

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Pro Publica, Inc. v. Butler

ProPublica · No. 22-cv-1455-BTM-KSC · Decided September 12, 2025

SUMMARY

The United States District Court for the Southern District of California considers ProPublica’s challenge to the Navy’s policies restricting public access to filings in Article 32 hearings and court-martial proceedings. The court rejects the political-question and mootness arguments, holds that the First Amendment right of access generally applies to such papers subject to statutory, national-security, and other compelling exceptions, and requires public notice of Article 32 proceedings. The court declines to issue a writ of mandamus because the Secretary of Defense’s duties under Article 140a are discretionary.

CASE DETAILS

COURT	United States District Court for the Southern District of California
WRITING FOR THE COURT	Barry Ted Moskowitz
JURISDICTION	United States District Court for the Southern District of California
DECIDED	September 12, 2025
DOCKET	22-cv-1455-BTM-KSC
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff sought declaratory judgment, a permanent injunction, and mandamus relief concerning public access to filings in naval Article 32 hearings and court-martial proceedings. The parties moved for summary judgment, and the Government moved to dismiss under the political question doctrine.
STANDARD OF REVIEW	Summary judgment is appropriate where no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. The political-question issue was reviewed for justiciability. Mandamus requires a clear and certain claim, a plainly prescribed ministerial duty, and no other adequate remedy, and remains within the court's discretion.
PRECEDENTIAL VALUE	persuasive

PARTIES

Pro Publica, Inc. v. Major General David J. Bligh, John Phelan, Earl G. Matthews, Pete Hegseth

TOPICS

first amendment

court martial

constitutional law

declaratory judgment

equitable relief

PRACTICE AREAS

constitutional law

military law

civil rights

criminal procedure

remedies

QUESTIONS PRESENTED

1. Whether the dispute over public access to filings in naval prosecutions presented a nonjusticiable political question.
2. Whether the Government's changed access policies and limited disclosures rendered ProPublica's claims moot.
3. Whether the First Amendment public right of access extends to Article 32 hearing papers, documentary evidence, transcripts, and related filings in court-martial proceedings.
4. Whether that right of access requires contemporaneous disclosure or permits review, redaction, and withholding based on statutory grounds, bona fide national-security concerns, and other valid and compelling reasons.
5. Whether the Government may categorically withhold records from court-martial cases ending in acquittal.
6. Whether ProPublica was entitled to a writ of mandamus compelling the Secretary to prescribe particular access standards under Article 140a.

HOLDINGS

1. The political-question doctrine does not bar adjudication of constitutional and statutory challenges to the Navy's public-access policies because determining the extent of constitutional and congressional limits on executive authority is a legal question committed to the judiciary.
2. The claims were not moot because the Government failed to show that the challenged denial of access could not or would not recur, and it continued to deny the existence of the asserted access rights.
3. The First Amendment public right of access extends to Article 32 hearings and to filings, documentary evidence, transcripts, and related papers in Article 32 and court-martial proceedings.
4. The right of access to papers from Article 32 and court-martial proceedings is not contemporaneous; the Government may review, redact, or withhold materials on statutory grounds, for bona fide national-security concerns, or for other valid and compelling reasons, but papers must generally be released within 30 days after certification of the trial record.
5. The Government may not categorically withdraw acquittal cases from public access, and it must provide at least ten days' public notice of an Article 32 proceeding.

6. Mandamus was unavailable because Article 140a leaves the Secretary's duties imprecise and discretionary, and ProPublica had other adequate relief through declaratory and equitable remedies.

KEY QUOTATIONS

“The extent to which the Constitution or Congress properly limits that power—for the public to access filings in naval prosecutions—is a legal question for courts and is not committed in the Constitution to Congress or the Executive Branch.” (at 5)

“For documentary evidence, transcripts, or related papers and filings from Article 32 and court-martial proceedings, the public right of access is not contemporaneous and is subject to withholding or redaction on statutory bases, for bona fide national security concerns, and for other valid and compelling reasons.” (at 12)

“However, the Court does reject the Government’s policy of withdrawing acquitted cases as a class from the public right of access.” (at 14)

“The Court holds that the public right of access applies to filings, documentary evidence, and related papers in Article 32 hearings and court-martial proceedings.” (at 16)

FACTUAL BACKGROUND

The Navy prosecuted Seaman Ryan Mays for the 2020 fire that severely damaged the Bonhomme Richard, a naval warship, and Mays was ultimately acquitted. ProPublica sought filings and papers from the prosecution, including materials concerning an Article 32 preliminary hearing and evidence regarding alleged Navy safety failures. The Navy denied access, including access to the full Article 32 report and transcript. During the litigation, the Government adopted new access standards and provided limited access to some filings but continued to deny a general right of access, particularly in acquittal cases.

PROCEDURAL HISTORY

ProPublica sought access to records from the court-martial prosecution of Seaman Ryan Mays after the Navy denied requests for filings, including the Article 32 hearing report and transcript. ProPublica sued federal officials in their official capacities. During the litigation, the Government adopted standards providing greater access and provided limited access to some filings, but continued to dispute the asserted right of access. The court denied dismissal, granted ProPublica partial summary judgment on declaratory and permanent-injunction relief, denied mandamus relief, and granted the Government summary judgment on the mandamus count.

DISPOSITION

other

CASES CITED

- Baker v. Carr, 369 U.S. 186, 217 (1963)
- Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 230 (1986)
- Vieth v. Jubelirer, 541 U.S. 267, 277 (2004)

- *Gilligan v. Morgan*, 413 U.S. 1, 5-12 (1973)
- *Nixon v. United States*, 506 U.S. 224 (1993)
- *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)
- *INS v. Chadha*, 462 U.S. 919, 942 (1983)
- *Morrison v. Olson*, 487 U.S. 654, 693 (1988)
- *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)
- *Newsom v. Trump*, 141 F.4th 1032, 1039, 1045 (9th Cir. 2025) (per curiam)
- *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)
- *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 457 n.1 (2017)
- *Waller v. Georgia*, 467 U.S. 39, 44 (1984)
- *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-15 (1986)
- *Richmond Newspapers v. Virginia*, 448 U.S. 555, 564, 593 (1980)
- *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)
- *United States v. Castleman*, 11 M.J. 562, 564 (A.F.C.M.R. 1981)
- *United States v. Davis*, 62 M.J. 645, 647 (A.F.C.C.A. 2006)
- *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997)
- *United States v. Davis*, 64 M.J. 445, 446-47 (C.A.A.F. 2007)
- *United States v. Miro*, 22 M.J. 509, 511 (A.F.C.M.R. 1986)
- *Ortiz v. United States*, 585 U.S. 427, 437-38 (2018)
- *Solorio v. United States*, 483 U.S. 435, 436 (1987)
- *Nixon v. Warner Communications*, 435 U.S. 589, 597-98 (1978)
- *Oregonian Publishing Co. v. United States District Court*, 920 F.2d 1462, 1466 (9th Cir. 1990)
- *Seattle Times Co. v. United States District Court*, 845 F.2d 1513, 1517 (9th Cir. 1988)
- *Courthouse News Serv. v. Planet*, 947 F.3d 581, 592, 594 (9th Cir. 2020)
- *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994)
- *Dhiab v. Trump*, 852 F.3d 1087, 1094 (D.C. Cir. 2017)
- *N.Y. Times Co. v. United States DOJ*, 806 F.3d 682 (2d Cir. 2015)
- *United States v. Vinas*, No. 08-CR-823 (NGG), 2017 U.S. Dist. LEXIS 86724 (E.D.N.Y. June 6, 2017)
- *In re Gabapentin Patent Litig.*, 312 F. Supp. 2d 653, 664 (D.N.J. 2004)
- *ACLU v. United States DOJ*, 750 F.3d 927 (D.C. Cir. 2014)
- *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994)
- *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986)
- *Oregon Natural Resources Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995)
- *Interstate Commerce Commission v. New York, N.H. & H.R. Co.*, 287 U.S. 178, 204 (1932)
- *Wilbur v. United States*, 281 U.S. 206, 218 (1930)
- *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)
- *Galvez v. Jaddou*, 52 F.4th 821, 831 (9th Cir. 2022)

- *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803)
- *Mesabi Metallics Co. LLC v. Cleveland-Cliffs, Inc.* (In re ESML Holdings Inc.), 135 F.4th 80, 94 (3d Cir. 2025)
- *United States v. Denedo*, 556 U.S. 904, 918 (2009) (Roberts, C.J., concurring in part and dissenting in part)

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF
CALIFORNIA 10 11 PRO PUBLICA, INC., Case No.: 22-cv-1455-BTM-KSC 12 Plaintiff,
ORDER GRANTING IN PART AND 13 v. DENYING IN PART MOTIONS FOR SUMMARY
JUDGMENT AND 14 MAJOR GENERAL DAVID J. DENYING MOTION TO DISMISS
BLIGH; JOHN PHELAN; EARL G. 15 MATTHEWS; and PETE [ECF NOS. 88 & 99] 16
HEGSETH, 17 Defendants.

18 19 20 This case presents a dispute over the public’s right to access filings in naval 21
prosecutions. Plaintiff Pro Publica, Inc. (“ProPublica”), a nonprofit journalism 22 organization,
contends that the Navy systematically denies the public access to 23 filings in court-marital
proceedings. ProPublica argues that the Navy’s public 24 access policies are unconstitutional and
inconsistent with an act of Congress.

25 The Government does not dispute that its policies limit public access to filings 26 in court-
martial proceedings. The Government contends that whether its policies 27 are lawful is a
“political” question—one unsuitable for courts to decide. Lack of 28 1 necessary in the interest of
national security. 2 I. BACKGROUND 3 The Bonhomme Richard, a naval warship, was in port in
San Diego in July 4 2020.

The Bonhomme Richard cost over \$700 million to build and supported 5 combat operations in
Iraq. But for about four days in July 2020, it was engulfed in 6 flames. The damage was
significant, and many sailors and civilians were injured. 7 The Navy decommissioned the ship
because it was not worth repairing. 8 In the Government’s view, the damage done to the
Bonhomme Richard was 9 no accident.

The Navy brought charges against Seaman Ryan Mays. A 10 preliminary hearing (an “Article 32
hearing”) was held, and the presiding judge 11 recommended that the case not proceed to trial. The
case did proceed to a court- 12 martial, however, and Mays was ultimately acquitted. What usually
coincides with 13 a noteworthy prosecution, of course, is press coverage, and ProPublica wanted
to 14 cover the Mays case.

15 ProPublica is a nonprofit journalism organization. It has won numerous 16 awards and
produced important journalism on the criminal justice system and the 17 Navy. For instance, three
ProPublica journalists—Megan Rose, Robert Faturechi, 18 and T. Christian Miller—won a
Pulitzer Prize for reporting on, among other things, 19 the collision of two Navy destroyers.

An arson trial over a near-billion dollar Navy ship unsurprisingly captured Megan Rose's interest. But her coverage of the Mays case was not so simple. Megan Rose tried to obtain filings in the Mays case. For instance, Rose learned that the Government was seeking "to exclude from evidence a Navy report documenting widespread safety failures leading up to the fire." (ECF No. 90).

Rose wanted to assess whether the *Bonhomme Richard* was damaged because of the Navy's negligence or whether Mays was guilty of arson. But her requests for court-martial documents were denied by the Navy's Office of the Judge Advocate General. ProPublica's counsel fared no better, and the presiding judge in the Mays case ruled that the court lacked the power to order the filings released to ProPublica.

Based on the Government's policies, ProPublica was denied access to filings and papers in the Mays case. In fact, the Navy continues to deny ProPublica access to the full Article 32 hearing report and transcript. Seeking to obtain the Mays filings and to prevent the Navy from denying the public access to filings in naval prosecutions, ProPublica brought suit against, in their official capacities, the commanding officer of the Judge Advocate General Corps of the U.S. Navy; the Secretary of the Navy; the General Counsel of the Department of Defense; and the Secretary of Defense.

ProPublica is seeking a declaratory judgment, a permanent injunction, and a writ of mandamus. The parties have moved for summary judgment, and the Government also moves for dismissal under the political question doctrine. II. DISCUSSION A. The political question doctrine does not apply here. The political question doctrine is grounded in the fundamental principle that the federal judiciary is tasked with adjudicating only legal—not policy—disputes.

See generally *Baker v. Carr*, 369 U.S. 186, 217 (1963) (indicating that the doctrine is "essentially a function of the separation of powers"). Federal courts must not decide "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am.*

Cetacean Soc'y, 478 U.S. 221, 230 (1986); accord *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (explaining that there are cases where "the judicial department has no business entertaining the claim of unlawfulness--because the question is entrusted to one of the political branches or involves no judicially enforceable rights"). The political question doctrine applies to questions (1) committed by constitutional text to an equal branch of government; (2) lacking manageable judicial standards; (3) requiring a policy determination; (4) requiring a court to express lack of respect to an equal branch of government; (5) where courts must adhere to a political decision already made; and (6) where a court decision would lead to "embarrassment

from multifarious pronouncements by various 5 departments on one question.” Baker, 369 U.S. at 217.

6 As examples, the Court found a case calling on courts to “to assume 7 continuing regulatory jurisdiction over the activities of the Ohio National Guard” to 8 raise a nonjusticiable political question, *Gilligan v. Morgan*, 413 U.S. 1, 5-12 9 (1973); and the Court found that the Senate’s impeachment method was 10 committed by the Constitution to the Senate and thus raised a nonjusticiable 11 political question, *Nixon v. United States*, 506 U.S. 224 (1993).

At the same time, 12 however, the Court has held that the legality of a statute giving Americans born in 13 Jerusalem the ability to list on their passport “Israel” as their place of birth raised a 14 legal question, not a political question. *Zivotofsky v. Clinton*, 566 U.S. 189 (2012). 15 Here, the Government contends that the first three Baker factors apply 16 because (1) the questions in this case should be left to the Executive and 17 Legislative Branches and raise national security concerns; (2) the questions here 18 lack manageable judicial standards; and (3) the questions here require policy 19 determinations.

20 But the judiciary is the branch best suited to adjudicate constitutional and 21 statutory challenges. See *INS v. Chadha*, 462 U.S. 919, 942 (1983) (“No policy 22 underlying the political question doctrine suggests that Congress or the Executive, 23 or both acting in concert and in compliance with Art. I, can decide the 24 constitutionality of a statute; that is a decision for the courts.”).

That is of course 25 what federal courts do daily. See *Zivotofsky*, 566 U.S. at 196 (stating that statutory 26 and constitutional interpretation is “a familiar judicial exercise”); *Japan Whaling*, 27 478 U.S. at 230 (“[I]t goes without saying that interpreting congressional legislation 28 is a recurring and accepted task for the federal courts.”). 1 The Constitution separates power between three branches and mandates a 2 system of check and balances.

Morrison v. Olson, 487 U.S. 654, 693 (1988) 3 (describing “the system of separated powers and checks and balances established 4 in the Constitution”). That system risks weakening if the Executive and Legislative 5 Branches were the ultimate arbiters of the legality of their actions. Article III courts 6 serve that function in the usual course of their duties.

If the public has a 7 constitutional or statutory right to access filings in naval prosecutions, that legal 8 right would not vanish because the Navy is a military unit of the Executive. See 9 *Gilligan*, 413 U.S. at 11 (“[W]e neither hold nor imply that the conduct of the 10 National Guard is always beyond judicial review or that there may not be 11 accountability in a judicial forum for violations of law or for specific unlawful conduct 12 by military personnel.”); see also *Chadha*, 462 U.S. at 942 (“[T]he presence of 13 constitutional issues with significant political overtones does not automatically 14 invoke the political question doctrine.

Resolution of litigation challenging the 15 constitutional authority of one of the three branches cannot be evaded by courts 16 because the issues have political implications in the sense urged by Congress.”). 17 Indeed, courts have enforced against the President rulings with national 18 security concerns. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) 19 (precluding the President from operating steel mills even where in his view it “was 20 necessary to avert a national catastrophe”).

The Ninth Circuit even recently ruled 21 that the statutory legality of the President’s decision to nationalize the National 22 Guard does not raise a pure political question. *Newsom v. Trump*, 141 F.4th 1032, 23 1039, 1045 (9th Cir. 2025) (per curiam).

The Court would hardly be charting a new 24 course by determining the extent of the public’s right to access filings in naval 25 prosecutions. But, declining to resolve this dispute could impair fundamental 26 rights. 27 Application of the political question doctrine to the constitutional questions in 28 this case could potentially endanger all rights in court-martial proceedings.

The 1 Government’s position that the political question doctrine precludes consideration 2 of ProPublica’s claims has little to no limiting principle. If the Navy wanted to close 3 to the public all court-martial proceedings, the political question doctrine would 4 certainly not apply—but the Government has not provided adequate reasoning to 5 distinguish that case from this one.

At bottom, resolving the questions in this case 6 in ProPublica’s favor would not improperly limit power granted by the Constitution 7 to the Executive—but would instead recognize power given by the Constitution to 8 the people. 9 The Constitution does, without question, grant the President much power 10 and discretion over the Navy. But that power is not unlimited.

The extent to which 11 the Constitution or Congress properly limits that power—for the public to access 12 filings in naval prosecutions—is a legal question for courts and is not committed 13 in the Constitution to Congress or the Executive Branch.

The questions in this 14 case fall within the core of a federal court’s function “to say what the law is.” 15 *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803) (“It is emphatically the 16 province and duty of the judicial department to say what the law is.”).

The Court 17 will thus answer them. 18 B. The questions in this case are not moot but ripe. 19 After ProPublica filed suit, the parties attempted to amicably resolve the 20 issues. The Government provided ProPublica with limited access to some of the 21 Mays filings. And on January 9, 2025, Caroline Krass, the (then) General Counsel 22 of the Department of Defense, issued new standards under Article 140a (the Krass 23 Standards).

The Krass Standards provide the public with greater access to filings 24 in naval prosecutions. The Government has also started providing the public 25 advanced notice of Article 32 proceedings. 26

But those developments do not moot the questions in this case.

The 27 “voluntary cessation of allegedly illegal conduct does not deprive the tribunal of 28 power to hear and determine the case, i. e., does not make the case moot.” *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Voluntary cessation moots 2 a claim only where the party asserting mootness carries the “heavy burden” of 3 showing clearly that the challenged conduct will not reoccur.

Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 457 n.1 (2017) (citation omitted). 5 There is insufficient evidence showing that the Government could not, or 6 would not, continue to deny the public access to filings in naval criminal 7 prosecutions.

The voluntary cessation doctrine’s heavy burden would hardly be a 8 burden at all if the Government could overcome it simply by changing course and 9 then invoking the doctrine. Finding mootness in this situation could also risk 10 preventing the resolution of the issues, because every time the Government 11 denied access, it could alter course after a suit is filed and then argue mootness.

12 The Government asserts that it can continue denying the public access to 13 court-martial filings in all cases ending in acquittals. (ECF No. 99 at 23). 14 Furthermore, the Government continues to deny the existence of the rights 15 ProPublica asserts, resulting in a realistic probability that ProPublica will be denied 16 access to court-martial records in the future.

See (ECF No. 99). The issues here 17 are not moot. 18 C. The public right of access applies to papers in Article 32 hearings 19 and court-martial proceedings. 20 The First Amendment generally grants the public the right to attend criminal 21 proceedings and to access the filings in such proceedings. See, e.g., *Waller v. Georgia*, 467 U.S. 39, 44 (1984) (noting that “the press and public have a qualified 23 First Amendment right to attend a criminal trial”); *Forbes Media LLC v. United States*, 61 F.4th 1072, 1077 (9th Cir.

2023) (explaining that the First Amendment’s 25 right of public access “extends to some criminal proceedings” and to certain filings 26 27 28 1 in such proceedings). Indeed, “throughout its evolution” in Anglo-American 2 history, “the trial has been open to all who cared to observe.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 564 (1980). “Such abiding adherence to 4 the principle of open trials ‘[reflects] a profound judgment about the way in which 5 law should be enforced and justice administered.’” *Id.* at 593 (Brennan, J., 6 concurring) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).

7 The scope of the public right of access is determined by a two-part test: 8 courts look first to “experience,” that is, whether historically the public was granted 9 the access at issue, and second to “logic,” that is, whether the right of access 10 significantly furthers the process at issue. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986).

Here, in assessing the public's right to access filings in naval prosecutions, the Court finds *Press-Enterprise* instructive. In that case, the Court held that the public right of access applied to a transcript of a preliminary hearing in a state criminal prosecution. *Id.* at 10-15.

The right applied, the Court reasoned, because the preliminary hearing was essentially a mini trial: the hearing was open to the public and held before a neutral magistrate, and the accused had the right to appear, to counsel, to present evidence, and to challenge the admission of evidence. *Id.* Thus, the Court found the First Amendment test satisfied and the public right of access compelling.

Id. Article 32 hearings are strikingly similar. They are in essence mini trials. Article 32 hearings are held before an impartial officer, ideally a judge advocate, to assess whether there is probable cause and jurisdiction and for a 23 24 25 1 Because the Court finds the First Amendment right of access broader or at least 26 coextensive with the common law right of access, the Court will analyze the issues here solely under the First Amendment.

See generally *Mesabi Metallics Co. LLC v. Cleveland-Cliffs, Inc. (In re ESML Holdings Inc.)*, 135 F.4th 80, 94 (3d Cir. 2025) (explaining that the First Amendment right of access “is even more robust” than the 1 recommendation whether to proceed with the charge(s). 10 U.S.C. § 832(a) & (b); 2 *United States v. Castleman*, 11 M.J. 562, 564 (A.F.C.M.R. 1981) (“Article 32 3 investigating officers, whose functions are judicial and quasi-judicial, are held to 4 the same standards as military judges in determining impartiality.”).

The military 5 courts have repeatedly recognized that Article 32 hearings are presumptively open 6 to the public, even finding the issue “settled.” *United States v. Davis*, 62 M.J. 645, 7 647 (A.F.C.C.A. 2006) (“It is settled that Article 32 investigations are presumptively 8 public hearings.”); *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997). Article 9 32 hearings must be recorded.

10 U.S.C. § 832(e). At an Article 32 hearing, the 10 accused has the right to counsel and may cross-examine witnesses and present 11 additional evidence. 10 U.S.C. § 832(d); *United States v. Davis*, 64 M.J. 445, 446- 12 47 (C.A.A.F. 2007) (“The procedures for an Article 32 hearing include 13 representation of the accused by counsel, the right to present evidence, and the 14 right to call and cross-examine witnesses.”); *United States v. Miro*, 22 M.J.

509, 15 511 (A.F.C.M.R. 1986) (explaining that an accused's counsel should have 16 “adequate time to prepare” for an Article 32 hearing). 17 Because Article 32 hearings are nearly identical to the hearing at issue in 18 *Press-Enterprise*, it would necessarily seem to follow that the right of access found 19 there should apply here as well.

To hold otherwise would require one of two 20 distinctions, neither of which is persuasive. First, *Press-Enterprise* and the right of 21 public access to filings could be found inapplicable to military

courts. But that 22 holding would be contrary to military court decisions and the very nature of the 23 courts-martial. 24 After all, courts-martial are criminal proceedings in nature, not a pure military 25 matter, and military courts can try common offenses by servicemembers divorced 26 from military service.

Ortiz v. United States, 585 U.S. 427, 437-38 (2018) 27 (describing the “military justice system’s essential character” as “judicial,” 28 explaining that service members are given virtually identical protections in courts- 1 martial as in state or federal prosecutions, and noting that service members can 2 be charged in courts-martial with “garden-variety crimes unrelated to military 3 service”); *Solorio v. United States*, 483 U.S. 435, 436 (1987) (rejecting the rule that 4 there must be a “service connection” to a court-martial charge).

The accused in a 5 court-martial is ultimately charged with a crime and could be subject to lifetime 6 incarceration or death, and thus there is little reason to withdraw the public right of 7 access from military proceedings. See *Ortiz*, 585 U.S. at 438 (“Courts-martial can 8 impose, on top of peculiarly military discipline, terms of imprisonment and capital 9 punishment.”).

The First Amendment’s experience-and-logic test requires 10 extending to the court-martial the public right of access. 11 Second, the Court could limit the right of access to testimony by excluding 12 filings, transcripts, and related papers from the right of access. But such a holding 13 would run counter to *Press-Enterprise*, *Nixon v. Warner Communications*, 435 U.S. 14 589, 597 (1978) (“[C]ourts of this country recognize a general right to inspect and 15 copy public records and documents, including judicial records and documents.”), 16 and Ninth Circuit precedent recognizing that documents in criminal cases generally 17 fall within the public right of access, *Oregonian Publishing Co. v. United States* 18 District Court, 920 F.2d 1462, 1466 (9th Cir.

1990) (“[T]he press and public have 19 a qualified right of access to plea agreements and related documents under the 20 First Amendment.”); *Seattle Times Co. v. United States District Court*, 845 F.2d 21 1513, 1517 (9th Cir. 1988) (“[T]he press and public have a right of access to pretrial 22 release proceedings and documents filed therein.”). 23 Moreover, distinguishing evidence through live testimony from evidence 24 submitted through exhibits, papers, and related filings would be tenuous at best.

25 If the press can attend Article 32 proceedings, then any evidence offered there 26 should not be withheld from the press merely because it is offered in documentary 27 form. The distinction between testimonial evidence and documentary evidence 28 has little basis in the First Amendment’s logic test. See *Courthouse News Serv. v. 1 Planet*, 947 F.3d 581, 592 (9th Cir.

2020) (“Absent a showing that there is a 2 substantial interest in retaining the private nature of a judicial record, once 3 documents have been filed in judicial proceedings, a presumption arises that the 4 public has the right to know the information they contain.”); *United States v. Antar*, 5 38

F.3d 1348, 1360 (3d Cir. 1994) (“It would be an odd result indeed were we to 6 declare that our courtrooms must be open, but that transcripts of the proceedings 7 occurring there may be closed, for what exists of the right of access if it extends 8 only to those who can squeeze through the door?”).

After all, as it pertains to the 9 public release of evidence, the Government and the public should have little 10 reason to be more concerned with the form that evidence takes in court over the 11 substance of the evidence. 12 Evidence which can be quoted in the press if admitted through witness 13 testimony should not be withheld from the press merely because it is admitted 14 through papers.

In this Court’s view, there is no persuasive basis to withdraw the 15 public right of access from Article 32 proceedings nor, as a general matter, from 16 the filings and submissions therein. It must necessarily follow, of course, that the 17 same right applies in a court-martial.

The closer question, however, is over the 18 scope of the right of access. 19 D. The public right of access to papers here is not contemporaneous 20 and is subject to statutory, national security, and other valid 21 exceptions. 22 Although essentially criminal trials, court-martial differ significantly from state 23 and federal systems. Generally stated, courts-martial are comprised of a 24 temporary group of service members who decide a case and then “return to their 25 regular duties.” See *United States v. Denedo*, 556 U.S. 904, 918 (2009) (Roberts, 26 C.J., concurring in part and dissenting in part).

ProPublica claims that any filings 27 in a court-martial should be given contemporaneously to the press. But this claim 28 mistakes the nature of a court-martial and the need for review before papers are 1 released for public view. 2 The members of a court-martial are not necessarily well suited to review 3 filings to determine whether they must be withheld or redacted from public view.

4 The members of a court-martial are not necessarily there to determine whether a 5 filing raises national security concerns or whether its release would violate a 6 statute. Indeed, it may not be readily apparent whether a filing raises national 7 security concerns or whether its release would violate a statute. 8 Further, “the right to inspect and copy judicial records is not absolute.

Every 9 court has supervisory power over its own records and files, and access has been 10 denied where court files might have become a vehicle for improper purposes.” 11 *Nixon*, 435 U.S. at 598. It should thus be unquestioned that the Government has 12 the right to control filings in Article 32 and court-martial proceedings and determine 13 whether the release of evidence would violate a statute, raise national security 14 concerns, or must be prevented for other valid and compelling reasons.

See *Dhiab 15 v. Trump*, 852 F.3d 1087, 1094 (D.C. Cir. 2017) (describing the American tradition 16 of denying public access to national security information); *N.Y. Times Co. v. United 17 States DOJ*, 806 F.3d 682 (2d Cir. 2015) (upholding sealing of classified 18 information); *United States v. Vinas*, No. 08-CR-823 (NGG), 2017 U.S. Dist. LEXIS 19 86724 (E.D.N.Y.

June 6, 2017) (finding after in camera review that portions of a 20 letter should remain redacted for national security concerns); *In re Gabapentin 21 Patent Litig.*, 312 F. Supp. 2d 653, 664 (D.N.J. 2004) (“[T]he public right of access 22 to judicial records does not trump all other interests and may be limited where there 23 are important overriding interests.”).

24 For documentary evidence, transcripts, or related papers and filings from 25 Article 32 and court-martial proceedings, the public right of access is not 26 contemporaneous and is subject to withholding or redaction on statutory bases, 27 for bona fide national security concerns, and for other valid and compelling 28 reasons.

The Court finds the release of papers within 30 days of the certification 1 of the trial record sufficient for the Government to review whether any papers must 2 be redacted or withheld. Any further delay risks unnecessarily preventing the 3 press from providing the public with newsworthy information in a timely manner. 4 See *Planet*, 947 F.3d at 594 (recognizing “that a necessary corollary of the right to 5 access is a right to timely access” and describing “the public interest in obtaining 6 news” as “an interest in obtaining contemporaneous news”).

The Court does not 7 here question the Government’s arguments, see Captain Chad Temple’s 8 deposition testimony, as to whether any specific documents raise national security 9 concerns, and the Court notes that considerable deference should be accorded to the 10 military over such questions. 11 However, the Court does reject the Government’s policy of withdrawing 12 acquitted cases as a class from the public right of access.

Eliminating acquitted 13 cases as a class from the public right of access runs afoul of the First Amendment. 14 The purported evidence offered to the contrary is speculative, baseless, and 15 inconsistent with the First Amendment. Indeed, as explained, a naval prosecution 16 ending in an acquittal may have nothing to do with military matters or national 17 security concerns at all.

The Government’s arguments are simply overbroad. 18 The Government relies on *ACLU v. United States DOJ*, 750 F.3d 927 (D.C. 19 Cir. 2014), which held that the DOJ could withhold under the Freedom of 20 Information Act “case names and docket numbers for prosecutions in which the 21 government had obtained cellular phone tracking data without a warrant and the 22 defendant” was acquitted or the case was dismissed.

That case is not binding 23 here, in the Ninth Circuit, and it is distinguishable. This case raises constitutional 24 questions distinct from the statutory question at issue in the D.C. Circuit case. In

25 fact, the D.C. Circuit did not even cite *Press-Enterprise*, a key precedent on the 26 issues presented in this case.

In any event, in this Court's view, Judge Brown's 27 dissenting opinion, 750 F.3d at 939-44, is more persuasive than the majority 28 opinion because the public interest in following criminal cases outweighs any 1 interest in trying to keep private information which is likely already public. 2 Last, the Court finds that notice of Article 32 proceedings must be reasonably 3 suited to facilitate attendance by interested observers.

Three days' notice would 4 be insufficient to that end. Considering the preparation that an accused's counsel 5 must undertake, the Government should be able to—and must—provide at least 6 ten days' notice to the public of an Article 32 proceeding. 7 E. The Court will not issue a writ of mandamus because the 8 Secretary's duties under Article 140a are imprecise and subject 9 to discretion.

10 A writ of mandamus may issue where “(1) the plaintiff's claim is ‘clear and 11 certain’; (2) the defendant official's duty to act is ministerial, and ‘so plainly 12 prescribed as to be free from doubt’; and (3) no other adequate remedy is 13 available.” *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994) (quoting *Fallini v. 14 Hodel*, 783 F.2d 1343, 1345 (9th Cir.

1986)). “The extraordinary remedy of 15 mandamus lies within the discretion of the trial court, even if the three elements 16 are satisfied.” *Oregon Natural Resources Council v. Harrell*, 52 F.3d 1499, 1508 17 (9th Cir. 1995). 18 Here, the Secretary's duties under Article 140a are imprecise and subject to 19 discretion. Congress in Article 140a, 10 U.S.C. § 940a, imposed on the Secretary 20 of Defense the duty to “prescribe uniform standards and criteria for” public access 21 to filings in the “military justice system... using, insofar as practicable, the best 22 practices of Federal and State courts.” The duties required under Article 140a— 23 the standards which the Secretary must prescribe—are not clearly set forth by 24 Congress.

The Secretary thus has much discretion under Article 140a, and a writ 25 of mandamus would risk the Court excessively overseeing the Secretary's 26 standards. Moreover, because the Court will grant *ProPublica* declaratory and 27 equitable relief, a mandamus is not necessary. See *Barron*, 13 F.3d at 1374 28 (providing that mandamus is not warranted where other relief is available).

1 In short, because Article 140a grants the Secretary much discretion, a writ 2 of mandamus should not issue. See *Interstate Commerce Com. v. New York, N. 3 H. & H. R. Co.*, 287 U.S. 178, 204 (1932) (“Where a duty... is regarded as 4 involving the character of judgment or discretion... mandamus is thereby 5 excluded.” (citation omitted)); *Wilbur v. United States*, 281 U.S. 206, 218 (1930) 6 (“[W]here the duty is not thus plainly prescribed but depends upon a statute or 7 statutes the construction or application of which is not free from doubt, it is 8 regarded as involving the character of judgment or discretion which cannot be 9 controlled by mandamus.”).

10 III. CONCLUSION 11 For the reasons stated, this case raises legal questions over the public's
right 12 to access papers in naval prosecutions. The political question doctrine is thus 13
inapplicable, and the Government's motion to dismiss is denied.

The Court finds 14 that there are no genuine disputes of material facts precluding summary
judgment, 15 and that the parties have waived any argument to the contrary. The Court holds 16
that the public right of access applies to filings, documentary evidence, and related 17 papers in
Article 32 hearings and court-martial proceedings.

The Government's 18 policies denied ProPublica's First Amendment right of access. 19
ProPublica is entitled to summary judgment in part on its claim for declaratory 20 relief. 28 U.S.C.
§ 2201(a); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 21 127 (2007) (explaining that
relief may be granted under the Declaratory Judgment 22 Act where a concrete, legal dispute
requires a judicial declaration rather than an 23 advisory opinion for hypothetical facts).

ProPublica is also entitled to summary 24 judgment in part on its claim for a permanent injunction.
See *Galvez v. Jaddou*, 25 52 F.4th 821, 831 (9th Cir. 2022) (explaining that a court may issue a
permanent 26 injunction where (1) the plaintiff has suffered irreparable injury; (2) remedies at law
27 are inadequate; (3) a balance of the hardships weighs in favor of equitable relief; 28 and (4)
equitable relief would aid rather than harm the public interest).

ProPublica 1 not entitled to a writ of mandamus, and the Government is entitled to summary 2
||judgment on ProPublica's Third Count. 3 Both motions for summary judgment are granted in part
and denied in part. 4 || The Government's evidentiary objections are overruled. No later than
fourteen 5 ||(14) days following the entry of this order, the parties may submit proposed 6
||language for the entry of final judgment.

The parties must appear for a status 7 ||hearing on September 29, 2025, at 4:30 P.M. 8 || IS SO
ORDERED. 9 ||Dated: September 11, 2025 il 10 Pa Tee Meech Honorable Barry Ted Moskowitz 11
United States District Judge 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28