

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, BRADLEY E., PFC
U.S. Army, (b) (6)
Headquarters and Headquarters Company, U.S.
Army Garrison, Joint Base Myer-Henderson Hall
Fort Myer, VA 22111

)
) REQUEST FOR PUBLIC ACCESS;
) OR, IN THE ALTERNATIVE,
) MOTION TO INTERVENE TO
) VINDICATE THE RIGHT TO
) PUBLIC ACCESS

) DATED: May 31, 2013
)

RELIEF SOUGHT

1. Pursuant to Rules of Court-Martial 806(a), 806(b) and 806(c), Petitioners William Simpich, Scott Galindez, and Kay Rudin of Reader Supported News make a request for public access; or, in the alternative, move to intervene to vindicate the right to public access and seek an order permitting full public and media access to the proceedings of the Manning court-martial.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The burden of persuasion is placed on the moving party. R.C.M. 905(c)(2). The party that is seeking to prevent the media right of access has the burden of proof to show, in specific, on the record, findings that (1) closure is essential to preserve higher values or compelling interests; (2) individualized, case-by-case findings that justify each closure; (3) closure is narrowly tailored to serve the compelling interest. *Press Enterprise Co. v. Superior Court*, 464 US 501, 513 (1984); *Press Enterprise v. Superior Court*, 478 US 1, 9-14 (1984).

ARGUMENT

3. PFC Bradley E. Manning was arrested in May 2010 and eventually was charged in this court-martial with various offenses arising from his alleged leaking of government documents to Wikileaks. His trial is scheduled to begin on June 3, 2013, at the Ft. George G. Meade military installation in Anne Arundel County, Maryland.

4. Manning's trial and his treatment during his confinement have been the subject of intense national and international media scrutiny. Nevertheless, although the public has been permitted to attend some portions of Manning's pretrial court-martial proceedings, petitioners allege that reasonable media access to the trial proceedings has been denied in the following ways:

5. The courtroom has ten seats for the media and the public. A media operations center

outside of the courtroom has been created to seat 70 members of the media corps, who will have access to their laptop computers to type their observations. In the past, a theater was made available as an "overflow room", which may be made available again for the more than 270 members of the media, as well as the general public, who will be unable to access the press room or the courtroom.

- A. Based on past experience, the media and public barred from the courtroom and media operations center will be consigned to the overflow room, where they will only be able to passively watch these transmissions and write down their observations with pen and pencil. This situation creates a two-tier system -- those who can type their observations, and those who cannot.
 - B. The court is exercising its discretion to have the military provide video and audio transmissions to the press and the public in the press room and the overflow room. However, the press and the public will not be allowed to capture the video and audio even though the military will retain the ability to capture these transmissions. This situation creates a two-tier system -- those who can capture the transmissions, and those who cannot.
 - C. Two courtroom artists have been given access to the courtroom throughout the proceedings, and that relationship seems likely to continue. Petitioner Kay Rudin, the courtroom artist with Reader Supported News, deserves an equal opportunity to access to the courtroom. A courtroom artist cannot accurately convey to the public what is going on in the courtroom without direct access to the courtroom itself. This situation creates a two-tier system -- those who can portray the proceedings, and those who cannot.
 - D. Petitioners William Simpich and Scott Galindez are reporting on the Manning trial for Reader Supported News. They were mandated to provide articles on their previous military coverage as a prerequisite for obtaining credentials. These previous articles were critical of the military and its procedures. Mr. Simpich, Mr. Galindez, and Ms. Rudin have been denied press credentials, and are now forced to struggle for a spot in the overflow room without knowing the basis for their exclusion. These petitioners believe it is on the basis of their reporting and/or their association with one another. These petitioners are also informed that the stenographer hired by the Guardian newspaper from the United Kingdom at considerable expense was denied access to the media observation room, which means that she cannot perform her duties which would aid the entire media corps and the public.
6. Due to the facts above, these petitioners, as well as the media and the public, are unable to engage in careful observation and analysis in one of the most important cases involving the alleged disclosure of classified information since the Pentagon Papers.
7. Rule of Court-Martial 806(a) states that the court-martial shall be open to the public. The Discussion of this rule states that "when public access to a court-martial is limited for some reason, including lack of space, special care must be taken to avoid arbitrary exclusion of

specific groups or persons. This may include allocating a reasonable number of seats to members of the press and to relatives of the accused." This directive is made more specific by Rule 806(b), which states that when specific persons are excluded from the courtroom, "the military judge must make findings on the record establishing the reason for the exclusion, the basis for the military judge's belief that exclusion is necessary, and that the exclusion is as narrowly tailored as possible". The petitioners have the right to know the process that was used to determine who was excluded from the courtroom and/or the media room, and whether the judge made the narrowly tailored findings as mandated by Rule 806.

8. Rule 806(c) states that video or audio transmission is generally barred, but that "the military judge may, as a matter of discretion, permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing...by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators".

9. Neither Judge Lind, nor any other government official, has indicated in the military court proceedings that the denial of public access as described is necessitated by a need to preserve secrets or classified information or to promote any other legitimate governmental interest.

10. A cloak of secrecy has been drawn over the Manning proceedings despite written requests made by several of the named plaintiffs (made on their own behalf and on behalf of the public) and by various other media organizations to the military court seeking greater public access on issues involving access to pretrial hearings and specific documents. On these issues, Judge Lind construed a letter from the Center for Constitutional Rights as a motion to intervene for the purpose of seeking to vindicate the right of public access to the Manning proceedings, and denied the motion. The Court of Appeals for the Armed Forces (CAAF) ultimately held, in a recent 3-2 decision, that the military appellate courts lacked jurisdiction over plaintiffs' claims. As the CAAF dissenters suggested, the Center for Constitutional Rights have now filed an action in an Article III Court.

11. As set forth herein, the public and press have First Amendment and common law right to prompt and contemporaneous access to the records of proceedings of the courts-martial trial proceeding. It is also critical to honor the rights of equal protection under the law.

12. Petitioners are likely to succeed on the merits of their claim that defendants are violating petitioners' rights under the First Amendment and common law by refusing access to courts-martial documents and proceedings. As the Supreme Court has repeatedly held, even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief. The intense public interest in the Manning court martial would be served by enjoining the military from continuing to deny adequate access to this proceeding.

13. If necessary, members of the press and public may bring actions for injunctive relief directly under the First Amendment. In addition, under 28 U.S.C. § 1361, "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." This First Amendment right to access applies in military courts as well. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-05 (1982); *ABC, Inc. v. Powell*, 47 MJ 363, 365 (1997)

("When an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied".) Furthermore, the petitioners' right to equal protection under the law has been denied when the military failed to issue press credentials in a transparent process and without the requisite findings by the military judge.

14. *Nixon v. Warner Communications, Inc.* 435 US 589, 597 (1978) specifically addresses the right of access to information presented at trial, stating that both the media and the public have a First Amendment right to attend, see and hear what transpires in a courtroom. In *Nixon*, the media was provided transcripts of the audiotapes. In *Nixon*, there was no issue of the government trying to prevent information from reaching the public. In *Manning*, the most crucial aspects of the trial are being actively prevented from reaching the public.

15. If the media or the public in the media room or the overflow room are denied the right transcribe the proceedings by typing their observations; or to capture the video or audio transmissions presented outside of the courtroom; or to adequately portray the proceedings inside the courtroom; or to obtain access to the courtroom, media observation center or the overflow room by means of a transparent process, valuable information will not reach the public while equal protection and Amendment rights are violated. It is the understanding of the petitioners that some of Judge Lind's views on this topic have been published - see Lt. Col. Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 Mil. L. Rev. 1 (2000).

http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/27608D~1.pdf As recognized in the aforementioned article, "right of access is the right to attend a proceeding and to hear, see, and communicate observations about it". Also see *Richmond Newspapers, Inc. v. Commonwealth*, 448 US 555, 576 (1980).

16. The Supreme Court considers an attempt by the government to delay publication of information as a prior restraint. Prior restraints are presumed to be unconstitutional. *Nebraska Press Association v. Stuart*, 427 US 539, 559-561 (1976) found a government order to delay publication to be a prior restraint. Preventing the media and the public from typing their observations in a room that cannot possibly disrupt the court proceedings is a similar type of prior restraint. Withholding the video and audio transmissions from the media and the public but not the military is an even more serious prior restraint. Delay will result because a reporter can type far more quickly than write with a pen or pencil. Nor is there any good reason to prevent the media and the public from capturing the video and audio transmissions of the trial. Security is not compromised in any conceivable way. If we can observe these transmissions, why can't we communicate these transmissions directly to the public?

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CONCLUSION

17. Petitioners ask the Court to act on this request for full public access, with complete transparency, and to honor the request for equal protection under the law, pursuant to the First Amendment and the procedures as set forth in R.C.M. 806 as soon as possible, and ideally before the close of business on Friday, May 31, 2013. Copies of this request are being served on the judge and on the offices of the prosecution and the defense.

Respectfully submitted,

Three handwritten signatures in black ink. The first signature is 'W. Simpich', the second is 'Scott Galindez', and the third is 'Kay Rudin'.

WILLIAM SIMPICH

SCOTT GALINDEZ

KAY RUDIN

on behalf of READER SUPPORTED NEWS

CERTIFICATE OF SERVICE

I hereby certify that paper copies of this motion were sent on the same day by same-day courier to the following:

Colonel Denise R. Lind
Chief Judge, 1st Judicial Circuit
U.S. Army Trial Judiciary
U.S. Army Military District of Washington
Office of the Staff Judge Advocate
103 Third Avenue, SW, Suite 100
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Maj. Gen. Michael S. Linnington
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And that an e-mail copy of this motion was sent on the same day to:

David E. Coombs
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May 31, 2013



WILLIAM M. SIMPICH