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1156 15th St. NW, Suite 1020  
Washington, D.C. 20005  
(202) 795-9300 • www.rcfp.org

Bruce D. Brown, Executive Director  
bbrown@rcfp.org • (202) 795-9301

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Affiliations appear only for purposes of identification.

September 13, 2022

Hon. Caroline D. Krass  
General Counsel  
Department of Defense  
1600 Defense Pentagon  
Washington, D.C. 20301-1600

**Re: Request for access to court records in *United States v. Mays* and corrected guidance interpreting Article 140a, UCMJ**

Dear Ms. Krass:

The Reporters Committee for Freedom of the Press, Pro Publica, Inc. (“ProPublica”), and the 38 undersigned media organizations write to express their concerns regarding a recent decision by a military judge and the Office of the Judge Advocate General of the Navy to deny public access to nearly the entire court record in the above-referenced court-martial, including written court orders and documents discussed in open court that are not classified, privileged, or under seal. Such documents would be contemporaneously available to the press and public in a criminal proceeding in state and federal court and have been released in other high-profile courts-martial within 24-48 hours. Even in military commission proceedings in Guantanamo, they would be released within one business day. Access to records of this kind have long been recognized as essential to public trust and oversight of any court system. Denying timely access to these records frustrates journalists’ ability to report on this case. The lack of transparency hampers the public’s ability to understand the proceedings, to assess the Navy’s decision to proceed with trial—despite its own preliminary hearing officer’s recommendation that it not do so—and, ultimately, to determine whether justice is served here.

The basis for the judge’s and OJAG decision is a 2018 memorandum issued by your predecessor, Paul C. Ney, Jr., implementing Article 140a of the Uniform Code of Military Justice, and instructions issued by the Navy interpreting that guidance. See [https://www.jag.navy.mil/library/instructions/JAGINST\\_5813.2.pdf](https://www.jag.navy.mil/library/instructions/JAGINST_5813.2.pdf). But Congress adopted Art. 140a to *enhance* public access to court-martial records and docket information, and it repeats well-settled guidance recognized by the highest military appellate court that court-martial proceedings must resemble a criminal trial in federal district court as much as possible. The Navy’s reliance on Art. 140a to justify broad restrictions on access is unfounded and contrary to Congress’s clear intent.





The legislative history confirms Congress’s intent to ensure *timely* public access to court records *throughout* the military proceedings. A conference report by HASC Chairman Mac Thornberry explained:

The purpose of this section is . . . to provide appropriate public access to military justice information *at all stages of court-martial proceedings*. At a minimum, the system developed for implementation should permit *timely and appropriate access to filings, objections, instructions, and judicial rulings at the trial and appellate level*....

162 Cong. Rec. H6376-03, H6884 (daily ed. Nov. 30, 2016) (emphasis added). The Defense Department’s Military Justice Review Group, which proposed Art. 140a in 2015, shared this understanding. In fact, Thornberry’s language describing the bill came verbatim from the group’s 2015 report. See Report of the Military Justice Review Group –Part I: UCMJ Recommendations at 1014-15, <https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf>.

That report explained that access through the federal Freedom of Information Act is “time-consuming” and insufficient, *id.* at 1011, and proposed the new article “to enhance efficiency and oversight, as well as to increase transparency in the system and foster public access to releasable information,” *id.* at 139. The new article aimed to provide “members of the public access to *all* unsealed court-martial documents” as well as court-martial dockets “in a manner similar to that available in the federal civilian courts.” *Id.* at 28, 36 (emphasis added). The report recommended using “the experience of federal and state systems” as a guide:

The civilian courts have developed systems that balance public access with the need to protect privacy, sensitive financial data, and classified information. There are well-developed models in the civilian sector which can be applied in a balanced manner to provide timely access to dockets, filings, and rulings.

*Id.* at 1012. Scholars at the time of Art. 140a’s passage had a similar understanding. One academic wrote that the new article “will require the government to facilitate the public’s access to all court-martial filings and records. That means that court-martial filings will be available to the public in a manner similar to what exists in . . . the federal civilian court system.” Schlueter, *supra*, at 113.

Since 2016, Congress has amended Art. 140a to further clarify that docket information and court records in the military justice system must be generally publicly available, to the same extent they are accessible in civilian courts.<sup>4</sup> And in 2021,

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<sup>4</sup> In 2019, Congress, tellingly, added the word “public” to the requirement that the uniform standards and criteria ensure “access to docket information, filings and records.”

Congress again pushed the military to implement a PACER-like case management system, requiring the Secretary of Defense to “publish a plan” to do so by December 2022, incorporating “the features” of PACER “to the greatest extent possible.” PL 117-81, 135 Stat 1541, 1712-13 (Dec. 27, 2021).

Despite this background and the plain language of Art. 140a, the Navy has relied on this provision to broadly deny public access to court-martial records, pointing to guidance from Mr. Ney and its own instructions.

### **Mr. Ney’s memorandum and the Navy’s instructions misinterpret Art. 140a and the Privacy Act**

Mr. Ney’s memorandum advising the Secretaries of the Military Departments on implementation of Art. 140a stated that if he determined “the law is changed” to exempt the release of military court records and docket information from the Privacy Act, they would be published online “as soon as practicable.” Ney Memo. for Secretaries of the Military Departments at 3, 5 (Dec. 17, 2018) (Enclosure 1 to JAG Instr. 5813.2), [https://www.jag.navy.mil/library/instructions/JAGINST\\_5813.2.pdf](https://www.jag.navy.mil/library/instructions/JAGINST_5813.2.pdf) (“Ney Memo”). But if he concluded that the Act did apply, these records and information would be published “as soon as practicable after certification of the record of trial[.]” *Id.* at 6.

Two years later, OJAG issued instructions pursuant to the Ney Memo, implementing Art. 140a. JAG Instr. 5813.12, [https://www.jag.navy.mil/library/instructions/JAGINST\\_5813.2.pdf](https://www.jag.navy.mil/library/instructions/JAGINST_5813.2.pdf). These instructions assume the Privacy Act applies, without any analysis, and prohibit the release of *any* court records unless the accused is convicted and then only *after* the case has ended and within a 45-day period following “certification” of the record. *Id.* at 2-3. In the event of a full acquittal, no records shall be published. *Id.* at 3. Even in those cases where the accused is convicted, numerous court records, which would routinely be contemporaneously available in civilian courts, are *never* made available to the public. These include: attachments and “supporting evidence” submitted in connection with a filing, any trial exhibits, transcripts of “any proceedings,” the Article 32 preliminary hearing report, “[p]re-trial matters” (including, among other things, witness lists, requests for instructions, and proposed voir dire), plea agreements, and even several types of court orders, such as protective orders, sealing orders, and contempt orders. *Id.* at Encl. 3 at 1-3.

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Pub. L. 116-92, Div. A, Title V, § 534(a), 133 Stat. 1198, 1361 (Dec. 20, 2019). The same year, Congress added two subsections to 140a to make clear that while military court records must *generally* be “publicly accessible,” there would be limited exceptions to this access for (1) “personally identifiable information of minors and victims of crime. . . to the extent such information is restricted in . . . Federal and State courts” and (2) records that are “classified, subject to a judicial protective order, or ordered sealed,” as they are in civilian courts. *Id.* at 1362 (codified at 10 U.S.C. § 940a(b)-(c)) (emphasis added).

The JAG instructions and Ney Memo materially misinterpret Art. 140a and the Privacy Act. As an initial matter, Mr. Mays agreed to waive any right he might have to prevent disclosure of these records under the Privacy Act, so it has no application here. In any event, the Privacy Act was “not designed to interfere with access to information by the courts.” 120 Cong. Rec. 36,967 (1974), reprinted in Source Book at 958-59, [https://www.justice.gov/opcl/PAOverview\\_SourceBook/download](https://www.justice.gov/opcl/PAOverview_SourceBook/download). Rather, it serves only to restrict government agencies from releasing certain personally identifiable information without prior written consent, with numerous exceptions, including for disclosures required by the federal Freedom of Information Act. 5 U.S.C. § 552a. Moreover, it is black-letter law that a statute cannot overcome a constitutional right, such as the First Amendment right of access to court proceedings and records, discussed below, or the Sixth Amendment right to a public trial, asserted by the accused here. *Marbury v. Madison*, 5 U.S. 137 (1803). Nor can the Ney Memo or JAG instructions supersede these constitutional protections. Moreover, as the Military Justice Review Group recognized, courts already consider privacy interests when assessing whether the presumption of public access is overcome with respect to specific records. *See supra*.

Even if the Privacy Act permitted the Navy to redact certain limited personally identifiable information in these court records, the Act must be read in conjunction with Art. 140a’s mandate to provide timely access to court-martial records at all stages of the proceedings. The Act does not permit the government to permanently deprive the public of access to entire court files—including court orders—or significantly delay such access until the records are no longer newsworthy. Doing so would contravene the clear aim of Art. 140a and render it a nullity. Nor is such delay necessary. Any review of court records for privacy concerns can happen swiftly. In fact, the Army has posted court records in virtual reading rooms during other court-martial proceedings, and there is no reason the Navy cannot do so here. *See, e.g., Ctr. For Const. Rts. v. Lind*, 954 F. Supp. 2d 389,403 (D. Md. 2013) (noting that during court-martial of Bradley (now Chelsea) Manning, “the Army released to the public, on the internet, in readily downloadable form, the vast majority of the documents that had been filed”); *United States v. Bergdahl*, Hearing Tr. 112-13 (Attachment A to Govt. Response to Defense & ProPublica Motions for Release of Documents, <https://bit.ly/3RTMfkY>) (order by military judge requiring government to publish online, on an ongoing basis, unclassified court documents within 24-48 hours of filing).

**The Armed Services must implement Art. 140a in a manner consistent with congressional intent and the public’s First Amendment and common law rights of access to military court records.**

In addition to the accused’s Sixth Amendment right to a public trial, the press and public also have a qualified First Amendment right to attend criminal trials and pre-trial proceedings and to access related court filings.<sup>5</sup> This First Amendment right is grounded

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<sup>5</sup> *See, e.g., Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596,602 (1982) (recognizing First Amendment right to attend criminal trials); *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 13 (1986) (“*Press-Enterprise I*”) (recognizing First



Military courts are no exception. The highest military appellate court has repeatedly recognized that the constitutional right of access to criminal trials “extends to courts-martial.” *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (citing *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985); *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977)); *see also ABC, Inc. v. Powell*, 47 M.J. 363, 364, 366 (C.A.A.F. 1997) (holding that preliminary hearing had to remain open unless Army could show “compelling” need for secrecy). The right to a public trial and preliminary hearings is also embedded in R.C.M. 806 and 405(j)(3), which require proceedings to be open to the public. They only permit closure, consistent with the First Amendment, where necessary to serve an “overriding” purpose, the closure is narrowly tailored, reasonable alternatives were found inadequate, and specific on-the-record findings justified the closure.

This right of access necessarily includes a right to also access military court records, as they are critical to understanding the proceedings. *United States v. Scott*, 48 M.J. 663,666 (A.C.C.A. 1998) (finding that military judge abused discretion by sealing entire stipulation of fact without identifying an “overriding reason” necessitating sealing or making any findings as required by First Amendment right of access). A federal court has similarly recognized that “it is obvious that many or even most of the documents filed in a court-martial or other criminal proceeding are likely to be judicial records” subject to the right of access. *Ctr. for Const. Rts.*, 954 F. Supp. 2d at 401. In recognition of this right, the military adopted regulations in 2011, to ensure public access to court filings and rulings in military commissions. U.S. Dep’t of Def., Regulation for Trial by Military Commission, ch. 19, <https://www.mc.mil/portals/0/2011%20regulation.pdf>.<sup>7</sup>

For good reason. Court records associated with proceedings that adjudicate criminal conduct are themselves public records that have historically been open to the public, as set forth above.<sup>8</sup> And like court records in civilian courts, such openness enables a fuller understanding of the court-martial proceedings, thus playing a significant and positive role in the military justice system by promoting public accountability and confidence in that system. The public has a significant interest in ensuring that a member of the Armed Forces is not wrongfully deprived of his liberty, so the need for transparency is paramount.

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<sup>7</sup> While the Privacy Act presumably does not apply to military commissions since it only pertains to the disclosure of information about “citizens of the United States or an alien lawfully admitted for permanent residence,” 5 U.S.C. § 552a(a)(2), the military commission regulations requiring public access are instructive here. The public has at least as strong a claim of access to courts-martial as military commissions. And there is no reason military personnel should not have the same rights to a public trial as those afforded accused terrorists. Indeed, military personnel have a right guaranteed by the Sixth Amendment.

<sup>8</sup> The R.C.M. contains rules permitting the sealing of certain records, making clear that they are otherwise presumptively *not* under seal. *See, e.g.*, R.C.M. 405(j)(8) (recognizing authority to order “exhibits, recordings of proceedings or other matters sealed”).







