IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Center for Constitutional Rights, et al., Petitioners-Appellants	GOVERNMENT SUPPLEMENTAL BRIEF ON THE COURT'S SPECIFIED ISSUES
v.	**Crim. App. Dkt. No. Misc. 20120514**
UNITED STATES OF AMERICA	**USCA Misc. Dkt. No. 12-8027/AR**
and	
Colonel DENISE LIND Military Judge, Respondents-Appellees.	

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

Specified Issues

I.

WHETHER, IN LIGHT OF DENEDO v. UNITED STATES, 556 U.S. 904 (2009), CLINTON v. GOLDSMITH, 526 U.S. 529 (1999), UNITED STATES v. LOPEZ de VICTORIA, 66 M.J. 67 (C.A.A.F. 2008), UNITED STATES v. HERSHEY, 20 M.J. 433 (C.M.A. 1985), ARTICLES 36, 66, AND 67, UCMJ, AND RULE FOR COURTS-MARTIAL 806, THIS COURT AND THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS HAVE SUBJECT-MATTER JURISDICTION OVER APPELLANTS' REQUEST FOR EXTRAORDINARY RELIEF.

II.

WHETHER APPELLANTS, NON-PARTIES TO THE COURT-MARTIAL, HAVE STANDING IN THIS COURT OR THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS TO FILE A REQUEST FOR EXTRAORDINARY RELIEF IN THIS MATTER.

III.

ASSUMING JURISDICTION, (1) IN THE CONTEXT OF THE RECORDS NOW AT ISSUE, WHICH OFFICIALS ARE LAWFULLY AUTHORIZED TO DIRECT PUBLIC RELEASE OF SUCH RECORDS, AND (2) TO WHAT EXTENT MUST APPELLANTS FIRST DEMONSTRATE THAT THEY HAVE MADE THEIR INITIAL REQUEST TO AN APPROPRIATE RECORDS CUSTODIAN AND HAD SUCH REQUEST DENIED.

Summary of Argument

The court's subject matter jurisdiction in this case turns on whether the military judge has authority to publicly release the requested documents. If she has such authority, then a judge's denial of public access would be within this Court's jurisdiction to review. If not, then the judge's action was not within the scope of the military justice system.

Here, the military judge does not have authority to affirmatively release these documents. That authority is committed by statute and regulation to the Judge Advocate General (TJAG). TJAG's decision to release or withhold court-martial records is not reviewable by this Court as it is a separate administrative decision, which the Court does not have jurisdiction to consider.[1] Appellant is free to seek judicial review of TJAG's decision in an Article III court, the forum designated by Congress.

Further, since the military judge does not have authority to publicly release these documents, appellants have no standing at this court because they suffered no injury. Appellants are not "denied" access to the record of trial when they request access from someone not empowered to grant it.

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[1] *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999).

Law and Argument

1. Scope of The All Writs Act[2]

This Court is an Article I court with limited jurisdiction that is "narrowly circumscribed."[3] The Court's jurisdiction is restricted by statute to court-martial cases reviewed by a Court of Criminal Appeals (CCA) involving specific types of sentences.[4]

The All Writs Act is not an independent grant of jurisdiction, nor does it enlarge the Court's existing statutory jurisdiction.[5] Rather, the Act provides that "all courts established by Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[6] The Act requires two separate determinations: first, whether the requested writ is "in aid of" the court's existing jurisdiction; and second, whether the requested writ is "necessary or appropriate."[7]

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[2] The Government believes this Court does have jurisdiction to resolve appellant's R.C.M. 802 complaint, but maintains its original position that the issue lacks merit.
[3] *Goldsmith*, 526 U.S. at 535.
[4] 10 U.S.C. § 866(b), 867(a). If read narrowly, one could argue that under Article 67, this Court has no jurisdiction to hear *original* petitions for extraordinary relief; the court could only review petitions on appeal from a CCA.
[5] 28 U.S.C. § 1651(a); *Goldsmith*, 526 U.S. at 535 (internal citations omitted).
[6] 28 U.S.C. § 1651(a).
[7] *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008); *Goldsmith*, 526 U.S. at 534-35.

The precise contours of the phrase "in aid of" have not been well-defined by the courts. In *Denedo*, though, this Court stated that a petition for extraordinary relief is "in aid of" the Court's jurisdiction when the petitioner seeks to "modify an action that was taken within the subject matter jurisdiction of the military justice system."[8] The Supreme Court subsequently affirmed that portion of *Denedo*: "As the text of the All Writs Act recognizes, a court's power to issue any form of relief – extraordinary or otherwise – is contingent on that court's subject-matter jurisdiction over the case or controversy."[9]

A writ petition may be "in aid of" this Court's statutory jurisdiction even though it addresses an interlocutory matter, where no finding or sentence has yet been entered in the court-martial.[10] Thus, the government agrees with appellant that this Court may, as a general matter, hear interlocutory writ-petitions.[11] The Supreme Court interpreted the All Writs Act this way in *Roche v. Evaporated Milk Association*:

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[8] *Denedo*, 66 M.J. at 120.
[9] *United States v. Denedo*, 556 U.S. 904, 911 (2009).
[10] *See, e.g., United States v. Lopez de Victoria*, 66 M.J. 67, 75 (C.A.A.F. 2008)(Ryan, J., dissenting)(noting that an Article 62 appeal is an interlocutory matter which by its nature has no finding, sentence, or convening authority action).
[11] Appellant's Post-Argument Supplement Brief (ASB) at 1-2.

> 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. Its authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by the unauthorized action of the district court obstructing the appeal.[12]

This Court also recognized the authority to hear interlocutory matters on petition for extraordinary relief in *Courtney v. Williams*:

> We conclude, therefore, that in an appropriate case, this Court clearly possesses the power to grant relief to an accused prior to the completion of court-martial proceedings against him....We may resort to extraordinary writs where such will be in aid of our jurisdiction over cases properly before us or which may come here eventually...."[13]

Contrary to appellant though, the generic authority to hear interlocutory petitions does not necessarily mean

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[12] *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). The Government's brief in *Clinton v. Goldsmith* also recognized the doctrine of potential jurisdiction under the All Writs Act. *See* Brief for the Petitioners, *Clinton v. Goldsmith*, 1998 WL 880845 at *15-16 (citing *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966)).

[13] 1 M.J. 267, n.2 (C.M.A. 1976); *see also United States v. Snyder*, 40 C.M.R. 192, 195 (C.M.A. 1969); *Font v. Seaman*, 43 C.M.R. 227, 230 (C.M.A. 1971)(noting that the All Writs Act "permits this Court to intervene in court-martial proceedings which may be subject to our review under Article 67(b)....").

there is jurisdiction in this case.[14] Here, appellate review of the military judge's decision cannot be "in aid of" the Court's subject matter jurisdiction because the judge does not have authority to publicly release the record of trial. Congress and the Secretary of the Army (SECARMY) committed that authority to TJAG through the Freedom of Information Act (FOIA). Appellants have asked the military judge to do something she has no authority to do.

2. The military judge does not have authority to affirmatively release the record of trial to the public.

Several provisions of the UCMJ address records of trial, but none discuss the authority to publicly release it. Article 54(a), UCMJ, codifies the requirement for a record of trial: "Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge." Further, Article 38(a) states that the trial counsel, under the direction of the court, is responsible for preparing the record of trial.

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[14] *See, e.g., Denedo*, 556 U.S. at 913 ("[T]he CAAF describes respondent's request for review as one 'under the All Writs Act.' This is correct, of course, if it simply confirms that the Act authorizes federal courts to issue writs 'in aid of' their jurisdiction; but it does not advance the inquiry into whether jurisdiction exists.").

Though not specifically mentioned in the UCMJ, custody of exhibits during the court-martial is the shared responsibility of the court reporter (who is appointed by the convening authority),[15] trial counsel,[16] and the military judge.[17]

Post-trial, Article 65, UCMJ vests control over disposition of records to TJAG and SECARMY. SECARMY in turn promulgated Army Regulation (AR) 27-10, Military Justice, para. 5-49, which gives TJAG "authority to issue directions...changing the procedures for preparing, copying, serving, certifying, authenticating, or distributing records of trial...." Under this statutory and regulatory structure, responsibility for and control over the record is not vested in a single person. Rather,

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[15] Article 28, UCMJ; *United States v. Dionne*, 6 M.J. 791 (A.C.M.R. 1978); *see also* R.C.M. 502(d)(5), Discussion ("Trial counsel should: ensure that a suitable room, *a reporter* (if authorized) and necessary equipment and supplies are provided for the court-martial...."){emphasis added}; AR 27-10, Military Justice, 3 October 2011, para. 5-11a ("Reporters will be detailed to all [special courts-martial] and [general courts-martial].").

[16] *See* R.C.M. 808, Discussion ("Trial counsel should also ensure that all exhibits and other related documents relating to the case are properly maintained for later inclusion in the record."); U.S. Army Trial Judiciary, Rules of Practice Before Army Courts-Martial, Rule 28.1 ("The assigned court reporter will maintain all original documents until the record of trial is assembled.").

[17] U.S. Army Trial Judiciary, Rules of Practice Before Army Courts-Martial, Rule 28.1 (Exhibits may not be altered, amended, or removed without the permission of the military judge).

responsibility is shared among the military judge, trial counsel, court reporter, and TJAG. All have some degree of control over the record, and bear some responsibility for producing an accurate and complete record of proceedings.[18]

To be sure, the military judge exercises a substantial degree of control over the record prior to authentication. She may seal exhibits where appropriate,[19] and the trial counsel prepares the record under her direction.[20] But the power to seal a document does not necessarily include the power to publicly release it.[21] Neither the Code, the Rules for Courts-Martial (RCM), nor Army Regulation expressly grants the military judge (or TJAG) authority to release court-martial records to the public. The code's silence on public release of records is not surprising given that Congress expressly provided for public release of court-martial records through a separate statute, the FOIA.[22]

In 5 U.S.C. § 551(1)(F), the definitions section of the FOIA, Congress specifically subjected courts-martial to

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[18] *United States v. Seal*, 38 M.J. 659, 662 (A.C.M.R. 1993).
[19] R.C.M 701(g)(2), R.C.M. 806(d).
[20] R.C.M. 1103(b)(1).
[21] The Government submits that this is analogous to the "bundle of sticks" expression from property law. *See, e.g., United States v. Craft*, 535 U.S. 274, 278 (2002). While the judge has specific authority to seal portions of the record, that does not mean she has authority to release it.
[22] *See* 5 U.S.C. § 552.

FOIA's disclosure requirements. The Department of the Army promulgated Army Regulation 25-55, The Department of the Army Freedom of Information Act Program, to meet this Congressional mandate. Under that regulation, TJAG is authorized to act on requests for records relating to courts-martial.[23] There is no temporal limit on this authority (i.e., pretrial or post-trial). If anything, the fact that Congress created a separate statutory mechanism to provide public access to court-martial records cuts against the argument that the judge has authority to release the record.

This statutory and regulatory design makes logical sense. Court-martial records are agency records of the Department of the Army.[24] If the military judge had independent authority to release the record of trial, then the military judge (and by extension this Court and the CCA) would be responsible for deciding which information "must be made available to the public and by what criteria such decisions will be made."[25] In essence, the court would be required to "fashion a constitutional freedom of

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[23] AR 25-55, para. 5-200(d)(14).
[24] AR 25-55, para. 1-402 (defining agency record).
[25] *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1167 (3rd Cir. 1986).

information act."[26] Congress and the Department of the Army have already created that system, delegating responsibility to release records to TJAG,[27] and judicial review to the Article III courts.[28] If appellant wishes to challenge the constitutionality of that system, the proper forum is federal district court, not this Court.[29]

Notwithstanding the statutory structure, appellant argues the military judge has inherent authority to release the record of trial. Relying on *Nixon v. Warner Communications*, appellant argues that "[e]very court has supervisory power over its own records and files" and federal courts have "frequently relied on their inherent powers over their own records to expunge judicial

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[26] *Id.* (Noting that "[t]he founding fathers intended affirmative rights of access to government-held information, other than those expressly conferred by the Constitution, to depend upon political decisions made by the people and their elected representatives.").

[27] AR 25-55, para. 5-200(d)(14).

[28] 5 U.S.C. § 552(a)(4)(B).

[29] Certainly the FOIA does not prohibit OTJAG from affirmatively publishing portions of the record of trial in a reading room. http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf. However, this Court has no jurisdiction to review that decision. That claim must be made in an Article III court. The Government also notes that AR 25-55 cautions against the premature release of information during a court-martial because it may result in prejudice to the accused. *See* AR 25-55, para. 5-101(d).

records...."[30] This comparison to federal courts is inapposite, and is wrong for several reasons.

First, unlike a federal judge, military judges have no "inherent judicial authority separate from a court-martial to which they have been detailed."[31] Military judges "have only such powers as are expressly granted them by statute, regulation, or decisional law."[32] A federal judge may inherently "own" the record,[33] but a military judge does not.

Second, unlike federal courts, the military justice system has no standing courts at the trial level, and no standing clerk's office charged with maintaining records of trial.[34] The first standing courts in the military justice system are the Courts of Criminal Appeals. At the trial level, courts-martial are temporary courts created entirely

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[30] ASB at 21, citing *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978). *See also* 28 U.S.C. § 751(a) (each district court may appoint a clerk who shall be subject to removal by the court); 28 U.S.C. § 753(a) (each district court shall appoint court reporters); 28 U.S.C. § 753 (reporter shall file record of trial with the clerk who preserves them for not less than ten years).

[31] *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992), *aff'd*, 510 U.S. 163 (1994); *United States v. Weichmann*, 67 M.J. 456, 461 (C.A.A.F. 2009).

[32] *United States v. Gragg*, 10 M.J. 732, 736 (N.M.C.R. 1980).

[33] *See* footnote 30, *supra*.

[34] *See* 28 U.S.C. § 751; Fed. R. Crim. P. 55 (2011) (Records).

by statute.[35] They are the "creature of an order promulgated by an authorized commander which convenes, or creates, the court-martial entity. Without such an order, there is no court."[36] Once its purpose is accomplished, the court-martial is "dissolved."[37]

Third, federal courts are not subject to FOIA's disclosure requirements.[38] Notably though, even under the military commissions system, which is subject to FOIA,[39] the military judge does not release records to the public. Rather, the Deputy Secretary of Defense created the Chief Clerk of the Trial Judiciary,[40] who is responsible for releasing information (filings, opinions, etc.) to the custodian of the Office of Military Commissions website.[41]

These fundamental and systemic differences make any comparison to the federal system unpersuasive. The military judge simply does not have "inherent" authority to release the record.

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[35] *United States v. Johnson*, 48 C.M.R. 665, 666 (C.M.A. 1974).
[36] *United States v. Ryan*, 5 M.J. 97, 101 (C.M.A. 1978)(internal citations omitted); *see also McClaughry v. Deming*, 186 U.S. 49, 62 (1902).
[37] *Weiss*, 36 M.J. at 228.
[38] 5 U.S.C. § 551(1)(B).
[39] 5 U.S.C. § 551(1)(F).
[40] *See* Regulation for Trial by Military Commission, Rule 17-1(b) (2011 Edition).
[41] *See* Regulation for Trial by Military Commission, Rule 19-4(a).

Appellant also suggests that the military judge can release the record because she has already "ordered that [defense briefs] may be published" on the internet.[42] This strained argument is not supported by the facts in the record. The military judge did not affirmatively authorize publication of the record; rather, as the military judge noted, *defense counsel* notified the government of its intent to publish all previous defense filings *unless* subject to protective order by the Court.[43] Consequently, the judge issued a protective order to ensure defense counsel did not publish classified or MRE 506 privileged information exchanged in discovery.[44] This was entirely appropriate given that there had already been two classified information spillages in this case.[45] Appellant's version of the facts is simply unsupported, and this example only furthers the distinction between the judge's authority to prohibit release of information, and the separate authority to publicly release it.

Finally, appellant argues this issue is within the court's jurisdiction because it impacts the public trial right, and "the integrity of the trial will be irreparably

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[42] ASB at 24.
[43] R. 13.
[44] R. 15.
[45] R. 15.

damaged by failure to grant the relief sought here...."[46] But the fact that an executive or agency action impacts the public's First Amendment public trial right, standing alone, is not sufficient to trigger this court's jurisdiction. There are many actions that may impact the First Amendment public trial right. Hypothetically, an installation commander may restrict public access to a military installation for security reasons.[47] Certainly that could impact the media's and the public's ability to access or attend ongoing court-martial proceedings. But such action is not reviewable in this Court and it could only be heard in an Article III court. Impact alone is not enough; the court must also focus on the cause. The action complained of must be tied to the Code.

In sum, the military judge has no statutory, regulatory, or inherent authority to publicly release the record of trial. Her control over the record of trial is limited, and cannot be equated to an Article III judge. In the military justice system, responsibility for preparing

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[46] ASB at 4.

[47] *See, e.g., Greer v. Spock*, 424 U.S. 828, 838 (1976), quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 893 (1961) ("A necessary concomitant of the basic function of a military installation has been 'the historically unquestioned power of (its) commanding officer summarily to exclude civilians from the area of his command.'")

the record of trial is shared between the military judge, the court reporter, and the trial counsel. Post-trial disposition of the record of trial rests with TJAG. And, pursuant to FOIA, public release is committed to TJAG as well. Since the military judge has no authority to release the record to the public, review of her order directing appellants to the proper record custodian is not "in aid of" the subject matter jurisdiction of this court.

3. *ABC, Inc. v. Powell* and *United States v. Hershey* are not applicable here.

This Court's decisions in *ABC, Inc. v. Powell* and *United States v. Hershey* are not applicable to this case because as of the date of the judge's challenged ruling, the proceedings in *United States v. Manning* have been open, and appellant did not allege that any document has actually been sealed by the judge.[48] In *ABC, Inc.*, the special court-martial convening authority (SPCMCA) closed the entire Article 32 investigation to the public.[49] In *Hershey*, the military judge closed the courtroom during the

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[48] R. 19, 20. *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985); *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).
[49] *ABC, Inc.*, 47 M.J. at 364.

merits testimony of the complaining witness.[50] Neither has happened in this case.

If the military judge were to actually close the courtroom, or seal a document, that would be an exercise of her authority under R.C.M. 806 and would be within this court's subject-matter jurisdiction to review. If and when either of those two actions occur, as the government noted in its original brief, appellant could file an extraordinary writ at the CCA or this Court.

As noted above, the military judge's power to seal documents does not necessarily include the power to grant affirmative access to the record. In the military justice system, these two powers are given to different people. The military judge has authority to seal a document under R.C.M. 806. TJAG has authority to release the record under the FOIA and AR 25-55. These two powers are discrete and

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[50] *Hershey*, 20 M.J. at 435. This Court has been less than clear in its opinions regarding the application of the First Amendment public trial right to courts-martial. In *Hershey*, the Court stated: "Without question, the sixth amendment right to a public trial is applicable to courts-martial." 20 M.J. at 435-36. But when discussing the First Amendment, the Court was much less explicit stating only that, "In addition to the sixth-amendment right of an accused to a public trial, the Supreme Court has held that the press and general public have a constitutional right under the first amendment to access criminal trials." 20 M.J. at 436. This Court then went on to hold that the Supreme Court's first amendment test was not met. *Id.; see also United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

cannot be lumped together just because both may result in withholding a particular document from the public.

4. Standing

Separate from the lack of subject-matter jurisdiction, appellant also has no standing to bring this claim because he suffered no injury. "The jurisdictional concept of standing normally concerns the limitation of the judicial power of the United States to [c]ases and [c]ontroversies."[51] This Court, as an Article I court, "has applied the principles from the 'cases' and 'controversies' limitation as a prudential matter."[52]

The constitutional minimum of standing is designed to prevent "courts of law from undertaking tasks assigned to the political branches."[53] It contains three elements. First, the petitioner must have suffered an "injury in fact," which is the "invasion of a legally protected interest" that is "concrete and particularized."[54] Second, "there must be a causal connection between the injury and the conduct complained of."[55] Third, "it must be likely as

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[51] *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) (alterations in original), citing U.S. Const. art. III, § 2.
[52] *Id.*, citing *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003).
[53] *Lewis v. Casey*, 518 U.S. 343, 349 (1996).
[54] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).
[55] *Id.*

opposed to merely speculative, that the injury will be redressed by a favorable decision."[56]

The problem here is not that appellant is a member of the public, or that the injury is too speculative.[57] Rather, appellant cannot satisfy the first element of standing because he has not been injured at all. Appellant's entire standing argument is premised on the fact that the military judge denied him access to the record.[58] That simply did not happen; the military judge did not "deny" appellant access to anything. The only entity authorized by statute or regulation to grant or deny appellant access to the record is the Office of the Judge Advocate General.[59] Here, the military judge recognized she did not have authority to release the record to the public and directed appellant to the proper record custodian.[60] This is no different than had appellant asked the bailiff for access to the record. The military judge could not have denied appellant access to the record because she had no authority to grant it in the first place.

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[56] *Id.* at 561 (internal quotations omitted).
[57] ASB at 15-16.
[58] ASB at 21 ("Petitioner-Appellants here have made their request and been denied; they clearly have standing.").
[59] AR 25-55, para. 5-200(d)(14).
[60] R. 20-21.

Moreover, the delays associated with appellant's FOIA request only further the argument that he has no standing and is in the wrong forum.[61] Under the FOIA and AR 25-55, a requester may seek an order from a United States District Court to compel release of a record after administrative remedies have been exhausted.[62] By statute, remedies are considered exhausted when an agency fails to comply with applicable time limits.[63] Thus, if appellant believes the Army has not timely complied with his FOIA request, he has a perfected claim for an Article III court, not this Court.

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[61] *See* Supplemental Declaration of Shayana Kadidal, para. 3., attached to ASB.
[62] *See also* AR 25-55, para. 5-400(b).
[63] 5 U.S.C. 552(a)(6)(C)(i); AR 25-55, para. 5-400(b).

Conclusion

The decision to publicly release or withhold court-martial records is not an action within the subject-matter jurisdiction of this Court. The authority to release court-martial records is committed to TJAG, and review of those decisions to Article III courts.

Wherefore, the Government respectfully requests this Honorable Court deny the petition for a writ-appeal.

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