IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE MOTION TO DISMISS**
v.	)	**BASED UPON UNREASONABLE**
	)	**MULTIPLICATION OF**
MANNING, Bradley E., PFC	)	**CHARGES**
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 29 March 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by counsel, pursuant to applicable case law, requests this Court to dismiss and/or consolidate several specifications because, as charged by the Government, they constitute an unreasonable multiplication of charges. The Defense submits that the Government has unreasonably multiplied the charges against PFC Manning by charging violations of multiple provisions of Title 18 of the United States Code for conduct that should only be charged, if at all, as a violation of one provision of Title 18. Additionally, the Government has unreasonably multiplied the charges against PFC Manning by breaking down single transactions into multiple specifications each.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to R.C.M. 905(c)(1) and (2).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010). The case has been referred to a general court martial by the convening authority with a special instruction that the case is not a capital referral.

4. In Specification 4 of Charge II, PFC Manning is alleged to have, "at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 5

January 2010," stolen, purloined, or knowingly converted "the Combined Information Data Network Exchange Iraq database containing more than 380,000 records belonging to the United States Government," in violation of 18 U.S.C. Section 641 and Article 134. In Specification 5 of the same charge, it is alleged that PFC Manning, having unauthorized possession of classified Combined Information Data Network Exchange Iraq database records, did, at the same place specified in Specification 4 between on or about 31 December 2009 and on or about 9 February 2010, willfully communicate, deliver, transmit, or cause to be communicated, delivered or transmitted, these records to a person not entitled to receive them with reason to believe that the records could be used to the injury of the United States or to the advantage of any foreign nation, in violation of 18 U.S.C. Section 793(e) and Article 134.

5. In Specification 6 of Charge II, PFC Manning is alleged to have, "at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 8 January 2010," stolen, purloined, or knowingly converted "the Combined Information Data Network Exchange Afghanistan database containing more than 90,000 records belonging to the United States Government," in violation of Section 641 and Article 134. Additionally, in Specification 7 of the same charge, it is alleged that PFC Manning, having unauthorized possession of classified records contained on the Combined Information Data Network Exchange Afghanistan database, did, at the same place specified in Specification 6 between on or about 31 December 2009 and on or about 9 February 2010, willfully communicate, deliver, transmit, or cause to be communicated, delivered or transmitted, these records to a person not entitled to receive them with reason to believe that the records could be used to the injury of the United States or to the advantage of any foreign nation, in violation of Section 793(e) and Article 134.

6. In Specification 8 of Charge II, PFC Manning is alleged to have, "at or near Contingency Operating Station Hammer, Iraq, on or about 8 March 2010," stolen, purloined, or knowingly converted "a United States Southern Command database containing more than 700 records belonging to the United States Government," in violation of Section 641 and Article 134. Specification 9 of the same charge alleges that PFC Manning, having unauthorized possession of classified records contained on the database specified in Specification 8, did, at the same place specified in Specification 8 between on or about 8 March 2010 and on or about 27 May 2010, willfully communicate, deliver, transmit, or cause to be communicated, delivered or transmitted, these records to a person not entitled to receive them with reason to believe that the records could be used to the injury of the United States or to the advantage of any foreign nation, in violation of Section 793(e) and Article 134.

7. In Specification 12 of Charge II, PFC Manning is alleged to have, "at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 4 May 2010," stolen, purloined, or knowingly converted "the Department of State Net-Centric Diplomacy database containing more than 250,000 records belonging to the United States Government," in violation of Section 641 and Article 134. Specification 13 of the same charge alleges that PFC Manning, at the same place specified in Specification 12 between on or about 28 March 2010 and on or about 27 May 2010, knowingly exceeded his authorized access on a Secret Internet Protocol Router computer, obtained classified Department of State cables determined to require protection against unauthorized disclosure, and willfully communicated, delivered, transmitted, or caused to be communicated, delivered, or transmitted, these cables to a

person not entitled to receive them with reason to believe that these cables so obtained could be used to the injury of the United States, in violation of 18 U.S.C. Section 1030(a)(1) and Article 134.

8. In Specification 10 of Charge II, it is alleged that PFC Manning, having unauthorized possession of classified records relating to a military operation in Farah Province, Afghanistan occurring on or about 4 May 2009, did, "at or near Contingency Operating Station Hammer, Iraq, between on or about 11 April 2010 and on or about 27 May 2010," willfully communicate, deliver, transmit, or cause to be communicated, delivered or transmitted, these records to a person not entitled to receive them with reason to believe that the records could be used to the injury of the United States or to the advantage of any foreign nation, in violation of Section 793(e) and Article 134.

9. In Specification 11 of Charge II, it is alleged that PFC Manning, having unauthorized possession of a file containing a video relating to the national defense, did, "at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 8 January 2010," willfully communicate, deliver, transmit, or cause to be communicated, delivered or transmitted, this file to a person not entitled to receive it with reason to believe that the file could be used to the injury of the United States or to the advantage of any foreign nation, in violation of Section 793(e) and Article 134.

WITNESSES/EVIDENCE

10. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this Court to consider the following evidence in support of the Defense's motion.

a. Charge Sheet;

b. Continuation of DD Form 457;

c. [redacted];

d. [redacted];

e. [redacted].

LEGAL AUTHORITY AND ARGUMENT

11. 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."

Rule for Court-Martial 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).

12. The Court of Appeals for the Armed Forces has set forth a five factor test for assessing claims of unreasonable multiplication of charges:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the [accused's] criminality?
>
> (4) Does the number of charges and specifications unreasonably increase the [accused's] punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004); *see Quiroz*, 55 M.J. at 338-39 (articulating these five factors). The Court has further instructed that "[t]hese factors must be balanced, with no single factor necessarily governing the result." *Pauling*, 60 M.J. at 95. Where a trial court finds an unreasonable multiplication of charges, dismissal of the unreasonably multiplied charges is an available remedy. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). Consolidation of the unreasonably multiplied charges is also a remedy available to the trial court. *United States v. Gilchrist*, 61 M.J. 785, 789 (A. Ct. Crim. App. 2005). In any event, once an unreasonable multiplication of charges is shown, "it [is] incumbent on the trial judge . . . either to consolidate the specifications or to dismiss a specification[.]" *United States v. Burris*, 21 M.J. 82, 82 (C.M.A. 1985).

13. When analyzed under this five factor test, the Government's drafting of several specifications in the instant case has run afoul of the prohibition against unreasonable multiplication of charges. First, multiple specifications of Charge II allege violations of either Section 641 or Section 793(e). In several such instances, the same transaction has been split into a Section 641 specification and a Section 793(e) specification. This creative drafting by the Government drastically exaggerates PFC Manning's criminality and unreasonably increases his punitive exposure. Second, Specifications 12 and 13 of Charge II charge violations of Sections 641 and 1030(a)(1), respectively. However, the alleged conduct behind these two charged offenses constitutes only one transaction. By splitting this conduct into two separate offenses, the Government has again unreasonably multiplied the charges against PFC Manning. Finally, several different specifications of Charge II allege violations of either Sections 641, 793(e), or 1030(a)(1). Yet the alleged conduct behind several of these specifications occurred in the same transaction on the same day. The Government has again sought to exaggerate PFC Manning's criminality and increase his punitive exposure by creatively separating one transaction into

multiple specifications. Each instance of unreasonable multiplication of charges is discussed in turn.

A. The Government Unreasonably Multiplied the Charges Against PFC Manning by Repeatedly Splitting the Same Transaction Into One Specification Alleging a Violation of Section 641 and One Specification Alleging a Violation of Section 793(e)

14. The Defense submits that the Government unreasonably multiplied the charges against PFC Manning by splitting one transaction into two specifications: one alleging a violation of Section 641 and one alleging a violation of Section 793(e). The conduct underlying a particular Section 641 violation cannot be logically separated from the conduct underlying the corresponding Section 793(e) violation. In maintaining this artificial distinction in these specifications, the Government has exaggerated PFC Manning's criminality and unreasonably increased his punitive exposure. Moreover, the Government has unreasonably multiplied charges against PFC Manning in this manner three separate times in Charge II.

15. Specifications 4 and 5 of Charge II allege that PFC Manning violated Sections 641 and 793(e), respectively, when he stole, purloined, or knowingly converted the Combined Information Data Network Exchange Iraq database and then disclosed certain classified records on that database to a person not entitled to receive those records. These specifications deal with the same transaction – PFC Manning's alleged unauthorized possession and disclosure of the Combined Information Data Network Exchange Iraq database records.

16. Additionally, Specifications 6 and 7 of Charge II allege that PFC Manning violated Sections 641 and 793(e), respectively, when he stole, purloined or knowingly converted the Combined Information Data Network Exchange Afghanistan database and then impermissibly disclosed certain classified records on that database. Like Specifications 4 and 5, Specifications 6 and 7 of Charge II deal with the same transaction – PFC Manning's alleged unauthorized possession and disclosure of the Combined Information Data Network Exchange Afghanistan database records.

17. Finally, Specifications 8 and 9 of Charge II allege that PFC Manning violated Sections 641 and 793(e), respectively, when he stole, purloined or knowingly converted a United States Southern Command database and then impermissibly disclosed certain classified records on that database. These specifications also attempt to target one transaction – the alleged unauthorized possession and disclosure of the records on a United States Southern Command database.

18. Application of the five factor test for unreasonable multiplication of charges demonstrates that the Government has unreasonably multiplied the charges against PFC Manning by drafting these specifications:

a. First, this motion serves as PFC Manning's objection to the unreasonable multiplication of charges, so this factor must be resolved in his favor. *See United States v. Paxton*, 64 M.J. 484, 491 (C.A.A.F. 2007).

b. Second, these specifications are not directed at distinctly separate acts. *See Quiroz*, 55 M.J. at 338. Taking Specifications 4 and 5 as an example, the alleged conduct behind these two specifications cannot logically be separated in the manner the Government has attempted. Before PFC Manning could have secured unauthorized possession of the relevant database records and before he could disclose these records, *see* 18 U.S.C. § 793(e), he first needed to secure possession of these records. In order to secure possession of these materials, PFC Manning, according to the Government, stole, purloined, or knowingly converted the database on which these materials were stored. Therefore, under the Government's theory, PFC Manning could not gain unauthorized possession of the records he allegedly disclosed without first stealing, purloining, or knowingly converting the database. The Section 641 violation charged in Specification 4 was simply the first step in the transaction that was the alleged Section 793(e) violation charged in Specification 5; without the theft or conversion of the database, there could be no unauthorized possession of the records. The Navy-Marine Court of Military Review's decision in *United States v. Johnson* is instructive. In *Johnson*, the accused failed to inform the Personal Support Detachment that he was no longer entitled to receive Basic Allowance for Quarters (BAQ) and Variable Housing Allowance (VHA). 39 M.J. 707, 708-10 (N-M.C.M.R. 1993). He continued to receive BAQ and VHA to which he was not entitled for eight months. *Id.* at 711. The Government elected to charge the accused with eight specifications of larceny of BAQ and VHA, one specification for each month of the accused's improper receipt of BAQ and VHA. *Id.* On appeal, the accused argued that this represented an unreasonable multiplication of charges. *Id.* The court agreed, explaining that "[w]hat happened here was essentially a single course of theft of Government funds over an extended period and not eight thefts. Therefore, the eight specifications shall be merged into one." *Id.*; *see also Burris*, 21 M.J. at 82 (finding an unreasonable multiplication of charges where "substantially one transaction" – the accused's false statements on two forms in his application for base housing – was charged as two separate specifications). Similarly, Specifications 4 and 5 in the instant case are not directed at distinctly separate acts. Rather, like the eight specifications in *Johnson* that were directed at a single course of theft, *see* 39 M.J. at 711, Specifications 4 and 5 are directed at a single course of alleged conduct. The same can be said for Specifications 6 and 7 of Charge II and for Specifications 8 and 9 of Charge II. Therefore, the second factor must also be resolved in PFC Manning's favor.

c. Third, the number of specifications misrepresent and exaggerate PFC Manning's criminality. *See Quiroz*, 55 M.J. at 338. One transaction – the Section 793(e) violation requiring unauthorized possession and disclosure of classified records – has been made the subject of two specifications through the Government's expansive charging in Specifications 4 and 5. The Government has repeated this duplication effort with respect to Specifications 6 and 7 and with respect to Specifications 8 and 9. Moreover, there are numerous other instances where the Government has similarly separated other transactions into two separate specifications in Charge II. *See* Argument, Parts B & C, *infra*.

d. Fourth, this overcharging unreasonably increases PFC Manning's punitive exposure. *See Quiroz*, 55 M.J. at 338-39. Congress has provided that the maximum punishment for a violation of Section 793(e) is imprisonment for ten years. 18 U.S.C. § 793(e). Similarly, the maximum punishment for a violation of Section 641 is also ten years. *Id.* § 641. Congress could have cross referenced Sections 641 and 793(e), but it chose not to do so. If the Government is permitted to

maintain both Specifications 4 and 5, the maximum punishment for one transaction – an unauthorized possession and disclosure under Section 793(e) – would become twenty years instead of the ten years that Congress chose. Doubling the punitive exposure for one transaction is plainly unreasonable. *See United States v. Quiroz*, 57 M.J. 583, 586 (N-M. Ct. Crim. App. 2002), *on remand from*, 55 M.J. 334 (C.A.A.F. 2001). Indeed, the Navy-Marine Court of Criminal Appeals confronted a similar doubling of the punitive exposure of an accused in *Quiroz*:

> By charging [Quiroz] twice for the sale of the same C-4, the prosecution magnified the extent of his criminal activity and increased the maximum permissible confinement for this sale from 10 years to 20 years . . . . The doubling of [Quiroz's] punitive exposure by 10 years is a significant increase that does not appear to be warranted by anything in the record. We, therefore, find that the charges in question did unreasonably increase [Quiroz's] punitive exposure.

Id. Here, as in *Quiroz*, the Government is attempting to double PFC Manning's punitive exposure by artificially splitting one act into two offenses. Additionally, the United States Supreme Court has instructed that the concept of "punishment" encompasses not only the imposition of sentence, but the actual conviction as well. *Ball v. United States*, 470 U.S. 856, 861, 864-65 (1985). Therefore, if the Government's expansive charging is permitted, PFC Manning could be subjected to twice as many convictions and twice as much punishment for what is substantially one Section 793(e) violation. The same can be said for the Government's drafting of Specifications 6 and 7 and Specifications 8 and 9.

e. Finally, there is evidence of prosecutorial overreaching and abuse in the drafting of the specifications. Charge II itself demonstrates the existence of prosecutorial overreaching. The Government has on three occasions sought to separate one transaction – a violation of Section 793(e) by unauthorized possession and disclosure of classified information – into two offenses. Moreover, the Government has similarly broken down other transactions into their component parts as well. *See* Argument, Parts B & C, *infra*. The reason for this unnatural breakdown of these transactions is obvious: the division serves no purpose other than to pile on the charges against PFC Manning in order to increase the likelihood of a severe sentence if he is convicted. This is precisely the type of overreaching that the prohibition against unreasonable multiplication of charges is intended to guard against. *See Quiroz*, 55 M.J. at 337. Additionally, in Specifications 4, 6, and 8 of Charge II, the Government has pushed Section 641 to the edge of its permissible application. Congress has legislated comprehensively in the field of information relating to the national defense. It has enacted Section 793(e), which punishes whoever, having unauthorized possession of information relating to the national defense, willfully discloses that information with reason to believe that the information could be used to the injury of the United States or to the advantage of a foreign nation. 18 U.S.C. § 793(e). It has also enacted Section 1030(a)(1), which punishes whoever exceeds authorized access to a computer, obtains covered information relating to the national defense or foreign relations, and willfully discloses that information with reason to believe that the information could be used to the injury of the United States or to the advantage of any foreign nation. *Id.* § 1030(a)(1). Some judges have expressed doubts over whether Section 641 can even be applied to information relating to the national defense without seriously disrupting this comprehensive framework established by Congress.

See United States v. Truong Dinh Hung, 629 F.2d 908, 926 (4th Cir. 1980) (opinion of Winter, J.) ("If [Section] 641 were extended to penalize the unauthorized disclosure of classified information, it would greatly alter this meticulously woven fabric of criminal sanctions."); *id.* at 928 ("[B]ecause a criminal prohibition against the unauthorized disclosure of classified information would be inconsistent with the existing pattern of criminal statutes governing the disclosure of classified information and because Congress has always refused to enact a statute like [Section] 641 applicable to the disclosure of classified information . . . [Section] 641 cannot be interpreted to punish the unauthorized disclosure of classified information."); *see also United States v. Jeter*, 775 F.2d 670, 682 (6th Cir. 1985) ("We do not attempt to determine the constitutionality of Section 641 in a 'Pentagon Papers' type of situation."). The fact that the Government in this case has elected to use Section 641 in this gray area to increase the charges against PFC Manning for what is really only an alleged Section 793(e) violation is further evidence of prosecutorial overreaching and abuse in the drafting of these specifications.

19. Therefore, this Court should determine that: Specifications 4 and 5 of Charge II constitute an unreasonable multiplication of charges; Specifications 6 and 7 of Charge II constitute an unreasonable multiplication of charges; and Specifications 8 and 9 of Charge II constitute an unreasonable multiplication of charges. Accordingly this Court should dismiss Specifications 4, 6, and 8 of Charge II.

B. The Government Unreasonably Multiplied the Charges Against PFC Manning by Splitting the Same Transaction into One Specification Alleging a Violation of Section 641 and One Specification Alleging a Violation of Section 1030(a)(1)

20. The Defense further submits that the Government again unreasonably multiplied the charges against PFC Manning by splitting one other alleged 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 allege that PFC Manning violated Sections 641 and 1030(a)(1), respectively, when he 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 deal with the same transaction – PFC Manning's alleged exceeding authorized access to obtain the Department of State Net-Centric Diplomacy database records and his subsequent disclosure of them. These specifications constitute an unreasonable multiplication of charges:

a. First, this motion serves as PFC Manning's objection to the unreasonable multiplication of charges, so this factor must be resolved in his favor. *See Paxton*, 64 M.J. at 491.

b. Second, Specifications 12 and 13 are not directed at distinctly separate acts. *See Quiroz*, 55 M.J. at 338. The alleged conduct constituting PFC Manning's Section 641 violation is identical to the first step in the charged Section 1030(a)(1) violation – exceeding authorized access and thereby obtaining covered information. Under the Government's theory, before he could wilfully disclose information covered by Section 1030(a)(1), PFC Manning was first required to exceed authorized access to a computer and to obtain covered information. How did PFC Manning accomplish these necessary prerequisite steps? According to the Government, it

was by and through his theft or knowing conversion of the Department of State Net-Centric Diplomacy database. In other words, PFC Manning's alleged theft or conversion of the database was the alleged exceeding of his authorized access and the obtainment of covered information, all rolled into one. Therefore, far from targeting distinctly separated acts in Specifications 12 and 13, the Government has artificially broken down one act into two offenses. *See Burris*, 21 M.J. at 82; *Johnson*, 39 M.J. at 711.

c. Third, Specifications 12 and 13 misrepresent and exaggerate PFC Manning's criminality. *See Quiroz*, 55 M.J. at 338. One alleged transaction – the Section 1030(a)(1) violation requiring exceeding authorized access, obtainment of covered information, and disclosure of that information – has been made the subject of two specifications through the Government's expansive charging in Specifications 12 and 13. When this effort to exaggerate PFC Manning's criminality is coupled with the several other instances of unreasonable multiplication of charges, *see* Argument, Part A, *supra*, and Part C, *infra*, the effort to misrepresent and exaggerate his criminality is manifest.

d. Fourth, this overcharging unreasonably increases PFC Manning's punitive exposure. *See Quiroz*, 55 M.J. at 338-39. Congress has provided that the maximum punishment for a violation of Section 1030(a)(1), as charged by the Government in this case, is imprisonment for ten years. 18 U.S.C. § 1030(c)(1)(A). Similarly, the maximum punishment for a violation of Section 641 is also ten years. *Id.* § 641. Congress could have cross referenced Sections 641 and 1030 (a)(1), but it chose not to do so. If the Government is permitted to maintain both Specifications 12 and 13, the maximum punishment for one transaction – exceeding authorized access, obtaining covered information, and disclosing it in violation of Section 1030(a)(1) – would become twenty years instead of the ten years that Congress chose. Doubling the available maximum punishment in this manner is, for the reasons discussed by the Navy-Marine Court of Criminal Appeals in *Quiroz*, a textbook example of unreasonably increasing an accused's punitive exposure. *See Quiroz*, 57 M.J. at 586; *see also* Argument, Part A, *supra*. Moreover, the mere attempt to secure an extra conviction for this one transaction also increases PFC Manning's punitive exposure. *See Ball*, 470 U.S. at 861, 864-65.

e. Finally, there is evidence of prosecutorial overreaching and abuse in the way in which Specifications 12 and 13 have been drafted. This overreaching and abuse is plainly evident from the purpose and effect of charging one transaction – the alleged Section 1030(a)(1) violation – as two separate offenses. It is clear that both the purpose and effect of this artificial splitting of one offense into two is to pile on the charges against PFC Manning to exaggerate his criminality and increase his punitive exposure. Moreover, the Government has similarly broken down other single transactions into separate specifications. *See* Argument, Part A, *supra*, and Part C, *infra*. This is precisely the type of prosecutorial overreaching that the prohibition against unreasonable multiplication of charges is intended to guard against. *See Quiroz*, 55 M.J. at 337. Additionally, the prosecutorial overreaching and abuse is similarly evident from the Government's decision to charge a Section 641 violation for the use of a computer to obtain information covered by Section 1030(a)(1). As Professor Orin Kerr has observed, because Section 641 is such an awkward tool to combat misuse of a computer to obtain information on the computer, Congress passed Section 1030:

> Because no res can be defined in the great majority of cases, [Section] 641 is an ill-suited tool to try to deter unauthorized use of federal government computer systems.
>
> Conversion's inability to serve as a useful doctrinal tool to deter unauthorized computer use has led to a number of federal and state statutory measures to meet this important need. The Computer Fraud and Abuse Act [, 18 U.S.C. Section 1030,] punishes a broad range of computer crimes. These crimes include the unauthorized access and procurement of classified national defense data by computer[.]

Orin S. Kerr, Note, *The Limits of Computer Conversion:* United States v. Collins, 9 Harv. J.L. & Tech. 205, 211 (1996) (footnotes omitted). Therefore, just as the Government has pushed Section 641 to its limit by charging PFC Manning with Section 641 violations for his alleged Section 793(e) violations, *see* Argument Part A, *supra*, the Government has here elected to use Section 641, an ill-suited tool for deterring computer misuse, in conjunction with Section 1030(a)(1), a provision enacted to rectify the deficiencies of using Section 641 to combat computer misuse. *See* Kerr, *supra*, at 211. This redundancy in charging is no accident; it represents clear evidence that the Government has sought to charge PFC Manning with any violation that could, by stretching the imagination, fit his alleged conduct. The doctrine of unreasonable multiplication of charges prevents the Government from piling on in this manner any and all conceivable charges. *See Quiroz*, 55 M.J. at 337.

21. For these reasons, this Court should determine that Specifications 12 and 13 of Charge II constitute an unreasonable multiplication of charges and should accordingly dismiss Specification 12 of Charge II.

C. The Government Unreasonably Multiplied the Charges Against PFC Manning by Splitting the Same Transaction that Occurred on the Same Day into Multiple Specifications

22. The Defense submits that for several specifications the Government has unreasonably multiplied the charges against PFC Manning by splitting a single transaction that occurred on the same day into multiple specifications. The Government has done this on two occasions in Charge II. Each instance of unreasonable multiplication of charges is discussed in turn.

The Conduct Alleged in Specifications 4, 5, 6, and 7 of Charge II Constitutes a Single Transaction Committed on the Same Day

23. Specifications 4 and 5 of Charge II allege that PFC Manning violated Sections 641 and 793(e), respectively, when he stole, purloined, or knowingly converted the Combined Information Data Network Exchange Iraq database and then disclosed certain classified records on that database to a person not entitled to receive those records. Additionally, Specifications 6 and 7 of Charge II allege that PFC Manning violated Sections 641 and 793(e), respectively,

when he stole, purloined or knowingly converted the Combined Information Data Network Exchange Afghanistan database and then impermissibly disclosed certain classified records on that database. The conduct alleged in all four of these specifications occurred on the same day.[1]

24. Additionally, the disclosures of the Combined Information Data Network Exchange Iraq database records and the Combined Information Data Network Exchange Afghanistan database records occurred at the same time. *See* footnote 1. Therefore, PFC Manning committed, at most, one Section 793(e) violation in disclosing these records. The Government, however, has attempted to charge this one violation as four violations – two Section 641 violations (Specifications 4 and 6) and two Section 793(e) violations (Specifications 5 and 7). This multiplication of charges is unreasonable:

a. First, this motion serves as PFC Manning's objection to the unreasonable multiplication of charges, so this factor must be resolved in his favor. *See Paxton*, 64 M.J. at 491.

b. Second, Specifications 4, 5, 6 and 7 are directed at the same conduct; they are not directed at distinctly separate acts. *See Quiroz*, 55 M.J. at 338. For reasons discussed above, the Section 641 violations alleged in Specifications 4 and 6 are unreasonable multiplications of the Section 793(e) violations alleged in Specifications 5 and 7, respectively. *See* Argument, Part A, *supra.* Additionally, the alleged disclosure of records from the Combined Information Data Network Exchange Iraq database targeted in Specification 5 and the alleged disclosure of records from the Combined Information Data Network Exchange Afghanistan database targeted in Specification 7 took place at the same time on the same day. In other words, there were not two disclosures, as Specifications 5 and 7 would lead one to believe, but only one disclosure of records from both databases. Therefore, the Government, in drafting Specifications 4, 5, 6 and 7, has taken the conduct behind a single disclosure and made it subject to four separate specifications. The Army Court of Criminal Appeals' decision in *Gilchrist* is instructive. In *Gilchrist*, the accused entered another's room and stole $60.00 cash and some Xanax pills worth about $20.00. 61 M.J. at 788. The Government charged the larceny of the cash as one specification and the larceny of the pills as another specification. *Id.* The *Gilchrist* Court unanimously found this to be an unreasonable multiplication of charges. *Id.* at 789. The court concluded that the larceny of the cash and the larceny of the pills were parts of a single larceny, and only a single larceny should have been charged. *Id.* The court quoted from the MCM as follows: "When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons. Thus, if a thief . . . goes into a room and takes property belonging to various persons, there is but one larceny . . . ." *Id.* (quoting MCM, Part IV, para. 46(c)(1)(h)(ii)) (ellipses in original). Elaborating on this point, the court explained that "specifications constitute an unreasonable multiplication of charges as a matter of policy when . . . what is substantially one transaction is unreasonably broken down into its component parts and charged separately." *Id.* at 789 n.5; *see also Burris*, 21 M.J. at 82; *United States v. Box*, 2009 WL 6865266, at *1 (A. Ct. Crim. App. Feb 27, 2009) (unpublished) (finding an unreasonable multiplication of charges where accused stole three items from a gym locker and Government drafted two specifications for this single theft); *United States v Thomas*, 2008 WL 8084967, at *1 (A. Ct. Crim. App. April 30, 2008) (unpublished) (finding an unreasonable multiplication of charges where accused stole a laptop and a cell phone from the same victim and Government charged the larceny of the

[1] See [redacted].

laptop in one specification and the larceny of the cell phone in a separate specification); *cf. Johnson*, 39 M.J. at 711 (finding a single course of theft spanning eight months as opposed to eight separate thefts). In this case, the Government has run afoul of this prohibition in drafting Specifications 4, 5, 6, and 7 of Charge II. Just as the Government in *Gilchrist* impermissibly broke down a single larceny into two separate larcenies, *see* 61 M.J. at 788-89, the Government here has impermissibly broken down an alleged single disclosure of multiple records (i.e. a single violation of Section 793(e)) into two separate disclosures (i.e. two separate violations of Section 793(e)). Compounding this problem, the Government has further broken down each of these two alleged violations of Section 793(e) into two even smaller parts: one violation of Section 641 and one violation of Section 793(e). *See* Argument, Part A, *supra*. Thus, the Government in this case has broken down a single disclosure into four separate violations. *Gilchrist* plainly forbids such a balkanization of a single transaction. *See* 61 M.J. at 788-89.

c. Third, the breaking down of one transaction into four specifications in this manner misrepresents and exaggerates PFC Manning's criminality. *See Quiroz*, 55 M.J. at 338. A single disclosure has been made the subject of four specifications.

d. Fourth, this overcharging unreasonably increases PFC Manning's punitive exposure. *See Quiroz*, 55 M.J. at 338-39. Instead of facing a maximum ten year sentence for his alleged Section 793(e) violation (the single disclosure), PFC Manning faces four specifications, each containing a ten year maximum punishment. *See* 18 U.S.C. § 641 (containing maximum punishment of ten years imprisonment); *id.* § 793(e) (same). Thus, the Government has quadrupled PFC Manning's punitive exposure for this one alleged disclosure by creatively charging it as four specifications instead of one. If doubling an accused's punitive exposure is unreasonable, *see Quiroz*, 57 M.J. at 586, surely quadrupling an accused's punitive exposure is even more unreasonable.

e. Finally, the Government's decision to multiply a single disclosure into four specifications readily demonstrates prosecutorial overreaching and abuse. Both the purpose and effect of this artificial splitting of one offense into four is to unnecessarily pile on the charges against PFC Manning to exaggerate his criminality and increase his punitive exposure. Preventing this prosecutorial overreaching is the main concern of the principle of unreasonable multiplication of charges. *See Quiroz*, 55 M.J. at 337.

25. For these reasons, this Court should determine that Specifications 4, 5, 6, and 7 of Charge II constitute an unreasonable multiplication of charges. Accordingly, this Court should dismiss Specifications 4 and 6 of Charge II, *see* Argument Part A, *supra*, and should consolidate Specifications 5 and 7 of Charge II into a single specification.

The Conduct Alleged in Specifications 10 and 11 of Charge II Constitute a Single Transaction Committed on the Same Day

26. Specification 10 of Charge II alleges that PFC Manning impermissibly disclosed certain classified records in violation of Section 793(e). Specification 11 of Charge II alleges that PFC

Manning impermissibly disclosed a video relating to the national defense in violation of Section 793(e).

27. Though the Government alleges different date ranges for these two disclosures, in reality the classified records and the video were disclosed at the same time on the same day, 11 April 2010.[2] Therefore, the conduct alleged in Specifications 10 and 11 constitutes a single disclosure. The Government's attempt to break this single disclosure down into two disclosures constitutes an unreasonable multiplication of charges:

a. First, this motion serves as PFC Manning's objection to the unreasonable multiplication of charges, so this factor must be resolved in his favor. *See Paxton*, 64 M.J. at 491.

b. Second, Specifications 10 and 11 are directed at the same conduct: a single disclosure of certain classified records and a video. The specifications are not directed at distinctly separate conduct. *See Quiroz*, 55 M.J. at 338. Like the Government's impermissible breakdown of one larceny into two separate larcenies in *Gilchrist*, *see* 61 M.J. at 788-89, the Government here has impermissibly broken down a single disclosure into two separate disclosures. For the reasons stated in *Gilchrist*, this constitutes an unreasonable multiplication of charges. *See id.*; *see also Burris*, 21 M.J. at 82; *cf. Johnson*, 39 M.J. at 711.

c. Third, breaking down a single disclosure into two specifications, each alleging separate disclosures, misrepresents and exaggerates PFC Manning's criminality. *See Quiroz*, 55 M.J. at 338. Instead of being charged for the one disclosure, PFC Manning is being charged with two disclosures, even though the records referenced in Specification 10 and the video file referenced in Specification 11 were disclosed at the same time.

d. Fourth, this overcharging unreasonably increases PFC Manning's punitive exposure. *See Quiroz*, 55 M.J. at 338-39. Instead of facing a maximum ten year sentence for his alleged Section 793(e) violation (the single disclosure), PFC Manning faces two specifications, each containing a ten year maximum punishment. *See* 18 U.S.C. § 793(e) (containing maximum punishment of imprisonment for ten years). Doubling an accused's punitive exposure in this manner, as explained by the Navy-Marine Court of Criminal Appeals, constitutes an unreasonable multiplication of charges. *See Quiroz*, 57 M.J. at 586.

e. Finally, the Government's decision to multiply a single disclosure into two specifications itself demonstrates prosecutorial overreaching and abuse. Both the purpose and effect of this artificial splitting of one offense into two is to unnecessarily pile on the charges against PFC Manning to exaggerate his criminality and increase his punitive exposure. The principle of unreasonable multiplication of charges is primarily aimed at preventing such a piling on of charges and specifications. *See Quiroz*, 55 M.J. at 337.

28. For these reasons, this Court should determine that Specifications 10 and 11 of Charge II constitute an unreasonable multiplication of charges and should accordingly consolidate these specifications into one specification.

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[2] [redacted]

CONCLUSION

29. For the reasons articulated above, this Court should determine the following:

a. that Specifications 4 and 5 of Charge II constitute an unreasonable multiplication of charges and accordingly dismiss Specification 4;

b. that Specifications 6 and 7 of Charge II constitute an unreasonable multiplication of charges and accordingly dismiss Specification 6;

c. that Specifications 4, 5, 6, and 7 constitute an unreasonable multiplication of charges and, in addition to the dismissals specified in a and b, consolidate Specifications 5 and 7 into one specification;

d. that Specifications 8 and 9 of Charge II constitute an unreasonable multiplication of charges and accordingly dismiss Specification 8;

e. that Specifications 12 and 13 of Charge II constitute an unreasonable multiplication of charges and accordingly dismiss Specification 12; and

f. that Specifications 10 and 11 of Charge II constitute an unreasonable multiplication of charges and accordingly consolidate those specifications into one specification.

Respectfully submitted,

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