

UNITED STATES

MANNIN G, Bradley E., PFC

U.S. Army, xxx-xx-9504

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,
Fort Myer, VA 22211

)
) **DEFENSE RESPONSE TO**
) **GOVERNMENT REQUEST FOR**
) **JUDICIAL NOTICE DATED**
) **24 JUNE 2013**

DATED: 25 JUNE 2013

BURDEN OF PERSUASION AND BURDEN OF PROOF

FACTS

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. The Defense does not request any witnesses be produced for this motion.

LEGAL AUTHORITY AND ARGUMENT

6. 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). 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)

7. Under MRE 201(d), a military judge should 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).

8. 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.). See Appellate Exhibit 356.

9. The Defense objects to this Court taking judicial notice of the following requests by the Government:

a. **Wikileaks released a video titled “Collateral Murder” on 5 April.** The Defense objects based on relevance. Whether or not Wikileaks released the aforementioned video on 5 April is not relevant to Specification 2 of Charge II. In order for the Government’s theory of relevance to be accepted, the Court would have to assume that Wikileaks only releases information that is “closely held” within the meaning of 18 U.S.C. § 793. The only issue that is relevant is whether the charged video was closely held or not at the time of PFC Manning’s disclosure. Its subsequent status and the release date by Wikileaks has no bearing on any fact at issue.

b. **Wikileaks released more than 390,000 records from the CIDNE Iraq database on 22 October 2010.** The Defense objects on the basis of relevance. For the reasons

stated above, the release of the records from the charged database is not relevant to determine whether or not the records were closely held. Additionally, the release of these records from the charged database does not make it more probable than not that PFC Manning stole, purloined, or converted the CIDNE Iraq database. The fact that Wikileaks, or any other news organization, published excerpts from the database on a particular date is irrelevant. Thus, any action by Wikileaks outside the period of charged misconduct is not relevant to the charged offense.

c. **Wikileaks released more than 75,000 records from the CIDNE Afghanistan database on 25 July 2010.** The Defense objects on the basis of relevance. For the reasons stated above in (a) and (b), the Defense opposes the Government's request for judicial notice.

d. **Wikileaks released more than 700 detainee assessment briefs produced by JTF-GTMO on 25 April 2011.** The Defense objects on the basis of relevance. For the reasons stated above in (a) and (b), the Defense opposes the Government's request for judicial notice.

e. **Wikileaks release of the ACIC document on 15 March 2010.** The Defense objects on the basis of relevance. For the reasons stated above in (a) the Defense opposes the Government's request for judicial notice.

f. **Base salary of a Specialist, E-4 from 2003-2010.** The Defense objects based upon relevance. How much an E-4 makes in a given year is not relevant to how much the charged database is valued for the purposes of 18 U.S.C. § 641. Should the Government wish to introduce evidence of this nature, it is free to do so through its witnesses subject to objection on relevance and the opportunity for the Defense to cross-examine the witness.

g. **Base salary of GS-12, from 2003-2010.** The Defense objects based upon relevance for the reasons stated above in (f).

h. **Existence of AR 25-1, dated 13 NOV 2007 and the definition of "Information System" from AR 25-2.** The Defense objects based upon relevance. PFC Manning is not charged under AR 25-1. While PFC Manning is charged under 25-2, PFC Manning is not charged with a Specification under 25-2 that requires proof of value. The definitions and statements provided by this unrelated regulation do not establish, or help establish, that the charged databases in this case had value. The Government is free to elicit witness testimony that the allegedly stolen, purloined, or converted databases had value. If the Government elects to do so, the Defense will then have the opportunity to object on relevance, personal knowledge, and hearsay grounds. The Defense will also have the opportunity to cross examine the witness. The Government, however, should not be permitted to rely upon an unrelated regulation that has nothing to do with the charged databases to establish value.

i. **Existence of DoD 5400.11-R, dated 14 May 2007.** The Defense objects based upon relevance for the reasons stated above in (h).

j. **Thanksgiving 2009 was on November 26.** The Defense does not object to the fact that Thanksgiving Day occurred on 26 November in 2009.

k. **The term, “.is,” is the top-level internet domain of Iceland.** The Defense objects based on relevance. The information is not relevant to prove that PFC Manning acted wantonly as charged in Specification 1 of Charge II. The Court has received testimony from numerous witnesses who testified that PFC Manning was permitted to search for whatever he wanted on the SIPRNET during his work day or free time. As such, any specific search allegedly done by PFC Manning does not make it more likely than not that PFC Manning acted “wantonly” and thus, is not relevant.

l. **Positions of various Icelandic politicians.** The Defense objects based on relevance for the reasons stated above in (k).

m. **Internet chat lingo and their meanings.** The Defense does not believe that this “lingo” is proper for judicial notice. The Court can use its common sense when reading the chats, but several of the meanings are open to interpretation and thus do not fall within the type of information that can be the subject of judicial notice. The Government is free to provide its interpretation of the various terms in the chat logs through its witnesses. If the Government elects to do so, the Defense will then have the opportunity to object on relevance, personal knowledge, and hearsay grounds. The Defense will also have the opportunity to cross examine the witness.

CONCLUSION

10. Based on the above, the Defense requests that the Court deny, in part, the Government’s request for judicial notice.

Respectfully Submitted

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel