

In The Matter Of:
United States vs.
PFC Bradley E. Manning

Vol. 17
July 10, 2013
UNOFFICIAL DRAFT-07/10/13 Afternoon Session

Provided by Freedom of the Press Foundation

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VOLUME XVII

IN THE UNITED STATES ARMY

UNITED STATES

VS.

MANNING, Bradley E., PFC **COURT-MARTIAL**

U.S. Army, xxx-xx-9504

Headquarters and Headquarters Company,

U.S. Army Garrison,

Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

The Hearing in the above-entitled matter was continued on Wednesday, July 10, 2013, commencing at 2:35 p.m., at Fort Meade, Maryland, before the Honorable Colonel Denise Lind, Judge.

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DISCLAIMER

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1 **APPEARANCES :**

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ON BEHALF OF THE GOVERNMENT :

4

MAJOR ASHDEN FEIN, MAJOR

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CAPTAIN JOSEPH, CAPTAIN

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CAPTAIN ALEXANDER von ELTON

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CAPTAIN ANGEL OVERGAARD

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ON BEHALF OF THE ACCUSED :

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DAVID COOMBS

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MAJOR THOMAS HURLEY

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CAPTAIN JOSHUA TOOMAN

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1 **PROCEEDINGS - AFTERNOON SESSION**

2 **(Reconvened at 2:35 p.m.)**

3 **THE COURT: Please be seated. The court is**
4 **called to order. Let the record reflect all parties**
5 **present when the Court last recessed are again present**
6 **in court and the witness is on witness stand.**

7 **Captain Morrow?**

8 **CAPTAIN MORROW: Just a few more**
9 **questions --**

10 **CONTINUED CROSS EXAMINATION**

11 **BY CAPTAIN MORROW:**

12 **Q Professor Benkler, you're still under oath.**
13 **Professor Benkler, have you ever seen a traditional**
14 **news organization where journalistic enterprise**
15 **actively solicits submissions of classified**
16 **information?**

17 **A I see tipis being requested that -- I**
18 **wouldn't say it's a standard practice, no.**

19 **Q And you've never been an intelligence**
20 **analyst; is that correct?**

21 **A No, I haven't.**

1 Q You served in the IDF, but you weren't in
2 the intelligence field?

3 A No, I was not.

4 Q And earlier you spoke about how a lot of
5 the information in the Army counterintelligence
6 document was in open source.

7 Do you remember that?

8 A Information that I was able to glean myself
9 from materials that were out in the open, in that
10 regard, yes.

11 Q But you didn't have access to all of the
12 sources of the documents, you couldn't go back and
13 verify every single source of information?

14 A Would you like me to talk about the
15 footnotes given that they haven't been unclassified?

16 Q No. (INAUDIBLE) You didn't have -- you
17 couldn't go back and check every single thing?

18 A Are you comfortable with my talking about
19 the footnotes?

20 THE COURT: Let's wait for just a moment.

21 CAPTAIN MORROW: No. Let's just move on.

1 **THE COURT:** I'll just ask the question. Do
2 you have access to them?

3 **THE WITNESS:** I have access to the version
4 that was on-line which included.

5 **BY CAPTAIN MORROW:**

6 **Q** I want to read you a quote and get your
7 thought. Wikileaks described itself as the first
8 intelligence agency of the people. Better principled
9 and less parochial than any governmental intelligence
10 agency, it is able to be more accurate and relevant, it
11 has no commercial or national interests at heart. Its
12 only interest is in the relevant use -- the revelation
13 of the truth.

14 Unlike the covert activities of State
15 intelligence agencies, Wikileaks relies upon the power
16 of overt fact to enable to empower citizens to bring
17 fear and corrupt governments and corporations to
18 justice.

19 Have you heard that mission statement
20 before or seen it somewhere?

21 **A** Probably I'm familiar.

1 Q It's somewhat similar to the mission
2 statement (INAUDIBLE) earlier in terms of exposing?

3 A That version, which was more predominant,
4 emphasized more the standard democratic transparency
5 models rather than (INAUDIBLE) more productive form.

6 Q In your experience, have you ever heard of
7 a journalist refer to having an intelligence source?
8 Now, journalists have sources, but have you ever heard
9 journalists refer to having an intelligence source?

10 A I think they just mostly talk about the
11 confidential sources or sources rather specifically
12 intelligence sources.

13 Q In your experience, have you ever heard of
14 journalists referred to outing a spy in their
15 organization?

16 A Outing a spy in their organization?

17 Q Yes. It sounds odd I know but.

18 A I think it's too hard to describe how
19 people will use rhetoric within very large
20 organizations in very diverse forms.

21 Q Now, we've talked extensively about how

1 initial reports, not really that extensively, but we're
2 talked about initial reports about the release of
3 Department of State cables was somewhat inaccurate; is
4 that right?

5 A Yes.

6 Q And some press outlets reported that
7 Wikileaks had released 251,287 cables, and now would
8 you agree that that reporting was based on what
9 Wikileaks was saying about what they had in their
10 possession?

11 A The reporting was based on what was
12 understood on what was said was in Wikileaks'
13 possession, yes, but it didn't --

14 Q You said misreported (INAUDIBLE) it
15 actually --

16 A Precisely, that it had been released, that
17 it had been released in unredacted form, neither of
18 which was true.

19 Q And that was something, at least in that
20 case, in November -- you can back and say that was
21 November 7, '10, that was something you could

1 independently verify?

2 A Yes.

3 Q Now, you're aware now that Wikileaks
4 released reported 251,000 Department of State cables in
5 unredacted form, right?

6 A Much later.

7 Q In August of 2011.

8 Professor Benkler, you'd agree that your
9 views on this court martial are pretty well known; is
10 that correct?

11 A I have written publicly on this.

12 Q You wrote an op-ed for the New York Times
13 or you co-authored an op-ed on March 7, 2013?

14 A I did.

15 Q And that was titled, death to whistle
16 blowers?

17 A Yes.

18 Q Also March of 2013 you wrote an article for
19 the New Republic?

20 A Yes.

21 Q And that was titled the dangerous logic of

1 the Bradley Manning case?

2 A Yes.

3 CAPTAIN MORROW: Thank you. Nothing
4 further.

5 THE COURT: Mr. Coombs?

6 REDIRECT EXAMINATION

7 BY MR. COOMBS:

8 Q I didn't have any redirect until the last
9 two questions.

10 I want to give you an opportunity to
11 explain both of those op-ed pieces.

12 Can you tell the judge what the first op-ed
13 piece was about?

14 A I wrote an article together with Floyd
15 Abrams who is a leading First Amendment lawyer
16 representing the New York Times and the Pentagon Papers
17 case, because we have this agreement between us on the
18 substance of the specifics of Wikileaks, we have a
19 different view, but we agree that it was particularly
20 dangerous to the model of the way in which the free
21 press works.

1 If the threat to potential whistle blowers
2 and leakers was as great as the death penalty or life
3 in prison, and that even people who, like the two of
4 us, disagreed on the merits of the particulars in this
5 case, could agree that the cost that finding PFC
6 Manning guilty of aiding the enemy would impose in
7 terms of the willingness of people of good conscious
8 but not infinite courage to come forward and reveal
9 would severely undermine the way in which leak-based
10 investigative journalism has worked even in the
11 tradition of free press in the United States.

12 Q And then the second piece?

13 A The second piece was a short more popular
14 version of the deep long article that I gave. I
15 particularly emphasized there, as best I remember, the
16 way in which Wikileaks did serve a particular
17 journalistic function and the way in which too
18 excessive a punishment would destabilize the battles
19 between transparency and the contribution we get there
20 and the appropriate framework for preventing
21 unauthorized disclosure. And so the concern was that

1 if essentially -- let me back up.

2 The logic I describe, and in what I call
3 the dangerous logic. The logic I describe was that in
4 order to -- once you accept that Wikileaks is a new
5 journalistic organization, if handing materials over to
6 an organization that can be read by anyone with an
7 Internet connection means that you are handing it over
8 to the enemy, that essentially means that any leak to a
9 media organization that can be read by any enemy and/or
10 in the world becomes automatically (INAUDIBLE).

11 The dangerous logic is that you essentially
12 exclude the question of, have you actually gone to the
13 enemy? It's enough that was the logic of the claim
14 that I was criticizing. It's enough that you've given
15 it to a medium that was readable on the Internet for
16 you to immediately move on.

17 And what I wrote was that, that can't
18 possibly be the claim. There has to be something
19 fundamentally wrong than simply giving to an
20 organization that publishes as a journalistic
21 organization, but is acceptable everywhere in the

1 world.

2 MR. COOMBS: Thank you. Retrieving from
3 Professor Benkler Exhibit golf golf from the witness
4 and Prosecution Exhibit 45.

5 No further questions.

6 THE COURT: Professor Benkler, I have a
7 couple of questions.

8 Early in your testimony you mentioned
9 another leak organization, I believe --

10 THE WITNESS: LiveLeak.

11 THE COURT: What is that?

12 THE WITNESS: Frankly it was -- it's not
13 become a significant organization. I mostly come
14 across it in the context of that story. This was
15 another early leaking organization that had much more
16 of anything goes and anything could be posted.

17 I described it in the context of a Los
18 Angeles Times story that was trying to describe
19 Wikileaks as part of the phenomenon of leaking
20 sites, but then juxtapose these two sites.

21 LiveLeak, to the best of my knowledge,

1 has not really developed into a significant source
2 of insight and the core differentiation between them
3 was that Wikileaks was more careful in
4 authenticating and more cautious in how it
5 published.

6 THE COURT: Do you consider Liveleaks
7 part of the Fourth Estate.

8 THE WITNESS: I haven't really looked at it
9 closely enough to see. It really would depend on its
10 function. I'm not trying to avoid the answer. I don't
11 want to pretend to knowing something about a site that
12 I haven't really studied.

13 THE COURT: I'm not suggesting that.

14 I guess in your testimony earlier you
15 talked about -- Fourth Estate is brought and now
16 sort of includes bloggers that in traditional
17 newspaper organizations are melding, if you will, in
18 getting information from each other.

19 If a person, anybody, you, me, anyone
20 here in the gallery, had information that they
21 weren't supposed to disclose for some reason or

1 another or was protected, contract bidding
2 information, something like that forever, and put it
3 on an individual blog for the world to see, is that
4 person now a journalist?

5 THE WITNESS: I don't think so. I think
6 that -- well, it depends on the context. If there's a
7 direct violation of that person's duty not to disclose,
8 that doesn't get washed away by the fact that they've
9 disclosed it, but this is the problem of defining a
10 range of the journalist privilege, as the Supreme Court
11 wrote in Branzburg, it's the liberty of the press is
12 the right of the lonely pamphleteer with a mimeograph
13 as it is from the metropolitan press with the latest
14 technologies.

15 It's a hard line to draw. You would
16 not -- if someone publishes it in a form that is
17 intended for the public, we see this a little bit
18 with reporters privileges of cases in the Second,
19 Third, and Ninth Circuits where they're working a
20 little bit with questions of people who are doing
21 the research by themselves and end up coming and

1 saying, we can't distinguish between these. They
2 would create them for purposes of reporter's
3 privilege where it existed, in the states where it
4 exists, within that reporter's privilege.

5 That's the line, the place where I would
6 look for the line in those states like New Jersey
7 that have the privilege. It's those line drawing
8 exercises that I think are the most productive for
9 our purposes here.

10 THE COURT: Thank you.

11 Any follow-up questions based on that?

12 MR. COOMBS: No, Your Honor.

13 CAPTAIN MORROW: No, Your Honor.

14 THE COURT: Temporary or permanent excusal?

15 MR. COOMBS: Permanent excusal.

16 THE COURT: Professor Benkler, you are
17 permanently excused. You're free to go or you can stay
18 here in the courtroom.

19 THE WITNESS: Thank you.

20 MR. COOMBS: Your Honor, the Defense
21 rests.

1 THE COURT: All right. PFC Manning, you
2 have not testified, is that your decision?

3 THE WITNESS: Yes, Your Honor.

4 THE COURT: And the Court was given a list
5 of additional witnesses by the Defense. Is it also
6 your decision not to call any of them?

7 THE WITNESS: That's correct, Your Honor.

8 THE COURT: Is the government to have a
9 rebuttal case?

10 MAJOR FEIN: At this time the government
11 does intend to have a rebuttal case.

12 THE COURT: We spoke about timing issues at
13 the 802 conference that we held earlier today, and it's
14 my understanding that the government is going to give
15 the Defense notice of the rebuttal case on Monday.

16 MAJOR FEIN: Yes, Your Honor. It's one of
17 the few things we planned.

18 THE COURT: And you owe me the responses to
19 the four motions for the finding of not guilty from the
20 Defense?

21 MAJOR FEIN: Yes, ma'am, by C.O.B. Thursday

1 tomorrow we owe the four responses to that. Monday we
2 have scheduled that the Court will hear argument, if
3 any, on the motions to dismiss R.C.M. 917, and if there
4 is any argument on whether the government's rebuttal
5 case -- if the Defense has any argument against whether
6 we are inside or outside the scope of the rebuttal.

7 THE COURT: Alright. Then we will be on
8 the record then on Monday at 0930; is that correct?

9 MAJOR FEIN: Yes, ma'am.

10 MR. COOMBS: Yes, Your Honor. And the
11 Defense would request that we can decide an exact time
12 after this session, but a time period in which the
13 government gives us notice of rebuttal on Monday with
14 the witnesses that they intend to call and the exact
15 facts that they are calling its witnesses in order to
16 rebut some fact listed by the Defense in this case; but
17 a time for that would occur on Monday and that way from
18 that point forward we could prepare argument and be
19 prepared later that same day to argue.

20 THE COURT: Why don't we do this, because
21 it make my more sense to start later on on Monday.

1 When we finish here let's take a brief recess and talk
2 about scheduling so we don't put something out and then
3 change and we'll come back on the report and we'll have
4 the definite way ahead.

5 And one thing I did want to mention to
6 the Defense, two things actually. PFC Manning, this
7 is a members case. My instructions to the members
8 would be that the accused has an absolute right to
9 remain silent. You will not draw any inference
10 adverse from accused from the fact that he did not
11 testify as a witness. The fact that he did not
12 testify should be disregarded by you. I intend to
13 follow that instruction.

14 THE WITNESS: Yes, ma'am.

15 THE COURT: And the other issue I wish to
16 address with the Defense is, there is a footnote in
17 your motion for finding of not guilty for 641 that says
18 based on your motion that you haven't contacted a
19 particular evaluation expert.

20 You have now until -- we're not going
21 forward until next Wednesday. You have time to do

1 that should you want to and the Court will give you
2 a continuance if you want to do that.

3 MR. COOMBS: Yes, Your Honor.

4 THE COURT: I'm not suggesting in anyway
5 how I'm going to rule.

6 Is there anything else we need to
7 address before we recess?

8 MR. COOMBS: No, Your Honor.

9 MAJOR FEIN: No, ma'am.

10 THE COURT: We'll probably come back. Do
11 you think 15 minutes is about right or do you think
12 we'll need longer than that?

13 MAJOR FEIN: Fifteen minutes.

14 THE COURT: The Court is in recess.

15 (Hearing recessed at 2:45 p.m.)

16 (Hearing resumed at 3:00 p.m.)

17 THE COURT: Please be seated.

18 The Court is called to order.

19 All parties are present when the Court
20 last recessed are again present in court.

21 I believe we have reached a way forward.

1 The plan will be, we will reconvene on Monday at
2 1500 and at that time if the parties want to oral
3 argument on rebuttal, or the scope of rebuttal, and
4 the 917 motions will do that at that time.

5 Depending on the ruling on rebuttal, if
6 there is going to be a rebuttal case, we will begin
7 on Thursday at 0930. If not we will have closing
8 argument starting on Tuesday at 0930.

9 So whether we go on Tuesday or on
10 Thursday will not be settled until Monday afternoon.

11 Is that the parties' understanding?

12 MR. COOMBS: Yes, Your Honor.

13 MAJOR FEIN: Yes, Your Honor.

14 THE COURT: And the notice from the
15 government's own rebuttal will be at 0900 on Monday
16 morning to both the Defense and the Court?

17 MAJOR FEIN: Yes, ma'am.

18 THE COURT: Is there anything else we need
19 to address now?

20 MR. COOMBS: No, Your Honor.

21 MAJOR FEIN: No, ma'am.

1 **THE COURT: The Court is in recess until**
2 **Monday at 1500.**

3 **(Hearing adjourned at 3:04 p.m.)**

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