IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

CENTER FOR CONSTITUTIONAL RIGHTS, GLENN GREENWALD, JEREMY SCAHILL, *THE NATION*, AMY GOODMAN, *DEMOCRACY NOW!*, CHASE MADAR, KEVIN GOSZTOLA, JULIAN ASSANGE, and WIKILEAKS,	:	Crim. App. Misc. Dkt. No. 20120514
Petitioners,	:	General Court Martial *United States v. Manning*, Ft. Meade, Maryland
v.	:	
	:	Dated: 15 June 2012
UNITED STATES OF AMERICA and CHIEF JUDGE COL. DENISE LIND,	:	
Respondents.	:	

REPLY BRIEF IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

Petitioners have moved this Court for 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. Petitioners also seek vindication of the right of public access to closed R.C.M. 802 conferences, which as to past conferences can only be accomplished by reconstituting the proceedings in open court.

By order issued on 30 May 2012, this Court ordered the government to respond to Petitioners on all but the R.C.M. 802 issues. The government's brief, filed on 8 June 2012, does not contest that the First Amendment right of public access applies to documents in courts-martial and takes no issue with Petitioners' factual description of the *Manning* proceedings. Instead, it makes 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. As respondents recognize, 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. For the reasons that follow, neither of these necessary elements of Respondents' arguments can be supported.

ARGUMENT

1. 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, Petitioners' opening brief explained that that right of public access exists not only to promote public confidence in judicial proceedings and assure public accountabil-

ity 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 10-11 (citing cases); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) ("Publicizing trial proceedings aids accurate factfinding") (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."). 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. The government complains that "petitioners cite no case for the proposition that [specifically] 'contemporaneous' access ... is constitutionally required," Gov't Br. at 9 n.6, but, as basic logic would lead one to expect, there is extensive support for this fundamental principle.

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

[1] *See* Pet. Br. at 11.

"[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).

In *Oliver* the Supreme Court held that a defendant's Fourteenth Amendment Due Process Clause rights[2] mandated reversal of a criminal contempt proceeding that took place behind closed doors.[3] 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. As the Second Circuit noted:

> The Sixth Amendment guarantees a defendant in a criminal case the right to a public trial principally to protect the defendant from prosecutorial and judicial abuses by permitting contemporaneous public review of criminal trials. *See Waller v. Georgia,* 467 U.S. 39, 46 (1984); *Gannett Co. v. DePasquale,* 443 U.S. 368, 379–80, 387 (1979).

Huminski v. Corsones, 386 F.3d 116, 143 (2d Cir. 2004), *as amended on reh'g*, 396 F.3d 53 (2d Cir. 2005). The Third Circuit re-

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[2] *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 592 (1980) (Brennan, J., concurring) ("*Oliver* did not rest upon the simple incorporation of the Sixth Amendment into the Fourteenth, but upon notions intrinsic to due process, because the criminal contempt proceedings at issue in the case were "not within 'all criminal prosecutions' to which [the Sixth] . . . Amendment applies." Levine v. United States, 362 U.S. 610, 616 (1960).").

[3] 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.

cently observed that:

> 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. *See, e.g., Grove Fresh Distribs. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (7th Cir.1994) ("To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.") ... [T]he 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].

United States v. Wecht, 537 F.3d 222, 229-30 (3d Cir. 2008); *see also United States v. Smith,* 787 F.2d 111, 113 (3d Cir. 1986) ("contemporaneous review [of judicial proceedings] by the public 'is an effective restraint on possible abuse of judicial power.'" (quoting *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 596 (1980) (Brennan, J., concurring) (quoting *Oliver*))). The Seventh Circuit decision cited by *Wecht* similarly observed that the principles animating the right of public access also mandate that such access be timely:

> 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. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976); *Continental Illinois Securities Litigation,* 732 F.2d at 1310. 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. *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 250 (7th Cir.1975), *cert. denied,* 427 U.S. 912 (1976). "[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment." *Nebraska Press Ass'n v. Stuart,* 423 U.S. 1327, 1329 (Blackmun, Circuit Justice 1975).

Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994). 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 because such real-time access "encourages witnesses to come forward and discourages perjury" (citing *Oliver*)).

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. 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.[4] Indeed, the tendency (identified in Petitioners' opening brief) of public access to improve errors in factfinding – the

[4] This Court's superior court has several times opined that the Sixth Amendment and First Amendment rights 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).

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 v. Virginia, 448 U.S. 555, 592 (1980) (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.).

Moreover, 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. The Supreme Court's prior restraint cases make clear that the media "has always been regarded as the handmaiden of effective judicial

administration, especially in the criminal field. ... The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559-60 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)). Correspondingly, the 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:

> Of course, 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, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays 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.

Id. at 560-61; *see also id.* at 572-73 (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))). All of this is consistent with the general First Amendment prin-

ciple that (as Petitioners noted in their opening brief) "the loss of First Amendment rights 'for even minimal periods of time' constitutes irreparable harm,"[5] 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*).

While the number of cases involving a (1) specifically 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 "of 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 ...

[5] Pet. Br. at 11 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971))).

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 (designed by district court to allow parties to make more permanent closure motion) for documents violates First Amendment right of public access).

Mandamus and Prohibition are, as Respondents note, appropriately termed "extraordinary" writs. But the First Amendment demands the immediate relief that only the writs can provide, despite whatever minimal potential Petitioners' requested relief holds for "'disrupt[ion of] the orderly judicial process'"[6] in the trial court.

2. <u>FOIA is no substitute for access under the First Amendment</u>

The second component of the government's argument is that the FOIA statute somehow provides all the relief Petitioners would be entitled to under the First Amendment and common law rights of access:

> Mandamus is not appropriate in this case because Congress has established a system designed and intended to provide for public access to court-martial records. Assuming petitioners are correct about the scope of the First Amendment and common law rights of public access as applied to court-martial, those rights are fully satisfied through the FOIA.

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[6] Gov't Br. at 4, quoting *McKinney v. Powell*, 46 M.J. 870, 1997 CCA LEXIS 309 at *10 (Army Ct. Crim. App. 1997).

Gov't Br. at 8. The government goes on to claim that the numerous federal cases allowing access to documents pursuant to the First Amendment are irrelevant because the FOIA statute by its own terms does not apply to records of federal courts. *Id.* at 9.

What is most notable about these passages (and indeed about the entire government brief) is that the government nowhere disputes that the First Amendment standards for public access to documentary records apply to courts-martial. Nor, in fairness, could it, given the overwhelming weight of federal caselaw cited by Petitioners, *see* Pet. Br. at 9–14, and the fact that this Court 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 14–16.

The test under the First Amendment is whether restrictions on access are "narrowly tailored to meet a compelling government interest," not whether the restrictions are "narrowly tailored to meet a compelling government interest (and no alternative statutory grounds for access exist)." An *entirely* equivalent form of access might mean that any restrictions were inconsequential and therefore not properly thought of as restrictions at all. But access under FOIA is hardly the exact equivalent of the First Amendment access Petitioners seek.

"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 exemption [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 this Court's decision in *Scott*, 48 M.J. at 665, 666, implied this Court had recognized such a First Amendment right of access. The court noted that under the First Amendment, juror questionnaires in civilian criminal courts would generally be

available to the media. 109 F. Supp. 2d 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 information 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.") 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.

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. Even if such documents are disclosed in open court during the Manning trial, the government has succeeded in withholding similar documents in FOIA litigation. *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).

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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.[7] Notwithstanding any practical delays engendered by agency backlogs and the like,[8] 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-

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[7] Judge Lind's law review article on public access 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. 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). This seems to be based on her misreading of the wording of the FOIA statute's definitions section, 5 U.S.C. § 551(a)(1)(F) ("(1) 'agency' means each authority of the Government … but does not include … except as to the requirements of section 552 of this title … (F) courts martial and military commissions"). That section apparently exempts "courts martial and military commissions" from the remainder of the APA, but not from FOIA ("section 552"); however, Judge Lind seems to have read § 551(a)(1)(F) to mean that courts-martial are exempt from FOIA, *see* 163 Mil. L. Rev. at 56 ("Both federal courts and courts-martial are exempt from FOIA"), and that the records of courts-martial thus only become "agency" records when they are transferred at the conclusion of trial, *id.* at 57.

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.

[8] 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.[9] (Although the government would 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 "unripe," Gov't Br. at 9 n.6, 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 government implies that "fair trial concerns" such as "tainting the jury pool" may be sufficient to justify the restrictions on access challenged here. Gov't Br. at 9 n.6. This argument is unripe because such concerns have not arisen yet; if and when they do, they must be subjected to the rigorous First Amendment test. Under that test, if the government asserts that potential jury taint rises to the level of a "compelling interest" in favor of sealing, the trial court must determine whether that claim is true and if so, must conduct a narrow tailoring analysis that considers less-restrictive alternatives, all supported by specific findings. Even with respect to a common-law

[9] *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").

right of access (such as that at issue in *Boyd*,[10] a case cited by the government), a court "may not ... deny access on the basis of unsupported hypothesis or conjecture." *See In re Application of CBS*, 540 F. Supp. 769, 772 (N.D. Ill. 1982) (speculative anxieties about possible jury taint insufficient to bar access to tapes). "[T]he burden is upon the party seeking [closure] to demonstrate that justice requires the denial of access." *Id*.

The few cases cited by Respondents, Gov't Br. at 7–8, all of which appear to involve pro se petitioners, are entirely inapposite. All four of them involve requests aimed at agency records (*Strunk*,[11] *Pickering-George*[12]) or prosecutorial files (*McLeod*,[13]

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[10] *See* Gov't Br. at 9 n.6 (citing *United States v. Boyd*, 2008 WL 2437725, *2–*3 (E.D. Tenn. 2008) (unpublished)).

[11] 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.

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

[13] 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.

Housley[14]). 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 sum, because FOIA is not a plausibly adequate alternative to the contemporaneous access required by the First Amendment,[15] petitioners need not exhaust any available FOIA remedy before seeking the relief they seek presently.[16]

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[14] 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.

[15] *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).

[16] Moreover, the prospective relief Petitioners seek is not available through FOIA. *Cf. Nat'l Ass'n of Waterfront Emplrs. v. Chao*, 587 F. Supp. 2d 90, 97 (D.D.C. 2008) (where "Plaintiffs seek vindication of their First Amendment and common law rights to access [records of] administrative proceedings *through equitable relief*," via APA, availability of documents via FOIA did not mandate dismissal, despite the fact that "an APA claim is precluded where an adequate remedy under FOIA is available" (emphasis added)).

3. **The Trial Court's recent (June 6) ruling as to R.C.M. 802 conferences also violates First Amendment standards**

Petitioners have also sought effective public access to the R.C.M. 802 conferences that have been held so frequently during the *Manning* pretrial process. Although the government does not address the issue (as it was not initially asked to by this Court), the government's failure to contest that the First Amendment governs access to courts-martial is fatal to the 802 process as it has been applied below because that process plainly denies *public* access, whatever the *parties* may have consented to. Recent events before the trial court (described in the attached Declaration of Alexa O'Brien, a journalist attending the proceedings) illustrate the problematic nature of that court's use of 802 conferences.

As 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 was taking positions in 802 conferences and then later taking contradictory positions in open court. O'Brien Decl. ¶ 5. 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. 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 party to object ... waives this requirement." *Id.* ¶ 7. 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.*

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, 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." 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.[17]

Petitioners 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

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[17] 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.

to object was erroneous, because case law establishes that 802 conferences must be recorded when important substantive matters 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 decided 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 Petitioners 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 C.A.A.F. have not yet held that the First Amendment applies to guarantee public access to anything other than the courtroom itself. *See* Pet. Br. at 22 n.9 (citing Kadidal Decl. ¶ 9 and Lt. Col. Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 Mil. L. Rev. 1, 45–53 (2000)). (The government, in contrast, does not here 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. 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, R.C.M. 405(h)(3) and R.C.M. 806 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 seriously as the equivalent of the civilian criminal justice system in terms of fairness, accuracy and transparency.

Date: New York, New York
June 15, 2012

Respectfully submitted,

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

ERRATA

Please take note that in the Declaration of Shayana Kadidal attached to the Petition, there is an incorrect internet link to the *current* (2011) version of the Regulation for Trial by Military Commission. The correct link at p.7 n.5 should be as follows:

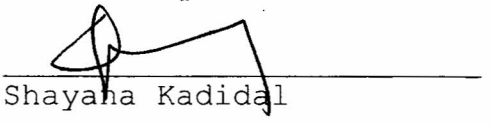
http://www.fas.org/irp/doddir/dod/mcreg.pdf

In the caption of the Petition, the name of one of the individual Petitioners, Kevin Gosztola, is incorrectly spelled as "Gostola." (It is, however, correctly spelled in footnote 1, which lists and describes each of the Petitioners.)

Additionally, footnote number 5 on page 9 of the Petition should include the following citations covering two circuits (the Fifth and Eleventh) that were inadvertently excluded from the string cite:

> *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)
>
> *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)

Undersigned counsel apologizes for the errors.



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Certificate of Service

I hereby certify on this 15th day of June, 2012, I caused the foregoing Reply Brief to be filed with the Court, via facsimile and courier delivery, and served on Respondents, via courier delivery, at the following addresses:

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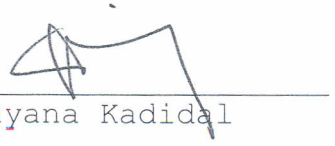

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