IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

CENTER FOR CONSTITUTIONAL RIGHTS, GLENN GREENWALD, JEREMY SCAHILL, *THE NATION*, AMY GOODMAN, *DEMOCRACY NOW!*, CHASE MADAR, KEVIN GOSZTOLA, JULIAN ASSANGE, and WIKILEAKS,	:	Crim. App. Misc. Dkt. No. 20120514
	:	USCA Misc. Dkt. No. 12-8027/AR
Appellants,	:	
	:	General Court Martial
v.	:	*United States v. Manning*, Ft. Meade, Maryland
	:	
UNITED STATES OF AMERICA and CHIEF JUDGE COL. DENISE LIND,	:	Dated: 13 July 2012
Appellees.	:	

REPLY BRIEF IN SUPPORT OF
WRIT-APPEAL PETITION FOR REVIEW OF ARMY COURT OF CRIMINAL APPEALS DECISION ON APPLICATION FOR EXTRAORDINARY RELIEF

Petitioner-Appellants have asked this Court to grant extraordinary relief enforcing the First Amendment right of timely public access to documents in the court-martial of Pfc. Bradley Manning (including the parties' filings, transcripts and court orders), as well as an order that any future restrictions on public access in the proceedings be imposed consistent with the First Amendment in a manner that allows for public participation in that decision-making process and subsequent appellate review. Petitioner-Appellants also seek application of First Amendment public access principles to the closed R.C.M. 802 conferences during which most of the substantive pretrial arguments and deci-

sions are taking place in the *Manning* proceedings – including deliberations over the protective order itself.

The government's brief, filed on 5 July 2012, does not seriously contest that the First Amendment right of public access applies to documents in courts-martial, and does not dispute that there has been no access to any written court orders, party filings, or transcripts below. Instead, it makes essentially one argument as to the claims for documents: extraordinary relief is inappropriate because the Freedom of Information Act (FOIA) allows for access (albeit non-contemporaneous access) to the documents at issue. As the government recognizes, this argument can only be sustained if (1) the right of public access applicable here does not mandate access to the documents at issue *contemporaneous with* the actual proceedings, *and* (2) if access under the FOIA statute can, as a legal matter, fulfill the mandates of the First Amendment and other rights of public access asserted by Petitioners. Neither is the case.

As to Petitioner-Appellants' demand to apply First Amendment access principles to R.C.M. 802 conferences, the government's alarmist response claims that 802 conferences would no longer be possible under our proposed standard. That confuses what we are proposing (application of strict scrutiny to closed conferences) with something no party is proposing (an absolute bar on their use). Where a trial court makes specific findings of a compelling

interest in arguing substantive issues in closed session, narrowly-tailored closures are permissible. But the routine use of off-the-record conferences to argue and decide nearly every significant issue in a case, as observed below, is not – even where both parties consent to it.

ARGUMENT

I. Precedent requires a right of *contemporaneous* public access

In describing the First Amendment right of access to judicial documents that has been recognized in eleven federal Court of Appeals circuits, Petitioner-Appellants' opening brief explained that that right of public access exists not only to promote public confidence in judicial proceedings and assure public accountability of government officials involved in those proceedings, but also because transparency and public scrutiny have a tangible effect on the ability of judicial proceedings to produce accurate results. *See* Pet. Br. at 14 (citing cases). It should be quite obvious, as Petitioners' opening brief notes,[1] that if public access is not contemporaneous with the actual proceedings, this error-correcting function of openness, especially with respect to factual matters, will be irretrievably lost.

More than sixty years of caselaw reinforce this point in the Due Process, Sixth Amendment, and First Amendment public access/open trial contexts. As Plaintiff-Appellants noted in their

[1] *See* Pet. Br. at 15-16.

opening brief, the Supreme Court noted that "contemporaneous review" was required as a "restraint on ... abuse of judicial power" as early as *In re Oliver*, 333 U.S. 257, 270 (1948). In that case the Court held that a defendant's Fourteenth Amendment Due Process Clause rights mandated reversal of a criminal contempt proceeding that took place behind closed doors.[2] No less than the Due Process Clause, the Sixth Amendment right to public trial also mandates contemporaneous access to proceedings — for the same logical reasons as the First Amendment cases describe: legitimacy, protection from official abuses, and error correction. The numerous Sixth Amendment cases cited in the opening brief make this abundantly clear. *See* Pet. Br. at 15–16 (citing cases).

These Sixth Amendment rights to "immediate and contemporaneous" public access apply no less to pretrial proceedings (such as the ones currently underway for Pfc. Manning) than to trials themselves. *See Waller v. Georgia*, 467 U.S. 39, 46 (1984) (Sixth Amendment right to public trial applies to pretrial (suppression) proceedings; "presence" of spectators necessary to ensure public legitimacy of trial, good conduct of government officials, and

[2] Notably, the habeas petitioner (and contempt defendant) complained that a full transcript of his supposedly-perjurious statements that were the basis of the contempt finding had not been made part of the record of his conviction or presented to his appellate court — adding to the problematic secrecy in his trial. *See Oliver*, 333 U.S. at 264.

because such real-time access "encourages witnesses to come forward and discourages perjury" (citing *Oliver*)).

There is no logical reason why the principle of contemporaneous access should not carry over from the Due Process and Sixth Amendment cases to First Amendment cases. This Court has several times opined that Sixth Amendment and First Amendment open trial principles in this regard are interchangeable. *See United States v. Ortiz*, 66 M.J. 334, 338, 339-40 (C.A.A.F. 2008); *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985). Indeed, the tendency of public access to improve errors in factfinding - the traditional purview of trial courts - argues forcefully for a contemporaneous right of public access to documents.

The common logic of the Due Process, Sixth Amendment and First Amendment policies favoring open trial is reflected in the frequent citation to *Oliver* in the Supreme Court cases recognizing a specifically First Amendment right of public access:

> *Oliver* recognized that open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous "checks and balances" of our system, because "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," [333 U.S.] at 270.

Richmond Newspapers, 448 U.S. at 592 (Brennan, J., concurring, with Marshall, J.); *id.* at 597 n.22 ("the [later] availability of a trial transcript is no substitute for a public presence ... the 'cold' record is a very imperfect reproduction of events that

transpire in the courtroom."); *id.* at 573 n.9 (citing *Oliver*) (Op. of Berger, C.J., joined by White, Stevens, JJ.).

As Petitioner-Appellants' declarations and opening brief make clear, restrictions on contemporaneous access have perhaps their sharpest impact on the media. *See* Pet. Br. at 17; Gosztola Decl. at ¶¶ 3-9 (JA-24-25). The Supreme Court and some of our finest legal scholars have recognized as much. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 572-73 (1976) (Brennan, J., concurring) ("discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors"); *id.* at 609 ("Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." (quoting Alexander Bickel, The Morality of Consent 61 (1975))). Unsurprisingly, most of the First Amendment cases mandating contemporaneous access to documents involve media petitioners. *See* Pet. Br. at 16-17 (citing three such cases: *Chicago Tribune Co.*; *Associated Press*; and *United States v. Smalley* (involving the *Dallas Morning News* and *Forth Worth Star Telegram*)).

Mandamus and Prohibition are, as the government notes, appropriately termed "extraordinary" writs. But the First Amendment demands the immediate relief that only the writs can provide. As noted in our opening brief, Pet. Br. at 18, this is reflected in numerous federal cases where extraordinary forms of relief - pre-

liminary injunctions, or appeals under the collateral order doctrine – are allowed to vindicate public access rights. *See, e.g.*, *Wecht*, 537 F.3d at 229–30 ("the value of contemporaneous disclosure, as opposed to post-trial disclosure, is significant enough to justify our immediate review of the matter under the collateral order doctrine [on the media-petitioner's appeal]."); *In re Applications of NBC*, 828 F.2d 340, 343 (6th Cir. 1987) (collateral order appeal); *Grove Fresh Distributors, Inc.*, 24 F.3d at 897 ("'[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment.'").

II. Cases involving audio and video records are not the equivalent of cases seeking documents

The government cites to two cases in support of the idea that federal courts have in fact not been unanimous in the requiring contemporaneous access to judicial documents – a single Supreme Court case decided on common law grounds prior to the *Richmond Newspapers* line of cases establishing the First Amendment right of public access (*Nixon v. Warner Communications*, 435 U.S. 589 (1978)), and a single Sixth Circuit case from 1986 (*United States v. Beckham*, 789 F.2d 401 (6th Cir. 1986)). Gov't Br. at 12. The government argues that, standing against all the cases and well-established legal principles cited above, the existence of these two singular cases means that Petitioner-

Appellants' "right to relief is [not] indisputable" and therefore extraordinary relief is inappropriate.

That argument would be extraordinary enough by itself. It is more extraordinary because *Beckham*, the Sixth Circuit case, is clearly no longer good law. The two-judge majority in *Beckham* based its ruling on a reading of a common law right of access to judicial records (informed by *Nixon*), finding the First Amendment did not apply.[3] The following year the Sixth Circuit ruled that the First Amendment did guarantee a right of access to judicial records. *See In re Applications of NBC*, 828 F.2d 340 (6th Cir. 1987) (cited in Pet. Br. at 11 n.5).[4]

Moreover, the *Beckham* majority, despite holding that the First Amendment did not govern access to judicial documents, ruled that under the common-law standard the trial court erred "in refusing to grant permission to copy the documentary exhibits" sought by the media in mandamus. 789 F.2d at 403, 412. The majority held that the trial court was only correct in withhold-

[3] *See Beckham*, 789 F.2d at 409 ("If a right to copy the tapes and transcripts in this case exists, it must come from a source other than the Constitution."); 409-10, 413 (noting common-law basis of analysis for access to tapes, citing *Nixon* frequently).

[4] The *NBC* panel came to this conclusion notwithstanding the *Beckham* panel opinion. *Cf.* 828 F.2d at 351 (Ryan, J., dissenting).

ing (again, under a common law analysis) the right to copy audio tapes[5] sought by the media.

Beckham and *Nixon*, then, are both narrow cases rejecting only a common law claim of access to audio tapes. Both cases illustrate why tapes are special: they have a potential to sensationalize judicial proceedings, in much the same way that televising court sessions might.[6]

The *Beckham* court, for instance, noted that release of the actual tapes could impart a carnival feeling into the court room, increasing tensions in the community (where the mayor and the media were engaged in conflict over what he asserted was racially-charged negative coverage) and importing them into the courtroom, and could also contaminate the jury pool because of the "misleading aura of accuracy to a tape recording." *Id*. at 410. *Nixon* involved similar concerns over commercially-motivated media sensationalism,[7] but primarily turned on the fact that Congress had re-

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[5] The *Beckham* court also denied the right to copy transcripts of those tapes. But the particular transcripts at issue were not admitted into evidence. The transcripts were used at trial only as "visual aids," with warnings to the jury to not consider them authoritative. The court refused to introduce them to evidence because they were acknowledged to be riven with errors. *See* 789 F.2d at 411. The same concerns the trial court had that the tapes would convey a misleading sense of accuracy seemed to apply to the transcripts as well. *See id*. at 411 n.4.

[6] For this reason R.C.M. § 806(c) contains a flat ban on audio and video recording of courts-martial.

[7] *See Nixon*, 435 U.S. at 598 (noting interest of courts in ensuring their records were not used to "promote ... scandal" or

cently legislated in the field the common law right otherwise occupied.[8]

The *Beckham* court noted that the question of access to the actual tapes might have come out differently if the First Amendment had applied to the actual tapes (as it now ought to, post-*NBC*). *Id.* at 411. However, application of First Amendment strict scrutiny analysis by trial courts will not always result in release of judicial records. Where a compelling interest (e.g., as in *Nixon*, a high risk of irreparable jury taint[9]) exists, narrowly-tailored measures taken to restrict public access (e.g. allowing public release of carefully-limited parts of the materials

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"serve as reservoirs of libel[]"); *id.* at 595 (noting risk of jury taint for Watergate defendants if tapes were released). Jury taint may at times constitute a compelling interest justifying restrictions on public access under strict scrutiny. *See infra*, pages 10-11 and n.9.

[8] *Id.* at 607 n.18 ("existence of Act...obviates...common-law right"). As the First Circuit noted a decade later, "[t]he Court in [*Nixon v.*] *Warner Communications* was dealing with a most idiosyncratic situation involving a Presidential privacy interest, a [Presidential Records] statute [created by Congress] specifically governing access in a limited number of unique cases, prior distribution of complete transcripts, and a motive to copy the tapes for sale. In light of *Richmond Newspapers*, decided two years later, we cannot read *Warner Communications* as laying down a general rule for all criminal cases that once the substance of testimony and evidence has been exposed to public view, there is no right of access to visual and aural means of preserving it." *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 504 (1st Cir. 1989) (Coffin, J.); *see also United States v. Berger*, 990 F. Supp. 1054, 1056-57 (C.D. Ill. 1998) (noting circuit splits re. videotapes).

[9] *See Nixon*, 435 U.S. at 595 (Judge Sirica felt Watergate defendants might suffer jury taint if tapes were released and they eventually faced retrial).

only after the jury verdict) may satisfy strict scrutiny. But even under the common law, the *Beckham* court noted that where the conduct of public officials is at issue, release of materials would advance public knowledge of a case, or the substance of the material was available to the public already,[10] these factors would weigh in favor of release. *Id.* at 412.

These latter factors are present in the instant case. Nothing in the materials Petitioner-Appellants have requested has the potential to exacerbate jury taint or turn the *Manning* proceedings into a circus (though application of strict scrutiny is typically for the trial court in the first instance). Petitioner-Appellants are merely seeking access to the most sober elements of the documentary record. Far from turning this trial into a circus, public access to the briefs, orders and transcripts

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[10] The government claims that "when the media and public are given unfettered access [and allowed] to publish what they have heard and seen," Gov't Br. at 12-13, that is all that is required - especially "given the word-for-word detail contained in appellants' sworn declarations," Gov't Br. at 14 and 14 n.39. (In other words, the fact that Ms. O'Brien took such excellent notes on one given section of the proceedings on one day (JA-26-29) should overcome the First Amendment right of access.) But their own best case contradicts this - the *Beckham* court, applying a common law standard, would have found the *Manning* transcripts releasable simply because their substance was already available to members of the public attending the proceedings. (Moreover, Ms. O'Brien was recently denied access to the media room where she managed to use her computer to type the notes used in her declaration. *See* http://www.alexaobrien.com/secondsight/wikileaks/ bradley_manning/miltary_distri/military_district_of_washington_threatens_journalist_with_arrest.html.)

should increase the amount of respect and legitimacy accorded to the proceedings below. *Cf*. Pet. Br. at 36–37.

III. FOIA is no substitute for access under the First Amendment

The second component of the government's argument is that because Petitioners "can obtain their requested relief" through FOIA, Gov't Br. at 6, they must exhaust FOIA before they can be entitled to extraordinary relief. *Id*. at 7–8, 4. In effect, the government argues that the FOIA statute somehow provides all the relief Petitioners would be entitled to under the First Amendment and common law rights of access.[11] In fact, FOIA provides neither the full extent of disclosure mandated by the First Amendment, nor the contemporaneous disclosure it demands.

"Even though the FOIA and the First Amendment both foster an atmosphere of governmental openness, ... the legal standards governing disclosure are not identical under the two provisions. [T]he government may overcome the FOIA's presumption of openness (i.e., disclosure) by demonstrating the applicability of an ex-

[11] The government also seems to argue – their brief is not entirely coherent on this point – that because there has been no order sealing documents from disclosure, there is no action of the trial court for us to challenge. Gov't Br. at 9–11. Of course, since neither the protective order nor any sealing orders have been released, the public has no way to know whether this is true, but the government's argument misses the more basic point that under the First Amendment, public access to judicial documents is presumptive; any deviation from the presumption of access not comporting with strict scrutiny is a violation of the public's right of access. Put another way, release should be automatic; the failure to release violates the First Amendment.

emption [provided for in the FOIA statute.]" *Dayton Newspapers, Inc. v. United States Dep't of the Navy*, 109 F. Supp. 2d 768, 772–73 (S.D. Ohio 1999). Under the terms of the FOIA statute, the government may withhold, for example, records relating to "internal personnel rules and practices"; most "inter-agency or intra-agency memoranda" including those subject to the deliberative process privilege; "personnel and medical files" implicating privacy interests; and various subcategories of "records or information compiled for law enforcement purposes" including those that "would disclose techniques and procedures for law enforcement investigations or prosecutions." 5 U.S.C. § 552(b)(2), (4)–(7).

In *Dayton Newspapers*, the plaintiffs requested certain court-martial records, including the questionnaires filled out by the members (the military rough-equivalent of jurors), under FOIA and not under the First Amendment. The *Dayton Newspapers* court, citing the A.C.C.A.'s decision in *Scott*, 48 M.J. at 665, 666, implied that Army courts had recognized such a First Amendment right of access. 109 F. Supp. 2d at 773. The court noted that under the First Amendment, juror questionnaires in civilian criminal courts would generally be available to the media. *Id.* at 772 (citing *Application of Washington Post*, No. 92-301, 1992 U.S. Dist. LEXIS 16882, 1992 WL 233354, at *4 (D.D.C. 1992)). However, because the plaintiff newspapers had only made their request under the FOIA, the court applied the "lesser" right to obtain in-

formation pursuant to FOIA "rather than the constitutional [First Amendment] strict-scrutiny analysis set forth in *Press-Enterprise* and *Washington Post*," *id*. at 773, and found that FOIA's exemption (b)(7)(C) (for records that if produced "could reasonably be expected to constitute an unwarranted invasion of personal privacy") applied to exempt the court-martial members' questionnaires from disclosure under FOIA. *Id*. at 776.

The district judge in *Dayton Newspapers* noted that in dicta in previous opinions he had opined that the First Amendment would have mandated "public release" of all but the most "intensely personal" information on the questionnaires. However, plaintiffs made their claims exclusively under FOIA; accordingly, he had come to the conclusion that because of the statutory exemptions built into FOIA, the documents could be withheld in their entirety. 109 F. Supp. 2d at 775 n.5 ("Because the present case, unlike *Washington Post*, involves a FOIA request, rather than the First Amendment, the Court need not engage in strict-scrutiny review.") This and other cases[12] make clear that FOIA's built-in legal exemptions from disclosure will typically operate to produce far lesser access to records than the First Amendment demands.

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[12] *See, e.g., Freedberg v. Department of Navy*, 581 F. Supp. 3, 4 (D.D.C. 1982) (Gesell, J.) (allowing withholding in FOIA of "NIS and JAG Manual investigations" of a murder despite the fact that "large portions" of the same "are already in the public record of the courts-martial" for two of the four murder suspects already tried).

In the Manning proceedings, the "internal personnel rules" FOIA exemption might operate to exclude evidence of computer security policies at the intelligence facility where Manning worked; the "inter-agency or intra-agency memoranda" exemption might operate to exclude the damage assessments that have of late been the subject of intense discovery litigation; "personnel and medical files" arguably implicating Manning's privacy might be withheld even though admitted into evidence; and untold amounts of evidence might be withheld under the (7)(E) exemption for law enforcement techniques and procedures.

Indeed, prior media FOIA requests for documents in the Manning case – including defense filings relating to speedy trial – were denied by the Army in their entirety on the grounds that they might interfere with law enforcement proceedings and deny the defendant fair trial under Exemption 7(A) and (B) of FOIA. That is a truly astonishing ruling given that many of the documents requested *were filed by the defense*. *See* Appendix A (FOIA request and appeal documents of Josh Gerstein of POLITICO).

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Moreover, access to documents under FOIA is too slow to be "contemporaneous" with the proceedings in the manner required by the First Amendment. This is true both as a practical matter and

a matter of law.[13] Notwithstanding any practical delays engendered by agency backlogs and the like,[14] the statute itself has delays built into it: Under 5 U.S.C. § 552(a)(6)(A)(i) agencies are allowed 20 business days to determine whether to comply with FOIA requests, a deadline that can be and often is extended as pro-

[13] The government appears to believe that only after a trial is over can FOIA provide access to the documentary record of trial. *See* Gov't Br. at 10 n.24 ("post-action requests" to JAG, SJA offices are proper means to seek release under Army FOIA regulation AR 25-55). Judge Lind's law review article on public access likewise claims that FOIA production of court-martial records can occur only after a trial is over, at which point the records are turned over from the court-martial to military authorities. *See* Lt. Col. Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 Mil. L. Rev. 1, 57 (2000) (finding, based on what may be a misreading of 5 U.S.C. § 551(a)(1)(F), that the records of courts-martial only become "agency" records when they are transferred at the conclusion of trial to the convening authority).

If accurate, this would render FOIA even more problematic as an alternative public access scheme – for the production of documentary records would by definition not be contemporaneous with the proceedings, instead only coming after the trial was over.

[14] The long delays endemic to processing FOIA requests are the stuff of legend. The New York Times recently reported that on 4 January 2012 it received a twelve-page document in response to a request it made (via Federal Express priority overnight courier) on 1 June 1997. The story also documented two 20-year-old unprocessed requests, both of which related to documents from 1961 or before, and quoted officials stating the system was "slower than any of us would like" and refusing to agree that "a delay of 10 years or more constituted a de facto denial." Matthew L. Wald, *Slow Responses Cloud a Window into Washington*, N.Y. Times (Jan. 28, 2012), *available at* http://www.nytimes.com/2012/01/29/us/slow-freedom-of-information-responses-cloud-a-window-into-washington.htm?pagewanted=all.

vided for in the statute.[15] Although the government would surely like to continue to avoid the entire issue of public access by claiming the lack of a pending FOIA request by Petitioners renders any appeal to the burden of real-world FOIA processing delays here premature, as it did below, it has no answer for the systematic delays and exemptions built into the statute. Finally, agencies may charge search and production fees in many circumstances under FOIA, a burden on the representatives of the press and public that is unheard of in First Amendment access cases.

The few cases cited by Respondents for the idea that FOIA forecloses extraordinary relief in mandamus, Gov't Br. at 8-9, all of which appear to involve pro se petitioners, are entirely inapposite. All four of them involve requests aimed at agency records (*Strunk*,[16] *Pickering-George*[17]) or prosecutorial files

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[15] *See* 5 U.S.C. § 552(a)(6)(A)(i) (twenty business day deadline); *id.* § 552(a)(6)(B)(ii) (allowing extensions without fixed time limit in "unusual circumstances").

[16] In *Strunk v. United States Dep't of State*, 693 F. Supp. 2d 112 (D.D.C. 2010), petitioner, a Birther, sought Department of State records relating to the President's travel, birth, and passport records simultaneously in both mandamus and FOIA. The court summarily dismissed the mandamus request in a footnote. *Id.* at 113 n.1. There is no mention of the First Amendment in the opinion.

[17] Respondents have cited to a footnote in *Pickering-George v. Registration Unit*, 553 F. Supp. 2d 3, 4 (D.D.C. 2008), wherein the court indicates that the pro se plaintiff attempted to amend his complaint seeking mandamus relief in addition to his FOIA claims seeking access to DEA records. The court denied that request as futile, finding plaintiff had not actually sent any FOIA

(*McLeod*,[18] *Housley*[19]). In neither situation would a First Amendment right of access to such documents exist in the first place, so it makes no sense to argue that the availability of FOIA to access such documents somehow has been held to displace a First Amendment right of access in mandamus in these otherwise rather trivial cases.

In sum, because FOIA is not a plausibly adequate alternative to the contemporaneous access required by the First Amendment,[20] Petitioner-Appellants need not exhaust any available FOIA remedy before seeking the relief they seek presently.

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request to the correct address for the agency. Again, there is no mention of the First Amendment in the opinion.

[18] In *McLeod v. DOJ*, 2011 WL 2112477 (D.D.C. May 24, 2011) (unpublished), a pro se petitioner sought access to files documenting a DOJ corruption investigation of a state prosecutor.

[19] In *Housley v. United States*, 1992 U.S. App. LEXIS 26368 (9th Cir. 1992) (unpublished mem. dec., table report at 978 F.2d 715), petitioner, a federal prisoner, sought "to disclose documents, files and records obtained through the alleged illegal use of electronic surveillance devices" via mandamus, and had simultaneously filed a FOIA request for the same. The Court dismissed. The case contains no mention of the First Amendment.

[20] *Cf. Doe v. Gonzales*, 500 F. Supp. 2d 379, 416 (S.D.N.Y. 2007) ("Plaintiffs' 'desire here is to exercise their First Amendment rights, which distinguishes this case from those in which an individual seeks disclosure of information ... pursuant to FOIA. Here, [Plaintiffs] seek to vindicate a constitutionally guaranteed right; they do not seek to vindicate a right created, and limited, by statute.'"), *aff'd in part, rev'd in part on diff. grounds*, 549 F.3d 861 (2d Cir. 2008).

IV. The history of public access is irrelevant here

The government did not contest below that the First Amendment right of public access identified in *Richmond Newspapers* applied in courts-martial.[21] For the first time on appeal, and in a footnote,[22] Gov't Br. at 14 n.41, the government claims that it "does not concede that the history of the public's access to courts-martial is the same as in Article III courts." The government offers no support other than a pincite to Winthrop (with no quotation attached[23]), nor does it elaborate as to in what sense the history of access has or has not been "the same as" in Article III courts, or why that is legally relevant. On any of these

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[21] Nor, in fairness, could it, given the overwhelming weight of federal caselaw cited by Petitioners, *see* Pet. Br. at 10–21, and the fact that the A.C.C.A. 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), applied First Amendment standards in analyzing a claim for public access to documents, *see* Pet. Br. at 21–22.

[22] Remarkably, the text this footnote is attached to discusses the *common law* right of access.

[23] The Winthrop treatise states of courts-martial that at the court's discretion, "proceedings shall not be reported except officially" and "other reporters may be required not to take notes," though "in general" open access is permitted. Winthrop's Military Law and Precedents 162 (2d ed. 1896) (reprinted 1920). However, the same section states "[o]riginally, (under the Carlovingian Kings,) courts-martial ... were held *in the open air,* and in the Code of Gustavus Adolphus ... criminal cases before such courts were required to be tried '*under the blue skies.*' The modern practice has inherited a similar publicity." *Id.* at 161 (original emphasis). And there is no reference to the treatment of judicial documents anywhere in this section (or that we can find in the rest of the treatise). In short, Winthrop provides no guidance for the present inquiry.

grounds – failure to raise argument in the lower court, failure to elaborate it with sufficient detail to allow a coherent response, failure to offer support, and placement in a footnote – this Court should consider any such argument waived.[24]

Even presuming that the government intended to allude to the Supreme Court's "experience and logic"[25] test for application of the First Amendment right of public access to proceedings, this Court has repeatedly applied that line of decisions to courts-martial.[26] In doing so this Court both found a past tradition of

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[24] *Hernandez v. Cook Cnty. Sheriff's Off.*, 634 F.3d 906, 913 (7th Cir. 2011) ("'skeletal' arguments may be properly treated as waived.... The underlying concern is to ensure that the opposing party is not prejudiced by being denied sufficient notice to respond to an argument."); *Long-Gang Lin v. Holder*, 630 F.3d 536, 543 (7th Cir. 2010) (party "must identify the legal issue, raise it in the argument section of her brief, and support her argument with pertinent authority"); *Draper v. Martin*, 664 F.3d 1110 (7th Cir. 2011) ("Plaintiffs fail to offer any record citations or analysis ... we deem their undeveloped argument waived"); *United States v. Torres-Aguilar,* 352 F.3d 934, 936 n.2 (5th Cir. 2003) (argument deemed abandoned by appellant "only briefly mentioning it in a footnote of his opening brief without providing any legal citation or analysis").

[25] *Press-Enterprise-II*, 478 U.S. 1, 9 (1986). The historical prong of this test has been widely criticized by commentators, and was never entirely dispositive as applied by the Supreme Court in any event, *see, e.g.*, *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 605 n.13 (1982) (Brennan, J. concurring) (noting there was a *general* tradition of openness of criminal trials, and the Court thus ignored the *specific* tradition of closure for minor sex victims given that the "logic" portion of the test demanded it); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 225 (3d Cir. 2002) (citing cases applying same analysis); *see also infra* note 27.

[26] *See, e.g.*, *United States v. Travers,* 25 M.J. 61, 62-63 (C.M.A. 1987) (First Amendment right of public access extends to

open access ("experience") and established such a practice going forward. Similarly, the *Scott* case established precedent for public access to judicial documents in Army courts-martial 14 years ago. *See* Pet. Br. at 21-22 (citing *United States v. Scott*, 48 M.J. 663 (A.C.C.A. 1998).

Perhaps the government means to imply that the relevant history is the 19th century environment of Winthrop's day – that is, that the history of access to documents need be ancient and unbroken for the First Amendment right to apply.[27] If so, that argument is a non-sequitur, for traditional courts-martial lacked any documentary records comparable to today's U.C.M.J. trials.[28] Historically, courts-martial were oral proceedings, without written

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courts-martial, citing *Richmond Newspapers* and *Press-Enterprise I* and *II*).

[27] Though the government has made similar arguments in civilian cases, the federal courts have not agreed that ancient history is relevant to this inquiry. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (rejecting argument that history of access must stretch to ancient times, and also finding relevant "current ... statutes" providing open access (*cf*. U.C.M.J. § 836; current R.C.M. 806(b)(2))); *id*. at 701 ("brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted" (citing Justice Brennan's *Richmond Newspapers* concurrence)); *NYCLU v. NYCTA*, 652 F.3d 247, 259 (2d Cir. 2011) (same; cases "focus not on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake").

[28] Moreover, as footnote 25, *supra*, notes, it is the *general* tradition of access to the *type of proceeding* in question that is significant under the Supreme Court's test – not whether access typically ran to documents, various portions of that proceeding, etc.

filings, adjudicated by a superior officer. The entire process was conducted without judges and typically without even any requirement for involvement by lawyers. A record of trial was only required to be produced if there was a conviction.[29]

Congress changed that radically in 1968, creating military judges to administer courts-martial,[30] and again in 1979, specifically extending the U.C.M.J. § 836 mandate that those tribunals apply "principles of law ... generally recognized in the trial of criminal cases in the United States district courts" to "[p]retrial ... procedures" (that is, the provision's coverage expanded from "cases" to all aspects of cases, including "[p]retrial, trial, and post-trial procedures").[31] Recent history is thus the only "experience" that is even possibly relevant here.[32] In any event, resolving historical questions is not necessary to resolve the present dispute, because by statute Congress has made clear that it intended that the U.C.M.J. system be open

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[29] However, the records of cases attracting significant public attention, dating back to the Revolution (such as Joshua Hett Smith (acquitted of aiding Benedict's Arnold treason), the Lincoln assassination conspirators, etc.) were often privately printed and sold to the public soon after the fact.

[30] *See* Statement of President Johnson on signing Military Justice Act of 1968, P.L. 90-632 (Oct. 24, 1968) ("It creates an independent court system within the military, free from command pressures and control.").

[31] *See* Defense Authorization Act 1980, P.L. 96-107, 93 Stat. 811, § 801(b) (Nov. 9, 1979) (specifically extending § 836 to pretrial proceedings).

[32] *See supra* note 27 (citing *Detroit Free Press*).

and be alike to federal courts procedurally. *See* Pet. Br. 12-13 (citing § 836). That procedural conformity should extend to access to judicial documents, as recognized (or presumed to exist) in every relevant federal Court of Appeals under the First Amendment.[33]

V. R.C.M. 802 conferences are subject to the First Amendment right of public access

The government claims the trial court has "appropriately summarized the substance of each [R.C.M. 802] conference on the record." Gov't Br. at 16. In open court on June 6, the trial court noted that three specific conferences "ha[ve] been synopsized" on the record and the parties invited to supplement the synopsis. JA-28. Without full transcripts of all public sessions (and full knowledge of all occasions on which R.C.M. 802 conferences have been held) it is impossible for Petitioner-Appellants to know whether the government's claim is accurate, but the language of the trial court's statement again implies that if the parties fail to object to an inadequate synopsis, the court has no further duty to provide public access. That cannot be adequate to satisfy the right of public access – which, it bears repeat-

[33] *See* Pet. Br. 11-12 n.5. Common law standards are much the same. *Id.* 20-21.

ing, is a right that belongs to the public and not the parties, and therefore cannot be waived away by the parties.[34]

The government is correct to say that the "First Amendment public trial right is not absolute" but is wrong to imply that that means certain areas of adversary proceedings and judicial decision-making – such as bench conferences in federal courts or substantive R.C.M. 802 conferences in courts-martial – may be placed entirely outside the scope of the First Amendment. Gov't Br. at 16. The First Amendment demands only that any restrictions on public access satisfy strict scrutiny (and, procedurally, that interested parties have meaningful notice and opportunity to object to such restrictions). If, for instance, the court finds that there is a compelling interest in keeping prejudicial material out of the view of the jury, the court may impose restrictions that meet the narrow tailoring test – meaning, they are the least restrictive means that can still satisfy the compelling interest. Occasionally, bench conferences are used in federal courts to discuss matters that must be kept out of earshot of the jury, and public dissemination is prohibited until after the verdict so as not to reach (non-sequestered) jurors via the media. In such cases, the First Amendment is satisfied so long as the

[34] Compare Manual for Courts Martial (2012), R.C.M. 806(b)(2), Discussion, stating "that the prosecution and defense jointly seek to have a session closed does not, however, automatically justify closure, for the public has a right in attending courts-martial."

restriction on contemporaneous public access is necessary to serve a compelling interest and is the least restrictive measure available to meet the need.[35]

The government claims that Petitioner-Appellants have failed to "identify any issue" decided "without being made part of the record" at the next public session. That is simply wrong: despite not having transcripts of the public sessions for comparison, our

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[35] *See, e.g.*, *United States v. Smith*, 787 F.2d 111, 114-15 (3d Cir. 1986) (approving press access to transcript of sidebar conference by applying common-law principles, 787 F.2d at 113 n.1, without reaching First Amendment: "Although the public and press may be justifiably excluded from sidebar and chambers conferences even when substantive rulings are made, the public interest in the ruling is not diminished. ... the public interest in observation and comment must be effectuated in the next best possible manner.").

Even *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993), cited by the government, acknowledged that courts had to "accommodate the public's right of access" to bench conferences, but that government interests might outweigh that right of access - in other words, strict scrutiny is not "fatal in fact" to all restrictions on public access. *Cf. In re Associated Press*, 172 Fed. Appx. 1, 5, 2006 WL 752044 (2006) ("prompt post-trial release of transcripts" of bench conferences satisfies public access right).

The government's brief cites to language in the *Richmond Newspapers* concurrence of Justice Brennan without correctly identifying that language as coming from a concurrence. *See* Gov't Br. at 16 n.50 (quoting *Richmond Newspapers*, 448 U.S. at 598 n.23 (Brennan, J., concurring) ("[W]hen engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor [are] judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.")). In any event, the language in question is logically read (a) as a concession that strict scrutiny would ordinarily allow the sort of exchanges traditionally held at trial in sidebar out of jury earshot, and (b) to distinguish administrative matters (which are "distinct from trial proceedings") from contested matters (which are not).

exhibits note that several orders were not disclosed on the record even though their existence was alluded to (e.g. a pretrial order, JA-11-12, and an order on posting of defense briefs, JA-6). Moreover, the *Defense Motion to Record and Transcribe All R.C.M. 802 Conferences*, JA-32-34, notes that there has "sometimes [been] confusion about what exactly was decided during [an] 802 session." JA-34, ¶ 10. In any event, it is sufficient at this point for this Court to order that the trial court ensure that its past and future R.C.M. 802 practices conform to First Amendment principles, *see* Pet. Br. at 4, Relief Sought, ¶ 2,[36] leaving specific implementation of the remedy to the trial court in the first instance.

Conclusion

As Petitioner-Appellants noted in our opening brief, it seems likely that the only reason Judge Lind did not find in favor of public access to the documents and proceedings at issue here is that she believed this Court and the A.C.C.A. have not yet held that the First Amendment applies to guarantee public access to anything other than the courtroom itself. *See* Pet. Br. at 28 n.9 (citing Kadidal Decl. ¶ 9 (JA-4-5) and Lt. Col. Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 Mil. L. Rev. 1, 45-

[36] This section in our opening brief contains a typographic error, repeated twice: "in a matter not inconsistent with the First Amendment" should read "in a manner not inconsistent...."

53 (2000)). (The government, in contrast, does not seriously contest that the First Amendment right of public access applies to documents in courts-martial.) Judge Lind concludes her article with a plea to the military authorities to amend the Rules for Courts-Martial to comply with the First Amendment's public access standards:

> The current Rules for Courts-Martial governing access to Article 32 investigations and courts-martial proceedings provide standards for closure that violate the media First Amendment right of access. ... Both R.C.M. 405(h)(3) and R.C.M. 806 should be amended to incorporate the compelling interest/individualized findings/narrowly tailored means test to justify closing proceedings or sealing records to which the First Amendment right of access attaches.[37] This test should be the rule for closure with or without defense objection. Rule for Courts-Martial 801(a)(3) should be amended to authorize military judges to control and release judicial records filed in connection with courts-martial. Finally, [the Rules] should provide for media notice and opportunity to be heard with respect to closure/sealing.

163 Mil. L. Rev. at 86. We could not agree more with the ultimate policy goals Judge Lind advocates for in her article: improved access (and opportunity to object to restrictions on access) for the media and the public. Petitioners would only add that this Court should make clear that the First Amendment *mandates* such a result, regardless of whether the R.C.M. specifies the same. Doing so is vital if the military justice system is to be taken se-

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[37] After Judge Lind's article was published, current R.C.M. 806(b)(2) was added to address some of the concerns in the quoted sentence. *See* E.O. 13,365, 69 Fed. Reg. at 71334 (Dec. 3, 2004).

riously as the equivalent of the civilian criminal justice system in terms of fairness, accuracy and transparency.

Date: New York, New York
13 July 2012

Respectfully submitted,

/s/sdk

Shayana D. Kadidal
J. Wells Dixon
Baher Azmy, Legal Director
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Counsel for Petitioner-Appellants [39]

[38] Counsel gratefully acknowledge the contributions of law students Madeline Porta and Carey Shenkman to this brief.

[39] Lead counsel, Mr. Kadidal, mailed a motion for admission to the bar of this Court to the Clerk of Court on July 2, 2012.

Certification of Compliance with Rule 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because it is a principal brief and contains 6995 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a mono-spaced typeface (Courier New) using Microsoft Word Versions 2003 and 2010 with 10 characters per inch in 12-point size.

/s/sdk
Shayana Kadidal

Certificate of Service

I hereby certify on this 13th day of July, 2012, I caused the foregoing Reply Brief to be filed with the Court and served on Respondents electronically via email (per this Court's Electronic Filing Order of 22 July 2010), and to be served on the trial and appellate courts below via overnight courier delivery (hardcopies arriving 16 July), at the following addresses and facsimile numbers, respectively:

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U.S. Court of Appeals for the Armed Forces
450 E Street, NW
Washington, DC 20442-0001
Tel: (202) 761-1448
efiling@armfor.uscourts.gov

- and -

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

- 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)
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- and -

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/s/sdk
Shayana Kadidal

APPENDIX A

(listed in reverse order)

FOIA request of Josh Gerstein, a journalist with POLITICO (March 3, 2011)

Administrative appeal of denial of request filed by Josh Gerstein (April 12, 2011)

Army General Counsel letter denying FOIA appeal (May 23, 2011)

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
104 ARMY PENTAGON
WASHINGTON DC 20310-0104

May 23, 2011

Mr. Josh Gerstein
1100 Wilson Boulevard, 6th Floor
Arlington, VA 22209

Dear Mr. Gerstein:

This letter responds to your Freedom of Information Act (FOIA) appeal, dated April 11, 2011. You appealed a denial by the U.S. Army Criminal Investigation Command (USACIDC) for records concerning PFC Bradley Manning.

We apologize for our delayed response to your appeal. The Army must address a large volume of FOIA demands and cannot always respond to appeals as quickly as we would like. We make it our practice to respond to appeals in the order received. The courts have sanctioned this method of handling FOIA cases. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-16 (D.C. Cir. 1976).

You requested records "of all motions or written requests filed by defense counsel for PFC Bradley E. Manning or by the Staff Judge Advocate in connection with the preferred charges pending against him or his conditions of confinement." You also requested "copies of any responses the opposing party, the commander, or convening authority submitted or issues in response to such motions or written requests." You specified that your request included, but was not limited to:

1. Any request to convene a Rule 706 board regarding PFC Manning;

2. Complaint(s) filed about PFC Manning's conditions of confinement on or about 5 January 2011; and,

3. A defense demand for a speedy trial filed on or about 19 January 2011.

USACIDC withheld the responsive documents pursuant to Exemptions 2, 6, 7(A), and 7(C) of the FOIA. 5 U.S.C. § 552(b)(2), (b)(6), (b)(7)(A), and (b)(7)(C). After carefully reviewing your appeal, this office has determined that, at this time, the responsive documents must be withheld in their entirety pursuant to Exemptions 7(A) and 7(B) of the FOIA. Accordingly, your appeal is denied.

Exemption 7(A)

Exemption 7(A) permits the Government to withhold information compiled for law enforcement purposes when disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). This exemption protects the

Government's ability to control and shape law enforcement proceedings and prevents the premature revelation of the government's evidence and trial strategy. *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 312 (D.C. Cir. 1988). Exemption 7(A) requires a two-part test. Records can be withheld only if they relate to a pending or prospective law enforcement proceeding, and their release could reasonably be expected to cause some harm. *See e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

After coordinating with the United States Army Criminal Investigation Command, we have determined that the records you have requested are part of an active law enforcement proceeding. Thus, they meet the first part of the Exemption 7(A). The second part of the analysis is also met, as releasing the records could hinder the Government's ability to shape its enforcement proceedings.

Exemption 7(B)

Additionally, the records are subject to Exemption 7(B) of the FOIA.

Exemption 7(B) protects records whose disclosure could lead to prejudicial pretrial publicity that would impair a court proceeding. Specifically, Exemption 7(B) protects "records or information compiled for law enforcement purposes [when] disclosure would deprive a person of a right to a fair trial or an impartial adjudication."

The leading case applying Exemption 7(B) is *Washington Post Co. v. DOJ.* 863 F.2d 96 (D.C. Cir. 1988). That case set forth a two-part test for applying Exemption 7(B): a trial or adjudication must be pending or truly imminent and it must be more probable than not that disclosure of the information would seriously interfere with the fairness of the proceedings. In this case, both requirements are met. Adjudication is pending and release of these documents, given the circumstances of the accusations against PFC Manning, would seriously interfere with the fairness of the proceedings.

This office notes, however, that both Exemption 7(A) and 7(B) are temporally-limited, and do not apply indefinitely. Rather, they apply only to the extent that enforcement proceedings are pending or ongoing. When the proceedings have closed, neither Exemption will apply to these records. At that time, however, other Exemptions, such as Exemptions 6 and 7(C) may continue to apply to limited portions of the responsive records. At such time, USACIDC will entertain a new request for this information.

This letter constitutes final action on behalf of the General Counsel, who has been designated by the Secretary of the Army to consider appeals under the FOIA. You may, if you so desire, seek judicial review of this determination through the federal court system in accordance with the provisions of the FOIA, 5 U.S.C. § 552(a)(4)(B).

Sincerely,

Ronald J. Buchholz
Associate Deputy General Counsel

POLITICO

April 12, 2011

Director
U.S. Army Crime Records Center
6010 6th Street
Fort Belvoir, VA 22060-5585

Via Fax No. (703) 806 0462

Re: Freedom of Information Act Appeal, FA11-1904

Expedited Processing Requested

Dear Sir or Madam:

This is an administrative appeal of denial of a request for agency records brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

By an e-mail dated March 3, 2011, I requested certain records from the Army's Northern Command and Military District Washington relating to the prosecution and detention of PFC Bradley Manning. (Copies of the relevant correspondence accompany this appeal.)

By a letter dated March 17, 2011, the Army's Joint Base Myer, Henderson Hall, responded to my request, indicating that "redactions are being recommended" and it was being referred for action to the U.S. Army Crime Records Center.

By a letter dated March 30, 2011, the U.S. Army Crime Records Center ("USACRC") responded to my request. It was not entirely clear whether the records addressed in the response were solely those located by Joint Base Myer or others. In any event, the request was denied in its entirety.

I hereby appeal from that decision.

I believe that some of the FOIA exemptions cited by USACRC are not applicable to the requested records. In addition, I believe others may be applicable to portions of the responsive records but are not a lawful basis to withhold the records in their entirety.

Exemption (b)(7)(A) is not an appropriate basis for withholding the records sought in my request. My request seeks primarily defense filings or requests which are commonly made public in connection with proceedings in civilian courts, including local, state and federal courts. The disclosure of such records is not viewed as interfering with ongoing investigations and there is no basis for expecting that they would do so in this instance.

To be clear, I am not seeking investigative records that would detail the strategies and techniques of criminal investigators, but rather adversarial legal filings. These are obviously known to the defendant and, in some instances, have been publicly discussed by or released by his counsel. Again, there is no reasonable basis to expect that disclosure of this sort of information would prejudice any ongoing investigation.

As a result of the Supreme Court's recent ruling in Milner v. Department of the Navy, exemption (b)(2) is inapplicable to substantive information responsive to this request. That exemption it could apply to certain strictly internal administrative data but the response to my request does not describe the records withheld in sufficient detail for me to assess that.

Exemptions (b)(6) and (b)(7)(C) could apply to some of the requested data but also do not justify withholding the requested records in their entirety. There is no reasonable expectation of privacy in adversarial legal filings. The significant public interest in PFC Manning's case and his conditions of confinement weighs in favor of disclosure. And public statements by his attorney, posted online at www.armycourtmartialdefense.info, diminish PFC Manning's reasonable expectation of privacy.

It is possible that some sensitive medical information could be contained in the requested records. If that is the case, such data could be redacted while releasing the remainder of the records.

I note that the Army has, on at least two occasions, publicly released so-called "charge sheets" in connection with Pvt. Manning's case. In addition, the Army has issued press releases about the case and made a series of public statements about the conditions of his confinement. If the "charge sheet," press releases, and information about conditions of confinement can be disclosed without interfering with an ongoing investigation or violating Pvt. Manning's privacy, it seems clear that at least some of the information I have requested can also be released while accommodating those concerns.

To the extent any of the claimed exemptions may be applicable to the requested records, I ask that the Army exercise its discretion to release the information in compliance with Obama Administration policy favoring transparency in government.

I ask that this appeal be expedited for the reasons cited in my March 3, 2011 request. I certify by my signature below that the statements in this appeal and the prior request are true and accurate to the best of my knowledge and belief.

If there are any questions about this appeal, please do not hesitate to contact me at (703) 647-7684.

Many thanks for your attention to this appeal.

Sincerely,

Josh Gerstein

From: Josh Gerstein
Sent: Thursday, March 03, 2011 4:02 PM
To: Tracy.mendez@jfhqncr.northcom.mil; FOIA@northcom.mil; MCBQuanticoFOIA@usmc.mil
Subject: FOIA Request - Expedited Processing Requested

Dear Sir or Madam:

This is a request for agency records brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

This request is being directed simultaneously to the entities I consider most likely to maintain the requested records: the Army's Northern Command, the Military District Washington Staff Judge Advocate, and the Marine Corps Base Quantico. If your entity does not maintain such records or you are not the proper point of contact for FOIA requests, I ask that you forward this request to the appropriate contact or entity.

I hereby request one copy of all motions or written requests filed by defense counsel for PFC Bradley E. Manning or by the Staff Judge Advocate in connection with the preferred charges pending against him or his conditions of confinement. In addition, I request copies of any responses the opposing party the commander or convening authority submitted or issued in response to such motions or written requests.

My request includes, but is not limited to:

any request to convene a Rule 706 board regarding PFC Manning;

complaint(s) filed about PFC Manning's conditions of confinement on or about 5 January 2011;

a defense demand for speedy trial filed on or about 9 January 2011;

an Article 138 complaint filed on or about 19 January 2011.

I ask that this request be expedited under the provisions of FOIA and applicable Department of Defense regulations. I am employed full-time as a journalist for POLITICO, a web site and newspaper of general circulation. I am seeking these records for use in time-sensitive news stories and contend there is a compelling need for their disclosure.

The prosecution of PFC Manning by the Army and his treatment at the brig by the Marine Corps are of widespread and exceptional media interest. They have generated stories in hundreds if not thousands of news outlets across the country and around the globe. The federal government's actual and alleged actions with respect to Manning are clearly of current interest to the public. DoD regulations specifically contemplate expedited processing in cases involving breaking news stories. See DoD Directive 5400.7 Paragraph C 1.5.4.3.2.

In addition, as a result of an apparent contradiction between public statements by the Army and counsel for PFC Manning, there is now considerable public confusion about the speedy trial and excludable time issues pertaining to PFC Manning. Release of these records should help resolve that conflict.

I seek a fee waiver for the reasons described above. However, I am willing to pay any fee of up to $250 while reserving my right to appeal any denial of a waiver.

I also note that some or all of the records I am seeking would routinely be available to the public if Manning was being prosecuted in state or federal courts. A similar presumption of public access should be applied to court filings and similar records in the military justice system.

I ask that these records be released to me in readily-viewable electronic form by e-mailing them to me at jgerstein@politico.com. If there are any questions about this request, please do not hesitate to contact me by email or by phone at (703) 647-7684.

If you would kindly send a short e-mail acknowledging receipt of this request, I would appreciate it.

I certify under penalty of perjury that the statements in this request are true and accurate to the best of my knowledge and belief.

Sincerely,
Josh Gerstein
Reporter
POLITICO
1100 Wilson Blvd, 6th Floor
Arlington, VA 22209
703-647-7684