

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, : USCA Misc.
: Appellants, : Dkt. No. 12-8027/AR
: v. : General Court Martial
: : *United States v. Manning*,
: Ft. Meade, Maryland
: UNITED STATES OF AMERICA and CHIEF :
: JUDGE COL. DENISE LIND, : Dated: 4 March 2013
: Appellees. :
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MOTION TO SUPPLEMENT THE RECORD PURSUANT TO RULE 30 AND 30A

Pursuant to Rules 30 and 30A of this Court's Rules of Practice and Procedure, Petitioner-Appellants in this matter hereby submit this motion to supplement the record by submission of the attached *Supplemental Declaration of Kevin Gosztola*, a credentialed journalist covering the proceedings in *United States v. Manning* and a plaintiff in this matter. The supplemental declaration adds to his earlier declaration of May 23, 2012, and brings to the attention of this Court further difficulties members of the press have had in covering the proceedings below in light of the lack of public access to court orders and other

records of the proceedings that have transpired since the oral argument held before this Court on October 10, 2012.

The supplemental declaration also notes that the Army has published some of the orders of the trial court in redacted form pursuant to FOIA, and documents some of the shortcomings of those releases, as well as the fact that several categories of judicial documents Petitioner-Appellants seek here have still not yet been released to the public.

Finally, the declaration notes that PFC Manning has pled guilty to some charges and, as to the rest, has waived jury trial in favor of a bench trial. As noted in the declaration, the absence of a jury pool that might be contaminated by public release of sensitive information should greatly simplify the processing of documents for public release by the trial court under the First Amendment standard going forward.

Good cause exists for this Court to grant this motion, as the facts detailed in the supplemental declaration have arisen since the last briefing in this matter (the post-argument briefs filed by the parties on October 22 and 31, 2012).

Respectfully submitted,

/s/sdk

Shayana Kadidal

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Dated: 4 March 2013

¹ Institutional affiliation noted for identification purposes only, and implies no endorsement by the University.

Certificate of Service

I hereby certify on this 4th day of March, 2013, I caused the foregoing Motion to Supplement the Record Pursuant to Rule 30 and 30A to be filed with the Court and served on Respondents and Amici electronically via email (per this Court's Electronic Filing Order of 22 July 2010), and to be served on the trial and appellate courts below via mail, at the following addresses and facsimile numbers, respectively:

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Office of the Clerk of Court
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Fort Belvoir, VA 22060-5546

- and -

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Appellants, :
: General Court Martial
v. : *United States v. Manning*,
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UNITED STATES OF AMERICA and CHIEF :
JUDGE COL. DENISE LIND, : Dated: 3 March 2013
:
Appellees. :
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SUPPLEMENTAL DECLARATION OF KEVIN GOSZTOLA

I, Kevin Gosztola, hereby declare as follows:

1. I am a journalist credentialed to cover the court-martial proceedings for PFC Bradley Manning, and a plaintiff in this action. I previously submitted a declaration (dated May 23, 2012) in this action, describing the difficulties I and other credentialed reporters have had in covering the trial court proceedings in *United States v. Manning*. I submit this declaration to supplement my earlier declaration and bring to the attention of this Court developments in the trial court since the oral argument held before this Court on October 10, 2012.

2. On January 8, 2013, Judge Lind read in open court her entire ruling on the defense's Article 13 motion. She determined PFC Manning had been "unlawfully punished" during his pretrial detention, and awarded him a 112-day sentencing credit. It took her approximately an hour and a half to read her ruling. She read the entire ruling without taking a single break. All members of the press present had to struggle mightily to keep up with her on their laptops in the media center, or by jotting

down what they could on paper in the courtroom. *Cf.* Decl. of Ed Pilkington (February 11, 2013) at ¶¶ 18-23. This would not have been necessary if the judge's rulings were made available to the press.

3. Members of the press generally observe the proceedings from the media center, which is located at a distance from the courtroom, because this allows them to use their laptop computers to type notes on the proceedings. (Members of the press and public are not allowed to bring computers into the courtroom.) Because there are no publicly-released versions of the court's orders, or audio or transcripts of the daily proceedings, members of the media are compelled to observe the proceedings from the media center so that we may use our laptops to type notes. See Decl. of Kevin Gosztola at ¶¶ 7-8.

4. On January 16, 2013, there were technical problems with the courtroom feed to the media center. The public affairs officers did not realize it was malfunctioning to an extent that could not be fixed before the judge gaveled court into session. Judge Lind began to read a ruling on a critical motion to preclude the defense from discussing motive evidence during Bradley Manning's trial. As she read it, the members of the media were being transported to the courtroom and processed through security. The court did not wait for the media to be seated before reading the order and, when the media finally entered, the judge had read the first three or four pages of the motion. This motion was not made available to media afterwards so reporters could get what they had missed. Any details on the first pages had to be obtained through a military legal expert, who shared what he had heard while he was in the courtroom.

5. On February 26, 2013, Judge Lind read her ruling on the defense's speedy trial motion in open court. It took two hours for her to complete reading this order. The order contained a large number of dates and abbreviations for government agencies and other military terminology that might have been readily comprehensible in a written document but that we in the press could scarcely keep up with when listening to Judge Lind's rapid-fire oral delivery. A colleague of mine in the press room calculated that Judge Lind was reading at a rate of 180 words per minute, and that the entire ruling contained at least 23,000 words, an estimate which comports with my observations as well. (For comparison, a very good professional typist can manage about 80 words per minute, and my understanding is that the absolute maximum speed at which humans can type for extended periods is approximately 150 words per minute.)

6. This situation is highly demoralizing to myself and to other members of the media attempting to cover the proceedings in an accurate, timely and fair manner. In response to various complaints about the lack of access to documents, the Legal Matter Expert reiterated his statement that the press is free to submit FOIA requests for the court's orders.

7. Of course, various members of the media have made FOIA requests for records relating to the Manning proceedings over the course of the last two years, to no avail. However, on February 27, 2013, the Army's records management division, responsible for responding to requests made under the Freedom of Information Act, released 84 judicial orders and rulings made by the trial court in *Manning*. The records are available here: https://www.rmda.army.mil/foia/FOIA_ReadingRoom/Detail.aspx?id=83

8. The publication of these orders is a long-overdue step towards increased transparency. However, it falls far short of what we have sought in our lawsuit. The First Amendment requires that the press and public have contemporaneous access to the four sets of materials we have requested: (1) the court's orders, (2) the government and (3) defense filings, and (4) transcripts (or some equivalent, such as audio files) of the daily proceedings in open court. The Army's release only provides a number of documents in the first category -- the court's rulings. Other than a small number of defense briefs published at the grace of defense counsel on his blog (with heavy redactions dictated by the government, not the court), the rest of the materials are still not available to the public in any way.

9. Not all of the judge's orders to date have been published. The Article 13 ruling (the ruling on whether Manning was "unlawfully punished" by his pretrial conditions of confinement) has not been posted, despite the fact that the ruling was made on January 7 - some seven weeks ago - and concerns an issue that has attracted a tremendous amount of public attention. Neither has the Speedy Trial motion that I refer to above in ¶5 - despite the fact that it was read out loud *in toto* by Judge Lind in open court on February 26.

10. Many of the orders that were published were issued over a year ago, and are only now being published in written form despite the fact that many of them had been read out loud in open court.

11. We have no commitment from the military that it will make court orders or the other judicial documents we have requested available to journalists and the public on a timely basis going forward. Indeed, from the Army's press release accompanying the publication of the orders, indications are that the military intends to slowly work its way through the backlog of older documents, rather than producing documents relevant to current and upcoming hearings:

Due to the voluminous nature of these documents, it will take additional time to review, redact, and re-release all of the responsive documents. To date, more than 500 documents have been filed by the parties or issued by the military judge, totaling more than 30,000 pages. Documents will continue to be published as they are reviewed and prepared for release.¹

This is typical of the slow pace of release that is the norm under FOIA.² This sort of access is fine for historians, but not for press covering a trial in real time. For instance, if a motion is being argued in open court, the motion and the briefs should be made available to the press prior to the hearing, otherwise it becomes impossible for us to effectively follow what is being said in court. Moreover, as we have argued in our lawsuit, the error-correcting function of public scrutiny of trials can only work when the media covers trials in real time.³ Indeed, the principle of contemporaneous public access to documents is predicated on the idea that public access and scrutiny makes trial outcomes more accurate.

12. I have always believed that the vast majority of the material we seek in our lawsuit is not classified or otherwise so sensitive that it cannot be released to the public without harming the interests of the government or PFC Manning. That is proven by the minimal scope of the redactions in the court orders published on February 27. However, even a cursory analysis of those materials demonstrates that redactions have been applied in an arbitrary fashion. To give an example that has been

¹ <http://mentionedoncspan.tumblr.com/post/44154407282/dod-releases-pre-trial-documents-in-united-states-vs> (The release incorrectly stated that the documents were published on Monday, Feb. 25; instead, the release and the documents were made public on Wednesday, Feb. 27.)

² See Reply Br. at 15-17 (noting delays built into statute), *id.* at 16 n.14 (noting practical delays).

³ See Writ-App. Pet. at 14.

widely noted by journalists, the name of the trial judge, Lt. Col. Denise Lind, has been redacted from each and every one of her own orders. Yet her name is – obviously – a matter of public record, and for many of these rulings, the fact that she made the ruling is evident from the fact that she read the ruling out in open court.

13. To give another example, in one document, Judge Lind's ruling on a defense motion to compel depositions, dated 16 March 2012,⁴ language naming and a deponent requested by the defense (an individual with the 1st Cavalry Division in Ft. Hood, Texas), and the facts he was expected to testify to, is redacted out of Paragraph 1(a). The listed FOIA exemption is Exemption 7(B), allowing withholding of records to prevent information from becoming public that would "deprive a person of a fair trial or an impartial adjudication." The redacted information was heard in open court when the judge read the ruling; the individual, whose name is in my notes for that day of the proceedings, did a classification review of three Apache gunship videos, and was someone who would specifically testify that "they were not classified at the time of release." Why that would prejudice the accused is unclear.

14. I can only conclude that this and numerous other redactions in the orders released on February 27 are a demonstration of the fact that application of the FOIA exemptions produces redactions that are much broader in scope than would be permissible under an ordinary First Amendment standard, as we have previously argued in this case.⁵

15. During the proceedings on February 28, 2013, PFC Manning pled guilty to certain counts and opted to have those counts to which he pled not guilty tried in a bench trial. Because there will be no military jury, there is no risk that public disclosure of materials related to the case could contaminate the jury pool. My understanding of the law is that even under application of a First Amendment strict scrutiny standard, the government

⁴ This document is available at: [https://www.rmda.army.mil/foia/FOIA_ReadingRoom/\(a\)\(2\)\(D\)%20-%20Records%20released%20to%20the%20public%20under%20t/PFC%20Bradley%20E.%20Manning/120316-Ruling%20\(Defense%20Motion%20to%20Compel%20Depositions\)\(AE%2033\)_Redacted.pdf](https://www.rmda.army.mil/foia/FOIA_ReadingRoom/(a)(2)(D)%20-%20Records%20released%20to%20the%20public%20under%20t/PFC%20Bradley%20E.%20Manning/120316-Ruling%20(Defense%20Motion%20to%20Compel%20Depositions)(AE%2033)_Redacted.pdf)

⁵ See Reply Br. at 14-15 (describing broad scope of FOIA exemptions).

could argue on a case-by-case basis that certain items could remain under seal even under a strict scrutiny standard if their release would potentially contaminate the jury pool. The fact that there will be no jury in PFC Manning's trial should thus vastly reduce the amount of material that the government can plausibly argue deserves to remain under seal, hidden from public view, on First Amendment standards. That in turn should make the process of preparing materials for public release much easier for the trial court and the parties. In short, the fact that there will be no jury trial here makes it much easier for the trial court to apply the First Amendment standard that the law mandates for release of the documents we have requested.

16. During the proceedings on February 28, PFC Manning also read in open court a lengthy statement as part of the providence inquiry into guilty pleas he entered to a number of the charges against him. The written statement appeared to be about 35 pages long. However, once again, this document was not made public despite the fact that it was being read in its entirety in open court. A number of very newsworthy items were revealed in the statement, which was the first factual account of his actions Manning has presented to the public. Accordingly it attracted a tremendous amount of coverage in the mainstream media, including front page stories in the *New York Times* and *Washington Post*. However, neither outlet was able to publish a copy of the statement, because none was made available to the media by the court. As far as we in the media know, the publication of the verbatim text will occur on the same dilatory pace that has attended the government's processing of defense filings for publication on defense counsel's blog - or, worse yet, the still-slower process for release of materials under FOIA.

17. The issue of the scope of public access to military proceedings under the First Amendment will not go away on its own. In addition to the Manning trial, a tremendous amount of public scrutiny will attend the trials of Robert Bales (a soldier accused of murdering civilians in Afghanistan) and Nidal Hasan (which involves an Army psychiatrist accused of going on a shooting rampage at Fort Hood). Hasan's court martial recently set a trial schedule in his case, which calls for the military jury to be empaneled on May 29, 2013.

18. In conclusion, neither the Army's belated, limited disclosure of judicial orders nor Private Manning's partial guilty plea resolves the important issues briefed and argued in this case many months ago; rather, they underscore the need for this

Court to promptly rule that the First Amendment applies to this case.

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

Executed this 3d day of March, 2013



Kevin Gosztola