UNITED STATES OF AMERICA	)	
	)	**DEFENSE RESPONSE TO**
v.	)	**GOVERNMENT MOTION IN LIMINE**
	)	**TO EXCLUDE OVERCLASSIFICATION**
Manning, Bradley E.	)	
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**28 December 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

1. The Defense in the above case respectfully requests that this Court deny the Government's motion *in limine* to exclude evidence of overclassification.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The burden of proof on any factual issue, the resolution of which is necessary to decide a motion, shall be by preponderance of the evidence. R.C.M. 905(c)(1). The burden of persuasion on any factual issue, the resolution of which is necessary to decide a motion, shall be on the moving party. R.C.M. 905(c)(2). The prosecution has the burden of persuasion as the moving party.

FACTS

3. PFC Manning is charged with one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of violations of 18 U.S.C. § 793(e), five specifications of violations of 18 U.S.C. § 641, two specifications of violations of 18 U.S.C. § 1030(a)(1), and five specifications of violating a lawful general regulation, in violation of Articles 104, 134, and 92, Uniform Code of Military Justice (UCMJ). *See* Charge Sheet.

4. On 16 November 2012, the Defense submitted a request for judicial notice of H.R. 553, the "Reducing Over-Classification Act," as well as transcripts of House Committee meetings on the Espionage Act (16 December 2010) and Over-Classification (22 March, 26 April, and 28 June 2007). *See* Appellate Exhibit (AE) 390.

5. On 23 November 2012, the Defense filed a Motion to Compel Production of Witnesses for Merits and Sentencing. *See* AE 408. In it, the Defense proffers that Mr. Cassius Hall will testify that the much of the charged information could not cause damage to the United States and was not closely held; Mr. Charles Ganiel will testify that the vast majority of the information within the charged diplomatic cables was already in the public realm prior to PFC Manning's alleged misconduct; and Ambassador Peter Galbraith will testify that many Department of State cables

APPELLATE EXHIBIT 456
PAGE REFERENCED:
PAGE

are in his experience overclassified and that a secret classification does not mean the information is genuinely secret. *Id.*

6. On 26 November 2012, the Court published Draft Instructions for all the Charged Offenses. *See* AE 410.

WITNESSES/EVIDENCE

7. The Defense requests the Court consider the charge sheet and the referenced Appellate Exhibits when deciding this motion.

LEGAL AUTHORITY AND ARGUMENT

8. Relevant evidence is defined as "evidence having 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." M.R.E. 401. The military judge has the initial responsibility to determine whether evidence is relevant under M.R.E. 401. *United States v. White*, 69 M.J. 236, 239 (CAAF 2010). Relevant evidence is admissible, except as otherwise provided by the Constitution, the Code, the Rules, the Manual, or any Act of Congress applicable to members of the armed forces. M.R.E. 402. Irrelevant evidence is not admissible. *See id.*; *United States v. Greaves*, 40 M.J. 432, 437 (CMA 1994).

9. Evidence related to overclassification is relevant because a fact at issue is less likely than without the evidence. *See* M.R.E. 401. Specifically, overclassification relates to the *men rea* requirement of the specifications incorporating 10 U.S.C. § 793(e). Overclassification also impacts the issue of whether the compromised information "relates to the national defense" which requires both that the information be "closely held" by the United States government and that the information could be "potentially damaging to the United States or might be useful to an enemy of the United States. *See* AE 410.

10. A conviction under section 793(e) requires the Government to establish PFC Manning "had reason to believe the classified records, classified memorandum, videos, and files described for each specification…could be used to the injury of the United States or to the advantage of any foreign nation." *See* AE 410 at 9. The Court has ruled that "[i]n considering whether the accused had reason to believe that the information could be used to the injury of the United States or to the advantage of a foreign country, you may consider the nature of the information involved." *Id.* at 10. The nature of the information at issue here is classified information. Evidence of overclassification relates to the nature of the offense, and, thus, a fact at issue.[1]

11. In a related vein, to sustain a conviction under section 793(e), the Government must establish that the information related to the national defense. In the Court's Draft Instructions, the Court indicated that this term encompassed both an inquiry into whether the material is

[1] The same argument would, of course, also apply to the 18 U.S.C. 1030 offenses which incorporate the 18 U.S.C. 793 language.

closely held by the United States government and whether the disclosure of the information "would be potentially damaging to the United States or might be useful to an enemy of the United States." *Id.* The Court also indicated that the fact-finder may consider "whether the information was classified or not in determining whether the information relates to the national defense." *Id.* Evidence of overclassification bears on whether a particular classified document "relates to the national defense" in the sense of being potentially damaging.

12. The Government's position throughout this litigation has been that the *very fact* that a document is classified provides the most compelling evidence that the document could cause injury to the United States or be used to the advantage of a foreign nation. This latest motion is no different. The Government indicates repeatedly that the fact of classification is the main factor that a court should look to in deciding whether the information could be used to the injury of the United States:

> That a document is classified does tend to support the contention that it contains information that could be used to the injury of the United States or to the advantage of any foreign nation.
>
> ...
>
> Factors, *including classification of the documents* and expert testimony of the potential damage from disclosure of the documents to unauthorized persons, determine whether the information could be used to the injury of the United States. See Gorin v. United States, 312 U.S. 19, 29 (1941); United States v. Diaz, 69 M.J. 127, 133 (CAAF 2010). *Proof of classification constitutes evidence that the compromised information could be used to the injury of the United States.* See Diaz, 69 M.J. at 133 ("Surely classification may demonstrate that an accused has reason to believe that the information relates to national defense and could cause harm to the United States."). Documents are classified if their unauthorized disclosure reasonably could be expected to result in damage to the national security. See Exec. Order No. 13526 § 1.1(4); Gorin, 312 U.S. at 28 (determining that the term "national defense" as used in a predecessor to § 793 is a broad concept); United States v. Morison, 844 F.2d 1057, 1071, 1074 (4th Cir. 1988) (noting that national defense information is information that is potentially damaging to the United States).

See Prosecution Motion in Limine to Exclude Overclassification at p. 2, 5.

13. In its most recent motion, the Government also emphasizes for the umpteenth time that courts should defer to classification decisions in determining whether information could cause harm to the United States:

> Once an OCA has made a classification determination, it is presumed proper and it is not the province of the court to question these determinations. See United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984) ("[T]he government . . . may determine what information is classified. A defendant cannot challenge this

> classification. A court cannot question it."). vacated and remanded on other grounds, 780 F.2d 1102 (4th Cir. 1985); see also United States v. Rosen, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007) ("Of course, classification decisions are for the Executive Branch . . . ."). The decision of the owner of the information must be given great deference. Sims, 471 U.S. at 176 ("The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.").

Id. at p. 4. This argument is largely a repeat of the argument the Government made in its Motion to Preclude Actual Harm of Damage from the Pretrial Motions Practice and the Merits Portion of the Trial where it argued:

> Courts largely agree that classification determinations, as products of the Executive Branch, should be presumed proper and not subject to great judicial scrutiny. See Haig v. Agee, 453 U.S. 280, 291 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); see also Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (such matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"). The decision of owner of the information must be given great deference. See Sims, 471 U.S. at 176 ("[t]he decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake"). The Fourth Circuit provides such great deference to the classification determination that courts largely do not question the determination. See United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984) ("[T]he government . . . may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it."), vacated and remanded on other grounds, 780 F.2d 1102 (4th Cir. 1985); see also United States v. Rosen, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007) ("Of course, classification decisions are for the Executive Branch . . . .").

AE 221 at p. 4

14. In the Government's Motion to Preclude Actual Harm of Damage from the Pretrial Motions Practice and the Merits Portion of the Trial, referenced above, the Government sought to preclude the Defense from raising or soliciting any evidence related to actual harm and the absence thereof from the merits portion of the trial. As part of this motion, the Court asked the Government whether it intended to introduce evidence of *actual harm* to prove *potential harm*. The Government emphatically said "no" – it would not be introducing evidence of actual damage to prove that the documents could cause damage under section 18 U.S.C. 793. *See id.* at p. 5 ("The law does not require the United States to prove that actual harm or damage occurred in its case-in-chief, in light of the charges facing the accused. Actual harm or damage, including the absence thereof, is not an element, or relevant to any element, of any offense for which the accused is charged. The extent of actual harm or damage that occurred bears absolutely no relationship to whether the accused, in fact, committed the offenses.").

15. The Government has made no secret about its plan for proving the *mens rea* requirement of section 793. The Government will establish that the documents were properly classified through OCA testimony, and then will rely on the presumption that it believes arises from the fact of classification to establish that the documents and information released could cause damage to the United States. The Government, no doubt, is permitted to do this. However, the Government would have the Court defer to the classification decision as *de facto* establishing that the information could cause damage without acknowledging the elephant in the room: that there is a major problem with overclassification in this country. The fact of overclassification significantly *weakens* any presumption which may otherwise arise from the fact of classification itself. That is, the overclassification of documents means "classified" is no longer an indisputable indicator of potential harm to the United States upon release of such information.

16. In a system where only truly sensitive documents are classified, then perhaps it is fair to accord a presumption of potential damage arising from disclosure to the fact of classification itself. In a system which the President of the United States has acknowledged that many non-sensitive documents are classified, there is much less reason to accord any presumption of potential damage arising from disclosure to the fact of classification itself. In other words, the fact that a document is classified, in a system that overclassifies too many things, significantly undermines the presumption which the Government would have this Court draw: that the fact of classification itself automatically equals "could cause damage." Accordingly, the Defense should be permitted to put forth evidence that negates or weakens the presumption which the Government argues should arise by virtue of the fact of classification.

17. If the Defense is not permitted to do this, the Court will be operating in a factual and legal vacuum. No doubt this is what the Government wants and intends. However, it is not fair for the Government to be able to argue that the fact of classification should be highly probative, if not determinative, in establishing the *mens rea* requirement of section 793(e) or that the information relates to the national defense without the Defense being able to paint a fulsome picture of the context in which the classification decision was made. When provided the context, the Court can then decide – with the benefit of full information – what weight to accord to the fact of classification itself in assessing whether a document's disclosure could cause damage. Again, the Government's intention to draw inferences from a document's classification makes not only that document's classification, but also the classification process as a whole, relevant. The Defense should not be precluded from exploring fully the issue of classification – in either the merits or in sentencing. Part of that exploration rightfully includes the facial reliability of a classification marking as signifying that a document's disclosure could cause damage to the United States.

18. The Government's argument with respect to M.R.E. 403 warrants short shrift. PFC Manning has already given notice of his intent to elect trial by military judge alone. It is highly doubtful that this Court will suffer from "the danger of issue confusion" if the Court takes judicial notice of the overclassification. *See* Prosecution Motion in Limine to Exclude Overclassification, p. 7. Moreover, the Government's contention that the Court taking judicial notice of overclassification would amount to an "undue waste of time" is incredulous given that the Government plans to call approximately 150 witnesses. *Id.*

19. Finally, the Government appears to have wholly misunderstood the Defense's position on overclassification. Accordingly, its arguments are directed at shooting down issues that the Defense has not even raised. For instance, the Government does a fine job outlining the authority for original classification and the source of that authority. However, the fact that PFC Manning is not an OCA is of no consequence for the purposes of this motion. The Defense has never taken the position that PFC Manning had the authority to declassify classified information. The significance of the overclassification issue relates to what weight the Court should accord the fact of classification itself in determining whether PFC Manning had reason to believe that the documents could cause damage to the United States and whether the documents at issue relate to the national defense.

20. The Government also contends "most of the evidence of overclassification...came into existence after the accused's misconduct occurred." Prosecution Motion in Limine to Exclude Overclassification, p. 3. This is simply not the case. Each piece of evidence was either in the public domain prior to the alleged misconduct or was based on information that was in the public domain prior to the alleged misconduct.

1. HR 553 was introduced on 15 January 2009 and passed the House on 3 February 2009. Although not signed into law until October 2010, the bill was very much in the public's consciousness prior to the charged misconduct in this case. *See* Attachment A to AE 390.

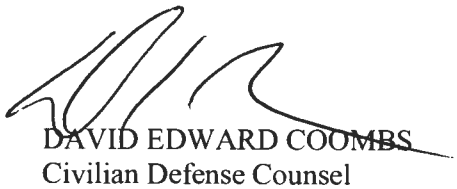
2. While Mr. Blanton did not testify until after the charged misconduct (16 December 2010), his testimony is quite obviously based on information that was in the public domain prior to the leaks that gave rise to this case. Specifically, Mr. Blanton cites findings from the 9/11 Commission, which finished its work prior to the charged misconduct. *See* Attachment C to AE 390.

3. The House Committee meetings on Over-Classification occurred in 2007, prior to PFC Manning even joining the Army. As such, the testimony from that hearing obviously informed the public debate on this issue. *See* Attachment D to AE 390.

Accordingly, each of the documents for which the Defense has requested judicial notice either pre-dates the alleged misconduct or is based on information that pre-dates the alleged misconduct in this case. Regardless of the precise timing of these public debates, the Government's position once again misses the key point: the overclassification problem informs the Court's determination of what weight to accord to the fact of classification itself in determining whether the documents could be used to the injury of the United States or to the advantage of a foreign nation. As such, the issue of overclassification is relevant and is a proper subject matter for judicial notice.

CONCLUSION

21. For the foregoing reasons the Defense respectfully requests this Court deny the Government's motion *in limine* to exclude evidence of overclassification.



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