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| **UNITED STATES OF AMERICA** | ) | |
| | ) | **RULING: JUDICIAL NOTICE MOTIONS** |
| **v.** | ) | |
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| **Manning, Bradley E.** | ) | |
| **PFC, U.S. Army,** | ) | |
| **HHC, U.S. Army Garrison,** | ) | |
| **Joint Base Myer-Henderson Hall** | ) | **16 January 2013** |
| **Fort Myer, Virginia 22211** | ) | |

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**Government Request for Judicial Notice:**

1. On 16 November 2012, the Government requested the Court take judicial notice of the following as adjudicative facts:

(1) Army Field Manual 2-0 "Intelligence"
(2) Army Field Manual 2-19.4 "Brigade Combat Team Intelligence Operations"
(3) Army Field Manual 2-22.2 "Counterintelligence"
(4) Army Field Manual 2-22.3 "Human Intelligence Collector Operations"
(5) Army Soldier's Manual and Trainer's Guide "Soldier's Manual and Trainer's Guide for Intelligence Analysis, MOS 35F, Skill Level 1/2/3/4"
(6) Executive Order 12958
(7) Executive Order 12972
(8) Executive Order 13142
(9) Executive Order 13292
(10) A 10 February 2010 BBC news report shows Julian Assange in Iceland.
(11) A New York Times article entitled "Pentagon Sees Threat from Online Muckrakers" by Stephanie Strom, dated 18 March 2010, references Lieutenant Colonel Lee Packnett.
(12) On 7 June 2010, the New Yorker published an article entitled "No Secrets: Julian Assange's Mission for Total Transparency".
(13) The Washington Post has published online a letter purportedly from United States Department of State Legal Adviser Harold Koh, and dated 27 November 2010, which states that the Department of State understood "from conversations with representatives from *The New York Times*, *The Guardian* and *Der Speigel,* that WikiLeaks also has provided approximately 250,000 documents to each of them for publication, furthering the illegal dissemination of classified documents".
(14) On 29 November 2010, the Armed Forces Press Service published an article stating WikiLeaks released classified information over the weekend of 27-28 November 2010.
(15) United States Department of State lists "al-Qa'ida" as a foreign terrorist organization as of 8 November 1999. It lists "al-Qaida in the Islamic Maghreb" as of 27 March 2002. It lists "al-Qaida in Iraq" as of 17 December 2004. It lists "al-Qa'ida in the Arabian Peninsula" as of 19 January 2010.
(16) The United States FBI has named Adam Yahiye Gadahn as a "most wanted terrorist" and states he is associated with Al Qaeda.



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(17) Under a header "defining the enemy," the United States Department of State has cited terrorist networks as the greatest national security threat. It has also named Al Qaeda and confederated extremist groups as the greatest terrorist threat.
(18) United States Department of State Assistant Secretary in the Bureau of Public Affairs recites that the Department of State has designated "al-Qa'ida in the Arabian Peninsula (AQAP) as a Foreign Terrorist Organization" in January of 2010.
(19) United States Department of State Undersecretary for Management Patrick Kennedy testified that "DOD material was leaked in July of 2010".
(20) "Inspire" is a magazine. It advocates violent jihad and promotes Al Qaeda in the Arabian Peninsula ideology.
(21) The Winter 2010 issue of "Inspire" states that "anything useful from WikiLeaks" can be archived and shared to "help the mujahidin".

2. During the Article 39(a) session held 8-11 January 2013, the Government filed an addendum to its motion clarifying that the Government moved the Court to consider (10) – (21) as sources for the Court to take judicial notice of the following adjudicative facts:

(a) Julian Assange was located in Iceland in February 2010 and working on the Icelandic Modern Media Initiative.

(b) LTC Lee Packnett was quoted in a New York Times article, dated 18 March 2010.

(c) A New Yorker profile of Julian Assange, titled "No Secrets: Julian Assange's Mission for Total Transparency" was dated 7 June 2010.

(d) WikiLeaks and various new organizations began publishing Department of State (DOS) diplomatic cables over the weekend of 27-28 November 2010.

(e) Al-Qaeda (AQ) and its affiliates (al-Qaeda in the Islamic Maghreb, al-Qaeda in Iraq, al-Qaeda in the Arabian Peninsula) are all listed as foreign terrorist organizations by the Department of State and are, in fact, enemies of the United States.

(f) Usama bin Laden is a member of AQ and an enemy of the United States.

(g) Adam Gadahn is a member of AQ and an enemy of the United States.

(h) "Inspire" is a magazine. It advocates violent jihad and promotes the ideology of AQAP.

3. On 11 January 2013 the Government provided additional source information for the Court for (a) – (h) above.

4. On 30 November 2012 the Defense filed a response objecting to (1) – (9) on the grounds that the Government has not established relevance. During oral argument at the 8-11 January 2013 Article 39(a) session, the Defense withdrew their objection to (6) – (9). On 15 January 2013 the Defense filed a response to the Government addendum. The defense did not object to (d), (e) in

part, (f), and (g). The Defense objected to (a), (b), (c), and (h) on lack of relevance; (b) and (c) as hearsay, and the portion of (h) that "It advocates violent jihad and promotes the ideology of al-Qaeda In the Arabian Peninsula." because it asks the Court to draw an inference. The Defense further objects to that part of (e) requesting the Court to take judicial notice that al-Qaeda in the Arabian Peninsula as an enemy because the accused allegedly gave intelligence to the enemy beginning in November 2009. The designation did not take place until 19 January 2010, which was after the alleged misconduct.

**Defense Judicial Notice – Damage Assessments**

1. On 30 November 2012 the Defense moved the Court to take judicial notice of the Office of National Counterintelligence Executive (ONCIX), Information Review Task Force (IRTF), and DOS damage assessments and their contents as adjudicative facts. The Defense asserts the damage assessments and their contents are admissible as admissions by a party opponent under MRE 801(d)(2) and as public records under MRE 803(8).

2. The Government does not object to the Court taking Judicial Notice of the existence of the damage assessments and that they were prepared by the relevant agency. The Government argues that the contents of the damage assessments are not admissible under MRE 801(d)(2) or MRE 803(8).

**Defense Judicial Notice – Over-classification – H.R. 553 and Congressional Hearings**

1. On 30 November 2012 the Defense moved the Court to take judicial notice of:

(1) H.R. 553 (Reducing Over-Classification Act);

(2) House Committee meetings on the Espionage Act (16 December 2010); and

(3) House Committee meetings on the Over-Classification Act (22 March, 26 April, and 28 June 2007).

On 10 January 2013, the Defense provided the Court with supplemental Authority, Executive Order 13526 (Sec. 5.1); DoD Instruction 5210.50 (paragraphs 5.1.10 and 5.1.11); DoD Instruction 5240.11; and DoD Regulation 5200-1R (Chapter 10, 10-104) to consider as source material for the judicial notice motion.

2. On 30 November 2012, the Government objected to the Court taking judicial notice of all of the above on grounds of lack of relevance for both merits and sentencing. The Government further objects that Mr. Blanton's testimony at the Congressional Hearing and the testimony at the Congressional meetings in (2) and (3) do not consist of adjudicative facts and represent hearsay within hearsay.

**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) provides in relevant part that admissions by a Party Opponent are not hearsay if the statement is offered against a party and is (A) the parties' own statement in either the party's individual or representative capacity; (B) a statement of which the party has manifested the party's adoption or belief in the truth; (C) a statement by a person authorized by the party to make a statement concerning the subject; or (D) 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 authority under (C), or the agency or employment relationship and the scope thereof under (D).

3. MRE 803(8) (Public Records) is an exception to the hearsay rule. This rule allows admission of records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the Government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

4. MRE 805 provides that hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules.

**The Law: Sentencing – Defense Evidence**

1. RCM 1001(c) governs matters to be presented by the Defense during sentencing. In relevant part, the rule allows the Defense to present matters in rebuttal to any material presented by the Government and matters in extenuation and mitigation. Matters in extenuation serve to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute legal justification or excuse. Matters in mitigation of an offense are reasons to lessen the punishment of an offense or to furnish grounds for recommendations of clemency.

2. RCM 1001(c)(3) authorizes the military judge, with respect to matters in extenuation or mitigation or both, to relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers and other writings of similar authenticity and reliability.

3. RCM 1001(c)(4) provides that when the rules of evidence have been relaxed for the Defense, they may be relaxed during rebuttal and surrebuttal to the same degree.

**Conclusions of Law:**

**Government Motion for Judicial Notice:**

1. For the matters where the sole Defense objection is relevance, the Court will take Judicial Notice of the adjudicative fact subject to a demonstration of relevance by the Government at trial. Thus, the remaining Government Judicial Notice requests at issue are:

(b) LTC Lee Packnett was quoted in a New York Times article, dated 18 March 2010.

(c) A New Yorker profile of Julian Assange, titled "No Secrets: Julian Assange's Mission for Total Transparency" was dated 7 June 2010.

(e) Al-Qaeda in the Arabian Peninsula is listed as a foreign terrorist organization by the Department of State and is, in fact, an enemy of the United States.

(h) ["Inspire" is a magazine.] It advocates violent jihad and promotes the ideology of AQAP. [The bracketed portion has only a relevance objection.]

2. In addition to relevance, the Defense objects to (b) and (c) as hearsay; the portion of (e) designating Al-Qaeda in the Arabian Peninsula as listed as a foreign terrorist organization by the DOS and as an enemy of the United States; and the portion of (h) stating "It advocates violent jihad and promotes the ideology of AQAP" because the designation by DOS occurred on 19 January 2010, after the accused's alleged misconduct.

3. The Government asserts that the information the Government seeks to be judicially noticed in (b) and (c) will be used by the Government for a non-hearsay purpose. The Court will defer ruling on whether to grant Judicial Notice on (b) and (c) until the Government offers the evidence at trial. The Court is in a better position to make relevance/hearsay determinations at that time.

4. The time-period in the charged offenses is from on or about 9 November 2009 – on or about 27 May 2010. The designation of Al-Qaeda in the Arabian Peninsula as listed as a foreign terrorist organization by the DOS occurred on 19 January 2010, within the time-period of the charged offenses. The Court will take judicial notice that Al-Qaeda in the Arabian Peninsula was listed as foreign terrorist organization by the DOS on 19 January 2010 and, since that date, is an enemy of the United States.

5. The Court declines to take judicial notice of the portion of (h) stating "It advocates violent jihad and promotes the ideology of AQAP." This statement requires the Court to draw an inference. Any inferences, linkages, argument, and legal conclusions to be gleaned from the adjudicative facts judicially noticed are appropriately presented to the fact finder by the parties, not the Court.

**Defense Motion for Judicial Notice – Damage Assessments:**

1. The Court finds the damage assessments and their contents, to include the draft DOS damage assessment, to be admissible as public records under MRE 803(8). The Government has not challenged their authenticity. By the Court taking judicial notice of the damage assessments, the Defense does not have to provide further evidence of authentication.

2. The Court held on 19 July 2012 and 13 January 2013 that evidence of actual damage, to include the damage assessments, is not relevant during the merits portion of the trial.

3. Should there be sentencing proceedings in this case, the Court will take judicial notice of the existence of the damage assessments, that each was created or compiled by ONCIX, IRTF, and DOS and the dates they were created or compiled. The Court will take judicial notice that the DOS damage assessment is the most current damage assessment prepared by DOS and that it is a draft.

4. The contents of the damage assessments are not adjudicative facts. Any inferences, linkages, argument, and legal conclusions to be gleaned from the damage assessments are appropriately presented to the fact finder by the parties, not the Court.

**Defense Motion for Judicial Notice – H.R. 553 and Congressional Hearings Discussing Classification.**

1. The Court has before it the Government Motion to Preclude Evidence of Over-classification and the Defense Motion to Take Judicial Notice of H.R. 553 and Congressional Hearings Discussing Classification.

2. Both motions are related. The Court takes them under advisement and will issue a supplemental ruling regarding use of evidence of over-classification on the merits and/or sentencing and on the Defense request for judicial notice regarding over-classification.

**RULING:** The Government and Defense Motions for Judicial Notice are **GRANTED IN Part** as set forth above.

1. The Court will take judicial notice of the following adjudicative facts for the Government: (6) – (9), (d), (e) as modified to add the date of designation by DOS as 19 January 2010, (1)-(6), (a) and that portion of (h) upon a demonstration of relevance, and (b) and (c) upon a demonstration of relevance and use as non-hearsay or as a hearsay exception.

2. The Court will take judicial notice of the following adjudicative facts for the Defense during the Sentencing phase of the trial: existence of the damage assessments, that each was created or compiled by ONCIX, IRTF, and DOS and the dates they were created or compiled. The Court will take judicial notice that the DOS damage assessment is the most current damage assessment prepared by DOS and that it is a draft.

3. The Court takes the Defense Motion for Judicial Notice of H.R. 553 and Congressional Hearings Discussing Classification under advisement along with the Government Motion to Preclude Evidence of Over-Classification and will issue a supplemental ruling on both matters.

So **Ordered** this 16th day of January 2013.

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