IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

CENTER FOR CONSTITUTIONAL RIGHTS, GLENN GREENWALD, JEREMY SCAHILL, *THE NATION*, AMY GOODMAN, *DEMOCRACY NOW!*, CHASE MADAR, KEVIN GOSZTOLA, JULIAN ASSANGE, and WIKILEAKS,	:	Crim. App. Misc. Dkt. No. 20120514
	:	USCA Misc. Dkt. No. 12-8027/AR
Appellants,	:	
	:	General Court Martial
v.	:	*United States v. Manning*, Ft. Meade, Maryland
	:	
UNITED STATES OF AMERICA and CHIEF JUDGE COL. DENISE LIND,	:	Dated: 3 October 2012
	:	
Appellees.	:	
	:	

MOTION FOR LEAVE TO FILE RESPONSE

Petitioner-Appellants hereby move for leave to file the attached response[1] to the government's letter-form Citation to Supplemental Authority, dated Oct. 1, 2012. The government cites to a district court opinion, *ACLU v. DOD*, 664 F. Supp. 2d 72, 79 (D.D.C. 2009) for the notion that "withholding information under the FOIA does not violate the First Amendment."

As noted in the attached response, the cited case has no relevance to the case before this Court. The government cites the district court decision, which has a four-sentence discussion of the point the case is cited for by the government, rather than

[1] Our understanding is that this Court has required parties responding to Rule 36A letters to request leave to do so. *See, e.g.*, *United States v. Tollinchi*, 2000 CAAF LEXIS 475.

the appellate opinion from the D.C. Circuit, which makes it clear that the First Amendment interest cited by the ACLU was the right of the detainees to speak about their experiences of torture, which the government asserted were classified. (*See* attached response, at n.1.) Moreover, both opinions in *ACLU v. DOD* are several years old and had obviously been decided (and available) well prior to the merits briefing in this case. While it is true that FRAP 28(j) (which "Rule 36A substantially tracks," 1999 Rules Advisory Committee Comment) does not require that the "additional authority" have been unavailable at the time of merits briefing, *see, e.g.*, *Canico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 434 n.1 (10th Cir. 1990), there appears to be no reason why this case should not have been cited in Appellees' brief, and in Petitioner-Appellants' view the government submission, coming nine days before scheduled oral argument, verges on impermissible supplemental briefing and should be rejected. In the alternative, Petitioner-Appellants request the Court accept their attached response.

Date: Ann Arbor, Michigan
3 October 2012

Respectfully submitted,

/s/sdk
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Certificate of Service

I hereby certify on this 3d day of October, 2012, I caused the foregoing Motion for Leave to be filed with the Court and served on Respondents and Amici electronically via email (per this Court's Electronic Filing Order of 22 July 2010), and to be served on the trial and appellate courts below via mail, at the following addresses and facsimile numbers, respectively:

Clerk of the Court
U.S. Court of Appeals for the Armed Forces
450 E Street, NW
Washington, DC 20442-0001
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efiling@armfor.uscourts.gov

- and -

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

- and -

Chief Judge Col. Denise Lind
U.S. Army Trial Judiciary, 1st Judicial Cir.
U.S. Army Military District of Washington
Office of the Staff Judge Advocate
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/s/sdk
Shayana Kadidal

October 3, 2012

Mr. William A. DeCicco
Clerk of the Court
U.S. Court of Appeals for the Armed Forces
450 E St. NW
Washington, D.C. 20442

Re. Government citation to supplemental authorities of Oct. 1, 2012 in
Center for Constitutional Rights v. United States, Misc. Dkt. No. 12-8027/AR

Dear Sirs:

The government has filed a Rule 36A letter citing to a district court opinion, *ACLU v. DOD*, 664 F. Supp. 2d 72, 79 (D.D.C. 2009) for the notion that "withholding information under the FOIA does not violate the First Amendment." In that case the ACLU sought via FOIA to obtain access to the redacted parts of Combatant Status Review Tribunal transcripts for "high-value detainees" at Guantánamo who were moved there from the CIA's secret torture/detention program. The agencies argued that the redacted material was classified and therefore exempt from disclosure under FOIA's statutory exemptions 1 and 3, and the court agreed. The ACLU argued that the use of the classification system to hide evidence of torture raised grave constitutional concerns under the First Amendment, but the District Court summarily rejected any such contention in a four-sentence-long coda to its opinion, stating "'[f]irst, there is obviously no First Amendment Right to receive classified information,' and '[s]econd, were plaintiffs correct, every FOIA exemption would likely be unconstitutional.'"[1]

[1] The district court opinion itself gives no indication of what the First Amendment argument the ACLU made actually was. Only by reading the ACLU's brief is that made clear: The "Court [should not] accept the government's argument that a person against whom those [CIA torture] methods have been employed may be prevented from speaking [about those torture methods] – and, as a consequence, that the American public may be prevented from hearing that speech – [for] such a holding would raise profound constitutional implications." *Pl's' Mem. Of Law in Opp. to Def's' Mot. For Summary Judgment*, Dkt. 23, *ACLU v. DOD*, Civ. Action No. 08-437 (D.D.C. filed Sep. 18, 2009) at 29. In other words, the claimed First Amendment violation was a *de facto* silencing of these torture victims' right to freely speak to the public about what they had experienced.

The subsequent appellate history of the case (which the government notes but does not cite to as supplemental authority) makes it clear that this was the case. *See ACLU v. DOD*, 628 F.3d 612, 619-20 (D.C. Cir. 2011) (summarizing ACLU arguments, including that techniques themselves had been declassified and banned by President Obama, eliminating any possible harm from disclosing redacted material, and that "the government lacks the authority to classify information derived from the detainee's personal observations and experiences."). The Court of Appeals rejected the argument in part because the FOIA suit sought only documents in the

The case thus stands only for the unremarkable proposition that the public has no absolute right to receive properly classified information under FOIA. The instant case is, obviously, *not* a FOIA case. However, if specific, identified portions of the orders, transcripts or pleadings sought here have been properly classified, strict scrutiny would surely permit those portions to be withheld from public disclosure. *Cf.* Pets.' Reply Br. at 10-11. Petitioner-Appellants therefore submit that this supplemental citation has absolutely no relevance to the case at hand.

Respectfully submitted,

/s/sdk

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control of the government, not some other form of direct access to the detainees and their memories of the particular techniques used to torture them. *Id*. at 623.