

LEGAL AUTHORITY AND ARGUMENT

The Defense argues that information does not fall within the ambit of § 641. The Defense argument fails because United States Circuit Courts of Appeal have broadly applied “thing of value” to information. § 641 reaches theft and conversion beyond the limitations of common law. Thus, the precedent regarding § 641 holds that information is a “thing of value.”

I. DATABASES AND RECORDS ARE UNITED STATES GOVERNMENT PROPERTY

A. Accused Compromised Databases and the Records Therein

The accused is charged with the theft or conversion of databases consisting of a number of records. *See* Charge Sheet. The evidence creates a reasonable inference that the accused used United States Government systems to create the records he conveyed to WikiLeaks. *See, e.g.,* Testimony of David Shaver; Testimony of SA Williamson; PE 30; PE 50; PE 82; PE 83; PE 92; PE 104. Where an accused avails himself of United States Government equipment to create copies, those copies remain records and property of the United States. *United States v. Hubbard*, 474 F. Supp 64, 79 (D.C. Cir. 1979); *United States v. DiGilio*, 538 F.3d 972, 978 (3d Cir. 1976). The Third Circuit decided:

[The accused] availed herself of several government resources in copying DiGilio's files, namely, government time, government equipment and government supplies. That she was not specifically authorized to make these copies does not alter their character as records of the government. A duplicate copy is a record for purposes of the statute, and duplicate copies belonging to the government were stolen.

Id. Because the accused utilized United States Government systems to compromise the charged databases, to include their records, the database and records the accused compromised remained records of the United States. The United States did not retain these records; thus, Defense arguments that the United States retained possession of the records is moot because the Defense mistakes which records were actually stolen and converted. *Cf. United States v. Matzkin*, 14 F.3d 1014, 1020-21 (4th Cir. 1994) (holding that the United States need not have the sole interest in a bid for it to be information that is a “thing of value” under § 641). Furthermore, electronic property that can later be reduced to a tangible form is protected under § 641. *See United States v. Morris*, 284 Fed. Appx. 762, 762-63 (11th Cir. 2008) (upholding a conviction under § 641 for theft of money where funds were directly deposited into an account).

B. Information Is an Intrinsic Quality of the Databases and Records

Information comprises an intrinsic quality of the compromised databases and records. The information contained in databases and records can be used to authenticate them as evidence. *See* Military Rule of Evidence 901(b)(4). The information dictates the market price for the information. *See* Testimony of Mr. Lewis. The statutory reference to “any record” includes the information held in the record and database. *United States v. Lambert*, 446 F. Supp.

890, 896 (D.C. Conn. 1978), *aff'd*, *United States v. Girard*, 601 F.2d 69, 70 (2d Cir. 1979). In *Lambert*, the Court found:

The phrase "other thing of value" strongly suggests that something other than the particular records themselves, i.e., the contents, are probably covered as well. Indeed, the distinction between a government "record" and its contents is rather fine. The individual of common intelligence would probably include the information held in a government computer in the statutory term "record" without reference to the catch-all phrase "thing of value."

Id. Therefore, the court held that an accused planning the unauthorized asportation of information held in a government data bank possessed sufficient notice that § 641 covered such conduct. *Id.* Also, the accused signed a non-disclosure agreements (hereinafter "NDAs") that gave the accused notice that classified information is the property of the United States Government. *See* PE 59 ¶ 7; PE 60 ¶7. The NDAs gave the accused additional notice that § 641 applies to unauthorized disclosure of classified information. *See* PE 59 ¶¶ 4, 10; PE 60 ¶¶ 4, 10. Here, where the contents of the databases and records could be used to authenticate the charged property, the information affected the value of the charged property, the individual of common intelligence in 1979, before computers were as widely used, would conclude that a record includes information, and the accused signed NDAs stating that classified information is the property of the United States Government, the accused had sufficient notice of the charged property.

II. A "THING OF VALUE" UNDER § 641 INCLUDES INFORMATION

§ 641 makes criminal the theft or conversion of a "thing of value."¹ § 641. "A 'thing of value' can be tangible or intangible property." AE CDX. Government information, although intangible, "is a species of property and a thing of value." *Id.*

A. The Supreme Court Established the Broad Reach of § 641

In discussing the pertinent legislative and judicial history of § 641 and similar crimes, the Supreme Court observed that "the modern tendency is to broaden the offense of larceny, by whatever name it may be called, to include such related offenses as would tend to complicate prosecutions under strict pleading and practice. *United States v. Morissette*, 342 U.S. 240, 270 & n.28 (1952). The Court added that stealing and purloining were added "to cover such cases as may shade into larceny, as well as any new situation which may arise under changing modern conditions and not envisioned under common law . . ." *Id.* Thus, § 641 applies to "acts which shade into crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Id.* In particular, § 641 closed the "gaps" and "crevices" that allowed guilty men to escape criminal liability. *See id.* at 271. ("What has concerned codifiers of the larceny-type

¹ In pertinent part, § 641 states, "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . . [s]hall be fined under this title or imprisoned not more than ten years, or both . . ." 18 U.S.C. § 641.

offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property.”). To close the gaps, Congress included the word “steal,” a word “having no common law definition to restrict its meaning as an offense, and commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership . . .” See *id.* (emphasis added).

Military courts also recognize the expansive scope of a thing of value. See, e.g., *United States v. Ward*, 35 C.M.R. 834, 837 (A.F.B.R. 1965) (stating that a “thing of value” under Article 123a, UCMJ, extends to every kind of right or interest in property, or derived from contract, including interest and rights which are intangible or contingent or which mature in the future). Since 1962 military courts distinguish between an “article of value,” which is based on the strict common law concept of larceny, and a “thing of value,” which encompassed a broader scope upon its implementation. See generally *United States v. Mervine*, 26 M.J. 482, 483-84 & nn.1-2 (C.M.A. 1988) (explaining that statutes may enlarge the scope of larceny, but the drafters declined to do so for Article 121, UCMJ). Here, the Supreme Court has found that Congress drafted § 641 to fill the gaps and capture all types of larcenies. See *Morissette*, *supra*. Thus, a “thing of value” should be given its all-encompassing meaning with respect to the § 641 specifications. See Part II.B-C.1, *infra*.

Additionally, “[t]he military is a notice pleading jurisdiction.” *United States v. Fosler*, 70 M.J. 225, 229 (C.M.A. 2011) (citing *United States v. Sell*, 3 C.M.A. 202, 206 (C.M.A. 1953)). “A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication.” RCM 307(c)(3). “An accused must be given notice as to which clause or clauses he must defense against . . .” RCM 307(c)(3), discussion (citing *United States v. Fosler*, 70 M.J. at 229. In *Morissette*, the Supreme Court held that § 641 possessed a broad reach under “strict pleading and practice.” *Morissette*, 342 U.S. at 270 n.28. Therefore, the broad reach of § 641 recognized in *Morissette* is more appropriate for the notice practice used in military practice.

B. “Thing of Value” Includes Information

A “thing of value” includes intangible and tangible property. AE CDX; see, e.g., *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985); *Girard*, 601 F.2d at 70. Accordingly, four Circuit Courts of Appeal explicitly agree that a “thing of value” under § 641 includes information. The Second Circuit held that the information reduced to writing in a document constituted an intangible “thing of value” under § 641. *Girard*, 601 F.2d at 70-71. The Sixth Circuit concluded information comprises government property or a “thing of value” under § 641. *Jeter*, 775 F.2d at 680-82. Noting its agreement with the Second and Sixth Circuits, the Fourth Circuit similarly determined that information is a “thing of value” under § 641. *United States v. Fowler*, 932 F.2d 306, 310 (4th Cir. 1991) (holding that conversion and conveyance of governmental information can violate § 641). The Eleventh Circuit upheld a conviction under § 641 for conveying information in United States Government records. *United States v. Jordan*, 582 F.3d 1239, 1246

(11th Cir. 2009). Similarly, the Third Circuit has found meritorious the argument that interference with the exclusive use of information established a sufficient basis for criminal liability under § 641. *DiGilio*, 538 F.3d at 978 (finding merit to the Government's argument that a misappropriation of information falls under § 641 but declining to so hold where a technical larceny was already proven).

Furthermore, additional circuits have held that § 641 embraces intangible property. The Seventh Circuit has found the testimony of a witness to be a "thing of value." *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974) (finding a "thing of value" under 18 U.S.C. § 876 to include testimony); *see also United States v. Croft*, 750 F.2d 1354, 1359-62 (7th Cir. 1984) (holding that § 641 applies to conversion of a student's services for a personal research project). The District of Columbia Circuit held that a "thing of value" under § 641 applied to conversion of computer time and storage. *United States v. Collins*, 56 F.3d 1416, 1418-19 (D.C. Cir. 1995). The Eighth Circuit decided that a "thing of value" reached a right in the intangible property of flight time. *United States v. May*, 625 F.2d 186, 191-92 (agreeing with *DiGilio* and *Girard*, *supra*). In sum, in addition to the four Circuit Courts of Appeal that hold information to be an intangible "thing of value" under § 641, three additional Circuit Courts of Appeal apply a "thing of value" broadly to intangible property. Therefore, a "thing of value" under § 641 applies to information.

C. Precedent Cited by the Defense Inapposite

1. § 641 Reaches Beyond Common Law Definitions

A single Circuit Court of Appeals has held that a "thing of value" should be applied only to tangible items. *See Chappell v. United States*, 270 F.2d 274, 277 (9th Cir. 1959). However, in 1986 the same Court that decided *Chappell*, citing criticism of the "limited, narrow, and unrealistic interpretation" of a "thing of value" under § 641 "reject[ed]" its prior decision *sua sponte*. *United States v. Schwartz*, 785 F.2d 673, 680-81 & n.4 (9th Cir. 1986) (citing *United States v. Croft*, 750 F.2d 1354, 1362 (7th Cir. 1984)). In "rejecting" *Chappell*, the Ninth Circuit stated that it had "tended clearly toward a broader scope of a *thing of value*, to include intangibles." *Id.* (italics in original) (citing *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980)) (holding information to be a "thing of value" under 18 U.S.C. § 912); *Friedman*, 445 F.2d at 1084-85; *Whaley v. United States*, 324 F.2d 356 (9th Cir. 1963) (holding implicitly information to be a "thing of value"). Moreover, the Ninth Circuit noted that legislative history cited in *Schwartz* undermined the decision in *Chappell*. *Id.* Therefore, the Ninth Circuit joined other Circuit Courts of Appeals in finding a "thing of value" to be unambiguous, and therefore not requiring the rule of lenity. *See Schwartz*, 785 F.2d at 681 (finding error in applying rule of lenity to a "thing of value" under § 1954).

After deciding *Schwartz*, the Ninth Circuit supported its *Chappell* holding in *United States v. Tobias*, 836 F.2d 449 (9th Cir. 1988). The Ninth Circuit distinguished the legislative history of 18 U.S.C. § 1954 in *Schwartz* as part of the basis for its renewed support for *Chappell*. *Tobias*, 836 F.2d at 451 n.2. *Schwartz* and *Tobias* were decided by different Circuit judges, and any split exists only within the Ninth Circuit. Additionally, in *Tobias*, the Ninth Circuit acknowledged the existence of the "'intangible goods' exception or 'classified information'

exception to § 641” but did not invoke the so-called “exceptions” because they were inapplicable to the tangible property at issue in *Tobias*. See *id.* at 451.²

The Ninth Circuit’s holdings in *Chappell* and *Tobias* and Judge Winter’s dissent in *United States v. Truong Dinh Hung*, 629 F.2d 908, 924-28 & n.21 (Winter, J., dissenting as to application of § 641), contradict the Supreme Court’s holding in *Morissette*. Judge Winter, however, acknowledged that § 641 could be applied to theft of United States Government information on “a case-by-case basis.” *Truong Dinh Hung*, 629 F.2d at 928 (citing *Lambert*, 446 F. Supp. at 899).³ In *Chappell*, the Ninth Circuit relied on the common law definition of “conversion” to restrict application of § 641 only to tangible goods. *Chappell*, 270 F.2d at 277 (“As Congress must have known, the words ‘converts’ and ‘conversion’ really have their origin in the law of torts. The terms imply a dealing with goods or personal chattels.”). Citing a discussion of trover and conversion, the Ninth Circuit narrowed the scope of § 641. See *id.* at 277-78 (citing *Olschewski v. Hudson*, 87 Cal. App. 282 (Cal. App. 1927).

In *Morissette*, the Supreme Court decided that § 641 covered common law larceny and “any new situation which may arise under changing modern conditions and not envisioned under the common law. . . .” *Morissette*, 342 U.S. at 270 n.30 (emphasis added). Specifically, the Supreme Court held that Congress broadened the reach of § 641 by adding “purloin” and “steal,” the latter which has “no common law definition to restrict its meaning as an offense.” *Id.* (emphasis added). At common law, trover would lie for the unlawful taking or conversion of a chattel or personal property. See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 44 (1989) (citations omitted); *United States v. Loughrey*, 172 U.S. 206, 212 (1898); *Johnson v. Weedman*, 4 Scam. 495 (Ill. 1843). Reverting to common law construction, the Ninth Circuit frustrates Congressional intent and binding precedent by ignoring the modern terms used by Congress. These terms, “steal” and “purloin,” lack any common law restrictions. *Morissette*, 342 U.S. at 270 n.30. Accordingly, the Supreme Court held that “[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions.” *Id.* (emphasis added). The Ninth Circuit, applying the common law definition of “conversion” appends such a “fixed definition.” Therefore, imputing the common law application of “conversion” defeats the purpose of § 641. See *id.*

2. Other Defense Precedent Inapplicable Here

Cited by the defense, *Pearson v. Dodd*, 410 F.2d 701, 703 (D.C. Cir. 1969) involved a claim for the tort of invasion of privacy. Publishing a matter in the general public interest is a defense to the tort of invasion of privacy by the publication. *Id.* *Pearson* is inapplicable because it pertained to the persons who received copies of documents without authorization, not the person who conveyed the documents without authorization. *Id.* at 705. Because *Pearson*

² In *Tobias*, the items at issue were cryptographic cards whose value came from their use as devices. *Tobias*, 836 F.2d at 452. Both parties agreed that the devices did not contain information, and the Ninth Circuit accordingly treated the device solely as tangible property. See *id.* at 451-52.

³ Judge Winter does not explain the factors that would make application of § 641 to information appropriate in his opinion. See *Truong Dinh Hung*, 629 F.2d at 928.

analyzes tort law with respect to persons receiving documents, it is not germane to this court-martial. *See id.* at 705 (“[W]here the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained.”).⁴

Additional material cited by the Defense similarly offers no persuasive value. Professor Nimmer’s article and comment notes that no copyright exists in United States Government documents. Melville B. Nimmer, *National Security Secrets v. Free Speech, The Issues Left Undecided in the Ellsberg Case*, 26 Stan. L. Rev. 311, 320 (1974) (analyzing 17 U.S.C. § 8). Having stated that no copyright exists in United States Government documents, Professor Nimmer argues that the criminal penalties set forth in 17 U.S.C. § 8—the penalties for copyright infringement—should apply to United States documents. *See id.* at 320-21 (acknowledging that Congress can criminalize copying certain United States Government documents). This incongruous argument offers no persuasive value. Indeed, as Professor Nimmer recognizes, Congress can protect information in documents and has enacted legislation to criminalize certain copying. *See id.* (noting that 18 U.S.C. § 793(b) “has made some copying criminal”).

Finally, the Defense presents *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988) for the proposition that § 641 does not capture the theft or conversion of information. In *Morison*, the Fourth Circuit determined that *United States v. Carpenter*, 484 U.S. 19 (1987), resolved the issue and held that “pure ‘information’” may be the subject of statutory protection under § 641. *See Morison*, 844 F.2d at 1077. The Fourth Circuit added that illegally disposing of United States Government records and photographs to a third party constituted “a textbook application of the crime set forth in § 641.” *Id.* The Defense highlights *Morison*’s reference to *Pearson*, but the reference is inapposite as set forth above and in Part I because, in the instant matter, the databases and records the accused asported were not returned. *See Morison, supra; Hubbard, supra.*

III. RULE OF LENITY

Military courts apply the rule of lenity when construing ambiguous criminal statutes. AE CXXXIX (citing *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983); *United States v. Cartwright*, 13 M.J. 174, 176 & n.4 (C.M.A. 1982); *United States v. Inthavong*, M.J. 628, 630 (A. Ct. Crim. App. 1998)). The rule of lenity “requires courts to limit the reach of criminal statutes to the clear import of their text and construe any ambiguity against the government.” AE CXXXIX (citing *United States v. Romm*, 455 F.3d 990, 1001 (9th Cir. 2006)). The rule of lenity, however, does not preclude a theory of prosecution that employs “well-known” understandings of the statutory terms. *See Romm*, 455 F.3d at 1001 (holding that the government’s theory fell within the plain meaning of the language of the criminal statute). Accordingly, the rule of lenity may be applied “only if, after reviewing all sources from which legislative intent may be gleaned, the statute remains truly ambiguous.” *Inthavong*, 48 M.J. at 630 (citing *United States v. Davis*, 656 F.2d 153, 158 (5th Cir. 1981)).

A. Statutory Language Supports Inclusion of Information as a “Thing of Value”

⁴ In *Pearson*, the appellee was a United States Senator, and the court held that the published information “clearly bore on the appellee’s qualifications as a United States Senator.” *Pearson*, 410 F.2d at 703.

The starting point for statutory interpretation is the plain or ordinary meaning of the language. See *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003); *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006) (stating that “a fundamental rule of statutory interpretation is that ‘courts must presume that a legislature says in a statute what it means and means in a statute what it says there’”) (citing *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). When a statute is clear and unambiguous, courts need not and should not consult the legislative history. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear.”).

The statutory definition of a “thing of value” is clear and unambiguous. A “thing” is “the subject matter of a right, whether it is a material object or not; any subject matter of ownership within the sphere of proprietary or valuable rights.” Black’s Law Dictionary (9th ed. 2009). Proprietary information comprises a property and right of ownership. See *Carpenter*, 484 U.S. at 25 (recognizing as worthy of protection a property right in confidential business information). Thus, information is a property right under the plain meaning of a “thing of value.” The Supreme Court supported this finding when it determined that “stealing” captures any transaction depriving an owner of rights and benefits. See *Morissette*, 72 U.S. at 270 n.28. To the extent the Ninth Circuit rejects this plain meaning, it does so by reference to “conversion,” which is a separate and distinct term. Moreover, the Supreme Court rejected limiting § 641 to common law definitions. See *id.* Therefore, the Ninth Circuit’s holding in *Chappell* contradicts *Morissette* but does not contradict the plain meaning of a “thing of value.”⁵

Although the statutory text and legislative history support the interpretation of the United States in this case, the simple existence of some statutory ambiguity is not sufficient to warrant application of the rule of lenity. *Muscarello v. United States*, 524 U.S. 125, 138 (1998). Most statutes are ambiguous to some degree; consequently, the “mere possibility of articulating a narrower construction...does not by itself make the rule of lenity applicable.” *Id.* (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993)). The Supreme Court has stated that “the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a ‘grievous ambiguity or uncertainty in the statute,’ such that the Court must simply guess as to what Congress intended.” *Barber v. Thomas*, 130 S. Ct. 2499, 2508-09 (2010) (quoting *Muscarello*, 524 U.S. at 139). In this case, there is no grievous ambiguity or uncertainty.

B. Legislative and Judicial History Supports the United States’ Theory

Assuming, *arguendo*, the statutory text is ambiguous, the relevant legislative history and precedent confirm the United States’ interpretation of § 641 and a “thing of value.”⁶ As described above in Part II.B-C, six Circuit Courts of Appeal have applied a “thing of value” to intangible property. Moreover, four Circuit Courts of Appeal have applied a “thing of value”

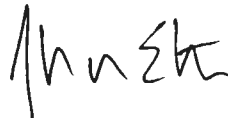
⁵ The Ninth Circuit reinterprets “conversion,” whose definition need not be decided to determine what constitutes a “thing of value.”

⁶ The United States makes this argument based on *Morissette*’s interpretation of the legislative history. The United States has been unable to locate the legislative history. To obtain the legislative history, the United States would have to send an attorney to the Library of Congress. The United States offers to obtain the legislative history if it would please the Court.

specifically to "information," and a fifth Circuit Court of Appeal found merit to the United States' argument presented herein. Furthermore, as described in Part II.C.1, the Ninth Circuit's ruling in *Chappell* contradicts legislative intent of the scope of § 641 as detailed in *Morissette*. See generally *Lambert*, 446 F. Supp. At 893-95 (describing a more flexible approach for interpreting § 641 as appropriate given *Morissette*). In particular, *Chappell* creates the types of "gaps" and "crevices" Congress sought to preclude by enacting § 641. See *Morissette, supra*. Therefore, applying "thing of value" to reach "information" follows legislative intent and judicial precedent and rather released to unauthorized individuals.

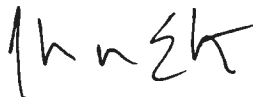
CONCLUSION

The Defense argues that information does not fall within the ambit of § 641. The Defense argument fails because United States Circuit Courts of Appeal have broadly applied "thing of value" to information. § 641 reaches theft and conversion beyond the limitations of common law. Thus, the precedent regarding § 641 holds that information is a "thing of value."



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I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 17 July 2013.



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