IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE TARGETED**
	)	**BRIEF ON ABSENCE OF HARM**
v.	)	
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 21 June 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. The Defense requests that this Court deny the Government's motion in its entirety for the reasons identified herein.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Government has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. On 29 March 2012, the Government filed a motion to preclude the Defense from mentioning actual damage on the merits. Appellate Exhibit LXIV. The Defense filed a brief opposing the Government's motion on 12 April 2012. Appellate Exhibit LXV. The Court heard oral argument on the issue during the 24 through 26 April Article 39(a) session, and took the matter under advisement.

4. On 6 June 2012, the Court requested the parties provide more targeted briefs on the following:

a) The potential uses of the "actual damage" information on the merits as indicated by the Defense in its Response Motion;

b) Research on the example provided by the Defense regarding assault with a means likely to cause death or grievous bodily harm. The Court requested case law on the issue of "what actually happened" being relevant to "what could happen."

During the 6 June 2012 hearing, the Court asked the Government if it intended to introduce *any evidence* of actual damage on the merits. The Government responded "No, Your Honor. None." *See* Audio Recording of 6 June 2012 Article 39(a). The Government then stated,

> But, Your Honor, may I clarify from the perspective of damage assessments then no. But, depending on the definition of damage, we do have to prove prejudicial to good order and discipline and service discrediting. So, it could be conceived of, of immediate damage on the unit, or the perception of the Army or the unit. That could be, that could fall under the umbrella of damage. So for our Clause 1-2 of Article 134 – what would be normally in any other court-martial then, yes. But not, damage from damage assessments that would go to actual harm of national security. We will definitely include that in our brief.

Id.

EVIDENCE

5. The Defense does not request any witnesses be produced for this motion. The Defense requests that this Court consider the following evidence in support of this motion:

a) Appellate Exhibits LXIV and LXV;
b) Audio Recording of 6 June 2012 Article 39(a);
c) Attachment A [redacted];
d) Attachment B [redacted];
e) Attachment C [redacted];
f) Attachment D [redacted];
g) Attachment E [redacted];
h) Attachment F [redacted];
i) Attachment G [redacted];
j) Attachment H [redacted];
k) Attachment I [redacted];
l) Attachment J [redacted];
and
m) Attachment K [redacted].

LEGAL AUTHORITY AND ARGUMENT

6. The Defense reasserts its initial arguments for the relevance and admissibility of information from the various damage assessments. *See* Appellate Exhibit LXV. Additionally, the Defense requests that the Court deny the Government's motion to preclude the Defense from mentioning actual damage on the merits since: 1) the Government's request is overbroad; 2) the information from the damage assessments is proper impeachment evidence; 3) the information from the damage assessments is relevant to the charged offenses; and 4) the information from the damage assessments provides a viable defense.

I. The Government's Request is Overbroad

7. The Government requests that the Court preclude the Defense from "[redacted]." Appellate Exhibit LXIV, at 1. It is unclear what exactly the Government is seeking to prevent the Defense from introducing. If the Government is attempting to prevent the Defense from referencing anything that might be contained in any damage assessment during the merits portion of trial, such a request is overbroad and should be denied by this Court.

8. The Government's request fails to draw a distinction between the Defense referencing the fact that a specific damage assessment concluded the charged information caused no harm or minimal harm, and the Defense referencing specific information contained in the damage assessments. The Government's request requires this Court to ignore any possible use of this information, such as impeaching a witness or providing evidence relevant to a charged offense, and simply rule that this information is not relevant until sentencing.

9. The Government fails to provide the Court with any real justification for granting its request at this time. If the Government believes that a particular line of questioning is not relevant, the Government should object at the time the testimony is being elicited. Only when the Court has the benefit of considering the testimony of the specific witness and the evidence introduced by the parties can the Court determine if a particular line of inquiry is relevant. *See United States v. Swenson*, 51 M.J. 522, 526 (A.F. Ct. Crim. App. 1999) ("By deferring his ruling, the military judge often can better assess the relevance and necessity of the evidence.").

10. Due to the overbroad nature of the Government's request and for the reasons discussed below, the Government's motion should be denied in its entirety.

II. The Information from the Damage Assessments is Relevant Impeachment Evidence

A. The General Nature of the Information from the Damage Assessments

11. The Government has provided notice of the following damage assessments:[1]

a) Department of State damage assessment;
b) DIA/IRTF damage assessment;
c) ONCIX damage assessment;
d) Department of Homeland Security damage assessment;[2]
e) FBI Impact Statement;
f) Any damage assessment by one of the 63 agencies; and
g) CIA damage assessment.

The Defense has been given an opportunity to review the damage assessments from the Department of State, the DIA/IRTF, the Department of Homeland Security and 25 of 63 governmental agencies that conducted a review for ODNI/ONCIX.

12. Based upon a review of the provided damage assessments, it is clear that the information within the damage assessments is favorable for the Defense. The damage assessments so far contain at least the following information:

a) Factual Assertions: The assessments provide specific factual assertions. By way of example, a factual statement could be "no sources were compromised because all sources were referred to by initials, not names."

b) Speculative Statements: The assessments also contain qualified statements concerning possible harm from the release of the charged information. Again, by way of example, a speculative statement could be "if X happens, then it could cause harm to our efforts to achieve a certain outcome."

B. Damage Assessments Can be Used to Impeach Witnesses Who Testify that the Charged Information "Could" Cause Damage

13. Factual assertions or speculative statements regarding the damage caused by the alleged leaks (or, more accurately, the absence of damage) are relevant for the impeachment of Government witnesses who claim that the leaks "could" cause damage. The Government, however, argues that the use of a damage assessment to impeach an Original Classification Authority (OCA) who prepared a classification review would be improper. *See* Appellate Exhibit LXIV, at 3. The Government fails to provide any justification for its position. Why is it improper to use actual *ex post* knowledge (whether derived from a damage assessment or not) to challenge the reasonableness or appropriateness of the *ex ante* classification decision which the Government relies on to show the documents could cause damage? If a doctor, for instance, were called to the stand to testify that a certain chemical "could" cause cancer and the doctor's

[1] The Government has not yet provided access to the damage assessments from ONCIX, the FBI, CIA, or 38 of the 63 agencies that completed a review for ODNI/ONCIX.

[2] The Government provided Defense with notification of the existence of the Department of Homeland Security damage assessment for the first time on 8 June 2012. The Government did not indicate when it first learned of the damage assessment or why it had not provided notice to the Court or the Defense of its existence. The Government simply stated that 8 June 2012 was the first time that they were authorized to provide the damage assessment to the Defense.

own hospital or the FDA had published a subsequent report saying that a link had not been established between the chemical and cancer, why could the Defense not use that subsequent knowledge to impeach the witness's testimony that the chemical "could" cause cancer?

14. An OCA witness is not immune from impeachment any more so than any other witness who takes the stand. M.R.E. 607 ("The credibility of a witness may be attacked by any party[.]"); M.R.E. 608 (once a witness testifies, his or her credibility becomes an issue). An OCA's testimony regarding whether certain information could cause damage to the United States or aid any foreign nation is simply that individual witness's opinion. An OCA's opinion is not sacrosanct. *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010) (holding that classification alone is not determinative on the issue of whether information could cause damage to the United States under 18 U.S.C. Section 793). An OCA does not get special treatment, nor is he exempt from cross-examination simply because he is an OCA.

15. Accordingly, the Defense should be able to probe the basis of the OCA's testimony that the information could cause damage by using either factual assertions or speculative statements from the various damage assessments. *See United States v. Israel*, 60 M.J. 485, 486 (C.A.A.F. 2005) ("A defendant's right under the Sixth Amendment to cross-examine witnesses is violated if the military judge precludes a defendant from exploring an entire relevant area of cross-examination." (citing *United States v. Gray*, 40 M.J. 77, 81 (C.M.A. 1994))).

16. For instance, suppose that a damage assessment revealed that Afghani sources were not compromised in the alleged leaks because the sources were referred to in the leaked SIGACTS by initials and not by name. If a Government witness testifies that the information could cause damage, the Defense should be able to information from the damage assessment to question the witness about whether, in making the determination that the information could cause damage, he knew that the sources were referred to by initials. If the witness did not know this, the Defense could probe whether this new information (learned from the damage assessment) would change the witness's view that the information could cause damage. While the Government would neatly have the Court separate the OCA classification reviews from the OCA damage assessments, the analysis is not that tidy. Evidence from the latter is directly relevant to the former and can be used to impeach a witness's credibility.

17. Similarly, suppose that the damage assessment conducted one or two years after the alleged leaks concluded that the released information "could" affect the mission in Afghanistan (not that it "did" affect the mission in Afghanistan). The Defense should be permitted to question a Government witness on the fact that, after a significant period of time had elapsed, the most that a damage assessment was able to conclude was that the information "could" affect the mission in Afghanistan. This would be used to establish that the witness' conclusion that the leaks "could" cause damage is remote and speculative, and thus should not be given weight by the members. The damage or injury that is contemplated under 18 U.S.C. Section 793 cannot be too remote or fanciful, or there is a risk that the section will be converted into a strict liability offense. Anything "could" happen – the world "could" end tomorrow; Kim Kardashian "could" be elected president of the United States of America; I "could" win the lottery. These are not the types of "could" that 18 U.S.C. Section 793 contemplates. Therefore, the Defense should be able to probe whether the witness's testimony that the information could cause damage to the United

States is remote, speculative, far-fetched and fanciful by examining such witnesses on the fact that two years after the alleged leaks, the conclusion is still merely that the information "could" cause damage – not that it "did" cause damage. *See United States v. Johnson,* 30 M.J. 53, 57 (C.M.A.1990), *cert. denied,* 498 U.S. 919 (1990) (indicating that in "means likely" cases, the probability of harm "must at least be more than merely a fanciful, speculative, or remote possibility.").

18. This Court should not limit the ability of the Defense to examine any OCA or other Government witnesses concerning the factual assertions and speculative statements in the damage assessments since this evidence could undermine the witnesses' conclusions that the charged information "could" cause harm. *See United States v. Bahr*, 33 M.J. 228 (C.M.A. 1991) (holding military judge's ruling was an evidentiary and constitutional error by limiting defense in their ability to cross examine the prosecutrix); *see also United States v. Moss*, 63 M.J. 233 (2006) (holding that exclusion of evidence of bias under Rule 608(c) raises issues regarding an accused's Sixth Amendment right to confrontation if the military judge precludes an accused from exploring an entire relevant area of cross-examination). Unfortunately, the Government seeks to put blinders on the members, the Defense and the witnesses in order to have the "could" analysis take place in an absolute vacuum.

19. If PFC Manning is not permitted to question an OCA or other Government witnesses regarding the factual statements and speculative assertions in the damage assessments, his Sixth Amendment right to confrontation will be violated. Without the ability to undercut the assertions of the OCA or other Government witnesses with the Government's own conclusions regarding the fact that the charged information did little if any damage, the members will undoubtedly defer to the expertise of the OCA when he testifies the information could cause damage. However, with the benefit of the information from the damage assessments, the members would receive a significantly different impression of an OCA's credibility when he testifies that the information could cause damage. *See United States v. Collier*, 67 M.J. 347, 352 (C.A.A.F. 2009) (Whether a limitation on the presentation of evidence of bias constitutes a Sixth Amendment violation is "whether '[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'"). Thus, PFC Manning must be allowed to explore this legally and logically relevant area of inquiry.

C. Damage Assessments Can Be Used to Show Bias of Government Witnesses

20. The Defense believes that any OCA or Government witness who testifies regarding the charged information has an inherent motive to overstate whether the charged information "could" cause harm. The motive to misrepresent by the OCA or other Government witness is due to either anger or embarrassment from the release of the charged information, and/or a desire to support the previous exaggerations by governmental officials concerning the nature or risk or the level of harm due to the charged information being made public. *See* M.R.E. 608(c) (stating "evidence of bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

It is important to recall the Government's initial reaction to the release of the charged information in this case. Then-[redacted] stated that:

> This is all classified secret information never designed to be exposed to the public. Our greatest fear is that it puts our troops in even greater danger than they inherently are on the battlefields. That it will expose tactics, techniques and procedures – how they operate on the battlefield, how they respond under attack, the capabilities of our equipment . . . how we cultivate sources [and] how we work with Iraqis . . . .
>
> Now you will have virtually half a million classified secret documents in the public domain which our enemies clearly intend to use against us . . . . That can endanger the lives of American forces, not just in Iraq and Afghanistan, but around the world.

[redacted] In addition to [redacted] statements, then-[redacted] stated, "[redacted] can say whatever he likes about the greater good he thinks he and his source are doing. But the truth is they might already have on their hands the blood of some young soldier or that of an Afghan family." *See* [redacted]. Likewise [redacted] stated in July of 2010 that WikiLeaks would have "potentially dramatic and grievously harmful consequences." *See* Attachment C ([redacted]).

21. In spite of the above criticism and conjecture, within a few months the Department of Defense concluded that "the online leak . . . did not disclose any sensitive intelligence sources or methods." *See* Attachment D ([redacted]). Instead, according to [redacted], the reports consisted primarily of "initial, raw observations by tactical units . . . [which are] essentially snapshots of events, both tragic and mundane." *See* Attachment E ([redacted]). Given the nature of these documents, it was acknowledged that the government knows of no case where anyone in Afghanistan has been harmed because their name was in the leaked documents. *See* Attachment F ([redacted]).

22. Likewise, when WikiLeaks announced its intent to release diplomatic cables, the response by the Government was that the leak of these documents would be far more damaging than the first two leaks combined. *See* Attachment G ([redacted]

[redacted]). The government stated that documents could drastically alter U.S. relations with top allies and reveal embarrassing secrets about U.S. foreign policy. *Id.* Government representatives, including [redacted], asserted that internal communications between U.S. diplomats and the State Department would be less forthright for fear of later exposure, and foreign sources would be less likely to disclose information or share opinions with American diplomats for fear that the U.S. would be unable to protect their statements and identities from disclosure. *See* Attachment H [redacted]). In an apparent effort to minimize the damage, [redacted] embarked on a global tour to discuss the issue with leaders in various countries. Then-[redacted] stated that the release could be "harmful to the United States and our interests and . . . create tension in relationships between our diplomats and our friends around the world." *See* Attachment I ([redacted]).

23. Again, within a short period of time the Government started to retreat from its dire predictions that the sky was falling. [redacted] downplayed her concerns surrounding the cables after she attended an Organization for Security and Cooperation in Europe meeting where she spoke with foreign leaders who assured her that diplomatic relations would continue as before. *See* Attachment J ([redacted] as saying that at the OSCE meeting, "I have not . . . had any concerns expressed about whether any nation will not continue to work with and discuss matters of importance to us both going forward")). [redacted] also confidently declared that the releases would have little effect on diplomatic relations:

> But let me – let me just offer some perspective as somebody who's been at this a long time. Every other government in the world knows the United States government leaks like a sieve, and it has for a long time. And I dragged this up the other day when I was looking at some of these prospective releases. And this is a quote from John Adams: 'How can a government go on, publishing all of their negotiations with foreign nations, I know not. To me, it appears as dangerous and pernicious as it is novel.' When we went to real congressional oversight of intelligence in the mid-'70s, there was a broad view that no other foreign intelligence service would ever share information with us again if we were going to share it all with the Congress. Those fears all proved unfounded.
>
> 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 – I think those descriptions are fairly significantly overwrought. The fact is, governments deal with the United States because it's in their interest, not because they like us, not because they trust us, and not because they believe we can keep secrets. Many governments – some

> governments deal with us because they fear us, some because they respect us, most because they need us. We are still essentially, as has been said before, the indispensable nation. 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. foreign policy? I think fairly modest.

See Attachment K ([redacted]). also stated "...I thin, in all of these releases, whether it's Afghanistan, Iraq, or the releases this week [diplomatic cables], is the lack of any significant difference between what the U.S. government says publicly and what they things show privately...." *Id.*

24. The Defense has now had the benefit of reviewing the Information Review Task Force's damage assessment and the Department of State's August 2011[3] draft damage assessment. The damage assessments underscore what the Defense has suspected all along in regards to the speculative damage supposedly caused by the alleged leaks.

25. The Defense should be entitled to use the draft damage assessments to impeach any witness from the Department of Defense, Department of State, or any other governmental agency. Based on the over-reaction of government officials to the leaks (described above), witnesses will have a motivation to lie or at least overstate whether the leaks "could" cause damage.

26. The impeachment rules are required to be read to allow liberal admission of bias-type evidence. *See United States v. Hunter*, 21 M.J. 240 (C.M.A.), *cert. denied*, 476 U.S. 1142 (1986); *see also United States v. George*, 40 M.J. 540 (A.C.M.R. 1994) (military judge improperly restricted defense cross-examination of government toxicology expert. Questions about the expert's salary and possible sources of contamination of the urine sample were relevant to explore bias); *United States v. Aycock*, 39 M.J. 727 (N.M.C.M.R. 1993) (military judge abused his discretion and committed prejudicial error in excluding extrinsic evidence of a government witness's bias and motive to testify falsely). The Defense should not be arbitrarily limited in exploring an entire relevant area of impeachment (i.e. bias) simply because the Government does not wish for panel members to know about America's worst-kept secret – that the alleged leaks did little to no harm to national security. It is axiomatic that it is the role of the members to determine the credibility of any witness. Accordingly, bias evidence, if logically and legally relevant, is properly presented to the members.

III. The Information from the Damage Assessment is Relevant to Charged Offenses

A. <u>The Lack of Harm Goes to An Element of the Charged Offenses</u>

[3] The Department of State did not even believe it was worthwhile to update its damage assessment after the entire diplomatic database was released in unredacted form in September of 2011. *See* Ms. Catherine Brown's testimony (audio recording of 7 June 2012 Article 39(a)). The fact the Department of State did not embark on an effort to verify possible damage should speak volumes regarding the real likelihood of any such damage.

27. The Government states that it will not seek to introduce any evidence of actual damage on the merits. *See* Audio Recording of 6 June 2012 Article 39(a) (transcript of colloquy provided in factual section of brief above). However, in the same breath, the Government says that damage may be relevant to the Clause 1 and 2 lesser included offense (LIO) of the various offenses. *Id.* So it appears that the Government would like to have its cake and eat it too. It would like to prevent the Defense from referencing the absence of harm, but would like to reserve its right to argue that harm was caused for the limited purpose of the Clause 1 and 2 elements of the charged offenses.

28. The absence of harm is relevant to whether PFC Manning's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. The relevance of this information is not controlled by how the Government attempts to prove the Clause 1 and 2 elements of the charged offenses. In the same manner the Government may seek to use this information to prove conduct that would satisfy the Clause 1 and 2 elements of the charged offenses, the Defense should be entitled to use the lack of damage to prove that the charged conduct was not prejudicial to good order and discipline or service discrediting. If the charged information caused no damage and, in fact, did overall good, the conduct can hardly be said to rise to the level of conduct that is prejudicial to good order and discipline or service discrediting.

29. Not only is damage or the lack of damage relevant to the Clause 1 and 2 elements of the charged offenses, but it is also relevant to the following:

a) 18 U.S.C. Section 793 and the 18 U.S.C. Section 1030 offenses: The absence of harm is relevant to whether PFC Manning had reason to know that the information released could be used to the injury of the United States or to the advantage of a foreign nation. *See* Charge Sheet.

b) 18 U.S.C. Section 641: The absence of harm is relevant to whether there was a substantial interference with the Government possession and thus a conversion of the information. *Id.*

c) Specification 1 of Charge II. The absence of harm is relevant to whether PFC Manning acted recklessly or wantonly, an element of the charged offense. *Id.*

<u>18 U.S.C. Section 793(e) and 1030(a)(1) Offenses</u>

30. In order to prove PFC Manning is guilty of either the Section 793(e) or 1030(a)(1) offenses, the Government must prove that PFC Manning knew or had a reason to believe that the charged information could be used to the injury of the United States or to the advantage of any foreign nation. "Reason to believe" means that PFC Manning knew facts from which he concluded or reasonably should have concluded that the charged information could be used for the prohibited purposes. *Gorin v. United States*, 312 U.S. 19 (1941); *United States v. Truong Dinh Hung*, 629 F.2d 908, 919 (4th Cir. 1980); *United States v. Lee*, 589 F.2d 980 (9th Cir. 1979). In considering whether or not PFC Manning had reason to believe that the charged information could be used to the injury of the United States, or to the advantage of any foreign nation, a panel member should be entitled to consider whether harm actually occurred, so as to test the reasonableness of PFC Manning's belief that this information could not cause damage to the United States.

31. The Government would seek to prevent the panel members from having the benefit of hindsight in determining whether PFC Manning had "reason to believe" the information "could be used to the injury of the United States or the advantage of a foreign nation." The Government argues that this Court should create a wall between the merits and the sentencing phase regarding this vital information. It is clear that the Government is hoping that the panel members will simply defer to the classification decisions of various OCAs regarding the conclusion that classified information "could" cause harm. Unfortunately for the Government, the Court of Appeals for the Armed Forces (CAAF) has rejected such a simplistic inference by the members. The CAAF has clearly stated that the classification of a document is only probative, and not determinative, of the issue of whether information could cause harm. *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010); *see also United States v. Morison*, 844 F.2d 1057, 1086 (4th Cir. 1988) ("[N]otwithstanding information may have been classified, the government must still be required to prove that it was *in fact* 'potentially damaging . . . or useful,' i.e., that the fact of classification is merely probative, not conclusive, on that issue"). Therefore, the panel members should not be denied relevant evidence on this issue.

32. Under *Diaz*, the Government cannot satisfy its burden of showing that the documents could cause damage merely by pointing to their classification.[4] Instead, the Government must produce some witness testimony or additional evidence to satisfy its burden. The Defense is entitled to challenge this testimony or additional evidence. The Defense should be permitted to argue that, by virtue of his expertise and training, PFC Manning knew which documents and information could be used to the injury of the United States or to the advantage of any foreign nation. PFC Manning had access to a great deal of very sensitive information that, if disclosed, could have caused damage to the United States. By selecting the information that he allegedly did, PFC Manning deliberately chose information that could not cause damage to the United States. The reasonableness of his belief that the information could not cause damage is buttressed by the damage assessments which say that the leaks did not cause damage to the United States. In short, the Defense submits that the damage assessments confirm that PFC Manning did not have "reason to believe" that the information could cause damage to the United States or be used to the advantage of a foreign nation.

33. The Court specifically requested the parties to explore case law on the issue of "what happened" being relevant to "what could happen." Audio from 6 June 2012 Article 39(a) hearing. Given the lack of case law covering the charged offenses in this regard, the Court suggested that the parties explore the issue in the context of assault with a means likely to produce death or grievous bodily harm. *Id.*; *see generally* Article 128 Para. 54c(4)(a).

34. *United States v. Hudson* provides an excellent example of "what happened" being relevant to "what could happen." 2000 WL 228777 (N-M. Ct. Crim. App. 2000). In *Hudson*, the court

[4] The Government cites *Diaz* for a completely unrelated proposition that is not at issue here. *See* Government Motion, at 6. The motion to preclude evidence in *Diaz* was related to intent, not relevance. In *Diaz*, the military judge excluded evidence that the Defense contended would satisfy the heightened *mens rea* requirement in 18 U.S.C. Section 793(e) of "intent to do harm" or "bad faith." *Id.* at 137. Given that the Court concluded there was no heightened *mens rea* requirement for Section 793(e), the exclusion of the evidence was proper. This ruling does not speak at all to whether it is appropriate to exclude reference to actual harm in this case.

found the evidence to be insufficient to support a conviction for assault with a means likely to produce grievous bodily harm. The court used a two pronged test for its determination "(1) the risk of harm and (2) the magnitude of the harm." *Id.* at *2 (citing *United States v. Outhier*, 45 M.J. 326, 328 (C.A.A.F. 1996)). The court stated that "the likelihood of death or grievous bodily harm was determined by measuring both prongs, not just the statistical risk of harm." *Id.*

35. Using the analysis that looked at "what happened" in order to determine "what could happen," the court held that the evidence fell short. Although the appellant assaulted his wife "by grabbing her with his hands, slamming her against the wall, causing her head to hit the wall, by pulling her across the room by her hair, and by pushing her to the floor causing her to strike a bed and nightstand" the court concluded that this "did not create a high degree of risk to cause grievous bodily harm" (the first prong). *Id.* at *1-2. Similarly, the court concluded that the "magnitude of harm was not great" (the second prong). *Id.* at *2. The court noted that the doctor who examined the wife the following day found only minor injuries and the wife suffered no fractures, dislocations, broken bones, deep cuts, or damage to any internal organs. *Id.* Therefore, the court was not convinced beyond a reasonable doubt of the appellant's guilt of assault with a means likely to produce grievous bodily harm. *Id.* In concluding that the evidence was factually insufficient to sustain a conviction, the *Hudson* court clearly considered "what happened" in order to inform its decision of "what could happen."[5] So too should this Court allow the panel members to consider "what happened" in order to inform it decision of "what could happen."

36. Similarly, in *United States v. Outhier*, 45 M.J. 326 (C.A.A.F. 1996), the CAAF found the accused's plea improvident as to aggravated assault with a means likely to produce death or grievous bodily harm. The Court noted that "while it is well-settled that there is no requirement to prove . . . any resultant injury or harm in order to prove aggravated assault, we recognize that these circumstances frequently provide the lynch-pin between a means that is used in a manner "likely" to produce death or grievous bodily harm and one that is not." *Id.* at 329. The court held that it was "the circumstances [that] define whether the means used were employed in a manner likely to cause grievous bodily harm." *Id.* After canvassing these circumstances, the court concluded, "Under these circumstances, we cannot hold that the plea provided factual support for the conclusion that appellant's actions were likely to result in death or grievous bodily harm. *In fact, no harm occurred.*" *Id.* at 330 (emphasis supplied). As is clear, whether harm occurred was a factor considered by the court in coming to its conclusion that the plea was not provident as to the "means likely" offense.

37. In *United States v. Joseph*, 33 M.J. 960 (N-M.C.M.R. 1991), the court stated:

> Whether the conduct of the accused charged as an aggravated assault involves a means used in a manner likely to produce death or grievous bodily harm ultimately becomes a question to be determined by the fact finder. The evidence need not establish that death or grievous bodily harm was highly probable or even more likely than not, and no required statistical probability can be found in

[5] The court held that it was insufficient to prove merely that death or grievous bodily harm was "possible." Instead, the Court concluded the Government must prove that it was "probable." *Id.* at *2 (citing *United States v. Weatherspoon*, 49 M.J. 209, 211, (C.A.A.F. 1998)).

> decisional law. It is for the fact finder to consider *all* the evidence and determine beyond a reasonable doubt whether the risk of harm meets the general statutory requirement, although the law clearly does require that the risk amount to more than "merely a fanciful, speculative, or remote possibility" of harm.

33 M.J. at 964 (emphasis supplied). Thus, two things are clear from this passage. First, the risk of harm must be more than merely "fanciful, speculative or remote." *Id.* Second, it is the job of the fact-finder to consider *all* the evidence (including whether harm actually resulted) and determine whether the assault was with a means likely to produce death or grievous bodily injury.

38. As stated above, the Government must prove that the information could cause damage, and more specifically, that the accused had reason to believe that the information could cause damage. The Defense should be entitled to rebut the Government's proof by showing that the accused did not have reason to believe that the information could cause damage and testing the reasonableness of that belief against the actual damage caused (or, as the Defense would submit, the absence of damage caused). Whether this line of defense is compelling to the members goes to weight, not admissibility of the evidence. Relevant evidence is simply evidence that 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." *See* M.R.E. 401 (emphasis supplied). The "any tendency" standard is the lowest possible standard for relevancy. *United States v. Schlamer*, 52 M.J. 80 (C.A.A.F. 1999) (holding that M.R.E. 401 is a low standard and the admitted evidence had some tendency to support a fact at issue); *see also United States v. Berry*, 61 M.J. 91 (C.A.A.F. 2005) (discussing any tendency standard being a low standard). If the facts are that the information either did not cause damage or caused minimal damage, this would have at least some tendency to confirm that PFC Manning did not have "reason to believe" that the information could cause damage to the United States or be used to the advantage of a foreign nation. *United States v. Truong Dinh Hung*, 629 F.2d 908, 919 (4th Cir. 1980) (approving jury instruction that "reason to believe" meant that a defendant must be shown to have known facts from which he concluded or reasonably should have concluded that the information could be used for the prohibited purposes). This plainly satisfies the lenient "any tendency" standard for relevancy.

18 U.S.C. Section 641 Offenses

39. 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. Under the charged specifications, the absence of harm is relevant to whether there was a substantial interference with the Government's property interest and thus a conversion of the information under Section 641.

40. The key requirement of conversion under Section 641 is that an accused must exercise control over the property in such a manner that serious interference with the rights of the owner result. *United States v. Wilson*, 636 F.2d 225 (8th Cir. 1980); *United States v. May*, 625 F.2d 186 (8th Cir. 1980). In determining whether there has been a substantial interference, members must be able to consider any actual harm or the absence of harm from the various damage assessments. Under relevant case law, serious interference is one that prevents the government

from making some other use of the property. *United States v. Kueneman,* 94 F.3d 653 (9th Cir. 1996) (the court reversed appellant's conviction under Section 641 when it determined that the government could not show any harm due to the appellant's conduct); *United States v. Collins*, 56 F.3d 1416, 1421 (D.C. Cir. 1995) (after explaining that a charge of conversion requires *serious interference* with property rights, the court found that the charges related to computer use and storage were not supported where no evidence was offered showing the conduct "prevented [the defendant] or others from performing their official duties"); *United States v. Matzkin*, 14 F.3d 1014, 1020 (4th Cir. 1994) (the court considered the amount of damage to the government in concluding whether the appellant violated §641).

41. Actual damage, or lack thereof, is relevant on the merits as it relates to charges under Section 641. This information would indicate the extent (if any) of "serious interference" with property rights of the Government. In deciding whether the Government has met its burden, the members should be able to consider information from the various damage assessments. Because evidence of actual damage is relevant, the Defense should be allowed to present this evidence to the members.

Specification 1 of Charge II

42. In Specification 1 of Charge II, PFC Manning is charged with wrongfully and wantonly causing United States intelligence to be published on the internet, having knowledge that the intelligence placed on the internet is accessible to the enemy, in violation of Article 134. *See* Charge Sheet. The absence of harm is relevant to whether PFC Manning acted recklessly or wantonly, an element of the charged offense. *Id.* Although the MCM does not define the term "wanton" in the context of disclosure of information, it does define the term in two other contexts. *See* MCM, Part IV, para. 35.c(8) (defining "wanton" for purposes of Article 111); *id.*, Part IV, para. 100a.c(4) (defining "wanton" for purposes of Article 134, offense of "reckless endangerment"). Both definitions provided by the MCM are essentially the same: "'Wanton' includes 'Reckless' but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense." *Id.*, Part IV, para. 100a.c(4); *see id.*, Part IV, para. 35.c(8) ("'Wanton' includes 'reckless', but in describing the operation or physical control of a vehicle, vessel, or aircraft 'wanton' may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.").

43. Thus, "wanton" as used in the clause 3 Article 134 offense will necessarily involve an assessment of whether it was indeed reckless to release the charged information to WikiLeaks or whether PFC Manning disregarded the probable consequences of his actions by engaging in the alleged conduct. As such, the Defense should be entitled to use the factual assertions and speculative statements within the damage assessments, as well as evidence related to the absence of harm, to dispute that PFC Manning's conduct was potentially "wanton" or "wrongful" for the purposes of Specification 1 of Charge II.

IV. The Court Should Not Preclude the Defense From Raising a Viable Defense

44. The Government's effort to preclude the Defense from referencing any information from the various damage assessments is identical to the tactic attempted in *United States v. Drake*. No.

RDB-10-181 (D. Md. Mar. 31, 2011). The government in *Drake* attempted to preclude the defense from referencing certain evidence during the merits. The court expressed an unwillingness to foreclose a potential line of argument, especially given that the court had the inherent power to control the courtroom. The court stated in this respect:

> **THE COURT**: -- but my point is that, to preclude them from going down that path, I think, essentially prevents them from presenting a defense, that we can control the matter of whether or not there is reference to necessity or justification, *and I'm fairly confident I'll be able to control the courtroom to do that*. It's just a matter of where else we go with this motion, and it seems to me they're certainly entitled to get into this.
>
> * * *
>
> **THE COURT:** As I interpret the Government's motion, or as I intend to interpret it, it doesn't mean that that evidence is -- although the Government seems very concerned with it amounting to a higher calling, necessity, or justification defense, *I'm fairly confident that I can keep this case on track to correct you if you happen to make an inadvertent mistake in that regard*, but you're certainly free to have at that in terms of the intent element, and that's how I see it.

Transcript of Record at M-100, M-103, *United States v. Drake,* No. RDB-10-181 (D. Md. Mar. 31, 2011) (emphasis supplied).

45. PFC Manning should be permitted to prove that he knew which documents and information could not be used to the injury of the United States or to the advantage of any foreign nation. In order to buttress the reasonableness of his belief that the information could not cause damage, this Court should conclude that PFC Manning is entitled to use information and conclusions from the damage assessments.

46. In *United States v. Diaz*, the CAAF held that the military judge erred by preventing the appellant from presenting motive evidence on an Article 133, UCMJ charge. 69 M.J. 127 (C.A.A.F. 2010). The CAAF determined that the evidence could have informed a factfinder's judgment as to whether the appellant's conduct was unbecoming an officer. *Id.* at 136. Similarly, the damage assessment information would inform a factfinder's judgment as to whether PFC Manning's conduct was prejudicial to good order and discipline or service discrediting; could cause damage to the United States or aid any foreign nation; substantially interfere with the government's use of the charged information; or constitute a reckless and wanton disregard for the consequences of his actions.

47. PFC Manning had access to a great deal of very sensitive information that, if disclosed, could have caused damage to the United States. By virtue of his expertise and training he should be entitled to assert that he selected information that could not be used to the injury of the United States or to the advantage of any foreign nation. In order to support this viable defense, the Defense must be allowed to challenge the testimony of any Government witness by introducing

factual assertions and speculative statements from the various damage assessments and must be permitted to argue that the leaked information did not cause harm to the United States.

CONCLUSION

48. For the reasons outlined herein, the Defense requests that this Court deny the Government's motion in its entirety. In the alternative, the Defense requests that this Court defer ruling on the motion until the issue is ripe.

Respectfully submitted,

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