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## LEGAL AUTHORITY AND ARGUMENT

### I. ACCUSED'S MISCONDUCT CONTRIBUTES TO AGGRAVATING CIRCUMSTANCES

The United States may present "evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." RCM 1001(b)(4); *see United States v. Zachary*, 61 M.J. 813, 819 (A. Ct. Crim. App. 2005) (stating that aggravating factors serve to increase the permissible punishment for a particular offense). Evidence in aggravation includes, *inter alia*, "significant adverse impact on the mission, discipline, or efficiency of the command" and impact or cost to any entity victimized by the accused's offenses. *See* RCM 1001(b)(4); *see also United States v. Metz*, 34 M.J. 349, 351 (C.M.A.1992) (holding that uncharged conduct was admissible because it was "interwoven" in the *res gestae* of the crime and provided information to determine criminal intent) .

Aggravating evidence that directly relates to the offenses is admissible. *See, e.g., United States v. Martin*, 20 M.J. 227, 232 (C.M.A. 1985) (citing *United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982)). The phrase "directly relating to or resulting from the offenses" imposes a "higher standard" than "mere relevance." *See, e.g., United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990). Evidence that is "the natural and probable [consequence]" of the offense directly relates to the offense. *See United States v. Fisher*, 67 M.J. 617, 620 (A. Ct. Crim. App. 2009) (citing *United States v. Stapp*, 60 M.J. 795, 800 (A. Ct. Crim. App. 2004), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006)). Consequential evidence is not admissible where "an independent, intervening event played the only important part in bringing about the effect." *Id.* (citing *Stapp*, 60 M.J. at 800-01) (emphasis added). Consequential evidence that is closely related in time, type, or often outcome of the crime is admissible, *see United States v. Hardison*, 64 M.J. 279, 281-82 (C.A.A.F. 2007), because it establishes a reasonable linkage between the offense and the aggravating circumstances. *United States v. Witt*, 21 M.J. 637, 641 (A.C.M.R. 1985). A reasonable linkage exists where the offense "contributed" to the aggravating circumstances. *See id.* at 641 (finding neither a "but for" test nor facts sufficient to constitute proximate cause are required to establish a reasonable linkage, thus a reasonable linkage is a lesser standard than a "but for" and proximate cause test).

Aggravating evidence may be direct or circumstantial. *See United States v. Harrod*, 20 M.J. 777, 779 (A.C.M.R. 1985) (citing *United States v. Pooler*, 18 M.J. 832, 833 (A.C.M.R. 1984)). Additionally, aggravating evidence may include the circumstances surrounding that offense or the repercussions of the offense itself, *see United States v. Gogas*, 58 M.J. 96, 98 (C.A.A.F. 2003) (quoting *Vickers*, 13 M.J. at 406) thereby enabling the sentencing authority to understand the gravity of the offense. *See United States v. Stebbins*, 61 M.J. 366, 373 (C.A.A.F. 2005). However, aggravating evidence is admissible only if its probative value outweighs its prejudicial effect. *See, e.g., United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001) (stating that sentencing evidence is subject to the balancing test under M.R.E. 403). The "military judge has wide discretion" in applying this balancing analysis. *See United States v. Yanke*, 23 M.J. 144 (C.M.A. 1987).



## II. EFFECT ON UNITED STATES GOVERNMENT IS PROPER AGGRAVATING EVIDENCE

The accused has been convicted of compromising over 700,000 United States Government documents. The accused compromised documents from multiple United States Government agencies; each of these agencies is an affected entity and a victim for national security purposes under RCM 1001(b)(4) where the effects are directly attributable to the accused's misconduct.

### A. Effects on National Security Are Proper Aggravation Evidence

RCM 1001(b)(4) presents illustrative examples that constitute a non-exhaustive list of potential aggravating evidence. *See* RCM 1001(b)(4) (stating that evidence in aggravation "is not limited to" the listed examples). The Drafters contemplated additional aggravating factors for the determination of punishment. *See* RCM 1004(c)(2)(A)-(C). In particular, the Drafters identified "knowingly creat[ing] a grave risk of substantial damage to the national security of the United States," or "knowingly creat[ing] a grave risk of substantial damage to a . . . function of the United States . . .," RCM 1004(c)(2)(B), or "caus[ing] substantial damage to the national security of the United States . . ." RCM 1004(c)(2)(A)-(C). RCM 1004(c)(2)(A)-(C) presents additional aggravating factors not explicitly listed in the non-exhaustive list of examples set forth in RCM 1001(b)(4). Although capital punishment is not at issue in this case, RCM 1004 serves as an illustrative example of the types of aggravating factors contemplated by the Drafters. Thus, the impact of the accused's misconduct on national security is properly admissible where it is connected to the accused's acts.

Impact may extend beyond the unit because that is but one type of aggravating evidence contemplated under RCM 1001(b)(4). *See United States v. Barber*, 27 M.J. 885 (A.C.M.R. 1989) (considering effect of blackmarketing in relation to the objectives of the Agreement on the Status of United States Armed Forces in Korea (SOFA)). In *Barber*, the Army Court of Military Review recognized that the "Army sends military forces into the sovereign nation of the Republic of Korea for mutually beneficial reasons of national security," and found a "reasonable linkage" between the accused's misconduct and the broader effects of blackmarketing on the victim entity, which was the command. *See id* at 887. Here, the accused has been convicted of compromising hundreds of thousands of United States Government documents; the voluminous compromises had widespread effects, to include the formation of task forces and working groups, and causation of actual and potential harm to national security. Because the accused's misconduct caused these effects, they are directly related and admissible under RCM 1001(b)(4). Additionally, the impact of the accused's conduct extends beyond national security, and these impacts are also proper aggravating evidence under RCM 1001(b)(4). *See, e.g.*, proffered testimony of Ambassador Kozak, *see* AE DV.

### B. Potential Harm Is Also Proper Aggravation Evidence

The accused's creation of risk and potential harm is proper aggravating evidence. *See United States v. Jones*, 44 M.J. 103, 104-105 (holding that subjecting the victim to risk of potential harm was admissible under RCM 1001(b)(4)); *United States v. Bauer*, 1999 WL



293907 at \*2 (A.F. Ct. Crim. App. 1999) (applying *Jones* to find no abuse of discretion by the military judge in instructing the members that they could consider potential damage to national security as an aggravating factor); *see also* RCM 1004(c)(2)(A)-(C). In particular, the risk to national security created by an intelligence analyst's misconduct aids understanding the circumstances surrounding the misconduct. *See Bauer* at \*2; *Jones*, 44 M.J. at 104 (upholding instruction for members to consider potential threat to national security where the accused, an intelligence analyst, was convicted of fraudulent enlistment, making a false official statement, and use of cocaine) (citing *United States v. Irwin*, 42 M.J. 479, 483 (C.A.A.F. 1995)). Furthermore, evidence of the scope of the criminal dissemination of unlawful information on the Internet constitutes evidence of potential harm that is proper aggravating evidence. *See United States v. Delgado*, 2013 WL 3238073 at \*3 (N-M. Ct. Crim. App. 2013) (concluding that distributing unlawful information to "countless unknown recipients" exacerbated "the grave nature of the crimes"); *cf. United States v. Pooler*, 18 M.J. 832, 833 (A.C.M.R. 1984) ("Evidence of the offender's attitude toward similar offenses, past or future, is reliable circumstantial evidence, and often the only available evidence, on this issue."). In *Delgado*, the widespread dissemination of the unlawful information onto the Internet created the potential for repetition of the crime, thus increasing the harm to the victims. *See Delgado, supra*.

In the instant case, the accused's misconduct created risk as opined by experts for the United States. *See, e.g.*, Testimony of BG (R) Carr; Testimony of Mr. Kirchhofer; Testimony of Ms. Dibble; Testimony of Mr. Feeley. This risk falls under RCM 1001(b)(4)'s permissive "any aggravating evidence directly relating to or resulting from the offenses of which the accused has been found guilty." RCM 1001(b)(4). The broad scope of the accused's misconduct effected wide-ranging consequences, which include risk to the United States and its national security. *See* Testimony of BG (R) Carr; Testimony of Mr. Kirchhofer; Testimony of Ms. Dibble; Testimony of Mr. Feeley.

### III. NON-CRIMINAL REVIEWS ARE PROPER AGGRAVATING EVIDENCE

Evidence pertaining to the "administrative burden of the court-martial process' is ordinarily not admissible under RCM 1001(b)(4) . . . ." *United States v. Fisher*, 67 M.J. 617, 621 (A. Ct. Crim. App. 2009). "The processing of a case, at least up until referral, is solely within the government's control." *Id.* at 621 n.3. The United States is not offering evidence of the expenses and actions associated with United States Army CID, FBI, and Department of State Diplomatic Security Services Criminal Investigations, or costs associated with the accused's prosecution.

In this case, the national security task forces and working groups conducted by the United States Government to assess the consequences of the accused's misconduct fall outside this prohibition because these reviews were not conducted to determine criminal liability. *See United States v. Lonetree*, 35 M.J. 396, 403 (C.M.A. 1992) (holding that a damage assessment was not a criminal investigation for the purpose of determining whether the accused was entitled to an Article 31(b) warning because it was not coordinated with the criminal investigation); *see also* AE LXXII (differentiating between a damage assessment and criminal investigation); BATES Numbers 00504636-00504637 (stating that the Information Review Task force will review classified documents posted to WikiLeaks and that the review is "separate from, and unrelated



to, any criminal investigations of the leaked information”).<sup>1</sup> These task forces and working groups were established to mitigate immediately the harm to individuals and national security caused by the accused. Moreover, costs incurred in the formation and execution of a review process resulting from an accused’s misconduct are proper aggravating evidence. *See United States v. Lawson*, 33 M.J. 946, 959-60 (N.M.C.M.R. 1991) (holding proper admissibility evidence of search costs resulting from dereliction of duty). Indeed, the Defense concedes that costs associated with determining and repairing damage directly attributable to an accused’s misconduct are proper aggravation evidence. *See* Defense Motion ¶ 16 (“The costs of repainting the portion of the building vandalized would certainly qualify as proper aggravation under R.C.M. 1001(b)(4).”).

Here, the financial costs, lost opportunity costs, and resources expended to determine the extent and effects of the intentional release of classified information are proper aggravating evidence because they were not conducted with an eye toward prosecution. *See* Testimony of BG (R) Carr. The purpose of the reviews conducted by United States Government agencies was to determine what information had been compromised and not to collect evidence for a future prosecution. Thus, the reviews were not criminal investigations. *See* Testimony of BG (R) Carr; Testimony of Mr. Kirchhofer. The criminal investigations stemmed directly from the accused’s misconduct and focused entirely on determining the criminality of the accused’s misconduct. *See* Testimony of SA Mander; Testimony of SA Graham; Testimony of SA Smith; Testimony of SA Shaver. Therefore, the resources and their circumstances constitute admissible aggravating evidence under RCM 1001(b)(4).

Furthermore, the reviews are distinct from corrective action taken by the United States Government such as implementing a prohibition on burning a CD because that prohibition would prevent future misconduct and is therefore not related to the accused’s misconduct. The Defense asserts that the United States will present evidence akin to “a never-ending domino effect.” Defense Motion ¶ 9. The Defense further avers that the United States will offer this type of evidence:

However, if the owner of the building decided to repaint the whole building and hired an exterior designer to provide visual examples of how the building might look depending upon the color chosen, this expense would not be proper aggravation under R.C.M. 1001(b)(4). Similarly, if the building owner decided to expend significant resources in researching anti-graffiti paint options to avoid a future vandalism incident, such an expense would also not be proper aggravation under R.C.M. 1001(b)(4).

Defense Motion ¶ 16. In discovery litigation, the United States maintained that it would not present evidence of subsequent remedial measures to prevent future criminal acts similar to those of which the accused has been convicted because it is not proper aggravation evidence. Such acts are deliberate steps taken by the United States to prevent future acts, and thus are not proper

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<sup>1</sup> BATES Numbers 00504636-00504637 constitute Appendix A to the Information Review Task Force Damage Assessment, of which the Court took judicial notice. *See* AE DLXXXVIII. Appendix A is a memorandum signed by Secretary of Defense Robert Gates.



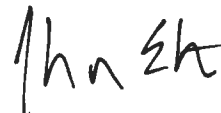
aggravation evidence in this matter. The United States made this determination that this type of information is not proper in response to litigation concerning the discovery of the Department of State "Mitigation Team" information. See AE CCXXII (noting that the "Mitigation Team" was established "to address the policy, legal, security, counterintelligence, and information assurance issues presented by the release of these documents").

#### IV. MRE 403 APPLICATION

Assuming, *arguendo*, the Court determines that the harm mitigation steps the United States Government took to prevent immediate harm to individuals, entities, and national security, are not proper aggravation evidence, the Defense should similarly be precluded from eliciting evidence regarding any absence of harm. If the Court determines that the United States Government's acts to mitigate harm are an independent and intervening event that played the only important part in bringing about the effect, then the Defense should be precluded from eliciting evidence of the effects of those acts—namely, the absence of harm. To present evidence of the absence of harm while simultaneously precluding evidence of steps to minimize harm would be unfairly prejudicial and misleading for the fact finder. Thus, the Defense should be precluded under Military Rule of Evidence 403 from eliciting such testimony and making related arguments.

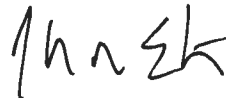
#### CONCLUSION

The United States respectfully requests that the Court deny the Defense Motion for Appropriate Relief Under RCM 1001(b)(4) because the accused's misconduct directly contributed to the matters described in the testimony of the United States' sentencing witnesses.



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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 1 August 2013.



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