IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

CENTER FOR CONSTITUTIONAL RIGHTS, GLENN GREENWALD, JEREMY SCAHILL, *THE NATION*, AMY GOODMAN, *DEMOCRACY NOW!*, CHASE MADAR, KEVIN GOSTOLA, JULIAN ASSANGE, and WIKILEAKS,	Crim. App. Misc. Dkt. No. _____
Petitioners,	General Court Martial *United States v. Manning*, Ft. Meade, Maryland
v.	
UNITED STATES OF AMERICA and CHIEF JUDGE COL. DENISE LIND,	Dated: 23 May 2012
Respondents.	

PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF WRITS OF MANDAMUS AND PROHIBITION AND SUPPORTING MEMORANDUM OF LAW

In order to enforce the guarantees of the First Amendment to the United States Constitution, Petitioners the Center for Constitutional Rights ("CCR"), Glenn Greenwald, Jeremy Scahill, *The Nation*, Amy Goodman, *Democracy Now!*, Chase Madar, Kevin Gosztola, Julian Assange, and the Wikileaks media organization (collectively, "Petitioners"),[1] by and through their undersigned

[1] The Center for Constitutional Rights is a nonprofit public interest law firm also engaged in public education, outreach and advocacy. Glenn Greenwald is a lawyer and prolific columnist and author on national security, civil liberties and First Amendment issues for Salon.com and other national media outlets. Jeremy Scahill is the National Security Correspondent for *The Nation*, the oldest continuously published weekly magazine in the United States. Amy Goodman is the host of *Democracy Now!*, an independent foundation and listener-supported news program broadcast daily on

counsel, respectfully submit this request for extraordinary relief, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), Rules 2(b) and 20 of the Courts of Criminal Appeals Rules of Practice and Procedure, and Rules 20.1 and 20.2 of the U.S. Army Court of Criminal Appeals Rules, seeking public access to documents in the court-martial proceedings against Pfc. Bradley Manning, including papers filed by the parties, court orders, and transcripts of the proceedings.

Statement of the Case and Issues Presented

On November 28, 2010, the Wikileaks media organization and its publisher Julian Assange commenced reporting on thousands of allegedly classified and unclassified U.S. State Department diplomatic cables. The cables were also published by other national and international media organizations, including *The New York Times*, *The Guardian*, *Der Spiegel*, *Le Monde*, and *El Pais*. Federal prosecutors have reportedly convened a grand jury in the Eastern District of Virginia to investigate whether Mr. Assange conspired with Pfc. Bradley Manning to violate the Espionage Act of 1917, 18 U.S.C. § 793 *et seq.*, and other federal laws.

---

over 950 radio and television outlets and the Internet. Chase Madar is an attorney, a contributing editor to *The American Conservative* magazine, and the author of *The Passion of Bradley Manning: The Story of the Suspect behind the Largest Security Breach in U.S. History*. Kevin Gosztola is a writer for Firedoglake, a website engaged in news coverage with a specific emphasis on criminal trial issues. Julian Assange is publisher of the Wikileaks media organization.

Pfc. Manning was arrested in May 2010 in Iraq on suspicion that he provided the diplomatic cables (and possibly other allegedly classified information) to Mr. Assange and/or Wikileaks. An Article 32 investigation was conducted at Fort Meade, Maryland, in December 2011, largely outside the public view,[2] and all charges were referred to a general court-martial in February 2012.

Pfc. Manning now faces a court-martial for offenses including aiding the enemy in violation of Article 104 of the Uniform Code of Military Justice. These offenses are serious but as yet wholly unproven. There is disturbing evidence that the government subjected Pfc. Manning to conditions of confinement and treatment reminiscent of the worst abuses of detainees at Guantánamo Bay, including prolonged isolation and sensory deprivation, and other torture or cruel, inhuman and degrading practices.

It is therefore not surprising that the court-martial of Pfc. Manning has generated a hurricane of worldwide media attention, most of which has not abated. Strikingly, however, and in marked contrast to the vigor with which senior U.S. government officials have themselves publicly condemned, pursued and sought to punish Pfc. Manning, Mr. Assange, and others

[2] Petitioners sought assurances of access to the Article 32 hearings, which were denied. *See Assange v. United States*, Misc. No. 12-8008/AR, 2012 CAAF LEXIS 42 (C.A.A.F. Jan. 11, 2012).

associated with Wikileaks, the public has been largely denied access to even non-classified documents filed in Pfc. Manning's court-martial that would shed light on the serious claims made about Pfc. Manning. As described in the attached declaration of CCR Senior Managing Attorney Shayana Kadidal (recording his personal observations of certain proceedings before the *Manning* Court Martial), the government's motion papers have not been disclosed in any form. Kadidal Decl. ¶ 4. Several important substantive issues have also been addressed and resolved, outside the public view, in Rule 802 conferences, including entry of a case management order, a pretrial publicity order and a protective order for classified information. *Id.* ¶¶ 13, 14 and Ex. A. The Court's own orders on these and other subjects have not been published. Id. ¶ 14. Moreover, no transcripts of these proceedings have been made available to the public. *Id.* ¶ 4, 6, 9.

All of this has occurred (or rather not occurred) despite written requests by Petitioners and other media organizations to the Court seeking public access. *Id*. Exs. C (Reporters' Committee Letter) & A & B (CCR Letters). The Court construed the last of those letters from CCR as a motion to intervene in the proceedings for the purpose of seeking to vindicate the right of public access to the proceedings, a motion which the Court denied. Kadidal Decl. at ¶ 8.

Although the public may attend portions of Pfc. Manning's court-martial proceedings (notably excluding Rule 802 conferences), public access to documents has been inexplicably denied in what is arguably one of the most controversial, high-profile court-martials since the trial of LT William Calley for the My Lai Massacre in Vietnam, and the most important case involving the alleged disclosure of classified information since the Pentagon Papers. Indeed, the restrictions on access to these basic documents in the case have made it exceedingly difficult for credentialed reporters to cover the proceedings consistent with their journalistic standards and obligations. *See* Declaration of Kevin Gosztola (attached) at ¶¶ 4-8. These restrictions not only plainly violate the First Amendment and the common law, they undermine the very legitimacy of this important proceeding.

Specific Relief Sought

(1) Petitioners request a writ of mandamus and prohibition to compel the trial court to grant public access to documents filed in *United States v. Manning*, including without limitation (a) all papers and pleadings filed by the parties, including particularly the government's motion papers and responses to defense motions,[3] (b) court orders, and (c) transcripts of all

[3] Redacted versions of certain motions filed by defense counsel have already been disclosed publicly on the website of

proceedings, and that any further restrictions on public access to the proceedings or documents therein only occur following notice to the public of any contemplated restrictions, an opportunity for interested parties to be heard, and case-by-case specific findings of necessity after consideration of less-restrictive alternatives; and

(2) Petitioners request a writ of mandamus and prohibition requiring that R.C.M. 802 conferences be made part of the record in their entirety, and that any such conferences that have already been held in this case be reconstituted in open court.

Petitioners request oral argument.

Jurisdictional Basis for Relief Sought

The Court may grant this relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the First Amendment to the United States Constitution, the common law, Rules 2(b) and 20 of the Courts of Criminal Appeals Rules of Practice and Procedure, and Rules 20.1 and 20.2 of the U.S. Army Court of Criminal Appeals Rules.

Reasons for Granting the Writ

Criminal proceedings, including court-martial proceedings, must be open to the public except in limited circumstances.

---

defense counsel, apparently by agreement of the parties. Kadidal Decl. at ¶ 11. Thus, at present, the public's continued access to even these defense filings is subject to the willingness of defense counsel to have them made public.

R.C.M. 806(a). The First Amendment requires public access unless the government demonstrates that closure is necessary to further a compelling government interest and narrowly tailored to serve that interest, and the Court makes specific findings that closure is warranted. The government bears a similarly high burden in attempting to limit public access to documents filed in connection with criminal proceedings. *See In re Wash. Post Co.*, 807 F.2d 383, 390–91 (4th Cir. 1986) (citing cases).[4]

In *United States v. Manning*, the press and public have not had access to any of the government's motions, responses to defense briefs, or filings in the case beyond the initial charges – even in redacted form. No transcripts of any proceedings in the case have been published – even for proceedings that occurred in open court. Nor have any orders of the Court been published. The government has not provided – and cannot provide – any legal basis for withholding these documents from the public. Nor does it appear that the Court made any of the requisite findings that could support closing these proceedings or denying access to the documents at issue, or provided notice of such envisioned closures and opportunity to object to the press and public.

These violations are particularly egregious in light of the First Amendment's mandate that even temporary deprivations of the

[4] The common law also allows the press and public a right of access to judicial documents. *Id.* Petitioners rely on both the First Amendment and the common law.

right of public access constitute irreparable harm, and given the Supreme Court's frequent pronouncements that openness promotes not just public confidence in the criminal process but also accuracy in factfinding and ultimate outcomes. The First Amendment thus demands contemporaneous access to documents and proceedings in cases like *Manning* while the proceedings are taking place. The trial Court's denial of the public's First Amendment rights is clearly erroneous and amounts to an usurpation of authority. Accordingly, this Court should grant Petitioners' requested relief.

I. The Public Has a Presumptive Right to Access to Documents in Criminal Proceedings

The Court's authority to act on the merits of this motion and grant Petitioners the requested relief is clear. *See Denver Post Co. v. United States*, Army Misc. 20041215 (A.C.C.A. 2005), *available at* 2005 CCA LEXIS 550 (exercising jurisdiction and granting writ of mandamus to allow public access to Article 32 proceedings); *United States v. Denedo*, 556 U.S. 904 (2009).

The right of public access is rooted in the common law and the First Amendment to the United States Constitution. *See, e.g.*, *Nixon v. Warner Commc'ns*, Inc., 435 U.S. 589, 597 (1978); *In re Washington Post Co.*, 807 F.2d 383, 390-91 (4th Cir. 1986); *Washington Post Co. v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991). It includes not only the right to attend court

proceedings but also the right to freely access court documents. *See Washington Post Co. v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) ("The First Amendment guarantees the press and the public a general right of access to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed.") (citing cases). Every Circuit Court to consider the question has ruled that the First Amendment right of public access to judicial proceedings also extends to judicial records (or has assumed without deciding that such a right exists).[5]

---

[5] Of the thirteen federal Courts of Appeals, only the Federal Circuit has not considered the issue, and only the Tenth has not decided it outright: *See Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989); *In re Globe Newspaper Co.,* 729 F.2d 47 (1st Cir. 1984) (bail hearings); *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988) (plea agreements); *In re New York Times Co*., 828 F.2d 110 (2d Cir. 1987), *cert. denied,* 485 U.S. 977 (1988); *United States v. Smith*, 787 F.2d 111, 116 (3d Cir. 1986) and 776 F.2d 1104 (3d Cir. 1985); *In re Washington Post Co*., 807 F.2d 383 (4th Cir. 1986); *Applications of NBC*, 828 F.2d 340 (6th Cir. 1987); *United States v. Ladd (In re Associated Press*), 162 F.3d 503 (7th Cir. 1998); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988)(documents filed to support search warrant); *Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462 (9th Cir. 1990); *Associated Press v. United States Dist. Court*, 705 F.2d 1143 (9th Cir. 1983); *Washington Post v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991); *cf. United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997) ("assum[ing] without deciding that access to judicial documents is governed by the analysis articulated in *Press-Enterprise II*"); *Riker v. Federal Bureau of Prisons*, 315 Fed. Appx. 752, 756 (10th Cir. 2009) (unpublished opinion) (same); *United States v. Gonzales*, 150 F.3d 1246, 1255-61 (10th Cir. 1998) (finding certain CJA records to be administrative not judicial in nature; as to others, assuming without deciding *Press-Enterprise* applies), *cert. denied*, 525 U.S. 1129 (1999). The Federal Circuit has not addressed the First Amendment argument, but recognizes a common-law right of access.

The right of public access exists primarily to ensure that courts have a "measure of accountability" and to promote "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). Access to information is especially important when it concerns matters relating to national defense and foreign relations, where public scrutiny is the only effective restraint on government. *See New York Times v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) ("In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government.").

The Supreme Court has also repeatedly stated that openness has a positive effect on the truth-determining function of proceedings. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) ("Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (open trials promote "true and accurate

---

See In re Violation of Rule 28(d), 635 F.3d 1352, 1357 (Fed. Cir. 2011).

fact-finding") (Brennan, J., concurring); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("[P]ublic scrutiny enhances the quality and safeguards the integrity of the factfinding process."); *see also Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (*Gannett*'s beneficial "fact-finding considerations" militate in favor of openness "regardless of the type of proceeding"). This effect is tangible, not speculative: the Court has held that openness can affect outcome. Accordingly, if the government attempts to restrict or deny the right of access, it bears the strictest of burdens: it must show that the limitation is necessary to protect a compelling government interest and is narrowly tailored to serve that interest. *See*, *e.g.*, *Robinson*, 935 F.2d at 287.

Moreover, public access must be contemporaneous with the actual proceedings in order to maximize this error-correcting aspect of openness. That is reflected in the many pronouncements from the Supreme Court noting that the loss of First Amendment rights "for even minimal periods of time" constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

II. Neither the Government Nor the Court Have Identified Any Compelling Interest That Would Overcome the Very Strong Presumption in Favor of Public Access

Even in cases assertedly implicating national security, the First Amendment demands that "[d]ocuments to which the public has

a qualified right of access may be sealed only if 'specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *United States v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008) (quoting *Press-Enter. Co*, 478 U.S. at 13-14). "[A] judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need" for the request. *Video Software Dealers Ass'n v. Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994). In assessing whether denial of public access is narrowly tailored, courts must "consider less drastic alternatives to sealing the documents, and ... provide specific reasons and factual findings supporting [the] decision to seal the documents and for rejecting the alternatives." *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (citations omitted); *see also United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985). The Supreme Court has stated that when a trial court finds that the presumption of access has been rebutted by some countervailing interest, that "interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

The public is also entitled to notice of a party's request to seal the judicial record and to an opportunity to object to

the request. *See In re Washington Post Co.*, 807 F.2d 383, 390–91 (4th Cir. 1986) (any motion or request to seal a document or otherwise not disclose a document to the public must be "docketed reasonably in advance of [its] disposition so as to give the public and press an opportunity to intervene and present their objections to the court." (quoting *In re Knight Publishing Co.*, 743 F.2d 231, 234 (4th Cir. 1984))); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474–76 (6th Cir. 1983); *United States v. Criden*, 675 F.2d 550, 557–60 (3d Cir. 1982) (due process requires that the public be given some notice that closure may be ordered in a criminal proceeding to give the public and press an opportunity to intervene and present their objections to the court).

The common law right of access to documents is nearly coterminous with the First Amendment. A common law right attaches where documents are properly considered "judicial documents," including at a minimum documents that play a role in determining the litigants' substantive rights. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (including documents "relevant to the performance of the judicial function and useful in the judicial process"); *see also United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (noting varying standards in different circuits). The motions, transcripts and orders at issue here clearly qualify as "judicial." The

presumption in favor of public access to such documents will be given the strongest weight possible. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) ("presumptive right to 'public observation' is at its apogee when asserted with respect to documents relating to 'matters that directly affect an adjudication.'" (quoting *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995))). Under the common law standard, the public interest favoring access must be "heavily outweighed" by the other asserted interests to overcome the presumption in favor of public access. *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (citations omitted); *see also Stone v. Univ. of Maryland Medical Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988). "[O]nly the most compelling reasons can justify non-disclosure of judicial records." *Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.)*, 422 F.3d 1, 6 (1st Cir. 2005); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474-476 (6th Cir. 1983) ("Appellants seek to vindicate a precious common law right, one that predates the Constitution itself. While the courts have sanctioned incursions on this right, they have done so only when they have concluded that 'justice so requires.' To demand any less would demean the common law right.").

In *United States v. Scott*, 48 M.J. 663 (Army Ct. Crim. App. 1998), *pet'n for rev. denied*, 1998 CAAF LEXIS 1459 (C.A.A.F. 1998), this Court applied standards for access to documents

identical to the First Amendment standards. The *Scott* Court did not explicitly *state* that the First Amendment applied to documents — as eleven federal Courts of Appeal have done — nor did it explicitly assert that it was applying some alternate standard derived from the common law. But this Court clearly applied the same test that would have applied had it expressly found the First Amendment applicable. First, it criticized the trial court for ordering sealing of documents without finding factual support for a compelling interest, stating that the "party seeking closure must advance an overriding interest that is likely to be prejudiced," *id.* at 666, and that that interest must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered," *id.* at 665-66. The *Scott* court found no factual findings in the record supporting a finding that a compelling interest was present: instead, the "military judge sealed the entire stipulation" — the contested document — "on the basis of an unsupported conclusion rather than on the basis of an overriding interest that is likely to be prejudiced if the exhibit is not sealed." *Id.* at 666. Moreover, "[r]ather than narrowly tailoring the order to seal those portions" that implicated any compelling interest, *id.* at 667 n.4, the court sealed the "entire" document and all its enclosures, *id.* These are exactly the same standards that a court would apply under the

First Amendment, as this Court noted earlier in the *Scott* opinion.[6] Because the trial judge left "no basis evident in the record of trial [on appeal] that would justify sealing," *id.* at 667, this Court found the trial court had committed an abuse of discretion, and vacated the order of sealing.

None of these necessary elements — public notice and opportunity to be heard, consideration of less-drastic alternatives (as part of a narrow-tailoring or common-law inquiry), and specific reasoning supported by factual findings supporting the decision and rejecting less-restrictive alternatives — appear to have been satisfied by the court in Pfc. Manning's case.

To begin with, no public notice of any motion by the government to seal parts of the judicial record here was made such that members of the press and public would have an opportunity to object. Moreover, the Center's legal representative at the April 23 hearing was not given the opportunity to address the court. Kadidal Decl. ¶ 8. If there had been notice and an opportunity to be heard, this Court might now be reviewing a record of the trial Court's reasoning, sharpened by adversarial challenge, and any factual support for its

---

[6] *Scott* noted that the First Amendment demands that "closure must be narrowly tailored to protect [the asserted compelling] interest[, and the] trial court must consider reasonable alternatives to closure [and] must make adequate findings supporting the closure to aid in review." 48 M.J. at 666 n.2.

conclusions. The government bears the burden of proof, and "must demonstrate a compelling need to exclude the public ... the mere utterance by trial counsel is not sufficient." *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985). Here, there is no evidence that the government met this heavy burden.

From the existing public record, there is no evidence that any consideration of alternatives took place below. Redaction of sensitive information is the most commonplace alternative used by the courts to allow partial public disclosure of documents containing sensitive information. However, there is no indication that the trial court even considered this simple expedient to allow publication of redacted versions of government filings, transcripts and its own orders here. No transcripts have been released and there is currently no schedule contemplated for publication of redacted transcripts, despite the fact that several hearings have been entirely open to the public. Kadidal Decl. ¶ 14. Needless to say, there can be no justification for the court's failure to publish transcripts of proceedings taking place in open court. Similarly, the court has read into the record several of its own orders. Kadidal Decl. ¶ 14; Gosztola Decl. ¶ 4. There can be no possible justification for not making

those orders available to the general public by publishing them in document form as well.[7]

We have no reason to believe that the court made some document-specific finding of justification for restricting all access to each of these documents, after careful consideration of less-restrictive alternatives, and has kept those orders under seal. But even if that were the case, without any reference to such findings being available on the public record, the press and public have no ability to challenge on appeal whatever specific rationale for restricted access the court relied on. The law forbids courts from so immunizing their decisions to seal parts of their records from both immediate public scrutiny and later appellate challenge to the decision to seal. See *United States v. Ortiz*, 66 M.J. 334, 340 (C.A.A.F. 2008) ("this Court, following the lead of the United States Supreme Court, requires that a military judge make *some* findings from which an appellate court can assess whether the decision to close the courtroom was within the military judge's discretion... On the current state of the record we have no way of knowing the military judge's reasons or reasoning for [closure] ... mak[ing] it impossible to determine

[7] Similarly, there should be no possible justification for a complete bar on access to every last word of the government filings in this case, especially since the government appeared to quote from portions of its briefs during the hearing on April 23d. Kadidal Decl. ¶ 12.

whether the military judge properly balanced" interests at stake).

There is also no indication that the court is withholding publications of the filings, transcripts and orders pending further review to ensure that no sensitive information that inadvertently slipped into the public record in open court is subsequently republished by the court. The court has not indicated that transcripts, for example, will eventually be produced in redacted form before the end of Pfc. Manning's trial. Even if this were the case, it is reversible error for a court to withhold from the public each and every document filed, subject to further review and disclosure, because such procedures "impermissibly reverse the 'presumption of openness' that characterizes criminal proceedings 'under our system of justice." *Associated Press v. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)). It is "irrelevant" that some of the pretrial documents might only be withheld for a short time, *id.*, as the loss of First Amendment rights in this context "for even minimal periods of time" constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

The contrast with the degree of public access provided for in the military commissions underway at Guantánamo is striking.

Courtroom proceedings at Guantanamo are open to public observers and also available for live viewing domestically via closed circuit television. Transcripts of these courtroom proceedings are posted in a time frame comparable to that provided for high-profile criminal trials in the Article III courts; transcripts of the arraignment of the accused 9/11 conspirators were posted on the public website within hours. Court orders and submissions by the parties are routinely posted in redacted form on the website for the Military Commissions, http://www.mc.mil/, within a maximum of fifteen days even where classification review and redaction occurs, and 24 hours where no classification review takes place. Rules mandating access to orders, transcripts, filings, and other materials are all provided for in the published *Regulation for Trial by Military Commission*. Kadidal Decl. ¶¶ 18-19.

For all practical purposes, the court below effectuated a blanket closure order over the proceedings in this case. Those few members of the public who are able to visit the courtroom are given access to the open court proceedings, and certain redacted defense filings are available on the internet. But as to the rest of the documents at issue here, a blanket bar on public access has been the rule. Confronted with similarly broad closures lacking specific justification on the record, the Court of Military Appeals reversed a conviction for contact with foreign

agents and attempted espionage. *United States v. Grunden*, 2 M.J. 116, 120–21 (C.M.A. 1977) ("the public was excluded from virtually the entire trial as to the espionage charges.... [B]lanket exclusion ... from all or most of a trial, such as in the present case, has not been approved by this Court"); *id.* at 121 ("In excising the public from the trial, the trial judge employed an ax in place of the constitutionally required scalpel."); *see also United States v. Ortiz*, 66 M.J. 334, 342 (C.A.A.F. 2008) (reversing conviction for failure of trial court to engage in process of applying *Press-Enterprise II*; appellate court may not make factual findings justifying closure *post hoc*).

The remedy Petitioners' request here is far more modest: an order mandating that the trial judge afford notice to the public of any contemplated closures or sealing of documents,[8] allow opportunity for interested parties to be heard, and ultimately justify any restrictions on access by case-by-case specific findings of necessity after consideration of less-restrictive alternatives. Petitioners also request that this Court make clear that these documents must be made available to the press and public contemporaneously with the proceedings in order for the

---

[8] Although redacted defense filings have been made available to the public on the defense firm's website, that access is by the grace of defense counsel. (*See supra* note 3.) Any order from this Court should mandate that the trial Court make *both* government and defense filings available to the public going forward, subject to the First Amendment standards described herein.

right of public access to be meaningful. Finally, this Court should take this opportunity to state clearly and affirmatively that the right of public access to documents like these – judicial orders, filings, and transcripts – is protected by the First Amendment and therefore subject to the strict First Amendment standards described above.[9]

III. All R.C.M. 802 conferences previously occurring in this case must be reconstituted in open court

CCR's April 23 letter also requests, consistent with the presumption of public access to military commissions proceedings, that all R.C.M. 802 conferences be reconstituted in open court. Kadidal Decl. Ex. B. It is clear that a number of matters, including the issue of public access to documents in this case, have been argued and decided in Rule 802 conferences out of view of the public with no articulated justification for the lack of public access. Kadidal Decl. ¶ 13 & Ex. B. There is, to Petitioners' knowledge, no recording, transcript, or other record of those discussions. Because there is no other way to vindicate the right of public access to those proceedings, this Court can only remedy the failure to make the R.C.M. 802 conferences part

[9] It appears that Chief Judge Lind's decisionmaking was affected by the fact that she believes the military appeals courts (*e.g.* this Court and the C.A.A.F.) have only recognized a limited common law right of access to judicial documents, not a First Amendment right of access. *See* Kadidal Decl. ¶ 9; *see also* Lt. Col. Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 Mil. L. Rev. 1, 45-53 (2000).

of the public record by ordering that conferences that have already been held be reconstituted in open court. *Cf. United States v. Ortiz*, 66 M.J. 334, 342 (C.A.A.F. 2008) ("an erroneous deprivation of the right to a public trial is a structural error, which requires" outcome of proceeding below to be voided "without [appellate court engaging in] a harmlessness analysis."). Moreover this Court should order that no further substantive matters be discussed in Rule 802 conferences without meeting the requirements of the First Amendment as set forth herein.

Conclusion

As the Second Circuit explained in a high-profile terrorism case:

> Transparency is pivotal to public perception of the judiciary's legitimacy and independence. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.

United States v. Aref, 533 F.3d 72, 83 (2d Cir. 2008) (quotation and citation omitted). The legitimating function of openness is as important as its role in making proceedings more likely to arrive at accurate outcomes. Both considerations are vital in a case with so high a public profile as this one, and the concerns raised by the secrecy imposed thusfar are magnified by the fact that they are taking place in a military proceeding. *See* Eugene R. Fidell, *Accountability, Transparency & Public Confidence in*

the Administration of Military Justice, 9 Green Bag 2d 361 (2006) (openness is particularly vital in courts martial because "military trial courts in our country are not standing or permanent courts," and may be convened by various commanding officers without any centralized oversight at the trial stage).

On remand, the trial court should be clearly instructed that the First Amendment right of public access applies to the documents sought by petitioners, that that right mandates timely access to the documents during (not after) the proceedings, and that any restrictions on public access that the Court finds to be consistent with the First Amendment may only be imposed in a manner that allows public participation in the decision-making as well as subsequent review by appellate courts.[10]

Date: New York, New York
May 23, 2012

Respectfully submitted,

____

Baher Azmy, Legal Director
Michael Ratner, President Emeritus
J. Wells Dixon
Shayana Kadidal
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6464

[10] To the extent that access to portions of the proceedings or certain documents may be restricted to protect classified information, CCR requests that its attorneys who already hold security clearances (*cf*. Kadidal Decl. at ¶ 2) be allowed access.

Fax: (212) 614-6499

Jonathan Hafetz
169 Hicks Street
Brooklyn, NY 11201
Tel: (917) 355-6896

Counsel for Petitioners [11]

[11] Petitioners' counsel are not admitted to practice before the Court and therefore request permission, pursuant to Rule 8(c) of the Courts of Criminal Appeals Rules of Practice and Procedure, to appear pro hac vice for the limited purpose of litigating this Petition. Good cause exists to grant this request given the emergency nature of the relief requested and the serious nature of the issues at stake in this case. Counsel are members in good standing of the bar in New York State, and are admitted to practice before various federal courts. This Court has already granted such a request in connection with its consideration of an earlier request for public access to the Art. 32 proceedings in this case. *See* Order, *Julian Assange et al. v. United States of America et al.*, Army Crim. App. Misc. Dkt. No. 20111146 (A.C.C.A. Dec. 16, 2011). (The Court of Appeals for the Armed Forces similarly granted leave to appear pro hac vice. *See Assange v. United States*, Misc. No. 12-8008/AR, 2012 CAAF LEXIS 42 (C.A.A.F. Jan. 11, 2012).)

Certificate of Service

I hereby certify on this 23d day of May, 2012, I caused the foregoing Petition for Extraordinary Relief to be filed with the Court, via facsimile and courier delivery, and served on Respondents, via courier delivery, at the following addresses:

U.S. Army Court of Criminal Appeals
Office of the Clerk of Court
9275 Gunston Road
Fort Belvoir, VA 22060-5546
Fax: 703-806-0124

- and -

Clerk of Court
U.S. Army Judiciary (JALS-CC)
901 North Stuart Street, Suite 1200
Arlington, VA 22203-1837
Fax: 703-696-8777

- and -

Chief Judge Col. Denise Lind
U.S. Army Trial Judiciary, 1st Judicial Cir.
U.S. Army Military District of Washington
Office of the Staff Judge Advocate
103 Third Ave., SW, Ste 100.
Ft. McNair, DC 20319

- and -

David E. Coombs (counsel for Pfc. Manning)
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Tel: (508) 689-4616

- and -

Capt. Judge Advocate Chad M. Fisher
Appellate Government Counsel
Office of the Judge Advocate General
U.S. Army Legal Services Agency
9275 Gunston Rd.

Ft. Belvoir, VA 22060
Tel: (703) 693-0783

____
Shayana Kadidal