IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

ROBERT B. BERGDAHL, Sergeant, U.S. Army, *Petitioner*, v. PETER Q. BURKE, Lieutenant Colonel, AG U. S. Army, in his official capacity as Commander, Special Troops Battalion, U. S. Army Forces Command, Fort Bragg, NC, and Special Court-Martial Convening Authority, and UNITED STATES, *Respondents*.	Misc. Dkt. No. 20150624 USCA Dkt. No. 16-0059/AR Dated: 14 October 2015

BRIEF OF AMICUS CURIAE THE CENTER FOR CONSTITUTIONAL RIGHTS

Shayana D. Kadidal
[CAAF Bar No. 35713]
J. Wells Dixon
Baher Azmy, Legal Director
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6438
Fax: (212) 614-6499

Counsel for Amicus Curiae

Index of Brief

Table of Cases, Statutes, and Other Authorities

PLEADINGS

LAW REVIEWS

MILITARY COURT RULES

FEDERAL STATUTES

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BRIEF OF AMICUS CURIAE THE CENTER FOR CONSTITUTIONAL RIGHTS

Amicus curiae the Center for Constitutional Rights[1] respectfully submits this brief in support of the mandamus petition filed on 21 September 2015 by petitioner Robert B. Bergdahl. Pe-

[1] As set forth in the accompanying motion, the Center for Constitutional Rights (CCR) is a nonprofit public interest law firm also engaged in public education, outreach and advocacy. CCR litigated the issue of public access to briefs, transcripts, and judicial orders in the court martial proceedings against PFC Bradley (now Chelsea) Manning. *See Center for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013); *Center for Constitutional Rights v. Lind*, 954 F. Supp. 2d 389 (D. Md. 2013).

titioner Bergdahl has requested that the Court issue a writ of mandamus directing respondents to make public the unclassified exhibits received in evidence in the preliminary hearing and modifying the protective order to make clear that his counsel may release them to the public as well.

Any such request by the accused must be considered in light of the First Amendment right of the public to access criminal proceedings. The First Amendment mandates public access to all such proceedings, trial or pretrial, unless the government demonstrates that closure is necessary to further a compelling government interest and narrowly tailored to serve that interest, and the court makes specific findings that closure is warranted. The government bears a similarly high burden in attempting to limit public access to documents filed in connection with criminal proceedings, trial or pretrial. *See In re Wash. Post Co.*, 807 F.2d 383, 390-91 (4th Cir. 1986)(trial); *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (pretrial) (each citing cases).

The Supreme Court has repeatedly emphasized that this right of public access exists not only to promote public confidence in judicial proceedings and assure public accountability of government officials involved in those proceedings, but also because openness has a tangible effect on the ability of judicial proceedings to produce accurate results. That is so because transparency and public scrutiny discourage false or misleading testi-

mony, may "induce unknown witnesses to come forward with relevant testimony," and will "cause all trial participants to perform their duties more conscientiously," *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). It should be quite obvious, then, that if public access to judicial documents is not contemporaneous with the actual proceedings, this error-correcting function of openness, especially with respect to factual matters, will be irretrievably lost. Accordingly, amicus curiae urges this Court to vindicate the rights of both petitioner and the general public by ordering the relief petitioner seeks.

Argument

1. The First Amendment guarantees the public's right of access to documents filed in criminal proceedings, absent a specific compelling interest articulated by the government and narrow tailoring of any restrictions

The right of public access to criminal proceedings 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, 390-91 (4th Cir. 1986); *Washington Post Co. v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991). It includes not only the right to attend court proceedings but also the right to freely access court documents. *See id.* at 287 ("The First Amendment guarantees the press and the public a general right of access to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed.") (citing cases). Every Circuit Court

to consider the question has held that the First Amendment right of public access to judicial proceedings also extends to judicial records (1st-9th, 11th, and D.C. Circuits) or has assumed without deciding that such a right exists (10th Circuit).[2]

[2] Of the thirteen federal Courts of Appeals, only the Federal Circuit has not considered the issue, and only the Tenth has not decided it outright: *See Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989); *In re Globe Newspaper Co.,* 729 F.2d 47 (1st Cir. 1984) (bail hearings); *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988) (plea agreements); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987), *cert. denied,* 485 U.S. 977 (1988); *United States v. Smith*, 787 F.2d 111, 116 (3d Cir. 1986) and 776 F.2d 1104 (3d Cir. 1985); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986); *Hearst Newspapers, L.L.C. v. Cardenas-Guillen*, 641 F.3d 168, 172, 176-77 (5th Cir. 2011) (finding First Amendment right in favor of media petitioners seeking, inter alia, unsealing of records); *Applications of NBC*, 828 F.2d 340 (6th Cir. 1987); *United States v. Ladd (In re Associated Press*), 162 F.3d 503 (7th Cir. 1998); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988) (documents filed to support search warrant); *Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462 (9th Cir. 1990); *Associated Press v. United States Dist. Court*, 705 F.2d 1143 (9th Cir. 1983); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1028-31 (11th Cir. 2005) (mandating First Amendment access to sealed docket and judicial records in criminal case); *Washington Post v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991); *cf. United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997) ("assum[ing] without deciding that access to judicial documents is governed by the analysis articulated in *Press-Enterprise II*"); *Riker v. Federal Bureau of Prisons*, 315 Fed. Appx. 752, 756 (10th Cir. 2009) (unpublished opinion) (same); *United States v. Gonzales*, 150 F.3d 1246, 1255-61 (10th Cir. 1998) (finding certain CJA records to be administrative not judicial in nature; as to others, assuming without deciding *Press-Enterprise* applies), *cert. denied*, 525 U.S. 1129 (1999).

The Federal Circuit has not addressed the First Amendment argument, but recognizes a common-law right of access. *See In re Violation of Rule 28(d)*, 635 F.3d 1352, 1357 (Fed. Cir. 2011). Of course, the federal circuit never hears criminal cases within its jurisdiction. *See* 28 U.S.C. § 1295 (setting forth jurisdiction).

Indeed, the spectacular degree of unanimity in the federal Courts of Appeals noted in the preceding footnote means that throughout the federal system, district courts are obliged to apply First Amendment principles to govern public access to judicial documents. That has implications for court-martial practice under the UCMJ as well, for Congress has mandated in section 36 of the UCMJ that

> [p]retrial, trial, and post trial procedures ... for cases arising under [the UCMJ] triable in courts-martial ... may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts....

10 U.S.C. 836(a). This Court has repeatedly enforced standards derived from the uniform practice of the federal district courts,[3] and there is no reason for it not to do so here as well. Nothing in R.C.M. 405's presumption that Article 32 proceedings are open or R.C.M. 806's open trial mandate indicates that the executive has a contrary intent. *See* R.C.M. 405(i)(4) ("Preliminary hear-

[3] *See, e.g.*, *United States v. Nieto*, 66 M.J. 146, 150 (C.A.A.F. 2008) (looking to "generally applicable standard for considering this question in the trial of criminal cases" in district courts); *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000) ("Congress intended [with § 836] that, to the extent 'practicable,' trial by court-martial should resemble a criminal trial in a federal district court."); *United States v. St. Blanc*, 70 M.J. 424, 429 (C.A.A.F. 2012) ("Nothing in the MCM or UCMJ suggests any reason for this Court to part ways with the federal courts" (citing UCMJ § 36)); *Loving v. United States*, 64 M.J. 132, 140 (C.A.A.F. 2006) (applying *Teague* retroactivity analysis from federal courts, citing § 836); *United States v. Dowty*, 60 M.J. 163, 172 (C.A.A.F. 2004) (applying "federal rule" as to jury selection, citing § 836).

ings are public proceedings and should remain open to the public whenever possible"); R.C.M. 806(a) ("courts-martial shall be open to the public"). Indeed both rules mirror First Amendment standards as federal courts have articulated them. *See* R.C.M. 405(i)(4); 806(b)(2).

The right of public access[4] exists primarily to ensure that courts have a "measure o f accountability" and to promote "confi-

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[4] There also exists a *common law* right of access to documents that is nearly coterminous with the First Amendment. A common law right attaches where documents are properly considered "judicial documents," including at a minimum documents that play a role in determining the litigants' substantive rights. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (including documents "relevant to the performance of the judicial function and useful in the judicial process"); *see also United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (noting varying standards in different circuits). The Article 32 submissions at issue here clearly qualify as "judicial." The presumption in favor of public access to such documents will be given the strongest weight possible. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) ("presumptive right to 'public observation' is at its apogee when asserted with respect to documents relating to 'matters that directly affect an adjudication.'" (quoting *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995))). Under the common law standard, the public interest favoring access must be "heavily outweighed" by the other asserted interests to overcome the presumption in favor of public access. *Ashcraft v. Conoco, Inc*., 218 F.3d 288, 302 (4th Cir. 2000) (citations omitted); *see also Stone v. Univ. of Maryland Medical Sys. Corp*., 855 F.2d 178, 180-81 (4th Cir. 1988). "[O]nly the most compelling reasons can justify non-disclosure of judicial records." *Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.)*, 422 F.3d 1, 6 (1st Cir. 2005); *In re Knoxville News-Sentinel Co*., 723 F.2d 470, 474-476 (6th Cir. 1983) ("Appellants seek to vindicate a precious common law right, one that predates the Constitution itself. While the courts have sanctioned incursions on this right, they have done so only when they have concluded that 'justice so requires.' To demand any less would demean the common law right.").

dence 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 military affairs, where public scrutiny is often 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 ... 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 also 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.

2. Public access to judicial documents must be contemporaneous in order to enhance the accuracy of proceedings

Public access must be contemporaneous with the actual proceedings in order to maximize this error-correcting aspect of openness. The Supreme Court has long held that contemporaneous access to criminal proceedings is necessary to serve the various functions – public legitimation, diligent and upstanding official behavior, and error-correction – that public access has traditionally served. As early as 1948 the Court had announced that "[t]he knowledge that every criminal trial is subject to *contemporaneous review* in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948) (emphasis added). *Oliver* was decided under the Due Process Clause but federal courts have extended the contemporaneous access principle to Sixth Amendment cases where defendants sought to make proceedings and information public. *Huminski v. Corsones*, 386 F.3d 116, 143 (2d Cir. 2004), *as amended on reh'g*, 396 F.3d 53 (2d Cir. 2005) ("Sixth Amendment guarantees ... the right to a public trial principally to protect the defendant from prosecutorial and judicial abuses by permitting

contemporaneous public review of criminal trials."); *United States v. Wecht*, 537 F.3d 222, 229-30 (3d Cir. 2008) ("Although post-trial release of information may be better than none at all, the value of the right of access would be seriously undermined if it could not be contemporaneous."); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous. *...* The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.").

Legitimacy, accountability, accuracy: these three principles motivating the Sixth Amendment right of contemporaneous access are the same values cited by the Supreme Court in support of the First Amendment right of public access recognized in *Richmond Newspapers* and its progeny. Accordingly, federal cases have correctly specified that *First* Amendment-based access *to documents* must also be contemporaneous to be effective. *See Chicago Tribune Co. v. Ladd (In re AP)*, 162 F.3d 503, 506 (7th Cir. 1998) (in case involving request for access to "various documents that were filed under seal," Court of Appeals noted that "the values that animate the presumption in favor of access require as a 'neces-

sary corollary' that, once access is found to be appropriate, access ought to be 'immediate and contemporaneous'"); *United States v. Smalley*, 9 Media L. Rep. 1255, 1256 (N.D. Tex. 1983) (newspapers' "motions for contemporaneous access" to transcripts of evidence "now being introduced" at trial granted per First Amendment; "without contemporaneous access to the transcripts ... the press would be foreclosed from reporting at all on a significant portion of the prosecution's evidence"); *see also Associated Press v. United States Dist. Court for Cent. Dist.*, 705 F.2d 1143 (9th Cir. 1983) (even a 48-hour presumptive sealing period for documents (designed by district court to allow parties to make more permanent closure motion) violates First Amendment right of public access).

3. Only a specifically-articulated compelling interest may overcome the very strong presumption in favor of public access

Accordingly, if the government attempts to restrict or deny the right of access, it bears the strictest of burdens: it must show 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. No less than closure of the courtroom, restrictions on access to documents are subject to Strict Scrutiny analysis as well. The First Amendment demands that "[d]ocuments to which the public has a qualified right of access may be sealed only if 'specific, on the record findings

are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *United States v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008) (quoting *Press-Enter. Co*, 478 U.S. at 13-14). "[A] judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need" for the request. *Video Software Dealers Ass'n v. Orion Pictures Corp*., 21 F.3d 24, 27 (2d Cir. 1994). In assessing whether denial of public access is narrowly tailored, courts must "consider less drastic alternatives to sealing the documents, and ... provide specific reasons and factual findings supporting [the] decision to seal the documents and for rejecting the alternatives." *Ashcraft v. Conoco, Inc*., 218 F.3d 288, 302 (4th Cir. 2000) (citations omitted); *see also United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).

The Supreme Court has stated that when a trial court finds, after public notice,[5] that the presumption of access has been re-

[5] The public is entitled to notice of a party's request to seal the judicial record and to an opportunity to object to the request. *See In re Washington Post Co.*, 807 F.2d 383, 390-91 (4th Cir. 1986) (any motion or request to seal a document or otherwise not disclose a document to the public must be "docketed reasonably in advance of [its] disposition so as to give the public and press an opportunity to intervene and present their objections to the court." (quoting *In re Knight Publishing Co*., 743 F.2d 231, 234 (4th Cir. 1984))); *In re Knoxville News-Sentinel Co*., 723 F.2d 470, 474-76 (6th Cir. 1983); *United States v. Criden*, 675 F.2d 550, 557-60 (3d Cir. 1982) (due process requires that the public be given some notice that closure may be ordered in a

butted by a countervailing interest sufficiently "compelling" to satisfy strict scrutiny, that "interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984). Based on the record submitted with Sgt. Bergdahl's mandamus petition, none of this has happened here: the government has failed to specify any compelling interest capable of overcoming the First Amendment presumption of contemporaneous access, and consequently there has been no analysis of whether the total bar on public access to the documents in question to date is the most narrow restriction on access sufficient to serve any putative compelling government interest.

The Army Court of Criminal Appeals applied exactly these standards in practice to a challenge to the sealing of documents. Seventeen years ago, in *United States v. Scott*, 48 M.J. 663 (Army Ct. Crim. App. 1998), *pet'n for rev. denied*, 50 M.J. 197 (C.A.A.F. 1998), the ACCA analyzed a document unsealing request along lines identical to the First Amendment standards. The *Scott* court did not explicitly *state* that the First Amendment applied to documents — as eleven federal Courts of Appeal have done — nor did it explicitly assert that it was applying some alternate standard derived from the common law. But the court clearly ap-

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criminal proceeding to give the public and press an opportunity to intervene and present their objections to the court).

plied the same test that would have applied had it expressly found the First Amendment applicable.[6] First, it criticized the trial court for ordering sealing of documents without finding factual support for a compelling interest, stating that the "party seeking closure must advance an overriding interest that is likely to be prejudiced," *id*. at 666, and that that interest must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered," *id*. at 665-66. The *Scott* court found no factual findings in the record supporting a finding that a compelling interest was present: instead, the "military judge sealed the entire stipulation" — the contested document — "on the basis of an unsupported conclusion rather than on the basis of an overriding interest that is likely to be prejudiced if the exhibit is not sealed." *Id*. at 666. Moreover, "[r]ather than narrowly tailoring the order to seal those portions" that implicated any compelling interest, *id*. at 667 n.4, the trial judge erroneously sealed the "entire" document and all its enclosures, *id*. These are exactly the same standards that a court would apply under the First Amendment, as the ACCA noted earlier in the *Scott* opinion.[7] Be-

[6] At least one federal court, citing *Scott*, 48 M.J. at 665, 666, has implied that that decision recognized a First Amendment right of access. *See Dayton Newspapers, Inc. v. United States Dep't of the Navy*, 109 F. Supp. 2d 768, 772 (S.D. Ohio 1999).

[7] *See Scott*, 48 M.J. at 666 n.2 (First Amendment demands that "closure must be narrowly tailored to protect [the asserted compelling] interest[, and the] trial court must consider reasonable

cause the trial judge left "no basis evident in the record of trial [on appeal] that would justify sealing," *id*. at 667, the ACCA found the trial court had committed an abuse of discretion, and vacated the order of sealing.

Finally, a protective order may not permissibly reverse this burden and place the onus on the accused or the public to justify release of documents. It is reversible error for a court, acting without appropriate specifically-articulated justification, to withhold from the public each and every document filed, subject only to later review and disclosure, because such procedures "impermissibly reverse the 'presumption of openness' that characterizes criminal proceedings 'under our system of justice." *Associated Press v. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)).[8]

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alternatives to closure [and] must make adequate findings supporting the closure to aid in review.").

[8] Confronted with similarly broad closures lacking specific justification on the record, the Court of Military Appeals reversed a conviction for contact with foreign agents and attempted espionage. *United States v. Grunden*, 2 M.J. 116, 120-21 (C.M.A. 1977) ("the public was excluded from virtually the entire trial as to the espionage charges.... [B]lanket exclusion ... from all or most of a trial, such as in the present case, has not been approved by this Court"); *id*. at 121 ("In excising the public from the trial, the trial judge employed an ax in place of the constitutionally required scalpel."); *see also United States v. Ortiz*, 66 M.J. 334, 342 (C.A.A.F. 2008) (reversing conviction for failure of trial court to engage in process of applying *Press-Enterprise II*; appellate court may not make factual findings justifying closure *post hoc*).

4. Pretrial proceeding documents no less than trial proceeding documents are subject to the same right of public access

Federal courts have held repeatedly that pretrial criminal proceedings are subject to the same presumptive First Amendment right of public access as trials. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (mandating access to jury selection); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10-13 (1986) (mandating access to state preliminary probable cause hearings "as they are conducted in California," which bear many similarities to military Article 32 process); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (holding unconstitutional Puerto Rico statute closing preliminary probable cause hearings unless accused requests that it be open). This Court has endorsed a right of public access to Article 32 proceedings specifically. *See ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).[9]

[9] In *ABC v. Powell*, an Article 32 investigation of sexual misconduct charges against the then-Sergeant Major of the Army was closed over the objection of the accused and the media. This Court held that an accused had a Sixth Amendment right to a public Article 32 investigation, the press enjoys the same right, and "has standing to complain if access is denied." 47 M.J. at 365. Applying the *Richmond Newspapers/Globe Newspaper/Press-Enterprise I* and *II* test, the C.A.A.F. held that government must assert a compelling interest on a "case-by-case, witness-by-witness, and circumstance-by-circumstance basis" in support of restrictions on public access that must be narrowly tailored to be the least restrictive means that will vindicate the asserted interest. *Id*. Sweeping closure of the entire Article 32 investigation "employed an ax in the place of a constitutionally required scalpel." *Id*. at 366. *See also Denver Post Co. v. United States*, Army Misc. 20041215 (A.C.C.A. 2005), available at 2005

Unsurprisingly, federal courts have held that this right of access extends to documents submitted as part of pretrial proceedings, no less than public access to the courtroom itself. *See, e.g.*, *Associated Press v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (vacating district court order that mandated that all pretrial documents in cocaine-dealing trial of John DeLorean be filed under seal, and holding that "[t]here is no reason to distinguish between pretrial proceedings [(which are presumptively open under the First Amendment)] and the documents filed in regard to them"); *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984) (Coffin, J.) (finding media right of access to transcripts of bail hearing and documents presented during hearings); *In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986) (vacating via mandamus an order sealing various documents in espionage case relating to plea and sentencing proceedings, including motion filed prior to plea hearing, as inconsistent with First Amendment right of access); *In re New York Times Co.*, 828 F.2d 110, 113-16 (2d Cir. 1987) (pretrial motions to suppress wiretap evidence); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 574 (8th Cir. 1988) (citing numerous cases re. documents filed in various forms of pretrial proceedings); *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (Selya, J.) (the First Amendment "constitu-

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CCA LEXIS 550 (exercising jurisdiction and granting writ of mandamus to allow public access to Article 32 proceedings).

tional right of access ... encompasses most pretrial proceedings ... [and] extends to documents and kindred materials submitted in connection with [such] proceedings").[10] The documents Sgt. Bergdahl seeks here are clearly subject to the same presumptive right of public access under the First Amendment.[11]

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[10] *See also United States v. Castellano*, 1985 U.S. Dist. LEXIS 23956, No. 84CR63 (S.D.N.Y. 1985) (Sofaer, J.) (unsealing judicial disqualification documents, over defense objection, under First Amendment right of access to pretrial documents).

[11] It is no response to note, as the ACCA did here (Slip Op. at 4), that FOIA may provide a means for the public to eventually access the same records. FOIA provides neither the full extent of disclosure mandated by the First Amendment, nor the contemporaneous disclosure it demands. The statutory exemptions built into the FOIA scheme would swallow up many records the First Amendment would allow access to. *See Dayton Newspapers, Inc. v. United States Dep't of the Navy*, 109 F. Supp. 2d 768, 772-73 (S.D. Ohio 1999). For example, FOIA Exemption 6 (5 U.S.C. § 552(b)(6)) readily allows withholding of records implicating privacy interests that do not rise to the level of a "compelling government interest" for First Amendment strict-scrutiny purposes. 109 F. Supp. 2d at 775 n.5; *Freedberg v. Department of Navy*, 581 F. Supp. 3, 4 (D.D.C. 1982) (Gesell, J.) (allowing withholding in FOIA of "NIS and JAG Manual investigations" of a murder despite the fact that "large portions" of the same "are already in the public record of the courts-martial" for two of the four murder suspects already tried). Moreover, the FOIA statute by its terms allows for delays in production that are too lengthy to satisfy the error-correcting function the First Amendment right of *contemporaneous* public access is primarily intended to serve, and in practice FOIA is notoriously slow. Indeed, in the *CCR v. Lind* litigation the government appeared to repeatedly assert that FOIA production could only take place after the conclusion of trial. For these reasons FOIA was never intended to (and does not by its terms) cover federal court records.

Conclusion

As the Second Circuit explained in a high-profile terrorism case:

> Transparency is pivotal to public perception of the judiciary's legitimacy and independence. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.

United States v. Aref, 533 F.3d 72, 83 (2d Cir. 2008) (quotation and citation omitted). The legitimating function of openness is as important as its role in making proceedings more likely to arrive at accurate outcomes. Both considerations are vital in a case with so high a public profile as this one, and the concerns raised by the secrecy imposed thus far are magnified by the fact that they are taking place in a military proceeding. *See* Eugene R. Fidell, *Accountability, Transparency & Public Confidence in the Administration of Military Justice*, 9 Green Bag 2d 361 (2006) (openness is particularly vital in courts-martial 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).

In order to vindicate these important rights of both the accused and the public,[12] this Court should grant the relief that

[12] A number of news media organizations have filed in the ACCA a mandamus petition (in which Sgt. Bergdahl has sought to intervene), also seeking access to documents in the Article 32 pro-

Sgt. Bergdahl has requested and direct respondents to lift the blanket secrecy over the documents at issue. On remand, any proceedings relating to sealing of any part of the record must be consistent with the First Amendment, which demands a default presumption of public release of judicial documents, contemporaneous with the proceedings to which the documents are relevant. Prior to any closure, the public must be given notice and opportunity to respond, and the court must apply strict scrutiny, justifying any restrictions on access by item-by-item, specific findings of necessity after ensuring itself that no less-restrictive alternatives exist that would adequately serve the compelling interest justifying closure. Finally, the record created must be sufficient to permit subsequent appellate review, by either the parties or the general public.

Date: New York, New York
14 October 2015

Respectfully submitted,

/s/sdk

Shayana D. Kadidal [C.A.A.F. Bar No. 35713]
J. Wells Dixon
Baher Azmy, Legal Director
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6438

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ceedings. *See* Petition for Extraordinary Relief, *Hearst Newspapers, LLC, et al. v. Abrams*, Army Misc. No. 20150652 (A.C.C.A. filed 2 October 2015). The ACCA denied the petition by summary disposition earlier today, 14 October 2015.

Fax: (212) 614-6499

Counsel for Amicus Curiae

Certificate of Compliance with Rule 24(d)

1. This amicus brief complies with the type-volume limitation of Rule 24(c) because it contains 5,189 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface (12 point, 10 character per inch Courier New) using Microsoft Word 2010.

Date: New York, New York
14 October 2015

Respectfully submitted,

/s/sdk

Shayana D. Kadidal [C.A.A.F. Bar No. 35713]
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6438
Fax: (212) 614-6499

Counsel for Amicus Curiae

Certificate of Filing and Service

I certify that a copy of the foregoing *Unopposed Motion for Leave to File Brief of Amicus Curiae* and its attached *Brief of Amicus Curiae the Center for Constitutional Rights* was, this 14th day of October, 2015, transmitted by electronic means to the Clerk of Court, counsel for petitioner, respondent Burke, his counsel, the Government Appellate Division, and counsel for amicus curiae at the following email addresses:

efiling@armfor.uscourts.gov (Clerk of Court)

efidell@ftlf.com (Eugene R. Fidell)
franklin.d.rosenblatt.mil@mail.mil (LTC Franklin D. Rosenblatt)
alfredo.n.foster.mil@mail.mil (Cpt. Alfredo N. Foster, Jr.)
jonathan.f.potter3.mil@mail.mil (LTC Jonathan F. Potter)

Peter.q.burke.mil@mail.mil (LTC Peter Q. Burke)
Jihan.e.walker.mil@mail.mil (Cpt. Jihan E. Walker)
Albert.g.courie2.mil@mail.mil (Maj. Albert G. Courie, III)
usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@mail.mil (U.S. Army Appellate Division)

mljucmj@court-martial.com (Philip D. Cave, counsel for amicus curiae NIMJ)

/s/sdk

Shayana D. Kadidal [C.A.A.F. Bar No. 35713]
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6438
Fax: (212) 614-6499

Counsel for Amicus Curiae