IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE MOTION TO**
v.	)	**COMPEL PRODUCTION**
	)	**OF WITNESSES FOR MERITS**
	)	**AND SENTENCING**
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6) [redacted]	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 23 November 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 703(b)(1) and (c)(2)(D) and R.C.M. 906(b)(7) requests this Court to compel production of the below listed witnesses for merits and for sentencing.

BACKGROUND

2. The Defense submitted its witness list for merits and sentencing on 15 October 2012. *See* Appellate Exhibit 344. The Defense provided a synopsis of the expected testimony for each witness sufficient to show relevance and necessity. R.C.M. 703(c)(2)(B)(i); R.C.M. 1001(e). On 12 November 2012, the Defense submitted its witness list in the event of a sentencing only case and provided a synopsis of the expected testimony under R.C.M. 1001(e).

3. On 16 November 2012, the trial counsel provided its response to the Defense's witness list. The trial counsel contends that production of several of the Defense requested witnesses is not required under R.C.M. 703. The trial counsel denied several witnesses under different bases. *See* Prosecution Response to Defense Witness List, dated 16 November 2012. The denial of the Defense requested witnesses can be broken down into the following groups:

a) Merit Witnesses under R.C.M. 703(b)(1): The trial counsel denied the following witnesses as not being relevant and necessary on a matter in issue on the merits:

1) Mr. Zachary Antolak;
2) Colonel (Retired) Morris Davis;
3) Professor Yochai Benkler; and
4) Mr. Daniel Cindrich.

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b) Merits and Sentencing Witnesses under R.C.M. 703(d): The trial counsel denied the following witness under the basis that the Defense was required to follow the procedures of R.C.M. 703(d) in order to have production of the requested witness:

1) Mr. Cassius Hall;
2) Mr. Charles Ganiel; and
3) Ms. Lillian Smith.

c) Sentencing Witnesses under R.C.M. 1001(e): The trial counsel denied the following witnesses under the basis of R.C.M. 1001(e):

1) Ambassador Peter Galbraith; and
2) COL Dick Larry.

d) Additional Witnesses in the event of a sentencing case only: The trial counsel denied the following additional witnesses under the basis of R.C.M. 703(d) and R.C.M. 1001(e):

1) Mr. Cassius Hall;
2) Colonel (Retired) Morris Davis;
3) Mr. Zachary Antolak;
4) Mr. Charles Ganiel;
5) Professor Yochai Benkler;
6) Mr. Daniel Cindrich.

ARGUMENT

A. The Government is Acting in Bad Faith in Contesting the Relevance and Necessity of the Defense Requested Witnesses

4. The Government is once again using R.C.M. 703(D) as a sword for its own advocacy by denying numerous facially relevant witnesses. This conduct is not anything new for the Government. The Court need only look to the now pending Article 13 litigation to see how the Government has chosen to act in regards to its power under R.C.M. 703(D). In that litigation, the Government contested the relevance and necessity of many of its own witnesses that were also listed by the Defense. Once the Defense withdrew its request for these witnesses, the Government, in short order, notified the Court that it would bring the vast majority of the witnesses it was initially opposing under R.C.M. 703(D).

5. Sadly, the Government also choosing to use R.C.M. 703(D) and R.C.M. 1001(e) in the instant case as a sword to deny Defense requested witnesses. The Defense believes that the witnesses on its merits list are relevant and necessary for obvious reasons. Additionally, the witnesses on the Defense's sentencing list clearly meet the R.C.M. 1001(e) standard. As such, the Defense requests that the Court compel production of each requested witness.

B. The Defense Requested Witnesses are Relevant and Necessary Under R.C.M. 703 and Required Under R.C.M. 1001(e)

6. R.C.M. 703 provides that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." This rule is based on Article 46, Uniform Code of Military Justice (U.C.M.J.) and implements the accused's Sixth Amendment right to compulsory process. The Defense is entitled to production of any witness whose testimony on a matter in issue on the merits that would be relevant and necessary. R.C.M. 703(b)(1). Necessary means the evidence is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(b)(1) discussion.

7. The synopsis provided by the Defense for each of its requested witnesses on the merits more than satisfies R.C.M. 703(b)(1). The Government appears to be attempting to use a denial of the Defense requested witnesses along with its motion *in limine*, dated 16 November 2012, to argue that the Defense witnesses are not relevant in the merits phase. Instead of replying in detail to this assertion, something the Defense will do in its response motion to the Government's motion *in limine*, it is suffice to say that motive evidence may be relevant where it is circumstantial evidence of intent. *United States v. Diaz*, 69 M.J. 127, 134 (C.A.A.F. 2010) (holding that "motive evidence may be relevant where it is circumstantial evidence of intent…").

8. The Government should realize the clear relevance of Mr. Antolak, Colonel Davis, Professor Benkler and Mr. Daniel Cindrich. Instead, the Government has, in bad faith, denied each witness. The Defense will address each witness in turn:

a) Mr. Zachary Antolak: The Government has essentially made the Defense's argument of relevance for Mr. Antolak when it argued for admissibility of PFC Manning's alleged disloyal statement to Ms. Showman. Instead of redrafting an argument, the Defense will quote the Government's own theory back to it. The Government argued that the statement to Ms. Showman was "relevant to the Accused's state of mind." See Appellate Exhibit 250 at page 4-5. The Government went on to assert that the "evidence is being offered to show that the Accused made a statement that he had no particular loyalty to the country whose information it was his job to safeguard. The statement is evidence of the Accused's intent for the charged misconduct because it makes it more likely that the Accused did not care if the enemy had access to the information that was posted on the Internet." *Id.* Finally, the Government asserted that the alleged statement to Ms. Showman was "circumstantial evidence that the Accused knowingly gave intelligence to the enemy in support of Charge I, Specification 1; that the Accused wrongfully and wantonly caused the information to be published on the internet with knowledge that it would be accessible to the enemy in support of Charge II, Specification 1; that the Accused's conduct was willful in support of Charge II, Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15; and that the Accused stole, purloined, or knowingly converted a thing of value to the United States in support of Charge II, Specifications 4, 6, 8, 12, and 16." The Government should not be surprised when the Defense now argues that the conversation Mr. Antolak will testify about, which happened before the deployment and

around the same time as the alleged statements to Ms. Showman, are circumstantial evidence of intent. *See Diaz*, 69 M.J. at 134. Mr. Antolak will testify to the following:

1) PFC Manning stated he was hoping to apply what he was learning in his current position as an analyst to provide more information to the officers above him and to his commanders;
2) PFC Manning stated that he was hoping that the information he provided to his officers and commanders would help save lives;
3) PFC Manning stated that he was more concerned about making sure that everyone - soldiers, marines, contractors, even the local nationals - would get home to their families safely;
4) PFC Manning stated that he felt a great responsibility and duty to people;
5) PFC Manning stated that he believed in what the Army tries to make itself out to be: a diverse place full of people defending the country... male, female, black, white, gay, straight, Christian, Jewish, Asian, old or young;
6) PFC Manning stated that it didn't matter to him what a person's background was since we all wear the same green uniform;
7) PFC Manning stated that he sometimes wished that everything was black and white like the media and politicians present it. That you could easily see that he is the bad guy and this other person was the good guy. Instead, PFC Manning stated that it was all shades of blurry grey;
8) PFC Manning stated that he constantly had foreign affairs on his mind, and that one of the bad parts of his job was having to think of bad stuff; and
9) PFC Manning stated that he wanted to pursue a career in politics after going to college.

The conversation that PFC Manning had with Mr. Antolak prior to the deployment is relevant to establish PFC Manning's then existing state of mind. This evidence is circumstantial evidence of PFC Manning's intent and relevant to prove that the he did not knowingly gave intelligence to the enemy as alleged in The Specification of Charge I; that PFC Manning did not wrongfully and wantonly caused the information to be published on the internet with knowledge that it would be accessible to the enemy as alleged in Specification 1 of Charge II; that PFC Manning's subjective lack of a belief that disclosure of the documents that he believed were already in the public forum could be to the injury of the U.S. or benefit of a foreign country was objectively reasonable and that did not have the requisite mens rea as alleged in Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15 of Charge II; and that PFC Manning did not steal, purloin, or knowingly convert a thing of value of the United States as alleged in Specifications 4, 6, 8, 12, and 16 of Charge II. Additionally, Mr. Antolak's testimony is relevant to rebut the testimony that the Government will elicit from Ms. Jihrleah Showman.

b) Colonel (Retired) Morris Davis: The Government asserts Colonel Davis' testimony is not relevant and necessary on a matter in issue on the merits. The Government intends to call Mr. Jeffery Motes and RADML David Woods to testify regarding the classification and value of the charged information in Specifications 8 and 9 of Charge II. These witnesses will also be used to attempt to prove the information could be used to the injury

of the United States or to the advantage of any foreign nation. Just as the Government will offer evidence to attempt to prove its case, the Defense should be free to prove the opposite. Colonel Davis will be used to show that the subjective lack of a belief by PFC Manning that disclosure of these documents already in the public forum could be to the injury of the United States or benefit of a foreign country was objectively reasonable. Because the detainee assessment briefs could not be used to the injury of the United States or to the benefit of a foreign country, PFC Manning lacked the required mens rea to commit the charged offenses. If the Defense is permitted to establish that the evidence was, in fact, not a danger to national security, an accused could not logically have the "reason to know" mens rea required under Specifications 9 of Charge II. Additionally, if the information was already in the public forum it would be relevant to disprove that PFC Manning stole, purloined, or knowingly converted a thing of value of the United States as alleged in Specifications 8 of Charge II.

c) Mr. Daniel Cindrich: The Government has listed 128 witnesses for its merits and sentencing case. Many of these witnesses will be used to attempt to establish PFC Manning had a reason to believe the information charged could be used to the injury of the United States or to the advantage of any foreign nation in Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15 of Charge II or that PFC Manning stole, purloined, or knowingly converted a thing of value to the United States in support of Specifications 4, 6, 8, 12, and 16 of Charge II. Mr. Cindrich's testimony will be used to show that the subjective lack of a belief by PFC Manning that disclosure of these documents already in the public forum could be to the injury of the United States or benefit of a foreign country was objectively reasonable. Because the charged information could not be used to the injury of the United States or to the benefit of a foreign country, PFC Manning lacked the required mens rea to commit the charged offenses. If the Defense is permitted to establish that the evidence was, in fact, not a danger to national security, an accused could not logically have the "reason to know" mens rea required under 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15 of Charge II. Additionally, if the information was already in the public forum it would be relevant to disprove that PFC Manning stole, purloined, or knowingly converted a thing of value of the United States as alleged in Specifications 4, 6, 8, 12, and 16 of Charge II. Mr. Cindrich in an intelligence analyst. He will testify as an expert and as a person with direct knowledge that since the charged leaks, the Center for Army Lessons Learned (CALL), U.S. Army Combined Arms Center, Fort Leavenworth, Kansas has not had any direct or indirect tasking to collect, analyze, or disseminate lessons learned on the WikiLeaks incidents or the information publicly disclosed in this case. Mr. Cindrich will testify that one of his responsibilities is to put out rapid adaption information to the field. Mr. Cindrich will testify that rapid adaption is a process whereby information is analyzed and disseminated in a timely manner relative to the criticality of actions required for soldiers and leaders to adapt that information to current operations and DOTMLPF (doctrine, organization, training, material, leadership and education, personnel, and facilities) development. Mr. Cindrich will testify that rapid adaption is a process that is designed to save soldier's lives and improve the effectiveness and/or efficiency of Army operations. The fact that CALL has not been requested to collect, analyze, or disseminate lessons learned on the WikiLeaks incidents or the information publicly disclosed in this case is circumstantial evidence that the Defense

will use to show that the subjective lack of a belief by PFC Manning that disclosure of these charged documents already in the public forum could be to the injury of the United States or benefit of a foreign country was objectively reasonable. Because the charged information could not be used to the injury of the United States or to the benefit of a foreign country, PFC Manning lacked the required mens rea. If the Defense is permitted to establish that the evidence was, in fact, not a danger to national security, PFC Manning could not logically have the "reason to know" mens rea required under Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15 of Charge II Specifications 9 of Charge II. Additionally, since CALL was not requested to take any action in response to information publicly disclosed, this is circumstantial evidence that the information was already in the public forum and it would be relevant to disprove that PFC Manning stole, purloined, or knowingly converted a thing of value of the United States as alleged in Specifications 4, 6, 8, 12, and 16 of Charge II.

d) Professor Yochai Benkler: The Government will be presenting evidence regarding the Specification of Charge I, Specifications 1 and 15 of Charge II. The Government will be attempting to prove that PFC Manning knowingly gave intelligence to the enemy in support of the Specification of Charge I; that PFC Manning wrongfully and wantonly caused the information to be published on the internet with knowledge that it would be accessible to the enemy in support of Specification 1 of Charge II; and that PFC Manning had a reason to believe the information charged could be used to the injury of the United States or to the advantage of any foreign nation in support of Specification 15 of Charge II. Just as the Government will offer evidence to attempt to prove its case, the Defense should be free to prove the opposite. Professor Benkler will testify as an expert witness concerning the history of the WikiLeaks organization and how it was viewed prior to the charged leaks. Professor Benkler will testify that at the time PFC Manning would have given information to WikiLeaks, that WikiLeaks was viewed as a journalistic organization with an impressive history of exposing fraud and corruption within governments and corporations. Professor Benkler will testify about an article that he wrote in 2011 entitled "A Free Irresponsible Press: WikiLeaks and the Battle Over the Soul of the Networked Fourth Estate." *See* 46 Harv.C.R.L. L. Rev. 311, 2011. As part of that article, Professor Benkler reviewed the publicly available copy of the document charged in Specification 15 of Charge II. Professor Benkler's article cites and extensively references the document charged in Specification 15 of Charge II. Professor Benkler will testify about how the U.S. Government overstated and overreacted to the leaked documents and WikiLeaks. Professor Benkler will also testify how the traditional media played a role in perpetuating the overstated and overheated public response by government actors, both administrative officials and elected representatives. Professor Benkler will testify that the Government's overreaction resulted in WikiLeaks being viewed as a security threat as opposed to a legitimate journalistic endeavor. Finally, Professor Benkler will testify that WikiLeaks is in fact a journalistic endeavor, no different for legally pertinent purposes than the New York Times, the Washington Post, or a wide range of smaller journalistic publications. Professor Benkler's testimony is circumstantial evidence of PFC Manning's intent and is relevant to prove that the he did not knowingly give intelligence to the enemy as alleged in the Specification of Charge I when he supplied the information to a legitimate journalistic organization; that PFC

Manning did not wrongfully and wantonly caused the information to be published on the internet with knowledge that it would be accessible to the enemy as alleged in Specification 1 of Charge II when he supplied the information to a legitimate journalistic organization; and that PFC Manning's subjective lack of a belief that disclosure of the documents that he believed were already in the public forum could be to the injury of the U.S. or benefit of a foreign country was objectively reasonable and thus did not have the requisite mens rea as alleged in Specification 15 of Charge II. If permitted to present his law review article[1], and discuss his analysis of the document charged in Specification 15 of Charge II. Professor Benkler's testimony will show that the information in the document was in the public forum, and an example of the Government simply over-classifying information and subsequently exaggerating the significance of its release.

9. On sentencing, the Defense is entitled to the production of any witness whose testimony is required under R.C.M. 1001(e). Under R.C.M. 1001(e), the Defense is required to provide a synopsis of the expected testimony to demonstrate why personal appearance is necessary under the standards set forth in the rule. Personal appearance is required only if all of the below are satisfied:

(a) The testimony is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence;

(b) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(c) The other party refuses to enter into a stipulation of fact;

(d) Other forms of evidence (depositions, interrogatories, former testimony, testimony by remote means) would not be sufficient in the determination of an appropriate sentence; and

(e) The significance of the personal appearance to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production.

Id. In this instance, the synopsis provided by the Defense for Ambassador Peter Galbraith and COL Dick Larry clearly demonstrates why personal appearance is necessary for both witnesses.

10. The Government intends to call *nine* witnesses from the Department of State to offer evidence in its sentencing case. *See* Appellate Exhibit CLXII. The fact that the Government could, in good conscience, deny the Defense Ambassador Galbraith is startling. Ambassador Galbraith's testimony is clearly mitigating evidence. Ambassador Galbraith will testify to the following:

[1] The Government is yet to respond to the Defense's request whether Professor Benkler's law review article is considered classified or to be a spillage. The Defense renews its request for the Government to respond to this request.

1) He does not believe that the SIPDIS cables contained our country's closely held secrets;
2) The SIPDIS cables were the type of cables were available to anyone with SIPRNET access – a potential audience of over a million people;
3) The SIPDIS cables were written for a relatively wide distribution, and thus were included into a database available to anyone with SIPRNET access;
4) No prudent diplomat would include genuinely sensitive material in a SIPDIS cable;
5) The SIPDIS cables often reported on widely known issues and events and many dealt with routine administrative matters;
6) While a SIPDIS cable appears to be signed by an Ambassador and addressed to the Secretary of State, the cables were rarely drafted by an Ambassador, usually not cleared by an Ambassador if they dealt with routine administrative matters, and almost never read by the Secretary of State.
7) That much of what would be in a SIPDIS cable could also be found in the newspapers of the relevant country or in other open source reporting.
8) That Ambassadors would use more restrictive channels (such as NODIS, EXDIS, LIMDIS, and intelligence channels) for discussion of truly sensitive material.
9) That no responsible ambassador would use a channel with such broad distribution for matters—be it intelligence, military, or policy recommendations—where the leak of the information could seriously damage the interests of the United States.
10) That it would be irresponsible to cite specific interlocutors in a SIPDIS cable where the person could be harmed by the leak of her or his name;
11) That he was and still is very concerned about the propensity of some in the U.S. Government to leak classified information. While he was Ambassador, someone on Capitol Hill leaked a report containing sensitive intelligence that compromised an ongoing intelligence operation in Croatia and put at risk embassy personnel. Ambassador Galbraith pushed hard for the investigation and punishment of those responsible. While Ambassador Galbraith will testify that he strongly disapproves of what PFC Manning allegedly did, he will also testify that there is no comparison in the sensitivity and importance of the material allegedly released by PFC Manning and real intelligence leaks where there has often been no investigation or only limited punishment; and
12) That in his experience, many—if not most—state department cables are over classified and that a secret classification does not mean the information is genuinely secret.

11. The Government is also denying the production of COL Dick Larry. The Government's denial of COL Larry is perplexing considering its intent to call Mr. James McCarl. Mr. McCarl is part of the Joint Improvised Explosive Device (IED) Defeat Organization (JIEDDO), Army Pentagon, Washington DC. He will be called to testify about how some of the charged information could have potentially given away counter-IED measures. COL Larry, part of the Army' G3 at HQDA will be used to rebut Mr. McCarl's testimony. COL Larry will testify as follows:

1) That his office is the Army's representative to the Joint Intelligence Explosive Ordnance Disposal (EOD) Organization. COL Larry will testify that his organization has the following sub-tasks: (1) publish and maintain the Army CID OPSEC manual, (2) sustain funding for theater operations, (3) manage Army EOD, (4) Army staff lead for weapons

technical knowledge, and (5) represent the Army at the Warfighter Senior Integration Group;

2) That his organization uses intelligence information gathered from Army G2, DIA, unit operation/intelligence summaries, and any intelligence gathered by Provincial Reconstruction Teams;
3) That intelligence gleaned from the charged SIGACTS would be limited by two general problems (1) there is limited information in a SIGACT (could be just a picture with the 5 Ws (who, what, where, when, and why) and (2) the information contained in the report may well be inaccurate;
4) That other factors weigh heavily in the enemy's ability to be successful with IEDs. COL Larry will testify those factors include the availability of material, the ability to communicate from bomb-makers down to the bomb-emplacers, the IED countermeasures used locally by BLUEFOR, and the consequent measures used by the IED to defeat the countermeasures;
5) That the enemy can immediately make changes based on the operational environment, and that the threat is constantly adapting its techniques; and
6) That his organization has to think three moves ahead of the threat, and has to constantly examine how the actions on the ground impact our response. As such, COL Larry will testify that what may have been true two years, two months, or even two weeks ago may not be true today. COL Larry will testify that he does not view the charged SIGACTS as providing sensitive counter IED measures to the enemy.

12. Ambassador Galbraith and COL Larry clearly meet the requirements of R.C.M. 1001(e). As such, this Court should compel the presence of both requested witnesses.

C. The Defense Requested Witness Denied by the Trial Counsel Under R.C.M. 703(d).

13. The Government's denial of Mr. Hall, Mr. Ganiel, and Ms. Smith appears to be based upon the belief that the Defense would need to request their appointment as an expert witness under R.C.M. 703(d). The Defense is not required to request the appointment of these individuals as expert witnesses for the Defense. Mr. Hall, Mr. Ganiel, and Ms. Smith are each government employees. The discussion to R.C.M. 703(d) clearly states that "This subsection does not apply to person who are government employees or under contract to the Government to provide services which would otherwise fall within this subsection." Discussion to R.C.M. 703(d) at A21-37.

14. The production and employment of expert witnesses is governed by R.C.M. 703(d) when that employment is at the expense of the Government. The rule clearly requires compliance with its procedures only if the Defense *or the Government* is seeking to have an expert witness produced **and** to have the convening authority cover the expense of the witnesses. If the Defense or the Government is wanting the convening authority to cover the costs of the expert witness, then the counsel must:

(a) Submit a request to the convening authority to authorize employment and fix compensation before employment; and

(b) Provide notice to the other party.

Id. In situations where the employment of the expert is at the expense of the convening authority, the Defense or Government must include a complete statement of reasons why the expert is necessary, and an estimate of costs. *Id. United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996). If the convening authority denies the request, the Defense or Government can raise the issue with the military judge. R.C.M. 703(d). The military judge will then determine whether the testimony of the expert is relevant and necessary. *Ndanyi*, 45 M.J. at 319. If the military judge determines the testimony of the expert is relevant and necessary, and it is a Defense request for an expert, she will determine whether the Government has provided or will provide an adequate substitute. R.C.M. 703(d).

15. The entire process under R.C.M. 703(d) does not apply in situations where the convening authority is not being asked to cover the expense of the witness. This is clearly why the rule specifically excludes from its application witnesses "who are government employees or under contract to the Government to provide services which would otherwise fall within this subsection." Discussion to R.C.M. 703(d) at A21-37. In such situations, there is no expense to the convening authority and Article 46 of the UCMJ would entitled the Defense equal access to the government witness.

16. Mr. Hall, Mr. Ganiel and Ms. Smith are no different from any other government employee that the Defense is calling as a witness. Under M.R.E. 702, an expert witness is someone who possesses particular knowledge, skill, experience, training or education and can offer scientific, technical, or other specialized knowledge testimony that will assist the trier of fact to understand the evidence or to determine a fact in issue. M.R.E 702. Every witness listed on the Defense's witness list could be qualified as an expert witness. Specifically, Mr. Milliman, Mr. Cindrich, CPT Lim or CPT Cherepko, to name a few, are qualified as experts in their respective fields. Would the Government seriously suggest that R.C.M. 703(d) requires the Defense to request the convening authority to appoint each of these witnesses as experts for the Defense? The answer to that question is "no" and the same is true in the case with Mr. Hall, Mr. Ganiel and Ms. Smith.

17. The Government may have become confused due to the fact that Mr. Hall, Mr. Ganiel and Ms. Smith were each appointed as expert assistants. As the Court is aware, an expert assistant is someone detailed to the defense team to assist the accused and defense counsel during the investigative stage of the trial process, although expert assistance can be requested for any stage. Expert assistants, once appointed, are a part of the defense team. As such, the communications between the expert and the defense counsel or the expert and the accused are privileged under M.R.E. 502. *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989). However, once the defense lists the expert as a witness, the Government is free to contact and interview the witness. *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R 1991).

18. The Government appears to be taking the category of "expert assistants," and lumping it with the topic of expert witness analysis that is found in R.C.M .703(d). A careful look at the rule reveals that R.C.M. 703(d) does not discuss expert assistants. In reality, the analysis for expert assistance requests is much more similar to the analysis of discovery issues than production issues. In any event, just because a government employee can be qualified as an

expert witness, or at one point has been appointed to the Defense as an expert assistant, does not mean that the requirements of R.C.M. 703(d) must be satisfied. R.C.M. 703(d) is a rule that is limited to those situations, and only those situations, where the Defense or Government is requesting appointment of an expert witness at the expense of the convening authority. As such, the Government's denial of Mr. Hall, Mr. Ganiel and Ms. Smith under R.C.M. 703(d) is without merit. The Court should compel the production of Mr. Hall, Mr. Ganiel and Ms. Smith.

D. The Defense Requested Witness Denied by the Trial Counsel in the Event of a Sentencing Only Case Under R.C.M. 703(d) and R.C.M. 1001(e).

19. In the event of a sentencing only case, the Government has denied the following requested witnesses: Mr. Cassius Hall; Colonel (Retired) Morris Davis; Mr. Zachary Antolak; Mr. Charles Ganiel; Professor Yochai Benkler; and Mr. Daniel Cindrich. The argument for the production of each of the additional Defense requested witnesses in the event of a sentencing only case is the same as previously stated above and need not be repeated here. Each requested witness clearly meets the requirements of R.C.M. 1001(e). As such, this Court should compel the presence of the Defense requested witnesses.

CONCLUSION

20. Based upon the above, the Defense requests this Court to compel production of the Defense requested witnesses for merits and for sentencing.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel