

APPELLATE EXHIBIT 651
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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)

5. 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).

6. The Defense requests judicial notice of the existence of a July 2011 article from National Defense Magazine titled, "Pentagon Still Playing Catch-Up With Bomb Makers." *See* Attachment A. Moreover, the Defense requests the Court take judicial notice of several portions of text that appear within this article. The Defense offers these portions for the non-hearsay purpose of showing that the quotes were uttered and appeared in the article. The below excerpts are relevant because their publication, regardless of their truth, demonstrates that the enemy could have been aware of U.S. counter-IED deficiencies through means other than the WikiLeaks disclosures.

- a. "Our adversary changes quicker than we do."
- b. An insurgent "has no bureaucracy. He can do things quicker than I can do. Whenever I come up with a new jammer, I've got to look three moves ahead. What have I forced him to do now that I have this new jammer?"
- c. The services' bomb technicians have several tools to help them with their inherently dangerous work. The radio-frequency jammers to which Larry¹ referred prevent insurgents from detonating bombs through the airwaves. Bomb suits provide some protection in the event that an IED explodes. Robots can provide a view of a bomb from a safe distance, and their manipulators can sometimes be used to render them safe without the specialists needing to put on the cumbersome suits. Metal detectors have been around since World War II. Recently, ground penetrating radar, which can see nonmetallic shapes, have been integrated onto the metal detectors. Explosives used to detonate IEDs in a controlled manner are also employed.
- d. Afghan IEDs have a low metallic signature, often employing wood as a casing. They are not technologically sophisticated and use materials that are readily available, he² said. They are difficult to find using standard mine detectors that seek out ferrous metals.
- e. Sensors carried into the field include the metal detectors, ground-penetrating radar and a device designed to find hidden tripwires.

¹ "Larry" is identified as COL Dick Larry in a previous paragraph.

² COL Leo Bradley is quoted in the prior paragraph and his thoughts are continued in this paragraph.

7. The Defense requests judicial notice of the existence of a 15 September 2009 article published in the Washington Times titled, "EXCLUSIVE: Taliban makes IEDs deadlier." See Attachment B. Additionally, the Defense requests the Court take judicial notice of several portions of text that appear within this article. The Defense offers these portions for the non-hearsay purpose of showing that the excerpts were uttered and appeared in the article. The below excerpts are relevant because their publication, regardless of their truth, demonstrates that the enemy could have been aware of U.S. counter-IED deficiencies through means other than the WikiLeaks disclosures.

- a. The Taliban has been building simpler, cheaper anti-personnel bombs made of hard-to-detect nonmetal components, increasing the number of lethal attacks on NATO forces in Afghanistan, according to a confidential military report.
- b. The change in production from metal-dominated explosives to devices made of plastic is making it more difficult for ground troops to detect the buried IEDs with portable mine-detectors, creating an "urgent need" inside the Pentagon for better detection devices, the report said.
- c. The Pentagon report said the current mine detector, the AN/PSS-12, is not sufficiently sensitive to pick up the scarce metal in anti-personnel IEDs. "There is an urgent need to identify new man-portable detection platforms to expand the ability of U.S. troops to detect anti-personnel IED-mines," the report concludes.
- d. One system now readily available commercially consists of electric field sensors, which can pick up electricity from nonmetallic conductors, the report said.

CONCLUSION

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

Respectfully Submitted



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I certify that I served or caused to be served a true copy of the above on MAJ Ashden
Fein, via electronic mail, on 9 August 2013.

A handwritten signature in black ink, appearing to read 'Joshua J. Tooman', written in a cursive style.

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