IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

ROBERT B. BERGDAHL, Sergeant, U.S. Army, *Appellant,* v. PETER Q. BURKE, Lieutenant Colonel, 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, and UNITED STATES, *Appellees.*	:	BRIEF ON BEHALF OF NBC NEWS, A DIVISION OF NBCUNIVERSAL MEDIA, LLC AS *AMICUS CURIAE* Crim. App. Misc. Dkt. No. Army 20150624 USCA Dkt. No. 16-0059/AR Dated: 22 October 2015

Daniel M. Kummer
[C.A.A.F. Bar No. 32931]
Senior Vice President, Litigation
NBCUNIVERSAL MEDIA, LLC
30 Rockefeller Plaza
Rm. 1221-28A18
New York, New York 10112
Phone: (212) 664-4017
Fax: (212) 664-6572
Email: daniel.kummer@nbcuni.com

Attorney for Amicus Curiae
NBC News, a division of
NBCUniversal Media, LLC

Index of Brief

Table of Cases, Statutes, and Other Authorities

CASES

MILITARY COURT RULES

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

NBC News, a division of NBCUniversal Media, LLC ("NBC News"), by its undersigned counsel, respectfully submits this brief as *amicus curiae*, in support of the writ-appeal petition submitted by Sgt. Robert B. Bergdahl.

NBC News joins in and unreservedly supports the First Amendment and jurisdictional arguments made, respectively, by *amici curiae* Center for Constitutional Rights and National Institute of Military Justice. NBC News will not repeat those arguments here, but instead submits this brief for the principal purpose of underscoring the potentially dispositive *common law* grounds for granting the requested mandamus relief. A straightforward application of the common law doctrine of presumptive public access to "judicial documents" - which unquestionably encompasses the investigative report and interview transcript received in evidence at the Article 32 proceeding below - calls for making those documents immediately available to the public and the media.

Issue Presented

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

Statutory Jurisdiction

NBC News joins in Sgt. Bergdahl's assertion of the grounds for this Court's jurisdiction, as further supported by the submission of *amicus* National Institute of Military Justice, but adds the following observation to that discussion: the decision of the United States Army Court of Criminal Appeals is fundamentally at war with itself on the question of jurisdiction over the instant writ-appeal. On the one hand, the Army Court ruled that it lacked jurisdiction under the holding of *Clinton v. Goldsmith*, 526 U.S. 529 (1999), on the ground that the petition concerns a pre-referral protective order that has purported applicability beyond the pending Article 32 preliminary hearing, and is therefore somehow outside the military justice process that may eventually produce findings and a sentence reviewable by the Army Court and this Court. ACCA decision at 3-4. On the other hand, after assuming *arguendo* that it *did* have jurisdiction, the Army Court's discussion of the merits of the petition expressly acknowledged that issues of public access to hearings and evidence in an Article 32 preliminary hearing, as well as the handling of unclassified material and sealing of exhibits in such a proceeding, are governed by provisions of the Manual for Courts-Martial. *Id.* at 5-7. It is simply untenable to posit that the orders and public access rights at issue here

are decoupled from the administration of military justice and somehow more akin to the administrative actions that were at issue in *Clinton v. Goldsmith*. This Court should accept jurisdiction over the instant writ-appeal.

Statement of Facts

NBC News accepts and incorporates by reference the facts and case history in Appellant's writ-appeal petition. However, NBC News highlights the following facts relevant to the issues discussed below:

Sgt. Bergdahl's preliminary hearing was open to the public in accordance with R.C.M. 405(i)(4) and this Court's decision in *ABC, Inc. v. Powell,* 47 M.J. 363, (C.A.A.F. 1997), and members of the press and public attended throughout. The 373-page transcript of Sgt. Bergdahl's sworn statement to Major General Dahl during the AR 15-6 investigation was offered by the government as its first exhibit, and Major General Dahl's investigative report, including an executive summary and his findings and recommendations, was offered by the defense. Art. 32 Tr. at iii; 222; 381. Both of those unclassified, unsealed documents were received in evidence by the hearing officer, *id.* at 226, 345-46, and the substance of each was discussed openly and at length in the presence of those observing the hearing, without any limitation sought by either party. Twice during the hearing, counsel for Sgt. Bergdahl requested that his sworn

statement be publicly released. *Id.* at 17, 228. The record does not reflect any objection by the Government to such release at the hearing before the hearing officer stated he had no authority to direct release. *Id.* at 228. Maj. Gen. Dahl further testified that he had no objection to public release of either the executive summary of his AR 15-6 report or Sgt. Bergdahl's sworn statement. *Id.* at 309.

Argument

THE COMMON LAW DOCTRINE OF PRESUMPTIVE PUBLIC ACCESS TO JUDICIAL DOCUMENTS REQUIRES THAT THE UNCLASSIFIED, UNSEALED EVIDENCE AT ISSUE BE PUBLICLY RELEASED, AS THE GOVERNMENT HAS NOT MET AND CANNOT MEET ITS BURDEN OF DEMONSTRATING WHY THE PROTECTIVE ORDER SHOULD SUPPLANT THAT RIGHT OF ACCESS.

The First Amendment principles and standards governing the right of access to court proceedings have been ably briefed in other submissions before the Court. Recognizing the general principle that a federal court should base its ruling on non-constitutional grounds if it can avoid a constitutional ruling, *see Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), *amicus* NBC News believes it can best assist the Court alongside the other *amici*

by amplifying the concomitant standards under common law regarding access to "judicial documents and records."[1]

Numerous federal courts have held, as a matter of common law, that the public has a fundamental, presumptive right of access to "judicial records and documents." *See, e.g. Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *United States v. Blagojevich*, 612 F.3d 558, 563 (7th Cir. 2010) ("[T]here is common-law right of access by the public to information that affects the resolution of federal suits"); *Lugosch v. Pyramid Co. of Onandaga*, 435 F.3d 110, 119 (2d Cir. 2006) ("[t]he common law right of public access to judicial documents is firmly rooted in our nation's history")(citing *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) *("Amodeo I")*); *Smith v. U.S. Dist. Court for S. Dist of Illinois*, 956 F.2d 647, 650 (7th Cir.1992) (noting that "right of access applies to civil as well as criminal cases; it can also apply to pretrial proceedings"); *F.T.C. v. Standard Fin. Mgmt Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) ("[W]e rule that relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory

---

1 NBC News acknowledges that *amicus* Center for Constitutional Rights has also summarized the common law standards at note 4 of its brief, to which the Court is respectfully referred as well.

proceedings, become documents to which the presumption of public access applies." (footnote omitted)); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir.1984)("[t]he existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute"); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983) (releasing previously sealed court documents concerning civil litigation for public inspection pursuant to both First Amendment and common-law right of access), *cert. denied*, 465 U.S. 1100 (1984).

As the First Circuit observed in *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986), these common law principles are "the foundation on which the courts have based the first amendment right of access to judicial proceedings." The rationale and purpose of this doctrine are plain:

> Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings.

United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir.1995) ("*Amodeo II*"); *see also, Republic of Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 56 (D.N.J. 1991) ("The right of access to judicial records, like the openness of court proceedings, serves to enhance the basic fairness of the

proceedings and to safeguard the integrity of the fact-finding process.")

In *Lugosch*, the Second Circuit outlined the appropriate analysis for application of the common law right of access:

> Before any such common law right can attach, . . . a court must first conclude that the documents at issue are indeed "judicial documents." In *Amodeo I*, we held that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." In order to be designated a judicial document, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process."
>
> Once the court has determined that the documents are judicial documents and that therefore a common law presumption of access attaches, it must determine the weight of that presumption. "[T]he weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance."
>
> Finally, after determining the weight of the presumption of access, the court must "balance competing considerations against it." Such countervailing factors include but are not limited to "the danger of impairing law enforcement or judicial efficiency" and "the privacy interests of those resisting disclosure."

435 F.3d at 119-20 (citations omitted).

As to the first prong, the courts have brought somewhat differing approaches to defining what constitutes a "judicial document." For example, the First Circuit takes a similar

approach to that of the Second Circuit, focusing on the relevance of the document to the adjudicatory process of the court. *Compare F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 (financial records were "judicial documents" and open to the public because they were "relevant and material" to assessing a proposed Consent Decree and would be relied upon "in determining the litigants' substantive rights and in performing [the court's] adjudicatory function"), *with Anderson v. Cryovac*, 805 F.2d at 13 (documents exchanged in discovery and attached to discovery motions were not "judicial documents.") The Third Circuit takes a somewhat more expansive approach based on the filing status of the document. *See, e.g.,; Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781-82 (3d Cir. 1994) (a document is a "judicial record" if it has been "'filed with, placed under seal, interpreted or enforced by the district court,'" and has not been "restored to [its] owner after [the] case has been completely terminated'")(quoting *Enprotech Corp. v. Renda*, 983 F.2d 17, 20 (3d Cir. 1993) and *Littlejohn v. Bic Corp.*, 851 F.2d 673, 683 (3rd Cir. 1988)); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165 (3d Cir. 1993)("there is a presumptive right to public access to all material filed in connection with nondiscovery pretrial motions").

Numerous courts have deemed documents and other materials (such as video and audio tapes) that have been received in

evidence in a hearing in a criminal case, or even simply relied upon without being formally admitted in evidence, to be subject to a presumptive right of access. *See, e.g., United States v. Graham*, 257 F.3d 143, 151-52 (2d Cir. 2001)(audio and video tapes played during pre-trial detention hearing deemed "judicial documents" subject to common law right of access, even though not admitted in evidence); *United States. v. Salerno* (*In re* CBS, Inc.), 828 F.2d 958 (2d Cir. 1987) (applying common law right of access to videotaped deposition shown to jury in criminal trial); *Valley Broad. Co. v. U.S. Dist. Court for Dist. Of Nevada*, 798 F.2d 1289, 1293-94 (9th Cir. 1986) (granting mandamus and applying presumptive common law right of access to audio and video tapes admitted into evidence in criminal trial); *United States v. Martin*, 746 F.2d 964 (3d. Cir 1984) (applying common law access right both to audio tapes admitted in evidence at trial and to unadmitted transcripts used by jury); *United States v. Jenrette* (*In re* Nat'l Broad. Co., Inc.), 653 F.2d 609 (D.C. Cir. 1981) (same holding as to audio and video tapes admitted in evidence in criminal trial); *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981) (same); *United States v. Myers* (*In re* Nat'l Broad. Co., Inc.), 635 F.2d 945 (2d Cir. 1980) (same); *Commonwealth v. Upshur*, 592 Pa. 273 (2007) (audiotape played at preliminary hearing but not formally entered in evidence was a judicial record subject to common law right of access.)

Once identified as a "judicial document," the evidence is presumptively open to public inspection and the burden is on the party seeking to prevent disclosure to demonstrate that strong countervailing interests, such as privacy or ongoing law enforcement investigations, outweigh the presumption of access. *Amodeo II*, 71 F. 3d at 1047-48, 1050. Here again, to be sure, the circuits have differed to some extent in prescribing the weight to be accorded that presumption and the nature of the countervailing burden to overcome it in different contexts. However, as the Ninth Circuit analyzed in *Valley Broadcasting*, the "majority approach" with respect to access to evidentiary materials in criminal cases "requires that the trial court start with *'a strong presumption'* in favor of access, to be overcome only 'on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.'" 798 F.2d at 1293-94 (quoting *United States v. Edwards* (*In re Video-Indiana, Inc.*), 672 F.2d 1289, 1294 (7th Cir. 1982) (emphasis added).

No decision of this Court or any lower military court has apparently addressed application of the common law right of access to documents received in evidence at an Article 32 hearing. However, the "strong presumption" of access prescribed in *Valley Broadcasting* and other cases cited above is entirely consistent with, and indeed logically flows from, this Court's

holding in *ABC, Inc. v. Powell,* 47 M.J. at 365, that Article 32 proceedings must be open to the public "absent 'cause shown that outweighs the value of openness,'" and that "the scope of [any] closure must be tailored to achieve the stated purposes and should be 'reasoned,' not 'reflexive.'" *Id.* (citations omitted)

Here, as noted above, the preliminary hearing itself was open to the public and attended throughout by members of the press and public. Sgt. Bergdahl's sworn statement during the AR 15-6 investigation and Major General Dahl's investigative report, both of which are *unclassified and unsealed,* were received in evidence by the hearing officer. Art. 32 Tr. at 226, 345-46. The substance of each of those exhibits was discussed openly and at length during the hearing, in the presence of the attending public and without any requested or imposed limitations. Both documents were unquestionably relevant and material to the hearing officer's performance of his designated function and undoubtedly useful in the Article 32 preliminary hearing process.

Moreover, Sgt. Bergdahl, the accused, not only consented to the public release of his sworn statement but twice during the hearing *affirmatively requested* such release, without any registered objection by the government. *Id.* at 17, 228. Maj. Gen. Dahl had no objection to public release of either his AR 15-6 report or Sgt. Bergdahl's sworn statement. *Id.* at 309.

In the face of this record, and notwithstanding the general protective order previously entered, a strong presumption of public and press access to these evidentiary documents should apply under the legal principles and standards discussed above. To the extent the government has a continuing objection to such access on the merits - as opposed to a jurisdictional objection to mandamus relief to effectuate such access - this Court should hold it to a heavy burden to show cause, by articulating specific facts and reasons rather than "reflexive" and "unsupported hypothesis or conjecture," why that strong presumption should be overcome in this specific context.

Before the Army Court, the government cited only a generalized interest in protecting individual privacy rights and avoiding release of personally-identifiable information in violation of the Privacy Act as a basis for invoking the protective order to prevent access to these documents. Gov't ACCA Br. at 16. Of course, the person with presumably the greatest privacy interest in these documents, Sgt. Bergdahl, has waived such privacy claims by repeatedly requesting public release of the documents. Nonetheless, the Court can easily tailor its order to require redaction of his or any other sensitive, personally-identifiable information in the documents, such as Social Security numbers, prior to any public release. Specific privacy considerations can be readily addressed and should not

impede public access to these evidentiary documents of significant national interest.

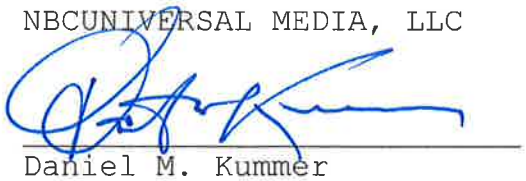
Conclusion

For the reasons set forth above, *amicus curiae* NBC News respectfully requests that this Court grant Sgt. Bergdahl's request for mandamus relief and direct that his sworn statement and the report of the AR 15-6 investigation be publicly released, together with such other and further relief as the Court deems just and proper.

Dated: October 22, 2015

Respectfully submitted,

NBCUNIVERSAL MEDIA, LLC



By: Daniel M. Kummer
[C.A.A.F. Bar No. 32931]
Senior Vice President, Litigation
30 Rockefeller Plaza
Rm. 1221-28A18
New York, New York 10112
Phone: (212) 664-4017
Fax: (212) 664-6572
Email: daniel.kummer@nbcuni.com

Attorney for Amicus Curiae
NBC News, a division of
NBCUniversal Media, LLC

Certificate of Compliance with Rules 24(d) and 26(d)

1. This amicus brief complies with the type-volume limitation of Rules 24(c) and 26(d) because it contains 3240 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface (12 point, 10 character per inch Courier New) using Microsoft Word 2010.

Dated: October 22, 2015

Daniel M. Kummer
[C.A.A.F. Bar No. 32931]
Senior Vice President, Litigation
NBCUNIVERSAL MEDIA, LLC
30 Rockefeller Plaza
Rm. 1221-28A18
New York, New York 10112
Phone: (212) 664-4017
Fax: (212) 664-6572
Email: daniel.kummer@nbcuni.com

Attorney for Amicus Curiae
NBC News, a division of
NBCUniversal Media, LLC

Certificate of Filing and Service

I certify that a copy of the foregoing *Motion of NBC News, a division of NBCUniversal Media, LLC, for Leave to File A Brief as Amicus Curiae* and the attached *Brief of Amicus Curiae* was, on 22 October 2015, transmitted by email to the Clerk of Court and to the below-listed counsel for Appellant, Appellee and *amici curiae* at the following email addresses:

efiling@armfor.uscourts.gov (Clerk of Court)
efidell@ftlf.com (Eugene R. Fidell)
franklin.d.rosenblatt.mil@mail.mil (LTC Franklin D. Rosenblatt)
alfredo.n.foster.mil@mail.mil (Cpt. Alfredo N. Foster, Jr.)
jonathan.f.potter3.mil@mail.mil (LTC Jonathan F. Potter)
Jihan.e.walker.mil@mail.mil (Cpt. Jihan E. Walker)
Albert.g.courie2.mil@mail.mil (Maj. Albert G. Courie, III)
usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@mail.mil
(Government Appellate Division)
shayana.kadidal@gmail.com (Shayana Kadidal, counsel for *amicus curiae* Center for Constitutional Rights)
mljucmj@court-martial.com (Philip D. Cave, counsel for *amicus curiae* NIMJ)
Rvanlandingham@swlaw.edu (Rachel E. VanLandingham, counsel for *amicus curiae* NIMJ)

Dated: October 22, 2015

Daniel M. Kummer
[C.A.A.F. Bar No. 32931]
Senior Vice President, Litigation
NBCUNIVERSAL MEDIA, LLC
30 Rockefeller Plaza
Rm. 1221-28A18
New York, New York 10112
Phone: (212) 664-4017
Fax: (212) 664-6572
Email: daniel.kummer@nbcuni.com

Attorney for Amicus Curiae
NBC News, a division of
NBCUniversal Media, LLC