IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE REPLY TO**
v.	)	**PROSECUTION 21**
	)	**DECEMBER NOTICE OF**
MANNING, Bradley E., PFC	)	**INABILITY**
U.S. Army, xxx-xx-(b)	)	
Headquarters and Headquarters Company,	)	
U.S. Army Garrison, Joint Base Myer-	)	4 January 2013
Henderson Hall, Fort Myer, VA 22211	)	

1. The defense requests the Court deny the relief sought by the government in its 21 December Notice of Inability to Comply with Paragraph 2c of Court Scheduling Order Dated 11 December 2012. The defense further requests the Court direct the Government to (1) describe its process for obtaining permission to use classified evidence for its witnesses during the pendency of this trial, (2) identify immediately any changes to its witness list going forward, and (3) provide a final witness list by a date certain.

2. The defense believes that, with respect to this particular case, the initial step in the classified evidence process was the government's identification of its witnesses along with a brief synopsis of the testimony they will provide at trial. The defense submits that the government's performance in execution of this initial step partially explains the time consumed by this pre-trial preparation. The government forwarded its first witness list with summaries on 15 October 2012. The number of witnesses listed by the government on this list was 144. In an effort to streamline the preparation for the trial and the trial itself, the undersigned defense counsel indicated to CPT JoDean Morrow that the defense was willing to stipulate to both classified and unclassified government evidence (be it by a Stipulation of Fact or Stipulations of Expected Testimony). The defense communicated that its general willingness did not depend on any pre-trial agreement and has reiterated its willingness to stipulate in other ways over the last three months. The government has not forwarded any proposed stipulations to the defense as of this writing. (The defense specifically made mention of stipulating to chain of custody witnesses or those witnesses that will just relate straightforward factual information. The defense estimates that at least 22 of the government's classified information witnesses would potentially be covered by this offer.) Another problem with this initial step is that it has or will occur at least three times: the first notice in October, the second notice in December (when six witnesses were removed), and another notice next week (when at least one more witness will be removed). The defense would request the Court direct the government to provide immediate notice when witnesses will be added or dropped to its witness list as well as a specific date after which no new witnesses may be added.

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3. The defense believes that the next two steps in the classified evidence process in this case were (1) the defense repeating the government's summaries back to the government in the form of a notice under the provisions of MRE 505(h) and (2) the government obtaining the permission of the relevant OCAs for the use of their respective portions of classified evidence. The Defense completed the second step, which was understood as a mandatory preliminary step to even interviewing government witnesses, on 16 November 2012. The government has provided no evidence that it has sought or obtained the permission of any OCA to discuss classified evidence during pretrial interviews with any government witness. It could be argued, by inference, that its 21 December 2012 response to the defense's 16 November notice is evidence that this step has been satisfactorily completed. However, this inferential claim ignores an important consequence of obtaining OCA permission. Namely, the notice that this permission gives to individual witnesses about what subjects can and cannot be discussed by the individual witnesses in their pretrial interviews with defense counsel. The defense is concerned that government witnesses that will be providing testimony on classified topics do not now understand the appropriate boundaries for their testimony. The defense contends that the problems associated with these steps in the classified evidence process are not attributable to the defense and necessitate denying the government the relief it seeks in its notice.

4. The defense understood that the next step in the classified evidence process used in this case would be the government's reporting the action of the OCA (approving or denying particular topics for discussion during witness interviews). The only filing by the government that could be seen as reporting this information (again, by inference) was the 21 December Prosecution Response. The undersigned defense counsel brought the lack of notice by the government to the defense to the attention of MAJ Ashden Fein in early December, and MAJ Fein responded that the defense would get something shortly. During November and December, the defense began working with the Department of State to interview the DoS witnesses listed by the Government. The defense's concerns about the lack of OCA approval for any DoS witnesses were lessened by the knowledge that representatives from DoS legal would be present during interviews with any witnesses from that organization. The defense conducted 13 witness interviews of DoS witnesses during December. The defense believes that it has another four interviews to conduct with only one scheduled. Again, the defense submits that any delay is not attributable to the defense.

5. The defense believes that the next step in the classified evidence process is the defense actually conducting the pretrial interviews of the government's witnesses. The undersigned defense counsel has contacted government witnesses, despite having no knowledge of whether the OCAs have approved discussing classified evidence with their respective witnesses, in order to prevent unnecessary delay in this case. This mundane detail is only significant in that a point of contact for an entire governmental agency indicated to the defense counsel that it would need to put off interviews of its three agents for several weeks. The representative went on to say that a delay of that length was necessary because the agency concerned has not yet approved of the use of classified evidence at trial by either party. Unfortunately, the defense does not have

an estimate for when this issue will be resolved to the satisfaction of both parties. Obviously, any delay associated with resolving this problem is not the responsibility of the defense.

6. The defense believes that the next step in the classified evidence process is the one complained about by the government in its filing. The main concern for the defense in actually conducting these interviews is that there is no evidence that an OCA has specifically approved the witness discussing classified evidence with the defense counsel. For instance, the defense has an interview scheduled with MG Michael Nagata on 14 January. The undersigned defense counsel doubts that MG Nagata will much care that some lawyers believe he is authorized to discuss this classified information. It stands to reason that he might want an OCA to explain to him the appropriate boundaries for this discussion. Again, any delay associated with the delay decried by the government is not the fault of the defense.

7. The defense is confident that it can complete interviewing the government's witnesses and provide notice under MRE 505(h) in accordance with the current scheduling order. We are confident that we can complete interviewing most Department of Defense witnesses during this month. The only outliers will be the personnel assigned to USCENTCOM. The defense hopes that many of the law enforcement witnesses called by the government can be stipulated to by both parties. The defense has interviewed most of the witnesses from the Department of State and will be able to complete that task this month – depending on the schedule of the DoS officials.

8. The defense requests that the Court deny the government the relief requested in its 21 December notice. The defense believes that the problems associated with classified information stem from a lack of notice that the relevant OCAs have approved of the defense counsel interviews with either the defense or the witnesses. Any delay associated with these problems should not be attributed to or held against the defense in this case.

Thomas F. Hurley

THOMAS F. HURLEY
MAJ, JA
Defense Counsel