

BRADLEY MANNING'S SENTENCE, PAROLE AND APPEAL IMPLICATIONS

On Monday I laid out the dynamics that would be in play for the court in considering what sentence to give Bradley Manning in light of both the trial evidence and



testimony, and that presented during the sentencing phase after the guilty verdict was rendered. Judge Lind has entered her decision, and Bradley Manning has been sentenced to a term of 35 years, had his rank reduced to E-1, had all pay & allowances forfeited, and been ordered dishonorably discharged. This post will describe the parole, appeal and incarceration implications of the sentence just imposed.

Initially, as previously stated, Pvt. Manning was credited with the 112 days of compensatory time awarded due to the finding that he was subjected to inappropriate pre-trial detention conditions while at Quantico. Pvt. Manning was credited with a total 1294 days of pre-trial incarceration credit for the compensatory time and time he has already served since the date of his arrest.

Most importantly at this point, Manning was sentenced today to a prison term of 35 years and the issue of what that sentence means – above and beyond the credit he was given both for compensatory time and time served – is what is critical going forward. The following is a look at the process, step by step, Bradley Manning will face.

The first thing that will happen now that Judge Lind has gaveled her proceedings to a close is the court will start assembling the record, in terms of complete transcript, exhibits and full docket, for transmission to the convening authority for review. It is not an understatement to say that this a huge task, as the Manning record may well be the largest ever produced in a military court martial. It will be a massive undertaking and transmission.

At the same time, the defense will start preparing their path forward in terms of issues they wish to argue. It is my understanding that Pvt. Manning has determined to continue with David Coombs as lead counsel for review and appeal, which makes sense as Coombs is fully up to speed and, at least in my opinion, has done a fantastic job. For both skill and continuity, this is a smart move.

The next step will be designation of issues to raise for review by the "convening authority". In this case, the convening authority is Major General Jeffrey Buchanan, who heads, as Commanding General, the US Army's Military District of Washington. This step is quite different than civilian courts, where a defendant proceeds directly to an appellate court.

The accused first has the opportunity to submit matters to the convening authority before the convening authority takes action – it's not characterized as an "appeal," but it's an accused's first opportunity to seek relief on the findings and/or the sentence. According to the Manual for Courts-Martial, Rule for Court-Martial 1105:

(a) In general. After a sentence is adjudged in any court-martial, the accused may submit matters to the convening authority in accordance with this rule.

(b) Matters which may be submitted.

(1) The accused may submit to the

convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. The convening authority is only required to consider written submissions.

(2) Submissions are not subject to the Military Rules of Evidence and may include:

(A) Allegations of errors affecting the legality of the findings or sentence;

(B) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;

(C) Matters in mitigation which were not available for consideration at the court-martial; and

(D) Clemency recommendations by any member, the military judge, or any other person. The defense may ask any person for such a recommendation.

Once the convening authority has the full record and the defense has designated its matters for review, Buchanan will perform his review and determine whether any adjustments to the sentence are appropriate, and that will be considered the final sentence. At this point, the only further review is by a traditional appeal process.

Generally, the level of appellate review a case receives depends on the sentence as approved by the convening authority. After the approval of the sentence, cases in which the sentence includes death, a punitive discharge (bad conduct, dishonorable discharge, or dismissal), or confinement for one year or greater (and Manning's sentence certainly fits that criteria) are automatically referred to the service (in this case the Army) Court of Criminal Appeals (ACCA) for review. In Bradley Manning's case, only some counts will be eligible for appeal, the ones for which Judge Lind convicted him of after "deliberation". Appeal on the counts

Manning voluntarily pled guilty to prior to trial was waived.

The ACCA will be responsible for reviewing the entire case and has, pursuant to Article 66, UCMJ, the responsibility to:

...affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines on the basis of the entire record, should be approved.

That statutory requirement to find law and fact "correct" is significant; the ACCA could decide not to sustain a conviction on a particular offense even if not challenged on appeal. The ACCA "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the court-martial saw and heard the evidence."

In addition to the ACCA's review, military appellate counsel, unless waived, are provided to the accused at no cost. Bradley Manning will likely already have David Coombs, but due to the complexity, it can be anticipated there will also be military counsel participating as well. The appellate counsel may raise specific legal issues to the court for resolution.

After the ACCA, the decision may be appealed to the Court of Appeals for the Armed Forces and thereafter to the United States Supreme Court. Military appellate counsel are continued to be provided at no cost until all the appeals have been exhausted. See generally Subchapter IC, Post-Trial Procedure and Review of Courts-Martial (10 USC §§ 860-876) and Chapter XII of the Rules for Courts-Martial.

The foregoing is the process that will play out in relation to court proceedings for Bradley Manning. But, as such is progressing, Mr. Manning will, of course, be incarcerated, and there will be factors to be considered in that regard as well. Manning will be sentenced to a

facility for confinement. The obvious location is Fort Leavenworth where he has been for some time already, although he will likely be moved out of pre-trial population and into general confinement population.

Some military prisoners can be transferred to a Federal Bureau of Prisons (FBOP) facility with the concurrence or direction of the Secretary concerned and agreement with the FBOP. Factors that are considered are: the prisoner's demonstrated potential for return to duty or rehabilitation, nature and circumstances of offenses, confinement file, status of legal appeals/proceedings, length and nature of sentence, age, and special circumstances (prisoner needs/interests of national security). At least at this point, there is no reason to believe Bradley Manning would be transferred to a civilian prison, although it is at least possible after all appeals are exhausted, which will not be for a very long time.

Once assigned to his facility, Mr. Manning will have a "sentence computation form" generated that will effectively control his confinement and eligibility for release going forward. Here is the template used for such computation. The form can be, and is, commonly updated as the prisoner serves his time, and the document is primarily an internal one as opposed to a public one. There is no set time period for initial production of the form, but it should happen pretty quickly after Manning's return to the permanent facility. Any number of things can cause adjustments to the form as time goes on, including any sentence relief granted by the convening authority, either initially or after alteration of the conviction status from appellate courts.

So, what about Bradley Manning's potential release date? This is where there is a HUGE difference in the UCMJ process from civilian process. As many know, the United States government has abolished "parole" for federal prison sentences. Instead, and this is now

common in many states too, federal prisoners must serve at least 85% of their imposed sentence, and only then are eligible for supervised release for the remaining time. Under the UCMJ, however, there is still an active and healthy parole system that is far more flexible and favorable to a defendant, especially one like Bradley Manning, who is sentenced to a long term.

Several programs exist within the military corrections process to allow prisoners to be released prior to serving their full sentence. These programs are: clemency, parole, mandatory supervised release (MSR), reenlistment, and restoration to duty. Prisoners do not have any right to clemency, parole, reenlistment, or restoration. These programs are administered by a Clemency and Parole Board (C&PB) on behalf of the Secretary concerned and only apply to military prisoners confined at military corrections facilities. Upon the unlikely event of permanent transfer to the Federal Bureau of Prisons, military prisoners may only be considered for clemency, restoration to duty, and reenlistment, the latter two of which are pretty inconceivable for Bradley Manning.

C&PB considers factors such as the nature and circumstances of the prisoner's offenses, the military and civilian history, the confinement file, personal characteristics of the prisoner (age, education, marital/family status, psychological profile), impact of prisoner's offense on victim and attempts at restitution, protection and welfare of society, and the need for good order and discipline in the military when determining whether a prisoner should be granted any of the above programs.

Parole is the conditional release from confinement of a prisoner under the guidance and supervision of a United States Probation Officer. This may be granted prior to the minimum release date and does not require the member to remain on parole until the adjusted maximum release date. Parole considerations

begin, upon request of the prisoner, if the sentence is less than 30 years after the member serves one-third of the confinement, but no less than 6 months. If the sentence is greater than 30 years, the prisoner must serve at least 10 years of confinement. The point at which the C&PB begins to consider the prisoner for these programs is dependent upon the sentence received. Specific details on how to calculate when a prisoner, such as Bradley Manning, is eligible for parole or MSR, see Department of Defense Instruction 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authority as well as the DOD Sentence Computation Manual.

MSR is the conditional release of a prisoner who has served the portion of the sentence to confinement up to the minimum release date from confinement. This type of release continues until the individual reaches the adjusted maximum release date unless the confinement term is altered by the military department through remission, revocation, etc. This is also served under the guidance and supervision of a United States Probation Officer.

Bradley will also be eligible for "good time credits" that will inure to his release favor assuming he is a model prisoner. Good time credit is time that is awarded for faithful observance of all rules and regulations and is subtracted from the prisoner's adjusted maximum release date. The adjusted maximum release date is computed by adjusting the maximum release date to include administrative credit (pretrial confinement), judicial credit (credit ordered by a judge to a sentence of confinement), inoperative time, and crossing the International Date Line. Good time credit is calculated as 5-10 days per month off the top depending on the length of the approved sentence. In addition, a prisoner may receive up to an additional 8 days per month for work, participation in rehabilitation programs, and/or participation in education programs. If a prisoner performs extraordinary acts, then an additional 2 days

per month for 12 months may be credited. The total combined credited time may not exceed 15 days per month.

There is no interplay between parole and good time credit as good time credit affects the adjusted maximum release date, and parole consideration is annual after a specified time frame as explained above. If a prisoner is not paroled, s/he may be released earlier than initially expected as a result of good time credit.

So, what is the bottom line as to how much time Bradley Manning will likely really serve in confinement given the sentence today by Judge Lind? As you can tell from the above discussion, that is an extremely hard question to answer, and the answer is quite fluid and subject to change as the circumstances dictate. A good rule of thumb, however, is that Bradley could be released after serving one third of his sentence. In light of the fact Judge Lind has imposed a term of 35 years, Mr. Manning, considering the time he has already served, could potentially be eligible for release in as little as 9 years from now. As painful as it is to admit, this sentence, and Bradley Manning's prospects could have very easily looked far worse. [UPDATE – after pondering what Col. Morris Davis said, I think he is right, and after recalculation, I think the initial eligibility for release – assuming everything goes perfectly for Bradley Manning – will be in 8.3 years.]

One last point – what are the effects of this UCMJ conviction upon Bradley Manning's civil rights? That is a question not nearly as easy to answer as it is for a civilian felony conviction, where certain rights are simply lost until formally restored. It turns out that for military convictions there is no set authority. The best resource I have found on understanding collateral consequences of a military conviction and sentence is this from the American Bar Association. Some consequences may apply during

a period of supervised release while others could be permanent. In general, the consequences that military convicts face is determined by the state law of the person's residence.