

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)
U.S. Army, xxx-xx-9504)
Headquarters and Headquarters Company, U.S.)
Army Garrison, Joint Base Myer-Henderson Hall,)
Fort Myer, VA 22211)

**DEFENSE REPLY TO
GOVERNMENT RESPONSE
TO BILL OF PARTICULARS**

DATED: 13 March 2012

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to R.C.M. 906(b)(6) and the Fifth, Sixth and Eighth Amendments to the United States Constitution to direct the Government to file the particulars that the Government has indicated it was opposed to filing in its 8 March 2012 Response to the Defense Motion for Bill of Particulars (“Government Response”).

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

WITNESSES/EVIDENCE

3. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the referred charge sheet in support of its motion.

LEGAL AUTHORITY AND ARGUMENT

I. Section 1030 Offense – Exceeds Authorized Access

4. The Government states at page 2 of its Response Motion, “the defense seeks the manner in which ‘PFC Manning exceeded his authorized access of a Secret Internet Protocol Router computer.’” (emphases supplied). This is exactly what the Defense is seeking. The Government states that “the purpose of a bill of particulars is to secure facts, not legal theories.” *Id.* When the Defense asks “how” or “the manner in which” it is asking for the *facts* underlying the

offense, and not the legal theory of the Government. To provide some examples to help guide the Government in what the Defense is seeking, did PFC Manning steal a password and logon to the computer, thereby exceeding authorized access? Did PFC Manning electronically by-pass a security protocol or firewall, thereby exceeding authorized access? Did PFC Manning not have security privileges to enter a certain area of the SIPRNET, thereby exceeding authorized access? The Defense needs to know what *facts* underlie PFC Manning's alleged exceeding of authorized access. The Government's Response states at page 2, "the purpose of the bill of particulars is not to find out what the government knows, but what the government claims." The Defense wants to know what facts the Government "claims" amount to PFC Manning exceeding his authorized access. Only then can the Defense know how to prepare a defense.

5. The Government's claim that it has provided sufficient facts in the charge sheet is inaccurate. The charge reads as follows:¹

SPECIFICATION 13: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 27 May 2010, having knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer, and by means of such conduct having obtained information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, to wit: more than seventy-five classified United States Department of State cables, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted the said information, to a person not entitled to receive it, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation, in violation of 18 U. S. Code Section 1030(a) (1), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces. (emphases supplied).

While the charge provides the "where" and "when", it does not provide the far more important "how." Since the Government has proceeded to charge PFC Manning under 18 U.S.C. § 1030 for "exceeding authorized access," the Defense must know what factual acts amount to PFC Manning actually having exceeded his authorized access. The specification further refers to "such conduct" but it does not describe *what conduct*. This is what the Defense needs to know. The factual basis of the charges is not a secret and would not divulge the Government theory of the case.

II. Article 92 Offense

6. The Government has misunderstood the nature of the Defense's request for this particular. It does not seek the mechanics by which PFC Manning is alleged to have added unauthorized software. As with the previous offense, a series of questions can explain the *facts* (not legal theory) that the Defense seeks. Are you alleging that PFC Manning saved the software as a program on the computer? Are you alleging that PFC Manning ran the software from the

¹ Note that Specification 14 is identical, with the exception of what was allegedly disclosed.

compact disc drive? Are you alleging that he ran the program as an executable file on the computer desktop? The Defense seeks the factual predicate for the Government's allegation that PFC Manning has added unauthorized software in violation of Army Regulation 25-2.

III. Section 641 Offenses

7. The Defense's request does not "attempt[] to restrict the Government's proof at trial." The Defense's request specifically contemplates that the Government may be alleging that PFC Manning stole, purloined and converted. Although the Defense would maintain that there is a subtle distinction between "steal" and "purloin," the Government appropriately recognizes in its Response that there is clearly a distinction between "steal" and "convert." The Defense is asking the Government: Are you alleging that PFC Manning "stole"? Are you alleging that PFC Manning "converted"? Or, are you alleging both? This hardly restricts the Government's proof at trial. It simply identifies for the Defense what it should be prepared to defend against.

8. If the Government alleges that PFC Manning both "stole" and "converted," does this apply equally to all the charged specifications? Or, are there specifications where the Government is alleging that PFC Manning "stole" (but did not convert), or conversely that he "converted" (but did not steal). The Defense has not suggested that it will be "paralyzed" by decisions over what evidence to present. *See* Government Response at page 3. However, the Government should not be permitted to play "hide-the-ball" with the Defense, particularly when it has charged twenty-two (22) different specifications for what is essentially one discrete course of conduct. The Defense should not have to prepare two different "Game Plans" if the Government is relying only one of the two prongs of 18 U.S.C. § 641 (assuming, for the purposes of this motion, that there is not a large distinction between steal and purloin).

CONCLUSION

9. Based on the above, the Defense requests that the Court order the Government to file the particulars for the above requested information.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel