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,	:	Crim. App. Misc. Dkt. No. 20120514
	:	USCA Misc. Dkt. No. 12-8027/AR
Appellants,	:	
	:	General Court Martial
v.	:	*United States v. Manning*, Ft. Meade, Maryland
	:	
UNITED STATES OF AMERICA and CHIEF JUDGE COL. DENISE LIND,	:	Dated: 24 August 2012
Appellees.	:	

PETITIONER-APPELLANTS' RESPONSE
PURSUANT TO INTERLOCUTORY ORDER OF 24 JULY 2012

On 24 July 2012, this Court "ordered that the Government file with this Court the ruling and analysis of the military judge regarding [Petitioner-Appellants'] request" for "public access to all documents and information filed in the case of *United States v. Private First Class Bradley Manning*, including the docket sheet, all motions and responses thereto, all rulings and orders, and verbatim transcripts or other recordings of all conferences and hearings before the court-martial." In response to this order, on 3 August 2012 the government filed an excerpt of the authenticated transcript from the Article 39(a) session of

April 24, 2012 in which Judge Lind announced a decision on Petitioners' motion for relief.

While a word-for-word comparison of the transcript to the account given in the Kadidal Declaration (*cf.* Kadidal Decl. ¶¶ 7-9, JA-4-5, with Tr. 18-21) demonstrates some of the difficulty in taking precise notes during a live courtroom proceeding,[1] the substance of the account given in our declaration was entirely accurate: Judge Lind held that neither the First Amendment (nor the Sixth) "mandated access to ... exhibits admitted during a court-martial" and nowhere indicated that she believed the First Amendment guaranteed access to transcripts, orders, and briefs. In the absence of any First Amendment right, she noted (somewhat ambivalently) that the FOIA statute "may" supersede any common law right of public access to the judicial documents in Pfc. Manning's case that might otherwise have been available (see Tr. at 21), and therefore denied the relief Petitioner-Appellants requested.[2]

---

[1] Compare Gov't Br. at 14 n.39 (implying that because Petitioners' declarations related open-court discussions in such detail, release of transcripts would be superfluous and unnecessary); Pet. Reply at 11 n.10 (responding to same).

[2] Needless to say, in so ruling Judge Lind made no "document-specific finding of justification for restricting all access to each of these documents, after careful consideration of less-restrictive alternatives," Pet. Br. at 24, as required by First Amendment strict scrutiny.

That holding neatly tracks Judge Lind's conclusions in the law review article on public access to courts-martial she published twelve years ago,[3] and is further confirmation of what we posited in our briefs: "it seems likely that the only reason Judge Lind did not find in favor of public access to the documents and proceedings at issue here is that she believed this Court and the A.C.C.A. have not yet held that the First Amendment applies to guarantee public access to anything other than the courtroom itself." Pet. Reply at 26; *see also* Pet. Br. at 28 n.9. Given the extraordinarily high profile of these proceedings, Judge Lind's statements make it imperative for this Court to make it absolutely explicit that the First Amendment applies to mandate release of judicial documents in courts-martial (as should already be clear from the *Scott* case[4] (for Army proceedings at the least), and from U.C.M.J. Article 36 and the tenor of R.C.M. 806 as well). Moreover, this Court should make it clear that the First Amendment mandates contemporaneous release of judicial documents. *See* Pet. Br. at 15–18; Pet. Reply at 3–7.

The government's filing also demonstrates what really needed no further proof: that there can be no justification for failure

---

[3] Lt. Col. Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 Mil. L. Rev. 1, 45–53 (2000).

[4] *United States v. Scott*, 48 M.J. 663 (A.C.C.A. 1998); *see also* Pet. Br. at 21–22, Pet. Reply at 13, 21.

to release transcripts of open court proceedings. The twenty-one pages of transcript the government has filed on the public record in this Court were filed without a single redaction. Nor can there be any justification for failing to publish the trial court's many orders, most obviously those that were read into the record during open court proceedings. *See, e.g.*, Tr. at 5–10 (trial court reciting into the record the full text of its Security Order); Tr. at 11 (full text of court's order with respect to amicus briefs); Tr. at 13–18 (full text of court's Interim Protective Order). Indeed, the government was not required by this Court's Interlocutory Order to file the portions of the transcript that disclose any of these three orders.[5] That it did so, without filing them under seal or redacting any portion of them, is simply another indication that most of the trial court's orders can be filed publicly with no harm to the government or the integrity of the trial.

The brief excerpt of the transcript filed with this Court also contains at least one indication that the failure to publish transcripts and orders may prejudice third parties seeking to assert their interests in the proceedings. At page 11 of the transcript, the trial court notes that it "has been advised that there may be non-parties who will move the Court for leave to

[5] This Court's 24 July 2012 Order required only that the government file "the ruling and analysis of the military judge" regarding "public access to all documents."

file an *Amicus Curiae* brief. The Court will not grant leave for a non-party to file an *Amicus* brief. The government or the defense may attach such a filing by a non-party as part of the brief filed within the suspense dates set by the Court." Absent publication of this order or of the transcript of the session in which it was announced, only those potential amici actually present in the courtroom would be aware that they were subject to this order. Of course, the rule announced gives the parties control over which amici may present their arguments to the court, so it is hardly surprising that neither party objected to this procedure. But any other potential amici not firmly aligned with the interests of the government or Pfc. Manning would likely have no knowledge of this rule and the deadlines mandated by the rule, and might end up investing huge amounts of effort in drafting briefs that end up yielding no benefit to the court or the public good. It is hard to imagine how this lack of transparency about basic ground rules will operate to aid the trial court in coming to proper resolutions of the many complex issues of first impression that will be presented during the course of the proceedings. And this is just one example of hidden lawmaking, contained in just fifteen lines of transcript on just one day of the pretrial proceedings. There may be many others.

The relief Petitioner-Appellants request here is not burdensome. Documents should ordinarily be made accessible to the pub-

lic in the normal course of events, just as courtroom sessions are. Publication of the documents should be made contemporaneous with the judicial proceedings to which they are relevant. Should the government assert a need to alter the First Amendment's default presumption of openness, the press and public are entitled to advance notice, an opportunity to participate in the judicial decisionmaking, and an adequate record of decision sufficient to facilitate later appellate review. As part of this process, the government must articulate with specificity a compelling interest in closure. The trial court must then engage in strict scrutiny analysis: it must carefully and skeptically review the asserted interest to ensure that it in fact rises to the level of a "compelling" interest in closure; make specific, on the record findings demonstrating that closure is essential to serve that compelling government interest; and assure itself that whatever restrictions on public access it orders are narrowly tailored to serve that interest by considering less drastic alternatives, again providing specific reasons and factual findings that support rejecting those alternatives. *See* Pet. Br. at 18–19 (setting forth standard and quoting cases for each point above), *id.* at 37–38 (summarizing same).

Application of First Amendment strict scrutiny does not mean that every filing in the trial court will be released in unexpurgated form to the public, or that every private conference at the

bench will be thrown open. Under strict scrutiny the government could still argue that national security interests are compelling enough to require redaction of specific items of information from certain documents prior to publication,[6] or require closure of the courtroom for certain arguments that touch on sensitive factual information or for certain presentations of evidence. Trivial administrative matters with no implications for third parties may be hashed out outside of public hearing in R.C.M. 802 conferences, so long as the requirement of a later public-record summary is complied with. There may be grounds to keep matters discussed in sidebars hidden from the public during trial when that is necessary to keep the discussion from the ears of the sitting military jury. But in every hypothetical noted above, the denial of public access will easily meet the requirements of strict scrutiny (so long as the facts support the government's assertions of necessity).

It is perhaps understandable that the trial court, fearful in light of what it (mistakenly) perceives as a lack of clear precedent for application of the First Amendment, has chosen to blanket the Manning trial in secrecy. But its default presumption

---

[6] Again, classification review and other redaction processing of documents should not become an excuse for non-contemporaneous publication: the military commissions at Guantanamo mandate production of public versions of even classified-information containing documents within 15 days of filing. *See* Pet. Br. at 26-27 (citing Kadidal Decl. ¶¶ 18-19 (JA-7-9)).

against transparency serves no one's interests – least of all the interests of the government, which will see the legitimacy of any conviction questioned if the current status quo prevails. We urge this Court to speedily alter that status quo. As we have stated previously, "[d]oing so is vital if the military justice system is to be taken seriously as the equivalent of the civilian criminal justice system in terms of fairness, accuracy and transparency."[7]

New York, New York
Dated: 24 August 2012

Respectfully submitted,

/s/sdk

Shayana D. Kadidal [8]
[C.A.A.F. Bar No. 35713]
J. Wells Dixon
Baher Azmy, Legal Director
Michael Ratner, President Emeritus
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6438
Fax: (212) 614-6499

Jonathan Hafetz
169 Hicks Street
Brooklyn, NY 11201
Tel: (917) 355-6896

Counsel for Petitioner-Appellants

[7] Pet. Reply at 27-28.

[8] Petitioner-Appellants' lead counsel, Mr. Kadidal, has since our last filing been admitted to the Bar of this Court. He will be resident at the University of Michigan Law School for the majority of the 2012-2013 academic year but is available, should the Court schedule oral argument, for most of the next two months.

Certificate of Service

I hereby certify on this 24th day of August, 2012, I caused the foregoing Supplemental Brief to be filed with the Court and served on Respondents 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 or courier delivery, at the following addresses and facsimile numbers, respectively:

Clerk of the Court
U.S. Court of Appeals for the Armed Forces
450 E Street, NW
Washington, DC 20442-0001
Tel: (202) 761-1448
efiling@armfor.uscourts.gov

- and -

U.S. Army Court of Criminal Appeals
Office of the Clerk of Court
9275 Gunston Road
Fort Belvoir, VA 22060-5546

- and -

Chief Judge Col. Denise Lind
U.S. Army Trial Judiciary, 1st Judicial Cir.
U.S. Army Military District of Washington
Office of the Staff Judge Advocate
103 Third Ave., SW, Ste 100.
Ft. McNair, DC 20319

- and -

David E. Coombs (counsel for Pfc. Manning)
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Tel: (508) 689-4616
(COURTESY COPY)

- and -

Capt. Judge Advocate Chad M. Fisher
Appellate Government Counsel
Office of the Judge Advocate General
U.S. Army Legal Services Agency
9275 Gunston Rd.
Ft. Belvoir, VA 22060
Tel: (703) 693-0783
chad.m.fisher.mil@mail.mil

/s/sdk
Shayana Kadidal