EXHIBIT 1

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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, Petitioners, 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, Respondents.	**PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS AND BRIEF IN SUPPORT** Army Misc. Dkt. No. _____

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

Through this Petition and brief in support, filed pursuant to the All Writs Act, 28 U.S.C. § 1651 (2012), and Rule 20 of the Court's Rules of Practice and Procedure ("A.C.C.A. Rules"), Hearst Newspapers, LLC, publisher of the San Antonio *Express-News* (hereinafter, the "*Express-News*"), joined by 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 (collectively, the "Press Petitioners"), seeks the immediate public release of unclassified documents received into evidence during the Article 32 preliminary hearing examining charges against Sgt. Robert ("Bowe") Bergdahl held on September 17 and 18, 2015 at Fort Sam Houston in San Antonio, Texas (the "Article 32 Hearing"), as well as the immediate public release of transcripts of the Article 32 Hearing. Respondents have denied the Press Petitioners contemporaneous access to these documents in violation of the public's First Amendment right of access to judicial records. The Press Petitioners also seek an order requiring Respondents to comply with constitutional requirements of public access to future judicial records that are created, filed, or otherwise received in *United States v. Bergdahl*.

History of the Case

This case concerns public access to unclassified documents related to the Article 32 Hearing on charges against Sgt. Bergdahl. Courts have long recognized that the government's administration of justice—including against military personnel like Sgt. Bergdahl—is a public act, conducted on the public's behalf and therefore necessarily open to public scrutiny. This right of the public to access the judicial proceedings carried out in its name is rooted in the First Amendment, and it furthers the basic fairness of the proceedings as well as public confidence in the judicial system.

The civilian courts have been clear that the right of access includes not just access to hearings and trials, but to the documents that form the foundation of those proceedings. Without access to records, the public is left in the dark on the full nature of proceedings. The same rationale applies with equal force in the context of military prosecutions, particularly this one. Sgt. Bergdahl stands accused of offenses that could result in the complete deprivation of his liberty; yet, in what may be the most publicly watched military prosecution of an active duty soldier, the Army has cast a shroud of secrecy over the very documents and records that provide the basis for the offenses charged. In the process, the

Army has impermissibly infringed the public right of contemporaneous access to judicial proceedings and records.

Sgt. Bergdahl, an active duty sergeant, was captured by Taliban affiliates in June 2009. He was held prisoner for nearly five years until his release in May 2014, which was part of a prisoner exchange that included the release of five Taliban detainees held by U.S. forces at Guantanamo Bay. On March 25, 2015, Sgt. Bergdahl was charged with desertion and "misbehavior before the enemy." The circumstances of Sgt. Bergdahl's capture and release, together with his prosecution, have been the subject of intense and politicized public interest and scrutiny.

Well in advance of the Article 32 Hearing, on July 31, 2015, the Press Petitioners requested that the special court-martial convening authority in this case, Respondent Lt. Col. Burke, implement procedures to ensure constitutionally-mandated public access to the Article 32 Hearing, including contemporaneous access to records of the case. Lt. Col. Burke's response did not address the issue of access to judicial records. Consequently, on September 12, 2015, the *Express-News* requested that Respondent Gen. Abrams, the general court-martial convening authority in this matter, answer whether and how access to judicial records would be provided in this case. The response received by the *Express-News* again did not answer these questions.

The Article 32 Hearing was conducted on September 17 and 18, 2015 at Fort Sam Houston in San Antonio, Texas, with Respondent Lt. Col. Mark A. Visger, JA, serving as preliminary hearing officer. The Article 32 Hearing was conducted in public, with members of the news media and public in attendance in the hearing room and in an overflow room with video and audio transmission from the hearing room. During those proceedings, Lt. Col. Visger accepted into evidence several documents that were, upon information and belief, unclassified. Among the documents accepted into evidence were a report of an AR 15-6 investigation conducted by Maj. Gen. Kenneth R. Dahl in 2014 (the "15-6 Report") and a transcript of an August 2014 interview conducted by Maj. Gen. Dahl of Sgt. Bergdahl (the "Interview Transcript"), both of which were repeatedly referred to in testimony in open court. The *Express-News* made formal written requests for the release of documents entered into evidence during the Article 32 Hearing. However, those requests were denied by representatives of the U.S. Army Forces Command ("FORSCOM").

Following the conclusion of the Article 32 Hearing, the *Express-News* also requested public release of the verbatim transcript of that hearing at the time it is made available to

the parties. That request was also denied.[1]

Respondents' denial of access to unclassified documents entered into evidence at the Article 32 Hearing infringes on the public's First Amendment right of access for the reasons discussed below. Accordingly, the Press Petitioners seek relief in the form of a writ of mandamus requiring Respondents to provide immediate access to these documents and to comply with constitutional access requirements with respect to future judicial records that are created, filed, or otherwise received in this case.

No prior actions have been filed by the Press Petitioners in this or any other court for the relief sought in this Petition. However, on September 21, 2015, counsel for Sgt. Bergdahl filed a petition for a writ of mandamus with this Court, Army Misc. No. 20150624, seeking an order directing Lt. Col. Burke to make public unclassified exhibits received into evidence at the Article 32 Hearing and allowing Sgt. Bergdahl to release those documents himself.

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[1] An unofficial transcript of the Article 32 Hearing titled "Record of Preliminary Hearing Under Article 32" was subsequently attached to a September 30, 2015 filing by Sgt. Bergdahl in *Bergdahl v. Burke*, Army Misc. No. 20150624 (hereinafter, "Unofficial Transcript"). However, the Army has not made the Hearing transcript available to Press Petitioners 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.

Specific Relief Requested

The Press Petitioners seek a writ of mandamus directing Respondents to immediately release to the public copies of the unclassified 15-6 Report, the unclassified Interview Transcript, and any other unclassified materials admitted into evidence during the Article 32 Hearing, as well as a transcript of the Article 32 Hearing.

The Press Petitioners also seek an order directing Respondents to provide the public with contemporaneous access to future unclassified filings, evidence, hearing transcripts, orders and other judicial records as they are received in *United States v. Bergdahl*, unless a military judge or other presiding officer provides the public with notice of sealing and an opportunity to be heard and makes specific, on-the-record findings that closure is necessary to further a compelling government interest and is narrowly tailored to serve that interest.

Sgt. Bergdahl consents to the specific relief sought by the Press Petitioners.

Issues Presented

A. WHERE UNCLASSIFIED DOCUMENTS ARE RECEIVED INTO EVIDENCE DURING A PUBLIC ARTICLE 32 HEARING, MAY THE CONVENING AUTHORITY OR OTHER PRESIDING OFFICER DENY PUBLIC ACCESS TO THOSE DOCUMENTS WITHOUT SPECIFIC, ON-THE-RECORD FINDINGS THAT SUCH DENIAL—EFFECTIVELY SEALING THE DOCUMENTS—IS NECESSARY TO FURTHER A COMPELLING GOVERNMENT INTEREST THAT OVERRIDES THE

FIRST AMENDMENT AND IS NARROWLY TAILORED TO FURTHER THAT INTEREST?

B. IS THE GENERAL COURT-MARTIAL CONVENING AUTHORITY, SPECIAL COURT-MARTIAL CONVENING AUTHORITY, AND/OR ARTICLE 32 PRELIMINARY HEARING OFFICER REQUIRED TO MAKE TRANSCRIPTS OF A PUBLIC ARTICLE 32 HEARING AVAILABLE TO THE PUBLIC IMMEDIATELY FOLLOWING THE HEARING?

Party In Interest

Under A.C.C.A. Rule 20(b), the party in interest is Sgt. Robert ("Bowe") Bergdahl.

Statement of Facts

1. Sgt. Bergdahl is an active duty noncommissioned sergeant. He was held prisoner by the Taliban-affiliated Haqqani network for nearly five years until his release in May 2014 as part of a prisoner exchange that included the release of five Taliban members then-in custody at Guantanamo Bay.

2. The circumstances of Sgt. Bergdahl's capture and the Government's decision to exchange Guantanamo detainees in order to obtain his release has been and continues to be the subject of intense public scrutiny and discussion. *See, e.g.*, Affidavit of Diego Ibarguen dated October 2, 2015 ("Ibarguen Aff.") ¶¶ 3-5, Exs. A-C.

3. In 2014, Maj. Gen. Kenneth R. Dahl conducted an AR 15-6 investigation into the circumstances under which Sgt. Bergdahl was captured by the Haggani network. That investigation included an interview of Sgt. Bergdahl by Maj. Gen. Dahl on

August 6-7, 2014, which was recorded in a 371-page transcript. On information and belief, the Interview Transcript is not classified. *See Bergdahl v. Burke et al.*, Army Misc. 20140624, Unofficial Tr. at iii-x (listing exhibits and not designating the Interview Transcript as classified).

4. In or around 2014, Maj. Gen. Kenneth R. Dahl produced the 15-6 Report. On information and belief, the 15-6 Report is not classified. *See Bergdahl v. Burke et al.*, Army Misc. 20140624, Unofficial Tr. at iii-x (listing exhibits and not designating the 15-6 Report as classified).

5. In December 2014, the Secretary of the Army referred the 15-6 Report to Gen. Mark A. Milley, who was then the Commanding General, FORSCOM, and general court-martial convening authority, for whatever action he deemed appropriate. Gen. Milley then forwarded the matter to Respondent Lt. Col. Peter Q. Burke, in his capacity as special court-martial convening authority, for a recommendation as to disposition of the matter.

6. On March 25, 2015, the Army charged Sgt. Bergdahl with violation of Articles 85 (desertion) and 99(3) (misbehavior before the enemy), UCMJ, and referred these charges to a preliminary hearing officer for purposes of conducting the Article 32 Hearing. *See, e.g.,* Ibarguen Aff. ¶ 7, Ex. E.

7. Since the announcement of the charges against him, Sgt. Bergdahl has repeatedly sought to make the 15-6 Report and

Interview Transcript publicly available, but Respondents have neither released these documents nor granted the defense permission to release the documents.

8. The defense has publicly taken the position that "it is in the public interest" that the executive summary of the 15-6 Report and the Interview Transcript "be made available without further delay." *See* Ibarguen Aff. ¶ 6, Ex. D.

9. On July 31, 2015, the undersigned counsel wrote to Respondent Lt. Col. Burke on behalf of the Press Petitioners requesting that certain procedures be implemented to ensure that the journalists have full and contemporaneous access to the proceedings against Sgt. Bergdahl, including access to records of those proceedings. *See* Ibarguen Aff. ¶ 8, Ex. F (the "July 31 Letter"). The Press Petitioners explained the bases of the public's First Amendment right of access to records in military prosecutions, and requested, among other things, that Respondent Lt. Col. Burke ensure that the public and press would have access to the records of these proceedings, including the docket of the proceedings, party filings decisions and procedural orders in the Article 32 proceeding and any court-martial through an online "reading room." *Id.* at 3-5. The July 31 Letter requested that access issues be resolved *in advance* of the Article 32 proceeding. *See id.* at 1. Respondent Lt. Col. Visger was copied on the July 31 Letter.

10. On August 6, 2015, Respondent Lt. Col. Burke responded to the July 31 Letter, confirming only that:

> The preliminary hearing will be conducted in accordance with Rule for Courts-Martial (RCM) 405, Manual for Courts Martial 2012 (as updated 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.

Ibarguen Aff. ¶ 9, Ex. G.

11. Over the course of the weeks leading up to the Article 32 Hearing, the *Express-News*, through its reporter Sig Christenson, repeatedly asked FORSCOM Public Affairs for more information about media access to the Article 32 Hearing and related records. FORSCOM Public Affairs did not provide any information about whether, when, and how the press would be able to access records in this case. Affidavit of Sig Christenson dated October 2, 2015 ("Christenson Aff.") ¶ 3.

12. On September 12, 2015, undersigned counsel forwarded the July 31 Letter to Respondent Gen. Robert B. Abrams—who succeeded Gen. Milley as Commanding General of FORSCOM and general court-martial convening authority—together with an email expressing concern that "there is no procedure for providing

access to records, and that reporters covering this case will be unable to obtain materials that are critical to understanding and explaining the proceedings to the public, such as materials entered into evidence, briefs and other filings, and written orders by the investigating officer or military judge." Ibarguen Aff. ¶ 10, Ex. H (the "September 12 Email"). The September 12 Email requested that Gen. Abrams respond by the close of business on September 15, 2015 to the question of "whether and how the press would be granted timely access to records in this case, including evidence, briefs, other party filings, and written orders." *Id*. Lt. Col. Burke and Lt. Col. Visger were copied on the September 12 Email.

13. On September 15, 2015, Major Margaret Kurz, trial counsel in Sgt. Bergdahl's case, responded on behalf of Gen. Abrams, stating that Lt. Col. Burke "has already addressed the issue of media access to the Article 32 Preliminary Hearing" in his letter of August 6, 2015, but failing to address public access to records related to these proceedings. Ibarguen Aff. ¶ 11, Ex. I.

14. The Article 32 Hearing was held on September 17 and 18, 2015 at Fort Sam Houston in San Antonio, Texas with Respondent Lt. Col. Visger presiding. Although the proceedings were open to the public, and members of the public and the press were in attendance in the hearing room and in an overflow room

equipped with audio and video transmission from the hearing room, the public was not given access to copies of evidence accepted by the hearing officer. In particular, the 15-6 Report and Interview Transcript were referred to repeatedly in open court and were accepted into evidence, though neither document was made available to the public. Christenson Aff. ¶ 4. Maj. Gen. Dahl testified that he did not object to the public release of either the 15-6 Report or the Interview Transcript. *See Bergdahl v. Burke et al.*, Army Misc. 20140624, Unofficial Tr. at 310:6-8.

15. The *Express-News* submitted formal written requests for access to copies of all documents admitted into evidence during the Article 32 Hearing, including the 15-6 Report and the Interview Transcript, among other documents. The *Express-News* also requested access to a transcript of the Article 32 proceeding. Those requests were denied by the Army. Christenson Aff. ¶¶ 5-8, Exs. A-C.

16. Undersigned counsel also requested that Respondents Gen. Abrams and Lt. Col. Burke release the Interview Transcript after it was received into evidence at the Article 32 Hearing on September 18, 2015. In response, counsel were informed that Lt. Col. Burke "is not the proper channel for public release of documents" and that Gen. Abrams "has not received any documents" from the Article 32 Hearing. Ibarguen Aff. ¶¶ 12-13 & Exs. J-K.

17. The Article 32 Hearing was the subject of extensive news coverage by the *Express-News* and other national and local media. *See, e.g.*, Ibarguen Aff. ¶¶ 14-15 & Exs. L-M.

18. On October 2, 2015, counsel for Sgt. Bergdahl specifically authorized the *Express-News* to represent to this Court that Sgt. Bergdahl consents to the relief sought by this Petition. Ibarguen Aff. ¶ 16.

19. The lack of public and press access to the 15-6 Report, Interview Transcript, and other evidence discussed in open court and accepted into evidence, as well as transcripts of the Article 32 Hearing, has already inhibited the press' ability to report fully on the Article 32 Hearing. Consequently the public has only been partially informed about the nature, conduct, and basis for the prosecution of Sgt. Bergdahl, and lacks information necessary to make sense of what occurred at the Article 32 Hearing, to monitor Respondents in their performance of their official duties, and to assure itself that justice is being done by the military justice system.

Reasons for Granting the Writ

A large body of military law holds that the public has a right, secured by the First Amendment, to attend Article 32 hearings and courts-martial. In recognizing this right, the military courts have relied on Supreme Court precedent concerning civilian criminal prosecutions, and have observed

that public access to military prosecutions (like civilian prosecutions) is critical because it promotes the basic fairness of the proceedings as well as public confidence in the judicial system.

Although the issue has never been squarely addressed in the military courts, it is well-established in civilian courts that contemporaneous access to judicial records of open proceedings is a critical component of the First Amendment right of access. Without timely access to records, the bases for judicial decisions remain secret, in-court proceedings can be unintelligible, and judicial fairness and public confidence are harmed rather than secured. The same is true in the military justice system, particularly where, as here, unclassified judicial records form the basis for a criminal prosecution that could result in the complete deprivation of Sgt. Bergdahl's liberty. The First Amendment right of access thus attaches to the judicial records of *United States v. Bergdahl*, and it requires that Respondents immediately release exhibits already received into evidence at the Article 32 Hearing and provide contemporaneous access to future judicial records in *United States v. Bergdahl*.

I. The Public Has A Constitutional Right of Contemporaneous Access To Judicial Records In Military Proceedings, Including Evidence And Transcripts.

The Rules for Courts-Martial ("RCM") mandate that both Article 32 hearings and courts-martial be presumptively open to the public, except in limited circumstances based on specific findings. RCM 405(i)(4) (2015 amendment, superseding the former RCM 405(h)(3)), 806. This is not just a default procedural rule, but the embodiment of the public's right of access to judicial proceedings that is independently protected by the First Amendment, and which would be meaningless without access to judicial records.

The Supreme Court has long recognized that a right of access to criminal proceedings is "implicit in the guarantees of the First Amendment." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). This right furthers more than dissemination of information—openness ensures basic fairness because "the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. Co. v. Superior Court of Cal.* (*"Press-Enterprise II"*), 464 U.S. 501, 508 (1984); *see also Richmond Newspapers*, 448 U.S. at 596 (open trials promote "true and accurate factfinding"). It also ensures public confidence in the justice system because people not actually attending trials can assure themselves that

standards of fairness are being observed. *Press-Enterprise II*, 464 U.S. at 508; *see also United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (right of access promotes "confidence in the administration of justice" and ensures that courts have a "measure of accountability").

It is settled law that the First Amendment right of access applies with equal force to Article 32 hearings and courts-martial in military courts. *See, e.g.*, *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997) (First Amendment right of access applies to Article 32 hearings); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) ("The [First Amendment] right to public access to criminal trials extends to courts-martial."); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (same); *United States v. Story*, 35 M.J. 677, 677 (A.C.M.R. 1992) (per curiam) (same). And it works to equal effect: in these military judicial proceedings, as in federal criminal prosecutions, constitutionally-mandated public access "'effect[s] a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury.'" *San Antonio Express-News v. Morrow*, 44 M.J. 706, 710 (A.F. Ct. Crim. App. 1996) (quoting *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985)).

The First Amendment right of access to in-court proceedings also encompasses a right to access documents related to those

proceedings. *See, e.g.*, *Washington 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); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) ("[T]he public and press have a First Amendment right of access to pretrial documents in general.").[2] The public specifically has a right to access material accepted into evidence and other documents submitted by the parties to the court. *See, e.g.*, *Tri-Cnty. Wholesale Distribs., Inc. v. Wine Grp., Inc.*, 565 F. App'x 477, 490 (6th Cir. 2012) (constitutional right of access "extends well beyond judicial opinions. . . . to court dockets, records, pleadings, *and exhibits*") (emphasis added); *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999) (constitutional right of access to documents filed as exhibits in support of pretrial motions); *United States v. Peters*, 754 F.2d 753, 763-64 (7th Cir. 1985) (right of access applies to trial exhibits); *In re Hearst Newspapers, LLC*, 641 F.3d 168, 176 (5th Cir. 2011) (citing various decisions recognizing right to access "documents filed for use in

[2] Indeed, every federal Court of Appeal to consider the issue has ruled that the First Amendment right of access to judicial proceedings extends to judicial records. *See Ctr. for Constitutional Rights v. Lind*, 954 F. Supp. 2d 389, 402 n.11 (D. Md. 2013) (citing cases).

sentencing proceedings"). Without access to these key documents, proceedings are closed for all practical purposes—the public and press are unable to fully understand the in-court proceedings and are left in the dark as to the full bases for the court's ultimate decision. They are consequently unable to assure themselves that justice is being done and that the judicial process is fair.

For similar reasons, the First Amendment also specifically requires that the public have access to transcripts or other recordings of public in-court proceedings. *See, e.g.*, *Perry v. City & Cnty. of S.F.*, No. 10-16696, 2011 WL 2419868, at *20 (9th Cir. Apr. 27, 2011) (video recording of in-court proceeding "can only remain sealed if Proponents satisfy the strict demands of the First Amendment"); *United States v. Doe*, 356 F. App'x 488, 490 (2d Cir. 2009) (First Amendment principles apply to sealing of sentencing transcript); *United States v. Antar*, 38 F.3d 1348, 1359-61 (3d Cir. 1994) ("the right of access . . . encompasses equally the live proceedings and the transcripts which document those proceedings"). As the Third Circuit has explained, transcripts allow those who are not physically present to "access" a court proceeding and vindicate the public value of openness:

> True public access to a proceeding means access to knowledge of what occurred there. It is served not only by witnessing a proceeding firsthand, but also by learning about it through a secondary source. . . . Access to the documentation of an open proceeding, then, facilitates the openness of the proceeding itself by assuring the broadest dissemination. It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?

Antar, 38 F.3d at 1360.

Moreover, the First Amendment requires that the public's access to these judicial records be contemporaneous with the actual proceedings. *See, e.g.*, *Doe v. Public Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) ("the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies"); *Application of Nat'l Broad. Co., Inc.*, 635 F.2d 945, 952 (2d Cir. 1980) ("only the most compelling circumstances should prevent contemporaneous public access" to physical evidence used at trial). When disclosure is delayed, "the public benefits attendant with open proceedings are compromised . . . ." *Public Citizen*, 749 F.2d at 272; *see also Chicago Tribune Co. v. Ladd*, 162 F.3d 503, 506 (7th Cir. 1998). Even minimal delays are unacceptable. *See, e.g.*, *Associated Press*, 705 F.2d at 1147 (finding that even a

48-hour presumptive sealing period for documents violates the First Amendment right of public access).

Accordingly, the public (including the Press Petitioners) has a right of contemporaneous access to the records of the criminal proceedings against Sgt. Bergdahl, including the 15-6 Report and Interview Transcript received into evidence, other evidence accepted during the Article 32 Hearing and the transcript of the Article 32 Hearing.

II. Respondents' Denial of Access In This Case Cannot Be Reconciled With Established Precedents Governing Sealing.

Because a First Amendment access right attaches to the records of this case—including the 15-6 Report, Interview Transcript, and transcript of the Article 32 Hearing—those records may only be withheld from public access if there are "compelling factors to justify closure" that "outweigh[] the value of openness." *ABC, Inc.*, 47 M.J. at 365; *see also Hershey*, 20 M.J. at 436.

To ensure that this constitutional limit is respected, the convening authority, presiding officer or military judge must take specific steps before denying public access to a judicial record. First, he or she must provide the public with notice and an opportunity to object. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Second, he or she must make specific, on-the-record findings that sealing is necessary

to further a compelling government interest and is narrowly tailored to serve that interest. *Scott*, 48 M.J. at 665-66; *see also Press-Enterprise II*, 464 U.S. at 513; *Hershey*, 20 M.J. at 436. In doing so, he or she must "consider reasonable alternatives to closure." *Hershey*, 20 M.J. at 436; *see also United States v. Anderson*, 46 M.J. 728, 731 n.4 (A. Ct. Crim. App. 1997) ("Prior to issuing a closure order, the trial court should be obligated to show that the order constitutes the *least restrictive means available* for protecting the overriding interest.") (internal citation omitted). The findings must be made on a "case-by-case" and "circumstance-by-circumstance" basis. *ABC, Inc.*, 47 M.J. at 365.[3]

Accordingly, this Court held in *Scott*, 48 M.J. 663, that a military judge abused his discretion in withholding an exhibit from public view "on the basis of an unsupported conclusion rather than on the basis of an overriding interest that is likely to be prejudiced if the exhibit is not sealed." *Id.* at 665-66. The military judge had concluded that the exhibit, which "contained extensive and detailed information about the attempted murder charge" in that case, should be withheld from

[3] These requirements have been repeatedly reaffirmed by the military courts in the context of access to in-court proceedings, and have been codified in RCM 405(i)(4) and 806(b)(2). *See, e.g.*, *United States v. Ducharme*, 59 M.J. 816, 818 (N-M. Ct. Crim. App. 2004); *United States v. Terry*, 52 M.J. 574, 577 (N-M. Ct. Crim. App. 1999).

the public because of "the apparent and significant privacy interests of persons referred to therein." *Id.* at 665. This Court found the judge's reasoning insufficient to deny public access to the exhibit because the military judge "did not conduct an Article 39(a), UCMJ, session on the record to discuss the issue and his concerns"; did not make evident on the record whether he "considered reasonable alternatives to sealing"; and "did not make adequate findings supporting the sealing of the exhibit to aid in [appellate] review . . . ." *Id.* at 666-67.

Here, Respondents have failed to provide any rationale for their denial of access, not even a conclusory assertion of privacy interests like that rejected as insufficient in *Scott*. The only reason given for the withholding of these records, which have been referred to repeatedly in the public Article 32 Hearing, is that they are "part of an on-going legal process." *See* Christenson Aff. Ex. A; *see also id* Exs. B-C. Indeed, these documents were discussed during the public Article 32 Hearing and were entered into evidence as unclassified documents. That they are part of the on-going and public process against Sgt. Bergdahl is precisely why the public is entitled to have access to them.

Even if Respondents attempted to follow the constitutional prerequisites required for sealing any evidence accepted during the Article 32 Hearing, there is no sufficiently "overriding

interest that is likely to be prejudiced if the [documents are] not sealed." *Scott*, 48 M.J. at 665-66. The requested documents are not classified,[4] and the Interview Transcript and 15-6 Report were referred to repeatedly in open court throughout the public Article 32 Hearing. Sgt. Bergdahl has repeatedly stated, through his counsel, that he would like those two documents to be released, and has a petition pending before this Court seeking the release of the documents. See *Bergdahl v. Burke et al.*, Army Misc. 20150624, "Petition for Writ of Mandamus" at 2 & Exhibits thereto. Even Maj. Gen. Dahl testified during the Article 32 Hearing that he had no objection to his 15-6 Report or the Interview Transcript being made public. *See Bergdahl v. Burke et al.*, Army Misc. 20140624, Unofficial Tr. at 310:6-8. And as Sgt. Bergdahl's counsel has recently pointed out, "the parties could literally have read [these documents] into the

[4] Even where a military proceeding may reveal classified or security matters, the Government's "simple utilization of the terms 'security' or 'military necessity'" is not enough. *United States v. Grunden*, 2 M.J. 116, 121 (C.M.A. 1977), *superseded on other grounds as recognized in United States v. Torres*, No. ARMY 9800575, 2001 WL 36264237 (A. Ct. Crim. App. May 25, 2001). Rather, "[b]efore a trial judge can order the exclusion of the public on this basis, he must be satisfied from all the evidence and circumstances that there is a reasonable danger that presentation of these materials before the public will expose military matters which in the interest of national security should not be divulged." *Id.* at 122. And he must carefully determine, on the record, which specific portions of the proceeding will touch on classified matters, allowing public access to everything else. *Id.* at 123-24; *see also Denver Post Corp. v. United States*, No. ARMY MISC 20041215, 2005 WL 6519929, at *3 (A. Ct. Crim. App. Feb. 23, 2005).

record from cover to cover." *Bergdahl v. Burke et al.*, Army Misc. 20150624, "Petition for Writ of Mandamus" at 4-5. Moreover, the hearing transcripts the Press Petitioners seek would reflect only those events that occurred in the open in-court proceedings.

Because Respondents have not made, and cannot make, adequate findings that sealing any of these documents is necessary to prevent prejudice to an overriding interest, and that sealing would be narrowly tailored to serve that interest, the public was and is entitled to access to these records of the Article 32 Hearing. The public's right of contemporaneous access to these documents has already been infringed, and each day that the records are withheld compounds the injury to these rights. Further, to avoid future constitutional violations, Respondents should also be ordered to provide the public with contemporaneous access to future unclassified filings, evidence, hearing transcripts, and other judicial records as they are received in this case, except where a military judge or other presiding officer provides the public with notice of sealing and an opportunity to be heard and makes specific, on-the-record findings that closure is necessary to further a compelling government interest and is narrowly tailored to serve that interest.

III. Respondents Have Authority To Release The Requested Documents.

Although Respondents have disclaimed responsibility for releasing the requested documents, *see* Ibarguen Aff. ¶ 13 & Ex. K, they undoubtedly have authority under the RCM to do so. As convening authorities, Respondents Lt. Col. Burke and Gen. Abrams have the power to direct the pretrial investigation of Sgt. Bergdahl (including the Article 32 Hearing), by, among other things, "giv[ing] procedural instructions." RCM 405(c). They also have authority to issue protective orders governing public disclosure of evidence. *See* RCM 405(g)(1)(B). For his part, Respondent Lt. Col. Visger, has authority as the investigating officer to seal portions of the Article 32 Hearing. By vesting Respondents with authority to issue procedural orders and to ***deny*** access to documents and the Hearing itself, these rules implicitly grant one or all of Respondents with the authority to ***release*** documents when the First Amendment so demands.

Jurisdiction

The Press Petitioners have standing to bring this Petition to enforce the public's First Amendment right of access under the Court of Appeals for the Armed Forces' decision in *ABC, Inc.*, 47 M.J. at 365. *See also Denver Post Corp.*, 2005 WL 6519929, at *2 (noting "obvious" "procedural error" in closing

Article 32 proceedings before allowing newspaper's counsel to address the issue).

This Court has jurisdiction to grant the relief sought pursuant to the All Writs Act, 28 U.S.C. § 1651(a) and the Military Code, based on the Court's potential appellate jurisdiction over the underlying prosecution under Article 66(b)(1), UCMJ, since the authorized maximum punishment for the offenses with which Sgt. Bergdahl has been charged qualifies for mandatory appellate review, MCM ¶¶ 9e, 23e. *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013) ("The All Writs Act and Article 66, UCMJ establish the CCA's jurisdiction [to grant extraordinary writs].") (internal citations omitted).

Even though no findings or sentence have been entered in the underlying case, this Court may grant the requested writ "in aid of" its potential appellate jurisdiction because the Press Petitioners seek to "modify an action that was taken within the subject matter jurisdiction of the military justice system" that has "the potential to directly affect the findings and sentence." *LRM*, 72 M.J. at 367-68 (internal citations omitted); *see also Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012) (granting writ to remove military judge before findings and sentence were entered). Specifically, because Sgt. Bergdahl has separately indicated that withholding public access to unclassified judicial documents in his case will affect his Sixth Amendment

right to a fair trial, *see* Ibarguen Aff. Ex. D, "Request for Interpretation," at 3, 5, has filed his own Petition before this Court seeking to release unclassified judicial documents, *Bergdahl v. Burke et al.*, Army Misc. 20150624, "Petition for Writ of Mandamus," and has indicated to Press Petitioners that he consents to this Petition, Ibarguen Aff. ¶ 16, the public access sought by this Petition has the potential to directly affect the findings and sentence in any court-martial of Sgt. Bergdahl (and indeed whether there is a court-martial at all) under the binding precedents of *ABC, Inc.*, 47 M.J. at 364, and *Center for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013). *See also San Antonio Express-News*, 44 M.J. at 708-09 (exercising jurisdiction over press petition for writ of mandamus compelling public access to pretrial investigation).

The relief sought by this Petition cannot be obtained during the ordinary course of appellate review under Articles 66 or 69, UCMJ. That review would only occur far down the road, following what is likely to be a lengthy decision-making process by Respondent Lt. Col. Visger, and then in the event of a referral, a lengthy and complicated court-martial. But as explained *supra*, the public's First Amendment right is one of ***contemporaneous*** access. Indeed, "each passing day may constitute a separate and cognizable infringement of the First Amendment," which is irreparable. *CBS, Inc. v. Davis*, 510 U.S.

1315, 1317 (1979) (Blackmun, J., in chambers); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126-27 (2d Cir. 2006) (noting, in context of action by news media seeking access to judicial records, that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (internal citations omitted). The public has thus ***already*** been injured by the denial of access to records, and delaying access until after the disposition of the charges against Sgt. Bergdahl could result in years of irreparable and compounded constitutional violations that eviscerate the purpose and value underpinning the public's right to contemporary access to these documents. *See generally Nebraska Press Ass'n V. Stuart*, 427 U.S. 539, 609 (1976) (Brennan, J., concurring) (noting that "delay . . . could itself destroy the contemporary news value of the information the press seeks to disseminate"); *Public Citizen*, 749 F.3d at 272 (when disclosure is delayed, "the public benefits attendant with open proceedings are compromised"). And failing to grant the relief requested at this time will ratify Respondents' disregard of the First Amendment, which is as binding in the military justice system as it is in all other tribunals.

Moreover, the Press Petitioners seek an order requiring Respondents to comply with constitutional requirements of access on a going-forward basis. Putting off such an order is likely

to lead to additional disputes over access and further constitutional violations until those disputes are resolved.

Request for Expedited Review

The Press Petitioners request expedited review of this Petition because the First Amendment violations that this Petition seeks to address constitute a continuing, irreparable injury to the public's right of contemporaneous access to judicial records.

Pertinent Parts of the Record and Exhibits

Pertinent portions of the Article 32 Hearing were conducted on the record on September 17 and 18, 2015, however, official transcripts of those proceedings have not been released as explained *supra*. The pertinent portions of the official record are therefore not reasonably available to the Press Petitioners under Rule 20(a)(3). However, as noted above, an unofficial copy of the transcript has been filed by Sgt. Bergdahl with this Court. *See Bergdahl v. Burke*, Army Misc. 20150624, Unofficial Transcript. All exhibits relating to this Petition are attached as Exhibits A through M to the Affidavit of Diego Ibarguen and Exhibits A through C to the Affidavit of Sig Christenson.

Conclusion

The prosecution of Sgt. Bergdahl may be the most-watched and politicized military prosecution in recent history, with everyone from Facebook commenters to Presidential candidates

expressing their views on Sgt. Bergdahl, the governmental actions taken to secure his release, and the conduct of his prosecution. This prosecution must be fair, and must be ***perceived*** as fair by its many watchers, or the public's faith in the military justice system will quickly erode.

For the foregoing reasons, the Press Petitioners respectfully request that this Court:

(a) afford this Petition expedited consideration;

(b) set the case down for oral argument;

(c) issue a writ of mandamus or other appropriate writ directing Respondents to:

i. immediately release to the public the transcript of Maj. Gen. Dahl's interview of Sgt. Bergdahl;

ii. immediately release to the public the executive summary of Maj. Gen. Dahl's A.R. 15-6 investigation report concerning Sgt. Bergdahl;

iii. immediately release to the public all other unclassified materials admitted into evidence during the Article 32 Hearing;

iv. immediately release to the public transcripts of the Article 32 hearings on the charges against Sgt. Bergdahl held at Fort Sam Houston in San Antonio, Texas, on September 17 and 18, 2015; and

v. in the event that the charges against Sgt. Bergdahl are referred to a court-martial for trial, provide the public with contemporaneous access to future unclassified filings, evidence, hearing transcripts, and other judicial records as they are received in this case unless a military judge provides the public with notice of sealing and an opportunity to be heard and makes specific, on-the-record findings that closure is necessary to further a compelling government interest and is narrowly tailored to serve that interest; and

(d) grant other relief as the Court deems just and proper.

Dated: October 2, 2015

Respectfully submitted,

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[5] Above-listed counsel are not admitted to practice before this Court and therefore are moving for leave to appear *pro hac vice* in this matter pursuant to A.C.C.A. Rule 13(c). As set forth in the simultaneously filed motions for *pro hac vice* admission, counsel are members in good standing of the bar of New York State and are admitted

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Certificate of Filing and Service

I certify that I have, this 2nd day of October, 2015, filed and served the foregoing Petition for Extraordinary Relief by emailing copies to the Clerk of Court, Respondents Gen. Abrams, Lt. Col. Burke, and Lt. Col. Visger, the Government Appellate Division, and counsel for party in interest Sgt. Bergdahl at the following email addresses:

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