

Court hears arguments on Bradley Manning trial access

By: [Tal Kopan](#)

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The battle for greater access to court martial proceedings against alleged WikiLeaks source Pfc. Bradley Manning trial went before the military's highest court Wednesday, with groups and individuals demanding that legal briefs, court orders and other records in the case be made public.

But what the five judges of the U.S. Court of Appeals for the Armed Forces seemed most interested in during the hourlong arguments was why the matter had to end up before the court at all.

Manning's trial on charges of aiding the enemy, disclosing classified information and disobeying orders, is set to begin in February. The judges finished Wednesday without giving any indication of when they might issue a ruling — or even whether it will happen before the trial starts.

Before any decision, though, both sides will have to produce an additional filing, explaining whether the court has jurisdiction — the appellants say it does, but the military disagrees.

The attorney for those seeking the documents was pressed Wednesday on whether they had exhausted every avenue to get the documents and on how much a right to public access requires, while the government was asked whether it could be "reasonable" and release the records voluntarily as it is now doing with military commissions at Guantanamo Bay.

The case could be rejected on narrow grounds, or it could produce a landmark ruling establishing a First Amendment right to court martial records akin to rights found to mandate access to civilian court filings.

Shayana Kadidal of the Center for Constitutional Rights, who represents several journalists interested in the Manning trial including WikiLeaks founder Julian Assange, compared the situation to a locked courtroom where the judges do nothing to let in the public — even if the judges didn't lock the doors themselves.

Though the release of documents in the trial has not been explicitly prohibited, the government has not released any, saying it is not constitutionally required to and saying that the Freedom of Information Act is the proper vehicle for requesting any records. Most of the court sessions have been open to the press and public, though a few have been closed and the military judge presiding over the trial sometimes holds lengthy private meetings with lawyers in her chambers.

The judge does not have the authority to order the release of the documents, the attorney for the government, Army Capt. Chad Fisher argued.

However, Kadidal insisted that access to documents as they are being filed is essential and mandated by the First Amendment.

“By denying access to the orders and motions, you’re sapping the media of all the interesting detail, which limits press coverage,” Kadidal said after the hearing. “You’re going to drive the press away of boredom.”

The judges noted that the trial is physically open to the public and said that, after the trial’s conclusion, a verbatim transcript will be made available. Judge Margaret Ryan suggested that those petitioning for access had not explored all their options and was asking for things that it doesn’t even know exist, especially transcripts of closed-door conferences.

Kadidal replied that timely access to all unclassified documents in the case was necessary to understanding the trial, even in person. He said that proper public access to court cases dissuades perjury and allows for independent fact-checking of arguments presented, in addition to being a First Amendment right.

“Courts perform better in their arrival of the truth if there is contemporaneous access,” Kadidal said.

Questioned as to how the document release would work, Kadidal told the court to punt it back to the lower courts after finding the First Amendment applies to the case.

“The most simple and elegant ruling on this issue would be to say the First Amendment applies and let the trial courts work it out,” Kadidal said after the hearing.

The judges didn’t use all their fire on Kadidal, however, slinging pointed questions at Fisher.

The government’s position is that it is not constitutionally required to provide documents, since the Freedom of Information Act offers a vehicle for requesting the information. (Two FOIA requests by members of the press, including one by POLITICO’s Josh Gerstein, have been denied, though none have been submitted by Kadidal’s center).

Fisher argued none of those pressing for access have actually been denied anything — they simply haven’t made the right request to the right person.

However, the judges pressed Fisher hard on why a FOIA request was needed at all and why the government doesn’t simply fork over the documents, which would routinely be available in civilian courts.

“I’m asking why make a constitutional case out of it? Why not be reasonable?” Ryan said.

Chief Judge James Baker drew attention to the fact that the court martial had already established a process for reviewing documents and had given the defense approval to release some of its briefs in redacted form. When asked by the judges why the government can’t just use that system to make records available directly to the public, Fisher repeated that FOIA was the established process.

“Does FOIA purport on its face to be the exclusive mechanism” for court documents, Judge Scott Stucky asked.

Senior Judge Walter T. Cox III also pressed hard on the issue, asking why if the military commission at Guantanamo Bay can put all unclassified documents online, the government can’t in this case. Again, Fisher answered that the Constitution did not require it.

“Do you only do things the Constitution requires and not things good sense condones?” Cox asked.

The judges who sit on the military justice system’s highest court also indicated they were concerned about whether they had jurisdiction to hear the case and asked for additional briefs on that issue. They gave no indication of when they will rule.

After the hearing, Kadidal said that he hopes there will be enough time to sort out the issue, but he said if the military courts don’t “work this out,” those seeking access will go to federal civilian courts and could even request for a stay of the trial.

POLITICO and its parent, Allbritton Communications Co., are among 32 media outlets and organizations that joined in an amicus brief, urging the appeals court to make public the briefs, motions, orders, and docket in the Manning court martial.