IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

HEARST NEWSPAPERS, LLC; THE ASSOCIATED PRESS; BLOOMBERG L.P.; BUZZFEED, INC.; DOW JONES & COMPANY, INC.; FIRST LOOK MEDIA, INC.; GANNETT CO., INC.; MCCLATCHY CO.; THE NEW YORK TIMES COMPANY; REUTERS AMERICA LLC; WP COMPANY LLC D/B/A THE WASHINGTON POST, *Appellants*, v. ROBERT B. ABRAMS, General, U.S. Army, in his official capacity as Commander of United States Army Forces Command, Fort Bragg, NC, and General Court-Martial Convening Authority, PETER Q. BURKE, Lieutenant Colonel (O-5), AG, U.S. Army, in his official capacity as Commander, Special Troops Battalion, U.S. Army Forces Command, Fort Bragg, NC, and Special Court-Martial Convening Authority, MARK A. VISGER, Lieutenant Colonel (0-5), JA, U.S. Army, in his official capacity as Preliminary Hearing Officer for Article 32 Proceedings against Robert B. Bergdahl, Sergeant, U.S. Army, and UNITED STATES, *Appellees*.	**WRIT-APPEAL PETITION FOR REVIEW OF U.S. ARMY COURT OF CRIMINAL APPEALS DECISION ON PETITION FOR WRIT OF MANDAMUS** Crim. App. Misc. Dkt. No. ARMY 20150652 USCA Misc. Dkt. No. _____

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Preamble

Pursuant to Rules 4(b)(2), 18(a)(4), and 27(b) of this Court's Rules of Practice and Procedure ("Rule(s)"), the All Writs Act, 28 U.S.C. § 1651(a), and Article 67(a), UCMJ, Appellants Hearst Newspapers, LLC (the "*Express-News*"), The Associated Press, Bloomberg L.P., BuzzFeed, Inc., Dow Jones & Company, Inc., First Look Media, Inc., Gannett Co., Inc., McClatchy Co., The New York Times Company, Reuters America LLC, and WP Company LLC d/b/a *The Washington Post* hereby pray that the Court reverse a decision (the "Decision") of the U.S. Army Court of Criminal Appeals (the "Army Court") denying Appellants' petition for a writ of mandamus (the "Petition").[1]

In the Petition, Appellants sought to redress Appellees' unconstitutional infringement of the public's First Amendment right of contemporaneous public access to judicial records filed in *United States v. Bergdahl*, and specifically requested that the Army Court issue a writ of mandamus compelling Appellees (a)

[1] The Petition is submitted along with this Writ-Appeal as Exhibit 1, and the affidavits filed by Appellants in support of the Petition are submitted as Exhibit 2 (October 2, 2015 Affidavit of Diego Ibarguen ("Ibarguen Aff.")) and Exhibit 3 (October 2, 2015 Affidavit of Sig Christenson ("Christenson Aff.")). The Army Court's Decision is submitted as Exhibit 4. These four exhibits comprise the record required by Rules 27 and 28.

to immediately release unclassified documents received into evidence during Sgt. Robert B. Bergdahl's Article 32, UCMJ preliminary hearing (the "Article 32 Hearing"), (b) to immediately release transcripts of the Article 32 Hearing, and (c) to comply with constitutional requirements of public access to future judicial records that are created, filed, or otherwise received in *United States v. Bergdahl*. The Army Court dismissed the Petition for lack of jurisdiction without considering the merits. Decision at 2.

The Army Court was wrong to do so: the requested writ was squarely within the statutory jurisdiction of the Army Court because public access to the requested records can affect the fairness and outcome of the Article 32 Hearing, which bears directly on any ultimate findings and sentence. But even more troubling than the Army Court's legal error is the confusion it introduces in an already tangled area of law. Read together with this Court's decisions in *ABC, Inc. v. Powell* and *Center for Constitutional Rights v. United States*, the Decision muddies the waters as to whether and when the military courts have jurisdiction to hear a petition filed by representatives of the public to enforce their First Amendment rights of public access. This lack of clarity is untenable: because federal courts will defer to the military courts' possible jurisdiction, the public must attempt to vindicate their time-sensitive constitutional

rights in the military system, only to be told by the military courts that relief must be sought elsewhere.

I
History of the Case

This Writ-Appeal arises out of an Article 32, UCMJ, hearing with respect to charges preferred against Sgt. Bergdahl under Articles 85 and 99(3), UCMJ, based on a 15-6 investigation report (the "15-6 Report") concerning the circumstances of Sgt. Bergdahl's capture by Taliban affiliates. Appellee Lt. Col. Peter Q. Burke is the special court-martial convening authority and Appellee Gen. Robert Abrams is the general court-martial convening authority. The charges against Sgt. Bergdahl, as well as the circumstances of his capture and release, have been the subject of intense and politicized public scrutiny. *See* Ibarguen Aff. ¶¶ 3-5 & Exs. A-C.

Well in advance of the Article 32 Hearing, on July 31, 2015, Appellants requested that Appellee Burke implement procedures to ensure constitutionally-mandated public access to the Article 32 Hearing, including contemporaneous access to evidence, transcripts, and other judicial records. Ibarguen Aff. ¶ 8 & Ex. F. Appellee Burke's response did not address the issue of access to judicial records. *See* Ibarguen Aff. ¶ 9 & Ex. G. Consequently, on September 12, 2015, Appellant the *Express-News* requested that Appellee Abrams answer whether and

how access to judicial records would be provided in this case. Ibarguen Aff. ¶ 10 & Ex. H. The response received by the *Express-News* did not answer these questions. *See* Ibarguen Aff. ¶ 11 & Ex. I.

The Article 32 Hearing was conducted on September 17 and 18, 2015, at Fort Sam Houston in San Antonio, Texas. The Article 32 investigating officer was Appellee Lt. Col. Mark A. Visger. The Article 32 Hearing was conducted in public, with representatives of the news media and public present in the hearing room and in an overflow room. Christenson Aff. ¶ 4.

During the Article 32 Hearing, Appellee Visger accepted several unclassified documents into evidence. Among them were the 15-6 Report, authored by Maj. Gen. Kenneth R. Dahl, and a lengthy transcript of Maj. Gen. Dahl's August 2014 interview of Sgt. Bergdahl (the "Interview Transcript"), both of which were repeatedly referred to in testimony in open court. Christenson Aff. ¶ 4. Maj. Gen. Dahl testified that he had no objection to either of these documents being made public. Unofficial Tr. at 310.

During and after the Article 32 Hearing, the *Express-News* made formal written requests for the release of these and other documents entered into evidence, which were denied by representatives of U.S. Army Forces Command. Christenson Aff. ¶¶ 5-7 & Exs. A-B; Ibarguen Aff. ¶¶ 12-13 & Exs. J-K. The

Express-News also submitted a request for release of the verbatim transcript of the Article 32 Hearing at the time it was provided to the parties, which was also denied. Christenson Aff. ¶ 8 & Ex. C.[2]

Because Appellee's denial of access to the unclassified evidence and transcripts infringed and continues to infringe Appellants' First Amendment right of access, on October 2, 2015, Appellants filed the Petition seeking a writ of mandamus from the Army Court. Sgt. Bergdahl moved to intervene in that action and joined Appellants' request for relief. On October 14, 2015, the Army Court granted Sgt. Bergdahl's motion to intervene but summarily dismissed the Petition on jurisdictional grounds, setting forth its reasoning in a single paragraph:

> The jurisdiction of this court to issue process under the All Writs Act is limited to issues having "the potential to directly affect the findings and sentence." *LRM v. Kastenberg*, 72 M.J. 364, 368 (2013); 28 U.S.C. § 1651. This court does not have jurisdiction to oversee the administration of military justice generally. *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). Petitioner [sic] has not demonstrated that

[2] An official transcript of the Article 32 Hearing was subsequently attached to a September 30, 2015 filing by Sgt. Bergdahl in *Bergdahl v. Burke*, Army Misc. No. 20150624 (cited herein as "Unofficial Tr."). However, the Army has not made the Hearing transcript available to Appellants or to the public generally, nor has it agreed to make public the official, certified transcript of the Article 32 Hearing when it is available.

> the release of documents to the public, prior to any decision on whether this case should be referred to trial, has the potential to directly affect the findings and sentence. As this court lacks the jurisdiction to consider the matter, the petition is DISMISSED.

Decision at 2.

Sgt. Bergdahl also filed a separate petition for a writ of mandamus with the Army Court on September 21, 2015, seeking an order allowing him to release the 15-6 Report and Interview Transcript to the public. The Army Court denied Sgt. Bergdahl's petition on October 8, 2015, *Bergdahl v. Burke*, Army Misc. No. 20150624, 2015 WL 5968401 (A. Ct. Crim. App. 2015), and Sgt. Bergdahl filed a writ-appeal with this Court on October 12, 2015, *see Bergdahl v. Burke*, USCA Misc. Dkt. No. 16-0059/AR. Though the records at issue in Sgt. Bergdahl's petition are among those sought by Appellants, the petitions assert different rights and bases for relief. *See, e.g.*, *Bergdahl*, 2015 WL 5968401, at *1 (noting that Sgt. Bergdahl's petition did not present the question of whether denial of public access to the 15-6 Report and Interview Transcript "infringes on the petitioner's right to a public hearing . . . .").[3]

[3] Appellee Visger submitted his report on the Article 32 Hearing and recommendation for the disposition of the charges against Sgt. Bergdahl on October 5, 2015, while both Appellants' and Sgt. Bergdahl's writ petitions were pending. Sgt. Bergdahl submitted objections to and comments on Appellee Visger's report

II
Reasons Relief Not Sought Below

Not applicable.

III
Relief Sought

Appellants seek an order from this Court reversing the Army Court's dismissal of their Petition for lack of jurisdiction and remanding the Petition for consideration on its merits.

IV
Issue Presented

DOES THE ARMY COURT OF CRIMINAL APPEALS HAVE JURISDICTION TO CONSIDER A PETITION FOR A WRIT OF MANDAMUS REQUIRING PUBLIC ACCESS TO UNCLASSIFIED RECORDS OF AN ARTICLE 32 HEARING, WHEN THE ACCUSED JOINS IN THE REQUEST FOR RELIEF?

V
Statement of Facts

All relevant facts are set forth in Part I, *supra*.

VI
Reasons for Reversal

Although the Army Court's one-paragraph summary Decision makes the jurisdictional question appear simple and the governing law well-settled, they are anything but. The recent precedents of both this Court and the Supreme Court raise as many questions as they answer about the jurisdiction of the

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on October 9, 2015. As of this filing, Appellee Abrams has not acted on Appellee Visger's report.

military appellate courts to issue extraordinary writs under the All Writs Act. The law is especially murky as to whether military courts can entertain extraordinary writ petitions, like the one at issue here, that are filed by members of the public seeking to vindicate their First Amendment right of access to military judicial proceedings and records.

This uncertainty flows from two discordant C.A.A.F. decisions: this Court considered and granted a petition seeking access to an Article 32 proceeding in *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), yet disclaimed jurisdiction over a very similar petition in *Center for Constitutional Rights v. United States* ("*CCR*"), 72 M.J. 126 (C.A.A.F. 2013). The *CCR* decision distinguished *ABC, Inc.* on the grounds that the accused had joined ABC's request for access. *Id.* at 129-30. While the *CCR* court did not clearly explain the jurisdictional significance of this distinction, it appears to carve out a narrow slice of jurisdiction for the military appellate courts to consider writ petitions for public access to military court proceedings and records (including Article 32 hearings and records), so long as the accused participates. *Id.* at 129-30; *see also id.* at 131-32 (Baker, C.J., dissenting).

The Petition at issue here falls squarely within that carve-out, *see supra* at 5; Ex. 1 at 27-28, but the Army Court nevertheless disclaimed jurisdiction. The result is confusion

over whether and when the military courts can consider extraordinary writ petitions by the public seeking to vindicate constitutional rights of access.

This Court should take this opportunity to clarify the jurisdiction of military courts to consider public access petitions brought under the All Writs Act. The current uncertainty, combined with federal court doctrines of abstention and exhaustion, means that a representative of the public (including the press) seeking to vindicate public access rights must first attempt to litigate a request for access up through the military court system before seeking other avenues of relief. *See Loving v. United States*, 62 M.J. 235, 240 (C.A.A.F. 2005) (noting "a continuation of discretionary . . . judicial deference to this Court by Article III courts . . . ."). If the military courts lack jurisdiction to entertain such petitions, this Court should make a clear statement to that effect, thereby avoiding the need for time-consuming and ultimately wasteful efforts litigants currently must undertake. A clear statement of the law would also foster faster resolution of continuing First Amendment violations. *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1979) (Blackmun, J., in chambers) (recognizing that "each passing day may constitute a separate and cognizable infringement" of First Amendment rights) (citation omitted). If nothing else, this Court should clarify where the public and

press must turn for timely vindication of their constitutional rights of access.

While the Army Court's Decision is most troubling because it exacerbates this legal uncertainty, a careful look at the broader legal picture reveals that it is also incorrect: the Petition lies at the heart of the military appellate courts' All Writs Act jurisdiction because it seeks to correct an error made in the course of Sgt. Bergdahl's prosecution which has the possibility of affecting the result of his Article 32 proceeding and the ultimate findings and sentence in his case, including whether there will be any findings and sentence at all. A contrary conclusion would not only conflict with this Court's recognition of its jurisdiction in *ABC, Inc. v. Powell*, but would also invite regular interference by the Article III courts on interlocutory matters in the court-martial process, and encroach on this Court's "primary responsibility for the supervision of military justice . . . ." *Loving*, 62 M.J. at 244 (citation omitted).

I. THE ARMY COURT ERRED IN DISCLAIMING JURISDICTION TO CONSIDER THE REQUESTED WRIT.

While the Supreme Court has never decided whether the military courts are empowered to consider an extraordinary writ petition like the one at issue here, it has indicated that the military courts have All Writs Act jurisdiction where they have

potential subject-matter jurisdiction over the case or controversy and the writ seeks to address a judicial action within the court-martial process. At a minimum, as this Court has held, the military courts have jurisdiction to entertain writ petitions that have the potential to directly affect the findings and sentence in a court-martial.

The Petition at issue here easily meets both of these standards: the Army Court has potential jurisdiction over Sgt. Bergdahl's case, and the denial of access at issue took place within the context of the Article 32 Hearing – which is a judicial proceeding and an integral part of the court-martial process. And public access to the records of the Article 32 Hearing can affect the result of that proceeding, which bears directly on the ultimate findings and sentence in any eventual court-martial, and on whether the matter even proceeds to court-martial (and thus yields findings and a sentence) at all.

A. The Jurisdiction of Military Appellate Courts to Issue Extraordinary Writs Under The All Writs Act.

The All Writs Act ("Act") authorizes "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." 28 U.S.C. § 1651(a). While the Act is "not a font of jurisdiction," *United States v. Denedo*, 556 U.S. 904, 914 (2009), it empowers courts to issue extraordinary writs to

protect their existing statutory jurisdiction, *see Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999), thereby "filling the interstices" of their judicial power "when those gaps threate[n] to thwart the otherwise proper exercise of [their] jurisdiction," *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985). An appellate court may use its All Writs Act power in service of its "potential" appellate jurisdiction by correcting lower courts' interlocutory errors in cases that have the potential to later reach the appellate court, even before the lower court issues an order that would be appealable in the ordinary course. *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966).

Military appellate courts are among the judicial tribunals empowered to issue extraordinary writs "in aid of" their statutory jurisdiction under the Act. *Denedo*, 556 U.S. at 911. The Courts of Criminal Appeals' statutory jurisdiction, under Article 66, UCMJ, extends to mandatory review of the record in prosecutions that have resulted in certain minimum sentences, and those courts are limited to acting "with respect to the findings and sentence . . . ." 10 U.S.C. § 866(b), (c). Like other appellate courts, the military appellate courts can consider and issue extraordinary writs on interlocutory matters in aid of their potential appellate jurisdiction. *Dettinger v. United States*, 7 M.J. 216, 220 (C.M.A. 1979) (agreeing that

military appellate courts can consider extraordinary writs "in cases that may potentially reach the appellate court"); *see also, e.g.*, *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012) (granting writ to remove military judge before findings and sentence were entered).

The Supreme Court has never articulated a specific standard for determining when an extraordinary writ petition filed before the entry of findings and a sentence falls within the "potential" appellate jurisdiction of the military courts. But, in the context of petitions filed after judgment, the Court has stated that the military appellate courts can consider extraordinary writs if they have "subject-matter jurisdiction ***over the case or controversy***." *Denedo*, 556 U.S.at 911 (emphasis added). Conversely, the military courts cannot entertain writs to reverse an executive action taken wholly outside the military justice system. *Goldsmith*, 526 U.S. at 535.[4] When read together and with the case law governing interlocutory writs and potential appellate jurisdiction, these decisions strongly suggest that the military appellate courts can consider writs to correct actions taken within the court-martial process in a case

[4] Similarly, in *United States v. Arness*, 74 M.J. 441 (C.A.A.F. 2015), this Court held that it lacked jurisdiction to issue a writ in a prosecution that the Court of Criminal Appeals has no jurisdiction to review under Article 66 or its other jurisdictional statutes.

where there is a possibility that they will have jurisdiction over any direct appeal, such as when the maximum sentences for the charges meet the jurisdictional minimum of Article 66, UCMJ. This reading is also consistent with this Court's Rule 5, which expressly states that the Court's jurisdiction to issue extraordinary writs extends to the "exercise of its supervisory powers over the administration of the UCMJ." Rule 5.

Nevertheless, this Court recently stated that "[t]o establish subject-matter jurisdiction [under the All Writs Act and Article 66], the harm alleged must have had 'the potential to ***directly affect*** the findings and sentence.'" *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013) (emphasis added) (citation omitted). Respectfully, neither the UCMJ[5] nor the All Writs Act contains such a narrow limit on military courts' jurisdiction, and this requirement appears inconsistent with the

[5] Article 66 does not limit the appellate jurisdiction of the Court of Criminal Appeals to the review of issues that "directly affect" a finding or sentence. As noted above, Article 66 states that the Court of Criminal Appeals must "*review* the record" in certain cases, but can only *act* with respect to the findings and sentence. 10 U.S.C. § 866 (emphasis added). Thus, the Court has jurisdiction to review issues in the record that may not "directly affect" the findings and sentence, and then decide not to act on them. The Court may also review a number of minor issues that do not *individually* "directly affect" the findings and sentence, but together amount to enough prejudicial error to warrant a reversal.

Supreme Court's broader holdings discussed above.[6] Regardless, the Army Court had jurisdiction to consider the Petition in this matter under any standard, as set forth below.

B. The Army Court Has Jurisdiction To Consider The Requested Writ Because It Is Directed At A Judicial Action In A Case Within The Court's Potential Jurisdiction.

Appellants seek a writ of mandamus to correct the Respondents' denial of constitutionally-mandated public access to unclassified records of the Article 32 hearing examining charges against Sgt. Bergdahl. Under the Supreme Court's precedent discussed above, the Petition falls within the Army Court's All Writs Act jurisdiction because it seeks to address a judicial action within the military court system in a case

[6] Nor is this requirement supported by this Court's own prior precedent. The "directly affect" standard appeared for the first time in this Court's 2013 *LRM* decision, 72 M.J. at 368, citing language the Court used in *CCR*, 72 M.J. at 129, to distinguish *Hasan v. Gross*, 71 M.J. 416, as one of several cases in which the military appellate courts properly exercised jurisdiction. Although the *CCR* decision distinguished four such cases, only *Hasan* was described as a situation where "the harm alleged by the appellant . . . had the potential to directly affect the findings and sentence." *CCR*, 72 M.J. at 129 (citing *Hasan*, 71 M.J. 416)). The list of cases distinguished in *CCR* also included *ABC, Inc.*, which involved the denial of public access to an Article 32 hearing – a harm that has the exact same "potential to directly affect the findings and sentence" as the denial of public access to Article 32 records that Appellants are challenging here. Accordingly, neither the *LRM* nor the *CCR* decision identifies a basis for imposing a limitation on the plain language of the All Writs Act.

within the Army Court's potential subject-matter jurisdiction. *See supra* at 13-14.

First, the denial of access was an action taken in the context of the Article 32 Hearing, which is a "judicial proceeding" within the military justice system. *See, e.g.*, *United States v. Nichols*, 23 C.M.R. 343, 348 (C.M.A. 1957) (noting the "judicial character" of the Article 32 hearing). It is a "predicate to the referral of charges to a general court-martial," an "important element of the military justice process," and includes "a substantial set of rights" for the accused. *United States v. Davis*, 64 M.J. 445, 446, 449 (C.A.A.F. 2007). And with respect to their administration of the Article 32 Hearing, Appellees are judicial and prosecutorial officers. *See, e.g.*, *United States v. Payne*, 3 M.J. 354, 357-58 (C.M.A. 1977) (investigating officer); *United States v. Nix*, 36 C.M.R. 76, 78-79 (C.M.A. 1965) (convening authority); *cf. Goldsmith*, 526 U.S. at 533 (challenging an administrative separation proceeding, rather than an act taken within the military justice system).

Second, the Army Court has potential subject-matter jurisdiction under Article 66, UCMJ, over Sgt. Bergdahl's case because his charges carry maximum sentences that exceed the threshold for mandatory appellate review. *See* 10 U.S.C. §§ 866, 885, 899(3). *Cf. Arness*, 74 M.J. at 441 (no jurisdiction to

review writ where, *inter alia*, sentence imposed was below the minimum triggering review under Article 66).

C. The Army Court Has Jurisdiction To Consider The Requested Writ Because It May Directly Affect The Ultimate Findings And Sentence In Sgt. Bergdahl's Case.

The writ requested by Appellants also has "the potential to directly affect the findings and sentence," *LRM*, 72 M.J. at 368 (citation omitted), in Sgt. Bergdahl's court-martial, even under a narrow reading of that standard. It is well-recognized that Article 32 procedures and other pre-referral matters are reviewable by the Courts of Criminal Appeals both on direct review and through the All Writs Act, because they bear directly on the ultimate outcome of military prosecutions, including the findings and sentence (or lack thereof).

As specifically relevant here and explained *infra* Part I.C.2, public access to an Article 32 hearing affects the outcome of the prosecution because it affects its ***fairness***. The constitutional requirement of openness is rooted in the defendant's Sixth Amendment right to a fair trial as well as the public's First Amendment right of access. Both of these rights extend to pretrial proceedings (such as the Article 32 hearing), and exist "for the benefit of the accused." *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (citation omitted). Without vindication of these rights – both during the Article 32 and at trial – the

prosecution may be less fair, the outcome may even be altered, and the ultimate findings and sentence may be subject to reversal.

1. *The Conduct of An Article 32 Hearing May Affect The Ultimate Findings And Sentence And Is Reviewable By the Army Court.*

The Army Court's observation that public access was denied during the Article 32 process, "prior to any decision on whether this case should be referred to trial," Decision at 2, is irrelevant to whether the Court has jurisdiction to issue the requested writ.[7] An Article 32 hearing clearly has the potential to affect the findings and sentence in a military prosecution. It is required before charges can be referred to a general court-martial, *Davis*, 64 M.J. at 446, and its very purpose is to determine whether there is probable cause supporting the charges and to recommend a disposition, which may include referral of the charges to a court-martial, 10 U.S.C. § 832(a)(2). The Article 32 process thus bears directly on ***whether*** there will be any court-martial (and thus findings and a sentence) at all, and, if so, which type of court-martial – which itself determines the sentences that are available and ultimately

[7] In Sgt. Bergdahl's related petition, the Government Respondents conceded that the Army Court has jurisdiction over the conduct of a preliminary hearing pursuant to Article 32. Government Response to Petition for Writ of Mandamus, at 6, *Bergdahl v. Burke*, Army Misc. No. 20150624.

imposed.[8] Unfairness in the course of an Article 32 hearing – such as improper exclusion of evidence or ineffective assistance of counsel – could, for example, result in a recommendation and then a referral to a general court-martial, and an ultimate sentence of two years in jail; whereas there may have been no court-martial and thus no sentence at all if the error had not occurred.

Accordingly, military appellate courts regularly review claims of error in Article 32 hearings as part of their normal-course appellate review under Articles 66 and 67 – during which they are statutorily limited to acting on "the findings and sentence" (10 U.S.C. §§ 866, 867). *See, e.g.*, *Davis*, 64 M.J. 445 (considering partial closure of Article 32 hearing on direct review); *United States v. Garcia*, 59 M.J. 447, 452 (C.A.A.F. 2004) (reviewing waiver of Article 32 hearing and finding "a reasonable probability of a different result" had the hearing not been waived); *United States v. Quintanilla*, 63 M.J. 29, 38 (2006) (reviewing claim that findings and sentence should be set aside because of prosecutorial misconduct including an improper *ex parte* communication between a prosecutor and the Article 32

[8] For instance, if an Article 32 hearing leads to a referral to a special court-martial, rather than a general court-martial, the sentence will necessarily be capped at one year of confinement, forfeiture of two-thirds basic pay per month for one year, and/or a bad-conduct discharge. *See* Article 19, UCMJ, 10 U.S.C. § 819.

investigating officer). They also consider – and sometimes issue – extraordinary writs to correct errors by the investigating officer or the convening authority in the conduct of an Article 32 hearing. *See, e.g.*, *ABC, Inc.*, 47 M.J. 363 (granting writ of mandamus compelling investigating officer and convening authority to allow public access to Article 32 hearing); *Denver Post Corp. v. United States*, Army Misc. No. 2005 WL 6519929 (A. Ct. Crim. App. Feb. 23, 2005) (same).[9] In fact, this Court has previously confirmed that a request for

[9] The military Courts of Criminal Appeals regularly assert jurisdiction to issue writs to correct errors by the investigating officer or convening authority in the Article 32 process, even where they decline to issue the writ on the merits. *See, e.g.*, *Oliver v. Mordente*, No. MC 2014-04, 2014 WL 2516540, at *2 (A.F. Ct. Crim. App. May 9, 2014) (finding jurisdiction to consider petition for writ of mandamus ordering convening authority to grant expert mitigation assistance to the accused at an Article 32 investigation); *Porter v. Garland*, No. 2013-10, 2013 WL 1874760, at *3 (A.F. Ct. Crim. App. Apr. 30, 2013) (holding that it has jurisdiction to consider merits of petition for writ of prohibition prohibiting a general court-martial convening authority from proceeding with an Article 32 investigation and from referring the case to a general court-martial); *McKinney v. Jarvis*, 46 M.J. 870, 872-73 (A. Ct. Crim. App. 1997) (holding that "[d]iscretionary decisions by officers who appoint Article 32, UCMJ investigations are . . . subject to review under the All Writs Act" and finding jurisdiction to consider merits of petition for writ of prohibition against an officer who appointed Article 32 investigating officer). Military appellate courts even recognize their jurisdiction to issue writs to correct errors in the court-martial process ***before*** any Article 32 hearing has taken place. *See, e.g.*, *Lawanson v. United States*, No. NMCCA 201200187, 2012 WL 3799586, at *10 (N-M. Ct. Crim. App. Aug. 31, 2012) (granting writ of mandamus directing dismissal of charges after they had been referred to an Article 32 investigation but before the Article 32 hearing).

extraordinary relief is the ***preferred*** method for challenging Article 32 errors in the appellate courts, because then the error can be corrected before it "infect[s] the trial." *Davis*, 64 M.J. at 449 (citing *ABC, Inc.*, 47 M.J. 80).

2. *Denial of Public Access To The Records of Sgt. Bergdahl's Article 32 Hearing May Affect The Article 32 Hearing And Thus The Findings And Sentence*

The writ sought by Appellants encourages quality and fairness in the Article 32 process and potentially affects its outcome, which, as explained *supra* Part I.C.1, may affect the findings and sentence in any eventual court-martial.

For as long as the Supreme Court has recognized a First Amendment right of public access to judicial proceedings, it has emphasized that public access ensures "true and accurate factfinding" in those proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (Brennan, J., concurring); *see also id.* at 569-70 (citing commentators recognizing, inter alia, that openness "discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."). Public scrutiny "enhances the quality and safeguards the integrity of the factfinding process," and "permits the public to . . . serve as a check upon the judicial process. . . ." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). And, as the predecessor to this Court has explained, these benefits of public access can actually affect

the ***outcome*** of a military judicial proceeding: the public's presence "***effect[s] a fair result*** by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury." *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985) (emphasis added).

Precisely because openness affects the fairness of a criminal proceeding, the Sixth Amendment guarantees criminal defendants a separate right to have their proceedings open to the public, *see id.*; *Waller*, 487 U.S. at 44-46; *Presley v. Georgia*, 558 U.S. 209, 211-12 (2010). Both the Sixth and First Amendment requirements of a public trial exist "for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46. Public access is so crucial to fairness in criminal proceedings (including pretrial proceedings) that the Constitution places an affirmative obligation on a presiding officer to ensure that the constitutional requirements of access are met, even if neither the defendant nor the public has argued for access. *See Presley*, 558 U.S. at 214-15. Failure to do so may be grounds for review of a conviction and, potentially, reversal. Indeed, this Court has repeatedly recognized the connection between public access and the findings and sentence

in a military case by ***reversing*** court-martial convictions and setting aside findings and sentences based on the erroneous exclusion of the public from the proceedings. *See, e.g.*, *United States v. Ortiz*, 66 M.J. 334 (2008) (complete deprivation of right to public trial required reversal of conviction); *United States v. Grunden*, 2 M.J. 116 (1977) (same), *superseded by rule on other grounds by* Mil. R. Evid. 105.

Both the Sixth and First Amendment rights of public access extend to pretrial proceedings, such as an Article 32 hearing. *See generally Waller*, 467 U.S. at 46 (Sixth Amendment right to public trial applies to pretrial suppression hearing). A critical component of public access to a proceeding is access to the records of that proceeding. *See, e.g.*, *Wash. Post Co. v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991) ("The First Amendment guarantees the press and the public a general right of access to court proceedings ***and court documents*** . . . .") (citing cases) (emphasis added). Without access to the records of a prosecution, the public cannot properly conduct its evaluative and protective function. In extreme cases, the substance of a prosecution may exist only in the records submitted to the court, reducing the public's right of access merely to a right to witness the passing up of sheets of paper without any opportunity to meaningfully evaluate whether the defendant has been dealt with fairly. In less extreme cases,

the public will have access only to those portions of the prosecution that are spoken in the public proceeding, leaving written portions of the proceeding shielded from public scrutiny.

Thus, here, Appellee's denial of access to the records of Sgt. Bergdahl's Article 32 proceeding can impact the fairness of that hearing and its result – including whether a court-martial occurs at all and, if so, what sentence(s) will be available. *See supra* Part I.C.1. This potential impact on the ultimate findings and sentence is just as direct as that which was sufficient to confer All Writs Act jurisdiction in *LRM*, 72 M.J. at 368. There, this Court held that a military judge's order preventing the accused's victim from being heard on a claim of privilege and exclusion of evidence "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." 72 M.J. at 368. There is no reason for a different result here, and in fact, both this Court and the Courts of Criminal Appeals have previously correctly exercised their jurisdiction to issue writs compelling public access to Article 32 proceedings. *See ABC, Inc.*, 47 M.J. 363; *Denver Post Corp.*, 2005 WL 6519929.

Furthermore, as in *LRM*, the parties here are not "strangers to the courts-martial" because the accused joined in Appellants' request for a writ of mandamus. *LRM*, 72 M.J. at 368 (quoting *CCR*, 72 M.J. at 129).[10] Sgt. Bergdahl's participation in this effort compounds the constitutional rights at stake here – the writ requested by Appellants will vindicate his Sixth Amendment rights in addition to the public's First Amendment rights. *See, e.g.*, *Grunden*, 2 M.J. at 120-21. As this Court affirmed in *CCR*, Sgt. Bergdahl's effort to secure his Sixth Amendment rights through access to an Article 32 proceeding "ha[s] immediate relevance to the potential findings and sentence of his court-martial." 72 M.J. at 129-30.

This mandamus petition thus involves a party to the court-martial, contesting an action taken within the military justice system that may affect his potential findings and sentence, in a case that will potentially come before the Army Court under Article 66 in the normal course. *See Denedo*, 556 U.S. at 911;

[10] Appellants do not concede that this Court was correct in holding that the petitioners in *CCR* were "strangers to the courts-martial" with no ability to seek an extraordinary writ in the military courts because the accused did not join in their petition. *See CCR*, 72 M.J. at 129. To the contrary, the *CCR* petitioners were seeking to protect a right of access that – in addition to being guaranteed by the First Amendment – was granted to them by the President in duly promulgated Rules for Courts-Martial 405 and 806, just as the petitioner in *LRM* was seeking to protect rights granted to her in the Military Rules of Evidence. *See LRM*, 72 M.J. at 368.

LRM, 72 M.J. at 368. This is exactly the sort of petition that the All Writs Act authorizes the Army Court to entertain "in aid of" its potential appellate jurisdiction under Article 32 – and to grant, if it determines the writ to be "necessary or appropriate . . . ." 28 U.S.C. § 1651(a). The military courts can and should exercise their jurisdiction when they have it and at least ***consider*** the merits of petitions for extraordinary relief. As the Supreme Court recognized, "[t]he military justice system ***relies*** upon courts . . . tak[ing] all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their judgments." *Denedo*, 556 U.S. at 917 (emphasis added). The Army Court accordingly erred by holding that it lacked jurisdiction to consider Appellants' request for a writ of mandamus.

II. Affirming The Army Court's Decision Will Have Far-Reaching Consequences.

Should the Court reach a conclusion contrary to that advocated by Appellants, its decision will have ramifications that go beyond this particular writ Petition and even Sgt. Bergdahl's prosecution. ***First***, a denial of jurisdiction here will conflict with this Court's recognition of its jurisdiction in *ABC, Inc. v. Powell*. The only difference between the petition in *ABC, Inc.* and this one is that Appellants specifically seek access to records, which has no bearing on the

jurisdictional question the Court. ***Second***, affirming the Army Court will extend this Court's holding in *CCR v. United States* to deny jurisdiction over extraordinary writ petitions seeking public access where the accused joins in the request.

Finally, and by far most importantly, affirming the Army Court's denial of jurisdiction here, combined with this Court's earlier decision in *CCR*, will conclusively close off the military appellate courts from all petitioners seeking to vindicate the First Amendment right of access to military judicial proceedings. Their only recourse will be to seek collateral review in the Article III courts, resulting in increased intervention by those courts in the military justice system. *See CCR*, 72 M.J. at 132 (Baker, C.J., dissenting). This will, in turn, undermine the uniform application of the law between services and between courts-martial and interfere with the ability of military judges to control their courtrooms. *Id.* It will also undermine Congress' intent that the military justice system should function separately from the civilian courts and that ***this*** Court should handle "the supervision of military justice . . . ." *Loving*, 62 M.J. at 244; *see also generally* Stephen I. Vladeck, *Military Courts and the All Writs Act*, 17 GREEN BAG 2D 191, 204-05 (Winter 2014).

VII
Respondents' Contact Information

Not applicable.

Conclusion

For the foregoing reasons, Appellants respectfully submit that the Army Court's Decision must be overturned and this matter remanded for consideration of the Petition on its merits.

Should the court disagree with Appellants and affirm the Army Court's Decision, Appellants respectfully request that this Court issue a published written opinion and clarify the extent of the military appellate courts' jurisdiction to entertain extraordinary writ petitions filed by the public that seek to enforce the public's First Amendment right of access to proceedings and records in the military justice system.

Dated: November 3, 2015 Respectfully submitted,

/s/ Jennifer D. Bishop

Diego Ibarguen
dibarguen@hearst.com
Jennifer D. Bishop
jbishop@hearst.com
THE HEARST CORPORATION
300 W. 57th Street, 40th Floor
New York, New York 10019
Tel: (212) 649-2030
Fax: (646) 280-2030
Counsel for Appellants[11]

[11] Above-listed counsel are not currently admitted to practice before this Court, but submit this brief as counsel of record under Rule 38(b). Pursuant to that Rule, counsel will submit applications for admission to the Bar of this Court no later than 30 days from today.

OF COUNSEL:

Brian P. Barrett
The Associated Press

Randy Shapiro
Bloomberg L.P

Nabiha Syed
Buzzfeed, Inc.

Jacob Goldstein
Dow Jones & Company, Inc.

Lynn Oberlander
First Look Media, Inc.

Mark Farris
Gannett Co., Inc.

James Asher
McClatchy Co.

David McCraw
The New York Times Company

Gail Gove
Reuters America LLC

James McLaughlin
WP Company LLC d/b/a The Washington Post

CERTIFICATE OF FILING AND SERVICE

I certify that I have, this 3rd day of November, 2015, filed and served the foregoing Writ-Appeal Petition by emailing copies to the Clerk of Court, the Government Appellate Division, Appellees Gen. Abrams, Lt. Col. Burke, and Lt. Col. Visger, and counsel for Sgt. Robert B. Bergdahl, the Intervenor-Petitioner and Party In Interest below, at the following email addresses:

efiling@armfor.uscourts.gov

usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@mail.mil

robert.b.abrams.mil@mail.mil

peter.q.burke.mil@mail.mil

mark.a.visger.mil@mail.mil

efidell@feldesmantucker.com

franklin.d.rosenblatt.mil@mail.mil

jonathan.f.potter3.mil@mail.mil

Jennifer D. Bishop
jbishop@hearst.com
THE HEARST CORPORATION
300 W. 57th Street, 40th Floor
New York, New York 10019
Tel: (212) 649-2030
Fax: (646) 280-2030

Counsel for Appellants