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| **UNITED STATES OF AMERICA** | ) | |
| | ) | |
| **v.** | ) | **Prosecution Response** |
| | ) | **to Defense Motion to** |
| **Manning, Bradley E.** | ) | **Compel Witnesses** |
| **PFC, U.S. Army,** | ) | |
| **HHC, U.S. Army Garrison,** | ) | |
| **Joint Base Myer-Henderson Hall** | ) | **12 December 2012** |
| **Fort Myer, Virginia 22211** | ) | |

## RELIEF SOUGHT

Pursuant to Rule for Courts-Martial (RCM) RCM 703 and RCM 1001(e) the United States in the above case respectfully requests the Court deny, in part, the defense request for the production of the witnesses addressed below.

## BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense has the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. RCM 905(c).

## FACTS

On 15 October 2012, the defense submitted its initial Witness List for Merits and Sentencing, requesting forty-six witnesses (hereinafter "Initial Witness List"). See AE 344. On 12 November 2012, the defense submitted its Witness List for Sentencing in Event of a Sentencing Only Case (hereinafter "Sentencing Only Witness List"), requesting twelve witnesses. See AE 387. There was some overlap between the Sentencing Only Witness List and the sentencing witnesses on the Initial Witness List.

On 16 November 2012, the United States responded to the defense's witness lists. See AE 403. The United States denied the production of Mr. Cassius Hall, Colonel (Retired) Morris Davis, Mr. Zachary Antolak, Mr. Charles Ganiel, Professor Yochai Benkler, and Mr. Daniel Cindrich for the merits portion of the case. The United States denied the production of AMB (b)(7)(C) Ms. Lillian Smith, COL (b)(7)(C), Mr. Cassius Hall, Colonel (Retired) Morris Davis, Mr. Zachary Antolak, Mr. Charles Ganiel, Professor Yochai Benkler, and Mr. (b)(7) (b)(7)(C) for the presentence proceedings of the case.

On 23 November 2012, the defense submitted a Motion to Compel Production of Witnesses for Merits and Sentencing (hereinafter "Defense Motion to Compel"). See AE 408.

## WITNESSES/EVIDENCE

The United States respectfully requests that the Court consider the Charge Sheet, the referenced filings, and the listed enclosures.

APPELLATE EXHIBIT 445
PAGE REFERENCED:
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## LEGAL AUTHORITY AND ARGUMENT

The prosecution, the defense, and the court-martial shall have equal opportunity to obtain witnesses and evidence, which includes compulsory process. RCM 703(a).

For the Defense to request production of a witness on merits and on sentencing, the Defense must "submit to the trial counsel a written list of witnesses whose production by the Government the defense requests." RCM 703(c)(2). The list of witnesses must include a synopsis of the expected testimony sufficient to show its relevance and necessity. RCM 703(c)(2)(B). The synopsis must set out what the witness is expected to say about those subjects. United States v. Rockwood, 52 M.J. 98, 105 (1999). The United States will arrange for the attendance of the defense witnesses unless the trial counsel argues that the witness's production is not required under this rule and, if required, it may be submitted to the military judge. RCM 703(c)(2)(D).

### I. PRODUCTION OF COL(R) DAVIS AND PROFESSOR BENKLER SHOULD BE DENIED PER RCM 703(B)(1).

For the merits portion of the trial, each party is entitled to witness production for those witnesses whose testimony on a matter in issue is "relevant and necessary." RCM 703(b)(1). Testimony is deemed relevant and necessary when "it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." RCM 703(b)(1) discussion.

#### A. Mr. Zachary Antolak

The United States withdraws its objection and will produce Mr. Antolak for the merits portion of the trial.

#### B. COL(R) Davis

The defense does not proffer Col(R) Davis's expected testimony in their motion to compel. See Defense Motion to Compel at 4-5. In their Initial Witness List, however, the defense proffers that Col(R) Davis will testify as an expert witness based on experience as a Chief Prosecutor for the Office of Military Commissions (OMC) from September 2005 to October 2007. The defense also proffers that Col(R) Davis will testify that none of the records contained actual intelligence reporting or names of sources.

Col(R) Davis has never, to his knowledge, seen any of the charged records in Charge II, Specification 8 or the charged compromise database in Charge II, Specification 9, so he cannot testify as to what information the records contain. Col(R) Davis bases his assumptions and conclusions on his "recollections" from other SOUTHCOM records that he viewed when he was an OMC prosecutor between September 2005 and October 2007. He is not, nor has he ever been an Original Classification Authority (OCA). Col(R) Davis also was not an intelligence analyst or intelligence professional. He is not, therefore, qualified to testify as an expert on SOUTHCOM records.

Unlike the defense's proffer in their Initial Witness List, Col(R) Davis will testify that SOUTHCOM records, in general, were sensitive if accurate; however, they were typically too inaccurate to be useful. Col(R) Davis will testify that if the information was accurate, then the information could be used to the injury of the United States or to the benefit of a foreign nation and, thus, should be protected. Also unlike the defense's proffer, Col(R) Davis cannot testify substantively about the Guantanamo Review Task Force (GRTF), as he had no involvement with it. Col(R) Davis also cannot discuss the Combatant Status Review Tribunals (CSRT).

The defense proffers that Col(R) Davis's testimony will show the accused's subjective lack of belief that disclosure of records already in the public forum could be to the injury of the United States or the benefit of a foreign nation was objectively reasonable. The defense proffers that they will establish that the charged information did not compromise national security so the accused could not have the mens rea required for Charge II, Specification 9.

An accused's subjective belief that information could not be used to the injury of the United States or to the advantage of a foreign nation is not relevant to whether or not the accused had a "reason to believe" the information could be so used. "Reason to believe" means that the accused knew facts from which he concluded or reasonably should have concluded that the information could be used for the prohibited purposes. AE 410 at 10 (definition of "reason to believe"). To determine whether or not the accused had a reason to believe the information could be used to the detriment of the United States or to the advantage of a foreign nation, the fact finder must only determine that the accused had reason to believe that the information could be used for the prohibited purposes, not that it would be used. Id.; see United States v. Diaz, 69 M.J. 127, 132 (C.A.A.F. 2010) (finding the critical language in 18 U.S.C. § 793(e) is that the Accused had "reason to believe" the information "*could be used* to the injury of the United States or to the advantage of any foreign nation.").

Furthermore, the defense has offered no evidence to support their argument for Col(R) Davis's relevance. The defense has offered no evidence that the allegedly leaked information was in the public forum, which the United States is in no way acknowledging, and they have offered no evidence that the accused had any knowledge of those alleged facts at the time of the accused's misconduct. Col(R) Davis's testimony, therefore, does not contribute positively to the presentation of defense's case on a matter in issue and is not relevant and necessary.

The defense also alleges that if the information was already in the public forum it would be relevant to disprove that the accused stole, purloined, or knowingly converted a thing of value of the Unites States in Charge II, Specification 8. The United States concedes that if information was already available to the public, that evidence could be used to negate the value element of the 18 U.S.C. § 641 offenses. However, the defense has offered no evidence that Col(R) Davis's testimony would contribute positively to the presentation of the defense's case on this discrete issue; thus, his testimony is not relevant and necessary.

**C. Professor Benkler**

The defense is offering Professor Benkler as an expert witness concerning the history of the WikiLeaks organization and how it was viewed prior to the charged leaks.

The United States does not dispute the majority of defense's proffer of Professor Benkler's testimony. See Defense Motion to Compel at 6. However, the United States does not agree with the defense's arguments that (1) the witness is an expert; (2) eliciting testimony that WikiLeaks is a "legitimate journalistic organization" is circumstantial evidence to show that the accused did not have the requisite intent in Charge I, The Specification or Charge II, Specification 1; or (3) Professor Benkler's testimony will show that the information in the Charge II, Specification 15 document was in the public forum, and an example of the Government simply overclassifying information and subsequently exaggerating the significance of its release. See id. at 6-7.

There is no evidence that Professor Benkler is an expert on WikiLeaks history and how it was viewed prior to the accused's misconduct. Professor Benkler did publish an article that he wrote in 2011 entitled "A Free Irresponsible Press: WikiLeaks and the Battle Over the Soul of the Networked Fourth Estate." In the article, Professor Benkler does discuss, among other things, the document charged in Charge II, Specification 15.[1] This article is a summary of Professor Benkler's knowledge and opinions regarding WikiLeaks.

Arguably, the method the accused used to indirectly give information to the enemy is irrelevant as long as the accused had the requisite general evil intent that the accused was dealing indirectly with an enemy of the United States (Charge I, The Specification). More importantly, but there is no evidence that the accused knew about Professor Benkler's article, that the accused believed WikiLeaks was a "legitimate journalistic organization," or that being a "legitimate journalistic organization" would have any impact on the accused's intent.

Similarly, Charge II, Specification 1 just requires that the accused had knowledge that intelligence published on the Internet was accessible to the enemy. See AE 410 at 3 (definition of "knowledge"). Again, the method the accused used to cause the information to be published on the Internet is not relevant as long as the accused was the proximate cause of the publication. See AE 410 at 3 (definition of "caused to be published"). Using an alleged "legitimate journalistic organization" to cause the publication of the information does not make the accused's actions any less reckless. See AE 410 at 3 (definition of "wanton"). More importantly, there is no evidence that the accused knew about Professor Benkler's article, that the accused believed WikiLeaks was a "legitimate journalistic organization," or that being a "legitimate journalistic organization" would have any impact on the accused's intent.

Professor Benkler could not address whether or not the information contained in the document charged in Charge II, Specification 15 was publically available before the document was leaked to WikiLeaks. There is no evidence that the document itself was available publically.

An accused's subjective belief that information could not be used to the injury of the United States or to the advantage of a foreign nation is not relevant to whether or not the accused had a "reason to believe" the information could be so used. "Reason to believe" means that the accused knew facts from which he concluded or reasonably should have concluded that the information could be used for the prohibited purposes. AE 410 at 10 (definition of "reason to

[1] LTC Lee Packnett, an Army spokesman, confirmed that the report was real. See Enclosure 1 (located at http://www.nytimes.com/2010/03/18/us/18wiki.html).

believe"). To determine whether or not the accused had a reason to believe the information could be used to the detriment of the United States or to the advantage of a foreign nation, the fact finder must only determine that the accused had reason to believe that the information could be used for the prohibited purposes, not that it would be used. Id.; see United States v. Diaz, 69 M.J. 127, 132 (C.A.A.F. 2010) (finding the critical language in 18 U.S.C. § 793(e) is that the Accused had "reason to believe" the information "*could be used* to the injury of the United States or to the advantage of any foreign nation.").

Furthermore, the defense has offered no evidence to support their argument for Professor Benkler's relevance. The defense has offered no evidence that the allegedly leaked information was in the public forum, which the United States is in no way acknowledging, and they have offered no evidence that the accused had any knowledge of those alleged facts at the time of the accused's misconduct. Professor Benkler's testimony, therefore, does not contribute positively to the presentation of defense's case on a matter in issue and is not relevant and necessary.

Finally, neither the accused nor Professor Benkler are Original Classification Authorities, and their opinions on overclassification are irrelevant and would not be helpful to the factfinder.

## II. PRODUCTION OF AMB (b)(7)(C) [redacted], MR. ANTOLAK, COL(R) DAVIS, AND PROFESSOR BENKLER SHOULD BE DENIED PER RCM 1001(E).

For sentencing, each party is entitled to the production of a witness whose testimony on sentencing is required under RCM 1001(e). RCM 703(b)(2). There is much greater latitude in presentence proceedings than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. RCM 1001(e). The production of a witness during presentencing proceedings is a matter within the discretion of the military judge and a witness may be produced to testify during presentencing through a subpoena or travel orders at Government expense only if the following is true:

> (A) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;
> (B) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;
> (C) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;
> (D) Other forms of evidence, such as oral depositions, written interrogatories, former testimony, or testimony by remote means would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and
> (E) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request

for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

RCM 1001(e)(2).

**A. AMB (b)(7)(C)**

AMB (b)(7)(C) was with the State Department, and a State Department OCA, from 1993 to 1998 when he served as the Ambassador to Croatia. The United States does not dispute the majority of defense's proffer of AMB (b)(7)(C) testimony, specifically proffered points ##1, 3-12. See Defense Motion to Compel at 8. AMB (b)(7)(C) h, however, had no direct knowledge of point #2 and caveated the SIPDIS points by saying that he has no direct knowledge of SIPDIS because he left the State Department before the SIPDIS tag was implemented and had only viewed a handful of the alleged leaked cables. His conclusions regarding SIPDIS are based on his belief of what information a responsible Ambassador should protect from further distribution, not on an actual review of the alleged leaked cables. It is also important to note that the AMB Galbraith's characterization as "genuinely sensitive material" does not relate with a document's classification, but instead has to do with whether or not AMB (b)(7)(C) believes the information falls into a category that should be further protected.

Since AMB (b)(7)(C) did not look at the alleged leaked cables and compare the content to his own standards of sensitivity or the classification standards set out by Executive Order 13526, he does not have any relevant testimony to offer on sentencing for the charged misconduct.

AMB (b)(7)(C) statement that in his experience, many State Department cables are overclassified and that a secret classification does not mean the information is genuinely secret could be relevant to sentencing. That being said, his opinions are apparently based on information he recalls from his brief stint as an Ambassador and an OCA in the mid-1990s and not on actual knowledge of any of the charged information. His testimony, therefore, is not necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence as it does not carry the requisite weight or credibility. See RCM 1001(e)(2)(A),(B).

**B. Mr. Zachary Antolak**

If the Court determines that Mr. Antolak's testimony could be relevant to sentencing, the United States will stipulate to the admissibility of Mr. Antolak's chat logs with the accused provided the defense requests and the Court grants the relaxing of the rules of evidence. The chat logs contain all of Mr. Antolak's potential testimony. See RCM 1001(e)(2)(C).

**C. COL(R) Davis**

COL(R) Davis does not have the expertise to render opinions on the classification of SOUTHCOM records or the potential reduction in value of compromised information that was

already in the public forum. His testimony, therefore, is not necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence as it does not carry the requisite weight or credibility. See RCM 1001(e)(2)(A),(B).

**D. Professor Benkler**

Professor Benkler's testimony regarding the history of WikiLeaks and his opinion regarding the legitimacy of WikiLeaks is not necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact, nor is the weight or credibility of his testimony of substantial significance to the determination of an appropriate sentence. See RCM 1001(e)(2)(A),(B).

Professor Benkler also does not have the expertise to render opinions on the classification of the document charged in Charge II, Specification 15 or the potential reduction in value of compromised information that was already in the public forum. He also cannot say, as alleged by the defense, that the allegedly leaked information was already in the public forum. His testimony, therefore, is not necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence as it does not carry the requisite weight or credibility. See RCM 1001(e)(2)(A),(B).

**III. PRODUCTION OF COL (b)(7)(C) MR. (b)(7)(C), MR. HALL, MR. GANIEL, AND MS. SMITH SHOULD BE DENIED AS DEFENSE HAS NOT REQUESTED OR RECEIVED THE NECESSARY APPROVAL TO CALL THEM AS EXPERT WITNESSES.**

When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. RCM 703(d).

All requested witnesses are DA Civilians, except COL (b)(7) who is an Army officer. The defense has requested the witnesses testify as experts and/or give their opinions on topics that directly relate to their federal employment.

The defense cites the nonbinding analysis of RCM 703(d) to support its proposition that RCM 703(d) does not apply to government employees. See Defense Motion to Compel at 9 (citing RCM 703(d), Analysis, at A21-37). The defense also argues that RCM 703(d) itself does not apply when the convening authority does not have to cover the costs of the expert witness. See Defense Motion to Compel at 9-10.

Regardless of whether or not RCM 703(d) directly applies, its procedures should apply and in practice are followed. Using DA employees and Army officers does cost the United States time and money and, thus, is at government expense. Although three of the witnesses have been appointed expert consultants for the defense, being called as an expert witness adds an additional and separate requirement to that duty.

Furthermore, for federal employees, the Code of Federal Regulations (CFR) dictates the potential ethical implications involved when a federal employee testifies without the approval of their employer. The relevant CFR which provides for the standards of ethical conduct for employees of the executive branch defines an employee as "any officer or employee of an agency, including a special Government employee. It includes officers but not enlisted members of the uniformed services." 5 CFR § 2635.102(h) (attached as Enclosure 3).

With regard to outside activities for employees of the executive branch, the CFR addresses service as an expert witness. Specifically, 5 CFR § 2635.805(a) states, "An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section." 5 CFR § 2635.805(c) allows "the designated agency ethics official" to authorize an employee's testimony under certain circumstances when it is to not otherwise prohibited. (5 CFR § 2635.805 is attached as Enclosure 4).

Calling any of these witnesses to testify without receiving approval from their chains of command or supervisors puts the employees in the position not only to potentially testify against their employer in an official capacity, but to violate an ethical regulation.

The GCMCA is the most efficient conduit through which to route such witness requests, which is why witness requests are typically done through the procedures set forth in RCM 703(d). The potential CFR issue, therefore, typically does not arise.

The United States attempted to avoid this issue and expedite the process by repeatedly asking the defense to submit expert requests to the GCMCA, but the defense has refused to do so. See Enclosure 2.

## CONCLUSION

The United States requests denial of the Defense Motion to Compel production of the above contested witnesses.

ANGEL M. OVERGAARD
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 12 December 2012.

ANGEL M. OVERGAARD
CPT, JA
Assistant Trial Counsel

4 Enclosures
1. NY Times Article
2. Emails re: Experts
3. 5 CFR § 2635.102
4. 5 CFR § 2635.805