

The Bradley Manning Prosecution Infected by Government Misconduct, Dismissal is the Only Option

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Last week I spent two days in court for a pretrial motions hearing in the court martial of Bradley Manning, the private accused of leaking documents to WikiLeaks that showed widespread unethical and illegal behavior by the Department of Defense and State Department. Manning has suffered the fate the Queen put on Alice when she was in Wonderland, "Sentence first — verdict afterwards." By the time his court martial is actually held he will have been incarcerated for more than two years, one of those years was spent in solitary confinement. But, that is only one of many obvious injustices Manning is being subjected to.

In fact, just before the pretrial motions were heard the UN Special Rapporteur on Torture Juan Mendez completed a 14 month investigation and published a [lengthy report](#) on torture and otherwise abusive punishment. He wrote: "The special rapporteur concludes that imposing seriously punitive conditions of detention on someone who has not been found guilty of any crime is a violation of his right to physical and psychological integrity as well as of his presumption of innocence."

Further, Mendez concluded that the US military was at least culpable of cruel and inhumane treatment in keeping Manning locked up alone for 23 hours a day over an 11-month period in conditions that he also found might have constituted torture.

The motions hearing had some twilight zone moments. The prosecutors were missing court orders and rulings as well as motions and documents filed by the defense up until March 11 because in the strange world of the 'land of the free' when the word "WikiLeaks" appeared in an email, the document was blocked. The government finally figured out that they were missing filings, now every day the prosecutors check their spam box at 10 AM to see what the censors have hidden. Unlike other federal employees in the land of constitutionally protected free speech, they read the word "WikiLeaks," what will be the impact!?

Taking a lesson from the Queen in Alice in Wonderland, America's top two military commanders have already pronounced Manning guilty. Almost a year ago, President Obama, the commander-in-chief, [pronounced Manning guilty](#) saying "He broke the law." Just recently the Chairman of the Joint Chiefs of Staff, General Martin Dempsey, echoed that finding of guilt before trial saying "He did break the law." Dempsey's comment was published in [Stars and Stripes](#), the official newspaper of the Department of Defense. It seems like the military is doing all they can to let everyone who serves on the jury know their career is over if Manning is found not guilty.

This openly violates [Article 37](#) of the Uniform Code of Military Justice which forbids “Unlawfully Influencing Action of Court.” This is a [heavily litigated area](#) because the command structure of the military makes higher ranking officers very powerful over their subordinates. In 2004, the United States Court of Appeals for the Armed Services issued a unanimous decision that affirmed the power of the military judge to dismiss charges and specifications with prejudice in the face of unlawful command influence, *United States v. Gore*, 60 M.J. 178 (2004).

Manning’s attorney, David Coombs raised the issue of unlawful command influence in the Article 32 hearing, when he sought testimony from President Obama and other high government officials, writing: “The relevancy of these witnesses should be obvious. Each of these witnesses has provided statements that contradict those given by the OCA [Original Classification Authority] witnesses regarding the alleged damage caused by the unauthorized disclosures. **Additionally, each of these witnesses is relevant in order to inquire into the issues of unlawful command influence** and unlawful pretrial punishment in violation of Articles 13 and 37 of the UCMJ.” [Emphasis added.]

It is unclear how Judge Col. Denise Lind will minimize the impact of command influence in the Manning case. She can tell the jurors to ignore the Commander-in-Chief and the Chairman of the Joint Chiefs statements that Manning “broke the law,” but will that just make matters worse?

But this is not the end of the mess the government has created making a fair trial seemingly impossible. Coombs pushed the government hard on their denial of discovery. The government said there were 3 million pages of documents related to the trial. Coombs has gotten a very tiny fraction of those. The argument in court over discovery was about disclosure of materials related to the Apache helicopter attack known as the Collateral Murder Video, the damage assessment reports done by five federal agencies on how the documents impacted national security, computer forensic images that could show what software was installed or downloaded, and video from the Quantico Marine Brig where Manning was held in solitary.

The damage assessments are particularly important to both the underlying offenses as well as sentencing. Regarding the underlying charge, Manning’s most serious charge is aiding the enemy, who the government disclosed in court was al Qaeda of the Arabian Peninsula. The damage assessments would surely describe whether and how al Qaeda was aided by the released documents.

Since October 2010 Coombs has been asking for the damage assessments. The State and Justice Departments claim not to have finalized their assessment (Will they ever? Will they before the Manning trial?) The Defense Intelligence Agency and the Central Intelligence Agency have completed their assessments, but they are classified. The Federal Bureau of Investigation has completed their assessment but it has not been made available. Coombs pointed out that leaks and statements by top officials like Secretary Clinton and former Secretary Gates indicate there was no significant damage from the release.

The government says that if they are ordered to produce the materials they will have to go to the Original Classification Authority to review them and that this could take up to 60 days to complete. Coombs was surprised that this had not already been done. And, the government claimed that any documents ordered released would be reviewed for relevancy,

they said it could be that one paragraph is relevant out of 100 page document where the remainder will be redacted. It is evident that discovery will be an ongoing battle as the prosecution seems intent on hiding information from the defense. When I practiced law and the government opened their files and showed everything, I realized there was not much evidence on my side, but when the government hid documents it almost always would mean – they had something that could lose their case.

After arguing the discovery motion for an hour, where he repeatedly criticized the government lawyers for not understanding their responsibilities under the discovery rules, Coombs heightened the argument by filing a motion to dismiss because of the government's failure to provide discovery. He argued that he did not know how this could be fixed; comparing it to baking a cake and 45 minutes into the baking realizing you forgot to put in the eggs.

Coombs also sought a Bill of Particulars, seeking more specificity of the facts the government intends to prove. Coombs specifically wanted to know whether the prosecution alleged that Manning had hacked into the SIPRnet, or stolen a password, or simply used the access he already had. Judge Lind interjected herself, asking an Alice in Wonderland-Queen like question: "Does the government have to prove how he did it?" Coombs responded that this type of specificity is what the Bill of Particulars was designed for, explaining, "I don't want a trial by ambush."

It is not only the defense that is not being given information, but the media and public are also being kept in the dark. The government is even hiding court filings from the media. [The Reporters Committee for Freedom of the Press](#) sent a letter signed by 46 media outlets urging the military to adopt at least the same level of media access as extended to trials at Guantanamo Bay, amazingly those terrorist trials provide more information to the media than the trial of Private Bradley Manning.

From pretrial abuse through prosecutors not living up to discovery obligations and commanders declaring Manning guilty it seems like the government is trying to send a message – blow the whistle on war crimes and we will incarcerate and torture you, prosecute you in a kangaroo court and put you away for life. It is almost a "we can do anything we want to you" message to troops that if they let the truth be known, they will be severely punished regardless of the law.

The case is once again reminiscent of the prosecution of Daniel Ellsberg for leaking the Pentagon Papers and faced up to 115 years' incarceration. During the trial it came out that the [White House had broken into Ellsberg's psychiatrist's office](#) and the judge ordered those documents released to the defense. John Ehrlichman twice met with the judge during the trial and offered him the directorship of the FBI. The FBI also taped numerous conversations involving Ellsberg and did not disclose this in discovery. After a four month trial, just as the case was going to a jury the judge dismissed all charges after the government claimed it had lost records of wiretapping against Ellsberg. [Judge Byrne dismissed the case](#) ruling: "The totality of the circumstances . . . offend a sense of justice. The bizarre events have incurably infected the prosecution of this case."

The bizarre and unfair behavior of the government in the prosecution of Bradley Manning likewise offends a sense of justice and has incurably infected the possibility of a fair trial and a just result. Short of outright dismissal it is hard to see how justice can be done.

Kevin Zeese is co-chair of [Come Home America](#) which brings people across the political spectrum together who oppose war and empire. He is one of the organizers of the [National Occupation of Washington, DC](#) which begins on March 30.

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