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, Appellants, v. UNITED STATES OF AMERICA and CHIEF JUDGE COL. DENISE LIND, Appellees.	Crim. App. Misc. Dkt. No. 20120514 USCA Misc. Dkt. No. 12-8027/AR General Court Martial *United States v. Manning*, Ft. Meade, Maryland Dated: 22 October 2012

PETITIONER-APPELLANTS' POST-ARGUMENT SUPPLEMENTAL BRIEF

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	:	
Appellees.	:	
	:	

PETITIONER-APPELLANTS' POST-ARGUMENT SUPPLEMENTAL BRIEF

Petitioner-Appellants submit this supplemental brief in response to the Court's order of October 12, 2012, setting forth three additional issues for briefing in the wake of the oral argument held on October 10, 2012.

I. Jurisdiction

In actions seeking extraordinary relief under the All Writs Act, the jurisdiction of the military appellate courts may properly be premised on a theory of "potential jurisdiction" (sometimes dubbed "anticipatory jurisdiction") over issues that arise prior to the court-martial's findings and sentence, where "necessary or appropriate" to preserve appellate jurisdiction that would otherwise exist in the future when actual findings and

a sentence have issued.[1] In the instant case, (1) the trial court clearly had jurisdiction to consider — and did consider — our claims; (2) the A.C.C.A. had potential appellate jurisdiction, since a conviction and sentence sufficiently grave to bring the case below within Article 66 may ensue,[2] and that potential jurisdiction gave the A.C.C.A. authority to issue extraordinary relief under the All Writs Act; and (3) this Court, in turn, has potential jurisdiction under Article 67 to review any such Article 66 appeal from the A.C.C.A., and that Article 67 potential jurisdiction gives this Court authority to issue extraordinary relief under the All Writs Act.[3]

The Supreme Court has recognized such potential or anticipatory jurisdiction in too many All Writs Act cases to count:

> [The power to issue writs in aid of jurisdiction under the All Writs Act] extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected. *Cf. Ex parte Bradstreet*, 7 Pet. 634 (1833) (Marshall, C.J.). These holdings by Chief Justice Marshall are elaborated in a long

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[1] As this Court noted at argument, the All Writs Act is not an independent source of jurisdiction. *See United States v. Denedo*, 556 U.S. 904, 913-14 (2009). Rather, it empowers the court to issue injunctive orders to preserve potential jurisdiction founded in other provisions.

[2] It is well-established at law that the possibility of acquittal is not enough to defeat jurisdiction in such circumstances. See, among many examples, *United States v. United States District Court for Southern Dist of W. Va.*, 238 F.2d 713, 718-19 (4th Cir. 1956); 16 Wright, Miller & Cooper, Federal Practice & Procedure § 3932 n.30 (citing cases and further references).

[3] *Cf*. *Dobzynski v. Green*, 16 M.J. 84, 90 (C.M.A. 1983) (Everett, C.J., dissenting) (explaining potential jurisdiction in All Writs Act context in same terms).

> line of cases, including *McClellan v. Carland*, 217 U.S. 268 (1910), where Mr. Justice Day held: "we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ ... may issue in aid of the appellate jurisdiction which might otherwise be defeated ...." At 280. And in *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943), Chief Justice Stone stated that the authority of the appellate court "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." At 25. Likewise, decisions of this Court "have recognized limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels. At 25. Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action...." *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658, 671, n. 22 (1963).

FTC v. Dean Foods Co., 384 U.S. 597, 603-04 (1966).[4] In *Dean Foods*, the FTC sought an injunction under the All Writs Act to preserve the status quo against what it viewed as a potentially anticompetitive purchase and planned breakup of a company. The Court of Appeals denied relief but the Supreme Court reversed, holding that because the purchasers planned to split up the target company and scatter its businesses and assets, an All Writs

[4] On potential jurisdiction, *see generally* 16 Wright, Miller & Cooper, Federal Practice & Procedure § 3932 ("[I]t has been established since the decision in *McClellan v. Carland*[, 217 U.S. 268 (1910)] that writs might issue in aid of appellate jurisdiction yet to be acquired, as well as jurisdiction actually acquired. This rule has allowed the Supreme Court to issue writs under the All Writs Act to the courts of appeals in cases in which it relied solely on the prospect of possible future jurisdiction, and even to issue writs directly to district courts on the ground that it ultimately would have jurisdiction to review a court of appeals judgment on appeal from the district court.").

Act injunction preserving the status quo pending a final agency ruling on the merger was the only way to preserve the Court of Appeals' statutory appellate jurisdiction over any future appeal from a decision of the FTC barring the merger. *See id*. at 605, 604 (All Writs Act relief necessary and appropriate "upon a showing that an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree of divestiture futile," which would thus create an "impairment of the effective exercise of appellate jurisdiction" in the Court of Appeals).

Jurisdiction clearly exists here on the same theory. *Whether* to exercise it, as this Court and others have done in any number of media access cases, is a separate prudential question under the All Writs Act, but just as easy to answer. Here, the integrity of the trial will be irreparably damaged by failure to grant the relief sought here, because denial of a public trial is a structural error that requires invalidation of the trial court proceedings. *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."); *Waller v. Georgia*, 467 U.S. 39, 49-50 (1984) (voiding outcome of suppression hearing improperly closed to the public, and ordering new suppression hearing, and new tri-

al as well if result of new suppression hearing was materially different); *Haddad v. Ashcroft*, 221 F. Supp. 2d 799, 805 (E.D. Mich. 2002) (even in civil administrative context, remedy for improperly-closed immigration detention hearing was to "either release [detainee] or hold a new detention hearing that is open to the press and public), *subsequently vacated as moot after deportation*, 76 Fed. Appx. 672 (6th Cir. 2002); Audio at 48:57 (Judge Ryan: "ultimately [openness or lack thereof] impacts the findings and sentence ... the validity [thereof]").[5] That is justifiably so given the Supreme Court's frequent warnings that openness tangibly enhances accuracy. *See Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (Rehnquist, C.J., stating opinion of the Court as to this section) (citing list of basic structural trial protections mandated by constitution, including open trial, and concluding that "[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair"; such violations are therefore not subject to harmless error analysis). Moreover, damage to the public's First Amendment interest in transparent criminal process occurs every day that the challenged secrecy is allowed to continue, and this

[5] *But see United States v. Hershey*, 20 M.J. 433, 437-38 (C.M.A. 1985) (holding error harmless in "unique circumstances" where, *inter alia*, no one attended proceedings and there was no evidence that anyone was actually barred from entry during the improperly-closed portion of the hearing).

harm is of the sort ordinarily cognized as irreparable harm. *See* Pet. Br. at 9-10, 18, 26. It is therefore "appropriate" under the All Writs Act for this Court to intervene in order to preserve jurisdiction and "compel [the trial court] to exercise its authority when it is its duty to do so,"[6] especially given that issuance of the writ in such circumstances would be "consistent with judicial economy," *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983), by preventing reversal of any ultimate conviction below.

The surest proof of the appropriateness of All Writs Act relief is the fact that it has been exercised so often in similar cases where third-party members of the public and news media have asked the Courts of Appeals to grant access to judicial documents in proceedings taking place in courts of first instance.[7] *See,*

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[6] *Schmidt v. Boone*, 59 M.J. 841, 843 (A.F.C.C.A. 2004); *see also Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943) ("function of mandamus [is] to correct" "abuse of judicial power, or refusal to exercise it").

[7] The trial court's refusal to allow Petitioner-Appellants to intervene below, *see* JA-4 ¶ 8, Tr. at 19 (holding that CCR's letter "is a request for intervention. That request is denied."), denied us the opportunity to participate directly in any direct appeal that might eventually be brought by the parties. Many federal Courts of Appeal only allow for mandamus, not direct appeal, in like circumstances. *See United States v. Chagra*, 701 F.2d 354, 360 (5th Cir. 1983) (noting many Circuits do not permit third-party appeals in federal system, and that "the great majority of cases involving challenges to closure and similar orders have been reviewed pursuant to some sort of extraordinary writ."); *cf*. R.C.M. 1201 (containing no mention of third-party appeal procedure). As we have argued, the trial court's failure to allow Petitioners *to be heard* on the matter of closures is *itself* a violation of the First Amendment that can justify this Court's

e.g., *In re Globe Newspaper Co.,* 729 F.2d 47 (1st Cir. 1984) (Coffin, J.); *In re Washington Post Co*., 807 F.2d 383 (4th Cir. 1986); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985); *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), among many others.[8]

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invocation of potential jurisdiction. All this strongly militates in favor of extraordinary relief here.

Even assuming the availability of some hypothetical form of *direct* appeal by third parties like Petitioner-Appellants, mandamus would still be available. The Supreme Court has recognized that issuance of the writ will often be appropriate even for issues addressable via direct appeal. *See* 16 Wright, Miller & Cooper, Federal Practice & Procedure § 3932 ("*La Buy* [*v. Howes Leather Company*, 352 U.S. 249 (1957),] is most famous for declaring that the writs may be used for 'supervisory control of the District Courts by the Court of Appeals.' This standard for properly exercising the writ power has led to other cases in which orders were reviewed that plainly could have been reviewed on appeal from a final judgment [citing cases, including *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966) (Friendly, J.)]. Supervisory mandamus, in short, establishes that a writ may be in aid of court of appeals jurisdiction, and thus within the power conferred by [the All Writs Act], simply because it is the most efficient method of reviewing an order that could effectively be reviewed, and if need be reversed, on a subsequent appeal.").

[8] The majority of the landmark Supreme Court First Amendment decisions granting access to courtrooms came up on extraordinary relief (in state appellate courts) as well. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 504-05 (1984) ("Petitioner then sought in the California Court of Appeal a writ of mandate to compel the Superior Court to release the transcript"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 600 & 600 n.4 (1982) (media sought extraordinary relief from a justice of the Massachusetts Supreme Judicial Court, the highest state court of appeals); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 5 (1986) (media sought mandamus in court of appeal and then California Supreme Court); *see also Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (newspapers sought mandamus as well as direct appeal).

Indeed, "potential" or "anticipatory" jurisdiction has been tacitly recognized by this Court in its previous All Writs Act cases. *ABC v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), was a case where media petitioners successfully sought extraordinary relief to gain access to Article 32 proceedings for SMA Gene McKinney. The opinion says next to nothing about extraordinary writ jurisdiction, other than making a passing citation to the All Writs Act, *id*. at 364, and noting that media petitioners sought access to the Article 32 proceedings via petition for extraordinary relief (mandamus) filed *directly* in the CAAF. But it clearly falls into the "potential jurisdiction" ambit of *Dean Foods* and the numerous similar Supreme Court decisions cited therein. *ABC* has been found by the A.C.C.A. to "remain good law" in the wake of *Goldsmith* and *Lopez de Victoria*. *United States v. Reinert*, 2008 WL 8105416 at *8 (A.C.C.A. 2008) ("Not only do the facts of [*ABC*] differ significantly from those of Goldsmith, but our superior court continues to cite to [it] without suggesting [the] decision[has] any infirmity." (citing *Lopez de Victoria*)). Its procedural posture bears a great deal of similarity to the instant case; if anything, Petitioner-Appellants here have a stronger claim because they did not circumvent the A.C.C.A as the *ABC* petitioners did.

More recently, in *United States v. Schmidt*, 60 M.J. 1 (C.A.A.F. 2004) (per curiam), defendant sought extraordinary re-

lief from a ruling of the trial court that before his security-cleared civilian defense counsel could access classified information, the defendant needed to inform the prosecutor of "the exact materials to which you think the civilian counsel needs access" and include a justification for the same. This Court reversed the CCA decision denying extraordinary relief on the merits. The CCA decision said nothing about the basis for jurisdiction, *Schmidt v. Boone*, 59 M.J. 841, 842 (A.F.C.C.A. 2004), but clearly the only possible basis was anticipatory jurisdiction – again based on a structural defect (denial of counsel in violation of the Fifth and Sixth Amendments) that threatened the validity of any ultimate finding and sentence the trial court might arrive at. *Cf*. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) ("The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant"). Because the CCA and this Court clearly would have had jurisdiction over any such future finding, extraordinary relief was permissible under the All Writs Act "in aid of" that jurisdiction where defendant had no other means to pursue timely relief, and delay would prejudice the interests of justice and waste judicial resources.

* * *

None of the other cases cited by this Court in its October 12, 2012 supplemental briefing order is to the contrary. *United*

States v. Lopez de Victoria, 66 M.J. 67 (C.A.A.F. 2008) held that either party may take an appeal to the C.A.A.F. under Article 67 from the ruling of a service court of criminal appeals on a government interlocutory appeal under Article 62. This Court held that it had jurisdiction to hear an appeal from an Article 62 appeal to the CCA despite the fact that text of Article 62 did not explicitly mention further appeals from the CCAs to the C.A.A.F. The decision was premised on Congress' intent to promote uniformity of decision among the service courts (which would be advanced by allowing the C.A.A.F. to sort out splits between the CCAs) (*id*. at 71), Congress' intent in creating Article 62 to parallel the rights of appeal federal prosecutors have under 18 U.S.C. § 3731 (*id*. at 70, 71), and relied on a directly-on-point piece of legislative history from the Senate Armed Services Committee (*id*. at 70). Because the case involved a direct appeal to this Court, neither the opinion nor the dissent dealt with the scope of the power to preserve appellate jurisdiction under the All Writs Act. It should be noted, however, that there is no controversy over this Court's power to hear Article 67 appeals from Article 66 cases in the CCAs. Therefore, even if the dissenting position in *Lopez de Victoria* had been adopted by this Court, this Court would still have potential jurisdiction over the claims now before it.

Nor does *Clinton v. Goldsmith*, 526 U.S. 529 (1999) counsel a different result here. Goldsmith was convicted by court-martial and sentenced; a year after his conviction became final, Congress expanded the President's power to drop certain convicted officers from the rolls of the military, and the Air Force sought to use this expanded power to drop Goldsmith from the rolls. Goldsmith obtained extraordinary relief from this Court to block what he characterized as a retroactive expansion of his sentence. The Supreme Court disagreed with this characterization, stating that "Goldsmith's court-martial sentence has not been changed; another military agency simply has taken independent action" dropping him from the rolls. *Id*. at 536. Thus the claims fell outside this Court's All Writs Act authority: "Simply stated, there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Id*. As an executive action independent of the court-martial proceedings, this Court had no power to intervene in Goldsmith's separation from service, especially given that there existed alternative administrative routes for appeal available by statute: Goldsmith could have presented his claim that dropping him from the rolls violated the *ex post facto* clause to an administrative board, *see id*. at 538, 538 n.12, among other venues for relief, *id*. at 539. Petitioner-Appellants here are challenging a *still-ongoing* proceeding where a legal violation (of the First

Amendment right of public access) threatens the *fundamental integrity* of the outcome. Conduct of the court-martial and public access to judicial records are core aspects of the trial process, making the instant case utterly unlike *Clinton v. Goldsmith*.

In contrast to Maj. Goldsmith, the petitioner in *United States v. Denedo*, 556 U.S. 904 (2009), sought a writ of *coram nobis* seeking to vacate his conviction by court-martial (which had at the time been final for six years) on the basis of ineffective assistance of counsel. The CCA summarily rejected the petition,[9] but this Court found that there was jurisdiction "to conduct collateral review under the All Writs Act" to "modify an action that was taken within the subject matter jurisdiction of the military justice system" and remanded. *Denedo v. United States*, 66 M.J. 114, 119, 120 (2008). The Supreme Court granted certiorari and affirmed. The Court found that the CCA's "jurisdiction to issue the writ" of *coram nobis* — which it said was "properly viewed as a belated extension of the original proceeding in which the error allegedly transpired" — "derives from the earlier jurisdiction it exercised to hear and determine the validity of the conviction on direct review" under Article 66. 556 U.S. at 914, 913, 914. Because the CCA had jurisdiction, "the CAAF had jurisdiction to entertain [an] appeal" from the CCA's

[9] The Supreme Court took note of the fact that the CCA decision (as in the instant case) included no discussion or analysis. 556 U.S. at 908.

judgment under Article 67. *Id*. at 915. The Court stated that "[o]ur holding allows military courts to protect the integrity of their dispositions and processes" via the All Writs Act "when it is shown that there are fundamental flaws in the proceedings leading to their issuance." 556 U.S. at 916. The Court concluded:

> The military justice system relies upon courts that must take all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their judgments. ... [T]he jurisdiction and the responsibility of military courts to reexamine judgments in rare cases where a fundamental flaw is alleged and other judicial processes for correction are unavailable are consistent with the powers Congress has granted those courts under Article I and with the system Congress has designed.

Id. at 917. Even the four dissenting Justices in *Denedo* were primarily concerned with granting military appellate courts with "*continuing* jurisdiction" over otherwise "final court-martial judgments" in *coram nobis*, *Id*. at 923, 921 (Roberts, C.J., dissenting), which they presumably viewed as outside even the potential jurisdiction conferred by statute and recognized in cases like *Dean Foods*. This, the dissenters feared, risked "conferring ... perpetual authority" on the CCA and this Court to "extend[] jurisdiction" even past the date of separation from the military when the government might lack jurisdiction to retry. *Id*. at 923, 923 n.2. That is the opposite of the situation here, where petitioners have intervened to preserve the "integrity of [any] judgment" that comes from the trial court by correcting the "funda-

mental flaw" *while the proceedings below are taking place*, not afterwards, when the only remedy may be the far more extreme one of vacatur and retrial. *Id*. (majority op.) at 917.

* * *

Nothing Congress has done in the intervening years since *ABC v. Powell* precludes the availability of the sort of relief requested here. (Indeed, there may well have been Congressional reliance on the availability of this sort of relief in the wake of high-profile public-access cases such as *Hershey* and *Powell*.) Recognizing All Writs Act relief here would be consistent with the Congressional policy that courts-martial follow processes similar to those used in ordinary federal criminal courts. That policy is embodied in Article 36 and in the simple fact that Congress has denominated this Court a "court." Courts have contempt power, jurisdiction to review their own jurisdiction, and various other powers that are not spelled out in the text of U.C.M.J. Articles 66 and 67 but that this Court and the service courts have recognized and exercised over the years.[10]

II. Standing

Petitioner-Appellants requested relief[11] from the trial court and were denied; they then exhausted their remedies in the Army

[10] *Cf. Noyd v. Bond*, 395 U.S. 683, 695 (1969) (All Writs Act "'mak[es] explicit the right to exercise powers implied from the creation of … courts'" by statute, including military courts) (quoting statutory revision notes to All Writs Act).

Court of Criminal Appeals.[12] They clearly have standing under existing Supreme Court precedents.

The Supreme Court recognized citizen-plaintiffs' standing in *FEC v. Akins*, 524 U.S. 11 (1998). In *Akins*, plaintiffs, six individual members of the voting public, claimed that a federal statute (the reporting requirements for political action committees) created a right to information (to the information the lobbying group AIPAC needed to file, on plaintiffs' view), and denial of this right created concrete injury:

> The 'injury in fact' that respondents have suffered consists of their inability to obtain information … that, on respondents' view of the law, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular. Indeed, this Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain in-

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[11] Several current Petitioners did not request relief in CCR's original missive to the trial court on April 23, 2012, but as to their standing, it obviously would have been futile for them to make the same request after CCR and the other media parties mentioned in the letter (see JA-15) had been denied relief. Moreover, as Chief Judge Baker noted at argument, Audio at 49:02, anyone actually present in the courtroom during the pretrial proceedings would have had extraordinary difficulty understanding the proceedings given the failure to provide access to the documents. (*See* Gosztola Decl., JA-24-25 at ¶¶ 4-8.) That itself is a further basis for recognizing standing of the media petitioners who have sought to cover the proceedings in open court.

[12] This Court's order asked whether standing existed in the A.C.C.A.; we believe it did there as well for the same reasons it exists in this Court, as described herein.

> formation which must be publicly disclosed pursuant to a statute.

Akins, 524 U.S. at 21 (citing cases).[13] Similarly, Petitioners here have suffered injury because they requested and were denied access to information that must be publicly disclosed by operation of the First Amendment. That sort of injury is no different, as the *Akins* court noted, from mass-tort or voting rights cases where a common injury is shared by many. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) ("a plaintiff who resides in a district which is the subject of a racial gerrymander claim has standing to challenge the legislation which created that district").

Akins is consistent with the unquestioned standing, recognized by the Supreme Court, of the various media plaintiffs in the *Richmond Newspapers* line of cases. In all four of those cases, media petitioners requested access in the trial court and

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[13] *Akins* was decided after *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which held that bars on citizen standing were not prudential but of constitutional dimension. So clearly the Supreme Court believes that standing premised on a violation of the public's right to information does not fall afoul of the requirement of individualized injury-in-fact otherwise mandated by Article III's case-or-controversy requirement. *See Akins*, 524 U.S. at 24-25 ("We conclude that similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of *constitutional* power to authorize its vindication in the federal courts.") (emphasis added). (The First Amendment rights at issue here are, like those in *Akins*, directly related to electoral accountability of the executive, which is in our system the primary check on the behavior of prosecutors. *Cf. Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).)

were denied; they then sought extraordinary relief from superior courts. The Supreme Court never questioned the standing of petitioners in any of these cases, despite the fact that standing is jurisdictional and any federal court is obliged to assure itself that it exists. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 560, 562-63 (1980) (not questioning standing, despite fact that media petitioners did not object to exclusion at very outset of dispute; issue not moot despite release of transcripts after end of trial, because "capable of repetition, yet evading review")[14]; *Globe Newspapers Co. v. Sup. Ct.*, 457 U.S. 596, 599 n.4 (1982) (not questioning standing of media petitioners, who had initially moved to revoke closure order in trial court, and subsequently sought extraordinary relief in state courts, and similarly finding case not moot); *Press-Enterprise Co. v. Sup. Ct. of Cal. [Press-Enterprise I]*, 464 U.S. 501, 504-05 (1984) (not questioning standing of media petitioners who had initially moved trial court for access, been denied, and sought writ of mandate); *Press-Enterprise Co. v. Sup. Ct. [Press-Enterprise II]*, 478 U.S. 1, 3-6 (1986) (not questioning standing of media petitioners requested release of transcripts at close of pretrial hearing and were denied, then sought extraordinary relief). Equally relevant are the many, many cases in the Courts of Ap-

[14] The media sought relief both on direct appeal and mandamus, 448 U.S. at 562.

peals recognizing standing for plaintiffs in the access-to-documents cases we have cited. *See* Pet. Br. at 11-12 n.5.

At oral argument on October 10, Judge Stuckey asked whether, if such First Amendment claims could be equally well asserted by members of the general public,[15] standing should be denied because the injury is too widely-shared. Essentially, Judge Stuckey's question speculates as to whether standing should be rejected here on an analogy to the citizen- and taxpayer-standing or "generalized grievance" cases decided by the Supreme Court over the

[15] In response to Judge Stuckey's question as to whether the media petitioners here stood exactly on par with any member of the general public, undersigned counsel noted at oral argument that *Branzburg v. Hayes*, 408 U.S. 665 (1972), did evince a desire on the part of the Supreme Court not to distinguish between classes of journalists -- but that case concerned applicability of *generally-applicable legal obligations* to journalists. Drawing distinctions between citizen journalists and professional journalists would effectively invalidate many statutes as to their applicability to whatever group of professional journalists the court drew a line around. *See id*. at 703-06. *Branzburg* did not involve attempts by journalists to *enforce a right* that arguably benefits them more tangibly than other citizens. Professional journalists may well have a more substantial, concrete injury – the cost to their professional interests -- than ordinary observers not seeking to earn income or enhance their professional reputations by covering the Manning trial. Moreover, the attorney petitioners here – CCR itself and as representative of its legal staff – have a professional interest in accessing information that will likely be useful in their representation of other clients. *See* JA-12 (specifically noting this interest for CCR). The injury from denial is thus a professional injury to them. *Cf. Meese v. Keene*, 481 U.S. 465, 473 (1987).

That said, Petitioners do still believe that any member of the general public denied access ought to be able to assert standing on par with the professional media petitioners here, based on the logic of the *Richmond Newspapers* line of cases above.

last several decades. *Cf. Warth v. Seldin*, 422 U.S. 490 (1975); *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Ex parte Levitt*, 302 U.S. 633 (1937). Of course, those lines of standing cases were well-established long before *Richmond Newspapers*, but proved no bar to the Burger Court finding that the petitioners in *Richmond Newspapers*, *Globe*, and *Press-Enterprise-I* and *-II* had standing to assert claims like those now before this Court. Most cases rejecting standing on grounds that the injury constituted a "generalized grievance" involved claims under *structural* provisions of the Constitution (*see, e.g.*, *United States v. Richardson*, 418 U.S. 166 (1974) (challenging CIA budget under Statements and Accounts clause); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (seeking injunction against members of Congress serving in reserves under Incompatibility Clause); *Ex parte Levitt* (Incompatibility Clause claim seeking to bar Hugo Black's appointment to Supreme Court because he had voted in Senate to increase pension of Justices)), or under theories of taxpayer-based standing to challenge federal expenditures. The First Amendment claims here are neither.[16] In *Akins*, the government made

[16] Taxpayer standing assertions in cases like *Richardson* (a case which did involve some nexus to information, *see Akins*, 524 U.S. at 21-22) were rejected because there is no "logical nexus between the status asserted and the claim sought to be adjudicated" under the provision of the constitution the claims were based on — the Statements and Accounts Clause. To put it in terms the Supreme Court has used in APA challenges brought by individuals not directly controlled by a regulation they seek to challenge,

the same argument suggested by Judge Stuckey at oral argument, and the Supreme Court rejected it clearly and in emphatic terms.[17]

As the Supreme Court has repeatedly noted over the years, that an injury is widely shared does not mean it cannot underlie standing. *See Akins*, 524 U.S. at 24 ("where a harm is concrete, though widely shared, the Court has found injury in fact.");

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the taxpayer-plaintiffs were not within the "zone of interests" the constitutional provision was designed to protect. *See, e.g.*, *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974) (**"**It is ... open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen. While the available evidence is neither qualitatively nor quantitatively conclusive, historical analysis of the genesis of cl. 7 [the Statements and Accounts Clause] suggests that it was intended to permit some degree of secrecy of governmental operations."). That is not so for the open-court rights protected by the First Amendment here: Petitioner-Appellants, like all members of the public who might request the relief sought here and be denied, are firmly within the zone of interests the First Amendment seeks to protect.

[17] *Akins*, 524 U.S. at 23 ("The Solicitor General points out that respondents' asserted harm (their failure to obtain information) is one which is ''shared in substantially equal measure by all or a large class of citizens.'' Brief for Petitioner 28 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). ... The kind of judicial language to which the FEC points, however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature -- for example, harm to the 'common concern for obedience to law.' [citing *Schlesinger*, *inter alia*]. The abstract nature of the harm -- for example, injury to the interest in seeing that the law is obeyed -- deprives the case of the concrete specificity that characterized those controversies which were 'the traditional concern of the courts at Westminster,' *Coleman*, 307 U.S. at 460 (Frankfurter, J., dissenting); and which today prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion.").

Of course, the bar on rendering "advisory opinions" is even weaker in an Article I court like this Court, where it is only a prudential, not a Constitutional, bar.

United States v. SCRAP, 412 U.S. 669, 686-88 (1973) ("all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury."); *see also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA [the Federal Advisory Committee Act] does not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue."). Petitioner-Appellants here have made their request and been denied; they clearly have standing.

III. The military judge has the authority to direct public release of judicial records

The military judge in this case has the inherent authority to direct public release of the records at issue here. "Every court has supervisory power over its own records and files." *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978).[18] The

[18] To answer a question raised during a colloquy with government counsel, Audio at 38:16-38:27, Petitioner-Appellants believe that courts-martial are *both* courts for purposes of the law of

A.C.C.A. has held that Army courts have inherent authority over their records. *United States v. Chisholm*, 58 M.J. 733, 738 (Army Ct. Crim. App. 2003) ("How a particular military judge 'directs' the completion of a given record is a matter within his or her broad discretion and inherent authority."). Federal courts have frequently relied on their inherent powers over their own records to expunge judicial records, to unseal records even after dismissal or final resolution of an action, or to unseal records of grand juries even outside the parameters of Fed. R. Crim. P. 6(e). *See, e.g.*, *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004) (describing power over expungement of judicial records, though rejecting claim); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 (2d Cir. 2004) (unsealing after dismissal); *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1267-72 (11th Cir. 1984) (grand jury). Ordering release pursuant to the public's First Amendment rights is equally within the inherent powers of any court, military or federal.

Moreover, the military judge controls access pursuant to R.C.M. 806. As we have consistently argued,[19] R.C.M. 806 should be interpreted in light of U.C.M.J. Article 36 to reach judicial documents. No one doubts that Judge Lind has authority over clo-

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public access to criminal trials (under the Sixth and the First Amendments and the due process clause) and an executive agency for FOIA purposes (as we noted at argument, Audio at 55:04).

[19] *See, e.g.*, Pet. Br. at 12-13.

sure of physical access to the courtroom under R.C.M. 806; in light of the fact that the uniform rule in district court criminal trials mandates public access to judicial documents, she must have authority under that same rule to make the records sought here available to the public. A military judge no more has authority to throw up her hands and disavow any power to enforce the First Amendment rights of the public than she has to disclaim power to enforce the open trial demands of the Sixth Amendment.

The current Army Judiciary Rules of Court (26 March 2012),[20] attached to the appended declaration of undersigned counsel, are fully consistent with the view that the trial judge has custody over the relevant documents. Rule 3 makes clear that the judge should receive copies of motions prior to the pre-trial session at which they are heard, and 3.1 makes clear that the judge receives copies of such motions along with the clerk and opposing counsel. And Rule 28.1 makes it clear that the documents held by the Court Reporter are held subject to the "express permission of the judge"; that is, that the Judge has ultimate control over their disposition. (Even actual *trial* documents must be copied to the judge in advance, Rule 2.1.9, witness lists to the judge and Court Reporter, Rules 2.1.8, 2.2.5, and trial exhibits to the

[20] The 2009 version, in effect for certain earlier pretrial sessions below, is effectively identical in all cited respects. *See* Rules of Practice before Army Courts-Martial (2009), Rules 2.1.6, 2.1.7, 2.25, 3, 3.1, 28.1 (mirroring cited provisions in 2012 version).

Court Reporter, Rules 2.1.9, 2.2.5, who again holds records subject to control of the judge.)

In fact Judge Lind has asserted control over the documents at issue here to at least this extent: as to the defense briefs, she has ordered that they may be published. So she clearly has already exercised control over whether to allow those documents to be released. The audio recording of each session is turned over to defense counsel, so she has also exercised control over distribution of the verbatim record. Moreover, Respondents complied with this Court's July 24, 2012 order, by publicly producing the transcript of the April 23, 2012 pretrial session.

In her ruling set forth in that transcript, Judge Lind claimed that "under the military justice system, the Court does not call a court-martial into existence, nor is the Court the custodian of exhibits in the case; whether appellate, prosecution, or defense exhibits, which become a part of the record of trial. See for example, [R.C.M.] 503(a) and (c); 601(a); 808 and 1103(b)(1)(a) and (d)(5)." (Tr. at 21.) None of the R.C.M. provisions cited, however, indicate that the trial judge is not a custodian of the records, or that some other party is a custodian, or that the trial court is not empowered to order publication or release of records of the court-marital in furtherance of the

open trial mandate of the First Amendment and R.C.M. 806.[21] In contrast, R.C.M. 801(a) states that "The military judge is the presiding officer in a court-martial," with the discussion note indicating that "[t]he military judge is responsible for ensuring that court-martial proceedings are conducted in a fair and orderly manner"; 801(b)(1) states that she may "promulgate and enforce rules of court"; and 801(f) instructs that her rulings "*shall* be made a part of the record" (emphasis added). All of these are consistent with the notion that the trial judge is empowered, under the First Amendment, Article 36, and R.C.M. 806, to publish the orders, transcripts, and pleadings sought here.

Given that the First Amendment mandates contemporaneous access[22] to judicial documents, *see* Pet. Br. at 15-18; Reply at 3-7,

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[21] Most of the provisions Judge Lind cited say nothing to the trial judge's power to make public records of courts-martial. R.C.M. 503(a) merely describes appointment of members, and 503(c) detailing of trial and defense counsel. R.C.M. 601(a) merely states that the charges are referred by the Convening Authority. R.C.M. 1103(d)(5) appears not to exist. Of the cited provisions, that leaves only R.C.M. 1103(b)(1)(A), which states that, post-trial, trial counsel,"[u]nder the direction of the military judge, [shall] cause the record of trial to be prepared,," and R.C.M. 808, which states that "trial counsel ... shall take such action as may be necessary to ensure that a record which will meet the requirements of R.C.M. 1103 can be prepared."

[22] While it is a trivial point given the overwhelming weight of authority in favor of contemporaneous access from the other circuits, *see* Pet. Br. at 15-18, there is no "split" in the Sixth Circuit, as counsel for the government insisted at oral argument, Audio at 33:45. *See* Reply Br. at 8, 8 n.4. Indeed the best proof of this is that *Beckham* has not since been cited as good law by the Sixth Circuit except in an assortment of situations where the Sixth Circuit has found that no First Amendment right of access

this Court's third question might usefully be refined to ask whether *any other entity besides the trial judge* has the ability to release documents from a court-martial *during the pendency of* the pre-trial and trial proceedings. The answer is no: The Convening Authority does not have actual custody of the records. Neither does the Convening Authority authenticate the record. *See* R.C.M. 1104(a)(2) ("the military judge present at the end of the proceedings shall authenticate the record of trial" except in emergency cases involving disability or prolonged absence). And there is no specific indication that trial counsel has custody — exclusive or otherwise — of the records *during* the trial. R.C.M. 1103(b)(1)(A), part of the chapter on post-trial procedures, states that trial counsel shall, "[u]nder the direction of the military judge, cause the record of trial to be prepared," but that clearly refers to a post-trial obligation, and says nothing

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applies, leaving only claims for common-law access of the type analyzed in *Beckham*. *See Indianapolis Star v. United States*, 2012 U.S. App. LEXIS 18627 (6th Cir. Sep. 5, 2012) (no First Amendment right of access to search warrant proceedings); *Resnick v. Patton*, 258 Fed. Appx. 789 (6th Cir. 2007) (common law right recognized in *Beckham* would not apply to documents not admitted to evidence (dictum)); *Carrelli v. Ginsburg*, 956 F.2d 598 (6th Cir. 1992) (applying common law access to minutes of Ohio State [horse] Racing Commission). These are the only Sixth Circuit cases ever to rely on *Beckham*, with the exception of a case citing it as authority for the constitutionality of bans on televising criminal proceedings, *Conway v. United States*, 852 F.2d 187 (6th Cir. 1988).

to who retains custody and authority over the documents during the trial.[23]

In her ruling, Judge Lind also stated that "[n]either is the Court the release authority for such documents if requested under FOIA." (Tr. at 21.) But the question of whether the trial judge is empowered to release judicial documents should not be confused with the *separate* question of whether she is also the proper release authority *under FOIA*. As we noted in our Reply, both Judge Lind and the government seem to believe that FOIA is only applicable to records of a court-martial *after the trial is over*:

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

[23] R.C.M. 1103(b)(1)(B) mandates that trial counsel shall, as prescribed by regulation, "cause to be retained" the original components of the record — but it clearly means that trial counsel should, after the post-trial assembly of the official record, retain the raw notes and materials from which that record was prepared.

> inition not be contemporaneous with the proceedings, instead only coming after the trial was over.

Reply Br. at 16 n.13. At oral argument, the government stated as follows:

> Judge Stuckey: They can go through FOIA while a court martial's goin' on?
>
> Capt. Fisher: Absolutely. The Army regulation specifically says that. It says: if you want court-martial documents, here is the office that you direct that request to. And I think the temporal nature of it, your honor, is really... I think the temporal nature... [answer cut off by question from the bench]

Audio at 39:08 to 39:30. The response skirts the question (it only states that the Army regulation specifies *a party to whom* FOIA requests should be directed, without taking a position on *when* the obligation to produce the records begins), and was unfortunately cut off before the key question — when can such a request be made, and at what point in time is the government obligated to act upon it? — was complete. (The government will, hopefully, clarify this in its response to this brief.) What is clear is that the government believes that, notwithstanding FOIA, the trial judge is empowered to release the documents requested here. Audio at 40:22 (Capt. Fisher, responding to question from Judge Cox as to whether FOIA creates any prohibition on trial judge, convening authority or JAG deciding to release documents contem-

poraneously: “I don’t think that there is, Your Honor. I think that that could be done.”).[24] We agree.

* * *

At oral argument, we noted the fact that one of the Petitioners — Kevin Gosztola — requested from the OJAG on August 3d thru FOIA the very order of the trial judge publicly produced to this Court on that same date by the government. The request is included with the supplemental declaration of undersigned counsel attached to this brief. As noted at oral argument, the document has not been produced thru FOIA, nearly three months later. Indeed, the request has not been responded to other than to notify Mr. Gosztola that the request was forwarded from the Office of Judge Advocate General (which the government insisted at argument was the FOIA custodian and the “only entity authorized” to control release of documents via FOIA in this case, Audio at 32:00, 48:01) to the Convening Authority (the Military District of Washington) and OTJAG Criminal Law Division. Whether this reflects a game of hide-the-custodian or whether there is genuine uncertain-

[24] In fairness, *earlier* in the argument the government *seemed* (with considerable hesitation) to take the opposite position: *see* Audio at 37:50 (Capt. Fisher, in response to Chief Judge Baker’s question whether FOIA is exclusive means for access to briefs: “I think that’s what it says…”); *id*. at 38:02 (in response to Judge Stuckey’s question “Does FOIA purport to be exclusive — on its face?”: “I’d have to double-check the statute”); *id*. at 38:11 (Judge Stuckey: “It is *a* mechanism.” Capt. Fisher: “No, Your Honor, I think it is *the* mechanism.”).

ty over who has release authority under FOIA, the episode simply illustrates the endemic delays that make FOIA unsuitable to satisfy the error-correcting function of contemporaneous access to judicial documents.

* * *

This Court has also asked: "To what extent must appellants first demonstrate that they have made their request to an appropriate records custodian and had such request denied?" As noted above, Petitioner-Appellants have made their request to the appropriate party — the trial judge, who has the power to mandate release (under R.C.M. 806, Article 36, the First Amendment and her inherent powers as a military judge) and who has already exercised that power in making many other decisions about open access in this case. But to some extent the question itself ignores the fact that the First Amendment mandates that the default presumption is one of public access to the documents at issue here. A failure by the trial judge to conform the proceedings to that mandated default position empowers, at a minimum, parties who have been injured by the failure to challenge the defect. Petitioners need not exhaust a process that is inadequate on its face (FOIA) before challenging that ongoing, irreparable harm to their First Amendment interests. (This dispute is obviously ripe for resolution by this Court for all the reasons given above.)

IV. Excluding records of R.C.M. 802 conferences, the records at issue are already in existence

At argument, during discussion of our request for release of transcripts (or their equivalent), Judge Ryan questioned whether Petitioner-Appellants had a right to demand that records be created which did not already exist.[25] That issue is moot here, as

[25] In any given case there are two alternatives: some form of audio recording, notes, or transcripts exist, or, no such record exists. If no such record exists, as Judge Stuckey noted at argument, there has been a violation of the verbatim transcript requirement of R.C.M. 1103. If audio files or written notes or transcripts exist, they constitute judicial documents, and all such records that exist are subject to the First Amendment right of access.

We do not suggest that if only audio files exist, transcripts *must* be created. Access to the audio files, while not always ideal, should suffice to meet the demands of the First Amendment, as members of the media or sufficiently interested members of the public could independently contract with private stenographers to produce transcripts from the audio files. *Cf*. R.C.M. 1103(j) (permitting audio or video recording in lieu of "recording by a qualified court reporter," but mandating that transcripts be produced prior to forwarding of record, except in cases of military exigency (in which event it must be prepared before further review)); R.C.M. 1103(b)(2)(B) (2012 version) (striking from prior version the word "written": "the record of trial shall include a verbatim ~~written~~ transcript of all sessions.").

There is authority for the position (advanced by Petitioner-Appellants at oral argument) that a failure to create *any* record of otherwise open court proceedings is constitutionally problematic (that is, that even if there were no R.C.M. 1103, there would be a right to have a tape or other record created), and also for the position that audio *must* be made available *if* transcripts are not available. *See Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 504-05 (1st Cir. 1989) (Coffin, J.) ("In light of *Richmond Newspapers*, decided two years later, we cannot read [*Nixon v.*] *Warner Communications* as laying down a general rule for all criminal cases that once the substance of testimony and evidence has been exposed to public view, there is no right of access to visual and aural means of preserving it. For such an

complete audio records and some stenographic records do exist for the pretrial sessions at issue here, as the attached declaration of undersigned counsel indicates, at ¶ 2.[26]

(As to the 802 conferences, Petitioner-Appellants *are* demanding that some form of record of the arguments, factual representations, and decisions therein be created for the benefit of the public. Again, as we summarized it at oral argument, we believe that the parties ought not be able to argue substantive issues behind closed doors, and then by consent waive away the public's right to know the substance of the legal arguments made and the factual positions taken.[27] In short, the waiver provision of R.C.M. 802(b) is inconsistent with the First Amendment.)

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extension arguably would mean that once an open trial is held, a permanent barrier can be erected against inspection of exhibits, audiotapes, videotapes, and any papers to which the public had no 'physical access.' Proceedings that were recorded only on tape — as many are — would be forever insulated from inspectors. Moreover, there would be no opportunity to check whether, in light of a tape, a paper record or transcript had been altered. / We therefore conclude that, after *Richmond Newspapers*, a blanket prohibition on the disclosure of records of closed criminal cases of the types at issue here implicates the First Amendment. This threshold decision does not leave the state helpless. The Commonwealth simply has the burden to demonstrate why more access is not better than less.").

[26] Rather than clutter the docket by submitting the declaration as a supplemental authority, Petitioner-Appellants have appended it to this brief.

[27] Again, while we have no reason to suspect specific collusion on the limited record before us, the potential for collusion does exist under the trial court's current practice, and defense and prosecution frequently have a mutual interest in secrecy that diverges from the interest of the public in transparency (and the corresponding interest of the courts in ensuring that proceedings

V. Relief

Finally, to summarize and reiterate our claims for relief (previously set forth at Pet. Br. at 3-4, 27-28, 30, and 37-38), as to our documents claims, this Court should follow the example of the twelve federal circuit courts that hear criminal appeals and clearly instruct the lower courts that the First Amendment applies to judicial documents in courts-martial; that the First Amendment demands a default presumption of public release of judicial documents, contemporaneous with the proceedings to which the documents are relevant; and that prior to any closure, the trial court must give the public notice and opportunity to respond, and apply strict scrutiny, justifying any restrictions on access with item-by-item, specific findings of necessity after ensuring itself that no less-restrictive alternatives exist that would adequately serve the compelling interest justifying closure. Finally, the record created must be sufficient to permit subsequent appellate review.

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are subjected to public scrutiny to ensure their accuracy). This was recognized by the four dissenting Justices of the Supreme Court in *Gannett v. DePascuale*, 443 U.S. 368, 418-33 (1978) (Brennan, J., dissenting) (suggesting Due Process clause forbids defendant from seeking a closed trial). This divergence between the defendant's interests (protected by the Sixth Amendment) and the public interest led to the creation of the First Amendment right recognized in the *Richmond Newspapers* line of cases, several of which involved charges of sexual abuse of minors that both prosecutors and defendants shared an interest in shielding from public view.

The practical and logistical details of access to the records sought here may be left to be worked out before the trial court in the first instance: we have every reason to believe Judge Lind will be receptive to these claims once this Court makes clear the First Amendment applies here, the costs of electronic publication should be trivial (and we have no reason to expect the media will be unwilling to collectively assume whatever costs comport with ordinary practice in federal court), and, as the government noted at oral argument, there is "absolutely nothing" wrong with allowing public access to much of the material requested here, Audio at 49:42 (subject, of course, to limitations of access to sensitive materials consistent with strict scrutiny that can be worked out before the trial court consistent with the procedures set forth in the preceding paragraph).

As to the R.C.M. 802 issue, as we noted in our Reply at page 26, "it is sufficient at this point for this Court to order that the trial court ensure that its past and future R.C.M. 802 practices conform to First Amendment principles ... leaving specific implementation of the remedy to the trial court in the first instance." In so doing, we believe it would be beneficial for this Court to specifically note that the waiver provision of R.C.M. 802(b) is inconsistent with the First Amendment (to the extent it allows the parties to waive rights that also belong to the general public). Moreover, in order to facilitate a review by peti-

tioners and the rest of the public as to whether the requirement for an adequate public summary of past 802 conferences was complied with, it would be beneficial for this Court to specify that the trial court should arrange for the speedy public release of audio files of the public pretrial proceedings and whatever transcripts (uncorrected or otherwise) such as exist.

The sky will not fall if this Court mandates this relief. In fact, quite the opposite is likely to result: an enhancement of public confidence in the military justice system which, as always with high profile criminal trials, will to some extent be on trial itself in the *Manning* proceedings.

CONCLUSION

For the reasons stated above, this Court should grant the relief Petitioner-Appellants seek.

Date: Ann Arbor, Michigan
22 October 2012

Respectfully submitted,

/s/sdk

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[28] Counsel gratefully acknowledge the contributions of former interns and current law students Madeline Porta and Carey Shenkman to this supplemental brief.

Certificate of Service

I hereby certify on this 22d day of October, 2012, I caused the foregoing Post-Argument Supplemental Brief to be filed with the Court and served on Respondents and Amici 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 mail, at the following addresses and facsimile numbers, respectively:

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