IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

CENTER FOR CONSTITUTIONAL RIGHTS, *ET AL.*,	:	BRIEF ON BEHALF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 31 NEWS MEDIA ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLANTS
Petitioners-Appellants,	:	
v.	:	
	:	Crim. App. Misc. Dkt. No. 20120514
UNITED STATES OF AMERICA and COL. DENISE LIND, MILITARY JUDGE,	:	USCA Misc. Dkt. No. 12-8027/AR
Respondents-Appellees.	:	

INDEX

TABLE OF AUTHORITIES

Cases

Rule

Regulation

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae are national and local news organizations, nonprofit associations representing newsgatherers and their interests and trade groups whose journalists and members regularly gather and disseminate news and information to the public through their newspapers, magazines, television, radio stations and via the Internet (collectively, "*amici*" or "*amici curiae*").[1] As described more fully in the accompanying motion for leave to file this brief, *amici* have a strong interest in ensuring that journalists covering the court-martial of Pfc. Bradley Manning ("Manning") are able to do so meaningfully by being able to view documents filed in the proceeding.

There can be little doubt among all parties involved in this case that the issues at stake are profound: national security and wartime operations and intelligence reports; military

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treatment of service members, including those who are homosexual; government response to military members accused of committing crimes; and the role of journalism and whistleblowing in an increasingly digital society, among many others. Yet, the overwhelming majority of records filed in Manning's court-martial have remained shielded from public view, even though the actual proceedings are largely open to the public. *See* Josh Gerstein, *Bradley Manning Defers Plea in WikiLeaks Case*, POLITICO, Feb. 23, 2012, http://www.politico.com/news/stories/0212/73214.html (reporting that orders and motions, including the details of a proposed defense order aimed at limiting pretrial publicity in the case, discussed during the first day of the proceeding were not publicly available). This secrecy has extended even to the court's docket, meaning that reporters covering the high-profile event are often unaware of what is occurring therein, *see id.* — a serious obstacle to effective reporting on this matter of significant public interest and concern.

This Court should find that such an arrangement is unconstitutional. More than thirty years ago, the U.S. Supreme Court recognized a presumptive right of access to criminal proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion). As discussed below, the Court has reiterated its holding repeatedly, and the nation's military

courts have applied the same reasoning to extend this right of public access to courts-martial.

Amici recognize that various interests, including the need to protect national security information, may justify sealed records in certain circumstances. They do not, however, generally justify complete secrecy. In fact, previous disputes about claims of national security have been litigated in the open: "Briefs in the Pentagon Papers case[2] and the hydrogen bomb plans case[3] were available to the press, although sealed appendices discussed in detail the documents for which protection was sought." *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000).

The Supreme Court's established practice of deciding issues of constitutional importance in public is grounded in the recognition that openness helps promote a perception of fairness and foster a better-educated public. But by refusing to provide reasonable and proper notice of such proceedings and the nature of the documents filed in connection therewith, the military justice system has severely undercut this foundational tenet of American democracy.

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[2] *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

[3] *United States v. Progressive, Inc.*, 467 F. Supp. 990, *reh'g denied*, 486 F. Supp. 5 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

And the effects of such secrecy are particularly significant in a case that has ignited debates worldwide about whether the U.S. government keeps too many secrets. Such a perception is fueled by the pervasive secrecy underlying the Manning prosecution. If the public is to have any faith in its government generally and the justice administered by military tribunals specifically, it needs to have confidence that the system is operating in the open, where potential misconduct may be exposed. Thus, *amici* respectfully request that this Court grant Petitioners-Appellants' motion.

ARGUMENT

I. The First Amendment and this Court's jurisprudence support recognition of a qualified right of public access to judicial documents in courts-martial.

A. The right of access to court records springs from the well-established recognition that open judicial proceedings provide accountability and oversight.

History makes abundantly clear that the open administration of justice is this nation's preference and practice. As then-Supreme Court Associate Justice Rehnquist stated more than 30 years ago, "all of the business of the Supreme Court of the United States comes in the front door and leaves by the same door." William H. Rehnquist, *Sunshine in the Third Branch*, 16 Washburn L.J. 559, 564 (1977). Justice Rehnquist's comment reflects the Court's enduring commitment to open courts. The open administration of justice provides "therapeutic value" to the

community, allowing citizens to reconcile conflicting emotions about high-profile cases. *See Richmond Newspapers, Inc.*, 448 U.S. at 570–71 (discussing openness in criminal trials). Additionally, open access reassures the public that its government systems are working properly and correctly and enhances public scrutiny into and understanding of the judicial process. *Id.*

Indeed, open access to judicial proceedings is not just a beneficial practice; in many instances, it is a constitutional mandate. Court proceedings related to criminal trials in particular are subject to a First Amendment right of access — a right that "permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *see also Richmond Newspapers, Inc.*, 448 U.S. at 596 (Brennan, J., concurring) (citation and internal quotation marks omitted) ("The 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[.]"). Allowing such access "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

This understanding of the value of the open administration of justice is reflected both in this Court's pronouncements on

the procedural steps necessary to close courts-martial from the public and the rules governing the proceedings. *See* Rule for Courts-Martial 806(b)(2), discussion ("Opening trials to public scrutiny reduces the chance of arbitrary and capricious decisions and enhances public confidence in the court-martial process."); *see also United States v. Ortiz*, 66 M.J. 334, 342 (C.A.A.F. 2008) (reversing the conviction of a military officer of child sexual offenses where the prosecutor had not clearly identified an overriding interest and the military judge had not articulated specific factual findings, thereby violating the defendant's Sixth Amendment right to a public trial); *ABC, Inc. v. Powell*, 47 M.J. 363, 364, 366 (C.A.A.F. 1997) (holding that a preliminary hearing in the sexual misconduct case against Sgt. Maj. Gene McKinney had to remain open to the public unless the Army could show a specific and substantial need for secrecy); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)(ruling that the constitutional right of public access to criminal trials extends to courts-martial such that the accused must demonstrate an "overriding interest" that could justify closure in order to bar the public from the courtroom and observing that "we believe that public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public"); *United States v. Hershey*, 20 M.J. 433, 435–36 (C.M.A. 1985) (finding that, "[w]ithout question," the

Sixth Amendment right to a public trial is applicable to courts-martial and noting that "[a] public trial is believed to effect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury").

B. The interest in open proceedings mandates access to courts-martial documents.

Although neither the U.S. Supreme Court nor this Court has found a constitutional right of access to judicial records and documents, the Army Court of Criminal Appeals recognized a qualified First Amendment-based right of public access to documents admitted in evidence at a pretrial proceeding open to the public. *United States v. Scott*, 48 M.J. 663, 666 (A. Ct. Crim. App. 1998). In *Scott*, the military judge presiding over the court-martial had made no findings of fact to support his conclusion that several people had privacy interests that justified sealing a stipulation of facts. *Id.* Moreover, several federal appellate courts have acknowledged that the public policy interest in open criminal documents mirrors the interest in open criminal proceedings, justifying the recognition of a constitutional right of access to court records.

For example, the U.S. Court of Appeals for the District of Columbia, in accordance with the rulings of three fellow circuits, found that a First Amendment right of access attached to

plea agreements. *Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991). The court noted that the documents "have traditionally been open to the public, and public access to them enhances both the basic fairness of the criminal [proceeding] and the appearance of fairness so essential to public confidence in the system." *Id.* (internal quotation marks omitted); *see also In re Providence Journal Co., Inc.*, 293 F.3d 1, 10 (1st Cir. 2002) (internal quotation marks omitted) ("[T]his constitutional right — which serves to ensure a full understanding of criminal proceedings, thereby placing the populace in a position to serve as an effective check on the system — extends to documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings."); *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (construing the constitutional right of access to apply to "written documents submitted in connection with judicial proceedings that themselves implicate the right of access").

In *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993), the *St. Petersburg Times* challenged the use of dual dockets by the district courts, which permitted cases to be placed on either a public or a sealed docket. The U.S. Court of Appeals for the Eleventh Circuit concluded that the use of a dual-docketing system was "inconsistent with affording the various interests of the public and the press meaningful access to criminal proceed-

ings." *Id.* at 715. The court recognized that the "dual-docketing system can effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences" and held that this system was "an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings." *Id.*

In *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004), the U.S. Court of Appeals for the Second Circuit held that "docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them." Otherwise, the court explained, "the ability of the public and press to attend civil and criminal cases would be merely theoretical." *Id.* at 93. A right of access to docket sheets, according to the court, was necessary to "endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment." *Id.* Thus, the court concluded that there was not only a historical tradition of public access to docket sheets but that such access allows the public to "discern the prevalence of certain types of cases, the nature of the parties to particular kinds of actions, information about the settlement rates in different areas of law, and the types of materials that are likely to be sealed." *Id.* at 94–96.

As these cases indicate, the public and news media's well-established right of access to judicial proceedings is nearly meaningless where the docket fails to provide reasonable and proper notice of a particular proceeding and the nature and contents of documents filed in connection with the proceeding beforehand. Journalists rely heavily on court documents to gain and provide to readers the background of and context surrounding a legal controversy — awareness and understanding of which is often necessary to accurately report on the dispute. Prior access to the materials also allows reporters, the overwhelming majority of whom have no legal background or education, to process the oftentimes complex legal theories at their own pace, or to interview a legal expert who could explain the issues, so they are better equipped to understand what is transpiring in a proceeding they attend. A *Los Angeles Times* reporter recently described how a sealing order that applied to all court documents filed in the case of the alleged Colorado movie theater shooting suspect impaired his ability to cover the newsworthy event. "If you were to attend a hearing, it would be very difficult to understand what they were talking about, because you were prevented from reading the charges beforehand." Raymond Baldino, *Judge Denies Media's Request to Film and Photograph Monday's Hearing of Colorado Shooting Suspect*, The Reps. Comm. for Freedom of the Press, July 27, 2012, http://rcfp.org/x?sGLt

(quoting reporter Rick Serrano). At the same time, public court records, namely the various legal arguments and requests by parties and their counsel contained in the documents, enable journalists to tell the full story, despite the fact that deadline pressures or shrinking news staffs may drastically limit their ability to attend a lengthy judicial proceeding in its entirety. Although Judge Lind granted the defense permission to publish redacted versions of court filings online, public release of this information is subject to government review and redaction. Moreover, the decision about which documents to publicly disclose pending government approval rests solely with the defense, making it incredibly difficult for journalists to ensure that they have obtained all the information needed for a balanced report. In short, the inability to view court documents filed in connection with a particular judicial proceeding burdens the news media's constitutionally protected right to collect and disseminate the news and severely curtails journalists' ability to do their jobs effectively.

C. The public policy implications of secrecy in cases like these, where profound issues are at stake, highlight the need for a finding by this Court that the constitutional right of access to courts-martial extends to the documents filed therein.

Despite the announced principles of openness in both rules and judicial decisions discussed above, a recent study reported that access to docket and schedule information for military pro-

ceedings is often extremely limited[4] — a trend clearly represented by the Manning prosecution. And the effects of this secrecy are significant: It raises the question of whether such secrecy is being used to protect the government from scrutiny, in direct contravention of the very rationale underlying the presumptive openness of criminal proceedings.

One need look no further than the facts of this case to see the alarming results when the public is deprived of its ability to oversee the proceedings by which military personnel have their day in court to answer to and defend against allegations of serious offenses. Despite the gravity of Manning's alleged actions — which provoked official responses ranging from a call for execution if found guilty of the treasonous behavior[5] to an accusation that the leak sowed "[t]he seeds of the next 9/11 terrorist attack"[6] — the man many others dubbed a "hero"[7] devel-

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[4] Tully Ctr. for Free Speech at Syracuse Univ.'s S.I. Newhouse Sch. of Pub. Commc'ns & The Reps. Comm. for Freedom of the Press, *Off Base: Fighting for Access to Military Court Dockets and Proceedings* (2008), http://www.rcfp.org/base-fighting-access-military-court-dockets-and-proceedings.

[5] Andy Barr, *Rep. Mike Rogers: Execute WikiLeaks Leaker*, POLITICO, Aug. 3, 2010, http://www.politico.com/news/stories/0810/40599.html.

[6] Frank Ryan, *WikiLeaks' Disclosure of Documents Sows Seeds for Next Terrorist Attack*, Cent. Pa. Bus. J., Sept. 17, 2010, at 16, 16, *available at* 2010 WLNR 19198737. To facilitate access to secondary sources, "WLNR," or Westlaw NewsRoom, citations are provided whenever possible.

oped a strong army of supporters worldwide in the weeks and months following the disclosure. In fact, forty percent of readers who responded to a poll by the British national daily newspaper *The Guardian* chose Manning from a selection of main contenders as the person who should receive the 2011 Nobel peace prize. James Walsh, *Nobel Peace Prize: Bradley Manning Tops Reader Poll*, Guardian, Oct. 6, 2011, *available at* http://www.guardian.co.uk/news/blog/2011/oct/06/bradley-manning-reader-poll-nobel-peace-prize. WikiLeaks founder Julian Assange placed second in the poll, receiving nearly 19 percent of the votes. *Id.*

The support reflected a sentiment among the antiestablishment community that the U.S. government keeps too many secrets in an attempt to shield itself from public scrutiny of misconduct. *See* Michael W. Savage, *Army Analyst Celebrated As Antiwar Hero*, Wash. Post, Aug. 14, 2010, at A2, *available at* 2010 WLNR 26713200. Manning became "an instant folk hero" to thousands of grassroots activists as disturbed by U.S. foreign policy as Manning claimed to be in chat logs released by an online confidant. *Id.* A Manning support group developed a line of memorabilia with the tagline, "[b]lowing the whistle on war crimes is not a

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[7] Aaron Glantz, *Jailed Soldier Has Support of Resisters*, N.Y. Times, Dec. 26, 2010, at A33, *available at* 2010 WLNR 25421844.

crime," and antiwar campaigners worldwide heralded Manning's alleged actions as "brave" and a favor to the public. *Id.*

In later months, accusations from supporters that Manning was being mistreated while held in a military prison — including speculation that the alleged abuse was an attempt to pressure him to testify against Assange — "rallied many on the political left to his defense." Scott Shane, *Accused Soldier Stays in Brig As WikiLeaks Link Is Sought*, N.Y. Times, Jan. 14, 2011, at A1, *available at* 2011 WLNR 825916. The United Nations' special rapporteur on torture, Juan Mendez, submitted a formal inquiry about the soldier's treatment to the U.S. State Department, and "the nation's best-known leaker of classified secrets," Daniel Ellsberg, who leaked the Pentagon Papers to the news media in 1971, denounced the government's then-seven-month detention of Manning. *Id.* The former-Vietnam War protester dubbed Manning "a courageous patriot." *Id.* A spokesman for the prison where Manning was detained rejected the assertions of mistreatment as "[p]oppycock," adding that Manning's treatment was "firm, fair and respectful" and like that of every other detainee in the facility. *Id.*

To be sure, the prosecution of an American service member for the alleged leak of the largest amount of classified information in U.S. history is a matter of intense public interest and controversy, particularly where, as here, that person's lib-

erty is at stake. Public oversight of the proceeding is of vital importance. Indeed, the interest in openness in this case is not mere curiosity but rather a concern about the very integrity of this nation's government and military courts. But the pervasive secrecy underlying the Manning prosecution has reinforced and indeed fueled a theory that the U.S. government keeps far too many secrets in an attempt to evade public oversight of its misconduct.

While *amici* recognize that various interests, including the need to protect national security information, may justify sealed records, it is hard to fathom that *all* the documents in this case — and *all portions* of those documents — consist of information of such a confidential nature that no part of them can be publicly disclosed. If the public is to have any faith in the justice administered by military tribunals overseeing cases of significant public interest and concern, it needs to have confidence that any misconduct or attempts to shield such behavior is exposed and resolved openly. This is particularly true in a justice system plagued by widespread criticism of its lack of fairness.[8] "People in an open society do not demand infallibility

[8] When the U.S. Department of Defense announced last year that the individuals charged with plotting the Sept. 11, 2001, attacks would be tried before military tribunals rather than in civilian courts, several news media organizations raised unresolved concerns about procedures that denied meaningful access to written pre-trial motions and orders filed in connection with

from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc.*, 448 U.S. at 572.

CONCLUSION

This case presents a stark example of the dangerous extent to which pervasive secrecy in military court proceedings undercuts the appearance of fairness essential to public confidence in the system and fundamental to the proper administration of justice. But this Court has the opportunity to restore public faith in the nation's military courts by applying the same reasoning underlying its holdings that the First Amendment protects a right of public access to courts-martial to recognize a corresponding right of access to the documents filed therein. Such a

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the military commissions at Guantanamo Bay, convincing the department to issue a substantially revised set of media guidelines. *See* U.S. Dep't of Def., Regulation for Trial by Military Commission (2011 Edition). The measures reflect the department's "good faith effort to carry out the guidance given to us to make the proceedings as transparent as practicable . . . We have been committed to that from day one." Kirsten Berg, *Reform Comes Slowly to Guantanamo Bay*, The News Media & The L., Fall 2011, at 27, 28, *available at* http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2011/reform-comes-slowly-guantanam (quoting Pentagon spokesman Bryan Whitman). However, as a news media coalition pointed out in a letter to the Defense Department, as well as Judge Lind and counsel, the lack of similar measures in this proceeding has produced an irony: Stateside journalists covering Manning's court-martial face the same unnecessary degree of secrecy that, prior to adoption of the revised media access guidelines, made reporting on offshore commissions against accused terrorists incredibly difficult.

holding is consistent with U.S. Supreme Court jurisprudence, as well as this Court's own announced principles of openness and acknowledgment of the important interests underlying the presumptive right. For the foregoing reasons, *amici* respectfully request that this Court grant Petitioners-Appellants' motion.

Arlington, VA
4 September 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(D)

I hereby certify that the foregoing brief *amici curiae*:

1) Complies with the type-volume limitations of Rule 24(c) because it contains 4,619 words; and

2) Complies with the typeface and type style requirements of Rule 37 because it was prepared in a monospaced typeface using Microsoft Word Version 2010 with 12-point Courier New font.

Arlington, VA
4 September 2012

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CERTIFICATE OF SERVICE

I hereby certify that on 4 September 2012, I electronically filed the foregoing brief *amici curiae* with the U.S. Court of Appeals for the Armed Forces and contemporaneously served electronically Shayana D. Kadidal, Counsel for Petitioners-Appellants, at shanek@ccrjustice.org, and Capt. Judge Advocate Chad M. Fisher, Appellate Government Counsel, at chad.m.fisher.mil@mail.mil.

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