UNITED STATES OF AMERICA	)	
	)	**RULING: Motions by Parties for Judicial Notice of Adjudicative Facts**
v.	)	
	)	
Manning, Bradley E.	)	
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**27 June 2013**
Fort Myer, Virginia 22211	)	

Defense Requested Judicial Notice - On 15 June 2013, the Defense filed 3 motions for judicial notice (AE 569 – 571) requesting the Court to take judicial notice of the following adjudicative facts:

1. The 13 October 2010 classification assessment conducted by RADM Kevin Donegan, Director of Operations at CENTCOM, regarding the Apache Video (PE 15).

2. The audio transcript for PE 15.

3. On or about 25 November 2009, WikiLeaks published what it claimed to be text and pager messages sent on 11 September 2001. The Defense does not request the Court to take judicial notice of the messages themselves or that the messages are actually from 11 September 2001.

4. On 25 July 2007, Reuters made a FOIA request to DoD for video and audio recordings relating to the deaths of Mr. Namir Noor-Eldeen and Mr. Saeed Chmagh, Reuters journalists. CENTCOM responded to the Reuters request on 24 April 2009.

On 19 June 2013, the Government filed a brief opposing (1), (2), and (4) above (AE 574). After oral argument, the Government revised its position and did not object to (2), (3), and (4) above. The parties stipulate that Enclosure 2 to AE 574 is an accurate transcript of the audio of PE 15. The Government objected to the classification assessment in (1) as hearsay not admissible as a statement of a party opponent under MRE 802(d)(2)(D).

The Court will grant Judicial Notice for (2), (3), and (4). The only remaining issue regarding the Defense motions for judicial notice is whether the Court will take judicial notice of (1).

Government requests for Judicial Notice - On 25 June 2013, the Government filed a motion for Judicial Notice (corrected copy) at AE 576 moving the Court to take notice of the following adjudicative facts:

Adjudicative Facts: WikiLeaks Releases

a. WikiLeaks released a video titled "Collateral Murder" on 5 April 2010;

APPELLATE EXHIBIT 582

b. WikiLeaks released more than 390,000 records from the Combined Information Data Network Exchange (CIDNE) Iraq database on 22 October 2010;

c. WikiLeaks released more than 75,000 records from the CIDNE Afghanistan database on 25 July 2010;

d. WikiLeaks released more than 700 detainee assessments produced by Joint Task Force Guantanamo (JTF-GTMO) on 25 April 2011;

e. WikiLeaks released a memorandum produced by the Army Counterintelligence Center titled "Wikileaks.org—An Online Reference to Foreign Intelligence Services, Insurgents, or Terrorist Groups?" on 15 March 2010;

Adjudicative Facts: Salary of Servicemembers and Government Employees

f. The monthly base salary for Servicemembers at the rank of Specialist, E-4, was $1,502.70 in 2003, $1,558.20 in 2004, $1,612.80 in 2005, $1,662.90 in 2006, $1,699.50 in 2007, $1,758.90 in 2008, $1,827.60 in 2009, and $1,889.70 in 2010;

g. The yearly base salary for government employees at the grade of 12 on the General Schedule (GS) scale was $51,508 in 2003, $52,899 in 2004, $54,221 in 2005, $55,360 in 2006, $56,301 in 2007, $57,709 in 2008, $59,383 in 2009, and $60,274 in 2010;

Adjudicative Facts: Reference Materials

h. The existence of Army Regulation (AR) 25-1, dated 13 November 2007, specifically paragraphs 1-1, subparagraphs (a) and (b) of 1-7, and subparagraphs (d), (e), and (f) of 6-1 and the definition found in AR 25-2 of "Information System;"

i. The existence of DoD 5400.11-R: Department of Defense Privacy Program, dated 14 May 2007, specifically Appendix 1 and the definition of "Personal Information;"

Adjudicative Facts: Miscellaneous

j. Thanksgiving of 2009 occurred on 26 November 2009;

k. The term, ".is," is the top level internet domain of Iceland;

l. Johanna Sigurdardottir was the Prime Minister of Iceland from February 2009 – May 2013, Ossur Skarphedinsson was the Icelandic Minister for Foreign Affairs from February 2009 – May 2013, Albert Jonsson was the Icelandic Ambassador to the United States from 2006-2009, and Birgitta Jonsdottir has been a member of the Icelandic parliament since 2009; and

m. The Internet chat lingo and their meanings in Enclosure 13 are synonymous.

On 25 June 2013, the Defense filed a brief objecting to all of the above except (j) and (m) on the grounds of relevance. The Defense did not object to (j) and objected to (m) as an improper subject for judicial notice. At oral argument, the Defense conceded that (a) – (l) were properly judicially noticed adjudicative facts if relevant. Thus, with the exception of (j), all of the Government's motions for judicial notice remain at issue.

The Law: Judicial Notice

1. Military Rule of Evidence (MRE) 201 governs judicial notice of adjudicative facts. The judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *U.S. v. Needham,* 23 M.J. 383 (C.M.A. 1987); *U.S. v. Brown,* 33 M.J. 706 (A.C.M.R. 1991).

2. MRE 201(c) requires the military judge to take judicial notice of adjudicative facts if requested by a party and supplied with the necessary information.

3. When the military judge takes judicial notice of adjudicative facts, the fact finder is instructed that they may, but are not required to, accept as conclusive any matter judicially noticed.

4. Judicial notice is of adjudicative facts. Judicial notice is not appropriate for inferences a party hopes the fact finder will draw from the fact(s) judicially noticed. Legal arguments and conclusions are not adjudicative facts subject to judicial notice. *U.S. v. Anderson,* 22 M.J. 885 (A.F.C.M.R. 1985) (appropriate to take judicial notice of the existence of a treatment program at a confinement facility but not appropriate to take judicial notice of the quality of the program.).

The Law: Hearsay

1. Hearsay is a statement, other than the one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c). Hearsay is not admissible except as provided by the Military Rules of Evidence or by any Act of Congress applicable in trials by court-martial. MRE 802.

2. Admission by a Party Opponent. MRE 801(d)(2)(D) provides in relevant part that admissions by a Party Opponent are not hearsay if the statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant made during the existence of the relationship....The contents of the statement shall be considered but are not alone sufficient to establish the declarant's ....agency or employment relationship and the scope thereof under (D). Consistent with the Court's 18 October 2012 Ruling: Defense Motion: Motion for Judicial Notice of Adjudicative facts – Finkel Book and Public statements (AE 356), the Court adopts the three-part test adopted by the Second Circuit in *United States v. Salerno*, 937 F.2d 797, 811 (2nd Cir. 1991) to determine if the classification assessment by RADM Donegan qualifies as an admission under MRE 801(d)(2)(D) against the Government and is worthy of judicial notice. The three-part test requires the Court, "[to] be satisfied that the prior [statement] involves an assertion of fact

inconsistent with similar assertions in a subsequent trial. Second, the court must determine that the [statements] were such as to be the equivalent of testimonial statements.... Last, the district court must determine by a preponderance of the evidence that the inference that the proponent of the statements wishes to draw is a fair one and that an innocent explanation for the inconsistency does not exist." *Salerno*, 937 F.2d at 811 (2d Cir. 1991) (quoting *United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984) (quotations omitted); *see also United States v. DeLoach*, 34 F.3d 1001, 1005 (11th Cir. 1994) (adopting the test from *Salerno*). The fact that a statement is admissible against a party opponent does not bind the party to that statement. The party against whom such a statement is made can rebut the statement and assert a different or contrary position. *U.S. v. Bellamy,* 403 Md. 308, 328, fn. 19.

The Law: Use of Statements Made by an Accused during the Providence Inquiry in the Merits of the Trial. An accused's guilty plea to a lesser included offense may be used to establish elements of the greater offense during the contested portions of the trial. Statements made by the accused during the providence inquiry, whether orally or in writing, are not evidence that is before the trier of fact and may not be considered during the contested portion of the trial. RCM 913(a) Discussion; *U.S. v. Grijalva,* 55 M.J. 223 (C.A.A.F. 2001).

Conclusions of Law:

Defense Motion for Judicial Notice of Classification Assessment of RADM Donegan.

1. The Court will not consider any statements made by the accused during the providence inquiry as evidence to support any of the requests for judicial notice.

2. RADM Donegan's statement meets the *Salerno* test and qualifies as an admission of a party opponent under MRE 801(d)(2)(D). RADM Donegan was acting in his official capacity as Director of Operations, CENTCOM, when he made the classification assessment. The classification assessment states facts inconsistent with the Stipulation of Expected Testimony of CW5 John Larue at PE 117. The inference the Defense wishes to draw is a fair one.

3. The Court will take Judicial Notice of the 13 October 2010 classification assessment by RADM Donegan.

Government Motion for Judicial Notice. The facts in (a) – (l) are adjudicative facts capable of accurate and ready determination of by resort to sources whose accuracy cannot reasonably be questioned.

Adjudicative Facts: WikiLeaks Releases

a. WikiLeaks released a video titled "Collateral Murder" on 5 April 2010;

b. WikiLeaks released more than 390,000 records from the Combined Information Data Network Exchange (CIDNE) Iraq database on 22 October 2010;

c. WikiLeaks released more than 75,000 records from the CIDNE Afghanistan database on 25 July 2010;

d. WikiLeaks released more than 700 detainee assessments produced by Joint Task Force Guantanamo (JTF-GTMO) on 25 April 2011;

e. WikiLeaks released a memorandum produced by the Army Counterintelligence Center titled "Wikileaks.org—An Online Reference to Foreign Intelligence Services, Insurgents, or Terrorist Groups?" on 15 March 2010;

All of the Wikileaks releases are relevant to show the path of information allegedly from the accused through WikiLeaks with opportunity to access it by the enemy for the specification of Charge I (Aiding the Enemy) and for the caused to be published element of specification 1 of Charge II (Wantonly Caused to be Published). In addition (a) – (e) are relevant to facts at issue as to whether the accused stole, purloined, or knowingly converted information and whether the information was closely held by the Government for the following specifications of Charge II: (a) - specification 2; (b) – specifications 4 and 5; (c) – specifications 6 and 7; (d) specifications 8 and 9; and (e) specification 15. The Court will take judicial notice of (a) – (e).

Adjudicative Facts: Salary of Servicemembers and Government Employees

f. The monthly base salary for Servicemembers at the rank of Specialist, E-4, was $1,502.70 in 2003, $1,558.20 in 2004, $1,612.80 in 2005, $1,662.90 in 2006, $1,699.50 in 2007, $1,758.90 in 2008, $1,827.60 in 2009, and $1,889.70 in 2010;

g. The yearly base salary for government employees at the grade of 12 on the General Schedule (GS) scale was $51,508 in 2003, $52,899 in 2004, $54,221 in 2005, $55,360 in 2006, $56,301 in 2007, $57,709 in 2008, $59,383 in 2009, and $60,274 in 2010;

The monthly and yearly base salaries of Servicemembers and government employees in the grade of GS 12 are relevant to a fact in issue to prove value of the information in specifications 8 and 16 of Charge II. The Court will take judicial notice of (f) and (g).

Adjudicative Facts: Reference Materials

h. The existence of Army Regulation (AR) 25-1, dated 13 November 2007, specifically paragraphs 1-1, subparagraphs (a) and (b) of 1-7, and subparagraphs (d), (e), and (f) of 6-1 and the definition found in AR 25-2 of "Information System;"

i. The existence of DoD 5400.11-R: Department of Defense Privacy Program, dated 14 May 2007, specifically Appendix 1 and the definition of "Personal Information;"

The references in AR 25-1, AR 25-2, and DoD 5400-R are relevant to a fact at issue in specification 16 of Charge II – to prove that the information stolen was a thing of value to the United States and are also relevant to a fact at issue in specification 4 of Charge III - to prove

that the accused used an information system for a manner other than its intended use. The Court will take judicial notice of (h) and (i).

Adjudicative Facts: Miscellaneous

j. Thanksgiving of 2009 occurred on 26 November 2009;

k. The term, ".is," is the top level internet domain of Iceland;

l. Johanna Sigurdardottir was the Prime Minister of Iceland from February 2009 – May 2013, Ossur Skarphedinsson was the Icelandic Minister for Foreign Affairs from February 2009 – May 2013, Albert Jonsson was the Icelandic Ambassador to the United States from 2006-2009, and Birgitta Jonsdottir has been a member of the Icelandic parliament since 2009; and

m. The Internet chat lingo and their meanings in Enclosure 13 are synonymous.

The Defense does not object to the Court taking judicial notice of (j). The terms and names in (k) and (l) were used by the accused in searches on Intelink and chats with Press Association/Julian Assange (PEs 81; 123; and 127). The facts at (k) and (l) are relevant to explain to the fact-finder the terms used in the searches and chats by the accused and are also relevant to whether the accused acted wantonly for specification 1 of Charge II (Wantonly Caused to be Published). The Government has provided no references for (m) other than a chart of chat terms and translations prepared by an unknown person or entity. The facts at (m) are not adjudicative facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The Court will take judicial notice of (j), (k), and (l). The Court will not take judicial notice of (m).

Ruling: The Defense motions for judicial notice are **Granted**. Government motion for judicial notice is **Granted in Part.** The Court will take judicial notice of (a) – (l). The Court will not take judicial notice of (m) (meanings of internet chat lingo).

So **Ordered** this 27th day of June 2013.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit