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FOR FREEDOM OF THE PRESS

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

Bruce D. Brown, Executive Director  
[bbrown@rcfp.org](mailto: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.

For the reasons herein, the undersigned news media organizations respectfully request that you provide corrected guidance as soon as possible that makes clear that Art. 140a, along with the First Amendment and common law, require contemporaneous access to court-martial records as well as a public docket, ensuring the immediate release of the court records here. We ask that such updated guidance be issued in advance of the trial in this matter, currently scheduled for September 19.

### **Background**

This court-martial involves charges against Seaman Apprentice Ryan Mays, USN, for allegedly starting a fire in July 2020 that destroyed the USS *Bonhomme Richard*, marking one of the worst non-combat warship disasters in recent memory.<sup>1</sup>

ProPublica is a nonprofit investigative newsroom that has won numerous awards, including six Pulitzer Prizes. Its journalists have been following this case, but their reporting has been frustrated by OJAG's refusal, since early July, to disclose any court records in the matter, including the preliminary hearing officer's report concluding that the case not proceed to trial, multiple motions filed by the defense, and written court orders issued by the military judge. *See* Megan Rose, *The Navy is withholding court records in a high-profile ship fire case*, ProPublica (Sept. 8, 2022), <https://www.propublica.org/article/navy-bonhomme-fire-records>. However, the government previously released two documents that support its version of the case—the charge sheet and search warrant materials. *Id.*

On Aug. 22, ProPublica moved to intervene in this case on behalf of the public for the limited purpose of seeking access to these court records. *See* Motion for Appropriate Relief at 2, <https://bit.ly/3RBwpvq>. ProPublica also requested access to a docket to enable the public and press to meaningfully monitor this case. The accused also filed a motion seeking release of the court records under the Sixth Amendment. Rose, *supra*.

On Aug. 30, the military judge recognized that ProPublica had standing to intervene but denied both motions, finding that he lacks authority to grant the requested relief because Art. 140a “controls this process,” and it “does not authorize this Court to release court filings or to order the Government to do so.” *See* Order at 3, <https://bit.ly/3QySGc3>. The military judge denied access to a public docket for the same reason. (This order, too, would be withheld from the public, along with the rest of the court record, except that ProPublica, as a litigant, was provided with a copy of the ruling and published it. *See* Rose, *supra*.)

On Sept. 1, CAPT (Sel) Chad Temple, JAGC, USN, Director of the Navy's Criminal Law Division (Code 20), declined ProPublica's request to publish the court records in a virtual reading room, as the government has done in other high-profile

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<sup>1</sup> *Sailor facing court martial in fire that destroyed Navy ship*, Associated Press & Fox5 San Diego (Feb. 25, 2022), <https://fox5sandiego.com/news/local-news/sailor-facing-court-martial-in-fire-that-destroyed-navy-ship/>.



courts-martial. OJAG again pointed to Art. 140a as the basis for this denial, stating that any court documents would only be released *if* Mays is convicted and then only certain portions of the record and after a delay of 45 days following “certification” of the record after a conviction.

**Congress enacted Art. 140a to *enhance* public access to military court proceedings.**

Congress adopted Art. 140a in 2016 to promote transparency in the military court system by ensuring public access to court-martial filings, records, and docket information, consistent with access in civilian courts. 10 U.S.C. § 940a(a)(4). Congress passed the law following years of public outcry concerning reports of widespread sex crimes in the military and calls from members of Congress and the public for greater transparency.<sup>2</sup> Among other things, the law aimed to shed light on how sexual assault crimes are handled by addressing the “lack of uniform, offense-specific sentencing data from military courts, which makes meaningful comparison and analysis of military and civilian courts ‘difficult, if not impossible.’” David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 St. Mary’s L.J. 1, 113 (2017).

Article 140a requires the Secretary of Defense to “prescribe uniform standards and criteria . . . using, insofar as practicable, *the best practices of Federal and State courts*” to facilitate “public access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.” 10 U.S.C. § 940a(a)(4) (emphasis added). Significantly, the standards and criteria must facilitate such public access “at *all stages* of the military justice system . . . including pretrial, trial, post-trial, and appellate processes”—not merely after the conclusion of trial and only in cases of conviction, as the Navy contends. *Id.* This language echoes Congress’s general intent “that, to the extent ‘practicable,’ trial by court-martial should resemble a criminal trial in a federal district court.” *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000).<sup>3</sup>

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<sup>2</sup> See, e.g., Emily Crockett, *The war in Congress over rape in the military, explained*, Vox (June 8, 2016), <https://www.vox.com/2016/6/8/11874908/mjia-military-sexual-assault-gillibrand-mccaskill>; *Sex Crime Coverup: Senators Attack Lack Of Transparency In Military Justice System*, First Amendment Coalition (Dec. 10, 2015), <https://firstamendmentcoalition.org/2015/12/sex-crime-coverup-senators-attack-lack-of-transparency-in-military-justice-system/>; Darren Samuelsohn, *Military still secretive on sex crimes*, POLITICO (Sept. 25, 2013), <https://www.politico.com/story/2013/09/military-sexual-assault-transparency-097314>.

<sup>3</sup> Likewise, Article 36 of the Uniform Code of Military Justice authorizes the President to prescribe rules for courts-martial procedures that should, “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).

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



in the country's longstanding tradition of open criminal proceedings and the significant positive role such openness plays in a democratic society, enabling public understanding and oversight of the court system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980). In addition, the U.S. Supreme Court has long recognized a broad common law right of access to judicial documents. *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597–98 (1978). As set forth above, Art. 140a aimed to ensure that the military courts incorporated these principles from civilian courts as much as possible, ensuring broad access to military court records and thereby promoting transparency and public accountability.

Courts have widely recognized that the public cannot have “a ‘full understanding’ of criminal proceedings” and thus be able “to serve as an effective check on the system” without a parallel right of access to criminal court records. *In re Providence J.*, 293 F.3d at 10 (quoting *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989)); see also *Associated Press*, 705 F.2d at 1145 (“There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them[.]”).

These principles apply with equal force to adjudicatory proceedings conducted by government agencies. See, e.g., *N.Y. Civ. Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 290 (2d Cir. 2012) (applying First Amendment right of access to administrative proceedings); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (recognizing First Amendment right of access to immigration hearings). In fact, the Supreme Court has long recognized the similarities between administrative and judicial proceedings and has held that legal protections available in Article III courts must also apply to analogous administrative proceedings.<sup>6</sup>

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Amendment right of access to pre-trial criminal hearing and associated transcript); *In re Providence J. Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (recognizing First Amendment right of access “to documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings”) (collecting cases); *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (recognizing constitutional right “to written documents submitted in connection with [criminal] proceedings”); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (recognizing First Amendment right of access to “pretrial documents in general” in criminal cases); *United States v. Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985) (recognizing First Amendment and common law right of access to bill of particulars).

<sup>6</sup> See, e.g., *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 757 (2002) (finding that sovereign immunity protected state from suit in federal maritime adjudication); *Butz v. Economou*, 438 U.S. 478, 514 (1978) (finding that “adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages” the same way those who participate in Article III adjudications are); *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (recognizing that “when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process”).

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”).



**Art. 140a supports the public's right of contemporaneous access to records.**

As discussed above, Congress intended Art. 140a to promote *timely* access to court-martial dockets and records. This is consistent with the public's well-established right of contemporaneous access to court records under the First Amendment and common law. Courts have recognized that the "values that animate the presumption in favor of access require as a 'necessary corollary' that, once access is found to be appropriate, access ought to be 'immediate and contemporaneous.'" *In re Associated Press*, 162 F.3d at 506–07 (quoting *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), in turn citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976)). "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." *Id.* (quoting *Grove Fresh Distribs.*, 24 F.3d at 897, and *Neb. Press Ass'n*, 427 U.S. 539). Even a "minimal delay" in access "unduly minimizes, if it does not entirely overlook, the value of 'openness,' a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure." *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989).

Accordingly, courts have interpreted the First Amendment to require contemporaneous access to court filings and have found even temporary delays of 48 hours or longer improper. *See, e.g., Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 329 (4th Cir. 2021) (courts must make newly filed complaints available on same day they are filed); *Associated Press*, 705 F.2d at 1147 (vacating order imposing 48-hour preliminary sealing period on all documents filed in criminal case); *United States v Brooklier*, 685 F.2d 1162, 1172-73 (9th Cir. 1982) (delaying release of transcript of closed suppression hearing until end of trial violates right of access); *United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994) (ten-day delay in release of transcript of closed hearing violates right of access).

Court records can and should be released promptly even in military courts. In military commissions, for example, filings and orders "that do not require classification security review" must be "posted within one business day of filing[.]" U.S. Dep't of Def., Regulation for Trial by Military Commission at 19-4(c)(1). And even filings that do require a security review must generally be posted within 15 business days, absent "exceptional circumstances." *Id.* We respectfully request that the Department of Defense implement similar measures in the services.

**Art. 140a also requires access to a public docket.**

Courts have widely recognized that the press and public's right of access to criminal proceedings necessarily encompasses the right to inspect public docket sheets, which provide the public with notice of case developments, the motions and other documents that have been filed, any orders that have been issued, and when judicial

proceedings are scheduled to occur.<sup>9</sup> In fact, “the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible.” *Hartford Courant Co.*, 380 F.3d at 93. Even military commissions publish a docket that lists court filings and rulings and their respective dates. See, e.g., <https://www.mc.mil/CASES.aspx>.

Consistent with these principles, Art. 140a makes clear that the Department of Defense must facilitate “public access to docket information.” § 940a(a)(4). Given Congress’s aim of ensuring meaningful public access at all stages of the proceedings, akin to that provided in civilian courts, such dockets should include, at a minimum, sufficient information necessary to follow the proceedings—i.e., the motions, orders, and other documents filed in the case and when upcoming hearings and trial will occur. The Navy JAG Corps purports to comply with this requirement by providing what it calls a “docket” for court-martial cases, but it omits any of this crucial information. Instead, it merely provides limited general information about these cases, such as the last name and first initial of the accused, the charges, hearing location, and procedural stage of the case. See <https://jag.navylive.dodlive.mil/Military-Justice/Docket/>. We therefore respectfully request that you clarify for the Navy and other services that any docket must include the information set forth above.

### Conclusion

For these reasons, we respectfully ask that you swiftly issue guidance to the services correcting the misconception that Art. 140a permits them to broadly withhold court records and a public docket. We ask that you clarify that the services must implement this provision in a manner that advances Congress’s aim of promoting timely public access to such records and a meaningful public docket, consistent with the First Amendment and common law. To that end, we request that such guidance make clear that the court records in the *Mays* case must be released immediately and any future filings must be released contemporaneously, consistent with the First Amendment and common law. Since ProPublica’s motion to intervene and secure access has been denied by the military judge in this case, and OJAG has repeatedly refused to release these

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<sup>9</sup> See, e.g., *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (explaining that dockets provide a critical “index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment”); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (finding that district court’s maintenance of a sealed docket “is an unconstitutional infringement on the public and press’s qualified right of access to criminal proceedings”); *In re State-Record Co.*, 917 F.2d 124, 129 (4th Cir. 1990) (vacating order sealing docket, explaining that it could “not understand how the docket entry sheet could be prejudicial” and finding that “[s]uch overbreadth violates one of the cardinal rules that closure orders must be tailored as narrowly as possible”); see also *United States v. Mendoza*, 698 F.3d 1303, 1307 (10th Cir. 2012) (recognizing that “the clear weight of authority indicates that a docket is normally a public filing”) (collecting cases).



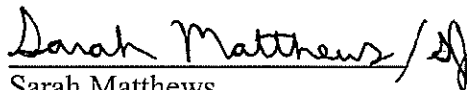
records, this matter is now ripe for review in an Article III court. *See, e.g., Ctr. for Const. Rts.*, 954 F. Supp. 2d at 399.

As in the past, with the adoption of the regulations governing military commission trials, we are happy to assist in the development of these reforms. Please feel free to contact Reporters Committee Executive Director Bruce D. Brown with any questions. We would be pleased to provide any additional information in aid of this work.

Sincerely,



Bruce D. Brown  
Executive Director  
Reporters Committee for Freedom of the Press  
bbrown@rcfp.org  
(202) 795-9301



Sarah Matthews  
Deputy General Counsel  
ProPublica  
sarah.matthews@propublica.org  
(917) 512-0288

**On behalf of the following:**

The Associated Press  
CalMatters  
The Center for Investigative Reporting (d/b/a Reveal)  
Cityside  
Courthouse News Service  
The E.W. Scripps Company  
Embarcadero Media  
First Amendment Coalition  
Freedom of the Press Foundation  
Gannett Co., Inc.  
Hearst Corporation  
Inter American Press Association  
International Documentary Association  
Los Angeles Press Club  
The Media Institute  
Military Reporters and Editors  
National Freedom of Information Coalition  
National Newspaper Association  
The National Press Club  
National Press Club Journalism Institute  
National Press Photographers Association  
National Public Radio, Inc.  
The New York Times Company  
The News Leaders Association

News/Media Alliance  
Nexstar Media Group, Inc.  
Online News Association  
Radio Television Digital News Association  
Society of Environmental Journalists  
Society of Professional Journalists  
Society of Professional Journalists, Northern California Chapter  
Stars and Stripes  
TEGNA Inc. and KFMB-TV (San Diego)  
Tully Center for Free Speech  
VICE Media Group  
The War Horse  
The Washington Post  
Yale Law School Media Freedom & Information Access Clinic

CC:

Office of the Secretary of the Navy  
1000 Navy Pentagon, Room 4D652  
Washington, DC 20350

Attn: Navy General Counsel's Office  
Office of the Secretary of the Navy  
1000 Navy Pentagon, Room 4D652  
Washington, DC 20350

VADM D. E. Crandall, JAGC, USN  
1322 Patterson Ave., Suite 3000  
Washington Navy Yard, DC 20374-5066

Commander Derek D. Butler, JAGC, USN  
Military Judge

Captain Jason L. Jones, JAGC, USN

LCDR Jordi Torres, JAGC, USN