

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re)	Misc. Dkt. 2003-07
)	
)	
)	ORDER
Senior Airman (E-4))	
AHMAD I. AL HALABI)	
Petitioner)	Panel 3

Before

PRATT, BRESLIN, and GRANT
Appellate Military Judges

On 15 September 2003, the petitioner filed a petition for extraordinary relief in the form of a writ of mandamus. The petitioner asks this Court to quash a blanket order excluding the public from all parts of the investigation conducted under Article 32, UCMJ, 10 U.S.C. § 832, and that this Court order the convening authority and investigating officer to close the investigation only when necessary to protect classified material. Further, the petitioner seeks an immediate stay of the investigation until this Court rules upon this petition.

As a court created by Congress under Article 66(c), UCMJ, 10 U.S.C. § 866(c), this Court has the authority to issue extraordinary writs under the All Writs Act, 28 U.S.C. § 1651. *See Noyd v. Bond*, 395 U.S. 683, 695, n.7 (1969). Our superior court holds that military appellate courts may exercise this authority over cases that may potentially reach the appellate court. *Dettinger v. United States*, 7 M.J. 216, 220 (C.M.A. 1979).

The petitioner states that he was charged with violating Articles 92, 104, 106a, 107 and 134, UCMJ, 10 U.S.C. § 892, 904, 906a, 907, 934, and that the formal investigation of the charges was ordered to commence on 15 September 2003. He further indicates that the convening authority, exercising his authority under Rule for Courts-Martial (R.C.M.) 405(h)(3), ordered that the investigation proceedings be closed to spectators. The convening authority's order states, in pertinent part:

Considering the language of M.R.E. 505 and applying its intent and reasoning to this Article 32 Investigation, I am directing that all portions of this Article 32 Investigation be closed to all members of the public other

than the investigating officer, the Article 32 witnesses, involved attorneys, necessary Security Forces personnel, and SrA Halabi. I am doing this by my authority as the commander who directed the Article 32 investigation and because virtually all of the evidence presented during this Article 32 Investigation can compromise current on-going investigations that are of concern to national security.

The Constitution of the United States gives to Congress the authority to regulate the armed forces. U.S. CONST. art. I, § 8, cl. 14. In the UCMJ, Congress delegated to the President the authority to prescribe pre-trial, trial and post-trial procedures for courts-martial. Article 36(a), UCMJ, 10 U.S.C. § 836(a). Pursuant to this delegation, the President promulgated the Rules for Courts-Martial. R.C.M. 405(h)(3) provides, “Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer.” The Discussion to the rule provides, “Closure may encourage complete testimony by an embarrassed or timid witness.” The Discussion also indicates, “Ordinarily the proceedings of a pretrial investigation should be open to spectators.” Similarly, Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 4.1.2 (2 Nov 99), states,

Article 32 investigations should ordinarily be open to the public. Because the public has an interest in attending Article 32 investigations, all efforts to keep the investigation open to the public should be explored before closing the investigation. Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer (IO) when the interests of justice outweigh the public’s interest in access. See R.C.M. 405(h)(3). For example, it may be necessary to close an investigation to encourage complete testimony of a timid or embarrassed witness, to protect the privacy of an individual or to ensure an accused’s due process rights are protected. Make every effort to close only those portions of the investigation that are clearly justified and keep the remaining portions of the investigation open. If the hearing is closed, the commander or IO ordering it closed should provide specific, articulable reasons, in writing, for closure. These reasons should be attached to the IO’s report of investigation.

In *ABC, Inc. v. Powell*, 47 M.J. 363 (1997), our superior court ruled that, “absent ‘cause shown that outweighs the value of openness,’ the military accused is likewise entitled to a public Article 32 investigative hearing.” *ABC, Inc.*, 47 M.J. at 365 (citing *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 509 (1984)). Of course, “the right to a public hearing is not absolute.” *Id.* (citing *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985), *cert. denied*, 474 U.S. 1002 (1986); *United States v. Grunden*, 2 M.J. 116, 120 (C.M.A. 1977); *United States v. Brown*, 22

C.M.R. 41, 46 (C.M.A. 1956)). As the Court in *ABC, Inc.* explained, “Every case that involves limiting access to the public must be decided on its own merits. Furthermore, the scope of closure must be tailored to achieve the stated purposes and should be ‘reasoned,’ not ‘reflexive.’” *Id.* (citing *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996)).

In this case, it appears the convening authority ordered the proceedings closed to all spectators because most, but not all, of the evidence involved matters of concern to national security. We find this analysis to be insufficient under the criteria established by *ABC, Inc.*, 47 M.J. at 365. Rather, the determination of whether closure is necessary “must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis.” *Id.* For these reasons we grant the petitioner’s request for a writ of mandamus, in part, and direct that the Article 32, UCMJ, proceedings not be closed pursuant to this blanket order.

It is important to clarify that we do not hold that the Article 32, UCMJ, investigation may not be closed in whole or in part, provided that the determination is made on the appropriate “case-by-case, witness-by-witness, and circumstance-by-circumstance basis.” *Id.* Upon proper inquiry and review of the interests of the government, the petitioner, and the public, the investigating officer may conclude that the interests of justice require closing all or part of the proceedings. Further, we do not hold that the proceedings may only be closed for the purpose of protecting classified information. The convening authority or the investigating officer may determine whether the interests of justice outweigh the public’s interest in access. *See ABC, Inc.*, 47 M.J. at 365 (rejecting the argument that protecting a witness from embarrassment would not qualify as a basis for closing a pretrial hearing); *Hershey*, 20 M.J. at 436 (may be permissible to exclude spectators to protect a child of tender years); *Brown*, 22 C.M.R. at 46; *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002) (national security interests may be considered as factors in closing a hearing, and are traditionally given considerable deference), *cert. denied*, 123 S. Ct. 2215 (2003).

Accordingly, it is by this Court, this 16th day of September 2003,

ORDERED:

The convening authority and the investigating officer may not exclude all spectators from the Article 32, UCMJ, investigation proceedings under the existing blanket order. The convening authority or the investigating officer may exclude persons from all or any part of the Article 32, UCMJ, investigation proceedings only after careful, detailed, analysis and based upon specific, articulable reasons, in writing (sealed if necessary). The scope of any closure must be tailored to achieve the required purposes.

FOR THE COURT

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator