IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE REPLY TO PROSECUTION RESPONSE TO SUPPLEMENT TO DEFENSE MOTION TO COMPEL DISCOVERY #2**
v.	)	
	)	**DEFENSE MOTION FOR MODIFIED RELIEF**
MANNING, 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	)	2 June 2012

RELIEF SOUGHT

1. In its Motion to Compel Discovery #2, the Defense sought the following:

> In accordance with the Rules for Courts Martial (R.C.M.) 701(a)(2), 701(a)(5), 701(a)(6) and 905(b)(4), Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 846; and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court compel the requested discovery. Specifically, the Defense requests that the Court order:
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> a) Full investigative files by CID, DIA, DISA, and CENTCOM/SOUTHCOM related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks be produced to the Defense under R.C.M. 701(a)(2). Further, that the HQDA file related to the 17 April 2012 request be produced under R.C.M. 701(a)(2) and 701(a)(6).
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> b) FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX files in relation to PFC Manning and/or Wikileaks be produced to the Defense, or alternatively, that they be produced for *in camera* review to determine whether the evidence is discoverable under R.C.M. 701(a)(2) as being material to the preparation of the defense. If the Court concludes that the files of the above agencies are not within the possession, custody, or control of military authorities, the Defense still requests that the Court order production of the entire file under the "relevant and necessary" standard under R.C.M. 703(f);
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> c) The Government state with specificity the steps it has taken to comply with its requirements under R.C.M. 701(a)(6);
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> d) The Government produce *Brady* materials from certain identified agencies;

e) The Government produce all evidence intended for use in the prosecution case-in-chief at trial obtained from DIA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, ONCIX and any aggravation evidence that it intends to introduce during sentencing from the above named organizations.

2. The Defense modifies its request for relief as specified below:

a) The Defense moves for the Court to suspend these proceedings and order the Government state with specificity the steps it has taken to comply with its requirements under R.C.M. 701(a)(6). Once a complete accounting is done, the Court and the parties can determine the best way forward. The Defense requests that the Court hear oral argument on the Defense's request for a due diligence statement prior to hearing oral argument on the Motion to Compel Discovery.

b) The Defense also moves to compel the following discovery:

i) The four T-SCIF computers that the Government represented would be produced on 18 May 2012. On 16 April, the Government stated it was confident that the 4 computer hard drives could be provided by 18 May 2012. The computer hard drives were not provided on 18 May 2012. On 29 May, the Defense asked when it should expect to receive the hard drives. The Government indicated that they would have approval by the end of the week. As of 2 June, 2012, the Government still has not produced these four hard drives. *See* Attachment A.

ii) The FBI impact statement under R.C.M. 701(a)(2) and 701(a)(6);

iii) The ONCIX damage assessment under R.C.M. 701(a)(2) and 701(a)(6).

WITNESSES/EVIDENCE

3. The Defense does not request any witnesses for this motion but does request the Court to consider the referenced documents and the previous pleadings of the parties.

FACTS

4. For the benefit of the Court, the Defense would like to provide a timeline with respect to requests for discovery from the Department of State, along with supporting attachments. This timeline will aid the Court in determining issues raised in the Defense's Motion to Compel Discovery #2.

Discovery Request for Information from Department of State

8 December 2010: Discovery request for "All forensic results and investigative reports by the Department of State regarding the information obtained by Wikileaks as referenced by Assistant Secretary of State for Public Affairs [redacted]. Additionally,

any specific damage assessment by the Department of State regarding the disclosures of the diplomatic cables by WikiLeaks. Any assessment, report, e-mail, or document by Secretary of State [redacted] regarding the disclosures of diplomatic cables by Wikileaks. Any report, e-mail, or document discussing the need for the State Department to disconnect access to its files from the government's classified network." Attachment D to Appellate Exhibit XVI at paragraph 2(b).

16 February 2011: Discovery request for "Access to all classified information that the government intends to use in this case. To include any damage assessment or information review conducted by any governmental agency or at the direction of a government agency." Attachment D to Appellate Exhibit XVI at paragraph 2(e).

13 October 2011: Discovery request for "Department of State: Any and all documentation relating to a review of the alleged leaks in this case and any specific damage assessment by the Department of State regarding the disclosure of diplomatic cables, the subject of this case, by WikiLeaks." Attachment F to Appellate Exhibit XVI at paragraph 1(c)(vi).

22 November 2011: Discovery Request for Production of Evidence Article 32 "Department of State: The Department of State formed a task force of over 120 individuals to review each released diplomatic cable. The task force conducted a damage assessment of the leaked cables and concluded that the information leaked either represented low-level opinions or was already commonly known due to previous public disclosures. According to published reports in multiple new agencies, including the Associated Press, The Huffington Post, and Reuters, internal U.S. government reviews by the Department of Defense and the Department of State have determined that the leak of diplomatic cables caused only limited damage to U.S. interests abroad, despite the Obama administration's public statements to the contrary. "A congressional official briefed on the reviews stated that the administration felt compelled to say publicly that the revelations had seriously damaged American interests in order to bolster legal efforts to shut down the WikiLeaks website and bring charges against the leakers. According to the published account 'We were told (the impact of WikiLeaks revelations) was embarrassing but not damaging,' said the official, who attended a briefing given in late 2010 by State Department officials. National security officials familiar with the damage assessments being conducted by defense and intelligence agencies told Reuters the reviews so far have shown "pockets" of short-term damage, some of it potentially harmful." *See generally*, http://www. huffingtonpost. com/2011/01/19/us-official-wikileaks-rev_n_810778.html). This determination is at odds with the classification review conducted by the OCA. [redacted] should not be permitted to espouse an opinion which is inconsistent with the damage assessments conducted by the government. *Brady v. Maryland*, 373 U.S. 83 (1963); *Jencks v. United States*, 353 U.S. 657 (1957)." Attachment H to Appellate Exhibit XVI at paragraph 5(e).

1 December 2011: Discovery Request to Compel Production of Evidence Article 32 "The collateral investigations by the Department of State, the Federal Bureau of Investigation, the Defense Intelligence Agency, the Office of the National Counterintelligence Executive and the Central Intelligence Agency. The defense is entitled to receive any forensic results and investigative reports by any of the cooperating

agencies in this investigation. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999); *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989); *United States v. Brooks*, 966 F.2d 1500, 1503 (1992); Article 46, Uniform Code of Military Justice (UCMJ). *The government responded that it "has no knowledge of any Brady or Jencks material ... [and] has provided all forensic results and investigative reports requested that are in its possession and that the United States has authority to disclose.'"* Attachment J to Appellate Exhibit XVI at paragraph 7(d)(iv).

"The Department of State damage assessment review conducted by its task force of over 120 individuals. This task force reviewed each released diplomatic cable. *See* Appendix G. *The government responded that it "has no knowledge of any Brady or Jencks material ... [and] does not presently have the authority to disclose damage assessments, if any, cited by the defense and will make a determination whether to provide the information if and when it becomes available.'"* *Id.* At paragraph 7(d)(vi).

"This is a news story by Reuters indicating the State Department representatives testified before a congressional hearing on the release of diplomatic cables. According to the news accounts, the State Department official told Congress that they the impact of the releases were embarrassing but not damaging." Appendix G to Attachment J to Appellate Exhibit XVI.

20 January 2012: Discovery request: "Does the Government possess any report, damage assessment, or recommendation by the Department of State concerning the alleged leaks in this case? If yes, please indicate why these items have not been provided to the Defense. If no, please indicate why the Government has failed to secure these items." Attachment L to Appellate Exhibit XVI at paragraph 3(e).

Other Relevant Facts

10 March 2011: Ambassador [redacted] testifies to Congress about the existence of a Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team, and the DOS report to Congress. *See* Attachment B.

2 December 2011: the Defense submitted its witness list to the Article 32 Investigating Officer, naming Ambassador [redacted] as witnesses. *See* Court's Ruling Appellate Exhibit XXXIII.

14 December 2011: the IO determined that [redacted] was not reasonably available. *Id.*

20 January 2012: the Defense filed with the Government a Discovery Request wherein it asked for complete contact information for Ambassador [redacted]. *Id.*

23 January 2012: the Defense filed a request for an oral deposition of [redacted] with the General Court-Martial Convening Authority. *Id.*

27 January 2012: the Government responded that it would not provide contact information for [redacted] because he was not a Government witness, but if he later became a Government witness they would provide access. *Id.*

1 February 2012: the Defense requested contact information for Ambassador [REDACTED] in order to explore calling [REDACTED] as a Defense witness. The Government indicated it would provide contact information for [REDACTED]. *Id.*

1 February 2012: the GCMCA denied the Defense's request to order a deposition of [REDACTED]. *Id.*

16 February 2012: the Defense filed its Motion to Compel a deposition of [REDACTED]; the Defense also filed Motion to Compel Discovery #1, seeking *inter alia*, damage assessments by the Department of State. *See* Appellate Exhibits VII and VIII.

28 February 2012: the Defense renewed its request for contact information for [REDACTED]. *See* Attachment A to Appellate Exhibit XXV.

29 February 2012: the Government indicated that the Defense would have to submit a *Touhy* request in order to speak with [REDACTED]. The Government asserted that it first became aware of the possible *Touhy* issue earlier that very week. *See* Attachment C to Appellate Exhibit XXV.

13 March 2012: the Defense filed its Reply to the Government's Response to the Defense's Motion to Compel a deposition of [REDACTED]; the Defense also filed a Reply to the Government's Response to Motion to Compel Discovery. *See* Appellate Exhibits XXV and XXVI.

15 -16 March 2012: Court considers the Defense's Motion to Compel Discovery and Depositions.

16 March 2012: Court issues its Ruling on Defense Motion to Compel Depositions. The Court denied the Defense's request to compel a deposition of [REDACTED]. The Court determined that the Government has not impeded the Defense's access to [REDACTED] and that the Government has volunteered to assist the Defense in coordinating interviews and an in any applicable *Touhy* process. The Court also determined that there was no evidence that [REDACTED] would not be available for trial. *See* Appellate Exhibit XXXIII.

23 March 2012: The Court issued its Ruling on the Defense Motion to Compel Discovery. *See* Appellate Exhibit XXXVI. The Court held that the Government had a due diligence duty to search for evidence that is favorable to the Defense and material to guilt or punishment. This included a due diligence duty to search any damage assessment pertaining to the alleged leaks in this case made by the DOS. The Court ordered the Government to notify the Court NLT 20 April 2012 whether any forensic results or investigative files relevant to this case existed within the DOS. Finally, the Court ordered the Government to immediately begin the process of producing the damage assessment from the DOS. *Id.*

23 March 2012: the Defense submits its *Touhy* request by Fed-Ex to the DOS and emailed a copy of the request to the Government listing [REDACTED] as the DOS witness and specifically discussing the Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team, and DOS reporting to Congress. *See* Attachment C.

26 March 2012: The Government sought clarification based upon the Court's 23 March Order. The Government stated that the DOS had not completed a damage assessment. The Government also stated "... although the Department has monitored and continues to monitor the impact of the release of the cables discussed in Under Secretary's [redacted] declaration in this case, the Department has not finalized an assessment of the damage to date, or over a shorter interim period of time. The Department only has a working draft that is not complete." The Government also acknowledged that it was "aware of investigative files maintained by the FBI and DOS." *See* Attachment B.

27 March 2012: the Defense sent to the Government and Court the statement by [redacted] [redacted] before the Senate Committee on Homeland Security and Governmental Affairs. The email discussed in detail the Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team, and DOS reporting to Congress. The Defense maintained that is issue was not whether there is a "completed" damage assessment, but whether the DOS had done what [redacted] testified to at the Senate hearing. The Defense stated that all of this information should be produced to the Defense under paragraphs 4-6 of the Court's 23 March 2012 Ruling. *Id.*

28 March 2012: the Government sent an email to the Court and Defense stated that it disagreed with the Defense's interpretation of [redacted] statement. The Government requested an opportunity to discuss the issue at an 802 conference that day. *See* Attachment D.

28 March 2012: the Court conducted a telephonic 802 session with the parties. The Court indicated that the Government would need to either produce what the DOS had, or produce a witnesses to testify regarding the DOS's efforts.

9 April 2012: the Government stated that they had been notified that the legal advisor to the DOS had received the Defense's *Touhy* request. *See* Attachment E.

9 April 2012: the Defense asked if the DOS had done anything on the request since it had been two weeks since the Defense Fed-Ex'd the request to the DOS. *Id.*

13 April 2012: the Defense requested the Government to provide it with an update on the *Touhy* request for [redacted]. *Id.*

16 April 2012: the Government stated that the DOS was processing the Defense's *Touhy* request and might have an answer by the end of the week. *Id.*

17 April 2012: the Court sent an email to the parties requesting that the Government advise the Court as to the State Department representative would be available for the 17 April Article 39(a). *See* Attachment F.

20 April 2012: the Government provided notice to the Court and the Defense that the DOS had forensic results and investigative files. The Government represented that it had reviewed this information for evidence that was favorable to the accused and material to either guilt or punishment. The Government also represented that "prior to the Court's order, the United States produced this information to the defense." See Appellate Exhibit LVI.

20 April 2012: The Government sent an email to the parties indicating that the DOS witness was no longer needed since the DOS would authorize the Government to submit, *in camera* and *ex parte*, the classified draft assessment along with an explanation of the draft, for the Court's review. The Government maintained that "the draft damage assessment was not discoverable under RCM 701(a)(6) or *Brady* because it was a mere draft." *See* Attachment F.

11 May 2012: the Court issued its Ruling Granting the Government's Motion to Reconsider the Court's ruling of 23 March 2012 with respect to the DOS Damage Assessment. Having reconsidered the ruling, the Court found that the fact that the DOS Damage Assessment is a draft does not make the draft speculative or not discoverable under RCM 701. As such, the Court order the Government to comply with the 23 March 2012 Ruling. *See* Court Ruling 11 May 2012.

15 May 2012: the Defense requested if the Government had any update on the *Touhy* request for [redacted]. *See* Attachment E.

15 May 2012: the Government stated that had made an inquiry this morning and should be hearing back from the DOS in the next day or two. The Government had not provided any further update on the *Touhy* request. *Id.*

ARGUMENT

A. The Government's Lack of Due Diligence With Respect to the Department of State

5. The Government makes a big production in its Response to Supplement to Defense Motion to Compel Discovery #2 [Government Response to Supplement] that "until recently, the defense has not requested any information from, yet alone reference [sic.], the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team or the DoS Reporting to Congress." Government Response to Supplement, p. 2. It states that "neither the pre-referral discovery requests nor the Defense Motion to Compel Discovery makes such a request." *Id.* It further states that it disputes paragraph 6 "insofar as the defense stated that it made discovery requests for "the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team or the DoS Reporting to Congress." *Id.* In footnote 2, it states again, "until 10 May 2012, the defense made no request for [these items]. … The prosecution has repeatedly stated its position that the requests are not specific to inform a search." *Id.* As if its position was not clear, the Government states once again, the "defense had not requested this information with specificity until three weeks ago." *Id.* at p. 3. The Government's submissions suggest that it was *only just now* learning that the Department of State had information related to the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team or the DoS Reporting to Congress. Nothing could be further from the truth.

6. By its own admission, [redacted] testified before Congress as to the existence of the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress on 10 March 2011. *See* Government Response to Supplement, p. 1. Accordingly, the Government had notice 15 months ago that there were documents within the Department of State that could contain *Brady* material.

7. Moreover, as the above timeline reveals, the parties have been litigating about this very issue for months. The timeline shows:

- There have been six pre-referral discovery requests for material within the Department of State with respect to the alleged leaks;
- The Defense moved to compel Department of State damage assessments at the Article 32 hearing;
- The Defense moved to compel damage assessments, forensic results and investigative files from the Department of State in the Motion to Compel Discovery #1;
- The Government has knowledge that the Defense has been seeking to depose [redacted] [redacted] about for approximately 8 months;
- The Defense's *Touhy* request on 23 March 2012, which a copy was provided to the Court and Government counsel, referenced the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress; and
- The Defense submitted [redacted] declaration (regarding the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress) to the Court on 27 March 2012.

8. One must also not forget the context in which all these battles were fought. The Government refused to acknowledge what the Department of State had and did not have in terms of documentation with respect to the leaks (in fact, the Government referred to the Department of State damage assessment as "alleged"). For instance, in its Response to the Defense Motion to Compel #1, it stated "The United States disputes any allegation, including those relating to whether, when, and to what extent select agencies, departments and organizations reviewed the compromised information, supported by unofficial public statements." Appellate Exhibit XVI, p. 1. The Defense then proffered publicly available documents referring to the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress to prove to the Court that the Department of State, a closely aligned agency, had information that was clearly relevant to the charged offenses. For the Government to imply that it was not "on notice" of material within the Department of State because the Defense had not made a request for this specific material is unbelievable.

9. Toward the end of the Government Response to Supplement, it states in passing, that "[t]he prosecution agrees with the defense that the prosecution already bore this obligation [to search the files of Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress] (i.e., files of closely aligned agencies under Williams." *Id.* p. 5. If the Government agrees that it was already obligated to search these files under *Brady*/*Williams*, why are there no less than *five* references in its submission to the fact that the Defense did not file a formal discovery request for this particular information? Such a request is entirely superfluous given the Government's: a) actual knowledge that these documents exist, and; b) the Government's existing obligations under *Brady* to search these documents.[1]

[1] The Government states that the "Supplement itself confirms the defense's ultimate objective in questioning the DoS witness where the defense proffers that it will ask the witness 'in what form' any documents are in; namely, to later formulate discovery requests." Government Response to Supplement, p. 1. The Government's position makes no sense. The Defense has already submitted no less than nine discovery requests (including motions to compel) for

10. The Defense's latest discovery request for *Brady* from the files of Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress did not trigger the Government's *Brady* obligation. The obligation already existed once it had knowledge (constructive or actual) that such files existed within the Department of State. At the very latest, the Government's *Brady* obligation to search through these files crystallized in March 2011, when Ambassador [redacted] made his public declaration.[2] Since then, 15 months have elapsed and the Government has not yet received, much yet reviewed, these files. *See* Government Response to Supplement, p. 2 ("the prosecution *intends to* review all [DOS] documents for *Brady*..."); p. 3 ("the DoS is currently working to provide all responsive files, including any information from the groups listed above"). The fact that the *Department of State* "chose to prioritize the production of the damage assessment" is irrelevant. *See* Government Response to Supplement, p. 3. The Department of State does not bear *Brady* obligations, the Government does. While the Department of State is a large organization and obtaining *Brady* and other discoverable material may be "challenging [and] time-consuming," there is no excuse – and can be no excuse – for letting over two years go by since placing PFC Manning in pre-trial confinement without reviewing Department of State documents for *Brady*. Government Response to Supplement, p. 5.

11. There is no reason why production and review of Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress could not have been accomplished simultaneously with the production of the Department of State damage assessment (though the Defense submits that such a review and production should already have occurred, at the latest, in the March 2011 timeframe when Ambassador [redacted] made his statements). In other words, the production of the Department of State damage assessment and the review/production of other Department of State files (including, but not limited to, those four referenced files) are not mutually exclusive.

12. As if to justify its failure to review Department of State files for *Brady* at this late date, the Government points out that "as of 18 May 2012, the DoS damage assessment has been available for defense counsel to inspect pursuant to the prosecution's filing." Government Response to Supplement, p. 5. The Government's statement is only a half-truth. The Government has imposed arbitrary limitations upon the Defense's access to the Department of State damage assessment. In particular, the Defense must give the Government at least four duty days' notice in order to access the damage assessment. This would mean that the earliest the Defense could have accessed the damage assessment was 25 May 2012 (one week ago). The Government also imposed another limitation on the Defense's access: Defense counsel could only access the document in the presence of its security experts. Thus, access involves coordinating with the Government and its own experts, who have many other responsibilities. During the telephonic 802 conference, the Defense raised the issue of the restrictions placed upon access. In particular, the Defense stated that it was difficult to coordinate with Defense experts to be present because

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information from the Department of State. If the Government provides this information, as it is required to do, there is no need for "later discovery requests."

[2] The Defense submits that the obligation may have actually crystallized much earlier. By its own admission, the Government and the Department of State are closely aligned and share a close working relationship. It has a duty to inform itself, therefore, of files within the Department of State which might contain *Brady* material. If the Mitigation Team, Working Group, etc. were assembled (as the Defense suspects) in the immediate aftermath of the leaks, the Government bore an obligation to search these files earlier than March 2011.

the experts' command was tasking them to do duties that took them out of the D.C. area. The Defense followed-up with MAJ Fein on this issue, providing him with a Memo for the Convening Authority which confirmed for the experts (and their command) that their first priority was this case. On 1 June 2010, the Government – rather than making it *easier* for the Defense to access the Department of State damage assessment, made it *harder*. The Government is now stating that the Defense must submit a formal request through the convening authority to re-approve the appointment of the Defense experts. The convening authority would then have the ability to either approve or *disapprove* the necessity for these experts. *See* Attachment G.

13. The bottom line is that the Government is closely aligned with the Department of State. It had knowledge – at the very latest, in March 2011 – that the Department of State had created the Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team and that the Department of State had reported to Congress. It likely knew about these things much earlier. It had a duty in early 2011, not in mid-2012, to arrange for a review of these files as part of its *Brady* obligations. Instead, it willfully chose to ignore its *Brady* obligations and, even worse yet, obfuscate for the Defense and the Court what materials the Department of State had and didn't have. The Government's utter lack of diligence with respect to the Department of State is emblematic of its "diligent *Brady* search" in other closely aligned agencies.

B. Additional Facts In Support of the Defense's Request for a Due Diligence Statement

14. The Government raises new issues in its latest submission that further bolster the Defense's argument that the Court should order a due diligence accounting.

15. First, the Government states that "the prosecution continues to search [] DIA, DISA, CENTCOM, and SOUTHCOM files for Brady and RCM 701(a)(6) material." Government Response to Supplement, p. 5. Again, this is a startling admission. These are the military's *own files*. Why hasn't the Government already searched its own files? Over two years have elapsed since the beginning of the case, trial is three months away, and the Government "continues to search" its own files? Much like the HQDA memo, if the Government has not already performed a *Brady* search in respect of files in its own backyard, it cannot be trusted to have diligently searched the files of other organizations. The Defense believes that there are only two possible explanations for this utter lack of diligence: a) the Government has not yet, after two years, searched its own files for some inexplicable reason; b) the Government already searched its own files using the wrong *Brady* standard; now that the Court clarified for the Government what is *Brady* obligations entail, the Government is going back and secretly doing the "re-review" that the Defense said was necessary.[3] Either way, the Government's conduct is inexcusable.

16. Second, the Government casually mentions that it "discovered that the FBI conducted an impact statement, *outside of the FBI law enforcement file*, for which the prosecution intends to file an *ex parte* motion under MRE 505(g)(2)." Government Response to Supplement, p. 4. What does the Government mean that it "discovered" that the FBI conducted an impact statement? The Government and the FBI engaged in a joint investigation of the accused and are

[3] See Appellate Exhibit XXXI.

closely aligned. The Defense has repeatedly asked for documents from the FBI; moreover, the Government has a duty to turn over *Brady* even in the absence of a Defense Request. *See* Government Response to Supplement, p. 6 ("The prosecution shall, and will, disclose Brady ... even in the absence of a defense request.").

17. On 20 January 2012, the Defense made the following discovery request: "Does the Government possess any report, damage assessment, or recommendation as a result of any joint investigation with the Federal Bureau of Investigation (FBI) or any other governmental agency concerning the alleged leaks in this case? If yes, please indicate why these items have not been provided to the Defense. If no, please indicate why the Government has failed to secure these items." *See* Attachment L to Appellate Exhibit VIII at paragraph 3(b). On 31 January 2012, the Government responded: "The United States will not provide the requested information. The defense has failed to provide any basis for its request. The United States will reconsider this request when provided with an authority that obligates the United States to provide the requested information." Attachment N to Appellate Exhibit VIII, paragraph 3(b).

18. Apparently, despite the Defense's discovery request, the Government did not disclose the existence of the FBI impact statement in January. When was the impact statement prepared? Why is the Government only now "discovering" its existence, as if by happenstance, three months before trial? Presumably, the impact statement is something that has been in the works for a while. In other words, the FBI impact statement did not just magically appear out of thin air. Why has the Government not disclosed its existence to the Defense or to the Court? This latest revelation by the Government shows that the Court and the Defense are left completely in the dark about relevant documents that exist in closely aligned agencies until the Government decides, at its convenience, to confirm or reveal their existence. Further, the Government states that it intends to produce any *Brady* material "*as soon as possible*; however, the current case calendar outlines MRE 505 proceedings to take place a future date." Government Response to Supplement, p. 4. The subtext of this statement is that it will be months before the Defense gets access to the FBI's impact statement.

19. Third, the Government again is trying to define its way out of conducting, and providing, *Brady* discovery. The Government apparently believes that the following request for documents from the Interagency Committee Review and the House of Representatives Oversight Committee is not a "specific" request under *Williams*: Government Response to Supplement, p. 4.

> **Interagency Committee Review.** The results of any investigation or review concerning the alleged leaks in this case by Mr. [redacted], National Security Staff's Senior Advisor for Information Access and Security Policy. [redacted] was tasked to lead a comprehensive effort to review the alleged leaks in this case. *See* Defense Discovery Request Dated 8 December 2010 and 13 October 2011 within Appellate Exhibit VIII;
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> **House of Representatives Oversight Committee.** The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative [redacted]. The committee considered the alleged leaks in this case, the actions of Attorney General [redacted], and the investigation of PFC Bradley Manning. *See* Defense Discovery Request Dated 10 January 2011 and 13 October 2011 within Appellate Exhibit VIII

Government Response to Supplement, p. 4. Apparently, however, the following request for *Brady* from the President's Intelligence Advisory Board is a specific enough request:

> **President's Intelligence Advisory Board**. Any report or recommendation concerning the alleged leaks in this case by Chairman [redacted] or any other member of the Intelligence Advisory Board. *See* Defense Discovery Request Dated 13 October 2011 within Appellate Exhibit VIII;

20. The Defense cannot, under any stretch of the imagination, understand how the Interagency Committee Review and the House of Representatives Oversight Committee request is not sufficiently specific, but the President's Intelligence Advisory Board is. The Government provides no authority to suggest that this is not a specific request under *Williams*. In *United States v. Trigueros*, 69 M.J. 604 (Army Ct.Crim.App. 2010), the court found the following to be a specific request under *Williams* "copies of any and all records ... maintained by *any* health care provider, to include mental health care ... for any sessions with either Mrs. [JLC] or Mrs. [SCR]....". If the *Trigueros* request for "any and all records … maintained by any health care provider [in respect of named individuals]" is a sufficiently specific request, then so too are requests for "The results of any investigation or review concerning the alleged leaks in this case by [redacted]" or "The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative [redacted]."

21. The Government also states that the "defense has not provided a sufficient request for why Brady material … exists in these alleged records." Government Response to Supplement, p. 5. There are two problems with this statement. First, the Government is back to playing hide-the-ball by referring to these as "alleged records." *Id.* It already tried this with the "alleged damage assessments" and that did not work. Second (and more importantly), the Defense does not need to make a proffer, above and beyond the specific request, as to why *Brady* material might exist in these records. It is obvious that investigations into the harm occasioned by the leaks might reveal that the leaks did no damage – i.e. classic *Brady* material. So, it appears that we are back to square one: the Government still does not understand *Brady*.

22. Fourth, the Government continues to maintain that it is not closely aligned with ONCIX, despite the Court's ruling to the contrary. Government Response to Supplement, p. 5. The position is troubling, given the *Brady/Williams* requirement to search the files of closely aligned agencies. If the Government believes that ONCIX is not closely aligned, it must follow that it believes it does not need to conduct a *Brady* search of ONCIX's files. See *id.* at p. 5 ("The prosecution is not closely aligned under Williams with ONCIX …"). In fact, the Government states "the prosecution has not been given access to review all ONCIX records." *Id.*, p. 5. Given this statement, the Defense has serious doubts as to whether the Government is complying with its *Brady* obligations with respect to ONCIX.

23. Fifth, and probably the most troubling, is the Government's 11th hour revelation that ONCIX has in fact produced a damage assessment, despite the Government's misrepresentations to the contrary. *See also* Defense Response to Government Notice to Court of ONCIX Damage Assessment. The Government represented to the Court on 21 March 2012 that "ONCIX has not produced any interim or final damage assessment in this matter." *See* Appellate Exhibit XXXVI. As such, the Court did not address ONCIX in its 23 March 2012 ruling, other than to say that the Government needed to search ONCIX for investigative files, forensic results, and *Brady*.

24. On 24 May, 2012, MAJ Fein wrote to the General Counsel at ONCIX, stating, "[redacted]" *See* Prosecution Notice to Court of Identification of NCIX Damage Assessment, attached Letter from MAJ Fein to [redacted], May 24, 2012 (emphasis added). The reason that the Court "did not rule on NCIX's draft" was because the Government represented to the Court that ONCIX did not possess a damage assessment, in either completed or draft form. MAJ Fein makes it look like this is simply an error on the *Court's* part, stating "[redacted]" To the extent that there is an "inconsistency" it is one which the Government created when it misrepresented to the Court on 21 March 2012 that ONCIX not have "any interim or final damage in this matter."

25. The Government waited over two months to tell the Defense and the Court about the ONCIX interim damage assessment. Undoubtedly, it will justify its failure to inform the Court of the interim damage assessment by stating that it was filing a motion for reconsideration of the 23 March 2012 ruling with respect to the Department of State damage assessment. The Government cannot use its own baseless motions for reconsideration – citing one case that is not on point from 1963 – to justify its failure to correct its misrepresentation to the Court. The trial counsel owes a duty of candor to the Court. *See* Rule 3.3 AR 27-26. By holding on to this information for two months, the Government has breached it duty of candor to the Court, resulting in a further delay of discovery for the Defense.

D. Suspending the Proceedings Pending a Due Diligence Statement is Necessary to Preserve PFC Manning's Right to a Fair Trial

26. As indicated above, the Defense modifies its request for relief in that it requests that this Court temporarily suspend the proceedings while the Government is preparing a due diligence statement. The Defense would agree that this time period (which the Defense submits should be no longer than a few weeks) would not be attributable to the Defense or the Government for speedy trial purposes.

27. To recap, the Defense is still waiting for *Brady* material and material discoverable under R.C.M. 701(a)(2) from at least the following organizations:

a) Interagency Committee Review
b) President's Intelligence Advisory Board
c) House of Representatives Oversight Committee
d) Chiefs of Mission review
e) WikiLeaks Working Group
f) "Mitigation Team" created by the Department of State
g) Department of State's reporting to Congress
h) Other DOS files
i) DIA
j) DISA
k) CENTCOM and SOUTHCOM
l) April 2012 HQDA Memo

m) FBI generally; FBI Impact Statement
n) DSS
o) DOJ
p) Government Agency
q) ODNI
r) ONCIX damage assessment; ONCIX generally
s) 63 agencies and other organizations the Government has claimed to have contacted

28. The volume of unproduced discovery is staggering given that the trial is scheduled for September, a mere 3 months from now. If the proceedings are not temporarily suspended (i.e. the trial schedule proceeds as planned despite the Defense not receiving discovery) the following motions will be impacted:

1. Witness Lists (22 June 2012) – how can the Defense prepare a witness list when it has not seen discovery from over 20 different sources? [Note: the Witness List in turn impacts the Motion to Compel Experts and Witnesses (11 July 2012)]
2. M.R.E. 505(h)(1) Notice (22 June 2012) – how can the Defense give M.R.E. 505 notice when it still hasn't received all the discovery from Motion to Compel #1?
3. Motion to Compel Discovery #3 (22 June 2012) – if the Defense is still waiting for discovery from the Motion to Compel Discovery #1 and #2, how can the Defense file a motion to Compel Discovery #3?
4. Pre-Authenticate and Pre-Admit Evidence (22 June 2012) – unlike the Government, the Defense will not have the discovery to pre-admit or pre-authenticate by 22 June 2012.
5. Defense Notice of Plea and Forum (11 July 2012) – the discovery that the Defense received will enable the Defense to make informed decisions about plea and forum.
6. Speedy Trial/Article 10 (27 July 2012) – the Defense believes that is should not be forced to file a speedy trial motion until all discovery is produced; since diligence is part and parcel of a speedy trial motion, that motion cannot be resolved until the underlying discovery process is complete.

29. The Defense maintains that the Government's failures with respect to discovery have already impacted PFC Manning's right to a fair trial. The purpose of discovery is to enable the Defense to prepare its case. When the Defense is receiving discovery one month before trial (e.g. the "newly-discovered" ONCIX damage assessment; the FBI impact statement), there is no way that the Defense can adequately prepare its case. If the Government requires over two years to fulfill its "challenging" *Brady* obligations[4] (*See* Government Response to Supplement, p. 5), then surely the Defense requires some period of time longer than one month to integrate all the voluminous discovery into the case. The Defense submits that it should have, at a minimum, two to three months after all discovery is complete to prepare its case. The Government should not be able to circumvent its discovery obligations for two years, then dump discovery on the Defense last-minute, and expect that there will be a fair battle. Indeed, the Defense believes that this was the intention of the Government – to defeat its adversary by adopting untenable litigation positions designed to frustrate discovery.[5]

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[4] What is more "challenging" than a Brady search is to litigate a case without the benefit of *Brady* (and other) discovery.
[5] For instance:

30. As the Government is apt to point out, this is a complicated case involving a great deal of information. How can the Defense be expected, after it took the Government two years to collect this information, to read, process and integrate this information into its case (including identifying witnesses; developing questions for witnesses; determining how this information can be used in cross-examination; determining how this information can be used for impeachment purposes; determining which of elements of the 22 specifications can be attacked using this information, etc.).[6] To allow the Government over two years to perfect its case and to allow the Defense a matter of weeks is simply unfair. It is setting the accused up to be denied his right to a fair trial, and is setting Defense counsel up to Ineffective Assistance of Counsel claims.

31. Accordingly, the Defense believes that if we continue with the current trial schedule at this point, we will have a rush to failure. Things are slipping through the cracks; the Government is just now "discovering" new damage assessments; there is still a large volume of unproduced discovery. Accordingly, the Defense requests that this Court suspend the proceedings for two to three weeks, order the Government to account for its *Brady* obligations, and then resume the proceedings once that accounting is complete.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel

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a) Maintaining that Brady did not apply to punishment;
b) Maintaining that R.C.M. 701 did not apply to classified discovery;
c) Disputing the relevance of facially relevant items (such as damage assessments);
d) Using the R.C.M. 703 standard, instead of the appropriate R.C.M. 701 standard;
e) Referring to damage assessments as "alleged" to frustrate the Defense's access to them;
f) Maintaining that the Department of State and ONCIX had not "completed" a damage assessment;
g) Maintaining that it was "unaware" of forensic results and investigative files;
h) Resisting production of the Department of State damage assessment under the "authority" of *Giles* (which provided no legal support for its position);
i) Despite understanding Defense discovery requests, defining "damage assessments" and "investigations" to avoid producing discovery. After instructing the Defense that it should not use the term "damage assessments" to refer to informal reviews of harm (instead, to use "working papers"), to now refer to working papers as "damage assessments";
j) Insisting on a threshold of specificity for *Brady* requests that does not exist or some additional showing of relevance.

[6] The Court should bear in mind that much of this discovery will be classified, necessitating additional safeguards.