IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE REPLY TO**
v.	)	**GOVERNMENT RESPONSE TO**
	)	**DEFENSE MOTION FOR**
	)	**SPECIFIC INSTRUCTIONS: THE**
MANNING, Bradley E., PFC	)	**SPECIFICATION OF CHARGE I**
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 11 July 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.) 920(c), requests this Court to give the instructions requested in the Defense Motion for Specific Instructions: The Specification of Charge I [hereinafter Defense Motion] and the Defense Requested Instruction: Article 104 [hereinafter Defense Requested Instruction].

ARGUMENT

2. The Government is incorrect that a "knowingly and intentionally" requirement for the actual knowledge element of Article 104, 10 U.S.C. § 904, Uniform Code of Military Justice (UCMJ), would transform Article 104 into a specific intent offense. Indeed, it is the Government's proposed definition of "knowingly" that would transform Article 104 into something that it is not – namely, an Article that punishes negligent acts. Finally, the Government's attempt to distinguish the mens rea standard of Offense 26 of the Military Commissions Act from the mens rea required for Article 104 is meritless.

3. Thus, for these reasons, this Court should give the Article 104 instructions requested by the Defense.

A. A "Knowingly and Intentionally" Requirement Does not Render Article 104 a Specific Intent Offense

4. The Defense Motion carefully explained that the "intentionally" component of its proposed "knowingly and intentionally" requirement was not to be understood as converting Article 104 into a specific intent offense. Nevertheless, the Government, either misunderstanding the Defense's arguments to the contrary or disregarding them entirely, spends considerable effort lambasting the "intentionally" component of the Defense proposed instruction as converting

Article 104 into a specific intent offense. This effort is fruitless. The Defense has said it once, and it will say it again: the "intentionally" component of the "knowingly and intentionally" requirement merely seeks to ensure that Article 104 does not impermissibly punish inadvertent, accidental, or negligent acts.

5. Much of the Government's Response is dedicated to equating the "intentionally" aspect of the Defense's proposed instruction to a specific intent requirement. *See* Government Response to Defense Motion for Specific Instructions: The Specification of Charge I [hereinafter Government Response], at 1 ("[redacted]"); *id.* at 2 ("[redacted]"); *id.* at 3 ("[redacted]" (citations omitted)); *id.* ("The Defense's proposed instruction requiring the Government to prove specific intent is improper. The Defense uses its request for instructions to raise anew its contention that, as charged in this case, Article 104 requires the Government to prove a specific intent to commit the offense."). Perhaps the Government genuinely misunderstood the reason for the Defense's inclusion of the "intentionally" component of the proposed "knowingly and intentionally" requirement. Perhaps the Government simply disregarded the reason for its inclusion and chose instead to argue an issue that was not raised by the Defense Motion. Either way, the Government's effort on this score was a wasted one, since at no point in the Defense Motion did the Defense intimate that Article 104 was or should be a specific intent offense.

6. Rather, the Defense Motion clearly states the reason for including the "intentionally" component of the proposed "knowingly and intentionally" requirement: to prevent Article 104 from impermissibly punishing the inadvertent, mistaken, accidental, or negligent act. Footnote 2 of the Defense Motion stated with unmistakable clarity that:

> Saying that an accused acted "intentionally" in this context is *not the same as saying an accused acted with any type of specific intent* or motive (e.g. intent to aid the enemy). *See* Appellate Exhibit LXXXI, at 3. Rather, the term "intentionally" here simply means that the accused intended to perform the act (i.e. intended to give intelligence to the enemy). In other words, it means that he did not act "inadvertently, accidentally, or negligently." [*United States v.*] *Olson*, 20 C.M.R. [461,] 464 [(A.B.R. 1955)]; *see* Appellate Exhibit LXXXI, at 2, 4 ("A person cannot violate Article 104 by acting inadvertently, accidently, or negligently.").

Defense Motion, at 6 n.2 (emphasis supplied). The Defense maintains in this Reply that if "knowingly *and intentionally*" is not the mens rea for the Article 104 offense, then this Court's instructions will run afoul of the well-established proposition that Article 104 does not punish the inadvertent, accidental, or negligent act. *See United States v. Batchelor*, 22 C.M.R. 144, 157

(C.M.A. 1956); *Olson*, 20 C.M.R. at 464; Appellate Exhibit, LXXXI, at 2, 4 ("A person cannot violate Article 104 by acting inadvertently, accidently, or negligently.").

7. Any of the loose conceptions of knowledge that the Government may wish would suffice – such as knowledge that an enemy might, could, or even would likely receive the intelligence – cannot prevent Article 104 from punishing the inadvertent, mistaken, accidental, or negligent act of an accused. For reasons discussed in the Defense Motion and in this Reply, *see* Part B, *supra*, this is especially true where, as here, an Internet-intelligence case is involved. The only way to ensure that Article 104 does not punish those who have acted inadvertently, accidentally, or negligently, *see* Appellate Exhibit LXXXI, at 2, 4, is to require the Government to prove actual knowledge on the part of the accused that he was giving intelligence *to* the enemy through indirect means. And the only sure way to require that actual knowledge be proven is to instruct the members that the accused must have knowingly and intentionally (i.e. intending to do the act or, conversely, not acting inadvertently, accidentally, or negligently) gave intelligence to the enemy through indirect means.

B. The Government's Instruction on Knowingly Would Impermissibly Allow Article 104 to Punish Negligent Acts

8. Despite its best efforts to paint the Defense proposed instruction as illegitimate, the Government is the one who has proposed an impermissible instruction for Article 104. The definition of "knowingly" anticipated by the Government's Response is far too lax; it would impermissibly allow Article 104 to punish inadvertent, accidental, or negligent acts. Accordingly, this Court should reject the Government's definition of "knowingly" and adopt the Defense's "knowingly and intentionally" standard.

9. In its response, the Government states that "[redacted]." Government Response, at 2. But simple awareness that a result is likely to follow cannot be the mens rea for an offense that cannot be consummated through inadvertent, accidental, or negligent acts. *See Batchelor*, 22 C.M.R. at 157; *Olson*, 20 C.M.R. at 464; Appellate Exhibit, LXXXI, at 2, 4 ("A person cannot violate Article 104 by acting inadvertently, accidently, or negligently."). This is especially true for Internet-intelligence cases like this one.

10. Today, virtually everyone understands that information posted on a publicly accessible website can potentially be viewed by anyone with Internet access, including enemies of the United States. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997); *see also* Defense Motion, at 5. Certainly every Army analyst understands this fact. Therefore, under the Government's understanding of "knowingly," an Army analyst would certainly be aware that the enemy might, could, or would likely be able to access intelligence placed on the Internet. Thus, in the Government's view, *anytime* an Army analyst placed *any* intelligence on the Internet, that analyst would have committed a capital offense, regardless of whether the analyst acted intentionally, inadvertently, accidentally, or negligently. This cannot be the proper understanding of Article 104's "knowingly" requirement.

11. Indeed, the American Civil Liberties Union (ACLU) has indicated that it would be "breathtaking" if this were indeed the proper interpretation of Article 104:

> **The Government's Overreach on Bradley Manning**
> Yesterday the military judge overseeing the court martial of Pfc. Bradley Manning, who is accused of giving government documents to WikiLeaks, heard a defense motion to dismiss the charge of "Aiding the Enemy." (She is expected to rule on the motion today.) The charge, which is akin to treason and is punishable by death, is separate from the main accusation against Manning — that he leaked sensitive documents to people unauthorized to receive them. The government's inclusion of this charge raises enormous problems, and a conviction of Manning in these circumstances would be unconstitutional.
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> The key to the government's case is this simple claim: that posting intelligence information to the internet aids Al Qaeda because Al Qaeda has access to the internet.
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> The implications of the government's argument are breathtaking. To understand why, it helps to recall the experience of another soldier. In December of 2004, Defense Secretary Donald Rumsfeld held a town-hall style meeting for troops who were preparing to deploy to Iraq. Following his remarks, Rumsfeld was confronted by an Army specialist who complained about the inadequacy of the combat equipment provided by the military.
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> "Our vehicles are not armored," said Specialist Thomas Wilson, an airplane mechanic with the Tennessee Army National Guard. "We're digging pieces of rusted scrap metal and compromised ballistic glass that's already been shot up . . . to put on our vehicles to take into combat. We do not have proper vehicles to carry with us north."
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> The soldier's question — and Rumsfeld's now infamous response that "you go to war with the army you have, not the army you might want or wish to have" — were front-page news around the world. And while war cheerleaders like Rush Limbaugh accused Specialist Wilson of "near insubordination" for embarrassing the defense secretary in a public forum, there was no suggestion in serious quarters that he face punishment — much less prosecution — for his words. Yet the government's decision to prosecute Manning for "Aiding the Enemy" threatens to make public comments like Wilson's grounds for criminal prosecution. The government does not contend that Manning gave any information to Al Qaeda, or even that he intended that Al Qaeda receive it. Rather, it claims that Manning "indirectly" aided Al Qaeda by causing intelligence information to be posted on WikiLeaks' website, knowing that Al Qaeda has access to the internet. Specifically, the government contends that Manning violated Article 104 of the Uniform Code of Military Justice, which provides that "any person who . . . gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or

indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct."

Article 104 is not limited to sensitive or classified information — it prohibits any unauthorized communication or contact with an enemy. So, if the government is right that a soldier "indirectly" aids the enemy when he posts information to which the enemy might have access, then the threat of criminal prosecution hangs over any service member who gives an interview to a reporter, writes a letter to the editor, or posts a blog to the internet.

For example, there are now more than a thousand enlisted military bloggers. According to Stars and Stripes, "Army officials . . . encourage troops to blog as long as it doesn't break any operational security rules, and they see it as a good release for servicemembers."

Are these bloggers aiding the enemy? Prior to Bradley Manning's case, charging anyone with that crime in the absence of any allegation or evidence that he had intended to aid the enemy would have been inconceivable.

The crux of the government's case against Manning — that he leaked sensitive documents without authorization — in no way depends on branding him a traitor. Indeed, some courts have held that leaks may be punished even if the leaker's motive was purely patriotic. In its zeal to throw the book at Manning, the government has so overreached that its "success" would turn thousands of loyal soldiers into criminals.

Which brings us back to Specialist Wilson — and, for that matter, Donald Rumsfeld. Both men spoke openly about the vulnerability of U.S. forces in Iraq. Both men surely knew that the enemy would watch their exchange on television or read about it on the internet. The notion that Wilson and Rumsfeld broke the law by communicating this information to the media and thereby "indirectly" aiding the enemy is absurd — but no more so than the government's contention that Bradley Manning did so.

See http://www.aclu.org/blog/free-speech-national-security/governments-overreach-bradley-manning.

12. This Court has held that Article 104 requires "actual knowledge" on the part of the accused that he was giving intelligence information *to* the enemy through indirect means. *See* Appellate Exhibit LXXXI, at 4 ("Article 104(2) requires *actual knowledge* by the accused that he was giving intelligence *to* the enemy." (emphases supplied)); *id.* ("The accused must *actually know* that by giving intelligence to the 3rd party he was giving intelligence *to* the enemy through this indirect means." (emphases supplied)). This Court did not hold that mere awareness that the enemy may be able to access the information or mere awareness that it would be likely that the enemy would access the information could suffice. In fact, by adopting an "actual knowledge" requirement this Court implicitly rejected any notion that bare awareness that a particular result

was likely could satisfy the mens rea of Article 104. *See id.* ("A person cannot violate Article 104 by acting inadvertently, accidently, or negligently."). Other Article 104 case law fully supports this Court's adoption of the "actual knowledge" requirement. *See Batchelor*, 22 C.M.R. at 157; *Olson*, 20 C.M.R. at 464.

13. Notwithstanding this Court's ruling, the Government has attempted to water down beyond recognition the "actual knowledge" requirement adopted by this Court. Its Response focused primarily on unwarranted concerns that the Defense proposed instruction turned Article 104 into a specific intent offense. However, the Government also subtly sought to replace the "actual knowledge" mens rea with one requiring mere awareness of a likely result (i.e. constructive knowledge). This back door substitution cannot be permitted. Since this Court's ruling requires that "[t]he accused must actually know that by giving intelligence to the 3rd party he was giving intelligence to the enemy through this indirect means[,]" Appellate Exhibit LXXXI, at 4, an accused cannot be found guilty of giving intelligence to the enemy where he gives intelligence to a third party with the mere awareness that the enemy might, could, or even would likely receive the intelligence. Actual knowledge that the accused was giving intelligence information *to* the enemy through indirect means is the requisite mens rea, *see id.*; mere awareness of a likely result is not. The Government's proposed standard would impermissibly sweep inadvertent, accidental, and negligent acts under Article 104's reach.

14. One must also recall that a prosecution such as this one has *never been maintained* in the history of the United States. This will be the first case in American history to consider whether causing information to be posted on the internet constitutes "indirectly" giving intelligence to the enemy. Since there is absolutely no precedent for a prosecution of this nature, this Court should err on the side of caution and ensure that panel members truly understand that "actual knowledge" cannot be satisfied by showing awareness of a possible, probable or likely result. Rather, the accused must have intended to give (as in, the act was volitional) intelligence to the enemy through the indirect means. While the accused did not have to *intend to aid* the enemy, he must have *intended to give* intelligence to the enemy.

15. Accordingly, this Court should reject that loose definition of "knowingly" and adopt the only sensible alternative: the "knowingly and intentionally" standard embodied in the Defense's proposed instructions.

C. A "Knowingly and Intentionally" Requirement is Supported by Offense 26 of the Military Commissions Act

16. Finally, the Government's attempt to distinguish Offense 26 of the Military Commissions Act from Article 104 is severely flawed in several respects. In its Response, the Government identified three ostensibly relevant differences between Offense 26 and Article 104: Offense 26 has a loyalty element absent from Article 104; Offense 26 uses the phrase "knowingly and intentionally" while Article 104 does not; and Offense 26 is entitled "Wrongfully Aiding the Enemy" while Article 104 is just entitled "Aiding the Enemy." None of these three "distinctions" has even an ounce of merit.

17. First, the Government argues that Offense 26 is appreciably different from Article 104 because Offense 26 has a loyalty element absent from Article 104. The Government Response states: "[redacted]")." Government Response, at 4. This contention is nonsense. For one thing, as the Government itself acknowledges, Soldiers already owe a duty of loyalty to the United States. *See id.* at 4 n.3 ("[redacted]"). This duty of loyalty is implicit in the UCMJ. For another thing, the loyalty element – whether explicit or implicit – has absolutely nothing to do with the mens rea of either Offense 26 or Article 104. The fact that Offense 26 makes one non-mens rea element explicit while Article 104 makes it implicit is irrelevant to the purpose for which the Defense compared the two offenses: to show that because Offense 26, which was modeled after and came from the same common law source as Article 104, has a "knowingly and intentionally" mens rea, Article 104 must have the same mens rea.[1]

18. Second, the Government attempts to distinguish Offense 26 from Article 104 by pointing out that Offense 26 contains a "knowingly and intentionally" mens rea while Article 104 does not. *See* Government Response, at 4 ("[redacted]"). While superficially appealing, this "distinction" breaks down upon closer examination. As was fully explained in the Defense Motion, Offense 26 does not create a new offense out of thin air. *See* Defense Motion, at 7. On the contrary, Section 950p(d) makes clear that the offenses currently listed in Section 950t, including Offense 26, are not new offenses, but are instead codifications of offenses traditionally triable by military commission. *See* 10 U.S.C. § 950p(d) ("The provisions of this subchapter codify offenses that have traditionally been triable by military commission. This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter[.]").

19. Therefore, Congress did not simply make up the "knowingly and intentionally" mens rea for Offense 26; it had to come from somewhere. Like Article 104, Offense 26 is based on the common law of war offense of aiding the enemy, which has remained substantially unchanged

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[1] The Government also relies on this loyalty element to portray as foolish the Defense's suggestion that a terrorist could receive a friendlier mens rea standard under Offense 26 than a Soldier would receive under Article 104. *See* Government Response, at 4 n.3 [redacted]."). However, the Government neglects to consider that the loyalty element upon which it relies can be satisfied by mere citizenship or resident alien status. *See* Manual for Military Commissions (MMC), Part IV, at 21 (2010 ed.) ("The requirement that conduct be wrongful for this crime necessitates that the accused owe allegiance or some duty to the United States of America. For example, citizenship, resident alien status, or a contractual relationship in or with the United States is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged."). Therefore, the Government is plainly mistaken that a terrorist would not be subject to Offense 26; a terrorist who is either a citizen of the United States or who has resident alien status would indeed be subject to Offense 26. Accordingly, in such a case, the terrorist *would* benefit from a friendlier mens rea than a Soldier charged with an Article 104 violation, provided, of course, that Article 104 does not require a "knowingly and intentionally" mens rea.

for the past 235 years. *See* Defense Motion, at 8. Given the similarities between Article 104 and Offense 26 and their shared common law roots, the unmistakable conclusion is that Article 104 and Offense 26 share the same "knowingly and intentionally" mens rea, derived from the common law of war offense that has remain unchanged for 235 years. *See id.*

20. Finally, the Government seeks to distinguish Offense 26 from Article 104 by comparing the names of the two offenses. *See* Government Response, at 4 ("[redacted]") This contention is barely deserving of a response. Article 104(2), the provision under which PFC Manning has been charged, punishes "[a]ny person who -- (2) *without proper authority*, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly[.]" 10 U.S.C. § 904(2) (emphasis supplied). Likewise, the MMC offers the following explanation of the meaning of "wrongfully:" "The requirement that conduct be wrongful for the crime necessitates that the accused act *without proper authority*." MMC, Part IV, at 21 (emphasis supplied). In this respect, then, the two offenses are exactly the same, notwithstanding the Government's silly name game.

21. Therefore, as Offense 26 is obviously modeled after Article 104, derives from the same common law roots as Article 104, and cannot be effectively distinguished from Article 104, its "knowingly and intentionally" mens rea must also be contained in Article 104's mens rea. Accordingly, Offense 26 offers yet another reason for this Court to adopt the "knowingly and intentionally" standard for the actual knowledge element of Article 104.

CONCLUSION

22. For these reasons and those articulated in the Defense Motion, the Defense requests that this Court give the instructions requested in the Defense Motion and the Defense Requested Instruction for the Specification of Charge I.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel