

The Bergdahl Block: How the Military Limits Public Access to Preliminary Hearings and What We Can Do About It

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**THE BERGDAHL BLOCK: HOW THE MILITARY LIMITS
PUBLIC ACCESS TO PRELIMINARY HEARINGS AND
WHAT WE CAN DO ABOUT IT**

Eric R. Carpenter*

ABSTRACT

Sergeant Bowe Bergdahl and Private First Class Bradley (now Chelsea) Manning have something in common. Military officials unlawfully closed all or portions of their preliminary hearings to the public. When doing so, military officials exploited two unusual features of the military justice system, thereby denying the accused and the media of their respective Sixth Amendment and First Amendment rights to a public hearing.

The first feature is that the military justice system does not include a standing trial-level court. If there is a problem at the preliminary hearing, the accused and media have nowhere to go for help. The accused and the media must file a writ petition with a military appellate court to vindicate their rights. This leads to the second feature: these courts routinely find that they do not have jurisdiction to hear these claims. And when these courts deny the writ petitions, the accused and the media are left without an effective remedy. Recognizing this, military officials now block access to these hearings by mischaracterizing these challenges as Freedom of Information Act requests. They then tell the accused and the media to seek relief using the rights provided under that law, knowing none will be coming anytime soon.

Using the Bergdahl case as context, this Article describes this blocking maneuver. It then exposes the flawed reasoning that military appellate courts use when refusing to hear these constitutional claims. Finally, this Article offers legislative and regulatory fixes to ensure public access to these hearings.

Now is the time for change. In the last three years, Congress and the President have made significant changes to the military justice system. These changes have come in large part because the public lost trust and confidence in the military justice system. Transparency fosters trust and confidence. The more the public knows about what is considered at a preliminary hearing, the more trust and confidence the public will have in the commander's prosecutorial decision based on that hearing, and, ultimately, in the overall role of commanders in the military justice system.

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INTRODUCTION

On June 30, 2009, Sergeant Bowe Bergdahl walked away from his remote observation post in Paktika Province, Afghanistan.¹ Shortly after, he was captured by hostile forces and remained in enemy hands until May 31, 2014, when he was returned to American control in exchange for five Taliban detainees who were being held at Guantanamo Bay.² Those who were outraged by the prisoner swap, including then–Presidential candidate Donald Trump, advanced the narrative that Bergdahl was a coward and that six brave Americans died looking for him.³ Bergdahl was subsequently charged in the military justice system with desertion and endangering his unit before the enemy.⁴

¹ *A Timeline of Bowe Bergdahl's 5 Years in Captivity*, BOISE ST. PUB. RADIO, <http://boisestatepublicradio.org/topic/timeline-bowe-bergdahls-5-years-captivity#stream/0> [<https://perma.cc/ED9L-95X2>] (last visited Feb. 21, 2018); see also Alex Horton, *Bowe Bergdahl Should Spend 14 Years in Prison and Lose His Medical Benefits, Army Says*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/11/02/bowe-bergdahl-should-spend-14-years-in-prison-and-lose-his-medical-benefits-army-says/?utm_term=.813082365b35 [<https://perma.cc/4JSZ-MV6X>].

² See *A Timeline of Bowe Bergdahl's 5 Years in Captivity*, *supra* note 1.

³ Editorial, *The Soldier Donald Trump Called a Traitor*, N.Y. TIMES (Nov. 26, 2016), <https://nyti.ms/2g3Sq7h>.

⁴ Jim Michaels, *Army Sgt. Bowe Bergdahl Pleads Guilty to Desertion and Misbehavior Before the Enemy*, USA TODAY (Oct. 16, 2017, 10:27 AM), <https://www.usatoday.com/story>

In an effort to divert the case from the most serious form of court-martial, Bergdahl's defense team worked to counter this narrative. During the military preliminary hearing, the defense sought the public release of two unclassified documents that had been admitted into evidence: the transcript of Bergdahl's statement given to an investigating officer, and the executive summary of that officer's investigative report.⁵ These documents included information that Bergdahl's mental health problems caused him to leave his base, rather than cowardice; that he acted admirably while in captivity; and that no one died looking for him.⁶ With that information made public, legitimate public pressure might be brought to bear on the commanding officer who was charged with making the prosecutorial decision in his case.

Despite many requests, military officials refused to release the documents, telling the accused and the media to seek relief under the Freedom of Information Act⁷ (FOIA).⁸ The preliminary hearing officer also refused to make those documents public, saying he lacked the authority to release the documents because of an earlier order by a commander who had authority over the case.⁹ The defense and the media then filed writ petitions with a military appellate court asking that court to order the release of the reports.¹⁰ However, that court then found it did not have jurisdiction to issue the writs and agreed with the government's position that Bergdahl and the media should seek relief through FOIA.¹¹ The documents remained hidden from public view.¹²

/news/world/2017/10/16/army-sgt-bowe-bergdahl-pleads-guilty-desertion-and-misbehavior-before-enemy/767320001/ [https://perma.cc/D48T-YXGK]. Bergdahl's experience was extensively covered in the second season of the *Serial* podcast. See generally *Serial: Season Two* (2015–2016), https://serialpodcast.org/season-two [https://perma.cc/J5UH-R6BL].

⁵ Record of Preliminary Hearing Under Article 32 at 17, 228, *United States v. Bergdahl* (Ft. Bragg Sept. 17, 2015), https://ccrjustice.org/sites/default/files/attach/2015/09/Sanitized%20Article%2032%20Transcript.pdf [https://perma.cc/3E63-UDRQ]; see also Transcript of Sergeant Bergdahl's Interview with Major General Kenneth R. Dahl, *United States v. Bergdahl* (Joint Base San Antonio Aug. 6, 2014), https://bergdahldocket.files.wordpress.com/2016/03/stmt20of20accused202014_redacted.pdf [https://perma.cc/V422-CWUJ] [hereinafter Bergdahl Interview Transcript].

⁶ See Michael Ames, *What the Army Doesn't Want You to Know About Bowe Bergdahl*, NEWSWEEK (Jan. 27, 2016, 6:01 AM), http://www.newsweek.com/2016/02/05/serial-bowe-bergdahl-mystery-pow-419962.html [https://perma.cc/HLR5-2NP3]. See generally Bergdahl Interview Transcript, *supra* note 5.

⁷ 5 U.S.C. § 552 (2012).

⁸ *Request Denied to Make Bergdahl Interrogation Public*, CBS DFW (Oct. 8, 2015, 6:45 PM), http://dfw.cbslocal.com/2015/10/08/request-denied-to-make-bergdahl-interrogation-public/ [https://perma.cc/F9FW-XESC].

⁹ See discussion *infra* Part III.

¹⁰ *Hearst Newspapers, LLC v. Abrams*, ARMY MISC 20150652, 2015 WL 6119474 (A. Ct. Crim. App. Oct. 14, 2015) (per curiam).

¹¹ See *id.*; *Bergdahl v. Burke*, ARMY MISC 20150624, 2015 WL 5968401 (A. Ct. Crim. App. Oct. 8, 2015).

¹² The *Serial* producers eventually received a copy of the investigative report. Sarah

How can that happen? How can the military deny the accused and the public access to unclassified documents admitted at a preliminary hearing? The accused has a Sixth Amendment right and the media have a First Amendment right to an open military preliminary hearing.¹³ And, if transparency in criminal proceedings is ever of value, certainly it must be in cases like this, where the public is unfamiliar with the military justice system and may question its fairness. The more the public knows about what is considered at a preliminary hearing and what the commander relied upon when making his or her prosecutorial decision, the more trust and confidence the public will have in the commander's decision—and ultimately, the role of commanders in making these prosecutorial decisions.

Yet time and again, when the military has a case in the national spotlight, we see that military officials will close portions of the preliminary hearing and then the accused or the media (or both) have to litigate to get the hearing opened.¹⁴ This happened when the military court-martialed the senior-most enlisted member in the Army, Sergeant Major Gene McKinney, for sexual misconduct.¹⁵ And it happened when the military court-martialed Private First Class Bradley (now Chelsea) Manning for leaking classified information to WikiLeaks.¹⁶

One reason we keep seeing these closures is that military officials do not have the option of using a secretive proceeding like a grand jury.¹⁷ To take cases to a felony-level court-martial, military officials must use open preliminary hearings.¹⁸ If military officials want to keep some information secret, they must try to close or partially close those hearings, and the tests they must satisfy are pretty onerous.¹⁹

Sometimes the tests are not very difficult, like when the government needs to protect classified material or private information about a sexual assault victim.²⁰ Unfortunately, sometimes military officials cannot satisfy the tests for some information but close the hearing anyway, or they can satisfy the tests but close way too

Koenig, *Was Anyone Killed Looking for Bowe Bergdahl? Some Hard Evidence, at Long Last* (Oct. 6, 2016, 12:45 PM), SERIAL, <https://serialpodcast.org/posts/2016/10/was-anyone-killed-looking-for-bowe-bergdahl-some-hard-evidence-at-long-last> [https://perma.cc/8RCX-ASEJ]. The report found that no one died looking for Bergdahl. *See id.* However, three service members appear to have been wounded looking for him. Government Brief Regarding the Admissibility Evidence of Injuries During Presentencing, Motion to Recognize Victims Under Article 6b, UCMJ, and for Reconsideration at 1–4, *United States v. Bergdahl* (Ft. Bragg June 6, 2017), <https://bergdahldocket.files.wordpress.com/2016/03/g-app-81.pdf> [https://perma.cc/UQZ2-AGP4] (discussing the admissibility of evidence of injuries during presentencing).

¹³ *See* discussion *infra* Parts IV–V.

¹⁴ *See, e.g., supra* note 8 and accompanying text; *see also* discussion *infra* Part VI.

¹⁵ *See ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997).

¹⁶ *See Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013).

¹⁷ *See* Uniform Code of Military Justice art. 32 (codified at 10 U.S.C. § 832 (2012 & Supp. IV 2016)).

¹⁸ *See id.*

¹⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(i)(4) (2016).

²⁰ *See id.*

much of the hearing.²¹ Until recently, when military officials did that, military appellate courts held them accountable by granting writ petitions. In the McKinney case, for example, a military appellate court ordered the military officials to follow the rules.²²

Since that case, though, the Supreme Court issued an opinion, *Clinton v. Goldsmith*,²³ that has made military appellate courts risk-averse about exercising jurisdiction over these writ petitions. With waning appellate oversight, it now appears that military officials can close these proceedings without fear that they will be reversed while the proceeding is underway.²⁴

The military can now run the Bergdahl Block. Military officials can mischaracterize this constitutional, open trial rights problem as an access to government information problem. Military officials can then deny the request to open the hearing, tell the accused and the media that they need to submit a FOIA request, and wait months for that request to be processed, and if that request is denied, to go litigate in an Article III court. Military officials did just that to Bergdahl and the media covering his case.²⁵

Military officials can run that play without concern that they will be held immediately accountable for ignoring the rules related to open trial rights.²⁶ They can take advantage of two quirks of the military justice system. First, the military justice system does not include standing trial-level courts that can supervise the preliminary hearings and immediately resolve these issues.²⁷ Instead, the accused or the media have to apply for a writ from a military appellate court to seek any relief.²⁸ Second, the military appellate courts have very limited jurisdiction.²⁹ And now, following the Supreme Court's decision in *Goldsmith*, those courts will likely find (after using faulty reasoning) that they do not have jurisdiction.³⁰ The hearing then comes to an end without any relief.

²¹ See, e.g., *ABC, Inc. v. Powell*, 47 M.J. 363, 366 (C.A.A.F. 1997) (“Here, the SPCMCA decided to close the entire proceeding for unsubstantiated reasons.”).

²² *Id.*

²³ 526 U.S. 529, 534–37 (1999).

²⁴ See, e.g., *Bergdahl v. Burke*, ARMY MISC 20150624, 2015 WL 5968401 (A. Ct. Crim. App. Oct. 8, 2015); *Hearst Newspapers, LLC v. Abrams*, ARMY MISC 20150652, 2015 WL 6119474 (A. Ct. Crim. App. Oct. 14, 2015) (per curiam).

²⁵ See *supra* notes 1–12 and accompanying text.

²⁶ See *Goldsmith*, 526 U.S. at 534–37. See generally *Bergdahl*, 2015 WL 5968401; *Hearst Newspapers*, 2015 WL 6119474.

²⁷ See discussion *infra* Part II.

²⁸ 10 U.S.C. § 806b(e)(1), (3) (2012 & Supp. IV 2016).

²⁹ Uniform Code of Military Justice art. 66(c) (codified at 10 U.S.C. § 866(c) (2012)) (outlining the courts of criminal appeal); Uniform Code of Military Justice art. 67(c) (codified at 10 U.S.C. § 867(c) (2012)) (describing the Court of Appeals for the Armed Forces).

³⁰ See discussion *infra* Part VI. This move is not available in the federal system. If a federal magistrate closes a preliminary hearing, the affected party can refer the issue to the standing district court, and that court would have jurisdiction over both the defendant's claim and the media's claim. See discussion *infra* Part I. And if a party sought a writ based on the district court's ruling, the federal appellate courts would have jurisdiction over both claims. See discussion *infra* Part I.

That is what happened in Bergdahl's case. The Army Court of Criminal Appeals found that it did not have jurisdiction over the writ petitions and the hearing came to an end without the public gaining access to those documents.³¹ The play worked beautifully. Subsequently, a military commander referred Bergdahl's case to the most serious type of court-martial.³²

The good news—for the accused, at least—is that if military appellate courts apply the correct reasoning, the accused should be able to seek relief from a military appellate court. The block should fail. Proper analysis shows that military appellate courts have jurisdiction over an accused's writ.³³ Fortunately, because the Army court's opinion was unpublished, the correct reasoning has not yet been foreclosed.³⁴ In an effort to prevent that bad reasoning from ever becoming law, this Article will closely analyze the Army court's reasoning and contrast it with the appropriate reasoning.

The bad news—for the media, at least—is that under current case law, courts-martial and military appellate courts lack jurisdiction to hear their claims.³⁵ When the media files a petition by itself, the block will work.³⁶ To provide a meaningful avenue for relief for the media, we need to change the underlying statutory and regulatory framework.

Congress should amend the language of Article 17 (the statute that governs the general jurisdiction of a courts-martial)³⁷ and Article 32 (the statute that governs the preliminary hearing)³⁸ to give courts-martial jurisdiction over claims brought by the media so they can vindicate their open trial rights. Congress should also amend Articles 66³⁹ and 67⁴⁰ (the statutes that define the military appellate courts' jurisdiction) to include subject matter and appellate jurisdiction over claims brought by the media related to their open trial rights at these hearings. And when implementing the new Article 140a⁴¹ (a statute designed to force the President to come up with procedures to provide victims, counsel, and members of the public access to unsealed court-martial documents), the President should include procedures for releasing all documents related to the preliminary hearing.

³¹ See generally *Bergdahl*, 2015 WL 5968401; *Hearst Newspapers*, 2015 WL 6119474.

³² See *Bergdahl Heading for Harsher General Court-Martial*, CBS NEWS (Dec. 14, 2015, 2:25 PM), <https://www.cbsnews.com/news/sgt-bowe-bergdahl-harsher-general-court-martial/> [<https://perma.cc/ZL3V-VCA5>].

³³ See discussion *infra* Part IV.

³⁴ See generally *Bergdahl*, 2015 WL 5968401.

³⁵ See discussion *infra* Part V.

³⁶ See discussion *infra* Part V.

³⁷ Uniform Code of Military Justice art. 17 (codified at 10 U.S.C. § 817 (2012)).

³⁸ Uniform Code of Military Justice art. 32 (codified at 10 U.S.C. § 832 (2012 & Supp. IV 2016)).

³⁹ Uniform Code of Military Justice art. 66 (codified at 10 U.S.C. § 866 (2012)).

⁴⁰ Uniform Code of Military Justice art. 67 (codified at 10 U.S.C. § 867 (2012)).

⁴¹ Military Justice Act of 2016, Pub. L. No. 114-328, § 5504, 130 Stat. 2894, 2961–62.

Congress should also allow military judges to take on the role of a standing court for preliminary hearing issues, to include open trial issues. Military judges should be able to hear the issues as they arise and provide at least one level of contemporaneous oversight of a military official's decision to close a hearing.

This Article starts by setting up the basic federal framework that would be used if this were a civilian case.⁴² Next, this Article describes those portions of the military system⁴³ that impact this problem and points out the consequential differences: no grand jury, no standing court, and limited jurisdiction.⁴⁴ To provide the last of the information needed for us to analyze this problem, the Article then describes the facts of Bergdahl's hearing closure.⁴⁵

The Article then turns to the deeper analysis, describing the accused's robust public trial rights at the preliminary hearing, providing the correct analysis for issuing writs when those rights are denied, and demonstrating that military appellate courts can issue writs on behalf of the accused.⁴⁶ Then, the Article looks to the media's rights but recognizes that under current military case law, courts-martial and military appellate courts do not have jurisdiction to hear their claims.⁴⁷ The Article then looks at how the Army Court of Criminal Appeals handled the issue and criticizes that reasoning (as it relates to the accused) so that it will not be used again.⁴⁸

Last, the Article provides solutions to this problem.⁴⁹

I. THE BASIC FEDERAL FRAMEWORK

To provide a framework that we can then compare with the military's justice system, we will look at the defendant's Sixth Amendment rights and the media's First Amendment right to an open trial in the civilian system.⁵⁰ Once that is developed, we will look, in the abstract, at how a defendant or the media would appeal a limitation of those rights within the federal system.⁵¹

⁴² See *infra* Part I.

⁴³ The Uniform Code of Military Justice, along with the Manual for Courts-Martial, are undergoing rapid and substantial change. The National Defense Authorization Acts for 2014 and 2015 brought significant changes. See MILITARY JUSTICE REVIEW GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP—PART I: UCMJ RECOMMENDATIONS 20–23 (2015) [hereinafter UCMJ RECOMMENDATIONS]. Further, the Military Justice Act of 2016 will bring about what are arguably the most significant changes to the military justice system since its creation. See Military Justice Act, §§ 5001–5542. The very recent changes do not impact the substantive analysis used in this Article. For ease of future reference, I will cite to the current version of the law or rule unless the older rule somehow impacts the analysis.

⁴⁴ See discussion *infra* Part II.

⁴⁵ See discussion *infra* Part III.

⁴⁶ See discussion *infra* Part IV.

⁴⁷ See discussion *infra* Part V.

⁴⁸ See discussion *infra* Part VI.

⁴⁹ See discussion *infra* Conclusion and Solutions.

⁵⁰ See discussion *infra* Section I.A.

⁵¹ See discussion *infra* Section I.A.

A. Open Trial Rights

In civilian criminal trials, the accused has a Sixth Amendment right to a public trial.⁵² As the law first developed, the accused held the right to the public trial and could ask that the trial be closed,⁵³ but it is now clear that the public has a First Amendment right to an open trial that is separate from the accused's Sixth Amendment right.⁵⁴ Both rights are means toward a common end—a fair trial⁵⁵: “The public trial is a ‘safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.’”⁵⁶

An initial question is whether a preliminary hearing even counts as part of the trial. The Supreme Court has said that it does, at least in the context of the public's First Amendment right to attend.⁵⁷ The proceeding functions much like a full-scale trial,⁵⁸ the proceeding has traditionally been open,⁵⁹ and public access plays a significant role in the process (by restraining possible government abuse, for example).⁶⁰

Some features of a preliminary hearing are different than those found in a trial: it does not result in a conviction, and it is conducted before a magistrate rather than a judge and jury.⁶¹ But the Court has said that these distinctions do not matter. Those features

do not make public access any less essential to the proper functioning of the proceedings Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding. . . . [T]he preliminary hearing in

⁵² U.S. CONST. amend. VI.

⁵³ See *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 (1979); PAUL MARCUS ET AL., *THE RIGHTS OF THE ACCUSED UNDER THE SIXTH AMENDMENT: TRIALS, PRESENTATION OF EVIDENCE, AND CONFRONTATION* 31 (2d ed. 2016).

⁵⁴ See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

⁵⁵ See *Press-Enter.*, 478 U.S. at 7.

⁵⁶ MARCUS ET AL., *supra* note 53, at 33 (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

⁵⁷ See *Press-Enter.*, 478 U.S. at 13. The reasoning used in the context of the public's First Amendment context applies equally as well to the defendant's Sixth Amendment right.

⁵⁸ The accused has already been charged, the hearing is used to evaluate the weight of the evidence, and the hearing includes the presentation of evidence and cross-examination of witnesses. *Id.* at 12.

⁵⁹ *Id.* at 10 (“From *Burr* until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court.” (analyzing *United States v. Burr*, 25 F. Cas. 1 (C.C.D. Va. 1807) (No. 14,692))).

⁶⁰ *Id.* at 12–13.

⁶¹ See, e.g., *id.* at 12.

many cases provides “the sole occasion for public observation of the criminal justice system.”⁶²

Importantly, precisely because the hearing might be the final stage of the criminal process, the rights attach.⁶³ The fact that there may never be a trial is a reason for attaching the rights to the proceeding, not for disconnecting them.⁶⁴

Contrast preliminary hearings to federal grand juries, where the rights do not attach.⁶⁵ Those proceedings have traditionally been closed and opening them would frustrate the very purpose of having closed proceedings.⁶⁶ For example, law enforcement might be investigating ongoing criminal activity and by opening the grand jury, the suspect would learn that he or she is being observed.⁶⁷ That concern does not exist in preliminary hearings, where the defendant is now fully aware that law enforcement is on to him or her.⁶⁸ Records of federal grand jury proceedings remain confidential “to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.”⁶⁹ To find out what happened at a grand jury, journalists often use the state’s sunshine laws or request access to the documents once they become part of the trial record.⁷⁰

The next relevant question is when can trials (including preliminary hearings) be closed. Hearings can be closed when the party seeking closure “advances an overriding interest that is likely to be prejudiced.”⁷¹ The analysis for closing trials is the same regardless of which right is invoked—the defendant’s Sixth Amendment right or the public’s First Amendment right.⁷² Closure must be essential to preserving that overriding interest,⁷³ must be narrowly tailored to serve that interest,⁷⁴ and reasonable alternatives to closure must be considered.⁷⁵

When the defendant is moving to close a preliminary hearing, he is often concerned that evidence introduced at the hearing would otherwise be inadmissible at trial, and if the media reports on that evidence, the publicity of that inadmissible

⁶² *Id.* (internal citations omitted) (quoting *San Jose Mercury-News v. Municipal Court*, 638 P.2d 655, 663 (Cal. 1982)).

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See, e.g., Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979).

⁶⁶ *See, e.g., Press-Enter.*, 478 U.S. at 8–9; *Douglas Oil*, 441 U.S. at 222–23.

⁶⁷ *Press-Enter.*, 478 U.S. at 8–9.

⁶⁸ *See* FED. R. CRIM. P. 5.1.

⁶⁹ FED. R. CRIM. P. 6(e)(6).

⁷⁰ REPORTERS COMM. FOR FREEDOM OF THE PRESS, SECRET JUSTICE: GRAND JURIES 3, 6–7 (2004) [hereinafter REPORTERS COMMITTEE FOR FREEDOM].

⁷¹ *Press-Enter.*, 478 U.S. at 7 (citing *Waller v. Georgia*, 467 U.S. 39, 47 (1984)).

⁷² *See, e.g., MARCUS ET AL., supra* note 53, at 34–38.

⁷³ *Press-Enter.*, 478 U.S. at 13–14.

⁷⁴ *Id.*

⁷⁵ *Presley v. Georgia*, 558 U.S. 209, 214 (2010) (per curiam) (quoting *Waller*, 467 U.S. at 48).

evidence will taint the jury pool.⁷⁶ When the defendant seeks closure, the party opposing the closure will likely be the media.⁷⁷ In contrast, when the government seeks closure, that is often because it wishes to protect sensitive information, like classified information or personal information about witnesses or victims.⁷⁸ In those cases, the defendant or the media (or both) might seek relief.

In the federal system, the power to conduct preliminary hearings has been delegated from the district courts to magistrate judges.⁷⁹ In the abstract, if a magistrate judge decided to close a portion of a preliminary hearing, a party could ask the appropriate district court to reconsider that ruling.⁸⁰ The district court would likely treat the magistrate judge's decision as nondispositive, meaning the district court would review that ruling under a "clearly erroneous or contrary to law" standard.⁸¹ If the district court denied the party's request for reconsideration, that ruling would be subject to the writ analysis discussed in the next section.⁸²

In reality, it is very unlikely that a party will ever file a writ petition to open a federal preliminary hearing. If the government has sensitive information that it does not want made public, the government will simply use the grand jury to get an indictment rather than file a complaint that triggers the need for a preliminary hearing.⁸³ In those situations where the government does need to file a complaint (because of an on-scene arrest, for example), the government will likely use its negotiating power to seek a waiver from the defendant of the preliminary hearing.⁸⁴

So, we will not see the equivalent of a Bergdahl Block in the federal system. But by fully understanding the civilian writ model, we will be able to see where the military model differs and why this closure scenario keeps recurring in high-profile military courts-martial.

⁷⁶ See, e.g., *Press-Enter.*, 478 U.S. at 5; *Gannett Co. v. DePasquale*, 443 U.S. 368, 378–79 (1979).

⁷⁷ See, e.g., *Press-Enter.*, 478 U.S. at 3–6 (discussing the procedural history of the case).

⁷⁸ See *MARCUS ET AL.*, *supra* note 53, at 34–35.

⁷⁹ FED. R. CRIM. P. 5.1(a). Magistrates are legislative judges that derive their power and jurisdiction from the district courts, as outlined in the Federal Magistrates Act of 1968, 28 U.S.C. §§ 631–639 (2012).

⁸⁰ 28 U.S.C. § 636(b)(1).

⁸¹ *Id.* § 636(b)(1)(A).

⁸² See discussion *infra* Section I.B.

⁸³ See FED. R. CRIM. P. 5.1(a)(2). The Federal Rules of Criminal Procedure do not contain explicit rules for handling classified information at a preliminary hearing. See generally *id.* The procedures for handling classified information only apply after indictment. Classified Information Procedures Act, 18 U.S.C. app. 3 § 2 (2012); see also REPORTERS COMMITTEE FOR FREEDOM, *supra* note 70, at 3–4, 6–7.

⁸⁴ If the defendant seeks to close the preliminary hearing, the Department of Justice has a policy to oppose that closure: essentially, the Department will take the side of the media even if no media is present to litigate its rights. See 28 C.F.R. § 50.9 (2018). In those circumstances, conceivably the government could lose its request for reconsideration with the district court and file a writ with the appellate court. See discussion *infra* Section I.B.

B. All Writs Act

If the district court denies the party's request for reconsideration, the party can petition for a writ of mandamus.⁸⁵ A party seeking relief from an appellate court under the All Writs Act⁸⁶ must show two things: first, that the appellate court has jurisdiction; and second, that the writ is necessary and appropriate.⁸⁷ The first prong relates to whether a court *can* issue a writ, whereas the second relates to whether a court *should*.

Looking at the first prong, Article III courts have broad subject matter jurisdiction—all of the areas in the long list found in Section 2 of Article III.⁸⁸ The All Writs Act does not grant any new jurisdiction.⁸⁹ It only allows courts to issue writs in support of existing jurisdiction: “As the jurisdiction of the circuit court of appeals is exclusively appellate, its authority to issue writs of mandamus is restricted by statute to those cases in which the writ is in aid of that jurisdiction.”⁹⁰

While intermediate appellate courts can hear a broad range of subjects, Congress has limited their appellate jurisdiction over those subjects to appeals that follow the final decision in the case, known as the final judgment rule.⁹¹ On its face, this rule conflicts with the purpose of the All Writs Act. Parties invoke the All Writs Act when a district court issues an order (or fails to issue an order) and the party that lost on that issue files an interlocutory appeal.⁹² An interlocutory appeal is one filed before final judgment at trial.⁹³ The party does this by application for writ of mandamus or prohibition with the appellate court.⁹⁴

Strictly applying the final judgment rule to the All Writs Act would mean that appellate courts could not hear interlocutory appeals or issue writs related to them.⁹⁵ About the only time writs would be authorized is if a lower court failed to take action that a higher court ordered it to take in the disposition of an appeal, and that would be a rare event.⁹⁶ But Congress must have intended for appellate courts to have the power to issue writs in more circumstances than that. If parties had to wait until final

⁸⁵ See 28 U.S.C. § 1651(a) (2012).

⁸⁶ The All Writs Act is codified at 28 U.S.C. § 1651.

⁸⁷ 28 U.S.C. § 1651(a) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”).

⁸⁸ U.S. CONST. art. III, § 2, cl. 1.

⁸⁹ DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 6:2, at 198–99 (6th ed. 2013).

⁹⁰ *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 25 (1943).

⁹¹ 28 U.S.C. § 1291 (2012).

⁹² See, e.g., *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 131–32 (C.A.A.F. 2013) (Baker, C.J., dissenting).

⁹³ THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS § 4.01, at 51, 51 n.260 (2d ed. 2009).

⁹⁴ See KNIBB, *supra* note 89, § 6:2, at 198.

⁹⁵ *Cf. Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382–83 (1953).

⁹⁶ *Cf. Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943); KNIBB, *supra* note 89, § 6:2, at 198–99.

judgment to seek a writ, then the All Writs Act would be pretty much gutted. Following this reasoning, the Supreme Court has said that a strict application of the final judgment rule in the context of the All Writs Act would frustrate justice: “Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal.”⁹⁷

Because a strict interpretation would render the All Writs Act effectively useless, the Court has interpreted it to include the concept of potential jurisdiction.⁹⁸ Potential jurisdiction exists “where an appeal is not then pending but may be later perfected,”⁹⁹ such that “[a] court of appeals may issue a writ to ensure effective review of a future appeal.”¹⁰⁰ If the court could hear that appeal *after* final judgment, then it has potential jurisdiction.¹⁰¹

Once we establish that the court has jurisdiction—the *can* analysis—then we see if the court *should* issue the writ. Congress described “should” as “necessary or appropriate.”¹⁰² In the context of writs of mandamus, the Supreme Court has provided further guidance on the meaning of necessary and appropriate—both of which must be satisfied.¹⁰³

Starting with necessity, the person seeking relief must have no other adequate means available for relief, which often means that he or she will suffer an irreversible injury if forced to wait until final judgment to appeal.¹⁰⁴ The Court does not want mandamus to be used as an easy bypass of the final judgment rule and the normal course of appeals.¹⁰⁵ Otherwise, parties could file interlocutory challenges with an appellate court for almost any ruling made by a district court and the result would be piecemeal litigation.¹⁰⁶ Instead, parties must use the prescribed statutory (or regulatory) appeals process first,¹⁰⁷ which often means the final judgment rule must be satisfied.¹⁰⁸

Focusing now on appropriateness, the Court looks at two factors. First, writs are only appropriate when the right to the issuance of the writ is “clear and indisputable.”¹⁰⁹

⁹⁷ *Roche*, 319 U.S. at 25.

⁹⁸ *See id.*; BAKER, *supra* note 93, § 5.03, at 66.

⁹⁹ *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966).

¹⁰⁰ KNIBB, *supra* note 89, § 6.2, at 198.

¹⁰¹ *Id.* § 6:2, at 200.

¹⁰² *See* 28 U.S.C. § 1651(a) (2012).

¹⁰³ *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004). The Court has essentially changed the statutory language of “necessary *or* appropriate” to “necessary *and* appropriate.” *See id.*

¹⁰⁴ *See id.* at 380; *see, e.g., Kerr v. U.S. Dist. Court*, 426 U.S. 394, 395–96 (1976).

¹⁰⁵ *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) (“[I]t is established that the extraordinary writs cannot be used as a substitute for appeals” (citing *Ex Parte Fahey*, 332 U.S. 258, 259–60 (1947))).

¹⁰⁶ *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam).

¹⁰⁷ *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 27–28 (1943).

¹⁰⁸ *But see* KNIBB, *supra* note 89, § 6:4, at 202 (“Even if appeal theoretically is available, the court may issue a writ where appeal would be inadequate.”).

¹⁰⁹ *Cheney*, 542 U.S. at 381 (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)).

This is where the issuing court should look at the merits of the appeal.¹¹⁰ For example, if there is a reasonable disagreement on the appropriate outcome or what law applies,¹¹¹ a party is invoking a novel or creative interpretation of the law,¹¹² or when a matter is committed to the lower court's discretion,¹¹³ then the right is not clear and indisputable and the appellate court should not issue the writ.

Second, the issuing court must be satisfied that the writ is appropriate under the circumstances.¹¹⁴ Two areas are clearly appropriate: "The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."¹¹⁵

On the flip side, issuing writs where there are serious separation of powers concerns may not be appropriate. In *Cheney v. United States District Court*,¹¹⁶ the Court suggested that it would not be appropriate to issue a writ when the mandated action would constitute an unwarranted impairment by the judicial branch of another coequal branch in the performance of that branch's constitutional duties.¹¹⁷ As for writs against the executive branch, the Court appears to have limited the benefit of this deferential rule to civil cases against the President and Vice President.¹¹⁸ In criminal cases, the judicial branch is expected to push back against the other branches of government because the "primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions."¹¹⁹ Therefore, this separation of powers concern is abated.¹²⁰

II. SOME BACKGROUND ON THE MILITARY JUSTICE SYSTEM

Within the context of the problem addressed in this Article, there are three big differences between the military system and the civilian system. First, military officials do not have the option of using a secretive grand jury.¹²¹ Second, while the preliminary hearing is ongoing, there is no standing court available from which the

¹¹⁰ See, e.g., *id.* at 394 (Thomas, J., concurring in part and dissenting in part); *Bankers Life & Cas. Co.*, 346 U.S. at 384.

¹¹¹ See, e.g., *Cheney*, 542 U.S. at 395 (Thomas, J., concurring in part and dissenting in part).

¹¹² See, e.g., *Bankers Life & Cas. Co.*, 346 U.S. at 384.

¹¹³ See, e.g., *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam) (citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (plurality opinion)).

¹¹⁴ *Cheney*, 542 U.S. at 381 (citing *Kerr*, 426 U.S. at 403).

¹¹⁵ *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (citations omitted).

¹¹⁶ 542 U.S. 367 (2004).

¹¹⁷ See *id.* at 390.

¹¹⁸ See *id.* at 384–86.

¹¹⁹ *Id.* at 384 (alteration in original) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

¹²⁰ See *Will v. United States*, 389 U.S. 90, 97–98 (1967).

¹²¹ See 10 U.S.C. §§ 801–941 (2012) (detailing the Uniform Code for Military Justice, but not permitting the use of grand juries); see also Uniform Code of Military Justice art. 32 (codified at 10 U.S.C. § 832).

accused can seek relief for errors made during the preliminary hearing.¹²² Third, courts-martial and military appellate courts have very limited jurisdiction. After addressing these differences in this section, in the next section we will look at the facts behind the closure in Bergdahl's preliminary hearing, and then look at a military accused's public trial rights and the military appellate courts' ability to use potential jurisdiction to issue writs to vindicate those rights, all in the context of Bergdahl's facts.

In the military, a preliminary hearing is required before charges can be referred to a general court-martial (this is the most serious court-martial, one that can give out felony-level punishment).¹²³ To take a case to a general court-martial, the commander *must* use a preliminary hearing.¹²⁴ The commander does not have a grand jury option.¹²⁵

In the early days of courts-martial, there was no preliminary event at all.¹²⁶ If a commander wanted to send an accused to a general court-martial, he simply referred it.¹²⁷ In response to criticism that commanders abused this power, Congress reformed the military justice system to require an independent review of the case, and consistent with placing a check on the commander's previously unfettered power, Congress required a public hearing.¹²⁸ We will see that the government can close portions of these preliminary hearings to protect classified information or other sensitive information from public disclosure, but on the whole, these proceedings must be in public.

The modern military preliminary hearing is modeled on the federal preliminary hearing¹²⁹ and serves the same basic purpose: to determine if there is probable cause to believe that the accused committed a crime.¹³⁰ The accused enjoys the same basic rights found in the federal procedure, including the right to counsel, the right to cross-examine witnesses, and the right to present evidence.¹³¹

There are some differences. The preliminary hearing officer is not a magistrate, but is instead an impartial, uniformed military lawyer (uniformed military lawyers are called judge advocates).¹³² The power to conduct a preliminary hearing is not derived from the power of a higher court, as we find with magistrates in federal court.¹³³

¹²² *See generally* Uniform Code of Military Justice art. 32 (codified at 10 U.S.C. § 832 (2012 & Supp. IV 2016)) (discussing the preliminary hearing).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See generally id.*

¹²⁶ *See, e.g.*, U.S. ARMY, A MANUAL FOR COURTS-MARTIAL 4-6 (1928) (acknowledging that the appointing authority could merely create a court-martial without any preliminary hearing).

¹²⁷ *See id.*

¹²⁸ U.S. DEP'T OF THE ARMY, PAMPHLET 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICER § 3-3(c), at 7 (1990).

¹²⁹ *Id.* § 1-1 at 1. *See generally* Christopher J. Goewert & Nichole M. Torres, *Old Wine into New Bottles: The Article 32 Process After the National Defense Authorization Act of 2014*, 72 A.F. L. REV. 231 (2015).

¹³⁰ Uniform Code of Military Justice art. 32(a)(2)(A) (codified at 10 U.S.C. § 832(a)(2)(A)).

¹³¹ Uniform Code of Military Justice art. 32(d) (codified at 10 U.S.C. § 832(d)).

¹³² Uniform Code of Military Justice art. 32(b) (codified at 10 U.S.C. § 832(b)).

¹³³ *See supra* notes 79-82 and accompanying text.

Rather, the power is derived from the commander's authority to dispose of a case.¹³⁴ As such, one of the purposes of the military preliminary hearing is to provide an optional, non-binding recommendation to the commander on how that commander should dispose of the case.¹³⁵ At the end of the hearing, the preliminary hearing officer writes a report and that report could contain a recommendation for disposition.¹³⁶ After the preliminary hearing, the commander's general counsel (called a staff judge advocate) then provides a required—but again, non-binding—recommendation on disposition.¹³⁷

Once the commander receives the staff judge advocate's advice, the commander can do several things: take no action, take administrative action, take nonjudicial punishment action, or refer the case to a court-martial.¹³⁸ There are three levels of court-martial: summary (a court-martial with limited due process but also limited punishment),¹³⁹ special (a court-martial with broad due process rights that can give misdemeanor-level punishments);¹⁴⁰ and general (the felony-level court-martial that can give the full punishment authorized by law, to include death).¹⁴¹

Importantly, when the preliminary hearing takes place, there is no standing court.¹⁴² Courts-martial are temporary proceedings.¹⁴³ In the Middle Ages, a commander would convene a court-martial, preside over it, and then go back to his regular business.¹⁴⁴ Over time, commanders eventually began to delegate this task to personally selected representatives.¹⁴⁵ The commander would call these representatives away from their regular duties, refer the case to them, and they would administer the court-martial.¹⁴⁶ When the case was over, the court-martial would disband and those representatives would go back to doing their regular jobs.¹⁴⁷

¹³⁴ See generally MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 407.

¹³⁵ Military Justice Act of 2016, Pub. L. No. 114-328, § 5203, 130 Stat. 2894, 2905–06.

¹³⁶ *Id.*; UCMJ RECOMMENDATIONS, *supra* note 43, at 324.

¹³⁷ Military Justice Act § 5205, 130 Stat. at 2907–08.

¹³⁸ MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 407.

¹³⁹ *Id.* at app. 9.

¹⁴⁰ There are now two types of special court-martial. See Military Justice Act § 5161, 130 Stat. at 2897–98.

¹⁴¹ Uniform Code of Military Justice art. 16 (codified at 10 U.S.C. § 816 (2012)).

¹⁴² See Pete Williams, *How the Court-Martial System Works: Difference Between Military and Civil Justice Systems*, NBCNEWS, http://www.nbcnews.com/id/5006458/ns/world_news-mideast_n-africa/t/how-court-martial-system-works/#.WlztJaJioY0 [<https://perma.cc/SRB8-EBPQ>] (last updated May 18, 2004, 6:12 PM).

¹⁴³ See *id.*

¹⁴⁴ See generally William R. Hagan, *Overlooked Textbooks Jettison Some Durable Military Law Legends*, 113 MIL. L. REV. 163, 181 (1986) (addressing some “legends” of the military law tradition); David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980) (tracing the history of the court-martial from medieval times to the 1980s).

¹⁴⁵ See generally Hagan, *supra* note 144; Schlueter, *supra* note 144.

¹⁴⁶ See generally Hagan, *supra* note 144; Schlueter, *supra* note 144.

¹⁴⁷ See generally Hagan, *supra* note 144; Schlueter, *supra* note 144.

At its very basic level, that model persists today. A court-martial only comes into existence when the commander orders that it be convened.¹⁴⁸ Most large installations have a physical courthouse, but the courthouse is just a building.¹⁴⁹ Most large installations also have a military judge who works full-time at that installation, but the military judge is just a person waiting for a commander to convene a court-martial.¹⁵⁰

The commander convenes the court-martial and details the panel members.¹⁵¹ The trial judiciary details the military judge, the staff judge advocate details the prosecutor (called a trial counsel), and the defense service details the defense counsel.¹⁵² After announcing the court-martial convening order and the detailing authorities, poof—there is a court-martial.¹⁵³ When the trial is over, poof—that court-martial is disbanded.¹⁵⁴ When the next charges on the next accused come up, the whole process starts over again with a new court-martial.¹⁵⁵

That model is starting to break down. Congress has begun the movement toward a standing court with a military judge who has power even when the commander has not referred a case.¹⁵⁶ Congress has started down this road primarily because the lack of a standing court causes problems for the parties in gaining access to evidence prior to the commander's referral.¹⁵⁷ For example, the Military Justice Act of 2016 authorizes the President to promulgate rules for pre-referral proceedings before a military judge or military magistrate to deal with issues related to subpoenas, warrants for electronic communications, and pre-referral matters that are referred by an appellate court.¹⁵⁸ The President may also now prescribe regulations that allow military

¹⁴⁸ MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 504. Commanders who are authorized by statute to convene courts-martial are called courts-martial convening authorities. See Uniform Code of Military Justice art. 22(a) (codified at 10 U.S.C. § 822(a) (2012)).

¹⁴⁹ See, e.g., Philip Jankowski, *Fort Hood Adds Barriers to Courthouse in Preparation for Hasan Court Martial*, KILLEEN DAILY HERALD (May 3, 2013), http://kdhnews.com/military/hasan_trial/fort-hood-adds-barriers-to-courthouse-in-preparation-for-hasan/article_a667e478-b3ac-11e2-860f-001a4bcf6878.html [<https://perma.cc/XR72-5Q98>].

¹⁵⁰ See, e.g., *Eastern Judicial Circuit*, U.S. MARINE CORPS, <http://www.mcieast.marines.mil/Staff-Offices/Eastern-Judicial-Circuit/> [<https://perma.cc/M782-SQMP>] (last visited Feb. 21, 2018).

¹⁵¹ Uniform Code of Military Justice arts. 22, 25 (codified at 10 U.S.C. §§ 822, 825 (2012)).

¹⁵² See Uniform Code of Military Justice arts. 26(c), 27 (codified at 10 U.S.C. §§ 826(a), (c), 827 (2012)).

¹⁵³ Uniform Code of Military Justice arts. 22–25 (codified at 10 U.S.C. §§ 822–825 (2012)).

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See generally Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5001–5542, 130 Stat. 2894, 2894–968.

¹⁵⁷ See generally MILITARY JUSTICE REVIEW GRP., MILITARY JUSTICE ACT OF 2016: SECTION-BY-SECTION ANALYSIS 8–9, http://jpp.whs.mil/Public/docs/03_Topic-Areas/01-General_Information/13_MJRG_MilitaryJusticeAct_2016_SecAnalysis.pdf [<https://perma.cc/K2S9-2WT9>] (last visited Feb. 21, 2018).

¹⁵⁸ Military Justice Act § 5202, 130 Stat. at 2904–05.

judges to hear matters after the point where the court-martial historically would have disbanded, allowing post-trial motions before the military judge enters judgment.¹⁵⁹

These changes do not affect the problem addressed in this Article, though. Congress has not yet authorized military judges to handle issues arising from preliminary hearings. For now, if there is an issue with the preliminary hearing, the parties do not have a standing trial-level court available from which to seek relief.¹⁶⁰ This is unlike the federal system, where a magistrate's ruling to close a preliminary hearing could be referred immediately to the district court.¹⁶¹ In fact, in the military, there might not ever be a court available if the commander decides not to refer the case.

If the commander does decide to refer the case, then the parties can litigate issues related to the preliminary hearing before the military judge.¹⁶² The accused would generally first make an objection during the preliminary hearing to the preliminary hearing officer¹⁶³ and then object to the preliminary hearing officer's report.¹⁶⁴ Failure to object constitutes waiver absent good cause shown.¹⁶⁵ With the preserved objection, the accused can file a motion for appropriate relief to correct defects in the preliminary hearing.¹⁶⁶

If the military judge agrees that there was an error at the preliminary hearing, the usual remedy is to reopen the preliminary hearing and include whatever evidence was excluded (or make public whatever evidence was closed).¹⁶⁷ Those defects do not affect the jurisdiction of the court, meaning the court-martial continues while those defects are corrected (although sometimes the court-martial is continued until the defects are corrected).¹⁶⁸ The preliminary hearing officer then updates his or her report and recommendation and the commander makes a different disposition decision or affirms the one he or she already made.¹⁶⁹

In addition to being temporary, courts-martial also have very limited jurisdiction. While courts-martial do not have any territorial jurisdictional limits,¹⁷⁰ courts-martial only have criminal jurisdiction¹⁷¹ over a limited set of people (generally, only military personnel).¹⁷² Courts-martial are not even authorized to hear civil actions between

¹⁵⁹ *Id.* § 5321, 130 Stat. at 2924.

¹⁶⁰ *See* Uniform Code of Military Justice art. 26(a) (codified at 10 U.S.C. § 826 (a) (2012)).

¹⁶¹ *See supra* notes 79–82 and accompanying text.

¹⁶² *See* MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 601(b).

¹⁶³ *See id.* at R.C.M. 405(h)(4).

¹⁶⁴ *Id.* at R.C.M. 405(j)(5).

¹⁶⁵ *Id.* at R.C.M. 405(k).

¹⁶⁶ *Id.* at R.C.M. 906(b)(3).

¹⁶⁷ *See id.* at R.C.M. 405(j)(5).

¹⁶⁸ Military Justice Act of 2016, Pub. L. No. 114-328, § 5203, 130 Stat. 2894, 2905–06.

¹⁶⁹ *Id.*

¹⁷⁰ Uniform Code of Military Justice art. 5 (codified at 10 U.S.C. § 805 (2012)).

¹⁷¹ Uniform Code of Military Justice arts. 3, 17 (codified at 10 U.S.C. §§ 803, 817 (2012)). *See generally* Uniform Code of Military Justice arts. 18–20 (codified at 10 U.S.C. §§ 818–20 (2012)).

¹⁷² Uniform Code of Military Justice art. 2 (codified at 10 U.S.C. § 802 (2012)).

service members¹⁷³ or complaints raised by service members against their commanders.¹⁷⁴ Courts-martial only hear criminal complaints made by a commander against a military accused.

This also means that the only parties involved in the criminal action are the United States and the accused. Here again, that model has started to break down a bit. As part of the reform efforts related to the military's perceived mishandling of sexual assault cases and poor treatment of sexual assault victims, either Congress or the President has given victims the right to an attorney,¹⁷⁵ the right to present information to the preliminary hearing officer,¹⁷⁶ and the right to be heard on evidentiary issues during the court-martial.¹⁷⁷ But that is it. Congress and the President have not opened courts-martial up to anyone else. Even with those reforms, courts-martial have very limited jurisdiction to handle disputes between anyone other than the United States or the accused.

Once the court-martial is complete,¹⁷⁸ the case can move through the military's robust appellate system. The system has three appellate levels. First, each service has a Court of Criminal Appeals.¹⁷⁹ These are Article I legislative courts where the judges are judge advocates with limited tenure (they are usually appointed for three-year terms).¹⁸⁰ Generally speaking, the accused has a right to appeal all cases with a sentence that includes more than six months confinement or a punitive discharge.¹⁸¹ Next is the Court of Appeals for the Armed Forces (CAAF), also an Article I legislative court but with civilian judges appointed to fifteen-year terms.¹⁸² With minor exceptions, CAAF is a discretionary court. Above the military appellate courts is the Supreme Court.¹⁸³

¹⁷³ See Uniform Code of Military Justice art. 139 (codified at 10 U.S.C. § 939 (2012)) (discussing the alternative process for resolving property claims).

¹⁷⁴ See Uniform Code of Military Justice art. 138 (codified at 10 U.S.C. § 938 (2012)).

¹⁷⁵ 10 U.S.C. § 1044 (2012).

¹⁷⁶ Military Justice Act of 2016, Pub. L. No. 114-328, § 5203, 130 Stat. 2000, 2905–06.

¹⁷⁷ See, e.g., Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 534(c), 128 Stat. 3292, 3367; MIL. R. EVID. 412(c)(2) (2012) (granting the alleged victim in a sex offense case a “reasonable opportunity to attend and be heard”); see also *LRM v. Kastenber*, 72 M.J. 364, 370 (C.A.A.F. 2013) (holding that to be “heard” includes the opportunity for the victim’s counsel to make arguments before the court-martial).

¹⁷⁸ Military appellate courts are also bound by the final judgment rule. Uniform Code of Military Justice arts. 62, 66(b), 67(a) (codified at 10 U.S.C. §§ 862, 866(b), 867(a) (2012)).

¹⁷⁹ Military Justice Act § 5330, 130 Stat. at 2932–34.

¹⁸⁰ See *id.*

¹⁸¹ Cases that involve death, a punitive discharge, or confinement for two years or more receive an automatic appeal. The accused can choose direct review of cases with confinement of more than six months, and can petition for discretionary review of cases with six months or less of confinement. See *id.* §§ 5329–5330, 130 Stat. at 2930–34. Except in cases of death, the accused may waive these appeals. See *id.* § 5325, 130 Stat. at 2928.

¹⁸² Uniform Code of Military Justice art. 142 (codified at 10 U.S.C. § 942 (2012)).

¹⁸³ Uniform Code of Military Justice art. 67a(a) (codified at 10 U.S.C. § 867a(a) (2012)).

Unlike Article III courts (or even other legislative courts that hear criminal appeals, like federal territorial courts) that have broad jurisdiction to hear subjects like civil actions, military appellate courts have very limited jurisdiction. To start, they only review courts-martial, which are already proceedings with very limited jurisdiction: criminal complaints made against a very narrow population.¹⁸⁴ Next, Congress has limited the appellate jurisdiction of military appellate courts: the Courts of Criminal Appeals and CAAF “may act only with respect to the findings and sentence [of the court-martial].”¹⁸⁵

In *Clinton v. Goldsmith*, the Supreme Court spoke about this narrow grant of jurisdiction. Major Goldsmith had been sentenced to six years in confinement and to forfeit \$2,500 of his pay per month for that period; however, he was not sentenced to a punitive discharge.¹⁸⁶ During the period of his confinement, the Air Force Court of Criminal Appeals affirmed his conviction and sentence.¹⁸⁷ Had he been sentenced to a punitive discharge, his discharge would have become effective at that point, he would have been dropped from the rolls, and his pay would have stopped.¹⁸⁸ However, because he was not sentenced to a punitive discharge, he continued to remain an officer in the Air Force and he was set to receive his regular monthly pay—minus the forfeitures—for the duration of his confinement.¹⁸⁹

Also during this period, Congress gave the President the authority to drop officers from the rolls that were in Goldsmith’s situation,¹⁹⁰ effectively cutting off that flow of money to Goldsmith. The Air Force notified Goldsmith that it was going to drop him from the rolls and Goldsmith filed a writ petition with the Air Force Court of Criminal Appeals.¹⁹¹ That court found that it did not have jurisdiction to hear his claim, so he filed a writ petition with the next higher court, CAAF.¹⁹²

CAAF held that it had jurisdiction to act on Goldsmith’s petition. In overarching language, CAAF reasoned that “Congress intended for this Court to have broad responsibility with respect to administration of military justice.”¹⁹³ More narrowly,

¹⁸⁴ See *supra* notes 170–74 and accompanying text.

¹⁸⁵ Uniform Code of Military Justice art. 66(c) (codified at 10 U.S.C. § 866(c) (2012)) (re-numbered to § 866(d)(1) in Military Justice Act § 5330, 130 Stat. at 2933); Uniform Code of Military Justice art. 67(c) (codified at 10 U.S.C. § 867(c) (2012)).

¹⁸⁶ 526 U.S. 529, 531–32 (1999).

¹⁸⁷ *Id.* at 532.

¹⁸⁸ See MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 1003(b)(2), 1003(b)(8).

¹⁸⁹ See *Goldsmith*, 526 U.S. at 531–32.

¹⁹⁰ *Id.* at 532.

¹⁹¹ See *id.* It is well settled that military appellate courts have power under the All Writs Act to issue writs. See, e.g., Thomas M. Rankin, *The All Writs Act and the Military Judicial System*, 53 MIL. L. REV. 103 (1971) (discussing the Court of Military Appeals’s regular issuance of writs under the Act); Stephen I. Vladeck, *Military Courts and the All Writs Act*, 17 GREEN BAG 2D 191 (2014) (discussing how the Supreme Court has upheld the Court of Military Appeals’s grant of habeas corpus).

¹⁹² See *Goldsmith*, 526 U.S. at 532–33.

¹⁹³ *Goldsmith v. Clinton*, 48 M.J. 84, 86–87 (C.A.A.F. 1998).

CAAF reasoned that its jurisdiction extended to the sentence of a court-martial and this amendment sure looked like a form of punishment.¹⁹⁴ For example, if the military kept Goldsmith in confinement beyond the terms of his sentence, then surely the court had jurisdiction to order his release.¹⁹⁵ Here, by dropping Goldsmith from the rolls, the government was essentially giving him a new punishment of 100% forfeitures, which was not part of his original sentence.¹⁹⁶ The court rejected the government's argument that this action was purely administrative and not punitive in nature, and held that "in order fully to accomplish the purposes of the *Ex Post Facto* and Double Jeopardy Clauses, we should treat this amendment as punitive and hold that it cannot be applied to Major Goldsmith."¹⁹⁷

The Supreme Court disagreed and specifically rejected CAAF's assertion that Congress intended for it to play a large role in the administration of military justice.¹⁹⁸ According to the Court, Congress never gave military appellate courts that authority.¹⁹⁹ The Court stated, "We have already seen that the CAAF's independent statutory jurisdiction is narrowly circumscribed" to acting only on the findings and sentence of courts-martial.²⁰⁰ The Court's real disagreement with CAAF, and what was dispositive in the case, was the Court's characterization of the post-trial action.²⁰¹ The Court characterized the pending drop from rolls as an executive action and not part of the sentence.²⁰² No one had formally or directly tried to alter the judgment of the court-martial; rather, another agency had simply taken independent, administrative action against Goldsmith.²⁰³ Because this was an administrative rather than a punitive action, this issue was beyond the scope of CAAF's jurisdiction.²⁰⁴

Had the Court characterized the action as *de facto* punishment (as CAAF had), then the Court would have found that CAAF had jurisdiction. But the Court took a narrow, *de jure* approach, looking to the start and finish lines of the court-martial process.²⁰⁵ If an action formally falls outside of those lines, then it is not part of the findings and sentence.²⁰⁶ But if an action falls within those lines, then the reasoning in *Goldsmith* is consistent with military appellate courts having jurisdiction over that action. Indeed, in the subsequent case of *United States v. Denedo*,²⁰⁷ the Supreme

¹⁹⁴ *See id.* at 87, 90.

¹⁹⁵ *See id.* at 87.

¹⁹⁶ *See id.* at 90.

¹⁹⁷ *Id.*

¹⁹⁸ *See Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999).

¹⁹⁹ *See id.* at 536.

²⁰⁰ *Id.* at 535.

²⁰¹ *See id.*

²⁰² *See id.*

²⁰³ *See id.* at 536.

²⁰⁴ *See id.* at 535.

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ 556 U.S. 904 (2009).

Court found that CAAF did have jurisdiction over a writ of *coram nobis* filed several years after the appellant's military appellate process had been exhausted.²⁰⁸ There, the petitioner was seeking to modify his actual conviction based on an ineffective assistance of counsel claim rather than attacking a post-conviction administrative matter.²⁰⁹ That action—his conviction—fell within the start and finish lines of the court-martial process.²¹⁰

Again, there are three big differences that set the stage for this recurring Bergdahl Block problem. Elsewhere in the federal system, if prosecutors want to keep information hidden from the public, they have the option of using a grand jury.²¹¹ Military prosecutors do not have that option, so if they want to keep information hidden from the public, they need to try to close the preliminary hearing.²¹² In the federal system, while the preliminary hearing is ongoing, there are standing courts that have jurisdiction over criminal law as well as other subjects.²¹³ In the military justice system, there is no standing court while the preliminary hearing is ongoing from which the parties can seek relief for errors made during the preliminary hearing.²¹⁴ In the federal system, the district courts' decisions are reviewed by Article III appellate courts with broad subject matter jurisdiction (but limited appellate jurisdiction).²¹⁵ In the military justice system, courts-martial and military appellate courts have very limited jurisdiction.

III. THE FACTS BEHIND BERGDAHL'S BLOCK

We have now looked at the structure and law that governs open trial rights and writs in the federal system, and the basic structure of the military system. Next, we will look at the facts in Bergdahl's case. With those facts in mind, we will then look at the law that governs open trial rights and writs in the military justice system.

Again, Bergdahl's defense team was trying to counter the narrative that Bergdahl was a coward and Americans died looking for him.²¹⁶ They hoped to do this by making public two documents that suggested that Bergdahl's mental health problems caused him to leave his base rather than cowardice, that he acted admirably while in captivity, and that no one died looking for him.²¹⁷

²⁰⁸ *Id.* at 912, 914–15.

²⁰⁹ *See id.* at 907–08.

²¹⁰ *See id.* at 914.

²¹¹ *See* discussion *supra* Section I.A.

²¹² *See* Uniform Code of Military Justice arts. 30–35 (codified at 10 U.S.C. §§ 830–835 (2012 & Supp. IV 2016)).

²¹³ *See* discussion *supra* Section I.A.

²¹⁴ *See generally* Uniform Code of Military Justice art. 32 (codified at 10 U.S.C. § 832).

²¹⁵ *See* discussion *supra* Section I.A.

²¹⁶ *See generally* THE BERGDAHL DOCKET, <https://bergdahldocket.wordpress.com> [<https://perma.cc/WFY2-HFNU>] (last visited Feb. 21, 2018) (providing documents related to Bergdahl's legal battles).

²¹⁷ *See* Bergdahl v. Burke, ARMY MISC 20150624, 2015 WL 5968401, at *1 (A. Ct. Crim. App. Oct. 8, 2015).

On March 25, 2015, the convening authority issued a protective order for personally identifiable information and sensitive information that might be found in documents related to the case.²¹⁸ The defense assumed that the report and transcript fell within this order and, prior to the preliminary hearing, asked the convening authority to release them minus any redactions that would be necessary to protect that information.²¹⁹

The convening authority apparently construed this as a FOIA request that the defense was making on behalf of the public (the defense already had the copy of the report—they did not need to request it through FOIA).²²⁰ The convening authority then denied the request, saying he did not have the authority (presumably under FOIA) to release the documents.²²¹ The lead prosecutor also emailed the defense, cautioning the defense to not release any documents.²²² The lead prosecutor conceded that the defense could present any information that it desired at the hearing, but also indicated that the government was interpreting the public release of this information as a FOIA problem rather than a public trial rights problem.²²³ The defense renewed these requests just a few days before the preliminary hearing,²²⁴ and the staff judge advocate again said that the convening authorities did not have the authority to release the information and referenced another memo where a convening authority said he would follow the required rules before closing the preliminary hearing.²²⁵

Anticipating access problems at the upcoming Article 32 hearing, representatives of the media also corresponded with the convening authority, asking for a set of procedures that would ensure they had access to documents.²²⁶ In a short response, the convening authority said that if portions of the hearing were closed, that would

²¹⁸ See Memorandum from LTC Peter Q. Burke, U.S. Army (Mar. 25, 2015) (on file with author) (subject line entitled: “Protective Order for Personally Identifiable Information (PII) and Sensitive Information—United States v. Sergeant Bergdahl”).

²¹⁹ See Memorandum from LTC Franklin D. Rosenblatt, U.S. Army, to LTC Peter Q. Burke, U.S. Army (Apr. 2, 2015) (on file with author).

²²⁰ See Memorandum from LTC Peter Q. Burke, U.S. Army, to LTC Franklin D. Rosenblatt, U.S. Army, et al. (Apr. 8, 2015) (on file with author).

²²¹ See *id.*

²²² See Email from MAJ Margaret V. Kurz, U.S. Army, to LTC Franklin D. Rosenblatt, U.S. Army (June 15, 2015, 4:20 PM) (on file with author) [hereinafter Kurz-Rosenblatt Email].

²²³ See *id.*

²²⁴ See Email from Eugene Fidell to LTC Peter Q. Burke, U.S. Army (Sept. 14, 2015, 8:59 AM) (on file with author); Memorandum from LTC Franklin D. Rosenblatt, U.S. Army, to GEN Robert B. Abrams, U.S. Army (Sept. 13, 2015) (on file with author).

²²⁵ See Memorandum from COL Vanessa A. Berry, U.S. Army, to LTC Franklin D. Rosenblatt, U.S. Army (Sept. 15, 2015) (on file with author).

²²⁶ Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Brief in Support at 3, *Hearst Newspapers, LLC v. Abrams*, ARMY MISC 20150652, 2015 WL 6119474 (A. Ct. Crim. App. Oct. 14, 2015) [hereinafter *Petition for Extraordinary Relief*].

be because the government determined that the closure met the required tests.²²⁷ The convening authority did not provide any analysis of any particular issues and did not establish any mechanism for releasing information.²²⁸ Representatives for the media also renewed their request days before the hearing and received the same response from the staff judge advocate that the accused received.²²⁹

The military preliminary hearing occurred on September 17 and 18, 2015.²³⁰ There, the report summary and the transcript were introduced into evidence and the information that formed the contents of those reports was discussed extensively.²³¹ The defense team again requested that the documents be made public, but the preliminary hearing officer refused to do so, saying he lacked the authority to release them.²³² Neither the preliminary hearing officer nor the convening authorities provided an explanation for the particular closure.²³³

Because there was no standing trial-level court available, the defense then filed a writ petition with the Army Court of Criminal Appeals asking it to order the convening authority to release the documents.²³⁴ Representatives of the media also filed a writ petition asking the appellate court to order the convening authority or the preliminary hearing officer to release the reports.²³⁵ The Army court found that it did not have jurisdiction to issue the writs and agreed with the government's position that Bergdahl and the media should seek relief through FOIA.²³⁶

IV. A MILITARY ACCUSED'S RIGHTS AND THE AVAILABILITY OF WRITS

With those facts, and with the three military differences in mind (no grand jury, no standing courts, and very limited jurisdiction), we can head into the main analysis of open trial rights and the availability of writs within the military. As we do, we need to keep distinct the analysis that is appropriate for the accused from the analysis that is appropriate for the media.

²²⁷ See Letter from LTC Peter Q. Burke, U.S. Army, to Diego Ibarguen, Hearst Corp. (Aug. 6, 2015) (on file with author) [hereinafter Burke-Ibarguen Letter].

²²⁸ See *id.*

²²⁹ See Petition for Extraordinary Relief, *supra* note 226, at 3.

²³⁰ See *Bergdahl v. Burke*, ARMY MISC 20150624, 2015 WL 5968401, at *1 (A. Ct. Crim. App. Oct. 8, 2015).

²³¹ See *id.*

²³² See Record of Preliminary Hearing Under Article 32, *supra* note 5, at 228.

²³³ See *id.*

²³⁴ See *Bergdahl*, 2015 WL 5968401, at *1.

²³⁵ See Petition for Extraordinary Relief, *supra* note 226. See generally *Bergdahl v. Burke* (*Amicus*), CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/bergdahl-v-burke-amicus> [<https://perma.cc/H5YP-MEE3>] (last visited Feb. 21, 2018) (discussing the Center for Constitutional Rights's media petition).

²³⁶ See *Bergdahl*, 2015 WL 5968401, at *3–5; *Hearst Newspapers, LLC v. Abrams*, ARMY MISC 20150652, 2015 WL 6119474 (A. Ct. Crim. App. Oct. 14, 2015) (*per curiam*).

That said, both the accused and the media have public trial rights, and the analysis of whether the military can close a hearing (which might infringe on those rights) is the same regardless of whose right is infringed. This analysis is pretty much the same as that found in the civilian system. However, the analysis for who can file a writ (the accused versus the media) if a public trial right is injured is very different. If a court applies the analysis required for the accused to the media, or for the media to the accused, the court will arrive at the wrong answer.

A. An Accused's Right to an Open Article 32

The accused's right to an open preliminary hearing is essentially the same as that found in the civilian system. According to military case law, the accused's Sixth Amendment right to an open trial extends to the preliminary hearing.²³⁷ That makes sense. This hearing was modeled on the federal preliminary hearing and the Sixth Amendment attaches to those.²³⁸ The hearing functions like a trial (the accused has already been charged, it is used to evaluate the weight of the evidence, and it includes the presentation of evidence and cross-examination of witnesses),²³⁹ access by the public provides an effective restraint on possible abuse of judicial power (a power that, prior to 1950, the public believed had been abused),²⁴⁰ and the system has a tradition of allowing access to these hearings.²⁴¹

Still, there are a few significant differences between this hearing and the federal preliminary hearing. For example, the presiding officer is a judge advocate rather than a magistrate, and the hearing officer's recommendation on case disposition is not binding on the convening authority.²⁴² But, as the Supreme Court has said with respect to the civilian system, those kinds of differences should not matter.²⁴³ Those features do not make public access any less essential. The critical features remain: the military preliminary hearing could be the final and most important step in the criminal proceeding, and in many cases, would provide the sole occasion for the public to observe the military justice system.

²³⁷ See *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013); *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997).

²³⁸ See *supra* notes 129–31 and accompanying text.

²³⁹ See *supra* notes 129–31 and accompanying text.

²⁴⁰ See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 12–13 (1986).

²⁴¹ See, e.g., *San Antonio Express-News v. Morrow*, 44 M.J. 706, 709–10 (A.F. Ct. Crim. App. 1996); Theodore Essex & Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001)*—“*The Cox Commission*,” 52 A.F. L. Rev. 233, 235 (2002) (discussing how the Uniform Code of Military Justice, a Congressional military justice reform in 1951, began providing for public hearings in Article 32 hearings).

²⁴² See *supra* notes 132, 135 and accompanying text.

²⁴³ See *Press-Enter.*, 478 U.S. at 13 (acknowledging “the importance of public access to a preliminary hearing”).

While no statute formalizes the right to an open hearing, the President has protected that right in Rule for Courts-Martial 405: “Preliminary hearings are public proceedings and should remain open to the public whenever possible.”²⁴⁴ The President further set out the same tests for closure that we find in the civilian courts.²⁴⁵ The convening authority or the preliminary hearing officer can close the proceedings “if an overriding interest exists that outweighs the value of an open preliminary hearing.”²⁴⁶ Further, “[a]ny closure must be narrowly tailored to achieve the overriding interest that justified the closure” and “no lesser methods short of closing the preliminary hearing can be [available] to protect the overriding interest in the case.”²⁴⁷

The rule provides examples of what constitutes an overriding interest: “preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety or privacy of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting.”²⁴⁸ These reasons are also consistent with reasons for closure that we find in the civilian model, although the discussion only lists the reasons that the government seeks closure and does not list the reason why the accused would seek closure—namely, to avoid bad publicity related to inadmissible evidence.²⁴⁹

The President also listed a specific process that must follow when closing the hearing: “If a convening authority or preliminary hearing officer believes closing the preliminary hearing is necessary, the convening authority or preliminary hearing officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the report of preliminary hearing.”²⁵⁰

When we apply these rules to Bergdahl’s preliminary hearing, he had a right to an open hearing. That right can be constrained, though: the government can close portions of the hearing under certain circumstances. So, we should expect to see that the government followed the correct procedures: the convening authority or the preliminary hearing officer would have made specific findings of fact, in writing, that closure was necessary. Those findings of fact would show that an overriding interest existed that outweighed the value of an open preliminary hearing. Those findings of fact would also show that the closure was narrowly tailored to achieve that overriding interest, and that no lesser methods short of closing the preliminary hearing, like redacting the sensitive information, were available to protect that overriding interest.

However, neither the convening authority nor the preliminary hearing officer complied with the President’s mandate.²⁵¹ Neither made specific findings of fact in

²⁴⁴ MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(i)(4).

²⁴⁵ *See Press-Enter.*, 478 U.S. at 13–14.

²⁴⁶ MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(i)(4).

²⁴⁷ *Id.* Before the President promulgated this rule, very similar tests were set out in *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997).

²⁴⁸ MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(i)(4).

²⁴⁹ *See id.*

²⁵⁰ *Id.*

²⁵¹ *See generally* Memorandum from LTC Mark A. Visger, U.S. Army, to Commander,

writing that supported the closure and nothing was included in the report of the preliminary hearing.²⁵² The closest thing we have is a letter from the special court-martial convening authority to a member of the press where he promises, if he closes parts of the hearing, to follow the rules,²⁵³ a letter from the general court-martial convening authority's staff judge advocate where she says the special court-martial convening authority has already taken care of the issue,²⁵⁴ and a statement during the hearing by the preliminary hearing officer that he did not have the authority to open the hearing.²⁵⁵

Getting past that procedural failure, even if military officials had complied with the rules, it would have been difficult to justify closing the entire report rather than using a lesser method short of complete closure, like redacting those portions that contained sensitive information. This is particularly true considering that much of the contents of the report had already been discussed during the preliminary hearing through the testimony of the officer who wrote the report and conducted the interview that formed the basis of the transcript.

B. Issuing Writs to Protect an Accused's Rights at the Article 32

The question then becomes, when military officials fail to comply with the President's mandate, what can the accused do about that? Again, for courts to issue writs before final judgment, they need potential jurisdiction and the writ must be necessary and appropriate.

1. Potential Jurisdiction

Looking first at whether military appellate courts *can* issue writs to protect the accused's Sixth Amendment rights at an Article 32 hearing, military appellate courts do have potential jurisdiction to issue these writs. The law is pretty clear that the closure of hearings, to include Article 32 hearings, can potentially impact the findings and sentence of the court-martial.²⁵⁶

Without providing detailed discussion about why it has potential jurisdiction, CAAF has repeatedly demonstrated that it does. In *ABC, Inc. v. Powell*,²⁵⁷ the highest ranking enlisted member of the Army, Sergeant Major of the Army Gene McKinney, was accused of sexual misconduct with junior service members.²⁵⁸ The convening authority ordered that the entire Article 32 hearing be closed to ensure due process

Special Troops Battalion, U.S. Army (Oct. 5, 2015), <https://bergdahldocket.files.wordpress.com/2016/03/article203220preliminary20hearing20report.pdf> [<https://perma.cc/FWP6-DMDZ>].

²⁵² *See id.* (containing no mention of closure).

²⁵³ Burke-Ibarguen Letter, *supra* note 227.

²⁵⁴ Kurz-Rosenblatt Email, *supra* note 222.

²⁵⁵ Record of Preliminary Hearing Under Article 32, *supra* note 5, at 228.

²⁵⁶ *See* Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 129 (C.A.A.F. 2013).

²⁵⁷ 47 M.J. 363 (C.A.A.F. 1997).

²⁵⁸ *Id.* at 364.

for the accused, to prevent publicity of potentially inadmissible evidence, and to protect the privacy of the victims.²⁵⁹

The media and the accused joined in a writ petition that went directly to CAAF (skipping the Army Court of Criminal Appeals).²⁶⁰ Importantly, in *ABC*, the writ petition was submitted while the Article 32 was ongoing—at that point in the process, there was no trial-level court available.²⁶¹ The court assumed, without providing reasoning, that it had jurisdiction to hear the accused’s Sixth Amendment claim and even said that it could hear the media’s First Amendment claim.²⁶² The court then granted the writ, reasoning that the convening authority had not made a case for closing the entire hearing rather than just particular moments.²⁶³

Later, in *Center for Constitutional Rights v. United States (CCR)*,²⁶⁴ the CAAF affirmed that it has potential jurisdiction to issue a writ when the accused makes a writ request by himself or joins the media’s request.²⁶⁵ *CCR* dealt with another high-profile case: the Private First Class Manning court-martial, where Private First Class Manning was charged with providing classified information to Wikileaks.²⁶⁶ The media sought a writ to order the military judge to release all of the trial documents.²⁶⁷ In contrast to *ABC*, where the accused was a party to the writ, in *CCR*, the accused did not join the media’s writ petition.²⁶⁸

While disapproving the reasoning in *ABC* that applied to media requests, the court affirmed in dicta the parts of *ABC* that applied to an accused’s request while the Article 32 hearing was ongoing²⁶⁹:

More immediately, the accused in [*ABC*] joined the media as a party in seeking a writ of mandamus to vindicate his constitutional right to a public trial—*something which had immediate relevance to the potential findings and sentence of his court-martial*. We are not foreclosing the accused from testing the scope of public access, but he has not done so here.²⁷⁰

Had the accused joined, CAAF was ready to find jurisdiction.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *See id.*

²⁶² *See id.* at 365.

²⁶³ *Id.* at 366.

²⁶⁴ 72 M.J. 126 (C.A.A.F. 2013).

²⁶⁵ *Id.* at 128.

²⁶⁶ *Id.* at 127.

²⁶⁷ *Id.*

²⁶⁸ *See id.*

²⁶⁹ In *CCR*, there was a convened court-martial, and the request was for a writ to order the military judge to release documents. *Id.*

²⁷⁰ *Id.* at 129–30 (emphasis added).

Further, dicta in *United States v. Davis*²⁷¹ reinforces that military appellate courts have jurisdiction to hear writ petitions arising from Article 32s.²⁷² In *Davis*, the accused litigated the closure of his Article 32 before the military judge and lost.²⁷³ He did not file a writ but rather raised the issue on appeal after final judgment.²⁷⁴ However, had he filed a writ petition before waiting for final judgment, CAAF again stated that it could have heard the petition: “In the event that an accused disagrees with the military judge’s ruling, the accused may file a petition for extraordinary relief to address immediately the Article 32 error.”²⁷⁵

CAAF’s repeated assertion that open trial rights trigger potential jurisdiction is consistent with the civilian model.²⁷⁶ The assessment by the public of what is presented at the proceeding could provide legitimate pressure on a convening authority to take no action in a case or to use a lower forum like a summary or special court-martial, and that certainly impacts sentencing.²⁷⁷

And the reasoning in these three cases is perfectly consistent with *Goldsmith*. Unlike in *Goldsmith*, where the executive action occurred after the completion of the appellate process (the case was completely over),²⁷⁸ in these three cases, the writ petitions were or would be within the start and finish lines of the court-martial process.²⁷⁹

Looking now at Bergdahl’s case, military appellate courts had potential jurisdiction to act on his petition. Most importantly, *he* filed the petition.²⁸⁰ This was not an action brought only by the media. Three CAAF opinions (*ABC*, *CCR*, and *Davis*) make clear that in that circumstance, military appellate courts have potential jurisdiction.²⁸¹ And *ABC* (which as it applies to the analysis of an accused’s Sixth Amendment rights is still good law) had the same procedural posture that Bergdahl had when he filed—the Article 32 was ongoing and there was no trial-level court available.²⁸²

2. Necessity

The more difficult question is whether military appellate courts *should* issue writs in these circumstances. Looking first at necessity, the person seeking relief

²⁷¹ 64 M.J. 445 (C.A.A.F. 2007).

²⁷² *Id.* at 449.

²⁷³ *Id.* at 446.

²⁷⁴ *See id.*

²⁷⁵ *Id.* at 449 (citing the portion of *ABC* that is still good law).

²⁷⁶ *See* discussion *supra* Part I.

²⁷⁷ *See, e.g.*, MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 1301(d).

²⁷⁸ *See* Clinton v. Goldsmith, 526 U.S. 529, 531–32 (1999).

²⁷⁹ *See* Ctr for Constitutional Rights v. United States, 72 M.J. 126, 127 (C.A.A.F. 2013); *Davis*, 64 M.J. at 446; *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997).

²⁸⁰ *Bergdahl v. Burke*, ARMY MISC 20150624, 2015 WL 5968401, at *1 (A. Ct. Crim. App. Oct. 8, 2015).

²⁸¹ *See Ctr. for Constitutional Rights*, 72 M.J. at 127–30; *Davis*, 64 M.J. at 446; *ABC*, 47 M.J. at 364; *see also* LRM v. Kastenber, 72 M.J. 364, 367–68 (C.A.A.F. 2013).

²⁸² *Compare Bergdahl*, 2015 WL 5968401, at *1, *with ABC*, 47 M.J. at 364.

must have no other adequate means available for relief.²⁸³ Parties have to use the prescribed statutory (or regulatory) appeals process first.²⁸⁴ To start the process, the accused has to make an objection during the hearing to the preliminary hearing officer.²⁸⁵ If the preliminary hearing officer overrules that objection, then the accused is in a tough spot. He has nowhere to go for help.

In the military, when the preliminary hearing is underway, there is no standing court that serves the function that a federal district court serves with a federal magistrate court.²⁸⁶ When this gap exists, the accused only has one option: file a writ petition with a military appellate court.²⁸⁷ There is no other adequate means available for relief. The service-level appellate court is the *only* place to get relief.

This argument recognizes that, once the case is referred to trial, the court-martial can hear the accused's claim.²⁸⁸ In that circumstance, the court-martial can serve the function within the military system that the federal district court plays in the civilian system. The accused can file a motion with the military judge. Then, the military judge could find that the hearing was improperly closed, order that a new Article 32 hearing be held where the closed portion is now opened to the public or made available to the public, order the convening authority to review the new hearing report, and then have the convening authority either affirm the earlier decision to refer the case to a general court-martial or make whatever changes to the referral are appropriate.²⁸⁹ In that case, a writ would not be necessary unless the military judge first rules against the accused.

One could argue, therefore, that before referral, a writ is not necessary because the accused can just wait until the case is referred to trial. Indeed, the case might not ever be referred, and in those cases, what is the harm? The problem with that argument is that it runs contrary to one of the primary reasons that the right to an open trial attaches to the preliminary hearing in the first place. The hearing needs to be open while it is ongoing precisely because of the chance that it will be the last event in that criminal process.²⁹⁰ If the case is not referred, violations of that right would

²⁸³ See *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27–28 (1943).

²⁸⁴ See *id.*

²⁸⁵ MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(i)(7). The rules do not require that the accused object directly to the convening authority, even if the convening authority is the one who ordered the closure. The accused always could, though. To preserve the issue, the accused also needs to object to the preliminary hearing officer's report. *Id.* at R.C.M. 405(j)(5).

²⁸⁶ See *generally supra* notes 148–59 and accompanying text.

²⁸⁷ See *generally* MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405 (regarding the Preliminary Hearing); *id.* at R.C.M. 1203 (regarding review of a case by a Court of Criminal Appeals).

²⁸⁸ See *generally id.* at R.C.M. 906 (discussing a variety of motions available for appropriate relief prior to trial).

²⁸⁹ See *generally id.* at R.C.M. 906(b)(3).

²⁹⁰ See discussion *supra* Section I.A.

go without a remedy. Part of the criminal justice system or the military justice system would forever remain hidden from the public.

In Bergdahl's case, he filed his petition while the Article 32 preliminary hearing was still active and before his case was referred to trial.²⁹¹ He already asked the convening authority and the preliminary hearing officer to open that portion of the hearing, and they either gave non-answers or said no.²⁹² He filed the writ petition during the gap where he had no available remedy, except to seek relief from the first standing court that was available: the Army Court of Criminal Appeals.²⁹³ During that gap, a writ was necessary.

3. Appropriateness

Next, a writ would need to be appropriate.²⁹⁴ To start, writs are only appropriate when the right to the issuance of the writ is clear and indisputable.²⁹⁵ Here, it is clear and indisputable that the government did not properly close the hearing. The convening authority did not make specific findings of fact in writing that supported the closure and then include those in the report.²⁹⁶

While the convening authority could have identified an overriding interest for closure (protecting the safety of witnesses and protecting classified information),²⁹⁷ the convening authority would have had a difficult time satisfying the rest of the strict-scrutiny tests—particularly the requirement that no lesser methods short of closing the report be available. The government could have redacted any personal information or sensitive information that was in the report and otherwise left enough in the report to show that no one was killed looking for Bergdahl and to show what Bergdahl's mental state may have been at the time of the offense.²⁹⁸

Next, the issuing court must be satisfied that the writ is appropriate under the circumstances. Two areas are clearly appropriate: “to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”²⁹⁹ In this instance, the inferior “court” (which here, would be the convening authority or preliminary hearing officer) had a duty to comply with Rule for Court-Martial 405(j)(4).³⁰⁰ The President has ordered all convening authorities

²⁹¹ See *Bergdahl v. Burke*, ARMY MISC 20150624, 2015 WL 5968401, at *1 (A. Ct. Crim. App. Oct. 8, 2015).

²⁹² See, e.g., Report of Preliminary Hearing Under Article 32, *supra* note 5, at 228.

²⁹³ See *Bergdahl*, 2015 WL 5968401, at *1.

²⁹⁴ 28 U.S.C. § 1651(a) (2012).

²⁹⁵ See *LRM v. Kastenber*, 72 M.J. 364, 367–68 (C.A.A.F. 2013) (discussing the requirements for a writ of mandamus); see also *supra* notes 109–15 and accompanying text.

²⁹⁶ See *supra* notes 226–30 and accompanying text.

²⁹⁷ See *supra* notes 244–50 and accompanying text.

²⁹⁸ See *supra* notes 245–50 and accompanying text.

²⁹⁹ *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

³⁰⁰ See MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(j)(4).

and preliminary hearing officers to follow this procedure and the officials in this case failed to do so.³⁰¹ This is an area where writs are traditionally appropriate.

And in this case, there were no serious separation of powers concerns. Unlike in *Cheney*, where the Court cut some slack to the President and Vice President in a civil case where a writ might have impeded their constitutional duties,³⁰² here we are dealing with the convening authority and preliminary hearing officer in their narrow roles within the military justice system.³⁰³ As the Court stressed in *Cheney*, in criminal cases, the judiciary is expected to push back against the executive branch because the “primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions.”³⁰⁴ Applying the correct analysis, Bergdahl should have prevailed on his petition. Military appellate courts had potential jurisdiction to hear his claim, and his need for the writ was necessary and appropriate.

V. THE MEDIA’S RIGHTS AND AVAILABILITY OF WRITS

The media does not have the same availability to seek redress for an injury that the accused has. The analysis is different and leads to an opposite result. The good news is that that analysis should not come up often. Most often, the accused will file the writ petition and the media will join. Or, the media will file a writ petition and the accused will join.³⁰⁵ If the accused files or joins, the court should apply the more forgiving reasoning to his claim, and if the accused wins, the hearing will be opened and the media’s rights will be vindicated through the exercise of the accused’s rights.

However, in rare circumstances, the accused may have a strategic reason for not joining the writ petition. This happened in *CCR*.³⁰⁶ As we will see, the danger is that when the accused does file a writ petition (or joins the media’s petition), the military appellate courts may take the analysis that is only appropriate for when the media are filing on their own and then apply it to the accused’s writ petition. That will lead the court to a wrong answer.

A. *The Media’s Right to an Open Article 32*

We have seen that the accused has a Sixth Amendment and regulatory right to an open Article 32 hearing. Likewise, the media also have a First Amendment right

³⁰¹ See discussion *supra* Part III.

³⁰² See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 389–92 (2004).

³⁰³ See discussion *supra* Part III.

³⁰⁴ *Cheney*, 542 U.S. at 384 (alteration in original) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

³⁰⁵ See, e.g., *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997). This is because both the accused and the media have a shared interest in an open hearing. See discussion *supra* Part I.

³⁰⁶ 72 M.J. 126, 127, 129 (C.A.A.F. 2013).

to an open Article 32 hearing: “Similarly, when an accused is entitled to a public hearing, the press enjoys [their First Amendment] right.”³⁰⁷ The source of that quote, *ABC*, was later called into question by *CCR*—but not about whether the media have the right.³⁰⁸ Rather, *CCR* challenged the holding in *ABC* that military courts have jurisdiction to hear the press’s complaint.³⁰⁹ That was a *writ* question (which I will address below), not a *right* question. Further, the media (and the public at large) have the same regulatory right to an open hearing under R.C.M. 405³¹⁰ that the accused has.³¹¹ When the convening authority or preliminary hearing officer closes the hearing, the analysis for that closure is the same, regardless of who complains about the closure.³¹²

In Bergdahl’s case, the convening authority and preliminary hearing officer failed to comply with the President’s mandate about what to do before closing a preliminary hearing.³¹³ The question then becomes, when the government fails to comply, what can the media do about that?

B. Issuing Writs to Protect the Media’s Rights to an Open Article 32

Here is where the analysis of the availability of writs to enforce the media’s rights departs from the analysis of the availability of writs to enforce the accused’s rights. Again, the media’s right to an open trial comes from the First Amendment and is embodied in R.C.M. 405.³¹⁴ When the convening authority or preliminary hearing officer closes a hearing, the law in the military is also clear that the media have suffered an *injury* to their right to an open trial and so have *standing*.³¹⁵ Since the *CCR* opinion (the Manning case, where the accused did not also join the petition), CAAF has affirmed that the media would have standing to bring these claims: “There is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege.”³¹⁶

The issue is where to fix that injury. When the media has been injured, where can the media bring that claim? What court has *jurisdiction* for that injured party? When this issue comes up in the civilian context, the courts that handle the criminal case and any of the defendant’s motions related to that case also have subject matter

³⁰⁷ *ABC*, 47 M.J. at 365.

³⁰⁸ *Ctr. for Constitutional Rights*, 72 M.J. at 129–30.

³⁰⁹ *Id.*

³¹⁰ MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(i)(4).

³¹¹ *ABC*, 47 M.J. at 365.

³¹² *Id.*; MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(i)(4).

³¹³ *See supra* Section IV.A.

³¹⁴ *ABC*, 47 M.J. at 365. *See generally* MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405.

³¹⁵ *See, e.g.*, LRM v. Kastenberg, 72 M.J. 364, 368–69 (C.A.A.F. 2013).

³¹⁶ *Id.* at 368. To support the assertion that an injured party has standing, the court noted approvingly that in *CCR*, that court had assumed that the media had standing. *Id.*

jurisdiction to handle the media's motions related to that case.³¹⁷ To be sure, the Constitution and Congress (by establishing Article III courts inferior to the Supreme Court) grant federal district courts and appellate courts the judicial power over cases arising under the Constitution—like cases related to the infringement of the public's right to an open trial.³¹⁸

The problem is that courts-martial and military appellate courts, unlike these other federal courts, have jurisdiction only over criminal law matters, and for the military appellate courts, they may only act with respect to the accused's findings and sentence.³¹⁹ They do not have subject matter jurisdiction for civilian causes of action arising under the Constitution or the laws of the United States.³²⁰

Congress could have granted broader power to courts-martial (as Congress has for territorial courts)³²¹ and to military appellate courts so they could hear claims raised by the media, but Congress has not. Congress has not even granted courts-martial the jurisdiction to hear issues related to other disputes that are recognized in the UCMJ, like grievances filed under Article 138 for wrongs committed by a commanding officer or Article 139 for damage to personal property committed by another service member.³²² Further, as discussed above, Congress has opened the jurisdiction of courts-martial to hear evidentiary issues raised by a third party in a criminal trial—the victims.³²³ Congress has not done that for the media.

That may not be the end of the story, though. If somehow a limitation on the media's rights could impact the findings and sentence of a court-martial, then military appellate courts might be able to take advantage of potential jurisdiction to hear the media's claims. We know that military appellate courts have potential jurisdiction over writ petitions filed by the accused related to the closing of Article 32s because that closure potentially affects the accused's findings and sentence.³²⁴ The question is whether the closing of an Article 32, uncontested by the accused, could also potentially affect the findings and sentence.

Under the current state of the law, the answer is that courts-martial and military appellate courts do not have jurisdiction over the media's claims because the media's claims do not have the potential to directly affect the accused's findings and sentence.³²⁵ That is the law. But that law is based on flawed reasoning.

³¹⁷ See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 560–62 (1980).

³¹⁸ See discussion *supra* Section I.A.

³¹⁹ See, e.g., *Kastenberg*, 72 M.J. at 368.

³²⁰ See, e.g., *id.*

³²¹ See, e.g., 48 U.S.C. §§ 1424–1424c (2012) (establishing and describing the power of the District Court of Guam).

³²² See *supra* notes 170–74 and accompanying text; see also Uniform Code of Military Justice arts. 138–39 (codified at 10 U.S.C. §§ 938–939 (2012)).

³²³ See *supra* notes 175–77 and accompanying text.

³²⁴ See *supra* Section IV.B.1.

³²⁵ See *generally* *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013).

In *CCR*, CAAF found that it did not have jurisdiction to hear the media's First Amendment claims, in contrast to the clear jurisdiction it had over the accused's claims (remember, Manning did not join that petition).³²⁶ The court stated that it did not have potential jurisdiction for the media's claims, but here is the extent of the court's reasoning: "We thus are asked to adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief—expedited access to certain documents—that has no bearing on any findings and sentence *that may eventually be adjudged by the court-martial*."³²⁷

But now contrast that to the court's reasoning that it has potential jurisdiction for claims raised by the accused: "[T]he accused in [*ABC*] joined the media as a party in seeking a writ of mandamus to vindicate his constitutional right to a public trial—*something which had immediate relevance to the potential findings and sentence of his court-martial*."³²⁸

Huh? If the information comes out, the public reacts, and that legitimate public pressure could later affect the findings and sentence, how could it possibly matter who brought the information to light? The reason that information could impact the findings and sentence is that the public's reaction to that information could provide legitimate pressure on a convening authority to take no action or be more lenient in a case, which could clearly affect the findings and sentence.

When looking at this *jurisdiction* problem, the impact on the findings and sentence does not depend on who sought to make the information public. That information either will or will not impact the findings and sentence. We care about who brings the claim when we look at *standing*, not *subject matter jurisdiction*.³²⁹

That is the law, though: military appellate courts do not have potential jurisdiction over claims raised by the media, but do over claims raised by the accused. We have this rule because of the faulty reasoning that the information will impact findings and sentence if the accused brings it up, but not if the media bring it up. We have this rule simply because the court in *CCR* said so.

In his dissent to *CCR*, Chief Judge Baker recognized that the court's approach to potential jurisdiction was illogical but did not pinpoint the precise flaw.³³⁰ He noted that this case differed from *Goldsmith* in that *Goldsmith* dealt with a post-trial administrative matter while this case dealt with an issue arising during the course of trial: "[T]he writ before this Court appeals a specific ruling of a specific Rule for Courts-Martial in a specific and ongoing court-martial."³³¹ But he never drilled down to the critical potential jurisdiction issue: how the media's claim could impact

³²⁶ *Id.* at 129–30.

³²⁷ *Id.* at 129 (emphasis added).

³²⁸ *Id.* at 129–30 (emphasis added).

³²⁹ See *LRM v. Kastenber*, 72 M.J. 364, 368 (C.A.A.F. 2013).

³³⁰ See *Ctr. for Constitutional Rights*, 72 M.J. at 130–32 (Baker, C.J., dissenting).

³³¹ *Id.* at 130.

the findings and sentence.³³² Rather, he thought the majority's flaw had to do with timing, which is the issue that potential jurisdiction actually circumvents.³³³ However, he did recognize that whatever bad reasoning was afoot, it applied equally as well to the accused as it did to the media: "Moreover, though the majority claims otherwise, today's opinion bars this Court from exercising jurisdiction in an appeal arising from an accused's assertion of his . . . right to a public trial."³³⁴

The problem with majority's reasoning in *CCR* (whether the information impacts the finding and sentence depends on who brings it up) was highlighted later in *LRM v. Kastenberg*.³³⁵ There, Chief Judge Baker now had enough votes to command a majority and he tried to backtrack on much of *CCR* without actually overruling it.³³⁶ *Kastenberg* involved the implementation of changes to the Military Rules of Evidence that allowed the victim to be heard at trial on certain evidentiary issues.³³⁷ The defense objected to the victim's counsel's presence or participation in evidentiary hearings.³³⁸ The military judge then limited the victim's counsel from arguing and found that she did not have standing to file motions to produce documents.³³⁹ The victim, through her counsel, then filed a writ petition.³⁴⁰

CAAF found that she had standing and military appellate courts had jurisdiction over her claim.³⁴¹ However, strictly applying the reasoning from *CCR*, the court should not have had potential jurisdiction to hear the victim's claim.³⁴² After all, according to *CCR*, it is only when the *accused* raises issues that those issues can affect the findings and sentence.³⁴³ In *Kastenberg*, Chief Judge Baker recognized (contrary to the reasoning in *CCR*) that issues raised by someone other than the accused could still potentially impact the findings and sentence:

The military judge's ruling has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered

³³² *See id.* at 130–32.

³³³ *Id.* at 131 ("Under the majority's reading . . . rulings regarding public access to courts-martial are unreviewable . . . because public access issues are raised before the findings and sentence are approved by the convening authority. Of course public access issues would arise before the findings and sentence are approved; a public trial necessarily occurs *before* findings and sentencing.").

³³⁴ *Id.*; *see also* Vladeck, *supra* note 191, at 199–200.

³³⁵ 72 M.J. 364 (C.A.A.F. 2013).

³³⁶ *See generally id.*

³³⁷ *See id.* at 366–67.

³³⁸ *See id.* at 366.

³³⁹ *See id.*

³⁴⁰ *See id.* at 367.

³⁴¹ *See id.* at 368.

³⁴² *See supra* notes 328–30 and accompanying text.

³⁴³ *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129–30 (C.A.A.F. 2013).

by the court-martial on the issues of guilt or innocence—which will form the very foundation of a finding and sentence.³⁴⁴

In an evidentiary context, it does not matter who litigates the admissibility of evidence. The result will be a ruling that allows or prevents the admission of the evidence, and whether the evidence will be considered at trial could impact the findings and sentence. That reasoning does not change when we shift the context from the admissibility of evidence to the public's access to a hearing.

Unfortunately, rather than overruling the illogical part of *CCR*, Chief Judge Baker tried to distinguish it: “Furthermore, unlike ‘strangers to the courts-martial,’ [the media in *CCR*,] LRM is the named victim in a court-martial seeking to protect the rights granted to her by the President in duly promulgated rules of evidence”³⁴⁵ He seems to have finally spotted the problem, but his distinction still does not make any sense. Abstract victims have certain promulgated rights.³⁴⁶ Those rights are formally vested in a person when she is named in the charging document.³⁴⁷ When those rights are injured, she gets standing.³⁴⁸ The court has jurisdiction over that issue when the exercise of those rights could affect the accused's findings and sentence.³⁴⁹ The fact that she was named in the charging document has nothing to do with standing or jurisdiction. Naming her in the charging document simply formally vests this particular person with those abstract rights.

Compare that to claims made by the media. The media have promulgated rights (for that matter, constitutional rights).³⁵⁰ Unlike victims, they do not need to be named in any charging document for those abstract rights to vest.³⁵¹ As discussed above, they have standing because their rights are injured. And the court should have jurisdiction because the exercise of those rights could affect the accused's findings and sentence. The problems are not distinguishable because the victim is named and the media are not.

The problem is that CAAF has created an artificial distinction where none exists.³⁵² For *jurisdiction*, it does not matter who brings the information to light. What matters is if the information could impact the findings and sentence. If the information could cause the public to apply legitimate pressure on the convening authority, then that information could impact the findings and sentence. For *standing*, it does matter who brings up the issue.³⁵³ For example, if the accused does not

³⁴⁴ *Kastenberg*, 72 M.J. at 368.

³⁴⁵ *Id.* (citation omitted).

³⁴⁶ *See, e.g., id.*

³⁴⁷ *See id.*

³⁴⁸ *See id.*

³⁴⁹ *Id.*

³⁵⁰ *See* discussion *supra* Section V.A.

³⁵¹ *See* discussion *supra* Section V.A.

³⁵² *See supra* notes 346–51 and accompanying text.

³⁵³ *See generally Kastenberg*, 72 M.J. 364.

join the petition, then the media cannot file a claim based on an injury to the accused's Sixth Amendment right.³⁵⁴ The military courts would have jurisdiction over that Sixth Amendment claim, but the media would not have standing to bring it.³⁵⁵

Again, this situation will rarely come up. We should expect that the accused will join the petition. When that happens, it is likely that the courts would only address the accused's claim,³⁵⁶ and if the accused wins, the media's issues would become moot. On rare occasions, like we find in *CCR*, the accused may have a reason for not joining the writ and the media will be on their own.³⁵⁷ As the law stands right now, military appellate courts do not have jurisdiction to hear those claims.³⁵⁸ Chief Judge Baker could have cleaned up *CCR*'s reasoning flaw in *Kastenber*, but he did not (maybe it would have cost him his majority?) and this illogical distinction remains the law.³⁵⁹ As a result, military appellate courts do not have jurisdiction to hear the media's First Amendment claims.³⁶⁰ Instead, if the media have suffered an injury to its open trial right, the media need to go to an Article III court to litigate the infringement of that right.

VI. THE ARMY COURT OF CRIMINAL APPEALS'S FLAWED ANALYSIS

Fair warning, the reasoning used by the Army Court of Criminal Appeals to resolve the public access issue at Bergdahl's preliminary hearing is extraordinarily confused. Hence, the need for this Article—to prevent opinions like this from occurring in the future. The court could have addressed Bergdahl's claim on its own, using the analysis described above, and simply left the media's claim alone. Applying the analysis appropriate to the accused's claim, the court should have granted his writ petition. With that done, the media's claim would have been moot. Instead, the court used the analysis appropriate for the media's claim to reject the media's claim—and also the accused's claim.

A. The Accused's Rights and Writs

1. Potential Jurisdiction

The Army Court of Criminal Appeals found that it did not have jurisdiction over Bergdahl's claim, using confused reasoning that is inconsistent with established case

³⁵⁴ See generally *id.*

³⁵⁵ See generally *id.*

³⁵⁶ This is because the accused's right to an open hearing is well settled. See discussion *supra* Section IV.A.

³⁵⁷ See *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 127, 129 (C.A.A.F. 2013).

³⁵⁸ See *id.* at 128–30.

³⁵⁹ See *Kastenber*, 72 M.J. 364.

³⁶⁰ See *Ctr. for Constitutional Rights*, 72 M.J. at 129–30.

law.³⁶¹ The court started off by correctly noting that the court may issue writs under the All Writs Act, but only on matters over which it has jurisdiction.³⁶² The court also noted that it has limited jurisdiction: only over those matters that directly affect the findings and sentence.³⁶³ From that point on, the court made several major mistakes.

The Army court set the stage for its reasoning by stating, “[T]he authority of this court to review pre-referral matters is limited and lacks a firm statutory basis.”³⁶⁴ The first part of that sentence is simply a truism. But we know from case law that open trial issues raised by the accused based on a closed Article 32 hearing are one of the matters over which military appellate courts have potential jurisdiction.³⁶⁵ The last part of that sentence is true, but is true for all cases that involve potential jurisdiction: there is no firm statutory basis for it. Potential jurisdiction is a court-made doctrine that is needed for the All Writs Act to have any teeth.³⁶⁶

The Army court then made an odd move, suggesting that because the Supreme Court in *Goldsmith* rejected CAAF’s assertion that it had broad responsibility with respect to the administration of military justice, the Army court should defer to the Judge Advocate General, staff judge advocates, and convening authorities when making decisions about pre-referral matters like this.³⁶⁷ According to the Army court, *those* people are the ones responsible for overseeing military justice.³⁶⁸

But that is not what the Supreme Court said in *Goldsmith*.³⁶⁹ The judiciary is responsible for overseeing criminal justice. Remember, in the lower court decision, CAAF tried to exercise jurisdiction over an administrative matter that occurred after the entire court-martial process was over, to include the appeals.³⁷⁰ That administrative

³⁶¹ I will be citing the unpublished memorandum opinion that the Army Court of Criminal Appeals issued in *Bergdahl v. Burke*, a seven-page opinion issued on October 8, 2015. *Bergdahl v. Burke*, ARMY MISC 20150624, 2015 WL 5968401 (A. Ct. Crim. App. Oct. 8, 2015), *petition dismissed*, 75 M.J. 116 (C.A.A.F. 2015). On October 14, 2015, the court issued an unpublished two-page summary disposition in response to the media’s petition. *Hearst Newspapers, LLC v. Abrams*, ARMY MISC 20150652, 2015 WL 6119474 (A. Ct. Crim. App. Oct. 14, 2015). While not referencing the earlier memorandum opinion (because it is unpublished), this second, summary disposition clearly rests on the reasoning in *Bergdahl v. Burke*. *See id.*; *Bergdahl*, 2015 WL 5968401, at *1–2. For example, the court cites to two cases that were central to its reasoning in the early opinion. *See Hearst Newspapers*, 2015 WL 6119474, at *1; *Bergdahl*, 2015 WL 5968401, at *1–2.

³⁶² *Bergdahl*, 2015 WL 5968401, at *1.

³⁶³ *Id.* at *1–2.

³⁶⁴ *Id.* at *2.

³⁶⁵ *See discussion supra* Section IV.B.1.

³⁶⁶ *See, e.g., Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 25 (1943).

³⁶⁷ *See Bergdahl*, 2015 WL 5968401, at *2 (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999)).

³⁶⁸ *See id.*

³⁶⁹ *Goldsmith*, 526 U.S. 529.

³⁷⁰ *Goldsmith v. Clinton*, 48 M.J. 84, 90 (C.A.A.F. 1998); *see supra* notes 186–206 and accompanying text.

matter was beyond the start and finish lines of “findings and sentences.”³⁷¹ For those administrative matters, the people the Army court listed might be the right ones to resolve them. However, here we are dealing with the closure of an Article 32, which is part of the court-martial process and well within the responsibility of the judiciary to supervise. If we followed the Army court’s reasoning, we would never second-guess any pre-referral decisions made by convening authorities, but we do all of the time. In fact, if the case had been referred, the accused could challenge this pre-referral decision by filing a motion with the military judge, and the military judge would not grant the convening authority any special deference.

The Army court also tried to characterize the partial closure of the Article 32 as an executive order, akin to the administrative matter in *Goldsmith*, rather than “a judicial order with focused applicability to only the Article 32.”³⁷² We will return to some of this reasoning later, when we look at whether it would be appropriate to issue a writ in cases where there may be separation of powers concerns. For now, the issue is whether a closure of an Article 32 by the convening authority and preliminary hearing officer by not making the record public is a “judicial” action (bringing it within the court’s jurisdiction) or an “executive” or “administrative action” (that, according to *Goldsmith*, would be beyond a military appellate court’s jurisdiction).³⁷³

According to the Army court:

In *Goldsmith*, the Supreme Court distinguished between “executive actions” (where writ jurisdiction did not exist) and actions effecting the “finding” or “sentence” (where writ jurisdiction does exist). Although a closer call than the facts presented in *Goldsmith*, we find a protective order issued by a military commander, intended to cover the public release of government information both before and after a preliminary hearing, to be more akin to an executive action.³⁷⁴

The court came to this conclusion by characterizing Bergdahl’s writ petition as a FOIA request.³⁷⁵ The court stated, “[T]he matter petitioner desires us to address

³⁷¹ See *Goldsmith*, 526 U.S. at 531.

³⁷² *Bergdahl*, 2015 WL 5968401, at *2.

³⁷³ *Goldsmith*, 526 U.S. at 535.

³⁷⁴ *Bergdahl*, 2015 WL 5968401, at *3 (internal citation omitted). In a subsequent case, the Supreme Court found that CAAF did have jurisdiction over a writ of *coram nobis* filed several years after his military appellate process had been exhausted. *United States v. Denedo*, 556 U.S. 904, 907–08, 914–15 (2009). There, the petitioner was seeking to modify his actual conviction based on an ineffective assistance of counsel claim rather than attacking a post-conviction administrative matter. See *id.* That action fell within the start and finish lines of the court-martial process. See *id.*

³⁷⁵ *Bergdahl*, 2015 WL 5968401, at *3 (“Setting aside whether this filing is a FOIA request clothed as a writ petition . . .”).

is not a judicial order with focused applicability to only the Article 32 preliminary hearing. Rather, the order in question is a military order provided by a commander with application far beyond the Article 32.³⁷⁶ Somehow, according to the court, if a commander or preliminary hearing officer issues a broad order that goes beyond the scope of the Article 32, then the commander or preliminary hearing officer can trump the accused's public trial rights that attach to that Article 32.³⁷⁷

That makes no sense. The accused's Sixth Amendment rights come first. If commanders or preliminary hearing officers are concerned about that information becoming public, they must follow the rules to close that portion of the hearing.³⁷⁸ The official must find that sensitive information needs to be protected and that the overriding interest outweighs the value of an open hearing.³⁷⁹ The official must then narrowly tailor the closure to achieve the overriding interest and then make specific findings of fact in writing that support the closure.³⁸⁰ Whatever orders exist outside of the hearing have no relevance to this analysis. To trump an accused's right to make this information public—a right that comes directly from this hearing—the official has to follow this process, and none other.³⁸¹ Simply issuing a broad order before the hearing does not change the fact that the hearing was closed. To hold otherwise means a commander could circumvent the public access rules by issuing broad orders before the hearing that cover everything that might come out during the hearing.

The court then said that Bergdahl should seek relief through FOIA processes: “[T]he protection provided the contents of the [report], for example, should and must be sought through administrative channels provided outside the court-martial process, such as [FOIA].”³⁸² And they suggested if he did not get relief, he should then go to an Article III court: “This is not to say that as an executive action, the protective order is not subject to judicial review. Assuming a proper request, when an agency fails to comply with FOIA, a civil action may be brought against the agency in a United States district court.”³⁸³

That also makes no sense. The court's analysis shows that it had a patent misunderstanding of what was going on. Bergdahl already had the report.³⁸⁴ He was not seeking discovery through FOIA; rather, he was seeking to vindicate his public trial rights.³⁸⁵ Congress did not write FOIA as a mechanism for enforcing constitutional rights, but to ensure government transparency in the day-to-day business of running a democracy: “The basic purpose of FOIA is to ensure an informed citizenry, vital

³⁷⁶ *Id.* at *2.

³⁷⁷ *See id.*

³⁷⁸ *See* discussion *supra* Section IV.A.

³⁷⁹ *See* discussion *supra* Section IV.A.

³⁸⁰ *See* discussion *supra* Section IV.A.

³⁸¹ *See* discussion *supra* Section IV.A.

³⁸² *Bergdahl*, 2015 WL 5968401, at *2.

³⁸³ *Id.* at *3.

³⁸⁴ *Cf. id.* at *1.

³⁸⁵ *See id.*

to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”³⁸⁶

Indeed, the public does not have a constitutional right to the information that is subject to FOIA requests—the Supreme Court “has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.”³⁸⁷ That is the very reason why we needed legislation to gain access to it. This is an act designed to give people access to information that the government could otherwise lawfully withhold.³⁸⁸ Here, however, we are dealing with a situation where the Constitution requires the government to grant access to the information because the government chose to put someone on trial.

Telling a defendant that he needs to use FOIA to vindicate his public trial right is like telling a party who is in litigation with the government, and who is entitled to information by the Constitution or formal discovery rules, that he or she needs to get that information through FOIA and not the court process. Defendants do not have to issue FOIA requests to get access to discovery material.³⁸⁹ That is preposterous. So is asking defendants to make FOIA requests to vindicate their Sixth Amendment rights.³⁹⁰

The Army court’s reasoning to this point was wholly incorrect. To compound it, the court then gives an incorrect statement of law: “An Article 32 hearing is ‘not part of the court-martial.’ An Article 32 hearing, being a hearing conducted before a decision is made to send a case to trial, is unlikely to have ‘the potential to *directly* affect the findings and sentence’ as required for writ jurisdiction.”³⁹¹ That statement is contrary to all of the law discussed above: *ABC*, *CCR*, and *Davis*.³⁹²

Recognizing this, the Army court tries to distinguish those cases and makes a critical error. The court failed to distinguish between the analysis required when the *accused* files a writ and the analysis required when the *media* files a writ.³⁹³ The reasoning between the two models is different, as we have seen.

The Army court turned to CAAF’s reasoning in *CCR* about whether military appellate courts have jurisdiction over the media’s claims to question whether military appellate courts have jurisdiction over the accused’s claims.³⁹⁴ The Army

³⁸⁶ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted).

³⁸⁷ *McBurney v. Young*, 133 S. Ct. 1709, 1718 (2013) (citations omitted).

³⁸⁸ *See, e.g., id.* at 1718–19.

³⁸⁹ *See generally* Recommendations of the Administrative Conference of the United States, 48 Fed. Reg. 57,461, 57,463, 57,464 (Dec. 30, 1983); Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119 (1984).

³⁹⁰ *See* discussion *supra* Section I.A.

³⁹¹ *Bergdahl v. Burke*, ARMY MISC 20150624, 2015 WL 5968401, at *3 (A. Ct. Crim. App. Oct. 8, 2015) (internal citations omitted).

³⁹² *See generally* *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013); *United States v. Davis*, 64 M.J. 445 (C.A.A.F. 2007); *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).

³⁹³ *See Bergdahl*, 2015 WL 5968401, at *1–3; *see also* discussion *supra* Parts IV–V.

³⁹⁴ *See Bergdahl*, 2015 WL 5968401, at *2.

court thought that *CCR* rejected *all* of *ABC*'s precedential value: "However, since [*ABC*], the C.A.A.F. has questioned whether [*ABC*] continues to be good law C.A.A.F. in *CCR* rejected [*ABC*] as controlling precedent" ³⁹⁵ But remember, in *CCR*, CAAF reversed those portions of *ABC* that applied to the media but kept in place—and even reaffirmed—those parts of *ABC* that applied to the accused. ³⁹⁶

The Army court then combined an incorrect interpretation of *Goldsmith* with an incorrect interpretation of *CCR* to come to this conclusion: "Viewing [*ABC*] in light of *Goldsmith*, we reject the invitation to extend the jurisdiction of this court under the All Writs Act to the pre-referral matter raised in this writ." ³⁹⁷

Despite clear case law to the contrary that shows that it did have jurisdiction, the Army court found that it did not, making several mistakes along the way. ³⁹⁸ The court suggested that it did not have power to supervise the military justice system on pre-referral actions that occur during the court-martial process, which it does. ³⁹⁹ The court suggested that the convening authority and preliminary hearing officer's decisions to close the hearing were executive or administrative action, which they were not. ⁴⁰⁰ The court suggested that Bergdahl's writ petition was actually a FOIA request in disguise, which it was not. ⁴⁰¹ And the court misinterpreted prior case law by bringing analysis that belongs in the media context to Bergdahl's claim. ⁴⁰²

2. Necessity

While finding it did not have jurisdiction, the Army court assumed for the sake of argument that it did and continued its writ analysis through the necessary and appropriate factors. ⁴⁰³ Again, the basic test for necessity is whether there are other adequate means available for relief. The Army court found that Bergdahl did have other adequate means. ⁴⁰⁴

The court started by saying, "[T]he structure of the military justice system assigns to others the initial responsibility of addressing the issue presented by the petitioner [and] this includes the military commander" ⁴⁰⁵ That is an odd statement. The rules do not require that Bergdahl petition the convening authority, but he did anyway and

³⁹⁵ *Id.*

³⁹⁶ *Ctr. for Constitutional Rights*, 72 M.J. at 129–30.

³⁹⁷ *Bergdahl*, 2015 WL 5968401, at *2.

³⁹⁸ *See id.* at *2–4; *supra* notes 361–97 and accompanying text.

³⁹⁹ *See Bergdahl*, 2015 WL 5968401, at *2.

⁴⁰⁰ *See id.* at *2–3.

⁴⁰¹ *See id.* at *3.

⁴⁰² *See id.* at *2.

⁴⁰³ *Id.* at *3–5.

⁴⁰⁴ *Id.* at *4.

⁴⁰⁵ *Id.* at *3.

was not given any relief.⁴⁰⁶ In addition, Bergdahl made the appropriate objections to the preliminary hearing officer.⁴⁰⁷

The court then argued that Bergdahl should wait until the case is referred to trial, if ever:

Not only will the military judge be the structurally appropriate person to consider the questions presented by this writ, the military judge, having a more developed record, will also be far better positioned to consider the matter . . . [W]e again note that the accused retains the full ability to seek relief at trial from any error arising from the Article 32 hearing. If a preliminary hearing did not substantially comply with R.C.M. 405 and Article 32, the military judge may reopen the Article 32 hearing or provide other appropriate relief.⁴⁰⁸

Indeed, as the court notes, there might not ever be a court-martial.⁴⁰⁹

Again, the problem with that argument is that it runs contrary to one of the primary reasons that the right to an open trial attaches to the preliminary hearing in the first place. The hearing needs to be open while it is ongoing *because* there is a chance that it may be the last event in that criminal process.⁴¹⁰ And if the case is not referred, violations of that right would go without a remedy.⁴¹¹ Part of the military justice system would forever remain hidden from the public.

Fortunately, CAAF's opinions are consistent with the idea that, during this gap, issuing a writ could be necessary. The procedural posture in *ABC* was during this gap, and *CCR* validated that part of *ABC* that applied to the accused.⁴¹² Dicta in *Davis* also suggests that the accused can file a writ during this gap.⁴¹³ Here, the Army court tried to make a completely unpersuasive distinction from this line of cases: "[T]his case differs significantly from the issues presented in [*ABC*]. . . . In [*ABC*], the news media petitioners were barred access from the hearing itself, and a remedy given after the hearing had concluded would have been too late."⁴¹⁴ That reasoning applies with as much force here. A remedy given after the hearing would

⁴⁰⁶ See *supra* notes 218–29 and accompanying text.

⁴⁰⁷ See Record of Preliminary Hearing Under Article 32, *supra* note 5, at 228.

⁴⁰⁸ *Bergdahl*, 2015 WL 5968401, at *3–4.

⁴⁰⁹ *Id.* at *2.

⁴¹⁰ See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 12–13 (1986); discussion *supra* Sections I.A, IV.A.

⁴¹¹ See discussion *supra* Sections I.A, IV.A.

⁴¹² See *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129–30 (C.A.A.F. 2013); *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997).

⁴¹³ *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007).

⁴¹⁴ *Bergdahl*, 2015 WL 5968401, at *4.

have been too late for Bergdahl to vindicate his public trial rights. The cases are not distinguishable.

If “Deny and FOIA” is Bergdahl Block, this is where the appellate court truly validates that move. Do not seek relief from us. Instead, just wait a few months until the case is referred and motions are docketed and then seek some relief. In the meantime, file a FOIA request. Had the Army court applied the correct reasoning, it would have seen that a writ was necessary to vindicate Bergdahl’s rights, and it could have foiled this play.

3. Appropriateness

Finding no jurisdiction and that a writ was not necessary, the Army court, for the sake of argument, continued through the appropriateness prong.⁴¹⁵ Again, writs are only appropriate when the right to the issuance of the writ is clear and indisputable.⁴¹⁶ Of the areas that are clearly appropriate, one is compelling a lower court (or here, a preliminary hearing officer) it to exercise its authority when it is its duty to do so.⁴¹⁷ While it was clear and indisputable that the government did not properly close the hearing, the court never addressed that issue.⁴¹⁸ Instead, the court went to possible, abstract reasons to close a hearing. Even then, the court used bad reasoning.⁴¹⁹

The Army court suggested, contrary to clear line of cases that says that the accused’s Sixth Amendment right attaches to these hearings, and contrary to a clear regulatory right to an open hearing, that the public trial rights do not wholly apply to these hearings: “[P]ublic access to trial documents serves important public interests. [Access] does indeed serve as a restraint on government, and openness has a ‘positive effect on the truth-determining function of the proceedings.’ *Article 32 hearings, however, are not an apples-to-apples comparison to trials on the merits.*”⁴²⁰ The court continued: “While an Article 32 hearing is a public proceeding, it is not clear that the public’s interest in obtaining documents at a preliminary hearing is viewed through the same lens as the public’s right to admitted documents at trial on the merits.”⁴²¹ Even when looking at it from the perspective of the media’s rights, as the court did here, that reasoning is contrary to settled law. The accused’s Sixth Amendment right (as well as the media’s First Amendment right) clearly attach to Article 32s.⁴²²

The court did not seem to recognize that, saying, “A judge-made rule that such matter is automatically public . . . or is presumptively public . . . would have secondary

⁴¹⁵ *Id.* at *3–4.

⁴¹⁶ *Id.* at *4.

⁴¹⁷ *See Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943).

⁴¹⁸ *See generally Bergdahl*, 2015 WL 5968401.

⁴¹⁹ *See id.* at *4.

⁴²⁰ *Id.* (emphasis added).

⁴²¹ *Id.*

⁴²² *See discussion supra* Parts IV–V.

effects.”⁴²³ Huh? These are constitutional and regulatory rules, not judge-made rules, and these rules clearly make this information presumptively public.⁴²⁴ Furthermore, these rules do not create an irrebuttable presumption that this information must always be made public.⁴²⁵ The hearings can be closed, but the proper authorities need to follow the rules first.⁴²⁶

The court then looked to a reason for closing the hearing that is generally advanced by the accused, not the government: that the public might learn about inadmissible evidence that could then impact the ability of the accused to get a fair trial.⁴²⁷ Even then, the accused still has to show “that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.”⁴²⁸ Here, there is no evidence that Bergdahl’s fair trial rights might have been compromised.

Instead, the court went into the abstract:

Article 32 preliminary hearings are not governed by rules of evidence. Evidence that would be excluded or suppressed at trial may be admitted at an Article 32 hearing. An Article 32 preliminary hearing officer cannot ordinarily screen out documents of dubious reliability, that are of questionable authenticity, or whose probative value is substantially outweighed by dangers of unfair prejudice.

. . . .

With no rules of evidence, and without a judicial officer, such a rule would allow a party to make public the entire case file so long as the information was relevant to the purposes of the preliminary hearing. This would allow a party to introduce into the public sphere information that is inadmissible at trial and whose evidentiary value may be minimal.⁴²⁹

⁴²³ *Bergdahl*, 2015 WL 5968401, at *4.

⁴²⁴ See discussion *supra* Parts IV–V; see also MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(i)(4) (“Preliminary hearings are public proceedings and should remain open to the public whenever possible.”).

⁴²⁵ See, e.g., MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(i)(4).

⁴²⁶ See, e.g., *id.*

⁴²⁷ *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 14 (1986) (quoting *Gannett v. DePasquale*, 443 U.S. 368, 378 (1979)).

⁴²⁸ *Id.*

⁴²⁹ *Bergdahl v. Burke*, ARMY MISC 20150624, 2015 WL 5968401, at *4 (A. Ct. Crim. App. Oct. 8, 2015) (internal citations omitted).

None of that makes sense. First, the Federal Rules of Evidence do not generally apply to federal preliminary hearings.⁴³⁰ The same potential problem exists there, and the public trial right still prevails. Second, the preliminary hearing officers are military lawyers.⁴³¹ They understand evidence. Third, a party *can* introduce the entire case file—but only if the information is relevant to the limited purpose of the hearing.⁴³² The very purpose of the hearing is to gather information so the preliminary hearing officer can make a probable cause determination.

Further, the Army court’s abstract reason for justifying the closure of Bergdahl’s particular hearing would apply equally well to all Article 32 hearings, not just Bergdahl’s.⁴³³ All preliminary hearings have those same rules. The Constitution and the President have ensured that the accused’s public trial right attaches to the hearing.⁴³⁴ And second guessing those rules is not the Army court’s role. Knowing that, Congress and the President have allowed the accused to present any relevant evidence, and the President has said that (with some exceptions) the Military Rules of Evidence do not apply.⁴³⁵ They know the risk that the public will see some evidence that might not be admissible at trial. And the President (reflecting constitutional considerations) created a mechanism for closing these hearings if that risk is too great.⁴³⁶ Congress and the President established these rules and the Army judges need to live with them.

Last, and related to the court’s concern about making a “judge-made rule,” the court hints that separation of powers concerns might make granting a writ inappropriate: “Although not phrased as such, the relief petitioner seeks is for this court to countermand an order given by a military commander”⁴³⁷ But commanders issue orders related to courts-martial all the time (or what is litigated most frequently, they do not grant defense requests for those orders), and the military judiciary does not treat those decisions with any special deference. Examples include orders to appoint expert assistants and witnesses;⁴³⁸ orders to hold depositions;⁴³⁹ orders granting immunity;⁴⁴⁰ and orders appointing panel members.⁴⁴¹

The reasons military courts do not grant any deference is because, as the Supreme Court stressed in *Cheney*, in criminal cases, the judiciary is expected to push

⁴³⁰ FED. R. CRIM. P. 5.1(e) advisory committee’s note to 2002 amendment (quoting FED. R. EVID. 1101(d)(3)).

⁴³¹ MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(d)(1).

⁴³² Military Justice Act of 2016, Pub. L. No. 114-328, § 5203, 130 Stat. 2894, 2905–06.

⁴³³ *See generally Bergdahl*, 2015 WL 5968401.

⁴³⁴ *See* discussion *supra* Section IV.A.

⁴³⁵ *See* MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(h).

⁴³⁶ *See id.* at R.C.M. 405(i)(4).

⁴³⁷ *Bergdahl*, 2015 WL 5968401, at *2.

⁴³⁸ MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 703(d).

⁴³⁹ *Id.* at R.C.M. 702(b).

⁴⁴⁰ *Id.* at R.C.M. 704(e).

⁴⁴¹ Uniform Code of Military Justice art. 25 (codified at 10 U.S.C. § 825 (2012)).

back against the executive branch.⁴⁴² The “primary constitutional duty of the [judiciary is] to do justice in criminal prosecutions.”⁴⁴³ In *Bergdahl*, there were no serious separation of powers concerns.⁴⁴⁴ This was just a regular court-martial. Unlike in *Cheney*, where the Court cut some slack to the President and Vice President in a civil case where the writ might have impeded their ability to execute their constitutional duties, here we are only dealing with the convening authority and preliminary hearing officer in their narrow roles within the military justice system.⁴⁴⁵ The military judiciary corrects those officials in those roles all of the time.

Here, if the convening authority or preliminary hearing officer were concerned about the public release of information, they had a simple solution: follow the rules for closing the hearing. They did not do so. And the military appellate judges should have pushed back. That is their job in the system.

The Army court made a mess of Bergdahl’s writ petition, from start to finish. The law is clear that military appellate courts have potential jurisdiction to hear these writs, and that during the gap between the close of the preliminary hearing and the start of the trial, military courts can find that a writ is necessary because there is no other place for the accused to go for relief.⁴⁴⁶ And in this particular case, the facts make it pretty clear that relief would have been appropriate: the government did not follow the rules, and even if it had, closing the entire report rather than providing a redacted copy was not narrowly tailored. Providing a redacted copy would have been an appropriate, lesser means compared to closing the entire report.

B. The Media’s Rights and Writs

The Army court did not apply any real analysis to the media’s claim, but that is not a great failing.⁴⁴⁷ As discussed above, while the media have standing for the injury to their First Amendment right to a public trial when the hearing is closed, the military appellate courts do not have jurisdiction over that issue.⁴⁴⁸ In very limited reasoning, the Army court found that it did not have jurisdiction: “This court does not have jurisdiction to oversee the administration of military justice generally.”⁴⁴⁹

The court continued that the media “has not demonstrated that the release of documents to the public, prior to any decision on whether this case should be

⁴⁴² *Cf.* *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 384 (2004).

⁴⁴³ *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

⁴⁴⁴ *See Bergdahl v. Burke*, ARMY MISC 20150624, 2015 WL 5968401, at *3 (A. Ct. Crim. App. Oct. 8, 2015).

⁴⁴⁵ *Compare Cheney*, 542 U.S. at 385, *with Bergdahl*, 2015 WL 5968401, at *1.

⁴⁴⁶ *See supra* notes 105–08 and accompanying text.

⁴⁴⁷ *See Bergdahl*, 2015 WL 5968401, at *4–5.

⁴⁴⁸ *See generally* *Hearst Newspapers, LLC v. Abrams*, ARMY MISC 20150652, 2015 WL 6119474 (A. Ct. Crim. App. Oct. 14, 2015) (per curiam); discussion *supra* Part V.

⁴⁴⁹ *Hearst Newspapers*, 2015 WL 6119474, at *1 (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999)).

referred to trial, has the potential to directly affect the findings and sentence.⁴⁵⁰ That statement would have been a correct statement of the law, except for the middle phrase. As the law stands, military courts never have jurisdiction over the media's claims, before referral or after referral.⁴⁵¹

CONCLUSION AND SOLUTIONS

To finish the Bergdahl story, following the denial of the writ petitions by the Army court, Bergdahl and the media petitioned CAAF.⁴⁵² CAAF rejected Bergdahl's petition in a summary disposition without any explanation.⁴⁵³ The court also rejected the media's petition in a summary disposition but included a little bit of reasoning: the writ "is hereby dismissed for the reasons stated in the decision of the United States Army Court of Criminal Appeals."⁴⁵⁴ As just discussed, the Army court generally got that right, although its reasoning was only two sentences long and contained a small error.

Note, though, that CAAF did not say the same thing when denying Bergdahl's writ.⁴⁵⁵ The case had not yet been referred⁴⁵⁶ and so still fell within the period where a trial-level court did not exist, but likely CAAF was waiting for this to be litigated at the court-martial (if there ever was one); then, if the military judge denied relief, the court could wait for a writ to go back through the Army court, all with a well-developed record. The last time CAAF moved quickly on an issue like this, it produced the *ABC* opinion, which it later had to backtrack from.⁴⁵⁷ The court may want to take more time this go-around and get the analysis right.

The convening authority referred Bergdahl's case to court-martial on December 14, 2015.⁴⁵⁸ At trial, the defense did not file a motion to correct that defect in the Article 32.⁴⁵⁹ Instead, after the case was referred, Bergdahl chose not to pursue this action further.⁴⁶⁰ Ultimately, the Bergdahl Block worked.

⁴⁵⁰ *Id.*

⁴⁵¹ *See* *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 131 (C.A.A.F. 2013).

⁴⁵² *See* *Bergdahl v. Burke*, 75 M.J. 116 (C.A.A.F. 2015).

⁴⁵³ *Id.* ("[T]he writ-appeal petition is hereby dismissed.").

⁴⁵⁴ *Hearst Newspaper, LLC v. Abrams*, 75 M.J. 155 (C.A.A.F. 2015).

⁴⁵⁵ *See id.*; *Bergdahl*, 75 M.J. 116.

⁴⁵⁶ *See* Luis Martinez, *Bowe Bergdahl to Face General Court Martial, Could Face Life Sentence*, ABC NEWS (Dec. 14, 2015, 4:06 PM), <http://abcnews.go.com/Politics/bowe-bergdahl-face-general-court-martial/story?id=35761933> [<https://perma.cc/PH3R-TBNJ>].

⁴⁵⁷ *Compare* *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), *with* *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013).

⁴⁵⁸ Martinez, *supra* note 456.

⁴⁵⁹ *See* Defense Motion to Vacate Pre-Referral Protective Order and for Other Appropriate Relief (Public Trial) at 1, *United States v. Bergdahl* (Ft. Bragg Feb. 4, 2016), <http://bergdahl.docket.files.wordpress.com/2016/03/4feb16vacate.pdf> [<https://perma.cc/V5MZ-NCG3>]. The issue is now forfeited on appeal. MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 905(d).

⁴⁶⁰ *See* Dan Lamothe, *Army Protests Bergdahl Attorneys' Release of Documents*, WASH. POST, Mar. 20, 2016, at A8.

The media did not even have an option at the court-martial. The court-martial did not have jurisdiction to hear their claims. To seek relief, the media would have to file a claim in a federal district court. The military officials did not follow the rules and the media was left without a worthwhile remedy. The Bergdahl Block worked.

The good news is that if military appellate courts apply the correct reasoning to claims brought by the accused, the block should not work (although there is still great inefficiency in not having a standing court available). However, the block will work against the media in those cases where the accused does not also raise a claim.

With a few simple fixes, Congress and the President can foil the Bergdahl Block and design a more efficient system. To start, Congress should amend the language of Article 32⁴⁶¹ and the President should amend R.C.M. 405⁴⁶² to make clear that the preliminary hearing officer can process requests by the media (1) to open the preliminary hearing and (2) to provide a process for providing information to the media. Congress and the President have already crafted rules for another non-party by giving victims the right to be heard in certain evidentiary issues,⁴⁶³ special provisions for receiving records related to the hearing,⁴⁶⁴ and the ability to provide additional information to the preliminary hearing officer (independent of the prosecutor).⁴⁶⁵ Clarifying the process for the media is not breaking any new ground and would provide an alternative means to the media short of filing a writ.

As it turns out, the Military Justice Act of 2016 provides a mechanism for these changes.⁴⁶⁶ The Act creates a new article, Article 140a, that is designed to force the President to come up with procedures to provide victims, counsel, and members of the public access to unsealed court-martial documents.⁴⁶⁷ When implementing this statute, the President should include procedures for releasing all documents related to the preliminary hearing contemporaneous with the hearing.

Still, military officials might just disregard those rules, as they did with the rules that governed Bergdahl's case. Congress needs to create an efficient mechanism that will hold military officials accountable to the rules. At the very least, Congress should amend Article 32 to make clear that military appellate courts have potential jurisdiction over issues raised at the preliminary hearing.⁴⁶⁸

⁴⁶¹ See generally Uniform Code of Military Justice art. 32 (codified at 10 U.S.C. § 832 (2012 & Supp. IV 2016)).

⁴⁶² MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405.

⁴⁶³ See *id.* at R.C.M. 405(i)(2)(A).

⁴⁶⁴ Uniform Code of Military Justice art. 32(e) (codified at 10 U.S.C. § 832(e)); MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(j)(5).

⁴⁶⁵ Military Justice Act of 2016, Pub. L. No. 114-328, § 5203, 130 Stat. 2894, 2905–06; MANUAL FOR COURTS-MARTIAL, *supra* note 19, at R.C.M. 405(k).

⁴⁶⁶ See generally Military Justice Act §§ 5001–5542, 130 Stat. at 2894–2968.

⁴⁶⁷ See UCMJ RECOMMENDATIONS, *supra* note 43, at 139.

⁴⁶⁸ The proposed Executive Order that would implement the MJA contains a provision for victims that states that they may file a writ if the preliminary hearing officer allows sexual propensity evidence at the hearing: “If the preliminary hearing officer determines that the

A more complete and efficient solution would be for Congress to close the gap between the preliminary hearing and the appellate court. Congress should continue the movement toward having a standing trial-level court by allowing military judges to hear issues related to the preliminary hearing before the referral. As discussed above, Congress has recently authorized military judges and magistrates to hear certain evidentiary issues before referral.⁴⁶⁹ Adding these preliminary hearing issues to the list would not be difficult and would bring the military system more in line with the federal system. Military judges would act as a district court judge, with the same relationships to the preliminary hearing officer that the district court judge has with the federal magistrate. The military judge would be able to hear the issues as they arise and provide at least one contemporaneous check on the military officials' decision to close a hearing.

While that would take care of issues raised by the accused, Congress would need to take an additional step for the media. Congress needs to amend Article 17 (which governs the general jurisdiction of courts-martial)⁴⁷⁰ to give courts-martial the jurisdiction to hear public trial claims brought by the media. And Congress needs to include language in Articles 66 and 67 (the statutes that define the military appellate courts' jurisdiction)⁴⁷¹ to grant subject matter and appellate jurisdiction over claims brought by the media related to their open trial rights at these hearings.

Now is the time for change. The last three years have seen arguably the most significant changes to the military justice system since it came into being in 1951. These changes have come in large part because the public lost trust and confidence in the military justice system, particularly for the military's handling of sexual assault cases.⁴⁷² Transparency fosters trust and confidence. The more the public knows about what is considered at a preliminary hearing and what the commander relied upon when making his or her referral decision, the more trust and confidence the public will have in the commander's decision and, ultimately, the role of commanders in making those decisions.

evidence should be admitted, the victim may directly petition the Court of Criminal Appeals for a writ of mandamus pursuant to Article 6b." Proposed Amendments to the Manual for Courts-Martial, United States (2016 ed.), 82 Fed. Reg. 31,952 annex 2, at 61 (proposed July 11, 2017), <https://www.federalregister.gov/documents/2017/07/11/2017-14447/proposed-amendments-to-the-manual-for-courts-martial-united-states-2016-ed> [<https://perma.cc/3SDH-JBYV>]. This provision is a memorialization of the ruling in *Kastenberg*, where CAAF found that it had potential jurisdiction over the victim's writ petition. See *LRM v. Kastenberg*, 72 M.J. 364, 367–68 (C.A.A.F. 2013). The President cannot safely do the same thing for the media, though. Only Congress (or the courts, by interpreting statutes) can expand jurisdiction.

⁴⁶⁹ See discussion *supra* Part II.

⁴⁷⁰ Uniform Code of Military Justice art. 17 (codified at 10 U.S.C. § 817 (2012)).

⁴⁷¹ Uniform Code of Military Justice arts. 66–67 (codified at 10 U.S.C. §§ 866–867) (2012)).

⁴⁷² See discussion *supra* Part II.