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

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

MOVANTS' SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION TO UNSEAL

1. *Introduction.* On 3 June 2017, the Court entered an Order that, according to press reports, removed Trial Counsel. On 4 June 2017, movants moved to unseal that Order and requested expedited consideration. On 5 June 2017, the Court offered the government and defense an opportunity to submit their views by 1000 hours on 10 June 2017. The Court wrote:

> Recognizing C.A.A.F.'s decision in Ctr. For Constitutional Rights v. United States, 72 M.J. 126 (2013), the court intends to take up the matter on Monday and would like to give you the opportunity to respond either on the jurisdiction question or on the substance (or both).

Movants appreciate the speed with which the Court has acted in response to their motion. To assist the Court, and since we assume there will be no proceedings in open court on the Motion to Unseal, we respectfully submit this supplemental memorandum.

2. *Jurisdiction.* There is no question that the Court has jurisdiction to grant the Motion to Unseal. If the Court had jurisdiction to seal the Order, it perforce has jurisdiction to *un*seal it.

Center for Constitutional Rights v. United States, 72 M.J. 126 (C.A.A.F. 2013) (3-2 decision) is inapposite. It dealt only with the statutory jurisdiction of the Court of Appeals and the Army Court of Criminal Appeals rather than the power of the presiding military judge. The majority had no occasion to refer to the power of the trial judge, but the dissenters did. Chief Judge Baker (joined by Senior Judge Cox) noted that "[t]he majority's interpretation leaves collateral appeal to Article III courts as the sole mechanism to vindicate the right to a public trial found in R.C.M. 806 *beyond the initial good judgment of the military judge*." 72 M.J. at 132 (emphasis added) (Baker, C.J., dissenting). Senior Judge Cox's separate dissent (joined by Chief Judge Baker) recognized the "jurisdiction, indeed the responsibility" of the trial judge "to ensure that a military court-martial is conducted so that the military accused and the public enjoy the same rights to a fair and public hearing as is envisioned in the Bill of Rights and embodied in the Rules for

Courts-Martial (R.C.M.)." *Id.* at 132 (Cox, Sr. J., dissenting). Whether or not appellate or collateral review is available, the trial judge has authority to grant this motion. *CCR* is not to the contrary.

But even if there were some impediment to movants' motion, the Court can always act *sua sponte*. *See* R.C.M. 1113(a) (Discussion) ("Upon request or otherwise for good cause, a military judge may seal matters at his or her discretion.") Either way, the Order can and should be unsealed.

Center for Constitutional Rights v. Lind, 954 F. Supp.2d 389 (D. Md, 2013) simply acknowledges that movants have recourse to the federal courts if this tribunal improperly abridges their access rights.

3. *Merits*. The *Lind* decision also supports the relief sought by movants. It makes clear that the judicial records of this proceeding are subject to a public right of access, but does not resolve whether that right is a common law or constitutional right. *See Lind,* 954 F.Supp.2d at 401-02. Either way, the relief requested should be granted.

As a threshold matter, while not all court filings are judicial records subject to a right of access, there can be no doubt that the Court's 3 June 2019 Order is a judicial record. A judicial record is any record that "play[s] a role in the adjudicative process, or adjudicate[s] substantive rights." *Lind,* 954 F.Supp.2d at 401. Stated differently, a judicial record is any court document that is "relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995); *see also, Lugosch v. Pyramid Co. of Onandaga,* 435 F.3d 110, 120 (2d Cir. 2006). A court order is unambiguously a judicial record.

Lind explains that the more rigorous First Amendment right applies to those judicial records that have historically been open and where access plays a significant positive role in the functioning of the judicial process. *Id.* Court orders plainly satisfy this test. They have historically been public and access to them promotes uniform application of the law, deters judicial abuse and assures the public that the judicial process is functioning as it should. As Chief Justice Warren Burger famously stated in *Richmond Newspapers v. Virginia,* "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." 448 U.S. 555, 572 (1980). We know of no court that has found the First Amendment access right not to extend to court orders.

Because the Order has been sealed in its entirety and (to our knowledge) without external explanation, it is impossible to tell whether the sealing is sustainable on the merits. Nor is it possible to tell whether some parts of the Order were appropriately sealed while others either need not or should not have been sealed. A justification for the sealing order and an explanation of why selective redaction is not feasible is required whether the public's right of access is considered a constitutional or common law right. *See Press-Enterprise Co. v. Superior Ct.,* 478 U.S. 1, 13-14 (1986); *Lugosch,* 435 F. 3d at 119-25; *In re Washington Post Co.,* 807 F.2d 380 (4th Cir. 1986); *In re The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984). The same requirement for scrupulous selectivity and factual findings when closing what would otherwise be a public trial, *see* R.C.M. 806(a)(2), -(a)(4), applies equally to sealing a court record, since sealing is the documentary analogue of closure. *See, e.g., In re New York Times,* 828 F.2d 110 (2d Cir. 1987); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983). This principle applies with particular force to this Court's Order. It is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.

For a number of reasons, this case has attracted widespread attention and, in some respects, dismay. In a democratic society, public confidence in the administration of justice is critical, and that is, if anything, even more urgent when an exceptional jurisdiction such as the military justice system is concerned. There can be no such confidence if the public is either uninformed or misinformed. The best source of information on legal rulings is the actual text. Movants wish to bring the actual text of the Order to the attention of the public as soon as possible, and to provide expert analysis and commentary informed by that actual text rather than as filtered or spun by the parties or anonymous leakers. We strongly believe this will serve the public interest.

4. *Relief Requested*. For the foregoing reasons and those previously stated, the Order should be unsealed and made publicly available. We respectfully invite the parties to support the Motion to Unseal.

Dated: June 7, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that I have, this 76th day of June, 2019, served the foregoing SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO UNSEAL by emailing copies to the Military Judge, Captain Aaron Rugh, aaron.rugh@navy.mil; Clerk of Court, Legalman First Class Jessica J. Holguin, jessica.holguin@navy.mil; Assistant Trial Counsel, Captain Connor McMahon, connor.mcmahon@usmc.mil; Defense Counsel, Lieutenant Brian P. John, brian.john@navy.mil; and Civilian Defense Counsels, Timothy C. Parlatore, timothy.parlatore@parlatorelawgroup.com, and Marc L. Mukasey, Marc.Mukasey@MFSLLP.com.

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* This motion was prepared by the Media Freedom and 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."