

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

Private First Class (E-3)
CHELSEA MANNING,
United States Army,

Appellant.

BRIEF OF AMICUS CURIAE AMNESTY
INTERNATIONAL LTD. IN SUPPORT
OF PRIVATE FIRST CLASS CHELSEA
MANNING

Case No. ARMY 20130739

Tried at Fort Meade, Maryland,
on 23 February, 15-16 March,
24-26 April, 6-8, 25 June, 16-
19 July, 28-30 August, 2, 12,
and 17-18 October, 7-8, and 27
November-2, 5-7, and 10-11
December 2012, 8-9 and 16
January, 26 February-1, 8
March, 10 April, 7-8 and 21
May, 3-5, 10-12, 17-18 and 25-
28 June, 1-2, 8-10, 15, 18-19,
25-26, and 28 July-2, 5-9, 12-
14, 16, and 19-21 August 2013,
before a general court-martial
appointed by Commander, United
States Army Military District
of Washington, Colonel Denise
Lind, Military Judge,
presiding.

US ARMY JUDICIARY

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Introduction

Amnesty International Ltd. respectfully submits this brief as amicus curiae because the military judge erred in concluding that Private First Class Chelsea Manning (PFC Manning) "was not held in solitary confinement" because "[s]olitary means alone and without human contact," whereas PFC Manning "had daily human contact" with Brig staff and "weekly visits with [her] counselor and mental health professionals." (App. Ex. 461 at 23). The United States Supreme Court rejected that definition of "solitary confinement" the first time the Court considered the issue. See *In re Medley*, 134 U.S. 160, 167-71 (1890).

As the Court held in *Medley*, solitary confinement is not "a mere unimportant regulation as to the safe-keeping of the prisoner, and is not relieved of its objectionable features" by the fact that the prisoner is not completely deprived of human contact. *Id.* at 167. A prisoner's inevitable interactions with "the officers of the prison and subordinates, who must necessarily furnish him with his food and his clothing, and make inspection every day that he still exists," does not ameliorate "the essential character of that mode of prison life," which is a "punishment" that the common law has always reserved for "the worst crimes of the human race." *Id.* at 169-70. Likewise, the fact that a prisoner may be allowed to meet with his "counsel, physicians, the spiritual adviser, and the members of his family," at the discretion of prison officials, "is but a small mitigation of this solitary confinement," which remains

"solitary confinement" as a matter of law and common understanding. *Id.* The Court's holding in *Medley* should be dispositive here: solitary confinement is a "punishment of the most important and painful character, and is therefore forbidden" by "the constitution of the United States" where, as here, punishment itself is forbidden. *Id.* at 171.

The military judge recognized that the Due Process Clause of the Fifth Amendment, and Article 13, Uniform Code of Military Justice, 10 U.S.C. § 813 (2006) [hereinafter UCMJ], protect "pretrial detainees who have not been convicted and sentenced from being punished." (App. Ex. 461 at 22). It is also undisputed that PFC Manning was held before trial at the Marine Corps Brig Quantico (MCBQ) in a 6' by 8' cell, for 23 to 24 hours a day, for 9 months. Contrary to the military judge's ruling, that is prolonged solitary confinement, which is unconstitutional and unlawful punishment under United States and international law.

The United States sponsored, and the United Nations (UN) unanimously adopted, the following definitions: "solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days." UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), G.A. Res. 70/175 (17 Dec. 2015), Rule 44. Unlike the military judge's definition of "solitary confinement," the internationally-accepted definition sponsored by the United

States is entirely consistent with United States law as established in *Medley* and many subsequent cases.

Accordingly, as demonstrated in further detail below, PFC Manning was subjected to unconstitutional and unlawful punishment for the entire duration of her pretrial confinement at MCBQ, and the military judge erred as a matter of law in concluding otherwise.

A Brief History of Solitary Confinement

Like the road to hell, the original solitary-confinement cells in the United States were paved with good intentions. In 1787, the Philadelphia Society for Alleviating the Miseries of Public Prisons convened at Benjamin Franklin's house. Inspired by the Quakers, the Society proposed that solitary confinement would force prisoners to reflect on their crimes and become truly penitent – hence the word “penitentiary.” That theory was put into practice in Walnut Street Penitentiary in 1790; Eastern State Penitentiary in 1829; then in penitentiaries around the world. See, e.g., *Medley*, 134 U.S. 167-68; Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol’y 325, 338-43 (2006) [hereinafter Grassian], http://openscholarship.wustl.edu/law_journal_law_policy/vol22/iss1/24; Chai Woodham, *Eastern State Penitentiary: A Prison With a Past*, *Smithsonian Magazine*, Sept. 30, 2008.

It soon became clear, however, that although it was originally “meant for reformation,” solitary confinement is

"cruel and wrong," as Charles Dickens wrote after visiting Eastern State Penitentiary in 1842:

I am persuaded that those who devised this system . . . do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony [of] this dreadful punishment . . . which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable . . . therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay. I hesitated once, debating with myself, whether . . . I would allow it to be tried in certain cases, where the terms of imprisonment were short; but now, I solemnly declare, that with no rewards or honors could I walk a happy man beneath the open sky by day, or lie me down upon my bed at night, with the consciousness that one human creature, for any length of time, no matter what, lay suffering this unknown punishment in his silent cell, and I the cause, or I consenting to it in the least degree.

Charles Dickens, *American Notes* 678 (1842). Dickens further stated - aptly here - that although the prisoner, of course, "sees the prison-officers," he is nevertheless "a man buried alive; to be dug out in the slow round of years; and in the mean time dead to everything but torturing anxieties and horrible despair." *Id.* at 679.

Dostoyevsky made similar observations after his own imprisonment in Siberia from 1850 to 1854. "I am firmly convinced that the belauded system of solitary confinement attains only false, deceptive, external results. It drains the man's vital sap, enervates his soul, crows and enfeebles it, and then holds up the morally withered mummy, half imbecile, as a

model of penitence and reformation." Fyodor Dostoyevsky, *The House of the Dead* 13 (Constance Garnett trans., 1915).

By the middle of the nineteenth century, it was well known that prisoners held in solitary confinement "fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane," or "committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community." *Medley*, 134 U.S. at 168. The "whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe." *Id.* By 1939, except in "isolated instances," solitary confinement was "no longer practiced by any civilized nation of the world." J.G. Wilson & M.J. Pescor, *Problems in Prison Psychiatry* 25 (1939).

From the 1970s to the present, however, the War on Drugs, combined with the widespread closure of mental-health facilities, among other factors, resulted in a dramatic increase in the number of prisoners and incidents of prison violence, which led, in turn, to the resurgence of solitary confinement.¹

¹ See, e.g., U.S. Dep't of Justice, *R. & Rs. Concerning Use of Restrictive Housing* 7 (2016) [hereinafter DOJ Recommendations], <https://www.justice.gov/restrictivehousing>; Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 Ind. L. J. 741, 747-53 (2015) [hereinafter Bennion], <http://www.repository.law.indiana.edu/ilj/vol90/iss2/7>; Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental*

"It is both tragic and highly disturbing that the lessons of the nineteenth century experience with solitary confinement are today being so completely ignored by those responsible for addressing the housing and the mental health needs in the prison setting." Grassian at 329. That tragedy is compounded by the fact that, in "the mid-1970s, the United States formally abandoned its commitment to the rehabilitative ideals" that were the only saving grace of the Quaker system. Haney at 128-29. And because prisons now "meld sophisticated modern technology with the age-old practice of solitary confinement, prisoners experience levels of isolation and behavioral control that are more total and complete and literally dehumanized than has been possible in the past," making "this extraordinary and extreme form of imprisonment unique in the modern history of corrections." *Id.* at 127.

Illness, 90 Denv. U. L. Rev. 1, 13-17 (2012) [hereinafter Hafemeister], <http://ssrn.com/abstract=2032139>; Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinquency 124, 127-30 (2003) [hereinafter Haney], <https://www.researchgate.net/publication/249718605>. It is worth noting that the author of the latter article, Dr. Craig Haney, "is perhaps the nation's leading expert in the area of penal institution psychology." *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 908 & n.93 (S.D. Tex. 1999), *rev'd and remanded on other grounds sub nom. Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001), *on remand at* 154 F. Supp. 2d 975, 984-85 (S.D. Tex. 2001) (readopting original findings and conclusions on constitutional issues, including with respect to Dr. Haney's opinions).

**Modern Studies Confirm that Prolonged Solitary Confinement
Causes and Exacerbates Serious Mental Illness**

Since the nineteenth century, legions of psychiatrists, psychologists, neuroscientists, primatologists, and others have proven beyond a shadow of a doubt what Dickens and Dostoyevsky already knew: prolonged solitary confinement exacts "a terrible price." *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (citing Grassian). After decades, if not centuries, of research, "there is not a single published study of solitary or supermax-like confinement . . . lasting for longer than 10 days . . . that failed to result in negative psychological effects," including "such clinically significant symptoms as hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and behavior." Haney at 132. Prolonged solitary confinement results in "permanent harm," with symptoms "characteristic of an acute organic brain syndrome." Grassian at 332-38.

Because prolonged solitary confinement causes mental illness, it is especially cruel and counterproductive to impose it on prisoners already suffering from mental illness:

The stress, lack of meaningful social contact, and unstructured days can exacerbate symptoms of illness or provoke recurrence. Suicides occur disproportionately more often in segregation units than elsewhere in prison. All too frequently, mentally ill prisoners decompensate in isolation, requiring crisis care or psychiatric hospitalization. Many simply will not get better as long as they are isolated. . . . Persons with mental illness are often impaired in their ability to handle the stresses of incarceration and to conform to a highly regimented routine. They may exhibit bizarre, annoying, or dangerous behavior and have higher rates of disciplinary infractions than other prisoners. Prison

officials generally respond to them as they do to other prisoners who break the rules. When lesser sanctions do not curb the behavior, they isolate the prisoners in the segregation units, despite the likely negative mental health impact. Once in segregation, continued misconduct, often connected to mental illness, can keep the inmates there indefinitely. . . . Whatever one's views on supermax confinement in general, human rights experts agree that its use for inmates with serious mental illness violates their human rights.

Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. Psychiatry & Law 104, 105 (2010) (footnotes omitted), <http://www.jaapl.org/content/38/1/104>; see also Grassian at 350-51. One of the "core irrationalities" of prolonged solitary confinement is that "prisoners who cannot 'handle' the profound isolation of supermax confinement are almost always doomed to be retained in it," whereas "those who have adapted all too well to the deprivation, restriction, and pervasive control are prime candidates for release to a social world to which they may be incapable of ever fully readjusting." Haney at 141. Plainly, "no penological purpose can be served by herding inmates into an expensive and perpetual cycle of disciplinary infractions and further confinement of which the primary effect appears to be the exacerbation of the mental illness that was the root of their placement in the first place, but which may also render them more violent, unresponsive, impulsive, or disruptive." Hafemeister at 51.

The extensive literature also makes clear that inevitable contacts with prison staff do not mitigate the cruel effects of prolonged solitary confinement, which are especially dire for

those already suffering from mental illness. "Of necessity, prisoners in solitary confinement must have some form of regular and routine contact with staff," and solitary confinement units "typically allow for some minimal form [of] communication between prisoners." Haney at 151 n.2. Such interactions, however, do not provide the "meaningful and appropriate therapeutic contact" that mentally ill prisoners desperately need. *Id.* at 143.

On the contrary, prisoners' interactions with guards are virtually guaranteed to be the opposite of therapeutic, especially "when the inmate experiences the stringencies of his confinement as being the product of an arbitrary exercise of power, rather than the fair result of an inherently reasonable process." Grassian at 333; see also, e.g., Haney at 137-43. Prison officials, in turn, tend to "treat disordered behavior as disorderly behavior, responding with disciplinary measures that may reinforce the unavailability of treatment and exacerbate the illnesses contributing to the inmates' conduct." *Developments in the Law: The Impact of the Prison Litigation Reform Act on Correctional Mental Health Litigation*, 121 Harv. L. Rev. 1114, 1145 (2008). That is exactly what happened here, as is clear from the transcripts of the Brig staff's interactions with PFC Manning, which read like they were co-authored by Joseph Heller and Franz Kafka.

PFC Manning's Confinement Was Unconstitutional and Unlawful

The determination of whether PFC Manning "endured unlawful pretrial punishment involves both constitutional and statutory considerations," which this Court reviews de novo. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

Under the Fifth Amendment, no person may be deprived of liberty without due process of law. U.S. Const. amend. V. Thus, "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). In the absence of direct proof of punitive intent, which is usually not available, courts evaluate whether the conditions in question are objectively reasonable. *Id.* at 538. If "a restriction or condition is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon" a pretrial detainee. *Id.* at 539. "A *fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners," including the Eighth Amendment right not to be subjected to cruel and unusual punishments. *Id.* at 545; *see also, e.g., Edwards v. Byrd*, 750 F.3d 728, 732 n.2 (8th Cir. 2014) ("Conduct constituting 'cruel and unusual punishment' *a fortiori* constitutes punishment. And the Due Process Clause prohibits any punishment of a pretrial detainee, be that punishment cruel-and-unusual or not.").

Similarly, "Article 13, UCMJ, prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial." *King*, 61 M.J. at 227. A violation of the first prohibition may be shown by examining the intent of detention officials or, if direct evidence of intent is unavailable, "by examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'" *Id.* (quoting *Bell*, 441 U.S. at 539). A violation of the second prohibition is shown if the conditions of pretrial confinement are "unduly rigorous." *Id.* "Conditions that are sufficiently egregious may give rise to a permissive inference that an accused is being punished, or the conditions may be so excessive as to constitute punishment." *Id.* at 227-28.

As already discussed, the Supreme Court in *Medley* held that solitary confinement is a severe and painful punishment. *Medley*, 134 U.S. at 171. The issue in *Medley* was whether solitary confinement violated the constitutional prohibition against *ex post facto* laws, where the state statute providing for solitary confinement was enacted after the prisoner committed the murder of which he was convicted. The Court held that solitary confinement "was an additional punishment of the most important and painful character, and is therefore forbidden by this provision of the constitution of the United States." *Id.* at 171. The Court explicitly rejected the contention that the prisoner's confinement was not truly "solitary" because he

had daily contact with prison staff, who also "may permit access of counsel, physicians, the spiritual adviser, and the members of his family." *Id.* at 169. Such minimal contact "is but a small mitigation of this solitary confinement," which retains its "essential character" as a "severe" punishment of particular "terror" and "infamy." *Id.* at 169-70.

The *Medley* Court's holding that solitary confinement is punishment, despite inevitable interactions with prison guards and minimal contact with others, remains the law, both under the United States Constitution, and under Article 13, UCMJ. In *King*, for example, the United States Court of Appeals for the Armed Forces held that a pretrial detainee was unlawfully "subjected to punishment" because he was held for two weeks in "segregation in a six-by-six, windowless cell" as an "arbitrary response to the physical limitations at Barksdale AFB." *King*, 61 M.J. at 228. The court granted his request for "three days of administrative credit for each day he endured solitary segregation" because placing him "in a segregated environment with all the attributes of severe restraint and discipline, without an individualized demonstration of cause in the record, was so excessive as to be punishment and is not justified by the Barksdale AFB confinement facility space limitations." *Id.* at 229. Similarly, in *United States v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2011), the court remanded for "meaningful relief" where a pretrial detainee was confined to his cell for an average of 23 hours a day, for 119 days, and denied appropriate mental-health care. *Id.* at 171-77.

Other federal courts have likewise recognized "what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total." *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988). In *Davenport*, Judge Richard Posner noted that the inmates were allowed to exercise in their cells - which, incidentally, were considerably larger than PFC Manning's - and also were "allowed to leave their cells for a variety of reasons, such as to use the law library, see visitors, consult with lawyers and other counselors, and visit the medical unit." *Id.* But such "excursions" were limited to a few hours per week, "and the degree of constraint is considerable. A visit to the law library, for example, means being escorted in handcuffs to a caged carrel in the library - not browsing in stacks or working at a library table in a reading room." *Id.* This "realistically is a form of solitary confinement," *id.*, which violates the Eighth Amendment. *Id.* at 1314-15.

In the seminal case *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), Chief Judge Thelton Henderson of the Northern District of California held that the Eighth Amendment prohibits solitary confinement of prisoners who are either already mentally ill, or "at an unreasonably high risk of suffering serious mental illness as a result of" solitary confinement. *Id.* at 1267. The prisoners in *Madrid* were "confined to their cells for 22 and ½ hours of each day." *Id.* at 1229. "The social isolation, however, is not complete." *Id.* Inmates

interacted with correctional staff and were allowed visits with their attorneys and medical and mental-health staff, but "such opportunities may be infrequent and generally provide only a limited type of interaction." *Id.* Thus, although the prisoners were not completely isolated, they were "severely deprived of normal human contact." *Id.* at 1230.

Imposing such conditions on mentally-ill or at-risk prisoners "is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly 'unreasonable.'" *Id.* at 1265 (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)). "Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an existing mental illness before obtaining relief." *Id.* at 1265-66. The court was "acutely aware" that officials are entitled to deference in prison management, but courts cannot defer to conditions of confinement that are known to cause or exacerbate serious mental illness. *Id.* at 1266. "A risk this grave – this shocking and indecent – simply has no place in civilized society." *Id.*; see also, e.g., *Brown v. Plata*, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.").

Likewise, in *Ruiz*, Judge William Wayne Justice of the Southern District of Texas held that solitary confinement, referred to there by the euphemism "administrative segregation,"

violates the Eighth Amendment prohibition against cruel and unusual punishment, "both as to the plaintiff class generally and to the subclass of mentally ill inmates housed in such confinement." Ruiz, 37 F. Supp. 2d at 861; see also *supra* n.1 (describing subsequent history of Ruiz); *McClary v. Kelly*, 4 F. Supp. 2d 195, 199 (W.D.N.Y. 1998) (prisoners' constitutional rights are not "extinguishable simply by virtue of the fact that the confinement was labeled by prison officials as 'administrative'"); George Orwell, *Politics and the English Language* (1946) (criticizing such euphemisms as "the defense of the indefensible").

Just as "the pain and suffering caused by a cat-o'-nine-tails lashing an inmate's back are cruel and unusual punishment by today's standards of humanity and decency, the pain and suffering caused by extreme levels of psychological deprivation are equally, if not more, cruel and unusual." Ruiz, 37 F. Supp. 2d at 914. It is "deplorable and outrageous" that prisons have become a "repository" for the mentally ill, who, "in a tragically ironic twist," are then "confined in conditions that nurture, rather than abate, their psychoses. The United States Constitution cannot abide such a perverse and unconscionable system of punishment." *Id.* at 915.

These and other cases leave no doubt that prolonged solitary confinement is cruel and unusual punishment for

prisoners who have, or are at risk of, serious mental illness.² A *fortiori*, such conditions violate pretrial detainees' constitutional rights to due process, as well as Article 13, UCMJ. See, e.g., *Bell*, 441 U.S. at 545; *King*, 61 M.J. at 227-29; *Graves v. Arpaio*, 48 F. Supp. 3d 1318, 1335-56 (D. Ariz. 2014). To impose such conditions not only *despite*, but *because* of, mental illness and suicide risk is worse than "arbitrary or purposeless," *Bell*, 441 U.S. at 539; it is "perverse and unconscionable." *Ruiz*, 37 F. Supp. 2d at 915.

² See also, e.g., *Coleman v. Brown*, 28 F. Supp. 3d 1068, 1099 (E.D. Cal. 2014) ("[P]lacement of seriously mentally ill inmates in the harsh, restrictive and non-therapeutic conditions of California's administrative segregation units for non-disciplinary reasons for more than a minimal period necessary to effect transfer to protective housing or a housing assignment violates the Eighth Amendment."); *Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr.*, No. 1:08-CV-01317-TWP, 2012 WL 6738517, at *17, *23 (S.D. Ind. Dec. 31, 2012) ("[T]here is a difference between mental health monitoring and mental health treatment," and the failure to provide the latter "violates the Eighth Amendment's proscription against the imposition of cruel and unusual punishment."); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 636-37 (S.D.N.Y. 1998) (Sotomayor, J.) (solitary confinement is "severe," "harsh," and "punitive"); *McClary*, 4 F. Supp. 2d at 208 ("[T]hat prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science."); *United States v. Suleiman*, No. 96 CR. 933 WK, 1997 WL 220308, at *1 (S.D.N.Y. Apr. 1, 1997) (pretrial "solitary confinement for twenty-three hours a day with one hour of supervised recreation," of defendant held in connection with the 1993 bombing of the World Trade Center, did not serve "any legitimate governmental objective"); *Casey v. Lewis*, 834 F. Supp. 1477, 1549 (D. Ariz. 1993) ("This use of lockdown as an alternative to mental health care for inmates with serious mental illnesses clearly rises to the level of deliberate indifference to the serious mental health needs of the inmates and violates their constitutional rights to be free from cruel and unusual punishment.").

Representatives of every branch of the United States government agree. President Obama, for example, has adopted the recommendations of the Department of Justice that prisoners with mental illness should not be placed in solitary confinement, and if there is no reasonable alternative to such confinement, must (among other things) receive intensive clinically-appropriate mental health treatment and enhanced opportunities for therapeutic activities. See DOJ Recommendations at 99-101. Further, inmates who are lesbian, gay, bisexual, transgender, or intersex (LGBTI) "or whose appearance or manner does not conform to traditional gender expectations should not be placed in restrictive housing solely on the basis of such identification or status." *Id.* at 102; see also Barack Obama, *Why we must rethink solitary confinement*, Wash. Post, Jan. 25, 2016. Others too numerous to list here agree with President Obama and the Justice Department, as shown by nearly one hundred submissions to the Senate Judiciary Committee, from organizations as diverse as the Mississippi Department of Corrections, the National Association of Evangelicals, the American Psychiatric Association, the American Bar Association, the American Civil Liberties Union, and the National Center for Transgender Equality. See *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences*, Hearing Before the Subcomm. on Const., Civ. Rights & Human Rights of the S. Comm. on the Judiciary, S. Hrg. 112-879, 112th Cong. (2012), <https://www.judiciary.senate.gov/imo/media/doc/CHRG-112shrg87630.pdf>.

Furthermore, the United States has ratified the UN Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment, and the International Covenant on Civil and Political Rights, both of which prohibit torture and other cruel, inhuman or degrading treatment or punishment, including prolonged solitary confinement. See Int'l Covenant on Civil and Political Rights art. 7, 16 Dec. 1996, 999 U.N.T.S. 171 (ratified by the U.S. on 8 Jun. 1992); UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1 and 16, 10 Dec. 1984, 1465 U.N.T.S. 85 (ratified by the U.S. on 21 Oct. 1994); UN Comm. against Torture, Observations re United States, UN Doc. CAT/C/USA/CO/3-5, para. 20 (20 Nov. 2014); UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), G.A. Res. 70/175 (17 Dec. 2015), Rules 43-46. Writing specifically about the conditions of PFC Manning's pretrial confinement, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reiterated that "solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions," and "can amount to a breach of article 7 of the International Covenant on Civil and Political Rights, and to an act defined in article 1 or article 16 of the Convention against Torture." Report of the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/19/61/Add.4, para. 170 (29 Feb. 2012).

Here, the military judge concluded that PFC Manning "was not held in solitary confinement" because "[s]olitary means alone and without human contact," whereas PFC Manning "had daily human contact" with Brig staff and "weekly visits with [her] counselor and mental health professionals." (App. Ex. 461 at 23). As discussed above, that mistaken definition of "solitary confinement" was rejected by the United States Supreme Court in 1890, and has been rejected repeatedly ever since. *Medley*, 134 U.S. at 167-71; *see also, e.g., Davenport*, 844 F.2d at 1313; *Madrid*, 889 F. Supp. at 1229-30; UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), G.A. Res. 70/175 (17 Dec. 2015), Rule 44. Under United States and international law, "solitary confinement" is properly defined as the confinement of prisoners for 22 hours or more a day without meaningful human contact, and "prolonged solitary confinement" is properly defined as solitary confinement for more than 15 consecutive days. PFC Manning was held in prolonged solitary confinement, which is unconstitutional and unlawful, especially in the context of pretrial detainment.

The military judge also noted that PFC Manning had a history of mental-health issues and was considered a suicide risk, and stated that preventing suicide is a legitimate government interest. (App. Ex. 461 at 6-24). But the government's interest in preventing suicide was not reasonably advanced by confining PFC Manning to a 6' by 8' cell, for 23 to 24 hours a day, for 9 months. It has been well-known since the nineteenth century, and has been proven repeatedly since, that

such conditions cause suicidal thoughts and actions. See, e.g., *Medley*, 134 U.S. at 168; *Haney* at 132. Imposing such conditions on a person believed to be mentally ill and/or suicidal is plainly unreasonable and excessive and, therefore, punitive. See, e.g., *Bell*, 441 U.S. at 539; *King*, 61 M.J. at 227-29.

Conclusion

The conditions of PFC Manning's pretrial confinement were not only "arbitrary or purposeless," *Bell*, 441 U.S. at 539, but shocking, indecent, deplorable, outrageous, perverse and unconscionable. *Madrid*, 889 F. Supp. at 1266; *Ruiz*, 37 F. Supp. 2d at 915. Thus, PFC Manning's rights under the Fifth Amendment and Article 13, UCMJ, were violated the entire time she was held in pretrial confinement at MCBQ. The military judge erred as a matter of law in concluding otherwise.

Respectfully submitted,

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Dated: May 18, 2016

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UNITED STATES v. Manning


Army No. 20130739

Brief on Behalf of Appellant _____

Motion _____

Other X

I certify that a copy of the foregoing was delivered
to the Court and Government Appellate Division on May 18,
2016.


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