IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE RESPONSE TO**
v.	)	**GOVERNMENT MOTION FOR**
	)	**IN CAMERA PROCEEDING**
	)	**UNDER MRE 505(i)(2) AND**
	)	**DEFENSE MOTION FOR**
MANNING, Bradley E., PFC	)	**APPROPRIATE RELIEF TO**
U.S. Army, (b) (6) [redacted]	)	**PRECLUDE EVIDENCE OF**
Headquarters and Headquarters Company, U.S.	)	**RECEIPT BY ENEMY DURING**
Army Garrison, Joint Base Myer-Henderson Hall,	)	**MERITS**
Fort Myer, VA 22211	)	
	)	DATED: 8 February 2013

RELIEF SOUGHT

1. The Defense respectfully requests that this Court preclude the Government from raising or eliciting any discussion, reference, or argument, to include the introduction of any documentary or testimonial evidence, relating to receipt of any of the charged information by al Qaeda, al Qaeda in the Arabian Peninsula, the enemy listed in Bates Number 00410660 through 00410664, or any other enemy from the merits portion of the trial. The Defense does not dispute whether receipt by al Qaeda, al Qaeda in the Arabian Peninsula, the enemy listed in Bates Number 00410660 through 00410664, or any other enemy is relevant on sentencing. In the alternative, should the Court determine receipt by the enemy is relevant during the merits portion of the trial, the Defense requests the opportunity to interview Mr. John Doe in order to adequately respond to the Government's requested relief in its motion. The Defense requests oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by preponderance of the evidence. *See* Manual for Courts-Martial, United States, Rule for Courts-Martial (RCM) 905(c)(1) (2012). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the Defense as the moving party. *See* RCM 905(c)(2). Whether the Court rules on the admissibility of evidence before it arises at trial is a decision in the discretion of the military judge. *See* RCM 906(b)(13).

FACTS

3. PFC Manning is charged with one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting,

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eight specifications of violations of 18 U.S.C. § 793(e), five specifications of violations of 18 U.S.C. § 641, two specifications of violations of 18 U.S.C. § 1030, and five specifications of violating a lawful general regulation, in violation of Article 104, 134, and 92, Uniform Code of Military Justice (UCMJ). *See* Enclosure 1.

WITNESSES/EVIDENCE

4. The Defense does not intend to produce any witnesses for this motion. The Defense requests that the Court consider the following enclosures to this Motion in making its ruling.

1. Charge Sheet (enclosed in record)
2. Draft Instructions, 26 November 2012 (Appellate Exhibit 410)
3. Ruling: Defense Motion to Dismiss Specification 1 of Charge II for Failure to State an Offense, 25 April 2012 (Appellate Exhibit 80)
4. Ruling: Defense Motion to Dismiss for Failure to State an Offense, 26 April 2012 (Appellate Exhibit 81)
5. Ruling: Government Motion to Preclude Reference to Actual Harm or Damage on Merits, 19 July 2012 (Appellate Exhibit 221)
6. Ruling: Government Motion to Preclude Motive Evidence on Merits, 16 January 2013 (Appellate Exhibit 470)
7. Ruling: Government Motion to Preclude Over-Classification Evidence on Merits and Sentencing and Defense Motion for Judicial Notice of H.R. 553 and Congressional Hearings Discussing Classification, 31 January 2013
8. Manual for Courts-Martial, United States, Article 104, UCMJ, c(5)(a) and c(6)(a) (2012)

LEGAL AUTHORITY AND ARGUMENT

5. The Court should preclude the Government from raising or eliciting any discussion, reference, or argument, to include the introduction of any documentary or testimonial evidence, relating to receipt by al Qaeda, al Qaeda in the Arabian Peninsula, the enemy listed in Bates Number 00410660 through 00410664, or any other enemy during the merits portion of the trial. Actual receipt by al Qaeda, al Qaeda in the Arabian Peninsula, the enemy listed in Bates Number 00410660 through 00410664, or any other enemy is not relevant to any of the charged offenses. Even if remotely relevant, the probative value of receipt by the enemy is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *See* MRE 403.

I. ACTUAL RECIEPT BY THE ENEMY IS NOT RELEVANT TO A MATTER AT ISSUE

6. MRE 401 provides that evidence is relevant if it has "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." *See also* MRE 401, analysis ("relevant evidence must

involve a fact 'which is of consequence to the determination of the action'"). The military judge has the initial responsibility to determine whether evidence is relevant under MRE 401. *U.S. v. White*, 69 M.J. 236 (C.A.A.F. 2010).

7. MRE 402 provides that "all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible."

8. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way in a matter at issue.

9. MRE 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

10. The Specification of Charge I requires the Government to prove that the accused knowingly gave intelligence information to al Qaeda, al Qaeda in the Arabian Peninsula and an entity specified in Bates Number 00410660 through 00410664 through the indirect means of WikiLeaks, that al Qaeda, al Qaeda in the Arabian Peninsula, and the entity specified in Bates Number 00410660 through 00410664 was an enemy and that this intelligence information was true, at least in part.

11. Specification 1 of Charge II requires the Government to prove the accused wrongfully and wantonly caused to be published on the internet intelligence belonging to the United States government, having knowledge that intelligence published on the internet is accessible to the enemy.

12. Actual receipt by al Qaeda, al Qaeda in the Arabian Peninsula, or the entity listed in Bates Number 00410660 through 00410664 is not an element of any of the charged offenses, nor is it probative of whether the accused had actual knowledge that he was giving intelligence to an enemy when he provided the charged information to WikiLeaks. Furthermore, it is not probative of the accused's state of mind at the time of the commission of the alleged offenses.

13. With respect to Specification 1 of Charge 2, this offense punishes the wrongful and "wanton publication of intelligence on the internet not giving intelligence to the enemy." *See* AE 80 at 4. Actual receipt by the enemy of intelligence belonging to the United States does not have a tendency to prove that the accused wrongfully and wantonly published information on the internet with knowledge that the information is accessible to the enemy. As the Government has repeatedly argued in the past, "After-the-fact evidence is irrelevant to prior events. ... After-the-fact evidence is irrelevant to a person's intent and state of mind at an earlier time. ... [A]n after-the-fact assessment is irrelevant because the facts are examined as they appeared to the accused at the time of the charged criminal act." *See* Appellate Exhibit 158 at 2-7. The relevant inquiry, then, is whether PFC Manning knew at the time of the alleged act that the information that he allegedly caused to be published on the internet was accessible to the enemy. The fact

that the information was, or was not, actually accessed by the enemy has no bearing on the charged offense. PFC Manning could be found guilty of Specification 1 of Charge 2 with absolutely no evidence that an enemy actually ever saw the information in question.

14. Similar logic applies to the Specification of Charge I, the Article 104 offense. In the specification of Charge I, PFC Manning is charged with Giving Intelligence to the Enemy in violation of Article 104(2). The Specification alleges that between on or about 1 November 2009 and on or about 27 May 2010, PFC Manning, without proper authority, knowingly gave intelligence to the enemy through indirect means.

15. Article 104(2) makes it a crime for "any person who, without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly." Article 104b(4) provides the following elements for the offense of Giving Intelligence to the Enemy:

(a) that the accused, without proper authority, knowingly gave intelligence information to the enemy, and;

(b) that the intelligence information was true or implied the truth, at least in part.

16. "Giving intelligence to the enemy" is a subset of "communicating" or "corresponding" with the enemy under Article 104(2):

> "Giving intelligence to the enemy is a particular case of corresponding with the enemy made more serious by the fact the communication contains intelligence that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. This intelligence may be conveyed by direct or indirect means." *See* Article 104, c(5)(a).

The explanation to Article 104 expressly states that "no response *or receipt* by the enemy is required. The offense is complete the moment the communication, correspondence, or intercourse issues from the accused." *See* Article 104, c(6)(a) (emphasis added).

17. A previous version of the Manual for Courts Martial contained slightly different verbiage, but the same underlying message: that the offense of communicating with the enemy (of which giving intelligence to the enemy is a subset) is complete regardless of whether the enemy actually receives the communication. In *U.S. v. Olson* , 20 C.M.R. 461 (U.S. Army Bd. of Review 1955)the court cited this previous version of the Manual:

> Correspondence does not necessarily import a mutual exchange of communication. The law requires absolute nonintercourse, and any unauthorized communication, no matter what may be its tenor or intent, is here denounced. *The prohibition lies against any method of communication whatsoever, and the offense is complete the moment the communication issues from the accused, whether it reaches its destination or not.* The words 'directly or indirectly' apply to this offense. It is essential to prove that the

offense was knowingly committed." (emphasis added) (citations omitted).

Id. at 467-468. Thus, whether or not an enemy of the United States or al Qaeda, al Qaeda in the Arabian Peninsula, or the entity listed in Bates Number 00410660 through 00410664 actually received the charged information is not relevant to any element of Article 104. Actual receipt by the enemy of the intelligence is not required to establish that the accused knowingly gave intelligence to the enemy. The offense is complete once the accused dispatched the information to a third party or intermediary or in some other indirect way, with actual knowledge that by so he was actually giving intelligence to the enemy through this indirect means.

18. Further, receipt of the intelligence by the enemy is not relevant to the accused's knowledge at the time he disclosed the information to WikiLeaks. As the Government has argued in the past, and as the Court has accepted, the focus is on PFC Manning's state of mind *at the time* he is alleged to have given intelligence to the enemy. That the enemy may have received such intelligence information has no bearing on PFC Manning's state of mind at the time of the alleged offense. In other words, even if an enemy of the United States actually received the charged information, actual receipt by the enemy does not focus on the key moment of time for the charged offenses: the actual knowledge of the accused when he provided the charged information to WikiLeaks.

19. A secondary basis for excluding evidence of actual receipt by the enemy is MRE 403. By allowing evidence of actual receipt by the enemy when the relevant inquiry is whether the accused had actual knowledge that by giving intelligence to WikiLeaks, he was actually giving intelligence to the enemy through indirect means, the court-martial will be sidetracked and unnecessarily delayed by the focus of the trial shifting to whether or not the enemy actually received the charged information and how the Government may be or may not be able to prove actual receipt by the enemy.

20. In its effort to prove actual receipt by the enemy, the Government intends to call at least the following six witnesses: Mr. Michael Longwell, SSA Alexander Otte, Mr. Kim Rosecrans, Ms. Kimberly Shupp, Mr. Jeffery Szczepanski, and Mr. John Doe. The Government requests that for at least one of the six witnesses, Mr. Doe, that the Court permit him to testify in a closed session at a secure off-site location in the Military District of Washington, rather than the Fort Meade courthouse. Mr. Doe's and the other five witnesses' testimony would cause undue delay, necessitating off-site travel for dozens of trial participants (including the accused), and multiple closed sessions to establish something that is not an element of the charged offenses. Moreover, references to receipt of the information by the enemy serves only to prejudice the fact-finder into making a determination on an improper basis. As such, the Court should preclude the Government from raising or eliciting any discussion, reference, or argument, to include the introduction of any documentary or testimonial evidence, relating to receipt by al Qaeda, al Qaeda in the Arabian Peninsula, the enemy listed in Bates Number 00410660 through 00410664, or any other enemy from the merits portion of the trial.

II. THE DEFENSE SHOULD BE ENTITLED TO INTERVIEW MR. JOHN DOE PRIOR TO RESPONDING TO THE GOVERNMENT'S MOTION

21. If the Court determines that Mr. John Doe and the other five witnesses are relevant on the merits, the Defense requests that the Court require the Government to provide access to Mr. Doe in order for the Defense to adequately respond to the Government's motion.

22. The Government did not indicate in its motion when it first determined that it would call Mr. Doe as a witness. However, it is clear that the Government was planning on calling him at least as of 21 November 2012 when it declassified information related to Usama bin Laden. *See* Government Motion for in camera Proceeding Under MRE 505(i)(2) [hereinafter Government Motion], dated 31 January 2013 at 2. In spite of this fact, the Government chose to wait to notify the Court and Defense until 31 January 2013 of the addition of Mr. Doe.

23. Although the Government can certainly amend its witness list when necessary, the failure to provide timely notice of Mr. Doe is problematic. The Government's delay in providing notice of Mr. Doe raises a new issue for litigation that was not considered when the Court and parties were discussing the court calendar – the relevance of actual receipt by the enemy of the charged information and the need for Mr. Doe to testify in disguise and at an off-site location. During the discussion of the calendar at our last session, the Court repeatedly asked if either party had any other issues that needed to be considered. The failure of the Government to raise the issue of Mr. Doe is yet another example of a lack of due diligence on the Government's part.

24. Due to the Government's lack of diligence, the parties are now forced to deal with an issue that could impact the Defense's ability to comply fully with its 505(h) notice requirements. If provided with the ability to interview Mr. Doe in a secure setting, the defense will be able determine if there is any information from Mr. Doe that is "relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence." *See* MRE 505(i)(4)(B).

25. The Government has not given the Defense any contact information for Mr. Doe. Instead, the Government seems to believe that due to the claim of privilege by the Secretary of Defense and the Acting Director for the Central Intelligence Agency that the Defense is not entitled to conduct an interview of Mr. Doe prior to his testimony. None of the cases cited by the Government support such a proposition. Prior to this Court determining if it should restrict discovery and cross-examination of Mr. Doe, the Court should provide the Defense with its Article 46, UCMJ right to interview Mr. Doe. *See United States v. Irwin*, 30 M.J. 87, 94 (C.M.A. 1990)(holding that United States had no authority to deny pretrial interview of a witness, even in a situation where the United States determined the questions were irrelevant, harassing, or amount to a "fishing expedition.").

26. The Court's existing Protective Order would prohibit the Defense from revealing any of the information that Government seeks to protect without proper authorization. Without having the opportunity to interview Mr. Doe, the Defense will not be able to adequately respond to the proposed alternatives by the Government. It may very well be that the rank, branch of service, service, unit specific training, actual years of service, actual years of active duty status during service, specialized qualifications, other background information, or other details about the Bin

Laden raid would be relevant and necessary under MRE 505(i)(4)(B). However, prior to being able to articulate that relevance, the Defense needs access to Mr. Doe.

27. The requirement for the Defense to interview Mr. Doe may result in this motion not being litigated at the next hearing and may also result in a subsequent MRE 505(h) filing. However, any needed delay will not impact the trial date of 3 June 2013. Additionally, by speaking with Mr. Doe, the Defense can determine whether a stipulation of expected testimony or a stipulation of fact would be appropriate. A matter is not at issue when it is stipulated as fact (discussion to RCM 703(b)(l)).

CONCLUSION

28. The Defense respectfully requests that this Court preclude the Government from raising or eliciting any discussion, reference, or argument, to include the introduction of any documentary or testimonial evidence, relating to receipt of any of the charged information by al Qaeda, al Qaeda in the Arabian Peninsula, the enemy listed in Bates Number 00410660 through 00410664, or any other enemy from the merits portion of the trial. In the alternative, should the Court determine receipt by the enemy is relevant during the merits portion of the trial, the Defense requests the opportunity to interview Mr. John Doe in order to adequately respond to the Government's requested relief in its motion.

Respectfully submitted,

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