"Why can't you be reasonable?" asks judge in the case to end secrecy in Bradley Manning's trial

The CCR argued its case at the Court of Appeals for the Armed Forces today for transparency in Bradley Manning's court-martial trial. Judges questioned why the government forced the issue to come to court at all, instead of simply making the documents public.

By Nathan Fuller. October 10, 2012.

The CCR's Shayana Kadidal

During oral arguments in the Center for Constitutional Rights' lawsuit against the government seeking public access to basic court documents in Bradley Manning's court-martial trial, judges for the Court of Appeals of the Armed Forces demanded the government explain why it wouldn't simply provide these documents in the first place.

When Army lawyer Capt. Chad Fisher said that the court wasn't constitutionally required to provide public access to documents like prosecution briefs, transcripts, and rulings, Judge Margaret Ryan interrupted him to ask what she called a "common sense" question.

"Why can't you just give it to them? Instead of making this a constitutional case, why can't you just be reasonable?"

Fisher was unable to directly answer the question. Instead, he gave an array of responses that circumvented the basic issue: he repeated his belief that the court wasn't obliged to make these records public, he said the fact that the public could attend the hearings meant they were "open,"

he complained that the defense wasn't asking the proper authority, and he reiterated the government's position that the availability of FOIA provided sufficient public and press access.

The five judges repeatedly questioned and challenged each of Fisher's points, particularly the idea that FOIA requests, to which the government frequently takes weeks, months, or even years to respond, provided sufficient and contemporaneous access, especially considering the fact that FOIA requests in this case have already been denied. They also pushed back on Fisher's claim that "Nothing has been withheld" from the public and the press, based on the idea that attending the hearings amounts to fully accessing the proceedings.

"How is oral argument sufficient if you can't read the briefs?" one judge asked.

"It's not as if they're speaking a foreign language," Fisher responded.

But as journalists from the 30 major media outlets who submitted a supportive brief in this case explained, the media (and therefore the public) needs these documents to adequately cover the case:

"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."

Shayana Kadidal, the CCR lawyer arguing in court today, similarly contended earlier this year that providing openness-in-name-only effectively "choked off" coverage of Manning's hearings.

But the judges, not seemingly satisfied with Fisher's responses, kept returning to the more elemental point that the government could avoid this litigation and a potential ruling that would affect courts-martial to come by simply turning over the documents requested. The court already has a process in place to redact documents, the judges noted, and parties settle extrajudicial matters with a compromise out of court all the time, so it seems perfectly feasible for the government to comply with the CCR's reasonable request for access to the documents.

In the midst of this questioning, Fisher did concede what the CCR has long observed: that Guantanamo tribunals – hardly beacons of transparency – were less secretive than Bradley Manning's court-martial, because the public could access filed briefs and transcripts to those proceedings.

The CCR's Kadidal fielded a similar though not quite as lengthy barrage of questioning from the appeals court judges. The first issue they raised was whether this court even has jurisdiction to make a ruling on this case, as their jurisdiction has been narrowly limited and it isn't clear that they have standing to make a ruling that affects the press and public alike. Kadidal responded

that the government hadn't raised this issue in their replies, and so he would need an additional 10 days to file a supplement that addresses the court's jurisdiction.

Judge Ryan also wanted to know whether there was precedent for this court to compel the production of documents that didn't yet exist. She was referring to the CCR's request for transcripts of RCM 802 conferences, the private telephonic meetings Judge Denise Lind holds between Ft. Meade hearings with both the defense and the prosecution. She also wanted Kadidal to account for how exactly the documents would hypothetically be produced: who would transcribe the hearings, or who would pay a stenographer?

Kadidal responded that an audio file would be acceptable, but on the issue more generally, he said he believes the court should make a First Amendment ruling granting the press the right to these documents and let lower courts adjudicate the logistics. Judges replied that it was unclear that the First Amendment affords contemporaneous access to these documents: in other words, it might be wholly constitutional for the court to provide these documents after the fact.

Kadidal will submit his jurisdictional supplement in 10 days, and the government will submit a reply less than a week later. It's unclear when or if this court will issue a ruling, or when exactly the parties might return to court. We'll update our coverage of this case as it unfolds.