

IN THE UNITED STATES ARMY  
COURT OF CRIMINAL APPEALS

Before Panel No. 2

THE DENVER POST CORPORATION,	)	BRIEF OF <i>AMICUS CURIAE</i>
	)	
	)	
<i>Petitioner,</i>	)	
	)	
	)	
v.	)	Dkt. No. 2004 1215
	)	
	)	
UNITED STATES <i>et al.</i> ,	)	
	)	
	)	
<i>Respondents.</i>	)	February 15, 2005

TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES ARMY  
COURT OF CRIMINAL APPEALS

Statement of the Case

*Amicus curiae* hereby adopts and incorporates by reference the statement of the case as set forth in the brief of the petitioner, The Denver Post Corp.

Statement of Facts

*Amicus curiae* hereby adopts and incorporates by reference the statement of facts as set forth in the brief of the petitioner, The Denver Post Corp.

### Statement of Interest

*Amicus curiae* The Reporters Committee for Freedom of the Press ("Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation since 1970. The interest of *amicus* in this case is in protecting the well-established First Amendment right of public access to military proceedings, specifically an Article 32 hearing to investigate charges against four Army soldiers accused of torturing to death an Iraqi general during interrogation.

### Errors and Argument

#### I. THE FIRST AMENDMENT GUARANTEES A RIGHT OF PUBLIC ACCESS TO ARTICLE 32 HEARINGS.

This court has recognized the vital role that public access plays in safeguarding the fairness of the military justice system. "One aspect of the nature of an open trial forum is to ensure that testimony is subjected to public scrutiny and is thus more likely to be truthful or to be exposed as fraudulent." *United States v. Anderson*, 46 M.J. 728, 729 (A.C.C.A. 1997). Moreover, this court has noted that "[p]ublic scrutiny of the courts-martial 'reduces the chance of arbitrary or capricious

decisions and enhances public confidence in the court-martial process.'" *United States v. Hood*, ARMY 9401841, at 731 (A.C.C.A. Feb. 20, 1996) (unreported case in appendix of *Anderson, supra*), citing R.C.M. 806(b) discussion.

In recognition of this important function, military courts rely on United States Supreme Court precedents that uphold the public's qualified First Amendment right of access to criminal trials. See, e.g., *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985), citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997). This right of public access applies equally to military courts-martial. See *Hershey*, 20 M.J. at 436; *ABC v. Powell*, 47 M.J. at 365. "Indeed, as Judge Cox has noted, public access to courts-martial is critical: 'we believe that public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public.' *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)." *Hood, supra* at 731 (citations omitted).

In 1997, the U.S. Court of Appeals for the Armed Forces made it clear that the public's right of access extends to Article 32 hearings. See *ABC v. Powell*, 47 M.J. at 365 (declaring that "when an accused is entitled to a public [Article 32] hearing, the press enjoys the same right and has standing to complain if access is denied"), citing *Globe Newspaper Co. v. Superior Court*,

457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), and *Hershey*, *supra* at 435-36. Although not absolute, this right nevertheless demands that the court determine "on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis" whether closure is necessary. See *ABC v. Powell*, 47 M.J. at 365. "Every case that involves limiting access to the public must be decided on its own merits." *Ibid.*

## II. THE RESPONDENT'S ORDER FAILS TO MEET CONSTITUTIONAL REQUIREMENTS FOR CLOSURE OF AN ARTICLE 32 HEARING.

Under established military law, an Article 32 hearing may be closed to the public only if a four-part "stringent test" is met: "[T]he party seeking closure must advance an overriding interest that is likely to be prejudiced; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review." *Hershey*, 20 M.J. at 436, citing *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).<sup>1</sup> See *ABC v. Powell*, 47 M.J. at 365 (requiring

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<sup>1</sup>We note that President George Bush, by executive order dated Dec. 3, 2004, amended R.C.M. 806(b) to provide that "[c]ourts-martial shall be open to the public unless (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the over-riding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the military judge makes case specific findings on the record justifying closure." See 2004 Amendments

scope of closure to be narrowly tailored as well as “‘reasoned,’ not ‘reflexive,’” and noting that civilian courts mandate “articulated and compelling factors to justify closure”). Furthermore, before closing a proceeding, the investigating officer must “show that the [closure] order ‘constitutes the least restrictive means available for protecting’ the overriding interest.” *Hood, supra* at n.4, citing *Press-Enterprise Co.*, 464 U.S. at 520 (Marshall, J., concurring) (emphasis added).

Here, the respondent’s blanket closure order fails to meet the constitutional requirement that it be narrowly tailored to protect any interest in secrecy. “In excising the public from the [hearing], the [respondent] employed an ax in place of the constitutionally required scalpel.” *United States v. Grunden*, 2 M.J. 116, 120 (C.M.A. 1977). Moreover, the articulated reason for closure - that “it would be difficult, if not impossible, it would be tough” to separate classified from non-classified testimony - is not a factual “finding,” and is hardly “compelling” enough to cloak the entire proceeding in secrecy.

This court may review de novo the scope of the order and reason given for closing the Article 32 hearing in this case.

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to the Manual for Courts-Martial, United States, available at <http://www.whitehouse.gov/news/releases/2004/12/20041203-9.html> Although the amendment may not apply to the Article 32 hearing at issue, it nevertheless recognizes and safeguards the public’s well-established First Amendment right of access to military proceedings.

See *ABC v. Powell*, 47 M.J. at 366 (holding that SPCMCA's three reasons for closing Article 32 hearing were "unsubstantiated" and "insufficient"). The purported difficulty in segregating testimony fails to justify "a sweeping closure of the entire proceeding to the public and press." *Ibid.* Rather, as the petitioner urges, the respondent must determine how to prevent disclosure of classified information witness by witness. See *id.* at 365.

We support the petitioner in asking this court to direct the respondent to rescind his blanket closure order and comply with the requirements of *ABC v. Powell, supra*, and to issue a writ of prohibition preventing the respondent from arbitrarily closing the Article 32 hearing to the public and press.

Respectfully submitted,

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Certificate of Filing and Service

I certify that on February 15, 2005, copies of the foregoing Brief of *Amicus Curiae* in support of the Petition for Extraordinary Relief were filed at the United States Army Court of Criminal Appeals and sent via first class mail and facsimile to:

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