IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Robert B. Bergdahl, Sergeant (E-5) United States Army, Petitioner v. Peter Q. Burke Lieutenant Colonel (O-5), United States Army, 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, Respondents	GOVERNMENT RESPONSE TO WRIT-APPEAL FOR REVIEW OF U.S. ARMY COURT OF CRIMINAL APPEALS DECISION ON PETITION FOR WRIT OF MANDAMUS Crim. App. Dkt. No. 20150624 USCA Dkt. No. 16-0059/AR

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

Index

Issue Presented

ONCE AN UNCLASSIFIED DOCUMENT HAS BEEN ACCEPTED IN EVIDENCE IN A PRELIMINARY HEARING OPEN TO THE PUBLIC, MAY THE CONVENING

AUTHORITY REFUSE TO RELEASE IT OR PERMIT THE ACCUSED TO DO SO?

Table of Cases, Statutes, and Other Authorities

United States Supreme Court

United States Court of Appeals for the Armed Forces

Service Courts

United States Courts of Appeals and District Courts

Uniform Code of Military Justice

Other Statutes, Materials and Regulations

Preamble[1]

The United States Army Court of Criminal Appeals (CCA) denied appellant's request for an extraordinary writ in the nature of a writ of mandamus,[2] pursuant to the All Writs Act.[3] This Court reviews decisions of a service court on a petition for extraordinary relief as a writ-appeal, under Rules 4(b)(2) and 18(a)(4) of this Court's Rules of Practice and Procedure (Rules).[4] This answer is filed pursuant to Rules 27(b) and 28(b)(2).

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[1] In the Preamble, petitioner requests that the judicial nominee to this court not participate in the disposition of this writ-appeal. The government is confident that this court and the judicial nominee are aware of the legal standards governing a duty to recuse in appropriate circumstances. However, whether petitioner's case is an appropriate circumstance cannot be determined at this time because it is not yet ripe. To date, there have been no confirmation hearings for the judicial nominee and the limited issue before this court is administrative in nature and does not impact the adjudication of petitioner's guilt or innocence.

[2] *Bergdahl v. Burke*, ARMY MISC 20150624, 2015 CCA LEXIS 431 (Army Ct. Crim. App. 8 Oct. 2015) (mem. op.) (hereinafter *Bergdahl v. Burke II*). A copy of the Army Court's decision is enclosed in the Appendix for the court's convenience.

[3] 28 U.S.C. § 1651 (1992). The writ of mandamus is a procedure that arises directly from the All Writs Act. *Id.* "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004) (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)).

[4] *Ellis v. Jacob*, 26 M.J. 90, 91 (C.M.A. 1988).

Statement of the Case

Petitioner has been charged with violations of Articles 85 and 99(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 885, 899 (2012) [hereinafter UCMJ]. On 17-18 September 2015, the preliminary hearing officer conducted a preliminary hearing pursuant to Article 32, UCMJ. The preliminary hearing officer submitted his report on 5 October 2015. To date, the charges have not been referred to court-martial.

Relief Sought

Petitioner seeks a writ of mandamus directing respondent "(1) to make public forthwith the unclassified exhibits that have been received in evidence in the preliminary hearing and (2) to modify the protective order to permit the accused to make those exhibits public."[5] Among these exhibits, petitioner seeks to release the Army Regulation (AR) 15-6 report and petitioner's interview.[6]

Issue Presented

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

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[5] Pet'r Br. 6.
[6] Pet'r Br. 4.

Statement of Facts

On 25 March 2015, the convening authority in petitioner's case issued a protective order to "facilitate discovery and to prevent the unauthorized disclosure or dissemination of personally identifiable information and sensitive information."[7] 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.[8]

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."[9] 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."[10]

On 15 June 2015, the government emailed petitioner's defense team concerning the protective order and the public release of documents.[11] In the email, the government stated the

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[7] Gov't Ex. 1.
[8] Gov't Ex. 1.
[9] Gov't Ex. 2.
[10] Gov't Ex. 3.
[11] Gov't Ex. 4.

"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."[12] 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."[13] The government emphasized "the national interest in the case" and the "importance of protecting individuals' privacy rights" and other sensitive information.[14] 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."[15]

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."[16]

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[12] Gov't Ex. 4.
[13] Gov't Ex. 4.
[14] Gov't Ex. 4.
[15] Gov't Ex. 4.
[16] Pet'r Br. 3.

"Members of the public, including representatives of the news media, were in fact present both in the hearing room and in an overflow room to which the proceedings were piped."[17] 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.

On 21 September 2015, petitioner sought a writ of mandamus from the U.S. Army Court of Criminal Appeals (CCA). The CCA denied the writ on 8 October 2015.[18]

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

This court should deny this writ-appeal.

This court is empowered to issue an extraordinary writ under the All Writs Act.[19] 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.[20] In other words, to prevail on a

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[17] Pet'r Br. 3.
[18] *Bergdahl v. Burke II*, 2015 CCA LEXIS 431.
[19] 28 U.S.C. § 1651(a).
[20] *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)).

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.'"[21] 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 . . . ."[22] Rather, to "establish subject-matter jurisdiction, the harm alleged must have had 'the potential to directly affect the findings and sentence.'"[23] 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."[24] This court also has jurisdiction to

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[21] *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)).
[22] *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999).
[23] *Kastenberg*, 72 M.J. at 368.
[24] *Id.*

determine the impartiality of a military judge, which also has "the potential to directly affect the findings and sentence."[25]

It is an open question whether this court possesses jurisdiction at the Article 32, UCMJ, preliminary stages. In *ABC, Inc. v. Powell*, this court exercised jurisdiction over a convening authority's decision to close an entire preliminary hearing.[26] However, as the Army Court noted, there is some question as to "whether *Powell* continues to be good law" in light of this court's opinion in *Ctr. for Constitutional Rights (CCR) v. United States*.[27] This court noted in *CCR* that "(1) *Powell* was decided before *Goldsmith* clarified our understanding of the limits of our authority under the All Writs Act, and (2) we assumed jurisdiction in that case without considering the question."[28]

Even if this court exercises jurisdiction at the preliminary Article 32 stage, jurisdiction is limited to the conduct of a preliminary hearing. For example, in *McKinney v. Jarvis*, the petitioner requested a writ of prohibition to prevent the convening authority from taking any further action

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[25] *Ctr. For Constitutional Rights (CCR) v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013).
[26] *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997).
[27] *Bergdahl v. Burke II*, 2015 CCA LEXIS 431, at *5.
[28] *CCR*, 72 M.J. at 129.

in respect to the preliminary hearing.[29] Although this 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."[30]

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."[31] "Members of the public, including representatives of the news media, were in fact present both in the hearing room and in an overflow room to which the proceedings were piped."[32] Accordingly, petitioner does not challenge the proceeding itself. As the CCA noted, petitioner's requested writ is not

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[29] *McKinney v. Jarvis*, 46 M.J. 870, 870, 1997 CCA LEXIS 309 (Army Ct. Crim. App. 3 Jul. 1997).
[30] *Id.* at *20.
[31] Pet'r Br. 3.
[32] Pet'r Br. 3

directed to the Article 32 proceeding, but to a "military order provided by a commander with application far beyond the Article 32, UCMJ."[33]

Instead, petitioner seeks the dissemination of certain documents.[34] This administrative request does not relate to the conduct of his preliminary hearing or his potential future trial. Congress established administrative mechanisms for the release of government information in the Freedom of Information Act (FOIA) and the Privacy Act.[35] Additionally, Army regulations govern the release of government information.[36]

If petitioner's case is referred to court-martial, this 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."[37] Any defect in the Article 32 process would best be addressed by the military judge detailed to the case.[38] Petitioner seeks to circumvent these

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[33] *Bergdahl v. Burke II*, 2015 CCA LEXIS 431, at *6.
[34] Pet'r Br. 4.
[35] 5 U.S.C. § 552; 5 U.S.C. § 552a.
[36] Army Reg. 340-21, Office Management: The Army Privacy Program [hereinafter AR 340-21], (5 Jul. 1985); Army Reg. 380-5, Security: Department of the Army Information Security Program [hereinafter AR 380-5], (29 Sep. 2000); Army Reg. 25-2, Information Management: Information Assurance [hereinafter AR 25-2], (24 Oct. 2007).
[37] *United States v. Rockwood*, 52 M.J. 98, 103 (C.A.A.F. 1999).
[38] *Bergdahl v. Burke II*, 2015 CCA LEXIS 431, at *8-9.

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.[39] The Court stated, "The basic premise of our legal system is that lawsuits should be tried in court, not in the media."[40]

Petitioner asserts that the he has been "subject to a record-shattering campaign of vilification in the right-wing media for more than a year" 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."[41] 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."[42] Finally, as previously discussed, there are many safeguards in the court-martial process, such as voir dire of potential panel members, to safeguard petitioner's right to a fair trial.

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[39] *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1080 n.6 (1991).
[40] *Id.*
[41] Pet'r Br. 20. The government does not concede that all of the media coverage concerning petitioner has been adverse or negative.
[42] *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.'").

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."[43] For example, issuance of a writ of prohibition was not proper 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 . . . ."[44]

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).[45] 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."[46] In fact, the

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[43] *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M. Ct. Crim. App. 1993).
[44] *Goldsmith*, 526 U.S. at 537-38.
[45] Army Reg. 15-6, Boards, Commission, and Committees, Procedures for Investigating Officers and Boards of Officers [hereinafter AR 15-6], para. 3-18b, (2 Oct. 2006).
[46] AR 15-6, para. 3-18(b).

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."[47] Despite receiving this specific guidance in June 2015, 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.[48] Finally, entities who are not party to this litigation, such as the media, may submit a FOIA request to release copies of the documents.[49]

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."[50] "Such a drastic remedy is justified only under exceptional circumstances amounting to more than gross error; it

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[47] Gov't Ex. 4.
[48] Rules for Court-Martial [hereinafter R.C.M] 906; *Bergdahl v. Burke II*, 2015 CCA LEXIS 431, at *8-9.
[49] *See CCR*, 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.").
[50] *McKinney*, 1997 CCA Lexis 309, at *10.

must amount to a judicial usurpation of power."[51] 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."[52] Instead, this court must determine whether "the ruling or action being challenged [was] 'contrary to statute, settled case law or valid regulation.'"[53]

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 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."[54] 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.[55] In this case, the legitimate purpose

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[51] *Pascascio v. Fischer*, 34 M.J. 996, 997 (A.C.M.R. 1992).
[52] *Id.* This case is even further removed, since the action was not taken by a military judge in a referred court-martial but a convening authority after a preliminary hearing.
[53] *McKinney*, 1997 CCA LEXIS 309 at *11 (quoting *Evans v. Kilroy*, 33 M.J. 730, 733 (A.F.C.M.R. 1991)).
[54] R.C.M. 404A(d) (as amended 15 Jun. 2015), 405(i)(4).
[55] R.C.M. 806.

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, before proceeding to a common law or First Amendment analysis, the documents must constitute judicial documents subject to release. "[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."[56]

It is not at all clear or indisputable that the executive summary to the AR 15-6 investigation or interview transcript are judicial documents. Where the documents are not "part of a public proceeding, nor are they official records, nor are they a final report" such documents are "predecisional materials upon which a final recommendation . . . may develop."[57]

The documents requested by petitioner are predecisional. The executive summary and interview transcript only served to

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[56] *Ctr v. Constitutional Rights v. Lind*, 954 F. Supp. 2d 389, 401 (D. Md. 2013).

[57] *Washington Legal Found. v. United States Sentencing Comm'n*, 89 F.3d 897, 899 (D.C. Cir. 1996) (discussing the lower court's rationale for ruling that the pre-sentencing documents were not public records). The court held that even if there was disagreement about whether the documents were "predecisional" or "preliminary," they were "merely incidental to the only official action the Advisory Group was authorized to take, *viz*, recommending sentencing guidelines to the Commission." *Id.* at 908.

inform the appointing authority.[58] It was ultimately the appointing authority's decision whether to take unfavorable action, to initiate a preliminary hearing under Article 32, UCMJ, or to do nothing at all. "[T]he appointing authority is neither bound nor limited by the findings or recommendations of an investigation or board."[59] Likewise, the documents only served to inform the preliminary hearing officer who has no authority over the ultimate disposition of the charges. In this case, the general court-martial convening authority retains the ultimate disposition authority.[60]

Third, 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 not uniform across jurisdictions. What is clear, however, is that "the press' right of access to

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[58] AR 15-6, para. 1-6. "The primary function of any investigation . . . is to ascertain facts and to report them to the appointing authority." AR 15-6, para. 1-6.
[59] AR 15-6, para. 2-3(a).
[60] R.C.M. 407. Given the non-binding nature of the preliminary hearing officer's recommendation to the convening authority, proceedings pursuant to Article 32, UCMJ, are distinguishable from the civilian, preliminary hearings conducted in California. In the California proceedings, "the preliminary hearing is often the final and most important step in the criminal proceeding." *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 12 (1986)(reasoning, in part, the final nature of the California preliminary hearing favored the release of information because "the preliminary hearing in many cases provides 'the sole occasion for public observation of the criminal justice system.'").

documents submitted for use in a hearing must be considered separately from the press' right to attend the hearing itself."[61]

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*, the Army 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."[62] 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.[63] In *CCR*, this court also declined to address the issue, stating, "In light of our jurisdictional holding, we need not reach the granted or other specified issues."[64]

Likewise, the Supreme Court has not directly addressed the issue stating, "[W]e need not undertake to delineate precisely the contours of the common-law right . . . ."[65] However, the Supreme Court addressed the constitutional right to attend

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[61] *United States v. Corbitt*, 879 F.2d 224, 228-29 (7th Cir. 1989) (citation omitted).
[62] *United States v. Scott*, 48 M.J. 663, 666 n.3 (Army Ct. Crim. App. 1998). Of significance, this case dealt with a record of trial from a court-martial proceeding—not exhibits submitted during a preliminary hearing.
[63] *Id.* at 666.
[64] *CCR*, 72 M.J. at 127 n.2.
[65] *Nixon v. Warner Communications*, 435 U.S. 589, 599 (1978).

proceedings separately from the common law right to access documents.[66] Furthermore, the Supreme Court has not addressed whether there is a public right, if any, under the First Amendment to documents.[67]

Federal courts have unevenly addressed this issue. Some courts apply a common law privilege while other courts have established access under the First Amendment.[68] As stated above, resolution of this issue begins at a determination of what constitutes a "judicial record." Then the courts determine whether the document must be disclosed pursuant to a common law right of access or a First Amendment right of access.

1. Under the common law standard, the government's interest outweighs the public's interest in disclosure.

The common law right of access inquiry is two-pronged: "First, the court must decide 'whether the document sought is a public record.' If the answer is yes, then the court should proceed to balance the government's interest in keeping the document secret against the public's interest in disclosure."[69]

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[66] *Id.* at 587.
[67] *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.'").
[68] *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).
[69] *Washington Legal Found.*, 89 F.3d at 902.

Here, as discussed *supra*, the executive summary and interview transcript are not judicial documents. However, even if the court determines that they are judicial documents, the government has articulated its interest in keeping the document under a protective order: to facilitate discovery while preventing the unauthorized disclosure or dissemination of personally identifiable information (PII) and sensitive information.[70]

Additionally, where there is a statute which provides a means and procedure for release of the information, the balance is tipped in favor of denying access under the common law.[71] Since there is an avenue to access these documents using FOIA, the federal statute tips the balance in favor of denying release of the documents under the common law.

2. There is no right to access the documents in this case under the First Amendment.

The "First Amendment does not grant the press or the public an automatic constitutional right of access to every document connected to judicial activity."[72] The analysis for whether a

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[70] Gov't Ex. 1. *See also* Gov't Ex. 4 ("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.")

[71] *Nixon*, 435 U.S. at 605.

[72] *United States v. Connolly (In re Boston Herald)*, 321 F.3d 174, 184 (1st Cir. 2003).

document is included within the First Amendment right of access is also a two-pronged inquiry: "(1) whether the document is one which has historically been open to inspection by the press and the public; and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'"[73] This analysis is also often referred to as the logic and experience test.[74]

In this case, the First Amendment right to access fails on both the logic and experience prongs. In accessing the experience prong, an AR 15-6 investigation has not historically been open to inspection by the press or the public. "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

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[73] *United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997) (quoting *Press-Enterprise II*, 478 U.S. 1, 8 (1986)).

[74] *Press-Enterprise II*, 478 U.S. at 9. In evaluating the logic prong, the court in *United States v. Criden* listed six societal interests for open court proceedings. Public access to criminal proceedings: (1) promotes informed discussion by providing the public with a more complete understanding of the judicial system; (2) gives the "'assurance that the proceedings were conducted fairly to all concerned' and promotes the public 'perception of fairness;'" (3) provides a "'significant community therapeutic value' because it provides an 'outlet for community concern, hostility, and emotion;'" (4) "serves as a check on corrupt practices by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality;" (5) "enhances the performance of all involved;" and (6) "discourages perjury." *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982) (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

regulation, without the approval of the appointing authority."[75] The "First Amendment generally grants the press no right to information about a trial superior to that of the general public."[76] Neither the general public nor the press has the right to these documents.

In assessing the logic prong, AR 15-6 documents do not play a role in the functioning of the court-martial process. As discussed *supra*, these documents are only used to inform the appointing authority's ultimate decision, which is entirely separate from the court-martial process. It bears repeating that no charges have been referred to trial at this time. Nothing about these AR 15-6 documents would provide the public with a more complete understanding of the process, provide assurance of fairness in the process, or serve as check on the process, because these documents are not used in the court-martial process at all.[77]

At least one federal circuit has held that "[n]either tradition nor logic supports public access to inadmissible evidence."[78] In *McVeigh*, the press sought access to un-redacted

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[75] AR 15-6, para. 3-18(b).
[76] *Nixon*, 435 U.S. at 609.
[77] *See Criden*, 675 F.2d at 556, *supra* n.74.
[78] *McVeigh*, 119 F.3d at 813. *See also Washington Legal Found.*, 89 F.3d at 905-06 ("[D]ocuments and exhibits filed with or introduced *into evidence* in a federal court are public records.") (emphasis added).

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.[79] 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."[80] Indeed, the exclusion of inadmissible evidence at trial is one of the hallmarks of a fair trial, and the press's access to and observation of trial is a check on that fairness. This case, however, is not at trial. It is at a preliminary stage which utilizes documents which would be inadmissible at trial.

Much like the common law right of access, the case law for applying the First Amendment right of access varies widely among jurisdictions. 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.[81]

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[79] *McVeigh*, 119 F.3d at 808.
[80] *Id.* at 813.
[81] *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, petitioner seeks the release of the executive summary to the AR 15-6 investigation which is inadmissible at trial. This document is inadmissible hearsay.[82] Additionally, petitioner's interview with the investigating officer would only be admissible if offered against the petitioner at trial.[83] Petitioner would not be able to introduce this statement on his own behalf. Accordingly, both documents are irrelevant to the criminal process and the adjudication of petitioner's guilt or innocence.

With such disparate treatment among the circuits, petitioner's right to such documents is not clear and indisputable.

Finally, all courts agree that "the right to inspect and copy judicial records is not absolute."[84] 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."[85] To overcome the presumption of access under the common law standard, a court "must find that there is a 'significant countervailing interest'

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[82] Military Rules of Evidence [hereinafter Mil. R. Evid.] 802.
[83] Mil. R. Evid. 801(2).
[84] *Nixon*, 435 U.S. at 597.
[85] *Id.* at 598.

in support of sealing that outweighs the public's interest in openness."[86] 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.'"[87] Lastly, "the mere fact that a case is high profile in nature does not necessarily justify public access."[88]

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."[89] Moreover, the protective order does not prohibit the defense from utilizing the documents to prepare and present petitioner's defense. Finally, unlike the restriction in *Gentile*, this protective order does not prohibit petitioner or his defense team from criticizing the government.[90]

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[86] *Appelbaum*, 707 F.3d at 293.
[87] *Lind*, 964 F. Supp. 2d at 401.
[88] *Appelbaum*, 707 F.3d at 294.
[89] Gov't Ex. 4.
[90] *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.'"[91] "The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations."[92]

"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."[93] In *Nixon*, the press sought immediate disclosure of tapes admitted into evidence at trial even though the tapes were played in open court.[94] 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."[95]

Here, petitioner's right to a public proceeding under R.C.M. 405 was satisfied as "the entire preliminary hearing was conducted in public."[96] Although the amici assert their right of

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[91] *Gross*, 73 M.J. at 868 (quoting *United State v. Higdon*, 638 F.3d 233, 245 (3d Cir. 2011)(citations omitted)).
[92] *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983).
[93] *Nixon*, 435 U.S. at 610.
[94] *Id.* at 591-95.
[95] *Id.* at 606.
[96] Pet'r Br. 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

public access, the press is not a party to this case and already has a congressionally authorized vehicle to obtain the requested information.[97] 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.[98] He conducted the interview with petitioner and he prepared the AR 15-6 report.[99] 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

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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.").

[97] *CCR*, 72 M.J. at 129; *Stars & Stripes v. United States*, NMCCA 200501631, 2005 CCA LEXIS 406, at *10 (N.M. Ct. Crim. App. 22 Dec. 2005)("Congress has provided legislation governing the handling and release to the public of Government information.") (citing FOIA). For the court's convenience this unpublished case is enclosed in Appendix.

[98] Pet'r Br. 4.

[99] Pet'r Br. 4.

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 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.

CARLING M. DUNHAM
CPT, JA
Appellate Government Counsel
U.S.C.A.A.F. Bar No. 36357

JIHAN WALKER
CPT, JA
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36340

DANIEL D. DERNER
MAJ, JA
Acting Deputy Chief,
Government
Appellate Division
U.S.C.A.A.F. Bar No. 36331

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 23rd day of October 2015.

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

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
4746 KNOX STREET, BLDG 1-1460
FORT BRAGG, NORTH CAROLINA 28310-5080

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

Neutral
As of: October 23, 2015 5:08 PM EDT

Bergdahl v. Burke

United States Army Court of Criminal Appeals

October 8, 2015, Decided

ARMY MISC 20150624

Reporter
2015 CCA LEXIS 431

Sergeant ROBERT B. BERGDAHL, Petitioner v. Lieutenant Colonel PETER Q. BURKE, Commander, Respondent & The UNITED STATES, Respondent

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *Bergdahl v. Burke, 2015 CAAF LEXIS 905 (C.A.A.F., Oct. 15, 2015)*

Core Terms

military, preliminary hearing, court-martial, documents, sentence, protective order, convening, exhibits, military justice, amicus curiae, Writs

Case Summary

Overview

HOLDINGS: [1]-Although the court had the power to issue extraordinary writs under the All Writs Act, *28 U.S.C.S. § 1651*, that power had to be exercised in aid of its jurisdiction, and its jurisdiction did not extend to issuing a writ of mandamus requiring a commander who issued a protective order in a case involving a servicemember who was charged with desertion and misbehavior before the enemy, in violation of UCMJ arts. 85 and 99, *10 U.S.C.S. §§ 885* and *899*, to release unclassified documents that were part of the record compiled during a hearing conducted pursuant to UCMJ art. 32, *10 U.S.C.S. § 832*, to the public; [2]-The order in question was a military order issued by a commander with application far beyond the servicemember's Article 32 hearing, and the servicemember had the right to seek the documents that were the subject of his petition by filing a request under FOIA.

Outcome

The court dismissed the servicemember's petition.

LexisNexis® Headnotes

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Governments > Courts > Authority to Adjudicate

Military & Veterans Law > Military Justice > Jurisdiction > General Overview

HN1 Jurisdiction must be established as a threshold matter without exception.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN2 The United States Army Court of Criminal Appeals ("ACCA") is a court of limited jurisdiction, established by the Judge Advocate General of the Army. Unif. Code Mil. Justice ("UCMJ") art. 66(a), *10 U.S.C.S. § 866(a)*. The mandate to establish the court was made pursuant to the authority of Congress to pass laws regulating the Armed Forces. *U.S. Const. art. I, § 8, cl. 14*. While the ACCA has jurisdiction to issue writs under the All Writs Act, *28 U.S.C.S. § 1651*, it must exercise that authority in strict compliance with the authorizing statutes. The ACCA's jurisdiction to issue a writ of mandamus is limited to its subject matter jurisdiction over a case or controversy. UCMJ art. 66, *10 U.S.C.S. § 866*. To establish subject matter jurisdiction, the harm alleged must have had the potential to directly affect the findings and sentence.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN3 The United States Army Court of Criminal Appeals ("ACCA") does not have jurisdiction to oversee military justice generally. The Judge Advocate General of the Army, staff judge advocates, and convening authorities are among those with significant duties in overseeing military justice. In general, while the jurisdiction of the ACCA over the

findings and sentence of a case referred to it is broad, Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, the court's authority to review pre-referral matters is limited and lacks a firm statutory basis.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN4 In Clinton v. Goldsmith, the United States Supreme Court clearly stated that a military court of criminal appeals' jurisdiction extends to reviewing the findings and sentence of courts-martial. Under the All Writs Act, *28 U.S.C.S. § 1651*, the United States Army Court of Criminal Appeals can issue process "in aid" of that jurisdiction.

Civil Procedure > Remedies > Writs > All Writs Act

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Extraordinary Writs

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

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

HN5 In Clinton v. Goldsmith, the United States Supreme Court distinguished between "executive actions" (where writ jurisdiction does not exist) and actions effecting a "finding" or "sentence" (where writ jurisdiction does exist). The United States Army Court of Criminal Appeals finds that a protective order issued by a military commander, intended to cover the public release of government information both before and after a preliminary hearing, to be more akin to an executive action. A hearing under Unif. Code Mil. Justice art. 32, *10 U.S.C.S. § 832*, is not part of a court-martial. An Article 32 hearing, being a hearing conducted before a decision is made to send a case to trial, is unlikely to have the potential to directly affect the findings and sentence as required for writ jurisdiction.

Administrative Law > ... > Judicial Review > Reviewability > Jurisdiction & Venue

HN6 Assuming a proper request, when an agency fails to comply with the Freedom of Information Act, *5 U.S.C.S. § 552*, a civil action may be brought against the agency in a United States district court. *5 U.S.C.S. § 552(a)(4)(B)*.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN7 In the course of appellate review, in order to receive relief from an error in a preliminary hearing, an accused is required to demonstrate a material prejudice to a substantial right. Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)*. If an accused must be prejudiced to receive relief on appeal, at least a similar showing of potential prejudice to the findings or sentence is a threshold requirement for the United States Army Court of Criminal Appeals to issue a writ of mandamus.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Extraordinary Writs

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN8 To prevail on a petition seeking a writ of mandamus, a 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 indisputable; and (3) the issuance of the writ is appropriate under the circumstances.

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

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

HN9 Public access to trial documents serves important public interests. Public scrutiny does indeed serve as a restraint on government, and openness has a positive effect on the truth-determining function of the proceedings. Hearings held pursuant to Unif. Code Mil. Justice art. 32, *10 U.S.C.S. § 832*, however, are not an apples-to-apples comparison to trials on the merits. As an Article 32 preliminary hearing is conducted before there has been a decision on whether to send a case to trial, comparisons to civilian practice are difficult. As an Article 32 hearing is created by statute, an accused's rights at such a proceeding generally have a statutory basis. Additionally, Article 32 preliminary hearings are not governed by rules of evidence. Evidence that would be excluded or suppressed at trial may be admitted at an Article 32 hearing. R.C.M. 405(h), Manual Courts-Martial. An Article 32 preliminary hearing officer cannot ordinarily screen out documents of dubious reliability, that are of questionable authenticity, or whose probative value is substantially outweighed by dangers of unfair prejudice. While an Article 32 hearing is a public proceeding, it is not clear that the public's interest in obtaining documents at a preliminary hearing is viewed through the same lens as the public's right to admitted documents at trial on the merits.

Counsel: [*1] For Petitioner: Lieutenant Colonel Jonathan F. Potter, JA; Captain Alfredo N. Foster, JA; Lieutenant

Colonel Franklin D. Rosenblatt; Eugene R. Fidell (on brief); Lieutenant Colonel Jonathan F. Potter, JA; Captain Alfredo N. Foster, JA; Lieutenant Colonel Franklin D. Rosenblatt; Eugene R. Fidell (on reply brief).

Amicus Curiae: For the Center for Constitutional Rights: Baher Azmy; J. Wells Dixon; Shayana D. Kadidal (on brief).

For Respondent: Colonel Mark H. Sydenham (JA): Major A.G. Courie III, JA; Captain Jihan Walker, JA (on brief).

Judges: Before HAIGHT, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge HAIGHT and Judge PENLAND concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION AND ACTION ON PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS

WOLFE, Judge:

Petitioner is charged with desertion and misbehavior before the enemy, in violation of Articles 85 and 99, Uniform Code of Military Justice, *10 U.S.C. §§ 885* and *899* [hereinafter UCMJ]. Pursuant to *Article 32, UCMJ*, a preliminary hearing was conducted in petitioner's case on 17-18 September 2015.

On 17 September 2015, Sergeant Robert Bergdahl petitioned this court for extraordinary relief in the nature of a writ of mandamus. Specifically, petitioner asks this court to direct **[*2]** the respondent, the special court-martial convening authority, to: 1) make public forthwith the unclassified exhibits that have been received in evidence in the accused's preliminary hearing; and 2) modify the protective order to permit the accused to make those exhibits public. For the reasons below, the petition is dismissed.

As an initial matter, it is important to note what this petition does not concern. This court has not been asked to review the appropriateness of the protective order issued by the special court-martial convening authority. Neither petitioner nor the United States has submitted to the court (under seal or otherwise) the documents that are subject to the protective order. The record in front of this court consists solely of the filings by the petitioner and the government, attached exhibits, and a brief submitted by the Center for Constitutional Rights as *amicus curiae*. Even if this court were to try to resolve the issue of whether the protective order is overly broad or infringes on the petitioner's right to a public hearing, as *amicus curiae* suggests, we are unable to do so. Instead, the question presented to this court is the narrow one submitted by petitioner: **[*3]** "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?"

Before we can address petitioner's question, however, we must first determine whether we have jurisdiction to issue the writ requested. *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* (***HN1*** Jurisdiction must be established as a threshold matter without exception).

HN2 The Army Court of Criminal Appeals is a court of limited jurisdiction, established by The Judge Advocate General. *UCMJ art. 66(a)* ("Each Judge Advocate General shall establish a Court of Criminal Appeals. . . ."). The mandate to establish this court was made pursuant to the authority of Congress to pass laws regulating the Armed Forces. *See U.S. Const. art. I § 8, cl. 14*. While this court has jurisdiction to issue writs under the All Writs Act, *28 U.S.C. § 1651*, we must exercise this authority "in strict compliance with [the] authorizing statutes." *Ctr. For Constitutional Rights (CCR) v. United States, 72 M.J. 126, 128 (C.A.A.F. 2013)*. Our jurisdiction to issue the requested writ is limited to our subject matter jurisdiction over the case or controversy. *See United States v. Denedo, 556 U.S. 904, 911, 129 S. Ct. 2213, 173 L. Ed. 2d 1235 (2009)*; *UCMJ art. 66*. "To establish subject matter jurisdiction, the harm alleged must have had 'the potential to directly affect the findings and sentence.'" *LRM v. Kastenberg, 72 M.J. 364, 368 (2013)* (quoting *CCR, 72 M.J. at 129*).

In determining **[*4]** whether we have jurisdiction, we are cognizant of the role this court plays in the military justice system. ***HN3*** This court does not have jurisdiction to oversee military justice generally. *Clinton v. Goldsmith, 526 U.S. 529, 534, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999)*. The Judge Advocate General, staff judge advocates, and convening authorities are among those with significant duties in overseeing military justice. *See e.g. UCMJ arts. 26(a), 27(b)(2), 69* and *73* (responsibilities of the Judge Advocate General in designating military judges, certifying the qualifications of counsel, conducting appellate review, and acting on petitions for new trials); *UCMJ arts. 32, 34, 60, 71*, and *138* (responsibilities of convening authorities in appointing preliminary hearings, referring cases to trial,

approving and executing sentences, and hearing complaints against commanding officers). In general, while the jurisdiction of this court over the findings and sentence of a case referred to it is broad, *see* UCMJ art. 66(c); United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991) ("a clearer *carte blanche* to do justice would be difficult to express"), the authority of this court to review pre-referral matters is limited and lacks a firm statutory basis.

Although not phrased as such, the relief petitioner seeks is for this court to countermand **[*5]** an order given by a military commander, in a circumstance where there is not yet—and may never be—a court-martial. This would be a broad view of this court's jurisdiction.

Nonetheless, although it is a broad view, it is not unheard of. In *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), our superior court granted a writ in a case that is somewhat similar to the issue presented here. In *Powell*, the special court-martial convening authority directed that the *entire* Article 32, UCMJ, hearing be closed. The Court of Appeals for the Armed Forces (C.A.A.F.) granted the writ, ordered that the hearing be open to the public, and directed that the hearing may be ordered closed only as necessary on a case-by-case basis. *Id. at 365-366*. However, since that time, the C.A.A.F has questioned whether *Powell* continues to be good law. In denying a writ seeking media access to court-martial filings, (as opposed to filings at a pretrial hearing such as the present circumstances), the C.A.A.F. in *CCR* rejected *Powell* as controlling precedent, noting that "(1) *Powell* was decided before *Goldsmith* clarified our understanding of the limits of our authority under the All Writs Act, and (2) we assumed jurisdiction in that case without considering the question." *CCR, 72 M.J. at 129*.

HN4 In **[*6]** *Goldsmith*, the Supreme Court clearly stated that a Court of Criminal Appeals' jurisdiction extends to reviewing the findings and sentence of courts-martial. *526 U.S. at 535*. Under the All Writs Act, this court can issue process "in aid" of that jurisdiction. Thus, for example, the C.A.A.F. had jurisdiction to order the removal of a "biased" military judge as it "had the potential to directly affect the findings and sentence" and was therefore in aid of the court's jurisdiction. *CCR, 72 M.J. at 129* (citing *Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012)*).

Viewing *Powell* in light of *Goldsmith*, we reject the invitation to extend the jurisdiction of this court under the All Writs Act to the pre-referral matter raised in this writ. Furthermore, the matter petitioner desires us to address is not a judicial order with focused applicability to only the *Article 32* preliminary hearing. Rather, the order in question is a military order provided by a commander with application far beyond the *Article 32, UCMJ*. Specifically, the protection provided the contents of the Army Regulation 15-6 administrative investigation, for example, should and must be sought through administrative channels provided outside the court-martial process, such as the Freedom of Information Act (FOIA) *5 U.S.C. § 552* **[*7]** , Army Reg. 15-6, Procedures for Investigating Officers and Boards of Officers, para. 3-18(b) (2 Oct. 2006), and *Article 138, UCMJ* (Complaints of wrongs).

HN5 In *Goldsmith*, the Supreme Court distinguished between "executive actions" (where writ jurisdiction did not exist) and actions effecting the "finding" or "sentence" (where writ jurisdiction does exist). *Goldsmith, 526 U.S. at 535*. Although a closer call than the facts presented in *Goldsmith*, we find a protective order issued by a military commander, intended to cover the public release of government information both before and after a preliminary hearing, to be more akin to an executive action. An Article 32 hearing is "not part of the court-martial." *United States v. Davis, 64 M.J. 445, 449 (C.A.A.F. 2007)*.[1] An Article 32 hearing, being a hearing conducted before a decision is made to send a case to trial, is unlikely to have "the potential to *directly* affect the findings and sentence" as required for writ jurisdiction. *Kastenberg, 72 M.J. at 368* (emphasis added).

This is not to say that as an executive action, the protective order is not subject to judicial review. ***HN6*** Assuming a proper request, when an agency fails to comply with FOIA, a civil action may be brought against the agency in a United States district court. *5 U.S.C. § 552(a)(4)(B)*.

Setting aside whether this filing is a FOIA request clothed as a writ petition and whether there are other paths more appropriate to address petitioners claim, the structure of the military justice system assigns to others the initial responsibility of addressing the issue presented by the petitioner. While this includes the military commander, most critically it includes the military judge. Were we to assume that the charges will be referred to a general court-martial in order to arguably find jurisdiction over this writ, we must also assume that a military judge will be

[1] The charges may be dismissed prior to referral or referred to a summary or special court-martial, in which case, the requirement for a preliminary hearing disappears. *See* Rule for Courts-Martial [hereinafter R.C.M.] 405(a) ("Failure to comply with this rule shall have no effect on the disposition of the charge(s) **[*8]** if the charge(s) is not referred to a general court-martial.").

detailed to the case. UCMJ art. 26(a) ("A military judge shall be detailed to each general court-martial."). Not only will the military judge be the structurally appropriate person to consider the questions presented by this writ, the military judge, having a more developed record, will also be far **[*9]** better positioned to consider the matter.

Furthermore, ***HN7*** in the course of appellate review, in order to receive relief from an error in a preliminary hearing an accused would be required to demonstrate a material prejudice to a substantial right. UCMJ art. 59(a); Davis, 64 M.J. at 448. Put differently, if an accused must be prejudiced to receive relief on appeal, at least a similar showing of potential prejudice to the findings or sentence is a threshold requirement for this court to issue the writ.[2] To the extent that petitioner has identified possible prejudice,[3] the petitioner has not demonstrated that the prejudice is incapable of remedy at trial through, for example, the process of liberal voir dire and other available court remedies. *See* R.C.M. 905(b)(1) and 906.

Even assuming we were to find jurisdiction in this case, we would **[*10]** not grant petitioner the relief he seeks. ***HN8*** To prevail on his writ of mandamus, 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 indisputable; and (3) the issuance of the writ is appropriate under the circumstances. Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459, 481 (2004). We conclude that petitioner has fallen short on all three prongs.

As to the first prong, we again note that the accused retains the full ability to seek relief at trial from any error arising from the Article 32 hearing. If a preliminary hearing did not substantially comply with R.C.M. 405 and Article 32, the military judge may reopen the Article 32 hearing or provide other appropriate relief. R.C.M. 906(b)(3). In this way, this case differs significantly from the issues presented in Powell and CCR. In *Powell*, the news media petitioners were barred access from the hearing itself, and a remedy given after the hearing had concluded would have been too late. 47 M.J. at 365. In *CCR*, the writ addressed access to trial documents, and not documents submitted during the Article 32 hearing.

With regards to the second prong, petitioner's right to the issuance of the writ is not clear or indisputable. Petitioner requests two forms **[*11]** of relief: (1) the immediate release of all exhibits; and (2) permission to release the documents to the public himself.[4] In support of this contention petitioner cites to the public's broad right to access documents admitted at trial. We agree with the brief submitted by *amicus curiae* that ***HN9*** public access to trial documents serves important public interests. "[P]ublic scrutiny" does indeed serve as a restraint on government, and openness has a "positive effect on the truth-determining function of the proceedings." Article 32 hearings, however, are not an apples-to-apples comparison to trials on the merits. As an Article 32 preliminary hearing is conducted *before* there has been a decision on whether to send the case to trial, comparisons to civilian practice are difficult. As an Article 32 hearing is created by statute, an accused's rights at such a proceeding generally have a statutory basis. Additionally, Article 32 preliminary hearings are not governed by rules of evidence. Evidence that would be excluded or suppressed at trial may be admitted at an Article 32 hearing. R.C.M. 405(h). An Article 32 preliminary hearing officer cannot ordinarily screen out documents of dubious reliability, that are of questionable authenticity, or whose **[*12]** probative value is substantially outweighed by dangers of unfair prejudice. While an Article 32 hearing is a public proceeding, it is not clear that the public's interest in obtaining documents at a preliminary hearing is viewed through the same lens as the public's right to admitted documents at trial on the merits. Thus, while we find the arguments of *amicus curiae* regarding openness to possess merit, petitioner has not met his burden to establish a "clear and indisputable" right to the requested relief.

As to the last prong, we do not find the relief petitioner seeks would be appropriate. A judge-made rule that such matter is automatically public (as petitioner requests) or is presumptively public (as *amicus curiae* argues) would have secondary effects.

With no rules of evidence, and without a judicial officer, such a rule would allow a party to make public the entire case file so long as the information was relevant to **[*13]** the purposes of the preliminary hearing. *See* R.C.M. 405(a)

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[2] Notably, however, an accused who alleges a defect in the Article 32 hearing in a motion to the military judge is *not* required to demonstrate prejudice. *See* Davis, 64 M.J. at 448. Again, the military judge, vis-à-vis this court, is likely to be in a superior position to consider this matter.

[3] Petitioner alleges negative media coverage "seriously threatens . . . his right to a fair trial if any charge is referred for trial."

[4] As petitioner seeks the right to release the documents himself without the redaction of sensitive matter (such as social security numbers, graphic photos, or medical records), the relief petitioner seeks goes far beyond the case-by-case evaluation required by Powell.

(purpose of the hearing includes information relevant to disposition). This would allow a party to introduce into the public sphere information that is inadmissible at trial and whose evidentiary value may be minimal. *See* Army Reg. 27-26, Rules of Professional Conduct for Lawyers, Rule. 3.6 (Tribunal Publicity) (1 May 1992). As an accused does not have full access to discovery until after referral, such a rule would result in an uneven power dynamic. *See* R.C.M. 701(a).

Lastly, a rule that provided for the automatic publication of all matter submitted to an Article 32 hearing appears to be contrary to the Military Rules of Evidence and Rules for Courts-Martial. Military Rule of Evidence 506(e)(1)(D) specifically allows the government to provide sensitive information to the accused before referral subject to a protective order. Additionally, the authority of the preliminary hearing officer under R.C.M. 405(i)(9) to seal exhibits is not limited to classified exhibits. Both rules would be undermined by the outcome that petitioner suggests.

CONCLUSION

Therefore, for the reasons stated above, the petition for extraordinary relief in the nature of a writ of mandamus is DISMISSED.

Senior Judge HAIGHT and Judge PENLAND concur. [***14**]

Cited
As of: October 23, 2015 12:51 PM EDT

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

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[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.