

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 synopsized 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