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
Appellants,	:	General Court Martial *United States v. Manning*, Ft. Meade, Maryland
v.	:	
	:	Dated: 26 June 2012
UNITED STATES OF AMERICA and CHIEF JUDGE COL. DENISE LIND,	:	
Appellees.	:	

WRIT-APPEAL PETITION FOR REVIEW OF ARMY COURT OF CRIMINAL APPEALS DECISION ON APPLICATION FOR EXTRAORDINARY RELIEF AND SUPPORTING MEMORANDUM OF LAW

Preamble

In order to enforce the guarantees of the First Amendment to the United States Constitution, Appellants 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, "Petitioner-Appellants"),[1] by and through their under-

[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*,

signed counsel, respectfully appeal the denial of their petition to the Army Court of Criminal Appeals for extraordinary relief, 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, and to proceedings taking place in R.C.M. 802 conferences outside of public view.

History of the Case

Petitioner-Appellants wrote two letters to the trial court in the *Manning* proceedings seeking the relief requested here. *See* Declaration of Shayana Kadidal (attached to original petition and in the Joint Appendix), Ex. A & B (JA-10-13 and 14-17). The trial court received them into the record, construed the second letter as a motion to intervene for purposes of seeking the relief requested, and, finding no entitlement to relief on the merits, denied the motion to intervene. Petitioner-Appellants then sought extraordinary relief from the Army Court of Criminal Appeals, filing a petition on 23 May 2012 pursuant to the All Writs Act,

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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 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.

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 A.C.C.A. Rules. By order issued on 30 May 2012, the Army Court of Criminal Appeals ordered the government to respond to respond to Petitioners on all but the R.C.M. 802 issues. The government's brief, filed on 8 June 2012, did not contest that the First Amendment right of public access applies to documents in courts-martial and took no issue with Petitioners' factual description of the *Manning* proceedings. Instead, it made essentially one argument: extraordinary relief is inappropriate because the Freedom of Information Act (FOIA) allows for access (albeit non-contemporaneous access) to the documents at issue. Petitioners' reply was filed on 15 June 2012.

On 21 June 2012, without oral argument, the court issued a one-sentence order, stating: "On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Prohibition and Mandamus the petition is DENIED."

Relief Sought

(1) Petitioner-Appellants 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 re-

sponses to defense motions,[2] (b) court orders, and (c) transcripts of all 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) Petitioner-Appellants request a writ of mandamus and/or prohibition ordering the trial judge to reconstitute past R.C.M. 802 conferences in the *Manning* case in open court, in a matter not inconsistent with the First Amendment right of public access, and to conduct all future conferences in a matter not inconsistent with the First Amendment right of public access.

Petitioner-Appellants request oral argument.

Issues Presented

1. Whether the First Amendment right of public access (or other public-access rights) applies and guarantees access to the documents Petitioner-Appellants seek (judicial orders, filings, and transcripts) in a timely fashion, contemporaneous with the proceedings to which they relate.

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[2] Redacted versions of certain motions filed by defense counsel have already been disclosed publicly on the website of defense counsel, apparently by agreement of the parties. Kadidal Decl. at ¶ 11 (JA-5). 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.

2. Whether First Amendment principles apply to future document sealings going forward, including (a) the right to public notice of a request for sealing, (b) opportunity for interested parties to be heard, and (c) that the trial court be required to ultimately justify any restrictions on public access with case-by-case specific findings of necessity after consideration of less-restrictive alternatives.

3. Whether past R.C.M. 802 conferences should be reconstituted on the public record.

4. Whether public access to future R.C.M. 802 conferences should be governed by First Amendment principles.

Statement of Facts

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.

Pfc. Manning was arrested in May 2010 in Iraq on suspicion that he provided the diplomatic cables (and possibly other alleg-

edly 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,[3] 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, sensory deprivation, forced nudity, 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 associated with Wikileaks, the public has been largely denied access to even non-classified documents filed in Pfc. Manning's court-martial that

[3] Some of the current Petitioner-Appellants 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).

would shed light on the serious claims made about Pfc. Manning. As described in the declaration of CCR Senior Managing Attorney Shayana Kadidal (JA-2-9, attached to the original petition, and 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 (JA-3). 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 (JA-5-6) and Ex. A (JA-10-13). The Court's own orders on these and other subjects have not been published. Id. ¶ 14 (JA-6). Moreover, no transcripts of these proceedings have been made available to the public. *Id.* ¶ 4, 6, 9 (JA-3-5). Finally, during the pendency of the petition in the A.C.C.A., the defense moved to have all Rule 802 conferences recorded and transcribed. *See* Declaration of Alexa O'Brien (JA-26-29, attached to reply brief below). That motion was denied.

All of this has occurred (or rather not occurred) despite written requests by Petitioner-Appellants and other media organizations to the Court seeking public access. *Id.* Exs. C (Reporters' Committee Letter, JA-18-22) & A & B (CCR Letters, JA-10-17). 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 (JA-4).

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 (JA-24-25, attached to the original petition) at ¶¶ 4-8. These restrictions not only plainly violate the First Amendment and the common law, they undermine the legitimacy of this important proceeding.

As noted above, in its response brief addressing the right of public access to the documents Petitioner-Appellants requested, the government took no issue with Petitioner-Appellants' factual description of the *Manning* proceedings.

Reasons Why Writ Should Issue

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

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.* Petitioner–Appellants 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 denial of the public's First Amendment rights by the trial court and the A.C.C.A. is clearly erroneous and amounts to an usurpation of authority. Accordingly, this Court should grant Petitioner-Appellants' 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 Petitioner-Appellants 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]

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[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); *Hearst Newspapers, L.L.C. v. Cardenas-Guillen*, 641 F.3d 168, 172, 176-77 (5th Cir. 2011) (finding First Amendment right in favor of media petitioners seeking, inter alia, unsealing of records); *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); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1028-31 (11th Cir. 2005) (mandating First Amendment access to sealed docket and judicial records in criminal case); *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*");

Indeed, the spectacular degree of unanimity in the federal Courts of Appeals noted in the preceding footnote means that throughout the federal system, district courts are obliged to apply First Amendment principles to govern public access to judicial documents. That has implications for court-martial practice under the U.C.M.J. as well, for Congress has mandated in section 36 of the U.C.M.J. that

> [p]retrial, trial, and post trial procedures ... for cases arising under [the U.C.M.J.] triable in courts-martial ... may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts....

10 U.S.C. 836(a). This Court has repeatedly enforced standards derived from the uniform practice of the federal district courts, and there is no reason for it not to do so here as well. *See, e.g.*, *United States v. Nieto*, 66 M.J. 146, 150 (C.A.A.F. 2008) (looking to "generally applicable standard for considering this question in the trial of criminal cases" in district courts); *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000)

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. *See In re Violation of Rule 28(d)*, 635 F.3d 1352, 1357 (Fed. Cir. 2011). Of course, the federal circuit never hears criminal cases within its jurisdiction. *See* 28 U.S.C. § 1295 (setting forth jurisdiction).

("Congress intended [with § 836] that, to the extent 'practicable,' trial by court-martial should resemble a criminal trial in a federal district court."); *United States v. St. Blanc*, 70 M.J. 424, 429 (C.A.A.F. 2012) ("Nothing in the MCM or UCMJ suggests any reason for this Court to part ways with the federal courts" (citing U.C.M.J. § 36)); *Loving v. United States*, 64 M.J. 132, 140 (C.A.A.F. 2006) (applying *Teague* retroactivity analysis from federal courts, citing § 836); *United States v. Dowty*, 60 M.J. 163, 172 (C.A.A.F. 2004) (applying "federal rule" as to jury selection, citing § 836). Nothing in R.C.M. 806's open trial mandate indicates that the executive bears a contrary intent. *See* R.C.M. 806 ("courts-martial shall be open to the public").

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 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. The Supreme Court has long held that contemporaneous access to criminal proceedings is necessary to serve the various functions – public legitimation, diligent and upstanding official behavior, and error-correction – that public access has traditionally served. As early as 1948 the Court had announced that "[t]he knowledge that every criminal trial is subject to *contemporaneous review* in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948) (emphasis added). *Oliver* was decided under the Due Process Clause but federal courts have extended the contemporaneous access principle to Sixth Amendment cases where defendants sought to make proceedings and information public. *Huminski v. Corsones*, 386 F.3d 116, 143 (2d Cir. 2004), *as amended on reh'g*, 396 F.3d 53 (2d Cir. 2005) ("Sixth Amendment guarantees ... the right to a public trial principally to protect the defendant from prosecutorial and judicial abuses by permitting contemporaneous public review of criminal trials."); *United States v. Wecht*, 537 F.3d 222, 229-30 (3d Cir. 2008) ("Although post-trial release of information may be better than none at all, the value of the right of access would be seriously undermined if it could not be contemporaneous."); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)

("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous. ... The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.").

Legitimacy, accountability, accuracy: these three principles motivating the Sixth Amendment right of contemporaneous access are the same values cited by the Supreme Court in support of the First Amendment right of public access recognized in *Richmond Newspapers* and its progeny. While the number of cases involving a (1) First Amendment right of access (2) specifically to documents and (3) simultaneously opining on the contemporaneous access issue is small, there are federal cases that specifically note that such access must be contemporaneous to be effective. *See Chicago Tribune Co. v. Ladd (In re AP)*, 162 F.3d 503, 506 (7th Cir. 1998) (in case involving request for access to "various documents that were filed under seal," Court of Appeals noted that "the values that animate the presumption in favor of access require as a 'necessary corollary' that, once access is found to be appropriate, access ought to be 'immediate and contemporaneous'"); *United States v. Smalley*, 9 Media L. Rep. 1255, 1256 (N.D. Tex. 1983) (newspapers' "motions for contemporaneous access" to transcripts

of evidence "now being introduced" at trial granted per First Amendment; "without contemporaneous access to the transcripts ... the press would be foreclosed from reporting at all on a significant portion of the prosecution's evidence"); *see also Associated Press v. United States Dist. Court for Cent. Dist.*, 705 F.2d 1143 (9th Cir. Cal. 1983) (even a 48-hour presumptive sealing period for documents (designed by district court to allow parties to make more permanent closure motion) violates First Amendment right of public access).

These principles are especially relevant in cases involving media plaintiffs. The failure to publish the court orders, government briefs, and transcripts here has uncontestedly had an inhibiting effect on the ability of the press to report on the Manning court-martial. *See* Gosztola Decl. at ¶¶ 3-9 (JA-24-25). The Supreme Court's prior restraint cases make clear that the blanket ban on prior restraints is motivated in part by the need to have timely reporting on matters of public interest, without which this important check on judicial error will no longer function:

> the order at issue [here, prohibiting publication of certain facts derived either from public judicial proceedings or independent sources] - like the order requested in [the Pentagon Papers case] - does not prohibit but only postpones publication. Some news can be delayed ... without serious injury [for editorial reasons, but d]elays imposed by governmental authority are a different matter. ... As a practical matter ... the element of time is not unimportant if press coverage is

> to fulfill its traditional function of bringing news to the public promptly.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560–61 (1976). All of this is consistent with the general First Amendment principle 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)), allowing press petitioners to seek preliminary injunctions against measures restricting such First Amendment rights of public access, and to immediately appeal denials of public access under the collateral order rule (*see Wecht*, *supra*).

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 "con-

sider 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), the Army Court of Criminal Appeals 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 the 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 trial judge erroneously 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 the 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, the court found the trial court had committed an abuse of discretion, and vacated the order of sealing. At least one federal court, citing the A.C.C.A.'s decision in *Scott*, 48 M.J. at 665, 666, has implied that that decision recognized a First Amendment right of access. *See Dayton Newspapers, Inc. v. United States Dep't of the Navy*, 109 F. Supp. 2d 768, 772 (S.D. Ohio 1999).

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[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.

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 (JA-4). 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 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 con-

taining 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 (JA-6). 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 (JA-6); Goszтola Decl. ¶ 4 (JA-24). 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 ra-

[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 (JA-5).

tionale 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 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 under such a scheme 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 *Regula-*

tion for Trial by Military Commission. Kadidal Decl. ¶¶ 18–19 (JA–7–9).

For all practical purposes, the trial court 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 Petitioner-Appellants' 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. Petitioner-Appellants 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 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]

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[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 2.) 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.

[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 A.C.C.A.) have only recognized a limited common law right of access to judicial documents, not a First Amendment right of access. *See* Kadidal Decl. ¶ 9 (JA-3-4); *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).

Moreover, Judge Lind's article and her discussion in court indicate that she believes the FOIA statute provides an adequate alternative mode of access to the documents in question, an argument that was the government's sole response to our petition below. This argument compares apples to oranges. FOIA provides a lesser level of access to court-martial documents than the First

III. The trial court's practice of deciding substantive issues within R.C.M. 802 conferences is inconsistent with the public's right of access to these proceedings

A number of substantive matters, including the very issue of public access to documents, have been argued and decided by the trial court in Rule 802 conferences out of view of the public with no articulated justification for the lack of public access. Kadidal Decl. ¶ 13 (JA-4-5) & Ex. B (JA-16). There is, to Petitioner-Appellants' knowledge, no recording, transcript, or other record of any of those discussions. Because there is no other way

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Amendment, as federal courts have noted. *See Dayton Newspapers, Inc. v. United States Dep't of the Navy*, 109 F. Supp. 2d 768, 772-73 (S.D. Ohio 1999) ("legal standards governing disclosure are not identical" under FOIA and First Amendment, in large part because FOIA allows numerous statutory exemptions). That court noted that the documents the Dayton Newspapers had requested – jury questionnaires from a court-martial – would largely have been available under the First Amendment but were properly withheld under FOIA. *Id.* 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.") There can be no clearer demonstration of the fact that FOIA's built-in legal exemptions from disclosure will typically operate to produce far lesser access to records than the First Amendment demands – even putting to one side the fact that the FOIA statute permits delays in production that would not satisfy the contemporaneous access principles demanded by the First Amendment.

Accordingly, no federal court has ever held that FOIA trumps the constitutional right of public access to documents; indeed, quite the opposite: federal courts have held that FOIA allows withholding of documents already disclosed on the public record of courts-martial. *See, e.g.*, *Freedberg v. Department of Navy*, 581 F. Supp. 3 (D.D.C. 1982) (Gesell, J.) (allowing withholding 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); *see generally* ACCA Reply Br. at 10-18.

to vindicate the right of public access to those proceedings, this Court can only remedy the failure to make these past R.C.M. 802 conferences part of the public record by ordering that all 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 below.

Rule 802 by its terms contemplates allowing resolution of "routine or administrative matters" in conferences,[10] but allows that substantive matters may be resolved therein by "consent of the parties."[11] However, all "matters agreed upon at a conference shall be included on the record." R.C.M. 802(b) (JA-30-31). The trial court has decided substantive matters without promptly memorializing the discussion or the decisions on the record. The use of 802 conferences in this way violates the First Amendment, regardless of whether or not the parties consent, because the

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[10] Manual for Courts-Martial, Discussion, R.C.M. 802 (JA-30-31).

[11] *Id.*

public is denied meaningful access to the proceedings. Recent events before the trial court (memorialized in the Declaration of Alexa O'Brien, a journalist attending the proceedings, JA-26-29) illustrate the problematic nature of that court's use of 802 conferences.

As Ms. O'Brien notes, during the 6 June 2012 Article 39 proceedings, the defense raised a number of objections to the court's R.C.M. 802 practice: (1) the government, it claimed, was relitigating already-decided motions during 802 conferences, (2) the public summary of issues decided in 802 conferences was generally not adequate, and (3) most importantly, the government had been taking positions in 802 conferences and then later taking contradictory positions in open court.[12] O'Brien Decl. ¶ 5 (JA-27). That latter problem, the defense contended, should be addressed by granting its motion that all 802 conferences in the case be recorded and transcribed. *Id.* ¶¶ 5, 4 (JA-26-27). Judge Lind denied the motion, noting that defense counsel had not objected to the lack of recording previously, and finding that while "matters agreed upon at the conference shall be included [in] the record orally or in writing" normally, "[f]ailure of a

[12] Eventually, the government approved for posting on the defense website the Defense Motion to Record and Transcribe All R.C.M. 802 Conferences (2 June 2012), appended as JA-32-34. The motion sets forth few examples of alleged government manipulation of the 802 process. *See id.* at ¶¶ 6-9 (JA-32-34); *see also id.* at ¶ 10 (JA-34).

party to object ... waives this requirement." *Id.* ¶ 7 (JA-28). Going forward, Judge Lind decided that "if either party objects to discussion of an issue in an R.C.M. 802 conference, the conference will be terminated" (rather than recording it), and the issue instead addressed at the next Art. 39 session on the court's calendar. *Id.* (JA-28-29).

Mandating that the substance of 802 conferences be memorialized on the record only when a party objects, as the trial court effectively has done here, is not enough to satisfy the right of public access. The parties cannot be allowed to control the right of the public to witness the substance of important aspects of the proceedings. The trial court's order would do nothing to prevent collusive attempts (by the parties acting together) to keep matters off the public record. And it does nothing to prevent the government from continuing to take contradictory positions from those it had taken in past conferences, as has been alleged here, O'Brien Decl. ¶ 5 (JA-26-27), relying only on the memory of the judge to provide a disincentive against such mischief.

Two R.C.M. rules are relevant here. On the one hand, R.C.M. 802(b) states that "conferences need not be made part of the record, but matters agreed on at a conference shall be included in the record orally or in writing. Failure of a party to object at trial to failure to comply with this subsection shall waive this requirement." (JA-30) On the other hand, R.C.M. 1103(b)(2)(B)

states that for general courts-martial, "the record of trial shall include a verbatim written transcript of all sessions" except deliberations, and the Discussion note to the rule states that this "verbatim transcript" requirement "includes ... all proceedings including sidebar conferences.... Conferences under R.C.M. 802 need not be recorded, but matters agreed upon at such conferences *must* be included on the record." (Emphasis added.) The verbatim transcript provision of R.C.M. 1103, which seems designed primarily to ensure the possibility of meaningful review by appellate courts, states the better rule, for it makes no reference to the potential for waiver by the parties of this mandate.[13]

Petitioner-Appellants submit that the trial court's finding that defense counsel had waived opposition to the court's failure to "include[e the substance of the 802s in] the record" by failing to object was erroneous, because case law establishes that 802 conferences must be recorded when important substantive mat-

[13] Conflicts between two trial regulation provisions have been resolved by various interpretive canons. *Cf. United States v. Valente*, 6 C.M.R. 476, 477 (C.G.C.M.R. 1952) ("in such a case of conflict [between two provisions of Manual for Courts-Martial, the] paragraphs should be read together and, if possible, the conflict resolved in accord with the over-all intent of the Manual."), *with United States v. Morlan*, 24 C.M.R. 390, 392 (A.C.M.R. 1957) ("specific terminology controls and imparts meaning to general terminology"). Here, the conflict with the First Amendment means this Court need not sort out which interpretive canon(s) to apply to resolve the apparent conflict between R.C.M. rules 803(b) and 1103(b)(2)(B), as the 803(b) waiver rule cannot stand in the face of the First Amendment.

ters are addressed. *See United States v. Sadler*, 29 M.J. 370, 373 n.3 (C.M.A. 1990) (instructions not to be discussed at 802s); *United States v. Garcia*, 24 M.J. 518, 519 (A.F.C.M.R. 1987) (802s "not [for] central trial issues"; providency of guilty pleas may not be discussed at 802 conference). Failure to do so violates not only the verbatim transcript provisions of R.C.M. 1103 but also the Fifth and Sixth Amendment right to public trial, and First Amendment right of the public to be present. *United States v. Walker*, 66 M.J. 721, 749–50, 753–54 (N–M.C.C.A. 2008) ("extensive use" of 802s creates "deep[] concern" under R.C.M. 804, U.C.M.J. Art. 39, and First, Fifth and Sixth Amendments; court overturned death sentence on other grounds, mooting otherwise serious 802 issues).

Several service courts of appeal have found this requirement is jurisdictional and therefore cannot be waived by a party's failure to object. *See Garcia*, 24 M.J. at 519–20 ("The requirement for a verbatim record, where it exists, is jurisdictional and cannot be waived by counsel's failure to object. *United States v. Whitney,* 23 U.S.C.M.A. 48, 48 C.M.R. 519 (1974); *United States v. Desciscio*, 22 M.J. 684 (A.F.C.M.R. 1986). ... R.C.M. 802 conferences covering authorized subjects are ... an exception. ... However, when matters beyond the scope of the rule have been discussed in an R.C.M. 802 conference, subsequent failure to include them in the record may render it nonverbatim."); *Walker*,

66 M.J. at 754-55 ("extensive use" of 802s, including those where there was "a ruling by the judge affecting rights," "is jurisdictional and cannot be waived by failure to object at trial." (citing *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000))). Courts have presumed prejudice to a defendant from failure to record the substance of an 802 conference in the appellate record, *see United States v. Adriance*, 1988 CMR LEXIS 222, at *6 (A.F.C.M.R. Mar. 4, 1988); *Desciscio*, 22 M.J. at 686, and have found that the trial judge has an independent obligation to record. *See id.* at 688 ("trial judges must protect the accused's right to a complete record whenever they rule on objections or motions"); *United States v. Grey*, 1997 CCA LEXIS 198, at *18 (N-M.C.C.A. Jun. 20, 1997) ("the military judge and the trial counsel each had an independent obligation to ensure that the R.C.M. 802 session was summarized on-the-record"). Other service courts have strongly castigated a trial court's practice of frequent resort to 802 conferences, and noted that the use of the 802 process to "litigate issues" or decide contested issues is outside the intent of the drafters of the rules. *See Walker*, 66 M.J. at 756 ("we roundly condemn the [802] practice employed by the military judge in this case"); *see also id.* at 752 ("To litigate issues, or to decide issues not subject to agreement between the parties, 'would exceed, and hence be contrary to, the authority established under [UCMJ] Article 39(a)' for such conferences,"

citing "R.C.M. 802(a), Drafter's Analysis"); *Grey*, 1997 CCA LEXIS 198, at *16 ("military judge should have summarized ... the nature of the conference.... It was error not to").

The widespread practice of using 802 conferences to argue and pre-decide troublesome issues outside of public view, evidenced by these many cases, is troublesome. If current trends continue, nearly all important issues in high profile court-martial proceedings will be rehearsed, argued and decided behind closed doors, and afterwards presented in the most summary fashion – if at all – to the public. It is said that the ad hoc nature of military trial courts, each convened for the purpose of a single case, tends to sap participants (including military judges) of the confidence born of continuity of practice, which in turn fosters the practice of dress-rehearsing issues outside of public scrutiny in 802 conferences. While the aim of such a policy may be to enhance the appearance of professionalism of the military courts, it is a short-sighted means to that end, for by allowing decision-making to be withdrawn from public view, it will in the long run erode public confidence in their ability to deliver justice.

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 thus far 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 all R.C.M. 802 conferences and to the documents sought by Petitioner-Appellants, 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.[14]

Date: New York, New York
26 June 2012

Respectfully submitted,

/s/sdk

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[14] 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 top-secret security clearances (*cf.* Kadidal Decl. at ¶ 2 (JA-2)) be allowed access.

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

[16] Petitioners' counsel are not admitted to practice before the Court and therefore request permission, pursuant to Rules 13(a-b) and 38(b) of this Court's Rules of Practice and Procedure, to appear pro hac vice for the limited purpose of litigating this Writ Appeal 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 the *Manning* case. *See Assange v. Unit-*

ed States, Misc. No. 12-8008/AR, 2012 CAAF LEXIS 42 (C.A.A.F. Jan. 11, 2012).

Lead counsel, Mr. Kadidal, will file a motion for admission to the bar of this Court as soon as is practicable.

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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 9056 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 26th day of June, 2012, I caused the foregoing Writ Appeal Petition 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 27 June), at the following addresses and facsimile numbers, respectively:

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Additionally the Joint Appendix hereto has been served in hard-copy on all parties and courts listed above except Capt. Fisher, who has consented to accept an electronic copy in lieu of a paper copy.

/s/sdk
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