IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Center for Constitutional Rights, et al., Petitioners-Appellants	APPELLEE'S ANSWER TO APPELLANT'S PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF WRITS OF MANDAMUS AND PROHIBITION
v.	
	Crim. App. Dkt. No. Misc. 20120514
UNITED STATES OF AMERICA	
	USCA Misc. Dkt. No. 12-8027/AR
and	
Colonel DENISE LIND Military Judge, Respondents-Appellees.	

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

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) denied appellant's request for extraordinary relief, pursuant to the All Writs Act.[1] This Court reviews decisions of a service court on a petition for extraordinary relief as a writ-appeal, under Rules 4(b)(2) and 18(a)(4) of this Court's Rules of Practice and Procedure (Rules).[2] This answer is filed pursuant to Rules 27(b) and 28(b)(2).

[1] 28 U.S.C. 1651 (1992); Joint Appendix (JA) 1.
[2] *Ellis v. Jacob*, 26 M.J. 90, 91 (C.M.A. 1988).

Statement of the Case and Facts

Private First Class (PFC) Bradley Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ).[3] The convening authority referred the charges to a general court-martial on February 3, 2012, and PFC Manning was arraigned on February 23, 2012. The military judge held Article 39(a), UCMJ, sessions on March 15-16, April 24-26, and June 6-8, 2012.

On March 21, appellants, who are not parties to the court-martial, sent a letter to the military judge requesting the Court:

> make available to the public and the media for inspection and copying all documents and information filed in the *Manning* case, including the docket sheet, all motions and responses thereto, all rulings and orders, and verbatim transcripts or other recordings of all conferences and hearings before the Court.[4]

---

[3] JA 35-42 (Charge Sheet).
[4] JA 3 (Declaration of Shayana Kadidal); JA 11-13.

At the 39(a) session on April 24, the military judge marked appellant's letter as Appellate Exhibit 66, treated it as a request to intervene, and denied the request.[5]

On May 23, 2012, appellant filed a writ-petition at the Army Court seeking similar relief. Appellant asked the Army Court to compel the military judge to grant public access to all documents pertaining to the case and to require conferences held under Rule for Courts-Martial (R.C.M.) 802 to be made part of the record in their entirety. On May 30, 2012, the Army Court ordered the Government to respond to the Petition, and on June 21, 2012, the Army Court denied the Petition. Five days later, on June 26, 2012, appellant timely filed this writ-appeal petition ("writ-appeal") at this Court.

Relief Requested

Appellant asks this Court to grant a petition for a writ-appeal of the Army Court's denial of his petition for extraordinary relief. The Government asks this Honorable Court to deny the petition because appellant fails to meet the threshold criteria for extraordinary relief.

[5] JA 4.

Appellant's Statement of the Issues

I.

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.

II.

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.

III.

WHETHER PAST R.C.M. 802 CONFERENCES SHOULD BE RECONSTITUTED ON THE PUBLIC RECORD.

IV.

WHETHER PUBLIC ACCESS TO FUTURE R.C.M. 802 CONFERENCES SHOULD BE GOVERNED BY FIRST AMENDMENT PRINCIPLES.

Summary of Argument

The Army Court properly denied the petition for extraordinary relief because appellant failed to meet the first two conditions for extraordinary relief. First, a writ of mandamus or prohibition is appropriate only when no other adequate remedy is available. Here, appellants have an adequate

remedy under the Freedom of Information Act (FOIA) to request access to these court-martial documents.[6]

Second, appellant failed to show that his right to the requested relief is clear and indisputable. At the very least, federal courts have divided over whether the press is *constitutionally* entitled to *contemporaneous* access to judicial documents.

Law and Standard of Review

A writ of mandamus or prohibition is a "drastic remedy... [which] should be invoked only in truly extraordinary situations."[7] Therefore, appellant has an "extremely heavy burden" to justify the granting of a writ.[8]

> As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue. First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires-a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of

---

[6] *See* 5 U.S.C. § 552.

[7] *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983) (citing *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983); and *United States v. Thomas*, 33 M.J. 768 (N.M.C.M.R. 1991)).

[8] *Dew v. United States*, 48 M.J. 639, 648 (Army Ct. Crim. App. 1997) (citing *McKinney v. Jarvis*, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997) and *Bankers Life and Casualty Co.*, 346 U.S. at 384).

its discretion, must be satisfied that the writ is appropriate under the circumstances.[9]

Argument

I. Appellants have adequate means, aside from a writ, to attain the relief they seek.

Utilizing the Supreme Court's standards for granting extraordinary relief, appellants fail to meet the first criteria because they can obtain their requested relief, public access to court-martial documents, through the FOIA.

The FOIA generally provides that any person has the right to obtain access to federal agency records except to the extent those records are protected from disclosure by the FOIA.[10] Indeed, the "thrust of the FOIA since its initial enactment has been to provide for disclosure of governmental files unless an exemption is established."[11] Specifically, in 5 U.S.C. § 552(a)(3)(A), Congress requires each agency, upon proper request, to "make the [requested] records promptly available to any person" unless subject to certain limited exemption. Under

---

[9] *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381 (2004) (internal quotation marks and brackets omitted) (quoting *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403 (1976); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953); and *Ex parte Fahey*, 332 U.S. 258, 260, (1947)).

[10] *See* 5 U.S.C. § 552; Pub. L. No. 104-231, § 2 (1996) (Congressional Statement of Findings and Purposes); *see also Brown v. Federal Trade Commission*, 710 F.2d 1165, 1177 (6th Cir. 1983).

[11] *Title Guarantee Co. v. N.L.R.B.*, 534 F.2d 484, 488 (2d Cir. 1976).

this statute, Congress *specifically* included courts-martial within the definition of an "agency" and subjected them to the FOIA disclosure requirements.[12]

The Department of the Army promulgated Army Regulation (AR) 25-55, The Department of the Army Freedom of Information Act Program (November 1, 1997), to comply with its disclosure obligations under the FOIA. Specifically, The Judge Advocate General (TJAG) is authorized to act on any request for records relating to courts-martial.[13] Appellants, who bear the burden of justifying extraordinary relief, provided no evidence of any FOIA request for the documents they seek.

Even assuming that appellants made a proper FOIA request, and that FOIA request was denied by both the initial and appellate denial authorities (AR 25-55, para. 5-3), then appellants still are not entitled to mandamus at this Court because the proper remedy is to challenge the denial in federal district court.[14] As provided in AR 25-55 and the FOIA statute itself, a requester "may seek an order from a United States

---

[12] 5 U.S.C. § 551(1)(F) (definitions).
[13] AR 25-55, para. 5-200(d)(14). *See also* "A Citizen's Guide To Request Army Records Under the Freedom of Information Act (FOIA)", Department of the Army Freedom of Information Act Guide, March 2006, p. 16, available at http://www.armyg1.army.mil/foia/docs/Citizensguide_2006.pdf (listing specific point of contact for FOIA requests at the Office of The Judge Advocate General).
[14] *See* 5 U.S.C. § 552(a)(4)(B).

District Court to compel release of a record after administrative remedies have been exhausted."[15]

Where access to agency documents is otherwise available under the FOIA, federal courts routinely deny requests for mandamus.[16] While these cases do not specifically address requests for court-martial documents, they do stand for the proposition that the availability of FOIA can preclude extraordinary relief. This Court should likewise deny appellants' request for extraordinary relief because FOIA is the proper vehicle for obtaining records from United States agencies.[17]

Appellants, relying on *Dayton Newspapers, Inc. v. United States Dep't of the Navy*,[18] argue that FOIA is not an adequate remedy because FOIA provides a lesser right of access than the First Amendment.[19] But *Dayton*'s discussion of the comparative scope of the First Amendment and FOIA is pure dicta, given that

---

[15] AR 25-55, para. 5-400(b); 5 U.S.C. § 552(a)(4)(B). *See also Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (the FOIA created a judicially enforceable public right to secure such information from "possibly unwilling official hands.").

[16] *See McLeod v. U.S. Dep't of Justice*, 2011 WL 2112477, *1 (D.D.C. 2011) (unpublished) (denying mandamus where petitioner sought Department of Justice records because relief available under FOIA); *Housley v. United States*, 978 F.2d 715 (9th Cir. 1992) (unpublished) (same); *Strunk v. U.S. Dep't of State*, 693 F.Supp.2d 112, 113 n.1 (D.D.C. 2010) (same for State Department records); *Pickering-George v. Registration Unit, DEA/DOJ*, 553 F.Supp.2d 3, 4 n.1 (same for DEA records).

[17] *See McLeod*, 2011 WL 2112477 at *1.

[18] 109 F.Supp.2d 768 (S.D. Ohio 1999).

[19] Writ-Appeal at 28-29, fn. 9.

the plaintiffs in *Dayton* did not assert a First Amendment claim.[20] Moreover, appellants have no legal basis to claim that FOIA is inadequate if they have yet to properly request the documents they seek.

There is no question that "[t]he public has a right to information concerning the activities of its Government."[21] But the mechanism for enforcing that right is the FOIA, not mandamus or prohibition. This Court should not permit appellants to use the extraordinary writ process to circumvent the procedures established by FOIA.[22]

For appellants' second issue presented, regarding notice and an opportunity to be heard prior to closure, it is important to note that there is a difference between public access to sealed documents (and closed hearings), and public access to documents admitted and discussed in open court without restriction. Appellants frequently conflate the two.[23]

---

[20] 109 F.Supp.2d at 773. The Government also notes that the *Dayton* court did not cite to any case standing for the proposition that the First Amendment was broader than FOIA.
[21] Department of Defense Regulation 5400.7-R, DOD Freedom of Information Act Program, para. C1.3.1.1.
[22] *See, e.g., Housley*, 978 F.2d at 715 (noting that mandamus under these circumstances would permit petitioner to circumvent FOIA procedures).
[23] *Compare* Writ-Appeal at 6 ("[T]he public has largely been denied access to even non-classified documents filed in Pfc. Manning's court-martial....[T]he government's motion papers have not been disclosed in any form....The court's own orders...have not been published.") with Writ-Appeal at 9 ("The First Amendment requires public access unless the government

To the extent appellants seek access to motions, pleadings, and orders admitted and discussed in open court (i.e., never sealed), appellants have never been "denied" access to these documents because they have yet to request them from the proper release authority.[24] Appellants' citation to case law concerning actual closure or sealing of documents is not applicable here[25] because neither the government, nor the military judge, denied, withheld, or restricted anything.[26] Logically, appellants cannot claim they have been denied access to these documents until they request access from the person or entity empowered to grant it.

This would be a different question if appellants were appealing an order actually sealing a document, or closing portions of the court-martial to the public. In such a situation, a writ may be appropriate.[27] However, appellants

---

demonstrates that closure is necessary to further a compelling government interest....) and Writ-Appeal at 18 ("[T]he First Amendment demands that '[d]ocuments to which the public has a qualified right of access may be sealed only if....)."

[24] Either the Office of The Judge Advocate General or the Fort McNair Office of the Staff Judge Advocate (see AR 25-55, App. B., para. 5(b)(5) addressing requests for court-martial documents post-action by the convening authority.).

[25] Writ-Appeal at 14.

[26] For example, appellants' cite to *United States v. Scott*, 48 M.J. 663 (Army Ct. Crim. App. 1998) at pages 21-22 of the writ-appeal, is inapposite. In *Scott*, the military judge sealed (that is, indefinitely prevented public access) a stipulation of fact used during the appellant's providence inquiry. Appellants presented no evidence to this Court that any of the documents they seek were sealed by protective order of the military judge.

[27] The Government is referring only to the process of filing a writ and is not suggesting that any writ would be meritorious.

presented no evidence that the military judge ever sealed any documents or closed the courtroom. The military judge's ruling - that she was not the custodian of the record of trial, or the release authority under FOIA[28] - is not a "closure" of the court or the sealing of a document. It is merely a recognition that appellants have failed to request these documents through the proper channels. This renders appellants' second issue presented unripe for review.

In sum, appellants have a statutory remedy available to them under FOIA, which they have decided to forego in favor of seeking extraordinary relief. The procedure for accessing court-martial documents is different than in federal court. A request for judicial documents in federal court may appropriately be made to the judge since FOIA does not apply to judicial documents in Article III courts.[29] But such is not the case for access to court-martial documents. Congress provided a specific statutory process for the public to access court-martial records, and this Court should not allow appellants to bypass the *procedures* and *protections* of that system through an extraordinary writ.

---

[28] JA 4.

[29] *See Brown*, 710 F.2d 1165, 1177 (citing 5 U.S.C. § 551(1)(B)).

II. Appellants also failed to show that the First Amendment indisputably requires contemporaneous access to court-martial documents.[30]

In addition to failing the first condition, appellants do not satisfy the second condition for extraordinary relief because they cannot show that their right to relief is indisputable. Appellants cite to a group of cases suggesting that the First Amendment to the Constitution requires *contemporaneous* access to judicial documents.[31] That view, however, is hardly unanimous among the federal circuits. The Sixth Circuit has held, and the Supreme Court has indicated, that the First Amendment right to public access is satisfied by one's unencumbered presence at the trial.[32] The Constitution only requires "that members of the public and the media have the opportunity to attend criminal trials and to report what they have observed."[33] Accordingly, "when the media and public are given unfettered access to attend all proceedings and members of

---

[30] The Government submits that this argument regarding the scope of the First Amendment right of public access can fit under either the second prong of mandamus, or the ultimate question of whether the writ should issue.

[31] *See* Writ-Appeal at 15-17.

[32] *United States v. Beckham*, 789 F.2d 401, 403 (6th Cir. 1986) (stating that the members of the media appealed the district court's denial of permission to copy, among other things, documentary exhibits).

[33] *Beckham*, 789 F.2d at 409 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978)).

the media are permitted to publish what they have heard and seen in the courtroom, there is no constitutional violation."[34]

This view of the scope of First Amendment public access is supported by the Supreme Court's decision in *Nixon v. Warner Communications*.[35] The *Beckham* court ably summarized the facts in *Nixon*:

> [*Nixon*] involved the criminal trial of several of President Nixon's former advisers in connection with the Watergate investigation. Portions of tape-recordings were played for the jury and the public in the courtroom, and the reels of tape were admitted into evidence. The district court furnished the jurors, reporters, and members of the public in attendance with transcripts, which were not admitted as evidence. Members of the media attempted to obtain immediate access to the tapes as well, which the district court denied.[36]

The media argued in *Nixon*, as appellants argue here, that the publics' understanding of the trial was incomplete without access to the tapes themselves.[37] The Supreme Court rejected that argument, and found that the constitutional requirement of a public trial is satisfied "by the opportunity of members of the public and the press to attend the trial and report what

---

[34] *United States v. Boyd*, 2008 WL 2437725 (E.D. Tenn. 2008) (unpublished); *see also In re NBC Universal, Inc.*, 426 F.Supp.2d 49, (E.D.N.Y. 2006) (When a court has placed "no restrictions upon press access to, or publication of any information in the public domain," the Constitution is not implicated.).
[35] 435 U.S. 589 (1978).
[36] *Beckham*, 789 F.2d at 408 (citing *Nixon*, 435 U.S. 589).
[37] 435 U.S. at 610; Writ-Appeal at 17; JA 6.

they have observed."[38] That opportunity existed in *Nixon*, and it certainly exists in *Manning* given the word-for-word detail contained in appellants' sworn declarations.[39]

In addition to the First Amendment, appellants also claim the common law entitles them to contemporaneously access these documents.[40] But here, to the extent the common law applies to courts-martial,[41] any common law right is obviated by the FOIA. Again, *Nixon* is instructive. In *Nixon*, the press also asserted that the common law guaranteed them access to the Presidential tapes at issue.[42] But the Supreme Court found that the common law did not authorize release of the tapes because Congress had created a statutory and administrative scheme for the public to access the Presidential tapes (The Presidential Recordings Act).[43] The Act provided for "legislative and executive appraisal of the most appropriate means of assuring public

---

[38] *Nixon*, 435 U.S. at 610 (appearing to address both First Amendment and Sixth Amendment arguments regarding the public trial right).
[39] JA 26-28.
[40] Writ-Appeal at 9, fn. 4.
[41] The Government does not concede that the history of the public's access to courts-martial is the same as in Article III courts. *See, e.g.*, William Winthrop, *Military Law and Precedents* 161-62 (2d ed., Government Printing Office 1920) (1895).
[42] *Nixon*, 435 U.S. at 607.
[43] *Nixon*, 435 U.S. at 608 ("[W]e hold that the common-law right of access to judicial records does not authorize release of the tapes in question....").

access to the material, subject to prescribed safeguards."[44] Congress and the Executive have done the same with access to court-martial records through the FOIA and its implementing regulations.

In short, appellants failed the second condition for extraordinary relief because they cannot show that the *Constitution*, or the common law, requires *contemporaneous* access to court-martial documents. This Court should grant no relief.

III. The parties and the military judge have complied with the requirements of R.C.M. 802, and no action by this Court is required.

Based on the evidence provided to this Court, neither the parties nor the military judge have violated the requirements of R.C.M. 802. Appellants allege in their pleading that "[t]he trial court has decided substantive matters without promptly memorializing the discussion or the decisions in the record."[45] But they provided no evidence to that effect. None of the declarations appellants provide identify any issue that was decided by the court without being made part of the record at the next Article 39(a) session.[46] Indeed, precisely the opposite

---

[44] *Nixon*, 435 U.S. at 605-606.
[45] Writ-Appeal at 30.
[46] Although not part of a declaration, Mr. Ratner's March 21, 2012, letter to the military judge (JA 11-12) does mention the issuance of a pretrial publicity order. However, this order was obviously captured on the record since Mr. Ratner begins his discussion of this issue by stating, "[W]hen the undersigned *was*

is true. The military judge found that the parties have held R.C.M. 802 conferences, and appropriately summarized the substance of each conference on the record.[47] No party has been prevented from making any argument, motion, or objection at trial.

The thrust of appellants' argument concerning R.C.M. 802 conferences amounts to a constitutional challenge to 802 conferences as a whole.[48] And this argument is also without merit. The First Amendment public trial right is not absolute, and does not extend to all parts of a trial.[49] Assuming an R.C.M. 802 conference can be considered part of the "proceedings,"[50] R.C.M. 802 conferences, like bench conferences in federal court, are not open to the public and do not infringe on the public trial right.[51] Public access and the statutory

---

in court, we were informed that the Court had signed a pretrial publicity order." (emphasis added).

[47] JA 28.

[48] Writ-Appeal at 30-31.

[49] *In re Associated Press*, 172 Fed.Appx. 1, 2006 WL 752044 (4th Cir. 2006)(citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980)).

[50] *See Richmond Newspapers, Inc.*, 448 U.S. at 598, n.23 ("[W]hen engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.").

[51] *In re Associated Press*, 2006 WL 752044 (citing *United States v. Valenti*, 987 F.2d 708, 713-14 (11th Cir. 1993) and *United States v. Edwards*, 823 F.2d 111, 116-17 (5th Cir. 1987). *See also United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977) (holding that "bench conferences between judge and counsel

requirement for a verbatim transcript[52] are satisfied by the parties' and the military judge's on the record synopses of any substantive matters actually decided in conference.

---

outside of public hearing are an established practice...and the protection of their privacy is generally within the court's discretion....Such conferences are an integral part of the internal management of a trial, and screening them from access by the press is well within a trial judge's broad discretion.").

[52] UCMJ, Art. 54.

Conclusion

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

CHAD M. FISHER
Captain, JA
Office of the Judge Advocate General, United States Army
Appellate Government Counsel
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0783
Chad.m.fisher.mil@mail.mil
Lead Counsel
C.A.A.F. Bar Number 34883

AMBER J. ROACH
Lieutenant Colonel, JA
Acting Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 35224

CERTIFICATE OF FILING AND SERVICE

I certify that the original was electronically filed to efiling@armfor.uscourts.gov on 5 July 2012, and contemporaneously served electronically on appellate defense counsel, Mr. Shayana D. Kadidal at shanek@ccrjustice.org and via hard copy at CENTER FOR CONSTITUTIONAL RIGHTS, 666 Broadway, 7th Floor, New York, New York, 10012.

Angela Riddick

ANGELA R. RIDDICK
Paralegal Specialist
Government Appellate
Division