IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

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| **UNITED STATES** | ) | |
| | ) | **RULING:** |
| **v.** | ) | **PROPOSED PLEAS** |
| | ) | **AND MAXIMUM** |
| **MANNING, Bradley E., PFC** | ) | **PUNISHMENTS** |
| **U.S. Army, (b) (6) [redacted]** | ) | |
| **Headquarters and Headquarters Company, U.S.** | ) | |
| **Army Garrison, Joint Base Myer-Henderson Hall,** | ) | DATED: 28 November 2012 |
| **Fort Myer, VA 22211** | ) | |

On 26 October 2012 the Court ordered the parties to address the following issues for each specification involving a propose plea by the accused.

1. Is the proffered plea a lesser included offense of the charged offense or does it contain amendments to the specification requiring Convening Authority approval to be a referred offense? *U.S. v. Morton,* 69 M.J. 12 (C.A.A.F. 2010).

2. Assuming the Court accepts the proffered plea as a lesser included offense of the Charged offense or the Convening Authority approves amendment of the specification, what is the maximum punishment for each specification in accordance with the accused's proffered plea IAW RCM 1003(c)(1)(B) and *United States v. Beaty,* 70 M.J. 39 (C.A.A.F. 2011).

The Court has considered the filings of the parties. Neither side requested oral argument. The Court asked for and received oral argument regarding specification 11 of Charge II. The Court finds and rules as follows:

1. The accused's proposed pleas to specifications 2, 3, 5, 7, 9, 10 and 15 of Charge II under clauses 1 and 2 of Article 134 are lesser included offenses of the offenses charged under 18 U.S.C. Section 793(e) and Article 134. The Court will accept the accused's pleas to these lesser included offenses if provident. The Article 134 lesser included offenses are not included in or closely analogous to an offense listed in the MCM. The conduct and mens rea of the lesser included offenses are not essentially the same as a violation of United States Code Section 793(e) because the accused is pleading to a residuum of elements for that offense. AR 380-5 dated 29 September 2000 (Information Security Program) establishes a custom of the service penalizing disclosures of classified and sensitive information. Disclosures charged under Article 92 would carry a maximum punishment of reduction to E-1, total forfeiture of all pay and allowances, confinement for 2 years, and a dishonorable discharge. This will be the maximum penalty for each of the above lesser included offense specifications proposed by the accused with a total of 14 years confinement for all 7 specifications.

2. The remainder of the accused's proposed pleas are irregular pleas IAW RCM 910(b). The proposed revised specifications are not lesser included offenses of the charged offenses. They are different offenses. *United States v. Diaz*, 69 M.J. 127 (C.A.A.F. 2010) (an accused is free to proffer an alternative plea, but he is not entitled to design his own offense). Without convening authority approval constituting a constructive referral, the remaining proposed pleas by exceptions and substitutions are charges not referred to this Court. *U.S. v. Morton,* 69 M.J. 12, fn 7 (C.A.A.F. 2010). The Court will not accept the pleas. The pleas are not variances. A variance exists when evidence at trial establishes the commission



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of a criminal offense by the accused but the proof does not conform strictly with the pleadings. *United States v. Allen,* 50 M.J. 84, 86 (C.A.A.F. 1999).

a. The proposed plea to specification 1 of Charge II is not a lesser included offense of the offense charged in that it adds an element of "knowing that WikiLeaks might publish the information on the internet". "Knowing" is not a subset of "wrongfully and wantonly". This added element and the substitution of "wrongfully gave information belonging to the United States Government to Wikileaks" changes the nature of the conduct the Government charged as prejudicial to good order and discipline and service discrediting.

b. The proposed pleas to specifications 4, 6, 8, and 12 of Charge II are not lesser included offenses of the offenses charged in the respective specifications. The essence of the offenses as charged under 18 U.S. C. Section 641 and Article 134 involve a taking, purloining, or knowing conversion of records belonging to the United States. The substituted words "removal for an unauthorized purpose" add an element and substantially change the nature of the conduct the Government has charged is prejudicial to good order and discipline and service discrediting. In addition, the substituted words are not inherently criminal and contain no words of criminality. RCM 307(c)(3) Discussion.

c. The proposed pleas to specifications 13 and 14 of Charge II are not lesser included offenses of the offenses charged in those specifications. The essence of the charged offenses under 18 U.S.C. Section 1030(a)(1) is the use of a computer to gain unauthorized access to information deemed by the Government to require protection against unauthorized disclosure for reasons of national defense or foreign relations. The proposed substitutions add an element of "unauthorized possession" and substantially changes the nature of the conduct the Government has charged is prejudicial to good order and discipline and service discrediting.

d. The proposed plea to specification 11 of Charge II is not a lesser included offense of the offense charged in that specification. The Government has proffered that there were 2 communications of the video at issue, one between on or about 1 November 2009 and 8 January 2010 and a second between on or about 10-12 April 2010. In specification 11 of Charge II, the Government charged the first communication. The substituted words are a plea to the second communication which has not been charged or referred to this Court for trial.

3. In addition to the pleas to the lesser included offense in specifications 2, 3, 5, 7, 9, 10 and 15 that the Court has agreed to accept, the accused is also pleading guilty to specification 5 of Charge III without change. Thus the maximum punishment based solely on the accused's proposed pleas that are accepted by the Court is reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for 16 years and a dishonorable discharge.

So **ORDERED** this 28th day of November 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit