8 December 2011

MEMORANDUM FOR Article 32 Investigating Officer, [redacted], 150th Judge Advocate General Detachment, Legal Support Organization, MG Albert C. Lieber USAR Center, 6901 Telegraph Road, Alexandria, Virginia 22310

SUBJECT: Witness Justification - United States v. PFC Bradley E. Manning

1. On 2 December 2011, the defense in the above case served a copy of its witness request on the government. Below, the defense sets forth the relevancy of each witness that the government opposes and notes that under Article 32(b) Uniform Code of Military Justice, PFC Manning has the right to cross-examine witnesses against him, and present anything he may desire either in defense or mitigation.

a. [redacted]. As noted in the defense's witness request, the defense believes each of the requested agents is relevant and will provide needed testimony at the Article 32. The defense would like to note that over 22 CID agents participated in the investigation of this case. The fact that the defense-requested agents mirror those of the government (with the exception of [redacted]) should speak to the reasonableness of the defense's request. The defense has requested the attendance of [redacted] in order to provide the Investigating Officer with testimony concerning the joint investigations being conducted by both the Department of State and the Federal Bureau of Investigation. Notably, [redacted] was on the original government's witness list filed on 7 July 2010. According to the government's memo dated 7 December 2011, the other agents "[redacted] can provide the needed testimony." Their testimony, however, will in large part be hearsay evidence about what other agents have done on the case and what witnesses have told these other case agents. Such testimony will do little to aid the Investigating Officer in conducting a "thorough and impartial investigation of all matters" as required by Article 32(a) UCMJ. Further, the defense has a legitimate interest in using the Article 32 hearing as a discovery tool (see discussion to R.C.M. 405(a)). If the defense does not have the opportunity to question the case agents about evidence they developed, witnesses they interviewed, leads they pursued, leads they elected not to pursue, and other relevant matters, the defense will also be denied an important function that the Article 32 investigation is designed to accomplish. Given the status of current and ongoing operations and the fact that case agents are likely spread throughout the United States and overseas, the Article 32 investigation is the only realistic mechanism available to the defense to personally question the case agents involved in the investigation.

b. **Key Leaders of 2nd Brigade Combat Team**: In the defense's witness request, the defense requested that selected key leaders of the 2nd Brigade Combat Team be made available.

1) The relevancy of these witnesses should be obvious. Each of these witnesses can provide different insight into the events that transpired between 1 November 2009 and 27 May 2010. Because each witness viewed the events from a different perspective, their individual testimony is independently relevant. The defense notes for example, that all of the requested witnesses provided sworn statements as part of the Secretary of the Army's 15-6 Investigation. This includes [redacted]. The statements from these witnesses provide different and important details about the events.

(a) [redacted] statement about the perception of the leadership qualities of [redacted] is relevant to their response or lack of a response in this case. Additionally, the fact that [redacted] ultimately decided to remove [redacted] and [redacted] from their respective positions and considered [redacted] "marginal, but not bad enough to either relieve or replace" is also relevant and provides mitigation evidence that the Investigating Officer should consider.

(b) [redacted] will testify not only to [redacted] weak performance and the fact that he was not a strong leader, but he will also testify that [redacted] did not take appropriate action to correct mistakes made by junior members in his unit and did not have control over the S-2 shop. [redacted] will also testify that [redacted] was handicapped by weak NCO leadership and that [redacted] was not an effective leader. [redacted] also provides key testimony regarding the S-2 section's failure to initiate a suspension of PFC Manning's security clearance when it became obvious that such action was required.

(c) [redacted] will testify to the fact he was not kept aware of the problems being suffered by PFC Manning. He will testify the [redacted] and [redacted] failed to inform him of PFC Manning's mental health issues. Differences in details and differing perspectives such as these cannot be resolved by merely looking at the sworn statements or considering the hearsay testimony of the witnesses the government wishes to bring.

(d) [redacted] will testify about the command's lack of relevant information from [redacted] and [redacted] concerning PFC Manning. The failure to provide this information impacted not only the decision regarding whether to deploy PFC Manning, but also the timeliness of the suspension of PFC Manning's security clearance.

2) In its response to the defense witness request, the government states that the defense's proffered testimony regarding the total breakdown in command and control within the S-2 Section and the multiple failures by the unit to take basic steps in response to clear mental health issues being suffered by PFC Manning is somehow "not relevant to the Article 32

investigation and will only serve to distract from the relevant issues." The government cites to R.C.M. 405(a). Inexplicably, the government ignores R.C.M. 405(f) and controlling case law which clearly states an accused has the right to present evidence in defense, mitigation, and extenuation at the Article 32. *See* R.C.M. 405(f) (stating an accused has the right to present evidence in defense, mitigation, and extenuation); Article 32(b), Uniform Code of Military Justice (UCMJ) (stating an accused may "present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested..."); *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004)(ruling that an accused has the right to present anything he may desire in his own behalf at an Article 32 in defense or mitigation). Each of the above requested witnesses will have relevant and independent information of the events that transpired, and all of these witnesses should be produced in order to accomplish the purposes of the investigation. Simply reading the sworn statements of some of these witnesses and hearing from a few others will not allow either party or the Investigating Officer to explore the relevant information. The listed witnesses need to be questioned personally and individually about what they saw, heard, and experienced if there is to be a thorough and impartial investigation.[1]

c. **Key Members of 2nd Brigade Combat Team's S-2 Section**: In the defense's witness request, the defense requested that selected key members of the intelligence section of the 2nd Brigade Combat Team be made available.

1) The relevancy of these witnesses should also be obvious. Each of these witnesses can provide different insight into the events that transpired between 1 November 2009 and 27 May 2010. Because each witness viewed the events from a different perspective, their individual testimony is independently relevant. The defense notes for example, that all of the requested witnesses provided sworn statements as part of the Secretary of the Army's 15-6 Investigation. This includes [redacted]. The statements from these witnesses provide different and important details about the events. Each of these witnesses can provide unique information regarding not only the dysfunctional leadership scheme by [redacted] and [redacted], but also the numerous recommendations to get PFC Manning help both prior to the deployment and during the deployment. Each witness will provide relevant mitigation and extenuation evidence regarding how the S-2 section failed to notify the company commander of the issues PFC Manning was

[1] It is troubling that in the government's response dated 7 December 2011, it objects to every listed witness by the defense that is not also on the government's list. The government does not seem to be interested at all in providing a thorough and impartial investigation. The government indicates that it is going to go to the expense and trouble of bringing two civilian witnesses and other military witnesses from multiple duty locations in the United States and overseas, and yet the government claims that it is too costly and troublesome to bring any of the defense requested witnesses. Such a position defies logic and common sense.

struggling with or the multiple acts of behavior that should have resulted in an immediate suspension of PFC Manning's security clearance.

2) In its response to the defense witness request for relevant S-2 section witnesses, the government states that the testimony of these witnesses is somehow "not relevant to the Article 32 investigation and will only serve to distract from the relevant issues." The government also opines that the breakdown in command and control, the decision to deploy PFC Manning, and the decision to not suspend his security clearance earlier "is not relevant to the Article 32 Investigation and will only serve to distract from the relevant issues." The government cites to R.C.M. 405(a). Again, the government ignores R.C.M. 405(f) and controlling case law which clearly states an accused has the right to present evidence in defense, mitigation, and extenuation at the Article 32. *See* R.C.M. 405(f) (stating an accused has the right to present evidence in defense, mitigation, and extenuation); Article 32(b), Uniform Code of Military Justice (UCMJ) (stating an accused may "present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested…"); *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004)(ruling that an accused has the right to present anything he may desire in his own behalf at an Article 32 in defense or mitigation). Each of the above requested witnesses will have relevant and independent information of the events that transpired, and all of these witnesses should be produced in order to accomplish the purposes of the investigation.

d. **Mental Health Providers**: In the defense's witness request, it requested [redacted] be made available.

1) The relevancy of these witnesses should also be obvious. Each of these witnesses provided mental health treatment to PFC Manning or conducted a behavioral health examination for the command. Because each witness was involved at different times and in different aspects, their individual testimony is independently relevant.

2) The government states the testimony of these mental health providers "is not relevant to the Article 32 investigation and will only serve to distract from the relevant issues." Additionally, the government points to the fact that a R.C.M. 706 board concluded that "PFC Manning did not have a severe mental disease or defect at the time of the allged criminal conduct that resulted in him being unable to appreciate the nature and quality or wrongfulness of his conduct" as a basis to ignore any mental health testimony. Such a position is indefensible. The fact PFC Manning did not have a "severe mental disease or defect" only indicates that he does not have a basis to claim an insanity defense. Such a conclusion does not speak to any diminished capacity or mitigating and extenuating circumstances. *See* R.C.M. 405(f) (stating an accused has the right to present evidence in defense, mitigation, and extenuation); Article 32(b), Uniform Code of Military Justice (UCMJ) (stating an accused may "present anything he may desire in his own behalf, either in defense or mitigation, and the

investigation officer shall examine available witnesses requested..."); *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004)(ruling that an accused has the right to present anything he may desire in his own behalf at an Article 32 in defense or mitigation). Each of the above requested witnesses will have relevant and independent information, and all of these witnesses should be produced in order to accomplish the purposes of the investigation.

e. **Original Classification Authorities (OCA)**: In the defense's witness request, the defense requested each of the individuals that provided OCA reviews be made available.

1) The relevancy of these witnesses should also be obvious. Each of these witnesses provided a unsworn affidavit under 28 U.S.C. § 1746.

2) The government objected to the defense request for any of these witnesses. The government, without any justification, requested that you find the requested witness were not reasonably available given the importance of their respective postion. The government seems to argue that in matters of justice, if you have too important of a position, you should not be bothered. Military justice should not be controlled by the importance of your duty position. Each individual took the time to provide an unsworn affidavit. The defense should be provided with the opportunity to examine these witnesses at the Article 32 hearing.

3) In the event these witnesses are not produced, the defense objects to the Investigating Officer considering their unsworn statements. R.C.M. 405(g)(4)(B). Unsworn statements under 28 U.S.C. § 1746 cannot be considered by the Investgating Officer. The Manual for Courts-Martial requires that testimony given at an Article 32 be under oath. R.C.M. 405(h)(1)(A). If a witness is deemed not reasonably available, the Investigating Officer can consider sworn statements. R.C.M. 405(g)(5)(B)(i). A unsworn statement provided under 28 U.S.C. § 1746 is not a sworn statement. In order for an unsworn statement provided under 28 U.S.C. § 1746 to be admissible, it must be subscribed and signed "in a judicial proceeding or course of justice" in order to subject the declarant to the penalty of perjury at the Article 32 hearing. *See* Article 131 c(3) (noting that "Section 1746 does not change the requirement that a deposition be given under oath or alter the situation where an oath is required to be taken before a specific person."); *See also* 28 U.S.C. § 1746 (noting that the unsworn declaration is not effective in "depositions or an oath of office, or an oath required to be taken before a specified official.")

f. **Current and Former Members of the U.S. Government**: In the defense's witness request, the defense requested [redacted] be made available.

1) The relevancy of these witnesses should be obvious. Each of these witnesses has provided statements that contradict those given by the OCA witnesses regarding the alleged

damage caused by the unauthorized disclosures. Additionally, each of these witnesses is relevant in order to inquire into the issues of unlawful command influence and unlawful pretrial punishment in violation of Articles 13 and 37 of the UCMJ. *See* R.C.M. 405(e) Discussion (stating that inquiry into other issues such as legality of searches or the admissibility of evidence is proper by an Article 32 Investigating Officer).

2) The government apparently has no difficulty obtaining the presence of civilian witnesses when it deems it necessary. The defense requests that the Investigating Officer contact each civilian witness and invite each witness to attend pursuant to R.C.M. 405(g)(2)(B).

3) The defense objects to the witnesses not being produced at the Article 32 based soley on the determination by the government that they are too important to be made available. Assuming the witnesses are not produced, the defense will request a deposition of these witnesses if charges are referred, pursuant to R.C.M. 702 and the holding in *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978).

g. **Mental Health Providers at the Quantico Confinement Facility**: In the defense's witness request, the defense requested [redacted] be made available.

1) The relevancy of these witnesses should is obvious. Each of these witnesses has provided statements that would support the fact PFC Manning was subjected to unlawful pretrial punishment under Article 13 of the Uniform Code of Military Justice. *See* R.C.M. 405(e) Discussion (stating that inquiry into other issues such as legality of searches or the admissibility of evidence is proper by an Article 32 Investigating Officer).

2) The government objects to the defense request, stating that the alleged unlawful pretrial punishment is not relevant at the Article 32 investigation and will only serve to distract from the relevant issues. Whether PFC Manning was unlawfully punished prior to trial is a relevant matter for you to consider. The facts of his unlawful pretrial punishment is appropriate information for you to consider in forming your recommendations to the convening authority. The issue is also important for the integrity of the military justice system and the appearance of fairness in the process.

h. [redacted]: In the defense's witness request, it requested [redacted] be made available. The relevancy of this witness should be obvious. Any agent testifying to the matters allegedly heard by [redacted] would only be testifying to hearsay. Given the potential impact of his testimony, [redacted] must be produced in order to provide for a thorough and impartial investigation.

2. PFC Manning is charged with offenses that carry the maximum punishment of life without the possibility of parole. His charges are among the most serious charges that a soldier can

face. The government must be prepared to accept the costs incurred by the seriousness of the charges that they have preferred against PFC Manning. Anything but the personal appearances of all witnesses requested by the defense and government would deny PFC Manning his right to a thorough and impartial investigation and turn this into a hollow exercise.

3. The government's claim that the cost and burden is too great to require the production and personal appearance of relevant and necessary witnesses is not justified. It was the government's decision to conduct this Article 32 investigation at Fort Meade. The defense's position has been consistent; it does not object to this location provided it has the personal appearance of all relevant and necessary witnesses. The government should not be allowed to use its own decision to conduct the investigation at Fort Meade as a way to avoid making relevant witnesses available.

//s//
DAVID EDWARD COOMBS
Civilian Defense Counsel