IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,
Appellee

v.

Private First Class (E-3)
CHELSEA E. MANNING,
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLANT

Docket No. ARMY 20130739

Tried at Fort Meade, Maryland, on 23 February, 15-16 March, 24-26 April, 6-8, 25 June, 16-19 July, 28-30 August, 2, 12, and 17-18 October, 7-8, and 27 November-2, 5-7, and 10-11 December 2012, 8-9 and 16 January, 26 February-1, 8 March, 10 April, 7-8 and 21 May, 3-5, 10-12, 17-18 and 25-28 June, 1-2, 8-10, 15, 18-19, 25-26, and 28 July-2, 5-9, 12-14, 16, and 19-21 August 2013, before a general court-martial appointed by Commander, United States Army Military District of Washington, Colonel Denise Lind, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error

I.

WHETHER THIS COURT SHOULD DISMISS ALL CHARGES, OR ALTERNATIVELY, AWARD MORE SENTENCING CREDIT, WHERE THE MILITARY JUDGE FOUND MULTIPLE VIOLATIONS OF ARTICLE 13, UCMJ, BUT FAILED TO CONSIDER THAT PFC MANNING WAS IN SOLITARY CONFINEMENT FOR APPROXIMATELY NINE MONTHS WHILE STRUGGLING WITH SEVERE MENTAL ILLNESS? . . . 6

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Introduction

This case arises from Private First Class (PFC) Chelsea E. Manning's disclosure of classified information while serving as an intelligence analyst (35F) in the S2 section of the 2d Brigade Combat Team, 10th Mountain Division (2/10 MTN). She deployed with 2/10 MTN to Forward Operating Base (FOB) Hammer, Iraq in the fall of 2009. She remained there until May 2010. It was around this time the Army discovered she had disclosed classified documents, mostly diplomatic cables and significant activity reports, to a whistleblower website called WikiLeaks.

For what PFC Manning did, the punishment is grossly unfair and unprecedented. No whistleblower in American history has been sentenced this harshly. Throughout trial the prosecution portrayed PFC Manning as a traitor and accused her of placing American lives in danger, but nothing could be further from the truth.

PFC Manning disclosed the materials because under the circumstances she thought it was the right thing to do. She believed the public had a right to know about the toll of the wars in Iraq and Afghanistan, the loss of life, and the extent to which the government sought to hide embarrassing information of its wrongdoing. At sentencing PFC Manning took responsibility for the disclosures and admitted she should have considered

other lawful ways of expressing these concerns. But she was not disloyal and did not harm anyone, nor did she intend to.

What PFC Manning did must be kept in context. She was barely twenty years old when all this happened. Her early life had been difficult—her mom was an alcoholic so PFC Manning was essentially forced to raise herself. Highly intelligent, PFC Manning wished to go to college but she lacked the money for it, so like many others she enlisted in the Army to better her life and pay for college.

A transgender woman, PFC Manning joined the military at a time when the public and the military were still largely unaware of what it means to be transgender (this is still true today). By her own admission, PFC Manning joined the military to "fix" what was "wrong with her." Because PFC Manning could not live openly as a transgender woman, however, her mental and emotional condition deteriorated, manifesting itself into depression, anxiety and other personality disorders.

These conditions affected PFC Manning's ability to cope with stress. Her stress was made worse by the mistreatment she received from fellow Soldiers who thought she was gay. This led to isolation, which further compounded her mental and emotional distress.

The government's litigation strategy was to ignore all of this, and to instead make an example of her. The overzealous

nature of the prosecution made the trial unmanageable, confused the military judge, and caused a myriad of errors. This appeal raises six assignments of error, all of which highlight the government's win-at-all-costs approach to the prosecution.

First, as set forth in Assignment of Error I, the government violated Article 13, Uniform Code of Military Justice (UCMJ), by subjecting PFC Manning to unlawful pretrial confinement for nearly a year. The military judge correctly found Article 13 error, but did not fully credit PFC Manning for the deplorable and inhumane conditions, which were tantamount to solitary confinement. For this alone the charges and specifications should be reversed or her punishment substantially reduced.

Second, as set forth in Assignments of Error II, III, and IV, the government overcharged the case to expose PFC Manning to excessive punishment. This appeal challenges the convictions related to 18 U.S.C. §§ 641, 1030(a)(1) and 793(e). Rather than charging PFC Manning for mishandling classified information, a charge she admitted to, the government charged her with stealing databases (Section 641), using unauthorized software on a classified computer system (Section 1030(a)(1)), and disclosing classified information with knowledge it might harm the national defense (Section 793(e)). As addressed below, the military judge misapprehended and misapplied the law with respect to these

statutes, which unfairly inflated the penalty landscape.

Third, in Assignment of Error V, the defense challenges the military judge's consideration of aggravation evidence that was not directly related to or resulting from the offenses. And finally, in Assignment of Error VI, the defense urges this Court to exercise its broad powers to reconsider the appropriateness of PFC Manning's sentence to confinement. These last two Assignments of Error are at the core of PFC Manning's appeal.

This court possesses broad authority to correct unfair and improper sentences. The defense urges this court to exercise this power to correct perhaps the most unjust sentence in the history of the military justice system. The Army's mantra is to take care of its Soldiers, but the Army has not taken care of PFC Manning. This court should do so. For the reasons described more fully below, a ten-year confinement term will adequately punish her, deter others, and allow her to receive the treatment and care she needs.

Statement of the Case[1]

On the dates indicated in the caption, at Fort Meade, Maryland, a military judge sitting as a general court-martial convicted PFC Manning, pursuant to her pleas, of violating a

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), PFC Manning personally requests this court consider the matters included in the Appendix.

lawful general regulation and conduct prejudicial to good order and discipline and of a service discrediting nature (two specifications), in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934 (2006).

Contrary to her pleas, the military judge convicted PFC Manning of violating a lawful general regulation (four specifications); violating 18 U.S.C. § 641 (five specifications), 18 U.S.C. § 793(e)(six specifications), and 18 U.S.C. § 1030(a)(1) under clause 3 of Article 134; and conduct prejudicial to good order and discipline and of a service discrediting nature, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934 (2006).

The military judge sentenced PFC Manning to total forfeiture of pay and allowances, reduction to the grade of E-1, confinement for thirty-five years, and a dishonorable discharge. The military judge credited PFC Manning with 1,293 days of confinement against the sentence to confinement. The convening authority approved the sentence as adjudged and credited PFC Manning with 1,293 days of confinement against the sentence to confinement.

Assignments of Error

I.

WHETHER THIS COURT SHOULD DISMISS ALL CHARGES, OR ALTERNATIVELY, AWARD MORE SENTENCING CREDIT, WHERE THE MILITARY JUDGE FOUND MULTIPLE VIOLATIONS OF ARTICLE 13, UCMJ, BUT FAILED TO CONSIDER THAT PFC MANNING WAS IN SOLITARY CONFINEMENT FOR APPROXIMATELY NINE MONTHS WHILE STRUGGLING WITH SEVERE MENTAL ILLNESS?

Introduction

The charges and specifications against PFC Manning should be set aside and dismissed because of the cruel and unusual nature of her pretrial confinement at Marine Corps Brig Quantico (MCBQ).[2] Alternatively, this court should award substantially more than 112 days of sentencing credit—the credit the military judge awarded—for the Article 13, UCMJ, and constitutional violations.

The government restricted PFC Manning to solitary confinement for nine months without any meaningful human contact while awaiting trial. The government claimed these conditions were necessary to safeguard PFC Manning. However, the evidence indisputably shows brig officials knew of PFC Manning's already poor and deteriorating mental health, transferred her to a brig that was ill-suited to address her mental health needs, and

[2] Private First Class Manning adopts the arguments raised in Amnesty International's amicus brief on this topic.

purposefully kept her in solitary confinement over the recommendation of the brig's own mental health professionals to avoid unfavorable media attention. Federal courts have found similar confinement conditions to violate the Eighth Amendment's prohibition against cruel and unusual punishment. When the Eighth Amendment is violated so too is Article 13.

As discussed below, 112 days of credit trivializes the harm associated with placing a mentally ill inmate in solitary confinement for several months. For this reason alone the charges should be dismissed because such conduct is outrageous. If this court believes dismissal is too drastic, however, the defense urges it to at minimum award at least ten days of credit for each day PFC Manning was in unlawful pretrial confinement at MCQB.[3]

Statement of Facts[4]

On 29 May 2010, the Army placed PFC Manning in pretrial confinement at FOB Hammer in Iraq for compromising classified information. (App. Ex. 461 at 7). On 31 May 2010, the Army moved her to the Theater Field Confinement Facility (TFCF) at Camp Arifjan, Kuwait, where she remained until 29 July 2010. (App.

[3] PFC Manning was held in pretrial confinement at MCQB for 264 days. A multiplier of 10-to-1 would provide 2640 days of credit, or approximately 7 years toward the 35-year sentence.
[4] The statement of facts is based on the military judge's ruling finding Article 13 violations. These facts are not in dispute unless expressly stated.

Ex. 461 at 7). She was assigned to medium custody with three to six other detainees but then placed on one-to-one watch due to suicide concerns. (App. Ex. 461 at 7). While there PFC Manning exhibited signs of anxiety and admitted to being transgender. (App. Ex. 461 at 7).

On 30 June 2010, PFC Manning was placed on suicide watch after erratic behavior in her cell. (App. Ex. 461 at 7). On 1 July 2010 a provider "recommended that [PFC Manning] be transferred to a facility with more resources for higher care, evaluation, and treatment." (App. Ex. 461 at 9).

> On 3 July 2010 . . . [the] Commanding Officer, Expeditionary Medical Facility Kuwait formally requested the Commander, Theatre Field Confinement Facility to transfer [PFC Manning] to a facility with a separate locked and specialized psychiatric ward or psychiatric nurses, both of which were required to manage a case of this level of high risk and complexity for any extended amount of time.

(App. Ex. 461 at 8).

In June and July 2010, PFC Manning saw the Army's mental health providers several times. They reported seeing "increased levels of regressive behavior," and noted she "appeared thin and exhausted and sat almost the entire time with [her] knees pulled against her chest, looking into space as she spoke." (App. Ex. 461 at 9). PFC Manning admitted "sleeping poorly" and "experiencing mood swings." (App. Ex. 461 at 9). She was proscribed medications for insomnia and recommended to be placed

on suicide watch. (App. Ex. 461 at 9). PFC Manning also informed Army officials she had previously seen a psychologist for obsessive-compulsive disorder, attention deficit hyperactive disorder and generalized anxiety disorder. (App. Ex. 461 at 9).

Throughout July 2010 Army officials closely monitored PFC Manning because of concerns she might commit suicide. (App. Ex. 461 at 10). On 21 July 2010 PFC Manning was provisionally diagnosed with "Depressive Disorder [Not Otherwise Specified (NOS)] requiring further time and observation to make a final diagnosis." (App. Ex 461 at 10). On 28 July 2010 PFC Manning's chief medical provider "prepared a summary of the mental health condition and treatment . . . during her time in confinement at TFCF. The Assessment for Axis 1 was anxiety disorder NOS, depressive DO NOS (Provisional, R/oMDD, Probable Gender Identity Disorder (by previous assessment). (App. Ex. 461 at 11). The next day the Deputy Commander of TFCF wrote a memo stating PFC Manning's mental state had "deteriorated" and recommended "transfer to a facility with adequate specialized resources and mental health professionals available to manage [her] case over an extended period of time, which did not exist at the facility in Kuwait." (App. Ex. 461 at 11).

The Army transferred PFC Manning to MCBQ on 29 July 2010. (App. Ex. 461 at 11). Due to cutbacks, MCBQ was not equipped to house PFC Manning. As the military judge explained:

> [o]n or about June 2010, as a result of the Base Realignment and Closure Act of 2005 (BRAC 2005), MCBQ was converted from a level 1 facility to a pretrial confinement facility. Resourcing was cut 50%. **MCBQ was not structured to be a long-term pretrial confinement facility.** Post-trial prisoners could be held at MCBQ for 30 days pending transfer. MCBQ was not resourced to house pretrial detainees for more than 180 days (*see* Pretrial Confinement Zero Based Review – App. Ex. 280, volume 3 of 6, pages 00513119 and 00513073-88). Pretrial detainees housed at MCBQ after July 2010 were typically held from two weeks to three months. **MCBQ was not resourced for long term mental health or other treatment programs. There were no organic mental health assets.** Pretrial detainees at MCBQ after July 2010 were assigned custody classification of either Maximum (MAX) or Medium In (MDI). All pretrial detainees regardless of custody level were housed in individual cells in Special Quarters 1 (SQI) that were 6’ wide by 8’ long and 8’ high. The accused was housed in the same sized cell as all the other pretrial detainees at MCBQ regardless of custody level and status. During the 264 days the accused was in pretrial detention at MCBQ, the brig averaged between 5 and 20 prisoners staying a length of two weeks to approximately three-four months. No other prisoner during [PFC Manning’s] tenure at MCBQ was on [Prevention of Injury (POI)] status longer than a few weeks.

(App. Ex. 461 at 11)(emphasis added).

According to the military judge, the MCBQ’s “approach to maintaining [PFC Manning] on POI status was to err on the side of caution and even over-caution” because of the military’s concerns about suicide. (App. Ex. at 12). Prior to PFC Manning’s arrival at MCBQ, brig officials notified the convening authority

about “MCBQ’s lack of resources for long-term pretrial detainees.” (App. Ex. 461 at 11).

On 29 July 2010 the brig rated PFC Manning’s classification level as MDI (or medium custody) but the brig duty supervisor overrode the decision and placed her in Suicide Risk (SR)/POI. (App. Ex. 461 at 13). Importantly, brig staff were “aware PFC Manning was a high profile detainee who would bring media and other attention to (sic) Quantico brig and case.” (App. Ex. 461 at 12). To further this point, on 9 August 2010—shortly after PFC Manning’s arrival—the base commander, Lt Gen George J. Flynn, forwarded a New York Times article concerning the suicide of a former high profile inmate, stating “the command needed to cover down on lessons learned from that case.” (App. Ex. 461 at 12). He “stressed the absolute necessity of keeping a close watch on the accused to include brig, medical, chaplain, and transport personnel.” (App. Ex. 461 at 12).

On 9 August 2010 PFC Manning’s mental health provider–who senior brig staff distrusted[5]–recommended downgrading PFC Manning’s status from SR. (App. Ex. 461 at 12). The brig commander questioned the recommendation, which further led to a breakdown in the relationship between brig leadership and the

[5] Their distrust stemmed from a belief the medical officer had missed indicators for suicide risk in a prior high profile case. (App. Ex. 461 at 12).

big provider. “There was no meaningful communication between [brig leadership] and [the mental health provider] regarding [PFC Manning’s] mental health condition and what, if anything, that condition and [her] behaviors contributed to the necessity of maintaining [her] on POI status.” (App. Ex. 461 at 14).

While on POI status, PFC Manning was prevented from any meaningful human contact and subjected to unusually harsh and unnecessary conditions. For example, she was restricted to her cell except for exercise (which was no more than an hour, and most of the time less than 20 minutes) and limited calls (i.e., sunshine, television, library, etc.). (App. Ex. 461 at 15). Brig guards monitored PFC Manning at all times and for all practical purposes prohibited her from engaging in any social contact with other inmates. (App. Ex. 258 at 8).[6] When PFC Manning left her cell the brig prohibited her from having contact with any other detainees. (App. Ex. 258 at 8). She was allowed occasional non-contact visitors during limited hours on weekends and holidays and only permitted contact visits with counsel. (App. Ex. 461 at 16).

[6] This is a topic of dispute. The military judge states that PFC Manning could talk in a low tone to inmates in adjacent cells, but in reality the cells adjacent to PFC Manning were rarely occupied and when PFC Manning attempted to speak to inmates several cells over, guards stopped her. (App. Ex. 258 at 8).

PFC Manning had to sleep in her underwear, for virtually the entire period of confinement at MCBQ had no personal items in her cell, had to request toilet paper each time she used the bathroom and soap each time she washed her hands. She could not exercise in her cell, where she spent the vast majority of her time. (App. Ex. 461 at 16). One of the most shocking aspects of PFC Manning's confinement occurred during sunshine call, where:

> [she was] brought to a small concrete yard, about half to a third of the size of a basketball court. PFC Manning would be permitted to walk around the yard in hand and leg shackles, while being accompanied by a Brig guard at [her] immediate side (the guard would have his hand on PFC Manning's back). Two or three other guards would also be present observing PFC Manning. PFC Manning would usually walk in figure-eights or some other pattern. [She] was not permitted to sit down or stay stationary.

(App. Ex. 258 at 8).

Defense counsel complained of PFC Manning's conditions on numerous occasions, and specifically requested a reduction from MAX to MDI. (App. Ex. 461 at 17). The brig mental health provider recommended downgrade from POI status in January 2011. (App. Ex. 461 at 17). In January a heated exchange occurred between brig staff and PFC Manning's provider. The provider stated, "POI was not justified from a medical point of view" and "told the brig staff to call POI something else if they wanted to maintain the accused on that status for security reasons

because it was not warranted for psychiatric status." (App. Ex. 461 at 17). The brig commander stated PFC Manning "would remain on POI status and that if keeping [her] on that status was required to get [her] to trial, [that is] what they would do." (App. Ex. 461 at 17).

Shortly thereafter, a new mental health provider was assigned to MCBQ. The provider also found "PFC Manning had no current suicidal thoughts or intent and that [she] was psychologically cleared to come off POI status." (App. Ex. 461 at 17). He recommended that PFC Manning "did not need to be segregated from the general population due to a treatable mental disorder, and that [she] required routine further examination." (App. Ex. 461 at 17).

Finally, also in January 2011 the brig commander ordered a review of MCBQ to determine if it had the appropriate resources to serve as a joint or regional pretrial confinement facility.

> **The review found in relevant part that MCBQ was not resourced to house long-term pretrial detainees for more than 180 days and was not resourced to house high profile pretrial detainees requiring maximum security and with complex mental health issues**. The zero based review further recommended that (sic) the brig policy provision changes: (1) the provision mandating detainees in SR/POI status receive a custody classification of MAX should be changed to provide that custody and status evaluations to be conducted separately; (2) clarify the authority of a Medical Officer to determine what protective measures are necessary based on a mental health evaluation, and of a [Brig

> Officer] to impose, or re-impose, additional protective measures based on subsequent behavior; (3) establish a separate [special quarters] and general population quarters; and (4) ensure that the [Brig Officer] returns detainees to the appropriate conditions or quarters when no longer considered to be suicide risks by a Medical Officer. The [procedures] should also state that, absent additional factors, the [Brig Officer] may not place, or return, a detainee to [suicide prevention] status and impose associated protective measures. Ultimately the zero based review recommended the confinement facility at MCBQ be closed.

(App. Ex. 461 at 21)(emphasis added).

The brig commander ignored all the medical providers' recommendations and kept PFC Manning on POI status for another three months until 20 April 2011, when she was transferred to Joint Regional Confinement Facility (JRCF), Fort Leavenworth, Kansas, where PFC Manning was classified MDI, *immediately put into population*, and remained in that status through trial. (App. Ex. 461 at 21).

Standard of Review

Whether the charges should be dismissed or more sentencing credit granted under Article 13, UCMJ, involve mixed questions of fact and law. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). This court "defer[s] to the findings of fact by the military judge where those findings are not clearly erroneous. However, [its] application of those facts to the constitutional and statutory considerations, as well as any

determination of whether [PFC Manning] is entitled to credit for unlawful pretrial punishment involve independent, de novo review." *Id.*

Law and Argument

The factual record shows PFC Manning suffered from various serious and persistent mental illnesses. The brig lacked the resources to treat PFC Manning's conditions, so, to compensate for the lack of resources and to avoid public scrutiny in the unlikely event PFC Manning attempted suicide, the brig placed her in solitary confinement because it was easier. Before PFC Manning was transferred to MCBQ the government knew it lacked the resources to meet PFC Manning's needs. The MCBQ expressed these concerns to the convening authority, but they were ignored.

Once a new medical provider who was trusted took over, the brig commander relented and realized MCBQ was not suited to detain PFC Manning, and that she should be transferred to another facility. That facility immediately classified PFC Manning in MDI status, which shows that the MCBQ classification system was arbitrarily applied and more restrictive than necessary to ensure PFC Manning's presence at trial. Finally, PFC Manning did not benefit from any meaningful human contact for the entire duration of her detention at MCBQ, which exacerbated her condition.

"Article 13, UCMJ, prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial." *Id.* at 227. Under the first prohibition, the intent to punish can be inferred from whether the government lacked a legitimate purpose for the confinement conditions. *See United States v. McCarthy*, 47 M.J. 162, 165 (C.M.A. 1997). Whereas under the second prohibition, the court examines whether the conditions are so excessive as to constitute punishment. *See King*, 61 M.J. at 227.

The military judge correctly found PFC Manning's Article 13 rights were violated. The ruling is wrong, however, because it gives no consideration for the nine months PFC Manning spent in solitary confinement while suffering from severe mental illnesses. The military judge made two overarching errors with respect to this issue. First, she found PFC Manning was not in solitary confinement and second gave no consideration to the effect the pretrial confinement had on PFC Manning while she was suffering from severe mental illness.

1. PFC Manning's confinement conditions were tantamount to solitary confinement.

The military judge erred when she found PFC Manning was not placed in solitary confinement because she had "daily human contact." (App. Ex. 461 at 23). In her ruling, the military

judge defined solitary as “alone and without human contact.” (App. Ex. 461 at 23). This is not the correct definition of solitary confinement.

“A servicemember is entitled, both by statute and the Eighth Amendment, to protection against cruel and unusual punishment.” *United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000). Although solitary confinement is not a per se violation of the Eighth Amendment, it is certainly a significant factor this court should consider when fashioning an appropriate remedy under Article 13.

Human contact does not itself address whether confinement is solitary. “[I]solating a human being from other human beings year after year or even month after month can cause a substantial psychological damage, even if the isolation is not total.” *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988). The constitutional interest in protecting detainees from solitary confinement arises when they are subjected to “23 hour-a-day in cell isolation, limited physical exercise, and limited human interaction[.]” *Wilkerson v. Goodwin*, 774 F.3d 845, 855-56 (4th Cir. 2014). Solitary confinement can arise merely from being placed in protective custody, which necessarily will include contact with prison staff. *United States v. Amaro*, 2009 CCA LEXIS 235 (A.F. Ct. Crim. App. 16 June 2009).

The Court of Appeals for the Armed Forces (CAAF) effectively addressed this issue in *King*. There, the Court granted pretrial confinement credit where the accused was placed in "segregation in a six-by-six, windowless cell." 61 M.J. at 228. "Placing King in a segregated environment with all the attributes of severe restraint and discipline, without an individualized demonstration of cause in the record, was so excessive as to be punishment and is not justified by the Barksdale AFB confinement facility space limitations." *Id.* at 229.

As in *King*, the MCBQ had no legitimate reason to hold PFC Manning in segregation for months on end. The medical officers made numerous recommendations to reduce her confinement conditions. The brig commander ignored these recommendations based on issues outside PFC Manning's control—the dysfunctional relationship between the brig's medical and operational staff, concerns over publicity, and the lack of resources. Just as *King* found space limitations were not a justifiable reason to hold an accused in segregation, PFC Manning's conditions were unreasonable and baseless. The mere fact that the JRCF placed PFC Manning in MDI immediately after transferring her from MCBQ resolves whether her confinement conditions at MCBQ were reasonable—they obviously were not because, had they been, the JRCF would have classified her as a suicide risk too.

2. The military judge failed to consider that PFC Manning suffered from serious mental illness while in solitary confinement.

The military judge's ruling also misses the mark with respect to the punishing effects solitary confinement can have on detainees with serious mental health issues. The military judge focused only on whether PFC Manning's mental health condition warranted SR or POI status. While this is a relevant consideration for Article 13, the military judge should have also considered, as most courts do, the harm such practices can have on inmates with serious mental illnesses.

Judge Tanya Pratt from the United States District Court for the Southern District of Indiana explained the various harms associated with this practice:

> [T]here are three ways in which segregation is harmful to prisoners with serious mental illness. The first is the lack of social interaction, such that the isolation itself creates problems. The second is that the isolation involves significant sensory deprivation. The third is the enforced idleness, permitting no activities or distractions. These factors can exacerbate the prisoners' symptoms of serious mental illness. This condition is known as decompensation, an exacerbation or worsening of symptoms and illness.

Indiana Prot. & Advocacy Servs. Comm'n v. Comm'r, Indiana Dep't of Correction, 2012 U.S. Dist. LEXIS 182974, *38 (S.D. Ind. Dec. 31, 2012).

It is already well established that putting prisoners with significant mental health illnesses in solitary confinement constitutes cruel and unusual punishment. *See, e.g., Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995)(holding that policy of placing mentally ill inmates in segregation constituted cruel and unusual punishment); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1118 (W.D. Wis. 2001)("Credible evidence indicates that Supermax is not appropriate for seriously mentally ill inmates because of the isolation resulting from the physical layout, the inadequate level of staffing and the customs and policies."). These considerations played a major role in the United States Department of Justice's recent decision to recommend broad changes to the practice of placing certain inmates in solitary confinement.

> The Department believes that best practices include housing inmates in the least restrictive settings necessary to ensure their own safety, as well as the safety of staff, other inmates, and the public; and ensuring that restrictions on an inmate's housing serve a specific penological purpose and are imposed for no longer than necessary to achieve that purpose. When officials determine that an inmate must be segregated from the general population, that inmate should be housed in safe, humane conditions that, ideally, prepare the individual for reintegration into both the general prison population and society at large.[7]

[7] U.S. Department of Justice Report and Recommendations Concerning the Use of Restrict Housing, Final Report, January 2016. Available at

It is beyond dispute PFC Manning suffered from severe mental illness while in pretrial confinement, and that brig officials knew of her condition. She was diagnosed with a number of conditions, including anxiety and depression. Her mental condition deteriorated while confined, no doubt because of the oppressive conditions. The military judge did not take any of these factors into consideration when she awarded only 112 days of confinement credit. Her analysis focused solely on whether the confinement classification violated policy.

3. Dismissal is warranted under these facts, or alternatively, at least 10-to-1 sentencing credit.

The court may, in the interest of justice, dismiss charges to remedy Article 13 violations when warranted. *See United States v. Fulton*, 59 M.J. 767, 769 (A.F. Crim. Ct. App. 2000). When balancing the various competing interests in this case, dismissal is the most appropriate remedy because no amount of sentencing credit can cure the military's mistreatment of PFC Manning. The relevant decision-makers knew PFC Manning suffered from severe mental illness, acknowledged that she needed specialized medical care, understood MCBQ lacked the resources to provide appropriate care, and detained her there anyway. The

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https://www.justice.gov/dag/file/815551/download (last accessed 10 May 2016).

government's interest in confining PFC Manning is far outweighed by the constitutional prohibition against cruel and unusual punishment.

If this court determines dismissal is not warranted, then it should provide additional sentencing credit beyond the 112 days provided by the military judge. The awarded credit is inadequate because it does not address the entire period of PFC Manning's pretrial confinement at MCBQ (she was confined there a total of 264 days); nor does it address the fact that PFC Manning was in solitary confinement while suffering from serious mental illness. In *King* the Court awarded 3-to-1 credit for an Article 13 violation that was not nearly as serious as here. 61 M.J. at 229. The defense recommends a minimal credit of 10-to-1. This would provide about seven years of sentencing credit, or about one-fifth of the adjudged confinement of thirty-five years.

Conclusion

The record provides more than enough evidence to establish that the brig's treatment of PFC Manning not only violated the Eighth Amendment and Article 13, but also was outrageous and completely unjustified. The conviction should be reversed and charges and specifications dismissed.

II.

WHETHER THE MILITARY JUDGE MISINTERPRETED THE DEFINITION OF "EXCEEDS AUTHORIZED ACCESS" IN THE COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. § 1030(a)(1)(SPECIFICATION 13 OF CHARGE II)?

Introduction[8]

Private First Class Manning was convicted under clause 3 of Article 134, UCMJ, of one specification of violating 18 U.S.C. § 1030(a)(1) of the Computer Fraud and Abuse Act (CFAA) by using a software program called W-get[9] on a classified computer to search for and download diplomatic cables maintained in a State Department database. (Specification 13 of Charge II). Section 1030(a)(1) of the CFAA requires proof that an accused obtained classified information from a computer "without authorization" or in "excess of authorized access."[10] The government alleged PFC Manning "exceeded authorized access" by using W-get in a manner that was contrary to Army policy. (App. Ex. 609 at 6).

The defense challenged the government's interpretation of the statute, arguing it was required to prove PFC Manning had no

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[8] Private First Class Manning adopts the Electronic Frontier Foundation's amicus brief on this issue.

[9] W-get is a "free software package for retrieving files using HTTP, HTTPS and FTP, the most widely used Internet protocols." GNU Operating System. Available at https://www.gnu.org/software/wget/ (last accessed 7 May 2016).

[10] The CFAA defines "exceeds authorized access" as "access[ing] a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6).

right of access to the cables, at all, under any circumstance. (App. Ex. 609 at 5). Her use of W-get was irrelevant.

At trial the defense also presented substantial evidence showing the Army lacked a clear, enforceable policy against the use of software programs like W-get on classified computers, and that PFC Manning was never made aware of the restrictions. (App. Ex. 595 at 10-14).

Had the military judge correctly applied the well-established law of this and higher courts with respect to the rule of lenity, PFC Manning would not have been convicted of violating 18 U.S.C. § 1030(a)(1). This court has strictly applied the rule of lenity in similar cases, making clear that any ambiguity concerning a statute's meaning "*must* be resolved in favor of the accused." *United States v. Williams*, __ M.J. __, 2016 CCA LEXIS 195, *10 (Army Ct. Crim. App. 30 Mar. 2016)(emphasis in original)(finding the word "exposure" in Article 120, UCMJ, to be ambiguous and resolving in favor of the accused).

Without question the military judge adopted an overly broad definition of "exceeds authorized access." In fact, the military judge's broad reading of the statute is not supported by the legislative history of the statute or the decision of any court in the country. *See id.* at *13 ("In the absence of unambiguous legislative intent or clear precedential legal support to apply

an expansive reading to the plain language of Article 120(n), UCMJ, we find the evidence legally insufficient to sustain a conviction for indecent exposure."). The ruling subjected PFC Manning to an additional ten years of confinement and dramatically changed the sentencing landscape, which directly contributed to the grossly excessive sentence. As shown below, PFC Manning's use of W-get cannot by itself establish that she "exceeded authorized access" within the meaning of the CFAA.

Statement of Facts

In Specification 13 of Charge II, the government charged PFC Manning under clause 3 of Article 134 with violating 18 U.S.C. § 1030(a)(1) for knowingly exceeding authorized access on a Secret Internet Protocol Router Network (SIPR) computer in order to obtain classified cables maintained in a State Department database. (Charge Sheet). At the time of referral, the government's theory was that PFC Manning had violated the Army's acceptable use policy (AUP) by accessing the cables for an unauthorized purpose. (App. Ex. 91 at 2).

The defense filed a pre-trial motion to dismiss pursuant to Rule for Court-Martial (R.C.M.) 907(b)(1)(B) challenging the government's theory. (App. Ex. 90). The crux of the motion was that the government could not satisfy the "exceeds authorized access" element merely by presenting evidence PFC Manning had accessed the information for an improper purpose or in violation

of the Army's AUP. The military judge agreed with the defense's interpretation of the statute. (App. Ex. 139 at 9)("Applying the Rule of Lenity, the Court shall adopt the narrow meaning of 'exceeds authorized access' under the CFAA and instruct the fact finder that the term 'exceeds authorized access' is limited to violations of restrictions on *access* to information, and not restrictions on its 'use'".). (App. Ex. 139 at 9)(emphasis in original).

The ruling correctly reflected the intent of the CFAA. "The statute is not meant to punish those who use a computer for an improper purpose *or in violation of the governing terms of use*, but rather the statute is designed to criminalize electronic trespassers and computer hackers." (App. Ex. 139 at 7)(emphasis added).[11] Although the military judge agreed with the defense's interpretation of the statute, and adopted a narrow definition of "exceeds authorized access" as the rule of lenity requires, she declined to dismiss the charge because the government represented that it would present evidence other than the AUP at trial. (App. Ex. 139 at 8-9).

The government then came up with new evidence and a new theory, consisting of the following: rather than alleging PFC

[11] The government conceded in pretrial briefing that 18 U.S.C. § 1030(a)(1) is aimed at circumventing computer hackers. (App. Ex. 188 at 5).

Manning accessed the cables for an improper purpose, the government would instead seek to prove she "bypassed the ordinary method of accessing information by adding unauthorized software [i.e., W-get] to [her] SIPRNET computer and using that software to rapidly harvest or data-mine the information. W-get was not available on the computers used by the accused or authorized as a tool to download the information." (App. Ex. 188 at 5). The government argued the Army's policy of prohibiting the use of unauthorized software on classified computers was *an access restriction* within the meaning of the CFAA. (App. Ex. 188 at 3)("The authority to access information cannot be meaningfully separated from the manner in which one does so. An individual's 'authority' to do practically everything is limited by specific circumstances or by the scope of that authority, and this case is no different.").

The defense again filed a motion to dismiss because even under the government's new theory, PFC Manning's security clearance allowed her to access all the cables. (App. Ex. 170 at 5). Whether she used W-get while accessing the cables was also irrelevant for purposes of the statute. This time, however, the military judge sided with the government.

The ruling relied on a 1996 Senate Judiciary Committee Report describing various amendments to the CFAA. *See* S. Rep. No. 104-357, at 6. The amendments were made to "bring the

protection for classified information maintained on computers in line with [federal] espionage laws." *Id.* at 5. ***Importantly, the following language in the Report appears to have swayed the military judge's interpretation of the statute in favor of the government***:

> [a]lthough there is considerable overlap between 18 U.S.C. § 793(e) and section 1030(a)(1), as amended by the NII Protection Act, the two statutes would not reach exactly the same conduct. Section 1030(a)(1) would target those persons who deliberately break into a computer to obtain properly classified Government secrets then try to peddle those secrets to others, including foreign governments. In other words, unlike existing espionage laws prohibiting the theft and peddling of Government secrets to foreign agents, section 1030(a)(1) would require proof that the individual knowingly used a computer without authority, or in excess of authority, for the purpose of obtaining classified information. In this sense then, it is the use of the computer which is being proscribed, not the unauthorized possession of, access to, or control over the classified information itself.

Id. at 6-7.

From this part of the legislative history, the military judge broadly and expansively interpreted the phrase "exceeds authorized access" to include ***manner of access*** restrictions reflected in Army policies.

> Restrictions on access to classified information are not limited to code based or technical restrictions on access. Restrictions on access to classified information can arise from a variety of sources, to include

> regulations, user agreements, and command policies. Restrictions on access can include manner of access. The two are not mutually exclusive.

(App. Ex. 218 at 2). The ruling permitted the government to proceed to trial on the theory that PFC Manning's use of W-get was itself sufficient to establish that she accessed classified information in "excess of authorized access."

After the presentation of evidence the defense filed a motion for a finding of not guilty pursuant to R.C.M. 917(d). (App. Ex. 595). The defense again challenged whether 18 U.S.C. § 1030(a)(1) criminalized PFC Manning's use of W-get. (App. Ex. 595 at 2)("PFC Manning's purported use of this allegedly unauthorized program to download the information specified in Specification 13 of Charge II does not change the only fact that matters in the 'exceeded authorized access' inquiry: PFC Manning was authorized to access each and every piece of information [she] accessed."). The military judge denied the motion, and in doing so, adopted an even broader reading of the statute:

> Although the definition for "exceeds authorized access" is the same for all sections of 18 U.S.C. § 1030, access restrictions on classified information can be more stringent than for other information and can include manner of access restrictions designed to ensure the security and protection of the classified information and to prevent the classified information from exposure to viruses, trojan horses or other malware.

(App. Ex. 609 at 6).

Finally, the military judge found sufficient evidence had been introduced at trial to support the allegations. "Evidence that the accused used unauthorized software, W-get, to access and download the classified records charged in Specification 13 of Charge II provides some evidence . . . that the accused 'exceeded authorized access' on a SIPR computer." (App. Ex. 609 at 7).[12]

The issue on appeal is straightforward—did the military judge err by broadly interpreting "exceeds authorized access" to include manner of access restrictions designed to keep classified information free from exposure to viruses, trojan horses and other malware? As shown below, the government cannot point to any unambiguous and definitive legal authority to support the military judge's broad reading of the statute—not the plain language of the statute, the statute's legislative history, or even case law in other jurisdictions. Therefore, the

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[12] The military judge made the following factual finding.

> The government has presented testimony by Special Agent (SA) David Shaver, Mr. Jason Millman, CPT Thomas Cherepko, and Mr. Mark Kirtz that W-get is not authorized software for a DCGS-A computer and, even if it was, W-get, as executable software, was required to be installed by Mr. Millman on the DCGS-A computers.

(App. Ex. 609 at 6).

rule of lenity requires dismissal of the charge and specification.

Standard of Review

This court reviews questions of statutory interpretation de novo. *See United States v. Atchak*, 75 M.J. 193 (C.A.A.F. 2016); *United States v. Vargas*, 74 M.J. 1, 5 (C.A.A.F. 2014); *Williams*, 2016 CCA LEXIS 195 at *5.

Law and Argument

18 U.S.C. § 1030(a)(1) makes it unlawful to knowingly access a computer "without authorization or to exceed authorized access" to obtain classified or other restricted information with reason to believe such information could be used to the injury of the United States. The statute defines "exceeds authorized access" as "**access[ing] a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter**." 10 U.S.C. § 1030(e)(6)(emphasis added). Congress enacted the CFAA **"**to address the growing problem of computer hacking, recognizing that, 'in intentionally trespassing into someone else's computer files, the offender obtains at the very least information as to how to break into that computer system.'" *United States v. Nosal (Nosal III)*, 676 F.3d 854, 858 (9th Cir. 2012)(quoting S. Rep. No. 99 – 432, at 9 (1986), 1986 U.S.C.C.A.N. 2479, 2487 (Conf. Rep.)).

1. The meaning of "exceeds authorized access" is ambiguous.

"Unless a statute is ambiguous, the plain language of a statute will control unless it leads to absurd results." *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013)(citation and internal quotations omitted). If a statute is ambiguous, the statute's purpose and legislative history must be considered. *See United States v. Valigura*, 54 M.J. 187, 200 (C.A.A.F. 2000); *United States v. Starr*, 51 M.J. 528, 432 (A.F. Ct. Crim. App. 1999). If after reviewing the legislative history and purpose of the statute ambiguity persist, "it *must* be resolved in favor of the accused." *Williams*, 2016 CCA LEXIS 195 at *10.

The phrase "exceeds authorized access" is unquestionably ambiguous. As the military judge acknowledged, the phrase has been subject "to differing interpretations among the [United States] Circuit Courts of Appeals thereby indicating the statutory language is not definitive and clear." (App. Ex. 139 at 5). Earlier this year the Second Circuit found the statute ambiguous for the exact same reason.

> Over the past fourteen years, six other circuits have wrestled with the question before us. Most recently, the Ninth Circuit sitting en banc in [Nosal III] and the Fourth Circuit in *WEC Carolina Energy Solutions LLC v. Miller,* 687 F.3d 199 (4th Cir.2012), adopted Valle's construction. Before that, the First, Fifth, Seventh, and Eleventh Circuits adopted the prosecution's interpretation. *See United States v. John,* 597 F.3d 263 (5th Cir.2010); *United States v. Rodriguez*, 628 F.3d 1258 (11th

> Cir.2010); *Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418 (7th Cir.2006); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir.2001). If this sharp division means anything, it is that the statute is readily susceptible to different interpretations.

United States v. Valle, 807 F.3d 508, 524 (2d Cir. 2015)(emphasis added).

Two prevailing interpretations of "exceeds authorized access" have arisen from this case law. One interpretation is considered narrow, and the other broad. The narrow interpretation is that an individual "exceeds authorized access" only when he or she violates an *access* restriction. *See, e.g., Valle*, 807 F.3d at 523 (defendant did not "exceed authorized access" because he was "authorized to obtain database information."); *WEC Carolina Energy Solutions LLC*, 687 F.3d at 206 (an individual "exceeds authorized access" only when he or she "accesses a computer without permission or obtains or alters information on a computer beyond that which he is authorized to access."); *Nosal III*, 676 F.3d at 863-64 (holding that "exceeds authorized access" is "limited to restrictions on *access* to information, and not restrictions on its *use*.")(emphasis in original).

Access restrictions tend to arise when, for example, an employee has authority to view database "x" on a computer, but

not database “y”.[13] If the employee views database “y”, he or she has “exceeded authorized access” within the meaning of the CFAA. This is why the “exceeds authorized access” language is generally understood to apply to “inside hackers” who use their authorized access to a computer to “hack” into files or databases on that computer to which they have no right of access. (App. Ex. 139 at 7)(citing *Nosal III*, 676 F.3d at 858).

Under the broad view, the employee in the above example could be found to have “exceeded authorized access” with respect to the information in database “x” (which he or she was authorized to access) if the information is used for an improper purpose or in violation of a computer use agreement, policy or regulation. *See, e.g., John*, 597 F.3d at 272 (“Access to a computer and data that can be obtained from that access may be exceeded if the purposes for which access has been given are exceeded.”); *Rodriguez*, 628 F.3d at 1263 (“Rodriguez exceeded his authorized access and violated the Act when he obtained personal information for a nonbusiness reason.”); *Int’l Airport Ctrs. LLC*, 440 F.3d at 420 (defendant “exceeded authorized access” by misusing former employer’s confidential data); *EF Cultural Travel BV*, 274 F.3d at 582-83 (defendant “exceeded

[13] It is not uncommon for a computer user to have restricted rights, meaning that he or she can access certain databases or files on a computer, but not others.

authorized access” by using a software program to rapidly glean prices in violation of confidentiality agreement).

Going back to the above example, under the broad view, an employee could “exceed authorized access” by copying or downloading the information in database “x”, even though he or she had authority to access the information, if copying or downloading violates company policy. These sorts of policies restrict employees’ use of the information, not their access.

This discussion proves the obvious—the statute is susceptible to at least two different interpretations, which under the law makes it ambiguous. In such cases the court must examine the legislative purpose and history of the statute to ascertain its meaning. *Starr*, 51 M.J. at 532.

2. Neither the statutory history nor the case law unambiguously supports the military judge’s interpretation of the CFAA.

The military judge issued three different rulings with respect to the meaning of the phrase “exceeds authorized access.” (App. Exs. 139, 218, 609). From these rulings it is clear the military judge misunderstood the purpose of the statute.

In the first ruling, the military judge correctly found the phrase “exceeds authorized access” ambiguous, applied the rule of lenity, and adopted the narrow interpretation, which is that “exceeds authorized access” is limited to access restrictions,

not restrictions on use. (App. Ex. 139 at 9). Although the military judge did not dismiss the charge and specification, her interpretation of the statute was correct.

In the second ruling the military judge considered the government's new theory, which is that PFC Manning "exceeded authorized access", not by accessing the cables for an improper purpose or in violation of the AUP, but by using W-get.

> Restrictions on access to classified information are not limited to code based or technical restrictions on access. Restrictions on access to classified information can arise from a variety of sources, to include regulations, user agreements, and command policies. Restrictions on access can include manner of access. The two are not mutually exclusive.

(App. Ex. 218 at 2). After the presentation of evidence at trial the military judge ruled on the defense motion for a finding of not guilty. (App. Ex. 609). It was here, in the third and final ruling, that the military judge interpreted the statute more broadly than any court ever has:

> Although the definition for "exceeds authorized access" is the same for all sections of 18 U.S.C. § 1030, access restrictions on classified information can be more stringent than for other information and can include manner of access restrictions designed to ensure the security and protection of the classified information and to prevent the classified information from exposure to viruses, trojan horses or other malware.

(App. Ex. 609 at 6). Taken together, the military judge adopted one of the broadest interpretations of "exceeds authorized access" imaginable, an interpretation neither the legislative history nor any case law supports.

A. The legislative history does not support the military judge's interpretation of the statute.

The military judge's ruling suffers from two glaring mistakes. The first mistake stems from the military judge's misunderstanding of the legislative history surrounding certain amendments to the CFAA in 1996. These amendments were made in 1996 to tighten loopholes with respect to "hacking" into government computers and to bring the CFAA's scienter element into conformity with the Espionage Act, 18 U.S.C. § 793(e). S. Rep. 104-357. It is the latter concern that drew the military judge's attention.

Three comments in the Senate Report are relevant to this appeal. First, Congress aspired to make the scienter element for 18 U.S.C. § 1030(a)(1) and 18 U.S.C. § 793(e) match. S. Rep. 104-357, at 6. ("Therefore, the NII Protection Act would amend § 1030(a)(1) to track the scienter requirement of 18 U.S.C. § 793(e), which also provides a maximum penalty of 10 years imprisonment for obtaining from any source certain items relating to the national defense."). Second, the amendments were intended to ensure the CFAA applied to both outside and inside

hackers. *Id.* ("The amendment specifically covers the conduct of a person who deliberately breaks into a computer without authority, or an insider who exceeds authorized access, and thereby obtains classified information and then communicates the information to another person, or retains it without delivering it to the proper authorities."). *Id.*

Third and finally, Congress wished to draw a distinction between the Espionage Act and the CFAA, recognizing that there is "considerable overlap" between the two. *Id.* at 6. As the Report explains, "*it is the **use** of the computer which is being proscribed* [*under 18 U.S.C. § 1030(a)(1)*]*, not the unauthorized possession of, access to, or control over the classified information itself.*" *Id.* at 6-7 (emphasis added).

The latter comment confused the military judge and led her to erroneously interpret the statute. The military judge apparently took this comment to mean that, "access restrictions for classified information can be more stringent than for other information and can include manner of access restrictions designed to ensure the security and protection of the classified information and to protect the classified information from exposure to viruses, Trojan horses or other malware." (App. Ex. 609 at 6).

Nowhere, however, does the Senate Judiciary Committee Report actually say this, nor is the military judge's

interpretation of the comment evident from the context. A more logical reading of the comment regarding the overlap between 18 U.S.C. § 793 and 18 U.S.C. § 1030(a)(1) is that Congress was concerned about Double Jeopardy, or what in the military justice system is called multiplicity. *See United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)("[A] constitutional violation under the Double Jeopardy Clause of the Constitution now occurs only if a court, *contrary to the intent of Congress,* imposes multiple convictions and punishments under different statutes for the same act or course of conduct.")(emphasis added); *see also United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001)("The prohibition against multiplicity is necessary to ensure compliance with the constitutional and statutory restrictions against Double Jeopardy."). When the Senate Report refers to the "use of the computer," it is making an important distinction for Double Jeopardy/multiplicity purposes—18 U.S.C. § 1030(a)(1) requires proof that a computer was used during the commission of the offense, whereas 18 U.S.C. § 793 does not.

Even if the military judge's interpretation of the legislative history is plausible, by no means is it clear or certain. *United States v. Santos*, 553 U.S. 507, 515, 128 S. Ct. 2020, 2026, 170 L. Ed. 2d 912 (2008)("When interpreting a criminal statute, we do not play the part of a mindreader."); *Williams*, 2016 CCA LEXIS 195 at *13 (requiring unambiguous

legislative intent to avoid an interpretation that favors the accused). Congress has never, anywhere in the CFAA's legislative history, stated or even implied that access restrictions for classified information are more stringent than for non-classified information. Nor has Congress ever said that one of the purposes of the CFAA is to safeguard classified information from viruses, trojan horses or other malware. Rather, as the military judge correctly noted in her first ruling on this issue, "[t]he CFAA is not meant to punish those who use a computer for an improper purpose *or in violation of the governing terms of use*, but rather the statute is designed to criminalize electronic trespassers and computer hackers." (App. Ex. 139 at 9)(emphasis added). The legislative history, therefore, does not support the military judge's later interpretation of the statute.

B. The case law does not support the military judge's interpretation of the phrase "exceeds authorized access."

The military judge also erred by misreading the case law surrounding the meaning of the CFAA. As discussed above the case law generally falls into two categories: a majority of cases define "exceeds authorized access" narrowly to include only access restrictions, while other cases support a broader interpretation, including restrictions on use or purpose-based restrictions. *See Giles Construction, LLC v. Tooele Inventory*

Sol., Inc., 2015 U.S. Dist. LEXIS 72722, at *6 (D. Utah Jun. 16, 2015)(unreported decision)("It appears that a majority of courts weighing in on the issue have adopted this narrow construction. And the trend among courts appears to be in this direction over time."). The military judge's ruling falls into the latter category of cases–she interpreted the statute broadly to include *manner of access* restrictions, which are really use restrictions. Only two appellate courts have considered the "manner of access" argument; both rejected it.

In *Nosal III*, for example, the Ninth Circuit sitting en banc expressly rejected the military judge's finding here, which is that the definition of "exceeds authorized access" includes *manner of access* restrictions. 676 F.3d at 857. Under this rejected interpretation, "an employee may be authorized to access customer lists in order to do his job but not to send them to a competitor." *Id.* This is strikingly similar to the government's theory, which is that PFC Manning may have had unlimited access to the cables but not to search them or download them with W-get.

The Ninth Circuit declined the government's interpretation of the statute for two reasons. First, the plain language of the statute did not support it. *Id.* (refusing to define the word "so" in the statutory definition of exceeds authorized access, 18 U.S.C. § 1030(e)(6), to mean "in a manner" because if

"Congress meant to expand the scope of criminal liability to everyone who uses a computer in violation of computer use restrictions—which may well include everyone who uses a computer—we would expect it to use language better suited to that purpose."). Second, the legislative history contradicted the government's reading of the statute:

> [a]lthough the legislative history of the CFAA discusses this anti-hacking purpose, and says nothing about exceeding authorized use of information, the government claims that the legislative history supports its interpretation. It points to an earlier version of the statute, which defined "exceeds authorized access" as "having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend." Pub. L. No. 99–474, § 2(c), 100 Stat. 1213 (1986). But that language was removed and replaced by the current phrase and definition. And Senators Mathias and Leahy — members of the Senate Judiciary Committee—explained that the purpose of replacing the original broader language was to "remove[] from the sweep of the statute one of the murkier grounds of liability, under which a[n] . . . employee's access to computerized data might be legitimate in some circumstances, but criminal in other (not clearly distinguishable) circumstances." S. Rep. No. 99–432, at 21, 1986 U.S.C.C.A.N. 2479 at 2494. Were there any need to rely on legislative history, it would seem to support Nosal's position rather than the government's.

Id. at 858, n.5.

The Fourth Circuit also rejected the military judge's reading of the statute in *WEC Carolina Energy Solutions LLC*, 687 F.3d at 206. There the court considered a civil claim brought by

an employer against an employee who had downloaded and copied information from a computer in violation of company policy. In rejecting plaintiff's argument the court found, "Congress has not clearly criminalized obtaining or altering information 'in a manner' that is not authorized. Rather, it has simply criminalized obtaining or altering information that an individual lacked authorization to obtain or alter." *Id.*

Lastly, no court has ever considered, much less found, that the CFAA imposes more "stringent" requirements for classified information than for non-classified information. The phrase "exceeds authorized access" is used in four different parts of the statute. *See* 18 U.S.C. § 1030 (a)(1), (a)(2), (a)(4), and (a)(7)(B). The phrase means the exact same thing for every part of the statute, regardless of the classification level of the information. *See* 18 U.S.C. § 1030(e)(6)(reflecting that Congress did not subscribe separate meaning for classified versus non-classified information). "A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning. *Powerex Corp. v. Reliant Energy Servs., Inc.,* 551 U.S. 224, 232, 127 S. Ct. 2411 (2007); *see also United States v. Simmermacher*, 74 M.J. 196, 201 n.8 (C.A.A.F. 2015)("There is no rule of statutory construction that allows for the court to append additional language as it sees fit."). The case law, therefore,

does not support the military judge's interpretation of the statute either.

3. The rule of lenity requires dismissal of the charge and specification.

No legal authority—not the plain language of the statute, the legislative history, or federal case law—unambiguously supports the military judge's expansive interpretation of 18 U.S.C. § 1030(a)(1). Under these circumstances the rule of lenity requires dismissal of the charge and specification for insufficiency of the evidence. *Williams*, 2016 CCA LEXIS 195 at *13. The government's case rests entirely on the notion that PFC Manning's use of W-get "exceeded authorized access" within the meaning of the CFAA. As established above, however, PFC Manning's use of W-get cannot itself establish a violation of the statute.

Conclusion

The CFAA makes it a crime to hack into government computer systems to obtain classified information. Congress did not enact the CFAA to safeguard classified information from misuse or malware. Every court to recently address the issue has declined to interpret the statute as expansively as the military judge. Therefore, Specification 13 of Charge II should be set aside and dismissed.

III.

WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN PFC MANNING'S CONVICTIONS FOR VIOLATIONS OF 18 U.S.C. § 641 (SPECIFICATIONS 4, 6, 8, 12, AND 16 OF CHARGE II)?

Statement of Facts

The government charged PFC Manning under clause 3 of Article 134, UCMJ, with five specifications of stealing, purloining, or knowingly converting a record or thing of value belonging to the United States of a value in excess of $1,000, in violation of 18 U.S.C. § 641. (Specifications 4, 6, 8, 12, and 16 of Charge II). (Charge Sheet). The elements of this offense are:

(1) The accused did steal, purloin, or knowingly convert records to her own use or someone else's use;

(2) The records belonged to the United States or a department or agency, thereof;

(3) The accused acted knowingly and willfully and with the intent to deprive the government of the use and benefit of the records;

(4) The records were of a value greater than $1,000;

(5) 18 U.S.C. § 641 was in existence on the dates alleged in the specification; and

(6) Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring

discredit upon the armed forces.

(App. Ex. 410a).

As charged, the Section 641 specifications alleged PFC Manning stole, purloined, or knowingly converted the following:

- Specification 4: the Combined Information Data Network-Iraq (CIDNE-I) database containing more than 380,000 records;
- Specification 6: the Combined Information Data Network-Afghanistan (CIDNE-A) database containing more than 90,000 records;
- Specification 8: a United States Southern Command (SOUTCOM) database containing more than 700 records;
- Specification 12: the Department of State (DoS) Net-Centric Diplomacy (NCD) database containing more than 250,000 records; and
- Specification 16: the United States Forces-Iraq (USF-I) Microsoft Outlook/SharePoint Exchange Server global address list (GAL). (Charge Sheet).

At the close of the government's presentation of evidence on the merits, the defense moved for findings of not guilty under R.C.M. 917 as to each of the five Section 641 specifications. (App. Exs. 593, 596). Defense counsel presented a range of arguments in support of these motions. (App. Ex. 593 (R.C.M 917 motion re: Specifications 4, 6, 8, 12); App. Ex. 596

(R.C.M. 917 motion re: Specification 16); App. Ex. 614 (motion for reconsideration); R. at 10462-85, 10502-19, 10531-38 (oral argument re: R.C.M. 917 motions)). The military judge denied the defense R.C.M. 917 motions, as well as the defense motion for reconsideration and the defense motion for a mistrial. (App. Exs. 613, 614, 623; R. at 11237).

The military judge found PFC Manning guilty of the five Section 641 specifications. (R. at 11238-41). In special findings, the military judge explained she found PFC Manning guilty of stealing, purloining, and converting "a portion of" the databases at issue in Specifications 4 and 6 (CIDNE-I and CIDNE-A) and the entire databases at issue in Specifications 8 and 12 (SOUTHCOM and DoS NCD). (App. Ex. 625 at 4-5). She found PFC Manning guilty of stealing, purloining, and attempting to convert[14] "a portion of" the USF-I GAL at issue in Specification 16. (App. Ex. 625 at 4-5).

Additional facts necessary to dispose of the assigned error are discussed below.

[14] The military judge found PFC Manning did not complete her attempted conversion of a portion of the USF-I GAL because she was apprehended prior to actually sending it to WikiLeaks. (App. Ex. 625 at 5).

Standard of Review

Pursuant to Article 66(c), UCMJ, this court must "conduct a de novo review of [the] legal and factual sufficiency of the case." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The standard of review for legal sufficiency is whether, considering all the evidence in the light most favorable to the government, a reasonable fact-finder could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the members of the court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987). An Article 66, UCMJ, review involves a "fresh, impartial look at the evidence" and this court must make "its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. The evidence must leave no fair and reasonable hypothesis other than PFC Manning's guilt. *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003)(citations omitted).

III.A.

WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN PFC MANNING'S CONVICTIONS FOR STEALING, PURLOINING, OR CONVERTING "DATABASES" (SPECIFICATIONS 4, 6, 8, AND 12 OF CHARGE II) WHERE THERE WAS NO EVIDENCE THE ACTUAL DATABASES WERE STOLEN, PURLOINED, OR CONVERTED?

Additional Statement of Facts

In Specifications 4, 6, 8, and 12 of Charge II, the government charged PFC Manning with stealing or converting "databases." (Charge Sheet). For example, in Specification 12 of Charge II, the government alleged PFC Manning stole or converted:

> a record or thing of value of the United States or of a department or agency thereof, to wit: the *Department of State Net-Centric Diplomacy database* containing more than 250,000 records belonging to the United States government . . . .

(Charge Sheet)(emphasis added). Specifications 4, 6, and 8 are identical in structure. (Charge Sheet).

At trial, the government presented evidence PFC Manning accessed these databases and produced digital copies of certain records within them. (R. at 7474-9171). She placed the digital copies of these records on her private portable digital media and ultimately transmitted these digital copies to WikiLeaks. (R. at 7474-9171).

There was no evidence PFC Manning stole, purloined,[15] or converted the actual databases themselves. The evidence demonstrated the databases never moved from their digital locations on the Secret Internet Protocol Router (SIPR) network. (R. at 7741, 7862, 7933; Pros. Exs. 115, 116). Government personnel maintained full access to the databases throughout the period of the alleged offenses. (R. at 7741, 7862, 7933; Pros. Exs. 115, 116). Similarly, there was no evidence PFC Manning stole or converted any original records within the databases, as the originals also remained within the databases and available to government personnel at all times relevant to the specifications. (R. at 7741, 7862, 7933; Pros. Exs. 115, 116).

The digital copies of records obtained by PFC Manning contained various types of information, depending on the type of record copied. The records copied from the CIDNE-A and CIDNE-I databases were Significant Activity reports (SIGACTS). (Pros. Ex. 115, R. at 8309). SIGACTS contain information on completed military operations. (Pros. Ex. 115; R. at 8310). The CIDNE databases also contain approximately 129 other types of reports, none of which PFC Manning copied or transmitted to WikiLeaks. (Pros. Ex. 115; R. at 8311, 10809-10).

[15] To "purloin" is simply to steal with the element of stealth. (App. Ex. 625 at 2). Thus, in the interest of brevity, future references to "stealing, purloining, or converting" will read "stealing or converting."

The records copied from the DoS NCD database were diplomatic cables. (R. at 8347). Diplomatic cables contain information on diplomatic relations and analysis of events occurring in a particular country. (R. at 9100, 9261). The records copied from the SOUTHCOM database were detainee assessment briefs (DABs). (R. at 7979-82, 8727). DABs contain information on detainees held at Guantanamo Bay. (R. at 8727).

In support of the R.C.M. 917 motion, defense counsel argued the government failed to present any evidence PFC Manning stole or converted the actual databases, or original records within the databases, at issue in Specifications 4, 6, 8 and 12 of Charge II (CIDNE-I, CIDNE-A, SOUTHCOM, and DoS NCD databases). (App. Ex. 593 at 1-9). Defense counsel argued the government's evidence instead focused solely on digital *copies* of records within the databases, and *information* within those copies, distinct property which PFC Manning was not charged with stealing or converting. (App. Ex. 593 at 5-8).

In her ruling on the R.C.M. 917 motion, the military judge found Specifications 4, 6, 8, and 12 of Charge II charged PFC Manning with stealing or converting "a specified database and a number of records contained within that database." (App. Ex. 613 at 6; R. at 10906). She also found "information is necessarily included within the definition of both record and database." (App. Ex. 613 at 6; R. at 10906). Thus, according to the

military judge, there was no material variance between the pleadings and the proof and the specifications provided PFC Manning notice she "was accused of stealing the information in the described records and databases described in the specifications . . . ." (App. Ex. 613 at 6; R. at 10906).

The military judge further ruled that, in the case of electronic data, there is no distinction between digital copies of records and original records, reasoning "there are no copies to steal until the accused accesses the digital information and makes the extraction. The original digital database and records remain in the database management system during and after extraction." (App. Ex. 613 at 7). She noted PFC Manning was not charged with stealing copies, but instead with stealing "the databases, electronic records, and information therein." (App. Ex. 613 at 7).

Law and Argument

"Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn v. United States*, 442 U.S. 100, 107 (1979)(citations omitted). The Sixth Amendment to the Constitution provides an accused shall "be informed of the nature and cause of the accusation." U.S. CONST. amend. VI. The Due Process Clause of the Fifth Amendment forbids conviction of an offense with which an accused has not been charged. U.S. CONST.

amend. V; *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011). "Both amendments ensure the right of an accused to receive fair notice of what he is being charged with." *Girouard*, 70 M.J. at 10 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *Cole v. Arkansas*, 333 U.S. 196, 200 (1948)).

The first part of the Section 641 specifications ("a record or thing of value of the United States") mirrors the language of 18 U.S.C. § 641 and puts PFC Manning on notice of the provision alleged to be violated. The second part of the specifications ("to wit: the . . . database") notifies PFC Manning of the actual property alleged to have been stolen or converted—a "database." The third part of the specifications ("containing more than 250,000 records") is merely descriptive, providing notice that the database alleged to be stolen or converted contained a certain number of records. However, that the databases contained some number of records does not alter the fact PFC Manning was alleged to have stolen or converted the "databases," not "records," "information," or "copies."

The government's charging decision and the evidence presented to support those charges overlooked a crucial detail—the databases themselves were not actually stolen or converted. Thus, the evidence is legally and factually insufficient to sustain PFC Manning's convictions for stealing or converting databases. To save these specifications after the presentation

of insufficient evidence, the military judge erroneously ruled "information" and "records" are necessarily included in the definition of "database," and that there is no distinction between original electronic records and digital copies of those records. (App. Ex. 613).

1. A "database" is a form of property distinct from records, copies of records, and the information therein.

A database is a substantially different form of property than the records and information contained within the database, or digital copies of those records. Contrary to the military judge's reasoning, the plain meaning of the term "database" dictates this conclusion. Also, Section 641 itself recognizes a distinction between "records" and intangible "things of value" such as information. Federal prosecutions under Section 641 recognize that distinction, invariably alleging the theft of information or copies when information or copies are stolen or converted. Thus, PFC Manning was not on notice she had to defend against a charge of stealing records, information, or copies of records, and the military judge's ruling was erroneous.

A. The plain meaning of the term "database" confirms it is distinct from "information," "records," or "copies."

Merriam-Webster defines "database" as a "collection of data organized especially for rapid search and retrieval (as by a computer)." Merriam-Webster, http://www.merriam-webster.com/dictionary/database (last accessed 13 Nov. 2015).

Similarly, Black's Law Dictionary defines "database" as a "compilation of information arranged in a systematic way and offering a means of finding specific elements it contains, often today by electronic means." *Black's Law Dictionary* 452 (9th ed. 2009).

Unlike a database, "information" is intangible. (App. Ex. 625 at 3); *United States v. Girard*, 601 F.2d 69, 71 (2nd Cir. 1979); *United States v. Tobias*, 836 F.2d 449, 451 (9th Cir. 1988). It is "the communication or reception of knowledge or intelligence." Merriam-Webster, http://www.merriam-webster.com/dictionary/information (last accessed 20 Nov. 2015).

"Records" and "copies" are tangible items. A "record" is "something that recalls or relates past events." Merriam-Webster, http://www.merriam-webster.com/dictionary/record (last accessed 15 November 2015). A "copy" is "an imitation, transcript, or reproduction of an original work (as a letter, a painting, a table, or a dress)." Merriam-Webster, http://www.merriam-webster.com/dictionary/copy (last accessed 15 Nov. 2015).

It is apparent from these definitions that a database is distinct from the records it contains, intangible information within those records, and any copies of those records. A database, as a "*collection* of data" or a "*compilation* of information," is simply the medium by which records and

information are stored, arranged, and retrieved. In contrast, a record and information within a record might be *stored* in a database but are not synonymous with the database itself. "Copies" of records are altogether separate items of property.

The military judge's special findings illustrate this point. For each Section 641 offense, she repeatedly referenced a database as a medium containing records, and a record as a medium containing information. She found "PFC Manning did steal and purloin the records, *and information therein*, by using [government computers] to extract the records, and information therein, *from the relevant database* . . . ." (App. Ex. 625 at 4)(emphasis added). In so doing, she effectively recognized records and information as forms of property distinct from the database containing those records and information.

The government's evidence also demonstrates that a database is distinct from the records and information it contains. Throughout trial, government witnesses differentiated between the databases and the information within those databases. For example, Mr. Bora's stipulation of expected testimony states, "CIDNE is a reporting and querying system" that "links operations information with intelligence information." (Pros. Ex. 115; R. at 8309). Similarly, Mr. Hoeffel's stipulation states, "CIDNE is a centralized database that *stores information* about events, people, organization, and facilities, and makes

that information available to users . . . .” (Pros. Ex. 116; R. at 8318)(emphasis added). Rear Admiral Kevin Donegan described the CIDNE database “as a big hard drive . . . where we store . . . a lot of our information . . . .” (R. at 12390).

Thus, according to the government’s own witnesses, a database is a system that simply catalogues information and is not synonymous with the information itself. Simply put, a database is a thing, information is a thing, but neither is the same thing nor necessarily included within the other. One can possess an empty database, or “hard drive,” devoid of records and information. One can also possess records and information outside of a database.

An analogy to an offense involving tangible property as opposed to digital media solidifies this point. Consider the similarity of a database and filing cabinet. Both are mediums for storing records and information. Private First Class Manning accessed a database and made digital copies of records containing information in the same manner one in the pre-digital age might have opened a government filing cabinet and photocopied the records within.

But stealing or converting photocopies of documents within a filing cabinet is not the same as stealing the filing cabinet itself. The filing cabinet has not been stolen or converted—it remained in the same place and was used by the government in the

same manner both before and after the alleged theft or conversion. Neither have the actual records within the cabinet been stolen or converted in this scenario. They too remain undisturbed. Rather, the *copies* of records are the property at issue.

The identification of the precise property at issue is important. A determination of whether the photocopies, actual records, or the filing cabinet itself was stolen or converted, and whether their value exceeds the statutory minimum, requires entirely different forms of proof. The government would not be permitted to charge the theft of a filing cabinet "containing" a certain number of records, then after failing to prove the cabinet was stolen argue the offense actually alleged the theft of photocopies containing information. But the military judge effectively allowed the government to do so here.

B. Federal case law establishes the theft of "information," "records," and "copies" are separate offenses.

The government chose to incorporate federal provisions into the charge sheet. The defense appropriately relied on federal case law to defend against allegations of stealing databases, the charged property—not records, information, or copies. (App. Ex. 614 at 4).

Cases involving federal prosecutions under Section 641 demonstrate theft of "information" and theft of "records" are

different theories of larceny. The Ninth Circuit holds information does not even fall within the ambit of Section 641. *Tobias*, 836 F.2d at 451. The Fourth Circuit has expressed similar reservation over Section 641's applicability to information. *United States v. Truong Dinh Hung*, 629 F.2d 908, 924-28 (4th Cir. 1980)(Winter, J., concurring). Under this view, "information" is never a "record" within the meaning of Section 641.

Even circuits holding Section 641 *does* apply to information have made clear that information falls within the "thing of value" prong of Section 641, not the "records" prong. *See United States v. DiGilio*, 538 F.2d 972, 978 n.10 (3rd Cir. 1976)("The government obviously did not consider this merely a theft of information case, because the indictment charges defendants only with converting to their use government records. Section 641 also prohibits conversion of any 'thing of value', and the government would presumably rely on this term in an information case."); *see also Girard*, 601 F.2d at 71 (although information is intangible, it is "a thing of value"). Since information is not a "record" under Section 641, but is instead an intangible "thing of value," under this view information cannot be

necessarily included within the definition of "record" as the military judge ruled.[16]

Federal case law also illustrates the appropriate charging method for the theft of information, records, or copies of records. For example, in *United States v. Jeter*, the government charged Jeter with the theft and conversion of "carbon paper and the information contained therein" that related to a secret grand jury proceeding. 775 F.2d 670, 680-81 (6th Cir. 1985). The jury convicted Jeter on the theory that the *information* in the carbon paper constituted a thing of value in excess of the statutory minimum. *Id.* at 680. Similarly, in *United States v. Jordan*, the government alleged the defendants conveyed *information* contained within criminal records. 582 F.3d 1239, 1246 (11th Cir. 2009). These records were contained within the National Crime Information Center (NCIC) database. *Id*. The government appropriately did not allege the NCIC database itself was stolen because, of course, it was not. *Id*.

In *DiGilio*, the government charged the defendants with converting "photocopies of official files of the Federal Bureau of Investigation." 538 F.2d at 975. The court held the evidence

[16] The military judge referred to information as "a thing of value," not a "record," in her instructions on the offenses: "A 'thing of value' can be tangible or intangible property. Government information, although intangible is a species of property and a thing of value." (App. Ex. 625 at 3).

was sufficient to sustain a conviction under Section 641, reasoning the defendant used government resources to make the copies, and thus the copies belonged to the government. *Id.* at 977. In short, federal indictments under Section 641 invariably charge defendants with stealing information or copies of records when information or copies are stolen, not the original records or the medium by which records and information are stored. Allowing the government to charge a theft of databases in this case, but instead prove the theft of copies of records and information, deprived PFC Manning of notice of the charges against her.

C. Changing the nature of the property stolen or converted after the presentation of evidence irreparably prejudiced PFC Manning's defense.

The distinctions among these terms are not merely semantic. The specific property alleged to be stolen is of crucial significance in a prosecution under Section 641 and directly impacts the focus of the defense at trial. When the military judge changed the plain-English definition of the charged property and thus the legal focus of the crime, after the presentation of all evidence in the case, PFC Manning's ability to mount an effective defense was substantially prejudiced.

From the earliest stages of this court-martial until the military judge's ruling on the R.C.M. 917 motion (the day before closing arguments), the defense was unaware it had to defend

against a charge of stealing "information," "records," or "copies." (App. Ex. 614 at 1-2). The entire theory of the defense with respect to these specifications was that PFC Manning did not steal or convert "databases" as charged. (*See, e.g.,* R. at 7741, 7862, 7933; *see also* App. Ex. 614 at 5).

In her ruling on the R.C.M. 917 motion, the military judge faulted the defense for not seeking more specificity as to the items charged. (App. Ex. 613 at 5). But from the inception of this case through the presentation of evidence, the government declared its intent to prove PFC Manning stole actual databases, not information. The government's intent to prove the theft of "databases" was evident not only from the language on the charge sheet, but also from its response to the defense's request for a bill of particulars, the government-proposed instructions for the offenses, and the government's focus throughout trial on the value of the databases themselves. Indeed, it is apparent from this record that the government merely assumed the term "database" automatically included every possible thing that could be put inside a database.

In its 8 March 2012 response to the defense motion for a bill of particulars, over a year before the close of the government's case on the merits, the government stated the property at issue in each specification "is clear," PFC Manning stole "specific, identified databases." (App. Ex. 14 at 3). In

each of the government's proposed instructions on the Section 641 offenses involving databases, the government proposed the valuation element of the offense as follows: "That the [CIDNE-I, CIDNE-A, DoS NCD, and SOUTHCOM] *database* was of a value of more than $1,000." (App. Ex. 159 at 9, 13, 14, 17)(emphasis added). Throughout the government's presentation of evidence, it attempted to prove the value element of Section 641 by showing the cost of creating and maintaining the databases themselves. (*See, e.g.,* Pros Ex. 115; R. at 8307-16 (CIDNE), 9059-60 (DoS NCD)).

Defense counsel, reasonably relying on the government's own representations, could be under no obligation to further ask the government whether it meant "information" or "copies of records" when it used the seemingly unambiguous term "database." Had the defense been on notice the term "database" included "information," its approach to the case would have been markedly different.

First, the defense would have litigated early on whether Section 641 even applies to the theft or conversion of intangible property such as information. (App. Ex. 614 at 5). Military courts have long held Article 121, UCMJ, does not proscribe the theft of intangible property because of the common law requirement "that the object of the larceny be tangible and capable of being possessed." *United States v. Mervine,* 26 M.J.

482, 484 (C.M.A. 1988); *see also United States v. Stevens*, 75 M.J. 548, 551 (N.M. Ct. Crim. App. 2015)(holding "electronic media without corporeal form do not fall within the ambit of Article 121.")

Whether the same holds true in a Section 641 prosecution under clause 3 of Article 134 is an issue of first impression in the military justice system. Although the majority of federal circuits hold Section 641 applies to intangible property such as government employee time and confidential information, the Ninth Circuit disagrees. *Chappell v. United States*, 270 F.2d 274, 276 (9th Cir. 1959)(holding Section 641 is inapplicable to intangible property); *United States v. Tobias*, 836 F.2d 449, 451 (9th Cir. 1988)(reaffirming the Ninth Circuit's view on this subject in the context of classified information); *see also Truong Dinh Hung*, 629 F.2d 908 at 928 ("Whatever the content of 'thing of value' in the context of other types of government information, this phrase may not be read to include classified information within § 641."). The defense had no occasion to litigate this issue because PFC Manning was not charged with stealing information.

Nonetheless, the military judge ruled intangible information is "a thing of value" under Section 641, but only after finding "information" is necessarily included in the term "database" a day before closing arguments. (App. Ex. 613 at 5).

This ruling on a pivotal issue of first impression *after* the defense had presented its entire case prejudiced PFC Manning's defense and deprived her of the ability to tailor her defense to the government's actual theory of the property stolen or converted.

Second, if the defense knew PFC Manning was charged with stealing or converting "information," it would have sought an expert on the valuation of information. (App. Ex. 614 at 6). However, since the government charged PFC Manning with stealing databases, such an expert was unnecessary because any allegation PFC Manning stole the databases could be, and was, rebutted through the government's own witnesses. (R. at 7741, 7862, 7933; Pros. Exs. 115, 116).

Once the government realized it was having trouble proving the value of the actual databases, it shifted its valuation case and presented evidence on the value of information within the databases through its very last witness on the merits, Mr. Lewis, a counterintelligence expert. (R. at 9465-771 (portions classified)). However, during several interviews with the defense team before his testimony, Mr. Lewis repeatedly stated he did not know why he was testifying, he did not consider himself an expert on the value of information, and he would not be able to value any documents or information. (App. Ex. 614 at 6; *see also* statement of defense security expert appended to

App. Ex. 614). Mr. Lewis maintained this position on the eve of his actual testimony. (App. Ex. 614 at 6).

Despite these last-minute representations to the defense, Mr. Lewis suddenly testified he could in fact value information. (R. at 9539 (redacted)). Thus, not only was the defense unaware it had to defend against an allegation of stealing information, it was also unaware the government would seek to prove the value element under Section 641 by valuing information instead of databases.

Mr. Lewis' testimony lacked the hallmarks of reliable expert testimony. (*See* Assignment of Error III.C). Had the defense known the military judge would allow the government to value "information," and that Mr. Lewis would testify contrary to his multiple previous representations, defense counsel would have sought an expert to provide a countervailing opinion or at a minimum enable the defense to better cross–examine him. (App. Ex. 614 at 6). The defense also could have filed a motion to preclude Mr. Lewis from testifying and from being qualified as an expert. Finally, the defense could have sought through discovery the source documents underlying Mr. Lewis' opinion on valuation.[17] (App. Ex. 614). However, given the representations

[17] These documents, their relation to Mr. Lewis' opinion on valuation, and his failure to consider them in forming his opinion, are further discussed in Assignment of Error III.C. at page 110 and the classified supplement at page 20.

of both the government and Mr. Lewis up to the point of his testimony, the defense reasonably took none of these actions and continued its focus on the databases PFC Manning was actually charged with stealing.

Even the government was unsure of what property it was attempting to value at trial. Despite PFC Manning being charged with stealing "databases," the military judge allowed the government to offer evidence of property valuation through a myriad of inconsistent and confusing approaches. Besides Mr. Lewis attempting to place a value on the *information* within the databases, the government also offered evidence of the "cost of creating the information in the charged databases and records, such as employee time and salary for data entry." (App. Ex. 613 at 8; R. at 8730-31, 8864-65, 8893-95, 8914-16, 10913). The government attempted to offer evidence on the value of the databases themselves, such as the "database management system, infrastructure, or software."[18] (App. Ex. 613 at 8; R. at 8310-15, 8734-35, 9054-60, 10911-13).

The government's mix-and-match theory of valuation demonstrates the lack of clarity as to which property was

[18] The military judge ultimately excluded this evidence, citing a lack of legal authority for valuing a database, or records and information in a database, by reference to "the cost of creating and maintaining the database management system, infrastructure, or software." (App. Ex. 613 at 8).

allegedly stolen or converted. Whether PFC Manning was alleged to have stolen information, records, or copies of records should have been pled on the charge sheet. If PFC Manning was alleged to have stolen information, then the value of the information itself had to be established. If PFC Manning was charged with the theft of government records, then the value of those records had to be established. The value of the databases in which these records or information were stored, and the value of any copies produced from records in the databases, are entirely different matters in terms of valuation. Under the Fifth and Sixth Amendments, the defense must be on notice of what property the government will value for purposes of proving a Section 641 offense.

The military judge erred to the substantial prejudice of PFC Manning when she changed the nature of the charged property after the presentation of evidence. Thus, there must be some evidence PFC Manning stole or converted the actual databases in question to sustain her Section 641 convictions.

2. The evidence fails to prove PFC Manning stole or converted databases.

To prove theft under Section 641, the government had to present evidence PFC Manning wrongfully took the databases from the United States with the intent to deprive the owner of the use and benefit temporarily or permanently. (App. Ex. 410a at

5). To prove conversion, the government had to present evidence PFC Manning's misuse of the databases "seriously and substantially interfered with the United States government's property rights." (App. Ex. 410a at 6).

In *Morisette v. United States,* the Supreme Court held that under Section 641 "[p]robably every stealing is a conversion, but certainly not every knowing conversion is a stealing." 342 U.S. 246, 271 (1952). Thus, at a minimum, the government had to present some evidence PFC Manning seriously and substantially interfered with the government's property rights in the databases.

A. There is no evidence PFC Manning seriously and substantially interfered with the government's property rights in the databases.

The government failed to present any evidence PFC Manning's actions resulted in a serious or substantial interference with the government's use of the databases in question. In *United States v. Collins*, the government prosecuted a Defense Intelligence Agency technical analyst for using the agency's classified computer system to create and maintain hundreds of documents relating to his ballroom dance activities. 56 F.3d 1416, 1417 (D.C. Cir. 1995). The government alleged Collins converted, among other things, the agency's computer time and storage space. *Id*. at 1418.

The court held the evidence was insufficient to support a conversion because the government did not prove the defendant's use of the system seriously interfered with the government's property rights. *Id*. at 1421. The court reasoned that, although Collins used the computer system for his personal activities, there was no evidence this conduct "prevented him or others from performing their official duties on the computer. The government did not even attempt to show that appellant's use of the computer prevented agency personnel from accessing the computer or storing information." *Id*. at 1421. *See also United States v. May*, 625 F.2d 186 (1980)(reversing Section 641 conviction because the district court failed to instruct the jury that conversion required a finding that the conduct seriously violated the government's property rights); *United States v. Kueneman*, No. 94-10566, 1996 U.S. App. LEXIS 21810 (9th Cir. Aug. 20, 1996)(unpublished)(reversing Section 641 conviction where defendant improperly allowed his daughter to live in government housing for the homeless because the "government offered no evidence that it had other contemporaneous uses for the HUD home.")

Similarly, there was no evidence presented in this case that the databases themselves were moved, altered, corrupted, changed, or taken away from the United States government. Private First Class Manning did not provide WikiLeaks access to

the CIDNE, SOUTHCOM, or DoS NCD databases. As in *Collins*, there is no evidence PFC Manning's actions rendered the databases inaccessible to government employees.

To the contrary, the evidence shows the databases were used in the same way both before and after PFC Manning's disclosure of copies of records and information contained within them. Unit witnesses testified there was no difference in the use of the databases after WikiLeaks released the information. (R. at 7741, 7862, 7933). Mr. Bora's and Mr. Hoeffel's stipulations of expected testimony also acknowledged there was no interference with the government's use of the CIDNE databases:

> At no time was the SIGACT information charged in this case unavailable for access on the CIDNE database. Those that accessed the SIGACT database before May of 2010 did so in the same manner after May of 2010. We continue to use the SIGACTs charged in this case in the CIDNE database.

(R. at 8316, 8323; Pros. Exs. 115, 116). Thus, the government failed to prove PFC Manning seriously and substantially interfered with the databases.

B. Even if "information" and "records" are necessarily included in the definition of "database," the government failed to present evidence PFC Manning stole or converted information or records.

There is also no evidence the actual records contained within the databases, or the information within those records, were stolen or converted. The actual records and information

within the databases never left the government's possession. They were always available to analysts and other government personnel as needed. (R. at 7741, 7862, 7933; Pros. Exs. 115, 116).

In *Morissette*, the Supreme Court said, "[t]o steal means to *take away from one* in lawful possession without right with the *intention to keep wrongfully*." 342 U.S. at 271 (quoting *Irving Trust Co. v. Leff*, 171 N.E. 569, 571 (N.Y. 1930)(emphasis in original)). The Court contrasted stealing with conversion, which does not require an "intent to keep" or a "taking." *Id.* at 272. Thus, the Court simply confirmed a universally recognized legal principle: stealing requires a taking with an intent to keep.

Here, the government failed to present evidence PFC Manning took and intended to keep the records or information in the databases. There was no taking because the records, and the information in those records, never moved. They remained available to the government and its analysts at all times relevant to the specifications. PFC Manning did not, for example, "cut and paste" the records and information from the database or otherwise delete them, effectively "taking" them from the government. She simply made a digital copy of the records, leaving the originals untouched. At most, then, PFC Manning took a digital copy of records. *See Stevens*, 75 M.J. at 551 ("[T]here was no 'trespassory taking' in this case because

Sony and Apple never lost possession of the media. There were not 2400 fewer donuts on their shelves or one less copy of the song 'Radioactive' by Imagine Dragons in their physical inventory because of the taking.").

It necessarily follows there was no intent to keep the records or information because PFC Manning never took them in the first place. Even the military judge grappled with this dichotomy in her ruling on the R.C.M. 917 motion:

> [The theft or conversion of] electronic data doesn't compare neatly to cases where the defendant made photocopies of government records, replaced the originals, and [stole or converted] the photocopies. [With stealing or converting digital records], there are no copies to steal until the accused accesses the digital information and makes the extraction. The original digital database and records remain in the database management system during and after extraction.

(App. Ex. 613 at 7). It is unclear why the military judge distinguished the copying of digital information from the copying of physical information. There is no legal authority for this distinction. Accessing a database, making a digital copy of a record in that database, and transmitting the digital copy to a third party is no different than taking a photograph of a classified memo in a cabinet drawer and sending the photograph to someone not authorized to receive it. The military judge's findings simply ignored that actual records and information in

the databases, which never left the government's possession, are wholly distinct from the digital copies PFC Manning obtained.

PFC Manning also did not convert the records or information because she did not "seriously and substantially interfere" with their use by the government. The military judge found PFC Manning converted the records and information because they were classified, and thus PFC Manning interfered with the government's rights to protect this information from unauthorized disclosure. (App. Ex. 625 at 4-5).

At most, then, the government lost exclusive possession of the information in the database. But it is questionable as to whether Congress intended Section 641 to protect the government's interest in the exclusive possession of its information. Applying Section 641 in such a broad manner raises First Amendment concerns. *See* Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 Stan. L. Rev. 311, 319-323 (Jan. 1974)(arguing Section 641 is unconstitutional as applied to the reproduction of government records, even if classified); *see also DiGilio*, 538 at 977 (acknowledging this argument but finding it inapplicable because defendants were charged with converting *copies* produced with government time and resources, not information); *Truong Dinh Hung*, 629 F.2d. at 925 (Section 641's "ambiguity is particularly disturbing because government

information forms the basis of much of the discussion of public issues and, as a result, the unclear language of the statute threatens to impinge upon rights protected by the first amendment.")

In any event, PFC Manning was not charged with stealing information, records, or copies of records. The evidence only supports that she made digital copies of records and information held within databases. The stealing or conversion of those digital copies and information are entirely different offenses than those charged. Thus, the evidence is legally and factually insufficient to sustain PFC Manning's convictions for stealing, purloining, or converting databases. Private First Class Manning respectfully requests that this court set aside and dismiss Specifications 4, 6, 8, and 12 of Charge II.

III.B.

WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN PFC MANNING'S CONVICTION FOR STEALING, PURLOINING, OR CONVERTING THE "USF-I GAL" (SPECIFICATION 16 OF CHARGE II)?

Additional Statement of Facts

In Specification 16 of Charge II, the government charged PFC Manning with stealing, purloining, or knowingly converting "the United States Forces-Iraq Microsoft Outlook I SharePoint Exchange Server global address list." (Charge Sheet). As with the database specifications, the government did not allege PFC

Manning stole or converted “a copy” of the USF-I GAL or “information” contained within it. (Charge Sheet). Also like the databases, the USF-I GAL was unaffected by PFC Manning’s actions and continued to function and remain available on government servers throughout the period relevant to the specification. (R. at 8825, 9366).

A GAL is an interface in Microsoft Outlook that allows the user to obtain email addresses, phone numbers, and additional contact information of other users in an organization. (R. at 8857, 8799). In the words of a government witness, a GAL is “just a list of email addresses.” (R. at 8862). The USF-I GAL contained approximately 160,000 email addresses in February 2010. (R. at 8820, 8826). Due to its large size, individual units in Iraq did not have the USF-I GAL downloaded on their servers. (R. at 8820-21). Maintaining the USF-I GAL on any one system would “lock your system up.” (R. at 8821).

Instead, individual units maintained separate, local GALs on their own servers containing the information of users within that unit. (R. at 8828, 8862, 8869, 9354-55). For example, an army division under USF-I might have 30,000 users on its separate GAL. (R. at 8821). To access the information of a user on the larger USF-I GAL, a division user would have to conduct a

"targeted" search of that particular GAL. (R. at 8820-21).[19] Brigades in Iraq also maintained their own GAL on their own server. (R. at 8869, 9354-55). From a technical perspective, "a single address list on a single server is a GAL." (R. at 8869). Put simply, the USF-I GAL was one of many GALs in Iraq, as there were multiple GALs on multiple servers for multiple units. (R. at 8820-21, 8869, 9354-55).

1. The government's evidence that PFC Manning stole or converted the USF-I GAL.

To prove PFC Manning stole or converted the USF-I GAL, the government called as a witness Mr. Johnson, a forensic examiner. (R. at 8422). Mr. Johnson testified he conducted a forensic examination of PFC Manning's personal computer and discovered "a large number of what appear to be exchange formatted email addresses" in the unallocated space. (R. at 8458). "Unallocated space" is deleted space on a computer. (R. at 8431). Mr. Johnson testified these files were in the unallocated space because PFC Manning deleted the contents of her computer. (R. at 8459).

Neither Mr. Johnson nor anyone else testified the email addresses found on PFC Manning's computer were transmitted to anyone prior to deletion. Mr. Johnson also did not testify as to

[19] As an illustration, this would be similar to a user on Fort Belvoir utilizing the dropdown menu in Outlook's address book to access the GAL of another installation or organization, then searching for a user within that organization.

whether these email addresses were in fact the USF-I GAL, or a portion of it. He simply identified the fact that a large number of email addresses existed on PFC Manning's computer. (R. at 8459).

Next, the government offered a stipulation of expected testimony from another forensic examiner, Special Agent (SA) Williamson. (R. at 8783, Pros. Ex. 143). Special Agent Williamson examined an unclassified government computer PFC Manning had used in Iraq. (R. at 8784; Pros. Ex. 143).

On this computer, SA Williamson found a large text file that "appeared to be an extract of a Microsoft Exchange [GAL]." (R. at 8788; Pros. Ex. 143). This text file contained approximately 74,000 Microsoft Exchange-formatted e-mail addresses. (R. at 9789; Pros. Exs. 48, 143). Like Mr. Johnson, SA Williamson did not attempt to identify which GAL these email addresses belonged to, if any. He "did not contact any individual who could have given [him] the actual Iraq GAL, nor did [he] compare the data in the files recovered . . . with the actual Iraq GAL." (R. at 8789; Pros. Ex. 143).

Finally, the government called Chief Warrant Officer Four (CW4) Nixon on two separate occasions to testify regarding the nature of the USF-I GAL. (R. at 8795-843, 9337-67). The first time CW4 Nixon testified, he stated there were approximately 160,000 users on the USF-I GAL in February 2010. (R. at 8826).

On cross-examination, however, he agreed there were significantly fewer email addresses found on PFC Manning's computer. (R. at 8827). He also acknowledged he did not compare the email addresses found on her computer to the actual USF-I GAL because the USF-I GAL was not provided to him. (R. at 8837-38).

On re-direct, the government for the first time attempted to connect the email addresses found on PFC Manning's computer to the USF-I GAL. (R. at 8838-39). To this end, CW4 Nixon testified he recognized "a couple system administrator names that belonged to USF-I headquarters" from the email addresses found on PFC Manning's computer. (R. at 8839). However, this was the extent of the testimony on this point—he did not testify the email addresses on her computer were in fact the USF-I GAL or a portion of it.

The second time CW4 Nixon testified, he acknowledged that a brigade is the lowest Army echelon of command with its own separate GAL. (R. at 9354-55). He agreed in general terms that a brigade's GAL "plugs into" a division's GAL, and a division's GAL "plugs into" USF-I's GAL. (R. at 9355). He further agreed that the email addresses found on PFC Manning's computer belonged to a "division-level GAL," not a brigade GAL or the USF-I GAL. (R. at 9356). However, he did not say this "division-level GAL" possessed by PFC Manning in fact "plugged into" the

USF-I GAL, nor did he elaborate at all on the significance of "plugging in" to a GAL.

2. The government's evidence on the value of the USF-I GAL.

The government proceeded under three theories to prove that the value of the USF-I GAL exceeded $1,000. First, the government sought to prove the cost of entering email addresses into the system. Chief Warrant Officer Four Rouillard testified that soldiers ranking E-4 and above spent approximately ten minutes entering a user's email account into a GAL. (R. at 8865, 8893). Thus, the government argued it took 740,000 minutes, or over 12,000 hours, to enter 74,000 email addresses into the system. (R. at 11048). In 2010, an E-4's base pay was $1,800 per month, which equates to eleven dollars per hour during a forty-hour work week. (R. at 11048). At this rate, the government argued, it would cost well over $1,000 to produce the USF-I GAL. (R. at 11048-49).

Second, the government attempted to value the GAL by reference to the cost of the software and physical infrastructure necessary to maintain it. (R. at 9337-52). The military judge rejected this approach and excluded the evidence. (App. Ex. 613 at 8).

Finally, the government sought to prove the market value of the information within the USF-I GAL on the "thieves' market" through its counterintelligence expert, Mr. Lewis. A detailed

discussion of this testimony is included in Assignment of Error III.C.

The defense moved for a finding of not guilty under R.C.M. 917 as to Specification 16 of Charge II. (App. Ex. 596). The military judge denied the motion. (App. Ex. 613). Additional facts necessary to dispose of this issue are discussed below.

Law and Argument

1. There is no evidence PFC Manning stole or purloined "the USF-I GAL," or "a portion of" it.

The evidence in this case only shows there were Microsoft Exchange-formatted emails in the unallocated space of PFC Manning's personal computer and on a government computer she used. (R. at 8459, 8788; Pros. Ex. 143). However, the government did not charge PFC Manning with stealing or converting "email addresses." Specification 16 of Charge II alleged PFC Manning stole or converted a specific item of property—the "USF-I GAL." (Charge Sheet).

In 2010, the USF-I GAL was not the only GAL in Iraq. (R. at 8869). There were others, as CW4 Nixon testified. Brigades, divisions, and USF-I (the corps) maintained their own separate GALs on their own servers. (R. at 9354). While there were email addresses found on PFC Manning's computers, the government presented no evidence as to which GAL these email addresses belonged to.

In fact, the government's own witness testified the email addresses on PFC Manning's computer were *not* the "USF-I level GAL," but instead a "division-level GAL." (R. at 9356-57). The USF-I GAL contained 160,000 email addresses but PFC Manning possessed no more than 74,000. (R. at 8826, 9789). According to CW4 Nixon, this discrepancy was due to the fact that it was not in fact the USF-I GAL on PFC Manning's computer. (R. at 9357).

To save this specification, the military judge allowed the government to amend it to allege the theft of "a portion of" the USF-I GAL under the theory that the email addresses must have been a subset of this larger GAL. (R. at 10815-19). But nowhere in the record is it established that the "division-level GAL" possessed by PFC Manning was in fact "a portion of" the USF-I GAL.[20]

Not only did a government witness affirmatively testify PFC Manning was not in possession of the actual USF-I GAL, but no witness even compared the USF-I GAL as it existed in 2010 to the email addresses on PFC Manning's computer. Mr. Johnson simply examined PFC Manning's personal computer and found "exchange formatted email addresses" in the unallocated space. (R. at 8458). Special Agent Williamson similarly examined a government computer used by PFC Manning and found what "appeared to be an

[20] As argued below, the military judge abused her discretion in allowing this major amendment over defense objection.

extract of a Microsoft Exchange [GAL].” (R. at 8788). Neither witness conducted an examination of the actual USF-I GAL, so they could not say PFC Manning ever possessed it. (R. at 8789; Pros. Ex. 143).

CW4 Nixon also did not examine the actual USF-I GAL and compare it to the email addresses on PFC Manning’s computer. (R. at 8837-38). He could do no more than recognize that a few email addresses and “group accounts” found on PFC Manning’s computer belonged to USF-I at some previous point in time. (R. at 8839). But he acknowledged some of these individuals “weren’t necessarily USF-I entities,” instead belonging to “different organizations all over Iraq.” (R. at 8839).

Moreover, the government did not admit the actual USF-I GAL into evidence. (*See* Record of Trial Index of Prosecution Exhibits Admitted at vol. 41, pp. 140-46). Thus, the court had nothing to compare with the email addresses found on PFC Manning’s computer to reach a finding that she in fact stole the USF-I GAL, or a portion of it.

There is a complete lack of evidence as to the exact nature of the email addresses found on PFC Manning’s computer. The court apparently assumed these addresses were “a portion of” the USF-I GAL because they were “.mil” exchange-formatted addresses, downloaded in Iraq. There is insufficient evidence to support this assumption, especially since there were multiple GALs in

Iraq at the time. (R. at 8820-21, 8869, 9354-55). Accordingly, the evidence is legally and factually insufficient to prove PFC Manning possessed "the USF-I GAL" or "a portion of" it and Specification 16 of Charge II should be set aside and dismissed.

2. Even if the evidence is sufficient to support a finding PFC Manning possessed "a portion of" the USF-I GAL, the military judge's amendment of the specification at the eleventh hour severely prejudiced PFC Manning's defense.

In support of the R.C.M. 917 motion, defense counsel argued the government failed to offer evidence that the entire USF-I GAL at issue in Specification 16 of Charge II was stolen or converted as charged. (R. at 10510-11; App. Ex. 596). The government conceded that only 74,000 email addresses were found on PFC Manning's personal computer, despite the USF-I GAL consisting of approximately 160,000 users. (R. at 10816).

In response to the defense's assertion that the government thus failed to prove a theft or conversion of the entire USF-I GAL as charged, the government moved to except the words "to wit:" and substitute therefor the words "to wit: a portion of" in the specification. (R. at 10815-19).

The defense objected, arguing such an amendment would be a major change because it would change the identity of the charged property and mislead PFC Manning as to the offense charged. (R. at 10814, 10819-22). The military judge granted the motion. (App. Ex. 613 at 6; R. at 10907).

A military judge's decision permitting the government to amend a specification after arraignment, over defense objection, is reviewed for an abuse of discretion. *United States v. Longmire*, 39 M.J. 536, 537 (Army Ct. Crim. App. 1994).

Minor changes in specifications are permitted "at any time before findings are announced, if no substantial right of the accused is prejudiced." R.C.M. 603(c). Major changes "may not be made over the objection of the accused unless the charge or specification affected is preferred anew." R.C.M. 603(d). Major changes are "those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." R.C.M. 603(a). A major change after arraignment deprives an accused of due process and strips the court-martial of jurisdiction to hear the amended charge. *Longmire*, 39 M.J. at 538.

The military judge may modify the charges and specifications to conform the findings to the evidence under the authority to make "exceptions and substitutions." *United States v. Parker*, 59 M.J. 195, 197 (C.A.A.F. 2003)(citing R.C.M. 918(a)(1)). However, "[e]xceptions and substitutions may not be used to substantially change the nature of the offense . . . ." R.C.M. 918(a)(1).

In *United States v. Sullivan*, the CAAF adopted a two-pronged test from the U.S. Courts of Appeals to determine if an amendment to a specification is major or minor. 42 M.J. 360, 365 (C.A.A.F. 1995). The first prong is whether the change results in an additional or different offense. *Id*. This prong "usually is satisfied if the charge is altered to allege a lesser-included offense." *Id*.

The second prong is whether the change prejudices a substantial right of the accused. *Id*. This prong is satisfied "if the amendment does not cause unfair surprise. The evil to be avoided is denying the defendant notice of the charge against him, thereby hindering his defense preparation." *Id.*

Applying the *Sullivan* test here, the military judge's amendment to Specification 16 of Charge II was a major change resulting in a different offense, not a lesser-included one. The amendment also resulted in unfair surprise, depriving PFC Manning notice of the charges against her.

A. The amended specification alleged a different offense.

Under the first *Sullivan* prong, the amendment to Specification 16 of Charge II created a different offense than the one charged because it fundamentally changed the nature of the property alleged to be stolen or converted. The government charged PFC Manning with stealing "the" USF-I GAL. (Charge Sheet). After the evidence failed to prove a theft of "the" GAL,

the military judge allowed the government to amend the specifications to allege the theft or conversion of only "a portion of" it.

But contrary to the military judge's ruling that this change merely alleged a lesser included offense, "a portion of" the USF-I GAL is qualitatively different than the entire GAL. First, nowhere in the record is it established that the "division-level GAL" possessed by PFC Manning was "a portion of" the USF-I GAL. Second, even assuming this division-level GAL somehow *was* "a portion of" the USF-I GAL, the evidence shows it was still a separate GAL maintained on a separate server, and thus an entirely different item of property than what was originally charged. (R. at 8869).

By alleging PFC Manning stole or converted the USF-I GAL, the government alleged she stole a specific item of property on a specific server containing 160,000 email addresses. The evidence failed to establish this item of property was stolen, and thus the modified Specification 16 of Charge II alleged a new offense and the first prong of the *Sullivan* test is met.

B. The amended specification caused unfair surprise, denied PFC Manning notice of the charge against her, and hindered her defense preparation.

The amendment to Specification 16 of Charge II from "the USF-I GAL" to "a portion of the USF-I GAL," after the close of all evidence in the case, caused unfair surprise and hindered

PFC Manning's ability to effectively prepare a defense. Given the language of the original specification, the defense appropriately focused its cross-examination of CW4 Nixon, the government witness most relevant to the GAL, on whether the email addresses found on PFC Manning's computer constituted "the USF-I GAL." (R. at 8825-38, 9354-57). The defense was unaware during the presentation of evidence that the appropriate line of inquiry was instead whether the email addresses found on PFC Manning's computer were "a portion of" the USF-I GAL.

Chief Warrant Officer Four Nixon testified on two separate occasions regarding the nature of a GAL. (R. at 8795-843, 9337-67). At no point during this extensive testimony did the government or the defense explore in any detail whether the email addresses found on PFC Manning's computer were "a portion of" the USF-I GAL.

The first time CW4 Nixon testified, he said he recognized a couple of names of individuals who belonged to USF-I headquarters from the addresses found on PFC Manning's computer, but he did not testify these email addresses were in fact "a portion of" the USF-I GAL. (R. at 8839). The second time he testified, he agreed in general terms that a brigade's GAL "plugs into" a division's GAL, and a division's GAL "plugs into" USF-I's GAL. (R. at 9355). However, nowhere did CW4 Nixon elaborate on whether the specific division-level GAL found on

PFC Manning's computer was "a portion of" the USF-I GAL, whether it "plugged into" the USF-I GAL, or whether "plugging into" a higher-level GAL even meant it was "a portion of" that GAL. Indeed, it is difficult to gain a coherent understanding at all from this record as to how other GALs interplayed with the USF-I GAL. Had PFC Manning been charged at the outset with stealing "a portion of" the GAL, this area could have been explored by the parties and an adequate record created for appellate review.

Instead, the defense was unaware it was defending against a charge of stealing or converting "a portion of" the USF-I GAL and had no occasion to further press CW4 Nixon on the nature of the division GAL on PFC Manning's computer, or what he meant when he said lower-level GALs "plug into" higher-level GALs. At the time of the testimony, PFC Manning could have no idea the specification would change and this issue would take on such relevance later in the proceeding. The military judge relied on this undeveloped testimony to later find that a division GAL was "a portion of" the USF-I GAL, severely prejudicing PFC Manning's ability to mount an effective defense. (R. at 10817; App. Ex. 613 at 6).

In short, when the military judge allowed the government to change the nature of the property from the USF-I GAL to "a portion of" the USF-I GAL after the presentation of evidence, the defense was deprived of a full and fair opportunity to

challenge the assertion that the email addresses found on PFC Manning's computer were in fact "a portion of" the USF-I GAL. Based on the evidence presented, this assertion was questionable at most, and could have been subjected to a rigorous cross-examination at least.

Accordingly, even if this court finds the evidence is sufficient to support a finding PFC Manning possessed "a portion of" the USF-I GAL, the military judge's amendment of the specification was an abuse of discretion and Specification 16 of Charge II should be set aside and dismissed.[21]

3. There is no evidence PFC Manning's possession of email addresses was "wrongful" or with the "intent to deprive."

The evidence demonstrates PFC Manning deleted a list of email addresses from her computer. (R. at 8459). There is no evidence she transmitted these addresses to WikiLeaks or anyone else, nor is there evidence she attempted to do so at some

[21] This argument applies with equal force to the military judge's amendments to Specifications 4 and 6 of Charge II regarding the CIDNE databases. Defense counsel argued the government failed to offer evidence that the entire CIDNE databases at issue in these specifications were stolen or converted as charged. (App. Ex. R. at 10712-14). The government conceded the records and information allegedly stolen or converted made up only twenty-four percent of the charged CIDNE databases. (R. at 10809-10). However, these digital copies of SIGACT reports were not, in any way, "a portion of" the CIDNE databases. The copies of SIGACTS were separate from the databases themselves, and did not exist until they were created by PFC Manning after accessing the databases. Thus the amendments to Specifications 4 and 6 of Charge II also alleged different offenses and caused unfair surprise.

point. The government presented no evidence WikiLeaks ever possessed or published any of these email addresses. Put simply, PFC Manning did nothing with these email addresses other than briefly possess and then delete them.

To prove a theft or conversion of the USF-I GAL under Section 641, the government had to show PFC Manning "wrongfully" took it from the government with "the intent to deprive." (App. Ex. 410a at 5). However, the government did not prove simple possession of a list of email addresses was wrongful, nor did the government prove PFC Manning intended to deprive the government of the email addresses.

The government presented no evidence PFC Manning was not permitted to view, save, or download the email addresses to her computer. On the contrary, the government's own witnesses confirmed there was no directive prohibiting soldiers from accessing or downloading .mil email addresses from any GAL, much less the USF-I GAL. According to CW4 Rouillard, nothing prevented any soldier from downloading the email addresses of other soldiers in his or her unit. (R. at 8923). Chief Warrant Officer Two Balonek and CW4 Nixon were similarly unaware of any prohibition against downloading email addresses. (R. at 7861, 8826). Special Agent Williamson's stipulation of expected testimony acknowledged, "The DOD warning banner and legal notice did not explicitly prohibit the downloading of e-mail addresses.

I am not aware of any restriction or guidance that precludes one from downloading e-mail addresses from Outlook." (R. at 8786; Pros. Ex. 143).

Consider an Army judge advocate who downloads the email addresses of other judge advocates, takes them home, and then ultimately deletes those email addresses. These actions are no more wrongful than those of PFC Manning. Thus, the evidence established only that PFC Manning *lawfully* downloaded email addresses from what appears to be a "division GAL," then deleted them.

Moreover, the fact that the email addresses were found in the unallocated space of PFC Manning's computer, and thus deleted, proves a lack of "intent to deprive the government of the use and benefit" of the addresses. (App. Ex. 410a). She never sent the email addresses to anyone, and the government's witnesses verified the email addresses were always accessible to government personnel. (R. at 8825, 9366). *See United States v. Schempp*, ARMY 20140313, 2016 CCA LEXIS 147, at *5-6 (Army Ct. Crim. App. 26 Feb. 2016)(mem. op.)(holding convictions for possession of child pornography were legally insufficient because appellant did not "knowingly possess" the images found in unallocated space).

The evidence failed to establish PFC Manning's simple possession of email addresses at some point in time was wrongful

and with the intent to deprive, and thus failed to establish she stole them. Accordingly, this court should set aside and dismiss Specification 16 of Charge II.

4. The government failed to prove the email addresses on PFC Manning's computer were of a value greater than $1,000.

Even assuming PFC Manning wrongfully took a portion of the USF-I GAL with the appropriate intent, the government still presented insufficient evidence to support a finding that the list of email addresses found on PFC Manning's computer were of a value greater than $1,000. Section 641 provides, "'Value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater." 18 U.S.C. § 641.

The government first attempted to establish value for this offense through the testimony of CW4 Nixon. He testified about the infrastructure, hardware, and software resources required to maintain the GAL. (R. at 8804-18, 9338-52). However, the military judge did not allow this method of valuation due to a lack of legal authority to support it. (App. Ex. 613 at 8).

Next, the government attempted to establish value through the testimony of CW4 Rouillard. The trial counsel asked him how much a foreign adversary would pay for email addresses in order to conduct "spear-phishing" campaigns. (R. at 8890). He responded, "So, honestly, monetary value is hard for me to assess . . . ." (R. at 8890). Based on this and other responses,

the government withdrew its request to qualify him as an expert in valuing the GAL. (R. at 8892). Thus, the government was left to rely only on CW4 Rouillard's testimony regarding the cost of employee data entry and Mr. Lewis' testimony regarding the "thieves' market" value of "information." (R. at 8865, 9466-772).

The insufficiency of Mr. Lewis' testimony regarding value is discussed in Assignment of Error III.C. Should this court find the military judge's admission of his testimony was an abuse of discretion, the only remaining evidence of the GAL's value is CW4 Rouillard's "cost of production" testimony. But this testimony is also flawed.

First, the cost of inputting data into the GAL does not reflect the "cost price" of what PFC Manning in fact possessed on her computer—a digital copy of a list of email addresses. As noted by the military judge, "cost price" refers to the "cost of producing or creating the *specific* property allegedly stolen, purloined, or knowingly converted." (App. Ex. 410a)(emphasis added). But the list of email addresses on PFC Manning's computer did not "cost" the government thousands of dollars. The actual GAL created by government employees remained functional and in the government's possession at all times relevant to the offense. (R. at 8825, 9366). Instead, the government had to establish the "cost price" of the list PFC Manning actually

possessed, which required minimal, if any, government resources to create.

Federal case law illustrates this point. In *DiGilio*, the court noted the distinction between a theft of original records and a theft of copies of those records. 538 F.2d at 977. Rejecting the defense's argument that copies are not "records" under Section 641, the court held the stolen copies were the property of the government due to the appellant's use of government time, equipment, and supplies to produce the copies. *Id*. The court noted the government did not produce any evidence of the "cost price" of these stolen copies, instead relying on "thieves' market" value. *Id*. at 979. Thus, the court recognized that the appropriate "cost price" of copies is determined by reference to the costs incurred by the government in the production of those copies, not by reference to the cost price of the originals. Had the case involved "memorization of information contained in government records, or even copying by thieves by means of their own equipment," the "cost price" analysis would necessarily have been different because the copies would have cost the government nothing. *Id*. at 977.

Similarly, in *Jeter*, the court found the cost price of the grand jury transcript copies stolen by the defendant "certainly could not represent a 'thing of value' over [the statutory minimum] and involve anything more than a misdemeanor

violation." 775 F.2d 680. These copies cost only $89.10 to produce. *Id*. The court instead relied on the fact Jeter was charged with stealing "information" within the copies, and sold that "information" to a third party on the thieves' market.[22] *Id.*

Thus, in this case, the cost to the government of several E-4s inputting email addresses into the GAL is irrelevant to the "cost price" of the list of email addresses PFC Manning possessed. Under a legitimate "cost price" analysis, this list was worth nothing more than the CD PFC Manning used to store it on, or any government time or money PFC Manning used as she created the list. Indeed, the list did not even exist until PFC Manning created it by making the digital copies. Since the government presented no evidence of the actual cost of the email addresses at issue, it failed to establish value under a "cost price" approach.[23]

Second, even assuming the "cost price" of the GAL can be attributed to the list PFC Manning possessed, the method the

[22] Unlike in *Jeter*, however, PFC Manning was not charged with stealing "information." Only the value of the "copies" can be relevant here.

[23] This reasoning applies equally to the value element of Specification 8 of Charge II. The government introduced similar "cost of employee entry" evidence to place a value on the detainee assessment briefs contained within the SOUTHCOM database. (R. at 8730-31). However, the cost to the government of a GS-12 typing information into this database is irrelevant to the actual cost price of the digital copies of the detainee assessment briefs PFC Manning obtained.

government employed to determine this cost does not provide an accurate indication of value. Chief Warrant Officer Four Rouillard said that soldiers ranking E-4 and above spent approximately ten minutes entering a user's email account into a GAL. (R. at 8865, 8893). However, he was last in Iraq in 2007 to 2008, two years before PFC Manning's actions. (R. at 8853, 8857). While he trained soldiers during Advanced Individual Training in how to generally set up a GAL, he did not have any knowledge of how the USF-I GAL was set up in 2009 and 2010 in Iraq. (R. at 8914).

Also, CW4 Rouillard acknowledged that some soldiers might take more or less time than others to input the information, and that it was even possible to create a "script" which would automate the creation of email accounts into the GAL. (R. at 8915). Due to this possible variation in the methods by which a GAL might be created and the fact that CW4 Rouillard did not actually observe the creation of the USF-I GAL, the government's "cost-price" valuation argument was based on an unreliable mathematical calculation.

Chief Warrant Officer Four Rouillard's "cost-price" testimony to value the GAL in excess of $1,000 was legally and factually insufficient (and Mr. Lewis' "market value" testimony was inadmissible). Thus, assuming the evidence on the remaining elements of Specification 16 of Charge II is sufficient, this

court should affirm only the lesser included Section 641 offense of stealing, purloining, or converting records or things of value belonging to the United States with a value of $1,000 or less and reassess the sentence accordingly.

III.C.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ADMITTING TESTIMONY FROM THE GOVERNMENT'S COUNTERINTELLIGENCE EXPERT ON THE VALUE OF THE INFORMATION AT ISSUE IN SPECIFICATIONS 4, 6, 8, 12 AND 16 OF CHARGE II?

Additional Statement of Facts

The maximum punishment for a violation of 18 U.S.C. § 641 is confinement for ten years if the value of the property alleged to be stolen, purloined, or converted exceeds $1,000. 18 U.S.C. § 641. If the value of the property is $1,000 or less, the maximum punishment is confinement for one year. *Id*.

The military judge defined value for purposes of 18 U.S.C. § 641 as follows:

> "Value" means the greater of (l) the face, par, or *market value*, or (2) the *cost price*, whether wholesale or retail. A "thing of value" can be tangible or intangible property. Government information, although intangible is a species of property and a thing of value. The market value of stolen goods may be determined by reference to a price that is commanded in the market place whether that market place is legal or illegal. In other words, market value is measured by the price a willing buyer will pay a willing seller. (The illegal market place is also known as a "thieves market".) "Cost price" means the cost of producing or creating the

> specific property allegedly stolen, purloined, or knowingly converted.

(App. Ex. 625 at 3)(emphasis added).

1. The government's claims regarding value under Section 641.

The government sought to prove the value element of the Section 641 specifications by resort to a confusing array of both "cost price" and "market value" methods of valuation. (App. Ex. 599). Under the "cost price" method, the government employed two separate theories. First, the government introduced evidence purporting to show the cost of producing, creating, and maintaining the *actual databases* and GAL in which the records and information were stored. (CIDNE: R. at 8310-15; SOUTHCOM: R. at 8734-35; DoS NCD: R. at 9054-60; GAL: R. at 8866-70, 9938-52). The military judge excluded all evidence of this method of valuation, finding it was not supported by any legal authority. (App. Ex. 613 at 8).

Second, the government introduced evidence purporting to show the cost of creating the *information* in the SOUTHCOM database and the GAL, such as employee time and salary for data entry. (SOUTHCOM: R. at 8730-31; GAL: R. at 8864-65, 8893-95, 8914-16). The military judge allowed this method of "cost price" valuation. (App. Ex. 613 at 8). However, with respect to the CIDNE and DoS NCD databases, the government did not introduce any evidence of this nature and relied only on "market value."

The government did not offer any evidence of the "cost price" of the digital *copies* of records, such as the cost of the CDs PFC Manning used, the time she spent downloading the copies, or the use of the government's information systems to obtain the copies.

To prove "market value," the government introduced evidence purporting to show the value on the "thieves market" of the information contained within the databases and the GAL. (R. at 9465-771 (portions sealed)). This illustration shows the methods the government used to value the property depending on the specifications at issue:

Specification	**Valuation methods offered by government**	**Valuation methods accepted by court**
4 (CIDNE-I) 6 (CIDNE-A) 12 (DoS NCD)	1) Database management costs 2) Thieves' market value of information	Thieves' market value of information
8 (SOUTHCOM)	1) Cost of information/records creation 2) Thieves' market value of information	1) Cost of information/records creation 2) Thieves' market value of information
16 (GAL)	1) Hardware/software maintenance costs 2) Cost of email account creation 3) Thieves' market value of information	1) Cost of email account creation 2) Thieves' market value of information

The military judge found the records and information in Specifications 4, 6, 8, 12, and 16 were of a value greater than $1,000. (App. Ex. 625 at 5). She determined this value by

reference to both “the cost of production of the information in the records and the records, and, as an independent basis of valuation for each specification, by the thieves market.” (App. Ex. 625 at 5). However, as illustrated by the above chart, the only evidence of value admitted into evidence for Specifications 4, 6, and 12 (CIDNE and DoS NCD) was testimony regarding the thieves’ market value of information contained within the databases.

2. The government’s claims regarding market value of the “information” at issue in the Section 641 specifications.

The only evidence offered by the government on the “market value” of the information at issue in each of the Section 641 specifications was the testimony of Mr. Lewis, the Senior Expert and Counterintelligence (CI) Advisor to the Directorate of Science and Technology (DST) for the Defense Intelligence Agency (DIA). (R. at 9466). In this capacity, Mr. Lewis advised the DST on CI and counterespionage activities. (R. at 9466). The government intended to qualify Mr. Lewis as an expert in CI and “valuing government information by foreign intelligence services.” (R. at 9482).

Mr. Lewis defined CI as “the information and the activities that we use to identify, disrupt, [sic] exploit our foreign adversaries’ intelligence services or international terrorism organizations, [sic] keep them from defeating us.” (R. at 9467).

He defined counterespionage as “an area of counterintelligence that’s really more focused on espionage investigations, really focused on proving or disproving allegations against any individual.” (R. at 9467).

Mr. Lewis described two realms within the field of CI: offensive CI operations and CI investigations. (R. at 9477). Offensive CI operations are “clandestine activities that are focused on individuals that we believe to be or [sic] known to be involved in our adversaries’ intelligence organizations or in international terrorist entities.” (R. at 9477). Counterintelligence investigations are “those significant investigations being conducted across the Department by the military services or the defense agencies or the FBI.” (R. at 9477).

After an extensive open-session overview of Mr. Lewis’ career in the CI field, the government moved to enter a closed session to continue laying the expert foundation with classified evidence. (R. at 9491). Before entering the closed session, the military judge allowed the defense to cross-examine Mr. Lewis on his qualifications. (R. at 9492).

During cross-examination, Mr. Lewis admitted he previously told the defense team that he did not consider himself an expert at valuing classified information. (R. at 9494). He also admitted he could not put a specific value on any document. (R.

at 9506, *see also* statement of defense security expert appended to App. Ex. 614). Mr. Lewis admitted he had never received any training on valuing classified information for a foreign intelligence service, or valuing information of any kind. (R. at 9496-500).

When discussing his CI experience, Mr. Lewis admitted that he had never been an offensive CI agent, or "case officer," engaged in offensive CI operations or involved in the actual sale of information. (R. at 9501). He also had never managed any offensive CI operations. (R. at 9506). Instead, his experience with offensive CI operations came from his "visibility" over those operations as the Chief of the Counterespionage Division and the Counterintelligence Field Activity. (R. at 9475, 9478, 9480, 9500-02). He admitted that, to the extent an offensive CI agent might be involved in the sale of classified information, it was the foreign adversary who determined the value of the information, not the offensive CI agent. (R. at 9502, 9506-07).

Mr. Lewis had never been accepted by any court as an expert in valuing classified information from a foreign intelligence service. (R. at 9502). He did not subscribe to any journals dedicated to the valuation of information, nor did he even know if any existed, and he had never attended any conferences in which the value of information was discussed. (R. at 9502-03). Mr. Lewis had never heard of the term "thieves' market," yet

this was the “market” on which the government had retained him to opine as an expert. (R. at 9504).

After the defense’s open-session cross-examination of Mr. Lewis, the military judge convened a closed session to continue the government’s foundational testimony on his expertise. (R. at 9510 (redacted)).[24] His role as a senior CI advisor was to review significant CI investigations and provide briefings to Congress and the Under Secretary of Defense for Intelligence (USDI) on their progress. (R. at 9514 (redacted)). In this capacity, he had “visibility” over a number of significant CI investigations. (R. at 9514-16 (redacted)).

Mr. Lewis testified that foreign intelligence organizations pay for both classified and unclassified information. (R. at 9512, 9514 (redacted)). They attempt to acquire U.S. government information by finding people willing to compromise it. (R. at 9526 (redacted)). During CI investigations, investigators analyze the financial records of individuals suspected of selling government information in order to find patterns of abnormal financial behavior. (R. at 9513 (redacted)). Although

[24] The following facts are derived from the redacted, unclassified version of the record. Citations to this portion of the record will include the term “redacted” to signify the information is derived from the unclassified record. Additional facts derived from the sealed classified record necessary to dispose of this issue are addressed in the classified supplement to this brief.

there is no legitimate market for the buying and selling of U.S. government information, Mr. Lewis stated foreign intelligence organizations purchase the information from people who steal it. (R. at 9532 (redacted)).

Mr. Lewis' experience with offensive CI operations is discussed in detail in the classified supplement to this brief at pages 3-9.[25] Mr. Lewis testified he was never directly involved in an offensive CI operation. (R. at 9501, 9523 (redacted)). However, in his role as a senior CI advisor he would obtain information on operations from offensive CI agents for his briefings to the USDI and Congress. (R. at 9523 (redacted)). Due to the "visibility" he obtained from these interactions with offensive CI agents, Mr. Lewis claimed he was able to assess the cost of information sold to foreign intelligence organizations. (R. at 9539 (redacted)). Based on this experience, the government offered Mr. Lewis as an expert in CI and the "value of government information to foreign intelligence services." (R. at 9539-40 (redacted)). The defense objected and requested to voir dire Mr. Lewis. (R. at 9540 (redacted)).

[25] To fully understand the purported basis for Mr. Lewis' testimony on valuation, it will be necessary to read this brief in conjunction with the classified supplement.

During voir dire, Mr. Lewis admitted that everything he had learned in the course of his oversight of offensive CI operations came from reading case files or talking to case officers. (R. at 9546 (redacted)). Mr. Lewis would read "reporting from the field" in order to inform his briefings to the USDI and Congress. (R. at 9547 (redacted)). Despite not being involved in the conduct of these offensive CI operations, Mr. Lewis never independently verified the accuracy of the facts relayed in these reports because "the foundation of the whole security system is trust." (R. at 9550 (redacted)).

The defense also questioned Mr. Lewis on his preparation to testify in this case. (R. at 9551 (redacted)). To aid in his preparation, Mr. Lewis asked an individual to compile a "snapshot" of information from a report entitled the Essential Elements of Information (EEI). (R. at 9551, 9616 (redacted)). The EEI is a quarterly report containing information that is further discussed in the classified supplement to this brief at pages 9-11.

Generally, the EEI provides information on "what the foreign adversaries were looking for." (R. at 9552, 9616 (redacted)). The EEI is generated from information obtained through completed offensive CI operations. (R. at 9616, 9618 (redacted)). The EEI does not contain information on

unsuccessful operations in which U.S. government information did not change hands. (R. at 9616, 9618 (redacted)).

Mr. Lewis did not request one of the actual quarterly EEI reports, however, because the "EEI list gets voluminous over time." (R. at 9552 (redacted)). Instead, he requested a "snapshot of information" in the report from 2008 through 2010. (R. at 9552-53 (redacted)). Mr. Lewis did not independently verify the accuracy of the information provided to him in the "snapshot" because he "was pretty certain" the individual gave him information from the EEI report and he knew "some of it" to be true. (R. at 9553 (redacted)).

Also in preparation for his testimony, Mr. Lewis asked another individual to pull value data on the "most and least successful offensive CI operations." (R. at 9553-56, 9661, 9685 (redacted)). He did not request value data from "unsuccessful or failed CI operations." (R. at 9619, 9661 (redacted)). This data, and its use by Mr. Lewis in conjunction with the EEI snapshot to determine the value of information in this case, is further discussed in the classified supplement to this brief at pages 12-15.

The government did not ask Mr. Lewis to place values on documents relevant to this case until one week before his testimony. (R. at 9557 (redacted)). At that time, government counsel gave Mr. Lewis access to the DoS NCD database and asked

him to do some keyword searches for specific information. (R. at 9557, 9642 (redacted))(s*ee* classified supplement at page 15 for further detail on these keyword searches). Government counsel also showed Mr. Lewis about forty records from both the CIDNE-A and CIDNE-I databases. (R. at 9558-59 (redacted)).

Mr. Lewis compared the results of his keyword searches of the DoS NCD database and his review of the CIDNE documents to the data he obtained earlier on "what the foreign adversaries were looking for." (R. at 9559-61, 9642 (redacted)). Mr. Lewis depended primarily on the historical data provided to him by others to arrive at his valuation opinion. (R. at 9553-54, 9560-61 (redacted)). He testified he could not otherwise accurately render his opinion using only memory or experience. (R. at 9560-64 (redacted)). However, he did not examine the records of the actual offensive CI operations from which this data was derived. (R. at 9560 (redacted)). He also did not consider whether the information in the charged documents was already publicly known, a factor which he admitted might have an impact on the value of the information. (R. at 9642 (redacted)). Significantly, until he began preparing for his testimony a week before he took the stand, Mr. Lewis had never attempted to value a classified document. (R. at 9566 (redacted)).

During oral argument on the government's motion to qualify Mr. Lewis as an expert, the defense objected to Mr. Lewis being

qualified as an expert in offensive CI operations and valuation of information. (R. at 9583 (redacted)). The defense did not object to Mr. Lewis being qualified as an expert in CI generally. (R. at 9583 (redacted)).

The government argued Mr. Lewis' extensive experience in CI provided him specialized knowledge regarding U.S. government information. (R. at 9584 (redacted)). The government also argued the information Mr. Lewis relied on was reliable because he used similar information to brief Congress, and the information is of the type relied upon by professionals in the CI field. (R. at 9589, 9612, 9614-15 (redacted)). The government stated Mr. Lewis could offer a reliable opinion on valuation by employing his CI experience and his visibility over offensive CI operations, reviewing the charged documents, and comparing those documents to the data he received in preparation for the case. (R. at 9604-05 (redacted)).

The defense argued Mr. Lewis' opinion on valuation was unreliable because it was not based on sufficient facts or data and it was not the product of reliable principles and methods. (R. at 9591-92 (redacted)). First, according to the defense, Mr. Lewis' experience in offensive CI operations stemmed solely from his recollection of having previously reviewed files from these operations, but these operations were completed by actual case agents, not Mr. Lewis. (R. at 9591-92, 9601-02 (redacted)).

Second, the defense argued Mr. Lewis' opinion as to valuation depended on his memory of reviewing these files, coupled with incomplete and unverified summaries of data requested solely for the purpose of testifying in this case. (R. at 9592-93, 9599 (redacted)). The defense argued this data was unreliable because Mr. Lewis only requested information from the EEI and other information regarding the most and least successful offensive CI operations, but he did not request or receive information on unsuccessful operations and thus did not have a complete picture of the market at issue. (R. at 9592 (redacted)).

In an unclassified ruling supplemented by an oral classified ruling, the military judge accepted Mr. Lewis as an expert in CI. (App. Ex. 591; R. at 9658-65 (redacted)). She did not accept Mr. Lewis as an expert in the value of U.S. government information to foreign intelligence services because this expertise was "too overbroad." (App. Ex. 591). However, the military judge ruled Mr. Lewis could "testify and offer an opinion with regard to value of certain charged documents upon laying a proper foundation within the parameters of the oral classified supplement to this ruling." (App. Ex. 591).

The military judge's classified ruling is discussed in the classified supplement to this brief at page 16. She ruled that Mr. Lewis was also qualified as an expert in offensive CI

operations, and the fact his experience came from oversight and not direct involvement as a case agent went only to the weight of his testimony. (R. at 9664 (redacted)). She further ruled that Mr. Lewis could discuss his use of key terms to find relevant information in the charged documents, compare this information to the data he requested in preparation for his testimony, and provide an opinion as to the value of the information in the charged documents. (R. at 9664-65 (redacted)).

Mr. Lewis rendered his substantive testimony on value during a closed session. This testimony is discussed in further detail in the classified supplement to this brief at pages 17-20. Mr. Lewis testified that between 2008 and 2010, certain foreign intelligence services would value information within the charged documents. (R. at 9641-9726 (redacted)).

On cross-examination, Mr. Lewis stated he based his valuation opinions on his experience, the EEI "snapshot," and the additional data on successful CI operations pulled for him in preparation for his testimony. (R. at 9727-29 (redacted)). Mr. Lewis could have asked the individual who pulled the EEI snapshot to also pull the source information underlying the EEI, but he did not. (R. at 9731-33, 9741 (redacted)). Also, Mr. Lewis verified he did not request any information on failed CI operations. (R. at 9734 (redacted)).

Mr. Lewis testified he spent about six hours reviewing the charged documents and conducting keyword searches. (R. at 9736 (redacted)). As he reviewed the documents and conducted keyword searches, he compared the results to historical information he remembered and the data previously provided to him in preparation for his testimony. (R. at 9738-39, 9755 (redacted)). He did not refer to any source documents to verify that his memory of the purported comparable information was accurate. (R. at 9740-41, 9756-57, 9760, 9762 (redacted)). While testifying, Mr. Lewis had difficulty recalling specific facts in the charged documents that led him to his valuation opinions. (R. at 9764-68 (redacted)).

At the close of Mr. Lewis' examination, the defense moved to strike his "valuation" testimony under Military Rule of Evidence (M.R.E.) 702 because it was not based on sufficient facts and was not the product of reliable principle and methods. (R. at 9770 (redacted)). The military judge denied the motion, citing her earlier ruling. (R. at 9770 (redacted)).

Standard of Review

A military judge's decision to admit or exclude expert testimony over defense objection is reviewed for an abuse of discretion. *United States v. Sanchez*, 65 M.J. 145, 148 (C.A.A.F. 2007). "A military judge abuses his discretion when (1) the findings of fact upon which he predicates his ruling are not

supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010).

Law and Argument

An expert's opinion is admissible only if the testimony: (1) "is based upon sufficient facts or data," (2) "is the product of reliable principles and methods," and (3) the principles and methods have been applied "reliably to the facts of the case." M.R.E. 702. The military judge is the gatekeeper, "tasked with ensuring that an expert's testimony both rests on a reliable foundation and is relevant." *Sanchez*, 65 M.J. at 149 (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)).

The proponent of expert testimony must demonstrate the following six factors: 1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of evidence; and (6) whether the probative value of the testimony outweighs other considerations. *United States v. Houser,* 36 M.J. 392, 397 (C.M.A. 1993).

In *Daubert*, the Supreme Court set out four non-exclusive factors which may be used by a judge in ensuring the reliability of expert testimony: (1) whether the theory or technique can be

and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential error rate and standards controlling the technique's operation; and (4) the degree of acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 593-94; *Kumho Tire*, 526 U.S. at 141 (applying *Daubert* to non-scientific expert testimony).

Although *Houser* was decided before *Daubert*, the decisions are consistent and the military judge should consider the factors from both cases. *Sanchez*, 65 M.J. at 149; *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999). This inquiry is "flexible" and the factors are not a "definitive checklist." *Sanchez*, 65 M.J. at 149. Instead, the focus of the inquiry should be "the *objective* of the gatekeeping requirement, which is to ensure that the expert, 'whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Id*. (quoting *Kumho Tire Co*., 526 U.S. at 152)(emphasis in original).

The military judge abused her discretion when she failed to adequately perform the gatekeeping role and admitted unreliable opinion testimony that exceeded the scope of the witness' expertise. Mr. Lewis' opinions on the value of information were

analytical leaps detached from his actual experience. He relied upon incomplete data and an unreliable method concocted at the eleventh hour in preparation for his testimony. Thus, a "fact which distinguishes a violation punishable by imprisonment for not more than one year from a violation punishable by imprisonment for ten years" was "permitted to rest upon conjecture or surmise." *United States v. Wilson*, 284 F.2d 407, 408 (4th Cir. 1960)(a case involving 18 U.S.C. § 641).

1. Mr. Lewis' testimony did not meet a single *Houser* or *Daubert* factor.

The military judge did not cite *Houser,* nor is there any indication she carefully applied its framework. An application of the principles set forth in *Houser* and *Daubert* demonstrates the decision to admit this evidence was manifestly erroneous because it meets none of the factors set forth in those cases. Mr. Lewis (1) was not qualified to opine on the value of information, (2) the subject matter of his testimony exceeded the scope of his actual qualifications, (3) the basis for his testimony consisted of incomplete and unverified information, (4) the method of valuation he employed was unreliable, and thus his opinion was (5) irrelevant and (6) unduly prejudicial.

A. Mr. Lewis was not qualified to value information.

The military judge did not accept Mr. Lewis as an expert in the "value of US government information to foreign intelligence

sources." (R. at 9664 (redacted); App. Ex. 591). Nonetheless, she ruled that Mr. Lewis could offer an opinion about the value of information in the charged documents because "[s]uch an opinion is within the scope of Mr. Lewis' expertise in counterintelligence." (R. at 9664 (redacted)). The record refutes this conclusion. Mr. Lewis was not qualified through "knowledge, skill, experience, training, or education" to offer an opinion on the value of information. M.R.E. 702.

The military judge's unclassified findings of fact focused exclusively on Mr. Lewis' twenty-nine years of experience in CI. (App. Ex. 591). She found Mr. Lewis "was the senior level subject matter expert for CI operations and investigations" at DIA, had extensive experience in CI investigations, and retained "over-sight over all DoD offensive CI operations." (App. Ex. 591). She acknowledged Mr. Lewis "has never been a case agent or case agent manager for an offensive CI operation," but found his lack of direct involvement as a case agent in operations went to weight, not admissibility. (App. Ex. 591; R. at 9664 (redacted)).

Mr. Lewis' general experience in the field of CI is indeed impressive. He had been involved in "the most sensitive and significant espionage investigations," briefing Congress and even winning awards. (App. Ex. 591). But his qualifications to value information were nonexistent.

First, Mr. Lewis repeatedly admitted he did not have the knowledge or skill necessary to offer an opinion on the value of information, telling the defense during several interviews prior to his testimony that he was not an expert in valuing classified information and he could not value a specific document. (R. at 9494, 9506, *see also* statement of defense security expert appended to App. Ex. 614). It was not until he was called upon to testify at trial that he suddenly found himself to be so qualified.

Second, Mr. Lewis had never received training or education on valuing classified information for a foreign intelligence service, or valuing information of any kind. (R. at 9496-500). To his knowledge, no such training exists within the Department of Defense. (R. at 9497). He did not know of any professional periodicals dedicated to the valuation of information and he had never attended any conferences in which the value of information was discussed. (R. at 9502-03).

Finally, and most importantly, Mr. Lewis lacked relevant experience. He had never valued information of any kind prior to PFC Manning's court-martial. (R. at 9500-01). The primary area of Mr. Lewis' expertise was the investigation of espionage. (R. at 9490). Every job he held in the field of CI was focused on that. (R. at 9470-78, 9500-01). But the investigation of espionage has little if anything to do with the valuation of

information, a fact Mr. Lewis acknowledged when he admitted he had never exercised the skill of valuing classified information, nor would he have occasion to, during the course of a CI investigation. (R. at 9501).

The government's failed attempts to connect Mr. Lewis' investigation experience to the "exchange of money" further demonstrate this point. (R. at 9512 (redacted)). When asked how money plays a role in CI investigations, Mr. Lewis explained investigators simply analyze financial records to identify unusual spending patterns, nothing more. (R. at 9512-13 (redacted)). There was no testimony that CI investigators analyze the value of information actually exchanged. Thus, while his experience may have qualified him to recognize sudden affluence in suspected perpetrators of espionage, he had zero experience in assigning value to a particular document or piece of information.

Since CI investigators gain no expertise or ability to value information, a significant focus of Mr. Lewis' foundational testimony was on the extent of his experience in offensive CI operations, where information *is* exchanged for money. (R. at 9477, 9479-80, 9500-02, 9506-07, 9516-18 (redacted), 9523-25 (redacted), see classified supplement at pages 3-9, 21-22). Apparently based on this testimony, the military judge found Mr. Lewis was an expert in offensive CI

operations, despite the fact his experience in this field was limited to “oversight.” (R. at 9664 (redacted)).

Mr. Lewis never actually conducted offensive CI operations himself. (R. at 9500-01). He also never managed a single offensive CI operation. (R. at 9506). Everything he learned in the course of his career about offensive CI operations came from reading case files. (R. at 9546 (redacted)). Moreover, he acknowledged that even offensive CI agents do not value information, because the nature of these operations leaves that task to the foreign intelligence service. (R. at 9502). In short, Mr. Lewis’ “oversight” of offensive CI operations never placed him in a position to actually value U.S. government information, or any other information for that matter.

The military judge’s conclusion that this lack of experience only “goes to weight” was manifestly erroneous because no other area of Mr. Lewis’ experience could arguably qualify him to value information. By its nature, the extent of his experience in offensive CI operations went to his qualifications to offer an opinion on valuation, and thus its admissibility.

Nothing in Mr. Lewis’ “knowledge, skill, experience, training, or education” qualified him to offer an opinion on the value of classified information. Indeed, the military judge expressly refused to accept Mr. Lewis as an expert in the value

of U.S. government information to foreign intelligence services. (App. Ex. 591). Since even the military judge found he was not an expert in valuing information, the question is "what is he an expert about?" *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001).

In *Wheeling*, the court found that a district court judge abused his discretion in admitting the opinions of a hydrologist specializing in flood risk management in a case involving flood damage to goods stored in a warehouse. *Id*. The court found the hydrologist, though "eminently qualified" to offer opinions on flood risk management, lacked the qualifications to opine on safe warehousing practices. *Id*. The court reasoned the expert "lacked the education, employment, or other practical personal experiences" to testify regarding the standard of care in the warehousing industry. *Id*. Nor had the expert studied in his formal education or written academically about the subject of his testimony. *Id*.

Similarly, Mr. Lewis was eminently qualified to offer opinions related to CI generally and CI investigations. But he sorely lacked the education, employment, or practical experience necessary to qualify him as an expert on the subject of information valuation. In fact, he had no practical experience whatsoever. He had never valued information during the course of his employment in the CI field, nor had he studied the valuation

of information, before he was asked to do so at PFC Manning's court-martial.

In *Redman v. John D. Brush & Co.*, the Fourth Circuit held a metallurgic engineer, though qualified to testify about the properties and characteristics of metal, was not qualified to testify about industry standards for the construction of safes. 111 F.3d 1174, 1179 (4th Cir. 1997). The expert "had never before analyzed a safe, engaged in the manufacture or design of safes, or received any training regarding safes." *Id*. At trial, the expert acknowledged his only knowledge of safes was acquired in preparation for his testimony. *Id*.

Like the metallurgic engineer analyzing a safe for the first time at trial, Mr. Lewis had never before analyzed information to determine its value, had never received any training in how to do so, and his only knowledge on the value of information was acquired during his preparation a week prior to his testimony. *See also United States v. Flesher*, 73 M.J. 303, 315 (C.A.A.F. 2014)(sexual assault response coordinator's practical experiences in the field of victim advocacy did not necessarily qualify her to offer expert opinions on counterintuitive behaviors). The military judge abused her discretion when she ruled Mr. Lewis was not an expert in information valuation, but effectively found him qualified to testify as one nonetheless. This CI expert was completely

unqualified to testify about the value of information in the WikiLeaks disclosures.

B. The subject matter of Mr. Lewis' testimony exceeded his qualifications.

The qualifications of an expert dictate the limits of that expert's testimony. *Flesher*, 73 M.J. at 315. An expert witness may not offer opinions that "exceed[] the scope of the witness's expertise." *Id*. (quoting *United States v. Birdsall*, 47 M.J. 404, 410 (C.A.A.F. 1998)). But that is exactly what Mr. Lewis did here.

As set forth above, Mr. Lewis was wholly unqualified to value information, a task he had never before attempted and which had little to do with his actual experience in the CI field. Since he was not so qualified, he necessarily exceeded his qualifications by testifying as he did. Despite finding Mr. Lewis was not an expert in the valuation of information, the military judge allowed him to offer opinions on that very subject. She therefore abused her discretion in admitting opinion testimony beyond the scope of Mr. Lewis' expertise.

C. The information underlying Mr. Lewis' opinion was not of the type a relevant expert would reasonably rely upon.

The third *Houser* factor, the basis for the expert testimony, addresses the facts and data an expert may appropriately rely upon in forming his opinion. *Id.* To reach his conclusion on the value of the charged documents, Mr. Lewis

relied upon three sources of information: (1) the EEI "snapshot," (2) the additional value data he obtained in preparation for his testimony, and (3) his "memory" and "experience." (R. at 9559-60, 9685, 9703, 9727-28, 9739 (redacted)).

Under M.R.E. 703, an expert's opinion may be based upon experience and inadmissible evidence, including "documents supplied by other experts." M.R.E. 703; *Houser* 36 M.J. at 399. However, "the rule has a proviso as important as the rule's statement regarding admissibility." *Redman*, 11 F.3d at 1179. An expert opinion is admissible only if the expert has relied on information "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." M.R.E. 703.

This record provides no reason to believe an expert in the relevant field would rely upon any of Mr. Lewis' three sources of information. The subject of Mr. Lewis' opinion, and thus the relevant field here, is "valuing U.S. government information." Mr. Lewis' experience and memory alone did not give him the ability to value information. (R. at 9553-54, 9560-64 (redacted)). He could not view a document and determine its value without reference to additional data. (R. at 9553-54, 9564-65 (redacted))). Thus, for Mr. Lewis' valuation opinion to

be admissible, the additional data he referenced must be of the type reasonably relied upon by an expert in valuing information.

Nothing in the record supports this proposition. The government offered no evidence the additional data Mr. Lewis relied upon has ever been used by experts to value information. The fact that the government generally relies on this information in other contexts does not mean it is reliable for the altogether unique purpose of valuing classified information.

Mr. Lewis stated that he and the USDI rely upon this information to brief Congress. (R. at 9574 (redacted)). (Congress' specific interest in this information is discussed further in the classified supplement to this brief at page 14.) However, Congress did not rely on this data to actually value information as Mr. Lewis did in this case. His briefings to Congress consisted of summaries of "what was happening in that quarter, both from an operational standpoint and from a financial standpoint." (R. at 9479). These briefings included information on "[t]he activities we're running against a foreign adversary, the contact that we were having with that adversary, and the things that were happening during that relationship." (R. at 9479). There is no indication Mr. Lewis briefed Congress or the USDI on how information was actually valued in any particular operation. Quite the contrary, the record indicates

he did nothing more than summarize the progress of ongoing operations.

The military judge's ruling, which is that the data was reliable, failed to consider the purposes for which it had actually been relied upon in the past. Impressed by the data's inclusion in high-level briefings to Congress, she simply cited the preparation of these briefings. (App. Ex. 591 at 3). Mr. Lewis did not even know of any individuals holding themselves out as such an expert. (R. at 9497). Therefore, the military judge's ruling that the data was reliable for purposes of valuation was clearly erroneous and Mr. Lewis' opinion was inadmissible under M.R.E. 703.

D. Mr. Lewis' opinion was not relevant because it was not reliable.

Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. Unreliable expert testimony is not relevant. *See United States v. Dimberio*, 56 M.J. 20, 27 (C.A.A.F. 2001).

While *reliable* evidence on the value of the information in this case would be relevant, Mr. Lewis' testimony lacked sufficient hallmarks of reliability because it failed to meet a

single *Houser* or *Daubert* factor. Thus, the military judge abused her discretion in finding the testimony was relevant.

E. Mr. Lewis' valuation method failed the *Daubert* reliability standard and lacked "alternative indicia of reliability."

Daubert provides detailed guidance on the fourth and fifth *Houser* prongs: relevance and reliability. *Griffin*, 50 M.J. at 284. The government, as the proponent of Mr. Lewis' testimony, had to demonstrate the reliability of his opinion. *Flesher*, 73 M.J. at 316. Reliability requires that "an expert's opinion is 'connected to existing data' by more than the '*ipse dixit* of the expert.'" *Id*. (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). The government must demonstrate reliability by relying on the four *Daubert* factors or on "alternative indicia of reliability." *Id.*; *United States v. Billings*, 61 M.J. 163, 168 (C.A.A.F. 2005).

Neither standard of reliability was met here. First, although the military judge cited *Daubert* in her ruling, her conclusions of law meet none of the factors set forth in that case. (App. Ex. 591). The *Daubert* framework is flexible and subject to discretionary use by the military judge. *Sanchez*, 65 M.J. at 149. But having purported to rely upon that framework, the military judge should have explained how Mr. Lewis' testimony met any of the *Daubert* reliability factors. Mr. Lewis' technique for valuing classified information had never been

tested, subjected to peer review or publication, had any discernable error rate or standards controlling its operation, nor had any acceptance whatsoever within the CI community.

Second, the military judge compounded this error by failing to cite any "alternative indicia of reliability" that would otherwise save Mr. Lewis' testimony. Instead, the military judge apparently accepted the connection between Mr. Lewis' testimony and the existing data simply because he had worked in the CI field for decades. (App. Ex. 591 at 1-2). *See Joiner*, 522 U.S. at 146 ("But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."); *Flesher*, 73 M.J. at 314 ("We first question how an individual can be characterized as an expert based simply on his or her job title.")

Mr. Lewis had never valued information of any kind until he was asked to do so at PFC Manning's court-martial. (R. at 9566, 9735 (redacted)). He demonstrated no particular or specialized knowledge on any of the information within the charged documents, such as diplomacy or military and detainee operations. He viewed the charged documents for the first time a week before he testified. (R. at 9557, 9736 (redacted)). He only spent a few hours reviewing "very small" samples of documents to arrive at purported values for entire sets of documents, yet was

not qualified to conduct statistical analysis and infer propositions based on sample sizes. (R. at 9557, 9736 (redacted)).[26] *See, e.g., Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 642 (S.D.N.Y. 2007)(excluding probability testimony of colorimetry expert because expertise in colorimetry "does not establish his expertise as a statistician").[27]

Mr. Lewis' testimony established he was aware that a market for classified information generally exists, nothing more. However, the specific market he was relying upon was not a "thieves' market" in the sense that term has been traditionally employed because PFC Manning never sold anything. *See, e.g., Churder v. United States*, 387 F.2d 825, 833 (8th Cir. 1968)(the thieves' market is "the amount the goods may bring to the thief"). Mr. Lewis had no knowledge of what an actual thief

[26] A full discussion of his flawed statistical analysis requires the use of classified data, and is thus detailed in the classified supplement at pages 29-32.

[27] *See also Arista Records, LLC v. Lime Group, LLC*, No. 06 CV 5936, 2011 U.S. Dist. LEXIS 47416, at *17-19 (S.D.N.Y. Apr. 29, 2011)(computer science professor unqualified to render opinions dependent upon statistics); *Kolokowski v. Crown Equip. Corp.*, No. 05-4257, 2009 U.S. Dist. LEXIS 77474, at *33-34 (D.N.J. Aug. 27, 2009)(expert's methodology "overly simplistic" and "far too inferential" where no statistical analysis performed to support inferences); *Ortiz v. Yale Materials Handling Corp.*, No. 03-3657, 2005 U.S. Dist. LEXIS 18424, at *25 (D.N.J. Aug. 24, 2005)(expert's "simple review of numbers" without incorporation of "any kind of statistical or mathematical analysis" rendered ultimate opinion unreliable).

might receive in return for selling the specific information in this case. In fact, he did not even know the term “thieves’ market.” His entire testimony relied upon his conjecture as to the amount an individual, masquerading as a thief, might receive for pre-selected documents.[28]

Mr. Lewis’ methodology for determining value in this artificially-created thieves’ market was not reliable, neutral, or trustworthy. He would perform a keyword search in the charged documents for certain types of information that had been sold in the past. (R. at 9557, 9642 (redacted)). He would then simply conclude that similar information in the charged documents must have some value. (R. at 9561 (redacted)). But Mr. Lewis did not compare the content of the actual information sold in the past to the information in the charged documents to ensure this purported similarity, despite his apparent ability to do so. (R. at 9740-42 (redacted)). Nor did he account for numerous factors that might alter the information’s value at the time of the sale, such as the information’s availability in open source reporting or elsewhere, or whether the passage of time had altered its current value. (R. at 9642 (redacted)).[29] Mr. Lewis was essentially comparing apples to oranges.

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[28] Further description of the government’s novel “thieves’ market” theory is found in the classified supplement at page 4.

[29] Much of this information was available in open source reporting and thus likely worthless to any prospective buyer. (R. at

Moreover, Mr. Lewis only considered past successful sales of classified information, wholly ignoring those instances in which an attempted transaction did not result in an actual sale of information.[30] (R. at 9616, 9619, 9661, 9734 (redacted)). It is a basic economic principle that price in any market is dependent upon demand.[31] Thus, failed transactions in a marketplace affect value just as much as successful ones. By considering only half of the valuation equation, Mr. Lewis' opinions on the value of the information were virtually worthless. The military judge recognized as much when she repeatedly asked government counsel to explain how reliable Mr. Lewis' opinion could be when he failed to consider unsuccessful transactions. (R. at 9608-17 (redacted)). Her ruling ultimately recognized Mr. Lewis' data did not include information on unsuccessful or failed CI operations, but she failed to explain

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10054, 10136, Def. Exs. W, X). Much of the information was also dated. (R. at 9806). This record contains no indication that Mr. Lewis took any of these individualized considerations into account when determining the information's value.

[30] Information on unsuccessful transactions was apparently available to Mr. Lewis, but he neither asked for it nor considered it. (R. at 9626-27).

[31] Demand is an "economic principle that describes a consumer's desire and willingness to pay a price for a specific good or service. Holding all other factors constant, the price of a good or service increases as its demand increases and vice versa." Investopedia, http://www.investopedia.com/terms/d/demand.asp (last visited Jan. 14, 2015).

how his method remained reliable despite this glaring shortcoming. (R. at 9661 (redacted)).

CAAF's analysis in *Billings* is instructive here. Billings was convicted of stealing an expensive Cartier watch. *Billings*, 61 M.J. at 165. At trial, the government called a jeweler as an expert witness. *Id*. at 165. The jeweler examined photographs of Billings wearing a watch and offered an opinion that the watch in the photograph was solid gold. *Id*. at 166. On appeal, the government argued the expert's experience enabled him to distinguish solid from plate gold merely by looking at pictures. *Id*. at 167.

The Court of Appeals for the Armed Forces held the military judge abused his discretion in permitting the jeweler to offer this opinion because the government met none of the four *Daubert* reliability factors, "nor did it identify any alternative indicia of reliability." *Id*. at 167-68. Although the jeweler was qualified as an expert to testify about the characteristics of Cartier watches, his opinion that Billings wore a solid gold watch in a photograph was based on an unreliable technique and was "the mere '*ipse dixit* of the expert.'" *Id.* at 168 (quoting *Kumho Tire Co.*, 526 U.S. at 157).

Similarly, the military judge here did not cite a single *Daubert* factor supporting the reliability of Mr. Lewis' technique. The only alternative indicia of reliability the

government and military judge relied upon was Mr. Lewis' decades of experience in the CI community. However, as in *Billings*, this experience says nothing about the reliability of the technique underlying Mr. Lewis' opinion. Like the jeweler's identification of solid gold from a photograph, Mr. Lewis simply compared information in the charged documents with summaries of information previously sold in the past. This technique was devoid of context and never before attempted, tested, reviewed, standardized, or accepted in any community. His method of valuing classified information was therefore unreliable and the military judge erred in her application of the *Daubert* framework.[32]

F. The probative value of Mr. Lewis' testimony was minimal and outweighed by its prejudicial effect.

The military judge abused her discretion when she found the probative value of Mr. Lewis' testimony was not substantially outweighed by the danger of unfair prejudice. (App. Ex. 591). Mr. Lewis' opinion was worthless to the factfinder because it met none of the *Daubert* or *Houser* factors. Its prejudicial effect was vast and unfair in comparison. The military judge relied on this testimony to find PFC Manning guilty of every Section 641 specification. (App. Ex. 625 at 5).

[32] The classified supplement provides additional detail on the shortcomings of Mr. Lewis' valuation method at pages 28-37.

2. The admission of Mr. Lewis' testimony materially prejudiced a substantial right of PFC Manning.

Under Article 59(a), UCMJ, this court must test the military judge's error in admitting this evidence for prejudice. "The test for nonconstitutional evidentiary error is whether the error had a substantial influence on the findings." *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001). The government bears the burden of demonstrating the admission of Mr. Lewis' testimony was harmless. *United States v. Berry*, 61 M.J. 91, 97-98 (C.A.A.F. 2005).

Mr. Lewis' testimony is the only evidence in the record to support the value element of Specifications 4, 6, and 12 of Charge II. Thus, if this court finds the admission of this evidence was error, this court should affirm only the lesser included Section 641 offense of stealing, purloining, or converting records or things of value belonging to the United States with a value of $1,000 or less.

The military judge also relied upon Mr. Lewis' testimony to find the value element was met in Specifications 8 and 16 of Charge II. (App. Ex. 591 at 5). Given the significant weaknesses of the government's alternative "cost price" method of valuation for those specifications, addressed in Assignment of Error III.B., this court should affirm only the lesser included Section 641 offenses for Specifications 8 and 16 of Charge II.

The resulting significant change in sentencing exposure on these offenses, from fifty years to ten, warrants a reassessment of PFC Manning's sentence.

IV.

WHETHER 18 U.S.C.§ 793(e) VIOLATES THE DUE PROCESS CLAUSE AND FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION?

Introduction

In Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, PFC Manning was charged under clause 3 of Article 134 with unauthorized possession and disclosure of classified information in violation of 18 U.S.C. § 793(e)(Espionage Act). The military judge convicted PFC Manning of all the Espionage Act offenses except Specification 11. As discussed below, 18 U.S.C. § 793(e) violates PFC Manning's due process and First Amendment rights. Two of the Act's essential elements are unconstitutionally vague and overbroad: (1) whether the classified records related to the "national defense" and (2) whether PFC Manning had reason to know the records could be used "to the injury of the United States or to the advantage of any foreign nation."

Statement of Facts

Before trial the defense sought to dismiss the Espionage Act specifications on constitutional grounds, specifically vagueness and overbreadth. (App. Ex. 88). The military judge denied the motion and issued draft instructions prior to PFC

Manning's election of a judge alone trial. (App. Exs. 138, 410a). The instruction defines the relevant terms:

> The term "national defense" is a broad term which refers to the United States military and naval establishments and to all related activities of national preparedness.
>
> To prove that documents, writings, photographs, videos, or information relate to the national defense, there are two things that the government must prove:
>
> (1) that the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States; and
>
> (2) that the material is closely held by the United States government, in that the relevant government agency has sought to keep the information from the public generally and has not made the documents, photographs, videos computer files available to the general public. Where the information has been made public by the United States government and is found in sources lawfully available to the general public, it does not relate to the national defense. Similarly, where the sources of information are lawfully available to the public, and the United States government has not made effort to guard such information, the information itself does not relate to the national security.

(App. Ex. 410a at 9). Regarding the second element, "injury to the United States or to the advantage of a foreign country," the draft instruction states the injury "must not be remote, hypothetical, speculative, far-fetched, or fanciful." (App. Ex. 410a at 10).

As explained below, neither definition cures the Act's defects—its failure to provide an accused fair warning of what is or is not unlawful or its infringement on a broad swath of protected speech—speech that goes to the very core of our democratic system. The government will argue the Act concerns national security, an important issue to be sure. But the military's national security interests should not *trump* two of our Constitution's most cherished rights, the right to due process and the right of free speech.

Standard of Review

This court reviews de novo issues involving the constitutionality of an act of Congress. *See United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005).

Law and Argument

1. 18 U.S.C.§ 793(e) is unconstitutionally vague.

"Due process requires 'fair notice' that an act is forbidden and subject to criminal sanction." *United States v. Caporale*, 73 M.J. 501, 504 (A.F. Ct. Crim. App. 2013)(*quoting United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)). An act must be sufficiently clear for "ordinary people [to] understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The military judge relied on *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), *United States v. Kim*, 808 F. Supp. 2d 44 (D.D.C. 2011), and *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), *aff'd on other grounds*, 557 F.3d 192 (4th Cir. 2009), for the proposition that the statute is sufficiently clear and provides fair warning. No military court has ever decided this issue so these cases are at best only persuasive.

Nor do these cases address the concerns raised in *Johnson v. United States*, 135 S. Ct. 2551 (2015), a case about whether the residual clause in the Armed Career Criminal Act violates due process. Writing for the court, Justice Antonin Scalia expressed apprehension with a criminal statute that "asks whether the crime '*involves conduct*' that presents too much risk of physical injury." *Id*. at 2557 (emphasis in original). Such indeterminate language, he wrote, "denies fair notice to defendants and invites arbitrary enforcement by judges." The Espionage Act suffers from the same problem.

As to the phrase "relating to the national defense," the military judge interpreted it "broadly" to cover virtually anything having to do with the military. (App. Ex. 410a at 9). Moreover, the disclosure of such information need only be "potentially damaging." (App. Ex. 410a at 9). The definition of the phrase "to the injury of the United States or to the Advantage of any Foreign Nation" is even less clear. The

instruction merely states the injury must not be remote, hypothetical, speculative, far-fetched, or fanciful." (App. Ex. 410a at 9). It does not even attempt to explain what constitutes an injury.

This leaves too much "uncertainty of how to estimate the risk posed by a crime." *Johnson*, 135 S. Ct. at 2557. Like the statute at issue in *Johnson,* the Espionage Act is abstract and written in a manner that gives no assurance that it relates to "real world" conduct. *Id.* It therefore violates the due process clause.

2. 18 U.S.C. 793(e) is unconstitutionally overbroad.

To establish a First Amendment violation, an accused bears the burden of establishing the statute "prohibits a substantial amount of protected speech." *United States v. Taylor*, 2016 CCA LEXIS 108, *6-7 (A.F. Ct. Crim. App. 25 Feb. 2016)(*quoting United States v. Williams*, 553 U.S. 285, 292 (2008)). The Espionage Act unquestionably regulates speech concerning our nation's national defense.

> The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words 'national security.' National security is public security, not government security from informed criticism. No decisions are more serious than those touching on peace and war; none are more certain to affect every member of society. Elections turn on the conduct of foreign affairs and strategies of national defense, and

> the dangers of secretive government have been well documented.

United States v. Morison, 844 F.2d 1057, 1081 (4th Cir. 1988)(Wilkinson, J., concurring).

In *Morison*, on which the military judge relied, the court found 18 U.S.C. § 793(e) constitutionally sufficient because the district court reasonably narrowed its instructions to "confine national defense to matters under the statute which "'directly or may reasonably be connected with the defense of the United States.'" *Id.* at 1076. In this case, however, the military judge defined the term broadly to include anything having to do with the "military" and "all activities of national preparedness." (App. Ex. 410a). But *Morison* did not go this far. When a court interprets a statute so broadly as to bring virtually any speech within its sweep, then as a matter of law it is unconstitutional. *Williams*, 553 U.S. at 292.

Given the vast record, we have no way of knowing whether the military judge would have found PFC Manning guilty of all the Espionage Act specifications had she correctly applied a more limiting standard. Under these circumstances this court has discretion to remand for a new trial or to affirm the lesser-included offense to which PFC Manning pleaded guilty and reassess the sentence. *See United States v. Roa*, 12 M.J. 210, 213 (C.M.A. 1982).

Between the two options, the most efficient way to reconcile the error is to affirm the lesser-included offenses to which PFC Manning pleaded guilty. This is more efficient and will cause less disruption to the Army. Finally, the lesser-included offenses capture the gravamen of the offenses. The interests of justice are not served by retrying the merits of the case—not when PFC Manning has pleaded guilty—and it is well established that 18 U.S.C. § 793(e) is one of the least serious Espionage Act offenses.[33]

Conclusion

For these reasons this court should reverse PFC Manning's conviction of the 18 U.S.C. § 793(e) specifications and affirm the lesser included offenses to which she pleaded guilty.

V.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ADMITTING SENTENCING TESTIMONY UNDER R.C.M. 1001(b)(4) NOT "DIRECTLY RELATING TO OR RESULTING FROM THE OFFENSES."

Introduction

The military judge abused her discretion by admitting sentencing evidence not "directly relating to or resulting from the offenses of which" PFC Manning was found guilty. R.C.M.

[33] Private First Class Manning also adopts the arguments in the amicus brief from the American Civil Liberties Union.

1001(b)(4). This inadmissible sentencing evidence fell within four categories:

1. Speculative testimony about "potential" effects that did not in fact occur;
2. Vague testimony of general effects that fell short of the requirement of a "specific harm" caused by PFC Manning;
3. Evidence of the government's efforts to mitigate speculative future harm; and
4. Evidence of events that were not "caused" by PFC Manning's offenses because the offenses were not the "but-for" cause of those events.

The military judge often allowed the government to elicit this improper testimony under the guise of providing an expert foundation or "context." Even assuming the testimony was proper aggravation, it was of little probative value and of substantial prejudicial effect.

Standard of Review

A military judge's decision to admit aggravation evidence at sentencing is reviewed for an abuse of discretion. *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009). Factfinding is reviewed under a "clearly erroneous" standard and conclusions of law are reviewed de novo. *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995).

Law and Argument

During presentencing, the government may admit evidence of aggravating circumstances "directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). However, PFC Manning "is not 'responsible for a never-ending chain of causes and effects.'" *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)(quoting *United States v. Witt*, 21 M.J. 637, 640 n.3 (A.C.M.R. 1985)).

"The phrase 'directly relating to or resulting from the offenses' imposes a 'higher standard' than 'mere relevance.'" *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)(quoting *United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990)). The evidence must relate to the "specific harm caused by the defendant." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *see also United States v. James*, 64 M.J. 514, 516 (C.G. Ct. Crim. App. 2006). Aggravation evidence must also pass the M.R.E. 403 test, which requires balancing the probative value of the evidence against its likely prejudicial impact. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

1. The military judge considered evidence of speculative harm that did not in fact occur.

The military judge considered the speculative testimony of three expert witnesses.[34] These witnesses testified PFC Manning's offenses "could cause damage" to national security in the future. The military judge erroneously ruled this "risk of damage or harm" was admissible under R.C.M. 1001(b)(4). (App. Ex. 639 at 2).

A. Brigadier General Carr speculated adversaries "could" use the CIDNE SIGACTS, but provided no indication they in fact did so.

At the time of PFC Manning's offenses, Brigadier General (BG) Robert Carr was the Director of the Defense Counterintelligence and HUMINT Center for the Defense Intelligence Agency. (R. at 11249-50). The government called him as a sentencing witness and he was qualified, over defense objection, as an expert in "Department of Defense intelligence operations and intelligence sharing within the United States Government and with foreign parties and coalition forces." (R. at 11315-16). After WikiLeaks released documents, BG Carr was tasked to oversee the Information Review Task Force (IRTF). (R. at 11321). The Secretary of Defense directed the formation of the IRTF to conduct a review of the WikiLeaks releases and

[34] This unclassified brief addresses the testimony of two of these witnesses, Brigadier General Carr and Commander Aboul-Enein. Mr. Kirchofer's speculative testimony is addressed in the classified supplement to this brief at page 38.

assess any impact on national security. (App. Ex. 631; R. at 11323).

During his testimony at sentencing, BG Carr repeatedly speculated adversaries "might" or "could" use documents released by WikiLeaks. He never testified they in fact did so. For example, he testified someone reading the CIDNE SIGACTS "could capture an understanding and get more information about insurgent activity." (R. at 11337). He also said, "If the adversary had more clarity as to which people in the village were collaborating with the U.S. forces, then there is a chance those folks could be at greater risk."[35] (R. at 11339).

When the defense objected to this line of questioning, the trial counsel told the military judge he was laying a foundation for the ultimate question of whether adversaries "did" use the SIGACTS. (R. at 11339). The military judge overruled the objection, apparently based on this assurance. (R. at 11339). However, the trial counsel never asked the witness if adversaries "did" use the released SIGACTS. In fact, throughout its entire sentencing case, the government did not present evidence of a single adversary's actual use of the SIGACTS, or

[35] John Kirchofer of the Defense Intelligence Agency, who also testified for the government at sentencing, echoed BG Carr's speculation that "cooperating foreign nationals" *could* be affected by the released SIGACTS. (R. at 11456).

any other released document, to retaliate against an individual "collaborating with U.S. forces."[36]

Similarly, BG Carr testified the release of SIGACTS "would have" caused a more severe impact if it were not for the government's establishment of the IRTF. (R. at 11368). As an example, he referenced U.S. forces sharing their understanding of the released cables with the Iraqi government, and in turn the Iraqi government not being surprised by the releases. (R. at 11369). Brigadier General Carr speculated the Iraqi government might have reduced its cooperation if it had in fact been surprised. (R. at 11369). The government thus effectively sought to blame PFC Manning for an effect on the war in Iraq which, in fact, never occurred.

In her ruling, the military judge reasoned speculative testimony of this nature was proper aggravation because it was evidence of "[r]isk of damage or harm to the national security." (App. Ex. 639 at 2, 4). This court should review this conclusion of law de novo. *Ayala,* 43 M.J. at 298. Though the military judge cited no case law to support her conclusion, she likely accepted

[36] Brigadier General Carr testified he was not aware of anyone being killed as a result of WikiLeaks' release of the SIGACTS. (R. at 11380). He mentioned a "Taliban killing" but was unable to connect it to the releases. (R. at 11350). Thus, the military judge ruled she would not consider it. (R. at 11351, 11408). He also did not know whether any local Afghans or Iraqis were in fact affected by the releases at the time of his testimony. (R. at 11388).

the government's argument in its response to the defense motion for appropriate relief under R.C.M. 1001(b)(4). (App. Ex. 630). However, the government's argument that "potential harm is proper aggravating evidence" relied on several problematic sources. (App. Ex. 630 at 3).

The government first relied on *United States v. Jones*, 44 M.J. 103 (C.A.A.F. 1996). (App. Ex. 630 at 3). Jones was HIV positive and had protected sexual intercourse with the wife of another Marine. *Id.* at 104. He was acquitted of aggravated assault but convicted of adultery. *Id*. While announcing the sentence, the military judge told Jones he found his "conduct to be outrageous" because he disregarded "the health and safety" of his "victim." *Id*. The Court of Appeals for the Armed Forces held the military judge did not abuse his discretion in considering Jones' medical condition at the time of the adultery offense because it was "directly related to the offense," and "subjecting the victim to the risk of a fatal disease more than justifies the decision of the military judge to consider evidence of appellant's condition." *Id.* at 104-05.

Three problems arise in citing this HIV case as support for the proposition that "potential harm to national security" was admissible in PFC Manning's case. First, the court based its decision in *Jones* on the since-overruled case of *United States v. Joseph*. *Id*. at 104. *See United States v. Gutierrez*, 74 M.J.

61, 68 (C.A.A.F. 2015)(expressly overruling *Joseph* and holding aggravated assault conviction for protected and unprotected vaginal sex was legally insufficient because HIV transmission was not "likely" in either scenario). The validity of *Jones* is thus in doubt.

Second, adopting *Jones* for the proposition that "potential harm to national security" is admissible at sentencing invokes concerns similar to the *Gutierrez* court's unease with the law's adoption of "a *sui generis* standard in cases involving HIV exposure." *Gutierrez*, 74 M.J. at 67. Should this court hold "potential harm to national security" is admissible under R.C.M. 1001(b)(4), it would similarly be creating a category of aggravation evidence *sui generis* to cases implicating national security.

For example, at a presentencing proceeding for drunken operation of a vehicle, the trial counsel could not offer evidence that the accused "could have" caused an accident and that accident "could have" injured someone. In an assault case, the trial counsel could not offer expert testimony that the accused "could have" caused a concussion. In these cases, the government would be limited to evidence the accused in fact caused a specific accident or injury. In a case involving the release of classified information, the government should similarly be limited to evidence the accused in fact injured

national security. To rule "risk of harm" is an appropriate consideration at sentencing would risk subsuming the requirement under R.C.M. 1001(b)(4) that sentencing evidence be "directly relating to or resulting from the offenses," as risk by its nature is nothing more than speculation that aggravation might occur.

Third, even if the transmission of HIV during protected sex was a valid risk of harm under modern legal and scientific standards, it is at least a "specific" risk capable of a qualitative and direct connection to an accused's actions. Here, however, the government sought to blame PFC Manning for a speculative and vague risk of harm to national security that required the sentencing authority to infer a never-ending chain of events. BG Carr's testimony that an adversary "could" use the SIGACTS to get more information about U.S. forces requires the sentencing authority to infer the existence of the unnamed adversary, that this adversary would be interested in the specific information released, that this information would in fact enable the adversary to conduct more effective operations, that the adversary will actually conduct those operations successfully, and that those successful operations would in fact injure the United States. Testimony that an adversary "might" retaliate against collaborators requires the sentencing authority to infer the adversary in fact desires to retaliate

against a specific collaborator, has the capability to do so, and so on. But none of these inferences can be taken as givens, especially in light of this record's dearth of evidence of an adversary's *actual* use of the released documents.

In short, absent a requirement the evidence demonstrates an actual, specific effect on national security, there is no end to the list of evils that can blamed on an individual charged with leaking classified information. *See Hardison*, 64 M.J. at 281 (in the context of uncharged misconduct, holding aggravation evidence "must be direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime.")

The government next relied on *United States v. Bauer*, an unreported Air Force case relying on *Jones*. (App. Ex. 630 at 3-4). There, an intelligence analyst was convicted of cocaine use. *United States v. Bauer*, 1999 CCA LEXIS 117, at *2 (A.F. Ct. Crim. App. 30 Apr. 1999). At sentencing, the military judge instructed the members they could consider "the potential threat to national security, if any, that may have resulted from" Bauer's actions. *Id*. The Air Force court held the military judge's instruction was not an abuse of discretion. *Id.*

Aside from the Air Force court's problematic reliance on *Jones*, there are two important distinctions between *Bauer* and PFC Manning's case. First, in *Bauer* the government offered this "potential harm" testimony on rebuttal under R.C.M. 1001(d),

which does not contain R.C.M. 1001(b)(4)'s requirement that the evidence be "directly related" to the offenses. *Id*. at *4. On rebuttal, evidence need only be related to "matters presented by the defense." R.C.M. 1001(d). In PFC Manning's case, the government offered "potential harm" testimony during its primary case in aggravation under R.C.M. 1001(b)(4).

Second, in *Bauer* the trial counsel specifically "acknowledged there was no actual adverse impact on national security in this case." *Id*. The military judge thus "wisely added 'if any' to his instruction and thereby left it to the court members to determine, based on the evidence, what impact the appellant's drug use had on national security." *Id*. at *5. Here, however, the government in fact asserted PFC Manning's offenses caused damage in the form of "potential harm" and the military judge in fact considered it as evidence in aggravation. (App. Exs. 630 at 3-4; 639 at 2, 4; 658 at 3).

The government also cited R.C.M. 1004(c)(2) for the proposition that the Drafters contemplated as an aggravating circumstance "knowingly creating a grave risk of substantial damage to the national security." (App. Ex. 630 at 3-4). However, the Drafters expressly distinguished the aggravating "factors" in R.C.M. 1004(c), unique to capital cases, from the aggravating "circumstances" in R.C.M. 1001(b)(4).

The aggravating "factors" of R.C.M. 1004(c) "identify the class of [criminals] eligible for the death penalty." *United States v. Witt*, 73 M.J. 738, 821 n.42 (A.F. Ct. Crim. App. 2014). To find an aggravating "factor" in a capital case, the members must vote and unanimously agree the factor applies beyond a reasonable doubt. *Id.*; R.C.M. 1004(c). To find the existence of an aggravating "circumstance" under R.C.M. 1001(b)(4) in a non-capital case, there is no requirement of panel-member unanimity and no "beyond a reasonable doubt" burden of proof. Given these important distinctions between death penalty-qualifying aggravating "factors" and aggravating "circumstances" in a non-capital case, reference to the former to identify the limits of the latter is inappropriate.

Even if this court finds the "potential harm" testimony of BG Carr was admissible under R.C.M. 1001(b)(4), the military judge should have excluded it under M.R.E. 403. The prejudicial impact of speculative testimony about possible future actions of America's adversaries, without any evidence of actual harm, far outweighs any probative value in determining an appropriate sentence in this case.

B. Commander Yousef Aboul-Enein speculated Al Qaeda "could" use the WikiLeaks disclosures.

Similar to BG Carr's testimony that adversaries "could" use the released SIGACTS to improve operations against U.S. forces

or retaliate against collaborators, Commander (CDR) Yousef Aboul-Enein speculated Al Qaeda “could” use the WikiLeaks documents to recruit perpetrators of terrorist acts or compile terrorist training manuals. (R. at 12331, 12333-39). Commander Aboul-Enein was a subject matter expert on “violent Islamist ideology” assigned to the Defense Intelligence Agency. (R. at 12321). The government called him at sentencing and qualified him as an expert in “Al Qaeda terrorism and ideology.” (R. at 12323). He testified generally about Al Qaeda operations and described the organization’s use of propaganda to influence the population to support its desire for an Islamic social order. (R. at 12325).

Commander Aboul-Enein referenced two instances in which Al Qaeda used Wikileaks material for its propaganda purposes. First, in January 2011, Al Qaeda in the Arabian Peninsula (AQAP) published its “Winter 2010” issue of “Inspire Magazine.” (Pros. Ex. 182). In this issue, AQAP asked “mujahidin” to archive “[a]nything useful from WikiLeaks.” (Pros. Ex. 182; R. at 12337). The magazine also mentioned the names of U.S. and U.K. government officials obtained from WikiLeaks. (R. at 12333).

Second, Al Qaeda referenced the leaks in a June 2011 propaganda video. (Pros. Ex. 182). This propaganda video featured excerpts from the video “12 JUL 07 CZ ENGAGEMENT ZONE 30 GC Anyone.avi,” which was the subject of Specification 2 of

Charge II. (Pros. Ex. 182). The video also featured members of Al Qaeda referencing Department of State information from WikiLeaks to support typical Al Qaeda propaganda, such as the idea that Arab leaders collaborate with America. (Pros. Ex. 182).

According to CDR Aboul-Enein, the 2011 video and magazine article are the only known uses by AQAP or Al Qaeda of information disclosed by WikiLeaks. (R. at 12349-50, 12367). Despite this admission, the military judge admitted over defense objection additional speculative testimony about Al Qaeda that had nothing to do with this video or magazine article, and thus was not "directly related to or resulting from" PFC Manning's offenses.

First, CDR Aboul-Enein referenced the "Little Rock recruiting incident" and the "Major Hasan, Fort Hood shooting" as examples of how the WikiLeaks disclosures might have an effect on Al Qaeda recruitment. (R. at 12331). The military judge allowed this testimony as "context evidence" because it provided "examples of why narrative is important to Al Qaeda for recruitment." (App. Ex. 658 at 1). This was clearly erroneous, as the language of R.C.M. 1001(b)(4) does not allow the government to provide historical "context" to buttress speculation as to future events. The military judge's ruling effectively allowed a government witness to suggest that another

mass shooting incident, like those that occurred in Little Rock or at Fort Hood, might occur in the future due to PFC Manning's offenses. Pure speculation that a terrorist act might occur in the future is improper aggravation and is inadmissible by any interpretation of the phrase "directly relating to or resulting from."

Second, citing Al Qaeda's use of leaked U.S. and Soviet military training manuals in the 1990s to create Al Qaeda's own manuals, CDR Aboul-Enein testified over defense objection, "one can only deduce from that that out of the thousands of SIGACTS that has [sic] been leaked, that they *could possibly potentially basically* deduce a pattern of behavior of U.S. combat forces." (R. at 12337)(emphasis added). When asked how Al Qaeda would use SIGACTS that are in English, CDR Aboul-Enein responded:

> *I'm speculating*, but take Al Qaeda's admonition in Inspire Magazine to help in processing the voluminous amount of information and, from that, if they see SIGACTS that are of interest, they can begin to piece together, like I said, a pattern of behavior that shows how U.S. combat forces operate in the field.

(R. at 12338)(emphasis added).

Aside from the self-admitted speculative nature of this testimony, CDR Aboul-Enein's opinion as to potential uses of the SIGACTS by Al Qaeda in the future is not proper aggravation evidence under R.C.M. 1001(b)(4). An event that "could possibly

potentially basically" happen, by its very nature, did not in fact happen and cannot be "directly related to or resulting from" PFC Manning's offenses. CDR Aboul-Enein acknowledged his entire opinion was based on a "hypothetical individual" who may one day decide to use the WikiLeaks documents to create a terrorist training product of some sort. (R. at 12354).

The military judge erroneously ruled this testimony "is admissible expert testimony under M.R.E. 702." (App. Ex. 658 at 3). There is no authority for the proposition that otherwise inadmissible aggravation evidence is permissible merely because it is uttered by an expert.

Moreover, the military judge's ruling that the testimony "is evidence of risk to the national security," even if based on an acceptable conclusion of law, is clearly erroneous because it is belied by the facts. ***Despite the unabated continuation of Al Qaeda's propaganda machine from the time of PFC Manning's offenses through the government's sentencing case three years later, CDR Aboul-Enein was not aware of a single use of WikiLeaks documents by Al Qaeda, AQAP, or any militant Islamist organization except the single magazine and video in 2011.*** (R. at 12349-53, 12361, 12367). There was simply no other evidence of an actual, specific effect even three years after the offenses. Thus, all of CDR Aboul-Enein's testimony beyond his descriptions of the "Inspire Magazine" issue and the Al Qaeda

video was inadmissible and improperly considered by the military judge in determining PFC Manning's sentence.[37]

Even if this court finds the testimony of CDR Aboul-Enein was admissible under R.C.M. 1001(b)(4), the military judge should have excluded it under M.R.E. 403. The prejudicial impact of speculative testimony as to future actions of terrorist groups far outweighs any probative value in determining an appropriate sentence in this case.

2. The military judge considered evidence of insufficiently specific harm, tenuously connected to PFC Manning's offenses.

A "foundational requirement" under R.C.M. 1001(b)(4) is that the evidence relate to a "specific harm" caused by the accused. *James*, 54 M.J. at 516 (citing *Rust*, 41 M.J. at 478). The evidence also "needs a reasonable linkage between the offense and its alleged effect." *United States v. Barber*, 27 M.J. 885, 887 (A.C.M.R. 1989). However, several of the harms Ambassador (AMB) Patrick Kennedy laid at PFC Manning's feet were insufficiently precise or connected to the offenses to meet these requirements.[38] Compounding this lack of specificity and

[37] Commander Aboul-Enein's testimony regarding the Al Qaeda/AQAP video and magazine was needlessly cumulative under M.R.E. 403 because it was essentially the same evidence contained within Pros. Exs. 182 and 183. The military judge overruled a defense objection to this cumulative testimony. (R. at 12328).
[38] Elizabeth Dibble similarly testified about insufficiently specific harms tenuously connected to the offenses. Her testimony is addressed in the classified supplement at page 40.

nexus to the offenses, some of AMB Kennedy's alleged effects were supported only by vague assertions based on hearsay or overt speculation as to possible future catastrophes.

Ambassador Kennedy was the Under Secretary of State for Management. (R. at 11865). At sentencing, the military judge qualified him as an expert "in the field of management and operations in the Department of State" and "in the use of diplomatic reporting by U.S. policymakers." (R. at 11868).

Ambassador Kennedy testified about the diplomatic importance of maintaining the "trust and confidence of our interlocutors overseas." (R. at 11883). He explained that an important part of a diplomat's job is to gain accurate information on "opinions" and "feelings" of those outside the U.S. government, including foreign diplomats and non-governmental organizations. (R. at 11883). Over defense objection, AMB Kennedy rendered his ultimate opinion that PFC Manning's disclosures resulted in an information-sharing "chilling effect" that harmed national security. (R. at 11902-03).

The basis for this opinion was neither specific nor reasonably linked to PFC Manning's offenses, instead depending on a speculative chain of events. He believed "chilling effects" occur because leaks of classified information result in a "breach of confidence," which in turn results in a reticence by

foreign individuals to provide “full and frank opinions,” which in turn results in a diminished value of reporting from the diplomatic field, which in turn impacts the ability of policy-makers in Washington, D.C. to do a “better job in supporting our national security.” (R. at 11884, 11894-96, 11903-04). Ambassador Kennedy also testified “some embassies,” but not all, reduced the amount of information in their diplomatic reporting after the leaks out of fear the information would not be protected. (R. at 11900). He said this reduction in reported information was “deleterious” and “we think we’re losing something in that regard.” (R. at 11900).

The military judge abused her discretion in finding AMB Kennedy’s opinion admissible under R.C.M. 1001(b)(4) because the witness arrived at his ultimate opinion, that PFC Manning harmed national security, through a “never-ending chain” of ill-defined causes and effects. He blamed PFC Manning for a chilling effect that occurred only after nameless foreign individuals “lost confidence” and decided to cease sharing their “frank opinions,” and “some embassies” included less information in their reporting. These effects then decreased the value of reporting, which in turn allegedly affected national security policy-making in Washington, D.C. Notably, AMB Kennedy never discussed a single diplomatic report affected by this reticence to share

information, nor a single national security policy affected by this decreased reporting.

A long chain of events resulting in a nebulous harm to national security policy-making is not a specific harm "directly resulting from" the leaks. Even if such an effect could be deemed "specific," it was necessarily the result of intervening, independent decision-making by individuals within foreign governments, the Department of State, and elsewhere in the U.S. government. Thus, there was no reasonable linkage between the offense and its alleged effect. *Barber*, 27 M.J. at 887; *see also United States v. Paroline*, 134 S. Ct. 1710, 1719 (2014)("Every event has many causes, however, and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result.")

Although the military judge ruled AMB Kennedy's opinion as to the effect on policy-makers was speculative and inadmissible under M.R.E. 403, she still considered this testimony "in general" as relevant to the foundation for AMB Kennedy's expert opinion that the leaks harmed national security. (App. Ex. 641 at 4). Moreover, it is impossible to accept his ultimate proposition, that the diminished reporting harmed national security, without considering the so-called "negative effect on policy makers in Washington D.C." (App. Ex. 641 at 4). This

speculative effect on policy-making was the cornerstone of AMB Kennedy's testimony, as it was the primary national-security harm AMB Kennedy related to the diminished reporting. (R. at 11895, 11904).

Compounding the lack of specificity and chain-reactional nature of these alleged effects, AMB Kennedy's opinion was based on double hearsay instead of his personal experience or observations. (R. at 11941). According to AMB Kennedy, foreign officials told U.S. diplomats about their reticence to provide information, then those diplomats reported this reticence to him. (R. at 11941). The military judge asked AMB Kennedy how frequently this reticence was reported. (R. at 11961). He responded that a "relatively small number of people" have reported it, his colleagues "have a sense" foreigners are not engaging in frank discussion, and individuals "just feel[] that they're not getting the kind of—kind of exchanges that they had before . . . ." (R. at 11961). When asked to place a timeframe on this chilling effect, AMB Kennedy responded that it started in 2010, but he "cannot go to the depth of—it's impossible to know what someone is not sharing with you . . . ." (R. at 11962).

Although an expert may consider hearsay as a basis for his opinion under M.R.E. 703, the government's use of AMB Kennedy's hearsay testimony only amplifies its lack of specificity. There

is nothing specific or direct about a “chilling effect” based on the “feelings” and “senses” of a “small number of people” who then relate those feelings and senses to someone else. This is especially so in light of AMB Kennedy’s admission that it is impossible to even know if another country is not sharing information.

The majority of AMB Kennedy’s testimony revolved around the concept of a vague chilling effect resulting from a long chain of events, known to him only through a chain of hearsay statements from a small number of people. The military judge abused her discretion in admitting this evidence because it was not a specific harm directly resulting from PFC Manning’s offenses and was inadmissible under R.C.M. 1001(b)(4). Even if this court finds the testimony was admissible under R.C.M. 1001(b)(4), the military judge should have excluded it under M.R.E. 403. The prejudicial impact of an Under Secretary of State’s vague and speculative testimony about harm to national security far outweighs any probative value in determining an appropriate sentence in this case.

3. The military judge considered evidence of the government’s efforts to mitigate speculative future harm.

Susan Swart was the Chief Information Officer for the Department of State. (R. at 11713). The government called her at sentencing as an expert in the field of “Department of State

Information systems." (R. at 11713). Ms. Swart generally described the process by which diplomatic cables are transmitted and the nature of the Net-Centric Diplomacy (NCD) database. (R. at 11719-22).

After this basic overview, the trial counsel asked Ms. Swart how her Information Resource Management (IRM) department responded to WikiLeaks' releases of information. (R. at 11724). Ms. Swart responded that IRM "started reviewing our systems . . . tightening up our own security, republishing our guidance about removable media . . . ." R. at 11724. The defense objected under R.C.M. 1001(b)(4) and the military judge deferred her ruling. (R. at 11724).

Ms. Swart continued to testify that IRM reviewed "access to NCD, and how we provided access to NCD, and how we would go about limiting that access." (R. at 11725). She discussed further government efforts to prevent future leaks, such as the implementation of training, reiterating the proper labeling of cables, and studying "ways to provide access [to cables] through other avenues." (R. at 11726). She then discussed the available avenues of access to cables once the government decided to remove the NCD database from the SIPR network, as well as the feasibility of preventative measures such as a login and password feature. (R. at 11728).

The majority of Ms. Swart's substantive testimony was inadmissible under R.C.M. 1001(b)(4) because it was evidence of acts undertaken by the government on its own volition which were not "directly relating to or resulting from the offenses." While efforts to mitigate any damage actually caused by PFC Manning would be admissible, Ms. Swart's testimony instead concerned efforts to prevent later similar misconduct. PFC Manning is not responsible for the government's efforts to better protect its systems in the future. The government's decision to implement subsequent remedial measures was "an independent, intervening event play[ing] the only important part in bringing about the effect." *United States v. Stapp*, 60 M.J. 795 (Army Ct. Crim. App. 2004).

The military judge expressed concern over this improper testimony. She warned the government, "I have in your motion, the United States maintains it would not present evidence of subsequent remedial measures to prevent future criminal acts similar to those which the accused has been convicted of, which this is sounding very much like that to me." (R. at 11727). Despite this initial concern, the military judge ultimately ruled Ms. Swarts' testimony admissible under R.C.M. 1001(b)(4) because it showed "the impact of the accused's misconduct on interagency access to NCD." (App. Ex. 639 at 3). However, while Ms. Swart did briefly mention the fact that the NCD database was

removed from the SIPR network, the majority of her testimony focused on her department's efforts to mitigate future harm, as well as efforts the State Department could have attempted to prevent the leaks in the first place. (R. at 11724-30). None of this testimony was proper under R.C.M. 1001(b)(4) and the military judge erred in considering it.

4. The military judge considered evidence of events that were not "directly relating to or resulting from" PFC Manning's offenses because her offenses were not the "but-for" cause of those events.

Attempting to further define the meaning of the phrase "directly relating to or resulting from," this court has required a showing that the offenses "contributed to" and played "a material role in bringing about" the aggravating circumstances. *Witt*, 21 M.J. at 641; *Stapp*, 60 M.J. at 800-01. In *Witt*, this court expressly rejected any requirement of "but-for" causation for aggravation evidence. *Witt*, 21 M.J. at 641 ("Facts sufficient to constitute proximate cause are not required; neither is a so-called "but for" test."); *but see Stapp*, 60 M.J. at 801 n.4 ("[W]e do not share the reluctance of our predecessors to apply the language of causation to our interpretation of R.C.M. 1001, and we decline to follow *Witt* to the extent that it rejects the use of such principles."). The military judge apparently relied on these authorities in her sentencing rulings where she applied a "substantial" or

"contributing" factor analysis. (*See, e.g.,* App. Ex. 639 at 1, para. 2).

However, the United States Supreme Court expressly rejected this analysis in *Burrage v. United States.*[39] 134 S. Ct. 881, 890-91 (2014). There, the Court explored the notion of causation in the criminal law context and held "but-for" cause is "*the minimum* requirement for a finding of causation." *Id*. at 888 (emphasis in original)(quoting Model Penal Code § 2.03, Explanatory Note).

In *Burrage* the defendant distributed heroin to Banka. *Id.* at 885. Prior to buying heroin from defendant, Banka crushed and injected oxycodone pills. *Id.* Immediately after purchasing the heroin, Banka cooked and injected some, then did so again later. *Id.* As Banka's girlfriend went to sleep that night, she saw Banka once again preparing to inject heroin. *Id.* When she awoke a few hours later, Banka's girlfriend discovered Banka dead in the bathroom. *Id.*

The defendant was charged with distribution pursuant to a provision in the Federal Code that establishes a twenty-year mandatory minimum sentence for distributing narcotics when

[39] Although the military judge relied upon this court's precedent in effect at the time of trial, she abused her discretion in light of *Burrage*. This is so because the issue is "whether the error is obvious at the time of appeal, not whether it was obvious at the time of the court-martial." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008).

"death . . . resulted from the use" of the distributed narcotics. *Id*. At trial, an expert testified Banka's cause of death was "mixed drug intoxication" with heroin, oxycodone, alprazolam, and clonazepam all playing a "contributing" role. *Id*. at 886. The expert could not say whether Banka would have lived had he not injected the heroin. *Id*. The trial court's instruction allowed the government to meet the "death results from" requirement through proof the distributed heroin was a "contributing cause" of Banka's death. *Id*.

The Supreme Court held this "contributing cause" instruction was erroneous. *Id*. at 892. In the Court's opinion, written by Justice Scalia, the Court noted phrases such as "results from," "because of," "based on," and similar phrases encompass a "but-for" requirement. *Id.* at 889. The Court determined "but-for" causality was the proper interpretation of such phrases "given the need for clarity and certainty" in the area of criminal law where the rule of lenity plays such a vital role. *Id.* at 891. The Court expressly rejected the government's proposed "substantial" or "contributing" factor analysis. *Id.* ("Taken literally, its 'contributing cause' test would treat as a cause-in-fact every act or omission that makes a positive incremental contribution, however small.") *See also United States v. Miller* 767 F.3d 585, 592-93 (6th Cir. 2014)(hate crime conviction, pursuant to *Burrage*, required "but-for" causation).

Under *Burrage*, the military judge's application of this "contributing cause" test at PFC Manning's sentencing was clearly erroneous. She ruled the offenses "must have contributed to the effects" and "must play a material role in bringing about the effects." (App. Ex. 639 at 1). The *Burrage* Court's reasoning in rejecting this test and requiring "but-for" causation is persuasive because the Court was interpreting the phrase at issue here—whether the aggravating circumstances "resulted from" PFC Manning's offenses. Under a "but-for" cause analysis, many of the ills laid at PFC Manning's feet were inadmissible and materially prejudiced her substantial rights. In several instances, government witnesses admitted certain harms might have occurred even absent PFC Manning's conduct, or at a minimum they could not rule out the possibility.

James McCarl, Elizabeth Dibble, Colonel Julian Chesnutt, Major General (MG) Michael Nagata, and MG Kenneth McKenzie offered significant testimony of events not "directly relating to or resulting from" PFC Manning's offenses because the government failed to establish "but-for" causation. Since the bulk of this testimony was offered during closed sessions, the facts and argument related to this section are necessarily briefed in the classified supplement at page 43.

5. The military judge's repeated consideration of inadmissible aggravation evidence substantially influenced PFC Manning's adjudged sentence.

This court must test the military judge's errors for prejudice. Art. 59(a), UCMJ; *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005). The test is whether the erroneous admission of sentencing evidence "substantially influenced the adjudged sentence." *Id*. Although military judges are presumed to know the law and to consider only relevant material in assessing a sentence, *Hardison*, 64 M.J. at 283-83, prejudice may arise if the record demonstrates the military judge in fact considered inadmissible sentencing evidence. *See United States v. Williams*, ARMY 20130284, 2014 CCA LEXIS 665, at *11 (Army Ct. Crim. App. 28 Aug. 2014)(mem. op.), *rev'd on other grounds*, *United States v. Williams*, 75 M.J. 129 (C.A.A.F. 2016).

Moreover, under the doctrine of cumulative error, "a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding." *United States v. Walters*, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954); *see also United States v. Hobbs*, 42 C.M.R. 870 (A.C.M.R. 1970)(setting aside sentence for cumulative error); *United States v. Shamburger*, ARMY 20030753, 2004 CCA LEXIS 454, at *12 (Army Ct. Crim. App. 20 Dec. 2004)(mem. op.)(reassessing sentence for cumulative error).

Here, inadmissible aggravation evidence permeated the government's entire sentencing case. The military judge repeatedly misapplied R.C.M. 1001(b)(4), allowing witness after witness to testify about events that were not "directly relating to or resulting from" the offenses. Time and again, the military judge expressed her intent to consider this evidence, overruling defense objections under R.C.M. 1001(b)(4) and expressly stating the evidence was admissible. (*See* App. Exs. 639, 641, 643, 650, 656, 658). The government relied extensively on this evidence during its sentencing argument. (*See, e.g.,* R. at 13114, 13117-21).

Most of these witnesses were senior military and diplomatic officials. General officers, directors of important government organizations, and ambassadors laid immeasurable harms at the feet of a young Private First Class for leaks of information that even the Secretary of Defense believed were of minimal, if any, impact to the security of the United States.[40]

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[40] Said then-Secretary of Defense Robert M. Gates in 2010, "Now, I've heard the impact of these releases on our foreign policy described as a meltdown, as a game-changer, and so on. I think those descriptions are fairly significantly overwrought. The fact is, governments deal with the United States because it's in their interest . . . So other nations will continue to deal with us. They will continue to work with us. We will continue to share sensitive information with one another. Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S.

Conclusion

The cumulative effect of this testimony was highly prejudicial, demonstrated by the military judge's harsh sentence of thirty-five years confinement—a sentence unparalleled in the history of espionage prosecutions (*see* Assignment of Error VI at pages 183-85). It is not possible, nor is it just, to parse out the admissible portions of these witness' testimony and find the cumulative errors harmless.

VI.

WHETHER THIS COURT SHOULD EXERCISE ITS BROAD POWERS TO READJUDGE A FAIR SENTENCE IN LIGHT OF THE NUMEROUS APPELLATE ERRORS AND THE OVERALL UNFAIRNESS OF THE ADJUDGED SENTENCE?

Introduction

The military justice system has many unique features, but none are more important than the power of the Courts of Criminal Appeals to reassess and reconsider the appropriateness of a sentence de novo. This broad power mitigates to an extent the problems that can arise in unusual or complex cases, where sentences can be difficult to determine. This is exactly what happened here.

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foreign policy? I think fairly modest." (R. at 11939; Def. Ex. YYY).

Private First Class Manning's case is quite possibly the most misunderstood case in the history of the military justice system. The government accused her of a serious offense—aiding the enemy in violation of Article 104, UCMJ. The military judge appropriately acquitted PFC Manning of the charge because there was absolutely no evidence to support it, but the adjudged sentence suggests the allegations of disloyalty played an important role in the sentencing.

The government's prosecution strategy made it difficult for the military judge to separate evidence that was directly related to the disclosures from evidence that was not. Had the correct sentencing standard been applied, and inadmissible evidence not considered, the confinement term would have been far less. Moreover, the government charged the case in a manner that inflated the maximum punishment and distorted what PFC Manning actually did. Together this placed the military judge in an awful position. She had no way of knowing, under the circumstances, what was a fair sentence except for the recommendations of counsel. And as to that, all she did was split the recommendations in the middle, which is how she arrived at thirty-five years of confinement.

At its core, this case is about whether the information PFC Manning disclosed, and how she did it, warrants a thirty-five year term of confinement. She is not a spy. She did not

personally profit from the disclosures. Once she is released PFC Manning is unlikely to ever hold a security clearance again. She certainly will not serve in the military. The government did not suffer any significant injury except for embarrassment and administrative burden. Nor does the sentence properly account for all of the mitigating evidence presented at trial.

Private First Class Manning was in her early twenties when the disclosures occurred. She was battling depression, anxiety, and gender dysphoria in a combat environment, all of which affected her judgment and decision-making. She naively believed at the time that disclosing the materials to a media outlet was the only way to expose the culture of over-classification in the military and save lives, but looking at it retrospectively, PFC Manning admitted to the military judge that she should have raised her concerns through other lawful channels. (R. at 13058)(“In retrospect I should have worked more aggressively inside the system.”).

This explains why this court’s sentencing role is so important, and why it should reconsider and reassess the sentence in this case. Private First Class Manning is not a traitor. She simply made a mistake borne out of youth, frustration, anxiety, unattended-to mental challenges, and the Army’s inattention to all of these.

Many people consider PFC Manning to be a whistleblower, and that she did what was right in exposing government misconduct and abuse. But for purposes of this sentencing, what matters most is this—PFC Manning did not act with malice or disloyal intentions; she took responsibility for her actions; and there is no chance of recidivism. This was an isolated event. A thirty-five year sentence is not required to generally deter other Soldiers. Private First Class Manning admitted that she disclosed classified information and should have known better. For this, a ten-year sentence to confinement is appropriate.

Statement of Facts

The military judge sentenced PFC Manning to total forfeiture of pay and allowances, reduction to the grade of E-1, confinement for thirty-five years, and a dishonorable discharge. All the charges and specifications arose from PFC Manning's disclosure of classified information while she was assigned to the S2 section of 2/10 MTN as an intelligence analyst. It was in this role that PFC Manning obtained and disclosed classified materials to WikiLeaks. The materials primarily consisted of diplomatic cables and records of long-since-completed operational missions.

Private First Class Manning pleaded guilty to disclosing the materials, but pleaded not guilty to the most serious offenses, including violations of Article 104, UCMJ, 18 U.S.C.

§§ 641, 793(e), and 1030(a)(1), and four specifications of violating Article 92, UCMJ. The military judge found her not guilty of violating Article 104, two of the Espionage Act specifications, and one of the CFAA specifications, but guilty of everything else.

At sentencing the government argued "there may not be a Soldier in the history of the United States Army who displayed such an extreme disregard for the judgment of the officers appointed above him, and the orders of the President of the United States." (R. at 13111). The government listed five factors supporting a sixty-year confinement term, including that PFC Manning disclosed "current information"; she disclosed the information while on deployment; she searched for the materials while on duty; she disclosed lots of information; and she continued the misconduct after her clearance was taken away. (R. at 13334-37). Also at sentencing the government offered evidence that PFC Manning's disclosures had an effect on diplomatic relations and military operations, although as discussed above, much of this evidence should never have been considered.[41]

The government's main argument for the harsh sentence, however, concerned the deterrent effect such sentence would have on other Soldiers. The trial counsel asserted:

[41] This allegation is discussed in Assignment of Error V and the classified supplement.

> This court must send a message to any Soldier contemplating stealing classified information. National security crimes that undermine the entire system must be taken seriously. Punish PFC Manning's actions, Your Honor. Think about the volume of information in this case: more than 700,000 records; complete, and partial databases. Your sentence can ensure we never see a number like this again.

(R. at 13138). The trial counsel closed by stating, "if you disclose information that aids our adversaries, if you betray your country, you do not deserve the mercy of the law." (R. at 13138).

To rebut these arguments the defense offered substantial mitigation evidence in support of a lesser sentence—ten years—including evidence related to PFC Manning's mental condition at the time she committed the offenses. For instance, CDR David Moulton, a board-certified forensic psychologist assigned to the Expeditionary Medical Force, Great Lakes, testified about his assessment of PFC Manning's mental condition and its effect. (R. 12980). According to CDR Moulton, PFC Manning was suffering from gender dysphoria, fetal alcohol syndrome[42] and Asperger's, and

[42] CDR Moulton, in response to a question from the military judge regarding fetal alcohol syndrome, explained that PFC Manning's intelligence is quite high but her ability to apply that knowledge into logical and rational outcomes is lower than he would expect given her intelligence level. (R. 13034). While this may have been related to fetal alcohol syndrome, the long period of solitary confinement also likely impacted his assessment. *See* Amnesty International Amicus Brief concerning Solitary Confinement.

also exhibited traits of abnormal personality disorder. (R. 12999). Private First Class Manning's primary diagnosis was gender dysphoria, which he described as a condition where one feels "they were born in the wrong gender," and they wish to "physically morph their body or change their body into the opposite gender." (R. at 13001). According to CDR Moulton the condition can cause significant impairment.

> It can be quite impairing and actually I have had several cases at the University of Utah, people presenting in-patient hospitalization because of safety issues regarding suicidality because of this. Gender is very much a core of our identity as individuals. And when that is off keel, can use a Navy kind of term, the whole ship or your life has difficulty establishing direction and tends to wander. It can cause a lot of stress, significant dysphoria, depression. Frequently in our society oftentimes questions regarding gender are associated with a lot of shame, guilt, concern for stigmatization, retaliation, can lead to a really questioning self-identity, self-concept, self-worth those types of things.

(R. at 13002).

This condition caused PFC Manning a great deal of stress, particularly because she was in the military and was precluded from talking openly about her feelings. (R. at 13011). It was also exacerbated by PFC Manning's lack of social and emotional support. (R. at 13012). The stress caused PFC Manning to act out. (R. at 13017). She became distressed with the injustice she discovered and believed that the disclosures would change how

the world viewed the wars in Afghanistan and Iraq. (R. at 13018-19).

The Army's treatment of PFC Manning also contributed to her impaired decision-making. Sergeant (SGT) Sheri Walsh worked with PFC Manning in Iraq. She testified that some Soldiers were not very nice to PFC Manning, while others ignored her. (R. at 12881). Sergeant Walsh described an incident where a Soldier purposely pushed a door into PFC Manning, which dazed her. (R. at 12882). The incident was not reported. (R. at 12882). This was a microcosm of PFC Manning's experiences in Iraq.

The Army also knew of PFC Manning's emotional troubles but ignored them because it needed intelligence analysts. Private First Class Manning self-reported her mental and emotional struggles associated with gender dysphoria. In an email dated 24 April 2010 to Master Sergeant (MSG) Paul Adkins, for example, who was within her chain of command, PFC Manning forwarded a picture of herself dressed as a woman and explained:

> [t]his is my problem. I've had signs of it for a very long time. Its caused problems within my family. I thought a career in the military would get rid of it. It's not something I seek out for attention, and I've been trying very, very hard to get rid of it by placing myself in situations where it would be impossible. But, it's not going away, its haunting me more and more as I get older. Now, the consequences of it are dire, at a time when its causing me great pain in itself.

(Def. Ex. QQQ; R. at 12791). When questioned by the defense about the email and why he did not immediately inform the chain of command, MSG Adkins stated, "[b]ecause, one, I was getting [her] therapy at the combat stress; two, we needed analysts to assess the threat and I wanted to make sure that we had enough Soldiers to conduct our mission." (R. 12802). Finally, in addition to all of these mitigating circumstances, the MCBQ subjected PFC Manning to isolation and other degrading and inhumane conditions while PFC Manning was in pretrial confinement, as discussed in Assignment of Error I.

Standard of Review

This court reviews sentence appropriateness de novo. *See United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005).

Law and Argument

This Court possesses broad authority to reassess and reconsider sentences when warranted by the circumstances. *See United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013)(setting forth factors for reassessing sentences). There are three reasons to reassess the sentence in this case. First, the assignments of error, if granted, will dramatically change the penalty landscape. *Id.* Second, because of the unusual nature of this case it cannot easily be determined how the military judge would have ruled without the errors. *Id.* Finally, the military judge considered a significant amount of inadmissible

aggravation evidence, both because she misinterpreted the sentencing rule and because she found PFC Manning guilty of committing offenses for which there was insufficient evidence *Id*.

With that said, the defense is under no illusion that remanding the case to the military judge—whether on the merits, sentencing, or both—will be an easy task. The trial required substantial time and resources. The same would be true on remand. This does not mean, however, that the default position should be to affirm the military judge's rulings and sentence. Rather, the fairest and most efficient way to correct the errors below is for this court to reassess the sentence itself.

The Courts of Criminal Appeals routinely consider the appropriateness of sentences. *See United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F. 1999). "Generally, sentence appropriateness should be judged by individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(internal citation and quotations omitted). Logically, there is significant overlap between the two concepts.

For this reason, the defense urges this court to reexamine PFC Manning's sentence through both lenses—reconsideration and appropriateness. When considered together, this court will come

to realize that a thirty-five year sentence to confinement grossly exaggerates the severity of the offenses and grossly undervalues the mitigating circumstances.

First, the adjudged sentence fails to take into consideration PFC Manning's mental condition at the time she committed the offenses. It is factually undisputed that PFC Manning was suffering from gender dysphoria, a unique but severe mental condition, for which she was not receiving any treatment. PFC Manning could not have recognized the trauma associated with this condition; in fact, the condition manifested itself by causing PFC Manning to join the military to "fix" the condition. (Defense Exhibit QQQ).

Second, the command failed to address her problems. For instance, MSG Adkins knew PFC Manning probably should have had her clearance revoked but chose not to do anything because the intelligence section needed her as an analyst. (R. at 12798-802). Private First Class Manning's condition was exacerbated by mistreatment at the hands of fellow Soldiers. While it is true PFC Manning bears responsibility for the disclosures, it is also unquestionably the case that the Army's prioritization of readiness allowed PFC Manning to slip through the cracks.

Third, PFC Manning did not intend to harm national security or diplomatic interests. She truly believed that the disclosures would save lives and support the military's mission. There is no

evidence whatsoever that she intended to aid the enemy, even though this is how the prosecution characterized her conduct throughout the trial and at sentencing.

Fourth, PFC Manning took responsibility for the disclosures by pleading guilty without the protection of a pretrial agreement. Had she truly wanted to avoid accountability, PFC Manning could have required the government to prove its entire case. While the government had the prerogative of seeking additional convictions, it did not have to. Private First Class Manning's guilty plea covered the extent of the crime. She should be given credit for this.

Fifth, the government introduced mounds of inadmissible aggravation evidence, clearly in an attempt to portray the crime as more serious than it really was. The truth of the matter is this—PFC Manning's disclosure caused more embarrassment than operational or diplomatic harm. The sentencing rules require more than speculative or theoretical damage or injury. But this is exactly the type of evidence the government introduced throughout its sentencing case.

Seventh, this court should take into consideration the egregious pretrial confinement conditions PFC Manning experienced while awaiting trial. *See* Assignment of Error I.

Sixth, the sentence is grossly disproportional to related cases. Courts-martial involving the disclosure of classified

information are few and far between. In circumstances like this it is reasonable to consider sentences for similar offenses. *United States v. Wacha*, 55 M.J. 266 (C.A.A.F. 2001)(recognizing the Courts of Criminal Appeals may exercise their discretion to review related cases for uniformity).

In the pantheon of cases involving disclosures motivated by whistleblowing, PFC Manning's is far and away the most severe sentence ever adjudged.[43] In the last five years alone, federal prosecutors have prosecuted more whistleblowers than at any time.[44] In the last five years, three whistleblowers have been prosecuted in federal courts. None have been sentenced more harshly than PFC Manning.

1) Thomas Drake, an analyst at the National Security Agency, pleaded guilty to a misdemeanor and was sentenced to a year of probation for leaking classified information to the news media for the purpose of exposing wrongful conduct by the government.[45]

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[43] *See* Espionage and other Compromises of National Security Information published by Defense Personnel Security Research Center dated 2 November 2009, available at http://www.dhra.mil/perserec/espionagecases/espionage_cases_august2009.pdf (last accessed 9 May 2016).

[44] *See* Charting Obama's Crackdown on National Security Leaks, Pro Publica, Cora Currier, 30 July 2013, available at https://www.propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks (last accessed 9 May 2016

[45] *See* No Jail Time in Trial over N.S.A. Leak, New York Times, dated 15 July 2011, available at

2) Stephen Jin-Woo Kim, a former arms expert at the State Department, was sentenced to thirteen months in federal prison for leaking classified information to a Washington Post reporter about North Korean military capabilities.[46]

3) Jeffrey Sterling, a former Central Intelligence Agency (CIA) officer, was sentenced to three and a half years in federal prison for leaking classified information to a New York Times reporter about a secret operation to disrupt Iran's nuclear capabilities. The federal sentencing guidelines had called for a sentence of more than twenty years.[47]

Finally, two recent non-whistleblower classified information cases prove PFC Manning's sentence is excessive. The first involved a Navy intelligence specialist named Bryan Martin.[48] Martin pleaded guilty to charges he sold classified

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http://www.nytimes.com/2011/07/16/us/16leak.html (last accessed 15 May 2016).

[46] *See* Ex-State Department Adviser Stephen J. Kim Sentenced to 13 Months in Leak Case, Washington Post, dated 2 April 2014, available at https://www.washingtonpost.com/world/national-security/ex-state-dept-adviser-stephen-j-kim-sentenced-to-13-months-in-leak-case/2014/04/02/f877be54-b9dd-11e3-96ae-f2c36d2b1245_story.html (last accessed 15 May 2016).

[47] *See* Ex-C.I.A. Officer Sentenced in Leak Case Tied to Times Reporter, New York Times, 11 May 2016, available at http://www.nytimes.com/2015/05/12/us/ex-cia-officer-sentenced-in-leak-case-tied-to-times-reporter.html (last accessed 15 May 2016).

[48] *See* Va. Beach-based sailor gets 34 years in espionage case, The Virginian-Pilot, 21 May 2011, available at http://pilotonline.com/news/military/va-beach-based-sailor-gets-years-in-espionage-case/article_f20a1d79-0b29-5fa4-b097-a7e4a77126e9.html (last accessed 17 May 2016).

information to a person he believed to be a spy. A military judge sentenced him to thirty-four years confinement. By all measures PFC Manning received the same sentence as a service-member who wished to sell classified information for money.

The second case involves General David Petraeus.[49] General Petraeus is one of the most decorated Army generals in American history and the former Director of the CIA. General Petraeus pleaded guilty to disclosing highly classified information to his former mistress and biographer. He apparently disclosed the materials for sex. General Petraeus pleaded guilty to a misdemeanor offense and was sentenced to two years of probation.

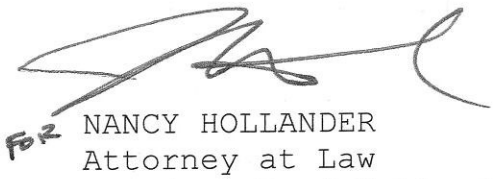
The trial counsel in PFC Manning's case claimed her crime was worse than any Soldier in history. (R. 13111). He obviously did not have the benefit of knowing about General Petraeus's misdeeds when he made the statement.

Conclusion

The military justice system is often maligned for its perceived unfairness. What these critics fail to realize is Congress has vested in this court the power to right a wrong by examining the appropriateness of sentences with a fresh set of eyes. The defense understands the enormity of the trial, but now

[49] *See* Petraeus sentenced: 2 years probation; $100K fine, CNN, 23 April 2015, available at http://www.cnn.com/2015/04/23/politics/david-petraeus-sentencing/ (last accessed 17 May 2016).

that time has passed it is clear the Army over-exaggerated the crime. There are so many unique circumstances surrounding PFC Manning's case that reducing her sentence will not have any effect on military readiness or good order and discipline. Reducing the sentence to ten-years is therefore appropriate.



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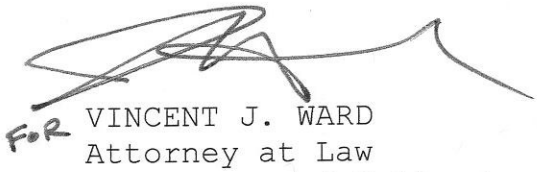

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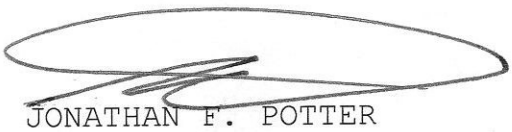

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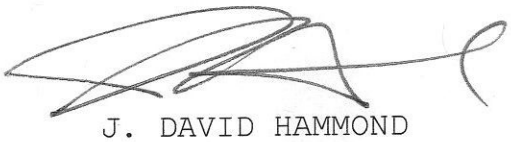

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Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Private First Class (PFC) Chelsea E. Manning, through counsel, personally requests that this court consider the following:

1. Violation of Right to Speedy Trial.

"Article 10, [Uniform Code of Military Justice (UMCJ)], is a fundamental, substantial, personal right, and is a statutory protection intended to prevent soldiers from being put in the clink and held there for weeks, sometimes months, before being brought to trial." *United States v. Cooley*, __ M.J.__, 2016 CAAF LEXIS 351, *26 (C.A.A.F. 6 May 2016). Contrary to the requirements of Article 10, it took the government over three years to bring PFC Manning to trial after her arrest and confinement. Much of the delay was caused by the government's needless decision to obtain classification reviews before the Article 32. As discussed below, the twenty-month delay in convening the Article 32 for purposes of obtaining the classification reviews violated PFC Manning's speedy trial rights and is itself a sufficient reason to reverse the conviction and dismiss all the charges and specifications.

The defense filed a speedy trial motion on several grounds, one of which was that the government violated Article 10 by delaying the Article 32 investigation to obtain classification reviews from the agencies allegedly affected by the disclosures.

(App. Ex. 326). PFC Manning sat in pretrial confinement for about twenty months before the Article 32 began. (App. Ex. 354 at 2). The government argued the classification reviews were necessary for the Article 32 officer to consider the extent to which the hearing should be closed and as proof of the preferred charges. (App. Ex. 494 at 20-21).

Importantly, the government did not formally request the classification reviews until 18 March 2011, almost a year after PFC Manning was first detained. (App. Ex. 494 at 21). The military judge found the government made "informal" requests for classification reviews, but the requests appear not to have been made in writing and the government offered little evidence of what these "informal" requests entailed. (App. Ex. 494 at 21). The military judge, in a conclusory fashion, determined the government acted diligently in obtaining the classification reviews, but even her ruling points out that the government did not formally request the reviews until several months after PFC Manning's pretrial confinement began. (App. Ex. 494 at 21).

If this court rules in the government's favor, it will essentially eviscerate Article 10 in any case involving classified information. The government did not submit formal requests for classification reviews for nearly ten months. It then took approximately six months to complete the classification reviews and produce them to the defense. The

evidence with respect to the informal requests is at best murky and inconclusive. It certainly does not establish diligence within the meaning of Article 10. Finally, the government could have moved forward with the Article 32 without the classification reviews. The government cannot hide behind the shield of classification in order to skirt Article 10. For these reasons the conviction should be reversed and all the charges and specifications dismissed with prejudice.

This court reviews de novo whether an appellant's speedy trial rights were violated, but it is bound by the military judge's factual findings unless they are clearly erroneous. *See United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007).

"An Article 10 violation rests in the failure of the [g]overnment 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." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005). This court examines four factors under Article 10: (1) the length of delay; (2) the reason for delay; (3) whether appellant made a demand for speedy trial; and (4) prejudice to the appellant. *See Cossio*, 64 M.J. at 256. "[I]t is the [g]overnment's responsibility to provide evidence showing the actions necessitated and executed in a particular case justified delay when an accused was in pretrial confinement."

Cooley, __ M.J. __, 2016 CAAF LEXIS 351, at *28.

The government did not meet its burden of establishing delay was necessary to complete the classification reviews. The government offered two reasons for the delay—the complexity of the case and the need to obtain the reviews before the Article 32. Neither was sufficient to keep PFC Manning detained for nearly twenty months before convening the Article 32.

"By definition, an Article 32 investigation is designed to gather evidence upon which a *recommendation* can be made to enable a convening authority to decide whether there is sufficient evidence to warrant referral of charges to trial." *United States v. Bramel*, 29 M.J. 958, 967 (A.C.M.R. 1990), *aff'd*, (C.M.A. Aug. 21, 1990) (emphasis added). However, "[a]n Article 32 investigation does not, in fact, require that a recommendation by the investigating officer that a charge be referred to trial be predicated upon evidence *sufficient to establish guilt beyond a reasonable doubt*." *United States v. Payne*, 3 M.J. 354, 359 (C.M.A. 1977) (emphasis added). Here the government essentially argues it may take as long as needed to obtain classification reviews for an Article 32 involving classified information. But this is not the law when it comes to speedy trial.

For instance, in *United States v. Longhofer*, 29 M.J. 22 (C.M.A. 1995), the court declined to adopt a per se rule that

delay was excludable for the time it took to get a counsel a security clearance. Similarly, in *United States v. Duncan*, 34 M.J. 1232, 1243 (C.M.A. 1989), the court rejected a per se rule that delay was excludable to ensure classified information was not improperly disclosed at an Article 32 hearing.

Taken together, these cases establish that an Article 32 cannot be indefinitely delayed merely because the substantive offenses involve classified information. The government had plenty of options to conduct the Article 32 without the classification reviews. Moreover, the military rules provide sufficient safeguards to protect classified information in the context of an Article 32. *See* Military Rule of Evidence (M.R.E.) 505. Finally, the government did not meet its burden of establishing the delay was necessary. The undisputed evidence shows prosecutors waited several months to formally request classification reviews, and then it took many more months for the classification reviews to be completed and produced to the defense. The government did not offer a single reason why it waited so long to formally ask for the classification reviews. This is inexcusable given the well-established right to a speedy trial.

For the reasons stated above, the charges and specifications should be dismissed because the government took too long to ask for and obtain the classification reviews. The

reviews were not needed for the Article 32, and in any event, the government had a choice to make—either keep PFC Manning in confinement and proceed to the Article 32 with diligence, or release PFC Manning from confinement and take what time it needed to perfect its case before the Article 32. The law does not support what the government did here, which was to hold PFC Manning in confinement indefinitely while moving at a snails pace to obtain classification reviews. Therefore, all charges and specifications should be dismissed with prejudice.

2. Discovery violations.

Military courts recognize "a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts." *United States v. Reece*, 25 M.J. 93,94 (C.M.A. 1987). Regarding discovery, "military law has been preeminent, zealously guaranteeing to the accused the right to be effectively represented by counsel through affording every opportunity to prepare his case by openly disclosing the Government's evidence." *United States v. Enloe*, 35 C.M.R. 228, 230 (C.M.A. 1965). The only restrictions placed upon liberal defense discovery are that the information requested must be relevant and necessary to the subject of the inquiry, and the request must be reasonable. *Reece*, 25 M.J. at 95. *See also United States v. Luke*, 69 M.J. 309, 319 (C.A.A.F. 2011).

Despite the liberal mandate for discovery, the government either purposefully or negligently avoided providing necessary discovery to the defense. For the first two years of the case, the government represented that it had been diligently searching for *Brady* material. Unfortunately, the government did not understand what Brady material was. It believed that *Brady* was the standard set by the United States Supreme Court, when it was not. As military courts have recognized over and over, military rules and ethical obligations mandate much broader *Brady* disclosure than the Supreme Court's actual 5O-year old decision in *Brady v. Maryland*, 373 U.S. 83 (1963).

In addition to deliberately withholding necessary discovery and *Brady* material, the government also deliberately withheld discoverable information under Rule for Courts-Martial (R.C.M.) 701(a)(2)(A) because it thought that R.C.M. 703 was the correct discovery rule. The government's abdication of its basic discovery responsibilities was unconscionable and irreparably prejudicial to PFC Manning's case. Although the military judge determined that the government failed to understand what its discovery obligations were, the military judge did not take any curative action based upon this failure. (App. Ex. 36 at 8)(“The 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."); (App. Ex. 68

at 2)("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."). Instead, the military judge simply chose to ignore the government's negligent or willful failure to provide necessary discovery to the Defense. Due to the egregious discovery and Brady violations, the military judge should have dismissed all charges with prejudice. (App. Exs. 8, 26, 36, 48, 50, 53, 68, 93, 96, 98, 99, l0l, 128, l3 1, 135, 142, 146, 147, 152, 153, 17l, 175, 176, 202, 222, 243, 273, 274, and 317).

3. Unreasonable Multiplication of Charges (UMC).

The Manual for Courts-Martial (MCM) directs that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." RCM 307(c)(4). "[T]he prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001).

The government unreasonably multiplied the charges against PFC Manning by splitting one transaction into two specifications: one alleging a violation of 18 U.S.C. § 641 and one alleging a violation of 18 U.S.C. § 793(e). The conduct underlying a particular Section 641 violation should not have

been artificially separated from the conduct underlying the corresponding Section 793(e) violation. In maintaining the artificial distinction created by the government, the military judge allowed the Government to exaggerate PFC Manning's criminality and unreasonably increase her punitive exposure.

The government also unreasonably multiplied the charges against PFC Manning in another instance by splitting one transaction into two separate specifications: one alleging a violation of Section 641 and one alleging a violation of Section 1030(a)(1). Specifications 12 and 13 of Charge II alleged that PFC Manning violated Sections 641 and 1030(a)(1), respectively, when she stole, purloined, or knowingly converted the Department of State Net-Centric Diplomacy database and then disclosed certain classified records on that database to a person not entitled to receive those records. These specifications dealt with the same transaction—PFC Manning's alleged exceeding authorized access to obtain the Department of State Net-Centric Diplomacy database records and her subsequent disclosure of them. As such, the government again was permitted by the military judge to exaggerate PFC Manning's criminality and unreasonable increase her punitive exposure.

The military judge erred when she determined that the 18 U.S.C. § 641, l8 U.S.C. § 793(e) and l8 U.S.C. § 1030(a)(1) specifications encompassed distinctly separate criminal acts.

(App. Ex. 78 at 4-7). The military judge also erred when she determined that the number of charges and specifications did not misrepresent or exaggerate PFC Manning's criminality. (App. Ex. 78 at 4-7). The military judge should have granted the defense motion to dismiss based on unreasonable multiplication of charges. (App. Ex. 57, 78).

Private First Class Manning respectfully requests appropriate relief.

Chelsea E. Manning

CERTIFICATE OF SERVICE

United States v. Manning
Army No. 20130739

I certify that a copy of the Brief on Behalf of Appellant and the classified supplement to the Brief was delivered to the Army Court of Criminal Appeals on 18 May 2016. Upon approval of the court, undersigned counsel will deliver the Brief to the Government Appellate Division.

J. DAVID HAMMOND
CPT, JA
Appellate Defense Counsel