ZUCKERMAN SPAEDER LLP

100 E. PRATT STREET SUITE 2440
BALTIMORE, MD 21202-1031
410.332.0444 410.659.0436 fax www.zuckerman.com

WILLIAM J. MURPHY
410 949 1146
wmurphy@zuckerman.com

June 18, 2013

VIA ECF

Hon. Ellen L. Hollander
U.S. District Judge
U.S. District Court for the District of Maryland
101 W. Lombard St.
Baltimore, Maryland 21201

Re: Center for Constitutional Rights et al v. Col. Denise Lind et al., Civil Action No. ELH -13-1504

Dear Judge Hollander:

I write to clarify one aspect of the argument presented by Mr. Kadidal yesterday on behalf of the plaintiffs. We indicated to the Court, in part through an exhibit handed up at the hearing, that plaintiffs had been unable to find on the Army's FOIA website many trial documents that we expected to have been posted based on Col. Van Eck's Declaration. As counsel for defendants suggested, and as your staff apparently confirmed during the hearing, we were indeed looking at the wrong link. Our list was based on the link cited in Col. Van Eck's Declaration (https://www.rmda.army.mil/foia/FOIA_ReadingRoom/Detail.aspx?id=84), whereas the new documents had been posted to a separate "reading room" reached through a slightly different link (https://www.rmda.army.mil/foia/FOIA_ReadingRoom/Detail.aspx?id=85). We were unaware of the separate reading room until yesterday, and apologize for that error.

Having said that, the correct link does not appear to include all the documents that we seek, although to be sure it contains many more than we knew about at the hearing. Our preliminary analysis as of late last night suggested that approximately 70 documents, mostly exhibits, were filed or introduced on June 10-12 but did not appear in the reading room. (It does appear that stipulated testimony has been posted to the reading room within a day after use.) Based on this analysis and on Col. Van Eck's declaration, which did not promise posting of trial exhibits, our inference was that the Army did not intend to post trial exhibits on the FOIA website, at least not on the schedule suggested in Col. Van Eck's declaration.[1] As we finalized

[1] We contend this is impermissible. The Fourth Circuit has consistently held that admitted exhibits are subject to the First Amendment right of access. *See In re Associated Press*, 172 Fed. Appx. 1, 5 (4th Cir. 2006) (unpublished) (in mandamus action "seeking contemporaneous access to documentary exhibits admitted into evidence in the course of the sentencing phase trial of Zacarias Moussaoui," court of appeals concluded: "As for documentary exhibits that have been admitted into evidence and fully published to the jury, we conclude that the district court abused its

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this letter this morning, however, the Army posted 13 additional documents to the website, which appear to consist of trial exhibits. At this point, therefore, we are not confident we understand the Army's intentions with respect to trial exhibits, although we continue to maintain that the defendants are not in compliance with the First Amendment and common law access standards discussed in our papers.

Two other matters arose at the hearing that required follow-up. First, I am attaching a copy of the report of the *United States v. Smalley* decision in the Media Law Reporter. Second, in response to the Court's question at oral argument, the best example cited in plaintiffs' briefs of a case where a district court directed a preliminary injunction mandating First Amendment access to the proceedings of a coordinate court is *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002), *aff'd*, 303 F.3d 681 (6th Cir. 2002) (Court of Appeals decision cited at PI Br. at 37). In that case the district court issued preliminary injunctive relief during the pendency of the immigration hearing process. *See* 195 F. Supp. 2d at 941. The Sixth Circuit affirmed, holding that while there might be grounds for deference to the executive and/or the Article I immigration courts on matters of substantive immigration law, no such deference was owed on matters relating to the rights of the general public, such as the right to public access at issue in the case. *Cf.* Gov't Br. at 23 n.7. The same logic should apply here; as noted at argument, this Court owes the military courts no deference on issues involving the public's right of access, especially in light of UCMJ § 836.

Thank you for your consideration.

Respectfully submitted,

/s/ William J. Murphy

William J. Murphy

cc: all counsel (ECF)

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discretion in denying access. 'Once … evidence has become known to the members of the public… through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.'" (quoting *United States v. Myers (In re Nat'l Broad. Co.)*, 635 F.2d 945, 952 (2d Cir. 1980))); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (First Amendment applies to supporting documentary exhibits filed with summary judgment motion); *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 577-80 (4th Cir. 2004) (affirming district court's unsealing of eight exhibits under First Amendment right of public access); *Stone v. University of Maryland Medical Sys. Corp.*, 948 F.2d 128 (4th Cir. 1991) (documents filed as exhibits in civil action subject to First Amendment right of access).