

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

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JULIAN ASSANGE and WIKILEAKS, :
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: Petitioners, : Docket No. ARMY _____
:
v. : Article 32 Hearing in
: *United States v. Manning*,
UNITED STATES OF AMERICA and : Ft. Meade, Maryland
LIEUTENANT COLONEL PAUL ALMANZA, :
:
: Respondents. : DATED: 15 December 2011
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**PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF WRITS
OF MANDAMUS AND PROHIBITION, OR, ALTERNATIVELY, APPLICATION
FOR STAY OF PROCEEDINGS, AND SUPPORTING MEMORANUM OF LAW**

Petitioners Julian Assange and Wikileaks, by and through their undersigned counsel, respectfully submit this request for extraordinary relief, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), Rules 2(b) and 20 of the Courts of Criminal Appeals Rules of Practice and Procedure, and Rules 20.1 and 20.2 of the U.S. Army Court of Criminal Appeals Rules.

Statement of the Case and Issues Presented

On November 28, 2010, the Wikileaks media organization and its publisher Julian Assange commenced reporting on thousands of allegedly classified and unclassified U.S. State Department diplomatic cables. The cables were also published by other national and international media organizations, including *The New York Times*, *The Guardian*, *Der Spiegel*, *Le Monde*, and *El*

Pais. To our knowledge, the U.S. government has never officially confirmed or denied whether any of the cables are indeed classified. However, the government has targeted and threatened Mr. Assange, Wikileaks, and their supporters, employees and contractors around the world with criminal prosecution arising from their journalistic activities.

Although the U.S. government has never successfully prosecuted anyone accused of soliciting or receiving allegedly classified information, federal prosecutors have reportedly convened a grand jury in the Eastern District of Virginia to investigate whether Mr. Assange conspired with Army Private Bradley Manning to violate the Espionage Act of 1917, 18 U.S.C. § 793 *et seq.*, and other federal laws. The grand jury investigation -- conducted entirely in secret, without any involvement permitted by defense counsel, and in a district with the highest concentration of military and government jurors in the United States -- so far has included the issuance of subpoenas that reportedly name Mr. Assange, Wikileaks and Private Manning. These production orders have been served in relation to Wikileaks' supporters on media companies such as Google and Twitter.

In addition, and of paramount importance here, Private Manning was arrested in May 2010 in Iraq on suspicion that he provided the diplomatic cables (and possibly other allegedly

classified information) to Mr. Assange and/or Wikileaks. Private Manning now faces the possibility of court-martial for offenses including aiding the enemy in violation of Article 104 of the Uniform Code of Military Justice. These offenses are serious but wholly unproven. There is strong evidence that Private Manning has nonetheless suffered serious human rights violations as a result of these unproven claims, including prolonged isolation and sensory deprivation, and other torture or cruel, inhuman and degrading treatment reminiscent of the worst abuses at Guantánamo Bay. The U.S. government has notably refused to allow the United Nations Special Rapporteur for Torture to adequately assess Private Manning's treatment and conditions.

It is in this context that Private Manning's Article 32 hearing is scheduled to commence at Ft. Meade, Maryland, on Friday, December 16, 2011. Notwithstanding the intense public interest in this case, and Petitioners' obvious, unique interest in these proceedings, as described below the limited procedures established to allow public access to the proceedings are plainly insufficient to ensure that Mr. Assange and Wikileaks, by and through their counsel, are able fully and adequately to observe the proceedings and safeguard their rights and interests, as well as Private Manning's legal and humanitarian rights and the right of the public access to the proceedings.

Indeed, Respondents have failed and refused to guaranty access to Petitioners' counsel despite repeated communications and requests via telephone, email and letter to the U.S. Army District of Washington Public Affairs Office and officials at Ft. Meade. See, e.g., Attachment (letter requesting access).

Accordingly, the failure and refusal to respond to Petitioners' request for guaranteed access to the Article 32 hearing in this case, and the lack of adequate capacity otherwise to accommodate the media and other interested parties such as Mr. Assange and Wikileaks, constitutes a constructive, blanket denial of public access to the proceedings. Petitioners thus request that the Court grant relief as follows.

Specific Relief Sought

1. Petitioners request a writ of mandamus to compel the Investigating Officer assigned to preside over the Article 32 hearing in this case to provide and guaranty access for counsel for Petitioners to the proceedings in their entirety.

2. Petitioners request a writ of prohibition to reverse and undo the current procedures affording limited access to the Article 32 hearing, which constitute a constructive, blanket denial of the right of public access to the proceedings.

3. Alternatively, Petitioners request an order staying the Article 32 hearing in order to allow the Court to consider this Petition, and to allow Petitioners to seek any further

judicial relief which may be necessary to protect Petitioners' rights and interests in these proceedings.

Reasons for Granting the Writs

The Court should grant the requested relief, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), to open the proceedings and ensure access for the public generally and for Mr. Assange and Wikileaks specifically. Relief should be granted because this matter involves exceptional circumstances warranting the Court's intervention at this time, relief has been requested but cannot be obtained in any other form or in any other court, and issuance of the writs will aid the Court's jurisdiction. Respondents' decision effectively to close the proceedings and deny access to Petitioners, particularly given their unique interest, is clearly erroneous and amounts to usurpation of authority.

A. Right of Public Access

The Court's authority to act on the merits of this Petition and grant relief is clear and indisputable. See *Denver Post Co. v. United States*, Army Misc. 20041215 (A.C.C.A. 2005), available at 2005 CCA LEXIS 550 (exercising jurisdiction and granting writ of mandamus to allow public access to Article 32 proceedings). Equally established and uncontroversial is the right of public access to judicial proceedings, including Article 32 hearings, which may be overcome only on a "case-by-case, witness-by-

witness, and circumstance-by-circumstance basis." *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997), available at 1997 CAAF LEXIS 74. The right of public access is rooted in the common law and the First Amendment to the United States Constitution. See, e.g., *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *Washington Post Co. v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991).

The right of public access exists to ensure that courts have a "measure of accountability" and to promote "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). Access to information is especially important when it concerns matters relating to national defense and foreign relations, where public scrutiny is the only effective restraint on government. See *New York Times v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) ("In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government.").

The Supreme Court has repeatedly stated that openness has a positive effect on the truth-determining function of proceedings. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) (“Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (open trials promote “true and accurate fact-finding”) (Brennan, J., concurring); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (“[P]ublic scrutiny enhances the quality and safeguards the integrity of the factfinding process.”); see also *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (*Gannett’s* beneficial “fact-finding considerations” militate in favor of openness “regardless of the type of proceeding”). This effect is tangible, not speculative: the Court has held that openness *can affect outcome*. Accordingly, if the government attempts to restrict or deny the right of access, it bears the burden of by showing that the limitation is necessary to protect a compelling government interest and is narrowly tailored to serve that interest. See, e.g., *Robinson*, 935 F.2d at 287.

In contravention of these authorities, Petitioners are informed and believe that Respondents in this case have set

aside only about eight seats in the Article 32 hearing room, for members of the media selected by the U.S. Army District of Washington Public Affairs Office, based on undisclosed criteria. They also understand that a limited number of other members of the media and the general public will be selected by lottery to observe the proceedings in an overflow room via limited video feed. These procedures are plainly insufficient to ensure that Wikileaks and Mr. Assange, by and through their counsel, are able fully and adequately to observe the proceedings and safeguard their rights and interests.

B. Due Process Rights

These rights and interests of Mr. Assange and Wikileaks may include, among others, their Fifth Amendment due process rights and their Sixth Amendment interest in confronting any allegations against them, particularly as relates to the grand jury investigation in the Eastern District of Virginia, which is apparently targeting Mr. Assange in connection with matters that will likely be addressed at Private Manning's Article 32 hearing. Access is also important to protect Private Manning's legal right to a fair and impartial hearing, and his humanitarian right to be free of torture and other unlawful abuse, as well as the general right of public access to the proceedings.

As set forth above, Petitioners' unique interest in these proceedings is obvious. If prior official statements relating to Private Manning - both on and off the record - are to be believed, it is nearly certain that allegations regarding Mr. Assange and Wikileaks will be disclosed in these proceedings. See, e.g., Ellen Nakashima & Jerry Markon, *WikiLeaks Founder Could Be Charged Under Espionage Act*, Wash. Post, Nov. 30, 2010 (quoting Attorney General Eric Holder and other government sources); Charlie Savage, *U.S. Tries to Build Case for Conspiracy by Wikileaks*, N.Y. Times, Dec. 15, 2010 (same).

Mr. Assange and Wikileaks need to know what those allegations may include in order to ensure the proceedings are as open, honest and transparent as possible. Consistent with the fact-finding purpose of open trials, which the Supreme Court has held may affect their outcome, Petitioners' counsel must have the ability to observe the proceedings in their entirety in order to evaluate live witness testimony and other evidence as it is presented. Counsel also must have access to the hearing room (rather than the overflow room) so that they may object and request permission to be heard if the Investigating Officer determines that it may be necessary to close portions of the hearing.¹ Factual assertions made in these proceedings may well

¹ To the extent that portions of the proceedings may be closed to protect classified information, CCR requests that its attorneys who already hold security clearances be allowed to observe the

be erroneous, and counsel for Wikileaks and Mr. Assange are in the best position to evaluate them and promptly correct the record as may be necessary to prevent further substantial prejudice to Private Manning, and to protect the interests of Mr. Assange, Wikileaks and their supporters in connection with these proceedings and other ongoing or possible future proceedings here and abroad, including the grand jury investigation and any threatened prosecution of Mr. Assange, as well as any request for his extradition to the United States. Transparency and accountability are especially important in military proceedings such as these because "military trial courts in our country are not standing or permanent courts," and may be convened by various commanding officers without any centralized oversight at the trial stage. See Eugene R. Fidell, *Accountability, Transparency & Public Confidence in the Administration of Military Justice*, 9 Green Bag 2d 361 (2006).

closed sessions on the ground that Wikileaks and Mr. Assange plainly have a "need to know" all information concerning them. For example, it would be necessary for counsel to evaluate whether information was improperly deemed classified in order to conceal evidence of illegality or prevent embarrassment to the Executive Branch. At a minimum, the proceedings should be delayed to permit a "need to know" determination to be made by the relevant agencies and reviewed by the courts.

Conclusion

For these reasons, the Petition should be granted.

Date: New York, New York
 December 15, 2011

Respectfully submitted,

/s/ Baher Azmy
Vincent Warren, Executive Director
Baher Azmy, Legal Director
Michael Ratner, President Emeritus
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6464
Fax: (212) 614-6499

*Counsel for Julian Assange
and Wikileaks²*

² Petitioners' counsel are not admitted to practice before the Court and therefore request permission, pursuant to Rule 8(c) of the Courts of Criminal Appeals Rules of Practice and Procedure, to appear pro hac vice for the limited purpose of litigating this Petition. Good cause exists to grant this request given the emergency nature of the relief requested and the serious nature of the issues at stake in this case. Counsel are members in good standing of the bar in New York State, and are admitted to practice before various federal courts.

Certificate of Service

I hereby certify on this 15th day of December 2011, I caused the foregoing Petition for Extraordinary Relief to be filed with the Court, via facsimile and overnight mail, and served on Respondents, via overnight mail, at the following addresses:

U.S. Army Court of Criminal Appeals
Office of the Clerk of Court
9275 Gunston Road
Fort Belvoir, VA 22060-5546
Fax: 703-806-0124

- and -

Clerk of Court
U.S. Army Judiciary (JALS-CC)
901 North Stuart Street, Suite 1200
Arlington, VA 22203-1837
Fax: 703-696-8777

- and -

Lt. Col. Paul Almanza
U.S. Army Reserve Judge
150th Legal Support Organization
Ft. Meade, MD 20755

/s/ Baher Azmy

Exhibit A



December 13, 2011

Via Federal Express

Investigating Officer
c/o Military District of Washington
Public Affairs Office
103 Third Avenue
Washington, D.C. 20319

Re: *United States v. Bradley Manning*

Dear Sir:

The Center for Constitutional Rights (CCR) represents the Wikileaks media organization and its publisher Julian Assange regarding access to the Article 32 proceedings in *United States v. Bradley Manning*, scheduled to begin at Fort Meade, Maryland, on December 16, 2011. We request that you allocate two seats in the hearing room, for a CCR attorney and for Mr. Assange's non-U.S. counsel Jennifer Robinson, so that they may observe the proceedings on behalf of our clients.

We understand from telephone calls and written communications with the U.S. Army District of Washington Public Affairs Office and officials at Fort Meade that only about eight seats in the hearing room will be set aside for members of the media selected by the Public Affairs Office. We also understand that a limited number of other members of the media and the general public will be selected by lottery to observe the proceedings in an overflow room via limited video feed. These procedures are plainly insufficient to ensure that Wikileaks and Mr. Assange, by and through their counsel, are able fully and adequately to observe the proceedings and safeguard their rights and interests, including under the Fifth and Sixth Amendments to the Constitution, as well as Private Bradley Manning's legal and humanitarian rights and the right of public access to the proceedings.

Our clients' unique interest in these proceedings is obvious. For more than a year, there has been intense worldwide speculation that hundreds of thousands of allegedly classified diplomatic cables published by Wikileaks – as well as *The New York Times*, *The Guardian*, and other international media organizations – were provided to Wikileaks and Mr. Assange by Private Manning. There is strong evidence that Private Manning has suffered serious human rights violations as a result of those unproven claims, including prolonged isolation and sensory deprivation, and other torture or cruel, inhuman and degrading treatment reminiscent of the worst abuses at Guantánamo Bay. (Throughout all of his detention, the U.S. government has refused to allow the United Nations Special Rapporteur for Torture to adequately assess Private Manning's treatment and conditions.) If prior official statements relating to Private Manning are to be believed, it is nearly certain that allegations regarding Wikileaks and Mr. Assange will be disclosed in these proceedings.

Mr. Assange and Wikileaks need to know what those allegations may include in order to ensure the proceedings are as open, honest and transparent as possible. Their counsel must have the ability to observe the proceedings in their entirety in order to evaluate live witness testimony and other evidence as it is presented.* Factual assertions made in these proceedings may well be erroneous, and counsel for Wikileaks and Mr. Assange are in the best position to evaluate them and promptly correct the record as may be necessary to prevent further substantial prejudice to Private Manning, and to protect the interests of Mr. Assange, Wikileaks and their supporters in connection with these proceedings and other ongoing or possible future proceedings here and abroad. Transparency and accountability are especially important in military proceedings such as these because “military trial courts in our country are not standing or permanent courts,” and may be convened by various commanding officers without any centralized oversight at the trial stage. See Eugene R. Fidell, *Accountability, Transparency & Public Confidence in the Administration of Military Justice*, 9 Green Bag 2d 361 (2006).

Mr. Assange also notably has a particular personal interest in the Article 32 proceedings because it appears that federal prosecutors in the Eastern District of Virginia have been issuing subpoenas to supporters of Wikileaks in order to investigate matters that, based on prior official statements, will likely be addressed in Private Manning’s Article 32 proceedings. It has been reported that these subpoenas are the result of a grand jury process that has, as is the norm in the United States, taken place entirely in secret without any involvement permitted by defense counsel, in a district that has the highest concentration of military and government jurors in the nation. The names of Mr. Assange, Wikileaks, and Private Manning reportedly appear on many of the production orders coming out of this grand jury process that have been served in relation to Wikileaks’ supporters on companies such as Google and Twitter.

Moreover, guaranteed access for media organization such as Wikileaks and its publisher Mr. Assange is necessary to ensure public access to the proceedings, which is protected at common law and by the First Amendment to the Constitution. Indeed, given the intense public interest in this case, we are concerned that the lack of adequate capacity to accommodate the media and other interested parties such as Wikileaks and Mr. Assange may result in a constructive, blanket denial of public access to the proceedings. See *Denver Post Co. v. United States*, Army Misc. 20041215 (A.C.C.A. 2005), available at 2005 CCA LEXIS 550 (granting writ of mandamus to allow public access to Article 32 proceedings).

In sum, counsel for Mr. Assange and Wikileaks have a professional duty of care which must be exercised not only for the benefit of our clients but also for others whose life or liberty is at risk, including alleged sources such as Private Manning as well as WikiLeaks supporters, employees and contractors who have been subject to U.S. government surveillance in relation to their constitutionally-protected activities. We hope that you will approve our request for guaranteed access to these Article 32 proceedings. We further ask for your response by no later than the close of business on

* To the extent that portions of the proceedings may be closed to protect classified information, CCR requests that its attorneys who already hold security clearances be allowed to observe the closed sessions on the ground that Wikileaks and Mr. Assange plainly have a “need to know” all information concerning them. For example, it would be necessary for counsel to evaluate whether information was improperly deemed classified in order to conceal evidence of illegality or prevent embarrassment to the Executive Branch. At a minimum, the proceedings should be delayed to permit a “need to know” determination to be made by the relevant agencies and reviewed by the courts.

Wednesday, December 14, 2011, so that we may seek any relief which may be necessary in court. Mr. Azmy, CCR's legal director, may be reached by phone at (212) 614-6427.

Very truly yours,

Baher Azmy
Vince Warren
Michael Ratner

cc: Jennifer Robinson
Convening Authority