

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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: JULIAN ASSANGE and WIKILEAKS, : USCA Misc. Dkt. No. 12-
: : 8008/AR
: Petitioners, :
: v. : WRIT-APPEAL PETITION FOR
: : REVIEW OF ARMY COURT OF
: : CRIMINAL APPEALS DECISION
UNITED STATES OF AMERICA and : ON APPLICATION FOR
LIEUTENANT COLONEL PAUL ALMANZA, : EXTRAORDINARY RELIEF
: :
: Respondents. : Army Crim. App. Misc. Dkt.
: : No. 20111146
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**MOTION TO SUPPLEMENT THE RECORD, OR,
IN THE ALTERNATIVE, FOR JUDICIAL NOTICE**

Petitioners Julian Assange and Wikileaks, by and through their undersigned counsel, respectfully submit this motion to supplement the record on appeal in support of their Writ-Appeal Petition pending before this Court.¹ Pursuant to Rules 30 and 30A of the Court's Rules of Practice and Procedure, Petitioners move to include in the record the Declaration of Amanda Lynn Jacobsen, counsel for Mr. Assange and Wikileaks. See Ex. A. Alternatively, Petitioners request that the Court take judicial notice of the indisputable adjudicative facts set forth in Ms. Jacobsen's declaration. Good cause exists to grant this motion.

¹ Petitioners' counsel have submitted a request for admission *pro hac vice*, which has not yet been decided by the Court.

Argument

The Court's authority to grant motions to supplement the record in connection with writ-appeal petitions relating to Article 32 proceedings is well-settled, and that authority is frequently exercised. *See, e.g., United States v. King*, 54 M.J. 330 (C.A.A.F. 2000) (granting pre-hearing motion to supplement and denying writ-appeal petition without prejudice to re-filing in connection with Article 32 hearing); *see also Doe v. Comm'r*, 61 M.J. 14 (C.A.A.F. 2005) (denying writ-appeal petition without prejudice to civilian counsel challenging, at Article 32 hearing, denial of access to information provided to military counsel). The Court should likewise grant relief in this case for several reasons.

First, this is not an ordinary case and the relief sought by Petitioners - *i.e.*, guaranteed, meaningful access to ongoing Article 32 proceedings in *United States v. Bradley Manning*, at Ft. Meade, Maryland - plainly cannot be obtained in connection with later proceedings. *See, e.g., United States v. Wilson*, 54 M.J. 450 (C.A.A.F. 2001) (granting writ-appeal petition to modify military judge's order sealing defense information). As set forth in the writ-appeal petition, Petitioners have a unique and substantial interest in attending the *Manning* proceedings in their entirety, as they occur, including closed and classified sessions.

Second, Ms. Jacobsen's declaration includes facts concerning ongoing efforts by Petitioners' counsel to obtain access to the *Manning* hearing, including information obtained as recently as yesterday afternoon, which had not yet transpired (and thus obviously could not be raised) at the time Petitioners sought extraordinary relief before the U.S. Army Court of Criminal Appeals.

Third, it is appropriate for the Court to consider these matters in the first instance because they relate to the course of ongoing proceedings rather than disputed issues such as the underlying conduct of the accused. For instance, Ms. Jacobsen's declaration describes the limited capacity for public attendance in the hearing room; the Investigating Officer's closure of the hearing without stating appropriate justification for doing so; the Investigating Officer's extensive use of "off the record" chambers conferences (including the apparent issuance of procedural, evidentiary and substantive rulings never disclosed or explained to the public); the unavailability of a verbatim transcript of the proceedings or access to legal briefs and other documents filed in connection with the hearing; the presence of other unidentified individuals in the hearing room (including during classified sessions), and other similar matters that would be clear and indisputable to anyone observing

these proceedings, but are nonetheless material to the Court's resolution of the writ-appeal petition.

Moreover, no prejudice would result from an order granting this motion on the ground that the government has not yet responded to the writ-appeal petition and thus would have full opportunity to do so in its answering brief.²

Conclusion

For these reasons, the motion should be granted.

Date: New York, New York
 December 22, 2011

Respectfully submitted,

/s/ Baher Azmy
Vincent Warren, Executive Director
Baher Azmy, Legal Director
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and Wikileaks*

² For the same reasons, in the alternative this Court should take judicial notice of the incontrovertible facts set forth in Ms. Jacobsen's declaration.

Certificate of Service

I hereby certify on this ___th day of December 2011, that I caused the foregoing Motion to Supplement to be electronically filed with the Court and served on counsel for Respondents (at michael.mulligan@us.army.mil and amber.williams@us.army.mil), and served on Respondents via overnight mail at this address:

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

/s/ Baher Azmy _____

Exhibit A

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LIEUTENANT COLONEL PAUL ALMANZA, : No. 20111146
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Respondents. :
: :
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DECLARATION OF AMANDA LYNN JACOBSEN

I, Amanda Lynn Jacobsen, hereby declare:

Introduction

1. I am over 18 years old. The information contained in this declaration is based on my personal knowledge, including without limitation my first-hand observations of the Article 32 proceedings currently underway in *United States v. Bradley Manning*, at Ft. Meade, Maryland.
2. I am a cooperating attorney with the Center for Constitutional Rights (CCR), a non-profit legal organization based in New York City.
3. I am currently a member in good standing of the New York State Bar. I have never been subject to any criminal prosecution or professional disciplinary proceedings.
4. I have an active national security clearance at the Top Secret//Sensitive Compartmented Information level. I received this clearance in relation to my ongoing representation of a so-called "High Value Detainee," who is currently imprisoned at Guantánamo Bay, Cuba.
5. CCR represents the Wikileaks media organization and its publisher Julian Assange in connection with their efforts to obtain guaranteed, meaningful access to the *Manning*

proceedings. As described below, the Investigating Officer in the *Manning* case has failed and refused to afford our clients such access.

6. On 15 December 2011, CCR filed a *Petition for Extraordinary Relief in the Nature of Writs of Mandamus and Prohibition, or Alternatively, Application for Stay of Proceedings, and Supporting Memorandum of Law* before the United States Army Court of Criminal Appeals, seeking to compel guaranteed, meaningful access to the *Manning* proceedings. CCR specifically requested allocated seating in the hearing room for myself and Mr. Assange's non-U.S. attorney Jennifer Robinson, including during any closed, classified sessions. The petition was denied on 16 December 2011. On 17 December 2011, CCR filed a writ-appeal petition before this Court, which is currently pending.
7. I respectfully submit this declaration in support of CCR's accompanying motion to supplement the record, pursuant to Rules 30 and 30A of this Court, to add additional factual information supporting the writ-appeal petition on behalf of Mr. Assange and Wikileaks.

**Ongoing Denial of Guaranteed,
Meaningful Access to the Manning Proceedings**

8. Beginning on 16 December 2011 and continuing through the present day, Ms. Robinson and I have been attending the Article 32 proceedings in *United States v. Bradley Manning*, at Ft. Meade, Maryland, as legal representatives of Wikileaks and Mr. Assange.
9. As set forth in their writ-appeal petition, Wikileaks and Mr. Assange have a unique, substantial interest in these proceedings because allegations concerning them are being addressed in these proceedings. For example, during the proceedings I have attended, both the prosecution and the defense counsel have elicited witness testimony concerning Mr. Assange and Wikileaks. Both parties have also made statements during these proceedings regarding ongoing criminal investigations against Mr. Assange and Wikileaks by the Department of Justice in the Eastern District of Virginia, as well as to the relevance of those investigations to these proceedings.

10. I plainly have a "need to know" any allegations or information relating to Wikileaks and Mr. Assange that may be addressed in these regards.
11. My access to the *Manning* hearing over the past several days has been granted as a member of the general public, and it has been tenuous and limited. I have not been afforded any formal guarantee of access to the hearing room. Instead, each time the proceedings are opened I must get in line before the proceedings are schedule to begin in order to attempt to obtain one of the only approximately twenty seats available in the public gallery; access is never certain no matter how early I arrive. And no matter how early I arrive, even if there is capacity in the hearing room it may take so long to get into the hearing room that I may miss portions of the proceedings even if they are supposedly open to the public.
12. Because the number of public access seats is so limited, I am also unable to exit the area to take instructions from my clients or co-counsel without risking the loss of my place in the public gallery. To be clear, if I leave the cordoned off, secure hearing area for any reason, including to obtain telephone or email access, which is prohibited in the hearing room but obviously necessary to consult with co-counsel in New York or my clients overseas, and if further spectators arrive and enter while I am outside, then I may not have access to the courtroom again if there is not sufficient seating to accommodate everyone.
13. Limited capacity for public access to the proceedings is now compounded by the fact that the "overflow" room, which was set up in the theatre across the parking lot from the hearing room to allow those who did not get into the main hearing room to watch via limited video link, is currently closed. This means that if I do step out of the hearing room to take instructions from my clients and are refused reentry, or if I am otherwise denied access to the hearing room, there is no provision for me to see the proceedings elsewhere.
14. My need to attend these proceedings, and to sit in the actual hearing room, is further heightened by the fact that a transcript of the proceedings is not currently being provided to the public, nor, upon information and belief, is one expected to be provided, if at all.

15. In addition, on multiple occasions over the last several days, the proceedings have been closed to the public ostensibly in order to protect classified information. Each time the proceedings have been closed on this basis, the Investigating Officer has informed the public that the reason for closing the proceedings is due to the presentation of classified information. However, the Investigating Officer has also informed the public that, in addition to himself, legal counsel for the parties, the accused himself, and select court security and support staff, certain unidentified "representatives of relevant governments" are being granted leave to stay in the court room for the presentation of classified information. No explanation as to which government agencies are represented or why they are permitted access has been provided to the public.
16. As a matter of practice, several persons, who do not enter and exit the proceedings as members of the general public, who instead appear to have been afforded guaranteed access to the proceedings, who have been sitting in the public gallery row behind the prosecution team, and who have declined to identify themselves upon inquiry from myself or members of the press, have indeed stayed in the hearing room for the classified portions of the proceedings. By contrast, despite my security clearance and obvious "need to know" any allegations and information concerning my clients, I have not been permitted to hear any portion of the classified information in these proceedings.
18. The proceedings have also been closed to the public on the basis of reasons other than the need to protect actual classified information.
19. At one point during the proceedings, the prosecution also informed the Investigating Officer that it could not present a document in its possession before the public because, although the document was unclassified, it continued to bear the markings of classification. No further investigation or explanation was sought concerning the availability of that document for public viewing by the Investigating Officer. Moreover, throughout the proceedings, there were a number of exhibits that were shared among the parties, the witnesses, and the Investigating Officer, but not shown to the public.

20. Indeed, many of the Investigating Officer's decisions, whether procedural, evidentiary or substantive, appear to be made off the public record, in closed conferences between the Investigating Officer and counsel for the parties. Closed conferences between the Investigating Officer and the parties appear to occur with regularity, multiple times throughout each day of the proceedings, or at nearly every recess.
21. Requests for closed conferences have been made by both the prosecution and defense counsel in the middle of witness testimony, without any accompanying objection to the testimony or any asserted need to interrupt the testimony. In these instances, when the parties return from conference, the line of questioning may be dropped or altered, without the public being informed of any relevant ruling by the Investigating Officer, which may have triggered these changes in the course of the examination. In addition, on multiple occasions, the fact that there has been a conference or that the Investigating Officer has issued a ruling outside the open proceeding is mentioned only peripherally before the public, as a reminder or admonishment to one of the parties.
22. On multiple occasions, the Investigating Officer has not even returned from conference to announce the break of the proceedings for the day, leaving it to the prosecution to inform the public that the proceedings would be in recess. It is clear to me from these instances that the Investigating Office does not find it a priority to inform the public of the course of the proceedings.
23. My ability to understand the proceedings is further hindered by the lack of public access to documents filed by the parties in the proceedings and the lack of access to decisions made by the Investigating Officer prior to the proceedings or in closed conference. The Investigating Officer frequently sustains or overrules objections on the basis of prior rulings made outside the court room, making it difficult if not impossible to understand the nature, basis, or implications of the ruling on the evidence or legal argument being presented. I am not aware of any public docket, that provides access to the public to the motions, exhibits, or other filings and orders made in these proceedings.

24. Finally, the Investigating Officer has refused to hear oral argument from me or Ms. Robinson on any of the foregoing issues.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 22 December 2011



Amanda Lynn Jacobsen