IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CENTER FOR CONSTITUTIONAL RIGHTS, et al., Plaintiffs, v. CHIEF JUDGE COL. DENISE LIND, et al., Defendants.	Civil Action No. _____

***EX PARTE* MOTION TO SHORTEN TIME ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs, members of the public and the news media, have moved for a preliminary injunction to stop defendants from continuing to irreparably harm them by refusing to provide access to judicial documents (and certain closed proceedings) in the court-martial proceedings for PFC Bradley Manning.

Plaintiffs hereby move *ex parte*, pursuant to Federal Rule of Civil Procedure 6(c)(1)(C), Local Civil Rule 105(2)(a), and the Court's inherent power to manage its docket, for an order shortening the time for defendants to file response and reply briefs on plaintiffs' Motion for Preliminary Injunction filed herewith, and setting a hearing date during the week of June 3.

A shortened briefing and an accelerated hearing date on plaintiffs' Motion for Preliminary Injunction is necessary and in the interest of justice. Plaintiffs are members of the press and public who seek to vindicate their First Amendment rights of public access to documents and proceedings that are part of PFC Manning's court-martial. As a matter of law the Supreme Court has repeatedly held that the loss of First Amendment rights "for even minimal periods of time"

constitutes irreparable harm, *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also N.Y. Times v. United States*, 403 U.S. 713, 715 (1971) (Black, J., concurring) (same); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 609 (1976) (Brennan, J., concurring) ("Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." (quoting Alexander Bickel, The Morality of Consent 61 (1975))).

The fact that the First Amendment recognizes a right of contemporaneous access to judicial proceedings and documents generated therein is simply more proof of the fundamental principle that this type of First Amendment injury constitutes *per se* irreparable harm. *See* Memorandum in Support of Preliminary Injunction, at 17-19 (citing cases). Every moment that the press and public are denied access to information they are entitled to receive concerning the functioning of organs of their government (here, both the court-martial and the conduct of the prosecution as well) constitutes irreparable harm. *See, e.g.*, *Grove Fresh Distribs. v. Everfresh Juice Co*., 24 F.3d 893, 897 (7th Cir. 1994) ("'[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment.'").

This is especially the case for plaintiffs like those in the instant case who are members of the news media or otherwise engaged in public advocacy. For these groups, "stale information is of little value." *Payne Enterprises, Inc*. v. *United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). Innumerable federal courts have held that, given the "perishable nature of news," delay in access to records requested by the press "can constitute an irreparable injury." *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1099 (9th Cir. 1999). The commencement of Manning's trial on June 3, after more than a year and a half of pretrial proceedings, should be expected to generate a tremendous expansion in the amount of media interest in the case. The trial is only expected to last for twelve weeks. Every day plaintiffs and other members of the media have to

wait for relief diminishes the odds that they will have a meaningful opportunity to review and report on the records before the trial is over. *Cf. United States v. Wecht*, 537 F.3d 222, 229-30 (3d Cir. 2008) ("the value of contemporaneous disclosure, as opposed to post-trial disclosure, is significant enough to justify our immediate review of the matter under the collateral order doctrine [on a media-petitioner's appeal].).

The court-martial and the government should also have the benefit of a ruling from this court on the First Amendment standards as promptly as possible. The Supreme Court has repeatedly stated that openness has a positive effect on the truth-determining function of proceedings. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) ("Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (open trials promote "true and accurate fact-finding") (Brennan, J., concurring); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("[P]ublic scrutiny enhances the quality and safeguards the integrity of the factfinding process."). It goes without saying that improving the accuracy of proceedings is a paramount concern of all parties involved – the defense, the prosecution, and of course the general public as well. It is also well-established that public access must be contemporaneous with the actual proceedings in order to maximize this error-correcting aspect of openness, making expedited relief all the more vital. In short, openness should benefit all relevant parties involved – the prosecutors, the defense, the court-martial itself, and of course the press and the general public as well – and the sooner it is achieved, the better for all parties.

The government can hardly complain that it will be prejudiced by a shortened schedule. Government lawyers have been engaged in litigation of this issue with this same group of plain-

tiffs for very nearly a year now, plaintiffs having first filed a petition for extraordinary relief in the Army Court of Criminal Appeals (ACCA) on May 24, 2012. The issues have now been briefed twice in military courts of appeals – first in the ACCA in May and June 2012, then again in the Court of Appeals for the Armed Forces (CAAF) from June thru October 2012. The government has had ample time to prepare its arguments on the merits.

Plaintiffs have been diligent in pursuing relief, having filed their appeal to the CAAF just five days after the ACCA's denial of relief in June 2012. Unfortunately, the CAAF took six and a half months to issue its decision after oral argument. As a result, plaintiffs have only been able to file this action less than two weeks before the start of the Manning trial. Plaintiffs did not seek a Temporary Restraining Order here because the relief we seek – a declaration that the First Amendment applies to these documents (contrary to Judge Lind's legal conclusion) and an order that the trial court apply First Amendment standards to any redactions, sealings, or court closures the government proposes – will invariably take some amount of time for the trial court to work through. Because that process will be an ongoing one, it seems the wisest use of the time and resources of the plaintiffs, the parties in the court-martial, and the court-martial itself to have the active participation and input of government counsel on the form of the initial preliminary injunction order to be issued by this court. Having said that, however, it is important to note that the vast majority of documents plaintiffs seek should be amenable to immediate release, given the fact that most of the orders and filings were read aloud or discussed in open court.

Plaintiffs therefore request that this Court set a schedule as follows: Defendants may file and serve their opposition to plaintiffs' Motion for Preliminary Injunction no later than Thursday, May 30, 2013; plaintiffs may file and serve their reply no later than Monday, June 3, 2013;

and this Court should set a hearing on the Motion for Preliminary Injunction during the week of June 3, 2013.

"An application to vary the time requirement [for hearing motions in rule 6] may be heard ex parte." 4B Wright, Miller & Kane, Fed. Prac. & Proc. Civ. § 1169 at 582. Far shorter periods of time than that proposed here have been found acceptable under due process challenge. *See Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1153 (10th Cir. 2001) (district court did not abuse its discretion in scheduling preliminary injunction hearing within 3 days of plaintiff's motion for injunctive relief; "Rule 65(a)(1) provides, in relevant part, that 'no preliminary injunction shall be issued without notice to the adverse party.' Neither the Rule nor the advisory committee notes specify the form or amount of notice required."); *CIENA Corp. v. Jarrard*, 203 F.3d 312, 319 (4th Cir. 2000) ("broad discretion is given to the district court to manage the timing and process for entry of all interlocutory injunctions – both TROs and preliminary injunctions – so long as the opposing party is given a reasonable opportunity, commensurate with the scarcity of time under the circumstances, to prepare a defense and advance reasons why the injunction should not issue."). The essential requirement is that the defendant be "given a fair opportunity to oppose the application and to prepare for such opposition." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 433 n.7 (1974); *DOL v. Wolf Run Mining Co.*, 452 F.3d 275, 283 (4th Cir. 2006) (Fourth Circuit has "focus[ed] not on a specific time period but on whether the opposing party had a fair opportunity to oppose" preliminary injunction motion). Plaintiffs' proposed schedule meets that requirement.

Nonetheless, counsel for plaintiffs have contacted the government's counsel in the CAAF proceedings, Capt. Fisher, in an effort to reach a stipulation to the briefing and hearing schedule

outlined above. Since that initial contact, plaintiffs' counsel have also communicated with attorneys in the United States Attorney's Office for the District of Maryland, who indicated that they were not yet in a position to evaluate the proposed schedule.

Respectfully submitted,

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Dated: May 22, 2013

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[PROPOSED] ORDER

This Court, having considered plaintiffs' ex parte Motion to Shorten Time for Briefing and Hearing pursuant to Fed. R. Civ. Proc. 6(c)(1)(C) and Civil Local Rules 105(2)(a), and the papers submitted, and good cause having been shown, hereby **GRANTS** plaintiffs' Motion to Shorten Time for Briefing and Hearing.

Defendants may file and serve their opposition to plaintiffs' Motion for Preliminary Injunction no later than May 30, 2013. Plaintiffs may file and serve their reply no later than June 3, 2013. A hearing on the Motion for Preliminary Injunction shall be held on June ___, 2013.

SO ORDERED.

Dated:

_____
HON.
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Ex Parte* Motion to Shorten Time on Plaintiffs' Motion for Preliminary Injunction with the Clerk of the Court for the United States District Court for the District of Maryland by using the CM/ECF system on May 22, 2013.

Paper copies were also served on the parties at the following addresses by overnight courier:

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