've noted earlier to the parties in informal conversations.
>
> CDC: So out of an abundance of caution and to ensure that in some other forum somebody doesn't say you failed to ask the preliminary hearing officer to authorize public release of the document, I am going to ask you to authorize it. I know the answer, but it is helpful to me in terms of exhausting the remedy if you could so indicate.
>
> PHO: I understand, and I will so indicate that I am not authorized to release that to the public.

Art. 32 Tr. 228, lines 2-15.

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[1] On 25 September 2015, petitioner asked the GCMCA, through trial counsel, for permission to release to the public the Article 32 verbatim transcript and the findings of the preliminary hearing officer "once these two documents have been served on the defense." GEN Abrams has not replied. Rule 20(a)(3) governs in any event, and this reply is itself a public document. We are therefore at liberty to make the transcript available to the public now and we are doing so.

Q [CDC]: Do you personally have any objection to those documents [the AR 15-6 report and SGT Bergdahl's interview] being made public?

A [MG Dahl]. No.

Art. 32 Tr. 310, lines 6-8.

Argument

If the government were trying to erode public confidence in the administration of military justice, it would be hard-pressed to find a more effective way to do so than its response to SGT Bergdahl's petition for a writ of mandamus. Because the issues are straightforward, this reply can and will be brief.

1. The government makes a point (at 17 n.3) of not conceding that the Sixth Amendment right to a public trial applies to Article 32, UCMJ preliminary hearings, citing Judge Ryan's concurrence in *United States v. Davis*, 64 M.J. 445, 450 (C.A.A.F. 2007). Passing over the fact that no other judge joined in that separate opinion, all Judge Ryan did was question whether *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), included such a holding. She herself merely evinced a willingness ("I await with interest") to have the issue briefed and argued in an appropriate case. 64 M.J. at 450.

The matter is easily resolved without regard to whether the Sixth Amendment applies *ex proprio vigore*, since the President has directed that preliminary hearings "are public proceedings and should remain open to the public whenever possible." R.C.M.

405(i)(4) (2015 amendment). This language is not new. *See* R.C.M. 405(h)(3) (superseded). If anything, moreover, Congress's elevation of the Article 32 from a mere pretrial "investigation" to a "preliminary *hearing*" (emphasis added) underscores the public nature of the proceeding. The Sixth Amendment either applies of its own force or through the replica provided by the *Manual for Courts-Martial*.

2. The government suggests (at 18) that if SGT Bergdahl wanted to have the text of MG Dahl's report and the 371-page interview transcript known to the public, all he needed to do was bring out every detail through examination of MG Dahl.[2] By our calculation (judging by the length of the transcript of the preliminary hearing), doing so would have easily added a day to the length of the hearing - an utter waste of valuable hearing time given the obvious alternative of simply making these documents available as we have requested.

3. The government insists that the petition is outside the Court's All Writs Act authority. We respectfully disagree. That the Court has potential appellate jurisdiction is undisputed. That a preliminary hearing is part of the military justice process is equally beyond dispute. And finally, that the documents whose release is sought are exhibits in the case is clear from

[2] Trial counsel made no such suggestion at the preliminary hearing. *See* Art. 32 Tr. *passim*.

the record. The record of an Article 32 is an integral part of the military justice process. Without a preliminary hearing there can be no general court-martial, for example, absent a waiver by the accused (and here there has been none). What could be more central to the adjudicatory process than documents that have been admitted in evidence? Indeed, SGT Bergdahl's 371-page sworn statement was offered *by the government*. It is Prosecution Exhibit 1. *See* Art. 32 Tr. iii (listing exhibits). The preliminary hearing officer described it as one of the larger pieces of evidence the government has. Art. 32 Tr. 224. MG Dahl's report is Defense Exhibit B. The government had no objection to it. Art. 32 Tr. 345-46. To attempt to paint access to these documents as if they were in any way akin to the matters at stake in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), is to engage in magical thinking.

4. At page 6, the government argues that SGT Bergdahl "cannot identify any harm in the conduct of his preliminary hearing as the hearing was not closed to the public." This disregards the fact that a hearing that is ostensibly public becomes the opposite of public when voluminous (unclassified) evidentiary documents are submitted but never made available to the public.

5. The government also claims we are at "the wrong window" and that SGT Bergdahl needs to apply to the Director of the Army Staff or invoke the Freedom of Information Act. 5 U.S.C. § 552

(2012). Even if these were valid claims at an earlier time, once the government offered SGT Bergdahl's statement in evidence and failed to object to the admission of MG Dahl's report, the case was altered. The documents were admitted in evidence. At that instant, *at the latest*, SGT Bergdahl had an unqualified right to make them available and the media had an unqualified right to obtain them, without regard to FOIA.

6. Only a word need be said about the nonprecedential decision in *Stars & Stripes v. United States*, 2005 CCA LEXIS 406 (N-M. Ct. Crim. App. 2005), on which the government relies (at 17). It is transparently inapposite. "Without charges preferred against an accused," the Navy Court wrote, "or restraint imposed on an accused, we would exceed our authority by issuing" the order *Stars & Stripes* had sought. *Id.* at *10. Here, of course, charges have been preferred.

7. Finally - and outrageously -- the government accuses SGT Bergdahl of "seek[ing] to litigate his case in the media." Response at 8; *see also id.* at 18. This preposterous contention disregards both Army Rule of Professional Conduct 3.6(c)(2), which permits "a lawyer involved in the investigation or litigation of a matter [to] state without elaboration . . . the information contained in a public record," as well as the fact, stated clearly on page 8 of the 24 June 2015 Request for Interpretation on which the Department of the Army Professional Conduct

Council indefensibly refused to rule (after protracted delay), that counsel "do not intend to elaborate on the contents of these documents when making them available to the media." Pet. Ex. 6.

As we explained, "I need to know whether the defense can, without fear of professional discipline, disseminate the documents themselves, letting the public in our democratic society make of them what it will." *Id.* at 8. Please also refer to page 9 of that request, which addresses Comment [7] to ABA Model Rule 3.6 and § 109(1) of the Restatement (Third), The Law Governing Lawyers. Both permit extrajudicial statements in response to and for the purpose of mitigating substantial, undue and prejudicial pretrial publicity. Perhaps - remarkably - the government does not believe this is such a case, but links to the examples of hostile coverage (of which there have been many more since June) and the *Army Times* Facebook page comments submitted with Pet. Ex. 6, leave the matter beyond doubt.

Conclusion

For the foregoing reasons and those previously stated, a writ of mandamus should issue directing respondents (1) to make public forthwith the unclassified exhibits received in evidence in the preliminary hearing and (2) to modify the protective order to permit petitioner to make those exhibits public.

Respectfully submitted,

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Certificate of Filing and Service

I certify that I have, this 30th day of September, 2015, filed and served the foregoing Reply to Government Response to Petition for Writ of Mandamus by emailing copies to the Clerk of Court, the Government Appellate Division, and *amicus curiae* Center for Constitutional Rights at the following email addresses:

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