

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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: CENTER FOR CONSTITUTIONAL RIGHTS, :
: GLENN GREENWALD, JEREMY SCAHILL, : Crim. App. Misc.
: THE NATION, AMY GOODMAN, DEMOCRACY : Dkt. No. 20120514
: NOW!, CHASE MADAR, KEVIN GOSZTOLA, :
: JULIAN ASSANGE, and WIKILEAKS, :
: Petitioner-Appellants, : General Court Martial
: *United States v. Manning,*
: Ft. Meade, Maryland
: v. :
: :
: Dated: 26 June 2012
: UNITED STATES OF AMERICA and CHIEF :
: JUDGE COL. DENISE LIND, :
: Respondent-Appellees. :
: :
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UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KERN, YOB, and COOK
Appellate Military Judges

**CENTER FOR CONSTITUTIONAL RIGHTS,
Petitioner**

v.

**THE UNITED STATES OF AMERICA and
Colonel DENISE LIND,
Respondents**

ARMY MISC 20120514

ORDER

On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Prohibition and Mandamus, the petition is DENIED.

DATE: 21 June 2012

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: JALS-DA
JALS-GA
Petitioner
Respondent
JALS-CR2

JA-001

DECLARATION OF SHAYANA KADIDAL

I, Shayana Kadidal, hereby declare as follows:

1. I am an attorney with the Center for Constitutional Rights (“CCR” or “the Center”) and, along with others, represent the petitioners in this case. I make this declaration in support of Petitioners’ application for a writ of mandamus.

2. The Center for Constitutional Rights is a nonprofit public interest law firm in New York, where I have worked since 2001. I am a member of the bars of the State of New York and the District of Columbia, as well as several federal courts including the United States Supreme Court. I received my law degree in 1994 from Yale Law School, where I was a member of the law journal, and was afterwards a law clerk to Judge Kermit V. Lipez of the United States Court of Appeals for the First Circuit. I have worked on a large portion of CCR’s post-9/11 litigation, including both cases successfully challenging the indefinite detention of foreign nationals at Guantánamo Bay Naval Station before the Supreme Court, *Rasul v. Bush*, 542 U.S. 466 (2004) and *Boumediene v. Bush*, 553 U.S. 723 (2008), and another case decided two terms ago at the Court, *Holder v. Humanitarian Law Project*, 561 U.S. ___, 130 S. Ct. 2705 (2010). I am currently managing attorney of CCR’s Guantánamo litigation project, a position I have held since late 2006. In that capacity I hold a current Top Secret//SCI clearance from the Justice Department.

3. CCR is counsel to the publisher of the WikiLeaks media group, Julian Assange, and Wikileaks. On behalf of Mr. Assange and Wikileaks the Center has sought to ensure public access to the proceedings in *United States v. Bradley Manning*, a Court Martial prosecution taking place in the Military District for Washington, D.C. and presided over by Chief Judge Col. Denise Lind. Manning is charged with potentially capital offenses for allegedly providing

materials later published by WikiLeaks and a large number of other media outlets including the *New York Times*, *The Guardian*, *Der Spiegel*, and others.

4. Concerned by the lack of transparency surrounding the *Manning* proceedings in general and, in particular, the lack of access to critical – and presumptively public – documents and filings in the case, the Center sent two letters to the Court requesting broader public access to the proceedings and to documents related to the *Manning* case. The first such letter, dated March 21, 2012, was addressed to Chief Judge Lind and set forth the constitutional and common law standards requiring broad public access to court martial proceedings, including access to non-classified documents filed in the case. (The March 21, 2012 letter is attached hereto as Exhibit A). On April 23, 2012, the Center sent a similar letter addressed to David Coombs, counsel to Bradley Manning, with a request that he deliver a copy to the Court and bring it to the attention of Chief Judge Lind. (The April 23, 2012 letter is attached as Exhibit B.) Both letters request public access to various documents in the *Manning* case including, *inter alia*, court orders, transcripts, and government filings, none of which have been made public to date. They also express concern about fact that many substantive matters are argued and decided in closed session during RCM 802 hearings, undermining this historic proceedings transparency and legitimacy. The April 23 letter also requests, consistent with the presumption of public access to military commissions proceedings, that all 802 conferences be reconstituted in open court.¹

¹ A third letter from the Reporters’ Committee for Freedom of the Press, dated March 12, 2012 and addressed to Defense Department General Counsel Jeh Johnson, requesting implementation of “the same measures provided for in the revised regulations governing trials by military commission” at Guantánamo to allow access to documents in the *Manning* proceedings, is appended as Exhibit C.

5. On April 23, 2012, I attended a pretrial hearing in *United States v. Manning* at the Magistrate's Court at Ft. Meade, Maryland. During that hearing one of the first issues addressed by the Court was CCR's April 23, 2012, letter demanding public access to the proceedings.

6. I took handwritten notes of the colloquy surrounding CCR's letter, which I relate in the following paragraphs, as no official transcript has been released to the public. (Indeed, there are no publicly-available transcripts of *any* proceedings before the Court Martial in *Manning*, including the RCM Article 32 hearings that took place beginning on December 16, 2011.). Quotations used in the following paragraphs are taken from my handwritten notes.

7. The Court stated that it had received CCR's letters, including the one addressed to David Coombs, and had entered both of them into the record in the case: "The Court has marked as appellate exhibit #66 a letter from the Center for Constitutional Rights. I received an earlier letter in March. Both are now [part of] appellate exhibit #66 in the record."

8. The Court then ruled on the requests. "The Court finds as follows: The letter asks that an attorney from the Center be allowed to address the Court. The letter is basically a request for intervention. That request is denied."

9. The Court went on to spell out some of its reasoning for denying CCR to access to critical documents in the case, including nonclassified portions the transcripts, court orders, and government filings. The Court stated that, "Documents are subject to a common law of access. That Common Law right of access is not absolute," citing *Nixon v. Warner Communications*, 435 U.S. 589 (1978). "This court also considers the Freedom of Information Act.... The common law right of access may be satisfied by FOIA. *Id.* at 603-606." The Court went on to imply that it lacked control over release of documents that might otherwise be subject to FOIA: "The Court is not the custodian of the record at trial," citing RCM 501, 808, and 1103. "Neither is the Court

the release authority under FOIA.” Chief Judge Lind gave no indication in her discussion that she believed the First Amendment right of public access applied to documents.

10. In short, the Court denied CCR the relief requested in our letters.

11. Prior to (and since) the hearing, a number of documents filed by the defense were publicly posted on defense counsel David Coombs’ website, <http://www.armycourtmarialdefense.info/>.² These include defense motions and replies in support of those defense motions, as well as defense responses to government motions. These defense filings were redacted by the government pursuant to a review procedure apparently agreed to by the parties.

12. However, to this day, *none* of the corresponding government filings—either government motions or government responses to defense motions—have been made publicly available anywhere. Indeed, it appears from the redacted defense documents that are available on the defense website that the government is insisting that any quotation from its own filings be redacted from the public version of the defense document solely on the basis that it is part of a government filing. *See, e.g.*, Defense Reply re. Motion to Compel Depositions (13 Mar. 2012), at ¶¶ 14-16;³ Defense Reply re. Motion to Compel Discovery (13 Mar. 2012), at ¶¶ 2, 3, 3 n.1, 5.⁴ This is so despite the fact that at the hearing the government attorney appeared to be quoting arguments from the briefs at the podium.

13. At the April 23 hearing defense counsel stated that it had offered to post government filings (after redaction by the government) as well, but that the government objected to this proposed mode of making its filings available to the public. At the hearing it was also stated that there was a RCM 802 conference on this very issue, and that a court order relevant to

² It is not clear whether every document filed by the defense has yet been posted in redacted form.

³ Available at https://docs.google.com/file/d/0B_zC44SBaZPoQzFkT1ZtREtCbDg/edit

⁴ Available at https://docs.google.com/file/d/0B_zC44SBaZPoV1FNVDNDc3FueVU/edit

the subject was issued on March 28, 2012. Yet, that order has not been publicly disclosed, nor have the original pleadings and arguments of the parties on the subject.

14. The Court's own orders, including the protective order, case management order, and pretrial publicity order, are not publicly available in documentary form. During the hearing on April 23, the Chief Judge Lind read several orders into the record from the bench. Most of the first hour of the session consisted of her reading several orders in this manner—so rapidly that it appeared she was losing her voice, and asked an assistant for water, near the end of that hour. Yet significantly, because there are also no publicly-available transcripts of the proceedings on April 23, the notes of those few members of the press and public who were present at the hearing are the only records of those orders that any members of the public have access to. The court gave no indication that there is currently any schedule contemplated for publication of redacted transcripts.

15. As a general matter, it was extremely difficult to follow what was being discussed and/or decided during the hearing without the having had an opportunity to read the Court's prior orders or the government's filings.

Comparison With Guantanamo Military Commissions and Habeas Proceedings

16. CCR has had substantial experience litigating habeas petitions on behalf of Guantanamo detainees in federal court under strict rules of confidentiality. CCR also has experience litigating cases in the Military Commission system established in Guantanamo by the President to adjudicate alleged war crimes. Based on our experiences in habeas cases and Military Commissions proceedings, it is striking how much *less* public access the Manning proceedings provides than these forums.

17. Many dozens of Guantanamo habeas cases have been consolidated in the district court for the District of Columbia. In these cases, all of the various protective orders in place since 2004 have been made public upon issuance. The courts have at various times allowed the intervention of representatives of the press and public seeking to vindicate a right of public access to the proceedings and in particular to documents filed during the proceedings. *See, e.g.,* Press Applicants' Motion to Intervene for the Limited Purpose of Opposing Government's Motion to Confirm Designation of Unclassified Factual Returns as 'Protected,' Dkt. No. 1526, *In re Guantanamo Bay Detainee Litigation*, No. 08-mc-442 (D.D.C. Jan 14, 2009) (motion of *New York Times*, AP, and *USA Today*, opposing sealing of unclassified information in Guantánamo detainee habeas cases); Minute Order (April 2, 2009) (granting motion). The district and appellate courts have gone to pains to allow certain parts of the courtroom proceedings to take place in public. For the most part, redacted versions of all judicial opinions and the filings of the parties, have been produced and made available via PACER quickly.

18. In the Military Commissions, far more openness also prevails than in the Manning proceeding. For example, the protective order applicable to proceedings before the commissions is publicly available, and court orders and submissions by the parties are routinely posted in redacted form on the website for the Military Commissions, <http://www.mc.mil/>, within a maximum of fifteen days even where classification review and redaction occurs. Access to the courtroom by members of the press and public (including observers from human rights organizations) is facilitated by the use of a glass partition between the court and the audience and an audio delay that allows the authorities to cut off the sound feed whenever classified information is inadvertently discussed during the proceedings. A viewing location has been set up at Ft. Meade allowing spectators who are unable to travel to Guantánamo to see the

proceedings in real time over closed-circuit television. Transcripts of these public courtroom proceedings are also posted in a time frame comparable to that provided for high-profile criminal trials in the Article III courts; for instance, on Saturday May 5, 2012, during the thirteen hour arraignment proceedings for Khalid Sheikh Mohammed and other accused planners of the 9/11 attacks, transcripts from the morning sessions were already posted on the website several hours before the end of the evening sessions that night around 10:28pm.


19. Written rules governing access to the proceedings and classification review are codified in Section 949d(c)(2) of the Military Commissions Act of 2009 (allowing closure only upon specific findings) and in the published *Regulation for Trial by Military Commission* (2011 Ed.).⁵ Chapter 19 of that Regulation provides rules governing “Public Access to Commission Proceedings and Documents,” including provisions ensuring access for spectators “to the maximum extent practicable” (§ 19-6), allowing for “Public Release of transcripts, Filings, Rulings, Orders and Other Materials” within fixed, short time frames (one day for items requiring no classification review and 15 days for items requiring such review) (§ 19-4), and providing that the presiding military judge may resolve any dispute raised over public access to judicial materials (§ 19-3). Notably, the general section on public access (§ 19-1) notes the special importance of access to documents in conforming to the statutory requirement of transparency:

Making military commissions accessible to the public includes providing access to military commission proceedings, transcripts, pleadings, filings, rulings, orders and other materials used at military commission proceedings, to the extent that these materials are not classified, covered by a protective order, or otherwise protected by law

⁵ Available at http://www.mc.mil/Portals/0/Reg_for_Trial_by_mcm.pdf

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 18th day of May, 2012.



Shayana Kadidal

Exhibit A

centerforconstitutionalrights
on the front lines for social justice

March 21, 2012

Via Federal Express

Colonel Denise R. Lind
Chief Judge, 1st Judicial Circuit
U.S. Army Trial Judiciary
U.S. Army Military District of Washington
Office of the Staff Judge Advocate
103 Third Avenue, SW, Suite 100
Fort McNair, DC 20319

Re: Access to Court-Martial Records in *United States v. Bradley Manning*

Dear Chief Judge Lind:

The Center for Constitutional Rights (CCR) represents the Wikileaks media organization and its publisher Mr. Julian Assange regarding access to the court-martial proceedings in *United States v. Bradley Manning* at Fort Meade, Maryland. We write to request that the Court make available to the public and the media for inspection and copying all documents and information filed in the *Manning* case, including the docket sheet, all motions and responses thereto, all rulings and orders, and verbatim transcripts or other recordings of all conferences and hearings before the Court. We have been unable to obtain access to these important documents and have been told that they are not being made available to the public, media or interested parties. As the Manning court martial purports to be a public trial, we cannot understand why critical aspects of the proceedings are being withheld from public view. As Circuit Judge Damon Keith wrote in *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002): "Democracies die behind closed doors." We urge the Court to take the action required by military law and the Constitution and make these documents available.

First, there is no dispute that military law (including RCM 806) mandates a presumption of open, public court-martial trials, which may be overcome only in limited circumstances based on specific findings that closure is necessary. The public, including the media, have First Amendment and common law rights of access to criminal trials. There is also no dispute that the public has a compelling interest in obtaining access to all documents and information filed in Pfc. Manning's case given the nature of his alleged offenses. Access for media organizations, including groups such as Wikileaks which provide groundbreaking independent reporting on issues of great international significance, is especially important to ensure transparency, freedom of the press, and the integrity of these proceedings. The fairness of the proceedings have already been called into doubt by strong evidence and recent findings by United Nations Special Rapporteur on Torture, Juan Mendez, that Pfc. Manning suffered cruel, inhuman and degrading treatment – if not torture – during an 11-month period of solitary pretrial confinement in Kuwait and at Marine Corps Base Quantico.

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JA-011

Second, Wikileaks and Mr. Assange also have a unique and obvious interest in obtaining access to documents and information filed in this case. For more than a year, there has been intense worldwide speculation that hundreds of thousands of allegedly classified diplomatic cables published by Wikileaks – as well as *The New York Times*, *The Guardian*, and other international media organizations – were provided to Wikileaks and/or Mr. Assange by Pfc. Manning. Mr. Assange notably has a particular personal interest in this case because it appears that federal prosecutors in the Eastern District of Virginia have obtained a sealed indictment against him concerning matters that, based on prior official statements, will likely be addressed in Pfc. Manning's court-martial.

Notwithstanding these substantial interests, the *Manning* court-martial case thus far has not proceeded with the requisite openness. Instead, to date this court-martial reflects – and indeed compounds – the lack of openness experienced in Pfc. Manning's prior Article 32 hearing. Documents and information filed in the case are not available to the public anywhere, nor has the public received appropriate prior notice of issues to be litigated in the case. For example, undersigned counsel attended the motions hearing on March 15, 2012, and determined that it was not possible to understand fully or adequately the issues being litigated because the motions and response thereto were not available. Without access to these materials, the *Manning* hearings and trial cannot credibly be called open and public. We do not understand how a court-martial proceeding can be deemed to comply with the UCMJ or the Constitution unless its proceedings are accessible in a timely fashion. The public and our clients must be given access to the legal filings when filed and prior to arguments before the Court.

In addition, like the prior Article 32 hearing, it appears that a number of substantive issues are argued and decided in secret, in closed Rule 802 conferences. These important issues should be argued and decided in open court and on the record. This impedes the public's and media's right to a public trial. For example, when the undersigned was in court we were informed that the Court had signed a pre-trial publicity order apparently after a closed door 802 discussion with counsel. The argument regarding such an order, the decision and the order itself should have happened in public. This is particularly so because the order concerns what can and cannot be said to the public and press; an order of that sort should be dealt with in open court.

We therefore request that the Court order disclosure of all documents and information filed in the *Manning* case, and further implement procedures similar to those used in connection with military commission proceedings at Guantánamo Bay to ensure that information is accessible to the public in a timely and meaningful fashion. Specifically, we request that the Court enter an order requiring (a) immediate public access to all documents and information filed to date in this case, and (b) public disclosure of documents and information filed now or in the future, including disclosure of motions and responses thereto on a real-time basis, prior to argument and rulings on such motions.

We respectfully request that the Court enter such an order, or otherwise respond to this request, by Friday, March 30, 2012, in order to allow Wikileaks and Mr. Assange to seek any further judicial relief that may be necessary to protect their rights and the rights of the media and the general public.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Michael Ratner
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
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mratner@ccrjustice.org

Counsel for Wikileaks and Julian Assange

cc: Jennifer Robinson

Jeh C. Johnson
General Counsel
Office of the General Counsel
United States Department of Defense
1600 Defense Pentagon
Room 3E788
Washington, D.C. 20301-1600

Exhibit B

April 23, 2012

Via Email (coombs@armycourtmarshaldefense.com)

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906

Re: *United States v. Bradley Manning*

Dear Mr. Coombs:

The Center for Constitutional Rights (CCR) represents the Wikileaks media organization and its publisher Julian Assange regarding access to the court-martial proceedings in *United States v. Bradley Manning* at Fort Meade, Maryland. We are also making this request for access on behalf of the Center for Constitutional Rights, a non-profit legal and educational organization. We ask that you forward copies of this letter to Chief Judge Lind and counsel for the prosecution in advance of the hearings commencing April 24, 2012.

By letter to Chief Judge Lind dated March 21, 2012, CCR requested public access to documents and information filed in this case, including the docket sheet, all motions and responses thereto, all rulings and orders, and verbatim transcripts or other recordings of all conferences and hearings before the Court. We have received no response to our letter, and, with the exception of certain redacted defense motions recently published on your website, continue to be denied access to the requested materials without legal justification or other explanation.

Accordingly, in order to avoid any confusion and ensure that we have exhausted efforts to obtain meaningful, timely access to documents and information filed in this case without further litigation, we now renew our request for public access to these materials, including without limitation the following items referenced in open court during the arraignment and motions hearings on February 23, March 15, 16 2012:

- All orders issued by the Court, including the case management order, pretrial publicity order, protective order regarding classified information, and other protective orders;
- The government's motion papers and responses to the redacted defense motions; and
- Authenticated transcripts of all proceedings, including in particular transcripts of open court sessions, at the same time and in the same form they are provided to counsel for the parties.

This request includes timely public access to all documents and information filed subsequent to the March 16 hearing and all such documents and information filed in the future. These should be provided when filed.

We further request that the Court require all conferences held pursuant to R.C.M. 802 be held in open court and be made part of the record in this case, to the extent they involve substantive matters, and regardless of whether the parties agree to have those substantive matters discussed and decided off the record. Moreover, we request that all Rule 802 conferences which have already occurred be reconstituted in open court.

To the extent these requests are denied (or not decided) we request an explanation for the purported factual and legal basis for such result. We expect an immediate decision as the loss of First Amendment rights in this context “for even minimal periods of time” constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

As you are aware, the First Amendment to the Constitution and the federal common law guarantee a right of public access to criminal proceedings, including courts-martial, except in limited circumstances. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). In particular, “[t]he First Amendment guarantees the press and the public a general right of access to court proceedings and *court documents* unless there are compelling reasons demonstrating why it cannot be observed.” *Washington Post Co. v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (emphasis added) (citing cases); see also *In re Washington Post Co.*, 807 F.2d 383, 390-91 (4th Cir. 1986) (same). Access may only be denied where the government establishes that closure is necessary to further a compelling government interest and narrowly tailored to serve that interest, and the court makes specific findings on the record supporting the closure to aid review. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). Any motion or request to seal a document or otherwise not disclose a document to the public must be “docketed reasonably in advance of [its] disposition so as to give the public and press an opportunity to intervene and present their objections to the court.” *In re Washington Post Co.*, 807 F.2d 383, 390-91 (4th Cir. 1986) (quoting *In re Knight Publishing Co.*, 743 F.2d 231, 234 (4th Cir. 1984)).

Indeed, it is reversible error for a court to withhold from the public each and every document filed, subject to further review and disclosure, because such procedures “impermissibly reverse the ‘presumption of openness’ that characterizes criminal proceedings ‘under our system of justice.’” *Associated Press v. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)). It is “irrelevant” that some of the pretrial documents might only be withheld for a short time. *Id.*

The Court’s authority to grant CCR’s requests for public access pursuant to the All Writs Act, 28 U.S.C. § 1651(a), is equally clear and indisputable. See, e.g., *Denver Post Co. v. United States*, Army Misc. 20041215 (A.C.C.A. 2005), available at 2005 CCA LEXIS 550 (exercising jurisdiction and granting writ of mandamus to allow public access); see also *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997), available at 1997 CAAF LEXIS 74. This is particularly true given the Supreme Court’s repeated conclusions that openness has a positive effect on the truth-determining function of proceedings and *can affect outcome*. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979)

(“Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously”); *Richmond Newspapers*, 448 U.S. at 596 (open trials promote “true and accurate fact-finding”) (Brennan, J., concurring); *Globe Newspaper*, 457 U.S. at 606 (“[P]ublic scrutiny enhances the quality and safeguards the integrity of the factfinding process.”).

Finally, senior CCR attorney Shayana Kadidal will attend the hearing in this case on April 24, 2012. We request that he be afforded the opportunity to address the Court directly and present arguments concerning our requests for public access to documents and information filed in this case.

If you, the prosecution or the Court have any questions concerning request, please do not hesitate to contact Mr. Kadidal at (212) 614-6438, shanek@ccrjustice.org, or Michael Ratner at (917) 916-4554.

Very truly yours,

Michael Ratner
Wells Dixon
Shayana Kadidal

Counsel for Wikileaks & Julian Assange

Exhibit C

REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

March 12, 2012

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Mr. Jeh C. Johnson
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Slate

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ALICIA SHEPARD
National Public Radio

PAUL STEIGER
Pro Publica

PIERRE THOMAS
ABC News

SAUNDRA TORRY
USA Today

JUDY WOODRUFF
PBS: The NewsHour

Re: Access to records in the court-martial of Pfc. Bradley Manning

Dear Mr. Johnson:

The media coalition (“coalition”) comprising the below-listed national and local news organizations and associations writes to express its concern about reports that journalists covering the court-martial of Pfc. Bradley Manning have been unable to view documents filed in the proceeding. *See, e.g.,* Josh Gerstein, *Bradley Manning Defers Plea in WikiLeaks Case*, POLITICO, Feb. 23, 2012, <http://www.politico.com/news/stories/0212/73214.html> (reporting that details of a proposed defense order aimed at limiting pretrial publicity in the case and other motions and orders filed therein and discussed during the first day of Manning’s court-martial were not publicly available). In light of the upcoming hearing this week, we respectfully urge the U.S. Department of Defense to take swift action to implement measures that will enable members of the news media to view documents filed in connection with the proceeding beforehand.

You will recall a similar group comprising news organizations and those who advocate on their behalf last fall successfully appealed to the Defense Department for greater and easier access to important information about military commission proceedings held at Guantanamo Bay. *See, e.g.,* U.S. Dep’t of Def., *Regulation for Trial by Military Commission* (2011 Edition). As such, the coalition respectfully urges the government to implement similar reforms in its regulations governing court-martial proceedings generally and that of Manning specifically to ensure that military personnel tried stateside have the same rights to a public trial as those afforded accused terrorists.

The prosecution of an American service member for the alleged leak of the largest amount of classified information in U.S. history is a matter of intense public interest, particularly where, as here, that person’s liberty is at stake. Public oversight of the proceeding is of vital importance. Indeed, the interest in openness in this case is not mere curiosity but rather a concern about the very integrity of this nation’s military courts — their ability to oversee the proceedings by which military personnel have their day in court to answer to and defend against allegations of serious offenses.

*Affiliations appear only
for purposes of identification.*

JA-019

Despite the recognition that such access helps promote a perception of fairness and foster a more informed and well-educated public, the overwhelming majority of court records filed in Manning's court-martial have remained shielded from public view. *See Gerstein, supra*. This secrecy extends even to the court's docket, meaning that journalists covering the proceeding are often unaware of what is being discussed therein. *See id.* The U.S. Supreme Court and the nation's highest military courts have said the American press and public have a First Amendment right of access to criminal proceedings. But by refusing to provide reasonable and proper notice of such proceedings and the nature of the documents filed in connection therewith, the military justice system has severely undercut this foundational tenet of American democracy.

Perhaps more significantly, though, this policy belies the Defense Department's recent renewed commitment to transparency in the trials of accused terrorists at Guantanamo Bay, as reflected in its creation of a new Web site that contains documents filed in the proceedings, its establishment of a viewing location at Fort Meade that allows the press and public to watch a closed-circuit broadcast of the hearings and its adoption of updated regulations governing the commissions. These new guidelines attempt to address the complaints of journalists covering trials at Guantanamo Bay that the long classified review procedures and otherwise heightened secrecy are significant obstacles to their effective reporting on the offshore commissions. In response to these concerns, the government has committed to providing reporters contemporaneous access to court documents from each of the military commission's cases against accused terrorists and a new process whereby they may object to the designation of information as "protected" and thereby shielded from public view. Ironically, however, these journalists' stateside counterparts covering Manning's military trial face the same unnecessary degree of secrecy that makes reporting on military court proceedings incredibly difficult.

Accordingly, the coalition respectfully urges the Defense Department to implement in domestic court-martials the same measures provided for in the revised regulations governing trials by military commission, namely:

- posting online, on the military commission Web site or elsewhere, filings and decisions that do not require classification security review within one business day, posting filings that do require a security review within 15 business days (except in "exceptional circumstances") and posting unofficial transcripts of the proceedings "as soon as practicable after the conclusion of a hearing each day" (Regulation for Trial by Military Commission, *supra*, at 75-76);
- authorizing military judges overseeing court-martials to rule on any dispute raised by the parties or the public regarding filings, rulings, orders or transcripts over whether the document was appropriately designated as "protected" (*id.* at 69); and
- allowing the prosecution to take an interlocutory appeal on any order or ruling of a military judge that relates to the closure of proceedings to the public or the protection of classified or protected information; *id.* at 105.

Swiftly adopting these media access reforms will help ensure that the public's right of access to stateside military trials is at least as strong as its right to participate in and serve as a check upon the judicial process that oversees trials of accused terrorists. As in the past, we are happy to assist the government in the development of these reforms. Please do not hesitate to contact us if we can be of further assistance to you.

Sincerely,

Lucy A. Dalglish, Executive Director
Gregg P. Leslie, Legal Defense Director
Kristen Rasmussen, McCormick Legal Fellow

On behalf of the following:

ABC News
Advance Publications, Inc.
A. H. Belo Corporation
Allbritton Communications Company
ALM Media, LLC
American Society of News Editors
The Associated Press
Association of Alternative Newsweeklies
Atlantic Media, Inc.
Bloomberg News
Cable News Network, Inc.
CBS News
Cox Media Group, Inc.
Digital First Media
Digital Media Law Project
Dow Jones & Company, Inc.
The E.W. Scripps Company
First Amendment Coalition
Gannett Co., Inc.
Hearst Corporation
Massachusetts Newspaper Publishers Association
The McClatchy Company
Meredith Corporation
Military Reporters & Editors
MPA – The Association of Magazine Media
The National Press Club
National Press Photographers Association
NBC News
New York Daily News
The New York Times
Newspaper Association of America

The Newspaper Guild – CWA
The Newsweek/Daily Beast Company LLC
North Jersey Media Group Inc.
NPR, Inc.
Online News Association
POLITICO LLC
Radio Television Digital News Association
The Reporters Committee for Freedom of the Press
Reuters News
Society of Professional Journalists
Stephens Media LLC
Time Inc.
Tribune Company
USA TODAY
The Washington Post
WNET

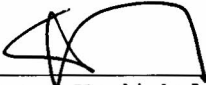
cc: Col. Denise Lind, JAG Corps, U.S. Army
David Coombs, Counsel for Pfc. Bradley Manning
Capt. Ashden Fein, JAG Corps, Special Prosecutor, U.S. Army
Douglas B. Wilson, Assistant Secretary of Defense for Public Affairs
U.S. Department of Defense

ERRATUM

Please take note that in the Declaration of Shayana Kadidal attached to the original Petition and made part of this Appendix, there is an incorrect internet link to the *current* (2011) version of the Regulation for Trial by Military Commission. The correct link at p.7 n.5 should be as follows:

<http://www.fas.org/irp/doddir/dod/mcreg.pdf>

Undersigned counsel apologizes for the error.



Shayana Kadidal

DECLARATION OF KEVIN GOSZTOLA

I, Kevin Gosztola, declare as follows:

1. I am a writer for Firedoglake ("Firedoglake.com"), a website engaged in news coverage with a specific emphasis on criminal trial issues. The site rose to fame with its award-winning coverage of the Valerie Plame affair and the Scooter Libby trial. Firedoglake has been covering the Bradley Manning case since his arrest in 2009. Because many of our writers have extensive expertise in criminal process, other journalists are frequent readers of Firedoglake; ABC news correspondent Jake Tapper referenced Firedoglake's coverage while questioning President Obama during a press conference recently.

2. I cover issues related to civil liberties and digital freedom at a blog on the site titled "The Dissenter." I have been credentialed to cover Pfc. Bradley Manning's legal proceedings for Firedoglake. I have appeared on *Democracy Now!*, *The Young Turks* on Current TV, RT's *The Alyona Show*, Free Speech Radio News and Sirius XM Left's *The Mike Feder Show* to share updates on the proceedings.

3. As a credentialed reporter, I would like access to court filings in the Manning proceedings to ensure that what I report is accurate and that quotes that I share with the public are not shared without proper context.

4. I have to scramble to keep up with the judge when she reads court filings into the record because they are not being made available to the press or public. The judge often reads through the filing quickly to ensure the reading does not unnecessarily prolong the proceedings. The judge's rapid-fire reading is usually the only chance the media has to write down whatever important information is in the filing. This means reporters run the risk of not getting down a significant detail, hearing something incorrectly, transcribing a phrase that they will report without proper context, etc.

5. From experience, reporters in the media pool for the Manning proceedings have on multiple occasions come together to compare notes. Reporters read what they were able to get down to each other. For example, they make sure they heard statements made by the prosecution or defense that are critical to coverage of the case. This has become a necessity because there is no access to court filings.

6. Reporters ask the Army's legal matter expert (who is present at the hearings and available for briefings) to take notes and share them after the proceedings so what they heard

from the defense, prosecution and defense can be verified. This is an unfair burden to place on the legal matter expert. It is not his job to take notes for the press because they do not have access to court filings. The legal matter expert tries to keep up but he often is unable to get down key details. Therefore, he is unable to help the media.

7. The Media Operations Center (MOC) at Fort Meade, a side room outside the courtroom where most reporters observe the proceedings via a video feed, frequently has technical glitches that disable its courtroom feed. In April, the feed went on and off at least 50 times. The technical issues made it nearly impossible for reporters in that room to cover the proceedings. Since press were unable to look at court filings after the day's proceedings, they had to ask the few media that were in the courtroom to share notes they wrote down on what the judge, defense and prosecution stated in court.

8. I have readers who ask me why I have not been in the courtroom to report the proceedings. I do not go into the courtroom because I do not have access to court filings. I cannot scribble down notes by hand fast enough to keep up with the judge, defense and prosecution. I am much better at keeping up by typing up notes on a computer. However, computers are not allowed in the courtroom. Therefore, I have to choose: Either I can go into the courtroom and guarantee key details are missed or I can miss out on the scene in the courtroom and ensure that I am able to get down most of what is stated in court.

9. I would have liked to have seen the pre-trial publicity order. It would have helped me understand what the prosecution, defense and judge want to protect in the proceedings and what they are willing to have disclosed to the public.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 23d day of May, 2012.



Kevin Gosztola

DECLARATION OF ALEXA O'BRIEN

I, Alexa D. O'Brien, hereby declare as follows:

1. I am credentialed press for the Article 39 proceedings in *United States v. Manning* and am located in the press pool during the proceedings. As a journalist, I have covered the WikiLeaks release of US State Department Cables, JTF memoranda known as the "GTMO files," and revolutions across Egypt, Bahrain, Iran, and Yemen, as well as the U.S. investigations and legal proceedings against WikiLeaks and Bradley Manning. I have interviewed preeminent U.S. foreign policy experts on the State Department cables, and published hours of interviews with former GTMO guards, detainees, defense lawyers, and human rights activists, as well as WikiLeaks media partners: Andy Worthington, a GTMO historian and author, and Atanas Tchobanov, the Balkanleaks' spokesman and co-editor of Bivol.bg. My coverage of Bahrain garnered in excess of 63,000 hits a day, and my stories have been picked up by Al Jazeera English, the BBC. My advocacy for free and fair elections, and freedom of speech and the press has been written about in Market Watch, Forbes, The Wall Street Journal, The Washington Post, Sydney Morning Herald, Australian Age, Fast Company, Wired, Nation, Harpers, The New York Times, The Los Angeles Times, and other news publications. I have also appeared on the BBC, RT News, French 24, and other news outlets.

2. I attended pretrial hearings in *United States v. Manning* on June 6, 2012, and took extensive notes on the proceedings, typing them directly onto my notebook computer in the press pool (a separate room some distance from the courtroom to which the trial is broadcast by video link). What follows is summarized from my notes (with areas that were unclear indicated with brackets).

3. During the June 6 session the court and counsel discussed the issue of off-the-record conferences under R.C.M. [Rules for Courts-Martial] 802.

4. Judge Lind began by stating as follows:

"R.C.M. 802 conferences are conferences where the parties for the Court to bring basically to the Court attention. Based on the last R.C.M. 802 conference the defense has filed a motion to record R.C.M. 802 conferences. That has been marked as Defense Motion to Record and Defense Trial all R.C.M. 802 Conferences. ... Appellate Exhibit 121. That motion is not part of the motions that were to be considered today in that R.C.M. 802 conferences are obviously provided by the Rule for Court-Martial are routine in criminal trials [but t]he Court believes that it is appropriate to address that motion at this hearing as they will continue to happen, and the defense has objected to participate in R.C.M. 802 conferences if they are not transcribed. [Addressing the defense:] Would you like to add anything the Court record?"

5. David Coombs responded for the defense as follows:

“Your Honor, the defense’s main position is that, even though we recognize 802 conferences are in fact a very common occurrence within Courts-Martial, usually the 802 conferences are limited to just scheduling issues, advisement to the Court of what may come up in future motion hearings, or any sort of logistical problems that may come up that either side may be having.

“Unfortunately, in this case the 802 conferences have become an opportunity to re-litigate a lot of the Court’s rulings. And, so what happens is that we go into a great deal of substantive matters that the Court then considers from both sides. And, even though the Court correctly then does not make a ruling, we end up discussing the matter in such detail that we come back on the record, what happens is there is a very brief summary and the Court gives the parties to provide more detail, but then the Court makes its ruling.

“The defense believes that the way the 802 conferences are being used both as a matter of re-litigating issues, but also even just right now ... the Court recalls an 802 conference that the Government said that the “mitigation evidence would not be relevant.” That is also the defense’s recollection of the Government’s assertion. But normally what happens is the Government takes a position in an 802 conference or later through its motion or its oral argument takes a contrary position.

“Because of the nature of the fact that things are not recorded, the defense is not in a position to say that the Government’s belief is inaccurate based upon its statements.

“So, for the purposes of a substantive discussion, we would request that the 802 conferences be recorded. Understanding that the way our system works is that there is a last minute logistical issue and we need get the parties on the line for logistical stuff, that’s normal, that’s understandable. The defense will participate in those. Even this morning, in the 802 conference, that was perfectly acceptable.

“But, to the extent that we start talking about substantive matters we would request that those matters are on the record, so there is no doubt as to what one party said. If we are re-litigating something, then there is no doubt as to what has been advanced to the Court. And then when the Court makes its ruling, it’s clear the matters which the Court considered.”

6. The prosecutor, Mr. Fein, responded for the government as follows:

“Your Honor, just briefly for purposes of the record, both the prosecution and the defense have petitioned the Court for 802(s) either over the telephone or even email on substantive matters.

“There is no prohibition for substantive matters to be discussed. In fact, 802 clearly contemplates that if parties agree it should that, it must be put on the record. It doesn’t necessarily draw a line on substantive and procedural matters. The Government contends that there is nothing that the parties or the Court discussed in an 802 that can’t be put on the record.

“Of course everything could be put on the record, and that is an option. However, the purpose of R.C.M. 802 according to the rule is to allow conferences for

the parties in order to consider matters to promote fairness, and efficiencies, and expeditious trial.

“Having to record an 802 is not going to help achieve the purpose of an 802, which is for an expeditious trial. So, the Government objects to the recording the 802s and if the issue [is] litigating substantive matters that don’t go in favor of one party, and the parties don’t agree then is making a part on the record is what 802...”

At the ellipsis at the end of the above colloquy, I missed a word.

7. Judge Lind then issued a ruling as follows:

“As I discussed with counsel at this morning’s 802, the Court is going to consider this issue at this session, because it does impact on the procedure for the remaining duration of this trial. And, the Court is actually prepared to rule on it. The ruling is as follows:”

[The Court noted this would be made an appellate exhibit titled “COURT RULING ON DEFENSE MOTION TO RECORD AND TRANSCRIBE ALL R.C.M. 802 CONFERENCES”:]

“The defense moves the Court to order all R.C.M. [Rules for Courts-Martial] 802 conferences be recorded and transcribed for the record. The Government opposes. After considering the pleadings that have been presented, and argument of counsel, the Court finds and concludes the following:

‘(1) The trial schedule developed by the Court and the parties provides for Article 39(a) Sessions to be held approximately every 5 to 6 weeks. To date there have been Article 39(a) Sessions held on 23 February, 15 and 16 March, 24 through 26 April, and the current session 4 to 6 June 2012.

‘(2) R.C.M. 802 provides that after referral the military judge may upon request of either party or *sua sponte*, which means by myself, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial. Conferences need not be made part of the record, but matters agreed upon at the conference shall be included [in] the record orally or in writing. Failure of a party to object at trial or failure to comply with R.C.M. 802 waives this requirement. No party may be prevented from any argument, objection, or motion at trial. The discussion to the rules states that the purpose of R.C.M. 802 conferences is to inform the military judge of anticipated issues and to expeditiously resolve matters in which the parties can agree, and not to litigate or decide contested issues.

‘(3) The Court has been holding R.C.M. 802 conferences with counsel during and following the Article 39(a) Sessions and by telephone on 8 February 2012, 28 March 2012, and 30 May 2012. Each of these conferences has been synopsisized on the record and the Court has invited the parties to add details to the Court synopsis.

‘(4) Prior to the current motion dated 2 June 2012 the defense has not objected to conducting R.C.M. 802 conferences.

‘(5) R.C.M. 802 does not require that such conferences be recorded or transcribed. The Court will continue to hold such conferences to address administrative, logistics, and scheduling issues. If either party objects to discussion of

an issue in an R.C.M. 802 conference, the conference will be terminated and the issue will be addressed at the next Article 39(a) Session.

“(6) The Court notes that the parties have raised substantive issues in the middle of the Article 39(a) scheduling periods that, if not addressed expeditiously, will delay the trial. Therefore, the Court in conjunction with the Parties will build in an additional Article 39(a) Session into the Court calendar. I anticipate it will be about a one day session midway between each scheduled Article 39(a) Session to address any such issues that arise. When additional substantive issues arise that require expeditious resolution the Court will schedule additional ad hoc Article 39(a) Sessions as necessary.

“Ruling:

“(1) The defense motion to record and transcribe R.C.M 802 conferences is denied.

“(2) R.C.M. 802 conferences will not be held over the objection of a party.

“(3) The Court will schedule an additional Article 39(a) Session in between the currently scheduled sessions to address on the record any additional issues that arise between our scheduled sessions.””

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 14th day of June, 2012.



Alexa D. O'Brien

(f) *Rulings on record.* All sessions involving rulings or instructions made or given by the military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge.

Discussion

See R.M.C. 808 and 1103 concerning preparation of the record of trial.

(g) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

Rule 802. Conferences

(a) *In general.* After referral, the military judge may, upon request of any party or sua sponte, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.

Discussion

Conferences between the military judge and counsel may be held when necessary before or during trial. The purpose of such conference is to inform the military judge of anticipated issues and to expeditiously resolve matters on which the parties can agree, not to litigate or decide contested issues (*see* section (c) below). No party may be compelled to resolve any matter at a conference.

A conference may be appropriate in order to resolve scheduling difficulties, so that witnesses and members are not unnecessarily inconvenienced. Matters which will ultimately be in the military judge's discretion, such as conduct of voir dire, seating arrangements in the courtroom, or procedures when there are multiple accused may be resolved at a conference. Conferences may be used to advise the military judge of issues or problems, such as unusual motions or objections, which are likely to arise during trial.

Occasionally it may be appropriate to resolve certain issues, in addition to routine or administrative matters, if this can be done with the consent of the parties. For example, a request for a witness which, if litigated and approved at trial, would delay the proceedings and cause expense or inconvenience, might be resolved at a conference. Note, however, that this could only be done by an agreement of the parties and not by a binding ruling of the military judge. Such a resolution must be included in the record (*see* section (b) below).

A military judge may not participate in negotiations relating to pleas (*see* R.M.C. 705; *see* also Mil. Comm. R. Evid. 410).

No place or method is prescribed for conducting a conference. A conference may be conducted by radio or telephone.

(b) *Matters on record.* Conferences need not be made part of the record, but matters agreed upon at a conference shall be included in the record orally or in writing. Failure of a party to object at trial to failure to comply with this section shall waive this requirement.

(c) *Rights of parties.* No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.

(d) *Accused's presence.* The presence of the accused is neither required nor prohibited at a conference.

Discussion

Normally the defense counsel may be presumed to speak for the accused.

(e) *Admission.* No admissions made by the accused or defense counsel at a conference shall be used against the accused unless the admissions are reduced to writing and signed by the accused and defense counsel.

(f) *Limitations.* This rule shall not be invoked in the case of an accused who is not represented by counsel.

Rule 803. Military commission sessions without members

(a) A military judge who has been detailed to the military commission may, at any time after the service of charges which have been referred for trial by military commission under chapter 47A of title 10, United States Code, call the military commission into session without the presence of members for the purpose of:

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under chapter 47A of title 10, United States Code, whether or not the matter is appropriate for later consideration or decision by the members;

(3) receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under these rules and which does not require the presence of the members.

(b) Except as provided in subsections (c), (d), and (e), any proceedings under paragraph (a) shall be conducted in the presence of the accused, defense counsel, and trial counsel, and shall be made part of the record.

(c) *Deliberation or vote of members.* When the members of a military commission under chapter 47A of title 10, United States Code, deliberate or vote, only the members may be present.

Discussion

The purpose of the sessions without members is “to give statutory sanction to pretrial and other hearings without the presence of the members concerning those matters which are amenable to disposition on either a tentative or final basis by the military judge.” The military judge and members may, and ordinarily should, call the commission into session without members to ascertain the accused’s understanding of the right to counsel, and the accused’s choices with respect to these matters; dispose of interlocutory matters; hear objections and motions; rule upon other matters that may

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, xxx-xx-9504)

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

**DEFENSE MOTION TO
RECORD AND TRANSCRIBE
ALL R.C.M. 802 CONFERENCES**

2 June 2012

RELIEF SOUGHT

1. The Defense requests that this Court order that all future R.C.M. 802 conferences be recorded and transcribed for the record.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2)(A). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

EVIDENCE

3. The Defense does not request any witnesses or evidence be produced for this motion.

FACTS

4. On several occasions the parties have held R.C.M. 802 conferences in order to discuss case related issues. These conferences have mostly been held either in a conference room adjacent to the courtroom or by telephone when the parties are not centrally located.

5. The Court has discussed the content of the various R.C.M. 802 conferences on the record at the following Article 39(a) session. The Court has also invited the parties to add any detail either party desired to the Court's summary.

ARGUMENT

6. The Defense submits that this Court should order that all future 802 sessions be recorded and transcribed for the record for four reasons: (1) The Government often uses the 802 sessions to re-litigate matters already decided by the Military Judge under the auspices of “clarification”; (2) the Government often takes positions in 802 sessions which are inconsistent with its motions and what it says in open court; (3) the Government makes admissions in the 802 sessions which are relevant to the Defense’s discovery requests; and (4) there is sometimes confusion as to exactly what was said at the 802 session.

7. First, the Government has used the opportunity that the 802 sessions provide to re-litigate issues already decided by the Military Judge under the guise that it was simply “clarifying” something. For instance, in its 23 March 2012 Ruling, the Court ordered that the Government produce the Department of State damage assessment. Appellate Exhibit XXXVI. The Government then sought “clarification” as to what it had to produce, given that the Department of State “had not completed a damage assessment.” The Government then used that opportunity to argue that a draft damage assessment is not discoverable under *Giles* because it is speculative. Appellate Exhibit LXXI. Far from clarifying the Court’s ruling, the Government was attempting to take issue with it. This happened again during the latest 802 session. The Court once again ordered the Government to provide a Department of State witness to testify as to what documents the department had that were responsive to the Defense’s repeated discovery requests. The Government once again took this as an opportunity to re-litigate the issue, insisting that the Defense did not have the right to ask a Department of State witness questions about what they possess because this is a classic “fishing expedition.” Again, when the Government disagrees with the Court’s ruling, it simply asks for an 802 for “clarification.”

8. Second, the Government will often say something in an 802 session that is inconsistent with what it says in its motions and what it says in open court. In one 802 session, the Defense asked what material from the FBI file the Government intended to produce since its motion was unclear in this respect (and the Court had not ruled on this issue, given that the Government represented that it was in the process of producing all discoverable material). In the 802 session, the Government explained that some portions of the FBI file do not deal with PFC Manning at all – accordingly, those would not be produced. Everything else would be. In its subsequent motions and in open court, it changed its position and said that only *Brady* was discoverable from the FBI file. Similarly, the issue regarding ONCIX and “damage assessments” vs. “investigative” files was dealt with during an 802 session. The Government claimed that the Defense was using the wrong terminology in its discovery requests and that’s why it was not getting what it was looking for. Appellate Exhibit LXXII. Now, the Government is using the term “damage assessments” in the way that it told the Defense was incorrect. *See* Attachment. This Court and an appellate court should have the benefit of the Government’s shifting litigation positions.

9. Third, the Government makes admissions or statements during these 802 sessions that it later denies – which is made easier by the fact that there is no transcript of exactly what the Government said during that session. For instance, the Government said during the latest 802 conference that the requested Department of State materials were simply not discoverable under R.C.M. 701(a)(2) or R.C.M. 701(a)(6). The Defense asked how the Government could make this statement, given that it had not even reviewed the files? Now, in its Response to the Defense

Motion to Compel Discovery #2, it states at p. 2, “The prosecution has never stated that the defense is not entitled to any information discoverable under RCM 701(a)(6), and has consistently stated that the prosecution intends to review all documents for Brady and RCM 701(a)(6) material that is provided by the DoS that are responsive.” Obviously, if the parties and the Court had a transcript of what was said, issues as to “who said what” could be easily resolved.

10. Fourth, there is sometimes confusion about what exactly was decided during the 802 session. At the latest 802 session, the Defense understood the Court to have ordered the Government to provide a list of all evidence it seeks to introduce in aggravation. The Government does not believe it needs to compile a list, but simply to give the Court a sense of the type of information it plans on introducing in aggravation. There was also some confusion on the dates when this needed to be produced. With the benefit of a transcript, both parties can have access to exactly what was decided at the 802 session.

11. As the Court is aware, there is a push for greater openness in this proceeding. At present, too many issues are being said and litigated behind closed doors. Accordingly, the Defense requests that this Court order a recording and transcript of all future 802 sessions.

CONCLUSION

12. The Defense requests that this Court order that all future R.C.M. 802 conferences be recorded and transcribed for the record.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (<i>Last, First, MI</i>) MANNING, Bradley E.			2. SSN [REDACTED]		3. GRADE OR RANK PFC	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall Fort Myer, Virginia 22211					6. CURRENT SERVICE	
					a. INITIAL DATE [REDACTED]	b. TERM 4 years
7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED Pre-Trial Confinement		9. DATE(S) IMPOSED 29 May 10 -	
a. BASIC \$1,950.00	b. SEA/FOREIGN DUTY None	c. TOTAL \$1,950.00				

II. CHARGES AND SPECIFICATIONS

^{AF 23 JAN 12}
~~ADDITIONAL~~ CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 104.

THE SPECIFICATION: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, without proper authority, knowingly give intelligence to the enemy, through indirect means.

^{AF 23 JAN 12}
~~ADDITIONAL~~ CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 134.

SPECIFICATION 1: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, wrongfully and wantonly cause to be published on the internet intelligence belonging to the United States government, having knowledge that intelligence published on the internet is accessible to the enemy, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

(See Continuation Sheet)

III. PREFERRAL

11a. NAME OF ACCUSER (<i>Last, First, MI</i>) Leiker, Cameron A.		b. GRADE O-5	c. ORGANIZATION OF ACCUSER HQ CMD BN, USA
d. SIGNATURE OF ACCUSER [REDACTED]			e. DATE 1 MAR 2011

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1st day of March, 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

ASHDEN FEIN

Typed Name of Officer

MDW, OSJA

Organization of Officer

0-3

Grade

Trial Counsel

Official Capacity to Administer Oath
 (See R.C.M. 307(b) - must be a commissioned officer)

12. On Wed 02 MARCH 2011 @ 1545 HRS, 2011, the accused was informed of the charges against him/her and of the name(s) of The accuser(s) known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)

CAMERON A. LEIKER
Typed Name of Immediate Commander

HQ CMD BN, USA
Organization of Immediate Commander

O-5
Grade

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1055 hours, Tue, 08 March 2011 at HQ CMD BN, USA
Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE¹

CAMERON A. LEIKER
Typed Name of Officer

Commanding
Official Capacity of Officer Signing

O-5
Grade

Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY
Headquarters, U.S. Army Military
District of Washington

b. PLACE
Fort McNair, DC

c. DATE
20120203

Referred for trial to the General Court-martial convened by Court-Martial Convening Order
Number 1, this headquarters, dated
2 February 2011, subject to the following instructions:² None.

By Command Of MG MICHAEL S. LINNINGTON
Command or Order

Typed Name of Officer

Chief, Military Justice
Official Capacity of Officer Signing

Grade

Signature

15. On 3 February, ~~2011~~ 2012, I (caused to be) served a copy hereof on ~~(each of)~~ the above named accused.

ASHDEN FEIN
Typed Name of Trial Counsel

O-3
Grade or Rank of Trial Counsel

Signature

FOOTNOTES: 1 — When an appropriate commander signs personally, inapplicable words are stricken.
2 — See R.C.M. 601(e) concerning instructions. If none, so state.

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [REDACTED]
Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base
Myer-Henderson Hall, Fort Myer, Virginia 22211

Item 10 (Cont'd):

SPECIFICATION 2: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 15 February 2010 and on or about 5 April 2010, having unauthorized possession of information relating to the national defense, to wit: a video file named "12 JUL 07 CZ ENGAGEMENT ZONE 30 GC Anyone.avi", with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 3: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 22 March 2010 and on or about 26 March 2010, having unauthorized possession of information relating to the national defense, to wit: more than one classified memorandum produced by a United States government intelligence agency, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 4: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 5 January 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the Combined Information Data Network Exchange Iraq database containing more than 380,000 records belonging to the United States government, of a value of more than \$1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [REDACTED]
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SPECIFICATION 5: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 9 February 2010, having unauthorized possession of information relating to the national defense, to wit: more than twenty classified records from the Combined Information Data Network Exchange Iraq database, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 6: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 8 January 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the Combined Information Data Network Exchange Afghanistan database containing more than 90,000 records belonging to the United States government, of a value of more than \$1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 7: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 9 February 2010, having unauthorized possession of information relating to the national defense, to wit: more than twenty classified records from the Combined Information Data Network Exchange Afghanistan database, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [REDACTED]
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SPECIFICATION 8: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, on or about 8 March 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: a United States Southern Command database containing more than 700 records belonging to the United States government, of a value of more than \$1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 9: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 8 March 2010 and on or about 27 May 2010, having unauthorized possession of information relating to the national defense, to wit: more than three classified records from a United States Southern Command database, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 10: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 April 2010 and on or about 27 May 2010, having unauthorized possession of information relating to the national defense, to wit: more than five classified records relating to a military operation in Farah Province, Afghanistan occurring on or about 4 May 2009, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [REDACTED]
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SPECIFICATION 11: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 8 January 2010, having unauthorized possession of information relating to the national defense, to wit: a file named "BE22 PAX.zip" containing a video named "BE22 PAX.wmv", with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 12: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 4 May 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the Department of State Net-Centric Diplomacy database containing more than 250,000 records belonging to the United States government, of a value of more than \$1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 13: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 27 May 2010, having knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer, and by means of such conduct having obtained information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, to wit: more than seventy-five classified United States Department of State cables, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted the said information, to a person not entitled to receive it, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation, in violation of 18 U.S. Code Section 1030(a)(1), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 14: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 15 February 2010 and on or about 18 February 2010, having knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer, and by means of such conduct having obtained information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, to wit: a classified Department of State cable titled "Reykjavik-13", willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted the said information, to a person not entitled to receive it, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation, in violation of 18 U.S. Code Section 1030(a)(1), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 15: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 15 February 2010 and on or about 15 March 2010, having unauthorized possession of information relating to the national defense, to wit: a classified record produced by a United States Army intelligence organization, dated 18 March 2008, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 16: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 May 2010 and on or about 27 May 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the United States Forces - Iraq Microsoft Outlook / SharePoint Exchange Server global address list belonging to the United States government, of a value of more than \$1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [REDACTED]
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Myer-Henderson Hall, Fort Myer, Virginia 22211

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~~ADDITIONAL~~ CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 92.

SPECIFICATION 1: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 8 March 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(4), Army Regulation 25-2, dated 24 October 2007, by attempting to bypass network or information system security mechanisms.

SPECIFICATION 2: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 February 2010 and on or about 3 April 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007, by adding unauthorized software to a Secret Internet Protocol Router Network computer.

SPECIFICATION 3: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, on or about 4 May 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007, by adding unauthorized software to a Secret Internet Protocol Router Network computer.

SPECIFICATION 4: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 May 2010 and on or about 27 May 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007, by using an information system in a manner other than its intended purpose.

SPECIFICATION 5: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, on divers occasions between on or about 1 November 2009 and on or about 27 May 2010, violate a lawful general regulation, to wit: paragraph 7-4, Army Regulation 380-5, dated 29 September 2000, by wrongfully storing classified information.

MEMORANDUM FOR RECORD

SUBJECT: Receipt of Referred Charge Sheet

I acknowledge receipt of the charges referred against me, to a General Court-Martial, by Major General Michael S. Linnington, dated 3 February 2012.



BRADLEY E. MANNING
PFC, U.S. Army
Accused

DATE: 03 FEB 2012