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Diego Ibargüen
Counsel

Office of
General Counsel

Eve Burton
Senior Vice President
General Counsel

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Corporate Secretary

Jonathan R Donnellan
Mark C Redman
Vice President
Deputy General Counsel

Kristina E Findikyan
Larry M Loeb
Kenan J Packman
Peter P Rahbar
Maureen Walsh Sheehan
Ravi V Sitwala
Jack Spizz
Debra S Weaver
Senior Counsel

Jennifer D Bishop
Abraham S Cho
Marianne W Chow
Adam Colón
Travis P Davis
Carolene S Eaddy
Shari M Goldsmith
Carl G Guida
Audra B Hart
Diego Ibargüen
Charlotte Jackson
Siu Y Lin
Alexander N Macleod
Kate Mayer
Kevin J McCauley
Alexandra McGurk
Jonathan C Mintzer
Aimee Nisbet
Elliot J Rishty
Shira R Saiger
Eva M Saketkoo
Aryn Sobo
Jennifer G Tancredi
Stephen H Yuhan
Counsel

VIA EMAIL (jeffery.r.nance.mil@mail.mil))

Colonel Jeffery Nance
2nd Judicial Circuit Judge
U.S. Army Forces Command
4710 Knox Street
Fort Bragg, North Carolina 28310

Re: Public Access to Court-Martial Proceedings and Records in *U.S. v. Sergeant Bergdahl*

Dear Colonel Nance:

This office represents the San Antonio *Express-News*, a Hearst newspaper, and writes on behalf of the *Express-News* and the 14 news organizations listed below.[1]

We understand that you have been designated by the convening authority as the judge detailed to the above-referenced court-martial and that motion practice in this case is already underway. Accordingly, we write to request that, as part of your preparations for and oversight of those proceedings, you implement measures that will ensure that journalists covering the court-martial have full, contemporaneous access to the records and proceedings. We write to you collectively to express our shared expectation that public and press access to these proceedings will comport with the requirements of the Constitution and other law, and we hope that by raising these issues with you at this early stage, we will be able to work with you to ensure complete access before the proceedings begin in earnest.

As you know, military law mandates a presumption of open and public courts-martial, except in limited circumstances based on specific findings that closure is necessary. Rules for Court-Martial 806. This presumptive openness is

[1] Joining in this letter are The Associated Press; Bloomberg; BuzzFeed; CNN; First Look Media, Inc.; Fox News; Gannett Co., Inc.; McClatchy Co.; NBCUniversal Media, LLC; *The New York Times*; Reuters; *USA TODAY*; *The Wall Street Journal*, and *The Washington Post*.

300 West 57th Street
New York, NY 10019-3792
T 212 649 2039
F 646 280 2039
dibarguen@hearst.com

not just a default procedural rule—it is mandated by the First Amendment and federal common law in both civilian and military courts. The Court of Appeals for the Armed Forces has made clear that "trial by court-martial should resemble a criminal trial in a federal district court," *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2008). And the public's constitutional right of access to all phases of criminal trials is well-established. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (trial); *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984) (jury *voir dire*); *Waller v. Georgia*, 467 U.S. 39 (1984) (suppression hearings)[2]; *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986) (preliminary hearings).

Military courts have long applied and relied on these principles when considering public access to military court proceedings. Thus, the Court of Appeals for the Armed Forces and its predecessor Court of Military Appeals have consistently held that the Sixth Amendment right to a fair trial applies to courts-martial, and that the public and press have a right of access to such public proceedings "absent 'cause shown that outweighs the value of openness'". *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997) (citing *Press-Enterprise I* and *Richmond Newspapers*); *see also*, *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (public rights of access to criminal trials "appl[y] with the equal validity to trials by courts martial.").

The public value of openness is considerable and is vital to the criminal process. Public and press scrutiny of criminal proceedings provides a "measure of accountability" and promotes "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). In the military context, access "'effect[s] a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury.'" *San Antonio Express-News v. Morrow*, 44 M.J. 706, 710 (A. Ct. Crim. App. 1996) (quoting *United States v. Hershey*, 20 M.J. 433, 436 (CMA 1985)).

For the value of openness to be meaningfully preserved, the public and the press must also have access to unclassified court records, including written legal arguments, documentary evidence and written decisions of the presiding officer. Without access to such records, including of pre-trial motion practice and hearings, the public will have difficulty understanding in-court proceedings and be left in the dark on the full bases for the ultimate disposition. And if daily transcripts of the in-court proceedings are not promptly made available, those who cannot fit in the hearing room will have no access to the proceedings at all. Put simply, the

[2] While *Waller* concerned a Sixth Amendment challenge made by the defendant, the Court based its reasoning on First Amendment precedent and applied the *Press-Enterprise I* closure standard.

proceedings will remain closed for all practical purposes if the filings, evidence, and transcripts of the proceedings are not publicly available. For this reason, the First Amendment protects the public's broad right to freely access court records as well as the underlying proceedings. *See, e.g., Washington Post Co. v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) ("The first amendment guarantees the press and the public a general right of access to court proceedings and court documents . . . ."); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93, 96 (2d Cir. 2004) (observing that access rights to trials "would be merely theoretical if the information provided by docket sheets were inaccessible," and holding "that docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them"); *United States v. Antar*, 38 F.3d 1348, 1359-60 (3d Cir. 1994) ("the right of access to voir dire examinations encompasses equally the live proceedings and the transcripts which document those proceedings"); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (qualified First Amendment public right of access to pretrial hearings extends to "written documents submitted in connection with judicial proceedings that themselves implicate the right of access"); *United States v. Peters*, 754 F.2d 753,763-64 (7th Cir. 1985) (recognizing presumption of access to trial exhibits "of constitutional magnitude through the first amendment"); *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) ("the public and press have a first amendment right of access to pretrial documents in general"). Federal common law similarly protects public access to judicial records and documents. *See, e.g., Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *Lugosch v. Pyramid Co. of Onandaga*, 435 F.3d 110, 119 (2d Cir. 2006) ("The common law right of public access to judicial documents is firmly rooted in our nation's history.").

The Constitution also requires that the public's access to both hearings and written records be contemporaneous with the actual proceedings. *See, e.g., Doe v. Public Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) ("the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies"); *Robinson*, 935 F.2d at 287 (noting the "critical importance of *contemporaneous* access to plea agreements") (emphasis in original); *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1310 (7th Cir. 1984) (right of access "normally involves a right of *contemporaneous* access"); *Application of Nat'l Broad. Co., Inc.*, 635 F.2d 945, 952 (2d Cir. 1980) ("only the most compelling circumstances should prevent contemporaneous public access" to physical evidence used at trial). When disclosure is delayed, "the public benefits attendant with open proceedings are compromised." *Public Citizen*, 749 F.2d at 272; *see also Chicago Tribune Co. v. Ladd*, 162 F.3d 503, 506 (7th Cir. 1998) ("the values that animate

the presumption in favor of access [to documents] require as a necessary corollary that ... access ought to be immediate and contemporaneous") (internal quotation marks and citation omitted). Even minimal delays are unacceptable. *See, e.g.*, *Associated Press v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (finding that even a 48-hour presumptive sealing period for documents violates the First Amendment right of public access).

Accordingly, closure or sealing for any length of time is permitted only when it "is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. First and foremost, a court must provide notice and an opportunity to be heard prior to closure. *Id.*; *Press-Enterprise II*, 478 U.S. at 9-10; *In re Application of The Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984) (observing that "it seems entirely inadequate to leave the vindication of a First Amendment right to the fortuitous presence in the courtroom of a public spirited citizen willing to complain about closure"); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 182-83 (5th Cir. 2011) (same); *United States v. Alcantara*, 396 F.3d 189, 199-200 (2d. Cir. 2005) (same). Second, access to both judicial records and hearings may only be denied where the Government establishes that closure is necessary to further a compelling government interest and is narrowly tailored to serve that interest, and the court makes specific findings on the record supporting the closure to aid review. *See Press-Enterprise I*, 464 U.S. at 513. Even where a military proceeding may reveal classified or security matters, the Government's "simple utilization of the terms 'security' or 'military necessity'" is not enough. *United States v. Grunden*, 2 M.J. 116, 121 (C.M.A. 1977). Rather, "[b]efore a trial judge can order the exclusion of the public on this basis, he must be satisfied from all the evidence and circumstances that there is a reasonable danger that presentation of these materials before the public will expose military matters which in the interest of national security should not be divulged." *Id.* at 122. And he must carefully determine, on the record, which specific portions of the proceeding will touch on classified matters, allowing public access to everything else. *Id.* at 123-24; *see also Denver Post Corp. v. United States*, No. ARMY MISC 20041215, 2005 WL 6519929, at *3 (A. Ct. Crim. App. Feb. 23, 2005).

In this case, openness is particularly important because Sgt. Bergdahl's case has been and continues to be a subject of intense public interest. The degree of public access to the proceedings and records of this case will affect public faith in the military justice system and its ability to oversee a fair trial for a soldier charged with desertion and misbehavior before the enemy, among the most serious military offenses. Since so many people are watching, "public confidence in matters of military justice would quickly erode" if comprehensive access to these proceedings

and related records were arbitrarily limited. *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

Therefore, in the interests of ensuring that the public's and the press' First Amendment right of access to judicial proceedings and records is respected and given effect during the court-martial of Sgt. Bergdahl, we collectively request that you implement the following procedures and practices:

- Provide public and press access to the hearing room during all public hearings, including pre-trial hearings and the trial itself.

- Provide public and press access to daily sound recordings and/or transcripts of all public hearings as soon as practicable after the conclusion of each day of the proceedings, in the same form as they are provided to the parties. In the alternative, we request that you permit the use of a privately-hired stenographer at the proceedings to make an independent record.

- Provide contemporaneous public and press access to a record of any conferences held under R.C.M. 802 at which substantive unclassified matters are discussed, either by providing transcripts, recordings, or minutes of such conferences or by reciting minutes of such conferences in open court as expeditiously as possible.

- Provide public and press access to the records of the proceedings, including the court docket, party filings (including motion practice) and court decisions (including procedural orders) in the court-martial either through an online "reading room" similar to that created by the Department of Defense in other high-profile military court proceedings or through the U.S. Army Trial Judiciary web site's eDocket service, if that service is suitable for the distribution of court records. Filings and decisions that do not require a classification security review should be available within one business day after filing, and those requiring a security review should be posted promptly after completion of such review, which itself should be conducted as expeditiously as possible.

- Provide public and press access to any other unclassified materials, including admitted evidence, submitted to the Court during the court-martial through the same online reading room or eDocket service. Materials that do not require a classification security review

should be available within one business day after filing, and materials requiring a security review should be posted promptly after completion of such expeditious review.

- Before closing proceedings to the public, require that the military judge or presiding officer overseeing the proceedings provide notice and opportunity to be heard and make specific, on-the-record findings that closure is necessary to further a compelling government interest and narrowly tailored to serve that interest.

- Require that if, after a classified security review, it is determined that a filing, decision, or material received into evidence is classified, the military judge or presiding officer overseeing the proceedings provide notice and opportunity to be heard before issuing a decision that the material will not be released to the public, announce that decision in open court and make specific, on-the-record findings that withholding is necessary to further a compelling government interest and narrowly tailored to serve that interest.

Many of these procedures are similar to 2011 reforms in regulations governing access to military commission proceedings held in Guantanamo Bay, *see* U.S. Dep't of Def., Regulation for Trial by Military Commission (2011 ed.) (providing for, *inter alia*, online posting of filings, decisions, and unofficial transcripts), and/or procedures that were ultimately implemented by the convening authority in the court-martial of Pfc. Bradley (now Chelsea) Manning, *see Ctr. for Constitutional Rights v. Lind*, 954 F. Supp. 2d 389, 403 (D. Md. 2013) (noting that the Army released documents filed in the court-martial of Pfc. Manning in an electronic "reading room"). The Military Justice Review Group established by the Department of Defense General Counsel has recently acknowledged the need for access procedures by recommending the enactment of a new Article 140a, which is intended to "provide appropriate public access to military justice information at all stages of court-martial proceedings," and "[a]t a minimum … should permit timely and appropriate access to filings, objections, instructions, and judicial rulings at the trial and appellate level." Report of the Military Justice Review Group: Part I: UCMJ Recommendations 1013-1015 (Dec. 22, 2015), *available at* http://www.dod.gov/dodgc/images/report_part1.pdf; *see also id.* at 28, 36.

We welcome the opportunity to discuss these requests with you by conference call or other means, and will be available at your convenience. We look forward to your prompt response.

Sincerely,

Diego Ibargüen
Jennifer D. Bishop

cc by email:
Maj. Margaret V. Kurz (Margaret.v.kurz.mil@mail.mil)
Eugene R. Fidell (efidell@feldesmantucker.com)
Lt. Col. Franklin D. Rosenblatt (franklin.d.rosenblatt.mil@mail.mil)