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, 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*.	)	APPELLANT'S REPLY Crim. App. Misc. Dkt. No. 20150624 USCA Dkt. No. 16-0059/AR

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

Index

Table of Authorities

Cases:

Constitution and Statutes:

Rules and Regulations:

Introduction

Not content to tiptoe (at 10 n.41) past the extraordinary pattern of character assassination to which SGT Bergdahl has been and continues to be subjected in the media and social media, appellees offer a cramped view of the All Writs Act, 28 U.S.C. § 1651, that would inflict lasting injury on this Court and the military justice system by extending *Clinton v. Goldsmith*, 526 U.S. 529 (1999), far beyond its limits. On the merits, they proffer an equally cramped reading of the public character of preliminary hearings under Article 32, UCMJ.

Oral argument is warranted.

Procedural Matters

1

Recusal, and assignment of a Judge sitting by designation

We learned after filing the writ-appeal petition that the nominee for a vacancy on the Court is no longer employed as a commissioner. On one level that alleviates any concern about his participation since one would expect this case to be decided before he joins the Court (assuming he receives a hearing[1] and favorable committee and floor action). *See also* Rule 19(e) (writ-appeal petitions afforded priority). There is no assurance that

[1] The Senate Armed Services Committee website does not indicate that a hearing has been scheduled on the nomination.

that will be the case, however, and our concern over Senator McCain's outrageous comments therefore remains justified.

But appellees' footnote treatment of the recusal question (at 1 n.1) prompts two additional observations. First, their view that "the limited issue before this court is administrative in nature and does not impact [on] the adjudication of [appellant's] guilt or innocence" reveals a breathtakingly narrow appreciation of the judicial process and this Court's function. There is no need to belabor the point beyond saying that it is of a piece with appellees' equally radical contention (at 7) that preliminary hearings may not even be subject to the All Writs Act.

Second, because Chief Judge Baker's term expired without a confirmed nominee ready to fill his seat (unfortunately, not an uncommon event in the Court's history), the Court is below full strength. While arrangements have been made for Article III judges to sit by designation, it is our understanding that those judges do so only for petition cases in which review has been granted and do not participate in the consideration of petitions for grant of review.

Writ-appeal petitions do not fall neatly into either category and we are unaware whether the Court's plan is to arrange for an Article III judge to participate in the disposition of this case. We ask that it do so because of the importance of the

question presented, the value that an Article III judge can add to the Court's understanding of public access to court records in the civilian federal courts, and the need to avoid the possibility of an affirmance by an equally divided court. The latter is especially critical since the case presents potential certiorari-worthy issues but would be ineligible for Supreme Court review if the Court were to deny relief (even by a tie vote). 28 U.S.C. § 1259(4).

2

Related case

On 14 October 2015, the Army Court summarily dismissed *Hearst Newspapers, LLC v. Abrams*, Misc. Dkt. No. 20150652 (Army Ct. Crim. App. 2015), for lack of jurisdiction. Sergeant Bergdahl was allowed to intervene as a real party in interest. The period for submission of writ-appeal petitions has not yet expired. Sergeant Bergdahl anticipates seeking review here within the prescribed period.

3

Status of the Article 32 proceedings

Appellee Burke forwarded the preliminary hearing officer's report to GEN Abrams (the general court-martial convening authority) on 20 October 2015. LTC Burke did not include a recommendation as to disposition because he had signed the charge sheet (as we had argued in *Bergdahl v. Burke*, Dkt. No. 15-

0710/AR (C.A.A.F. 2015) (mem.)). As of this writing GEN Abrams has taken no action.

We have not suggested modification of the caption since LTC Burke remains in the picture as issuer of the still-effective protective order.

4

Status of the Request for Interpretation

The Department of the Army Professional Conduct Council has issued nothing further in response to appellate defense counsel's 24 June 2015 Request for Interpretation, which is referred to in the writ-appeal petition at page 4.

Argument

1

Jurisdiction

Missing from the answer is any recognition of the principle that courts established by Congress – a category that includes both the service courts and this Court – may issue extraordinary writs in cases that could in the future come before them. This is not open to question. Nor is it fairly arguable that the relief sought falls outside the scope of the All Writs Act because of *Goldsmith*.

Whatever might be the framework for seeking public release of unclassified AR 15-6 reports or unclassified transcripts of interviews conducted in the course of an AR 15-6 investigation,

once such documents have been submitted in evidence in a public preliminary hearing, they fall into a separate juridical category. They become subject to precisely the same principles of public access as apply to the hearing itself.

That they may prove to be inadmissible at trial is of no moment once they have been accepted as exhibits by the preliminary hearing officer – as happened here.[2] Preliminary hearings are part and parcel of the court-martial process. Indeed, that is the sole reason they exist, since otherwise all a commander would need to do when faced with a matter requiring scrutiny is appoint a formal or informal board of investigation or a Court of Inquiry.

Nothing inextricably linked Major Goldsmith's being dropped from the rolls to the court-martial process. In stark contrast, SGT Bergdahl's preliminary hearing is integral to the court-martial process, and is governed in detail by provisions of both the Code and the *Manual*. To read *Goldsmith* as precluding relief under the All Writs Act is to do violence to that decision.

[2] Appellees maintain (at 22) that MG Dahl's AR 15-6 report would be inadmissible as hearsay. But the rules of evidence may be relaxed for sentencing purposes. Additionally, to the extent that MG Dahl might have to testify if there were a trial and the government sought to offer SGT Bergdahl's interview transcript in evidence (as it did at the preliminary hearing), the AR 15-6 report would likely be an exhibit as well in the course of cross-examination on the merits or on a motion to suppress the transcript for failure to administer necessary cleansing warnings.

Merits

Appellees insist (at 13-14, 23) that the writ-appeal petition should be denied because the documents at issue may properly be withheld from the public because of the protective order. This claim is mistaken. For one thing, it is far from clear that the protective order, by its terms, actually forbids what the writ-appeal petition seeks. If it does, it is impermissible because – applying the standards that apply to the analogous decision to close a court-martial or preliminary hearing – it is not narrowly drawn and lacks the kind of particularized findings that the closure cases demand.

Appellees claim (at 14, 18) that one purpose is to protect personally identifying information (PII) from dissemination, and we of course understand that, but it has no purchase here because there is no PII in either of the documents at issue and in any event SGT Bergdahl not only consents to their release: he demands it.

Appellees' other claim (at 14, 18) is that the protective order seeks to guard against the dissemination of "sensitive information" in compliance with several Army Regulations and the Privacy Act. The Privacy Act rationale drops out because, again, SGT Bergdahl himself wants the documents released, and appellees have pointed to no one else whose Privacy Act interests are at

stake. *See also* AR 340-21, *Office Management: The Army Privacy Program* ¶ 5-5h(4) (5 July 1985) ("Court-martial files are exempt [from the Privacy Act] because a large body of existing criminal law governs trials by court-martial to the exclusion of the Privacy Act").

As for the various Army Regulations appellees cite, the question is what particularized interest they vindicate and how that interest is in fact served by withholding them from the public in the circumstances. And precisely what is the "sensitive information" in these documents? Appellees have not even attempted to answer these critical questions.

Appellees claim (at 4, 12) that SGT Bergdahl has not asked the appointing authority for MG Dahl's AR 15-6 investigation to permit release of the documents at issue. This disregards the fact that he did so in April and again on September 13. *See* Writ-Appeal Petition at 4 & Ex. 5. We asked GEN Abrams to release the documents and if someone else had to give approval, then to "direct [his] staff to coordinate with the cognizant official(s) and forward [our request] as necessary." Ex. 5 (¶ 2).

We have to assume that GEN Abrams or his staff passed the request to the appointing authority. But whether they did or not, AR 15-6 does not forbid the relief appellant seeks. Thus, under the rubric of "safeguarding a written report," ¶ 3-18b provides:

> No one will disclose, release, or cause to be published any part of the report, except as required in the normal course of forwarding and staffing the report or *as otherwise authorized by law* or regulation, without the approval of the appointing authority. [Emphasis added.]

A writ of mandamus issued by a court of competent jurisdiction is thus an authorized basis for disclosure notwithstanding the default rule that only the appointing authority may approve disclosure, release or publication.

If the Army did not wish to have the documents at issue becoming subject to release by court order (*i.e.*, without the appointing authority's approval), trial counsel should not have offered SGT Bergdahl's interview transcript in evidence at the preliminary hearing and should have objected to MG Dahl's AR 15-6 report being made an exhibit.[3] The appointing authority lost at the preliminary hearing whatever power he had to refuse to release those documents.

Thus, appellees' claim that SGT Bergdahl failed to request the appointing authority to release or permit the release of the documents at issue is not only factually mistaken, but of no moment in any event.

[3] The government could also have invoked M.R.E. 506. It didn't do so, presumably because the documents at issue cannot qualify under that rule.

The Freedom of Information Act

Appellees have a double-barreled theory about the application of the FOIA to the relief sought.

First, they imply (at 9, 25) that SGT Bergdahl and the *amici* ought to ask for the documents under that statute. This is both irrelevant and disingenuous.

It is irrelevant because SGT Bergdahl already possesses the documents; he doesn't need to obtain copies, and that is the sole function FOIA performs. It is also disingenuous because it could not be clearer that a request for them would be futile, despite the terms of the Army's FOIA regulation.[4] Others have made similar requests to no avail. *See* Writ-Appeal Petition at 10 n.3. Even if an answer to such a request could be obtained within a reasonable period, it is a mortal lock that it would be denied on the basis that the military justice process had not run its course.

Additionally, appellees treat the documents at issue as predecisional, which is a familiar basis for denying FOIA re-

[4] The opening paragraph of AR 25-55, *Information Management: Records Management: The Department of the Army Freedom of Information Act Program* ¶ 5-101d(2) (1 Nov 1997) speaks of the period "[b]efore evidence has been presented in open court." It goes on in ¶ 5-101d(2)(b) to forbid the release of "[s]tatements, admissions confession, or alibis attributable to an accused," but one must assume the drafter's intent was that that and other specific release prohibitions would no longer apply once the evidence had been presented in open court.

quests. Their theory seems to be that since the current commander-centric charging system leaves the disposition decision in the hands of someone other than the preliminary hearing officer, a report of preliminary hearing has no independent legal significance.

This theory should be rejected because it seeks to smuggle issues of releasability under FOIA or discoverability into an area in which those considerations have no bearing. After all, a finding of probable cause by a federal magistrate judge under Fed. R. Crim. P. 5.1 (the model for the recently-amended version of Article 32 – both refer to "preliminary hearings")[5] does not commit the United States Attorney to prosecute. And yet there is no question that probable cause determinations under that rule are a matter of public record and may be freely inspected in the district court's files.

Strictly speaking, moreover, the predecisional theory -- even if it had any merit in principle -- is of no moment here because the current writ-appeal petition does not seek public access to the preliminary hearing officer's report (that is one of the matters at issue in the *Hearst* case); it concerns the re-

[5] "Congress amended Article 32 in the National Defense Authorization Act for Fiscal Year 2014 and modeled it on Rule 5.1 of the Federal Rules of Criminal Procedure." Dep't of the Army Pamphlet 27-17, *Legal Services: Procedural Guide for the Article 32 Preliminary Hearing Officer* ¶ 1-1 (18 June 2015).

port of an AR 15-6 investigation that has been completed and received final appointing authority action last December.

4

The Nixon Tapes Case

Finally, appellees repeatedly invoke *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). That case plainly does not support the decision below. Justice Powell, writing for the majority, described it as a "concededly singular case," and the linchpin was the existence of the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695, a measure specially passed by Congress to address the unique circumstances President Nixon's case presented. Here, in contrast, all there is is the entirely generic FOIA.

The instant case is distinguishable because SGT Bergdahl already has actual possession of the documents at issue. What is more, in *Warner Communications* the Court was concerned about the effect of release of the tapes on the rights of four criminal defendants whose cases were pending on appeal. Here SGT Bergdahl is the only party whose rights as a criminal defendant might be affected by release, and he, of course, is the very party seeking release. *Warner Communications* is distinguishable on each of these grounds.

Conclusion

For the foregoing reasons and those previously stated, the decision below should be reversed. A writ of mandamus should issue directing appellees (1) to make public forthwith the unclassified exhibits received in evidence in the preliminary hearing and (2) to modify the protective order to permit SGT Bergdahl to make those exhibits public.

Respectfully submitted,

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Certificate of Filing and Service

I certify that I have, this 26th day of October, 2015 filed and served the foregoing Reply by emailing copies to the Clerk of Court, the Government Appellate Division, and counsel for all *amici curiae*, at the following email addresses:

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