

Hearst Newspapers, LLC v. Burke, Misc. Dkt. No. 20150652 (Army Ct. Crim. App. 2015)	1
Hearst Newspapers, LLC v. Burke, No. 16-_____/AR (C.A.A.F. filed 3 Nov. 2015)	1

Statutes:

Art. 32, UCMJ, 10 U.S.C. § 832	1
Art. 67(a), UCMJ, 10 U.S.C. § 867(a)	1
All Writs Act, 28 U.S.C. § 1651	1

Rules:

Rules of the U.S. Court of Appeals for the Armed Forces:

Rule 4(b) (2)	1
Rule 18(a) (4)	1
Rule 27(b)	1
Rule 33	1

Introduction

Pursuant to Rules 4(b)(2), 18(a)(4), and 27(b), the All Writs Act, 28 U.S.C. § 1651, and Article 67(a), UCMJ, SGT Robert B. Bergdahl prays that the Court reverse an unpublished 14 October 2015 decision of the U.S. Army Court of Criminal Appeals that denied a petition for writ of mandamus. *Hearst Newspapers, LLC v. Abrams*, Misc. Dkt. No. 20150652 (Army Ct. Crim. App. 2015), Ex. 1. The case concerns access to the records of an Article 32, UCMJ, preliminary hearing in which he is the accused, and is related to both *Hearst Newspapers, LLC v. Abrams*, No. 16-____/AR, which seeks review of the same decision, and *Bergdahl v. Burke*, No. 16-0059/AR, which seeks review of an earlier Army Court decision. The instant writ-appeal petition is timely filed.

Because another writ-appeal petition has been filed from the same decision of the Army Court and our position is the same as that of the Hearst appellants, we ask in accordance with Rule 33 that the Court suspend the provisions relating to the content of writ-appeal petitions, in order to permit us to adopt the arguments made by them as well as those made by SGT Bergdahl in No. 16-0059/AR.

History of the Case

The history of the case is set forth in the Hearst appellants' writ-appeal petition. As a real party in interest, SGT Bergdahl moved for and was granted leave to intervene in their

case below. He is therefore entitled to file a writ-appeal petition from the decision below.

Argument

Sergeant Bergdahl joins in the Hearst appellants' writ-appeal petition.

Conclusion

For the reasons stated by the Hearst appellants, the decision below should be reversed. If the Court remands rather than proceeding to the merits, it should set an early date certain for the completion of proceedings on remand and direct the return of the record for such further proceedings here, if any, as may be necessary. Oral argument is requested.

Respectfully submitted,

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Certificate of Filing and Service

I certify that I have, this 3rd day of November, 2015 filed and served the foregoing Writ-Appeal Petition and Motion to Suspend Rules by emailing copies to the Clerk of Court, the Government Appellate Division, and counsel for the Hearst appellants and *amici curiae* at the following email addresses:

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Exhibit 1

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before HAIGHT, PENLAND, and WOLFE
Appellate Military Judges

HEARST NEWSPAPERS, LLC et al., Petitioner
&
Sergeant ROBERT B. BERGDAHL, Real Party in Interest
v.
General ROBERT B. ABRAMS, Commander, Respondent
&
Lieutenant Colonel PETER Q. BURKE, Commander, Respondent
&
**Lieutenant Colonel MARK A. VISGER, Preliminary Hearing Officer,
Respondent**
&
UNITED STATES, Respondent

ARMY MISC 20150652

For Petitioner: Jennifer D. Bishop; Diego Ibarguen (on brief).

For Real Party in Interest: Lieutenant Colonel Jonathan F. Potter, JA; Captain Alfredo N. Foster, JA; Lieutenant Colonel Franklin D. Rosenblatt; Eugene R. Fidell (on brief).

For Respondent: Pursuant to A.C.C.A. Rule 20(e), no response filed.

14 October 2015

SUMMARY DISPOSITION AND ACTION
ON PETITION FOR EXTRAORDINARY RELIEF IN THE
NATURE OF A WRIT OF MANDAMUS

Per Curiam:

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 2 October 2015, Hearst Newspapers, LLC et al. petitioned this court for extraordinary relief in the nature of a writ of mandamus. On 5 October 2015, Sergeant Robert B. Bergdahl filed a motion for leave to intervene as a real-party-in interest, which was granted by this court on 13 October 2015.

Petitioner presents the following two issues:

A. WHERE UNCLASSIFIED DOCUMENTS ARE RECEIVED INTO EVIDENCE DURING A PUBLIC ARTICLE 32 [UCMJ] 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 [UCMJ] PRELIMINARY HEARING OFFICER REQUIRED TO MAKE TRANSCRIPTS OF A PUBLIC ARTICLE 32 HEARING AVAILABLE TO THE PUBLIC IMMEDIATELY FOLLOWING THE HEARING?

Petitioner asks this court to answer both questions in the affirmative and to issue a writ of mandamus directing the public release of documents.

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 has not demonstrated that 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.

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court