IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE REPLY TO**
v.	)	**GOVERNMENT RESPONSE**
	)	**TO DEFENSE MOTION TO**
	)	**DISMISS FOR LACK OF A**
MANNING, Bradley E., PFC	)	**SPEEDY TRIAL**
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 17 October 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by counsel, pursuant to the Sixth Amendment to the United States Constitution, Article 10, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 810, Rule for Courts Martial (R.C.M.) 707(a), (d)(1), and applicable case law, requests this Court to dismiss all charges and specifications with prejudice for lack of a speedy trial.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Government bears the burden of persuasion on a motion to dismiss for denial of the right to speedy trial under R.C.M. 707. R.C.M. 905(c)(2)(B). Additionally, the Government bears the burden of persuasion on a motion to dismiss for denial of the right to speedy trial under Article 10. *See United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005) ("Under Article 10, the Government has the burden to show that the prosecution moved forward with reasonable diligence in response to a motion to dismiss." (citing *United States v. Brown*, 28 C.M.R. 64, 69 (C.M.A. 1959))); *United States v. Calloway*, 47 M.J. 782, 785 (N-M. Ct. Crim. App. 1998) ("[W]hen the defense raises a motion to dismiss for lack of speedy trial under Article 10, UCMJ, 10 U.S.C. § 810, the prosecution has the burden of proof to establish that such immediate steps were taken."); *United States v. Laminman*, 41 M.J. 518, 520-21 (C.G. Ct. Crim. App. 1994) ("[I]t is our conclusion that RCM 905(c)(2)(B) places the burden of proof on the prosecution whenever the defense moves to dismiss for lack of speedy trial, whether the motion is framed under the terms of Article 10 or RCM 707."). Therefore, the Government bears the burden of persuasion on all aspects of this motion. The burden of proof on any factual issue necessary to decide this motion is by a preponderance of the evidence. R.C.M. 905(c)(1).

ARGUMENT

3. The Government claims that the "accused has been awaiting court-martial since 27 May 2010, which totals 867 days, as of the date of this response." *See* Government Response, p. 62, fn 11. The days are not calculated based on the date of the Government's Response; the days are

calculated as of the day the accused is brought to trial. Accordingly, if trial proceeds as scheduled in early February, it will be nearly 1000 days from the time PFC Manning was placed under pretrial restraint that he will have been brought to trial within the meaning of Article 10. This is a clear violation of PFC Manning's right to a speedy trial under R.C.M. 707 and Article 10.

A. Pre-Referral Delay

1. OCA Classification Reviews Were Not Completed In a Reasonably Diligent Manner

a) Classification Reviews Were Not Required Prior to the Article 32 Hearing

4. It is clear that PFC Manning's court martial was delayed for over a year and a half because of the Government's entirely self-imposed requirement that classification reviews needed to be conducted prior to the Article 32 hearing.

5. Contrary to the Government's contention, there is nothing within the Manual for Courts-Martial or in relevant case law that would require the Government to complete a classification review prior to the Article 32. *See* Government Response, p. 7 ("Before referral, a classification review is necessary to establish the classification of the evidence to meet an element of the charge."). The Government, as it did when it thought it was obligated to send redacted Defense motions to an OCA for review, undertook the added obligation of obtaining a classification review prior to the Article 32 without the requirement that it do so. The fact that the classification reviews were not required prior to the Article 32 hearing is proven by looking at the fact that ODNI classification review was disclosed to the Defense *after* the Article 32 hearing. Had the classification reviews been a legal pre-requisite, the Government could not have proceeded in the absence of this classification review.

6. A classification review is typically used by the Government for one of three distinct purposes:

1) In order to assert a privilege under M.R.E. 505;

2) In order to demonstrate that information is properly classified; or

3) In order to allow the Government the opportunity to argue for a closed session during *Grunden* hearings.[1]

7. However, a classification review is not the only method available to the Government in order to assert a privilege under M.R.E. 505, demonstrate that information is properly classified, or argue for a closed session. The Government may assert a privilege under M.R.E. 505 or demonstrate that information is properly classified through testimony of an OCA. Likewise, the Government may demonstrate the need for a closed hearing through testimony, or, under R.C.M. 806, by requesting the military judge to make a finding based upon her own review of the information. Either alternative is a common sense solution whenever the Government is faced

[1] The classification review is also used by the Government to demonstrate the "overriding interest" that will be prejudiced if the proceedings remain open. The classification review typically will achieve this objective by describing the harm to national security that would result from disclosure to the public.

with a situation where a classification review has not been completed in a timely manner or has not even been initiated. The Government, however, failed to grasp the fact that classification reviews were not required prior to the Article 32 hearing (or for that matter for the court-martial). Instead, the Government treated the classification reviews as if they were somehow a prerequisite to proceeding with the court-martial.[2]

8. The trial counsel in this case are similar to those in the *Pyburn* case. *See United States v. Pyburn*, 1974 WL 13919 (C.M.A.). In *Pyburn*, the Court of Military Appeals found a violation of the accused's speedy trial rights where the trial counsel waited 62 days for laboratory results prior to starting the Article 32 hearing. The Court stated:

> The crucial delay in this case, however, resulted from the 62 days it took for evidence to be analyzed in the forensic laboratory of another agency of the federal government. In this case of alleged rape in which the female victim was able to identify the accused but not able to say whether an act of sexual penetration occurred after she had been beaten unconscious, and because *the medical evidence was marginal at best, we cannot seriously question the relevancy of a laboratory analysis of the real evidence involved. Nevertheless, other strong evidence of guilt was available to the Government, and we believe that the investigating officer was not compelled to await the laboratory results before completing the statutory duties required by Article 32, UCMJ, 10 USC § 832. We do find a lack of diligence on his part, as well as on the members of the prosecution, in their failure to justify this 62-day period of delay.* Even where the prosecution does not exercise any direct control over the facility where evidence is analyzed, the duty of speedily trying the accused cannot be set aside by the unexplained slowness of another agency in analyzing and returning evidence. The 62-day delay associated with the laboratory analysis in this case was not a "really extraordinary circumstances" justifying the failure to try the accused within 90 days.

Id. at *180 (emphasis supplied).

9. As in *Pyburn*, this Court should conclude that although it would have been marginally more helpful for the Government to have the benefit of a classification review prior to the Article 32, a classification review was by no means a legal requirement. The Government clearly had other means of demonstrating that the charged information was classified at the time of the offense, describing the harm to national security, asserting a privilege on behalf of the OCA, or requesting a closed hearing. The Investigative Officer was not "compelled to await" the OCAs' classification review before "completing his statutory duties required by Article 32, UCMJ." *Id.* As such, the resulting delay, at least 238 days from the completion of the R.C.M. 706 Board on 22 April 2011 until the start of the Article 32 hearing on 16 December 2011, was a violation of PFC Manning speedy trial rights.

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[2] The Government also indicated that a classification review was necessary to ensure the proper handling and storage of information during discovery. The Defense does not understand what this means. Classified information, including the charged documents, was produced *prior to* the classification reviews being completed. How then could the classification review be "necessary" to ensure proper handling and storage of information during discovery?

b) The Total Elapsed Time to Complete Classification Reviews was 530 Days, a Clearly Unreasonable Period of Time

10. The Government's explanation of which OCAs were tasked with completing a classification review when is less than clear. It appears that there was some discussion and coordination of classification reviews early on in the case. The Government states in its Response:

> The prosecution began working to facilitate discovery immediately, which required, *inter alia*, obtaining classification reviews. Directly following preferral of the original charges on 5 July 2010, the trial counsel in Iraq began reaching out to DOS and DOD for assistance in identifying the appropriate personnel to conduct classification reviews of the charged documents. *See* Enclosure 10. In July 2010, the trial counsel met with United States Army Criminal Investigation Command (CCIU) and DOJ in Wiesbaden, Germany to discuss the way forward. At that meeting, it was determined that DOJ (based on their ongoing relationships and experience with national security cases) would help facilitate the coordination for DOS and DOD information. *See id.*

See Government Response at p. 4-5.

11. The Government continued:

> On 28 July 2010, with coordination from DOJ, the trial counsel requested the assistance from DOD for classification reviews of classified documents. On 30 July 2010, the trial counsel was notified that DOD was coordinating with 1st Cavalry Division to facilitate the classification review of the video that is the subject of Specification 2 of Charge II. *See id.*
>
> Upon transfer of the accused to MDW, the prosecution continued the process of requesting classification reviews from various organizations. *See* Enclosures 20 and 21.

Id. at p. 7-8.

12. The Government then conveniently skips over the eight month period from July 2010 to March 2011. It then picks up in March 2011:

> After additional charges were preferred [in March 2011], the prosecution memorialized its requests for OCAs to prepare classification reviews of the charged documents and evidence necessary for the Article 32 investigation. Pre-referral and in preparation for the Article 32 investigation, the prosecution requested classification review(s) of CENTCOM, OGA#1, DOS, SOUTHCOM, DISA, CYBERCOM, INSCOM, OGA#2, ODNI, and DOD. *See* Enclosures 20 and 21. …
>
> The prosecution submitted formal requests for classification reviews as follows:

i. CENTCOM. On 18 March 2011, the prosecution submitted a written request to CENTCOM for classification reviews. *See* Enclosures 20-21.

ii. OGA#1. On 18 March 2011, the prosecution submitted a written request to OGA#1 for classification reviews. *See* Enclosures 20-21.

iii. DOS. On 18 March 2011, the prosecution submitted a written request to DOS for classification reviews. *See* Enclosures 20-21.

iv. SOUTHCOM. On 18 March 2011, the prosecution submitted a written request to SOUTHCOM for classification reviews. *See* Enclosures 20-21.

v. DISA. On 18 March 2011, the prosecution submitted a written request to DISA for a classification review of evidence it intended to use. *See* Enclosures 20-21.

vi. CYBERCOM. On 18 March 2011, the prosecution submitted a written request to CYBERCOM for a classification review of evidence it intended to use. *See* Enclosures 20-21.

vii. ODNI. On 18 March 2011, the prosecution submitted a written request to ODNI for a classification review of evidence it intended to use. *See* Enclosures 20-21.

viii. OGA#2. On 18 March 2011, the prosecution submitted a written request to OGA#2 for a classification review of evidence it intended to use. *See* Enclosures 20-21.

ix. DOD. On 30 November 2010, the prosecution submitted a written request to DOD for a classification review of evidence it intended to use. *See* Enclosures 20-21.

x. INSCOM. On 18 March 2011, the prosecution submitted a written request to INSCOM for a classification review of evidence it intended to use. *See* Enclosures 20-21.

Id.

13. With the exception of DOD, the Government apparently submitted written requests for classification reviews to all the OCAs on 18 March 2011.[3] The Government never once answers the million dollar question: *Why did the Government wait 295 days before submitting requests to the OCAs to review the charged documents*? 295 days. That, in itself, would violate PFC Manning's speedy trial rights more than two times over.

[3] It had apparently drafted classification review requests as early as August 2010. See *Chronology* ("20-Aug-10 Fri Drafted the Department of State Classification Review request"). The Government provides no explanation for why it did not submit this request until seven months later.

14. Strangely, the Convening Authority began excluding periods from the speedy trial clock based on "Original Classification Authorities' (OCA) reviews of Classified Information" beginning on 12 July 2010.[4] How could the Convening Authority have excluded time from the speedy trial clock based on a request that did not yet happen? In other words, it was not until 18 March 2011 that the Government requested the majority of the OCAs to complete a classification review. How could the classification review then have been a basis for delay from 12 July 2010 to 18 March 2011? Not surprisingly, the Government provides no explanation for the glaring inconsistency in dates. Surely if the Convening Authority approved delays on the basis of something that was not happening, this action would constitute an abuse of discretion.

15. The Defense is not convinced that the OCAs began the classification review process on 18 March 2011, when the Government submitted its formal requests. The Defense believes that the Government focuses on this date because it appears that less time elapsed between the submission of the request for the classification review and completion of the review. That is, 8 months to complete a classification review yielding a 3-page document looks a little better than 18 months to complete a classification review yielding a 3-page document. The Government's Chronology and Enclosure 20 seem to show that the OCA classification reviews were happening earlier than 18 March 2011. For instance, the memorandum to the various OCAs on 18 March 2011 asks the OCAs to "finalize" their classification review, not to "start" their classification review (*see, e.g.*, Enclosure 20, Memoranda to Department of State, ODNI, SOUTHCOM, etc. dated 18 March 2011). It is clear from the term "finalize" combined with the suspense dates on these memoranda that the OCAs had nearly completed (or should have nearly completed) the classification reviews on 18 March 2011. And yet, the OCAs did not complete their reviews of the classified evidence until shortly before the Article 32 hearing in December 2011. In particular, according to the Government's Response, the Defense received the OCA classification reviews on the following dates:

CENTCOM:	8 November 2011
OGA#1:	8 November 2011
DOS:	8 November 2011
SOUTHCOM:	17 November 2011
CYBERCOM:	8 November 2011[5]
ODNI:	12 January 2012

Id. at p. 24-25. The Government does not provide information on when it received and provided the DOD classification review to the Defense. However, according to the Defense's records, the DOD classification review was provided to the Defense in mid-November 2011.

[4] In the SPCMCA Excludable Delay Memoranda, the Convening Authority lists "Defense Request for Results of Government's Classification Reviews by OCAs, dated 26 August 2010." The Defense request cannot be used as the basis for delay because it is derivative of requirements already borne by the Government. For instance, if the Defense requested *Brady* material, this could not serve as the basis for delay since the Government already bears the obligation to provide *Brady* material. This "basis" for delay is an attempt to make it look like the delay is equally attributable to the Government and the Defense – which it is most certainly not.

[5] The Government had this review in its possession since 28 July 2011 and yet did not disclose it to the Defense until some three and a half months later.

16. Based on the 18 March 2011 request, it took the OCAs approximately 235 days to complete the classification reviews. However, it is clear that the classification reviews were near completion on 18 March 2011 (based on Enclosure 20 which asked the OCAs to "finalize" their reviews). In reality, then, it took the OCAs far longer than 235 days to complete their reviews.

17. For argument's sake, when the 235 days from 18 March 2011 to 8 November 2011 are combined with the 295 days that elapsed prior to the OCAs being formally requested to complete the reviews, this amounts to a grand total of 530 days. In other words, *it was not until 530 days into this case that the majority of OCAs had completed their classification reviews*. This excludes the classification review that was provided to the Defense on 12 January 2012, which apparently took 594 days to produce to the Defense. As argued in the Defense Motion to Dismiss for Lack of Speedy Trial, these classification reviews were not Tolstoy novels – they were generally documents that spanned three or four pages. Under no stretch of the imagination can a 530 day lag in completing a three or four page classification review be characterized as reasonably diligent.

18. While the Government apparently followed-up with the OCAs to "re-request" that the OCAs complete their classification reviews, no one asked the OCAs what was taking so long. A "re-request" is not the same thing as following up with the OCAs to figure out what was taking so long and to expedite the process. *See* Government Response, Enclosure 20 ("The prosecution in the above-referenced case requests that the appropriate authority ***complete*** their classification reviews of the documents listed on the prosecution's original written request, dated 18 March 2012). Moreover, these re-requests were cut-and-paste jobs of the original request, showing just how seriously the Government was taking its responsibilities and those of the OCAs. If a task is not getting completed, it makes little sense to copy-and-paste the original request three times and send it to the same recipient. Perhaps an email with four words ("What's taking so long?") would have been more effective.

19. There is no documentation from either the Trial Counsel or the Convening Authority inquiring as to what the OCAs were doing and what was taking so long. Both the Government and the Convening Authority preferred to let bureaucratic nature take its course and allow the OCAs a total of 530 days to complete their tasks. That the Convening Authority failed to ever make even the most basic inquiries as to the length of time the classification review process was taking demonstrates that he was just a rubber stamp for the Government. He was prepared to let the OCAs take as long as they wanted without asking any questions. Unlike the Convening Authority, however, the speedy trial clock does not wait for the OCAs.

20. The Government's own documentation shows just how unreasonably long the OCA classification review process was taking. In the Government's July 2011 re-request for the OCAs to complete their classification reviews, the Government gives the OCAs a three-week or so suspense period. *See* Government Response, Enclosure 20. Instead, it was not until approximately 5 months after prodding the OCAs that the classification reviews were ready to give to the Defense. The Government, in its communication with the OCAs in July 2011, indicates that time was of the essence in completing the classification reviews, noting that "all existing and future delays could severely hinder the prosecution." *Id.* In full, the Government stated:

> **SPEEDY TRIAL**. Under Article 10, UCMJ, when an accused is in pretrial confinement, the United States is required to use "reasonable diligence" to continue forward motion on resolving criminal cases. *See* 10 U.S.C. §810. The only remedy for a speedy trial violation is dismissal of the charges with prejudice. Additionally, the United States must ensure that it does not violate the accused's Sixth Amendment right to a speedy trial. *See* Barker v. Wingo, 407 U.S. 414 (1972). All existing and future delays by your organization could severely hinder the prosecution. Enclosed is an information paper to further explain an accused's speedy trial rights in the military justice system.

21. Now is the time that the all the delays caused by the OCAs should "seriously hinder the prosecution" as predicted by the Government almost a year and a half ago. The Government should not be permitted to talk out of both sides of its mouth – to claim to the OCAs that the failure of the OCAs to complete their task in a timely manner could "severely hinder the prosecution" for speedy trial purposes, and then claim that the failure of the OCAs to complete their task in a timely manner was, in effect, no big deal.

22. If the Government had approached the OCAs earlier and if the OCAs had actually completed what was asked of them in a timely manner, this case could have gone to trial much sooner than nearly three years after PFC Manning was placed in pretrial restraint. Assume the entire process took half the time that it actually did (approximately 265 days into the case – which the Defense submits would *still* be patently unreasonable). All other things being equal, including the innumerable discovery missteps of the Government, the case would then have been pushed up 265 days and PFC Manning would have been tried in May 2012 (not February 2013). It is abundantly clear that if the OCAs and the Government had exercised even a sliver of diligence in getting the classification reviews processed, the accused would have been brought to trial much sooner.

d) The Government Relies on Cut-and-Paste Conclusory Language in its Response to Justify the Inordinate Delay for the Classification Reviews But Never Explains Why They Took 530 Days to Complete

23. In Part III of the Government's Response, it makes a cursory attempt to argue that the Convening Authority did not abuse his discretion in approving all the delays, which total a staggering 532 days.[6] The Government parrots the exact same language over and over in this section, stating: "[The Convening Authority] had good cause to exclude this period of delay and did so for only so long as was necessary under the circumstances." *See* Government Response (repeating this phrase a total of 18 times). Simply saying that the Convening Authority excluded the delay "for only so long as was necessary" does not make it so.

[6] The Defense concedes, as argued in its Motion to Dismiss for Lack of a Speedy Trial, that some of these exclusions were proper based on Defense requests. However, for the purposes of PFC Manning's Article 10 argument, it is clear that notwithstanding the Defense-requested delay for the 706 Board, the Government would not have been prepared to go to trial any sooner than it currently is, February 2013.

24. The Government never explains *why* 530 days were necessary to complete the classification reviews. Just because a case is complex does not mean that the Government gets carte-blanche to take 530 days to complete a two-page classification review. In other words, the Government fails to provide the *causal link* between the actual delay (530 days) and the task at hand. *See United States v. Longhofer*, 29 M.J. 22, 27 (C.M.A.1989) ("… we focus on the reasonableness of the duration of the event."; "there must be a causal connection between the event and the delay sought to be excluded"). *See also United States v. Duncan*, 34 M.J. 1232, 1243 (A.C.M.R. 1992) ("We reject out of hand several bases for exclusion asserted pursuant to the "good cause" exception at trial. These include arguments premised upon (1) the complex nature of the case, (2) the fact that the case was highly classified, and (3) the fact that the appellant initiated a collateral civil suit in federal district court. While any one or a combination of these factors might have warranted the exclusion of a *reasonable* period of delay for good cause, a causal connection or nexus between the delay and the event offered in justification for exclusion must be established before the government is entitled to an exclusion for good cause."). Under the Government's logic, if it took the OCAs 1000 days to complete the classification reviews, this would be "only so long as was necessary under the circumstances." The length of time a task took cannot then be bootstrapped to conclude that the time took was reasonable under the circumstances.

25. What the inquiry must entail – and what the Government has yet to explain despite being asked this question dozens of times – is *why* it took 530 days after PFC Manning was placed in pretrial restraint for the OCAs to complete their classification reviews. "It's complex" simply does not cut it. There is no evidence that the Government ever conveyed to the Convening Authority what was taking so long (in particular given that the reviews were only a couple of pages), what the OCAs were doing on a daily or weekly basis, how many people were working on the task, how often the OCAs or their delegates worked on the review, and the like. These are the factors that any independent arbiter would want to know in assessing whether the length of the classification review process was reasonable. To the Defense, it appears wholly unreasonable that it would take a mind-boggling 530 days from the date of PFC Manning's placement into pretrial restraint to complete classification reviews. 530 days spent "languishing in a brig" is a very long time. *See United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993) ("We happen to think that 3 months is a long time to languish in a brig awaiting an opportunity to confront one's accusers, and we think Congress thought so, too. Four months in the brig is even longer. We see nothing in Article 10 that suggests that speedy-trial motions could not succeed where a period under 90 – or 120 – days is involved."). The Convening Authority never asked these questions and the Government (then and now) has not provided any answers.

26. The Government misrepresents the Defense's argument by stating that "the defense argues that the decision granting the delay must include justification to the defense's satisfaction, which is more than the rule requires and a standard too nebulous to meet." *See* Government Response (repeating this argument 11 times). The Defense made no such argument. The Defense did, however, say that the Convening Authority's decision must be informed and independent so as to not constitute an abuse of discretion. By literally cutting-and-pasting the same bases for delay for well over a year, with no evidence that he was actually informed of any details pertaining to what kept "necessitating" the delay, the Convening Authority shows that he abdicated his responsibilities as a third-party neutral. Instead, the Convening Authority became an agent of the Government, who simply signed what was put in front of him (and in one case, allowed the

Government to sign *for him*). The Convening Authority must be more than a Government rubber stamp; here, he was not. Any reasonable person – and certainly, any reasonable Convening Authority – would at the very least inquire as to why the delay was taking so long and what could be done to expedite the process.

e) The Cases Cited By the Government For the "Reasonableness" of the 530 Day Classification Review Delay are Not On Point

27. The Government cites various cases as supporting its argument that the complexity in the case justified the Convening Authority excluding massive amounts of time from the speedy trial clock. None of the cases cited by the Government come anywhere close to the length of time that elapsed in this case, or was excluded in this case. The Government cited *United States v. Longhofer*, 29 M.J. 22 (C.M.A.1989) a total of 16 times to support its argument that the complexity of this case justifies the inordinate delay.[7] In *Longhofer*, the Government argued, and the Court accepted, that "[t]his case involves highly classified information. All trial participants were required to receive a compartmentalized security clearance, and every step of this case has been complicated by the need to safeguard classified information." *Id.* at 29. In short, *Longhofer* was a complicated classified evidence case, much like the instant case. In that case, the "elapsed time from notification of the charges to presentation of evidence was 322 days," much less than the nearly 1000 days that have elapsed in this case. While the Government cites *Longhofer* apparently in support of its position that the delay in the instant case was reasonable, the court in *Longhofer* found that there *was* a violation of the accused's speedy trial rights. Far from supporting the Government's position, *Longhofer* undercuts it.

28. The Government also raises *United States v. Matli*, 2003 WL 826023 (A.F.Ct.Crim.App 2003) as supporting its argument that the complexity of this case justified the Convening Authority's exclusion of so much time from the speedy trial clock. As the Government notes, the Court in *Matli* approved of the Convening Authority's exclusion of 68 days from the speedy trial clock. Here, the Convening Authority excluded 532 days from the speedy trial clock, approximately 8 times as many days as the court in *Matli*. Moreover, the accused in *Matli* was brought to trial after 211 days of being placed in pretrial confinement. *Id.* at *7. Here, PFC Manning will have been in pretrial confinement for almost 1000 days prior to being brought to trial, five times longer than the accused in *Matli*.

29. Other cases cited by the Government, particularly the federal cases, are even less on point. *See e.g. United States v. Kramer*, 781 F.2d 1380 (9th Cir. 1986) (no speedy trial violation where accused's court-appointed attorney moved for a four-to-five month continuance prior to scheduled trial date); *United States v. Beech Nut Nutrition Corp.* 871 F.2d 1181, 1197 (2d Cir. 1989) (defense counsel agreed to waive right to speedy trial and conceded that case was complex within the meaning of Speedy Trial Act); *United States v. McGrath*, 613 F.2d 361 (2d Cir. 1979) (excluding a mere 60 days from speedy trial clock due to complexity). Moreover, the Speedy

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[7] *Longhofer* is no longer good law on one point. It "applied [an older] version of R.C.M. 707(c), and … focused on allocating blame for delays." *U.S. v. Nichols*, 42 M.J. 715, 721-22 (A.F.Ct.Crim.App. 1995).

Trial Act does not govern this case; R.C.M. 707 does.[8] In terms of the constitutional right to a speedy trial, military courts have indicated that the protections afforded an accused in the military justice system exceed those protections offered by the constitution. *United States v. Cooper*, 58 M.J. 54, 60 (C.A.A.F. 2003) ("Article 10 protects the right to a speedy trial, and … imposes a more stringent standard than the Sixth Amendment"). *See also* Government Response, p. 62. Thus, it is not clear why the Government is resorting to federal cases – particularly when such federal cases provide no support for its position.

2. [REDACTED] Abused His Discretion in Excluding Time He Did Not Work on This Case From the Speedy Trial Clock

30. As argued in the Defense's Motion to Dismiss All Charges for Lack of a Speedy Trial, [REDACTED] abused his discretion in excluding days that he did not work on the case. There is *no authority* for excluding federal holidays, weekends and days that an Investigating Officer did not work on the case from the speedy trial clock. Under this logic, every weekend and holiday between 27 May 2010 through 23 February 2011 should have been excluded (approximately 60 days). *See United States v. Duncan*, 34 M.J. 1232 (A.C.M.R. 1992) (attributing weekends to the Government for speedy trial purposes; note that *Duncan* was decided under the previous rule, which required that the Military Judge attribute delay to either the Defense or the Government).

31. The Government also claims that [REDACTED] civilian employer required him to work between 24 December 2011 and 3 January 2012. Be that as it may, the Government chose to have a Reserve civilian Investigating Officer presiding over the Article 32 hearing. The Government chose to let the IO's orders expire on 23 December 2010 and to renew the orders (apparently) on 4 January 2011. The Government's own decisions as to how to process this case – and in particular, how to mobilize a reserve IO – are attributable to the Government and cannot be excluded from the speedy trial clock.

32. Finally, the Government seems to think that the test under R.C.M. 707 for excludable delay is prejudice; it is not. The test is whether or not the time is properly excluded, irrespective of prejudice. The Government is mixing up R.C.M. 707 with PFC Manning's Article 10 rights (where prejudice is one of several factors to consider).

3. The 706 Board Was Not Completed In a Reasonably Diligent Manner

33. The Government argues that the 285 days it took to complete the R.C.M. 706 board was a reasonable amount of time. The Government, in making its argument, conveniently leaves out facts that would undercut its position.

34. The Government points to the fact that even before the Defense submitted its request for a R.C.M. 706 board, [REDACTED] [REDACTED] for the 1st Armored Division, took steps

[8] The Government cites *United States v. Cooper,* 58 M.J. at 57 at Response, p. 53 for the proposition that the Court of Appeals for the Armed Forces has "cited [the Speedy Trial Act] for guidance concerning military speedy trial issues." This citation does not appear in *Cooper.*

to start the process in Iraq. While it is true that [redacted] took some preliminary steps in anticipation of the need for an RCM 706 and some immediate steps after the Defense's initial request for a R.C.M. 706 on 11 July 2010, the proactive nature of the Government stopped once [redacted] was no longer involved. After jurisdiction of the court-martial was transferred to the Military District of Washington on 28 July 2010, the wheels of diligence started to grind to a halt. Despite having a R.C.M. 706 request from the Defense, the Government took no immediate action to implement the request.

35. The Government asserts that the Defense's first argument that the prosecution "did nothing" between the above dates could not be further from the truth. How so? The reality is that the Government did nothing. Did the Government appoint board members? Did the Government start the process of the R.C.M. 706 board? No it did not. Instead, it wants to be patted on the back for appointing the board on 3 August 2010 and by having an email exchange with the defense counsel on 5 and 9 August 2010. Appointing a board and then emailing the Defense twice does not show diligence. The Government was at a standstill from 3 August to 25 August 2010. During that time, the Government could have appointed members, secured the relevant information for the board, and scheduled convenient times for the board members to meet with PFC Manning. None of this was done.

36. On 25 August 2010, PFC Manning retained Mr. David Coombs as his civilian counsel. At this point, Mr. Coombs raised a couple of issues that did necessitate the delay of the start of R.C.M. 706 board. Mr. Coombs requested a forensic psychiatrist to be appointed to the Defense team and for this individual to be permitted to evaluate and work with PFC Manning prior to the R.C.M. 706 board. *See* Government Response, Enclosure 35. Additionally, on 26 August 2010, the Defense requested a delay of the board "until procedures can be adopted to safeguard any classified information that will be discussed during the board's determination." *See* Government Response, p. 16.[9]

37. The Defense request for a preliminary classification review (PCR) necessitated the delay of the board from 26 August 2010 until 13 December 2010. The Defense does not challenge the Convening Authority's exclusion of that time under R.C.M. 707(c). However, that time is still attributable to the Government under Article 10. Just because a given period of time is properly excluded under R.C.M. 707(c) does not mean that the Government need not answer for that time period in the Article 10 inquiry; rather, the fact of proper exclusion under R.C.M. 707(c) has little to no bearing on whether the Government has used reasonable diligence under Article 10. *See United States v. Lazauskas*, 62 M.J. 39, 42 (C.A.A.F. 2005) ("The resolution under R.C.M. 707 does not preclude a party from asserting responsibility for delay under Article 10, UCMJ, or the Constitution."); *United States v. Mizgala*, 61 M.J. 122, 128-29 (C.A.A.F. 2005) ("Article 10 and R.C.M. 707 are distinct, each providing its own speedy trial protection. The fact that a prosecution meets the 120-day rule of R.C.M. 707 does not directly 'or indirectly' demonstrate that the Government moved to trial with reasonable diligence as required by Article 10."). While

[9] The Government appears in its Response to subscribe some fault to the Defense for previously stating that PFC Manning would not disclose classified information as part of the R.C.M. 706 board. *See* Government Response, p.16. The Government cites Enclosure 1 (Unclassified Email 0016) for its position. The email by MAJ Hurley, while stating that PFC Manning should not need to divulge classified information, indicate that if PFC Manning "feels he must disclose classified information, then he will let you know that there is more that he wants to say but cannot. CPT Fein and I will then seek an exception to the current order." *Id.*

the Defense's security experts were conducting the PCR, the Government stood in a "waiting posture."

38. Once the Defense security experts completed the PCR on 13 December 2010, the Government was not prepared to do anything. On 18 December 2010, the Defense asked the Government who, other than [redacted], was on the R.C.M. 706 board. Incredibly, the Government could not answer this simple question. As of 18 December 2010, 138 days after [redacted] directed the appointment of a R.C.M. 706 board, the Government was still in a waiting posture. The Government promised that it would identify the board members that very week. *Id*. The Government's initial chronology indicates that the Government failed to do this and took the next two months to not only identify the board members but secure the requisite clearances for the board members. Why couldn't the Government have been proactive and completed this task during the time period between 3 August 2010, the date [redacted] directed the board, and 13 December 2010, the date the PCR was completed?

39. Once it became clear to the Defense that nothing was being done, on 13 January 2011, the Defense emailed the Government and filed its demand for a speedy trial, along with its demand to remove PFC Manning from pretrial confinement. *See* Attachment 1. Despite filing this demand it took the Government another 100 days to complete the R.C.M. 706 Board.

40. A key fact for the Court to consider is that it only required the board to meet with PFC Manning on *one occasion*, 9 April 2011, in order to be able to complete its review. Once the board was able to meet with PFC Manning, the board completed the report 13 days later on 22 April 2011. The Government tries to avoid responsibility for the delay in completion of the R.C.M. 706 board by pointing to the security concerns of conducting the board on weekdays, the Defense's request that the board "take the time necessary to conduct a thorough and complete examination", and the Defense requesting to meet with PFC Manning prior to the board's interview of PFC Manning. All three are without merit and will be discussed in turn.

41. First, the Government, as it has done with other aspects of this case[10], unnecessarily chose to complicate the R.C.M. 706 process. Instead of allowing the board to meet whenever it chose to, the Government established the unnecessary requirement that the board would only meet on weekends. Due to the self-imposed requirement that the board conduct its interview of PFC Manning on the weekends, the board was not able to complete its work in a timely manner, and was required to request two separate extensions. Both extensions of time should be placed at the Government's doorstep for R.C.M. 707 and Article 10 purposes.

42. Second, the Government reads the Defense's 7 February 2011 email as giving the green light for the board to take all the time that it wanted regardless of the reason for the amount of time. The Government's reading on the Defense's email is an inaccurate one. The Defense's email to [redacted] stated the following:

> Additionally, although the convening authority has given a four week suspense date for completion of the board, the defense views this suspense as aspirational.

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[10] The Government, as the Court has previously noted, has placed other time consuming requirements on itself without a need to do so. The Government sought to amend the Court's Protective Order due to its self-imposed requirement to run all Defense motions, even administrative or purely legal motions, by the OCAs prior to indicating whether it objected to publication of the motion.

> Clearly, you and the board should feel free to take the time necessary to conduct a thorough and complete examination of PFC Manning. If the board requires an extension of time, you should feel free to submit such a request through the trial counsel. Undoubtedly, any request for an extension of time by the board would be granted. In the end, the most important thing is that the board takes the time it needs to in order to feel comfortable with its results.

43. Far from waiving any concerns about the time it would take to complete the board, the Defense's email simply stated that [redacted] should take time necessary to complete a thorough *medical* review. In this instance, the board was hamstrung by the Government's requirements to interview the accused on the weekends. The board did not need an extension of time to conduct additional tests or additional interviews. Such a request would be reasonable and consistent with the Defense saying "take the time necessary to conduct a thorough and complete examination of PFC Manning."

44. Lastly, the Government's characterization of the facts surrounding the Defense's request to meet with PFC Manning prior to the R.C.M. 706 board is patently false. The Government claims the delay was necessary in order for Defense counsel to save money on flights. The Government cites to Enclosure 1, email [84] and [85] to support its position that "although the prosecution arranged to have the accused ready to meet with the defense in a SCIF on 11 and 12 March 2011, on 7 March 2011 the defense counsel requested the prosecution to have a SCIF ready on 25 and 26 March 2011 in order to save money on flights." *See* Government Response, p. 66. Neither email cited by the Government supports its position.

45. Instead, the truth is that the delay was necessitated by the Government providing late notice to the Defense of meeting dates. On 15 February 2011, the Defense requested to meet with PFC Manning to ensure that he understood what he could discuss with the board. The nature of the discussion with PFC Manning required the meeting to take place in a SCIF. The Defense offered to meet with PFC Manning on 24 February 2011, well in advance of the board's plans to meet with PFC Manning to discuss classified information. The Government, however, could not arrange for that meeting because it was having trouble determining an appropriate location. The Defense requested updates and notified the Government that it could meet with PFC Manning at any time as long as it had some advance notice. On 7 March 2011, *nearly a month after the original request*, the Government notified the Defense that it could arrange for the Defense to meet with PFC Manning a mere four days later, on 11 and 12 March 2011. Due to the late notice, the Defense notified the Government that the price of a flight went from $270.00 with a week's notice to $1,300.00 with less than a week's notice. As such, the Defense asked if the Government could arrange for a time that gave the Defense some more reasonable advance notice. The Government responded, "The arrangements were finalized this morning, immediately before your email. We needed to wait until this morning to finalize the coordination with the different entities. All the systems are in place for this Friday and Saturday, if you want to go then, but we understand minimizing cost is a factor for you." *See* Attachment 2. Had the Government simply acted on the Defense's request and provided some reasonable advance notice, this would not have been an issue.

B. Pre and Post Referral Discovery Delay

46. As the Defense argued in its Motion to Dismiss for Lack of a Speedy Trial, this case has been marred by a wholly negligent prosecution. Many of the issues discussed in the Motion to Dismiss for Lack of a Speedy Trial (and discussed below) have arisen in other contexts. The Government would prefer to let this all be "water under the bridge" and for the Court to pretend that the Government did not commit some monumental errors in processing this case. For instance, the Government continues to pretend that it understood *Brady* all long. *See* Government Response at p. 18 ("The prosecution has always interpreted *Brady* to apply to the merits and sentencing. From the onset of this case, the prosecution has not waivered from that position."). Apparently, the Government has had a bout of amnesia. The Court found that the Government did not understand *Brady*. In Appellate Exhibit LXVIII, the Court ruled:

> From the 8 March 2012 Government response to Defense Motion to Compel Discovery and its email of 22 March 2012, the Court finds that the Government believed RCM 701 did not govern disclosure of classified information for discovery where no privilege has been invoked under MRE 505. This was an incorrect belief. The Court finds that the Government properly understood its obligation to search for exculpatory *Brady* material, *however, the Government disputed that it was obligated to disclose classified Brady information that was material to punishment only*.

Id. at 2 (emphasis supplied). Not only did the Court find that the Government did not understand that *Brady* applied to sentencing, but the Court also found that "the Government believed RCM 701 did not govern disclosure of classified information for discovery where no privilege has been invoked under MRE 505." *Id.* The Court stated, as plain as day, "this was an incorrect belief." *Id.* The fact that the Government is trying to re-write history, and trying to convince the Court that the Court did not say what it very clearly said, is beyond belief. If the Government wishes to re-litigate this finding, it must request reconsideration of the Court's Ruling. Otherwise, the Government is estopped from making arguments to the contrary.

47. Much as the Government wishes it were otherwise, the Government's gross negligence in military discovery counts against the Government for speedy trial purposes. A prosecution that does not understand basic and fundamental discovery rules cannot be characterized as a reasonably diligent prosecution. It is against this wholly erroneous and convoluted view of discovery that the Government further compounded its negligence by deliberately dragging its feet and providing as little to the Defense as possible, as late as possible. In so doing, the Government resorted to a series of active misrepresentations, critical omissions, and half-truths. The Government's behavior is nothing short of shameful.

48. Below, the Defense focuses on some of the extreme foot-dragging that occurred in this case. As argued previously, the Defense does not believe this was simply an inept prosecution. The Defense believes that this inept prosecution was part of a bigger design to impede PFC Manning's right to a fair trial and to make an example out of him. There are simply too many questionable things that occurred in this case to ignore. These are chronicled in detail in the Defense's Motion to Dismiss All Charges for Lack of a Speedy Trial. Below, however, the Defense specifically addresses the dates and facts presented by the Government in its Response and its Chronology.

1. The Government Did Not Exercise Reasonable Diligence With Respect to ONCIX

a) The Government Concocted An Elaborate Series of Misrepresentations, Omissions, and Half-Truths to Hide Its Lack of Diligence with Respect to the ONCIX Damage Assessment

49. The Government's Response confirms definitively that the Government made an affirmative misrepresentation to the Court and the Defense about what it knew and when with respect to the ONCIX damage assessment. As the Court will recall, the Government represented to the Court that "ONCIX has not produced any interim or final damage assessment in this matter." Full stop. It claims to have repeated this "verbatim" from what it was told by ODNI/ONCIX. *See* Government Response, p. 29 ("the prosecution relied on the information provided by ODNI … and used the ODNI response, verbatim, to address the Court's inquiries."). The Government fails to acknowledge that its "verbatim" statement represents only a quarter of the message from ODNI/ONCIX, which reads in full:

> To date, ONCIX has not produced any interim or final damage assessment in this matter. *ONCIX is tasked with preparing a damage assessment. However, that draft damage assessment is currently a draft and is incomplete and continues to change as information is compiled and analyzed. Damage assessments can take months or even years to complete, and given the sheer volume of disclosures in this case we do not know when a draft product will be ready for coordination, must less dissemination.*

See Government Response, p. 29 (emphasis supplied). The Government told the Court a deliberate half-truth designed to convey a false impression – that ONCIX did not have *anything* by way of damage assessment as of March 2012. That way, the Government could avoid disclosing even the very existence of the damage assessment to the Defense.

50. Based on the Government's Response, it is clear that as of February 2011, the Government knew that ONCIX was charged with creating a damage assessment. *See* Government Response, p. 27. Moreover, on 22 September 2011, the Government was informed that ONCIX had a damage assessment that was "in working draft form." *Id.* p. 28. On 6 March 2012, ONCIX informed the Government that its "draft damage assessment is currently a draft." *Id.* at p. 29. These two statements regarding the ONCIX "draft," lifted directly from the Government's Response, show that the Government had *actual knowledge* as of 22 September 2011 that ONCIX had a "draft" damage assessment.

51. And yet, MAJ Fein plainly told a falsehood to the Court in oral argument when asked why he did not disclose the existence of the draft damage assessment to the Court when asked about it in the series of 21 March 2012 questions. MAJ Fein stated:

> "we were unaware [when the Court asked its questions] that [ONCIX] had any other documentation created *that would even qualify as a draft*."

Article 39(a) Audio Recording 6 June 2012 (emphases supplied). This was an outright misrepresentation. By the Government's own admission, MAJ Fein knew on 22 September 2011 that ONCIX had a "working draft." How could he, as an officer of the Court, represent that the

Government was "unaware that [ONCIX] had any other documentation created that would even qualify as a draft?" *Id.*

52. Lest MAJ Fein claim that he misspoke in this respect, he repeated this refrain multiple times during oral argument, claiming twice that the Government had "no clue" that ONCIX had a draft damage assessment as of 21 March 2012 when the Court asked its questions:

> MAJ Fein: Your Honor, to be honest, the Government *does not necessarily know. We asked the questions and this is what we are given and what we relayed to the Court.* To us, there is a difference between a draft and an interim. A draft is an ongoing document. An interim is something that is produced as a snapshot in time, to memorialize the information. So we did have discussions with both entities on what the differences could be, but at the end of the day we asked "do you have any documentation or do you have a damage assessment, and if not, what do you have?" *And these were the responses that we were given and that we relayed to the Court.* So again, we have never maintained that we didn't know they were doing one. In fact, I think it was publicly announced, and the Defense has notified the Court in one of the very first filings that it was publicly announced that they were doing one, *but the extent of what they did – the prosecution had no clue*, we had to rely on what they were told, or what we were told.
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> …
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> MAJ Fein: … So, so the Government's position isn't that we didn't know that they weren't in the process of creating a damage assessment, *but we were unaware that they had any other documentation created that would even qualify as a draft.* Once we received the Court's Order on 11 May, we had them relook and reassess and that is when we started this process.
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> …
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> MAJ Fein: … the *prosecution had no clue, we had to rely on what they were told, or what we were told*. And then we remedied it the moment we realized that, that, we attempted to remedy it once we realized, and asked them to reassess their position based off the Court's Order of 11 May. But they had to come back to us to say "yes, what we read actually means we have something like that. Not what necessarily we told you before." Of course, everything changes as time goes on. So, once they told us, we then went through the procedures and we are here.
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> …
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> MAJ Fein: Correct your Honor. It is our belief, at that point, that they were compiling these other assessments we knew about because we started reaching out once they told us about it – to go get those. *But, that they had no other documentation that would be subject to discovery – based off this response.*
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> …

> MAJ Fein: And so, going forward your Honor, after that Ruling and then after we re-litigated the Department of State, then we sent that and said listen, essentially as we have outlined in our memo to ODNI on behalf of NCIX, and then their response back. On 11 May the Court ruled even a draft damage assessment from the Department of State is discoverable in that form. We re-litigated that. *Does this, does this information apply to ya-all (sic)? Based off of what you have previously told us.* And at that point they said we need to have a meeting. We had the meeting within a week.

Id. The audio recording, in combination with the Government's dates in its Response, clearly show the following:

> a) The Government knew that ONCIX had a draft damage assessment as of 22 September 2011 and the Government was reminded of that fact on 6 March 2012;
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> b) The Government misrepresented to the Court whether ONCIX had a damage assessment by stating "ONCIX has not produced any interim or final damage assessment in this matter." This statement was cherry picked from a longer message from ONDI/ONCIX that explained that while ONCIX had not completed an interim or final report, it did have a draft damage assessment.
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> c) The Government further misrepresented at oral argument that it had "no clue" that ONCIX had a draft damage assessment at the time it made its 22 March 2012 representation to the Court.

53. In short, the Government has tried to cover up its misrepresentations with even more misrepresentations. It is truly disheartening that the Court and the Defense cannot believe anything the Government says. These are the basic facts that the Government simply cannot dispute.

54. Another fact that the Government cannot dispute is that it became aware that ONCIX was preparing a damage assessment in February 2011. In fact, it claims at that time to have "requested authority to review the ONCIX damage assessment." *See* Government Response, p. 73. Fast-forwarding past all the misrepresentations, it was not until 23 August 2012 that the Government, after a protracted battle to discover whether ONCIX even had a damage assessment, disclosed the damage assessment to the Defense. That is a total of 569 days. 569 days. Especially when contrasted with the mere 20 days it took for the Government to review the ONCIX damage assessment and arrange to have it produced to the Defense, the 569 day number is unfathomable. Had the Government exhibited even a modicum of diligence with respect to ONCIX, the Defense would have had this information (and this case could have gone to trial) much sooner.

55. If these were the only misrepresentations in the Government's account of what happened with ONCIX, that, in itself, should be grounds for censure. However, there are countless more misrepresentations to the Court that stem from the pile of misrepresentations discussed above.

b) <u>MAJ Fein Misrepresented That He Simply Relayed What He Was Told by ONCIX</u>

56. The Court was, rightly, not satisfied with the Government's account of what happened with ONCIX. The Court asked MAJ Fein about why he made the representation to the Court that he did in light of his admission in oral argument that he knew ONCIX was charged with completing a damage assessment. MAJ Fein repeatedly fell back on some variation of, "that's what ONCIX told us, and that's what we told you."

> MAJ Fein: And then their response of course given was the department of, ONCIX has not completed a damage assessment – to date they have not produced any interim or final damage assessment in this matter. *That is what they gave us and told us.*
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> …
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> MAJ Fein: … And so, by us writing that down, and inquiring is this all you have, is this what it is? *And this is the response we received.* That is ultimately what we – fast forward, at the motions hearing, on the record, both at the 802 conference after the motions hearing, and on the email inquiry on 21 March, when asked. As you will notice from the Court's motion to compel discovery dated 23 March 2012, the Court documented the email questions and those email questions were does the damage assessment essentially exist with ODNI, or excuse me with ONCIX. And we responded in an email ONCIX has not produce any interim or final damage assessments in this matter. *We asked them the questions. We don't have any other access to their files. They answered it. So, at that point we relayed that to the Court, we relayed it to the Defense and the Court ruled.* Then –
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> MAJ Fein: We asked questions, we give them the relevant cases, the case law, we show them the discovery requests and any other orders. *And then they give us the answer*. Or give us access and we go search them for the answer. *And in this case, they gave us the answer. We relayed that to the Court.*
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> …
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> MAJ Fein: Yes, your Honor, we did. And we were told that they were compiling the documents to do a damage assessment. *We asked what is the status of the damage assessment so that we can relay it to the Court and this was the exact wording we were given.*
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> …
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> MAJ Fein: … We inquired into what documentation they had, that we could report on whether they have a draft damage assessment. *And they reported back again, to date ONCIX has not produced any interim or final damage assessment in this matter, when we asked them the question.*

…

> MAJ Fein: So we did have discussions with both entities on what the differences could be, but at the end of the day we asked "do you have any documentation or do you have a damage assessment, and if not, what do you have?" *And these were the responses that we were given and that we relayed to the Court.*

Article 39(a) Audio Recording 6 June 2012 (emphases supplied). MAJ Fein stated on *six* separate occasions that he simply repeated the answers that he was given by ONCIX. What he failed to state is that he repeated only *a portion* of the answer that was given by ONCIX – the portion which, in isolation, is misrepresentative of the documentation that ONCIX had in its possession and that the Government *knew* ONCIX had in its possession.

57. Moreover, the six separate submissions above convey the impression that MAJ Fein had absolutely no idea that ONCIX had a draft damage assessment and that he was attempting, to no avail, to determine what ONCIX had by way of a damage assessment. As indicated above, MAJ Fein knew on 22 September 2011 that ONCIX had a "working draft." Clearly, these earnest conversations with ONCIX that MAJ Fein told the Court about, where he tried in vain to figure out what ONCIX had in terms of a damage assessment, did not take place. Again, more misrepresentations to cover up the original misrepresentations.

c) MAJ Fein Misrepresented that ONCIX's Communication Was Oral

58. The Court, in attempting to figure out what happened with ONCIX, asked MAJ Fein a pointed question – how did ONCIX make the representation to you that they had not produced any final or interim damage assessments in this matter?

59. The dialogue between the Court and MAJ Fein reads:

> MAJ Fein: And then their response of course given was the department of, ONCIX has not completed a damage assessment – to date they have not produced any interim or final damage assessment in this matter. That is what they gave us and told us.
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> COURT: Did they do that orally or in writing?
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> MAJ Fein: *Orally your Honor*. And so, by us writing that down, and inquiring is this all you have, is this what it is? And this is the response we received. That is ultimately what we – fast forward, at the motions hearing, on the record, both at the 802 conference after the motions hearing.

Id. In its Response, the Government states that on 6 March 2012, the prosecution received a response from ODNI on behalf of ONCIX with the statement, *inter alia*, "ONCIX has not produced any interim or final damage assessment in this matter." Government Response, p. 29. The Response shows that the communication from ONCIX was written, not oral, as MAJ Fein claimed.

60. MAJ Fein will undoubtedly claim that he forgot that the communication was written. Any such claim, however, should be viewed with suspicion. MAJ Fein appeared to recall the conversation (that didn't happen) with ONCIX with remarkable clarity. He stated that the communication was oral and that the Government "[wrote] that down, and inquir[ed] 'is this all you have, is this what it is?'" *Id.*

61. The reason that MAJ Fein stated the communication was oral is obvious: because that way, no one would be able to prove it didn't happen. He did not count on the fact that there would ultimately be a day of reckoning for the multitude of misrepresentations, half-truths and omissions.

d) <u>MAJ Fein's Misrepresented That the Government Double-Checked with ONCIX After Receiving the Court's Questions</u>

62. At oral argument, MAJ Fein stated that after the Court sent the email questions on 21 March 2012, it reached out to ONCIX again on this issue prior to responding on 22 March 2012:

> MAJ Fein: Yes, your Honor. And the prosecution did exactly that, your Honor. *Even after the email from the Court, the prosecution reached out to ODNI and NCIX to ask the question again* and this was the response we received.

Id.

63. The Government's Response does not refer to this communication with ONCIX/ODNI on 21 or 22 March 2012. Nor does the Government's 230 page Chronology.[11] Again, the

[11] All the Government's entries for 21-22 March 2012 are reproduced below:
21-Mar-12 Wed Email with DOS-request to disclose IRTF assessment of DOS equities
21-Mar-12 Wed Email with OGA1-prosecution sent copy of other Agencies' information for review and consent to disclose
21-Mar-12 Wed leave (Wife Surgery)
21-Mar-12 Wed Motions practice to include research and drafting
21-Mar-12 Wed Phone call with DOJ
21-Mar-12 Wed Phone call with DOS for discovery meeting concerning damage assessment and prudential search request
21-Mar-12 Wed UCMJ v Commissions research
21-Mar-12 Wed Worked on Speedy Trial Tracker
22-Mar-12 Thu Email from VA with response to request
22-Mar-12 Thu Email with BBG to request update on research for discoverable material
22-Mar-12 Thu Email with DA-discussed obtaining defense access to NWC
22-Mar-12 Thu Email with FBI-prosecution sent other Agency's information for review by FBI in order to produce in discovery
22-Mar-12 Thu Email with NASA received portion of damage assessment via email
22-Mar-12 Thu Email with OGA2-requested review for OGA2 equities
22-Mar-12 Thu Email with VA-received damage assessment
22-Mar-12 Thu Evidence research
22-Mar-12 Thu From BBG OGC- Stated they are still trying to track down their copy of the assessment
22-Mar-12 Thu From NRC- States that OGC point of contact was out of the office due to a death in the family and will be back next week

Government appears to have misrepresented to the Court that it had communication with ONCIX after it received the questions from the Court on 21 March 2012 and prior to responding to the Court on 22 March 2012.

e) MAJ Fein's Misrepresented What Happened After the Court's Ruling on 11 May 2012

64. At oral argument, MAJ Fein stated that it was after the Court's Ruling on 11 May 2012 regarding the discoverability of the Department of State damage assessment that he felt compelled to go back to ONCIX to get ONCIX to reassess its position:

> MAJ Fein: … So, so the Government's position isn't that we didn't know that they weren't in the process of creating a damage assessment, but we were unaware that they had any other documentation created that would even qualify as a draft. Once we received the Court's Order on 11 May, we had them relook and reassess and that is when we started this process.
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> MAJ Fein: … the prosecution had no clue, we had to rely on what they were told, or what we were told. And then we remedied it the moment we realized that, that, we attempted to remedy it once we realized, and asked them to reassess their position based off the Court's Order of 11 May. But they had to come back to us to say "yes, what we read actually means we have something like that. Not what necessarily we told you before." Of course, everything changes as time goes on. So, once they told us, we then went through the procedures and we are here.
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> MAJ Fein: And so, going forward your Honor, after that Ruling and then after we re-litigated the Department of State, then we sent that and said listen, essentially as we have outlined in our memo to ODNI on behalf of NCIX, and then their response back. On 11 May the Court ruled even a draft damage assessment from the Department of State is discoverable in that form. We re-litigated that. Does this, does this information apply to ya-all (sic)? Based off of what you have previously told us. And at that point they said we need to have a meeting. We had the meeting within a week.

Article 39(a) Audio Recording 6 June 2012 (emphases supplied).

65. Clearly, and in light of the fact that the Government had actual knowledge that ONCIX had a "working draft" on 22 September 2011 and a "draft" on 6 March 2012, these conversations did not take place as MAJ Fein claims they did. The Government did not go back to ONCIX to inquire as to whether ONCIX had a draft damage assessment. The Government *knew* that

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22-Mar-12 Thu leave (Wife Surgery)
22-Mar-12 Thu Motions practice to include research and drafting
22-Mar-12 Thu Phone call with CCIU
22-Mar-12 Thu Phone call with NSF to inquire about any discoverable material

ONCIX had a draft damage assessment. What the Government went back to ONCIX with was the Court's ruling that the draft damage assessment (about which it had known for approximately 8 months) was discoverable. MAJ Fein, however, had to continue to tell the elaborate and fanciful story that he had weaved to the Court, so as to convince the Court: a) that he had not made any misrepresentations; and b) that the Government had been diligent all along. Nothing could be further from the truth.

2. The Government Was Not Diligent in Obtaining Damage Assessments from the 63 Agencies

66. The Government concedes that the speedy trial clock began on 27 May 2010 when the accused was placed under pretrial restraint. The Government admits that its first meeting with ONCIX was not until 2 February 2011, 251 days later. The Government provides no explanation of why it was not in contact with ONCIX, an apparently closely aligned agency, any earlier.

67. On 18 February 2011, ONCIX informed the Government that it would not be able to turn over the individual damage assessments it had received from the agencies it had contacted and that "approval from the other government organizations was necessary, since many of the individual assessments were classified." *See* Government Response, p. 28. Apparently, after this communication, the Government tried for over *one full year* to figure out a "system" to obtain these very short damage assessments before it had the brilliant idea to ask a paralegal to track them down. It was not until 27 February 2012, some 374 days after it was informed that ONCIX could not turn over these damage assessments that the Government, in a moment of sheer genius, figured out how to obtain them. The paralegal then tracked down these damage assessments in approximately one month.

68. It is clear that if the Government had exercised even a modicum of diligence, these damage assessments could have been provided to the Defense in March or April of 2011, not over one year later. The Government can point to no justification – other than its own ineptitude – to explain the ridiculous time lag in obtaining these very short damage assessments from individual agencies. The only "explanation" for such a time lag is that the damage assessments revealed that little to no damage was done to any agency of the U.S. Government – and, of course, the Government has not been in any hurry to turn over any of that sort of information to the Defense.

69. The above dates are taken directly from the Government's motion and are the key dates in assessing the Government's lack of diligence from a big-picture perspective. However, as with most of the Government's submissions, things simply do not add up with respect to the rest of the story. The following highlights the various residual inconsistencies and gaps in the Government's story:

- Apparently, the Government didn't receive the contact information for the various agencies until 14 October 2011, but the Government claims that it attempted to contact the different organizations on 11 October 2011. *Id.* at p. 28-29. How could the Government have contacted these agencies without their contact information? If the Government did indeed have their contact information, why did it not contact them earlier?

- The Government's meetings and communications with ONCIX were seemingly repeats of one another. On 18 February 2011, "the prosecution sought assistance from ONCIX to retrieve the individual damage assessments of those government organizations from which ONCIX requested input. ONCIX advised the prosecution that approval from the other government organizations was necessary, since many of the individual assessments themselves were classified." *Id.* at p. 28. Approximately 5 months later, the Government and ONCIX had made no progress on this point. On 14 July 2011, "ONCIX notified the prosecution that it would need authorization from the other government organizations to retrieve those organizations' individual assessments." *Id.* How can it be that after 146 days, absolutely no progress was made on this front and that the Government was still at Square One?

- The Government claimed in oral argument that it only found out in February 2012 that it needed to go to the agencies directly, rather than go through ONCIX to obtain the damage assessments. This is wholly inconsistent with its new position in its Speedy Trial motion where it indicates that it knew in 2011 that it had to retrieve the damage assessments from the individual agencies and that it began the process of retrieving those damage assessments "on or about 1 November [2011]." *Id.* at p. 29. At the 6 June 2012 motions argument, MAJ Fein stated that it was in February 2012 that he learned he would have to go to the individual agencies:

> MAJ Fein: … The NCIX as explained in the Government's filing to explain the difference between assessments and investigations. The NCIX is chartered to do a national level, national counterintelligence review – a damage assessment at a national level. That's what their – what the counter espionage act, excuse me, what the counterintelligence act set up. We briefed that in our filing. That is their charter. They do it government wide. They receive inputs from different government organizations. What Mr., excuse me, what the Defense has already referenced and we have already produced to the Defense are different entities that have submitted their information to NCIX. We have not reviewed any document that belongs to NCIX. Period. *What we have done is, we have gone to the originator, the owner of the information that was submitted to NCIX. The original entities, to request approval to review their material, and if discoverable, turn it over to the Defense. And that is what the Defense has been receiving.* Specifically, the ultimate source your Honor of these documents is not NCIX. The source of the documents that the Defense is receiving in discovery are the actual agencies. *So as mentioned earlier on the record today, the Department of Agriculture or the, or any of the executive departments that the Defense has received, those organizations independently did their own and submitted those*. We have gone to those agencies for efficiency purposes. We have acquired the documents, or attempting to finalize acquiring all of the documents. And then once we obtain them or review them get approval to turn them over if discoverable and give them to the Defense immediately once we get that approval.
>
> …

> MAJ Fein: Correct your Honor. It is our belief, at that point [February 2012], that they were compiling these other assessments *we knew about because we started reaching out once they told us about it – to go get those*. But, that they had no other documentation that would be subject to discovery – based off this response. So, yes we did know that their individual organizations were submitting theirs, and *that is why we went out to those independent organizations to get them approval and disclose them*.

Article 39(a) Audio Recording 6 June 2012 (emphases supplied). As is clear from the above passage, MAJ Fein states he became aware that ONCIX had received inputs from various agencies in February 2012, and it was at that point that the Government began reaching out to these different agencies. ("we knew about [these other agencies] because we started reaching out once they told us about it – to go get those."; "So as mentioned earlier on the record today, the Department of Agriculture or the, or any of the executive departments that the Defense has received, those organizations independently did their own and submitted those"). *Id*. Indeed, this is confirmed in an email from [REDACTED], a paralegal for the Government, to the EPA. [REDACTED] writes on 27 February 2012:

> I am a paralegal for the prosecution team in the Court-Martial of Private First Class Bradley Manning in connection with "W#kileaks." The purpose of this email is to request a copy of all documents your organization provided to NCIX approximately one year ago. Although we have been coordinating with NCIX/ODNI for the past year, *just two weeks ago they determined that we cannot review copies of your organization's documents in their possession, and we must directly go to your organization to coordinate a review*.

See Appellate Exhibit 173.

The Government knew in 2011 that it had to go to the individual agencies directly (indeed it claimed to have begun the process in November 2011) – and yet it represented to the Court and the Defense in oral argument that it learned in February 2012 that it had to go to the agencies directly. The Government has told so many falsehoods that it is having trouble keeping its stories straight. The Government, of course, told such falsehoods in order to create the illusion of diligence (i.e. "We didn't know until February 2012 that we had to go to the individual agencies and when we found out, we did that immediately."). However, when one looks at the dates the Government has presented to the Court and the representations it had made, one sees that the reality is otherwise than presented by the Government.

- The Government claims that on or about 1 November 2011, it "the prosecution began to reach out to individuals on the ONCIX contact list in order to obtain copies of the damage assessments." *Id.* at 29. The Government provides no proof of this. If this actually happened, where were these damage assessments? Why was there a need to

have a paralegal re-reach out to these same organizations in February 2012? Moreover, it is impossible to reconcile the Government's timeline with its representation at the first 802 session in February 2012 that it had contacted these agencies and had received no *Brady* information from them. In short, the timeline that the Government has presented does not make sense:

> 1 November 2011 – Government reaches out to individual agencies to obtain damage assessments. Unclear which agencies the Government contacted and what the response was.
>
> 23 February 2012 – Government represents that it has already reached out to individual agencies and found no *Brady* material.
>
> 27 February 2012 – Government tasks a paralegal to reach out to agencies that it has apparently already contacted.
>
> March-onward – Defense begins receiving damage assessments/*Brady* from each of the agencies that the Government purported to have contacted in November 2011 that apparently had no *Brady* material.

In particular, the Government had represented at an 802 session on 23 February 2012 that the Government had reached out to the Department of Agriculture as part of its *Brady* search and found nothing. Article 39(a) Audio Recording 23 February 2012, (unauthenticated record of trial at p. 39). *See* Transcript at p. 106 ("Mr Coombs: Even going so far as going to the Department of Agriculture to see if they had potential information there. And then they stated; and they even state it here, that they have not found any *Brady* material."). The Court summed up the 802 session for the record as follows:

> MJ: The government advised the Court that although it has been extensively engaged in evaluating executive branch and sub-branch files for discoverable information prior to referral, the government's due diligence obligations under the *Brady Williams* case law; duty to find, evaluate and disclose favorable and material evidence to the defense will take additional time because of the need to cull through voluminous classified and unclassified information contained throughout executive branch [and] sub-branch agencies that have been involved in the classified information disclosure investigations.

Id. at p. 38. The Defense added the following:

> Mr. Coombs: Just that the when government spoke about its *Brady* search they stated at that time they had not found any *Brady* material even though they had looked for over a year.

Id. at p. 39. Even though the Government claimed on February 23 2012 that it had already searched the Department of Agriculture and found nothing, the very next day, the

Government "email[ed] … the Department of Agriculture to inquire about any discoverable material." *See* Chronology. Then on 30 March 2012 the Government states that it "retrieved classified response from Department of Agriculture and subsequently disclose[d] it to the defense." *Id.* How could the Government have represented that it had contacted the Department of Agriculture as of 23 February 2012 and that the Department of Agriculture did not have any discoverable material, but then contact the Department of Agriculture the very next day and ultimately disclose discoverable material from the Department of Agriculture a couple of months later?

- If it is true that the Government began reaching out to agencies in November 2011, some ten months after being in touch with ONCIX, why was there a three month lag between that time and the time it put in place its revolutionary paralegal idea? This, of course, begs the question of *who* exactly was contacting agencies in November 2011.

70. There are so many holes in the Government's story, that it will be impossible for the Government to now plug them all. The bottom line is that the Government waited for well over a year to collect damage assessments from the 63 agencies which it knew were favorable to the Defense in the hopes that it would never have to produce them. The actual collection process ended up being only a month or so, according to the Government's Response. Now, after the fact, it has woven a fictional account of what happened with these damage assessments to convey the impression that it had been diligent all along. In reality, had the Government exercised reasonable diligence, these damage assessments would have been produced almost a year ago (i.e. in April or May of 2011).

3. The Government Was Not Reasonably Diligent in Producing Discovery from the FBI, the Organization that Jointly Investigated the Accused

71. Much like with ONCIX and the 63 agencies, the Government dragged its feet on producing the FBI investigative file and related discovery from the FBI (in particular, an "impact statement" that it hid from the Court and the Defense). The investigative file and the impact statement will be discussed, in turn:

a) The Government Did Not Exercise Reasonable Diligence in Producing the FBI Investigative File to the Defense

72. According to the Government's Response, the FBI agreed to participate in a joint investigation of the accused on or about 30 July 2010. *See* Government Response, p. 6. The Government waited until 19 April 2011 to request approval to disclose to the defense the FBI case file and its sub-files. *Id.*, p. 22. Apparently, the Government made two other duplicative requests on 28 July 2011 and 15 August 2011. It is unclear why the Government had to make three requests for the same thing. Leaving this issue aside, it was not until 1 February 2012 that the Government "completed its review of the FBI file related to the accused." This is a total of 288 days. While the FBI file related to the accused was undoubtedly large, there is no explanation as to why it took five prosecutors nearly *one year* to review the file.

73. The Government claims that after reviewing the file, on 7 February 2012, it "began extensive negotiations with DOJ and the FBI to disclose all requested information to the defense."[12] The Government then states, "The FBI would not approve disclosure to the defense, absent a military judge to issue a Protective Order." *See* Government Response, p. 22. The Government includes a citation to Unclassified Email 0451. The email is dated 5 May 2011, nine months *prior* to the Government even reviewing the FBI file and engaging in "extensive negotiations" with the FBI as to whether the FBI would consent to disclosure of its case file. The email, from someone at DOJ, is entitled "CID Case File and Update" and reads as follows:

> Hi Ashden/Joe,
>
> Thanks for the update and the disks. [redacted] and I have taken a preliminary look and wanted to give you advance notice of some potential concerns that we have with some of the items on the unclassified disk, as follows: [redacted]
>
> That's it for now. But I think it's fair to say we will likely need an extension from Monday May 9 to complete the review and obtain all necessary court orders.

74. The reference to "completing the review and obtaining all necessary court orders" refers to whatever task the FBI/DOJ was asked to complete by 9 May 2011.[13] Apparently, that task involved potentially obtaining a court order. This "court order" must have referred to some sort of civilian court order, since there was no order from a military judge that could have been obtained in May 2011, the time frame contemplated by the email (a military judge was not detailed to this case until February of 2012).

75. The email does not, by any stretch of the imagination, say that the FBI refuses to disclose information to the accused absent a military judge's protective order. First, the email does not refer to a "military judge" or a "protective order." Second, the email was drafted nine months *prior* to discussions about whether the FBI file would be disclosed to the accused. Third, something as important as the FBI refusing to disclose information to an accused absent a military judge's protective order would not be casually referenced as a throwaway line after "That's it for now." Presumably, there would be some formal memorandum from the FBI indicating that it would not consent to disclosure unless the information was subject to a military judge's protective order (and presumably, this memo would be prepared in February 2012, pursuant to the "extensive negotiations"). Fourth, the email is entitled "CID Case File" which seems to suggest that this doesn't even deal with the FBI investigative file. Fifth, this apparently important communication is not even referenced in the Government's chronology/time sheets; one would expect something as significant as the FBI refusing to disclose documents absent a military judge's protective order would be at least as important as the 5 May 2011 entry "worked on fixing issues with courtroom equipment." *See* Government Chronology. Finally, there is an email from MAJ Fein on 11 May 2012 that appears to be part of the same email chain as the 5

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[12] The Government cites "Enclosure 1" for this proposition. Enclosure 1 spans many hundreds of emails, so it is not clear what the Government is referring to.

[13] Based on Government Response, Enclosure 1, Unclassified Email 0465, it appears that the task was to do an "initial scrub of CID's files for [FBI] equities." *See also* Unclassified Email 0452.

May 2011 email (the subject line is "CID Case File and Update"). In this email, MAJ Fein writes:

> Thank you again for the review of the CID files … Joe and Angel are going to coordinate with [redacted] to finish scrubbing the FBI files, and then we will put together our 'wish list' of the documents we would like authorization to use and/or turn over in discovery. Ideally, in the coming weeks, we will have a comprehensive list of all documents in all investigative files (CID, FBI, and DSS), that we would like to seek approval for use during discovery and will present the list to all for input and potential for follow-on action (e.g. requesting a modification of sealing orders). ….

See Government Response, Enclosure 1, Unclassified Email 0465. It is clear from this email that the Government has not yet reviewed the FBI investigative file, much yet prepared its 'wish list' for discovery. If that is the case, how could the email from 6 days *prior* be read to suggest that the FBI will not disclose documents (yet to be reviewed and requested) absent a military judge's protective order?

76. In short, the Defense does not believe that the FBI had a "prerequisite" that a military judge issue a protective order prior to the FBI consenting to disclosure. *See* Government Response, p. 22. At the very least, this email does not say anything close to what the Government says it does. The Defense believes that the Government needed to find a way to hide its lack of diligence in disclosing the FBI investigative file so late in the game. It was not until 21 May 2012 that the Government apparently disclosed the entirety of the FBI's investigative file to the Defense. To put this in perspective, the Defense received the FBI investigative file – an elemental aspect of discovery – nearly *two full years* after the accused was placed in pretrial restraint. In order to explain its failure to provide the investigative file sooner, the Defense believes that the Government searched its emails from the FBI and DOJ to find the expression "court order" and then claimed that this email says something that it does not – that the FBI did not consent to disclosure absent a protective order specifically issued by a military judge.[14]

b) <u>The Government Hid the Existence of the FBI Impact Statement From the Court and the Defense</u>

77. The Government revealed for the first time on 31 May 2012 that it had "discovered" that the FBI had prepared a damage assessment (what it called an "impact statement"). In Appellate Exhibit CI (Defense Reply to Prosecution Response to Supplement to Defense Motion to Compel Discovery #2; Defense Motion for Modified Relief), the Defense argued:

> 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

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[14] It is important to note that a protective order was already in place. The Government, however, is claiming that this protective order was not sufficient for the FBI and that the FBI was seeking, in May 2011, a protective order from a military judge who was yet to be detailed – and who would not be detailed for another 9 months.

> Government and the FBI engaged in a joint investigation of the accused and are 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.").
>
> 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).
>
> 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.

Id. p. 10-11.

78. At oral argument on 6 June 2012, the Court asked MAJ Fein *when* the Government learned about the FBI impact statement.

> COURT: Alright, we will be addressing that aspect of this motion at the next session. I understand the Defense's argument. Government, are you prepared to tell me when you did know about this impact statement or impact assessment?

> MAJ Fein: Your Honor, the Government would like to at least have a chance to argue the due diligence argument first and then answer that in (inaudible) Court's order.

Article 39(a) Audio Recording 6 June 2012. MAJ Fein seemed to indicate that he would provide an answer to the Court's very straightforward question as part of the Government's due diligence submission, for which he had requested a two-week extension. MAJ Fein did not address the FBI impact statement *at all* in the Government's 20 June 2012 submission. The Government also conveniently omitted any reference to the FBI impact statement in its Response to the Defense Motion to Dismiss for Lack of Speedy Trial.

79. However, in the Government's 230-page Chronology, the Government indicates that it sent a request to review any FBI damage assessment on 6 October 2011 and that it reviewed the FBI impact statement on 2 November 2011 ("Email with FBI-sent impact statement"; "Prosecution initially reviews FBI impact statement"). It is clear that the Government knew about the existence of the FBI impact statement at some point prior to 6 October 2011 (though it is not clear when the FBI completed the impact statement or when the Government first learned of the impact statement).

80. And yet, despite knowing about the FBI impact statement since at least 6 October 2011, the Government waited until 31 May 2012 to disclose its existence to the Defense and the Court. In other words, it took the Government a mind-boggling 238 days to even *tell* the Court and the Defense that the FBI had prepared an impact statement. And, in so doing, the Government made it look like it was *just now* "discovering" the existence of the impact statement. *See* Appellate Exhibit 100, p. 4 ("The prosecution further requested that the FBI search its entire records for information relating to any damage resulting from the charged offenses. The prosecution 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)."). The Government provides no date for when the FBI prepared this statement and for why it took the Government 238 days to disclose its existence to the Court and the Defense.

81. And, because the Government sought substitutions for some of the information that it had been sitting on for 238 days, it was not until 19 July 2012 that the Court approved the Government's motion for substitutions and until 2 August 2012 that the Government provided the Defense with a copy of the court-approved substitutions. In short, it took over *nine months* from the time of the Government's review of the impact statement to get the impact statement (or a variation thereof) to the Defense.

4. The Government Did Not Exercise Reasonable Diligence in Producing Discovery from the Department of State

82. As if all the above weren't enough, the Government moved at a snail's pace with respect to discovery from the Department of State. This, of course, is not surprising given what appears to be the Government's *modus operendi* with respect to the Department of State: "Let's use the information that's favorable to the Government for our purposes, but let's resist producing anything of benefit to the Defense." The Defense will separately address the Department of

State damage assessment, general discovery from the Department of State, and the Department of State's complicity in denying PFC Manning his right to discoverable material and witnesses.

a) Department of State Damage Assessment

83. The Defense made numerous discovery requests for the Department of State damage assessment. The Government refused to provide the Department of State damage assessment to the Defense. The Government, in fact, refused to acknowledge that the Department of State was even working on a damage assessment (the Government referred to the damage assessment as "alleged") despite having submitted a request to the Department of State on 6 October 2011 to view the damage assessment and despite public proclamations from the Department of State that it was conducting a damage assessment.

84. The Government, in response to the Court's questions on 21 March 2012 as to whether the Department of State had a damage assessment indicated that "the Department of State has not completed a damage assessment." Because the Court and the Defense had knowledge that the Department of State had *something* (if not a "completed" damage assessment), the Court ordered production of the Department of State damage assessment on 23 March 2012. The Court should not overlook the fact that the expression "the Department of State has not completed a damage assessment" was given by the Government to the Court at the behest of the Department of State, and was designed (much like the ONCIX statement) to convey the impression that the Department of State did not have anything that was discoverable.

85. It was not until 18 May 2012, almost one year after it was prepared, that the Defense was granted access to the Department of State damage assessment. The Government provides no explanation for this time lag and why the damage assessment – a facially relevant document that the Government had requested to review on 6 October 2011 – was disclosed at such a late date.

b) The Government Did Not Exercise Reasonable Diligence in Fulfilling its *Brady* Obligations with Respect to the Department of State

86. On 25 May 2011, the Government submitted a prudential search request to the Department of State, asking it to preserve and locate certain documents related to PFC Manning and WikiLeaks. The Government provides no explanation as to why this discovery request was made of the Department of State (not to mention other key agencies) *one full year* after PFC Manning was placed in pretrial restraint. Clearly, the Government knew that the Department of State would be a big part of this case. Why did it wait one year to get the Department of State involved in the discovery process?

87. Once the Government submitted the prudential search request to the Department of State, the request then simply fell by the wayside for *more than another full year*. It was not until 28 June 2012 that the "DOS finishe[d] gathering and consolidating information responsive to the prosecution's prudential search request." *See* Chronology. That is a total of 400 days for the Department of State to "gather and consolidate" documents. The Government has provided no explanation – much less a satisfactory explanation – for why it took the Department of State 400

days to process the discovery request. Notably, 400 days is more than three times the length of time that R.C.M. 707 provides for an accused to be brought to trial.

88. Interestingly, while the *Brady* search was on the back burner (i.e. not being completed with any degree of haste), the Department of State was providing evidence to the Government to help with the Government's case-in-chief. The Government's chronology refers to the following activities that occurred after the Government submitted its prudential search request to the Department of State:

> 10-Aug-11 Tue – received valuation evidence
> 19-Aug-11 Fri Meeting-with DOS to discuss sentencing
> 13-0ct-11 Thu Request for Valuation Evidence (DOS)
> 19-0ct-11 Wed Email with DOS-requested valuation evidence
> 20-0ct-11 Thu Email with DOS- received notification that request for valuation evidence was being processed
> 2-Nov-11 Wed Email with DOS-request to disclose damage in slides
> 28-Nov-11 Mon Email with DOS-received valuation evidence
> 2-Dec-11 Fri Email with DOS- received valuation evidence

See Chronology. It is clear that when it came to the Government proving its case – in particular in advance of the Article 32 hearing – it routinely followed-up with the Department of State to ensure that it had all the information it needed. And the Department of State readily complied with Government requests for assistance (e.g. it took only a month for the Department of State to get the Government valuation evidence for the Article 32 hearing). For the Article 32 hearing, the Defense did not have *one document* (aside from the charged documents) from the Department of State.[15]

89. Once the Department of State finally produced the relevant documents to the Government, the Government was able to review them in *less than three weeks* ("11-Jul-12 Wed Prosecution completes review of DOS records responsive to Court ruling"). It then took another 65 days for the Government to coordinate with the Department of State to actually produce these documents to the Defense. If the Department of State had actually produced these records in a timely manner, the Defense would have had these documents over one year ago – not one month ago. No explanation has ever been provided for the inordinate amount of time that elapsed in submitting a prudential search request and in the Department of State responding to a prudential search request (or, for that matter, for the inordinate delay of the Government in even submitting a prudential search request).

90. The diligence, or lack thereof, of other agencies is highly relevant to evaluating speedy trial rights. *See United States v. Kuelker*, 20 M.J. 715, 716-17 (N.-M. Ct. Crim. Rev. 1985) ("[T]he need to obtain crucial evidence in the custody of another agency of the United States is a

[15] As evidence that the Government was simply perfecting its case at the expense of the Defense prior to the Article 32 hearing, *see* Government Response, p. 79 (noting that in November 2011, "the prosecution presented its case, specifically how it intended to prove the charges and what damage, if any, the accused's misconduct has caused."). What the Government is saying is that it kindly shared its case with the Defense, while refusing to provide the Defense with even a scintilla of evidence to be able to use to rebut the charges.

common problem and therefore associated delay does not qualify for exclusion from the 120-day rule as a 'delay for good cause.'"). Otherwise, a prosecution could drag on for years – or even decades – by "blaming" the delay on entities outside of the prosecution team. Even with the most diligent prosecutor, asking for updates and attempting to speed up the process on a daily basis, one could have a speedy trial violation if the case as a whole was not moved along at a diligent pace. In short, the lack of diligence of individual entities is imputed to the Government for speedy trial purposes.

91. In *United States v. Pyburn*, 1974 WL 13919 (C.M.A.), the Court of Military Appeals found a violation of the accused's speedy trial rights where there was an "unexplained slowness of another agency in analyzing and returning evidence." The Court stated:

> *Even where the prosecution does not exercise any direct control over the facility where evidence is analyzed, the duty of speedily trying the accused cannot be set aside by the unexplained slowness of another agency in analyzing and returning evidence.* The 62-day delay associated with the laboratory analysis in this case was not a "really extraordinary circumstances" justifying the failure to try the accused within 90 days.

Id. at *180 (emphasis supplied). If 62 days constitutes a period of "unexplained slowness" in *Pyburn*, what are we to say about 400 days? The Department of State did not respond to the Government's prudential search request for 400 days – and it appears that the Government was in no haste to have the Department of State do so. The lack of diligence of the Department of State is ascribed to the Government for Speedy Trial purposes.

c) <u>The Department of State was a Willing Partner in Impeding PFC Manning's Speedy Trial Rights</u>

92. The Department of State was the Government's willing partner in impairing PFC Manning's right to a speedy trial, his rights to discovery under R.C.M. 701 and his right to equal access to witnesses under Article 46, UCMJ. It is clear that the Department of State has been feeding the Government information for its case-in-chief, while secreting discovery and witnesses from the Defense and encouraging the Government to make frivolous arguments during the course of this litigation. Below, the Defense addresses the Department of State's requirement for a *Touhy* request prior to speaking with the Defense, the Department of State's ludicrous discovery positions, and the Department of State's attempt to hide the damage assessment from the Defense. All of these are examples of extreme bad faith on the part of both the Government and its close ally, the Department of State.

The Department of State's Requirement that the Defense File a Touhy Request

93. After asking to speak with witnesses from the Department of State for approximately one year, the Defense was informed in March 2012 that it needed to file a "Touhy Request" to be able to interview and potentially depose Department of State witnesses. The Government provided no explanation as to why, almost two years into the case, the Defense was in March 2012 being informed of apparently the proper bureaucratic protocol to follow for interviewing

Department of State witnesses. According to its Chronology, on 26 March 2012, the Government submitted the *Touhy* request on behalf of the Defense and assured the Defense that it would do its utmost to encourage the Department of State to process the request in an expeditious manner.[16] Despite multiple inquiries from the Defense as to the status of its *Touhy* request, the Defense has not heard a peep on the *Touhy* request in the past seven months – a total of 205 days.

94. This is particularly ironic because the Government apparently had to submit *Touhy* requests on its own to view certain damage assessments, and these *Touhy* requests were approved in two days. *See* Chronology (2-Apr-12 Mon Email with OPM-submitted written Touhy request consistent with OPM's demands to review damage assessment; 4-Apr-12 Wed From OPM OGC-Approved Touhy request, will make arrangements for the prosecution to receive a copy of the damage assessment). Clearly, what's good for the goose is not good for the gander. The Government had its *Touhy* request approved in 2 days and the Defense is still waiting 205 days later with no word. Equal access to witnesses under Article 46 does not include jumping through impenetrable red tape to even speak with witnesses.

95. As the Government will recall, the Government put 22 witnesses from the Department of State on its witness list. The Defense has attempted to interview these witnesses, but has not been able to do so because its *Touhy* request has not been approved.[17] It is clear that *Touhy* was deliberately designed by the Government and the Department of State as a roadblock to insulate the Department of State from questioning by the Defense.

The Department of State's Attempt to Hide the Damage Assessment from the Defense

96. As the Court knows, it was yeoman's work getting the Government to finally admit that the Department of State had a damage assessment. The Government's original position (undoubtedly at the behest of the Department of State) was that the Department of State had not "completed" a damage assessment. *See also* Appellate Exhibit XVI, Government Response to the Defense Motion to Compel #1, p. 1 ("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."). Its position with respect to ONCIX was the same. Both of these statements conveyed the impression that the Department of State and ONCIX had nothing – i.e. that these "alleged" damage assessments simply did not exist. The Defense, by this point, knew better and that the Government was fond of playing word games. The Defense argued that the Government was likely using the word "completed" as a synonym for "finished" – as in "The Department of State has not finished completing its damage assessment." Clearly, had the Government's submission been phrased that way, everybody would have known that the Department of State had a damage assessment, but that it had not been finalized. However, the Government's

[16] Note, however, that the Department inexplicably did not receive the *Touhy* request until 6 April 2012, some 10 days later. Apparently, the Government submitted the *Touhy* request through the Pony Express.

[17] On 17 October 2012, during an R.C.M. 802 Session, the Government stated that a Touhy request was no longer required due to the addition of the requested individuals on the Government's witness list. Besides being inconsistent with the Government's previous position regarding whether Article 46 trumps any Touhy requirement, the Government still fails to explain the 89 day delay between the filing of the Touhy request on 26 March 2012 and the Government's filing of its initial witness list on 22 June 2012.

language – apparently authorized by the Department of State – was calculated to create a false impression. Had the Defense simply "let it go," the Defense would not have the Department of State damage assessment (much less the ONCIX damage assessment, the DHS damage assessment and the like). This was what the Government and the Department of State was hoping for. And this is why they had so many conversations just prior to the 15 March 2012 motions argument dealing with discovery of the Department of State Damage Assessment. *See* Chronology (2-Mar-12 Fri Email with DOS-discussed draft damage assessment; 6-Mar-12 Tue Email with DOS-discussed draft damage assessment; 14-Mar-12 Wed Email with DOS-discussed draft damage assessment). Clearly, at the 15 March 2012 motions argument, the Government knew that the Department of State had a "draft" damage assessment – however, its representation to the Court was only a half-truth. It was only because the Defense provided a mountain of proof, including newspaper articles, that the Court pushed the issue with the Government. The Defense should not have had to disprove the Government's false impression.

The Department of State Intermeddled in the Instant Case By Feeding the Government Frivolous Litigation Positions

97. The Defense has argued previously that the Government has allowed the Department of State to commandeer its litigation positions. This is abundantly clear when one looks at the "Government's" (i.e. the Department of State's) position with respect to draft damage assessments and the discoverability of documents which pre-dated the Department of State damage assessment.

98. After the Court ruled on 23 March 2012 that the Government must produce the Department of State damage assessment, the Government and the Department of State put their heads together to come up with a way to re-litigate the Court's ruling. They found a random quotation from a second concurring opinion from a1967 case (*Giles v. Maryland*) and used that one sentence to craft an argument that a draft damage assessment is "speculative" and therefore is not discoverable under R.C.M. 701. However, the Government did not assert this litigation position right away. Instead, it waited until May 2011 to raise this issue. The position was so ridiculous and so unsupported in law that the Court did not ask the Defense to brief it. This, in turn, prompted the Government to contact ONCIX and DHS and ultimately to reveal to the Court that there were other draft damage assessments in existence. The Government acted in bad faith in supporting the Department of State's position in this respect; the Government's job is not to advance the interests of various equity holders but to litigate this case as justice requires. If the Department of State wanted to invoke a privilege, it was permitted to do so. What it is not permitted to do – and what the Government allowed to happen – is to interject itself into the legal issues and rulings in this case.

99. The Department of State's interference did not end there. Once the Court ordered the Government to examine documents from the Department of State (over two years into the case), the Government came back to the Court asking for permission to simply exclude from discovery anything with a date that preceded the Department of State damage assessment - which would, in effect, be practically everything at the Department of State. Its basis for this request is that the information predated the damage assessment was "likely" considered by the Department of State, therefore making it cumulative. The Government's (i.e. the Department of State) position

was wholly devoid of logic. After all, the Department of State damage assessment was less than 50 pages; how could the 5000 plus pages of Department of State discovery be cumulative when the damage assessment was less than 50 pages? That the Government even attempted to make this argument at the behest of the Department of State is yet another example of bad faith.

100. The point is that this is yet another in a long series of examples of the Government doing the bidding for other government agencies. The 2-year plus delay in the Department of State producing *Brady* discovery to the Government, followed by subsequent delays arguing the *Giles* point and the "must be cumulative point," followed by additional time to get Department of State documents ready for disclosure reflects concerted effort by both the Government and Department of State to deny discovery to the accused and impede his right to a fair and speedy trial.

5. The Government Did Not Exercise Reasonable Diligence in Searching Its Own Files (the HQDA Memo)

101. The Defense discovered, by accident, that in July 2011, the Government had sent out a memo to Headquarters, Department of the Army requesting it to task Principal Officials to search for, and preserve, any discoverable information. This memo was sent out on 29 July 2011. *See* Defense Motion to Compel Discovery #2, Attachment A. According to a 17 April 2012 Memorandum for Principal Officials of Headquarters, Department of the Army, "[i]t was only recently determined that no action had been taken by HQDA pursuant to the 29 July 11 memo from DOD OGC." *Id.* This memo clearly shows that no action had been taken by HQDA for *nine months* in response to the Government's request for *Brady* and other potentially discoverable material.

102. The Government provides no explanation as to why it submitted a *Brady* search request to HQDA 426 days after PFC Manning as placed in pretrial restraint. Instead it focuses on trying to explain the further nine month delay in following-up with HQDA. The Government's explanation essentially amounts to "We outsourced the *Brady* search and then forgot about it."

103. Actually, when one looks at the Government's "explanation," it's even worse than that. The Government writes:

> On 25 May 2011 and again on 6 June 2011, the prosecution submitted a Prudential Search Request to DOD, which included HQDA. … On 8 August 2011, the prosecution followed up with DOD OGC and learned the request was distributed on 29 July 2011.

See Government Response, p. 24. Essentially, what the Government is saying is that after 361 days of PFC Manning being in pretrial restraint, the Government enlisted the help of DOD to submit a prudential search request to HQDA. Apparently, submitting a prudential search request to HQDA directly would have been too arduous. Then, DOD waited over *two months* to submit the prudential search request to HQDA.

104. The Government continues:

> …. On 3 October 2011, the Joint Staff notified the prosecution that it compiled all the responsive material. Between the middle of October 2011and the start of the Article 32 investigation on 16 December 2011, the prosecution began to process the voluminous material into its computer systems and understand what information needed to be reviewed. After realizing the Joint Staff and DOD response did not include material l from HQDA, *the prosecution contacted DOD OGC on 5 January 2012, who advised the prosecution to contact HQDA directly to speed up the process*.

Id. (emphasis supplied). So essentially the Government's position is that it realized in January 2012, nearly six months after submitting a prudential search request, that DOD had dropped the ball on obtaining information from HQDA. Whether DOD or the Government dropped the ball is of no moment; somebody dropped the ball and the Government is accountable for the lack of diligence for speedy trial purposes.

105. The Government then writes:

> On 10 January 2012, the prosecution emailed Criminal Law Division, Office of the Judge Advocate General, United States Army (hereinafter "OTJAG") to request an update, and was informed that OTJAG needed to contact DOD OGC for the inquiry.

Id. This statement by the Government doesn't make any sense. The Government says it "contacted DOD OGC on 5 January 2012 who advised the prosecution to contact HQDA directly to speed up the process." *Id.* But on "On 10 January 2012, the prosecution emailed Criminal Law Division, Office of the Judge Advocate General, United States Army (hereinafter "OTJAG") to request an update, and was informed that OTJAG needed to contact DOD OGC for the inquiry." Wasn't the Government already told on 5 January by DOD that it had to go to HQDA directly? Why was it emailing the OTJAG instead of HQDA?

106. Then the story seems to fall apart even more:

> On 2 February 2012, the prosecution again emailed OTJAG to request an update.

Id. Apparently the Government did not understand what it was being told on 5 January 2012. Why was it still emailing OTJAG when it had been told by OTJAG to go to DOD directly, and by DOD to go to HQDA directly? Couldn't this utter mess of broken telephone have been avoided by doing the only seemingly logical thing – that is, going to HQDA directly?

107. The Government continues with its tangled HQDA story in a different part of its Response:

> The [redacted] [redacted] emailed OTJAG on 6 March 2012 for an update on the status of the Prudential Search Request. On 16 March 2012, the [redacted] emailed OTJAG again for an update and it was determined that OTJAG was coordinating the best method to efficiently execute the task, which had not occurred based on the OGC, DoD tasker. On 27 March 2012, on behalf of

> the prosecution, the [redacted] emailed OTJAG with an explanation of the prosecution's discovery obligations, including the requirement to respond to the Court by 18 May 2012 with an update of the prosecution's review of the DOD and HQDA information. On 23 April 2012, OTJAG notified the prosecution that it had started to receive responsive information.

Id. at p. 40. It seems like the Government did not get the message. It was told to go to HQDA directly, and instead chose to engage in another four months of broken telephone. Apparently, though, the Government was in no rush to get this information – information which could have been produced nearly a year earlier. Finally, on 11 May 2012, the prosecution received the HQDA information. One would thing that, after all this time, the Government would have looked at the HQDA information. Not so. Instead, it waited until 30 June 2012 (i.e. 50 days later) to look at this information. Apparently, the Government completed its review in a mere 2 days.

108. Despite having approval to disclose the information since 5 June 2012 (*See* Chronology, "5-Jun-12 Tue Email with HQDA-sent signed approval for consent to disclose"), the Government waited until 2 August 2012 to disclose the HQDA discovery to the Defense. This is a total of 339 days after the original memo was sent to HQDA. What this episode shows is how fatally flawed the discovery process was. The Government could not keep track of what was going on and the right had did not know what the left hand was doing. What is unimaginable is that the Government, the DOD and the OTJAG lost track of *Brady* discovery within the Army's own files for almost a year.

6. The Government Did Not Exercise Reasonable Diligence in Completing its Discovery Obligations of Other Closely Aligned Agencies

109. The Government indicates that it sent out prudential search requests to the various closely aligned agencies beginning in May 2011.[18] Some of these requests were actually sent later; for instance, the prudential search request of the FBI was sent on 27 June 2011 and the DEA prudential search request was sent on 16 November 2011. Notably, the search requests included the request that the agencies "take all reasonable and necessary steps to *preserve* any responsive files gathered as a result of [its] search for information." (emphasis supplied). It is nonsensical for the Government to have requested for agencies to "preserve" documents a year after they may have come into existence. Why were the preservation requests not sent to the agencies shortly after charges were preferred?

110. Moreover, the prudential search requests do not request that the agencies search for *Brady* information. Rather, the Government requested the organizations to:

> "conduct a thorough and comprehensive search of its records for information which concerns or references PFC Manning and/or WikiLeaks, including certain

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[18] The Government indicates that it sent out these requests "sua sponte" and "proactively" *See* Government Response, p. 23, 79. The Defense is not sure what this is intended to convey. Of course the Government sent these out "sua sponte" – did the Government expect the Defense to submit the prudential search requests? Or the agencies to come to the Government with discovery?

> information…which directly implicates the evidence" in this court-martial; and (2) "take all reasonable and necessary steps to preserve any responsive files gathered as a result of [its] search for information."

Id. at p. 23. Nowhere in this search request is a request for *Brady* information. The Government itself realizes this, so it goes to pains to say, "The prosecution included any records relating to WikiLeaks to capture, *inter alia*, any documents that discussed damage resulting from the unauthorized disclosures." *Id.* In other words, the Government is now trying to say that "documents related to WikiLeaks" was intended to capture documents which "discussed the damage resulting from the unauthorized disclosures." *Id.* It is clear that the prudential search requests were not aimed at obtaining mitigating evidence which dealt with damage (or lack thereof) from the leaks. Otherwise, the Government could simply have asked for those sorts of documents, as it did after it realized in April of 2012 that nobody had acted on the HQDA memo. In that prudential search request, the Government requested:

> DOD OGC is requesting that HQDA search for and preserve any documents with material pertaining to: any type of investigation; working groups; resources provided to aid in rectifying an alleged compromise of government information damage assessments of the alleged compromise; or the consideration of any remedial measures in response to the alleged activities of PFC Manning and Wikileaks.

Clearly the Government is quite capable of asking for documents which "discussed the damage resulting from the unauthorized disclosures." *See* Government Response, p. 23. Instead, it realized as it was preparing its Response that it had never actually asked for *Brady* information, to include documents which discussed the lack of damage resulting from the alleged leaks. So it needed to find some way to explain the glaring omission – and the only way possible was to read into the statement "documents related to WikiLeaks" to include documents related to damage (or lack thereof) caused by the alleged leaks. This is a stretch, even for the Government.

111. As noted above, it was not until May of 2011 that the Government began sending out these prudential search requests (which did not even ask for *Brady* material). The Government fails to explain why there is a *one-year gap* (or significantly more) between the accused being placed in pretrial restraint and its submission of these prudential search requests. Not only did it take the Government a year to send out prudential search requests, but it took over another year to actually produce responsive documents from these agencies. In short, it took *over two years* for the Defense to receive discovery, including *Brady* discovery, from closely aligned agencies. For instance, even though the Government sent ODNI a prudential search request on 27 May 2011 (a year after PFC Manning was placed in pretrial restraint), it waited until 11 July 2012 to review the responsive documentation. *See* Chronology. This is a total of 411 days for the Government to even sit down and review documents from a closely aligned agency. And then, it wasn't until 14 September 2012 that the Government disclosed these ODNI documents to the Defense, which brings the elapsed time between the submission of the prudential search request and disclosure to the Defense to 476 days.

112. The Government claims to have "both formally in writing and informally through emails and in meeting, requested many updates on the status of the search." *See* Government Response, p. 23. The Government could have asked for updates every day for 400 days – that would not change the fact that the agencies themselves were not reasonably diligent in producing the information. The Government never appears to have *once* asked why the process was taking so long. Regardless of who bears the blame for the delay – which the Defense submits is both the agencies and the Government – the time is attributable to the Government for speedy trial purposes.

113. There are too many open-ended questions for the Defense to count when it comes to the Government's discovery obligations. Below, the Defense highlights three specific discovery issues (of many) that the Government has yet to account for.

a) Department of Homeland Security Damage Assessment

114. The Government indicates that on 19 October 2011, "DHS authorize[d] prosecution to review DHS damage assessment." *See* Chronology. It is not clear when the DHS completed the damage assessment, but it is safe to assume that it was months prior. The Government did not disclose the existence of the DHS damage assessment until 6 June 2012, sum 231 days after the Government was authorized by DHS to review the damage assessment.

115. The Government failed to provide any explanation as to why this damage assessment, much like the ONCIX damage assessment, was hidden from view until the 11th hour. However, when one looks at the Government's chronology, it is clear what happened. The Government was hoping to hide the very existence of the DHS damage assessment from the Defense and the Court. However, when the Court ruled against the Government on 11 May 2012, denying its motion for reconsideration of the Court's ruling on the discoverability of the Department of State damage assessment, the Government realized it was in trouble. Consequently, there was a flurry of discussion between the DHS and the Government in the immediate aftermath of the Court's order. *See* Chronology (16-May-12 Wed Email with DHS-discussed Court Order; 21-May-12 Mon Email with DHS-discussed Court Order; 24-May-12 Thu Email with DHS-notified that DHS is in the process of clearing the damage assessment for disclosure to the defense). It is clear that the Government would never have disclosed the existence of the DHS damage assessment absent the Court's ruling on 11 May 2012 (but note: there is no indication that the DHS damage assessment at this point was even in draft form).[19]

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[19] In the aftermath of the Court's 11 May 2012 ruling, the Government reached out to dozens of entities asking for discoverable material. *See* Government Chronology:

> 14-May-12 Email with Export-Import Bank of US to inquire about any discoverable material
> 14-May-12 Mon Email with FMC to inquire about any discoverable material
> 14-May-12 Mon Email with MMC to inquire about any discoverable material
> 14-May-12 Mon Email with OPI to inquire about any discoverable material
> 14-May-12 Mon Email with SSA to inquire about any discoverable material
> 14-May-12 Mon Email with SSS to inquire about any discoverable material
> 14-May-12 Mon Phone call with Export-Import Bank of US to inquire about any discoverable material
> 14-May-12 Mon Phone call with FCA to inquire about any discoverable material
> 14-May-12 Mon Phone call with FMC to inquire about any discoverable material
> 14-May-12 Mon Phone call with MMC to inquire about any discoverable material

b) IRTF Damage Assessment and Second Follow-On Damage Assessment

116. As yet another example of the Government's lack of diligence, on 25 October 2011, the Government "requested approval to disclose the classified IRTF Final Report to the defense." This obviously means that the IRTF damage assessment was prepared many months prior. *See* Chronology. And yet, it was not until 6 June 2012 that the Government disclosed the IRTF damage assessment to the Defense. Again, it was likely a full year (if not longer) between completion of the report and its disclosure to the Defense. A one-year turn-around time for a document – even a classified document – does not constitute moving the case along with reasonable diligence. The Government fails to provide any explanation for the lengthy delay.

117. Another issue the Government completely ignores in its Response is the CIA's second "follow-on report to the original WikiLeaks Task Force Report." *See* Prosecution Notice to the Court of Identification of Additional CIA Information. The Government indicated that it had "learned on 11 July 2012 that the CIA ha[d] drafted another report analyzing the impact of the WikiLeaks disclosures on a discrete matter." The Government's 11 July 2012 entry fails to mention this apparently important matter.

118. However, interestingly, the Government's Chronology notes that on [REDACTED], the "[REDACTED]." Was one of the two damage assessments this "follow-on report" that the Government claimed to have learned about on 11 July 2012? The Government states in its Notice that "the United States intends to review the additional reports on 13 July 2012." And yet, 13 July 2012 does not contain any reference to the follow-on CIA Report. In fact, the Defense could find no reference in the Government's chronology to the second CIA Report. As the Defense asked in its Motion to Dismiss for Lack of a Speedy Trial, why was the Government in 11 July 2012 just "learn[ing] on 11 July 2012 that the CIA has drafted another report." When was the report prepared? Why did the Government not know about the report? Or, did the Government know about the report for quite some time? Again, the Government remains mum on the answers to these questions.

119. The Government claims that these late disclosures did not impact the Defense and implies that the Defense should be grateful to the Government for providing discovery:

> The defense also alleges that the delay in discovery has impacted his ability to prepare for trial. … Further, to the contrary, *the prosecution's proactive discovery efforts better enabled the accused to prepare his defense*. The prosecution, *sua sponte*, submitted preservation requests to more than a dozen government organizations. … The discovery already provided to the defense has resulted in additional defense discovery requests. These continued requests reveal

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14-May-12 Mon Phone call with OPI to inquire about any discoverable material
14-May-12 Mon Phone call with SBA to inquire about any discoverable material
17-May-12 Thu Email with ODNI to inquire about any discoverable material with NCPC
17-May-12 Thu Email with ODNI to inquire about any discoverable material with NCTC

The timing should not be viewed as mere coincidence. Undoubtedly, the Government realized that all these organizations potentially had draft documents which could be discoverable.

> that the defense valued the discovery they received and *were willing to wait based on the possibility of the existence of more discoverable information*.

See Government Response, p. 79 (emphasis supplied).

120. The Government is completely out of touch with reality if it believes that the late disclosure "better enabled the accused to prepare his defense" and that the Defense was "willing to wait" for discovery. The Defense "wait[ed]" for discovery simply because it had no other choice. And the Defense is *still waiting* for discovery in this case. As of a couple of weeks ago, discovery was still pouring in, as evidenced by the Government's Chronology:

> 15-Sep-12 Sat Discovery production: Bates# 00514454-00514497 (44 pages) including DHS information [Unclassified]
> 15-Sep-12 Sat Discovery production: Bates# 00514498- 00514498 (1 pages), including DHS information [Classified]
> 15-Sep-12 Sat Discovery production: Bates# 00514501- 00514898 (398 pages), including DIA and ODNI information (SCI F) [Classified with Special Control Measures]
> 19-Sep-12 Wed Discovery production: Bates# 00514499- 00514500 (2 pages), including DOE information [Unclassified]
> 19-Sep-12 Wed Discovery production: Bates# 00514899- 00515842 (944 pages), including DIA and CIA information [Classified]
> 19-Sep-12 Wed Discovery production: Bates# 00515843- 00519167 (3325 pages), including Quantico emails [Unclassified]
> 20-Sep-12 Thu Discovery production: Bates# 00519168- 00519352 (185 pages), including FBI information [Classified]
> 20-Sep-12 Thu Discovery production: Bates# 00519353- 00523672 (1286 pages), including DOS information [Classified][20]

c) <u>Grand Jury Testimony</u>

121. The Government also fails to explain why the huge time lag in producing *Brady* from grand jury testimony. It indicates that on 29 September 2010, "DOJ informed prosecution that judge signed order disclosing grand jury matters to prosecution." *See* Government Chronology. But it wasn't until 12 April 2012 that the Government reviewed grand jury information. *Id.* Although it had "authority to disclose" grand jury information to the defense on 2 June 2011, the grand jury information was not produced until 21 May 2012. This is almost one year later, and a total of 600 days after a judge signed an order allowing the grand jury material to be given to the Government. Again, the Government provides no explanation as to why the grand jury material could not have been produced much sooner than it actually was.

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[20] Ironically, the Government includes an entry on 14 September 2012 stating "14-Sep-12 Fri PROSECUTION DISCLOSES, OR SUBMITS TO THE COURT FOR IN CAMERA REVIEW, All OUTSTANDING DISCOVERY." Clearly, as of 14 September 2012, the Government had not disclosed all outstanding discovery.

122. Had the Government exercised reasonable diligence, the "discovery phase" of the court martial would not have extended well over two years into the case. It is unacceptable that 847 days into the case, discovery is still not complete. Had the Government made inquiries much sooner than it did, and had it kept on top of the agencies in a diligent manner, the case would have gone to trial a great deal sooner than February 2012.[21]

7. The Government Was Not Reasonably Diligent in Providing Discovery From Quantico

123. As documented in previous motions, included the Defense's Motion to Dismiss for Lack of a Speedy Trial, the Government dumped critical emails on the Defense literally the night before the Defense's Article 13 motion was due, and after the Defense had already filed its Attachments with the Court. This is yet another in a long series of examples of bad faith on the part of the Government. When the Government's lack of diligence is tied to bad faith, this weighs heavily in the speedy trial calculus. *See Barker v. Wingo,* 407 U.S. 514, 531 (1972) ("[D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defense. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.").

124. The Government's extremely late disclosure of the Quantico emails (and subsequent communications with the Defense) is illustrative of both lack of diligence and bad faith on the part of the Government. The Government justifies holding on to these emails for up to a year without even so much as looking at them (much less disclosing them) on the following basis:

> On 8 December 2010, the Defense submitted a discovery request, requesting "[a]ny and all documents or observation notes by employees of the Quantico confinement facility relating to [the accused]." Enclosure 1 to AE CCXLIV. In the same discovery request, the Defense requested "[a]ny report, *e-mail* or document discussing the need for the State Department to disconnect access to its files from the government's classified network." *Id.* (emphasis added). The discovery request also requested, "[a]ny e-mail, report, assessment, directive, or discussion by ██████████ to the Department of Defense, Department of State or Department of Justice." *Id.* (emphasis added). The discovery request further requested, "any and all memorandums*, e-mails*, or other references by Congressmen, Senators, or government officials concerning the disposition of this case or the need to punish [the accused]." *Id.* (emphasis added). The discovery request requested, "[a]ny and all documentation, *e-mails*, or reports given to the Summary Court-Martial Convening Authority, the General Court-Martial Convening Authority, or the Staff Judge Advocate concerning the disposition of

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[21] It is clear that the Government was nowhere close to prepared to go to trial in February 2011 when it referred the case. Instead, it referred the case in order to stop the Speedy Trial clock under R.C.M. 707 and then took its time over the next year to complete all the tasks that should have been completed in the first year and a half of this court martial.

> [the accused's] case or nature of the charges or possible charges against [the accused]." *Id.* (emphasis added).

See Government Response, p. 41. In short, the Government's justification for sitting on these emails for six months to one year is "we didn't think you wanted them." It is inconceivable that the Government could make this argument with a straight face.

125. Apparently, the Government believes that the term "document" does not capture emails. This would mean that emails are not discoverable under R.C.M. 701(a)(2), since the section refers only to "documents" and not "emails." If "emails" are not a subset of "documents" then the defense would never be entitled to emails under R.C.M. 701(a)(2). Such a position is absurd. Any sensible interpretation of the term "documents" includes "emails." *See e.g. United States v. Solomon*, 2012 WL 3106790, *2 (N.M.Ct.Crim.App.)(" The defense submitted *two documents*: *an email* from the appellant's defense counsel from his previous court-martial and an incident report from the Camp Pendleton Provost Marshal's Office.")(emphasis supplied).

126. Moreover, even if the Defense did not specifically request "emails," the Government has an independent obligation to turn them over. The Discussion to R.C.M. 701 states that "[w]hen obviously discoverable materials are in the trial counsel's possession, trial counsel should provide them to the defense without a request." The discussion does not state that the Government's obligation kicks in when the Government "gets around" to looking at documents; such obligation kicks in once the documents are in the trial counsel's possession. Such documents were in the trial counsel's possession six months to one year prior to when they were disclosed. Waiting until a couple of days before the Defense filing date for the Article 13 motion to view these documents is not only grossly negligent, but unfortunately characteristic of the lack of diligence that has plagued this case from the outset.

127. When the Government disclosed the 84 emails the night before the Article 13 Motion was due, MAJ Fein indicated that these emails were "obviously material to the preparation of the defense." *See* Defense Motion to Dismiss for Lack of a Speedy Trial, Attachment 62. The Defense was troubled by the Government's use of the expression "obviously material to the preparation of the defense." Accordingly, the Defense sent an email to the Government asking whether there were documents that were material to the preparation of the defense, but not *obviously* material to the preparation of the defense. *See* Appellate Exhibit 243, Attachments; *see also* Appellate Exhibit 260. Two prosecutors from the Government (CPT Morrow and CPT Overgaard) responded that the Government had produced *all emails* that were material to the preparation of the defense, not simply those that are obviously material (i.e. the Government was not drawing a distinction between "material" and "obviously material"). *Id.*

128. On 17 August 2012, the Defense submitted a motion to compel production of the remaining 1,290 emails. *See* Appellate Exhibit 243. At this point, the Government decided to voluntarily disclose 600 more emails to the defense, as constituting documents that were "material to the preparation of the defense." What is clear is that two separate prosecutors were not entirely truthful with the Defense about having disclosed all documents that were material to the preparation of the Defense. The Government's Response completely overlooks this aspect of the Defense argument and never explains the misrepresentation by two different members of the prosecution team. As with so many other things in this case, the misrepresentations were

designed to hide from public view discovery that is embarrassing and damaging to the Government.

8. Miscellaneous Other Examples of the Government's Lack of Diligence and Mischaracterizations of Fact

129. Among the miscellaneous other examples of the Government's lack of diligence or mischaracterization of fact are the following:

- At p. 75 of its Response, the Government indicates that it exhibited diligence by submitting a prudential search request to CYBERCOM six days after the Defense submitted a request for CYBERCOM records. The Government was anything but diligent. It should already have submitted a prudential search request to CYBERCOM (much like it submitted a prudential search request to other military entities). As explained in previous motions, CYBERCOM files are military files, subject both to *Brady*/R.C.M. 702(a)(6) and R.C.M. 701(a)(2). Far from being diligent, the Government missed the boat on not having already searched these files earlier.

- The Government states that for the various administrative investigations related to the accused, the Government "immediately sought to review and produce said files to the defense." *See* Government Response, p. 6-7. The Government's definition of "immediately" is questionable. For instance, the Secretary of the Army AR 15-6 investigation was completed on 14 February 2011 and disclosed to the defense on 30 June 2011, 136 days later. Similarly, the United States Forces-Iraq (USF-I) AR 15-6 investigation was completed on 16 June 2010; the documents were not produced to the Defense until 12 May 2011, 262 days later. Finally, the United States Division-Center (USD-C) AR 380-5 investigation was completed on 16 June 2010, but not disclosed to the Defense until 9 February 2011, 238 days later. This hardly qualifies as "immediately."

- The Government indicates that it submitted a request for various OCAs to approve disclosure of the charged documents to the Defense on 14 March 2011, around the same time it requested classification reviews. Again, why did the Government wait 295 days before requesting that the OCAs approve disclosure of the documents to the Defense? Apparently, the process was not overly involved, as the OCAs all approved the document disclosure within 2 weeks.

- On 14 March 2011, the Government submitted written requests to various organizations to disclose classified evidence to the Defense. Based on the Government's description, this request relates to the computer forensics evidence in this case. The Government does not clearly indicate when the 14 March 2011 requests were approved. However, the Defense received the vast majority of the computer forensic evidence right before the Article 32, in November 2011. Accordingly, it appeared to take eight months for the Government to get all the requisite approvals to disclose the computer forensics information. The Government, again, provides no accounting for why the approval

process took so long. Incidentally, the Government had the full benefit of the forensic evidence for a year and a half prior to the Article 32, while the Defense had this evidence for approximately one month prior to the Article 32.[22] Other than demonstrating that the Government was not acting in a diligent manner, the timing suggests (much like many things in this case) that the Government deliberately dumped tens of thousands of pages on the Defense immediately prior to the Article 32 in order to gain a tactical advantage.

C. The Government Misunderstands *Barker* and the Relevant Case Law

130. The Government claims that a nearly 1000 day delay in this case was not facially unreasonable. There is no military case in history that approaches anywhere near a 1000 day delay. To not concede that this is a facially unreasonable delay in light of R.C.M. 707's 120-day mandate is disingenuous. The Government cites *United States v. Schuber*, 70 M.J. 181 (C.A.A.F. 2011) for the proposition that the nearly 1000 day delay was not facially unreasonable within the context of this case. The Government, purportedly applying *Schuber*, proceeds to separately address "seriousness of the offense", "complexity of the case", "availability of proof" and "additional considerations" in order to bolster its contention that the nearly 1000 day delay is not facially unreasonable.[23] However, the Government conveniently ignores the *Schuber* court's warning that "an analysis of the first factor is not meant to be a *Barker* analysis within a *Barker* analysis." *Schuber*, 70 M.J. at 188. Rather, this first factor in the Article 10 procedural framework simply serves to screen off those cases in which the delay is not facially unreasonable. *See United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010); *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). As is readily apparently, the Government has improperly conducted a "*Barker* analysis within a *Barker* analysis" to arrive at a conclusion which defies common sense: that a nearly 1000 day delay is not facially unreasonable.

131. At bottom, the Government's analysis under *Barker* involves arguing, in as many different ways as possible, that this case is complex.[24] The term "complex" or "complexity" appears in the Government's Response a total of 85 times. Apparently, the Government believes that if you say something enough times, the Court will simply accept the Government's fallacious logic: "It's complex, therefore 1000 days is reasonable." As discussed above, nowhere in the Government's motion does it attempt to provide any showing that the 1000 days was, in fact, reasonable by any sort of objective, quantifiable or demonstrable measure. Instead, as always,

[22] Indeed, its presentation at the Article 32 hearing focused almost exclusively on computer forensics.
[23] In this section, the Government also purports to explain what it was doing during time periods where the Defense claims there was no apparent Government activity. The Defense requests that the Court examine what the Government contends it was doing (which usually involved "coordinating" and other administrative tasks) and ask itself whether it is reasonable that it would take a five-person prosecution team that amount of time to complete the tasks the Government claimed it was completing.
[24] The Government appears to suggest at various points in its Response that it was the "rolling" nature of the disclosures that caused such a delay in the Government's processing of this case. The WikiLeaks disclosures and their timing is a red herring. The Government had computer forensics from PFC Manning's computer by late 2010 and was able to identify with precision what information was allegedly compromised. Moreover, all the closely aligned agencies had completed their damage assessments prior to all the documents being disclosed by WikiLeaks. For instance, the damage assessments by the 63 agencies for ONCIX were complete in February 2011, months prior to all the diplomatic cables being released. Thus, any argument that it was the subsequent disclosures by WikLeaks that delayed the case is wholly without merit.

the Government expects the Court and the Defense to accept the Government's say-so that a 1000 delay is permissible because, well, "it's complex."

132. The Government then cites various cases involving "complexity" within the context of speedy trial claims. For instance, the Government cites *Untied States v. Morrison*, 22 M.J. 743 (N.M.C.M.R. 1986) for the proposition that "the government showed the complexities of the case and the unusually extensive efforts required to prepare for trial in a complicated scheme of larceny of records spanning 20 months, encompassing at least two dozen co-conspirators, and resulting in a loss of as much as one million gallons of aviations [sic.] fuel and significant United States Government action." What the Government fails to tell the Court, however, is that the Government in *Morrison* – in apparently an overwhelmingly complex case involving misconduct "spanning 20 months," "encompassing at least two dozen co-conspirators" and requiring "significant United States Government action" – managed to bring the accused to trial within 208 days. If the prosecution team in *Morrison* managed to bring the accused to trial in 208 days, why did it take the prosecution team in this case (with five prosecutors and a veritable army of paralegals, other attorneys and support staff) take nearly 1000 days to bring the accused to trial?

133. The Government also cites *United States v. Cole*, 3 M.J. 220, 227 (C.M.A. 1977) for the proposition that "The complex nature of a given case will serve as the sole justifiable basis for finding extraordinary delay, if the complexity was the proven cause of the delay." The Government states that the Court in *Cole* found "[b]ecause many of the witnesses had departed Fort Sill after AIT graduation, … the difficulty of identifying and gathering material witnesses was "extraordinary." Again, what the Government fails to tell the Court is that in that case – one involving what the defense in that case called "overwhelming complexity" – the accused was brought to trial in 97 days, less than one-tenth of the time that it took the Government to bring the accused to trial in the instant case. *Id*. at 227.

134. Further, the Government relies on *United States v. Hatley*, 2011 WL 2782023 (A.C.C.A. 2011) for its "complexity justifies the inordinate delay" argument. *See* Government Response, p. 69. In *Hatley*, "[t]he government's asserted reasons for further delays were to complete the prosecutions in multiple cases arising from the murders, which involved as many as eighteen potential immunized witnesses and sixteen co-accuseds…" *Id.* at *5. The Court indicated that "[t]he complexity of a case, both in terms of the necessity for investigation and the number of witnesses involved, is a legitimate basis for delay." In that case, however, the elapsed time at issue was approximately 7 months (September 2008-April 2009). Again, if the Government in *Hatley* could bring an accused to trial in a complex case which "involved as many as eighteen potential immunized witnesses and sixteen co-accuseds" in approximately 200 days, surely the Government in this case could have brought the accused to trial prior to Day 1000.

135. The Court in *United States v. Duncan* did not allow the Government to invoke generalized assertions of "complexity" to get out of its speedy trial obligations. In *Duncan*, the Court was also dealing with a complicated case involving classified information. It found that the delay at issue (275 days) was not causally linked to the fact the case was complex or highly classified. It saw that many of the reasons for delay were "tactical concerns amounting to no more than a desire to forestall the [accused's] right of discovery and his right of cross-examination at the pretrial investigation and at his court-martial." So too was the case here. At every turn, the

Government made tactical and bad faith decisions to deny the accused his fundamental right to a fair trial, including his right to a speedy trial.

136. Every task in this case – from classification reviews, to request for approvals, to the 706 Board, to *Brady* discovery, to general discovery – was completed at a snail's pace. The Government treated this case as though it were on a Sunday drive, with no care in the world with respect to PFC Manning's speedy trial rights. Military courts do not countenance such a cavalier disregard for the statutory and constitutional rights afforded to an accused. In *United States v. Laminman*, 41 M.J. 518 (C.G. Ct. Crim. App. 1994), cited by the Government at p. 68, the Coast Guard Court of Criminal Appeals approved of the military judge's decision to dismiss the case on speedy trial grounds. In her findings, the trial judge concluded that a failure to send the Investigating Officer's report by courier, rather than by ordinary mail, "constituted a lack of reasonable diligence and evidence of a non-diligent, or negligent, attitude on the part of the Government during the case." The Coast Guard Court of Criminal Appeals stated:

> At first glance, this conclusion might appear to place an undue emphasis on two days out of an overall delay of 109 days, for which the Government was accountable. It must be stated, however, that at the time the investigative report was completed the Accused had already been confined for 90 days, or as the judge put it, "about 64 days of confinement, even by the government's calculation". R. 4 (April 26, 1994). In the eyes of the trial judge, expedited action was called for at that point, and we agree that such a conclusion is entirely reasonable and supported by the evidence. … When an accused has been confined for a lengthy period, as in this case, reasonable diligence may call for expeditious processing. …
>
> If the failure to transmit the report by a means more rapid than ordinary mail were the only indication of lack of reasonable diligence, we would have to find the dismissal of charges clearly erroneous. In our view, however, the judge saw that shortcoming as *merely reflecting an attitude by the Government inconsistent with reasonable diligence, which permeated the entire process*. In effect, that is what she said: I think that the nondiligent attitude of the government is really exemplified by the six-day transmittal of the 32 report.... Expeditious handling would be indicated at that point with due regard for the fact that the accused was confined at the time. Now that two days I am talking [about] in and of itself is not so significant, but it just shows you that the government had no regard for the fact that the man was confined. R. 6 (April 26, 1994).

Id. at 522 (emphasis supplied). This quote could not be more apt if spoken about the instant case. The Government had an "attitude … inconsistent with reasonable diligence, which permeated the entire process" and "no regard for the fact that the man was confined." *Id.* What's worse is that, in PFC Manning's case, the lack of reasonable diligence does not appear to be sheer laziness on the part of the prosecution; rather, it is the result of a combination gross negligence and bad faith.

CONCLUSION

137. For the reasons discussed herein, and in the Defense's Motion to Dismiss for Lack of a Speedy Trial, the Defense requests that this Court dismiss all charges with prejudice.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel