IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE RESPONSE TO**
v.	)	**GOVERNMENT MOTION FOR**
	)	**APPROPRIATE RELIEF:**
	)	**PROPOSED LESSER-INCLUDED**
MANNING, Bradley E., PFC	)	**OFFENSES**
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 23 May 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law and Article 79, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 879 (2010), requests this Court to deny, in part,[1] the Government Motion for Proposed Lesser-Included Offenses (Government Motion).

BURDEN OF PERSUASION AND BURDEN OF PROOF

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

WITNESSES/EVIDENCE

3. 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. Army Regulation 380-5.

c. Appellate Exhibit LXXX (Court's Ruling on Defense Motion to Dismiss Specification 1 of Charge II)

[1] The Defense concedes that under certain circumstances, attempt under Article 80, can be a lesser included offense (LIO) of the offenses charged in Specifications 2-16 of Charge II. The Defense does not believe attempt under Article 80 will qualify in this case. Additionally, the Defense concedes that a violation of 18 U.S.C. Section 641 with the value of the property being less than $1,000 is a LIO of the offenses charged in Specifications 4, 6, 8, 12 and 16 of Charge II. Finally, the Defense also concedes that a violation of clause 1 and 2 of Article 134 is a LIO of the offenses charged in Specifications 13 and 14 of Charge II.

LEGAL AUTHORITY AND ARGUMENT

4. The Government is not permitted to use clause 1 and 2 of Article 134 as a lesser included offense (LIO) of the violations of 18 U.S.C. Section 793(e) charged in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. The Government has identified in its motion the "act" that would constitute the first element of the clause 1 and 2 Article 134 offense as: "That the accused willfully communicated information related to the national defense." Government Motion at 3; *see also* Charge Sheet (alleging this act). This act also constitutes a violation of Army Regulation 380-5 (AR 380-5), a punitive lawful general order in effect at the time of PFC Manning's alleged actions. *See* Appellate Exhibit LXXX at 1. Where, as here, conduct is proscribed by a punitive lawful general order, the Government may not utilize clause 1 and 2 of Article 134 to punish that conduct; rather, the Government must charge that conduct as a violation of Article 92 or not at all. *See United States v. Borunda*, 67 M.J. 607, 609 (A.F. Ct. Crim. App. 2009).

5. The Government is also not permitted to utilize clause 1 and 2 of Article 134 to manufacture a larceny-type LIO of the violations of 18 U.S.C. Section 641 charged in Specifications 4, 6, 8, 12 and 16 of Charge II. Though the Government Motion does not identify with specificity the act that would constitute the first element of the clause 1 and 2 Article 134 LIO of the Section 641 violations, the language of Specifications 4, 6, 8, 12 and 16 of Charge II makes clear that the act for each specification is PFC Manning's alleged obtainment of various computer databases or global address list owned by the Government under circumstances which make that obtainment a theft or knowing conversion of that database or global address list. *See* Charge Sheet. This larceny-type of offense must be charged under Article 121 or not at all; the preemption doctrine forbids the Government from using Article 134 to punish a larceny-type offense. *See United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010); *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979); *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A. 1978); *United States v. Norris*, 8 C.M.R. 36, 39-40 (C.M.A. 1953).

6. Therefore, this Court should deny the Government Motion insofar as it requests this Court to adopt the proposed clause 1 and 2 Article 134 LIOs for the violations of Section 793(e) and Section 641 alleged in Charge II.

A. The Government Cannot Use Clause 1 and 2 of Article 134 as a LIO of Violations of 18 U.S.C. Section 793(e)

7. The Government cannot use clause 1 and 2 of Article 134 as a LIO of the violations of Section 793(e) charged in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. The act alleged in each of these specifications is proscribed by AR 380-5. Therefore, the act must be charged as a violation of Article 92 and cannot be charged as a violation of clause 1 and 2 of Article 134, as the Government has attempted to do with its proposed LIO. *See Borunda*, 67 M.J. at 609.

8. In Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, PFC Manning is charged with violations of Section 793(e) under clause 3 of Article 134. *See* Charge Sheet. The Government has proposed a clause 1 and 2 Article 134 offense as a LIO of each of these Section 793(e)

violations. *See* Government Motion at 2. In general, conduct punished under clause 1 and 2 of Article 134 requires proof of the following elements:

> (1) That the accused did or failed to do certain acts; and
>
> (2) That, under the circumstances, the accused's conduct 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.

Manual for Courts-Martial (MCM), Part IV, para. 60.b. In this case, the Government has indicated in its motion that the act that would satisfy the first element of the clause 1 and 2 Article 134 offense is PFC Manning's willful communication of information related to the national defense. *See* Government Motion at 3. That same act is proscribed by AR 380-5, *see* AR 380-5, para. 1-21(a) ("DA personnel will be subject to sanctions if they knowingly, willfully, or negligently – (1) [d]isclose classified or sensitive information to unauthorized persons"), which is a punitive lawful general order that was in effect at the time of PFC Manning's alleged willful communication of information related to the national defense, *see* Appellate Exhibit LXXX at 1 ("At the time of PFC Manning's alleged unlawful actions, Army Regulation 380-5 (Department of the Army Information Security Program) was in effect. The regulation is a punitive lawful general order").

9. In *Borunda*, the Air Force Court of Criminal Appeals held that "when a lawful general order or regulation proscribing [certain conduct] exists, an order or regulation which by definition is punitive, the [proscribed conduct], if charged, will *only* survive legal scrutiny as a violation of Article 92(1), UCMJ, *and not as a violation* of Article 134, UCMJ." 67 M.J. at 609 (footnote omitted) (emphases supplied). Additionally, the MCM explains that "[m]any customs of the service are now set forth in regulations of the various armed forces. Violations of these customs *should be charged under Article 92* as violations of the regulations in which they appear if the regulation is punitive." MCM, Part IV, para. 60.c(2)(b) (emphasis supplied); *see* Appellate Exhibit LXXX at 4 ("Violations of customs of the service that are made punishable in punitive regulations should be charged under Article 92 as violations of the regulations in which they appear.").

10. After *Borunda*, it is clear that a court must not sustain a clause 1 and 2 Article 134 offense where the conduct underlying that offense also violates a lawful general order or regulation. This is precisely what the Government is requesting this Court to do with respect to the proposed clause 1 and 2 Article 134 LIO of the Section 793(e) violations.

11. In its Motion to Dismiss Specification 1 of Charge II for Failure to State an Offense (Defense Motion to Dismiss), the Defense raised a *Borunda* argument with respect to Specification 1 of Charge II, as the conduct underlying that specification was also proscribed by AR 380-5. This Court denied that motion, and it identified three reasons for doing so. *See* Appellate Exhibit LXXX at 5. First, Specification 1 of Charge II contained a different mens rea than AR 380-5: the specification included a wanton mens rea, whereas AR 380-5 requires a knowingly, willfully, or negligently mens rea. *Id.* Second, Specification 1 of Charge II contained an additional element not included in an AR 380-5 violation: that the accused knew

that intelligence published on the internet is accessible to the enemy. *Id.* Finally, the term "intelligence" included information that does not fall within AR 380-5's prohibition on the disclosure of classified or sensitive information. *Id.* For all of these reasons, this Court determined that the situation was "distinct from *Borunda*, as that case addressed an Article 134 specification where the offense charged was specifically proscribed in a punitive regulation." *Id.*

12. None of these three reasons identified by this Court in Appellate Exhibit LXXX are implicated in this instance. In fact, each reason militates in favor of the conclusion that the Government's proposed clause 1 and 2 Article 134 LIO of the Section 793(e) offenses runs afoul of *Borunda*.

13. First, the act that would constitute the first element of the proposed clause 1 and 2 Article 134 LIO – the *willful* communication of information relating to the national defense, *see* Government Motion at 3 – has a mens rea that is included in AR 380-5's mens rea requirement, *see* AR 380-5 (punishing anyone who knowingly, *willfully*, or negligently discloses classified or sensitive information). Second, unlike Specification 1 of Charge II, the clause 1 and 2 Article 134 offense does not contain an element in addition to the willful communication of information relating to the national defense.[2] The only act constituting the purported Article 134 violation is the willful communication of information relating to the national defense. That act is "specifically proscribed in a punitive regulation." Appellate Exhibit LXXX at 5. Finally, while the scope of the term "relating to the national defense" is not free from doubt, *see* Defense Motion to Dismiss Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II at 3-4, 7-8, the specific information identified in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II is clearly classified or sensitive information within AR 380-5. As this Court has observed:

> AR 380-5 defines classified information as "information and material that has been determined, pursuant to [Executive Order] 12958 or any predecessor order, to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary and readable form.["] Sensitive information but unclassified information is defined as "information originated from within the Department of State which warrants a degree of protection and administrative control and meets the criteria for exemption from mandatory public disclosure under the Freedom of Information Act."

Appellate Exhibit LXXX at 2 (quoting AR 380-5). The information identified in Specifications 3, 5, 7, 9, 10 and 15 of Charge II is expressly alleged to be classified. *See* Charge Sheet. Additionally, it seems apparent that the information in Specifications 2 and 11 of Charge II,

[2] To be sure, the proposed clause 1 and 2 Article 134 LIO does contain the element that the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature as to bring discredit upon the armed forces. *See* MCM, Part IV, para. 60.b. But that is true in all cases where a clause 1 and 2 Article 134 offense is alleged. It was certainly true in *Borunda*, where the accused was charged under clause 1 and 2 of Article 134 for wrongful possession of drug paraphernalia. *See* 67 M.J. at 608-09. This did not prevent the *Borunda* Court from holding, in no uncertain terms, that "when a lawful general order or regulation proscribing [certain conduct] exists, an order or regulation which by definition is punitive, the [proscribed conduct], if charged, will only survive legal scrutiny as a violation of Article 92(1), UCMJ, and not as a violation of Article 134, UCMJ." *Id.* at 609 (footnote omitted). Thus, this additional element in a clause 1 and 2 Article 134 offense is entirely irrelevant to the *Borunda* inquiry.

though not expressly alleged to be classified, meets either AR 380-5's definition of "classified information" or its definition of "sensitive information." *See id.* Thus, it cannot be said, as it could for the term "intelligence" in Specification 1 of Charge II, that the "information relating to the national defense" identified in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 is beyond the scope of AR 380-5. On the contrary, AR 380-5 squarely prohibits the disclosure of the information identified in these specifications.

14. Therefore, as none of the three important reasons this Court identified for its denial of the Defense Motion to Dismiss are present in this case, *Borunda* forbids the Government from using clause 1 and 2 of Article 134 as a LIO for the Section 793(e) offenses, when the "act" that would form the first element of the clause 1 and 2 Article 134 LIO is a breach of a custom set forth in a punitive regulation. Thus, the Court should deny the Government's request that it adopt a clause 1 and 2 Article 134 LIO for Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II.

B. The Government Cannot Use Clause 1 and 2 of Article 134 as a LIO of Violations of 18 U.S.C. Section 641

15. The Government cannot utilize clause 1 and 2 of Article 134 to manufacture a LIO of the violations of Section 641. The act constituting the first element of the purported clause 1 and 2 Article 134 LIO would be a larceny-type act. The preemption doctrine forbids the Government from using Article 134 to create new larceny-type offenses that do not fall within, or have not been charged under, Article 121.

16. In Specifications 4, 6, 8, 12 and 16 of Charge II, PFC Manning is charged with violations of Section 641 under clause 3 of Article 134. *See* Charge Sheet. The Government has proposed a clause 1 and 2 Article 134 LIO for each of these offenses. *See* Government Motion at 2. As mentioned above, conduct punished under clause 1 and 2 of Article 134 requires proof of the following elements:

> (1) That the accused did or failed to do certain acts; and
>
> (2) That, under the circumstances, the accused's conduct 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.

MCM, Part IV, para. 60.b. In this case, the Government has not indicated in its motion what the act or acts are that establish the first element of the clause 1 and 2 Article 134 offense. But from the language of Specifications 4, 6, 8, 19 and 16 of Charge II, it seems clear that the acts are PFC Manning's alleged obtainment of various computer databases and a global address list owned by the Government under circumstances which make that obtainment a theft or knowing conversion of that database and global address list. *See* Charge Sheet.

17. This is a larceny-type offense. Article 121 punishes both larceny and wrongful appropriation. *See* 10 U.S.C. § 921. It provides, in pertinent part, as follows:

> Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind --
>
> (1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or
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> (2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

Id. § 921(a). Notably, the Government elected not to charge PFC Manning's allege unlawful obtainment of the various databases and global address list identified in Specifications 4, 6, 8, 12 and 16 of Charge II as violations of Article 121. Instead, the Government chose to charge these alleged unlawful actions as violations of Section 641. The preemption doctrine prevents the Government from using Article 134 as a purported LIO to punish a larceny-type offense when it elected not to utilize Article 121 in the first place.

18. The then-Court of Military Appeals has defined the doctrine of preemption as "the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, simply by deleting a vital element." *Kick*, 7 M.J. at 85. The preemption doctrine is described in paragraph 60.c(5)(a) of the MCM as follows:

> The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking – for example, intent – there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. *Article 134 cannot be used to create a new kind of larceny offense,* one without the required intent, *where Congress has already set the minimum requirements for such an offense in Article 121*.

MCM, Part IV, para. 60.c(5)(a) (emphases supplied). Courts apply a two-pronged test to determine whether an Article 134 charge is preempted by another Article in any given case. First, it must be shown that Congress "indicate[d] through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article, and may not be charged under Article 134, UCMJ." *Anderson*, 68 M.J. at 387; *see Kick*, 7 M.J. at 85; *Wright*, 5 M.J. at 110-11; *see also* Appellate Exhibit LXXX at 2 (explaining this prong). Second, it must be established that the offense charged under Article 134 is composed of a "residuum of elements" of an enumerated offense under the UCMJ. *Wright*, 5 M.J. at 111; *see Kick*, 7 M.J. at 85; *see also* Appellate Exhibit LXXX at 2-3 (explaining this prong).

19. The Court of Military Appeals in *Norris* squarely addressed the issue of whether Article 134 may be used to create a larceny-type offense, as the Government seeks to do in the present case

with its purported clause 1 and 2 Article 134 LIO. In *Norris*, the accused was charged with larceny and wrongful appropriation under Article 121 and wrongful taking under Article 134. 8 C.M.R. at 37-38. The accused was initially found guilty of wrongful appropriation and wrongful taking, but on appeal the board of review held that the law officer had erred in not instructing on the effect of intoxication on specific intent. *Id.* at 38. The board remedied this defect by vacating the wrongful appropriation conviction and affirming the wrongful taking conviction under Article 134, as the offenses charged under Article 121 required a specific intent to deprive the owner of the property, either permanently or temporarily, and the wrongful taking charge required only a general criminal intent. *Id.* The Court of Military Appeals reversed, holding that "there is no offense known as 'wrongful taking' requiring no element of specific intent, embraced by Article 134 of the Code." *Id.* at 40. The Court reasoned that:

> Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive articles . . . . We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.

Id. at 39.

20. The *Norris* Court readily found the requisite congressional intent that Article 121 govern the universe of larceny-type offenses under the UCMJ: "Congress has, in Article 121, covered the entire field of criminal conversion for military law." *Id.* As for the second prong, the *Norris* Court found that the wrongful taking offense charged under Article 134 was composed of a residuum of elements of wrongful appropriation under Article 121; the wrongful taking offense had all of the elements of a wrongful conversion except for the specific intent element. *Id.* at 38-39.

21. Just as the Government was not permitted in *Norris* to use Article 134 to create a larceny-type offense when it was unable to prove the requisite intent under Article 121, so too should the Government not be permitted here to use Article 134 to create a larceny-type offense as a LIO of a federal theft and conversion statute. *See id.* at 39-40; *see also* MCM, Part IV, para. 60(c)(5)(a). Congress "covered the entire field of criminal conversion for military law" in Article 121. *Norris*, 8 C.M.R. at 39. The Government chose not to utilize Article 121 in this case. Moreover, the clause 1 and 2 Article 134 LIO would be composed of a residuum of Article 121 larceny-type elements. The alleged unlawful acts, though not expressly identified in the Government Motion, are the obtainment of databases and a global address list under circumstances which constitute a theft or knowing conversion. At a minimum, the Government will have to prove a larceny-type intent (intent to permanently or temporarily deprive the Government of the use and benefit of the databases and global address list) and a larceny-type act (the obtainment of the databases and global address list). *See* MCM, Part IV, para. 46.b (outlining elements of larceny and wrongful appropriation under Article 121). Thus, both prongs of the preemption doctrine are satisfied by the Government's proposed clause 1 and 2 Article 134 LIO.

22. Therefore, because the preemption doctrine forbids the Government from using Article 134 to punish a larceny-type offense, the Government may not utilize clause 1 and 2 of Article 134 to

manufacture a LIO of Section 641 in this case. Thus, the Court should deny the Government's request that it adopt a clause 1 and 2 Article 134 LIO for Specifications 4, 6, 8, 12 and 16 of Charge II.

CONCLUSION

23. For these reasons, the Defense requests that this Court deny, in part, the Government Motion.

Respectfully submitted,

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