

UNITED STATES

V.

**RULING: RELEVANCE
ON THE MERITS OF TESTIMONY
EXPLAINING NATURE OF
CHARGED CLASSIFIED
DOCUMENTS AND POTENTIAL
DAMAGE**

DATED: 21 May 2013

- (1) the relevance of testimony on context and circumstances surrounding the charged information;
- (2) the relevance of testimony on prospective damage that could be caused to the United States by release of the charged classified evidence on the date of release; and
- (3) whether the Defense may rebut such testimony.

Findings of Fact:

2. The accused has entered a plea of guilty by exceptions and substitutions to lesser included specifications for specifications 2, 3, 5, 7, 9, 10, and 15 of Charge II (the greater offenses in violation of 18 U.S.C. § 793(e)). The accused's plea and the Court's taking judicial notice of the existence of 18 U.S.C. § 793(e) leave the following elements to be proved by the Government beyond a reasonable doubt for the accused to be found guilty of the greater offense for these specifications:

b. that the accused had reason to believe the information communicated could be used to the injury of the United States or to the advantage of any foreign nation.

3. The Court's proposed instructions define information related to the national defense as follows:

"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."

4. The Court's instructions define reason to believe as follows:

"'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."

5. The accused has also entered a plea of guilty by exceptions and substitutions to lesser included offenses for specifications 13 and 14 of Charge II (the greater offenses in violation of 18 U.S.C. § 1030(a)(1)). The accused's plea and the Court's taking judicial notice of the existence of 18 U.S.C. § 1030(a)(1) leave the following elements to be proved by the Government beyond a reasonable doubt for the accused to be found guilty of the greater offense for these specifications:

- a. that the accused knowingly exceeded authorized access on a Secret Internet Protocol Router (SIPR) Network;
- b. that the accused had reason to believe the information communicated could be used to the injury of the United States or to the advantage of any foreign nation.

6. The accused has entered pleas of not guilty to all of the remaining charges and specifications. Thus, the Government is required to prove all of the elements of these specifications beyond a reasonable doubt.

7. The Government proffers that evidence of the context and circumstances surrounding the charged offenses and evidence of prospective damage are relevant to prove the following elements of the following offenses:

- a. the elements of "relating to the national defense" and "with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation" for all of the 18 U.S.C. § 793(e) specifications;
- b. the element "with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation" for specifications 13 and 14 in violation of 18 U.S.C. § 1030(a)(1);
- c. that the information was "intelligence" that the "intelligence" was true for the specification of Charge I (Aiding the Enemy, Article 104, UCMJ) and specification 1 of Charge II (Wantonly Causing Publication of Intelligence, Clauses 1 and 2, Article 134);
- d. the element of value for specifications 4, 6, 8, 12, and 16 of Charge II (18 U.S. C. § 641); and
- e. the element of prejudice to good order and discipline and service discrediting conduct for the specifications of Charge II to which the accused has entered a plea of not guilty (specifications 1, 4, 6, 8, 11, 12, and 16 of Charge II).

8. The Court's instructions define "intelligence" for the specification of Charge I and specification 1 of Charge II as "any helpful information, given to and received by the enemy which is true, at least in part."

The Law.

1. Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. MRE 401. The military judge has the initial responsibility to determine whether evidence is relevant. *U.S. v. White*, 69 M.J. 236 (C.A.A.F. 2010).
2. Relevant evidence is admissible unless any of the following provides otherwise: (1) the United States Constitution as applied to members of the armed forces; (2) a federal statute applicable to trial by courts-martial; (3) the military rules of evidence; or (4) the Manual for Courts-Martial. Irrelevant Evidence is not admissible. MRE 402.
3. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. MRE 403.

Conclusions of Law:

1. Evidence of the context and circumstances surrounding the charged information and prospective damage is relevant to the following elements:
 - a. whether the information charged in the specifications alleging violations of 18 U.S.C. § 793(e) relates to the national defense (specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II);

b. whether the information charged in the specification of Charge I and specification I of Charge II is intelligence and whether that intelligence is true, at least in part;

2. The Government's proffers regarding relevance to the value element of the specifications alleging violations of 18 U.S.C. § 641 (specifications 4, 6, 8, 12, and 16 of Charge II) and the element of prejudice to good order and discipline and service discrediting conduct for all of the specifications of Charge II to which the accused has pled not guilty provide logical theories of relevance. The Court will allow limited evidence of the context and circumstances surrounding the charged offenses and potential damage to prove those elements.

3. The Government concedes, and the Court agrees, that the Defense may also present evidence to challenge the above elements and to rebut Government evidence regarding the context and circumstances of the charged information and prospective damage.

4. Evidence of the context and circumstances surrounding the charged information and prospective damage that was not known by the accused is not relevant to whether the accused had reason to believe that communication of the charged information could be used to the injury of the United States or to the advantage of any foreign nation for the specifications alleging violations of 18 U.S.C. § 793(e) (specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II) or violations of 18 U.S.C. § 1030(a)(1) (specifications 13 and 14 of Charge II). This element is a *mens rea* of the accused.

5. The Court is concerned that extensive evidence of the context and surrounding circumstances and prospective damage of the charged information has the potential to cause this trial to devolve into mini-trials regarding international politics in various regions of the world, particularly with respect to such evidence regarding the charged cables in specifications 12 and 13 of Charge II:

(a) This evidence is not relevant to any remaining element in specification 13 of Charge II. The only remaining elements the Government must prove are (1) that the accused knowingly exceeded authorized access on a SIPR network and (2) that the accused had reason to believe the information communicated could be used to the injury of the United States or to the advantage of any foreign nation;

(b) This evidence is potentially relevant to the value and prejudice to good order/discipline elements in specification 12 of Charge II. The Government proffer alleges that for specifications 4, 6, 8, 12, and 16 of Charge II alleging violations of 18 U.S.C. § 641, the Government will prove value in a thieves market and expects to provide evidence of the content and context of the charged information and the motives and resources of foreign adversaries. The Government does not proffer that evidence of prospective damage to the United States aside from evidence of the motives and resources of foreign adversaries, is relevant to value.

Accordingly, assuming proper foundation, if the evidence is brief, limited, and focused, evidence of the immediate context and circumstances surrounding the charged information in specifications 12 and 13 of Charge II and the motives and resources of foreign adversaries for the value element of specification 12 of Charge II is relevant. While the Court is not in a position to rule on any MRE 403 objections to specific evidence at this time, the parties are on notice that the Court views evidence beyond that authorized above as potentially subject to exclusion under MRE 403, particularly with respect to the charged cables in specifications 12 and 13 of Charge II.

RULING: Evidence on context and circumstances surrounding the charged information and potential damage is relevant on the merits as set forth above. The Court will address particular MRE 403 objections as they are raised during the trial.

So **ORDERED** this 21st day of May 2013.

A handwritten signature in black ink, appearing to read 'DRL', is positioned above the printed name.

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