IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DRAFT**
	)	**INSTRUCTIONS:**
v.	)	
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6) [redacted]	)	
Headquarters and Headquarters Company,	)	
U.S. Army Garrison, Joint Base Myer-	)	DATED: 26 November 2012
Henderson Hall, Fort Myer, VA 22211		

The Government and Defense have proposed instructions for the elements and definitions for the charged offenses. The Court has considered the proposals of both parties and has arrived at the following draft instructions. Some of the proposed instructions are standard instructions from the Department of the Army Pamphlet, 27-9, Military Judge's Benchbook with portions of the instructions in brackets. Bracketed portions will be instructed upon if raised by the evidence. These draft instructions may be modified by the Court as necessary from the presentation of the evidence. Affirmative defense, evidentiary, and procedural instructions will be drafted as appropriate during the trial.

CHARGE I: Aiding the Enemy

In the specification of Charge I, the accused is charged with the offense of Aiding the Enemy by Giving Intelligence to the Enemy, in violation of Article 104, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

(1) That at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, the accused, without proper authority, knowingly gave intelligence information to certain persons, namely: al Qaeda, al Qaeda in the Arabian Peninsula, and an entity specified in Bates Number 00410660 through 00410664 (classified entity);

(2) That the accused did so by indirect means, to wit: transmitting certain intelligence, specified in a separate classified document to the enemy through the WikiLeaks website;

(3) That al Qaeda, al Qaeda in the Arabian Peninsula, and Bates Number 00410660 through 00410664 (classified entity) was an enemy; and

(4) That this intelligence information was true, at least in part.

"Intelligence" means any helpful information, given to and received by the enemy, which is true, at least in part.

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"Enemy" includes (not only) organized opposing forces in time of war, (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

"Indirect means" means that the accused knowingly gave the intelligence to the enemy through a 3rd party, an intermediary, or in some other indirect way.

"Knowingly" requires actual knowledge by the accused that by giving the intelligence to the 3rd party or intermediary or in some other indirect way, that he was actually giving intelligence to the enemy through this indirect means. This offense requires that the accused had a general evil intent in that the accused had to know he was dealing, directly or indirectly, with an enemy of the United States. "Knowingly" means to act voluntarily or deliberately. A person cannot violate Article 104 by committing an act inadvertently, accidentally, or negligently that has the effect of aiding the enemy.

The Court declines to give the instructions requested by the Defense regarding actual knowledge and indirect means because they add a specific intent element to Article 104 (Giving Intelligence to the Enemy) that is not required by the statute. The Court's "general evil intent" and knowledge that the accused was dealing with the enemy language is taken from *U.S. v. Olson,* 20 C.M.R. 461 (C.M.A. 1955) and *U.S. v. Batchelor,* 22 C.M.R 44 (C.M.A. 1956).

The Court reserves its decision on whether to instruct on mistake of fact as requested by the Defense until the close of the evidence to determine whether a mistake of fact defense is raised by the evidence.

CHARGE II, Specification I: Wrongfully and Wantonly Causing Publication of Intelligence Belonging to the United States on the Internet Knowing the Intelligence is Accessible to the Enemy to the Prejudice of Good Order and Discipline in the Armed Forces or of a Nature to Bring Discredit Upon the Armed Forces

In specification 1 of Charge II, the accused is charged with the offense of Wrongfully and Wantonly Causing Publication of Intelligence Belonging to the United States on the Internet Knowing the Intelligence is Accessible to the Enemy to the Prejudice of Good Order and Discipline and Being of a Nature to Bring Discredit Upon the Armed Forces, in violation of Article 134, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

(1) That at or near Contingency Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, the accused wrongfully and wantonly caused to be published on the internet, intelligence belonging to the United States Government, having knowledge that Intelligence published on the internet is accessible to the enemy; and;

(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The definitions of "intelligence" and "enemy" I read for you for the specification of Charge I also applies to this offense. Would any member like me to repeat those definitions to you?

"Wrongful" means without legal justification or excuse.

"Wanton" includes "recklessness" but may connote willfulness, or a disregard of probable consequences and thus describes a more aggravated offense. "Reckless" conduct is conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm. The ultimate question is whether under all the circumstances, the accused's conduct was of that heedless nature that made it actually or imminently dangerous to others.

"Knowledge" requires that accused acted with actually knowledge that intelligence published on the internet was accessible to the enemy. You may not find the accused guilty of this offense if you find that the accused should have known, but did not actually know this fact. Knowledge, like any other fact, may be proved by circumstantial evidence, including the accused's training, experience, and military occupational specialty.

"Caused to be published" means the action of the accused was a proximate cause of the publication even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role, meaning an important role, in bringing about the publication. An act is not a proximate cause if some other unforeseeable, independent, intervening event, which did not involve the accused's conduct, was the only cause that played any important part in bringing about the publication.

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

With respect to "prejudice to good order and discipline," the law recognizes that almost any irregular or improper act on the part of a service member could be regarded as prejudicial in some indirect or remote sense; however, only those acts in which the prejudice is reasonably direct and palpable is punishable under this Article.

With respect to "service discrediting," the law recognizes that almost any irregular or improper act on the part of a service member could be regarded as service discrediting in some indirect or remote sense; however, only those acts which would have a tendency to bring the service into disrepute or which tend to lower it in public esteem are punishable under this Article.

Under some circumstances, the accused's conduct may not be prejudicial to good order and discipline but, nonetheless, may be service discrediting, as I have explained those terms to you. Likewise, depending on the circumstances, the accused's conduct can be prejudicial to good order and discipline but not be service discrediting.

Findings:

The Court finds that a definition of "caused to be published" will be helpful to the members. The "caused to be published instruction" stated above is taken from the proximate cause instruction currently in the Military Judge's Benchbook at 5-19. The proposed Defense instruction adds elements to the offense charged.

The Court tailored the definition of knowledge proposed by the Defense. The definition requires the fact finder to find beyond a reasonable doubt that the accused act with actual knowledge and not constructive knowledge.

Clauses 1 and 2 of Article 134 are alternate theories of proving that offense. The members do not have to find both that the conduct was prejudicial to good order and discipline and was service discrediting. So long as the fact finder finds at least one theory beyond a reasonable doubt, the fact-finder can find the accused guilty. The Court will instruct accordingly. If a findings worksheet is necessary, the parties may request the Court to tailor the findings worksheet such that the fact finder be given the option to except Clause 1 or Clause 2 from the specification.

CHARGE II, Specifications 4, 6, 8, 12, and 16: Stealing, Purloining, or Knowingly Converting Records Belonging to the United States of a Value in Excess of $1,000.00.

In specifications 4, 6, 8, 12, and 16 of Charge II, the accused is charged with the offense of Stealing, Purloining, or Knowingly Converting Records Belonging to the United States, of a Value in Excess of $1,000.00, in violation of Title 18 United States Code, Section 641 and Article 134, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt that:

(1) A or near Contingency Operating Station Hammer, Iraq,

SPECIFICATION 4: between on or about 31 December 2009 and on or about 5 January 2010; the accused did steal, purloin, or knowingly convert records to his own use or someone else's use, to wit: the Combined Information Data Network Exchange Iraq database containing more than 380,000 records;

SPECIFICATION 6: between on or about 31 December 2009 and on or about 8 January 2010; the accused did steal, purloin, or knowingly convert records to his own use or someone else's use, to wit: the Combined Information Network Exchange Afghanistan database containing more than 90,000 records;

SPECIFICATION 8: on or about 8 March 2010; the accused did steal, purloin, or knowingly convert records to his own use or someone else's use, to wit: a United States Southern Command database;

SPECIFICATION 12: between on or about 28 March 2010 and on or about 27 May 2010; the accused did steal, purloin, or knowingly convert records to his own use or someone else's use, to

wit: the Department of State Net-Centric Diplomacy database containing more than 250,000 records;

SPECIFICATION 16: between on or about 11 May 2010 and on or about 27 May 2010; the accused did steal, purloin, or knowingly convert records to his own use or someone else's use, to wit: the United States Forces – Iraq Microsoft Outlook/SharePoint Exchange Server global address list;

(Elements Common to all specifications)

(2) the records belonged to the United States or a department or agency, thereof;

(3) the accused acted knowingly and willfully and with the intent to deprive the government of the use and benefit of the records; and

(4) the records were of a value greater than $1,000;

(5) at the time 18 U.S.C. Section 641 was in existence on the dates alleged in the specification;

(6) under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The same definitions for prejudice to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces that I read for you for specification 1 of Charge II also apply to this offense.

To "steal" means to wrongfully take money or property belonging to the United States government with the intent to deprive the owner of the use and benefit temporarily or permanently.

"Wrongful" means without legal justification or excuse.

To "purloin" is to steal with the element of stealth, that is, to take by stealth the property of the United States government with intent to deprive the owner of the use and benefit of the property temporarily or permanently.

A "taking" doesn't have to be any particular type of movement or carrying away. Any appreciable and intentional change in the property's location is a taking, even if the property isn't removed from the owner's premises. The accused did not have to know the United States government owned the property at the time of the taking.

A "conversion" may be consummated without any intent to permanently deprive the United States of the use and benefit of the property and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include the misuse or abuse of

property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Not all misuse of government property is a conversion. The misuse must seriously and substantially interfere with the United States government's property rights.

"Value" means the greater of (1) the face, par, or market value, or (2) the price, whether wholesale or retail. A "thing of value" can be tangible or intangible property. Government information, although intangible is a species of property and a thing of value.

The market value of stolen goods may be determined by reference to a price that is commanded in the market place whether that market place is legal or illegal. In other words, market value is measured by the price a willing buyer will pay a willing seller. (The illegal market place is also known as a "thieves market".)"Cost price" means the cost of producing or creating the specific property allegedly stolen, purloined, or knowingly converted.

An act is done "willfully" if it is done voluntarily and intentionally with the specific intent to do something the law forbids, that is, with a bad purpose to disobey or disregard the law.

An act is done "knowingly" if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

I have taken judicial notice that Title 18, United States Code Section 641 was in existence on the dates alleged in specifications 4, 6, 8, 12, and 16 of Charge II.

LESSER INCLUDED OFFENSE: Stealing, Purloining, or Knowingly Converting Records Belonging to the United States, of a Value of $1,000.00 or less, in violation of Title 18 United States Code, Section 641 and Article 134, UCMJ.

The court is further advised that the offense of Stealing, Purloining, or Knowingly Converting Records Belonging to the United States, of a Value of $1000.00 or less is a lesser included offense of the offense set forth in specifications 4, 6, 8, 12, and 16 of Charge II. When you vote, if you find the accused not guilty of the offense charged, that is Stealing, Purloining, or Knowingly Converting Records Belonging to the United States, of a Value in Excess of $1000.00, then you should consider the lesser included offense of Stealing, Purloining, or Knowingly Converting Records Belonging to the United States, of a Value of $1000.00 or less, also in violation of Title 18 U.S. Code Section 641 and Article 134, UCMJ. In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond reasonable doubt all of the elements as set forth in specifications 4, 5, 8, 12, and 16 except the value element. The value element of the lesser included offense requires that the Government prove the property in each specification was of a value of $1000.00 or less.

The offense of Stealing, Purloining, or Knowingly Converting Records Belonging to the United States, of a Value of $1000.00 or less is a lesser included offense of the offense of Stealing, Purloining, or Knowingly Converting Records Belonging to the United States, of a Value in Excess of $1000.00, as set forth in Specifications 4, 6, 8, 12, and 16 of Charge II. If you find the accused not guilty of the charged offense in specifications 4, 6, 8, 12, and 16 of Charge II, you should then consider the lesser included offense of Stealing, Purloining, or Knowingly

Converting Records Belonging to the United States, of a Value of $1000.00 or less. The offense and the lesser included offense differ in that the charged offense requires as an essential element that you be satisfied beyond a reasonable doubt that the property Stolen, Purloined, or Knowingly Converted was of a value in excess of $1000.00. The lesser included offense does not include that element but does require as an essential element that you be satisfied beyond reasonable doubt that the property Stolen, Purloined, or Knowingly Converted was of a value of $1000.00 or less.

Findings:

The Court arrived at the proposed instructions by considering the instructions requested by the parties and any responses to include enclosures and cited authority, pattern jury instructions for 18 U.S. C. Section 641 for the 5th, 7th, 8th, 10th, and 11th Circuits, the Federal Jury Instructions provided to the Court from the Defense from the book "Federal Jury Instructions", the Federal District Court Jury Instructions in *United States v. Morrison,* , and the additional research provided by the Defense regarding whether "knowing conversion" requires substantial interference with the government's use of the property and "thieves market". The definitions of "steal", "purloin", and "knowingly convert" are taken from *U.S. v. Morrisette,* 342 U.S. 246 (1952). The definitions of "knowing" and "willful" are taken from the District Court's instructions in *States v. Morrison,* and from *U.S. v. May,* 625 F.2d 186, 190 (8th Cir. 1980) quoting *O'Malley v. United States,* 378 F.2d 401, 404 (1st Cir.) cert. denied, 389 U.S. 1008 (1967) and *United States v. Lee,* 589 F.2d 980 (9th Cir. 1979). The Court will give a "thieves market" instruction if evidence is presented on the value of the records alleged to be stolen, purloined, or knowingly converted by the accused in a thieves market.

CHARGE II, Specifications 2, 3, 5, 7, 9, 10, 11, and 15: Transmitting Defense information.

In specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II, the accused is charged with the offense of Transmitting Defense Information, in violation of Title 18, United States Code Section 793(e) and Article 134, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

(1) That at or near Contingency Operating Station Hammer, Iraq,

SPECIFICATION 2: between on or about 15 February 2010 and on or about 5 April 2010; the accused, without authorization, had possession of, access to, or control over: a video file named "12 JUL 07 CZ ENGAGEMENT ZONE 30 GC Anyone.avi";

SPECIFICATION 3: between on or about 22 March 2010 and on or about 26 March 2010; the accused, without authorization, had possession of, access to, or control over: more than one classified memorandum produced by a United States government intelligence agency;

SPECIFICATION 5: on or about 31 December 2009 and on or about 9 February 2010; the accused, without authorization, had possession of, access to, or control over: more than 20 classified records from the Combined Information Data Network Exchange Iraq database;

SPECIFICATION 7: between on or about 31 December 2009 and on or about 9 February 2010; the accused, without authorization, had possession of, access to, or control over: more than 20 classified records from the Combined Information Network Exchange Afghanistan database;

SPECIFICATION 9: between on or about 8 March 2010 and on or about 27 May 2010; the accused, without authorization, had possession of, access to, or control over: more than 3 classified records from a United States Southern Command database;

SPECIFICATION 10: between on or about 11 April 2010 and on or about 27 May 2010; the accused, without authorization, had possession of, access to, or control over: more than 5 classified records relating to a military operation in Farah Province, Afghanistan occurring on or about 4 May 2009;

SPECIFICATION 11: between on or about 1 November 2009 and on or about 8 January 2010; the accused, without authorization, had possession of, access to, or control over: a file named "BE22 PAX.zip" containing a video named "BE22 PAZX.wmv";

SPECIFICATION 15: between on or about 15 February 2010 and on or about 15 March 2010; the accused, without authorization, had possession of, access to, or control over: a classified record produced by a United States Army intelligence organization, dated 18 March 2008;

(Elements Common to all specifications)

(2) the classified records, classified memorandum, videos, and files described for each specification in element (1) was information related to the national defense;

(3) the accused had reason to believe the classified records, classified memorandum, videos, and files described for each specification in element (1) could be used to the injury of the United States or to the advantage of any foreign nation;

(4) the accused willfully communicated, delivered, or transmitted or caused to be communicated, delivered, or transmitted the above material to any person not entitled to receive it;

(5) at the time 18 U.S.C. Section 793(e) was in existence on the dates alleged in the specification;

(6) under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The same definitions for prejudice to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces that I read for you for specification 1 of Charge II also apply to this offense. Would any member like me to repeat those defininitions?

An act is done "willfully" if it is done voluntarily and intentionally with the specific intent to do something the law forbids, that is, with a bad purpose to disobey or disregard the law.

"Possession" means the act of having or holding property or the detention of property in one's power or command. Possession may mean actual physical possession or constructive possession. "Constructive possession" means having the ability to exercise dominion or control over an item. Possession inherently includes the power or authority to preclude control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item.

A person has unauthorized possession of documents, photographs, videos, or computer files when he possesses such information under circumstances or in a location which is contrary to law or regulation for the conditions of his employment.

The term "national defense" is a broad term which refers to the United States military and naval establishments and to all related activities of national preparedness.

To prove that documents, writings, photographs, videos, or information relate to the national defense, there are two things that the government must prove:

(1) that the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States; and

(2) that the material is closely held by the United States government, in that the relevant government agency has sought to keep the information from the public generally and has not made the documents, photographs, videos, or computer files available to the general public. Where the information has been made public by the United States government and is found in sources lawfully available to the general public, it does not relate to the national defense. Similarly, where the sources of information are lawfully available to the public, and the United States government has made no effort to guard such information, the information itself does not relate to the national defense.

In determining whether material is "closely held," you may consider whether it has been classified by appropriate authorities and whether it remained classified on the date or dates pertinent to the charge sheet. You may consider whether the information was classified or not in determining whether the information relates to the national defense. However, the fact that the information is designated as classified does not, in and of itself, demonstrate that the information relates to the national defense.

"Reason to believe" means that the accused knew facts from which he concluded or reasonably should have concluded that the information could be used for the prohibited purposes. In 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. You need not determine that the accused had reason to believe that the information would be used against the United States, only that it could be so used. Additionally, the likelihood of the information being used to the injury of the United States or to the advantage of any foreign nation must not be remote, hypothetical, speculative, far-fetched, or fanciful. The Government is not required to prove that the information obtained by the accused was in fact used to the injury of the United States or to the advantage of any foreign nation.

The government does not have to prove that the accused had reason to believe that his act could both injure the United States and be to the advantage of a foreign country – the statute reads in the alternative. Also, the country to whose advantage the information could be used need not necessarily be an enemy of the United States. The statute does not distinguish between friend and enemy.

In determining whether the person who received the information was entitled to have it, you may consider all the evidence introduced at trial, including any evidence concerning the classification status of the information, any evidence relating to law and regulations governing the classification and declassification of national security information, its handling, use, and distribution, as well as any evidence relating to regulations governing the handling, use, and distribution of information obtained from classified systems.

I have taken judicial notice that Title 18, United States Code Section 793(e) was in existence on the dates alleged in specifications 2, 3, 5, 7, 9, 11, and 15 of Charge II.

Findings:

The Court arrived at the proposed instructions for specifications 2, 3, 5, 7, 9, 11, and 15 of Charge II by considering the instructions requested by the parties and any responses to include enclosures and cited authority, pattern jury instructions for 18 U.S. C. Section 793(e) for the 5th, 7th, 8th, 10th, and 11th Circuits, the Federal Jury Instructions provided to the Court from the Defense from the book "Federal Jury Instructions", the Federal District Court Jury Instructions in *United States v. Morrison* and *United States v. Regan.*

CHARGE II, Specifications 13 and 14: Fraud and Related Activity With Computers

In specification 13 and 14 of Charge II, the accused is charged with the offense of Fraud and Related Activity in Connection with Computers, in violation of Title 18, United States Code, Section 1030(a)(1) and Article 134, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

(1) That at or near Contingency Operating Station Hammer, Iraq,

SPECIFICATION 13: between on or about 28 March 2010 and on or about 27 May 2010;

SPECIFICATION 14: between on or about 15 February 2010 and on or about 18 February 2010;

the accused knowingly accessed a computer exceeding authorized access on a Secret Internet Protocol Router Network.

(2) the accused obtained information that has been determined by the United States Government by Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations; to wit:

SPECIFICATION 13: more than 75 classified United States Department of State cables;

SPECIFICATION 14: a classified Department of State cable titled "Reykjavik-13";

(3) the accused had reason to believe the information obtained could be used to the injury of the United States or to the advantage of any foreign nation;

(4) the accused communicated, delivered, transmitted, or caused to be communicated, delivered or transmitted the information to a person not entitled to receive it.

(5) the accused acted willfully; and

(6) under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The same definitions for prejudice to good order and discipline in the armed forces, and of a nature to bring discredit upon the armed forces that I read for you for specification 1 of Charge II also apply to this offense.

An act is done "willfully" if it is done voluntarily and intentionally with the specific intent to do something the law forbids, that is, with a bad purpose to disobey or disregard the law.

An act is done "knowingly" if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator, or other similar device.

The term "exceeds authorized access" means that the accused accessed a computer with authorization and used such access to obtain or alter information in the computer that the Accused is not entitled so to obtain or alter. It is the knowing use of the computer by exceeding authorized access which is being proscribed, not the unauthorized possession of, access to, or control over the protected information itself.

"Reason to believe" means that the accused knew facts from which he concluded or reasonably should have concluded that the information could be used for the prohibited purposes. In 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. You need not determine that the accused had reason to believe that the information would be used against the United States, only that it could be so used. Additionally, the likelihood of the information being used to the injury of the United States or to the advantage of any foreign nation must not be too remote, hypothetical, speculative, far-fetched, or fanciful. The Government is not required to prove that the information obtained by the accused was in fact used to the injury of the United States or to the advantage of any foreign nation.

The government does not have to prove that the accused had reason to believe that his act could both injure the United States and be to the advantage of a foreign country – the statute reads in the alternative. Also, the country to whose advantage the information could be used need not necessarily be an enemy of the United States. The statute does not distinguish between friend and enemy.

In determining whether the person who received the information was entitled to have it, you may consider all the evidence introduced at trial, including any evidence concerning the classification status of the information, any evidence relating to law and regulations governing the classification and declassification of national security information, its handling, use, and distribution, as well as any evidence relating to regulations governing the handling, use, and distribution of information obtained from classified systems.

The term "person" means any individual, firm, corporation education institution, financial institution, governmental entity, or legal or other entity.

I have taken judicial notice that Title 18, United States Code Section 1030(a)(1) was in existence on the date alleged in the specification.

Findings:

The Court arrived at the proposed instructions for specifications 13 and 14 of Charge II by considering the instructions requested by the parties and any responses to include enclosures and cited authority, pattern jury instructions for 18 U.S. C. Section 1030(a)(1),for the 8th, 9th, and 11th Circuits, the Federal Jury Instructions provided to the Court from the Defense from the book "Federal Jury Instructions". The definition for "exceeds authorized access" is taken from 18 U.S.C. Section 1030(a)(6) and the 1996 legislative history. The definitions of "knowing",

"willful", and "reason to believe" are the same as those instructed upon for the specifications in violation of 18 U.S.C. Section 793(e).

CHARGE III, Specifications 1-5: Violation of a Lawful General Regulation:

In specifications 1-5 of Charge III, the accused is charged with the offense of Violating a Lawful General Order, in violation of Article 92, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

(1) That there was in existence a certain lawful general regulation in the following terms:

Specification 1: paragraph 4-5(a)(4), Army Regulation 25-2, dated 24 October 2007;

Specification 2: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007;

Specification 3: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007;

Specification 4: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007;

Specification 5: paragraph 7-4, Army Regulation 380-5, dated 29 September 2000;

(2) That the accused had a duty to obey such regulation; and

(3) That at or near Contingency Operating Station Hammer, Iraq:

Specification 1: between on or about 1 November 2009 and on or about 8 March 2010 the accused violated this lawful general regulation by attempting to bypass network or information security system mechanisms.

Specification 2: between on or about 11 February 1010 and on or about 3 April 2010 the accused violated this lawful general regulation by adding unauthorized software to a Secret Internet Protocol Router Network computer.

Specification 3: on or about 4 May 2010the accused violated this lawful general regulation by adding unauthorized software to a Secret Internet Protocol Router Network computer.

Specification 4: between on or about 11 May 2010 and on or about 27 May 2010 the accused violated this lawful general regulation by using an information system in a manner other than its intended purpose.

Specification 5: between on or about 1 November 2009 and on or about 27 May 2010 the accused violated this lawful general regulation by wrongfully storing classified information.

NOTE 1: <u>Proof of existence of order or regulation</u>. The existence of the order or regulation must be proven or judicial notice taken.

NOTE 2: <u>Lawfulness of order or regulation</u>. The lawfulness of the order or regulation is not a separate element of the offense. Thus,

the issue of lawfulness is determined by the MJ and is not submitted to the members. See United States v. New, 55 MJ 95 (CAAF 2001); United States v. Deisher, 61 MJ 313 (CAAF 2005). To be lawful, the order or regulation must relate to specific military duty and be one that the noncommissioned/warrant/petty officer was authorized to give the accused. The order or regulation must require the accused to do or stop doing a particular thing either at once or at a future time. An order or regulation is lawful if reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and is directly connected with the maintenance of good order in the services. (The three preceding sentences may be modified and used by the MJ during a providence inquiry to define "lawfulness" for the accused.) When the MJ determines that, based on the facts, the order or regulation was lawful, the MJ should advise the members as follows:

As a matter of law, the (order) (regulation) in this case, as described in the specification, if in fact there was such (an order) (a regulation), was a lawful (order) (regulation).

NOTE 3: Order or regulation determined to be unlawful. An order or regulation is illegal if, for example, it is unrelated to military duty, its sole purpose is to accomplish some private end, it is arbitrary and unreasonable, and/or it is given for the sole purpose of increasing the punishment for an offense which it is expected the accused may commit. If the MJ determines that, based on the facts, the order was not lawful, the MJ should dismiss the affected specification, and the members should be so advised.

NOTE 4: Dispute as to whether order was general. If there is a factual dispute whether the order was general, that dispute must be resolved by the members in connection with their determination of guilt or innocence. The following instruction may be given:

General (orders) (regulations) are those (orders) (regulations) which are generally applicable to an armed force and which are properly published by (the President) (the Secretary of (Defense) (Homeland Security) (or) (a military department).

General (orders) (regulations) also include those (orders) (regulations) which are generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof and which are issued by (an officer having general court-martial jurisdiction) (or) (a general or flag officer in command) (or) (a commander superior to one of these).

You may find the accused guilty of violating a general (order) (regulation) only if you are satisfied beyond a reasonable doubt that the (order) (regulation) was general.

NOTE 5: Deleted.

NOTE 6: Order issued by previous commander. If appropriate, the following additional instruction may be given:

A general (order) (regulation) issued by a commander with authority to do so retains its character as a general (order) (regulation) when another officer takes command, until it expires by its own terms or is rescinded by separate action.

NOTE 7: Orders or regulations containing conditions. When an alleged general order or regulation prohibits a certain act or acts "except under certain conditions," (e.g., "except in the course of official duty"), and the issue is raised by the evidence, the burden is upon the prosecution to prove that the accused is not within the terms of the exception. In such a case, the MJ must inform the members of the specific exception(s) when listing the elements of the offense. Additionally, under present law an instruction substantially as follows must be provided:

When a general (order) (regulation) prohibits (a) certain act(s), except under certain conditions, then the burden is on the prosecution to establish by legal and competent evidence beyond a reasonable doubt that the accused does not come within the terms of the exception(s).

Conclusion. The Court's Proposed Draft Instructions substantially cover the relevant and legally correct instructions proposed by the parties. These draft instructions may be modified by the Court as necessary from the presentation of the evidence. Affirmative defense, evidentiary, and procedural instructions will be drafted as appropriate during the trial.

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