IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE MOTION FOR**
v.	)	**JUDICIAL NOTICE OF**
	)	**WIKILEAKS PUBLICATION OF**
MANNING, Bradley E., PFC	)	**9/11 PAGER MESSAGES**
U.S. Army, (b) (6) [redacted]	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 15 JUNE 2013
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to Military Rules of Evidence (MRE) 201 to take judicial notice that Wikileaks, on or about 25 November 2009, published what it claims are text and pager messages sent on 11 September ~~2011~~.[1] 2001

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. RCM 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 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 to a general court-martial on 3 February 2012.

[1] The Defense *does not* request this Court take judicial notice of the messages themselves, nor does the Defense request this Court take judicial notice that the messages are actually from 11 September 2001.

APPELLATE EXHIBIT 571
PAGE REFERENCED: ___
PAGE___OF___PAGES

WITNESSES/EVIDENCE

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

LEGAL AUTHORITY AND ARGUMENT

6. In the interest of judicial economy, MRE 201 relieves a proponent from formally proving certain facts that reasonable persons would not dispute. There are two categories of adjudicative facts that may be noticed under the rule. First, the military judge may take judicial notice of adjudicative facts that are "generally known universally, locally, or in the area pertinent to the event." MRE 201(b)(1). Under this category of adjudicative facts, it is not the military judge's knowledge or experience that is controlling. Instead, the test is whether the fact is generally known by those that would have a reason to know the adjudicative fact. *U.S. v. Brown*, 33 M.J. 706, 709 (N.M.C.A 1992). The second category of adjudicative facts is those "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b)(2). This category of adjudicative facts includes government records, business records, information in almanacs, scientific facts, and well documented reports. *Id.* See also, *U.S. v. Spann*, 24 M.J. 508 (A.F.C.M.R. 1987). Moreover, judicial notice may be taken of a periodical. *U.S. v. Needham*, 23 M.J. 383, 385 (C.M.A. 1983)(taking judicial notice of Drug Enforcement Agency publication). The key requirement for judicial notice under this category is that the source relied upon must be reliable. Salzburg, Lee D. Schinasi & David A. Schlueter, *Military Rules of Evidence*, §201.02[3] at p. 2-7 (7th Ed., Matthew Bender & Co. 2011)

7. Under MRE 201(d), a military judge must take judicial notice if the proponent presents the necessary supporting information. In making the determination whether a fact is capable of being judicially noticed, the military judge is not bound by the rules of evidence. *Id.* Additionally, the information relied upon by the party requesting judicial notice need not be otherwise admissible. *Id.* The determination of whether a fact is capable of being judicially noticed is a preliminary question for the military judge. *See* MRE 104(a).

8. That fact that Wikileaks published, on or about 25 November 2009, what it claims are text and pager messages from 9/11 is a fact not subject to reasonable dispute.[2] The publishing was reported by media outlets worldwide, both on 25 and 26 November, with outlets such as *CNN, CBS News, NBC News, BBC News, NPR, The Guardian, Telegraph, New York Post, New York Daily News,* and, *New York Times* all reporting on the release. *See* Attachment 1. The fact that a wide array of reputable news organizations all reported the release by WikiLeaks establishes the reliability necessary for this Court to take judicial notice.

9. The requested fact is relevant. Specification 11 of Charge II alleges that PFC Manning, between on or about 1 November 2009 and on or about 8 January 2010, communicated a file named "BE22 PAX.zip" to a person not authorized to receive it. During his providence inquiry, PFC Manning indicated he did not begin paying attention to WikiLeaks until after they published the purported 9/11 messages. PFC Manning testified he then began to routinely monitor the

[2] The Defense has not provided the actual WikiLeaks page on which the text/pager messages were released due to limitations on visiting this particular website. However, a web search employing Google and the search terms, "9/11 test messages," results in the relevant WikiLeaks page as the top response.

WikiLeaks website. PFC Manning admitted to transferring the file named "BE22 PAX.zip" to WikiLeaks in late March 2009. It is clear from Specification 11 that the Government believes PFC Manning's relationship with WikiLeaks began in early November 2009. The fact that PFC Manning did not begin monitoring WikiLeaks until after the site published the purported 9/11 messages, coupled with the fact that WikiLeaks published the aforementioned in late November 2009 makes it less likely that PFC Manning began communicating with WikiLeaks in early 2009. As such, the date WikiLeaks published the purported 9/11 messages, is relevant.

CONCLUSION

10. Based on the above, the Defense requests that the Court to take judicial notice of the requested adjudicative fact.

Respectfully Submitted

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel

I certify that I served or caused to be served a true copy of the above on MAJ Ashden Fein, via electronic mail, on 15 June 2013.

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel