IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE RESPONSE TO**
v.	)	**GOVERNMENT MOTION FOR**
	)	**JUDICIAL NOTICE**
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx(b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 30 NOVEMBER 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court to deny the Government's motion for judicial notice.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Government has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 Investigating Officer. The charges were referred on 3 February 2012.

WITNESSES/EVIDENCE

5. The Defense does not request any witnesses be produced for this motion.

APPELLATE EXHIBIT 430
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LEGAL AUTHORITY AND ARGUMENT

6. The Defense objects to the admission of the Government's Enclosures to its Motion for Preliminary Determination on Admissibility of Evidence dated 16 November 2012 and will address each Government Enclosure in turn.

I. Government Enclosures 1-9, 15, 16, 18, and 19

7. The Defense objects to the Court taking judicial notice of the above Enclosures because the Government has made no showing of the Enclosures' relevance. MREs 401 and 402 establish that any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant and admissible. Absent a showing by the Government that the instant Enclosures are relevant, judicial notice would not be proper. Should the Court find Enclosures 1-9, 15, 16, 18, and 19 are relevant, the Defense has no objection to the Court taking judicial notice of the requested documents. The Defense would, however, request the Court limit its judicial notice to those specific portions of the Enclosures for which the Government is able to establish relevance.

II. Government Enclosures 10-14, 20 and 21

8. The Defense objects to the Court taking judicial notice of the above Enclosures because the Government has made no showing of the Enclosures' relevance. MREs 401 and 402 establish that any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant and admissible. Absent a showing by the Government that the instant Enclosures are relevant, judicial notice would not be proper.

9. If the Court finds that Enclosures 10-14, 20, and 21 are relevant, the Defense objects to the Court taking judicial notice because they are inadmissible hearsay. On 18 October 2012 this Court ruled that a statements appearing in a newspaper are admissible "only if the newspaper article within which the statements appear qualify for a hearsay exception." *See* Appellate Exhibit 356 at 11. Here, Enclosures 10-14, 20 and 21 contain statements that appeared in newspapers or other publications. Not only has the Government failed to offer the Court a hearsay exception for the publications in which the statements appear, it has also failed to articulate a hearsay exception for the statements themselves. Because the Government has failed to articulate the necessary hearsay exceptions for Enclosures 10-14, 20 and 21, the Defense requests this Court deny the Government's request for judicial notice.

III. Government Enclosure 17

10. The Defense objects to the Court taking judicial notice of the above Enclosures because the Government has made no showing of the Enclosures' relevance. MREs 401 and 402 establish that any evidence "having any tendency to make the existence of any fact that is of consequence

to the determination of the action more probable or less probable than it would be without the evidence" is relevant and admissible. Particularly troubling about this Enclosure is the fact that no publication date is evident. The only date which appears on the Enclosure is the date on which the Government presumably printed the document, 16 November 12. It is hard to contemplate a showing of relevance for an undated document. Absent a showing by the Government that the instant Enclosures are relevant, judicial notice would not be proper.

CONCLUSION

11. To summarize, the Defense makes the following objections:

Enclosure 1, Army Field Manual 2-0—Relevance
Enclosure 2, Army Field Manual 2-19.4—Relevance
Enclosure 3, Army Field Manual 2-22.2—Relevance
Enclosure 4, Army Field Manual 2-22.3--Relevance
Enclosure 5, Army Soldier's Manual and Trainer's Guide "Soldier's Manual and Trainer's Guide for Intelligence Analysis, MOS 35F, Skill Level 1/2/3/4"--Relevance
Enclosure 6, Executive Order 12958—Relevance
Enclosure 7, Executive Order 12972—Relevance
Enclosure 8, Executive Order 13142—Relevance
Enclosure 9, Executive Order 13292—Relevance
Enclosure 10, BBC news report—Relevance and Hearsay
Enclosure 11, New York Times article—Relevance and Hearsay
Enclosure 12, New Yorker Article—Relevance and Hearsay
Enclosure 13, Washington Post news article—Relevance and Hearsay
Enclosure 14, Armed Forces Press Service news article—Relevance and Hearsay
Enclosure 15, Department of State enemy designation—Relevance
Enclosure 16, FBI designation of Adam Yahiye Gadahn as terrorist—Relevance
Enclosure 17, Department of State website—Relevance
Enclosure 18, State Department enemy designation--Relevance
Enclosure 19, State Department testimony—Relevance
Enclosure 20, "Inspire" magazine—Relevance and Hearsay
Enclosure 21, The Winter 2010 issue of "Inspire" –Relevance and Hearsay

12. Based on the above, the Defense requests that the Court deny the Government's motion for judicial notice.

Respectfully submitted,

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel