

## UNITED STATES

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U.S. Army, (b) (6)

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE MOTION FOR  
JUDICIAL NOTICE OF  
CENTCOM CLASSIFICATION  
ASSESSMENT OF APACHE  
VIDEO AND TRANSCRIPT OF  
PROSECUTION EXHIBIT 15**

DATED: 15 JUNE 2013

1. PFC Bradley E. Manning, by and through counsel, moves this Court, pursuant to Military Rule of Evidence (MRE) 201 and MRE 801(d)(2)(D) to take judicial notice of the CENTCOM classification assessment conducted by RADM Kevin Donegan. The Defense further requests this Court take judicial notice of the transcript for Prosecution Exhibit 15.

2. As the moving party, the Defense has the burden of persuasion. Rule for Courts-Martial (RCM) 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

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.

5. On 13 October 2010 RADM Kevin Donegan, Director of Operations at CENTCOM, conducted an assessment of the classification determination of the Apache video, which is now PE 15. *See* Enclosure 1. RADM Donegan determined:

In our view, the video in question should be deemed UNCLASSIFIED. Reference B sets out guidance for classification of materials in the CENTCOM Area of Responsibility. The guidance covers a wide range of issues, but in this instance the relevant category is on page A-26, "Specific Operational Information." Under this category, operational information may be UNCLASSIFIED if the information describes a past event in generic terms, provides no indicators of potential future operations, does not provide specific locations, unit data, TTPs, capabilities, or does not embarrass Coalition members. The subject video meets these criteria and should therefore be UNCLASSIFIED. It is possible that some elements of the video may have warranted higher classification at the time of the event, but without specific operational context we cannot now make an assessment on this.

#### WITNESSES/EVIDENCE

6. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the referenced attachments to this motion in support of its request.

#### LEGAL AUTHORITY AND ARGUMENT

A. The Statement of RADM Donegan is Proper for Judicial Notice Under MRE 201 and MRE 801(d)(2)(B)

7. 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.

8. 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. 1 STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A. SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL* 201.02[3] (2003). 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).

9. The Defense requests this court take judicial notice that the statement outlined above was made by RADM Donegan. Here, the statements fall under the second category of facts contemplated by MRE 201(b)(2). The statement is capable of accurate and ready determination, as it appears on official U.S. CENTCOM letterhead and is signed by RADM Donegan. Because the statement is facially reputable and there is no reasonable basis to question its authenticity, it is appropriate for judicial notice. MRE 201(b)(2)

B. The Statements are Admissible as Non-Hearsay Under MRE 801(d)(2)

10. Any government agency affected by the alleged leaks should be considered a party opponent. *Id.* *U.S. v. American Tel. & Tel. Co.*, 498 F.Supp. 353 (D.C.D.C. 1980) is instructive. At issue were statements made by representatives of various agencies of the Executive Branch at FCC proceedings.<sup>1</sup> The court rejected the government argument that the entire Executive Branch should not be considered a party opponent, noting that the implications of the case extended beyond just the Department of Justice (DOJ). *Id.* at 357. The court also rejected the government's contention that it should not have to offer explanations for the statements because the government's size and the varying interests of the numerous government agencies would make offering such an explanation burdensome. The court held:

[T]he underlying theoretical premise of the government's argument is troubling and cannot be accepted. Its argument in effect is that, whenever the purpose of a rule—whether of pleading or of evidence—would be better effectuated by altering the configuration of a party to which it is applicable, then the definition of that party must be changed in midstream. Carried to its logical conclusion, this position would force the courts to change the shape and size of parties, particularly in complex litigation, depending upon the part of the case being tried and the principles of law and procedure that may be relevant at any given moment. These chameleon-like shifts in the identity of the parties would upset the orderly conduct of such litigation.

For these reasons, the Court rejects the proposition that the plaintiff in this case for the purposes of the rules of evidence is the Department of Justice; it holds, as it did on September 11, 1978, that the plaintiff is the United States; and it concludes that the statements contained in the three test case documents in

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<sup>1</sup> Specifically at issue was a Brief for the Administrator of General Services, testimony of the Director for Telecommunications Policy, Office of the Secretary of Defense and Proposed Findings of Fact and Argument of the Secretary of Defense. *Id.* at 357.

question (see note 6 supra ) constitute admissions by a party-opponent under Rule 801(d)(2). *Id.*

11. The Department of Defense clearly qualifies as a party opponent in this case. PFC Manning is charged with releasing documents from the Department of Defense and is facing action under the Uniform Code of Military Justice. U.S. CENTCOM falls under the Department of Defense and, as such, must be considered a party opponent. The Director of Operations for CENTCOM, RADM Donegan, has the authority to speak for CENTCOM.

12. The statement is admissible pursuant to MRE 801(d)(2)(D). Statements by a party's agent or servant are admissible against that party as long as those statements fall within the agent's or servant's scope of authority and are made while the agency or employment relationship continued. MRE 801(d)(2)(D). Statements made in the scope of employment by a government employee may properly be admitted. *C&H Commercial Contractors v. U.S.*, 35 Fed. Cl. 246, 256 (Fed. Cl. 1996). The court in *U.S. v. Babat*, 18 M.J. 316 (C.M.A. 1984) held, "statements someone makes through an authorized agent are imputable to the principle and may be admitted in evidence against him." *Id.* at 324. The rationale for this rule is that agents or employees have an incentive not to make statements that might damage the party who retains them.

13. While some circuit courts have held that not all statements by government agents should be considered statements by a party opponent under rule 801(d)(2)(D), such holdings are predicated on the idea that an individual cannot bind the sovereign. *U.S. v. Garza*, 448 F.3d 294 (5th Cir. 2006). However, where a government agent is capable of binding the sovereign, statements from that agent are admissible under 801(d)(2)(D). *U.S. v. Salerno*, 937 F.2d 797, 812 (2d. Cir. 1991)(holding that opening and closing statements made by prosecutor in a different, but related criminal prosecution were admissible to show the government once had expressed a different theory about the alleged crime), *see also*, *U.S. v. Johnson*, --- F.Supp.2d ---, 2012 WL 1836282 (N.D. Iowa 2012)(discussing the admissibility of inconsistent factual assertions and inconsistent opinions), *U.S. v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989)(holding that a government manual on field sobriety testing issued by the government was admissible where the agency was a relevant and competent section of the government), *U.S. v. Branham*, 97 F.3d 835, 851 (6th Cir. 1996)(noting that the federal government is a party-opponent of the defendant in a criminal case and a statements by a paid informant were admissible).

14. Here, the statement for which judicial notice is requested was made by an individual with the power to speak for CENTCOM. The statements in questions are not the musings of random Soldiers posted to a blog. Rather, RADM Donegan, the CENTCOM Director of Operations, serves in a high level position and spoke on behalf of those who did/do have the ability to bind the sovereign. Moreover, his position at CENTCOM is relevant to this case because PFC Manning is charged with leaking various CENTCOM documents. Because the statements were made by party opponents within the scope of their employment and the party opponents have the ability to bind the sovereign their statements should be deemed admissible under MRE 801(d)(2)(D).

C. A Transcript of Prosecution Exhibit 15 is Admissible Pursuant to MRE 201(b)

15. Rule 201(b) allows for the Court to take judicial notice of those facts which are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Enclosure 2 provides the Court with a transcript of Prosecution Exhibit 15. The source of this information is Prosecution Exhibit 15. The transcript can easily be verified by viewing Prosecution Exhibit 15 and following along. As such, the transcript is capable of accurate and ready determination. This transcript promotes judicial economy by allowing the Court to reference the dialogue of the video without actually viewing the Exhibit. Accordingly, the Defense requests this Court take judicial notice of Enclosure 2.

CONCLUSION

16. Based on the above, the Defense requests that the Court to take judicial notice of requested adjudicate facts, and to admit these facts as admissions by a party opponent at trial.

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