**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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|---|---|
| Robert B. Bergdahl,<br>Sergeant (E-5)<br>United States Army,<br>Petitioner | GOVERNMENT RESPONSE TO PETITION FOR WRIT OF MANDAMUS |
| v. | Misc. Dkt. No. 20150624 |
| Peter Q. Burke<br>Lieutenant Colonel (O-5),<br>United States Army,<br>In his official capacity as Commander, Special Troops Battalion, U.S. Army Forces Command, Fort Bragg, NC, and Court-Martial Convening Authority | |
| AND | |
| United States,<br>Respondents | |

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

## Issue Presented

**ONCE AN UNCLASSIFIED DOCUMENT HAS BEEN ACCEPTED IN EVIDENCE IN A PRELIMINARY HEARING OPEN TO THE PUBLIC, MUST THE CONVENING AUTHORITY RELEASE IT AND PERMIT THE ACCUSED TO DO SO?**



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## Preamble

COMES NOW the undersigned appellate government counsel, pursuant to Rule 20(e) of this Honorable Court's Rules of Practice and Procedure and responds to Petitioner's request for a writ of mandamus. For the reasons stated herein, this Honorable Court should deny the petition for a writ of mandamus.

## Statement of the Case

Petitioner, the accused in this case, has been charged with violations of Articles 85 and 99(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 885 and 899 (2012). On 17-18 September 2015, the preliminary hearing officer conducted a preliminary hearing pursuant to Article 32, UCMJ. To date, the preliminary hearing officer has not completed his report and the charges have not been referred to court-martial.

## Relief Sought

Petitioner seeks an order directing his convening authority, Lieutenant Colonel (LTC) Burke, "(1) to make public forthwith the unclassified exhibits that have been received in evidence in the accused's preliminary hearing and (2) to modify the protective order to permit the accused to make those exhibits public." (Pet'r Br. 3). Among these exhibits, petitioner seeks to release the Army Regulation (AR) 15-6 report and petitioner's interview. (Pet'r Br. 6). Petitioner does not

seek a "stay of the remaining steps in the Article 32 process." (Pet'r Br. 3).

## Issue Presented

**ONCE AN UNCLASSIFIED DOCUMENT HAS BEEN ACCEPTED IN EVIDENCE IN A PRELIMINARY HEARING OPEN TO THE PUBLIC, MUST THE CONVENING AUTHORITY RELEASE IT AND PERMIT THE ACCUSED TO DO SO?**

## Statement of Facts

On 25 March 2015, petitioner's convening authority issued a protective order to "facilitate discovery and to prevent the unauthorized disclosure or dissemination of personally identifiable information and sensitive information." (Gov't Ex. 1). This protective order did not preclude the petitioner's defense team from utilizing any information obtained through discovery to prepare for and present petitioner's defense. (Gov't Ex. 1).

On 8 April 2015, the convening authority denied petitioner's request to publicly release the Army Regulation (AR) 15-6 investigation because the convening authority did "not have the authority to release this information." (Gov't Ex. 2). However, the convening authority assured petitioner that public access at the preliminary hearing "will comply with R.C.M. 405(i)(4), which explicitly states that a preliminary hearing is a public proceeding and will remain open to the public whenever possible." (Gov't Ex. 3).

On 15 June 2015, the government emailed petitioner's defense team concerning the protective order and the public release of documents. (Gov't Ex. 4). In the email, the government stated the "protective order does not affect the preliminary hearing proceedings since the disclosure of information during those proceedings would not be considered an unauthorized disclosure as contemplated within the order." (Gov't. Ex. 4). The government further stated "the defense should present evidence, conduct direct and cross-examination, and present their arguments at those proceedings as they would if there was not a protective order in place." (Gov't Ex. 4). The government emphasized "the national interest in the case" and the "importance of protecting individuals' privacy rights" and other sensitive information. (Gov't Ex. 4). Finally, the government notified the defense that "[i]f the Defense desires to make such releases they must go to the appropriate official—in the case of the AR 15-6 Investigation, it is the Director of the Army Staff—and request the appropriate release of the relevant documents." (Gov't Ex. 4).

Petitioner's defense team has not submitted a request to the appointing authority to release the AR 15-6 investigation.

On 17-18 September 2015, the preliminary hearing officer conducted a preliminary hearing pursuant to Article 32, UCMJ. "[T]he entire preliminary hearing was conducted in public."

(Pet'r Br. 1). "Members of the public, including representatives of the news media, were present both in the hearing room and in an overflow room to which the proceedings were piped both visually and aurally." (Pet'r Br. 1-2). During the hearing, petitioner called Major General (MG) Kenneth R. Dahl to testify on behalf of the defense without government objection. Additionally, the defense submitted the executive summary and findings/recommendation memorandum from the AR 15-6 investigation.

Any additional facts necessary for the disposition of this case are contained in the argument below.

## Law and Argument

**This petition for a writ of mandamus should be denied.**

This court is empowered to issue an extraordinary writ under the All Writs Act. 28 U.S.C. § 1651(a). However, the All Writs Act requires several determinations prior to the issuance of a writ to include: (a) whether the requested writ is "in aid of" the court's existing jurisdiction, (b) whether it is necessary, and (c) whether it is appropriate. *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013)(quoting *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008)). In other words, to prevail on a writ of mandamus, the "petitioner must show that '(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and

undisputable; and (3) the issuance of the writ is appropriate under the circumstances.'" *United States v. Gross*, 73 M.J. 864, 867 (Army Ct. Crim. App. 2014)(quoting *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012)). Here, petitioner fails to satisfy any of these requirements.

**A. The requested writ is not "in aid of" this court's jurisdiction.**

The All Writs Act does not grant this court the authority to "oversee all matters arguably related to military justice . . . ." *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999). Rather, to "establish subject-matter jurisdiction, the harm alleged must have had 'the potential to directly affect the findings and sentence.'" *Kastenberg*, 72 M.J. at 368. For example, this court has jurisdiction over a military judge's determination to limit the right of an alleged victim to be heard on evidentiary rulings because such a determination "has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the court-martial on the issues of guilt or innocence - which will form the very foundation of a finding and sentence." *Id.* This court also has jurisdiction to determine the impartiality of a military judge, which also has "the potential to directly affect the findings

and sentence." *Ctr. For Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013).

Likewise, this court has jurisdiction over the conduct of a preliminary hearing pursuant to Article 32, UCMJ. In *McKinney v. Jarvis*, the petitioner requested a writ of prohibition to prevent the convening authority from taking any further action in respect to the preliminary hearing. *McKinney v. Jarvis*, 46 M.J. 870, 870, 1997 CCA LEXIS 309 (Army Ct. Crim. App. 1997). Although our superior court found jurisdiction to consider the writ, the court ultimately denied it because the petitioner "failed to produce 'clear and indisputable' evidence that [the convening authority's] exercise of discretionary authority denied petitioner a fair and impartial pretrial investigation or in any manner prejudiced the investigation." *Id.* at *20. As another example, our superior court exercised jurisdiction over a convening authority's decision to close an entire preliminary hearing. *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997).

In this case, petitioner's alleged harm does not have the potential to directly affect the findings or sentence. Petitioner's asserted harm does not involve any evidentiary rulings at trial. The asserted harm does not allege a biased military judge at trial. Moreover, petitioner cannot identify any harm in the conduct of his preliminary hearing as the hearing was not closed to the public. In fact, petitioner

acknowledges that "the entire preliminary hearing was conducted in public." (Pet'r Br. 1). "Members of the public, including representatives of the news media, were present both in the hearing room and in an overflow room to which the proceedings were piped both visually and aurally." (Pet'r Br. 1-2). Accordingly, petitioner does not challenge the proceedings and does not even request a "stay of the remaining steps in the Article 32 process." (Pet'r Br. 3).

Instead, petitioner seeks the dissemination of certain documents. (Pet'r Br. 3) This administrative request does not relate to the conduct of his preliminary hearing or his future, potential trial. Congress established administrative mechanisms for the release of government information in the Freedom of Information Act (FOIA) and the Privacy Act. 5 U.S.C. § 552; 5 U.S.C. §552a. Additionally, Army regulations govern the release of government information. Army Reg. 340-21, The Army Privacy Program [hereinafter AR 340-21], (5 July 1985); Army Reg. 380-5, Department of the Army Information Security Program [hereinafter AR 380-5], (29 September 2000); Army Reg. 25-2, Information Assurance [hereinafter AR 25-2], (24 October 2007).

If petitioner's case is referred to court-martial, our superior court established the "traditional tools of discovery, voir dire, challenges, and cross-examination provide a means of identifying improper influences or interests on the part of

commanders, court-members, or witnesses." *United States v. Rockwood*, 52 M.J. 98, 103 (C.A.A.F. 1999). Petitioner seeks to circumvent these traditional tools to litigate his case in the media. However, the Supreme Court rejected the argument that a defense attorney has a "self-help" right to reply to adverse publicity. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1080 n. 6 (1991). The Court stated, "The basic premise of our legal system is that lawsuits should be tried in court, not in the media." *Id.*

Petitioner asserts that the he has been "subject to a record-shattering year-long campaign of vilification in parts of the media" and he speculates that this "campaign seriously threatens both his reputation and his right to a fair trial if any charge is referred for trial."[1] (Pet'r Br. 7). Petitioner's reputation is outside the scope of this court's jurisdiction as it plainly does not directly affect the findings and sentence. Moreover, "pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976); *see also, United States v. Curtis*, 44 M.J. 106, 139 (C.A.A.F. 1996)("But adverse pretrial publicity does not in and of itself 'lead to an unfair trial'"). Finally, as previously discussed, there are

[1] The government does not concede that all of the media coverage concerning petitioner has been adverse or negative.

many safeguards in the court-martial process, such as voir dire of potential panel members, to safeguard petitioner's right to a fair trial.

**B. The requested writ is not necessary because there are other adequate means to attain relief.**

An extraordinary writ "should not be invoked in cases where other authorized means of appeal or administrative review exist." *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M. Ct. Crim. App. 1993). For example, our superior court erred in granting a writ of prohibition in *Clinton v. Goldsmith*, in part, because "other administrative bodies in the military and the federal courts have authority to provide administrative or judicial review of the action challenged . . . ." *Clinton*, 526 U.S. at 537-38.

In this case, petitioner has other means to attain relief both administratively and judicially. Most significantly, he may petition the appointing authority for the AR 15-6 investigation to release the documents stemming from the AR 15-6 investigation (*i.e.*, the executive summary and interview transcript). Army Reg. 15-6, Procedures for Investigating Officers and Boards of Officers [hereinafter AR 15-6], para. 3-18b, (2 October 2006). The regulation states, "No one will disclose, release, or cause to be published any part of the report, except as required in the normal course of forwarding and staffing the report or as otherwise authorized by law or

regulation, without the approval of the appointing authority." AR 15-6, para. 3-18b. In fact, the government specifically told petitioner, "If the Defense desires to make such releases they must go to the appropriate official-in the case of the AR 15-6 Investigation, it is the Director of the Army Staff-and request the appropriate release of the relevant documents." (Gov't Ex. 4). Despite receiving this specific guidance, petitioner has not submitted a request to the appointing authority.

In addition to administrative means of relief, if this case is referred to court-martial, petitioner may move for appropriate relief from a military judge. R.C.M. 906. Finally, entities who are not party to this litigation, such as the media, may submit a FOIA request to release copies of the documents. *See Ctr for Constitutional Rights*, 72 M.J. at 129 (declining to "adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief - - expedited access to certain documents - - that has no bearing on any findings and sentence that may eventually be adjudged by the court-martial.").

**C. Petitioner has not established a clear and indisputable right to relief.**

"The 'extraordinary' nature of relief under the All Writs Act places an 'extremely heavy burden' upon the party seeking relief." *McKinney*, 1997 CCA Lexis 309, at *10. "Such a drastic

remedy is justified only under exceptional circumstances amounting to more than gross error; it must amount to a judicial usurpation of power." *Pascascio v. Fischer*, 34 M.J. 996, 997 (A.C.M.R. 1992). For example, in reviewing a petition for extraordinary relief, this court is "not at liberty to substitute [its] judgment for that of the trial judge." *Id.* Instead, this court must determine whether "the ruling or action being challenged [was] 'contrary to statute, settled case law or valid regulation.'" *McKinney*, 1997 CCA LEXIS 309 at *11 (quoting *Evans v. Kilroy*, 33 M.J. 730, 733 (A.F.C.M.R. 1991)).

In this case, the convening authority did not commit gross error or usurp judicial power by issuing the protective order. First, military rules authorize protective orders. Military rules treat preliminary hearings and trial proceedings differently than the dissemination of documentation. For example, although Rule for Court-Martial (R.C.M.) 405 indicates that preliminary hearings are public *proceedings* and should remain open, R.C.M. 404A(d) authorizes a convening authority to "enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused." R.C.M. 404A(d), 405(i)(4)(emphasis added). Likewise, although R.C.M 806(b)(4) indicates that a court-martial shall be open to the public, R.C.M. 806(d) also authorizes a military judge to issue a protective order. R.C.M. 806. In this case, the

legitimate purpose of the protective order is to guard against the dissemination of personally identifiable information or sensitive information in compliance with AR 340-21, AR 25-2, AR 380-5, and the Privacy Act.

Second, the convening authority did not commit gross error or usurp judicial power by issuing the protective order as the case law surrounding the release of government information and public access to documents is unsettled. No military case has directly addressed whether there is a public right to access documents under the common law or the First Amendment. In *United States v. Scott*, this court declined to address the issue, stating, "We need not decide in this case whether or to what extent the public has a qualified right of access to the record of trial for a court-martial."[2] *United States v. Scott*, 48 M.J. 663, 666 n.3 (Army Ct. Crim. App. 1998). Instead, the court held the military judge abused his discretion in sealing a stipulation of fact because the military judge "made no findings supporting" his decision. *Id.* at 666. In *Ctr for Constitutional Rights v. United States*, our superior court also declined to address the issue, stating, "In light of our jurisdictional holding, we need not reach the granted or other

[2] Of significance, this case also dealt with a record of trial from a court-martial proceeding—not exhibits submitted during a preliminary hearing.

specified issues." *Ctr for Constitutional Rights*, 72 M.J. at 127 n. 2.

Likewise, the Supreme Court has not addressed the issue stating, "we need not undertake to delineate precisely the contours of the common-law right . . . ." *Nixon v. Warner Communications*, 435 U.S. 589, 599 (1978). However, the Supreme Court addressed the constitutional right to attend proceedings separately from the common law right to access documents. *Nixon*, 435 U.S. at 587. Furthermore, the Supreme Court has not addressed whether there is a public right, if any, under the First Amendment to documents. *United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998)("The Supreme Court has not yet ruled on 'whether there is a constitutional right of access to court documents and if so, the scope of that right.'").

Federal courts have unevenly addressed this issue. Some courts apply a common law privilege while other courts have established access under the First Amendment. *See e.g., United States v. Appelbaum*, 707 F.3d 283, 293 (4th Cir. 2013); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 181 (5th Cir. 2011). Resolution of this issue turns on what constitutes a "judicial record." "[T]he mere filing of a paper or document with a court is insufficient to render that paper a judicial document subject to the right of public access." *Ctr v. Constitutional Rights v. Lind*, 954 F.Supp. 2d 389, 401 (D.Md. 2013). "Not all documents

filed with a court are considered 'judicial documents.'" *Appelbaum*, 707 F.3d 1255. Accordingly, the "First Amendment does not grant the press or the public access to every document connected to judicial activity." *United States v. Connolly*, 312 F.3d 174, 184 (1st Cir. 2003). For example, some courts apply a First Amendment presumption of access to search warrant applications, while other courts decline to extend this presumption to search warrant materials submitted during an ongoing investigation. *Compare In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988)("We are persuaded that the first amendment right of public access does extend to documents filed in support of search warrant applications."), *with Indianapolis Star v. United States*, 692 F.3d 424, 433, n. 3 (6th Cir. 2012)(finding the holding in *In Re Search Warrant for Secretarial Are Outside Office of Thomas Gunn* to be unpersuasive). In this case, the Article 32 process remains unfinished as the transcript is not complete and the preliminary hearing officer has not completed his report.

At least one federal circuit has held that "[n]either tradition nor logic supports public access to inadmissible evidence." *United States v. McVeigh*, 119 F.3d 806, 813 (10th Cir. 1997). In *McVeigh*, the press sought access to un-redacted motions to suppress certain evidence, reports by the Federal

Bureau of Investigation (FBI) concerning Terry Lynn Nichol's statement to authorities, and motions for separate trials. *Id.* at 808. The court reasoned that "press access to such evidence will not play a significant role in the functioning of the criminal process, as that evidence is simply irrelevant to that process." *Id.* at 813. In this case, petitioner seeks the release of the executive summary to the AR 15-6 investigation, (Pet'r Br. 6), which is inadmissible at trial. This document is inadmissible hearsay. Mil. R. Evid. 802. Accordingly, it is irrelevant to the criminal process and the adjudication of petitioner's guilt or innocence.

Finally, all courts agree that "the right to inspect and copy judicial records is not absolute." *Nixon*, 435 U.S. at 597. The Court reasoned such documents should not become a "vehicle for improper purposes" such as "'to gratify private spite or promote public scandal,'" "to serve as reservoirs of libelous statements for press consumption," or as "sources of business information that might harm a litigant's competitive standing." *Id.* at 598. To overcome the presumption of access under the common law standard, a court "must find that there is a 'significant countervailing interest' in support of sealing that outweighs the public's interest in openness." *Appelbaum*, 707 F.3d at 293. Under the First Amendment standard, a "record may be withheld from the public 'only on the basis of a compelling

government interest, and only if the denial is narrowly tailored to serve that interest.'" *Lind*, 964 F.Supp. 2d at 401. Lastly, "the mere fact that a case is high profile in nature does not necessarily justify public access." *Appelbaum*, 707 F.3d at 294.

Under either standard, the protective order in this case advances a compelling interest and is narrowly tailored. "Due to the national interest in this case, the protective order focused on the importance of protecting individual's privacy rights—personally identifiable information (PII)—that will be implicated if PII is released in violation of the Privacy Act." (Gov't Ex. 4). Moreover, the protective order does not prohibit the defense from utilizing the documents to prepare and present petitioner's defense. (Gov't Ex. 1). Finally, unlike the restriction in *Gentile*, this protective order does not prohibit petitioner or his defense team from criticizing the government. *See Gentile*, 501 U.S. at 1034 (addressing the issue of a ban on political speech critical of the government and its officials).

**D. Issuance of the writ is not appropriate under the circumstances.**

"Even when the petitioner has shown there is no adequate means to obtain relief and that its right to the writ is clear and indisputable, 'the issuance of a writ is largely discretionary.'" *Gross*, 73 M.J. at 868 (quoting *United State v. Higdon*, 638 F.3d 233,245 (3d Cir. 2011)(internal citations

omitted)). "The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983).

"The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." *Nixon*, 435 U.S. at 610. In *Nixon*, the press sought immediate disclosure of tapes admitted into evidence at trial even though the tapes were played in open court. *Id.* at 591-95. The Supreme Court declined to release the tapes because the "presence of an alternative means of public access tip[ped] the scales in favor of denying release." *Id.* at 606.

Here, petitioner's right to a public proceeding under R.C.M. 405 was satisfied as "the entire preliminary hearing was conducted in public."[3] (Pet'r Br. 1). Although the amicus assert its right of public access, (Amicus Br. 2-10), the press is not a party to this case and already has a congressionally authorized vehicle to obtain the requested information. *Ctr for Constitutional Rights*, 72 M.J. at 129; *Stars & Stripes v. United States*, 2005 CCA LEXIS 406, at *10 (N.M. Ct. Crim. App.

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[3] The government does not concede the Sixth Amendment right to a public trial attaches to a preliminary hearing under Article 32, UCMJ. *See United States v. Davis*, 64 M.J. 445, 450 (C.A.A.F. 2007)(Ryan, J., concurring)(dispelling the confusion surrounding *United States v. Powell* and stating that "*Powell* does not hold that the Sixth Amendment right to a public trial applies to an Article 32, UCMJ, investigation.").

2005)("Congress has provided legislation governing the handling and release to the public of Government information.")(citing FOIA).[4] Indeed, there is no indication from their submissions that they made a request pursuant to FOIA.

Moreover, MG Dahl testified at the preliminary hearing in full view of the public. (Pet'r Br. 1-2). He conducted the interview with petitioner and he prepared the AR 15-6 report. (Pet'r Br. 1-2). Since petitioner's defense team had an opportunity to question MG Dahl concerning both documents and to elicit any exculpatory information concerning these documents in an open proceeding, this case does not involve a "truly extraordinary situation" and this court should not issue this drastic remedy under the circumstances.

**Conclusion**

Petitioner fails to meet his burden in establishing any of the requisite determinations under the All Writs Act. He seeks to circumvent the traditional tools that address pretrial publicity and the administrative means available to obtain relief merely to litigate his case in the media. Given the convening authority's compliance with governing legal authority and the open preliminary hearing that occurred, a writ of

[4] For the court's convenience this unpublished case is included in Appendix 2.

mandamus is not necessary or appropriate under the circumstances.

Wherefore, the government respectfully requests this Honorable Court deny the petitioner's request for a writ of mandamus.

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CPT, JA
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A.G. COURIE, III
MAJ, JA
Deputy Chief, Government
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MARK H. SYDENHAM
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# Appendix 1

# Government Exhibit 1

DEPARTMENT OF THE ARMY
UNITED STATES ARMY FORCES COMMAND
4700 KNOX STREET
FORT BRAGG, NC 28310-5000

AFCS-STB-BC

25 March 2015

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Protective Order for Personally Identifiable Information (PII) and Sensitive Information - United States v. Sergeant Bergdahl

1. References.

a. 5 U.S. Code § 522a, "The Privacy Act" as amended .

b. AR 340-21 (The Army Privacy Program), 5 July 1985.

c. AR 25-2 (Information Assurance), 24 October 2007.

d. AR 380-5 (Department of the Army Information Security Program), 29 September 2000.

2. PURPOSE. The purpose of this Protective Order is to facilitate discovery and to prevent the unauthorized disclosure or dissemination of personally identifiably information and sensitive information. This Protective Order covers all information and documents previously available to the accused in the course of his employment with the United States Government or which have been, or will be, reviewed or made available to the accused, defense counsel, and other recipients of information in this case.

3. APPLICABILITY. "Persons subject to this Protective Order" include the following:

a. The Accused;

b. Military and Civilian Defense Counsel and Detailed Military Paralegals;

c. Members of the Defense Team IAW M.R.E. 502 and U.S. v. Toledo, 25 M.J. 270 (C.M.A. 1987);

d. Security Officers;

e. Members of a Rule for Courts-Martial 706 Inquiry Board (if one is conducted); and

f. Behavioral Health Providers for the Accused.

4. ORDER:

a. The inadvertent or unintentional failure to identify PII and/or designated discovery materials sensitive but unclassified shall not be deemed a waiver in whole or in part of a party's or the United States' claim of confidential treatment under the terms of this Order.

b. If a document or item is produced for which the designation of personally identifiable information (PII) or sensitive information is lacking but should have appeared, the producing party or the United States may restrict future disclosure of the document or item in accordance with this Order by notifying the receiving party in writing of the change in or addition to such restrictive designation with respect to the document or item.

c. The receiving party shall then take reasonable steps to prevent any further disclosure of such newly designated information, except as permitted by this Order.

d. A producing party also may downgrade or remove any designation under this Order by so notifying the receiving party in writing.

e. If a party determines that a previously produced document inadvertently was not identified as containing protected information, the producing party shall give notice in writing that the document is to be treated as protected, and thereafter the designated document shall be treated in accordance with this Protective Order.

f. If a party receives documents containing personally identifying information (PII) they will notify the producing party, and give that party the opportunity to replace said documents with and properly redacted version. Personally identifying information is information that identifies, links, relates, is unique to, or describes the individual, such as name[1], SSN, date and place of birth, mother's maiden name, biometric records, home phone numbers, other demographic, personnel, medical, and financial information, or any other PII which is linked or linkable to a specific individual. This definition of PII is not anchored to any single category of information or technology. Non-PII can become PII when information is publically available and when combined could identify an individual. Documents that contain PII are prohibited from further use or distribution.

PETER Q. BURKE
LTC, AG
Commanding

[1] Names of relevant parties to this case are excluded from this definition.

# Government Exhibit 2

DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY FORCES COMMAND
4700 KNOX STREET
FORT BRAGG, NORTH CAROLINA 28310-5000

AFCG-JA

8 April 2015

MEMORANDUM FOR LTC Frank Rosenblatt, Individual Military Defense Counsel, Mr. Eugene Fidell, Civilian Defense Counsel, CPT Alfonso Foster, Detailed Military Defense Counsel, United States v. SGT Robert B. (Bowe) Bergdahl

SUBJECT: Request for FORSCOM to release AR 15-6 investigation concerning SGT Bergdahl

1. I have received your request dated 2 April 2015, requesting FORSCOM publically release the AR 15-6 investigation that served as the basis for the charges against SGT Bergdahl.

2. As the Commander, Special Troops Battalion, FORSCOM, and under Army Regulation 25-55, I do not have the authority to release this information.

3. POC is the undersigned.

PETER Q. BURKE
LTC, AG
Commanding

# Government Exhibit 3

DEPARTMENT OF THE ARMY
SPECIAL TROOPS BATTALION
UNITED STATES ARMY FORCES COMMAND-UNITED STATES ARMY RESERVE COMMAND
4745 KNOX STREET, BLDG 1-1460
FORT BRAGG, NORTH CAROLINA 28310-5000

August 6, 2015

Mr. Diego Ibarguen
Hearst Corporation
300 West 57th Street
New York, NY 10019-3792

Dear Mr. Ibarguen,

Thank you for your letter of July 31, 2015, concerning the Article 32 Preliminary Hearing in the case of Sergeant Bowe Bergdahl. The preliminary hearing will be conducted in accordance with Rule For Courts-Martial (RCM) 405, Manual For Courts-Martial 2012 (as updated in June 2015). Accordingly, public access will comply with RCM 405(i)(4), which explicitly states that a preliminary hearing is a public proceeding and will remain open to the public whenever possible. In the event the preliminary hearing must be closed, such as due to the presentation of classified evidence, this closure will be narrowly tailored balancing the Government's interest in protecting classified information and the public's right to be present at the preliminary hearing.

The Government is planning for media access, please have your news representative contact Mr. Paul Boyce, US Forces Command, Public Affairs, at john.p.boyce2.civ@mail.mil or (910) 570-7200 for information on the required procedures to attend the preliminary hearing.

Sincerely,

Peter Q. Burke
Lieutenant Colonel, U.S. Army
Commanding

# Government Exhibit 4

## Kurz, Margaret V MAJ USARMY FORSCOM (US)

**From:** Kurz, Margaret V MAJ USARMY FORSCOM (US)
**Sent:** Monday, June 15, 2015 4:20 PM
**To:** Rosenblatt, Franklin D LTC USARMY (US)
**Cc:** eugene.fidell@yale.edu; Beese, Christian E MAJ USARMY HQDA TJAGLCS (US); Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US)
**Subject:** Government position concerning Protective Order and public release of documents

Sir,

The 25 March 2015 protective order issued by LTC Burke in his capacity as the convening authority was intended to highlight to the parties their responsibility to protect the privacy interests of the individuals mentioned in the documents, and to protect the due process of the current proceedings. Paramount within that due process concern was the accused's right to a fair trial.

The protective order does not affect the preliminary hearing proceedings since the disclosure of information during those proceedings would not be considered an unauthorized disclosure as contemplated within the order. Accordingly, the defense should present evidence, conduct direct and cross examination, and present their arguments at those proceedings as they would if there was not a protective order in place.

Due to the national interest in the case, the protective order focused on the importance of protecting individuals' privacy rights—personally identifiable information (PII)—that will be implicated if PII is released in violation of the Privacy Act. Further, sensitive information as contemplated by the protective order is again defined as information that contains PII in accordance with AR 380-5, paragraph 5-19.

Independent of, and unrelated to the protective order, the Defense has been provided government owned documents and information for the limited purpose of preparing for the Article 32 preliminary hearing—not for release to the media or other third parties unrelated to Defense's preparation of their case. If the Defense desires to make such releases they must go to the appropriate official—in the case of the AR 15-6 Investigation, it is the Director of the Army Staff—and request the appropriate release of the relevant documents. Trial counsel do not have the authority to authorize release of the documents to third parties, or assist or approve redactions within documents.

The Government's release of information is bound by the Freedom of Information Act and the Privacy Act, and the Government cannot authorize or condone the release of information outside of those official procedures. Further, the attorneys representing the Government must comply with Army Regulation 27-26, Rule 3.6 Tribunal Publicity. The rule recognizes the potential risk that the release of information to a public forum could have a substantial likelihood of materially prejudicing an adjudicative proceeding. Defense counsel should ensure that any contemplated release of information complies with their similar local bar rules governing the release of information.

The Prosecution will continue to abide by the rules protecting privacy interests of individuals, the right of the accused to have a fair trial, and the public's right to attend public proceedings, e.g., the preliminary hearing. The release of documents by the Defense to the public that either does not have PII or has the PII redacted only risks impacting the rights of the accused.

V/R
MAJ Margaret V. Kurz
Chief, Complex Litigation
Office of the Staff Judge Advocate

# Appendix 2

# *Stars & Stripes v. United States*

United States Navy-Marine Corps Court of Criminal Appeals

December 22, 2005, Decided

NMCCA 200501631

**Reporter**
2005 CCA LEXIS 406; 2005 WL 3591156

Stars and Stripes, Petitioner v. UNITED STATES and Rear Admiral N.E. Preston, USN Convening Authority and Lieutenant Commander K. McCormick, JAGC, USN Investigating Officer, Respondents

**Notice:** [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

**Prior History:** PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF WRITS OF MANDAMUS AND PROHBITION AND APPLICATION TO STAY PROCEEDINGS.

## Core Terms

investigating officer, proceedings, charges, closure, convening, newspaper

## Case Summary

### Procedural Posture

Petitioner, a Department of Defense-authorized daily newspaper distributed overseas for the military community, sought extraordinary relief in the nature of writs of mandamus and prohibition, as well as an application to stay further proceedings under the All Writs Act, *28 U.S.C.S. § 1651(a)*. Respondents, United States Government and military authorities, moved to dismiss the petition as moot.

### Overview

The newspaper asked the court, inter alia, to nullify an investigation under Unif. Code Mil. Justice art. 32, *10 U.S.C.S. § 832* and to allow the newspaper access in all future proceedings and to issue a writ of prohibition preventing the convening authority or investigating officer from arbitrarily closing further proceedings to the public and press. The appointing authority had nullified the Article 32 investigation; that matter was moot. The court determined that it would not issue orders of prohibition regarding future cases. Finally, the newspaper asked the court to order the release of the tapes or transcripts of the proceedings of the Article 32 investigation. The court declined to do so, noting that the newspaper's remedy was under the Freedom of Information Act of 1966, *5 U.S.C.S. § 552*. Without charges preferred against an accused, or restraint imposed on an accused, the court would have exceeded its authority by issuing such an order.

### Outcome

The court granted the Government's motion to dismiss the petition.

## LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > General Overview

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

***HN1*** Absent cause shown that outweighs the value of openness, the military accused has a *Sixth Amendment* right to a public investigative hearing under Unif. Code Mil. Justice art. 32, *10 U.S.C.S. § 832*. In addition, the press enjoys the same right and has standing to complain if access is denied. The right to a public hearing, however, is not an absolute one. As a statutory matter, there is discretion to properly limit the public's access to Article 32 hearings. R.C.M. 405(h)(3), Manual for Courts-Martial (2005), states that either the investigating officer or the commander who directed the investigation can restrict access to all or part of the proceeding. The discussion of the rule provides that closure may encourage complete testimony by an embarrassed or timid witness. Ordinarily the proceedings of a pretrial investigation should be open to spectators. The determination of whether to close part or all of an Article 32 hearing must be made on a case-by-case, witness-by-witness, and circumstance-by circumstance basis.

Administrative Law > Governmental Information > Freedom of Information > General Overview

*HN2* Congress has provided legislation governing the handling and release to the public of Government information. Freedom of Information Act of 1966, 5 U.S.C.S. § 552 (as amended by the Intelligence Authorization Act for Fiscal Year 2003, Pub. Law No. 107-306, 5 U.S.C.S. § 552(a)(3)(A), (E).

**Judges:** BEFORE C. L. CARVER, D.A. WAGNER, E.B. STONE. Senior Judge CARVER and Judge STONE concur.

**Opinion by:** D.A. WAGNER

## Opinion

WAGNER, Senior Judge

The petitioner, Stars and Stripes [1], through their 7 December 2005 filing before this court, sought extraordinary relief in the nature of writs of mandamus and prohibition, as well as an application to stay further proceedings under the All Writs Act, 28 U.S.C. § 1651(a). Specifically, the petitioner asked this court to (1) stay the pretrial proceedings below; (2) issue a writ of mandamus directing the convening authority to nullify the Article 32, UCMJ, investigation and comply with the requirements of *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), and *United States v. Grunden*, 25 C.M.A. 327, 2 M.J. 116, 54 C.M.R. 1053 (C.M.A. 1977), in all future proceedings; and (3) issue a writ of prohibition preventing the convening authority or investigating officer from arbitrarily closing further proceedings to the public and press. **[*2]**

On 14 December 2005, the Government filed a Motion to Dismiss the petitioner's request for extraordinary relief as moot, stating that the charges that were the subject of the Article 32, UCMJ, investigation had been dismissed without prejudice. The petitioner then filed an Opposition to the Government Motion to Dismiss on 16 December 2005, asking this court to grant the following extraordinary relief on the basis that the issue is one that is capable of repetition, yet may still evade review: (1) a finding that the blanket closure order was unlawful and the Article 32 investigation was invalid; (2) an order directing Respondents to obtain a *Grunden* review of the Article 32 tapes and, after employing the scalpel to make only necessary redactions, release copies or transcripts of them to Petitioner; (3) a writ of mandamus directing the convening authority to nullify **[*3]** the Article 32 investigation and comply with the requirements of *ABC, Inc. v. Powell* and *United States v. Grunden* in all future proceedings; (4) a writ of prohibition preventing the convening authority or investigating officer from arbitrarily closing further proceedings to the public and press; and (5) such other and further relief as may in the circumstances be just and proper (citations omitted).

**Facts Provided by the Petitioner**

[2]

On 14 November 2005, a reporter for the Stars and Stripes newspaper notified the Public Affairs Office (PAO) for Naval Support Activity, Naples, Italy, that **[*4]** she would be attending a hearing in an Article 32, UCMJ, investigation scheduled for 0900, 15 November 2005. The investigation had been ordered to consider charges of sexual harassment, fraternization, and indecent acts with a minor against a chief petty officer attached to the Naval Computer and Telecommunications Station, Naples, Italy. At 0815, 15 November 2005, the reporter was notified via telephone by the public affairs office (PAO) that a decision had been made to close the hearing to the public. The reporter stated her desire to protest the blanket closure on the record before the investigating officer and indicated that she would be present to do so.

The two-day hearing was conducted in closed session and the reporter was not made privy to any session where closure was discussed. Neither was she permitted to place her objection to the closure on the record before the hearing began. After the hearing began, the reporter was told she could put her objection in writing. The reporter complied, although continuing to request that the objection be conducted in person before the investigating officer and before the taking of evidence in the hearing. After submitting the written **[*5]** objection, the reporter was informed that the investigating officer had upheld her earlier decision to close the hearing in its entirety.

After the taking of evidence had concluded on the 15th, the reporter was again contacted and asked if she still desired to

[1] Stars and Stripes describes itself as "a Department of Defense-authorized daily newspaper distributed overseas for the U.S. military community."

[2] The petitioner includes a multitude of facts not relevant to the issue of public access to Article 32, UCMJ, investigation hearings. In large part, these extraneous facts deal with the disclosure of information by the armed forces to the public and are not germane to the issue at hand. Such matters are the rubric of the various statutes and regulations governing the release of information by the armed forces.

make her objection on the record to the investigating officer. After consulting with her editor, she indicated that the chief operating officer and general counsel (COO/GC) for the newspaper would make the objection on behalf of Stars and Stripes. At 1800 that evening, the COO/GC, located in Washington, D.C., was permitted, by telephone, to place the objection to the closure on the record. Subsequently, the investigating officer decided to continue the hearing on 16 November 2005 and that the hearing would remain closed to the public. No detailed rationale for the blanket closure was provided. Apparently, both the Government and the accused joined in the request to close the hearing.

Meanwhile, an appeal of the investigating officer's ruling had been made to the appointing authority by a member of the newspaper's editorial staff. In responding to this appeal, the PAO stated that the investigating officer had concluded, after [*6] a careful analysis and discussion with the parties at the beginning of the hearing, that the expected testimony of the witnesses and discussion of evidence would, if released to the public, adversely affect the rights of the accused and/or the alleged victims, one of whom is a minor child, or discourage the complete testimony of an embarrassed or timid witness. The PAO also stated that the hearing was recessed on two additional occasions to reconsider the request of Stars and Stripes and to consider new matters. The convening authority declined to overturn the decision of the investigating officer.

The investigating officer submitted her report under *Article 32*, UCMJ, on 23 November 2005. Further action on the case was unknown to the petitioner at the time of their filing before this court. The appointing authority dismissed the charges on 14 December 2005, stating that the *Article 32*, UCMJ, investigation was procedurally defective. The appointing authority stated, in dismissing the charges without prejudice, that this action was taken "...to ensure that the interests and rights of both the accused and the public and media are given due regard...," and that the charges could be repreferred [*7] in the future.

**Law**

Our superior court has stated that, ***HN1*** "absent 'cause shown that outweighs the value of openness,'" the military accused has a *Sixth Amendment* right to a public *Article 32*, UCMJ, investigative hearing. *Powell, 47 M.J. at 365* (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)*. In addition, "the press enjoys the same right and has standing to complain if access is denied." *Id.* (citing *Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982))*.

The right to a public hearing, however, is not an absolute one. *Id.* (citing *United States v. Brown, 7 C.M.A. 251, 22 C.M.R. 41, 46 (C.M.A. 1956))*; *Grunden, 2 M.J. at 120*; *United States v. Hershey, 20 M.J. 433, 435 (C.M.A. 1985)*. As a statutory matter, there is discretion to properly limit the public's access to *Article 32*, UCMJ, hearings. Rule for Courts-Martial 405(h)(3), Manual for Courts-Martial, United States (2005 ed.), states that either the investigating officer or the commander who directed the investigation can restrict access to all or [*8] part of the proceeding. The Discussion of the Rule provides: "Closure may encourage complete testimony by an embarrassed or timid witness. Ordinarily the proceedings of a pretrial investigation should be open to spectators." The determination of whether to close part or all of an *Article 32*, UCMJ, hearing "must be made on a case-by-case, witness-by-witness, and circumstance-by circumstance basis." *Powell, 47 M.J. at 365* (citing *Globe, 457 U.S. at 609* and *Hershey 20 M.J. at 436*).

In addressing the issue of the potential release of classified information during public court-martial proceedings, our superior court stated that "the exclusion of the public was narrowly and carefully drawn. The blanket exclusion of the spectators from all or most of a trial . . . has not been approved . . . nor could it be absent a compelling showing that such was necessary to prevent the disclosure of classified information." *Grunden, 2 M.J. at 121* (footnote omitted).

The Government now argues, however, that, by dismissing the charges and, in essence, agreeing with the petitioner that the *Article 32*, UCMJ, investigation was defective, [*9] their actions have mooted the issue before the court.

**Discussion**

If the charges had not been dismissed, and this court were asked to apply the stringent requirements of *Powell* and *Grunden* to the present case, we would find it necessary to first examine the proceedings themselves in order to determine whether the closure of the hearing was a violation of the petitioner's claim of right under the *Sixth Amendment*. While we agree with our sister court's observation that closing the hearing "even before Petitioner's counsel was allowed to address the matter on the record" is an error "obvious on its face," we are mindful that the facts presented to us in support of the petition were incomplete and provided solely by the petitioner.

Now, we are faced with a Government action that, on its face, appears to be in agreement with the thrust of the

petitioner's request for extraordinary relief from this court. The appointing authority has nullified the *Article 32*, UCMJ, investigation, which the petitioner asked this court to order him to do. There is no longer a proceeding for us to stay, as the petitioner also requested. Finally, the court will not issue orders of prohibition [*10] regarding future cases that may or may not come within the jurisdiction of the court.

In their Opposition to the Government's Motion to Dismiss the petition, the petitioner asks this court to order the release of the tapes or transcripts of the proceedings of the *Article 32*, UCMJ, investigation. We decline to do so. ***HN2*** Congress has provided legislation governing the handling and release to the public of Government information. *See*, Freedom of Information Act of 1966, *5 U.S.C. § 552* (as amended by the Intelligence Authorization Act for Fiscal Year 2003, Pub. Law No. 107-306, *5 U.S.C.A. § 552(a)(3)(A), (E) (West Supp. 2003)*). Without charges preferred against an accused, or restraint imposed on an accused, we would exceed our authority by issuing such an order. *See Article 66*, UCMJ.

**Conclusion**

Accordingly, we hereby grant the Government's motion to dismiss the petition. The petition is dismissed.

Senior Judge CARVER and Judge STONE concur.

**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing was delivered to this Court and emailed to civilian appellate defense counsel, Mr. Eugene Fidell, on this 29th day of September 2015.


JIHAN WALKER
CPT, JA
Branch Chief, Government
Appellate Division
(703) 693-0783