

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

CENTER FOR CONSTITUTIONAL RIGHTS, et al.,)	
)	
Plaintiffs,)	Case No. 1:13-cv-01504
)	
v.)	
)	
COL DENISE LIND, et al.,)	
)	
Defendants.)	
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DECLARATION OF LIEUTENANT COLONEL NELSON VAN ECK

I, Lieutenant Colonel Nelson J. Van Eck, hereby declare as follows:

1. I am a Lieutenant Colonel in the United States Army. I currently serve as the Chief, Criminal Law Division, Office of The Judge Advocate General (“OTJAG”), 2200 Army Pentagon, Washington, D.C. 20310. I have served in this position since July, 2012, and have been a commissioned officer in the U.S. Army Judge Advocate General’s Corps for the past sixteen (16) years.

2. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon determinations and conclusions made in accordance therewith.

3. As the Chief, OTJAG Criminal Law Division, I am personally familiar with the conduct of courts-martial within the military, including the Army’s practices and policies regarding court-martial documents. Specifically, I am familiar with the Army’s procedures for making court-martial documents publicly available pursuant to the Freedom of Information Act (“FOIA”), Title 5, United States Code, section 552.

4. The primary documents at issue in this litigation are those that have been and will be filed in the case of *U.S. v. Private First Class Bradley E. Manning*. Private First Class (“PFC”) Bradley E. Manning is being tried by general court-martial in the U.S. Army Trial Judiciary’s 1st Judicial Circuit. The 1st Judicial Circuit is one of several circuits that comprise the U.S. Army Trial Judiciary—the organization responsible for presiding over Army courts-martial worldwide.

5. The military judges in the U.S. Army Trial Judiciary are commissioned officers in the U.S. Army Judge Advocate General’s Corps. In the military justice system, although military judges preside over general and special courts-martial, it is military commanders who, in their role as the convening authorities under the Uniform Code of Military Justice, have responsibility for initiating courts-martial and taking action on the findings and sentence. Thus, the disposition of court-martial documents is not a matter under the sole purview of the military judge. Rather, their disposition comes under the broader Army command structure, which includes The Judge Advocate General’s Corps.

6. In courts-martial proceedings, documents are typically filed with the court without redaction. For instance, many of the documents that underlie this litigation included PFC Manning’s social security number, persons’ personal phone numbers, persons’ names that are subject to a protective order, classified documents, and other information that would normally not be produced to the public.

7. Court-martial “records of trial” are prepared in accordance with Army Regulation (AR) 27-10, Military Justice, paragraph 5-41, and Rule for Courts-Martial (“RCM”) 1103 in the Manual for Courts-Martial (“MCM”). *See also* Article 54, Uniform Code of Military Justice (UCMJ). Rule for Courts-Martial 1103(b) requires the Trial Counsel (the military prosecutor), under the direction of the military judge, to prepare the “record of trial.” The record of trial is

the final, authoritative, authenticated set of documents that is required to be maintained in a given proceeding by the UCMJ, MCM and AR 27-10.

8. The record of trial for a general court-martial¹ includes “the written transcript of all court-martial sessions and all prosecution and defense exhibits which were marked for identification or referred to on the record, regardless of whether received into evidence, and all appellate exhibits.”² Audio-recordings, as opposed to the transcripts of those recordings, are not made part of the record of trial, except in unique cases of military exigency that prevent preparation of a written transcript or summary.³ The record of trial in each general court-martial “shall be separate, complete, and independent of any other document.”⁴

9. The exact content of the record of trial depends on the outcome of the proceeding. A verbatim transcript is not required in all cases. A verbatim transcript is required whenever any part of the sentence adjudged exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay per month for more than six months or when a punitive discharge has been adjudged.⁵ If a verbatim transcript is not required a summarized report of proceedings may be prepared instead.⁶ Audio-recordings of court-martial proceedings are maintained while the proceedings are ongoing. However, no transcript is made of those recordings until it is determined whether one is required. For example the Court of Appeals for the Armed Forces (CAAF) directed production of a transcript of an Article 39a session. The

¹ PFC Manning’s court-martial is a general court-martial. Unless otherwise stated, the explanation of the statutory and regulatory requirements for the preparation, authentication, and maintenance of records of trial, in this declaration, is limited to those requirements for general court-martial.

² ARMY REG. 27-10, MILITARY JUSTICE, page 42 (3 Oct. 2011).

³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULES FOR COURTS-MARTIAL 1103(j)(3) (2012).

⁴ MCM, RCM 1103(a)(2)(A).

⁵ MCM, RCM 1103(a)(2)(B).

⁶ MCM, RCM 1103(b)(2)(C). Note, however, that in cases of acquittal, findings of not guilty by reason of lack of mental responsibility, etc., all that may be required is “the original charge sheet, a copy of the convening order and amending orders (if any), and sufficient information to establish jurisdiction over the accused and the offenses...” MCM, RCM 1103(e).

transcript was needed for CAAF to consider plaintiffs' writ-appeal. This transcript was authenticated, filed with CAAF, and released accordingly. To the extent a transcript is required to be produced during trial it may be released similarly after authentication. Transcripts of court-martial proceedings are prepared at government expense.

10. Once a record of trial is complete it must be "authenticated."⁷ Authentication means that a person specified in RCM 1104 declares that the record accurately reports the proceedings. In general and special courts-martial, the military judge authenticates the record of trial. Records of trial are not authenticated until the parties have had a chance to review and all known administrative corrections are made, a process that occurs after the conclusion of the court-martial. Army Regulation 27-10, paragraph 5-47b requires that once the record of trial is authenticated, and any required review and supplemental action is completed, the record of trial is filed with the Clerk of Court, U.S. Army Legal Services Agency, HQDA, 9275 Gunston Road, Fort Belvoir, VA 22060-5546.

11. The Army responds to FOIA requests, pursuant to Title 5, United States Code, section 551(1), for court-martial documents, whether they are documents prepared during the pendency of the proceedings or the final, authenticated record of trial. Pursuant to his Title 10 authorities, the Secretary of the Army is the responsible official for all Department of the Army documents, including court-martial documents. Army Regulation 25-55, "The Department of the Army FOIA Program," paragraph 5-200(d)(14), delegates the Secretary of the Army's authority to The Judge Advocate General for court-martial documents. Within the Army, this authority is referred to as Initial Denial Authority. The Judge Advocate General, in turn, has delegated his Initial Denial Authority to the OTJAG Criminal Law Division, for court-martial documents requested while the proceedings are ongoing, and to the Clerk of Court, U.S. Army Legal

⁷ MCM, RCM 1104(a). *See also* Army Regulation 27-10, paragraph 5-44.

Services Agency, Fort Belvoir, for courts-martial documents requested after the proceedings conclude. Final authority to act on any request for Army records rests with the Army General Counsel, who is the Secretary of the Army's designated FOIA appellate authority.

12. Because the *Manning* court-martial is ongoing, the documents at issue in this litigation all fall under the OTJAG Criminal Law Division's Initial Denial Authority. It is important to note that, although the OTJAG Criminal Law Division serves as the Army's Initial Denial Authority for court-martial documents during the pendency of proceedings, it does not, itself, actively maintain or possess those documents during the proceedings. The OTJAG Criminal Law Division receives copies of the documents when they are subjected to a specific request for access.

13. On February 27, 2013, the Criminal Law Division placed eighty-four (84) pre-trial documents, of varying length, on the Army's electronic FOIA reading room, indexed under the title "PFC Bradley E. Manning." These records were accessible from the main page of the reading room, using a hyperlink titled "PFC Bradley E. Manning."

14. In response to requests from the public, the Army has now made the vast majority of pre-trial filings in the *Manning* court-martial publicly available. As of June 5, 2013, the OTJAG Criminal Law Division, working with the Military District of Washington Office of the Staff Judge Advocate, posted 515 of the 564 pre-trial filings made with the court in PFC Manning's court-martial on the Army's FOIA electronic public reading room.⁸ These 515 documents included the 84 pre-trial filings released earlier in February, now available in a less redacted form. These 515 documents contain limited redactions. The Army has made redactions to the documents to protect personally-identifying information including social security numbers,

⁸ The *Manning* documents posted in the Department of the Army FOIA electronic reading room are available at https://www.rmda.army.mil/foia/FOIA_ReadingRoom/Detail.aspx?id=84. There were 516 documents uploaded; AE 1 was uploaded twice.

phone numbers, addresses and email addresses. Redactions have also been made to safeguard information such as: the names of potential witnesses whose identities are subject to a protective order issued in the case,⁹ proffered testimony submitted to the court that has not yet been testified to in open court, any other matters subject to a protective order or seal,¹⁰ classified information,¹¹ and information tied to the operational security of the court-martial proceeding itself.¹² Forty-nine documents have been withheld in full by the Army because they are classified in their entirety, sealed, or were reviewed only *in camera*, or are not in the Army's possession because they are *ex parte* motions submitted by PFC Manning's defense counsel.¹³ Sixteen enclosures to appellate exhibits were withheld because they are classified. The table attached to this declaration provides a complete listing of these documents, the date they were filed, and whether the exhibit or the enclosures attached to them were withheld in full.

15. Additionally, the Army is committed to ensuring that motions, court rulings, or stipulated testimony published in open court, including any attachments, are made available on a rolling basis. Redactions will be made along similar lines, and for the same purposes, identified in paragraph 14, above, as necessary. The Army will endeavor to produce those documents as soon as possible, with the goal of providing documents to the public within one to two business days after filing, except in exceptional circumstances. To that end, eighteen documents filed with the court between June 3, 2013 and June 5, 2013, were posted on the Department of the Army FOIA electronic reading room on June 5, 2013 and June 6, 2013. One classified document

⁹ These redactions are identified in the documents by the markings "(b)(6)" and "(b)(7)(C)".

¹⁰ These redactions are identified in the documents by the markings "(b)(7)(A)" and "(b)(7)(B)".

¹¹ These redactions are identified in the documents by the markings "(b)(1)(A)" and "(b)(1)(B)".

¹² These redactions are identified in the documents by the marking "(b)(7)(E)".

¹³ Forty-four of the documents withheld are classified. One document is a defense *ex parte* filing to which the government does not have access. One withheld document contains FBI Grand Jury Testimony. The three remaining exhibits withheld, AE 279, 280, and 281, consist of CDs that contain discovery materials reviewed *in camera*. The military judge ordered the government to provide some documents contained on the CDs (see AE 317). The government complied with the military judge's order and the releasable documents from the CDs can be found in AEs 418, 419, 420, 423, 435, 438, 440, 441, and 442.

was withheld. These documents are included on the attached table. As of June 6, 2013, 533 documents have been posted on the Department of the Army FOIA electronic reading room.¹⁴

16. The documents for the *Manning* court-martial are maintained by the Trial Counsel at the Military District of Washington's Office of the Staff Judge Advocate in accordance with RCM 1102(b)(1). The Deputy Staff Judge Advocate for the Military District of Washington will collect the releasable documents each day of trial and submit them to OTJAG Criminal Law Division. OTJAG Criminal Law Division will review the documents and apply limited redactions as set forth herein. OTJAG Criminal Law will then submit those documents to the Department of the Army FOIA office which will post them on the Department of the Army FOIA electronic reading room website.

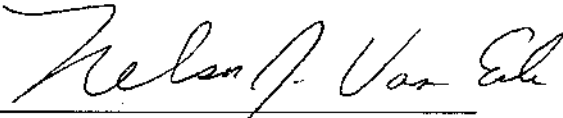
17. The Army will provide an expedited process for appellate review of any postings made pursuant to the process described herein. An interested party can challenge redactions or withholdings by submitting such a challenge to: Department of the Army, Office of the General Counsel, 104 Army Pentagon, Room 3C546, Washington, DC 20310. The Office of the Army General Counsel will respond to such challenges on an expedited basis.

18. Lastly, I note that on June 3, 2013, the presiding military judge in the *Manning* court-martial authorized the use of stenographs in the media operations center as long as the devices used do not have audio recording capability. Since that order, observers have used this opportunity and used stenographers to memorialize their observations of the proceedings.¹⁵ The Army is making every effort to make these proceedings as transparent as possible to the public.

¹⁴ To the extent that confusion arises because the number of exhibits does not match the number of documents posted, some appellate exhibits have subparts that have been posted with the same appellate exhibit number. This results in multiple documents being posted and assigned only one appellate exhibit number.

¹⁵ See <https://pressfreedomfoundation.org/bradley-manning-transcripts>.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 6th day of
June 2013.



NELSON J. VAN ECK