IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

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| U N I T E D S T A T E S | ) | |
| | ) | **MOTION TO DISMISS ALL** |
| v. | ) | **CHARGES AND** |
| | ) | **SPECIFICATIONS WITH** |
| | ) | **PREJUDICE 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: 19 September 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).

## FACTS[1]

[1] In addition to this statement of facts, the Defense has also prepared a chronology detailing the processing of the case, as suggested by R.C.M. 707(c)(2). *See* Attachment 1.

3. As of the date of this motion, PFC Manning has been in pretrial confinement for 845 days. Eight hundred forty-five days. Two days after the Government placed PFC Manning in administrative hold with escorts on 27 May 2010, PFC Manning was placed into pretrial confinement. *See* Confinement Order, Attachment 2. He has remained in pretrial confinement ever since. With trial scheduled to commence on 4 February 2013, PFC Manning will have spent a grand total of 983 days in pretrial confinement before even a single piece of evidence is offered against him. To put this amount of time into perspective, the Empire State Building could have been constructed almost two-and-a-half times over in the amount of time it will have taken to bring PFC Manning to trial.[2]

4. The processing of this case has been marred with prosecutorial incompetence and a profound lack of Government diligence. The combination has led to an abject failure of the Government to honor PFC Manning's fundamental speedy trial rights. Since the date of arraignment is a significant date in the R.C.M. 707 speedy trial analysis, *see* R.C.M. 707(b)(1) (providing that the R.C.M. 707 speedy trial clock terminates when the accused is arraigned), the discussion of the facts of this case will be divided into pre-arraignment delay and post-arraignment delay.

## A. Pre-Arraignment Delay

### 1. R.C.M. 706 Board

5. The Government preferred the original charges against PFC Manning on 5 July 2010. The next day, [redacted] appointed [redacted] to be the Article 32 Investigating Officer (IO). *See* [redacted] Appointment Memorandum, Attachment 3. On 11 July 2010, the Defense moved for a delay of the Article 32, UCMJ, 10 U.S.C. § 832, hearing in order to conduct an R.C.M. 706 board. *See* 11 July 2010 Defense Request, Attachment 4. After this initial request was denied, the Defense renewed its request for delay a day later. *See* 12 July 2010 Defense Request, Attachment 5. This request was granted. When no further action was taken, the Defense yet again renewed its request for a R.C.M.706 board on 18 July 2010. *See* 18 July 2010 Defense Request, Attachment 6 (stating in the first paragraph "[t]o date, the Defense has not been notified as to whether that request [request from 11 and 12 July] has been approved or denied.").

6. On 29 July 2010, the Government transferred PFC Manning to the Marine Corps Base Quantico (MCBQ) Pretrial Confinement Facility (PCF) in Quantico, Virginia. *See* Appellate Exhibit 258 at 4. The [redacted], [redacted], approved of the Duty Brig Supervisor's Maximum (MAX) custody determination and also decided that PFC Manning should be placed under special handling instructions of Suicide Risk (SR). *Id.* Despite the recommendations of two senior forensic psychologists (and contrary to the requirements of Secretary of Navy Instruction (SECNAVINST) 1640.9C), the Brig did not immediately remove PFC Manning from Suicide Risk, waiting almost a full week to move PFC Manning from Suicide Risk to Prevention of Injury (POI) status on 11 August 2011. *Id.* at 4-5. For the next 8 months, PFC Manning remained in MAX custody and POI status, despite the recommendations

[2] The Empire State Building took one year and 45 days to build. See http://history1900s.about.com/od/1930s/a/empirefacts.htm.

of multiple psychiatrists that he be downgraded from POI status. *Id.* at 8, 11. The severely onerous conditions of life under MAX custody and POI status were detailed extensively in the Defense Article 13 Motion. *See id.* at 8-11. As if life at Quantico was not difficult enough for PFC Manning under MAX custody and POI status, he was placed on Suicide Watch on two separate occasions: from 18 January 2011 to 21 January 2011 and from 2 March 2011 until the time he was transferred to the Joint Regional Correctional Facility (JRCF) at Fort Leavenworth, Kansas on 20 April 2011. *See id.* at 27, 35-36. During each stint on Suicide Watch, the Brig forced PFC Manning to, among other things: strip down to his underwear during the day; sleep naked each night; surrender his eyeglasses; and remain in his 6'x8' cell. *See id.* at 27-37. The severity of PFC Manning's treatment at the hands of the Quantico Brig sparked intense criticism, both domestically and internationally. *See id.* at 38-41.

7. Meanwhile, on 4 August 2010, the Convening Authority, [redacted], appointed [redacted] as the new IO. *See* [redacted] Appointment Memorandum, Attachment 7. This memorandum provided [redacted] with the authority to exclude reasonable periods of delay under R.C.M. 707 but directed that all approvals or denials of delay requests must be in writing. *Id.* at 1. Further, the memorandum stated that the Convening Authority must approve all delays in excess of ten days. *Id.*

8. One week later, as the Government had still made little to no progress on the three prior Defense requests for a R.C.M. 706 board, the Defense yet again requested a delay in the Article 32 hearing for the completion of the R.C.M. 706 board. *See* 11 August 2010 Defense Request, Attachment 8. The Convening Authority approved the requested delay on 12 August 2010, ordering that "the period from 11 August 2010 until the R.C.M.706 Sanity Board completion is excludable defense delay." *See* 12 August 2010 Excludable Delay Memorandum, Attachment 9.

9. On 25 August 2010, the Defense requested that the R.C.M. 706 board be delayed until a forensic psychiatrist was appointed to the Defense team. *See* 25 August 2010 Defense Request, Attachment 10. That same day, the Convening Authority approved the request, stating that "[t]he period between 27 August 2010 and until the GCMA takes action on the defense request is excludable delay under R.C.M. 707(c)." *See* 25 August 2010 Excludable Delay Memorandum, Attachment 11.

10. The next day, the Defense requested delay of the R.C.M. 706 board until procedures were adopted to safeguard any classified information discussed in the board's determination. *See* 26 August 2010 Defense Request, Attachment 12. On 3 September 2010, the Defense requested appropriate security clearances for the Defense team and access for PFC Manning. *See* 3 September 2010 Defense Request, Attachment 13. The Convening Authority ultimately issued its preliminary classification order on 22 September 2010. *See* 22 September 2010 Preliminary Classification Review Order, Attachment 14. The Defense responded to this order on 28 September 2010. *See* 28 September 2010 Defense Response to Preliminary Classification Review Order, Attachment 15.

11. On 12 October 2010, the Convening Authority began its monthly practice of issuing an excludable delay memorandum. In the 12 October 2010 memorandum, the Convening Authority stated that "[t]he period from 12 July 2010 until the date of this memorandum is excludable

delay under RCM 707(c)." *See* 12 October 2010 Excludable Delay Memorandum, Attachment 16. For the basis of this period of excludable delay, the Convening Authority identified the following: the Original Classification Authorities' (OCA) reviews of classified information; the Defense Requests of 11 July 2010, 18 July 2010, 25 August 2010, 26 August 2010, 3 September 2010; the Preliminary Classification Review Order; and the Defense Response to the Preliminary Classification Review Order. *See id.*

12. A little less than a month later, the Convening Authority excluded the period from 12 October 2010 to 10 November 2010 as excludable delay under R.C.M. 707(c). *See* 10 November 2010 Excludable Delay Memorandum, Attachment 17. The Convening Authority listed the same defense requests and responses that were listed in the 12 October 2010 Excludable Delay Memorandum as the basis for the most recent period of excluded delay. *See id.*

13. On 13 December 2010, the Defense security experts completed their preliminary classification review and provided the required written responses to the questions posed by the Convening Authority's Preliminary Classification Review Order. *See* 13 December 2010 Memorandum of Defense Security Experts, Attachment 18.

14. The Convening Authority issued another excludable delay memorandum on 17 December 2010, this time excluding the period from 10 November 2010 to 17 December 2010 under R.C.M. 707(c). *See* 17 December 2010 Excludable Delay Memorandum, Attachment 19. For the basis of its finding of excludable delay, the Convening Authority identified the OCA reviews of classified information, and the Defense requests of 11 July 2010, 18 July 2010, 26 August 2010, and 3 September 2010. *See id.*

15. On 13 January 2011, the Defense made a speedy trial request, pursuant to the guarantees of the Sixth Amendment to the United States Constitution, Article 10, and R.C.M. 707. *See* 13 January 2011 Defense Speedy Trial Request, Attachment 20.

16. The next day, the Convening Authority issued another excludable delay memorandum, stating that "[t]he period from 17 December 2010 until the date of this memorandum [14 January 2011] is excludable delay under RCM 707(c)." *See* 14 January 2011 Excludable Delay Memorandum, Attachment 21. The memorandum set forth the exact same basis for delay that was set forth in the 17 December 2010 Excludable Delay Memorandum. *See id.* The Convening Authority acknowledged the Defense's speedy trial request from the day before. *See id.*

17. On 3 February 2011, the Convening Authority issued an order directing the R.C.M. 706 board to resume its examination into the mental capacity and mental responsibility of PFC Manning. *See* 3 February 2011 Order to Resume Conducting Sanity Board, Attachment 22, at 1. The order set a suspense date of 3 March 2011, four weeks from the date of the order. *See id.* at 6.

18. About two weeks later, on 15 February 2011, the Convening Authority issued another excludable delay memorandum, excluding the period from 14 January 2011 to 15 February 2011 as excludable delay under R.C.M. 707(c). *See* 15 February 2011 Excludable Delay

Memorandum, Attachment 23. The Convening Authority identified the same bases for delay in its February memorandum as it had identified in its December and January memoranda. *See id.* No new bases or reasons for delay were identified. *See id.* The Convening Authority also acknowledged the Defense's 13 January 2011 speedy trial request. *See id.*

19. On 14 March 2011, almost two weeks after the suspense date set forth in the Convening Authority's 3 February 2011 order to resume conducting the R.C.M. 706 sanity board, [redacted], [redacted] Forensic Psychologist, sought an extension of the suspense date for the R.C.M. 706 board until 29 April 2011. *See* 14 March 2011 Memorandum Requesting Extension for R.C.M. 706 Board, Attachment 24. In this memorandum, [redacted] related that the R.C.M. 706 board needed 57 more days than the original suspense date of 3 March 2011 because "[t]he evaluators are coordinating suitable dates and times for the final evaluation session to take place. This involves multiple parties. Additionally, the final interview will take place at a SCIF and this has resulted in the consumption of extra time for this aspect of the evaluation to be coordinated." *Id.* Four days later, the Convening Authority approved the R.C.M. 706 Board's request for delay, but set a suspense date of 16 April 2011 instead of the 29 April 2011 suspense date requested by [redacted]. *See* 18 March 2011 Memorandum Approving R.C.M. 706 Board's Extension Request, Attachment 25.

20. That same day, 18 March 2011, the Convening Authority issued another excludable delay memorandum. *See* 18 March 2011 Excludable Delay Memorandum, Attachment 26. Acknowledging the Defense's 13 January 2011 speedy trial request, the Convening Authority excluded the period from 15 February 2011 to 18 March 2011 as excludable delay under R.C.M. 707(c). *See id.* For the basis of this delay, the Convening Authority identified the same bases that were articulated in the December, January, and February excludable delay memoranda. *See id.* Two other bases were also identified in the March excludable delay memorandum: OCA consent to disclose classified information and the R.C.M. 706 Board's extension request. *See id.*

21. On 15 April 2011, the day before the extended suspense date for the completion of the R.C.M. 706 Board's evaluation, [redacted], on behalf of the Board, requested yet another delay in the suspense date. *See* 15 April 2011 Memorandum Requesting Extension for Sanity Board, Attachment 27. [redacted] requested an extended suspense date of close of business on 22 April 2011. *See id.* [redacted] explained that this delay was necessary because of the Board's "limited availability to meet as a full board to discuss the report. This is because of conflicting schedules and demands of the three board members." *Id.* The Convening Authority approved, without Defense input, [redacted] request later that same day. *Id.* While the three board members were coordinating their schedules, PFC Manning remained confined at Quantico, enduring the severely onerous confinement conditions, which included being held in MAX Custody, in POI Status, being stripping naked at night and wearing a suicide smock. *See* Appellate Exhibit 258, at 35-37.

22. On 22 April 2011, the R.C.M. 706 Board submitted its final report. *See* 22 April 2011 Sanity Board Evaluation of Bradley E. Manning, Attachment 28. That same day, the Convening Authority issued another excludable delay memorandum excluding the period from 18 March 2011 until 22 April 2011 as excludable delay under R.C.M. 707(c). *See* 22 April 2011 Excludable Delay Memorandum, Attachment 29. This memorandum identified the exact same

bases for the delay as were identified in the 18 March 2011 excludable delay memorandum, as well as the second extension request by the R.C.M. 706 Board. *See id.* The memorandum acknowledged the Defense's 13 January 2011 speedy trial request. *See id.* This memorandum was signed for the Convening Authority by [redacted], a paralegal for the Government. *See id.*

**2. Government Requests for Delay**

23. On 25 April 2011, the Government submitted the first of many requests for delay of the Article 32 hearing. *See* 25 April 2011 Government Request for Delay, Attachment 30. The Government requested delay until

> [t]he United States receives consent from all the Original Classification Authorities (OCAs) to release discoverable classified evidence and information to the defense. This consent is necessary in order for the United States to fulfill its discovery obligations under Article 46, UCMJ and the Rules for Courts-Martial (RCM), as well as for the defense to adequately prepare for the Article 32 Investigation.

*Id.* The Government represented that "[s]ince 17 June 2010, the United States has been diligently working with all of the departments and agencies that originally classified the information and evidence sought to be disclosed to the defense and the accused." *Id.* The delay requested was "until the earlier of the completion of the OCA Disclosure Requests and OCA Classification Reviews or 25 May 2011." *Id.*

24. The Defense opposed this delay the next day, 26 April 2011. *See* 26 April 2011 Defense Response to Government Request for Delay, Attachment 31. In order to minimize any further delay, the Defense requested that the Government: provide substitutes for or summaries of the relevant classified documents; allow the Defense to inspect all unclassified documents within the Government's control that were material to the preparation of the Defense; and ensure that the Defense has equal access to CID and other law enforcement witnesses by making available any requested witnesses. *Id.* at 1. The Defense also renewed its previous request for discovery that was either denied or not provided by the Government. *Id.* Finally, the Defense requested that any further delay be credited to the Government. *Id.* at 2.

25. On 12 May 2011, the Convening Authority issued another excludable delay memorandum, stating that "[t]he period from 22 April 2011 until the date of this memorandum is excludable delay under RCM 707(c)." *See* 12 May 2011 Excludable Delay Memorandum, Attachment 32. The memorandum listed the following as the basis for the delay: OCA reviews of classified information; OCA consent to disclose information; the Defense's 26 August 2010 request for the results of the Government's classification reviews by the OCAs; the Defense's 3 September 2010 request for appropriate security clearances for the Defense team and access for PFC Manning; and the Government's 25 April 2011 request for delay. *See id.* The Convening Authority acknowledged the Defense's 13 January 2011 speedy trial request. *See id.*

26. On 22 May 2011, the Government submitted its second request for delay of the Article 32 hearing, relating once again that delay was necessary in order to obtain consent from the OCAs. *See* 22 May 2011 Government Request for Delay, Attachment 33. In the "Update" section of its request, the Government represented that it was "continuing" to work with the OCAs to obtain the necessary consent to disclosed classified information and evidence to the Defense. *Id.* The Government requested delay until the earlier of the completion of the OCA disclosure requests and classification reviews or 27 June 2011. *See id.* The Government promised an update no later than 25 June 2011. *Id.*

27. Two days later, the Defense sent an email opposition to the Government's request for delay. *See* 24 May 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 34. The Defense relied on its position from the 26 April 2011 memorandum opposing the Government's first request for delay. *Id.* The Defense also requested that any additional delay be credited to the Government. *Id.*

28. Nevertheless, on 17 June 2011, the Convening Authority excluded the period from 12 May 2011 to 17 June 2011 as excludable delay under R.C.M. 707(c). *See* 17 June 2011 Excludable Delay Memorandum, Attachment 35. The "basis" for this exclusion was the exact same basis identified in the Convening Authority's May excludable delay memorandum, except now the Government's 22 May 2011 request for delay replaced the 25 April 2011 request for delay that had been listed in the 12 May 2011 excludable delay memorandum. *See id.* Finally, at the conclusion of the memorandum, the Convening Authority repeated, with no elaboration whatsoever, the line that it had repeated ad nauseam in every excludable delay memorandum since 13 January 2011: "I acknowledge and reviewed the defense request for speedy trial, dated 13 January 2011." *Id.*

29. On 27 June 2011, two days after its self-imposed update deadline, the Government yet again requested delay of the Article 32 hearing – its third such request in as many months. *See* 27 June 2011 Government Request for Delay, Attachment 36. This request, like the other two before it, requested delay "until the United States receives the proper authority to release discoverable unclassified and classified evidence and information to the defense." *Id.* at 1. The Government once again represented that it was "continuing" to work with the OCAs. *Id.* The Government therefore requested delay until the earlier of the completion of the OCA classification review process or 27 July 2011. *Id.* at 2. Two days later, the Defense opposed the Government's request for delay via email, maintaining the position articulated in its 26 April 2011 memorandum opposing the Government's first request for delay. *See* 29 June 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 37. The Defense again requested that any additional delay be credited to the Government. *Id.*

30. On 5 July 2011, the Convening Authority approved the Government's latest request for delay. *See* 5 July 2011 Memorandum Approving Government Request for Delay, Attachment 38. The Convening Authority then purported to exclude the period from 22 April 2011 to the restart of the Article 32 hearing as excludable delay under R.C.M. 707(c). *Id.* Based on the "national security concerns and ongoing investigations" in this case, the Convening Authority directed the Government to "cautiously proceed with the disclosure of information[.]" *Id.* However, the Convening Authority also ordered the Government to "expeditiously" disclose

information to the Defense once it received the authority to disclose the information in order to "minimize any unnecessary delay." *Id.*

31. To no one's surprise, the Government requested delay of the Article 32 hearing for the fourth time in as many months on 25 July 2011. *See* 25 July 2011 Government Request for Delay, Attachment 39. The basis of this request was exactly the same as all of the previous requests: the Government still needed time to get the approvals of the various OCAs to release information to the defense. *See id.* at 1. The Government once again presented its patented get-out-of-diligence-free card by representing that it was still "continuing" to work with the relevant OCAs. *Id.* In order to create the illusion of progress, the Government represented that it had "produced the Secretary of the Army AR 15-6 and related documents, as well as the complete record of the [redacted] reduction board – approximately 10,000 pages of documents in total." *Id.* Of course, the Government neglected to mention that most of these 10,000 pages were irrelevant, duplicative, or both. The Government requested that the Article 32 hearing be delayed until the earlier of the completion of the OCA classification review process or 27 August 2011. *Id.* at 2.

32. Later that same day, the Defense opposed the Government's request for delay. *See* 25 July 2011 Defense Opposition to Government Request for Delay, Attachment 40. While acknowledging that classification reviews do take some time to complete, the Defense pointed out that "the Government has now had over a year" to complete the classification review process. *Id.* The opposition memorandum also attacked the adequacy of the Government's explanation of why such protracted delay was necessary: "The latest request by the trial counsel for excludable delay does not adequately explain what has been done to require timely response and reviews by the relevant OCAs." *Id.* In this memorandum, the Defense also renewed its requests for speedy trial and for the Government to: provide a substitute for a summary of the relevant classified documents; to allow the Defense to inspect all unclassified documents, tangible items, and reports within the Government's control; provide previously denied or withheld discovery; and provide access to all CID and other law enforcement agents who have worked on the case. *Id.* The Defense once again requested that any additional delay be credited to the Government instead of being excluded under R.C.M. 707(c). *Id.*

33. The Convening Authority nevertheless approved the Government's fourth request for delay the next day. *See* 26 July 2011 Memorandum Approving Government Request for Delay, Attachment 41. Appearing to merely change the dates listed in the 5 July 2011 memorandum approving the Government's third request for delay, the 26 July 2011 memorandum excluded under R.C.M. 707(c) the period between 22 April 2011 and the restart of the Article 32. *See id.* The Convening Authority did not respond to the Defense's concerns regarding the Government's wholly inadequate explanation of why more delay was necessary. *See id.* Moreover, the Convening Authority's memorandum did not even acknowledge the Defense's request for speedy trial. *See id.*

34. On 10 August 2011, the Convening Authority issued another excludable delay memorandum. *See* 10 August 2011 Excludable Delay Memorandum, Attachment 42. This memorandum stated that "[t]he period from 13 July 2011 until [10 August 2011] is excludable delay under RCM 707(c)." *Id.* The Convening Authority relied on the exact same bases for

delay as it had relied on in the excludable delay memoranda of 12 May 2011 and 17 June 2011. *See id.* Namely, the Convening Authority identified the following as providing the basis for the delay: OCA reviews of classified information; OCA consent to disclose classified information; the 26 August 2010 Defense request for the results of the Government's classification reviews; and the 3 September 2010 Defense request for appropriate security clearances for the defense team. *See id.*; 17 June 2011 Excludable Delay Memorandum, Attachment 35 (identifying these exact same bases for delay); 12 May 2011 Excludable Delay Memorandum, Attachment 32 (same). The only difference in the basis for the delay of the 10 August 2011 excludable delay memorandum and the two prior excludable delay memoranda is that the Government's fourth request for delay was substituted for the earlier requests for delay that were identified in the May and June excludable delay memoranda. *See* 10 August 2011 Excludable Delay Memorandum, Attachment 42. The Convening Authority gave no explanation of the reasons that justified granting yet another delay based on the same Government argument that had been repeated every month since April 2011. Additionally, the Convening Authority did not even attempt to address the Defense's argument raised in the 25 July 2011 opposition memorandum that the Government had had over a year to complete the classification review process and had still not managed to get its affairs in order. At the end of the excludable delay memorandum, the Convening Authority acknowledged the Defense's 13 January 2011 speedy trial request and 25 July 2011 renewed speedy trial request. *Id.*

35. The Government made its fifth request for delay of the Article 32 hearing on 25 August 2011. *See* 25 August 2011 Government Request for Delay, Attachment 43. The basis for the requested delay was the same as before: the Government still, over a year and two months after PFC Manning was placed into pretrial confinement, needed time to obtain the authority from the OCAs to disclose evidence and information to the Defense. *See id.* at 1. The Government once again represented that it was "continuing" to work with the OCAs without providing any detail on where the classification review process stood and why it still remained incomplete after more than a year. *See id.* While the Government was quick to point out that it had already disclosed over 20,000 pages of documents to the defense, *see id.* at 2, it omitted the fact that most of these documents were irrelevant, duplicative or both. The Government asserted in conclusory fashion that it had "actively and diligently worked to resolve all outstanding issues to ensure the timely release of all possible information to the defense so their ability to represent and potentially defend their client will be in no way impaired." *Id.* However, the Government chose to not respond to the Defense's concerns identified in the 25 July 2011 opposition memorandum that the Government had still not completed its classification review process after over a year after the charges had been preferred and that the Government had provided a patently inadequate explanation for its numerous requests for delay.

36. Two days later, the Defense opposed the Government's request for delay, reiterating its position that any additional delay should not be excluded under R.C.M. 707(c) but should rather be credited to the Government for speedy trial purposes. *See* 27 August 2011 Email from Mr. Coombs to [redacted] Opposing the Government's Request for Delay, Attachment 44.

37. On 29 August 2011, the Convening Authority approved the Government's fifth request for delay of the Article 32. *See* 29 August 2011 Memorandum Approving Government Request for Delay, Attachment 45. The memorandum stated that "[t]he period between 22 April 2012 and

the restart of the Article 32 Investigation is excludable delay under RCM 707(c). The prosecution is required to provide me an update no later than 23 September 2011." *Id.* This memorandum was quite plainly a cut-and-paste job, identical to the 5 July 2011 and 26 July 2011 approval memoranda in all respects save the updated dates. *See id.*; 26 July 2011 Memorandum Approving Government Request for Delay, Attachment 41; 5 July 2011 Memorandum Approving Government Request for Delay, Attachment 38. Like the prior memoranda, the 29 August 2011 memorandum did not address the Defense's concerns regarding the delay of over a year that had already ensued in the classification review process and the inadequacy of the Government's explanations. The memorandum did not state any new reasons why the request for delay had been granted.

38. The sixth Government delay request since April 2011 was made on 26 September 2011, three days *after* the Convening Authority's deadline for a Government update on the status of the classification review process. *See* 26 September 2011 Government Request for Delay, Attachment 46; 29 August 2011 Memorandum Approving the Government's Request for Delay, Attachment 45 (ordering the Government to provide the Convening Authority with an update "no later than 23 September 2011"). As always, the reason for the Government request for delay was the ongoing classification review process. *See id.* at 1. Once again, the Government explained, without elaboration, that it was "continuing" to work with the relevant OCAs. *Id.* The Government did not explain why the classification review process has still not run its course, over a year and two months after PFC Manning was placed into pretrial confinement and charges were preferred.

39. The Defense opposed the Government's sixth request for delay on 27 September 2011. *See* 27 September 2011 Email from Mr. Coombs to [redacted] Opposing the Government's Request for Delay, Attachment 47. The Defense reiterated its position that any delay should not be excluded under R.C.M. 707(c), but rather should be credited to the Government for speedy trial purposes. *Id.*

40. The Convening Authority approved the Government's sixth request for delay of the Article 32 hearing on 28 September 2011. *See* 28 September 2011 Memorandum Approving Government Request for Delay, Attachment 48. The Convening Authority excluded "[t]he period between 22 April 2011 and the restart of the Article 32 Investigation [a]s excludable delay under RCM 707(c)." *Id.* This memorandum was a virtual carbon copy of the 5 July 2011, 26 July 2011, and 29 August 2011 memoranda approving the various prior Government requests for delay; only the dates had been changed. *See id.*; 29 August 2011 Memorandum Approving Government Request for Delay, Attachment 45; 26 July 2011 Memorandum Approving Government Request for Delay, Attachment 41; 5 July 2011 Memorandum Approving Government Request for Delay, Attachment 38. The Convening Authority offered no new reasons for approving this sixth request for delay, and it did not respond to the Defense's concerns articulated in the 25 July 2011 memorandum opposing the Government's July request for delay, which had been reiterated on several occasions. The Convening Authority also did not mention that the Government had disobeyed the order to provide an update no later than 23 September 2011.

41. The Convening Authority issued another excludable delay memorandum on 14 October 2011, in which the period from 15 September 2011 to 14 October 2011 was found to be excludable delay under R.C.M. 707(c). *See* 14 October 2011 Excludable Delay Memorandum, Attachment 49. The basis for the excludable delay identified in the 14 October 2011 memorandum was virtually identical to the 10 August 2011, 17 June 2011, and 12 May 2011 excludable delay memoranda. *See id.*; 10 August 2011 Excludable Delay Memorandum, Attachment 42; 17 June 2011 Excludable Delay Memorandum, Attachment 35; 12 May 2011 Excludable Delay Memorandum, Attachment 32. The only thing that made the 14 October 2011 excludable delay memorandum different from any of these prior memoranda was the substitution of the Government's sixth request for delay in place of the particular Government request delay that was identified in each prior memorandum. The Convening Authority once again gave no reasons why delaying the Article 32 for the completion of the classification review process was still reasonable, given the year and three months that had passed since the preferral of charges. The Convening Authority also included the stock line that had been repeated numerous times before: "I acknowledge and reviewed the defense request for speedy trial, dated January 13 2011 (enclosed), and the renewed request for speedy trial, dated 25 July 2011 (enclosed)." 14 October 2011 Excludable Delay Memorandum, Attachment 49 (parentheticals in original).

42. The Government made its seventh request to delay the Article 32 hearing on 25 October 2011. *See* 25 October 2011 Government Request for Delay, Attachment 50. The reasons for the requested delay were the same as ever: the Government still needed more time to obtain authority to release evidence and information to the defense. *See id.* at 1. The Government assured the Convening Authority that it was still "continuing" to work with the OCAs. *Id.* However, the Government remained as vague as it had been throughout this protracted process, not specifying exactly what had already been done or exactly what remained to be done.

43. The Defense opposed this request for delay on the same day. *See* 25 October 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 51. In this email, the Defense repeated its previous position that any additional delay should not be excluded under R.C.M. 707(c) but should be credited to the Government for speedy trial purposes. *Id.*

44. The Convening Authority approved the Government's seventh request for delay on 27 October 2011, excluding the period from 22 April 2011 until the restart of the Article 32 hearing under R.C.M. 707(c). *See* 27 October 2011 Memorandum Approving Government Request for Delay, Attachment 52. When compared to the various prior memoranda approving the numerous Government request for delay, the October memorandum had simply updated the stated dates. *See id.* No new reasons for the delay were discussed, and the Convening Authority did not explain why this additional exclusion of time was still reasonable, given the year-plus period of time that had already gone by in which the Government was unable to complete the classification review process.

45. Beginning on 24 October 2011, the long-awaited OCA classification reviews began to trickle in. The Government provided the Defense with the DISA classification review on 24 October 2011. That classification review – a one page document – was completed on 6 June 2011. The Government offered no explanation for the four-and-a-half month delay between the

completion of the classification review and its disclosure to the Defense. The Government provided the three-page Apache Video classification review, which was completed on 26 August 2010, to the Defense on 4 November 2011. The Defense received no explanation for the delay of over a year and two months between the completion of this classification review and its disclosure to the Defense. The Government also provided a 28-page Other Government Agency classification review to the Defense on 4 November 2011. The Government provided a few more classification reviews to the Defense on 8 November 2011. This round of disclosure included a three-page CENTCOM PowerPoint classification review that was completed on 21 February 2011, a 24-page CENTCOM classification review that was completed on 21 October 2011, a four-page CYBERCOM classification review that was completed on 21 July 2011, and a 51-page Department of State classification review that was completed on 30 October 2011. The Government did not explain the reason for the eight-plus month delay between the completion of the CENTCOM PowerPoint classification review and its disclosure or the reason for the three-plus month delay between the completion of the CYBERCOM classification review and its disclosure. Additionally, on 17 November 2011, the Government provided the Defense with the four-page GTMO classification review, completed on 4 November 2011. Finally, the Defense was provided with two classification reviews on 12 December 2011: a three-page Other Government Agency classification review and a 12-page Other Government Agency classification review.

46. On 16 November 2011, the Convening Authority issued yet another excludable delay memorandum. *See* 16 November 2011 Excludable Delay Memorandum, Attachment 53. This memorandum excluded the period from 14 October 2011 to 16 November 2011 under R.C.M. 707(c). *Id.* As had been the case for the last several excludable delay memoranda, the articulated basis for this most recent delay was the following: the OCA reviews of classified information; OCA consent to disclose classified information; the 26 August 2010 Defense request for the results of the Government's classification reviews (made a year and two months prior to the latest Government request for delay); and the Government's seventh request for delay. *See id.* As usual, the Convening Authority failed to articulate any new reasons that made this delay reasonable. Finally, the Convening Authority once again repeated its familiar refrain that it had "acknowledge[d] and reviewed" the Defense's 13 January 2011 and 25 July 2011 speedy trial requests. *Id.*

47. That same day, the Government requested to restart the Article 32 investigation. *See* 16 November 2011 Government Request to Restart Article 32 Investigation, Attachment 54. At first blush, it seemed that the Government was finally ready to proceed to the Article 32 hearing a year and a half after PFC Manning was first placed in pretrial confinement. In fact, in the second sentence of its request, the Government related that "[t]he prosecution is prepared to proceed and, by 1 December 2011, should receive all approvals and classification reviews necessary to proceed." *Id.* at 1. First appearances were deceiving, however, as the Government's self-titled request to restart the Article 32 investigation was, in actuality, a poorly-concealed eighth request for delay of the Article 32 investigation. Indeed, in the very next sentence of its so-called "Request to Restart Article 32 Investigation," the Government requested that "the period from the date of this memorandum to 16 December 2011 be approved as excludable delay." *Id.* The Government represented that this further 30 day period of delay, on top of the year and a half in which the Government had ostensibly been processing the case after

PFC Manning was in pretrial confinement, was necessary for two reasons. *See id.* at 2. First, the Government was *still* working with an OCA to obtain one final classification review. *Id.* Second, the Government explained that the command required 30 days to execute OPLAN BRAVO, a prerequisite to the Article 32 hearing. *Id.*

48. Later that afternoon, the Defense opposed the Government's eighth request for delay. *See* 16 November 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 55. The Defense email explained that Mr. Coombs had sent an email to then-CPT Fein on Monday, 14 November 2011, in which Mr. Coombs requested that the Government begin its OPLAN BRAVO preparations so that the Article 32 hearing could commence on 12 December 2011. *Id.* The email went on to explain that based on the Government's most recent request for delay, it appeared that the Government had done nothing from 14 November 2011 to 16 November 2011. *Id.* The Defense pointed out that the Government failed to provide the Convening Authority "with any justification for the arbitrary 30-day-requirement in order to complete its OPLAN BRAVO." *Id.* The Defense then requested that the Convening Authority order the Article 32 to commence on 12 December 2011, thereby giving the Government close to its requested 30 days to execute its OPLAN BRAVO while at the same time ensuring that the Article 32 hearing would be completed prior to the holiday period in order to avoid any issues with obtaining needed witnesses. *Id.* Finally, the Defense objected to the Government's request to exclude the time period of 16 November 2011 to 16 December 2011under R.C.M. 707(c) and requested instead that the delay be credited against the Government for speedy trial purposes. *Id.*

49. Later that same day, the Convening Authority approved the Government's eighth request for delay, excluding the time period from 22 April 2011 to 16 December 2011 under R.C.M. 707(c). *See* 16 November 2011 Memorandum Approving Government Request for Delay, Attachment 56. Even when judged in comparison to the bare-bones, conclusory "rationale" given by the Convening Authority in the numerous prior excludable delay memoranda and memoranda approving the Government requests for delay, this 16 November 2011 memorandum stands apart. Not only does it not offer a single reason explaining the Convening Authority's decision to grant an eighth Government request for delay, it does not even attempt the pretense of offering reasons. The Convening Authority's decisional process, to the extent that it can be gleaned from this memorandum, is captured in full in the following two sentences: "I reviewed both the prosecution's request and its enclosures and the defense's response. 2. This request is: (signature) approved." *Id.* That's it. That is the extent of the Convening Authority's articulation of its reasons why this requested delay was reasonable. There was no such articulation or even an attempt at such an articulation. Capping a busy day in an otherwise stagnant prosecution, the Convening Authority issued Special Instructions to the Article 32 IO on 16 November 2011. *See* Special Instructions for Investigation under Article 32, Attachment 57. These instructions required that all approvals or denials of requests for delay under R.C.M. 707(c) be in writing. *Id.* at 3.

50. Meanwhile, the Government unloaded a barrage of discovery and forensic evidence in the month or so before commencement of the Article 32 hearing, despite the fact the case had been ongoing for over a year and a half at that time. The sheer volume and lack of organization of this discovery made it virtually impossible for the Defense to sort through the material and organize

it in any coherent manner before the Article 32 hearing took place. Therefore, the Defense was deprived of the ability to use this evidence at the Article 32 hearing as a result of the Government's eleventh hour disclosure.[3]

51. The Article 32 hearing was conducted from 16 December 2011 through 22 December 2011. On 3 January 2012, the Government asked the Article 32 IO to "exclude, as a reasonable delay, anytime between 22 December 2011 and 3 January 2012 that you did not work on the Article 32 investigation based on the federal holidays and weekends." *See* 4 January 2012 Email from [redacted] to then-CPT Fein, Attachment 58. The next day, the Article 32 IO excluded as reasonable delay the days between 23 December 2011 and 3 January 2012 when he did not work on the Article 32 investigation. *See id.* [redacted] did not specify how many days were being excluded. Reference to [redacted] chronology makes clear that he did no work on the Article 32 investigation between the period of 24 December 2011 and 2 January 2012, but these dates are nowhere to be seen in the email approving the Government's delay request. *See* Chronology of Article 32 IO, Attachment 59, at 4 (listing activity on 23 December 2011and 3 January 2012 but listing no activity between 24 December 2011 and 2 January 2012). Additionally, [redacted] did not wait to hear from the Defense before granting this request for excludable delay. [redacted] gave no reasons or explanation for the delay. *See id.* Indeed, the entire exclusion decision, rendered via email, is contained in the following sentence: "I will exclude as a reasonable delay the days between 23 December 2011 and 3 January 2012 when I did not work on the Article 32 Investigation." *Id.* Moreover, [redacted] did not state the legal authority, whether under R.C.M. 707(c), the discussion to that section, or case law, that allows for excluding from the R.C.M. 707 speedy trial clock federal holidays and weekends in which the Article 32 IO did not work on the case. Meanwhile, PFC Manning remained in pretrial confinement for all of December 2011 and January 2012, including on federal holidays and weekends.

52. The Convening Authority issued its last excludable delay memorandum on 3 January 2012. *See* 3 January 2012 Excludable Delay Memorandum, Attachment 60. This memorandum excluded "[t]he period from 16 November 2011 up to and including 15 December 2011" as excludable delay under R.C.M. 707(c). *Id.* Consistent with its prior excludable delay memoranda, the Convening Authority identified a familiar basis for delay: the OCA reviews of classified information; OCA consent to disclose classified information; the 26 August 2010 Defense request for results of the Government's classification reviews; and the Government's eighth request for delay. *See id.* As usual, the Convening Authority stated no reasons why the various requests and classification reviews that had been cited in every excludable delay memorandum for over a year made this particular excluded period a reasonable one. Finally, the Convening Authority once again "acknowledge[d] and reviewed" the two Defense speedy trial requests. *Id.*

53. On 11 January 2012, [redacted] submitted his Article 32 report and recommendations. A little over three weeks later, the GCMCA referred the charges to this Court on 3 February

[3] The Government's failure to provide timely discovery did not necessitate a delay in the Article 32 hearing due to the Defense's overall strategy at that point to use the Article 32 as a discovery tool and to highlight the nature of the Government's overcharging of the case. *See* R.C.M. 405(a) discussion ("The investigation also serves as a means of discovery.").

2012. That same day the Government submitted an Electronic Docket Notification requesting a trial date of 3 April 2012. Three days later, the Defense submitted an Electronic Docket Notification of its own requesting a trial date of 30 April 2012 due to fellow defense counsel being in ILE and other conflicts.

54. Following the initial 802 conference on 8 February 2012, PFC Manning was arraigned on 23 February 2012, 635 days after he was first placed into pretrial confinement.

**3. Pre-Arraignment Discovery Delay**

55. In addition to making eight consecutive requests that the Article 32 hearing be delayed, the Government was also quite lethargic in its pre-arraignment discovery conduct. The Defense made numerous requests for discovery in the 635 days between PFC Manning was placed into pretrial confinement and his arraignment. The Government's responses to these requests were untimely and woefully inadequate.

56. On 29 October 2010, the Defense made its first discovery request. When the Government did not timely respond, the Defense made subsequent discovery requests on 15 November 2010, 8 December 2010, 10 January 2011, 19 January 2011, and 16 February 2011.

57. Instead of responding in writing to these requests, the Government would just send random, unorganized discovery on compact discs without indicating how, if at all, the provided discovery was responsive to the Defense's six discovery requests. Most of the disclosed material was unnecessarily duplicative. The Government responses, both in their volume and their lack of organization, made any effort by the Defense to inspect the information unnecessarily time-consuming.

58. The Government finally responded in writing to the Defense's six discovery requests on 12 April 2011, nearly six months after the first discovery request. This written response was plainly inadequate, merely offering one of the following responses for each of by the Defense discovery requests: the United States has disclosed a portion of the requested material and understands its continuing obligation to disclose; the United States has disclosed all of the requested material in its possession and understands its continuing obligation disclose; the United States does not have authority to disclose this classified information; or the United States will not provide the information because the Defense has failed to provide any basis for the request.

59. Because of the gross inadequacy of the Government's written response, the Defense made its seventh discovery request on 13 May 2011. After the Government yet again failed to respond in a timely fashion, the Defense made its eighth discovery request on 21 September 2011. In the 21 September 2011 discovery request, the Defense requested that the Government preserve all of the hard drives from the Tactical Sensitive Compartmented Information Facility (T-SCIF) and the Tactical Operations Center (TOC) of Headquarters and Headquarters Company, 2nd Brigade Combat Team, 10th Mountain Division, Forward Operating Base Hammer, Iraq. The Defense also made subsequent discovery requests on 13 October 2011, 15 November 2011, and 16 November 2011. The Government did not adequately respond to any of these discovery requests.

60. On 1 December 2011, the Defense made a motion to compel production of evidence at the Article 32 hearing. This motion was denied by the Article 32 IO two weeks later, the day before the Article 32 hearing began.

61. On 20 January 2012, the Defense made yet another discovery request. A week later, the Government responded to all outstanding discovery requests. This response was wholly inadequate. Then, on 31 January 2012, the Government sent the Defense a blanket response to the Defense request for discovery of any and all damage assessments, denying the requested discovery because the Defense had failed to provide any basis for its request.

62. Finally, on 16 February 2012, the Defense filed its first motion to compel discovery. *See* Appellate Exhibit VII. The motion explained that, although the Government had provided up to that date approximately 78,148 pages of unclassified discovery to the Defense and approximately 333,194 pages of what the Government considers classified discovery, the vast majority of this discovery was not responsive to the specific items repeatedly requested by the Defense.

**4. Periods of Apparent Government Inactivity**

63. In addition to the foregoing chronology, there have been several periods of apparent Government inactivity in the processing of this case. From 31 May 2010, when PFC Manning was transferred to Theater Field Confinement Facility, Camp Arifjan, Kuwait, until 5 July 2010, when the original charges were preferred – a period of 36 days – there was no apparent Government activity. *See* Attachment 1. In addition, the Government was evidently inactive for a period of 17 days from 13 July 2010 until 30 July 2010, when PFC Manning was transferred to Quantico. *Id*. Similarly, there was also no apparent Government activity for a period of 20 days from 23 April 2011, the day after the R.C.M. 706 Board's submission of its report, through 12 May 2011, the date of one of the Convening Authority's excludable delay memoranda. *Id*. Likewise, there appears to have been no Government activity for a period of 36 days from 13 May 2011, the day after the Convening Authority's May excludable delay memorandum, to 17 June 2011, the date of the Convening Authority's June excludable delay memorandum. *Id*.

64. The 18-day period from 18 June 2011, the day after the Convening Authority's June excludable delay memorandum, until 5 July 2011, the date of the Convening Authority's approval of the Government's third request for delay of the Article 32 hearing, appears to be equally devoid of any Government activity. *Id*. Additionally, there was no apparent Government activity for a period of 21 days from 6 July 2011, the day after the Convening Authority's approval of the Government's third request for delay, and 26 July 2011, when the Convening Authority approved the Government's fourth request for delay. *Id*. Likewise, there appears to have been no Government activity in the 34-day period between the day after Convening Authority's approval of the Government's fourth request for delay on 26 July 2011 and the Convening Authority's approval of the Government's fifth request for delay on 29 August 2011. *Id*.

65. The Government was evidently equally inactive in the 30-day period from 30 August 2011, the day after the Convening Authority's approval of the Government's fifth request for delay,

through 28 September 2011, when the Convening Authority approved the Government's sixth request for delay. *Id*. Similarly, for a period of 29 days from 29 September 2011, the day after the Convening Authority's approval of the Government's sixth request for delay, until 27 October 2011, when the Convening Authority approved the Government's seventh request for delay, no apparent Government activity occurred. *Id*. Additionally, from the day after the Convening Authority's approval of the Government's seventh request for delay until 15 November 2011 – a period of 19 days – the Government was apparently inactive. *Id*. In addition, the Government appears to have been inactive for a period of 29 days from 17 November 2011 until 15 December 2011. *Id*. Also, for a period of 12 days after the conclusion of the Article 32 hearing on 22 December 2011 until 3 January 2012, it appears as though the Government did nothing to move the case forward. *Id*. Finally, the Government was apparently inactive for a period of 22 days from 12 January 2012, the day after [redacted] submitted his Article 32 report and recommendations, and 2 February 2012, the day before the charges were referred. *Id*.

66. In total, from the commencement of PFC Manning's pretrial confinement until PFC Manning's arraignment on 23 February 2012, there were 323 days in which no apparent Government activity has occurred.

**B. Post-Arraignment Delay**

67. By the time PFC Manning was arraigned on 23 February 2012, the Government's extreme foot-dragging had thoroughly pervaded the case. Things had gotten so bad that on 25 February 2012, the Defense thought it necessary to file a preemptive request with this Court to prevent further Government delay tactics. Following the Defense's filing of its motion for a bill of particulars, the Government took three weeks to file its response, based in part on email glitches experienced by the Government. Not wanting to compound the delay surrounding this motion any further, the Defense requested the following from this Court:

> Should you order that such particulars must be given to the Defense, the Government will likely request an extension of time to provide those particulars. Given that the Government will have over three weeks to address this issue, the Defense would request that you direct the Government to be immediately prepared to release the particulars if you rule in favor of the Defense. In other words, if the Court deems that particulars should be provided, the Government should not have any additional time to provide them . . . . The particulars sought by the Defense do not require the Government to coordinate with multiple external agencies, search files, or engage in complex legal research. Rather, the particulars simply flesh out the charges that the Government has preferred against my client, and that it has been preparing to prosecute for the past 18 months. While I realize this request may be slightly unusual, the Defense believes that the Government had already received a windfall owing to the email situation; it should not be able to continue to press for extensions of responses to straightforward motions. Any such extension would require the trial calendar to be pushed further out, thereby affecting my client's right to a speedy trial.

27 February 2012 Email from Mr. Coombs to COL Lind, MJ, Attachment 61.

68. Additionally, after the Government filed its Response to the Defense Motion to Compel, the Defense and this Court became aware that the Government profoundly misunderstood its basic discovery obligations. As the Defense pointed out in its Reply Motion, the Government Response evidenced that the Government was laboring under three critical misunderstandings of its discovery obligations in a classified evidence case. *See* Appellate Exhibit XXVI, at 1-2, 7. First, the Government mistakenly asserted that R.C.M. 703, and not R.C.M. 701, governed its discovery obligations. *See id.* at 1-2. It believed that the *Brady* standard governing its mandatory disclosure obligations was narrowly limited to the standard articulated in the Supreme Court case of *Brady v. Maryland*, 373 U.S. 83 (1963), and not that enshrined in R.C.M. 701(a)(6). *See id.* at 2. Second, the Government mistakenly believed that *Brady* only required it to turn over evidence material to the merits of the case and that it did not require the Government to turn over evidence material for sentencing purposes. *Id.* Finally, the Government erroneously interpreted Military Rule of Evidence (M.R.E.) 505 as giving the Government, as opposed to the military judge, the authority to be the arbiter of what should and should not be disclosed after balancing the interests of the accused against the national security concerns in a classified evidence case. *Id.* at 7.

69. Based on the Government's grave ignorance of its discovery obligations, the Defense moved to dismiss all charges on 15 March 2012. *See* Appellate Exhibit XXXI. The motion explained that for nearly two years the Government had been representing that it has been diligently searching for *Brady* material, and yet the Government had just tipped its hand that it did not come close to comprehending the scope of its *Brady* obligations. *Id.* at 1-2. The Defense pointed out that if the Government was forced to start its *Brady* search anew, as it would be required to do if the charges were not dismissed, the proceeding would be delayed another two years. *Id.* Since PFC Manning had already spent a total of 656 days in pretrial confinement as of the date of the Defense Motion to Dismiss For Discovery Violations, the Defense argued that any additional delay to re-conduct *Brady* searches from scratch would amount to a *per se* violation of PFC Manning's right to a speedy trial. *Id.* at 4. The motion also pointed out that it was impossible to tell how much *Brady* information had been lost or destroyed as a result of the Government's use of an incorrect *Brady* standard for nearly two years. *Id.* at 5.

70. Lest there be any doubt about the Government's interpretation of the discovery rules, the Government clarified its position in an email from then-CPT Fein to this Court, dated 22 March 2012. In that email, the Government stated its position was that R.C.M. 701 does not apply to classified evidence discovery. The email also stated that the Government had, and would continue to, consult the provisions of MRE 505 to determine what information was discoverable and what information was not discoverable, indicating that the Government viewed itself as the one tasked with balancing PFC Manning's right to a fair trial with the national security concerns raised by the classified evidence. *See* Appellate Exhibit XLIII at 8-9.

71. The next day, this Court issued its ruling on the Defense Motion to Compel. *See* Appellate Exhibit XXXVI. In this ruling, this Court explained that "[t]he classified information privilege under MRE 505 does not negate the Government's duty to disclose information favorable to the defense and material to punishment under *Brady*." *Id.* at 8. This Court further explained that

"[i]f classified discovery detrimental to national security is at issue and the government does not wish to disclose the classified information in part or in whole to the defense, the government must claim a privilege under MRE 505(c)." *Id.* at 10. Speaking more generally about the Government's discovery obligations, the Court noted that "[t]rial counsel have a due diligence duty to review the files of others acting on the Government's behalf in the case for favorable evidence material to guilt or punishment." *Id.* at 8. Finally, this Court ordered the Government to "**immediately**:" (i) begin the process of producing the requested damage assessments; and (ii) cause an inspection of the 14 hard drives of computers from the T-SCIF and the TOC of Headquarters and Headquarters Company, 2nd Brigade Combat Team, 10th Mountain Division, Forward Operating Base Hammer, Iraq and provide the results of those inspections no later than 20 April 2012. *Id.* at 12 (emphasis in original).

72. On 16 April 2012, then-CPT Fein sent an email to Mr. Coombs explaining that, of the 14 hard drives referenced in the Defense's 21 September 2011 Discovery Request and the Court's 23 March 2012 ruling on the Defense Motion to Compel, 2 drives were completely inoperable, 7 drives were wiped, and 1 drive was partially wiped. *See* Appellate Exhibit XLIII, at 15-16. The email did not state when the 8 drives were wiped.

73. The next day, the Defense filed its Reply Motion to Dismiss for Discovery Violations. The motion urged that dismissal was a proper remedy for the discovery violations because there was ample evidence to support the contention that the discovery violations were willful, as the Government seemed to be resisting handing over exculpatory evidence at every turn. *Id.* at 9-10. The motion reiterated the argument raised in the Defense Motion to Dismiss for Discovery Violations that if the charges were not dismissed the Government would have to conduct its *Brady* searches anew, and the resultant delay would surely violate PFC Manning's speedy trial rights. *Id.* at 15. Additionally, the Defense took issue with the Government's need to delay the proceedings until 18 May 2012 to decide whether to assert a privilege with respect to any classified information. *Id.* at 12 n.4. The Defense pointed out that the Government claimed that it needed an extra four months after referral of charges in which to find out whether the equity holders would assert a privilege. *Id.* Finally, the Defense expressed concern about the destruction of several of the 14 hard drives, noting that the CID requested that the evidence be preserved in September 2010, and the Defense also filed a preservation request in September 2011. *Id.* at 15-16.

74. On 25 April 2012, this Court issued a ruling on the Defense Motion to Dismiss for Discovery Violations. *See* Appellate Exhibit LXVIII. In that ruling, this Court confirmed that the Government had indeed been operating under a grave misunderstanding of its discovery obligations for some time:

> 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.

75. On 10 May 2012, the Defense filed a second motion to compel. *See* Appellate Exhibit XCVI. Based on the meager 12 pages of *Brady* material that the Government had provided the Defense as of that date, 713 days after PFC Manning was first placed in pretrial confinement and 676 days after the original charges were preferred, the Defense requested this Court to require the Government to state on the record the steps it had taken in fulfilling its *Brady* obligations. *See id.* at 10. The Defense related to this Court that the Government had sent out a memo on 29 July 2011, over a year after PFC Manning was placed into pretrial confinement and charges were preferred, to Headquarters, Department of the Army (HQDA) requesting it to task Principal Officials to search for, and preserve, any discoverable information. *Id.* at 13-14. Moreover, a 17 April 2012 HQDA memorandum confirmed that no action had yet been taken on the 29 July 2011 memorandum. Almost two full years after PFC Manning's arrest, the Government had not even been able to complete a *Brady* search of files in the Department of the Army. *Id.*

76. On 30 May 2012, the Defense filed a Supplement Motion to Compel 2. *See* Appellate Exhibit XCIX. In this Supplement, the Defense explained that at the 30 May 2012 802 telephonic conference the Government admitted that it still had not reviewed Department of State documents for which the Defense had made a discovery request in 2011. *Id*. at 2. The Defense related its frustration that it had, two years after the Government had supposedly begun its *Brady* search, only received 12 pages of unclassified *Brady* material and was still waiting on the bulk of the *Brady* material. *Id.* at 3-4. The Defense further pointed out in its Reply to the Government's Response to the Supplement Motion to Compel 2, dated 11 July 2012, that the Government was *still*, over two years after the preferral of charges, continuing to search the military's own files for *Brady* material. *See* Appellate Exhibit CI, at 10.

77. On 8 June 2012, following testimony by Department of State witnesses at a motions hearing, this Court ordered the prosecution to begin the process of searching for and inspecting the following Department of State records:

(1) Written assessments produced by the Chiefs of Mission used to formulate a portion of the draft damage assessment completed in August of 2011;

(2) Written Situational Reports produced by the WikiLeaks Working Group between roughly 28 November 2010 and 17 December 2010;

(3) Written minutes and agendas of meetings by the Mitigation Team;

(4) Information Memorandum for the Secretary of State produced by the WPAR;

(5) A matrix produced by WPAR to track identified individuals;

(6) Formal guidance produced by WPAR and provided to all embassies, including authorized actions for any identified person at risk;

(7) Information collected by the Director of the Office of Counter Intelligence and Consular Support within the Department of State regarding any possible impact from the disclosure of diplomatic cables; and

(8) Any prepared written statements for the Department's reporting to Congress on 7 and 9 December 2010.

*See* Appellate Exhibit CXLII, at 1-2. On 9 July 2012, the Government completed its search and inspection of these records. *See id.* at 2-4. The Government did not explain why it was unable to conduct this search and inspection of these documents – which only took 30 days – during the 741 days that PFC Manning was in confinement at the date of the 7 June 2012 motions hearing. Additionally, despite the fact that the Government had completed its search for and inspection of these documents in 30 days, it requested 45-60 days delay of any Court order to compel production of those documents in order to allow the Government to decide whether to seek limited disclosure or claim a privilege under M.R.E. 505. *See id.* at 6.

78. During this timeframe, the Government also disclosed that ONCIX had prepared a draft damage assessment and that the FBI had prepared an impact statement looking into the apparent damage caused by the alleged leaks. *See* Appellate Exhibit CLXXIII. In support of its motion for a due diligence statement, the Defense chronicled the open questions that existed in respect of these particular items: Why didn't the Government tell the Court about the ONCIX damage assessment earlier? Why had the Government used the phrase "ONCIX has not completed an interim or final damage assessment"? When did the Government learn about the FBI impact statement? The Government did not provide satisfactory answers to these questions.

79. On 25 June 2012, this Court ordered the Government to provide a due diligence statement to the Court. *See* Appellate Exhibit CLXXVII, at 2-3. Specifically, this Court ordered the following:

> By **25 July 2012**, the Government will provide the Court with a statement of due diligence, in the format attached, stating:
>
> a. Steps the Government has taken to inquire about the existence of files pertaining to PFC Manning from Government agencies/entities;
>
> b. When these inquiries were made;
>
> c. When the Government became aware of the existence of each file pertaining to PFC Manning from Government agencies/entities;
>
> d. What files the Government has searched for *Brady*/RCM 701(a)(6) information and when;

e. What files the Government has searched for information material to the preparation of the defense IAW RCM 701(a)(2) and when.

f. What information from the above files the Government has disclosed to the Defense;

g. What files the Government has reviewed and found no discoverable information;

h. What files the Government has decided not to disclose to the Defense,

i. What files the Government has identified that have yet to be searched for Brady/RCM 701(a)(6) and/or RCM 701(a)(2).

By **25 July 2012**, the Government will provide a timeline and synopsis of the inquiries and communications between the Government and ONCIX.

*Id.* at 2-3 (emphases in original). This Court further provided that the proceedings would not be suspended because of the Government's due diligence statement. *Id.* at 3.

80. The Government yet again requested more time to disclose all *Brady* material to the Defense on 25 July 2012. *See* Appellate Exhibit 226, at 1. The Government explained that it was still searching files for *Brady* material, and therefore could not make its 3 August 2012 deadline for disclosure of all outstanding *Brady* material. *Id.* The Government related that it would also be unable to obtain the necessary approvals from the requisite equity holders to disclose any *Brady* material uncovered in its search by the 3 August 2012 deadline. *Id.* Therefore, the Government requested that the deadline be pushed back to 14 September 2012, 840 days after PFC Manning was first placed into pretrial confinement. *See id.*

81. To this date, much discovery is still up in the air. In an email from MAJ Fein to the Court and the Defense on 14 September, MAJ Fein chronicled the numerous Government filings pertaining to outstanding discovery issues:

1. Government Ex Parte RCM 701(g)(2) Motion for a DHS document. The motion and its enclosures are being submitted via NIPR in a separate email. Attached to this email is a redacted version for the defense.

2. Government MRE 505(g)(2) Motion for DOS Information. The motion and its enclosures are being submitted via NIPR in this email. Two of the enclosures are being submitted via NIPR in a separate email.

3. Government MRE 505(g)(2) Motion for CIA Information. The motion and its enclosures are being submitted via SIPR and hand delivery on Monday.

4. Government Notice to the Court for Government MRE 505(g)(2) Motion for DOS and CIA Information, which includes the unclassified and redacted version of the CIA

motion.

5. Government Notice to the Court for ODNI Information.

6. Government Supplemental Filing for MRE 505(g)(2) Filing for FBI Investigative File. The supplement is attached. The classified enclosures are being submitted ex parte via SIPR and hand delivery on Monday.

*See* 14 September 2012 Email from MAJ Fein to COL Lind, Attachment 67. These outstanding issues will be resolved over the next few months, likely meaning that it will not be until November 2012 that the Defense has all relevant discovery in its possession (over 900 days after PFC Manning was placed in pretrial confinement).

82. Finally, the Defense's previously articulated concern of the Government dumping evidence on the Defense on the eve of trial or key motions materialized on 26 July 2012. That night, the Government sent to the Defense 84 emails that it characterized as "obviously material to the preparation of the defense for Article 13 purposes." 26 July 2012 Email from MAJ Fein to Mr. Coombs, Attachment 62. The Defense Article 13 Motion was due the next day. At 12:54 a.m. on 27 July 2012, the Defense relayed to this Court the quite literal last minute disclosure of these emails:

> MAJ Fein just notified the Defense of the existence of 60 emails that the Government determined were material to the preparation of the defense for the Article 13 motion which, as you know, is due tomorrow. At 2115, MAJ Fein sent the Defense copies of the emails. The Defense cannot understand why it is getting these emails the night before its motion is due. The Defense had requested any documentation pertaining to PFC Manning's confinement while at Quantico over a year and a half ago, in a discovery request dated 8 December 2010.

27 July 2012 Email from Mr. Coombs to COL Lind, MJ, Attachment 63.

83. MAJ Fein related that the Government "received the emails with the original documents approximately six months ago and prioritized their review for Giglio/Jencks material based on potential witnesses." 27 July 2012 Email from MAJ Fein to Mr. Coombs, Attachment 64. However, MAJ Fein admitted that the Government had just started to review the emails:

> On Wednesday [25 July 2012], the prosecution started reviewing the emails for potential impeachment evidence or Jencks material, and during that review found 84 emails which we deemed obviously material to the preparation of the defense for Article13 purposes. Within 24 hours, the United States notified the defense and sent the emails last night [Thursday July 26].

27 July 2012 Email from MAJ Fein to COL Lind, MJ, Attachment 65. MAJ Fein attempted to minimize any effect that this eleventh hour disclosure would have on the Defense's Article 13 Motion: "the United States still sees no reason why the defense will not have adequate time to

prepare its Article 13 motion, and especially since this the majority of these emails appear to only bolster the defense's current argument, as proffered in the Article 13 witness list litigation." *Id*. The Defense then voiced its displeasure with the MAJ Fein's remarks:

> What matters is that 84 emails were dumped on the Defense the night before the Article 13 motion was due, after I had already sent the Defense attachments and just prior to leaving the country for family reasons.
>
> The Government avoids addressing the two issues that I raised. First, I need additional time to incorporate these emails into my motion. The Government seems to suggest that the emails simply support the arguments that I was in the process of already making, (i.e. I was on the right track). However, these emails do much more than simply support our argument. The emails change the basis of the Defense's argument. When does the Government propose that the Defense incorporate these emails into our motion? Based upon the Government's email it would seem that it would have us do this today.
>
> Second, due to the nature of these emails, the Defense believes that additional witnesses will be needed for the motion. The question is not necessarily just interviewing potential witnesses, but likely litigating with the Government over whether the witnesses will be produced.
>
> How the Government could have waited so long to look at these emails which should have been produced as part of its discovery obligations is beyond me. The fact that the Government is now trying to hold the Defense to a time line of today when the need for a delay is due to their lack of diligence is unbelievable. The Defense has repeated since referral its concern that information would be dumped on us on the eve of trial. This is [a] perfect example of the Defense's concerns coming to fruition.

27 July 2012 Email from Mr. Coombs to COL Lind, MJ, Attachment 66.

84. As a result of the incredible last minute disclosure and the disclosure of the existence of an additional 1,294 emails within the Government's possession, further delay has ensued. The Article 13 motions hearing has been pushed back to 27 November 2012. The disclosure of additional emails necessitated the filing of a supplemental Article 13 motion and a supplementary witness list. The Defense filed a motion to compel with respect to the 1,294 emails that the Government did not disclose. At that point, the Government "voluntarily" turned over approximately 600 more emails that were apparently material to the preparation of the defense, with no explanation as to why these were not produced earlier. The Court then reviewed the remaining 600 or so emails and determined that *all but twelve* were material to the preparation of the defense. Of course, the needless delay in consideration of the Article 13 motion was, as always has been the case, occasioned by the Government's lack of due diligence.

85. Currently, PFC Manning's trial is scheduled to commence on 4 February 2013. As of that date, PFC Manning will have spent 983 days in pretrial confinement.

WITNESSES/EVIDENCE

86. The Defense requests the following witnesses be produced for the purposes of this motion:

a. [redacted];

b. [redacted];

c. [redacted];

d. [redacted];

e. Original Classification Authorities (OCAs). The Defense requests the Government produce a witness from each of the following OCAs: United States Central Command (CENTCOM); Joint Task Force – Guantanamo (JTF-GTMO); Department of State (DOS); Office of the Director of National Intelligence (ODNI); Other Government Agency for Specifications 3 and 15 of Charge II; Defense Information Systems Agency (DISA); and United States Cyber Command (CYBERCOM). *See* Appellate Exhibit 256.

f. The Defense requests a witness from each of the following organizations: Headquarters Department of the Army (HQDA); Department of State (DOS) and Diplomatic Security Services (DSS); Federal Bureau of Investigation (FBI); Department of Homeland Security (DHS); Office of the National Counterintelligence Executive (ONCIX); DIA, DISA, CENTCOM, SOUTHCOM, CYERCOM; DOJ; Other Government Agency; and each of the previously identified 63 Agencies. See Appellate Exhibit 256.

LEGAL FRAMEWORK

87. There are several sources of a Soldier's right to a speedy trial. *See United States v. Lazauskas*, 62 M.J. 39, 41 (C.A.A.F. 2005); *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *United States v. Birge*, 52 M.J. 209, 210-11 & nn.3-4 (C.A.A.F. 1999). These sources include, among others, the Sixth Amendment to the United States Constitution, Article 10, and R.C.M. 707, under which PFC Manning moves this Court for speedy trial relief. *See Lazauskas*, 62 M.J. at 41; *Cooper*, 58 M.J. at 57; *Birge*, 52 M.J. at 210-11. The numerous speedy trial sources complement one another, and together they serve several salutary purposes. As the Court of Appeals for the Armed Forces explained in *Mizgala*:

> Congress enacted various speedy trial provisions in the UCMJ to address concerns about "the length of time that a man will be placed in confinement and held there pending his trial"; to prevent an accused from "languish[ing] in a jail somewhere for a considerable length of time" awaiting trial or disposition of charges; to protect the accused's rights to a speedy trial without sacrificing the

> ability to defend himself; to provide responsibility in the event that someone unnecessarily delays a trial; and to establish speedy trial protections under the UCMJ "consistent with good procedure and justice."

61 M.J. at 124 (citations omitted). Because the analysis under R.C.M. 707 is distinct from the analysis under Article 10, the legal framework for each speedy trial provision is discussed separately below.[4]

**A. R.C.M. 707**

88. Rule for Courts-Martial 707 "was drafted not only to address an accused's constitutional and statutory speedy-trial rights but also to 'protect[ ] the command and societal interest in the prompt administration of justice.'" *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997). To serve these ends, R.C.M. 707(a) sets forth a 120-day speedy trial clock: "The accused shall be brought to trial within 120 days after the earlier of: (1) [p]referral of charges; (2) [t]he imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) [e]ntry on active duty under R.C.M. 204." R.C.M. 707(a).[5] As the then-Court of Military Appeals has remarked, "[t]he duty to proceed in these matters in a timely, efficient manner is imperative at all stages of the process, from the first minute of day 1 to the last minute of day 120." *United States v. Carlisle*, 25 M.J. 426, 429 (C.M.A. 1988).

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[4] As explained in more detail below, *see infra* note 4, the same factors are analyzed under the Sixth Amendment analysis and the Article 10 analysis. Therefore, the remainder of this section discusses the legal framework of R.C.M. 707 and Article 10 only. The legal framework for the Sixth Amendment analysis is covered in the discussion of Article 10's legal framework, *infra*.

[5] R.C.M. 707(a)(2) defines "imposition of restraint" by reference to R.C.M. 304(a)(2)-(4). That rule provides as follows:

> Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.
>
> * * *
>
> (2) *Restriction in lieu of arrest*. Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.
>
> (3) *Arrest*. Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.
>
> (4) *Confinement*. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses.

R.C.M. 304(a)(2)-(4) (italics in original). Additionally, substance prevails over form under R.C.M. 304(a): "The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, will determine whether it is technically an arrest or restriction in lieu of arrest." R.C.M. 304(a) discussion.

89. Subsection (b) of R.C.M. 707 provides several rules on how the R.C.M. 707 speedy trial clock operates. For instance, the day on which the triggering event under R.C.M. 707(a) occurs – whether it be the preferral of charges, the imposition of restraint, or entry on active duty – is not counted for purposes of the 120-day clock. R.C.M. 707(b)(1). Additionally, subsection (b) clarifies that an "accused is brought to trial within the meaning of [R.C.M. 707] at the time of arraignment under R.C.M. 904." *Id.*; *see Cooper*, 58 M.J. at 59 ("[T]he duty imposed on the Government by R.C.M. 707 is to arraign an accused within 120 days of preferral of charges or pretrial confinement, or face dismissal of the charges."); *United States v. Doty*, 51 M.J. 464, 464 (C.A.A.F. 1999) (similar). Unlike the date on which the triggering event occurs, "[t]he date on which the accused is brought to trial [i.e. arraigned] shall count" for purposes of the 120-day speedy trial clock. R.C.M. 707(b)(1).

90. Subsection (c) of R.C.M. 707 sets forth the standard and procedure for excluding periods of delay from the R.C.M. 707 speedy trial clock. It provides in full as follows:

> All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.
>
> (1) *Procedure*. Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

R.C.M. 707(c) (italics in original). The discussion section to R.C.M. 707(c) makes clear that only "reasonable delay" may be excluded from the speedy trial clock: "[t]he decision to grant or deny a *reasonable delay* is a matter within the sole discretion of the convening authority or a military judge." R.C.M. 707(c) discussion (emphasis supplied). The discussion sets forth some reasons that reasonable delay may be excluded:

> This decision should be based on the facts and circumstances then and there existing. Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

*Id.* The discussion section also provides that "[p]retrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing." *Id.*

91. In addition to the discussion section R.C.M. 707(c), case law demonstrates that any delay excluded under R.C.M. 707(c) must be reasonable. *See United States v. Savard*, No. ACM 37346, 2010 WL 4068964, at *3 (A.F. Ct. Crim. App. Jan. 19, 2010) (unpub.) ("[T]o be excludable the reason for the delay must be reasonable."); *United States v. Melvin*, No. ACM 37081, 2009 WL 613883, at *7 (A.F. Ct. Crim. App. March 4, 2009) (unpub.) (same); *United States v. Billquist*, No. ACM 35003, 2008 WL 2259774, at *2 (A.F. Ct. Crim. App. May 30, 2008) (unpub.) (same); *United States v. Brown*, No. ACM 36607, 2008 WL 1956589, at *9 (A.F. Ct. Crim. App. Apr. 23, 2008) (unpub.) ("As long as the length of the delay is reasonable and the approving official did not abuse his discretion, it is excluded from the 120–day speedy trial clock."); *United States v. McDuffie*, 65 M.J. 631, 634 (A.F. Ct. Crim. App. 2007) (same); *United States v. Fujiwara*, 64 M.J. 695, 699 (A.F. Ct. Crim. App. 2007) (same); *United States v. Rowe*, No. ACM 34578, 2003 WL 828986, at *1 (A.F. Ct. Crim. App. Feb. 28, 2003) (unpub.) ("A decision to grant a delay under R.C.M. 707 is reviewed for abuse of discretion and reasonableness."); *United States v. Proctor*, 58 M.J. 792, 795 (A.F. Ct. Crim. App. 2003) (same); *United States v. Weatherspoon*, 39 M.J. 762, 766 (A.C.M.R. 1994) (same); *United States v. Hayes*, 37 M.J. 769, 772 (A.C.M.R. 1993) (same). Additionally, the Government bears the burden of proving the facts to support a conclusion that the challenged periods of excludable delay were "reasonable." *See* R.C.M. 905(c)(2)(B).

92. This Court reviews the Convening Authority's decision to exclude a certain period of delay under R.C.M. 707(c) under the abuse of discretion standard. *See Lazauskas*, 62 M.J. at 41-42 ("If the issue of speedy trial under R.C.M. 707 is raised before the military judge at trial, the issue is not which party is responsible for the delay but whether the decision of the officer granting the delay was an abuse of discretion."); *United States v. Anderson*, 50 M.J. 447, 448 (C.A.A.F. 1999). As Judge Baker explained in *Lazauskas*, the Manual for Courts-Martial envisions that, in order to survive abuse of discretion review, the Convening Authority must make an independent determination that there was good cause for the delay that was excluded:

> [T]he decision to grant must be reasonable based on the reasons, facts or circumstances presented. Otherwise, such a grant would constitute an abuse of discretion. This view finds support in the analysis in the *Manual for Courts–Martial, United States* (2002 ed.) (*MCM*) contained in the non-binding discussion accompanying R.C.M. 707(c) stating that 'Military judges and convening authorities are required, under this subsection, to make an independent determination as to whether there is in fact *good cause for a pretrial delay,* and to grant such delays for only so long as is necessary under the circumstances.' *MCM,* Analysis of the Rules for Courts–Martial A21–42 (emphasis added).

62 M.J. at 45 (Baker, J., concurring) (emphasis in original); *see Thompson*, 46 M.J. at 474-75 (quoting this language from the MCM).

93. Subsection (d) of R.C.M. 707 provides the remedy for a violation of R.C.M. 707's speedy trial clock: "dismissal of the affected charges." R.C.M. 707(d)(1). The dismissal can be with or without prejudice. R.C.M. 707(d)(1). In determining which type of dismissal to order, R.C.M. 707(d) directs military judges to consider a variety of factors, including: "the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial." *Id.*; *see United States v. Dooley*, 61 M.J. 258, 259 n.6 (C.A.A.F. 2005) (listing these factors); *United States v. Bray*, 52 M.J. 659, 663 (A.F. Ct. Crim. App. 2000) (outlining this multi-factor framework and conducting an analysis under it). However, "[t]he charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial." R.C.M. 707(d)(1).

**B. Article 10**

94. The constitutional right to speedy trial is a fundamental right of a military accused, protected by both the Sixth Amendment and Article 10. *Mizgala*, 61 M.J. at 124; *Cooper*, 58 M.J. at 60. Article 10 provides that "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, *immediate steps* shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him. 10 U.S.C. § 810 (emphasis supplied). The protections of Article 10 become available after "arrest or confinement," as those terms are used in Article 10. 10 U.S.C. § 810; *see United States v. Schuber*, 70 M.J. 181,184 (C.A.A.F. 2011). Unlike R.C.M. 707, however, the protections of Article 10 extend beyond the date of arraignment. *Cooper*, 58 M.J. at 59-60. Under Article 10, "the Government must . . . move diligently to trial and the entire period up to trying the accused will be reviewed for reasonable diligence on the part of the Government." *Id.* at 60.

95. Military courts have interpreted the "immediate steps" mandate of Article 10 as requiring "reasonable diligence." *See Schuber*, 70 M.J. at 188; *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); *Mizgala*, 61 M.J. at 127; *Cooper*, 58 M.J. at 58; *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). Article 10 does "not demand constant motion, but reasonable diligence in bringing the charges to trial." *Cossio*, 64 M.J. at 256; *see Thompson*, 68 M.J. at 312; *Mizgala*, 61 M.J. at 127. "Short periods of inactivity are not fatal to an otherwise active prosecution." *Thompson*, 68 M.J. at 312 (quoting *Mizgala*, 61 M.J. at 127); *see Cossio*, 64 M.J. at 256; *Kossman*, 38 M.J. at 262 ("Article 10 does not require instantaneous trials, but the mandate that the Government take immediate steps to try arrested or confined accused must ever be borne in mind."). When assessing whether the Government has complied with the reasonable diligence standard in any particular case, courts look at the proceeding as a whole, and the "essential ingredient is orderly expedition and not mere speed." *Mizgala*, 61 M.J. at 129 (quoting *United States v. Mason*, 45 C.M.R. 163, 167 (C.M.A. 1972)); *see Thompson*, 68 M.J. at 312.

96. Government diligence in any particular case can fall short of the reasonable diligence benchmark even in the absence of bad faith or gross neglect. As the *Mizgala* Court explained, "An Article 10 violation rests in the failure of the Government to proceed with reasonable diligence. A conclusion of unreasonable diligence may arise from a number of different causes and need not rise to the level of gross neglect to support a violation." 61 M.J. at 129. Along the

same lines, the then-Court of Military Appeals observed in *Kossman* that "where it is established that the Government could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to," Article 10 has been violated. 38 M.J. at 261; *see United States v. Hatfield*, 44 M.J. 22, 23 (C.A.A.F. 1996). In plain terms, the Article 10 inquiry asks "whether the Government has been foot-dragging on a given case, under the circumstances then and there prevailing." *Kossman*, 38 M.J. at 262. The Government bears the burden of proving that it has moved the case forward with the required reasonable diligence. *See Mizgala*, 61 M.J. at 125 ("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.").

97. To assess whether the Government has used reasonable diligence in processing the case, courts look to a four-factor procedural framework. *See Schuber*, 70 M.J. at 188; *Thompson*, 68 M.J. at 312. "The procedural framework for analyzing Article 10 issues examines the length of the delay, the reasons for the delay, whether the accused made a demand for a speedy trial, and prejudice to the accused." *Thompson*, 68 M.J. at 312; *see Schuber*, 70 M.J. at 188; *Cossio*, 64 M.J. at 256; *Mizgala*, 61 M.J. at 127, 129; *Birge*, 52 M.J. at 212.[6] Each factor of this procedural framework is discussed in more detail below.

98. The length of delay factor operates, to some extent, as a triggering mechanism. *See Thompson*, 68 M.J. at 312; *Cossio*, 64 M.J. at 256. "[U]nless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, 'there is no necessity for inquiry into the other factors that go into the balance.'" *Cossio*, 64 M.J. at 256 (quoting *United States v. Smith*, 94 F.3d 204, 208-09 (6th Cir.1996)); *see Schuber*, 70 M.J. at 188. To determine whether the delay in a given case has been "presumptively prejudicial," courts look at the particular circumstances of the case, including "the seriousness of the offense; the complexity of the case; and the availability of proof;" whether the accused was "informed of the accusations against him; whether the Government complied with procedures relating to pretrial confinement, and whether the Government was responsive to requests for reconsideration of pretrial confinement." *Schuber*, 70 M.J. at 188; *see Thompson*, 68 M.J. at 315 (Stucky, J., concurring in the result); *Kossman*, 38 M.J. at 261-62. Ultimately, however, "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 Thompson*, 68 M.J. at 312; *Cossio*, 64 M.J. at 256.

99. Under the second factor in the procedural framework – the reasons for delay factor – courts carefully scrutinize the Government's articulated reasons for delay to ensure that the Government has not spent too long in a "waiting posture." *See Mizgala*, 61 M.J. at 129. Courts

[6] The four factors identified in the above-quoted procedural framework are derived from the *Barker* factors used under the Sixth Amendment speedy trial analysis. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972) (adopting these same four factors). Therefore, the analysis under Article 10 and the analysis under the Sixth Amendment examine the same factors. However, while the two analyses are similar, it is bedrock law that Article 10 creates a far more exacting speedy trial demand than the Sixth Amendment does. *See Schuber*, 70 M.J. at 184, 188; *Thompson*, 68 M.J. at 312; *Cossio*, 64 M.J. at 256; *Mizgala*, 61 M.J. at 124-25; *Cooper*, 58 M.J. at 60; *Birge*, 52 M.J. at 211-12. Thus, despite the similarities between the two inquiries, "because Article 10 imposes a more stringent speedy trial standard than the Sixth Amendment, 'Sixth Amendment speedy trial standards cannot dictate whether there has been an Article 10 violation.'" *Thompson*, 68 M.J. at 312 (quoting *Mizgala*, 61 M.J. at 127).

must be careful not to accept as legitimate Government justifications that simply "reflect the realities of military criminal practice." *Thompson*, 68 M.J. at 313 ("As a general matter, factors such as staffing issues, responsibilities for other cases, and coordination with civilian officials reflect the realities of military criminal practice that typically can be addressed by adequate attention and supervision, consistent with the Government's Article 10 responsibilities.").

100. The third factor in the procedural framework – whether the accused made a demand for a speedy trial – is straightforward. When a demand is made, courts inquire as to how early the demand was made in the context of the entire proceedings and the genuineness of that demand. *See Thompson*, 68 M.J. at 313 ("We also take into account the fact that [the accused] did not make a speedy trial request during the entire pretrial day period addressed by the military judge."); *Kossman*, 38 M.J. at 262 ("Stratagems such as demanding a speedy trial now, when the defense knows the Government cannot possibly proceed, only to seek a continuance later, when the Government is ready, may belie the genuineness of the initial request.").

101. Finally, courts look at three interests of the accused when analyzing the prejudice factor. The *Cossio* Court quoted the Supreme Court's discussion of the prejudice factor in *Barker v. Wingo*:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

64 M.J. at 257 (quoting *Barker v. Wingo*, 407 U.S. 514, 532 (1972)); *see Mizgala*, 61 M.J. at 129 (identifying these three interests); *see also Schuber*, 70 M.J. at 191 (Erdmann, J., dissenting in part and concurring in the judgment) (same); *United States v. Miller*, 66 M.J. 571, 575 (N-M. Ct. Crim. App. 2008) ("the inability of [a defendant] adequately to prepare his case skews the fairness of the entire system.").

102. The Court of Appeals for the Armed Forces has emphasized the importance of treating "the procedural framework as an integrated process, rather than as a set of discrete factors." *Thompson*, 68 M.J. at 313; *see Mizgala*, 61 M.J. at 129.

103. It is important to recognize that the Article 10 analysis and the R.C.M. 707 analysis must remain distinct. 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 Lazauskas*, 62 M.J. at 42 ("The resolution under R.C.M. 707 does not preclude a party from asserting responsibility for delay under Article 10, UCMJ, or the Constitution."); *Mizgala*, 61 M.J. at 128-29 ("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."); *Birge*, 52 M.J. at 211 ("[E]ven if the Government has complied with RCM 707 and the Sixth Amendment, the Government's failure to proceed with 'reasonable diligence' would constitute a violation of Article 10."); *Kossman*, 38 M.J. at 261 ("Merely satisfying lesser presidential standards [of R.C.M. 707] does not insulate the Government from the sanction of Article 10."); *Calloway*, 47 M.J. at 787 ("Even where delay is approved by the military judge, the Government must still show reasonable diligence under an Article 10, UCMJ, 10 U.S.C. § 810, analysis."); *id.* (explaining that, unlike the R.C.M. 707(c) provision for excludable delay, "Article 10, UCMJ, 10 U.S.C. § 810, does not include a provision for a military judge to relieve the Government of the burden of proving it proceeded with reasonable diligence when an accused is in pretrial confinement."). Because the protections of Article 10 are preeminent over those provided by R.C.M. 707, *Kossman*, 38 M.J. at 261, R.C.M. 707 "does not act as a limitation on the rights afforded under Article 10." *Mizgala*, 61 M.J. at 125. Therefore, regardless of those periods of delay properly excluded under R.C.M. 707(c), the Government still must show reasonable diligence under Article 10 for the entire period from "arrest or confinement" until trial. *See Cooper*, 58 M.J. at 59-60; *United States v. Simmons*, No. ARMY 20070486, 2009 WL 6835721, at *4 n.13 (A. Ct. Crim. App. Aug. 12, 2009) (unpub.) ("Article 10, UCMJ, however, does not address any specific excludible time periods; rather, the entire period of time from inception of confinement or arrest until trial is examined when considering whether the government exercised reasonable diligence."); *see also Miller*, 66 M.J. at 573, 577 (finding no violation of R.C.M. 707 but finding a violation of Article 10).

104. Finally, there is only one remedy for a violation of Article 10: dismissal of the affected charges with prejudice. As the *Kossman* Court has explained:

> The remedy for an Article 10 violation must remain dismissal with prejudice of the affected charges. If it is concluded that the circumstances of the delay are sufficiently excusable or unavoidable as to permit a reinstitution of the charges, there is no violation of Article 10 in the first place. Where the circumstances of delay are not excusable, on the other hand, it is no remedy to compound the delay by starting all over.

38 M.J. at 262. Likewise, dismissal with prejudice is the only remedy available for a violation of a military accused's Sixth Amendment speedy trial right. *See* R.C.M. 707(d)(1) ("The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial.").

## ARGUMENT

### A. The Government Violated PFC Manning's Speedy Trial Rights under R.C.M. 707

105. PFC Manning was placed into pretrial confinement on 29 May 2010. He was arraigned on 23 February 2012. Not counting the day of the triggering event but counting the day of arraignment, *see* R.C.M. 707(b)(1), 635 days passed from the imposition of restraint under R.C.M. 304(a)(4) until PFC Manning was "brought to trial" within the meaning of R.C.M.

707(a), *see id.* While several periods of delay were excluded by the Convening Authority under R.C.M. 707(c), many of these delays constituted abuses of discretion. When those improperly excluded periods are added back to the R.C.M. 707 speedy trial clock, it becomes clear that the Government has trampled upon PFC Manning's R.C.M. 707 speedy trial rights. Given the profound lack of diligence in the processing of this case from PFC Manning's pretrial confinement until PFC Manning's arraignment, this Court should dismiss all charges with prejudice.

**1. Triggering Event under R.C.M. 707(a)**

106. The speedy trial protections of R.C.M. 707(a) are triggered upon "the earlier of: (1) [p]referral of charges; (2) [t]he imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) [e]ntry on active duty under R.C.M. 204." R.C.M. 707(a). In this case, as the imposition of restraint predated the preferral of charges, the triggering date is the imposition of restraint under R.C.M. 304(a)(2)-(4). *See id.*

107. Here, the "imposition of restraint under R.C.M. 304(a)(2)-(4)," R.C.M. 707(a)(2), occurred when PFC Manning was placed in pretrial confinement on 29 May 2010. *See* R.C.M. 304(a)(4) (defining pretrial confinement). Therefore, the 120-day speedy trial clock began to run on 30 May 2010, the day after the imposition of restraint. *See* R.C.M. 707(b)(1) (providing that the date on which restraint is imposed shall not be counted for purposes of the speedy trial clock).

**2. Uncontested Days Under the R.C.M. 707 Speedy Trial Clock**

108. The earliest day that was excluded by the Convening Authority was 12 July 2010. *See* 12 October 2010 Excludable Delay Memorandum, Attachment 16 (excluding period from 12 July 2010 to 12 October 2010 under R.C.M. 707(c)). Therefore, the 43 day period from 30 May 2010, the day after PFC Manning was placed in pretrial confinement, *see* R.C.M. 707(b)(1), until 11 July 2010 counts against the R.C.M. 707(a) 120-day speedy trial clock.

109. The last day that was excluded by the Convening Authority was 15 December 2011. *See* 3 January 2012 Excludable Delay Memorandum, Attachment 60 (excluding period from 16 November 2011 to 15 December 2011 under R.C.M. 707(c)). Additionally, it appears that [redacted] excluded the 10 days between 24 December 2011 and 2 January 2012. *See* 4 January 2012 Email from [redacted] to then-CPT Fein, Attachment 58; Chronology of Article 32 IO, Attachment 59, at 4.[7] Therefore, the 8-day period from 16 December 2011 until 23 December 2011 unquestionably counts against the R.C.M. 707(a) speedy trial clock. Finally, the 52-day period from 3 January 2012 to PFC Manning's arraignment on 23 February 2012, *see*

[7] On 4 January 2012, [redacted] purported to "exclude as a reasonable delay the days between 23 December 2011 and 3 January 2012 when [ [redacted] ] did not work on the Article 32 Investigation." 4 January 2012 Email from [redacted] to then-CPT Fein, Attachment 58. However, [redacted] did not specify how many days, if any, he actually excluded. [redacted] chronology seems to indicate that he did not work on the Article 32 investigation for a period of 10 days within the 23 December 2011–3 January 2012 date range. Specifically, it appears that [redacted] did not work on the Article 32 investigation from 24 December 2011 to 2 January 2012. *See* Chronology of Article 32 IO, Attachment 59, at 4.

R.C.M. 707(b)(1) ("The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904."), also counts against the R.C.M. 707(a) speedy trial clock.

110. Taken together, the 43 days from 30 May 2010 to 11 July 2010, the 8 days from 16 December 2011 to 23 December 2011, and the 52 days from 3 January 2012 to 23 February 2012 add up to 103 days. Therefore, the Government cannot dispute that 103 days count against the 120-day speedy trial clock of R.C.M. 707(a).

**3. Uncontested Exclusions under R.C.M. 707(c)**

111. Other than the 103 days that unquestionably count against the R.C.M. 707(a) speedy trial clock, the Convening Authority and Article 32 IO excluded under R.C.M. 707(c) the rest of the 635 days between the day after PFC Manning was placed in pretrial confinement and the day he was arraigned, *see* R.C.M. 707(b)(1). The Defense challenges many of those exclusions, which totaled 532 days, as an abuse of the Convening Authority's discretion. *See* Argument, Part A.4, *infra*. However, the Defense does not challenge some of the Convening Authority's excludable delay decisions.

112. The Defense does not dispute the propriety of the Convening Authority's decision to exclude the period of 11 August 2010 until 12 October 2010. *See* 12 August 2010 Excludable Delay Memorandum, Attachment 9; 25 August 2010 Excludable Delay Memorandum, Attachment 11; 12 October 2010 Excludable Delay Memorandum, Attachment 16.[8] The Government apparently began acting on the Defense's several requests for a R.C.M. 706 Board only after the Defense's fourth request on 11 August 2010. *See* 11 August 2010 Defense Request, Attachment 8. The Defense then made a number of requests related to the upcoming R.C.M. 706 Board's evaluation. *See* 25 August 2010 Defense Request for Appointment of Forensic Psychiatrist Expert, Attachment 10; 26 August 2010 Defense Request for Adoption of Procedures to Safeguard Classified Information, Attachment 12; 3 September 2010 Defense Request for Appropriate Security Clearances for Defense Team and Access for PFC Manning, Attachment 13.

113. For similar reasons, the Defense does not challenge the Convening Authority's decision to exclude the following periods under R.C.M. 707(c): from 12 October 2010 to 10 November 2010, *see* 10 November 2010 Excludable Delay Memorandum, Attachment 17; from 10 November 2010 to 17 December 2010, *see* 17 December 2010 Excludable Delay Memorandum, Attachment 19; from 17 December 2010 to 14 January 2011, *see* 14 January 2011 Excludable Delay Memorandum, Attachment 21; and from 14 January 2011 to 15 February 2011, *see* 15 February 2011 Excludable Delay Memorandum, Attachment 23.

[8] The Defense does contend that the portion of the Convening Authority's 12 October 2010 excludable delay memorandum that excluded the period of 12 July 2010 up until 10 August 2010, before the Government had taken any action on the Defense's first three requests for a R.C.M. 706 Board, was an abuse of discretion. *See* Argument, Part A.4.b, *infra*. Therefore, to clarify the statement in the text preceding this footnote, the Defense reiterates that it only concedes the validity of the Convening Authority's 12 October 2010 excludable delay memorandum to the extent that it excluded the period from 11 August 2010 until 12 October 2010.

114. On 3 February 2011, the Convening Authority issued an order directing the R.C.M. 706 board to resume its examination into the mental capacity and mental responsibility of PFC Manning. *See* 3 February 2011 Order to Resume Conducting Sanity Board, Attachment 22, at 1. The order set a suspense date of 3 March 2011, four weeks from the date of the order. *See id.* at 6. Therefore, the Defense also does not contest that portion of the Convening Authority's 18 March 2011 Excludable Delay Memorandum which excludes the period from 15 February 2011 to 3 March 2011, the suspense date set in the 3 February 2011 Order to Resume Conducting Sanity Board. *See* 18 March 2011 Excludable Delay Memorandum, Attachment 26.[9]

115. To recap, then, this Motion does not purport to challenge the Convening Authority's exclusion of the time period from 11 August 2010 to 3 March 2011, a period of 205 days.

**4. Improper Exclusions under R.C.M. 707(c)**

116. Apart from the periods of excluded delay that the Defense does not challenge, the Convening Authority or the Article 32 IO excluded several periods, totaling 327 days, under R.C.M. 707(c). Each of these many exclusions constituted an abuse of discretion.

117. Most clearly, [redacted] exclusion of the 10-day period from 24 December 2011 to 2 January 2012 constituted a patent abuse of discretion. [redacted] failed to state the time period covering the delay as well as his reasons for finding the delay to be reasonable. The exclusion decision – a one sentence email – failed to even comply with the Convening Authority's directions. More problematic, the exclusion has absolutely no legal support whatsoever. Because it is such an egregious abuse of discretion, this 10-day exclusion is discussed first.

118. The Convening Authority was hardly better at fulfilling its role under R.C.M. 707(c). With respect to each of the Convening Authority's many exclusions, the Convening Authority abused its discretion. The Convening Authority abjured its responsibility to make an independent determination of the reasonableness of each requested period of delay and instead became a rubber stamp for the Government's repeated requests for delay. Under the speedy trial protections of R.C.M. 707, such a wholesale abdication of responsibility cannot be countenanced. When even one of the improperly excluded time periods is added to the uncontested days that count against the speedy trial clock, *see* Argument, Part A.2, *supra*, and the 10 days so obviously erroneously excluded by [redacted], the R.C.M. 707(a) 120-day speedy trial clock has been violated. Each of the Convening Authority's abuses of discretion is discussed in chronological order.

**a. [redacted] Exclusion**

119. The most glaring example of an abuse of discretion in excluding a period from the R.C.M. 707 speedy trial clock occurred on 4 January 2012 when [redacted] purported to exclude, in a one sentence email, the days between 23 December 2011 and 3 January 2012 when he did

[9] However, the Defense does challenge the Convening Authority's decision to exclude the period beyond the original 3 March 2011 suspense date. *See* 18 March 2011 Excludable Delay Memorandum, Attachment 26 (excluding from 15 February 2011 to 18 March 2011); *see also* Argument, Part A.4.c, *infra*.

not work on the Article 32 investigation. 4 January 2012 Email from [redacted] to then-CPT Fein, Attachment 58. This exclusion is completely unsupportable on both legal and factual grounds.

120. The entirety of this "exclusion" is the following sentence in a 4 January 2012 email from [redacted] to then-CPT Fein: "I will exclude as a reasonable delay the days between 23 December 2011 and 3 January 2012 when I did not work on the Article 32 investigation." *Id.* [redacted] did not even specify which days within this time period were excluded or, indeed, if any days were excluded at all. It is not until one looks to [redacted] chronology that one discovers that the days that [redacted] was ostensibly referring to are the 10 days from 24 December 2011 to 2 January 2012. *See* Chronology of Article 32 IO, Attachment 59, at 4 (listing activity on 23 December 2011and 3 January 2012 but listing no activity between 24 December 2011 and 2 January 2012). The failure to reduce the exclusion decision to writing along with the dates covering the delay violated both the Convening Authority's exclusion decisions and the proper procedure for granting delays under R.C.M. 707(c). *See* R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting reasons and *the dates covering the delay, should be reduced to writing*." (emphasis supplied)); [redacted] Appointment Memorandum, Attachment 7, at 1 (requiring all approvals or denials of delay requests to be in writing); Special Instructions for Investigation under Article 32, Attachment 57, at 3 (same).

121. Equally problematic, [redacted] provided no reasons whatsoever to support the exclusion. This lack of reasons alone makes [redacted] exclusion an abuse of discretion. *See* R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting *reasons* and the dates covering the delay, should be reduced to writing." (emphasis supplied)). It is impossible to tell what it was about the time period in which [redacted] did not work on this case that made him feel that excluding these 10 days was reasonable. *See Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same).

122. Moreover, there is absolutely no legal authority for a "federal holidays and weekends" exclusion or a "time the Government didn't work on the case" exclusion under R.C.M. 707(c). The rule itself contains no such provision. Moreover, the discussion section to R.C.M. 707(c), quoted in full above, *see* Legal Framework, Part A, *supra*, lists several situations where exclusions might be appropriate. The discussion section neither states nor even implies that weekend and holiday time or time where the Article 32 IO simply doesn't feel like working on the case might be excluded under R.C.M. 707(c). Additionally, the Defense is aware of no case that contains even a scintilla of support for a "federal holidays and weekends" exclusion or a "time the Government didn't work on the case" exclusion under R.C.M. 707(c).

123. This lack of legal authority is unsurprising, as it plainly comports with common sense, something that has been lacking in the Government's camp in the 845 days since this case began. If time can be excluded under federal holidays and weekends, what else can be excluded along

the same thought process? Does R.C.M. 707(c) make room for exclusion of sick days? Vacation days? [redacted] wasn't computing billable hours for a law firm in his 4 January 2012 email; he was shaving days off of the R.C.M. 707 120-day speedy trial clock, one of the many sources of PFC Manning's fundamental right to a speedy trial. *See Lazauskas*, 62 M.J. at 41; *Mizgala*, 61 M.J. at 124. While [redacted] was taking a break from the Article 32 investigation for the "federal holidays and weekends," PFC Manning remained in pretrial confinement, where he had been for the past 586 days. The notion that the Government can exclude from the R.C.M. 707 speedy trial clock, a provision designed to ensure that the Government diligently processes a case against an accused, periods of time in which the Government simply did not work on the case is simply abhorrent to the purposes behind the many speedy trial protections given to a military accused.

124. Finally, if more were needed to show that this exclusion constitutes an abuse of discretion, [redacted] exclusion was an improper ex parte exclusion. The discussion section to R.C.M. 707(c) states that "[p]retrial delays should not be granted ex parte." R.C.M. 707(c) discussion. [redacted] neither requested nor waited for a Defense response to the Government request for an exclusion; he simply granted the Government's request the very next day. Such an ex parte exclusion cannot be upheld by this Court.

125. For these reasons, the 10 days excluded by [redacted] represent a gross abuse of discretion. Therefore, those 10 days should be added back to the R.C.M. 707(a) speedy trial clock.

**b. 12 July 2010 to 10 August 2010**

126. The Convening Authority abused its discretion in excluding the period from 12 July 2010 to 10 August 2010, since the Government had made no apparent progress on the Defense's several requests for a R.C.M. 706 Board until after the Defense's fourth request on 11 August 2010.

127. To be sure, the Defense requested the R.C.M. 706 Board, and in its 11 August 2010 request (its fourth such request) the Defense stated that it "maintains responsibility for this delay because Captain Paul Bouchard initially requested the inquiry from PFC Manning's previous chain of command." 11 August 2010 Defense Request, Attachment 8. However, that statement was made under the assumption that the R.C.M. 706 Board would be conducted in a timely manner. Because the Government did nothing between the period of 12 July 2010, when the Defense's second request for a R.C.M. 706 Board was made, and 11 August 2010, when the Defense's fourth request for a R.C.M. 706 Board was made, the responsibility for delay discussed in the Defense's fourth request was prospective only, ranging from the date of the request until the date of the R.C.M. 706 Board's completion.

128. On 12 August 2010, the Convening Authority approved the Defense's fourth request and ordered that the period from 11 August 2010 until the R.C.M. Board's completion was excludable defense delay. 12 August 2010 Excludable Delay Memorandum, Attachment 9.

129. However, on 12 October 2010, the Convening Authority reached back an additional month and excluded the period from 12 July 2010 to 12 October 2010. 12 October 2010 Excludable Delay Memorandum, Attachment 16. The excludable delay memorandum stated the following under the heading "Basis of Delay:"

> The above delay is based on the following defense requests, responses, and the facts and circumstances of this case:
>
> a. Original Classification Authorities (OCA) reviews of classified information.
>
> b. Defense request for Sanity Board, dated 11 July 2010 and Defense Renewed Request for Sanity Board, dated 18 July 2010 (enclosed).
>
> c. Defense Request for Appointment of Expert with Expertise in Forensic Psychiatry to Assist the Defense, dated 25 August 2010 (enclosed).
>
> d. Defense Request for Delay in the RCM 706 Board to Comply with Prohibitions on Disclosure of Classified Information, dated 26 August 2010 (enclosed).
>
> e. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
>
> f. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
>
> g. Preliminary Classification Review of the Accused's Mental Impressions, dated 17 September 2010 (enclosed), and Superseding Order, dated 22 September 2010 (enclosed).
>
> h. Defense Response to the Preliminary Classification Review of the Accused's Mental Impressions, dated 28 September 2011.

*Id.*

130. The decision to exclude the period from 12 July 2010 to 10 August 2010 was an abuse of discretion. The Convening Authority offered no actual reasons for why the period from 12 July 2010 to 10 August 2010 should be excluded. All of the "reasons" articulated by the Convening Authority, with the exception of "b" above, occurred after 11 August 2010. Therefore, none of these reasons can support a decision excluding the period that predated the occurrence of these reasons.

131. Moreover, the Convening Authority simply identified in reason "b" above the fact that the second and third Defense requests for the R.C.M. 706 Board were made. But the mere fact that these requests were made does not justify excluding the period immediately following them. To be a reasonable delay, there would need to be some action taken with respect to these requests in

order to justify excluding the period from 12 July 2010 to 10 August 2010. The Convening Authority identified no such action in the "Basis of Delay" section of its 12 October 2010 excludable delay memorandum. That is not surprising, however, since it appears that the Government took no action on the Defense's earlier R.C.M. 706 board request until after its fourth request on 11 August 2010. As far as the Defense can tell, the Government did nothing for the 17-day period from 13 July 2010, the day after the second Defense request for a R.C.M. 706 Board was made, and 30 July 2010, when PFC Manning was transferred to Quantico. *See* Facts, Part A.4, *supra*. Additionally, the only Government action taken between 30 July 2010 and 11 August 2010 appears to be the appointment of [redacted] as the new Article 32 IO. Nothing was done on the Defense's R.C.M. 706 Board requests. Indeed, the whole reason that the Defense was forced to make its fourth R.C.M. 706 Board request in the span on one month was because the Government had done nothing on the prior three requests.

132. Therefore, because the Convening Authority failed to state the reasons that justified excluding the period from 12 July 2010 to 10 August 2010 (and because no such reasons existed), it abused its discretion in excluding this period. *See* R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting *reasons* and the dates covering the delay, should be reduced to writing." (emphasis supplied)). The Convening Authority failed to state why the delay that was being excluded was reasonable. *See Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same).

133. For these reasons, the Convening Authority abused its discretion in excluding the period of time between 12 July 2010 and 10 August 2010. When these 30 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**c. 4 March 2011 to 18 March 2011**

134. The Convening Authority also abused its discretion in excluding the period from 4 March 2011 to 18 March 2011. [redacted] reasons for delay of the R.C.M. 706 Board's suspense date were inadequate, and the Convening Authority offered no explanation whatsoever of why the Board's request justified the delay.

135. On 14 March 2011, almost two weeks after the original R.C.M. 706 Board's suspense date, [redacted] requested an extension of the suspense date to 29 April 2011. *See* 14 March 2011 Memorandum Requesting Extension for R.C.M. 706 Board, Attachment 24. [redacted] offered only the following paragraph as the basis for his extension request:

> The evaluators are coordinating suitable dates and times for the final evaluation session to take place. This involves multiple parties. Additionally, the final

> interview will take place at a SCIF and this has resulted in the consumption of extra time for this aspect of the evaluation to be coordinated. We anticipate that the final date for the evaluation should take place in the first ten days of April 2011 and are expecting that this delay will be confirmed today.

*Id.*

136. Four days later, the Convening Authority approved [redacted] extension request. *See* 18 March 2011 Memorandum Approving R.C.M. 706 Board's Extension Request, Attachment 25. The entirety of the Convening Authority's approval was stated in the following four sentences: "I have reviewed the request for an extension of the RCM 706 Sanity Board for PFC Manning. The request is: (signature) approved. The Sanity Board will be completed no later than 16 April 2011. Any other extension of time must be submitted through the trial counsel to me for approval." *Id.* That same day, the Convening Authority also issued an excludable delay memorandum. *See* 18 March 2011 Excludable Delay Memorandum, Attachment 26. The "Basis of Delay" section of this memorandum stated in its entirety:

> The above delay is based on the following extensions, defense requests, responses, and the facts and circumstances of this case:
>
> a. Original Classification Authorities' (OCA) reviews of classified information.
>
> b. OCA consent to disclose classified information.
>
> c. Defense Request for Sanity Board, dated 11 July 2010 and Defense Renewed Request for Sanity Board, dated 18 July 2010 (enclosed).
>
> d. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
>
> e. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
>
> f. RCM 706 Sanity Board Extension Request, dated 14 March 2011 (enclosed).

*Id.*

137. There are several problems with the Convening Authority's approval of the extension request and exclusion of the time period between 4 March 2011 and 18 March 2011. First, neither [redacted] in his extension request nor the Convening Authority in its approval memorandum or excludable delay memorandum even discussed the fact that the R.C.M. 706 Board had flouted the Convening Authority's original suspense date of 3 March 2011. No mention was made by either [redacted] or the Convening Authority of why the R.C.M. 706 Board had waited almost two weeks after the expiration of that suspense date to seek an extension of it. The omission of a timely extension request indicates that the reasons offered by

[redacted] and the "basis of delay" identified by the Convening Authority were merely post hoc rationalizations for the R.C.M. 706 Board's failure to timely complete its evaluation.

138. Moreover, the Convening Authority did not actually articulate any reasons why the R.C.M. 706 Board's request should be granted. In its approval memorandum, the Convening Authority literally gave no reasons why the request should be granted. *See* 18 March 2011 Memorandum Approving R.C.M. 706 Board's Extension Request, Attachment 25 (stating merely that "I have reviewed the request for an extension of the RCM 706 Sanity Board for PFC Manning. The request is: (signature) approved."). Similarly, in its excludable delay memorandum of the same date, the Convening Authority offered no explanation of why the extension request justified the delay. The mere fact that the request was made cannot establish that it was reasonable to grant the request. And yet, from the paucity of the Convening Authority's explanation, that is the only possible conclusion that can be drawn as to the Convening Authority's thought process. Therefore, because the Convening Authority offered no explanation of the reasons justifying the delay as reasonable delay, the Convening Authority abused its discretion in excluding the time period from 4 March 2011 to 18 March 2010 from the R.C.M. 707 120-day speedy trial clock. *See* R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting *reasons* and the dates covering the delay, should be reduced to writing." (emphasis supplied)); *Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same); *cf. Miller*, 66 M.J. at 574 (remarking, in the context of an Article 10 analysis, "Lastly, and perhaps most importantly, the Government presented no evidence as to what action was taken to expedite the [R.C.M. 706] examination, particularly when it began to lag.").

139. For these reasons, the Convening Authority abused its discretion in excluding the period of time between 4 March 2011 and 18 March 2011. When these 15 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**d. 18 March 2011 to 22 April 2011**

140. The Convening Authority also abused its discretion in excluding the period from 18 March 2011 to 22 April 2011 as excludable delay under R.C.M. 707(c). The R.C.M. 706 Board's second request for an extension offered even fewer reasons than its first request, and the Convening Authority once again offered no real explanation of the justification for finding that the period excluded was reasonable. Additionally, the circumstances surrounding the 22 April 2011 excludable delay memorandum raise substantial questions as to whether the Convening Authority gave the requisite "independent determination" of whether there was in fact good cause for the requested delay.

141. On 15 April 2011, the day before the extended suspense date for the completion of the R.C.M. 706 Board's evaluation, [redacted] requested yet another extension of the suspense date. *See* 15 April 2011 Memorandum Requesting Extension for Sanity Board, Attachment 27. [redacted] requested an extended suspense date of close of business on 22 April 2011. *See id.* [redacted] offered only the following statement of reasons for the second extension request: "The Board has been diligently working on completion of the long report. We are nearing finalization of the report, but have limited availability to meet as a full board to discuss the report. This is because of conflicting schedules and demands of the three board members." *Id.* The Convening Authority approved, without Defense input, [redacted] request later that same day. *Id*.

142. The R.C.M. 706 Board submitted its report on 22 April 2011. *See* 22 April 2011 706 Short Report, Attachment 28. The Convening Authority issued another excludable delay memorandum on the same day that the R.C.M. 706 Board submitted its report. *See* 22 April 2011 Excludable Delay Memorandum, Attachment 29. This memorandum excluded the period from 18 March 2011 to 22 April 2011. *Id.* at 1. The "Basis of Delay" section of this memorandum was quite familiar; it was a carbon copy of the 18 March 2011 excludable delay memorandum's "Basis of Delay" section, except that the R.C.M. 706 Board's second extension request was added to the list. *See id.* at 2. In full, the 22 April 2011 excludable delay memorandum's "Basis of Delay" section provided as follows:

> The above delay is based on the following extensions, defense requests, responses, and the facts and circumstances of this case:
>
> a. Original Classification Authorities' (OCA) reviews of classified information.
>
> b. OCA consent to disclose classified information.
>
> c. Defense Request for Sanity Board, dated 11 July 2010 and Defense Renewed Request for Sanity Board, dated 18 July 2010 (enclosed).
>
> d. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
>
> e. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
>
> f. RCM 706 Sanity Board Extension Request, dated 14 March 2011 (enclosed).
>
> g. RCM 706 Sanity Board Extension Request, dated 15 April 2011 (enclosed).

*Id.* Moreover, this excludable delay memorandum was not actually signed by the Convening Authority. Rather, it was signed for the Convening Authority by [redacted]. *Id.* at 2. [redacted] is a paralegal for the Government. There are several reasons why the Convening Authority abused its discretion in excluding the time period from 18 March 2011 until 22 April 2011 under R.C.M. 707(c).

143. First, the Board's only other reason for the second extension request was the "limited availability to meet as a full board to discuss the report . . . because of conflicting schedules and demands of the three board members." 15 April 2011 Memorandum Requesting Extension for Sanity Board, Attachment 27. This reason is entirely illegitimate. Reasons like inadequate staffing, other demands, and conflicting schedules of Board members are nothing more than the "realities of military criminal practice." *Thompson*, 68 M.J. at 313 ("As a general matter, factors such as staffing issues, responsibilities for other cases, and coordination with civilian officials reflect the realities of military criminal practice that typically can be addressed by adequate attention and supervision[.]"); *see United States v. Johnson*, 48 C.M.R. 9, 9 (C.M.A. 1973) (explaining that a "generalized claim of inadequate personnel and administrative convenience" are insufficient excuses for speedy trial delay); *United States v. Marshall*, 47 C.M.R. 409, 412-13 (C.M.A. 1973) (holding that "manpower shortages" and having "too few officers assigned to the preparation of the pretrial advice" were insufficient reasons for speedy trial delay); *United States v. Mickla*, 29 M.J. 749, 752 n.2 (A.F.C.M.R. 1989) ("Despite a heavy workload or absence of a full staff, the Government is still responsible for time delays."); *United States v. Bell*, 17 M.J. 578, 580 (A.F.C.M.R. 1983) ("The only explanation offered by the prosecution was, in essence, that the office of the staff judge advocate was very busy. This is not an acceptable explanation for a delay."). While the three members of the R.C.M. 706 Board were taking time coordinating their conflicting schedules, PFC Manning remained confined at Quantico in conditions tantamount to solitary confinement. *See* Appellate Exhibit 258, at 35-37. Therefore, because the Board's second extension request was based solely on the illusory justification of the length of the report and the illegitimate justification of busy schedules, the Board presented the Convening Authority with no valid reason to grant the extension request.

144. In addition to the inadequate reasons for the extension request offered by the R.C.M. 706 Board, the Convening Authority also failed to adequately explain the reasons for the exclusion and how those articulated "reasons" justified the delay as reasonable. Additionally, as it had done before, the Convening Authority simply identified, without any elaboration whatsoever, the OCA classification review process, various Defense requests, and the R.C.M. 706 Board's extension requests. But the mere fact that the Board made two requests does not in itself make the delay reasonable under R.C.M. 707(c). Apart from simply identifying the fact that the requests were made (which in itself provides no justification for the conclusion that the requested delay was reasonable), the Convening Authority gave no reasons why the second extension of the suspense date was justified. *See* R.C.M. 707(c) discussion (explaining that any delay under R.C.M. 707(c) must be reasonable); *Savard*, 2010 WL 4068964, at *3 (same); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same); *cf. Miller*, 66 M.J. at 574. Indeed, since the suspense date had already been extended once, one would suspect that the Convening Authority would at least require more of a showing of good cause, or at least itself identify some reasons establishing such good cause, before a second extension was granted. The fact that the Convening Authority neglected to even offer the most minimal explanation of the reasons supporting the delay as reasonable leads to one of two conclusions: either there were no adequate reasons to support the reasonableness of delay, so that the Convening Authority thought it could just get a pass by

identifying requests for extensions without more; or the Convening Authority had by then abdicated its responsibility to determine the reasonableness of the delay and had instead become a rubber stamp for any Government requested delay. Neither conclusion can justify the Convening Authority's failure to identify the reasons why the delay was reasonable. *See* R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting *reasons* and the dates covering the delay, should be reduced to writing." (emphasis supplied)).

145. Furthermore, the fact that the request was signed for the Convening Authority by a paralegal of the Government Criminal Law shop shows that the Convening Authority abdicated its responsibility to make an independent determination of the existence of good cause for the delay. *See Lazauskas*, 62 M.J. at 45 (Baker, J., concurring); *Thompson*, 46 M.J. at 474-75. It is outrageous that either the Government or the Convening Authority thought it appropriate for an agent of the Government prosecuting the accused to sign for the apparently "neutral" Convening Authority. Indeed, [redacted] signature supports one sole inference: that the Convening Authority had by 22 April 2011 simply become a rubber stamp for the Government's requested delays.

146. For these reasons, the Convening Authority abused its discretion in excluding the period of time between 18 March 2011 and 22 April 2011. When these 36 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**e. 22 April 2011 to 12 May 2011**

147. The Convening Authority also abused its discretion in approving the Government's request for delay and in excluding the period from 22 April 2011 to 12 May 2011. The Government's stated reasons did not sufficiently explain why the delay requested was reasonable. Additionally, the Convening Authority similarly failed to explain the reasons that made the excluded period of delay a reasonable one.

148. The Government's first of eight requests for delay in the Article 32 hearing was made on 25 April 2011. *See* 25 April 2011 Government Request for Delay, Attachment 30. The Government related that this delay was necessary for it to receive consent from all of the OCAs to release discoverable classified evidence and information to the Defense. *See id.* The Government provided the following reasons for its delay request:

> Since 17 June 2010, the United States has been diligently working with all of the departments and agencies that originally classified the information and evidence sought to be disclosed to the defense and the accused . . . . However, because of the special circumstances of this case, including the voluminous amounts of classified digital media containing multiple equities and the subsequent discovery of more information helpful to both the United States and the accused, more time is needed for executive branch departments and agencies to obtain the necessary consent from their OCA or authorizing official.

*Id.*[10]

149. The Defense opposed this delay the next day, 26 April 2011. *See* 26 April 2011 Defense Response to Government Request for Delay, Attachment 31. In order to minimize any further delay, the Defense requested that the Government: provide substitutes for or summaries of the relevant classified documents; allow the Defense to inspect all unclassified documents within the Government's control that were material to the preparation of the Defense; and ensure that the Defense has equal access to CID and other law enforcement witnesses by making available any requested witnesses. *Id.* at 1. Finally, the Defense requested that any further delay be credited to the Government. *Id.* at 2.

150. The Convening Authority in effect approved the Government's request for delay on 12 May 2011 when it issued an excludable delay memorandum excluding the period from 22 April 2011 to 12 May 2011 under R.C.M. 707(c). 12 May 2011 Excludable Delay Memorandum, Attachment 32. The memorandum's "Basis of Delay" section provided in full as follows:

> The above delay is based on the following extensions, defense requests, responses, and the facts and circumstances of this case:
>
> a. Original Classification Authorities' (OCA) reviews of classified information.
>
> b. OCA consent to disclose classified information.
>
> c. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
>
> d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
>
> e. Government Request for Delay of Article 32 Investigation, dated 25 April 2011 (enclosed).

*Id.* The Convening Authority's decision to exclude this time period is unsupportable and thus constitutes an abuse of discretion.

151. As an initial matter, by its own admission, the Government had 313 days from 17 June 2010, when it apparently began to work with the OCAs, to 25 April 2011, when it made its first request for delay, in which to have the OCAs complete the classification review process and to obtain the necessary consent to disclose the relevant information. *See* 25 April 2011 Government Request for Delay, Attachment 30 (explaining that the Government had been

[10] It is unclear what "subsequent discovery" the Government was referring to that was apparently "helpful" to the accused. The Defense did not receive any discovery during this period that was "helpful" to the accused. Accordingly, the Defense believes that the Government misstated the reasons for delay in order to make it appear that the Government was acting in an even-handed manner in pursuing discovery.

"diligently working with" the OCAs since 17 June 2010).[11] Moreover, by 12 May 2012, the Government had an additional 17 days in which to complete the process. The Government offered no satisfactory explanation of why it was unable to complete the classification review process in 330 days from the date that it supposedly started working with the OCAs and 349 days after PFC Manning was placed into pretrial confinement. The only explanations that even potentially address the Government's inability to complete the OCA classification review process are "the voluminous amounts of classified digital media containing multiple equities and the subsequent discovery of more information helpful to both the United States and the accused[.]" *Id.*

152. But neither of these "explanations" satisfactorily explains the substantial delay that had already occurred. Even if the Government is correct that voluminous amounts of classified digital media are involved in this case, the OCA classification reviews are anything but voluminous. Of the ten OCA classification reviews provided to the Defense by the Government, only three were over twelve pages in length. Six of the classification reviews were four pages or less in length. The Government's explanation does not address why the classification reviews of "voluminous amounts of classified digital media," if as lengthy as the Government asserts, yield as little as a few pages in results. Additionally, at least two of these classification reviews were completed before the Government's first request for delay of the Article 32 hearing. Even these completed reviews, however, were not disclosed to the Defense until late October or early November, many months after the Government's first request for delay and many more after their completion. The Government offered no reason for the delay in producing these completed classification reviews.

153. If the Government meant to imply that the process itself of coordinating with the OCAs was a time-consuming one, it offered no reasons why this was so. The mere fact that the Government needed to coordinate with another governmental agency does not in itself establish good cause for delay. *See United States v. Kuelker*, 20 M.J. 715, 716-17 (N.M.C.M.R. 1985). In *Kuelker*, the Government argued that a period of 87 days from the Government's subpoena of U.S Treasury checks then in possession of the Treasury Department to the Government's receipt of those checks should be excluded under R.C.M. 707(c). *Id.* at 716-17. The Navy-Marine Court of Military Review disagreed, holding that "the need to obtain crucial evidence in the custody of another agency of the United States is a common problem and therefore associated delay does not qualify for exclusion from the 120-day rule as a 'delay for good cause.'" *Id.* at 716. Any other conclusion, the *Kuelker* Court reasoned, would lead to the R.C.M. 707(c) exception devouring the R.C.M. 707(a) rule. *Id.* at 717.

154. To be sure, the OCA classification review process is likely more involved than the subpoena of Treasury checks in *Kuelker*. But the Government provided no detail in its first request regarding the coordination between it and the various OCAs, other than to say it was "diligently working" with them. Therefore, the Government offered nothing about the particular coordination between it and the OCAs, other than the fact of the coordination itself, to justify the delay. Accordingly, the rule in *Kuelker* is fully applicable to the Government's generalized

[11] The Government did not explain why it had waited until 17 June 2010, 19 days after PFC Manning was placed in pretrial confinement on 29 May 2010, to begin working with the OCAs. When that period is added to the 313 days from 17 June 2010 to 25 April 2011, the Government had 332 days in which to complete the OCA process.

claim of the need to coordinate with other agencies to obtain critical information, to the extent that the Government's explanation in its first request for delay even made such a claim.

155. As far as the Government's subsequent discovery of helpful information goes, it offered no explanation why it was not able to discover this information in the 313 days between 17 June 2010 and its first request for delay. Moreover, the Defense remains skeptical of whether the Government actually found information helpful to PFC Manning, since the Government has only just recently provided the Defense with most of *Brady* material turned over thus far.

156. Additionally, the Government's explanations of the need for delay are far too conclusory to be helpful to the Convening Authority in determining whether the requested delay was reasonable. The Government offers no explanation of what had been done in the classification review process up to the date of its first request for delay and what still needed to be done in the process. Certainly the statement that the Government has been "diligently working" with the OCAs is both too self-serving and too lacking in detail to offer any insight into where the classification review process stood on 25 April 2011. Nothing else in the Government's request for delay makes up for the Government's utter lack of detail in its two explanations for the need for delay. *See United States v. Facey*, 26 M.J. 421, 425 (C.M.A. 1988) ("Since the Government has the responsibility of establishing its entitlement to any deductions from the period for which it would otherwise be accountable under R.C.M. 707, any deficiency of evidence must be laid at its door.")

157. In the end, therefore, it seems that the Government requested delay simply because it was not ready to proceed. The then-Court of Military Appeals cautioned that such a justification for delay (i.e. we need to delay the proceedings because we are not ready to proceed) is unacceptable: "If, however, a recess or continuance is requested solely because the Government is not prepared to go forward with evidence on the merits, such time should not be excluded from its speedy-trial accountability." *United States v. Ramsey*, 28 M.J. 370, 373 (C.M.A. 1989). And yet that is precisely what appears to have happened here.

158. Moreover, the Convening Authority appears to have done nothing on its own to fulfill its responsibility to conduct an independent determination as to the good cause for or reasonableness of the delay. *See Lazauskas*, 62 M.J. at 45 (Baker, J., concurring); *Thompson*, 46 M.J. at 474-75. Based on the lack of detail provided by the Government, the Convening Authority should have at least made some effort to set forth the reasons why the delay being excluded was reasonable. But, as usual, the Convening Authority relied on the practice of citing various requests as the "Basis of Delay" without providing any elaboration on why those requests made the excluded period of delay a reasonable one. It is not at all clear how the Defense's request for the results of the OCA classification reviews and for appropriate security clearances, each made more than seven and a half months before the Government's 25 April 2011 request for delay, contributed to any delay in the Government's classification review, which was still ongoing at that point. Additionally, it is not clear from the Convening Authority's memorandum what about the Government's request made the excluded period of delay reasonable. The mere fact that the request was made cannot itself establish the reasonableness of the requested delay. Perhaps we would know the Convening Authority's thought process if he explained that thought process. Because the Convening Authority limited

his discussion of the basis for the delay to a laundry list of requests and did not provide the reasons why these requests made the excluded delay reasonable, we cannot know what led the Convening Authority to conclude that the delay was reasonable. Therefore, the Convening Authority abused his discretion in not articulating the reasons supporting his conclusion that the delay was reasonable. *See* R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting *reasons* and the dates covering the delay, should be reduced to writing." (emphasis supplied)); *Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same).

159. Even more problematic, the Convening Authority offered no consideration of the Defense's alternatives to delay, namely, the provision of summaries of or substitutions for the classified material so that the Article 32 hearing could commence as soon as possible. Indeed, nothing in the Convening Authority's excludable delay memorandum even indicates that the Convening Authority consulted the Defense's memorandum opposing the delay. The Convening Authority's refusal to even acknowledge the possibility of other options to delay of the Article 32 is further evidence that the Convening Authority had by then abdicated its responsibility to make an independent determination of the reasonableness of the delay and had become a rubber stamp for the Government's many delay requests. *See* Argument, Part A.4.d, *supra* (discussing further evidence of Convening Authority being a rubber stamp for the Government's delay requests).

160. For these reasons, the Convening Authority abused its discretion in excluding the period of time between 22 April 2011 to 12 May 2011. When these 17 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**f. 12 May 2011 to 17 June 2011**

161. The Convening Authority also abused his discretion in approving the Government's second request for delay and excluding the period of 12 May 2011 to 17 June 2011. The Government's stated reasons did not sufficiently explain why further delay was reasonable. Additionally, the Convening Authority similarly failed to explain the reasons that made the excluded period of delay a reasonable one.

162. On 22 May 2011, the Government submitted its second request for delay of the Article 32 hearing, relating once again that delay was necessary in order to obtain consent from the OCAs. *See* 22 May 2011 Government Request for Delay, Attachment 33. The "Update" section of the Government's request reads in full as follows:

> The prosecution is continuing to work with relevant Original Classification Authorities (OCAs) to obtain consent to disclose classified evidence and

> information to the defense along with receiving completed classification reviews. In anticipation of OCA consent, CID began making copies of classified digital media and evidence for disclosure to the defense. Additionally, the prosecution learned that several exhibits and documents in the unclassified CID case file require authorization to disclose apart from any classified information. The U.S. Attorney's Office for the Eastern District of Virginia is working to obtain that authorization on behalf of the prosecution from multiple federal districts within the United States.

*Id.* (emphasis in original). Two days later, the Defense sent an email opposition to the Government's request for delay. *See* 24 May 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 34. The Defense relied on its position from the 26 April 2011 memorandum opposing the Government's first request for delay. *Id.* The Defense also requested that any additional delay be credited to the Government. *Id.*

163. On 17 June 2011, the Convening Authority excluded the period from 12 May 2011 to 17 June 2011 as excludable delay under R.C.M. 707(c). *See* 17 June 2011 Excludable Delay Memorandum, Attachment 35. The "basis" for this exclusion was the exact same basis identified in the Convening Authority's May excludable delay memorandum, except now the Government's 22 May 2011 request for delay replaced the 25 April 2011 request for delay that had been listed in the 12 May 2011 excludable delay memorandum. *See id.* Specifically, this memorandum's "Basis of Delay" section provided in full as follows:

> The above delay is based on the following extensions, defense requests, responses, and the facts and circumstances of this case:
>
> a. Original Classification Authorities' (OCA) reviews of classified information.
>
> b. OCA consent to disclose classified information.
>
> c. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
>
> d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
>
> e. Government Request for Delay of Article 32 Investigation, dated 22 May 2011 (enclosed).

*Id.*

164. There are several reasons why the Convening Authority's exclusion of the period from 12 May 2011 to 17 June 2011 was an abuse of discretion. First, the Government offered no explanation of why the delay was reasonable or of where the Government stood in the classification review process. As of the date of its request, 340 days had passed since the Government began working with the OCAs, and 359 days had passed since PFC Manning was

first placed into pretrial confinement. What explanation did the Government provide of where it was in the classification review process, which had at that point been ongoing for at least 340 days? It was "continuing" to work with the OCAs. 22 May 2011 Government Request for Delay, Attachment 33. It had "beg[u]n making copies" of some of the classified material. *Id.* And the United States Attorney's Office was "working" to obtain necessary authorization to disclose unclassified portions of the CID case file.[12] These three facts told the Convening Authority nothing about where the classification review process was then positioned. What specifically had already been done? How much had the various OCAs done in their respective classification reviews, and how much more did each OCA need to do before the classification review was complete? The Government didn't say. Instead, it unhelpfully related that it was "continuing" to work with the OCAs. *Id.* Without knowing how much has been done and what still needed to be done in the classification review process, the Convening Authority was unable to make an informed determination of whether the requested period of delay was reasonable. *See Facey*, 26 M.J. at 425.

165. Additionally, as mentioned above, *see* Argument, Part A.4.e, *supra*, the length of the completed OCA classification reviews casts further doubt on the Government's contention that it was working diligently in obtaining consent from the OCAs. The Government offered no explanation of the details of the classification review process, and when that lack of detail is juxtaposed with the brevity of the completed classification reviews, the Government's conduct from 17 June 2010 to 22 May 2011 seems anything but reasonably diligent. Furthermore, the Government cannot simply hide behind the need to coordinate with other United States agencies as justifying its inordinate delay. *See Kuelker*, 20 M.J. at 716-17. Like its first request, the Government's second request boils down to a plea for more time simply because it was not yet ready to proceed. Accordingly, the Convening Authority should not have approved the request and excluded yet another period of time simply because the Government was still not yet ready to proceed. *See Ramsey*, 28 M.J. at 373.

166. Moreover, the Convening Authority was characteristically short on an explanation of reasons why the period of excludable delay was a reasonable one. If the Convening Authority had not already demonstrated that it was simply a rubber stamp for the Government's many delay requests, it amply demonstrated this fact with its 17 June 2011 excludable delay memorandum. For one thing, the memorandum is quite clearly a cut-and-paste job, identifying the exact same "Basis of Delay" in the exact same order as had been identified in the 12 May 2011 excludable delay memorandum and changing only the date of the Government's request for delay. For another thing, the Convening Authority once again offered no reasons as to why the period of delay was reasonable. The only "Basis of Delay" identified was the OCA classification review process, two Defense requests from 26 August 2010 and 3 September 2010, and the Government request. It offered no explanation of why these items justified the delay as reasonable. The fact that the various requests were made cannot establish that the delay was reasonable. Furthermore, the significance of the Convening Authority's identification of the OCA classification reviews is equally unexplained. Perhaps the Convening Authority meant to suggest that the mere fact that the classification review process was ongoing was proof that any

[12] Unsurprisingly, the Government also offered no explanation for why it was just now, 359 days since PFC Manning was placed into pretrial confinement, learning that some unclassified portions of the CID case file required authorization to be disclosed.

delay until the completion of that process was excludable delay. But this cannot be otherwise this de facto determination eliminates the reasonableness determination required under the rule. In order to find that the ongoing nature of the classification review process made any delay reasonable, the Convening Authority would need to know that the classification review process was being conducted in a reasonably diligent manner. The Convening Authority identified no facts indicating that this was the case in its 12 July 2011 memorandum. That's not surprising, either, since the Government had eschewed any effort to provide the Convening Authority with a meaningful description of where the classification review process was, where it had been, and where it was going.

167. Additionally, the Convening Authority once again made no effort to address the concerns and alternatives put forth in the Defense's 26 April 2012 opposition memorandum and reiterated in the Defense email opposing the Government's second request for delay. This refusal to even acknowledge the existence of alternatives to further delay is yet additional evidence that the Convening Authority was simply a rubber stamp to all Government requests for delay. Finally, while the Convening Authority mouthed its familiar refrain that it had "acknowledge[d] and reviewed" the Defense's request for speedy trial, the Convening Authority made no mention of the fact that PFC Manning had spent 385 days in pretrial confinement as of the date of its excludable delay memorandum.

168. In short, the 17 June 2011 excludable delay memorandum is entirely devoid of an articulation of the *reasons* why the exclusion of the delay was reasonable. Even if excluding the prior period of delay was not an abuse of discretion (which the Defense does not in any way concede), the decision to exclude an additional 37 days on the same factual predicate as the prior period with no new reasons to suggest that the delay was reasonable constitutes an abuse of discretion. *See Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same).

169. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 12 May 2011 and 17 June 2011. When these 37 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**g. 17 June 2011 to 5 July 2011**

170. The Convening Authority also abused his discretion in approving the Government's third request for delay and excluding the period from 17 June 2011 to 5 July 2011.[13] The Government

[13] The Convening Authority's 5 July 2011 memorandum approving the Government's third request for delay actually purported to exclude from 22 April 2011 to the restart of the Article 32 investigation under R.C.M. 707(c). Because the time period from 22 April 2011 to 17 June 2011 is challenged above, *see* Argument, Part A.4e-f, *supra*, and the time period from 5 July 2011 to the restart of the Article 32 investigation is challenged below, *see*

once again failed to adequately explain why the delay sought was reasonable, and the Convening Authority once again declined to state its reasons why it found that the period of delay excluded was reasonable.

171. The Government made its third request for delay of the Article 32 hearing on 27 June 2011. *See* 27 June 2011 Government Request for Delay, Attachment 36. This request was made two days after the date the Government promised to provide the Convening Authority with an update of the proceedings. *See* 22 May 2011 Government Request for Delay, Attachment 33 (explaining that "[t]he prosecution will provide [the Convening Authority] an update no later than 25 June 2011."). The Government did not explain its tardiness in its third request for delay. This request once again requested delay "until the United States receives the proper authority to release discoverable unclassified and classified evidence and information to the defense." 27 June 2011 Government Request for Delay, Attachment 36, at 1. In the "Update" section of its delay request, the Government explained that it was still "continuing" to work with the OCAs. *Id.* The Government also explained that forensic examiners had just discovered another document requiring OCA consent to disclose to the defense. *Id.* The Government related that the National Security Agency (NSA) was still reviewing the unclassified CID case file. *Id.* Finally, the Government explained that the United States Attorney's Office for the Eastern District of Virginia was "continuing" to work on obtaining the necessary authorizations. *Id.*

172. The Defense opposed the Government's request for delay via email, maintaining the position articulated in its 26 April 2011 memorandum opposing the Government's first request for delay. *See* 29 June 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 37. The Defense again requested that any additional delay be credited to the Government. *Id.*

173. On 5 July 2011, the Convening Authority approved the Government's third request for delay. *See* 5 July 2011 Memorandum Approving Government Request for Delay, Attachment 38. The only portion of the Convening Authority's memorandum that can arguably contain any reasons for the delay states in full as follows:

> After reviewing pertinent portions of the case file, it is my understanding that ongoing national security concerns exist in this case, as well as an ongoing law enforcement investigation(s) into PFC Manning and others. In light of the national security concerns and ongoing investigation(s), the prosecution will cautiously proceed with the disclosure of information, but will comply with its obligations under Article 46, UCMJ, RCM 405, RCM 701, RCM 703, and applicable case law. In addition, once the prosecution receives the authority to disclose previously undisclosed information to the defense, it will do so expeditiously to minimize any unnecessary delay.

*Id.*

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Argument, Part A.4.h-l, *infra*, this subsection deals only with the 5 July 2011 approval memorandum to the extent that it excludes the period from 17 June 2011 to 5 July 2011.

For reasons similar to those identified above, *see* Argument, Part A.4.e-f, *supra*, the Convening Authority abused its discretion when it excluded the time period from 17 June 2011 to 5 July 2011.

174. As usual, the Government failed to answer the question on the Defense's mind (and the one that should have been, but evidently was not, on the Convening Authority's mind): why was the classification review process *still* ongoing on the date of the Government's third request for delay, 376 days after it had been started on 17 June 2010 and 395 days after PFC Manning was placed into pretrial confinement? The Government only explained that the process was "continuing" in multiple respects. 27 June 2011 Government Request for Delay, Attachment 36.

175. Additionally, the Government's explanation for the delay was as vague as ever. It stated that it was "continuing" to work with the OCAs and that the U.S. Attorney's Office was "continuing" to work on getting the necessary authorizations. *Id.* But saying that a process is "continuing" says nothing about what exactly has already been done and what exactly remains to be done. Without that information, how could the Convening Authority determine that the classification review process was "continuing" at a reasonably diligent pace? The Convening Authority could not and did not come to such a determination. *See Facey*, 26 M.J. at 425. Likewise, the Government explained that the NSA was reviewing the unclassified portion of the CID case file, but it neglected to explain what that review process entailed, how far along the NSA was in that process, and when the NSA was expected to complete this review. Finally, the Government offered no explanation for why its forensic examiners had just now, 395 days after PFC Manning was placed into pretrial confinement, "discovered" a new classified document. Consistent with its prior requests for delay, the Government's third request for delay gave just enough new facts about the processing of the case to create the illusion that many things were happening while not giving away too many facts to reveal the Government's overall lack of reasonable diligence in the classification review process.

176. The conclusion that the Government failed to use reasonable diligence in processing this case towards the Article 32 hearing becomes unmistakable when the length of the completed OCA classification reviews is thrown in the mix. *See* Argument, Part A.4.e, *supra*. Furthermore, the mere fact that the Government needed to coordinate with other United States agencies is no justification for the Government's substantial delay. *See Kuelker*, 20 M.J. at 716-17. Like its first two requests, the Government's third request for delay was simply a plea for more time because the Government was not yet ready to proceed. Accordingly, the Convening Authority should not have approved the request. *See Ramsey*, 28 M.J. at 373.

177. For its part, the Convening Authority bought the Government's explanation of the necessity for the delay hook, line, and sinker. The Convening Authority, like the Government in its request, offered no reasons why the Government's processing of the case had been diligent enough that the requested delay was reasonable. In fact, the only justification the Convening Authority offered was the ongoing national security concerns and law enforcement investigation(s). *See* 5 July 2011 Memorandum Approving Government Request for Delay, Attachment 38. How did those ongoing national security concerns and law enforcement investigation(s) contribute to the delay in the classification review process? What about the ongoing national security concerns and law enforcement investigation(s) made the delay

requested by the Government and eventually excluded by the Convening Authority reasonable? The Convening Authority did not provide an answer to either question. Evidently, the Convening Authority believed that he could invoke important, busy sounding words like "ongoing," "national security concerns," and "law enforcement investigation(s)," without any elaboration whatsoever, just as the Government had repeatedly invoked the phrase that it was "continuing" to work with the OCAs, in order to manufacture the reasonableness of the delay. However, R.C.M. 707(c) provides for no magic words or incantations that show the reasonableness of the delay; rather, that reasonableness must be shown by stating the reasons for that conclusion. *See* R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting *reasons* and the dates covering the delay, should be reduced to writing." (emphasis supplied)).

178. Additionally, the Convening Authority once again eschewed any explicit consideration of the alternatives proposed and the concerns voiced by the Defense in its 26 April 2011 memorandum opposing the requested Government's first requested delay and reiterated in the Defense's email opposing the Government's third request for delay. To be sure, the Convening Authority at least acknowledged the fact that the Defense opposed the request for delay, a fact noticeably absent from the Convening Authority's 12 May 2011 and 17 June 2011 memoranda. But acknowledging the fact that an opposition position was stated is a far cry from considering the substance of that opposition position, and there is nothing to indicate that the Convening Authority gave any consideration to the substance of the Defense's speedy trial concerns or the suggestions for alternatives to any further periods of delay. The Convening Authority's failure to give the Defense's position any meaningful consideration is consistent with what was by 5 July 2011 perfectly clear to all involved: the Convening Authority would not undertake any sort of independent determination of the good cause for the requested delay, but would instead, similar to a grand jury indicting the proverbial ham sandwich, exclude any period of delay that the Government put in front of it.

179. Finally, the Convening Authority failed to mention that the Government did not provide the Convening Authority with an update within the time period the Government had promised. On a matter where the Government's reasonable diligence (or lack thereof) is front-and-center, it is surprising that the Convening Authority did not even bother to mention that the Government had proved unable to live up to its own deadlines. The Convening Authority's silence on this point, whether deliberate or inadvertent, is further indication that the Convening Authority was a mere rubber stamp for the Government's many delay requests.

180. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 17 June 2011 and 5 July 2011. When these 19 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**h. 5 July 2011 to 10 August 2011**

181. The Convening Authority similarly abused his discretion in excluding the period of 5 July 2011 to 10 August 2011 under R.C.M. 707(c).[14] The troubling pattern of vague status updates by the Government that did not explain why further delay was reasonable followed by immediate exclusion of the time period by the Convening Authority with no articulation of the reasons that the exclusion was reasonable also marred the Convening Authority's exclusion of this time period.

182. The Government requested delay of the Article 32 hearing for the fourth time on 25 July 2011. *See* 25 July 2011 Government Request for Delay, Attachment 39. The basis of this request was exactly the same as all of the previous requests: the Government still needed time to get the approvals of the various OCAs to release information to the defense. *See id.* at 1. The Government identified what could arguably be three reasons for the necessity of yet another period of delay: (1) the Government was still "continuing" to work with the OCAs to obtain consent to disclose the relevant information; (2) the NSA review of the unclassified CID case file, along with a similar review of that case file being conducted by another government intelligence organization (OGA), was "ongoing;" and (3) the United States Attorney's Office was still "continuing" to work on obtaining the necessary authorizations. *See id.* The Government also identified the discovery that it had produced to the Defense so far. *See id.*

183. The Defense opposed the Government's request for delay on 25 July 2011. *See* 25 July 2011 Defense Opposition to Government Request for Delay, Attachment 40. The Defense pointed out that "the Government has now had over a year" to complete the classification review process. *Id.* The opposition memorandum also attacked the adequacy of the Government's explanation of why such protracted delay was necessary: "The latest request by the trial counsel for excludable delay does not adequately explain what has been done to require timely response and reviews by the relevant OCAs." *Id.* The Defense also renewed its requests for speedy trial and for the Government to provide a substitute for a summary of the relevant classified documents in order to minimize any further unnecessary delay. *Id.* Finally, the Defense once again requested that any additional delay be credited to the Government instead of being excluded under R.C.M. 707(c). *Id.*

184. The Convening Authority approved the Government's fourth request for delay on 26 July 2011. *See* 26 July 2011 Memorandum Approving Government Request for Delay, Attachment 41. The memorandum merely changed the dates listed in the 5 July 2011 memorandum

[14] This subsection challenges two decisions of the Convening Authority: the 26 July 2011 approval of the Government's fourth request for delay and the 10 August 2011 excludable delay memorandum. The 26 July 2011 approval purports to exclude the time period from 22 April 2011 to the restart of the Article 32 investigation. However, because the period from 22 April 2011 to 5 July 2011 is challenged elsewhere, *see* Argument, Part A.4.e-g, *supra*, and the period from 10 August 2011 to the restart of the Article 32 investigation is also challenged elsewhere, *see* Argument, Part A.4.i-l, *infra*, this subsection only challenges the 26 July 2011 approval to the extent that it excludes the time period from 5 July 2011 to 10 August 2011.

Additionally, as explained *infra* in the text of this subsection, there are no additional facts in the record from the 26 July 2011 approval of the Government's fourth request for delay and the Convening Authority's 10 August 2011 excludable delay memorandum. Therefore, because the factual basis underlying the 26 July 2011 approval and the 10 August 2011 excludable delay memorandum is identical, this subsection also challenges the propriety of this memorandum.

approving the Government's third request for delay; otherwise, the two memoranda approving the Government's requests for delay were virtually identical.

185. On 10 August 2011, the Convening Authority issued another excludable delay memorandum. *See* 10 August 2011 Excludable Delay Memorandum, Attachment 42. This memorandum stated that "[t]he period from 13 July 2011 until [10 August 2011] is excludable delay under RCM 707(c)." *Id.* The Convening Authority relied on the exact same bases for delay as it had relied on in the excludable delay memoranda of 12 May 2011 and 17 June 2011 and simply added the latest Government request for delay as an additional basis. *See id.* The 10 August 2011 excludable delay memorandum provided the following in the "Basis of Delay" section:

> The above delay is based on the following extensions, defense requests, responses, and the facts and circumstances of this case:
>
> a. Original Classification Authorities' (OCA) reviews of classified information.
>
> b. OCA consent to disclose classified information.
>
> c. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
>
> d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
>
> e. Government Request for Delay of Article 32 Investigation, dated 25 July 2011 (enclosed).

*Id.*

186. For many of the same reasons articulated above, *see* Argument Part A.4.e-g, the Convening Authority once again abused its discretion in excluding, via the 26 July 2011 memorandum approving the Government's fourth request for delay and the 10 August 2011 excludable delay memorandum, the period from 5 July 2011 to 10 August 2011 from the R.C.M. 707 speedy trial clock.

187. First of all, nowhere in the "Update" section of its request for delay did the Government provide any explanation whatsoever for why the classification review process had still not been completed 404 days after the process began on 17 June 2010 and 423 days after PFC Manning was placed into pretrial confinement. The only three points that could conceivably be characterized as "reasons" for the requested delay were that the Government was "continuing" to work with the OCAs, the review of the unclassified CID case file was "ongoing," and that the United States Attorney's Office for the Eastern District of Virginia was "continuing" its work. 25 July 2011 Government Request for Delay, Attachment 39. These points tell us nothing about the progress had been made in the past 404 days, what remained to be done, and approximately when the "ongoing" tasks would be completed. Without this information, the Convening

Authority had no sufficient basis to assess whether the Government's request for delay was reasonable because he had no sufficient basis to assess whether the Government was performing these "ongoing" tasks in a reasonably diligent manner. *See Facey*, 26 M.J. at 425. In this respect, the Government's profferred "reasons" were as flawed as always. *See* Argument, Part A.4.e-g, *supra*. Moreover, the fact that the Government finally provided the Defense with discovery similarly gives no indication of the diligence (or lack thereof) with which the Government was handling the classification review process.

188. Additionally, the length of the completed OCA classification reviews casts further doubt on the Government's contention that it was working diligently in obtaining consent from the OCAs. *See* Argument, Part A.4.e, *supra*. Finally, the Government's need to coordinate with other United States agencies to obtain information cannot excuse its inordinate delay in the processing of this case. *See Kuelker*, 20 M.J. at 716-17. Like its first three requests, the Government's fourth request for delay was simply a plea for more time because the Government was not yet ready to proceed. Accordingly, the Convening Authority should not have approved the request. *See Ramsey*, 28 M.J. at 373.

189. With this meager explanation of the necessity of yet another period of delay in the Article 32 hearing, one might expect the Convening Authority to make a slightly more searching inquiry before concluding that the fourth requested period of delay was a reasonable one. One would be mistaken, however, as the Convening Authority approved the Government's request the very next day after the request was made. The Convening Authority's cut-and-paste approval of the Government's fourth request for delay, offering as it does the exact same "reasons" that were put forth in the Convening Authority's 5 July 2011 approval of the Government's third request for delay, requires little comment in addition to what has already been provided above. *See* Argument, Part A.4.g, *supra*. It suffices to say that the Convening Authority yet again failed to articulate specifically what about the ongoing national security concerns and law enforcement investigation(s) made the delay requested by the Government and eventually excluded by the Convening Authority as reasonable excludable delay. Even if clinging to the phrase "ongoing national security concerns and law enforcement investigation(s)" as if it were a magic phrase was not an abuse of discretion on 5 July 2011, which the Defense submits it was, surely clinging to the same phrase nearly a month later with no elaboration whatsoever of any new developments justifying the further period of delay does constitute an abuse of discretion.

190. Similarly, the Convening Authority's 10 August 2011 excludable delay memorandum suffers from the same incurable flaws that plagued all of the Convening Authority's excludable delay memoranda from 22 April 2011 onward. *See* Argument, Part A.4.e-f, *supra*. As always, the Convening Authority appears to have done nothing on his own to fulfill his responsibility to conduct an independent determination as to the good cause for or reasonableness of the delay. *See Lazauskas*, 62 M.J. at 45 (Baker, J., concurring); *Thompson*, 46 M.J. at 474-75. Moreover, the Convening Authority once again failed to articulate the *reasons* why the various items listed in the "Basis of Delay" section made the excluded period of delay reasonable. *See Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at

766 (same); *Hayes*, 37 M.J. at 772 (same). The fact that the classification review process was still "ongoing," or that the various cited requests were made, tells us nothing about why the excluded time period is a period of reasonable delay under R.C.M. 707(c). Without an articulation of the reasons supporting the Convening Authority's conclusion that the delay was reasonable, this Court is left with no other choice but to find that the Convening Authority abused its discretion in so thoroughly abdicating its responsibilities to consider the reasonableness of the requested delay.

191. Most troubling about the 26 July 2011 memorandum approving the Government's fourth request for delay and the 10 August 2011 excludable delay memorandum is that neither document addresses the main concern of the Defense opposition memorandum, a concern which strikes at the heart of the exclusion of this time period and indeed every other time period challenged in this Motion: the Government had provided the Convening Authority with absolutely no explanation for why the classification review process had not been completed over a year after PFC Manning was placed into pretrial confinement. *See* 25 July 2011 Defense Opposition to Government Request for Delay, Attachment 40. Neither of the Convening Authority's memoranda excluding the time period from 5 July 2011 to 10 August 2011 addressed the alternatives to further delay suggested by the Defense on numerous occasions. And neither memorandum appeared to give any consideration to the fact that PFC Manning had been in pretrial confinement for 424 days as of the date of the 26 July 2011 memorandum and 439 days as of the date of the 10 August 2011 memorandum. Because the Convening Authority gave no apparent consideration to any of the Defense's arguments against delay, the Convening Authority yet again revealed that he was simply a rubber stamp for approving Government delay requests.

192. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 5 July 2011 and 10 August 2011. When these 37 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**i. 10 August 2011 to 29 August 2011**

193. The Convening Authority also abused his discretion in approving the Government's fifth request for delay and excluding the period from 10 August 2011 to 29 August 2011.[15] As always, the Government failed to provide a sufficient explanation for why the classification review process was still ongoing, well over a year after the process ostensibly began. Not to be

[15] In its 29 August 2011 memorandum approving the Government's fifth request for delay, the Convening Authority purported to exclude the period from 22 April 2011 to the date of the restart of the Article 32 investigation. *See* 29 August 2011 Memorandum Approving Government Request for Delay, Attachment 45. However, because the exclusion of the time period from 22 April 2011 to 10 August 2011 is challenged above, *see* Argument, Part A.4.e-h, *supra*, and the exclusion of the time period from 29 August 2011 to the restart of the Article 32 hearing is challenged below, *see* Argument, Part A.4.j-l, *infra*, this subsection only challenges that portion of the Convening Authority's 29 August 2011 memorandum that excludes the time period from 10 August 2011 to the date of the memorandum.

outdone, the Convening Authority took his usual route: exclusion of the requested time period with absolutely no articulation of the reasons that justified that exclusion as reasonable.

194. The Government made its fifth request for delay of the Article 32 hearing on 25 August 2011. *See* 25 August 2011 Government Request for Delay, Attachment 43. The basis for the requested delay was the same as before: the Government still, over a year and two months after PFC Manning was placed into pretrial confinement, needed time to obtain the authority from the OCAs to disclose evidence and information to the Defense. *See id.* at 1. The Government once again related, without elaboration, that it was still "continuing" to work with the OCAs and that the NSA review of the unclassified CID case file was still "ongoing." *Id.* The Government added now in its fifth request that the CID was conducting a secondary review of the derivative classification of the forensic reports and that it was "continuing" to work with the FBI and DSS to receive authorization to disclose the relevant portions of any case files. *Id.* at 1-2. Finally, the Government stated the following in its "Request" section of its fifth request for delay:

> Given the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews, the prosecution requests a reasonable delay of restarting the Article 32 investigation . . . . The prosecution has actively and diligently worked to resolve all outstanding issues to ensure timely release of all possible information to the defense so their ability to represent and potentially defend their client will be in no way impaired.

*Id.* at 2.

195. The Defense once again opposed the Government's request for delay, reiterating its position that any additional delay should not be excluded under R.C.M. 707(c) but should rather be credited to the Government for speedy trial purposes. *See* 27 August 2011 Email from Mr. Coombs to [redacted] Opposing the Government's Request for Delay, Attachment 44.

196. The Convening Authority yet again approved the Government's request for delay on 29 August 2011. *See* 29 August 2011 Memorandum Approving Government Request for Delay, Attachment 45. This memorandum was quite plainly another cut-and-paste job, identical to the 5 July 2011 and 26 July 2011 approval memoranda in all respects save the updated dates.

197. For many of the same reasons articulated above, *see* Argument Part A.4.e-h, the Convening Authority once again abused his discretion in excluding the period from 10 August 2011 to 29 August 2011 from the R.C.M. 707 speedy trial clock.

198. Yet again, the Government provided no explanation whatsoever for why the classification review process had still not been completed 435 days after the process began on 17 June 2010 and 454 days after PFC Manning was placed into pretrial confinement. The Government merely repeated that it was "continuing" to work with the OCAs and that the review of the unclassified CID case file was "ongoing." 25 August 2011 Government Request for Delay, Attachment 43. In other words, as explained above, *see* Argument Part A.4.h, *supra*, the Government said nothing about the progress had been made in the past 435 days, what remained to be done, and

approximately when the "ongoing" tasks would be completed. Without this information, the Convening Authority had no sufficient basis to assess whether the Government was performing these "ongoing" tasks in a reasonably diligent manner and thus had no sufficient basis to assess whether the Government's request for delay was reasonable. *See Facey*, 26 M.J. at 425.

199. The new "reasons" offered by the Government were equally unhelpful. While the Government stated that it was "continuing" to work with the FBI and DSS, for example, it failed to specify why the work with the FBI and DSS was not already completed after 454 days of pretrial confinement for PFC Manning, when the Government began to work with the FBI and DSS, and how much more work needed to be done. Accordingly, the Government provided the Convening Authority with no information to assess whether the Government had been reasonably diligent in working with the FBI and DSS. Similarly, the Government's lack of explanation with respect to the CID secondary review process left the same questions lingering.

200. Additionally, the Government's statement towards the end of the memorandum that yet further delay was necessary "[g]iven the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews" provides no support for the Convening Authority's exclusion decision. 25 August 2011 Government Request for Delay, Attachment 43. It is important to note that the Government offered no elaboration of what it meant by "complexity," "the number of classification authorities involved" and "the volume of information requiring classification reviews." *Id.* The statement has two potential implications: (i) coordination with the number of classification authorities involved made this case complex; and (ii) the volume of information requiring classification reviews made this case complex. Without any elaboration, neither potential implication is a valid reason for further delay.

201. In regards to the coordination with the number of classification authorities, the Government did not specify how many classification authorities were involved and what the coordination with those classification authorities entailed. Without elaboration, therefore, it amounts to a contention that the mere fact that the Government has to coordinate with several different OCAs makes the requested delay reasonable. But such a contention is meritless, however, since "the need to obtain crucial evidence in the custody of another agency of the United States is a common problem and therefore associated delay does not qualify for exclusion from the 120-day rule as a 'delay for good cause.'" *Kuelker*, 20 M.J. at 716.

202. With respect to the volume of information requiring classification reviews, it bears repeating that the length of the completed OCA classification reviews belies the contention that this process was as onerous as the Government represents. As mentioned above, *see* Argument, Part A.4.e, *supra*, of the ten OCA classification reviews provided to the Defense by the Government, only three were over twelve pages in length. Six of the classification reviews were four pages or less in length. The Government's explanation does not address why the classification reviews of "the volume of information requiring classification reviews," if as substantial as the Government asserts, yield as little as a few pages in results. Perhaps the Government could have explained why a classification review of a large volume of information might yield only a few pages of results. But that is entirely beside the point. The important and undeniable fact is the Government failed to provide any such explanation, and that the

Convening Authority was therefore without such an explanation when he approved the Government's fifth request for delay.

203. Finally, the Government's assertion that it has been "actively and diligently" been working, 25 August 2011 Government Request for Delay, Attachment 43, is utterly meaningless. In effect, it amounts to a plea along the following lines: "Trust us. We've been working really hard. Diligently too. Don't worry about a thing because we've definitely been reasonably diligent." For one thing, nothing in R.C.M. 707 or within the realm of common sense would suggest that the Government can show that it has been reasonably diligent simply by saying that it has been reasonably diligent. Since the Government has the burden of proof on a speedy trial motion, *see* Burden of Persuasion and Burden of Proof, *supra*, it cannot be that the Government can simply assert "we've been diligently working" and that is the end of the matter.

204. For another thing, the fact that the Government resorted to making such a meaningless, self-serving statement is yet further evidence that the Government has not been reasonably diligent. If the Government had really been actively and diligently processing this case, it wouldn't need to say so; it could just impress the Convening Authority by stating in detail all of the tasks necessary to complete the classification review process, all the tasks that had already been done, and all of the tasks that still needed to be completed. Of course, the Government's requests for delay are worlds apart from requests containing such impressive detail. Indeed, if the Government had really been actively and diligently processing this case, it wouldn't need to make a fifth request for delay 454 days after PFC Manning was placed in pretrial confinement. Once again, it seems that the Government requested further delay for the simple reason that it was not yet ready to proceed. Accordingly, the Convening Authority abused his discretion in approving the request. *See Ramsey*, 28 M.J. at 373.

205. Moving to the Convening Authority's approval memorandum, the Convening Authority offered no new reasons for delay. Rather, it simply regurgitated the same nonsense about "ongoing national security concerns and law enforcement investigation(s)," without any elaboration whatsoever about what that phrase meant and how it made the requested delay reasonable. Since no new reasons were articulated to justify the period of delay from 10 August 2011 to 29 August 2011, no new reasons need be articulated here to show why the Convening Authority's approval of the Government's fifth request for delay was a mere rubber stamp and, therefore, a patent abuse of discretion. Accordingly, the Defense simply relies on the arguments against the 5 July 2011 and 27 July 2011 approval memoranda stated above. *See* Argument, Part A.4.g-h, *supra*. It suffices to say that the rehashing of an obviously insufficient explanation of the reasons why the Convening Authority determined the period of delay to be reasonable is an even stronger case of an abuse of discretion than it was to provide that insufficient explanation the first time.

206. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 10 August 2011 and 29 August 2011. When these 20 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**j. 29 August 2011 to 14 October 2011**

207. The Convening Authority similarly abused his discretion in approving the Government's sixth request for delay and excluding the period from 29 August 2011 to 14 October 2011.[16] The Government yet again failed to provide a sufficient explanation of why it was reasonable to grant further delay in the commencement of the Article 32 hearing, and the Convening Authority once again failed to articulate the reasons why the excluded delay was reasonable.

208. The Government's sixth request for delay, filed on 26 September 2011, was a virtual carbon copy of its fifth request for delay. *See* 26 September 2011 Government Request for Delay, Attachment 46. Like its prior requests, the sixth request represented that further delay was necessary because the Government had still not received the authority necessary to disclose classified and unclassified evidence to the Defense. *See id.* at 1. The Government was still "continuing" to work with the OCAs regarding the classification reviews and with the NSA regarding the unclassified CID case file. *Id.* The Government was also still working with the FBI and DSS, and it represented that it had just now started to review the FBI and DSS files for discoverable information. *See id.* Finally, the Government repeated verbatim the two line phrase that was contained in its fifth request for delay:

> Given the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews, the prosecution requests a reasonable delay of restarting the Article 32 investigation . . . . The prosecution has actively and diligently worked to resolve all outstanding issues to ensure timely release of all possible information to the defense so their ability to represent and potentially defend their client will be in no way impaired.

*Id.* at 2.

209. The Defense opposed the Government's sixth request for delay on 27 September 2011. *See* 27 August 2011 Email from Mr. Coombs to [redacted] Opposing the Government's

[16] This subsection actually challenges two exclusion decisions of the Convening Authority: the 28 September 2011 approval of the Government's sixth request for delay and the 14 October 2011 excludable delay memorandum. The 14 October 2011 excludable delay memorandum excluded the period from 15 September 2011 to 14 October 2011. *See* 14 October 2011 Excludable Delay Memorandum, Attachment 49. However, the only thing identified in the 14 October 2011 excludable memorandum that was not identified in the 10 August 2011 excludable delay memorandum is the Government's sixth request for delay. Therefore, it makes sense to consider the approval of the Government's sixth request for delay and the propriety of the 14 October 2011 excludable delay memorandum in the same subsection.

Additionally, the 28 September 2011 approval of the Government's sixth request for delay purports to exclude the period from 22 April 2011 to the restart of the Article 32 investigation. *See* 28 September 2011 Memorandum Approving Government Request for Delay, Attachment 48. However, since the exclusion of the period from 22 April 2011 to 29 August 2011 is challenged above, *see* Argument, Part A.4.e-i, *supra*, and the exclusion of the period from 14 October 2011 to the restart of the Article 32 investigation is discussed elsewhere, *see* Argument, Part A.4.k-l, *infra*, this subsection only challenges the portion of the 28 September 2011 approval memorandum that excludes the period from 29 August 2011 to 14 October 2011.

Request for Delay, Attachment 47. The Defense reiterated its position that any delay should not be excluded under R.C.M. 707(c), but rather should be credited to the Government for speedy trial purposes. *Id.*

210. The next day, the Convening Authority approved the Government's sixth request for delay. *See* 28 September 2011 Memorandum Approving Government Request for Delay, Attachment 48. With the exception of changed dates, this approval memorandum was identical to the Convening Authority's approval of the Government's fifth request for delay.

211. The Convening Authority issued another excludable delay memorandum on 14 October 2011, in which the period from 15 September 2011 to 14 October 2011 was found to be excludable delay under R.C.M. 707(c). *See* 14 October 2011 Excludable Delay Memorandum, Attachment 49. The basis for the excludable delay identified in the 14 October 2011 memorandum was virtually identical to the 10 August 2011, 17 June 2011, and 12 May 2011 excludable delay memoranda. In full, the "Basis of Delay" section read as follows:

> The period of excludable delay is reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:
>
> a. Original Classification Authorities' (OCA) reviews of classified information.
>
> b. OCA consent to disclose classified information.
>
> c. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
>
> d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
>
> e. Government Request for Delay of Article 32 Investigation, dated 26 September 2011 (enclosed).

*Id.*

212. For many of the same reasons articulated above, *see* Argument, Part A.4.e-i, *supra*, the Convening Authority once again abused his discretion in approving the Government's sixth request for delay and excluding the time period from 29 August 2011 to 14 October 2011.

213. Since the Government's sixth request for delay was nearly indistinguishable from its fifth request for delay, the attacks levied above at the fifth request, *see* Argument, Part A.4.i, *supra*, are equally applicable here and need not be regurgitated. As always, the Government provided no explanation whatsoever for why the classification review process had still not been completed 467 days after the process began on 17 June 2010 and 486 days after PFC Manning was placed into pretrial confinement. As explained above, *see* Argument Part A.4.h, *supra*, the Government said nothing about the progress made in the past 467 days, what remained to be done, and approximately when the "ongoing" tasks would be completed. Without this information, the

Convening Authority had no sufficient basis to assess whether the Government was performing these "ongoing" tasks in a reasonably diligent manner and thus had no sufficient basis to assess whether the Government's request for delay was reasonable. *See Facey*, 26 M.J. at 425. The Government also provided no explanation of why it was just now, 486 days after PFC Manning had been placed into pretrial confinement, starting to review the FBI and DSS case files.

214. The Government's repetition of its statements towards the end of the memorandum that yet further delay was necessary "[g]iven the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews" and that the Government was "actively and diligently" working was as pointless in its 26 September 2011 request as it was in its 25 August 2011 request. Once again, the Government offered no elaboration of what it meant by "complexity," "the number of classification authorities involved," "the volume of information requiring classification reviews" or of how it was working "actively and diligently." *Id.* As nothing changed in the Government's use of these phrases, the arguments against these phrases in the Government's fifth request for delay are fully applicable here. *See* Argument, Part A.4.i, *supra*. Yet again, it seems that the Government requested further delay for the simple reason that it was not yet ready to proceed. Accordingly, the Convening Authority should not have approved the request. *See Ramsey*, 28 M.J. at 373.

215. Not to be outdone, the Convening Authority's approval memorandum and excludable delay memorandum were as flawed as ever. As the Convening Authority's 28 September 2011 approval memorandum was identical (save for the updated dates) to its 5 July 2011, 26 July 2011, and 29 August 2011 approval memoranda, the various arguments against the Convening Authority's decision to approve yet another Government delay request need not be repeated. *See* Argument, Part A.4.g-i, *supra*. If merely reciting, without any elaboration whatsoever, the phrase "ongoing national security concerns and law enforcement investigation(s)" wasn't an abuse of discretion the first three times (which the Defense does not in any way concede), surely doing it a fourth time in three months did constitute an abuse of discretion.

216. Likewise, as the Convening Authority's excludable delay memorandum was identical in all respects, except for the date of the Government request for delay, to the many excludable delay memoranda that came before, the same arguments against these prior excludable delay memoranda are fully applicable here. *See* Argument, Part A.4.e-i, *supra*. Once again, the Convening Authority offered no reasons why the various items listed in the "Basis of Delay" section justified yet another period of delay when PFC Manning had remained in pretrial confinement for 504 days as of 14 October 2011.

217. Finally, neither the 28 September 2011 approval memorandum nor the 14 October 2011 excludable delay memorandum made any mention that the Government was tardy in providing its update in its sixth request for delay. In the Convening Authority's 29 August 2011 memorandum approving the Government's fifth request for delay, the Convening Authority stated: "The prosecution is required to provide me an update no later than 23 September 2011." 29 August 2011 Memorandum Approving Government Request for Delay, Attachment 45. The Government's update was contained in its sixth request for delay, which was filed three days after the Convening Authority's deadline. 26 September 2011 Government Request for Delay, Attachment 46. As the Government's diligence (or lack thereof) is an issue of paramount

importance in determining whether a particular period of delay is reasonable excludable delay, it is hard to fathom how the Convening Authority neglected to even mention the Government's untimeliness in complying with the update deadline. This serves as yet additional evidence that the Convening Authority had long ago given up on any pretense of being an independent arbiter of the necessity and reasonableness of the requested delays, and had morphed into a mere rubber stamp for all of the Government's many delay requests.

218. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 29 August 2011 to 14 October 2011. When these 47 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**k. 14 October 2011 to 16 November 2011**

219. The Convening Authority also abused his discretion in approving the Government's seventh request for delay and excluding the period between 14 October 2011 and 16 November 2011.[17] Not changing a thing about the lack of detail provided in the past, the Government provided no explanation of why it still was not ready for the Article 32 investigation, 517 days after PFC Manning was placed into pretrial confinement. Moreover, the Convening Authority once again punted its responsibility to articulate the reasons why the excluded delay was reasonable.

220. The Government made its seventh request to delay the Article 32 hearing on 25 October 2011. *See* 25 October 2011 Government Request for Delay, Attachment 50. The reasons for the requested delay were the same as ever: the Government still needed more time to obtain authority to release evidence and information to the defense. *See id.* at 1. The Government once again explained that it was still just "continuing" to work with the OCAs. Likewise, the Government again repeated verbatim the two line phrase that was contained in its fifth request for delay:

> Given the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews, the prosecution requests a reasonable delay of restarting the Article 32 investigation . . . . The prosecution has actively and diligently worked to resolve

[17] This subsection actually challenges two exclusion decisions of the Convening Authority: the 27 October 2011 approval of the Government's seventh request for delay and the 16 November 2011 excludable delay memorandum. The 16 November 2011 excludable delay memorandum excluded the period from 14 October 2011 to 16 November 2011. *See* 16 November 2011 Excludable Delay Memorandum, Attachment 53. Additionally, the 27 October 2011 approval of the Government's seventh request for delay purports to exclude the period from 22 April 2011 to the restart of the Article 32 investigation. *See* 28 September 2011 Memorandum Approving Government Request for Delay, Attachment 52. However, since the exclusion of the period from 22 April 2011 to 14 October 2011 is challenged above, *see* Argument, Part A.4.e-j, *supra*, and the exclusion of the period from 16 November 2011 to the restart of the Article 32 investigation is discussed below, *see* Argument, Part A.4.l, *infra*, this subsection only challenges the portion of the 27 October 2011 approval memorandum that excludes the period from 14 October 2011 to 16 November 2011.

> all outstanding issues to ensure timely release of all possible information to the defense so their ability to represent and potentially defend their client will be in no way impaired.

*Id.* at 2-3.

221. The Defense opposed this request for delay on the same day. *See* 25 October 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 51. In this email, the Defense repeated its previous position that any additional delay should not be excluded under R.C.M. 707(c) but should be credited to the Government for speedy trial purposes. *Id.*

222. The Convening Authority approved the Government's seventh request for delay on 27 October 2011. *See* 27 October 2011 Memorandum Approving Government Request for Delay, Attachment 52. With the exception of changed dates, this approval memorandum was identical to the Convening Authority's approval of the Government's sixth request for delay.

223. On 16 November 2011, the Convening Authority issued yet another excludable delay memorandum. *See* 16 November 2011 Excludable Delay Memorandum, Attachment 53. The basis for the excludable delay identified in the 16 November 2011 memorandum was virtually identical to the 14 October 2011, 10 August 2011, 17 June 2011, and 12 May 2011 excludable delay memoranda. In full, the "Basis of Delay" section read as follows:

> The period of excludable delay is reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:
>
> a. Original Classification Authorities' (OCA) reviews of classified information.
>
> b. OCA consent to disclose classified information.
>
> c. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
>
> d. Government Request for Delay of Article 32 Investigation, dated 27 October 2011 (enclosed).

*Id.*

224. For the same reasons articulated above, *see* Argument, Part A.4.e-j, *supra*, the Convening Authority once again abused his discretion in approving the Government's seventh request for delay and excluding the time period from 14 October 2011 to 16 November 2011.

225. Since the Government's seventh request for delay was nearly indistinguishable from its fifth and sixth requests for delay, the attacks levied above at the fifth and sixth requests, *see* Argument, Part A.4.i-j, *supra*, are equally applicable here. The Government yet again failed to provide any explanation whatsoever for why the classification review process had *still* not been

completed 498 days after the process began on 17 June 2010 and 517 days after PFC Manning was placed into pretrial confinement. As explained above, *see* Argument Part A.4.h, *supra*, the Government said nothing about what progress had been made in the past 498 days, what specifically remained to be done, and approximately when the "ongoing" tasks would be completed. Without this information, the Convening Authority had no sufficient basis to assess whether the Government was performing these "ongoing" tasks in a reasonably diligent manner and thus had no sufficient basis to assess whether the Government's request for delay was reasonable. *See Facey*, 26 M.J. at 425.

226. The Government's statements towards the end of the memorandum that yet further delay was necessary "[g]iven the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews" and that the Government was "actively and diligently" working were as meaningless as ever. Once again, the Government offered no elaboration of what it meant by "complexity," "the number of classification authorities involved," "the volume of information requiring classification reviews" or of how it was working "actively and diligently." As nothing changed in the Government's use of these phrases, the arguments against these phrases in the Government's fifth request for delay are fully applicable here. *See* Argument, Part A.4.i, *supra*. Yet again, it seems that the Government requested further delay for the simple reason that it was not yet ready to proceed. Accordingly, the Convening Authority should not have approved the request. *See Ramsey*, 28 M.J. at 373.

227. For its part, the Convening Authority's approval memorandum and excludable delay memorandum were as bare-bones as imaginable. As the Convening Authority's 27 October 2011 approval memorandum was identical (save for the updated dates) to its 5 July 2011, 26 July 2011, 29 August 2011, and 28 September 2011 approval memoranda, the various arguments against the Convening Authority's decision to approve yet another Government delay request need not be repeated. *See* Argument, Part A.4.g-j, *supra*. If merely reciting, without any elaboration whatsoever, the phrase "ongoing national security concerns and law enforcement investigation(s)" wasn't an abuse of discretion the first four times (which the Defense does not in any way concede), surely doing it a fifth time in four months did constitute an abuse of discretion.

228. Likewise, as the Convening Authority's 16 November 2011 excludable delay memorandum was identical in all respects, except for the date of the Government request for delay, to the many excludable delay memoranda that came before, the same arguments against these prior excludable delay memoranda are fully applicable here. *See* Argument, Part A.4.e-i, *supra*. Once again, the Convening Authority offered no reasons why the various items listed in the "Basis of Delay" section justified yet another period of delay when PFC Manning had remained in pretrial confinement for 537 days as of 16 November 2011.

229. For these reasons, the Convening Authority abused its discretion in excluding the period of time between 14 October 2011 to 16 November 2011. When these 34 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the

imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**l. 16 November 2011 to 15 December 2011**

230. Finally, the Convening Authority abused his discretion in approving the Government's eighth request for delay and excluding the period between 16 November 2011 and 15 December 2011.[18] The Government once again provided no explanation of why it still was not ready for the Article 32 investigation, 537 days after PFC Manning was placed into pretrial confinement. Moreover, the Convening Authority again abdicated its responsibility to articulate the reasons why the excluded delay was reasonable.

231. The Government made its eighth and final request for delay on 16 November 2011. *See* 16 November 2011 Government Request to Restart Article 32 Investigation, Attachment 54. The Government explained that it "has continued to work diligently to resolve the . . . issues that served as the basis for the delay of the Article 32 investigation" but nonetheless related that it was still not ready to proceed with the Article 32 investigation. *Id.* at 1. The Government related that yet further delay was necessary for two reasons. *See id.* at 2. First, the Government was *still* working with an OCA to obtain one final classification review. *Id.* Second, the Government explained that the command required 30 days to execute OPLAN BRAVO, a prerequisite to the Article 32 hearing. *Id.*

232. The Defense opposed the Government's eighth request for delay the same day it was made. *See* 16 November 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 55. The Defense email explained that Mr. Coombs had sent an email to then-CPT Fein on Monday, 14 November 2011, in which Mr. Coombs requested that the Government begin its OPLAN BRAVO preparations so that the Article 32 hearing could commence on 12 December 2011. *Id.* The email went on to explain that based on the Government's most recent request for delay, it appeared that the Government had done nothing from 14 November 2011 to 16 November 2011. *Id.* The Defense pointed out that the Government failed to provide the Convening Authority "with any justification for the arbitrary 30-day-requirement in order to complete its OPLAN BRAVO." *Id.* Finally, the Defense objected to the Government's request to exclude the time period of 16 November 2011 to 16 December 2011 under R.C.M. 707(c) and requested instead that the delay be credited against the Government for speedy trial purposes. *Id.*

233. Later that same day, the Convening Authority approved the Government's eighth request for delay, excluding the time period from 22 April 2011 to 16 December 2011 under R.C.M.

[18] This subsection actually challenges two exclusion decisions of the Convening Authority: the 16 November 2011 approval of the Government's eighth request for delay and the 3 January 2012 excludable delay memorandum. The 3 January 2012 excludable delay memorandum excluded the period from 16 November 2011 to 15 December 2011. *See* 3 January 2012 Excludable Delay Memorandum, Attachment 60. Additionally, the 16 November 2011 approval of the Government's eighth request for delay purports to exclude the period from 22 April 2011 to 16 December 2011. *See* 16 November 2011 Memorandum Approving Government Request for Delay, Attachment 56. However, since the exclusion of the period from 22 April 2011 to 16 November 2011 is challenged above, *see* Argument, Part A.4.d-k, *supra*, this subsection only challenges the portion of the 16 November 2011 approval memorandum that excludes the period from 16 November 2011 to 16 December 2011.

707(c). *See* 16 November 2011 Memorandum Approving Government Request for Delay, Attachment 56. The Convening Authority's decisional process, to the extent that it can be gleaned from this memorandum, is captured in full in the following two sentences: "I reviewed both the prosecution's request and its enclosures and the defense's response. 2. This request is: (signature) approved." *Id.*

234. The Convening Authority issued its last excludable delay memorandum on 3 January 2012. *See* 3 January 2012 Excludable Delay Memorandum, Attachment 60. The memorandum's "Basis of Delay" section was as familiar as ever:

> The period of excludable delay is reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:
>
> a. Original Classification Authorities' (OCA) reviews of classified information.
>
> b. OCA consent to disclose classified information.
>
> c. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
>
> d. Government Request for Delay of Article 32 Investigation, dated 10 November 2011 (enclosed).

*Id.*[19]

235. For the same reasons articulated above, *see* Argument, Part A.4.e-k, *supra*, the Convening Authority once again abused his discretion in approving the Government's seventh request for delay and excluding the time period from 16 November 2011 to 15 December 2011.

236. As far as the Government request goes, it once again offers no explanation of the reasons why further delay would be reasonable. With respect to the outstanding OCA classification, the Government just states that it was "continuing" to work with the OCAs and that one classification request was still outstanding. 16 November 2011 Government Request to Restart Article 32 Investigation, Attachment 54, at 2. Evidently, the Government was operating under the assumption that because it was not yet ready for the Article 32 investigation, the Convening Authority could simply exclude the time period under R.C.M. 707(c). This is a flatly incorrect understanding of how the R.C.M. 707(c) exclusion process operates. *See Ramsey*, 28 M.J. at 373 ("If, however, a recess or continuance is requested solely because the Government is not prepared to go forward with evidence on the merits, such time should not be excluded from its speedy-trial accountability.").

[19] The Convening Authority's reference to the 10 November 2011 Government Request for delay is likely an error. The Defense is not aware of any 10 November 2011 Government request for delay. The Government's eighth request for delay was made on 16 November 2011, not 10 November 2011. Therefore, the Convening Authority was likely referring to the Government's 16 November 2011 request for delay.

237. The Government's claim that it has been "diligently" working on the processing of this case, 16 November 2011 Government Request to Restart Article 32 Investigation, Attachment 54, at 1, borders on the absurd. At the time of the request, 537 days had passed since PFC Manning was placed into pretrial confinement. 518 days had passed since the Government claims to have begun the classification review process. The completed classification reviews were hardly Tolstoy novels, some spanning only a few pages. And yet the classification review process had *still* not been finished. Something doesn't add up. That "something" is the Government's unsupported and grossly self-serving claims of working "diligently" throughout the process.

238. With respect to the 30 day period necessary to implement OPLAN BRAVO, the Government offered absolutely no support for its claim that 30 days were needed to put the plan into effect. The arbitrariness of the 30 day period was pointed out to the Convening Authority by the Defense, to no avail. The unexplained extra 30 day period is perfectly consistent with the likelihood that the Government was simply not ready for the Article 32 hearing in mid-November but felt like it would be by mid-December. Of course, the mere fact the Government is not ready to proceed cannot itself justify excluding that period of delay. *See Ramsey*, 28 M.J. at 373.

239. The Convening Authority's exclusion decisions were no better. With respect to the approval of the Government's eighth request for delay, the Convening Authority offered even less of an explanation than its usual non-explanation of the reasons for the delay. The Convening Authority commendably scrapped the unelaborated nonsense about the "ongoing national security concerns and law enforcement investigation(s)" that plagued the Convening Authority's 5 July 2011, 26 July 2011, 29 August 2011, 28 September 2011, and 27 October 2011 approval memoranda. In its place, the Convening Authority offered . . . well, nothing. Not one reason that the delay was approved. The Convening Authority's "decision" to approve is contained in the following two sentences: "I reviewed both the prosecution's request and its enclosures and the defense's response. 2. This request is: (signature) approved." 16 November 2011 Memorandum Approving Government Request for Delay, Attachment 56. No explanation of reasons was given. This complete failure to provide any reasons whatsoever (not even bad ones) for approving the Government's eighth request for delay clearly constitutes an abuse of discretion. *See* R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting *reasons* and the dates covering the delay, should be reduced to writing."[20] (emphasis supplied)

240. If more were needed to torpedo the Convening Authority's approval of the Government's eighth request for delay, the approval was issued on the same day as the request was made. This incredibly quick turnaround time belies any claim that the Convening Authority gave this request the requisite independent determination of good cause for the delay, *see Lazauskas*, 62 M.J. at 45 (Baker, J., concurring), and confirms the Defense's belief that the Convening Authority had long

[20] The discussion to R.C.M. 707(c) recognizes that it may not always be practicable to reduce the decision to grant or deny a reasonable delay to writing. Although the discussion section does not provide an example of when it would not be practicable, the Defense could envision times where military exigencies may prevent reducing the decision to writing).

been a mere rubber stamp for the Government's many delay requests. To truly put the Convening Authority's blazingly fast approval into proper context, consider all that happened on 16 November 2011: the Convening Authority issued an excludable delay memorandum for the period between 14 October 2011 to 16 November 2011; the Government requested that the Article 32 hearing be restarted on 16 December 2011; the Defense countered that the Article 32 hearing should recommence on 12 December 2011; the Convening Authority decided that the Article 32 hearing would commence on 16 December 2011; the Government made its eighth request for delay; the Defense opposed; the Convening Authority granted the delay; and the Convening Authority issued special instructions to the Article 32 IO. This is a lot for any Convening Authority to tackle in one day. When coupled with the several long periods of Government inactivity, *see* Facts, Part A.4, *supra*, and the Government's overall incredibly lethargic processing of this case, this flurry of activity is particularly unmistakable. Given all of the tasks that the Convening Authority accomplished on 16 November 2011, it seems rather dubious that the Convening Authority gave any careful thought to the eighth Government delay request, which arrived the same day it was approved.

241. With respect to the Convening Authority's 3 January 2012 excludable delay memorandum, it was decidedly more of the same. As the 3 January 2012 excludable delay memorandum was identical in all respects, except for the date of the Government's request for delay, to the many excludable delay memoranda that came before, the same arguments against these prior excludable delay memoranda are fully applicable here. *See* Argument, Part A.4.e-k, *supra*. Once again, the Convening Authority offered no reasons why the various items listed in the "Basis of Delay" section justified yet another period of delay when PFC Manning had already languished in pretrial confinement for 585 days as of 3 January 2012.

242. Finally, neither the Convening Authority's approval of the Government's eighth request for delay nor its 3 January 2012 excludable delay memorandum gave any consideration to the Defense's opposition arguments. Particularly troubling, the Convening Authority made no mention whatsoever of the Defense's position that the 30 day request to implement OPLAN BRAVO was wholly arbitrary. The Convening Authority's decision to forgo any express consideration of the Defense's legitimate concerns is yet further evidence that the Convening Authority was a mere rubber stamp of any and all Government delay requests.

243. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 16 November 2011 and 15 December 2011. When these 30 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by [redacted], the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

**m. The Sum of the Many Exclusions**

244. Of the 635 days from the day after PFC Manning was placed into pretrial confinement up to and including the date PFC Manning was arraigned, *see* R.C.M. 707(b)(1), 532 days have been excluded by the Convening Authority and the Article 32 IO. This Motion does not

challenge 205 days of those excluded days. *See* Argument, Part A.3, *supra*. Subtracting those 205 unchallenged days from the 635 total days, the Convening Authority and the Article 32 IO excluded 327 days of the 430 remaining days. Those exclusions amount to a total of over 76% of the 430 days. In practical terms, the Convening Authority and the Article 32 IO has excluded from the R.C.M. 707 speedy trial clock over 76% of the time that the Defense contends should be counted against that clock. It bears repeating that the Government has the burden of proof with respect to this Motion. The Government, in other words, must prove that the facts and circumstances of this case show that excluding over 76% of the contested time during which PFC Manning was in pretrial confinement was reasonable.

245. If all of the challenged exclusions are upheld, this Court will have countenanced the exclusion of over 76% of days from the R.C.M. 707 speedy trial clock. This speedy trial provision was meant to address and protect the accused's constitutional and statutory speedy trial rights. *Thompson*, 46 M.J. at 475. If the exclusion of over 76% of days from the speedy clock is upheld, the speedy trial protections provided by R.C.M. 707 would be effectively eviscerated. *See United States v. Dooley*, 61 M.J. 258, 264 (C.A.A.F. 2005) (quoting and agreeing with military judge's concern that "the plain meaning of R.C.M. 707 may be thwarted if trial [was] allowed" in that case after "inordinate delay"); *cf. Bray*, 52 M.J. at 662 (lamenting that the Government's interpretation of a particular provision of R.C.M. 707 "would emasculate the speedy-trial provisions of R.C.M. 707.").

246. In *Bell*, a case involving an Article 10 violation premised upon a delay of 199 days between preferral of charges and trial, the Air Force Court of Military Review explained the findings of the military judge:

> The military judge found, "there has been a significant delay in the processing of this case and the delay is by and large without explanation." He further found that the delay approached being "callously indifferent."

17 M.J. at 579. These words could not be more apt if spoken about this very case. To make matters worse, the Convening Authority, by rubber stamping every single one of the Government's eight delay requests, and the Article 32 IO, by excluding time that he simply did not work on the case with no legal basis for that exclusion, joined the Government in its callous indifference to PFC Manning's speedy trial rights. Whatever the protections of R.C.M. 707 may mean in the abstract, they must mean, if they mean anything at all, more than what PFC Manning was afforded in this case.

247. Therefore, in order to safeguard the protections that R.C.M. 707 is supposed to provide an accused and that were completely gutted by the Convening Authority's rubber stamp approval of any and all Government requests for delay, this Court must find that some or all of the challenged exclusions constituted an abuse of discretion. And if even just one or two of those periods was improperly excluded (and the Defense maintains that all challenged periods were improperly excluded), PFC Manning's R.C.M. 707 speedy trial rights have been violated.

**5. Remedy: Dismissal With Prejudice**

248. As mentioned above, *see* Legal Framework, Part A, *supra*, R.C.M. 707(d)(1) provides four factors to be balanced in determining whether the dismissal of the affected charges shall be with or without prejudice. Those four factors are "the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial." R.C.M. 707(d)(1). The appropriate balance of those factors leads to the conclusion that only one remedy will suffice for the Government's flagrant disregard of PFC Manning's R.C.M. 707 speedy trial rights: dismissal of all charges with prejudice.

249. With regard to the first factor, the charges against PFC Manning are concededly serious. But the mere fact that the charges are serious in no way precludes dismissal with prejudice for a violation of R.C.M. 707(a)'s mandate. *See, e.g.*, *Bray*, 52 M.J. at 660, 663 (dismissing charges with prejudice for a R.C.M. 707 violation even where dismissed charge alleged accused raped a 5-year-old girl). Rather, the seriousness of the charges is but one factor to be considered in the mix.

250. The remaining factors identified in R.C.M. 707(d)(1) all weigh heavily in favor of dismissal with prejudice. The facts and circumstances that lead to dismissal are grave indeed. The Government took 635 days to arraign PFC Manning after placing him in pretrial confinement. It took the Government 566 days after PFC Manning was placed into pretrial confinement to make itself ready for the Article 32 hearing. To be sure, the Defense did request some delay in order to conduct a R.C.M. 706 Board of PFC Manning. But the Defense's request was not a free pass to the Government to take it easy until the R.C.M. 706 Board completed its examination. Rather, the Government had an obligation to process the case in a reasonably diligent manner from the moment PFC Manning was placed into pretrial confinement to the moment PFC Manning was arraigned. Even after the R.C.M. 706 Board had run its course, the Government needed to request a period of delay every month until the Article 32 hearing commenced 566 days after PFC Manning was placed into pretrial confinement. Moreover, these requests were wholly lacking in reasons showing why the requested delay was reasonable. The facts and circumstances of the Government's processing of this case show anything but reasonable diligence. The Defense has found no reported case involving precisely what this case involves: an inordinate period of delay coupled with the Government's cavalier disregard of the accused's speedy trial rights. Therefore, this factor weighs in favor of dismissal with prejudice.

251. The "impact of re-prosecution on the administration of justice" factor also weighs heavily in favor of dismissal with prejudice. The Government will no doubt protest this contention strongly, arguing that barring prosecution in this case would prevent the Government from prosecuting the Soldier alleged to have perpetrated one of the largest leaks of U.S. information in history. We've heard the "this is such an important case" refrain before. However, the Government must finally face reality: if the Government is deprived of the opportunity of prosecuting PFC Manning, it will have no one to blame but itself for that result. Moreover, this third factor is a two sided coin. "[J]ustice is also frustrated when an accused is held in pretrial confinement for an unreasonably long time." *Proctor*, 58 M.J. at 797. Justice has already been irreparably frustrated by the inordinate Government delay in this case. Allowing the Government a second bite at the apple after it has so completely dropped the ball in processing this case in the first go-round would only compound that frustration. *See Dooley*, 61 M.J. at 264

("[I]f the military judge dismisses without prejudice and the Government decides to reprosecute the accused, the remedy leads to further delay."). Therefore, this third factor also weighs heavily towards dismissal of all charges with prejudice.

252. Finally, as argued below, *see* Argument, Part B.4, *infra*, PFC Manning has already suffered substantial prejudice as a result of being denied his rights to a speedy trial. He suffered a long period of oppressive pretrial confinement at the hands of the Quantico officials, being forced to endure MAX custody, POI status, and Suicide Risk restrictions during his time there. PFC Manning has suffered substantial anxiety and concern as a result of his pretrial confinement. Lastly, the preparation of PFC Manning's defense has been prejudiced by the inordinate delay, as the Government's lack of diligence has likely led to the loss of evidence and has further compounded the already staggering delay in bringing PFC Manning to trial. All of these aspects of prejudice are discussed in much more detail below. *See* Argument, Part B.4, *infra*. For present purposes, it suffices to say that PFC Manning has suffered a substantial amount of prejudice to all three interests identified by the Supreme Court in *Barker*. Therefore, this final factor also points strongly towards dismissal of the charges with prejudice.

253. In sum, three of the four R.C.M. 707(d)(1) factors clearly militate in favor of dismissal of the affected charges with prejudice. Indeed, dismissal with prejudice is the only acceptable remedy for the Government's profound disregard for PFC Manning's speedy trial rights.

254. Furthermore, where, as here, the accused's constitutional or Article 10 speedy trial rights have been violated, the only available remedy is dismissal with prejudice. *See* R.C.M. 707(d)(1); *Kossman*, 38 M.J. at 262 (explaining that the only remedy for an Article 10 violation is dismissal of the affected charges with prejudice); *see also* Argument, Part B, *infra* (arguing that PFC Manning's Article 10 and Sixth Amendment rights to speedy trial have been violated).

255. For these reasons, this Court should dismiss all charges with prejudice, as PFC Manning's R.C.M. 707 speedy trial rights have been severely trampled upon.

## B. The Government Violated PFC Manning's Speedy Trial Rights Under Article 10 and the Sixth Amendment to the United States Constitution

256. The Government has also violated PFC Manning's speedy trial rights under Article 10 and the Sixth Amendment to the United States Constitution.[21] As of the date of this motion, PFC Manning will have spent 845 days in pretrial confinement before his trial commences. This staggering period of delay is unquestionably facially unreasonable under the length of delay factor, triggering the remainder of the Article 10 analysis. Moreover, the various excuses for this monstrous delay that the Government may put forth are all red herrings, meant to detract from the two undeniable truths that permeate this case: the Government has been dragging its feet in the processing of this case from day one and the Government was inexcusably operating under a profound misunderstanding of its bedrock discovery obligations for the first 698 days of this

[21] Since the *Barker* factors under the Sixth Amendment have been adopted by the Court of Appeals for the Armed Forces as "an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation," *Mizgala*, 61 M.J. at 127, to avoid unnecessary repetition, this section covers PFC Manning's speedy trial claims under the Sixth Amendment and Article 10.

case. Additionally, the Defense made two genuine speedy trial requests early on in this odyssey, and it has reiterated those requests on numerous occasions throughout the case. Finally, PFC Manning has suffered severe prejudice to all three interests identified by the Supreme Court in *Barker* and the Court of Appeals for the Armed Forces in *Cossio* and *Mizgala*.

257. In sum, all four factors in the Article 10 procedural framework point unmistakably to the conclusion that PFC Manning's statutory and constitutional speedy trial rights have been trampled upon with impunity. Under no stretch of the imagination could the Government's processing of this case be characterized as reasonably diligent. There is only one remedy for the Government's severe constitutional and statutory violations: dismissal of all charges with prejudice.

**1. Length of Delay**

258. To date, PFC Manning has spent 845 days in pretrial confinement. The 845 days PFC Manning has already spent in pretrial confinement dwarfs other periods of pretrial confinement that the Court of Appeals found to be facially unreasonable, and it is plainly sufficient to trigger the analysis into the remaining factors in the Article 10 framework. Indeed, the Defense has found no reported military case involving a period of delay even close to the 845 delay in this case.

259. The protections of Article 10 are triggered when the accused is placed in "arrest or confinement." 10 U.S.C. § 810; *see Schuber*, 70 M.J. at 184. Article 10 was implicated in this case when the Government placed PFC Manning in pretrial confinement on 29 May 2010. Moreover, Article 10's protections last until the accused is tried. *See Cooper*, 58 M.J. at 49-60. Currently, PFC Manning's trial is scheduled to commence on 4 February 2013. Therefore, for purposes of Article 10, PFC Manning will have been in "arrest or confinement" for a period of 983 days when his trial begins.[22]

260. This 852 day delay is clearly facially unreasonable. Applying the factors identified by the *Schuber* Court, the Defense concedes that the charged offenses are serious and that PFC Manning was notified of the charges against him. *See* 70 M.J. at 188. Additionally, while this case may be more complex than the run-of-the-mill prosecution, *see id.*, much of that complexity has been created by the Government's expansive charging decision. *See, e.g.*, Appellate Exhibit XC (arguing that Government was relying on an untenable expansive theory of "exceeds authorized access"); Appellate Exhibit XCII (same); Appellate Exhibit CLXX (same); Appellate Exhibit CXCVII (same); Appellate Exhibit LXII (arguing that Government's expansive interpretation of the term indirectly was untenable and, as applied in this case, rendered Article 104 unconstitutionally vague and substantially overbroad). PFC Manning's Article 10 rights cannot be made dependent upon the unlucky circumstance of having an imaginative prosecutor

[22] This motion uses the period of pretrial confinement to the date of this motion for purposes of the Article 10 argument. The Defense points out, however, that this figure (845) will continue to increase each day until this motion is litigated and decided. In the event that this Court denies the motion to dismiss with prejudice and the case proceeds to trial as scheduled, the entirety of the 983 day period in which PFC Manning will have spent in pretrial confinement by 4 February 2013 will constitute the period of pretrial delay for purposes of Article 10.

assigned to his case. *See* Argument, Part B.2.a, *infra* (further explaining the Government's responsibility for this case's complexity).

261. Finally, the Government may attempt to seek shelter behind the "availability of proof" factor identified in *Schuber*, *see* 70 M.J. at 188, arguing that the proof was not as readily available in this case as in some cases, given the volume of classified evidence implicated by this case. However, the Government has had ample time to allow the OCAs to conduct the classification review process, to obtain consent from the OCAs to release discoverable information to the Defense, and to conduct its required *Brady* searches. From PFC Manning's placement in pretrial confinement to the Government's 25 April 2011 request for delay of the Article 32 hearing – its first of eight such requests – the Government already had a period of 332 days in which to get its affairs in order with respect to the classified evidence in this case. Moreover, the Government needed an additional 235 days after 25 April 2011 before it was even ready for the Article 32 hearing. Furthermore, as of the date of this motion, the Government has *still* not finished conducting its basic *Brady* searches of the files within its possession, custody, or control, 845 days after PFC Manning was placed in pretrial confinement and 808 days after the original charges were preferred. Therefore, the Government cannot hide its profound lethargy behind the fact that this case involved classified evidence. *See* Argument, Part B.2.ii, iv (further explaining the Government's inexplicable discovery delay).

262. The remaining *Schuber* factors weigh in favor of finding this 845 day period of PFC Manning's pretrial confinement to be sufficiently lengthy to trigger the remainder of the Article 10 analysis. First, the Government has not properly complied with the procedures relating to PFC Manning's pretrial confinement. *See Schuber*, 70 M.J. at 188. When PFC Manning was transported to Quantico, for example, the Duty Brig Supervisor (DBS) completed an initial custody classification determination. Appellate Exhibit 258, at 4. Despite the fact that PFC Manning's score of "5" was substantially lower than the "12" or more points that are typically required for a detainee to be placed in MAX custody, the DBS overrode the custody determination and placed PFC Manning in MAX custody. *Id.* Moreover, despite the recommendations of two Brig psychiatrists that PFC Manning be downgraded from Suicide Risk to POI status, the Brig did not immediately remove PFC Manning from Suicide Risk designation. *Id.* at 4-5. This failure to take prompt action following the psychiatrists' recommendations violated Secretary of Navy Instruction (SECNAVINST) 1640.9C. *Id.*; *see id.* at 35 ("In CWO5 Abel Galaviz's investigation of the conditions of PFC's Manning's confinement, he found that the failure to immediately take PFC Manning off of Suicide Risk status upon the psychiatrist's recommendation was in violation of Navy rules."). Likewise, for the next eight months that PFC Manning was at Quantico, Brig officials repeatedly ignored the recommendations of the Brig psychiatrists that PFC Manning should be taken off of POI status. *Id.* at 11. Similarly, on the two occasions when the Brig increased PFC Manning's handling instructions to be compatible with those of a Suicide Risk detainee, Brig officials either ignored or simply did not consult the Brig's mental health providers. *Id.* at 27, 35-36. Additionally, the Classification and Assignment Board, which apparently met on a weekly basis to discuss PFC Manning's confinement conditions, failed to properly document its recommendations on the required Brig Form 4200 for over five months. *Id.* at 27. Finally, and most egregiously, [redacted], the [redacted] and senior rater of the [redacted], indicated at a 13 January 2011 meeting that there would be no relaxation of the restrictions of PFC Manning's

confinement "on [his] watch," notwithstanding the dissenting views of the Brig's medical health personnel, because he believed that the Brig could do whatever it wanted to do when it came to PFC Manning's confinement. *Id.* at 37-38. [redacted] was obviously simply relying an order from [redacted], the [redacted] at Quantico. The 84 emails provided by the Government on (literally) the eve of the Defense's Article 13 filing expose that everybody at Quantico, from a three-star-general to lower enlisted marines at the brig, was complicit in the unlawful pretrial punishment of PFC Manning.

263. Second, the Government was wholly unresponsive to requests for reconsideration of PFC Manning's pretrial confinement. *See Schuber*, 70 M.J. at 188. PFC Manning, through counsel, made numerous requests of the United States Army Staff Judge Advocate's Office for the Military District of Washington to assist in removing PFC Manning from MAX and POI. Appellate Exhibit 258, at 47. While giving vague assertions that the Government was giving these concerns the "highest priority," email correspondence between then-CPT Fein and the Brig officials demonstrates that the Government was not at all concerned with seeing PFC Manning's confinement conditions reconsidered, but was instead solely concerned with combating a potential Article 13 Motion. *Id.* at 47-50. Moreover, PFC Manning filed numerous complaints about his pretrial confinement and requests to have his confinement conditions reconsidered – a complaint with the [redacted], a DD Form 510 complaint through the Brig's grievance process, a request for release from pretrial confinement under R.C.M. 305(g), a request for redress under Article 138 and two rebuttals of the inadequate responses to this request, to be precise – all to no avail. *Id.* at 49. The responses to these numerous requests and complaints were either nonexistent or inadequately explained, cursory denials. *Id.* Additionally, as a result of the domestic and international outrage at PFC Manning's inhumane treatment, several organizations and individuals pleaded with the Government to modify the conditions of his confinement. *Id.* at 38-41. All such pleas, like the several requests and complaints lodged by PFC Manning himself, fell on deaf ears.

264. Finally, a comparison of the time PFC Manning has spent in pretrial confinement and the periods of pretrial confinement found to be sufficiently facially unreasonable to trigger the remaining Article 10 analysis readily demonstrates that the 845 days of pretrial confinement in this case easily qualifies as facially unreasonable. Indeed, the 845 days of pretrial confinement dwarfs the periods of pretrial confinement in any reported military case. *See, e.g.*, *Thompson*, 68 M.J. at 312 (holding that "the 145-day period [the accused] spent in pretrial confinement is sufficient to trigger an Article 10 inquiry"); *Cossio*, 64 M.J. at 257 (explaining that where the accused "had been in continuous pretrial confinement for 117 days," the length of delay was sufficient to trigger the remaining Article 10 analysis); *Mizgala*, 61 M.J. at 123, 129 (conducting full Article 10 analysis when the accused was in pretrial confinement for 117 days); *Miller*, 66 M.J. at 574 (finding 140 delay to weigh "significantly against the Government"); *see also Kossman*, 38 M.J. at 261 ("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."); *cf. Hatfield*, 44 M.J. at 23-24 (affirming military judge's determination that Government violated Article 10 based primarily on five periods of delay totaling 48 days); *Laminman*, 41 M.J. at 518-19, 523 (affirming military judge's determination that Government violated Article 10 based on a delay

of 109 days); *United States v. Collins*, 39 M.J. 739, 741 (N.M.C.M.R. 1994) (affirming military judge's determination that Government violated Article 10 based on a period of pretrial confinement of 88 days); *United States v. Hayes*, 16 M.J. 636, 638 (A.F.C.M.R. 1983) (finding delay of 466 days "unacceptable," even where no pretrial confinement and observing that it was "inconceivable that the processing was not done more expeditiously."). As an additional basis for comparison, the 845 day period of PFC Manning's pretrial confinement is almost twelve times longer than the 71 day period of pretrial confinement that the *Schuber* Court found to be not facially unreasonable. *See* 70 M.J. at 187-89.

265. In sum, no reported military case has involved such a staggering period of pretrial confinement. If periods of 117 days and 145 days have been held to be sufficiently lengthy to trigger the remainder of the Article 10 analysis, surely the 852 day period in this case qualifies as facially unreasonable. Therefore, this first factor must be resolved in favor of PFC Manning.

**2. Reasons for Delay**

266. As of the date of this motion, the Government's case against PFC Manning has been ongoing for 845 days. For the entirety of that time, PFC Manning has remained in pretrial confinement. With trial scheduled to commence on 4 February 2012, PFC Manning will have spent a total of 983 days in pretrial confinement before the trial against him even begins. This marathon period of pretrial confinement is tremendous, to say the least.

267. But since the Government always seems to have some excuse for all of its many missteps along the way, the Defense suspects that the Government will respond to this motion with a smorgasbord of excuses in a vain attempt to justify the astounding period of pretrial delay in this case. This Motion anticipates and responds to a few of these potential excuses in this section.[23] Because there are essentially two distinct tracks of Government delay in this case – delay of the Article 32 hearing and discovery delay – this Motion addresses the various potential Government excuses for each type of delay in different subsections below.

268. Every conceivable excuse offered by the Government is simply a red herring designed to detract this Court's attention from the ugly truth of this case: the Government was operating for almost two years under a profound misunderstanding of its bedrock discovery obligations and the Government was incredibly lethargic in processing this case on all fronts. All the excuses under the sun fail to justify why, after PFC Manning has spent 845 days in pretrial confinement, the Government is still not ready for trial. A delay of 845 days is simply intolerable. Accordingly, the "reasons for delay" factor of the procedural framework also weighs in favor of PFC Manning.

**a. Delay of the Article 32 Hearing**

269. It took the Government 566 days after PFC Manning was placed in pretrial confinement before it was ready for the Article 32 hearing. Even if this Court upholds the many challenged

[23] The Defense has anticipated these potential excuses from the Government's court filings and emails. As the Government may offer reasons not anticipated here by the Defense in the Government's Response to this Motion, the Defense reserves the right to address any new reasons offered by the Government in a reply motion.

exclusions from the R.C.M. 707 speedy trial clock that occurred during this period, the Government still has the burden to show reasonable diligence for this time period for purposes of Article 10 and the Sixth Amendment. *See Lazauskas*, 62 M.J. at 42; *Mizgala*, 61 M.J. at 128-29; *Birge*, 52 M.J. at 211; *Kossman*, 38 M.J. at 261; *Calloway*, 47 M.J. at 787; *see also* Legal Framework, Part B.2, *supra*. The Government may offer a number of reasons for this delay, many of which are discussed or hinted at above, *see* Argument, Part A.4.e-l, *supra*. No reason can sufficiently explain the Government's inexcusable failure to get its affairs in order for the Article 32 hearing until 566 days went by.

270. First, the Government may attempt to pin some of the blame for the delay on the Defense. After all, the Government might say, the Defense requested delay in the Article 32 hearing in order to conduct a R.C.M. 706 Board. However, while it's true that the Defense did request such a delay, this fact has no bearing on the issue of whether the Government diligently processed this case. From day one of PFC Manning's pretrial confinement, the Government had regulatory, statutory, and constitutional duties to proceed to trial with reasonable diligence. During the lead up to the R.C.M. 706 Board through the completion of the Board's evaluation, the Government's duty to process the case with reasonable diligence remained in full effect. It could not simply take a 205 day "timeout" from processing the case simply because the Defense had requested some delay to complete a R.C.M. 706 Board. Taking such a timeout would in itself establish a lack of reasonable diligence in proceeding to the Article 32 hearing.

271. Of course, the Government will assert that it took no such timeout. In fact, the Government's representations to the Convening Authority indicate that the Government began the classification review process by reaching out to the OCAs on 17 June 2010[24] and that it was "continuing" to work with the OCAs right up until the Article 32 hearing. If true, these representations show why the fact that the Defense requested a R.C.M. 706 Board provides no justification for the Government's delay in preparing for the Article 32 hearing: the Defense request had no effect on the Government's classification review process, which was ongoing at the time the request was made. Therefore, given that the Government requested delay in the Article 32 hearing about once a month for a continuous period of 8 months, it is abundantly clear that the Government would have needed to begin those delay requests earlier if the Defense had never made the R.C.M. 706 Board request. In other words, because the Government has represented that it was "continuing" to work on the classification review process since 17 June 2010 right up until December 2011 and because it still, even after the 205 days of delay stemming from the R.C.M. 706 Board process, needed to request delays of the Article 32 hearing eight times between 22 April 2011 and 16 November 2011, it is clear that the only thing that would have changed had the Defense not made its R.C.M. 706 Board request would be the number of Government requests for delay from 11 August 2010 to 16 November 2011. Thus, the Government cannot base any of its 566 days of delay in the Article 32 hearing on the Defense request for a R.C.M. 706 Board. *See United States v. Cole*, 3 M.J. 220, 225 (C.M.A. 1977) ("While defense-requested delays or continuances generally are attributable to the defense as the party which benefits therefrom, a showing that the prosecution could not have proceeded any earlier at any rate compels the conclusion that the defense-requested 'delay' did not in fact delay

[24] Once again, however, the Defense notes that the Government has offered no explanation of why it waited 19 days after PFC Manning was placed in pretrial confinement before first reaching out to the OCAs to begin the classification review process.

the proceedings at all and the responsibility for the pertinent time period remains where it started: on the shoulders of the Government.").

272. Second, the Government could claim, as it did repeatedly in its eight requests for delay, that the classification review process was so lengthy because of the volume of classified information that needed to be reviewed. While this reason may justify some delay, it cannot even begin to justify all 566 days of delay of the Article 32 hearing. For one thing, as mentioned above, *see* Argument, Part A.4.e-l, *supra*, many of the classification reviews of this allegedly voluminous amount of classified information are quite brief. Of the ten completed classification reviews provided, six were four pages or less in length. *See* Facts, Part A.2, *supra*. Of the remaining four classification reviews, only three were more than 12 pages in length and only one was over 30 pages in length. *See* Facts, Part A.2, *supra*. While the Defense understands that length of a finished product is not the sole factor in determining a task's complexity, the fact that many of the classification reviews are only a few pages in length casts serious doubt on the Government's assertion that the classification review process was so overwhelming. For another thing, there is a large unexplained gap, ranging from a few months up to over a year and two months, between the completion dates for some of the classification reviews and their disclosure to the Defense. The Defense believes that the Government may have been stockpiling completed classification reviews so that it could still plausibly claim that the classification review process was ongoing. Whether the Government actually engaged in this practice, however, is beside the point. The bottom line is that there was a substantial delay between the completion of the classification reviews and either their disclosure to the Government by the OCAs or their disclosure to the Defense by the Government. Either way, there is a period of unexplained delay and that delay was caused by some arm of the United States Government. Finally, even if the amount of classified information to be reviewed was indeed voluminous, the Government cannot deny the fact that it took 566 days after PFC Manning was placed in pretrial confinement before it was ready to proceed to the Article 32 hearing. Therefore, to the extent that the Government intends to simply use "voluminous amounts of classified information" as some type of magic phrase, the Defense fires "566 days" right back.

273. Third, the Government may argue that the classification review process was prolonged in this case because of the necessity of coordinating with the various OCAs. Taking this contention a step further, the Government may assert that its entire case preparation was bogged down by the need to coordinate with the several different government agencies involved in this case. This "reason" for delay is more cry than wool. At no point in its many requests for delay has the Government explained how the necessary coordination in this case was especially burdensome. As mentioned above, *see* Argument, Part A.4.e-l, *supra*, the fact that the Government needed to coordinate with other governmental agencies does not itself justify any period of delay. *Cf. Kuelker*, 20 M.J. at 716-17 ("[T]he need to obtain crucial evidence in the custody of another agency of the United States is a common problem and therefore associated delay does not qualify for exclusion from the 120-day rule as a 'delay for good cause.'").

274. At the end of the day, the Government had the resources of the United States at its disposal from day one. Specifically, this meant that the Government had five full time prosecutors, two warrant officers, and multiple enlisted paralegal support assigned to this case, with the ability to call on numerous additional lawyers and paralegals from the SJA's office to help with the

processing of this case. With all of these resources, any claim by the Government that coordination with the many entities involved in this case was overwhelming should be scrutinized carefully. Are we really to believe that the Government was overwhelmed by its coordination efforts when it had the ability to summon countless SJA attorneys and paralegal support to assist in the preparation of this case? Should PFC Manning be made to suffer because the entity that is prosecuting him – the United States of America – is having difficulty coordinating amongst its many subparts? If the standard of reasonable diligence has any teeth whatsoever, the answers to these questions must be no. Moreover, to the extent that Government is simply attempting to impress this Court with the sheer number of OCAs and other entities with which it needed to coordinate, the Defense would stress that the sheer length of delay – 566 days – makes that coordination decidedly less impressive.

275. Finally, the Government may fall back on its oft-repeated, yet never fully explained, excuse of complexity. Throughout the processing of this case, the Government has stressed that this case is somehow unique or one of a kind as a result of its extreme complexity. While the Defense recognizes that this case is not your ordinary court-martial, the Government cannot repeatedly utilize the complexity excuse as some get-out-of-diligence-free card.

276. As an initial matter, each time the Government raises the "complexity" defense to hide its lack of diligence it neglects to acknowledge the undeniable fact that the Government's own charging decision has substantially contributed to the complexity of this case. The Government referred 22 charges against PFC Manning. Several of these charges appear to rely on expansive interpretations of the penal statutes under which PFC Manning has been charged. To recap just a few of these complex charging decisions, consider the specifications alleging violations of 18 U.S.C. Section 1030(a)(1). These specifications depend on an expansive interpretation of the phrase "exceeds authorized access." *See generally* Appellate Exhibit XC; Appellate Exhibit XCII; Appellate Exhibit CLXX; and Appellate Exhibit CXCVII. Moreover, even after referral of the charges, the Government was still unable to articulate its precise theory under which it had charged PFC Manning with "exceeding authorized access." *See* Appellate Exhibit XC, at 2-4, (explaining the Government's reluctance to articulate its theory on how PFC Manning exceeded his authorized access). What's more, once the Government finally did articulate its "definitive theory" for "exceeds authorized access," it quickly shifted ground at the first sign of court resistance to its initial definitive theory. *See* Appellate Exhibit CLXX, at 2-3 & n.1 (explaining the Government's overdue articulation of its self-titled "definitive" theory of "exceeds authorized access," followed quickly by its abandonment of that theory for an alternative theory). That the Government, 742 days after PFC Manning was placed into pretrial confinement, 705 days after preferral of charges, and 127 days after referral of charges, was having so much difficulty ironing out its own theory of the Section 1030 specifications speaks volumes about both the Government's self-created complexity and its overall lack of diligence.

277. To make matters worse, Section 1030 was not the only section that the Government needed to have interpreted expansively in order to reach PFC Manning's alleged conduct. The Government's theory underlying its Article 104 specification – the Specification of Charge I – also depended on an expansive interpretation of a criminal statute. This time, the Government needed the phrase "indirectly" to be interpreted so that a person could be found to have indirectly given intelligence information to the enemy when that person gave the information to a third

party with the knowledge that the enemy might be able to access that information. *See* Appellate Exhibit LXII. As explained in the Defense Article 104 Motion to Dismiss, no court had ever accepted such an expansive interpretation of that phrase. *Id.* Additionally, the Government has been less than forthcoming with the theories underlying some of the other specifications in this case. For example, despite a bill of particulars request covering the Government's theories underlying the 18 U.S.C. Section 641 specifications, the Government refused to articulate its theory of how PFC Manning stole or knowingly converted Government databases that remained in the possession of the United States. While at the time the Defense believed the Government was just engaging in some improper gamesmanship, the Defense now believes, in light of the Government's confusion over its own "exceeds authorized access" theory (or theories), that the Government simply did not yet have an articulable legal theory for the theft or knowing conversion specifications.

278. The point of this discussion is not to rehash memories of long ago motions hearings. Rather, the Defense merely wishes to point out that the Government cannot assert that this case is overly complex or that it raises novel issues while simultaneously turning a blind eye to the fact that a substantial portion of that complexity and novelty has been caused by the Government's own charging decision. In other words, the Government cannot be given a free pass on the reasonable diligence inquiry simply by asserting the complexity of the case, especially when it has charged the case in such a complex manner that necessitated delay in the proceedings to allow the Government to mull over how it can make the proof fit its lofty and imaginative charging decision. As explained above, *see* Argument, Part B.1, *supra*, PFC Manning's speedy trial rights cannot hinge upon the unfortunate circumstance of having an imaginative prosecutor assigned to his case. Therefore, to the extent that case complexity is a reason offered by the Government for its profound delay in processing this case, this Court should discount any self-inflicted complexity from the weight given to that reason.

279. Furthermore, even if some residual amount of complexity exists in this case (i.e. complexity that was not created by the Government's charging decision), that complexity can only get the Government so far. Indeed, the sheer length of delay in this case prevents the Government from waving the complexity flag as triumphantly as it attempts to. While case complexity may be a valid reason for reasonable delay in the abstract, the delay here is so astounding that not even vague calls of "complexity" can rescue this case from the chopping block. Once again, 566 days passed between the date PFC Manning was placed into pretrial confinement and the Government was finally ready for the Article 32 hearing to commence. No matter the complexity of a given case, the Government's team of five full time prosecutors, along with an arsenal of additional SJA attorneys and paralegals waiting in the wings, could have been ready for the Article 32 investigation much sooner, if only it had been reasonably diligent in processing the case.

280. At bottom, the true cause of the Government's repeated requests for delay in the Article 32 hearing seems to be that the Government was simply stuck too long in a waiting posture. The *Mizgala* Court, though not finding an Article 10 violation based on the 117 days of delay in that case, nevertheless expressed grave concern about the Government being in a "waiting posture:"

> The processing of this case is not stellar. We share the military judge's concern with several periods during which the Government seems to have been in a waiting posture: waiting for formal evidence prior to preferring charges and waiting for a release of jurisdiction for an offense that occurred in the civilian community. There are periods evidencing delay in seeking evidence of the off-post offense and seeking litigation packages to support prosecution of the drug offenses.

61 M.J. at 129.

281. Here, the Government appears to have been in some type of waiting period for most of the 566 days before the Article 32 investigation began. While the Government was quick to tell the Convening Authority that it had contacted the OCAs on 17 June 2010 and that it was "continuing" to work with the OCAs thereafter, the Government offered no specifics of what it was actually doing in the 566 days it took for the classification review process to be completed. The most likely scenario seems to be that the Government was simply waiting around for the OCAs to finish up the classification reviews. Article 10 does not permit the Government to sit idly by while an accused languishes in pretrial confinement.

282. Additionally, lengthy periods of inactivity weigh heavily against the Government in an Article 10 analysis. For example, in *Calloway*, the Navy-Marine Court of Criminal Appeals reversed the military judge's conclusion that the Government did not violate Article 10 in trying the accused after he had been in pretrial confinement for 115 days. 47 M.J. at 787. In finding an Article 10 violation, the *Calloway* Court was particularly troubled with a 20-day period of apparent Government inactivity: "There is no evidence explaining why, during the first 20 days of the appellant's pretrial confinement, the Government did absolutely nothing with a view toward prosecution." *Id.* at 785. Similarly, the *Hatfield* Court, in affirming the military judge's determination that the Government violated Article 10 based primarily on five periods of inactivity that totaled 48 days, quoted approvingly the military judge's prime concerns that the Government had essentially brought the case to a standstill:

> Yeah, but what the Government has done is just bring the processing of the case to a complete stop. It's not like they're gathering evidence and preparing for a[n Article] 32 [pretrial investigation]. The Government tells itself that everything is stopped, we're not proceeding anywhere. We're not going to proceed to the 32, we're not going to assign counsel, we're not going to identify an IO so the appointing letter can be done, so things can get moving. What we're going to do is we're going to come to a complete stop in activity because we're not satisfied we have a couple of documents that we need. You have a viable preferral which the command wants to go to a 32 and the Government says, "No, we're not going to do anything with this until you get a couple of documents." So, that's the problem I have with that period of time. I mean, the Government has stopped processing the case basically.

44 M.J. at 24 (alterations in original).

283. Here, there are several lengthy periods of Government inactivity taking place prior to preferral. Those periods, which have been chronicled above, *see* Facts, Part A.4, *supra*, need not be laid out once again here. The total of these periods added up to 323 days, far more than the 48 days that troubled the military judge and the Court of Military Appeals in *Hatfield* and the 20 days that bothered the *Calloway* Court. In fact, each of the 13 periods of inactivity are comparable to the 20-day period of inactivity in *Calloway*; the periods vary in length from 12 days to 36 days, and all are longer than 16 days with the exception of one 12-day period. These several periods of inactivity weigh heavily against the Government in the reasonable diligence inquiry.

284. In the end, "[w]hen an accused has been confined for a lengthy period, as in this case, reasonable diligence may call for expeditious processing." *Laminman*, 41 M.J. at 522 n.4. The Government's processing of this case falls far short of this mark.

285. For these reasons, no excuse the Government can muster can sufficiently explain why the Government was unable to proceed to the Article 32 hearing before PFC Manning spent 566 days in pretrial confinement. Therefore, with respect to any delay of the Article 32 hearing, the second factor in the Article 10 framework and Sixth Amendment analysis must be resolved in PFC Manning's favor.

**b. Discovery Delay**

286. At the time of this motion, PFC Manning has been in pretrial confinement for 845 days. It has been 808 days since charges were originally preferred and 230 days since charges were referred to this Court. Despite these long periods of delay, the case is *still* languishing in the discovery phase. The Defense is *still* awaiting critical discovery. The Government is *still* conducting its *Brady* searches. This delay is intolerable.

287. The Government, never being short on excuses, will no doubt have some at the ready to explain its staggeringly slow pace of discovery. Any excuse offered by the Government is a mere cover-up attempt. No matter what the Government offers in its defense, there is simply no way to explain away the Government's inexcusable failure to understand its discovery obligations and how the discovery rules operate in a classified evidence case. It is this failure, and not the many reasons that the Government may point to in an attempt to divert attention away from the storm cloud that has hovered over this case's discovery stage, that has caused the Government's profound delay in providing discovery to the Defense.

288. As if the Government's inexplicable misunderstanding of the discovery ground rules were not enough, the Government has maintained several untenable legal positions in a childish attempt to withhold as much discovery as possible. These frivolous positions, apart from being contrary to the liberal tenor of the discovery rules in military practice, have further compounded the delay. Finally, several discrete instances of Government discovery delay hammer home the undeniable fact that the Government has simply fallen far short of the reasonable diligence benchmark in the processing of this case.

289. Thus, the second factor in the Article 10 procedural framework and the Sixth Amendment analysis must be resolved in favor of PFC Manning.

**i. Government's Potential Reasons for Delay**

290. The Government may offer some excuses for its inexcusable discovery delay. Some of those excuses are addressed below.[25] No excuse can justify the mammoth delay in the processing of this case.

291. The Government will no doubt attempt to justify its discovery delay by clinging to the prized possession of its veritable cache of excuses: case complexity. As applied to the discovery context, the excuse will likely take the form of something like the following: "The discovery process in this case was unduly time consuming given the complexity of this case, which stems from the accused's misconduct, the volume of classified information implicated in that conduct, and the number of OCAs, equity holders, aligned entities, and other government agencies and entities involved with this case." This "reason" for delay, while nicely varnished, cannot excuse the Government's legendary discovery delay.

292. As an initial matter, the Government's generalized assertion of case complexity has been less than forthright, since the Government bears a significant amount of responsibility for any complexity that this case may involve. *See* Argument, Part B.2.a, *supra*. Without rehashing what's already been argued, the Government's charging decision injected much of the complexity that the Government is always complaining about. Therefore, to the extent that the complexity of this case has bogged down the Government's discovery efforts, the Government must be held to task for the consequences of the complexity it created for itself.

293. Additionally, as mentioned above, *see* Argument, Part.B.2.a, *supra*, case complexity does not equate to a free pass on the reasonable diligence inquiry. Even in a complex case, the Government must still proceed with reasonable diligence. That case complexity may make discovery time consuming doesn't get the Government very far. The extent to which some task is time consuming is, after all, relative to the expediency at which one operates. For one who moves at a snail's pace, tying one's shoes is time consuming. The Government appears to use the "time consuming task" label as way to sidestep its lack of diligence, all the while overlooking (purposefully or not) the elephant in the room: the Government's astoundingly lethargic pace of action. PFC Manning has been in pretrial confinement for the last 845 days, and the Government has still not yet finished conducting its *Brady* searches, a prerequisite to bringing PFC Manning to trial. No matter the complexity of a case, the Government's failure to wrap up its *Brady* searches after 845 days is not and cannot be reasonably diligent.

294. In addition to its case complexity excuse, the Government may attempt to deflect attention from the sheer length of delay by pointing out that charges were not referred until 3 February 2012 and arguing that "the defense does not have a right to discovery prior to referral under

[25] Again, these potential excuses have been gleaned from the Government's many filings and emails in this case. To the extent the Government responds to this motion by raising other excuses for its discovery delay, the Defense reserves the right to address these new excuses in a reply motion.

RCM 701 or *Brady*." Appellate Exhibit CLXXII, at 2. This excuse for delay is wholly unavailing.

295. For one thing, it misstates the law. While some discovery rules note the significance of the date that charges are referred, R.C.M. 701(a)(6) – the rule the Government thought was inapplicable to a classified evidence case until this Court set it straight on 25 April 2012, 698 days into this case, *see* Appellate Exhibit LXVIII, at 2 – makes no reference to the date of referral. Rather, that rule directs the Government to provide discovery within the rule's reach to the Defense "as soon as practicable." R.C.M. 701(a)(6).

296. For another thing, this Government excuse, even if correct as far as the Defense's right to discovery goes (which the Defense does not in any way concede), is terribly misleading. The overarching requirement of reasonable diligence in the speedy trial context does not start merely when charges are finally referred; that reasonable diligence duty begins when the accused is put in pretrial confinement. *See* 10 U.S.C. 810 ("When any person subject to this chapter is *placed in arrest or confinement prior to trial, immediate steps* shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." (emphasis supplied)); *Schuber*, 70 M.J. at 184. Therefore, the Government was required to be reasonably diligent in its prosecution of PFC Manning from the moment he was placed into pretrial confinement. The Government appears to have made no real effort to search for discoverable material until referral of the charges. That period – almost two years – was an incredibly long one. It was not reasonably diligent to wait so long to tackle its *Brady* and R.C.M. 701(a)(2) responsibilities, an inevitable obligation in any criminal prosecution.

297. Additionally, the Government is attempting to use this late referral justification in conjunction with its repeated refrain of "complexity" and "uniqueness" of the case, to get a pass on its botched discovery efforts. This attempt should be recognized as fruitless for two reasons. First, the late date of referral was itself the product of the Government's baseless and unsupported requests for delay in the Article 32 proceedings. Had the Government been diligent in its Article 32 preparation, the charges would have been referred much earlier than February 2012. *See* Argument, Part A.4.e-l, *supra*; Argument, Part B.2.a, *supra*. Second, the real reason for the Government's pathetic discovery showing cannot seriously be overlooked: the Government did not understand its discovery obligations from the outset of the case. *See* Argument, Part B.2.b.ii, *infra*. That failure is as astounding as it is unforgivable. A criminal defendant's right to speedy trial cannot be cast on the back burner by the need to bring his prosecutors up to speed on the bedrock discovery obligations of a prosecutor. Just as a defendant's speedy trial rights cannot be made to hinge on the unfortunate circumstance of having a creative or imaginative prosecutor assigned to his case, *see* Argument, Part B.2.a, *infra*, so too should a defendant's fundamental speedy trial rights not be made to suffer from the delay occasioned by having an inept prosecutor assigned to the case. In this respect then, this "date of Defense's discovery rights" nonsense must be seen for what it truly is: an illegitimate, post hoc justification for the Government's inordinate discovery delay, which was caused primarily by the Government's inexcusable failure to understand its discovery obligations and how discovery rules operated in a classified evidence case.

298. The final reason for its discovery delay that the Government may muster might be the astounding position that the Defense itself has caused the discovery delay by filing too many motions. *See* Appellate Exhibit CLXXII, at 4 ("[T]he defense raises anew complaints of the timing of receiving discovery without regard to the motions it has submitted to the Court."); *id.* at 4 n.6 ("The numerous and unanticipated defense motions have affected the trial date."). This contention is nothing short of absurd.

299. While the Government may prefer that those who come under the aim of its prosecutorial crosshairs go quietly into the night, the United States Constitution permits a defendant to do otherwise. PFC Manning has exercised his constitutional right to defend himself by taking issue with several aspects of the Government's case, including the drafting of the charges against him, the validity of the legal theories underlying those charges, and the Government's various untenable discovery positions. These Defense motions were not part of some elaborate conspiracy to sow the seeds for a successful speedy trial motion. Rather, they were legitimate, nonfrivolous challenges to the Government's case against PFC Manning. PFC Manning cannot be punished for the exercise of his constitutional right to defend himself, especially where the necessity of taking issue with several aspects of the Government's case against him was occasioned by the Government's own conduct. *See* Argument, Part B.2.a, *supra* (explaining Government's charging decision); Argument, Part B.2.b.iii (explaining the many untenable discovery positions of the Government). Indeed, it has been the Government's conduct, both in cryptically revealing (or simply refusing to reveal) the theories underlying its creatively drafted charges and in taking untenable discovery positions in an effort to withhold as much discoverable information as possible, that has necessitated the filing of many of the motions in this case.

300. Moreover, despite the Government's constant attempt to conjure up the image of the tired, overworked attorney who must search high and low for discoverable information while simultaneously fighting off innumerable borderline-frivolous motions from the Defense, that is simply not the reality. PFC Manning is not being sued by some tired, overworked attorney in a shabby office; he is being prosecuted by the United States of America, which has full command of an arsenal of resources. Five full-time prosecutors are assigned to this case. Many more SJA attorneys and paralegals may be summoned for further assistance at a moment's notice. That the United States of America, represented in this case by five full-time prosecutors (and any additional SJA attorneys called in), has been unable to simultaneously manage its discovery obligations, case preparation, and motions practice is a testament not to the legitimate reasons for delay, but to the Government's own profound lack of diligence.

301. Thus, for these reasons, any potential Government excuse fails to justify the inordinate discovery delay in this case. Indeed, there is only one true reason for the delay, one which the Government would prefer to have swept under the rug: the Government was operating under a chronic misunderstanding of its own discovery obligations and how discovery rules operate in a classified evidence case for nearly two years. This true reason for delay is discussed below.

**ii. The True Cause of Delay: The Government's Misunderstanding of Discovery Rules**

302. Try as it might to argue otherwise, the Government simply cannot get around the undeniable fact that it was dead wrong about its discovery obligations for the first 698 days of PFC Manning's marathon 845-day pretrial confinement. The Government's misunderstanding of its bedrock discovery obligations, even for one day, would be virtually inexcusable. The fact that this misunderstanding persisted for 698 days is equal parts mind-boggling and disturbing. This misunderstanding is the true reason for the Government's discovery delay. It amounts to gross negligence or, at the absolute least, simple negligence.[26] Either way, the Government's error is inexcusable and has caused substantial delay in PFC Manning's case.

303. To recap the circumstances of the Government's mistaken belief concerning the discovery rules – a mistaken belief that persisted for 698 days – the Defense first became aware of the Government's misunderstanding on 8 March 2012, when the Government filed its Response to the first Defense Motion to Compel. Appellate Exhibit XVI. In that Response, the Government revealed three chronic misunderstandings of the rules of military discovery: (1) that R.C.M. 703, and not R.C.M. 701, governed the Government's discovery obligations; (2) that *Brady* required the Government to turn over only evidence material to the merits of the case and not evidence that is material for sentencing purposes; and (3) that M.R.E. 505 permitted the Government, as opposed to the military judge, to be the arbiter of what should and should not be disclosed after balancing the interests of the accused against the national security concerns in a classified evidence case. *Id*. All of these grave errors were pointed out in the Defense's Reply to the Government's Response, filed on 13 March 2012. *See* Appellate Exhibit XXVI, at 1-2, 7.

304. Not backing down in the face of the Defense's irrefutable contentions, the Government persisted in maintaining its flatly incorrect positions. On 22 March 2012, the Government reiterated its positions in an email from then-CPT Fein to this Court. In that email, the Government stated that R.C.M. 701 does not apply to classified evidence and that the Government had, and would continue to, consult the provisions of MRE 505 to determine what information was discoverable and what information was not discoverable:

> As litigated at the motions hearing, the government's position is that classified information does not fall under RCM 701. The information the defense has requested in discovery is classified and the prosecution has no reason to believe it is not classified. Because the information is classified, RCM 701 does not apply (as per RCM 701(a) and (f)), which leaves the prosecution to use the standards under MRE 505 along with Brady and its progeny. The defense provided no authority to apply RCM 701(a)(2) or (6) to classified information and all the authorities only reference unclassified information. The prosecution has relied on MRE 505 and Brady for regulation of what classified information is discoverable.
>
> The United States Government must always weigh the necessity to provide the defense access to classified information and protecting national security. The normal open-file procedures in the military justice process does not and cannot apply to classified information, although in this case the government has turned over as much classified information as possible while still protecting national

[26] Not even the Government can dispute that its misunderstanding of the military discovery rules constituted at least simple negligence.

> security. The parties are now at a point where the defense wants access to classified information that the government does not agree to disclose under MRE 505(g)(1). To date, the only classified information the defense has requested which the government has withheld are items subject to the motion to compel, because they are more sensitive than the other classified information previously produced. The prosecution has maintained from the beginning of this case, that it intends to produce all discoverable information, under our legal and ethical obligations.
>
> Just because the defense requests classified information does not mean it is discoverable, as outlined in MRE 505 and relevant case law. The United States understands its Constitutional obligations to ensure a fair trial while balancing national security interests by protecting classified information.

Appellate Exhibit XLIII, at 8-9.

305. In this Court's 25 April 2012 ruling on the Defense Motion to Dismiss All Charges, this Court confirmed that the Government had indeed been operating under a grave misunderstanding of its discovery obligations up until the date of the ruling:

> 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.

Appellate Exhibit LXVIII, at 2. Based on the Government's unawareness of its discovery obligations and other Government discovery conduct that raised some eyebrows (to say the least), this Court ordered the Government to provide a due diligence statement to the Court. *See* Appellate Exhibit CLXXVII, at 2-3.

306. The Government's failure to fully understand its basic discovery obligations from the outset of the case is wholly inexcusable. As the Army Court of Criminal Appeals has recently said, "[i]gnorance or misunderstanding of basic, longstanding … fundamental, constitutionally-based discovery and disclosure rules by counsel undermines the adversarial process and is inexcusable in the military justice system." *United States v. Dobson,* 2010 WL 3528822, at *7 (A.Ct.Crim.App. Aug. 9, 2010). This case is one of the most important cases in military history – and there were no less than five prosecutors who had not bothered to read the Manual for Courts Martial. How could the entire prosecution team not have understood *basic* discovery rules? How could the entire team prosecuting a classified evidence case not have understood classified evidence? How could nobody in the SJA office have stepped in and said, "Wait, we're not even operating under the correct rules." There is no justification—and there can be no justification—for such an abject failure of the Government to understand the rules of the game. The Government has tried to sweep its profound discovery misunderstandings under the rug,

pretending they didn't happen. In subsequent motions practice, the Government began articulating the correct *Brady* standard, as if it understood it all along. While the Court did not believe that the Government's failure of understand how discovery works warranted dismissal of the charges when the issue was raised in March 2012, the Court now has the benefit of a more fulsome picture: a picture that features an inept and deceitful prosecution.

307. The Government's mistaken interpretation and understanding of the discovery rules lasted an incredible 698 days after PFC Manning was placed into pretrial confinement. This grave error has caused substantial delay. Based in large part on the Government's erroneous interpretation of its *Brady* obligations, the Government is *still*, 845 days after PFC Manning was placed into pretrial confinement, completing its *Brady* searches. The Defense is *still* awaiting discovery. In a very real sense, the reverberations of the Government's chronic misunderstandings regarding military discovery rules is still causing delay in the proceedings to this day. Therefore, this true reason for the Government's discovery delay weighs heavily in finding an Article 10 and Sixth Amendment violation in this case.

308. The recent well-reasoned decision by our superior court in *Simmons* is instructive on this point. In *Simmons*, the Army Court of Criminal Appeals found that the Government violated the accused's Article 10 speedy trial rights in bringing him to trial after 135 days of pretrial confinement. 2009 WL 6835721, at *1, 4. This conclusion was based in large part on the Government's erroneous interpretation of the Status of Forces Agreement (SOFA) between the United States and the Republic of Korea. *See id.* at *9-10. The Government interpreted the SOFA (mistakenly, it turned out) as requiring the Government to delay prosecution of a Soldier in all cases where the Republic of Korea had primary jurisdiction of the case until either the Government received a waiver of jurisdiction by the Republic of Korea or the Republic of Korea completed its own criminal proceedings against the Soldier. *Id.* at *1. The Government concluded that the Republic of Korea had primary jurisdiction over Simmons' case and that the Government therefore would need to delay its own prosecution of Simmons. *Id.* As it turned out, the Government's interpretation of the SOFA was incorrect. *Id.* at *2. As the *Simmons* Court explained, "the SOFA clearly and specifically grants primary jurisdiction to the United States 'over members of the United States armed forces . . . in relation to . . . offenses solely against the person of . . . a dependent.'" *Id.* (quoting the SOFA). Once the military judge set the Government straight on the proper interpretation of the SOFA, the Government conceded that the United States had had primary jurisdiction over Simmons' case all along. *Id.*

309. In the Article 10 analysis, the Government's mistaken interpretation of the SOFA cost the Government dearly. *See id.* at *9-10. As the *Simmons* Court explained:

> On its face, the government's negligent, i.e. *unreasonable* interpretation of its own SOFA seems the polar opposite of *reasonable* diligence. "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Doggett* [*v. United States*], 505 U.S. [647,] 657 [(1992)]. However, a finding of government negligence that is responsible for a period of delay in bringing an accused to trial does not prohibit a conclusion that the government acted with reasonable diligence overall. *See United States v. Lazaukas* [sic], 2004

> CCA LEXIS 199, *13 (A.F.Ct.Crim.App. Aug. 19, 2004) (unpub.) The weight we ascribe to government negligence also varies depending on the gravity of the negligence at issue – simple negligence weighs lighter than gross negligence. The length of delay the negligence causes is also a consideration; a longer delay resulting from government negligence weighs more heavily against it than does a shorter delay.
>
> The government's conduct here, in misreading its own international agreement from the inception of appellant's pretrial confinement until the day the military judge heard the speedy trial motion 107 days later, was, in our view, negligent. The government's negligence in misreading the SOFA, regardless of whether it is characterized as simple or gross, only stymied the government's processing of appellant's case until the Republic of Korea completed the unnecessary waiver of primary jurisdiction on 11 January. We believe that even gross negligence for a portion of a court-martial's processing time does not automatically result in violation of Article 10, UCMJ; rather, it is part of the "difficult and sensitive balancing test" we must perform to determine whether, *in toto,* the government proceeded with reasonable diligence. This reason for delay is weighted heavily against the government.

*Id.* at *9 (emphasis in original). In an effort to justify the Government's erroneous interpretation of the SOFA, the Government and the military judge pointed out that the original trial counsel in Simmons' case was new and relatively inexperienced. *Id.* at *10. The *Simmons* Court was unmoved:

> Captain B, the original trial counsel, was new to the brigade and new to military justice. This was one of the military judge's primary justifications in favor of finding no Article 10, UCMJ, violation. We categorically reject this as a legitimate reason for delay. Faced with a similar "inexperienced" argument more than forty years ago when it was proffered to explain the lack of diligence of non-lawyer commanders, the Court of Military Appeals forcefully rejected it as well. The court responded: "As to the inexperience of the officers involved, we do not believe this is a legally or factually sufficient explanation. Whether they thought they were doing their job is irrelevant. The plain fact of the matter is that the delay occurred." *Parish,* 17 U.S.C.M.A. at 417, 38 C.M.R. at 215.
>
> The record of the speedy trial motion also makes clear that CPT B had a number of other trial counsel with whom to consult, a chief of criminal law, and a staff judge advocate. Unlike the hapless non-lawyers in *Parish*, CPT B also had available to him all the wonders of the technological age. It is no excuse whatsoever that he was "new." We refuse to view the question of whether the government acted with reasonable diligence through a prism of the government counsel's experience and adjust it or appellant's right to a speedy trial accordingly. Moreover, the government assigned another more experienced trial counsel to appellant's case in late January or early February, and there is no evidence why this could not have occurred earlier.

*Id.* (footnote omitted).

310. Here, the Government's failure to understand its basic discovery obligations for 698 days is far more negligent than the Government's erroneous interpretation of the SOFA in *Simmons*. While the *Simmons* Court declined to speculate whether the Government's incorrect interpretation of the SOFA constituted simple or gross negligence, *see id.* at *9, there can be little doubt that a prosecutor's grave misunderstanding of his discovery obligations for almost two years into the processing of the case constitutes gross negligence of the highest order. Even if the Government's negligence in this case is characterized as only simple negligence (which it should not be), the *Simmons* Court made clear that an Article 10 violation can be found based on simple negligence on the part of the Government. *See id.* ("The government's negligence in misreading the SOFA, regardless of whether it is characterized as simple or gross, only stymied the government's processing of appellant's case until the Republic of Korea completed the unnecessary waiver of primary jurisdiction on 11 January . . . . This reason for delay is weighted heavily against the government.").

311. The *Simmons* Court also explained that the delay caused by the negligence is also a relevant consideration. The Government's negligent failure to understand its discovery obligations clearly caused more delay in this case than the Government's inaccurate interpretation of the SOFA caused in *Simmons*. In *Simmons*, the total delay was 135 days. *See id.* at *4. The delay caused by the Government's erroneous interpretation of the SOFA amounted to 25 days. *See id.* at *17. Here, by contrast, PFC Manning has been in pretrial confinement for a grand total of 845 days. While the delay occasioned by the Government's misunderstandings of its discovery obligations is not as easily quantified as the delay caused by the Government's negligence in *Simmons*, the delay caused by the Government's negligence in this case is far more substantial than the 25 days of delay in *Simmons*. The Government in this case has represented that it has been conducting its *Brady* searches since April 2011. For 698 days of this case, it didn't even know what its *Brady* obligations were. Even now, 845 days after this case began, the Government is still conducting its *Brady* searches, hopefully with a proper understanding of what it needs to look for this time around. The Defense is still waiting on crucial discovery. The case is still languishing in the discovery phase, with trial still several months away. Therefore, there can be little doubt that the Government's inexcusable ignorance of its basic discovery obligations caused an inordinate amount of delay in this case.

312. Finally, as *Simmons* helpfully instructs, inexperience of the trial counsel is no excuse for delays caused by the Government's negligence. *See id.* at *10. Thus, although the Government has yet to come forth with an excuse for its failure to understand how discovery works in classified evidence cases in the military, to the extent it seeks to hide behind its collective inexperience with classified evidence cases, such an attempt would be wholly unsuccessful.

313. In the end, the Government in both *Simmons* and this case was negligent. That negligence caused delay in both cases. As the *Simmons* Court weighed the "reasons for delay" factor heavily against the Government as a result of Government negligence that caused 25 days of delay, this Court must similarly weigh that factor heavily against the Government as a result of

its negligence, which has caused delay far, far in excess of 25 days. Indeed, the words that the Court of Military Appeals uttered in *Kossman* are particularly apt here:

> 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. At the same time, we recognize that there are many circumstances that justify even longer periods of delay. However, where it is established that the Government could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to, we think an Article 10 motion would lie.

38 M.J. at 261. Here, the time PFC Manning has spent languishing in pretrial confinement – 845 days as of the date of this motion – is unquestionably a long time. The Government could have gone to trial much sooner than the currently scheduled 4 February 2013 trial date, if only it had understood its basic discovery obligations from the inception of this case and did not have to be corrected by this Court 698 days into the case. Therefore, an Article 10 motion lies in this case. *See id.*

314. It should also be pointed out that the Government's failure to understand basic discovery rules continued at virtually every motions argument. In one instance, MAJ Fein refused to accept that R.C.M. 701(a)(2) required him to turn over evidence that was obviously material to the preparation of the defense, even in the absence of a defense request. The following email exchange between the Court and MAJ Fein shows the Government's utter lack of understanding (or willful misreading) of basic discovery rules. Neither can be countenanced.

> Court: So when you're doing reviews then, are you looking at these reviews for both 701(a)(6) and 701(a)(2)?
>
> MAJ Fein: [pause] Ma'am for DIA information, we have been reviewing it for 701(a)(2) as well in anticipation if the Court does rule in favor based off a specific request from the Defense so we do not have to review the documents again.
>
> Court: Okay, let's go a little bit more broadly here. When you are reviewing documents for 701(a)(2), if the Government is alerted that this could be material to the defense, the Government's got an obligation to turn this over.
>
> MAJ Fein: The Government's … the Government at least argues that it's not just that the documents themselves are material, it would be certain information – just like the defense is arguing or proffered to the court in their response to the *ex parte* motions of 505(g)(2). Here are the categories of information. The prosecution makes the initial determination of material to the preparation of the defense and the defense argues – provides – as they've done and then it's like "Okay, that's what we're on notice of." We're absolutely on notice that any type of damage that resulted, for instance, is material to the preparation of the defense

based off of the year and a half of requests. So as each discovery request comes in, we process it, we add it to our database of what we're reviewing and we start again, churning the review of these documents. We maintain still based off today's litigation that those documents are still not 701(a)(2), subject to the Court's order, but because we do not have a specific request. It's all documents at DIA with some caveats. Not any type, not anything directed at a certain type of information. I mean the Defense is in the best position to know exactly what was and was not compromised from their client. They could be making specific requests for what type of information they're looking for. So it's not that the Defense is an odd position of not being aware of what could be out there and if, as the Defense just stated on the record, as if the Information Review Task Force, which it was, started to review all the possible compromised documents then they should know what was compromised. We would know from reviewing the files what's there and they can make specific requests. But it goes back to, it's a generic request that's copied and pasted from 701(a)(2) for pretty much every type of document out there.

Court: What volume of information are we talking about?

MAJ Fein: Your honor, we have probably keep going, about … I'll get you that information before we close the Court today.
…

MAJ Fein: If the Court's willing to accept the Defense's argument, that means that any document that is in the possession, custody or control of military authorities that they simply request and make no other showing, then they are entitled to inspect. Your honor, especially dealing with classified information, it goes back to … that this is a tactic in order to essentially slow this prosecution down, slow this court martial down, on one hand arguing that, for instance, in the upcoming *Brady* motion we've given too much information for them to identify stuff and now they want everything, just because they've made a request. We've maintained, the prosecution has maintained, from the very first request, "Provide us with the specific…provide us with an adequate basis and a specific factual basis and we'll be able to process it." All documents from DIA and IRTF is not sufficient. Yes, we have prepared because we do want to move this case and we do not want to have unneeded delay in order to do this. And I have to review thousands of pages of documents again, but again, these are classified documents and the Defense notes that. And yet they still maintain a general request just because they make the request that it must be material to the preparation of the defense with no other showing.

Court: I understand that, MAJ Fein, but when the Government is reviewing these documents, the Government has a burden, an obligation, under R.C.M. 701(a)(2) to disclose material to the preparation of the defense. So if the Government while observing, while looking through these documents, sees something that you think is material to the preparation of the defense, and you're not turning it over

because they didn't ask for it, I'm going to order everything turned over to me for *in camera* review.

MAJ Fein: Yes, ma'am.

Court: So is the Government going to look at this with an eye of the defense counsel and …

MAJ Fein: We absolutely will, ma'am. Ah - to turn over material based off of just what the Defense gives us and what they consider material to the preparation of the defense, we will review the documents for that. Cause then, that would qualify as a specific request and we would do it.

Court: We're having a circular argument here again. If you're looking at document and you say, as MAJ Fein, "Boy, if I were a defense counsel, I would find this material to the preparation of the defense" are you going to hold onto it until they request it?

MAJ Fein: No, your honor, we're not.

Audio from Article 39(a) session, 6 June 2012. This passage illustrates that, up until 6 June 2012, the Government was *still* operating under an incorrect understanding of military discovery. It almost seems unfathomable that an entire SJA shop could bungle discovery on so many different fronts.

315. As is clear, the true cause of the discovery delay in this case, notwithstanding any Government protestations to the contrary, has been the Government's inexcusable failure to understand its bedrock discovery obligations. The negligence inherent in such a failure is manifest, and the delay that has been occasioned by this negligence is severe. Accordingly, the second factor of the Article 10 procedural framework and the Sixth Amendment analysis must be resolved in PFC Manning's favor.

**iii. Untenable Government Discovery Positions**

316. As if laboring under a chronic misunderstanding of its discovery obligations wasn't unbelievable enough, the Government has furthered undermined any confidence in its discovery abilities by putting forth numerous untenable discovery positions. These positions, some of which are chronicled briefly below, have been adopted to serve the Government's obvious desire to provide the Defense with as little discovery as possible. This tactic, in addition to being contrary to the clear liberal tenor of the discovery rules in military practice, has caused yet further periods of delay in this case.

317. The Government has taken the following meritless positions throughout discovery in this case:

a) Maintaining that *Brady* does not require the Government to turn over documents that are relevant to punishment;

b) Maintaining that R.C.M. 701 does not apply to classified discovery;

c) Disputing the relevance of facially relevant items (such as damage assessments);

d) Using the R.C.M. 703 standard, instead of the appropriate R.C.M. 701 standard when dealing with items within the military's possession, custody and control;

e) Referring to damage assessments and other documents as "alleged" to frustrate the Defense's access to them;

f) Maintaining that the Department of State and ONCIX had not "completed" a damage assessment;

g) Maintaining that it was "unaware" of forensic results and investigative files;

h) Resisting production of the Department of State damage assessment under the "authority" of *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (which provided no legal support for its position);

i) Despite understanding Defense discovery requests, defining "damage assessments" and "investigations" to avoid producing discovery. After instructing the Defense that it should not use the term "damage assessments" to refer to informal reviews of harm (instead, to use "working papers"), then referring to working papers as "damage assessments";

j) Insisting on a threshold of specificity for *Brady* requests that does not exist or some additional showing of relevance;

k) Maintaining that the FBI investigative file was not material to the preparation of the defense, to which the Court quizzically asked, "How could the investigative file *not* be material to the preparation of the defense?";

l) Maintaining that anything that predated the Department of State Damage assessment was not discoverable because it was "likely" cumulative;

m) Arguing with the Court at length about whether the Government was obligated to turn over documents that were obviously material to the preparation of the defense absent a "specific request";

n) Waiting until two days before the Defense's Article 13 filing before reviewing 1374 emails from Quantico which it had in its possession for over six months.

318. The United States advanced each of these positions in an attempt to frustrate the Defense's access to discoverable information. This necessitated further delay to correct the Government's untenable positions, either through motions practice, 802 sessions with the Court, or otherwise.

Therefore, these positions doubly compounded the already inexcusable delay caused by the Government's failure to understand its discovery obligations. The first stage of delay that occurred as a result of these meritless positions was the delay in the Defense receiving this discoverable information. The second stage of delay caused by these positions was the litigation or conversations concerning their invalidity. Both stages of delay caused by these positions have contributed to the incredibly slow pace of the Government's discovery and to the continued rescheduling of PFC Manning's trial date. In short, each of these positions has caused further unwarranted delay to pile up on the Mount Vesuvius of delay that the Government has caused to accumulate in this case.

**iv. Government's Lack of Reasonable Diligence in All Aspects of Discovery**

319. Finally, even apart from the Government's inexcusable failure to understand its basic discovery obligations and its continued assertion of untenable discovery positions, there is ample evidence of the Government's overall lack of reasonable diligence in the processing of this case. One fact which speaks volumes is that the Government, by its own admission, did not start searching for *Brady* discovery until 28 April 2011, nearly one year after PFC Manning was placed in pretrial confinement. *See* Attachment A to Appellate Exhibit 243. What was the Government doing for this year? The OCAs, it must be recalled, were "in the process" of completing the classification reviews; the Defense had barely received basic discovery (it wasn't until 27 July 2011 that the Defense started to receive the bulk of the unclassified CID file, and it was not until 4 November of 2011, the month prior to the Article 32 hearing, that the Defense received any of the classified discovery); PFC Manning was languishing in a Brig under oppressive conditions. And what was the Government doing? No one knows. More detailed instances of a lack of diligence and unjustified delay are discussed below.

**(1) The Government's Failure to Search Its Own Files in a Timely Manner**

320. First of all, the Government's *Brady* search of Department of the Army files (i.e. its *own* files) completely flouts the reasonable diligence standard. The Government sent out a memo on 29 July 2011 to HQDA requesting it to task Principal Officials to search for, and preserve, any discoverable information. To put the 29 July 2011 date into perspective, PFC Manning was placed into pretrial confinement on 29 May 2010. Charges were originally preferred on 5 July 2010. Thus, this 29 July 2011 memorandum shows that the Government waited *over one year* after charges were preferred and PFC Manning was placed into pretrial confinement before even beginning its *Brady* search of its own files. Waiting a year to begin a *Brady* search of the Government's own files is not even close to reasonably diligent (and cannot be under any sensible interpretation of the phrase).

321. Moreover, a 17 April 2012 HQDA memorandum confirmed that no action had yet been taken on the 29 July 2011 memorandum. In other words, if it wasn't bad enough that the Government waited over a year to even start a *Brady* search of its own files, it didn't even realize that nothing had been done on its request for almost another full year. Therefore, almost two full years after PFC Manning's arrest, the Government had not even been able to complete a *Brady* search of its own files. This fact is disturbing, to say the least. To hold that the Government's discovery conduct has been reasonably diligent would make a complete mockery of that phrase.

322. Additionally, as the Defense pointed out in its Reply to the Government Response to the Supplement to the Defense Motion to Compel Discovery 2, the Government was still conducting its *Brady* search of DIA, DISA, CENTCOM, and SOUTHCOM files on 2 June 2012, 736 days after PFC Manning was placed into pretrial confinement and 699 days after preferral of charges. Again, these files are the Government's *own* files. How the Government can assert in good faith that it has conducted its discovery obligations in a reasonably diligent manner is beyond comprehension. Whether the Government had been secretly conducting a re-review using the correct *Brady* standard or had been negligently or intentionally dragging its feet in discovery is ultimately beside the point. No matter the circumstances, the Government cannot justify the fact that it is still, well over two years after PFC Manning was placed in pretrial confinement, "in the process" of conducting its *Brady* search of its own files.

**(2) The Government's Failure to Conduct a Timely Brady Search of the Files of Non-Military Agencies**

323. The Government's discovery mantra since referral has been that it is "in the process" of conducting its *Brady* discovery searches. Much like the situation described above with respect to its own files, as of June 2012, the Government was still "in the process" of searching the files of closely aligned agencies (such as ODNI, FBI, ONCIX, etc.). While some of these documents have since been produced—over two years after PFC Manning was placed in pretrial confinement—others have not.

324. On 25 July 2012, the Government requested leave of the Court until 14 September 2012 for the following: "(1) to disclose files not subject to the Court's 22 June 2012 order, if any, to the defense or to the Court for *in camera* review IAW RCM 701(g)(2) or MRE 505(g)(2), but which may contain discoverable material, or, (2) if necessary, to notify the Court with a status of whether the United States anticipates the custodian of classified evidence will claim a privilege IAW MRE 505(c) for the classified information under that entity's control and to file notice IAW MRE 505(i)(2)." *See* Appellate Exhibit 226. The Government stated that "The United States is in the process of completing its review of information that is not under the possession, custody, or control of military authorities and has not been specifically requested by the defense that is owned by the Central Intelligence Agency (CIA), the Department of Homeland Security (DHS), and Office of the Director of National Intelligence (ODNI). The United States is reviewing the information in accordance with their ethical obligation to search for potential *Brady* material and/or their legal obligations under *Williams* in accordance with the Court's 22 June 2012 Order." *Id*. Not surprisingly, the Government is still "in the process" of reviewing all this information for *Brady*. How the Government could not have completed the *Brady* search 839 days after PFC Manning was placed in pretrial confinement defies all logic. One would think that a five person prosecution team, backed by the resources of the United States government, would not need 839 days to conduct a *Brady* search of certain closely aligned agencies. Such delayed disclosure of *Brady* discovery hardly satisfies the R.C.M. 701(a)(6) requirement that such discovery be produced "as soon as practicable."

325. Further, the Defense made a request for *Brady* material from the President's Intelligence Advisory Board in October 2011. In its response to the Defense Motion to Compel Discovery #2, the Government stated, in a footnote, that it was "in the process" of searching for

discoverable information from the Intelligence Advisory Board Government Response. *See* Appellate Exhibit XCVII, p. 4. The Government failed to explain why the Government was still "in the process of searching for discoverable information" seven months after the request was made. Why would it take seven months to search these files? The Defense would venture to guess that the Government's "diligent" search began when the Government received the Defense's motion to Compel Discovery #2 on 10 May 2012.

326. Likewise, as far as the Defense is aware, the Government is still "in the process" of conducting its *Brady* search of all 63 agencies involved in this case. It is deeply troubling that the Government appears to be perpetually "in the process" of conducting these searches without ever reaching the finish line for any of them. Indeed, if there was ever a case where the Government was indefinitely moored in some "waiting posture," it would surely be this case. *See Mizgala*, 61 M.J. at 129 (expressing concern about Government spending too long in a "waiting posture"); *Hatfield*, 44 M.J. at 24 (similar).

327. Equally troubling, it appears that the Government did not even begin reaching out to some of the 63 agencies to begin its *Brady* searches until mid-February 2012, nearly two years after PFC Manning was placed into pretrial confinement. *See* Appellate Exhibit CLXXIII, at 16-19. This revelation came as part of the ONCIX debacle, discussed in detail below, where MAJ Fein admitted that it was after reaching out to ONCIX that the Government became aware that it needed to contact the 63 agencies directly.

328. This, in turn, is inconsistent with the representation that the Government made at the very first 802 session on 23 February 2012 where it stated that it had *already* searched the files of the 63 agencies and not found any *Brady* material. *See* Article 39(a) Audio Recording 23 February 2012, (unauthenticated record of trial) at p. 39. The Government stated that it had searched different sub-agency files, even going so far as to the Department of Agriculture.[27] In this respect, the Court stated:

> Court: 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 when the 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.

[27] "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." Transcript at p. 106.

*Id*. at p. 39. The Court asked, "Is that correct?" to which MAJ Fein responded:

> MAJ Fein: Your Honor, that is correct but also at the same time [we] stated that material continues to evolve because this is an on-going issue.

*Id.* Thus, it is not clear whether the Government began its *Brady* search of the 63 agencies prior or subsequent to February 2012. The Defense believes that the Government conducted an initial *Brady* review of documents at the 63 agencies under the incorrect *Brady* standard. After being set straight about what *Brady* actually entailed, the Defense believes that the Government secretly went back and re-reviewed the documents. The Government did not admit this, of course, as to do so would be to admit a profound lack of diligence. The Defense's theory is the only way that the Government's contradictory statements can be reconciled.

329. The inconsistencies in the Government's story have become par for the course in the deeply dysfunctional discovery process that has plagued this case. Whatever the truth of the matter is, one thing is clear: there has been an overwhelming lack of diligence in conducting *Brady* searches of the 63 agencies and of closely aligned agencies.

**(3) The Government's Failure to Review Any Discovery from the Department of State for Nearly Two Years**

330. The Government has charged PFC Manning with the release of hundreds of thousands of diplomatic cables from the Department of State. One would think that approximately two years into the case, the Government would have, at the very least, reviewed key Department of State documents. Of course, as this Court knows, this is not so.

331. When the Government referred this case on 3 February 2012, it still had not reviewed the Department of State damage assessment, a critical document in the case. And, it wasn't until 18 May 2012 that the Defense actually was given access to the Department of State damage assessment, an assessment that had been prepared nearly a year earlier. The Defense's receipt of the Department of State damage assessment (or, more accurately, the ability to *view* the document under controlled circumstances defined by the Government) came after months of litigation about the meaning of a "completed" damage assessment versus a "draft" or "interim" damage assessment. Even after the Court ordered production of the damage assessment as clearly being within the purview of the Government's *Brady* obligations, the Government made one last "Hail Mary" attempt to avoid producing the document, under the authority of a concurring opinion in a 50-year-old case that was not even remotely on point. *See* Appellate Exhibit LXXV.

332. After the Court ordered that the Defense was entitled to discovery of the Department of State damage assessment, the Defense then began the process of trying to obtain other *Brady* discovery from the Department of State. The Government revealed in late May 2012, two years after PFC Manning was placed in pretrial confinement, that it had not even seen— much less begun reviewing—any other documents from the Department of State. In fact, it had no idea what documents existed at the Department of State. *See* Appellate Exhibit 100, at 2, ("The

prosecution … has consistently stated that the prosecution *intends* to review all documents for Brady and RCM 701(a)(6) material that is provided by the DoS that are responsive.")(emphasis supplied). That that Government didn't get around to even obtaining potentially relevant documents from the Department of State for over 733 days speaks volumes about the lack of diligence that has permeated this case. When juxtaposed with the Government's witness list produced a short while later (on 22 June 2012) which names twenty-two individuals from the Department of State as witnesses, it is clear that what was going on: the Government was cherry picking evidence and witnesses from the Department of State to build its case, while failing to exercise even a modicum of diligence in fulfilling its *Brady* obligations for the Defense.

333. Unfortunately, the Department of State discovery saga did not end there. After the relevant files and documents were identified for the Government via the testimony of three Department of State witnesses, the Government requested an additional thirty days to respond. The Government's response after having been granted the additional thirty days to respond was more of the same unreasonable litigation positions that the Defense had witnesses many times before.

334. The Government's final attempt to protect the Department of State from having to turn over documents involved the Government arguing (undoubtedly at the behest of the Department of State) that the requested documents were cumulative because they predated the damage assessment. The Defense, by way of Response motion, pointed out the sheer absurdity of this position:

> The Government wants this Court to rule that *anything* that predated the State Department damage assessment should not be produced because it is cumulative and not relevant and necessary. …
>
> The Government is asking for permission to simply exclude from discovery anything with a date that preceded the State Department damage assessment – which would, in effect, be *practically everything at the State Department*. It would have the Court do so on the sheer conjecture that this information "likely contributed to[] the Department's draft damage assessment." Government Response, at p. 5.
>
> The Government's request is breathtaking. It would have the Court deny discovery of facially relevant information because this information was "likely" considered by the State Department in compiling the damage assessment. The Government does not even bother to try to make the argument that the discovery is *actually* cumulative (i.e. it is duplicative of information in the damage assessment). That argument would not be true. Instead, it makes the argument that based on the fact that this material predates the damage assessment, it *must be* cumulative (i.e. it is *de facto* cumulative). The Government's lack of logic continues to dumbfound the Defense.
>
> Consider the implications of this request. All an agency would need to do to avoid discovery is to compile some type of ultimate assessment and then claim that anything that predated that assessment was "off limits" because it was

> somehow "considered" in developing the assessment. The contention is ludicrous.
>
> Further, the volume of information that the Government would seek to have the court exclude from its discovery obligations is in the ballpark of 5000 pages. The Government believes that these 5000 pages must have "likely contributed to" the 150 page State Department damage assessment. It is hard to believe that the damage assessment is cumulative when, page-wise, there are thirty-three times more pages in the disputed discovery than in the damage assessment itself.

*See* Appellate Exhibit CCII, p. 2-3.

335. This litigation position was patently unreasonable, as reflected in the Court's ruling. *See* Appellate Exhibit CCXXII. However, having to litigate yet another frivolous Government attempt to resist producing discovery further pushed back the discovery timeline.

336. The Government, after having thirty days to concoct the "predates therefore cumulative" theory, then asked for *additional* time to actually review the material that it resisted producing. The Court generously granted the Government until 14 September 2012 to produce documents from the Department of State, a total of 127 days after the Defense moved to compel discovery of these documents on 10 May 2012. The Government, however, offered no explanation for why it could not have completed this review sometime in the 742 days after PFC Manning had been placed in pretrial confinement. A reasonably diligent prosecutor would have been sure to review all critical documents in this case well before referral, and certainly well before being ordered to do so by this Court, so that the discovery period did not drag on for almost a year after referral.

337. On 14 September 2012, the prosecution made available to the defense for inspection all Department documents responsive to the above Court Order, or otherwise discoverable, for which redactions under RCM 701(g)(2) or MRE 505(g)(2) are not sought (i.e., approximately 6500 pages)." *See* Government *in camera* and *ex parte* Motion for Authorization of Redactions of Department of State Records under MRE 505(g)(2) and RCM 701(g)(2), p.2. And yet, even though the Government claims to have "made available" all Department of State documents, the Defense has not actually received these documents. In reality, the Government's representation is, in fact, a misrepresentation as evidenced by its subsequent clarification:

> For any captioned or otherwise particularly sensitive documents (as explained below, to include NODIS, EXDIS, Roger Channel, DS Channel, or DS-controlled) for which redactions are not sought, the Department *will make the documents* available to the defense counsel and their security experts to inspect at the Department until the end of the court-martial. For all remaining documents for which redactions are not sought, the prosecution *will deliver these documents to the defense by 21 September 2012*. The defense counsel and their experts are not authorized to share the information contained within these documents or their notes with the accused.

*Id.* at 5. Apparently, the Government "will make [certain] documents available" at the Department of State at some unknown point in time. For other documents, the Government "will deliver these documents to the defense by 21 September 2012." *Id.* Accordingly, it is clear that the Government has not complied with the Court's order to "disclose all discoverable information … to the Defense." Instead of requesting leave of the Court to extend the deadline once again, the Government simply granted itself extra time while making it look like it had complied with the Court's order by stating the information was available for inspection by the Defense. In addition to being yet another example of word games played by the Government, the inability to comply with the Court's timeline further evidences the Government's lack of diligence in this case. Provided the Defense actually receives the Department of State discovery on 21 September 2012 pursuant to the Government's unilateral extension of time, these documents will come 846 days after PFC Manning was placed into pretrial confinement.

338. On 19 July 2012, the Court ordered the Government, *inter alia*, to provide to the Defense certain discovery from the Department of State, including dates and times that the Mitigation Team held meetings. It was not until 48 days later, 5 September 2012, that the Government actually got around to completing this task—or more specifically, that the Government tasked a paralegal from its arsenal of paralegals to complete the task. The list of meeting dates/times is inconsistent with the testimony of Department of State witnesses who believed that these meetings ended sometime in the summer of 2011. In reality, the Mitigation Team was still meeting as of 19 December 2011. This is information that is material to the preparation of the defense that should have been, and could have been, disclosed much sooner. There was no reason why the Government needed to sit on this aspect of the discovery request until 9 days before the discovery was technically due. The Government's actions, unfortunately, are consistent with its overall approach to discovery in this case: as little as possible, as late as possible.

**(4) The Government's Casual "Discovery" of Critical Documents**

339. In mid-June 2012, the Government notified the Defense that it had "discovered" an FBI impact statement. The Government's revelation was startling, since the Government and the FBI had been conducting a joint investigation of the accused. The Government offered no explanation for why it had only just now, over two years after PFC Manning was placed into pretrial confinement, "discovered" the FBI impact statement. The Government also offered no explanation for why it did not disclose the impact statement (or even the fact of its existence) when the Defense requested "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" way back in January of 2012. The Government has failed to answer even the most basic of questions: When was the impact statement prepared? When did the Government learn of the impact statement? Why did the Government not disclose its existence to the Defense or to the Court? At oral argument, the Defense pressed for answers to these questions. So did the Court. 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 indicated 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. To date, the Government has not answered any question about the FBI impact statement. Because to answer any such question would be to reveal publicly what everybody already knows: the Government has been wholly negligent in carrying out its discovery obligations.

340. The FBI impact statement is not the only document that the Government happened to "discover" two years into the case. The Government also "discovered" that the Department of Homeland Security had conducted a damage assessment. But that's not all. The Government also "discovered" that the Other Government Agency had conducted a second damage assessment. *See* Appellate Exhibit CCVIII.[28] And let us not forget that the Government "discovered" that ONCIX did, in fact, have a draft damage assessment which would likely be discoverable. It is inexcusable that the Government "discovered" the existence of these important documents, as if by pure chance. The Government is the agency that is prosecuting PFC Manning. Its job is to "discover" the existence, or potential existence, of these documents in a timely manner. Its job is not to sit back and wait to stumble across relevant documents two years into the case. The Government fails to explain why it did not, or could not reasonably have, "discovered" these documents earlier. Again, these casual and last minute "discoveries" speak volumes about the Government's lack of diligence in prosecuting this case.

**(5) The Government's Attempt to Cover up Its Lack of Diligence with Respect to the ONCIX Damage Assessment**

341. The Defense maintains that the ONCIX fiasco reveals that the Government is not simply inept, but untrustworthy as well. The Government's dishonesty with respect to the ONCIX damage assessment shows a "deliberate intent to harm the accused's defense" and weighs significantly in the Article 10 calculus. *See Simmons, supra* at *9 (noting that "negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense").

342. To recap briefly, at the 15 March 2012 motions argument, the Government represented that the Department of State had not "completed" a damage assessment and that ONCIX had not "completed" a damage assessment. After the motions argument, on 21 March 2012, the Court asked the Government to respond to questions regarding whether certain agencies had damage

[28] The Government apparently did not know about this second damage assessment at the 6 June 2012 motions hearing, as no mention was made of it when the Court specifically asked about files from the Other Government Agency.

assessments. The Government's responses with respect to the Department of State and ONCIX were as follows:

a) DOS – "DOS has not completed a damage assessment."
b) ONCIX – "ONCIX has not produced any interim or final damage assessment in this matter."

*See* Prosecution's Response to Court's Email Questions dated 21 March 2012. The Court and the Defense knew, based on previous oral argument and public statements, that the Government's statement regarding the Department of State meant that the Department of State had something (i.e. a draft) – even though there was not a "completed" damage assessment. With respect to ONCIX, the Government's phraseology that ONCIX had neither a completed nor interim damage assessment was designed to deceive the Court and the Defense into believing that *nothing* existed in the hands of ONCIX.

343. The Government had numerous occasions to correct the misimpression it had deliberately created. It did not. The Court was troubled by this:

> Court: Why did you tell me back on the 21st of March that NCIX or ONCIX had no damage assessment? Those were not the exact words you used but go ahead and tell me-
>
> MAJ Fein: Correct your Honor. Your Honor, frankly. Because we do not have access. Or even knowledge, absent us asking a question and receiving it to these files because of the nature of this type of assessment. We ask the questions based off of the Defense's discovery requests.

Article 39(a) Audio Recording 6 June 2012. MAJ Fein implied that he did not have any "knowledge" of the damage assessment; he later admitted that he knew the whole time that ONCIX was working on a damage assessment. If the Government knew that ONCIX was working on a damage assessment, why did it not tell the Court on 21 March 2012? It was clear what the Court was asking at the time – did ONCIX have some type of damage assessment, whether in draft or final form? The Government deliberately misled the Court in not supplying a full answer to the Court's question. This was an obvious attempt to avoid having to produce the ONCIX damage assessment to the Defense.

344. MAJ Fein on behalf of the Government provided a long-winded and contradictory explanation of what apparently happened between ONCIX and the Government. At bottom, he maintained that the Government kept asking questions and ONCIX kept giving the Government the same pro forma response: "ONCIX has not produced any interim or final damage assessments in this matter." *See* Appellate Exhibit CLII, p.4. As argued in detail in Appellate Exhibit CLXXIII, the Government's version of events simply does not ring true.

345. The ONCIX saga plainly shows one of two things. Either it shows: a) that the Government in this case was not diligent in keeping abreast of what discovery was in the hands of ONCIX, and then sought to cover up that lack of diligence through a series of half-truths; or b) that the

Government actually knew what was in the hands of ONCIX but avoided disclosing that information until it felt that it could no longer get away with it, and the concocted a convenient (but implausible) back-story to explain its failure to be forthright. Regardless of which actually transpired, both speak volumes about the abject failures of the Government to process this case expeditiously and to exhibit candor with the Court.

**(6) The Government's Inability to Process Any Discovery Matter in an Expeditious Manner**

346. The Government has shown itself incapable of processing any discovery matter in this case in a diligent and expeditious manner. For instance, the Government caused further delay as a result of its failure to claim any privileges in a timely manner. The case was referred to this Court on 3 February 2012. The Government, if it was processing this case in a reasonably diligent manner, should have been in a position to claim any privileges on that date. Instead, the Government needed to wait until 18 May 2012, almost four months after referral, in order to decide whether it would claim any privileges. After that time, the Government would resort to its "we need to consult with the equity holders" refrain to request an additional 45-60 days to determine whether to claim a privilege. *See e.g.* Appellate Exhibit CXCII, at 6 ("Assuming, *arguendo*, the Court orders production of the above records or some portion thereof, the prosecution requests no less than 45-60 days to notify the Court whether the Department will seek limited disclosure under MRE 505(g)(2) or claim a privilege under MRE 505(c) and to produce the documents under RCM 701(g), MRE 505(g)(2), or MRE 505(c), if necessary."). Why couldn't the Government consult with the equity holder *in advance* to determine whether privilege would be claimed in respect of certain documents? It's not like the Government didn't know that the issue of privilege would come up; after all, this is a classified evidence case. The Government has apparently been unable to multi-task for the duration of this case.

347. As another example of the Government's inability to complete any task in a timely manner, even when the Government promised the Defense discovery by a certain date (which was always long after the Defense requested the information), the Government proved itself unable to keep its deadlines. For example, after notifying the Defense that most of the 14 computer hard drives that were the subject of the first motion to compel and this Court's 23 March 2012 order had been wiped or were inoperable, the Government represented that the 4 remaining hard drives would be provided by 18 May 2012. The hard drives were not provided on 18 May 2012. On 29 May, the Defense asked when it should expect to receive the hard drives. The Government indicated that they would have approval by the end of the week. When it was all said and done, the Defense did not receive the hard drives until 5 June 2012, almost three weeks after the 18 May 2012 deadline set by the Government. There are numerous other instances where the Government has promised discovery by a certain date only to provide that discovery, if at all, well beyond that deadline, but this already lengthy motion would turn into a tome if all of those instances were chronicled.

348. A recent discovery request is also illustrative of the Government's lethargic response rate. On 9 July 2012, the Defense requested the following discovery from Quantico:

> The Defense requests that the Government provide a copy of the video referenced in Bates Number 00042936. According to [redacted], the Quantico Brig recorded an incident where the guards had to assist in freeing PFC Manning from the suicide smock that he was wearing.

*See* Defense Discovery Request, dated 9 July 2012, Attachment 68

349. Despite various follow-up emails from the Defense, it wasn't until 13 September 2012 that the Government responded in a mere three sentences:

> RESPONSE: The Quantico video does not exist. The United States conducted a search but could not locate the video. See Enclosure 1; Enclosure 2.
>
> RESPONSE: The Prosecution has provided all matters requested that are in the Government's possession and understands its continuing obligation to provide information responsive to this request.

*See* Government Discovery Response, Attachment 69. A 66-day turnaround time for a very basic discovery request is not reasonable, but is unfortunately illustrative of the total lack of diligence that the Government has exhibited throughout this case.

**(7) The Government's Failure to Review and Disclose the Existence of Quantico Documents that Had Been in Its Possession for Over Six Months**

350. Finally, the Government substantially delayed the Article 13 motions hearing by its literal eleventh hour disclosure of emails from Quantico that it had been sitting on for months. The Government represented to the Defense that it had the emails in its possession for at least six months prior to the date the Defense Article 13 Motion was due. *See* 27 July 2012 Email from MAJ Fein to Mr. Coombs, Attachment 64.

351. As far back as December 2010 when the Defense filed its initial complaint concerning Article 13, the Government knew that an Article 13 motion would be filed. At the very latest, the Government knew that the Defense would be filing an Article 13 motion after the first motions hearing in February 2012. And yet, despite knowing about the Article 13 motion before it claims to have even received the emails, the Government did not begin its search of these emails until 25 July 2012, two days before the Defense Article 13 Motion was due. *See* 27 July 2012 Email from MAJ Fein to COL Lind, MJ, Attachment 63. In defense of its incredibly late disclosure of the emails, the Government attempted to point out that it disclosed the emails within 24 hours of finding that some of the emails were "obviously material to the preparation of the defense for Article 13 purposes." *Id.* This excuse neglects to mention why the Government waited until two days before the motion was due before it began its review of the emails when the emails had been its possession for over six months, knowing for that entire six-month period about the certainty that an Article 13 motion would be filed. The Government likely offered no excuse for that delay because it is simply inexcusable. The failure to search emails between Quantico officials concerning PFC Manning's confinement conditions until two days before the motion challenging PFC Manning's confinement conditions while at Quantico is worlds apart

from reasonable diligence. What's more, the Defense had made a specific discovery request for any documentation pertaining to PFC Manning's confinement on 8 December 2010, 596 days before the Government even began its review of these emails. While the Government disclosed a bevy of evidence responsive to this request, it surreptitiously withheld the emails.

352. When it did finally disclose the emails to the Defense the night before the Article 13 motion was due, the Government provided the Defense with 84 emails that were "obviously material to the preparation of the defense." *See* 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 has 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*. The Defense then asked how many emails the Government had reviewed; the Government indicated that it had reviewed 1374 emails. *Id*. That the Government waited until 2 days before the Defense filed the Article 13 motion before even looking at one of the 1374 emails is astonishing. What would possess a prosecutor, sitting on a trove of obviously relevant documents, to simply ignore them for months upon end? The lack of diligence is beyond comprehension.

353. 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 are "material to the preparation of the defense." Accordingly, it is clear that the Government was not completely truthful to the Defense about having disclosed all documents that were material to the preparation of the Defense. Again, this is part of a pattern by the Government to withhold damaging and embarrassing discovery at all costs.

354. The Court considered *in camera* whether the remaining 690 emails should be produced as being material to the preparation of the defense. The Court ruled on 14 September 2012 that 678 of these emails were material to the preparation of the defense and ordered that they be produced promptly. *See* Court Ruling Defense Motion to Compel #3, dated 14 September 2012.

355. It is important to put in perspective the veritable gulf that existed between what the Government originally believed what was material to the preparation of the defense and what the Court believed was material to the preparation of the defense. The Government would have produced a mere 6% of the emails as being material to the preparation of the defense. The Court, on the other hand, saw 99% of the remaining emails as being material to the preparation of the defense. What is clear is that the Government has no clue how to apply the standard in R.C.M. 701(a)(2). After all the Defense has endured with the Government's tactics at hiding discovery, the Government's incompetence should come as no surprise. While there can be legitimate arguments about what is or is not material to the preparation of the defense, when the Government is *that far off* in gauging materiality, the conclusion is a singular one: the Government has not been diligent in fulfilling its discovery obligations.

356. It is worth noting that it is only because the Government "got caught" that the thousand plus other emails have seen the light of day. Had the Defense simply accepted the Government's word that it had produced everything that was material to the preparation of the defense (as most defense counsel are forced to do), the Government would have been able to secret these emails away to avoid the embarrassment that will eventually befall many individuals implicated in what happened at Quantico. As a result of the Government's profound lack of diligence with respect to these emails, the consideration of this motion has been delayed even further. The Defense has had to file a supplemental Article 13 motion, and may be required to file a further supplemental motion. The Defense has also had to file and litigate a new request for witnesses. *See* Argument, Part B.4, *infra*. Moreover, the late and piecemeal disclosure of these emails has resulted in the Article 13 motion not being presented in the manner of the Defense's choosing. The fragmented nature of the Defense's argument may (but hopefully will not) undermine the persuasiveness of the overall argument.

**(8) Multiple Discovery Issues are Still Outstanding**

357. As discussed above, a large volume of discovery is *still* outstanding. As of 14 September 2012, 839 days after PFC Manning was placed in pretrial confinement, the Government was still in the process of producing discovery from the Department of Homeland Security, the Department of State, Government Agency, ODNI and the FBI. *See* 14 September 2012 Email from MAJ Fein to COL Lind, Attachment 70. On that date, the Government also provided the Court with proposed redactions and substitutions for several documents under M.R.E. 505(g). The Court will need to review these documents and decide whether the proposed redactions and substitutions are adequate. If they are not, as has been the case with previous Government M.R.E. 505(g) submissions, additional time will be required for the Court and the Government to confer on appropriate redactions and substitutions. And, if the Court decides that that the redacted information is necessary to enable the accused to prepare for trial, then the Government will need additional time to determine whether an equity holder will claim a privilege. *See* Government *in camera* and *ex parte* Motion for Authorization of Redactions of Department of State Records under MRE 505(g)(2) and RCM 701(g)(2), p 5 ("Should the Court find the redacted information is discoverable under RCM 701(a)(6) or Brady/Giglio, relevant and necessary or responsive to the Court's Order for production under RCM 703(f), or is 'necessary to enable the accused to prepare for trial' under MRE 505(g)(2), then the prosecution requests the opportunity to either: (1) address the Court's findings with the relevant government agency to determine whether a different alterative under MRE 505(g)(2) is appropriate and file that alternative with the Court, or (2) allow for the relevant government agency to claim a privilege under MRE 505(c) and the prosecution to move for an *in camera* proceeding under MRE 505(i).").

358. To be clear, we are not talking about one or two documents that are still outstanding. Thousands of documents have yet to be produced to the Defense. The Government indicated that there are at least 6500 pages from the Department of State that have yet to be produced. It defies logic that 839 days into the case, the Government has still not provided the defense with all documents from a key organization. How can the defense prepare for both the merits and sentencing when every document from the Department of State (except for the damage assessment) has yet to be produced? How the Government could charge PFC Manning with the

compromise of hundreds of thousands of Department of State cables, but fail to provide any documentation from the Department of State for well over two years defies all logic and speaks to an inept prosecution. Under no stretch of the imagination can the Government's actions in regard to this discovery be characterized as reasonably diligent.

359. The foregoing is not meant to be an exhaustive list of the many instances that reveal the Government's lack of reasonable diligence in the discovery phase of this case.[29] Rather, the purpose has been simply to provide this Court with telling examples of the Government's profound lack of reasonable diligence in order for it to more clearly see that the Government's processing of this case as a whole cannot be characterized as reasonably diligent under any sensible interpretation of that term.

**c. Total Delay**

360. The undeniable fact of the matter is that PFC Manning has spent the last 845 days in pretrial confinement and still has not had his day in court. If this Court fails to grant the appropriate relief, PFC Manning will have spent 983 days in pretrial confinement before his trial rolls around. This case has been marred with inexplicable discovery errors and an overall unmistakably lethargic pace in the processing of this case. Try as it might, the Government cannot convincingly explain away the fact that PFC Manning has spent 845 days in pretrial confinement (and will conceivably spend over a hundred additional days in pretrial confinement before any evidence is offered against him). Therefore, this second factor in the Article 10 procedural framework and Sixth Amendment analysis must be resolved in PFC Manning's favor.

**3. Demands for Speedy Trial**

361. PFC Manning promptly made two speedy trial demands. He made his first request on 13 January 2011. 13 January 2011 Defense Speedy Trial Request, Attachment 20. He then

[29] There are countless other illustrations of the Government's lack of diligence in this case, independent of the discovery issues. Among them:

- The Government has repeatedly requested additional time to complete simple tasks and to respond to straightforward motions;
- The Government has repeatedly promised to "get back to" the Court on various issues in oral argument and rarely does;
- The Government still has not provided "timely and meaningful" access to Ambassador Kennedy, as promised when it required the Defense to file a *Touhy* request;
- The Government has frequently shifted litigation positions, suggesting that its positions are borne of convenience and not of principle (consider, for instance, the Government's thrice-shifting argument on whether Army Regulation 380-5 was punitive in nature and its arguments on "exceeds authorized access");
- The Government's email system has been plagued by errors that still have not been fixed. Given the volume of email traffic, these issues should have been sorted out months ago;
- The Government's about-face on complying with the Protective Order with respect to Defense redacted motions. The Government argued that it was simply too difficult for it to continue reviewing the redactions;
- The Government's failure to organize logistical issues in a timely manner (e.g. its requirement for a 30 day OPLAN Bravo Order prior to the Article 32, etc.).

renewed his speedy trial request on 25 July 2011. 25 July 2011 Defense Opposition to Government Request for Delay, Attachment 40. Moreover, these speedy trial demands were reiterated in each of the several Defense oppositions to the Government's many requests for delay of the Article 32 hearing. *See* 26 April 2011 Defense Response to Government Request for Delay, Attachment 31 (requesting summaries of or substitutions for withheld classified evidence in order to minimize delay and requesting any delay be credited to the Government for speedy trial purposes); 24 May 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 34 (reiterating same position and requesting any delay be credited to the Government for speedy trial purposes); 29 June 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 37 (same); 27 August 2011 Email from Mr. Coombs to [redacted] Opposing the Government's Request for Delay, Attachment 44 (same); 27 August 2011 Email from Mr. Coombs to [redacted] Opposing the Government's Request for Delay, Attachment 47 (same); 25 October 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 51 (same); 16 November 2011 Email from Mr. Coombs to [redacted] Opposing Government Request for Delay, Attachment 55 (same). Since referral, the Defense has also raised its speedy trial concerns in connection with the Government's discovery delays. *See* Appellate Exhibit XXXI, at 4; Appellate Exhibit XLIII, at 15.

362. Furthermore, PFC Manning's 13 January 2011 speedy trial request, when judged in relation to his total period of pretrial confinement, was made early in the processing of his case, long before his arraignment and the litigation of this speedy trial motion. In *Thompson*, the Court observed that the accused "did not make a speedy trial request during the entire pretrial day period addressed by the military judge." 68 M.J. at 313. Instead, the accused in *Thompson* did not make her speedy trial request until a mere five days before her arraignment and the litigation of the speedy trial motion. *See id.* at 610. Here, by contrast, PFC Manning made his first speedy trial request well in advance of both his arraignment and the litigation of this motion: 407 days before his arraignment on 23 February 2012 and 657 days before the litigation of this speedy trial motion, to be precise.

363. Finally, there can be no dispute regarding the genuineness of PFC Manning's 13 January 2011 and 25 July 2011 speedy trial requests. *Cf. Kossman*, 38 M.J. at 262 (indicating that an accused speedy trial request must be genuine).

364. For these reasons, the third factor in the Article 10 procedural framework and Sixth Amendment analysis must be resolved in favor of PFC Manning.

**4. Prejudice to PFC Manning**

365. As mentioned above, *see* Legal Framework, Part B, *supra*, the prejudice factor of the Article 10 and Sixth Amendment inquiries is concerned with protecting three interests of the accused which speedy trial rights were designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532; *Cossio*, 64 M.J. at 257; *Mizgala*, 61 M.J. at 129. In this case, all three of these interests of PFC Manning have been violated by the Government's processing of this case. With regards to the first interest –

prevention of oppressive pretrial incarceration – PFC Manning endured extremely oppressive pretrial confinement during his time in Quantico, Virginia. *See* Appellate Exhibit 258, at 4, 8-11, 27, 35-37. For 265 days of the 845 days of PFC Manning's continuous pretrial confinement as of the date of this motion, PFC Manning was held in conditions tantamount to solitary confinement at the Quantico Brig. *See id.* at 4. Additionally, he was also held on Suicide Risk in Kuwait for his first two months of pretrial confinement, bringing his final total of solitary confinement-like conditions to 326 days out of his total 845 days in pretrial confinement. *See id.* at 49. While at Quantico, PFC Manning was held under a combination of MAX custody and POI status. *Id.* at 8. That combination meant that for approximately 9 months while at Quantico, PFC Manning was held in his 6x8 cell for 23-24 hours a day. *Id.* His cell did not have a window or any natural light. *Id.* PFC Manning was subjected to constant monitoring, being asked by the Brig guards literally every five minutes whether he was alright. *Id.* at 9. Guards would sometimes wake him in the middle of the night if his face was not visible while he was sleeping. *Id.* In addition, PFC Manning was prohibited from talking to other detainees, exercising in his cell, or even lying down in his rack or leaning up against the wall of his cell during the duty day. *Id.* at 8-11. Finally, PFC Manning was only permitted 20 minutes of exercise time a day for the first six months of his time at Quantico, which he spent walking around a small concrete yard. *Id.* at 8. In December of 2011, the Quantico Brig graciously extended the 20 minutes of recreation call to 60 minutes. *Id.*

366. As if his solitary confinement under MAX custody and POI status was not onerous enough, PFC Manning was subjected to heightened, Suicide Risk type restrictions on two occasions during his confinement at Quantico. *Id.* at 27. The Suicide Risk restrictions were severe. *Id.* PFC Manning was stripped of all clothing with the exception of his underwear. *Id.* PFC Manning's prescription eyeglasses were taken away from him and he was forced to sit in his cell in essential blindness. *Id.* At night, he was forced to surrender his underwear and sleep naked. *Id.* For a consecutive four day period, PFC Manning was forced to stand naked at parade rest where he was in view of multiple guards. *Id.* at 37. Finally, from 7 March 2011 until his transfer from Quantico to the JRCF on 20 April 2011, PFC Manning was required to wear a heavy and restrictive suicide smock which irritated his skin and, on one occasion, almost choked him. *Id.* In total, PFC Manning spent 53 of his 265 days at Quantico under these inhumane conditions. Not surprisingly, the United Nations Special Rapporteur on Torture, Mr. Juan Méndez, concluded that PFC Manning's treatment at the hands of the Quantico officials constituted "at a minimum[,] cruel, inhuman and degrading treatment in violation of article 16 of the convention against torture. If the effects in regards to pain and suffering inflicted on Manning were more severe, they could constitute torture." *Id.* at 41.

367. Moreover, this case is readily distinguishable from *Thompson*, where the Court identified two critical considerations that contributed to its finding that the accused's pretrial confinement was not oppressive for purposes of Article 10. 68 M.J. at 313-14. First, the accused in *Thompson* failed to raise even a single formal or informal complaint about her confinement conditions or to request a change in her confinement conditions. *Id.* Second, the accused entered into a pretrial agreement in which she expressly waived her ability to assert a claim for relief under Article 13 for illegal pretrial punishment. *Id.* Here, by contrast, PFC Manning, both of his own accord and through counsel, made numerous formal and informal complaints regarding his harsh confinement conditions at Quantico, in addition to several requests to be

taken off of MAX custody and POI status. *See* Appellate Exhibit 258, at 47-49 (chronicling the several requests made by Mr. Coombs to the SJA's Office as well as PFC Manning's DD Form 510 complaint, request for release from pretrial confinement under R.C.M. 305(g), and Article 138 requests and rebuttals). Additionally, far from waiving the ability to assert an Article 13 claim for relief, PFC Manning recently filed an Article 13 Motion to Dismiss All Charges, which spans 110 pages and lays out the oppressive treatment of PFC Manning in painstaking detail. *See* Appellate Exhibit 258. A supplementary Article 13 motion was also filed in response to the late disclosure of critical emails. *See* Appellate Exhibit 260. This case, then, stands in stark contrast to *Thompson* with respect to the two considerations relied on by the *Thompson* Court. *See* 68 M.J. at 313-14.

368. Therefore, PFC Manning's pretrial confinement has plainly been oppressive for purposes of the prejudice factor in the Article 10 analysis.

369. Turning to the second interest of the accused sought to be protected by the speedy trial rights, PFC Manning suffered substantial anxiety and concern in his 845 days of pretrial confinement. *See* Appellate Exhibit 258, at 4, 13, 28, 31-33. As an initial matter, the sheer inordinate length of PFC Manning's pretrial confinement itself leads to the common sense conclusion that PFC Manning must have suffered serious anxiety and concern. The Navy-Marine Court of Criminal Appeals' decision in *Calloway* is instructive in this regard. In *Calloway,* the court reversed the military judge's denial of the accused's Article 10 motion to dismiss and held that the Government had violated the accused's Article 10 speedy trial rights by not trying him after he had spent 115 days in pretrial confinement. 47 M.J. at 787. The *Calloway* Court explained the resolution of the prejudice factor in this case:

> The prejudice suffered by the appellant is self-evident in the fact of his confinement. He has been deprived of his liberty for 115 days. Our supervisory court has stated that "3 months is a long time to languish in a brig awaiting an opportunity to confront one's accusers[.]" We perceive that the 115 days that the appellant languished in the brig was longer than Congress considers appropriate, when there was no showing of a reasonably diligent effort by the government to bring him to trial, or even to inform him of the charges against him.

*Id.* at 785 (quoting *Kossman*, 38 M.J. at 261) (citation omitted). Surely if prejudice is "self-evident" in the fact of 115 days of pretrial confinement, *id.*, the substantial prejudice involved in languishing in pretrial confinement for 845 days must be equally unmistakable, if not more so.

370. Moreover, apart from the ordinary anxiety and concern that accompanies any lengthy pretrial confinement, PFC Manning suffered anxiety and concern above and beyond the norm as a result of the oppressiveness of his confinement. For example, during his time in Kuwait from 31 May 2010 until 29 July 2010, PFC Manning's mental health deteriorated. Appellate Exhibit 258, at 4. PFC Manning was anxious, confused and disoriented for much of his time in Kuwait. *Id.*

371. Additionally, PFC Manning's anxiety was only amplified upon his arrival at the Quantico Brig. As was explained by [redacted], the forensic psychiatrist for the Brig, the "[s]uicide

precautions and POI [imposed upon PFC Manning while he was at the Brig] were excessive and were making [PFC] Manning unnecessarily anxious." *Id.* at 13 (quoting affidavit of [redacted]). Indeed, the strain on PFC Manning caused by his excessive confinement conditions was readily apparent in an episode that occurred 18 January 2011. After being harassed by the Brig guards both inside his cell and during his brief period of exercise, PFC Manning suffered an anxiety attack. *Id.* at 28. His heart was pounding in his chest, and he could feel himself getting dizzy. *Id.* The stress PFC Manning was experiencing was so severe that he needed to sit down to avoid falling down. *Id.* In his conversations with two Brig officials after his anxiety attack, PFC Manning's concern for and frustration at his confinement conditions was evident. As for the anxiety attack itself, PFC Manning explained that his anxiety increased because the Brig guards who were harassing him were "edgy" and "anxious." *Id.* at 31. He further explained that he was feeling lightheaded because he was hyperventilating. *Id.* Moving the conversation to the more general topic of his confinement conditions at Quantico, PFC Manning related that he was growing increasingly frustrated. *Id.* at 32. He revealed his "main concern" each day: "[H]ow do I get off of POI status? How do I get off of POI status? When will I be taken off of POI status? What is being used to justify the precautions?" *Id.* PFC Manning explained his frustrating belief that nothing he could do would change the conditions of his confinement: "I feel like the facility, honestly, I feel like the facility is looking for reasons to keep me on POI status." *Id.* at 33.

372. Of course, there was no improvement in PFC Manning's confinement conditions during the remainder of his time at Quantico. In fact, things got even worse, as PFC Manning was placed under a version of pseudo-Suicide Risk restrictions for a total of 53 days out of the remainder of his 93 days at Quantico after 18 January 2011. *Id.* at 27, 35-37. These restrictions could only exacerbate PFC Manning's already heightened anxiety and concern caused by his pretrial confinement. In addition to being severely onerous, these restrictions above and beyond PFC Manning's MAX custody and POI status restrictions were also humiliating and degrading; over a span of four straight days, PFC Manning was forced to suffer, for no apparent legitimate reason, the humiliation of standing naked at parade rest in front of several Brig guards for several minutes each time. After PFC Manning realized that there was nothing he could do to change the conditions of his confinement, he became more withdrawn. As chronicled in the Article 13 motion, this was then used against him in justifying the MAX and POI designations.

373. Therefore, PFC Manning's pretrial confinement has caused PFC Manning to suffer substantial anxiety, concern, frustration and humiliation.

374. Finally, moving to the third, and most important, *see Barker*, 407 U.S. at 532; *Cossio*, 64 M.J. at 257; *Mizgala*, 61 M.J. at 129, relevant interest of the accused – limiting the possibility of impairment of the defense – PFC Manning's ability to effectively prepare his defense was substantially impaired by the Government's profound delay in processing his case. Most glaring has been the Government's inexplicable failure to understand its discovery obligations and to timely conduct its required *Brady* searches. *See* Argument, Part B.2.b.ii, iv, *supra*. How much evidence was either lost or destroyed as a result of the Government's inexplicable failure to understand its discovery obligations for 698 days? There is simply no way to know. The Government will no doubt seize on this point, claiming that any assertion of prejudice resulting from its profound misunderstanding of how military discovery operates is speculative at best.

But this argument would miss the point entirely. To the extent that the Defense's claim that the Government's discovery missteps caused evidence to be lost or destroyed is speculative, this is only because the Government's failure to understand its discovery obligations for such a long period of time raises serious concerns about spoliation of evidence. If the Government understood its discovery obligations from day one of this case, as any reasonably diligent prosecutor would, the case would not still be mired in discovery and the Defense would have no reason to fear that evidence has been lost or destroyed as a result of any inexcusable delay. But this case has not been processed in a reasonably diligent manner. Therefore, because of the substantial delay, which has been seriously compounded by the Government's failure to understand its discovery obligations for the first 698 days of this case, the impairment of the defense cannot even be quantified.

375. Plus, the Government is still "in the process" of conducting its *Brady* searches, including *Brady* searches of its own files. *See* Argument, Part B.2.b.iv, *supra*. This case has been ongoing for 845 days. And the Defense is *still* waiting for the Government to finish its *Brady* searches. In the meantime, the Defense has just recently received critical *Brady* discovery, and it is still awaiting more critical discovery. When the Defense at long last receives all of the discoverable information it has requested, the Defense will need time to review the evidence in planning PFC Manning's defense. Receiving discovery from the Government in dribs and drabs over the course of two years is representative of the Government's lack of due diligence.

376. PFC Manning has also suffered prejudice to the preparation and presentation of his defense by the Government's lack of diligence that is separate and apart from its inexcusable failure to understand its discovery obligations. For example, the Government's lack of diligence in responding to the Defense's discovery requests potentially resulted in the loss of evidence. On 21 September 2011, the Defense requested the preservation of 14 computer hard drives. It was not until that 30 November 2011 that the Government notified the Defense that it was seeking to preserve the requested forensic computer images of the hard drives. Moreover, even before the Defense's request, the CID requested that the hard drives be preserved in September 2010. Nevertheless, the Government notified the Defense on 16 April 2012, eighteen months after the CID's preservation request, that 2 drives were completely inoperable, 7 drives were wiped, and 1 drive was partially wiped. *See* Appellate Exhibit XXXI, at 15-16. While the email did not state when the 8 drives were wiped, if the Government had acted more quickly on the September 2010 CID preservation request, perhaps the wiped drives would have been preserved. Since the Government waited until 30 November 2011 to begin the process of preserving the requested forensic images, over a year and two months after the CID's preservation request, the Government's lack of diligence may have resulted in this loss of evidence.

377. Moreover, the Government's lack of diligence impacted PFC Manning's ability to defend himself at the Article 32 hearing. The Government unloaded a barrage of discovery and forensic evidence in the month or so before commencement of the Article 32 hearing, despite the fact the case had been ongoing for over a year and a half at that time. Because of the sheer volume and lack of organization of this discovery, it was impossible for the Defense to sort through the material and organize it in any coherent manner before the Article 32 hearing took place. Accordingly, the Defense was deprived of the ability to use this evidence at the Article 32 hearing as a result of the Government's untimely disclosure. *See* Footnote 3, *supra*.

378. Finally, the Government's incredibly belated disclosure of the Quantico emails on the night before the Article 13 Motion was due also prejudiced the Defense. The Defense was not able to incorporate these emails into its original motion, so the Defense was required to file a 27 page supplemental motion shortly after receiving the emails. The emails impacted the witness list for the motion. Because of the late disclosure of the emails, the Article 13 motions hearing was pushed back yet again, from late August all the way to late November. Additionally, because the Government only disclosed 84 of the over one thousand emails, the Defense was required to file yet another motion to compel discovery. The Court has subsequently ordered that virtually all the emails be produced to the Defense. The Defense will have to cull through all these emails and potentially file another supplementary motion and/or update its witness list. Most importantly, the Government's lack of diligence prevented the Defense from presenting the Article 13 motion in the manner of its choosing. The Defense would certainly have preferred to have filed one Article 13 motion, rather than one Article 13 motion plus two supplementary motions (not to mention multiple replies to Government responses). If only the Government had diligently reviewed the emails and disclosed them to the Defense, the Article 13 motions and hearing would have been able to proceed on schedule. Because of the Government's lack of diligence, further delay has been piled upon PFC Manning. Therefore, PFC Manning's defense has been impaired by the inordinate delay that the Government has injected into this case. For these reasons, the fourth factor of the Article 10 procedural framework and the Sixth Amendment analysis also must be resolved in PFC Manning's favor.

**5. Balancing the Factors**

379. Each factor in the Article 10 procedural framework and Sixth Amendment analysis points unwaveringly to the conclusion that the Government has violated PFC Manning's Article 10 and Sixth Amendment trial rights. The sheer length of delay – 845 days – makes this case stand apart from all other military cases. The reasons for delay, notwithstanding the Government's assertions to the contrary, are clear and damning. The Government has processed this entire case from beginning to end at a snail's pace. The classification review process inexplicably lagged for 566 days, causing the Government to delay the Article 32 hearing eight times. The Government's failure to understand its basic discovery obligations and how the discovery rules operate in a classified evidence for the first 698 days of this case is as unprecedented as it is inexcusable. Nothing the Government can offer can justify the 845 delay in bringing PFC Manning to trial. Additionally, PFC Manning made a genuine speedy trial demand early on in his confinement, renewed this demand once more, and reiterated these demands every time the Government sought to delay the proceedings further. Finally, PFC Manning has suffered substantial prejudice to all three prejudice interests. Therefore, taking all of the factors together, there can be no doubt that PFC Manning's Article 10 and Sixth Amendment speedy trial rights have been violated. Accordingly, this Court must dismiss all charges with prejudice. *See Kossman*, 38 M.J. at 262 (explaining that dismissal with prejudice is the only remedy for violation of an accused's Article 10 rights); R.C.M. 707(d)(1) ("The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial.").

## CONCLUSION

380. A military accused's right to speedy trial is fundamental. The Government's processing of this case makes an absolute mockery of that fundamental right. The mandate of R.C.M. 707(a) that an accused be arraigned within 120 days of the imposition of restraint has been technically complied with in this case (if all of the Convening Authority's many exclusions are upheld) only because the Convening Authority abandoned any attempt to make an independent determination of the reasonableness of any Government delay request. Instead, the Convening Authority operated as a mere rubber stamp by granting all delay requests, which totaled 327 days, without being provided with or itself providing any reasons that justified the excluded delay as reasonable. Additionally, the Government's delay of the Article 32 hearing and its inexcusable failure to understand its basic discovery obligations have completely flouted the reasonable diligence standard of Article 10. If PFC Manning's right to speedy trial is indeed fundamental, there can be no doubt that the Government's tremendous lack of diligence in the processing of this case violated that fundamental right.

381. In *Kossman*, Judge Wiss observed that "[t]here are no winners when criminal trials are unnecessarily delayed; all are losers." 38 M.J. at 266 (Wiss, J., dissenting). All have lost as a result of the Government's shameful and unjustifiable delay in this case. PFC Manning has lost. The United States Government has lost. The entire system of military justice has lost. There is only one adequate remedy for such a total loss: dismissal of all charges with prejudice.

382. For these reasons, the Defense requests this Court to dismiss all charges and specifications with prejudice because the Government has trampled upon PFC Manning's speedy trial rights.

Respectfully submitted,

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