

# Holland & Knight

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December 2, 2009

## VIA HAND DELIVERY

Honorable Robert M. Gates  
Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301-1000

Honorable John McHugh  
Secretary of the Army  
1400 Defense Pentagon  
Washington DC 20301-1400

**Re: Ensuring Public Access to All Proceedings Against  
Major Nidal Malik Hasan and all Dockets and Records**

Dear Secretary Gates and Secretary McHugh:

We write on behalf of a coalition of news media organizations that includes: Military Reporters & Editors; the Reporters Committee for Freedom of the Press; the Associated Press; Gannett Co., Inc.; the Military Times newspapers; *USA TODAY*; *The Washington Post*; and *The New York Times*. These organizations join the Nation in expressing their sorrow at the loss of thirteen service men and women at Fort Hood on November 5, 2009.

We write today to emphasize the importance of the public's ability to observe all aspects of the Article 32 and any subsequent court martial or other military court proceeding against Maj. Nidal Malik Hasan. In particular, our clients seek to ensure public access to the Convening Authority's docket and all pleadings and motions filed in this matter, as well as the ability to attend all proceedings. Our clients hope that this letter will prompt the Departments of Defense and the Army to begin preparations for public access to these materials and events. We stand ready to participate in a dialogue with you to address any concerns and ensure that public access will not interfere with the orderly conduct of any proceedings in this matter.

It is well established that First Amendment guarantees the general public a right of access to court martial proceedings, including Article 32 proceedings. *See, e.g., U.S. v. Anderson*, 46 M.J. 728, 731 (Army Ct. Crim. App. 1997)(per curiam)("trials in the United States military

justice system are to be open to the public”); *ABC Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997)(First Amendment right of public access applies to investigations under Article 32); *U.S. v. Story*, 35 M.J. 677 (A.C.M.R. 1992)(same); *U.S. v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)(same); *U.S. v. Hershey*, 20 M.J. 433 (C.M.A. 1985)(finding right of public access to courts-martial); *U.S. v. Grunden*, 2 M.J. 116 (C.M.A. 1977)(“as a general rule, the public shall be permitted to attend open sessions of court martial”). See also Lieutenant Colonel Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 MIL. L. REV. 1 (2000); Manual for Courts-Martial United States, at RCM 806 (2008) (“courts-martial shall be open to the public”).

In addition to the public's First Amendment right of access, military courts have consistently held that the accused retains his Sixth Amendment right to a public hearing in a court-martial or Article 32 proceedings. See *ABC Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997)(citing *Hershey*, 20 M.J. at 435); *Grunden*, 2 M.J. at 120; *MacDonald v. Hodson*, 42 C.M.R. 184 (C.M.A. 1970); *United States v. Brown*, 22 C.M.R. 41, 46 (C.M.A. 1956)). See also Major Mark Kulish, *The Public's Right of Access to Pretrial Proceedings Versus the Accused's Right to a Fair Trial*, ARMY LAW, Sept. 1998, at 1.

As with courts in the civilian setting, press access to military proceedings allows the public to oversee the proper functioning of government, instills public confidence, and enhances the basic fairness of the proceeding. See, e.g., *Anderson*, 46 M.J. at 731 n. 2. These First and Sixth Amendment principles are especially critical here, where a United States soldier stands accused of multiple counts of premeditated murder, and where, absent the military's exclusive jurisdiction over Maj. Hasan, he would be tried in open civilian court proceedings.

As you are aware, the military lacks an established mechanism for providing access to the contents of documents filed with its tribunals. While the Army Courts-Martial Internet Docket (ACMID) provides some basic information, ACMID alone is insufficient as the scant notations it contains do not furnish the public with access to any documents themselves. In the civilian setting, federal courts guarantee the public right of access to dockets as well as the records filed in court. See e.g. *Hartford Courant v. Pelligrino*, 380 F.3d 83, 86 (2d. Cir. 2004)(holding that “the press and public have a qualified First Amendment right of access to docket sheets”); *United States v. Valenti*, 987 F.2d 708, 715 (11<sup>th</sup> Cir. 1993)(holding that a court's secret docketing system for criminal cases “is an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings.”)

As the proceedings in connection with the Fort Hood shootings involve a matter of the utmost public concern, and consistent with the Constitution, our clients ask that the Departments of Defense and the Army make preparations now for full, contemporaneous access to the records through the ACMID website or some other accessible means. We further request that you also begin preparations to permit access to all further proceedings held in this matter.

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Honorable John McHugh  
December 2, 2009  
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Our clients would be pleased to meet with the appropriate DOD and military officials to discuss their concerns and assist in making these preparations. We look forward to hearing from you.

Sincerely,

HOLLAND & KNIGHT LLP



Charles D. Tobin  
Drew E. Shenkman

*Counsel to Military Reporters & Editors; the Reporters Committee for Freedom of the Press; the Associated Press; Gannett Co., Inc.; the Military Times newspapers; USA TODAY; The Washington Post; and The New York Times*

cc: Maj. Gen. Kevin J. Bergner, U.S. Army Chief of Public Affairs  
Lt. Gen. Dana K. Chipman, U.S. Army Judge Advocate General  
Col. Stephen R. Henley, Chief Judge, U.S. Army Trial Judiciary  
Col. Greg Gross, Chief Judge, 3<sup>rd</sup> Judicial Circuit