WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES	)	EXPEDITED CONSIDERATION
	)	REQUESTED
v.	)	
	)	
Chief Special Warfare Operator	)	
EDWARD GALLAGHER	)	
U.S. Navy,	)	
	)	
Accused.	)	

MOTION OF GLOBAL MILITARY JUSTICE REFORM
AND EUGENE R. FIDELL TO UNSEAL COURT ORDER

This is a motion for public access to court records filed on behalf of Global Military Justice Reform, an online news and opinion site established in 2014, and its editor, Eugene R. Fidell.

Movant Global Military Justice Reform is online at globalmjreform.blogspot.com. To date it has had nearly 690,000 visits from readers in 185 jurisdictions around the world.

Movant Fidell, a graduate of the U.S. Naval Justice School, teaches Military Justice at Yale Law School. He is the author of *Military Justice: A Very Short Introduction* (Oxford 2016) and a co-author of the casebook *Military Justice: Cases and Materials*, the third edition of which is in preparation.

BACKGROUND

This is among the highest profile courts-martial in recent memory. The charges are extremely serious and have understandably attracted widespread attention across the United States as well as in Afghanistan and around the world. Yesterday, we learned from press reports, the Court issued a sealed Order disqualifying the Trial Counsel. We are hard-pressed to recall similar relief having been granted by a Military Judge in any of the armed forces. The Order is reportedly under seal. It appears not to be available on any public, private or agency website. Hard copy has not to our knowledge circulated within the military justice community. If press accounts of the Order and the circumstances under which it was issued are accurate (and we have no reason to believe otherwise), it seems highly unlikely that a comparable ruling would have been sealed if the same issues had arisen in a case in federal district court. *Cf.* Art. 36(a), UCMJ. We cannot frame a reason why a different approach is warranted in the context of a general court-martial.

RELIEF REQUESTED

Movants respectfully request that the Court unseal its 3 June 2019 Order removing Trial Counsel and make it publicly available forthwith. Immediate relief is needed given the importance of the case and the high level of interest it has understandably attracted here and in other countries.

BASIS FOR RELIEF

1. The First Amendment Right of Access Applies to the Court's Order

A qualified right of public access to the proceedings and records of military criminal prosecutions is mandated by the Constitution of the United States. This right can only be overcome by findings of fact demonstrating a compelling need to deny access and an absence of any adequate alternative measures. Even then, a restriction on the right of access must be no broader than necessary to be effective. No such factual findings have been made, or could be made, to justify the refusal to afford public access to the 3 June 2019 Order.

The First Amendment to the Constitution "protects the public and the press from abridgement of their rights of access to information about the operation of their government." *Richmond Newspapers*, 448 U.S. at 584 (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-06 (1982) (same); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-510 (1984) ("*Press-Enterprise I*"); (recognizing First Amendment right of public access to *voir dire* proceedings); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) ("*Press-Enterprise II*") (same as to preliminary hearings in a criminal prosecution). The scope of this qualified constitutional right was first defined by the U.S. Supreme Court in *Richmond Newspapers*. As the Court put it in *Globe Newspaper*, the First Amendment right of access is based upon

> the common understanding that a "major purpose of that Amendment was to protect free discussion of governmental affairs." By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

457 U.S. at 604 (citation omitted). *Richmond Newspapers* "unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." 448 U.S. at 583 (Stevens, J. concurring).

This First Amendment right of public access attaches to proceedings of adjudicative military tribunals. *See, e.g.*, *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) (absent adequate justification clearly set forth on the record, "trials in the United States military justice system are to be open to the public"):

> "We believe that public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public." . . . Public scrutiny of the courts-martial "reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process."

Id. at 731 (citations omitted); *See also*, *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (finding First Amendment right of public access to courts-martial); *United States v. Hershey*, 20 M.J. 433, 436 & 438 n.6 (C.M.A. 1985) (same); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Cr. App. 1998) (same); *United States v. Story*, 35 M.J. 677, 677 (A. Ct. Cr. App. 1992) (per curiam) (same).

Indeed, judges within the military justice system have long recognized that openness significantly assists the functioning of the adjudicative process. "A public trial is believed to effect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury." *Hershey*, 20 M.J. at 436. Even before the Supreme Court recognized the right of access to criminal proceedings in *Richmond Newspapers*, the Court of Military Appeals had identified the functional benefits of public proceedings: (1) improving the quality of testimony; (2) curbing abuses of authority; and (3) fostering greater public confidence in the proceedings. *See United States v. Brown*, 22 C.M.R. 41, 45-48 (C.M.A. 1956), *overruled, in part, on other grounds by United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977); *see also Anderson*, 46 M.J. at 731 n.2; *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (same: "The first amendment right of access is, in part, founded on the societal interests in public awareness of, and its understanding and confidence in, the judicial system. . . .").

2. No Proper Basis Has Been Established for Sealing the Court's Order

While the First Amendment access right is not absolute, it can only be overcome by specific findings of fact justifying the closure of proceedings or the sealing of records. A party that seeks to deny the right of access must show that "the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (quoting *Globe Newspaper Co.*, 457 U.S. at 607-07); *see Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277-78 (D.C. Cir. 1991) (same); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123-24 (2d Cir. 2006) (same). Thus, before the First Amendment right of access may be restricted, four distinct factors must be satisfied:

(a) Compelling Interest: No proceeding may be closed without factual findings demonstrating a substantial probability that public access will harm a compelling governmental interest. *See, e.g., Richmond Newspapers*, 448 U.S. at 581 (Burger, C.J.); *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14; *United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995).

(b) No Alternative: No proceeding may be closed unless there is no alternative to closure that can adequately protect the threatened interest. As the Second Circuit explained in *In re The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984), a "trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue." *See also, e.g., Press-Enterprise II*, 478 U.S. at 13-14; *Doe*, 63 F.3d at 128; *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982).

(c) Narrow: If no adequate alternative exists, a closure or sealing order must be no broader than necessary to protect the threatened interest. *See, e.g., Richmond Newspapers*, 448 U.S. at 581 (Burger, C.J.); *Press-Enterprise II*, 478 U.S. at 13-14; *Doe*, 63 F.3d at 128; *In re Matter of New York Times Co.*, 828 F.2d 110, 116 (2nd Cir. 1987). If a more narrowly tailored means of protecting the interest exists, it must be employed to limit any impact on the public's access rights. *See Press-Enterprise I*, 464 U.S. at 510-13.

(d) Effective: Any order limiting access must be effective. The public's rights must not be restricted for a futile reason. *See Press-Enterprise II*, 478 U.S. at 14

(party seeking secrecy must demonstrate that "closure would prevent" harm sought to be avoided; *Herald*, 734 F.2d at 101 (closure order could not stand if "the information sought to be kept confidential has already been given sufficient public exposure"); *Associated Press v. U.S. Dist. Court.*, 705 F.2d 1143, 1146 (9th Cir. 1983) ("there must be a 'substantial probability that the closure will be effective in protecting against the perceived harm'") (citation omitted).

Accord Scott, 48 M.J. at 665-66 (military judge must find a compelling interest and narrowly tailor any sealing of a court exhibit).

To our knowledge, none of the above constitutionally-imposed standards were applied before the decision was made to seal the Court's 3 June 2019 Order. The failure to enforce the public access right scrupulously is particularly troubling where this prosecution is being so closely watched, and the need for transparency is so critical. It is especially important that proper procedures are followed and that this prosecution is fully transparent to U.S. citizens, so they may have confidence in whatever verdict may result.

3. The Right of Access Is a Right of *Contemporaneous* Access; Immediate Relief is Needed Because Access Delayed is Access Denied

The right of public access guaranteed by the First Amendment is a right of *contemporaneous* access. *See, e.g.*, *Lugosch*, 435 F.3d at 126-27 (emphasizing "the importance of immediate access where a right to access is found"); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 664 (3d Cir. 1991) (noting public interest in the ability "to make a contemporaneous review of the basis of an important decision"); *Robinson*, 935 F.2d at 287 (recognizing "the critical importance of contemporaneous access"); *In re Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980) (recognizing significant public interest in affording contemporaneous access to evidence "when public attention is alerted to the ongoing trial").

As the Supreme Court observed in *Nebraska Press Association v. Stuart*, "[d]elays imposed by the governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." 427 U.S. 539, 560-61 (1976). Thus, courts have found that even temporary delays in release of information concerning criminal proceedings are unacceptable. *See, e.g.*, *Associated Press*, 705 F.2d at 1147 (delay of release of filed documents for 48 hours violates right of access); *Brooklier*, 685 F.2d at 1172-73 (delaying release of transcript of closed suppression hearing until end of trial violates right of access); *United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994) (ten-day delay in release of transcript of closed hearing violates right of access).

Indeed, the military courts have stayed Article 32 investigations that have been closed and have expedited review of the closure orders precisely because "awaiting relief in the ordinary course of appellate review would be an inadequate remedy to preserve the public interest . . . ." *Denver Post Corp.*, Army Misc. 20041215, at 6 (lifting stay of Art. 32 proceeding only upon release of redacted transcript of improperly closed portion); *see ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997) (granting immediate Writ of Mandamus directing Art. 32 proceedings to be opened before issuance of written decision).

Put simply, so long as the 3 June 2019 Order is withheld from public scrutiny, "'each passing day may constitute a separate and cognizable infringement of the First Amendment.'" *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1979) (Blackmun, J., in chambers) (quoting *Nebraska Press*

Ass'n, 423 U.S. at 1329 (Blackmun, J., in chambers)); *Lugosch*, 435 F.3d at 126-27 ("'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury'") (citation omitted).

To keep a document like the Order away from the public's scrutiny does not foster public confidence in the administration of justice. The Order is newsworthy and movants wish to reproduce or link to it on the blog. Readers of the blog should not have to rely on leaks and incomplete descriptions of such a document. Movants have no interest in this matter other than their interest in the prompt dissemination of important developments in military justice and thereby fostering improved public understanding of military justice.

Expedited consideration of this motion is respectfully requested because of the high public interest in this case.

Respectfully submitted,

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* This motion was prepared by the Media Freedom & Information Access Clinic, a program of the Floyd Abrams Institute for Freedom of Expression at Yale Law School. It does not purport to express the School's institutional views, if any."

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I have, this 4th day of June, 2019, served the foregoing motion by emailing copies to the Military Judge, Captain Aaron Rugh, aaron.rugh@navy.mil; Assistant Trial Counsel, Captain Connor McMahon, connor.mcmahon@usmc.mil; and Civilian Defense Counsels, Timothy C. Parlatore, timothy.parlatore@parlatorelawgroup.com, and Marc L. Mukasey, Marc.Mukasey@MFSLLP.com.

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