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*.	**APPELLANTS' REPLY IN SUPPORT OF THEIR WRIT-APPEAL PETITION** USCA Dkt. No. 16-0116/AR Crim. App. Misc. Dkt. No. ARMY 20150652

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

Pursuant to Rules 27(b) and 28(c)(2), Appellants respectfully submit this reply in support of their Writ-Appeal Petition ("Writ-Appeal" or "Op. Br.").[1]

Introduction

Appellees' brief ("Ans. Br.") fails to directly address in any meaningful way the only issue raised on this appeal – the threshold question of whether the Army Court has jurisdiction to simply ***consider*** the Petition – focusing instead on arguments that actually go to the Petition's merits or are otherwise divorced from the jurisdictional question in this case.

The jurisdictional issue is vitally important, and Appellees' arguments (though they do not squarely address the issue at hand) highlight the current legal confusion over the scope of the Army Court's jurisdiction and the proper venue for Appellants to seek relief. For instance, Appellees claim that *ABC v. Powell* and volumes of CCA decisions are no longer good law (although they have not been overruled), and suggest that Appellants should look first to the federal courts for relief (although those courts defer to the military courts' possible jurisdiction). Without clarity on whether and when the military courts have jurisdiction to hear petitions filed by the press or

[1] Capitalized terms not defined herein shall have the meaning given to them in Appellants' Writ-Appeal.

public to enforce the First Amendment right of access, Appellants and others are required to engage in time-consuming and ultimately wasteful efforts to secure their rights in multiple fora. Resolution of the jurisdictional question here will provide clarity where there is now confusion, conserve judicial and party resources, and further the timely resolution of important constitutional rights recognized by this Court.

I. THE ARMY COURT ERRED IN DISCLAIMING JURISDICTION.

A. The Army Court's Jurisdiction Is Not Limited To Issues That May "Directly Affect" The Findings And Sentence.

Appellants are not seeking to "enlarge" the military appellate courts' jurisdiction as Appellees contend. Ans. Br. 7. To the contrary, Appellants ***agree*** that neither the All Writs Act nor the doctrine of potential jurisdiction creates jurisdiction, and that the Army Court's power to issue writs is "narrowly circumscribed" by the UCMJ. *See id.* 5-7; Op. Br. 11-13.

But Appellants do dispute that these principles limit the Army Court's (and, by extension, this Court's) jurisdiction to review of writ petitions where "the harm alleged [has] 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 and quotation marks omitted). The Army Court's statutory jurisdiction is not so limited. The UCMJ requires the Army Court to "***review***" "the entire record" and then to "***act***"

with respect to the findings and sentence. 10 U.S.C. § 866 (emphasis added). This difference between scope of review and action matters: because the Army Court's action on the findings and sentence must be based on review of "the entire record," it may reverse based on issues in the record that did not individually "directly affect" the findings and sentence, but nonetheless amount to prejudice.[2] Alternatively, the Army Court may review the record, find no prejudice, and affirm. *See Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999) (this Court has "jurisdiction … to ***review the record*** in specified cases….") (emphasis added) (citation and quotation marks omitted).

Nor does Supreme Court precedent support the "directly affect" standard. The applicable Supreme Court decisions make clear that where the Army Court would have jurisdiction to "review the record" on direct appeal, it has jurisdiction to consider a writ petition that takes place within the court-

[2] Appellees cite Article 59(a), UCMJ, which restricts the Army Court from reversing a finding or sentence based on a legal error "unless the error materially prejudices the substantial rights of the accused." Ans. Br. 8 (quoting 10 U.S.C. § 859(a)). This is another limitation on the Army Court's ultimate action, not what is within its jurisdiction to ***review***. Moreover, Appellees' reliance on this provision reveals a logical inconsistency running throughout their brief: Appellees appear to concede that errors that materially prejudice the accused's substantial rights are reviewable on a writ petition, but such issues will not necessarily "directly affect" the findings and sentence. In fact, this Court has found that denial of public access ***can*** warrant reversal. *See, e.g.*, *United States v. Ortiz*, 66 M.J. 334 (C.A.A.F. 2008).

martial process and thus is part of that record. *See* Op. Br. 13-14 (discussing *Goldsmith*, 526 U.S. 529, and *United States v. Denedo*, 556 U.S. 904 (2009)).[3]

Indeed, Appellees do not point to any statutory or Supreme Court basis for their "directly affect" standard, and instead rely only on general statements about the limited use of extraordinary writs in *Bankers Life & Casualty Co. v. Holland*. Ans. Br. 7-8 (quoting 346 U.S. 379 (1953)). But *Bankers Life* has no application here – it did not address subject-matter jurisdiction but instead held that mandamus was unwarranted ***on the merits***. Specifically, the Supreme Court held that mandamus was an "inappropriate" remedy because the challenged district court action (a venue transfer order) was wholly within the district court's jurisdiction, involved no abuse of judicial power, and thus did not amount to a "clear abuse of discretion or 'usurpation of judicial power'" that would justify the use of mandamus. *Bankers Life*, 346 U.S. at 382-83. Because *Bankers Life* has nothing to do with jurisdiction to consider a writ petition, it does not speak to the Army Court's jurisdiction here.

B. 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.

Even under the standard that Appellees advance, the Army

[3] Appellees do not (because they cannot) dispute that the Petition falls within these bounds. *See* Op. Br. 15-17.

Court had jurisdiction to consider the Petition because it has "the potential to directly affect the findings and sentence." Op. Br. 17-26. To avoid this conclusion, Appellees alternatively argue (1) there is no appellate jurisdiction over Article 32 hearings; (2) any such jurisdiction is limited to the "conduct" of the hearing; and (3) public access to the judicial records of an Article 32 hearing does not have even the ***potential*** to affect its outcome. All of these arguments are unsupported.

1. An Article 32 Hearing May Directly Affect The Ultimate Findings And Sentence.

Appellees first make the unprecedented suggestion that the military appellate courts might ***never*** have jurisdiction to review an Article 32 proceeding, either on direct appeal or on writ petitions. *See* Ans. Br. 8-13. Their support for this proposition is a catalogue of differences between an Article 32 hearing under the new RCM 405 and a court-martial, but this list is a red herring. Appellees do not explain ***how*** these differences are relevant to the Army Court's jurisdiction; they merely assert, without support, that because an Article 32 hearing does not "look like" a court-martial, it "may not have the potential to directly affect the findings and sentence."[4]

In fact, it is not at all "unclear" whether the Army Court can review Article 32 errors. *See* Ans. Br. 8. The Army Court's

[4] By using "may," Appellees appear to concede there ***is*** potential for an Article 32 hearing to affect the findings or sentence.

power to review the Article 32 process on direct appeal is well-established. *See* Op. Br. at 19 (citing cases). There is no reason why the changes to RCM 405 would eliminate that review – an Article 32 hearing is still a "predicate to the referral of charges to a general court-martial" and thus an "important element of the military justice process." *United States v. Davis*, 64 M.J. 445, 446, 449 (C.A.A.F. 2007);[5] *see also* DA PAM 21-17 (Procedural Guide for Article 32 Preliminary Hearing Officer) §§ 1-4(a), 2-1(b), C-1 (describing duties of hearing officer as "similar to … a judicial officer" and an Article 32 hearing as "a quasi-judicial proceeding [which] plays a necessary role in the due process of law in military justice"). Defendants still have substantial rights at the Article 32 stage that can be infringed, including but not limited to the rights to counsel, to access exculpatory evidence, to present defense and mitigation matters, and to cross-examine witnesses. RCM

[5] Appellees cite *Davis* for its holding that Article 32 errors do not "necessarily fall[] within that narrow class of defects treated by the Supreme Court as structural error subject to reversal without testing for prejudice." Ans. 9 (quoting *Davis*, 64 M.J. at 449). This means only that some Article 32 errors, *while reviewable*, must be harmful to warrant reversal. Appellees also rely on *Davis* as establishing that Article 32 errors should be raised with the military judge prior to invoking the All Writs Act, Ans. Br. 14, but there is no military judge yet in this case, and waiting until a judge is appointed would result in continuing violations of Appellants' First Amendment rights. *See generally CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1979).

405(f).[6] And because the Army Court's subject-matter jurisdiction to issue extraordinary writs flows from its jurisdiction on direct appeal, *see* Ans. Br. 5; *supra* at 2-3, it follows that it has jurisdiction to review extraordinary writs that seek to correct at least those Article 32 errors that would be reviewable on direct appeal.[7]

Moreover, under Appellees' own standard, an Article 32 hearing undeniably has the ***potential*** to directly affect the findings and sentence in a court-martial. It is true that an Article 32 hearing does not "dictate" an outcome and that a convening authority is not "constrained" by an Article 32 recommendation (and Appellants have never claimed otherwise). Ans. Br. 10. Nevertheless, the Article 32 hearing and resultant recommendation form the record on which the referral is based, and thus obviously can affect the convening authority's referral decision – otherwise, there would be no purpose in holding an

[6] Thus, it is not of ***any*** significance that the formal rules of evidence do not apply in preliminary hearings. *See* Ans. Br. 10 n.42. As Appellees admit, Appellants nonetheless have the right to present matters in defense and mitigation that are relevant to the preliminary hearing's scope. *See* Ans. Br. 11 (quoting RCM 405(f). Improper exclusion of such matters could amount to an error reviewable by the appellate courts. *See* Ans. Br. 9-10.

[7] Although *Lawanson v. United States* involved a petition seeking review of the denial of a motion to dismiss, it nonetheless shows the Army Court's power to review defects in the court-martial process that arise before an Article 32 hearing, because the Army Court's decision to issue the writ was based on its finding that such a defect warranted dismissal of the charges. *See* Ans. Br. 12-13 (citing No. NMCCA 201200187, 2012 WL 3799586, at *10 (N.M. Ct. Crim. App. Aug. 31, 2012).

Article 32 hearing at all. And as Appellants have explained, the convening authority's referral decision has a direct effect on the disposition of the charges. *See* Op. Br. 18-19; *see also United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004) (explaining that an Article 32 investigation can lead to a plea deal and thereby affect the outcome of a prosecution).

2. Appellate Review of An Article 32 Hearing Is Not Limited To Its "Conduct," And The Petition Seeks Review Of The Conduct of the Article 32 Hearing.

Appellees next contend – again without support – that any jurisdiction the Army Court has over an Article 32 proceeding is limited to errors in the "conduct" of the Article 32 hearing, but not other errors. *See* Ans. Br. at 13-15. But non-"conduct" errors in the Article 32 process can be part of the reviewable record under Article 66, *see supra* at 2-3, can affect the outcome of the Article 32 process, *see supra* at 7-8, and can even "prejudice a substantial right" and warrant reversal, *see supra at* 3 n.2; Ans. Br. 14 n.59. *See, e.g.*, *Garcia*, 59 M.J. at 452 (waiver of Article 32 hearing warranted reversal).

In any event, Appellees' assertion that Appellants have not challenged the "conduct" of the Article 32 Hearing contorts both Appellants' requests for access and Appellees' denials of those requests. Ans. Br. 14. Appellants never asked for "modification of the protective order" as Appellees claim. *Id*. Rather, Appellants requested access to unclassified materials as they

were introduced as exhibits at the Hearing, as judicial records subject to the First Amendment. Ibarguen Aff. ¶ 12 & Ex. J; Christenson Aff. ¶¶ 5-8 & Exs. A-C; *see also* Ibarguen Aff. Ex. F. Regardless of whether Appellees denied those requests because of a protective order, the denials were part of their administration of the conduct of the Hearing – a procedural decision ***within*** the court-martial process (*see supra* at 6-7). This case is thus nothing like *Goldsmith*, where there was no jurisdiction over a challenge to an executive action taken ***wholly outside*** the military justice system. 526 U.S. at 535.

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

Under Appellees' own "directly affect" standard, the crux of this case is whether denial of access to the requested records can potentially affect the outcome of the Article 32 hearing, and by extension, the findings and sentence (*see supra* at 7-8). Appellants have already explained that it can: public access to evidence, like public access to hearings, makes a proceeding fairer and thus can affect its outcome – that is why the Constitution protects access in the first place. *See* Op. Br. 21-24. None of Appellees' arguments negate this conclusion.

Appellees first argue that the records sought do not raise constitutional concerns under the "experience and logic" test developed by the Supreme Court, because, they claim, the records

have not historically been open to public inspection and play no role in the court-martial process. App. Br. 16-17. But the requested records are precisely the type of documents that have been and should be open to public inspection – they were submitted as exhibits in a criminal preliminary proceeding that, as explained above, has a distinctly judicial character. *See, e.g.*, *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). Moreover, the records at issue here in fact played a crucial role in Sgt. Bergdahl's prosecution: besides forming part of the record on which any referral will be based, *see supra* at 7-8, they were the very basis for the charges against Sgt. Bergdahl.[8]

In any event, Appellees' arguments about whether a constitutional right of access applies are merits arguments that put the cart before the horse. Under the jurisdictional standard espoused by Appellees, what matters now is whether access to these documents can potentially affect the outcome of the

[8] There is no support for Appellees' further assertion that a defendant's Sixth Amendment right to a public trial does not attach to Article 32 hearings. To the contrary, "[a]n accused's right to a public Article 32 investigative hearing is a 'substantial pretrial right' protected by the Sixth Amendment." *United States v. Davis*, 62 M.J. 645, 647 (A.F. Ct. Crim. App. 2006) *aff'd*, *United States v. Davis*, 64 M.J. at 450 (adopting the reasoning of the lower court but declining to address the constitutional dimension of an improper closure); *see also ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997).

Article 32 hearing. Public access has the potential to affect the fairness of a proceeding and thus its outcome; the Constitution guarantees access ***because*** of this effect, not the other way around. *See* Op. Br. 22-23 (citing cases). And access to judicial records has the same error-correcting effect as access to a hearing. *See id.* 23-24. Any argument to the contrary presents a false dichotomy: there is no reason why public access to evidence entered through live testimony would improve the fairness of the proceeding, while access to evidence entered in the form of documents would not. When access to records is denied, just as when access to a hearing is denied, the public cannot properly conduct its evaluative and protective function and the fairness of the proceeding suffers.

Appellees point only to irrelevant rules and law in arguing that the access requested here will not increase fairness. For instance, they assert that the RCM treats hearings and documents differently, and that the denial of access did not violate the RCM. *See* Ans. Br. 17-18. But even assuming that is true, it does not follow that denial of access will have no impact on the hearing's fairness.

Appellees also argue that the requested records are "inadmissible evidence," the release of which could have a "negative role … in the functioning of the criminal process" by "exposing the public … to incriminating evidence that the law

has determined may not be used to support a conviction." Ans. Br. 18-20.[9] This argument is based entirely on the Tenth Circuit's decision in *United States v. McVeigh*, which concluded that access to suppressed evidence could have a "negative" impact on a criminal proceeding. 119 F.3d 806, 813 (10th Cir. 1997). But Appellees ignore that the *McVeigh* decision and the cases it relied on draw a clear distinction between evidence that was "actually ruled inadmissible" after a suppression hearing, and thus can never form the basis of any court decision (other than the decision to suppress it), and evidence like the records at issue here, which are received into evidence and form part of the record on which a substantive decision (here, the referral) is based.[10] *See id.*; *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977) (distinguishing exhibits that are admitted and thus "in the public domain" from non-public documents "not yet admitted into evidence"). Consistent with this distinction, a wealth of case law holds that exhibits submitted on non-discovery matters ***other*** than a suppression hearing are subject to public access, without any analysis of whether that material would be admissible and without noting any

[9] Appellees also cite *McVeigh*'s holding that the "logic and experience" test does not support a constitutional right to access suppressed evidence in arguing that no such right attaches to the records requested by Appellants. App. Br. 16-17. That argument fails for the same reasons.
[10] *See* RCM 405(a), (j); 407.

"negative" impact on the justice process.[11]

This distinction makes sense: the concerns about public access to "***incriminating*** evidence that … may not be used to ***support*** a conviction" animating *McVeigh* are not present outside the context of suppression motions — the very purpose of which is to limit the evidence that the government can present against the accused out of concern for their fair trial rights. They are certainly not present here, where Sgt. Bergdahl himself seeks to make the requested records public.[12]

Even assuming *McVeigh* has some applicability outside the suppression context and crediting Appellees' assertion that the MG Dahl's opinions would be inadmissible at trial, Ans. Br. 19, Appellees still lack a basis for their claim that public access to the requested records would not improve the fairness (and hence the outcome) of the Article 32 Hearing. First, there is

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[11] *See, e.g.*, *In re Time Inc.*, 182 F.3d at 271 (exhibits filed in support of pretrial motions); *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995) (exhibit to appointed court officer's investigation report); *United States v. Kravetz*, 706 F.3d 47, 57-59 (1st Cir. 2013) (letters submitted in support of sentencing); *United States v. Int'l Boxing Fed'n*, No. Civ.A. 99-5442, 2000 WL 1575576, at *3 (D.N.J. Jan. 28, 2000) (distinguishing *McVeigh* and holding that "sealed materials [that] are the foundation of the government's preliminary injunction motion" were subject to public access); *see also, e.g.*, *Romero v. Drummond Co.*, 480 F.3d 1234, 1245-46 (11th Cir. 2007) ("[m]aterial filed in connection with any substantive pretrial motion, unrelated to discovery").

[12] In stark contrast, the defendants in *McVeigh* objected to release of the suppressed evidence because it would impact their right to a fair trial. *McVeigh*, 119 F.3d at 809.

more to the requested records than MG Dahl's opinions – including the Interview Transcript, which Appellees admit is admissible. Ans. Br. 16 n.69. Appellees have made no argument as to why access to the interview or factual portions of the records would not improve the fairness of the proceeding. Second, even as to MG Dahl's opinions, in this context those opinions are akin to government arguments in favor of a certain disposition submitted as part of motion practice, which are routinely subject to public access. *See, e.g.*, *McVeigh* (presumptive right of access to suppression motions); *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (presumptive right of access to pretrial motion papers); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (similar).[13]

C. Any "Alternative Means" Of Relief are Irrelevant and Inadequate.

Appellees finally argue that Appellants have "alternative means" to obtain relief through the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). As a threshold matter, the existence of alternative relief is irrelevant to the jurisdictional question currently before this Court — it goes to the merits of whether a court should issue a writ, not whether a court can consider the petition. *See, e.g.*, *Goldsmith*, 526 U.S. at 537-38.

[13] Appellees also point to the questioning of MG Dahl on "inadmissible matters." Ans. Br. 20-21. But that testimony was in open court, and Appellees appear to concede that public access to that testimony was required. *Id.* at 17.

Regardless, FOIA is not an adequate substitute for the contemporaneous access to the requested records that Appellants are entitled to under the First Amendment. The access required by the Constitution is not coterminous with – and in many instances is greater than – that mandated by FOIA. *See Dayton Newspapers, Inc. v. U.S. Dep't of Navy*, 109 F. Supp. 2d 768, 772-73 (S.D. Ohio 1999). At the same time, FOIA allows for lengthy delays in production – often amounting to several years in practice – whereas the First Amendment demands ***contemporaneous*** access so that public scrutiny can have its error-correcting and fairness-boosting effect. *See, e.g.*, *Doe v. Public Citizen*, 749 F.3d 246, 272 (4th Cir. 2014); *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991). Appellants' receipt of the documents through FOIA several years down the road will not satisfy the First Amendment.[14]

Conclusion

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

[14] Appellees also suggest that Appellants should have sought relief *first* in the federal courts before asking the military appellate courts for extraordinary relief. Ans. Br. 22. This is a Catch-22; as Appellants have pointed out, federal courts defer to the military courts' potential jurisdiction under the doctrines of exhaustion and abstention. *See* Op. Br. 9-10 (citing *Loving v. United States*, 62 M.J. 235, 240 (C.A.A.F. 2005)).

Dated: December 3, 2015 Respectfully submitted,

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I certify that I have, this 3rd day of December, 2015, filed and served the foregoing Writ-Appeal Petition by emailing copies to the Clerk of Court, the Government Appellate Division, Appellate Government Counsel Jihan E. Walker, and counsel for Sgt. Robert B. Bergdahl, the Appellant-Intervenor and Party In Interest, at the following email addresses:

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