

## UNITED STATES

 $\gamma$ 

U.S. Army, (b) (6)

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE TARGETED BRIEF  
ON 18 U.S.C. SECTION 793(e)**

DATED: 29 March 2013

I. The Defense respectfully requests that this Court deny the Government's requested relief of instructing on the so-called "documents clause" of 18 U.S.C. Section 793(e). The Defense does not request oral argument.

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. *See* Manual for Courts-Martial, United States, Rule for Courts-Martial (R.C.M.) 905(c)(1) (2012). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the Government as the moving party. *See* R.C.M. 905(c)(2). A question of statutory interpretation is a question of law. R.C.M. 801(e).

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. Section 793(e), five specifications of violations of 18 U.S.C. Section 641, two specifications of violations of 18 U.S.C. Section 1030, and five specifications of violating a lawful general regulation, in violation of Article 104, 134, and 92, Uniform Code of Military Justice (U.C.M.J.).

### WITNESSES/EVIDENCE

4. The Defense does not intend to produce any witnesses or evidence for this motion.

### LEGAL AUTHORITY AND ARGUMENT

5. The Court should deny the Government's requested relief of instructing on the "documents clause" of 18 U.S.C. Section 793(e).<sup>1</sup> The language of the statute under which PFC Manning is charged reads as follows:

Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

The statute punishes two distinct acts: i) willful communication, delivery or transfer of national defense information (NDI) to unauthorized persons, or ii) willful retention of NDI and failure to deliver it to an officer entitled to receive it.

6. Although "reason to believe" is contained in Section 793(e) and is a listed element of the charged Section 793(e) specifications of Charge II, the Government believes that it does not need to prove the "reason to believe" element in order to prove the charged offenses. The Government argues that under the "documents clause" of 18 U.S.C. Section 793(e), it is not required to prove that PFC Manning had reason to believe the information transmitted "could be used to the injury of the United States." See Appellate Exhibit 496. In other words, the Government is arguing that the "reason to believe" scienter requirement only applies to intangible information relating to the national defense and not to tangible information in the form of documents and the like. Accordingly, the Government urges an interpretation of the section that bifurcates the mens rea requirement depending on whether the disclosed item falls within the "documents clause" (tangible information) or "information clause" (intangible information). The Government cites three cases in support of its position. See *U.S. v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006); *U.S. v. Drake*, 818 F. Supp. 2d 909, 916-17 (D.Md. 2011); *U.S. v. Kiriakou*, 2012 WL 4903319, at \*1 (E.D. Va. Oct. 16, 2012).

7. The Government's argument and reliance on *Rosen* and those federal cases that follow *Rosen*

---

<sup>1</sup> For the purposes of this Motion, the Defense will use the Government's nomenclature—the "documents clause" and the "information clause" but contests that there are two such clauses controlling the mens rea requirement of 18 U.S.C. Section 793(e).

in recognizing a “documents clause” and “information clause” is misplaced for several reasons. First, the Court of Appeals for the Armed Forces (C.A.A.F.) has clearly held that the mens rea requirement for all of Section 793(e) is reason to believe that the charged information could be used to the injury of the United States or to the advantage of any foreign nation. Second, the *Rosen* interpretation of Section 793(e) relied upon the Government for its argument has been rejected by the C.A.A.F. and A.C.C.A. Finally, the distinction between “documents” and “information” (and, between “tangible” and “intangible” information) is an arbitrary and untenable one that cannot be used to guide courts in determining scienter requirements under 18 U.S.C. Section 793.

**1. C.A.A.F. Clearly Held In *Diaz* that the Scienter Requirement of 18 U.S.C. 793(e) Is “Reason to Believe”**

8. C.A.A.F. held in *Diaz* that the mens rea requirement contained in Section 793(e) was clear in that it punished “[w]hoever having ... information relating to nation defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully ... communicated, delivered, or transmitted ... the same to any person not entitled to receive it.” 69 M.J. 127, 132 (C.A.A.F. 2010). C.A.A.F. held that “[t]he critical language is, of course, that the accused ‘has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.’” *Id.* (emphasis in original). In identifying the critical language of Section 793(e), C.A.A.F. made it clear that the Government must prove that an accused had a reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation.

9. Importantly, C.A.A.F. in *Diaz* did not draw the distinction adopted in *Rosen* and its progeny that the Government now urges—i.e. that there is a different mens rea requirement depending on whether the disclosed item is a “document” (tangible) or “information” (intangible). Nowhere in the judgment is there any inkling that military courts accept a bifurcation of the mens rea requirement depending on whether an accused is charged under the so-called “documents clause” or the “information clause.”

10. When C.A.A.F. identified the mens rea requirement of Section 793(e), it was clearly aware of the *Rosen* opinion. The *Rosen* opinion was decided a mere four years before the *Diaz* case; and as argued in more detail below, the accused in *Diaz* actually argued for C.A.A.F. to follow *Rosen*’s “bad faith” requirement, which C.A.A.F. declined to do. Had C.A.A.F. elected to follow *Rosen* and recognize a mens rea distinction between “documents” (tangible information) and “information” (intangible information) in Section 793(e), it would have arrived at its result in a different manner. Instead of spending six pages of its opinion discussing “reason to believe,” C.A.A.F. would have simply stated that “reason to believe” was not required given the fact that *Diaz* was charged with disclosing a document (i.e. tangible classified information).<sup>2</sup> C.A.A.F.,

---

<sup>2</sup> The facts in *Diaz* clearly involved a document or tangible information being disclosed by the appellant. The appellant in *Diaz* printed out a list of detainees from the Joint Detainee Information Management System (JDIMS) (a classified web-based database on a Secure Internet Protocol Router Network (SIPRNET)), and anonymously mailed that list to a civilian attorney in order to assist her efforts in locating habeas counsel for those unrepresented detainees. *Diaz*, 67 M.J. at 129 -131. Additionally, the document came off of a classified database and C.A.A.F.,

however, did not end its analysis of the mens rea requirement by citing the “documents clause.” Instead, it spent a significant portion of its opinion detailing how the government had met its burden of proving the accused had a “reason to believe” the charged information, a document, could be used to the injury of the United States or to the advantage of any foreign nation. *Id.* at 132 - 134. In choosing to use the mens rea prescription that it did for Section 793(e), C.A.A.F. made it clear that it did not recognize a *Rosen* “documents” (tangible information) and “information” (intangible information) distinction. Given the clear statement on the mens rea requirement of Section 793(e) by C.A.A.F. in *Diaz*, this Court should deny the Government’s request to instruct on the “documents clause” of 18 U.S.C. Section 793(e).

## **2. C.A.A.F. Has Already Rejected the *Rosen* Holding and No Military Court Has Followed *Rosen***

11. In addition to endorsing a “documents clause” and “information clause” the *Rosen* court also added a gloss to 18 U.S.C. Section 793(e) in holding that the Government must prove “bad faith” when an accused is charged with disclosing information that the accused had reason to believe could be used to the injury of the United States or to the advantage of a foreign nation. In *Diaz*, the accused argued that such a “bad faith” requirement should be adopted by military courts interpreting Section 793(e). *Id.* at 132. C.A.A.F. outright rejected this argument. *Id.* at 132 - 133. While recognizing that some federal case law required a heightened mens rea requirement of “bad faith,” C.A.A.F. held that “the law in the military justice system is well-settled on this point” and that Section 793(e) “does not require proof of an accused’s bad faith.” *Id.*

12. The Government is now requesting this Court to salvage a part of the *Rosen* opinion that discussed the mens rea requirement of Section 793(e). C.A.A.F. in *Diaz* clearly rejected the *Rosen* courts’ textual and legislative interpretation of Section 793(e) when it held that the mens rea requirement of Section 793(e) did not require proof of an accused’s bad faith. In rejecting the *Rosen* position on requiring bad faith, the *Diaz* Court also implicitly rejected differing mens rea requirements depending on whether the disclosed items were “documents” or “information.” There is no reason to believe that C.A.A.F. intended to follow a portion of the *Rosen* opinion when it clearly rejected another portion of the *Rosen* opinion, particularly given that both portions were part and parcel of the same argument. As discussed above, the clearest proof of this implicit rejection is the analysis in *Diaz* itself. If C.A.A.F. intended to adopt a “documents”/“information” framework for mens rea: a) it would have said so; and b) it would have concluded its analysis in a completely different way (i.e. by avoiding the entire discussion of “reason to believe” since it was dealing with a tangible document).

13. Despite the clear holding in *Diaz*, the Government is requesting this Court to recognize a “documents clause” and “information clause” and to follow the *Rosen* precedent—or at least the part it likes. In doing so, the Government is requesting this Court to relieve it of the requirement to prove “reason to believe” for those charged offenses that involve documents or tangible information. The Government cites no military authority for its argument.

---

held that the appellant “knew he was dealing with sensitive material derived from a classified computer system.” *Id.* at 134.

14. The only other military case to address this issue was the unpublished decision of *U.S. v. Steele*. 2011 WL 414992 (A.C.C.A. Feb 3, 2011). The *Steele* court, however, did not accept *Rosen* and its “document”/“information” framework as precedential; it simply dealt with *Rosen* because the accused had argued that the government was required to show that he acted in bad faith when he retained national defense information in violation of Section 793(e). That the *Steele* court did not adopt *Rosen* is clear when it stated, “Further, even if *Rosen* represented applicable precedent, we find appellant’s analysis inconsistent with the law and logic of the *Rosen* court.” *Id.* at \*3 (emphasis added). The cited statement makes it clear that *Steele* did not accept that *Rosen* applies in military courts; it simply indicated that *even if Rosen applied*, the accused was reading *Rosen* incorrectly.

15. Importantly, after pointing out the accused’s flawed logic of relying upon *Rosen*, A.C.C.A. still went on to discuss why the appellant had a reason to believe the information could be used to harm of the United States or to the advantage of a foreign nation. Specifically, A.C.C.A. held that the “evidence regarding the nature of that information amply demonstrated appellant had ‘reason to believe [it] could be used to the injury of the United States or to the advantage of any foreign nation. The *mens rea* requirement of 18 U.S.C. § 793(e) was clearly met.” *Id.* at \*5. Much like in *Diaz*, had A.C.C.A. believed that the *Rosen* “documents clause” applied under military law, it would not have discussed the “reason to believe” element given the fact the appellant was charged with disclosing documents (i.e. tangible information). *See id.* at \*4 (“Here the evidence clearly showed that appellant unlawfully retained physical, tangible computer files and documents containing NDI and not ‘intangible’ information as in *Rosen*.”).

16. This Court should decline the Government’s request to recognize a different *mens rea* requirement under Section 793(e) for violations involving “documents” and “information.” C.A.A.F. and A.C.C.A. have both rejected such a framework under Section 793(e). Both courts held that the *mens rea* requirement of Section 793(e) requires the Government to prove that an accused had reason to believe that the charged information could be used to the injury of the United States or to the advantage of any foreign nation. This Court should require the same and decline the Government’s request instruct on the “documents clause” of 18 U.S.C. Section 793(e).

### **3. The Distinction Between “Documents” and “Information” (and “Tangible” and “Intangible” Information) Is An Untenable One**

17. In addition to being entirely unsupported in military law, the “documents”/“information” distinction is inherently unworkable in practice, further bolstering the argument that there is only one *mens rea* requirement under 18 U.S.C. Section 793(e): that the accused had “reason to believe” that the relevant information could cause injury to the United States or be used to the advantage of a foreign nation.

18. According to the Government, the first part of 18 U.S.C. 793(e) is the “documents” clause which applies when the accused willfully communicates *tangible* items related to the national defense. The second part of 18 U.S.C. 793(e) is the “information” clause which applies when the accused willfully communicates *intangible* items related to the national defense. The distinction

between tangible and intangible national defense information makes no sense and should certainly not be the guiding light in ascribing a *mens rea* to an offense. Something as important as the *mens rea* of an offense should not be left to technical arguments about whether something constitutes a “document” or “information” or whether something is “tangible” or “intangible.” Consider the following hypotheticals:

**Hypothetical 1:** The accused transmits an electronic ‘document’ via email to a person not authorized to receive it. The document is never printed by the accused or the recipient. Under the Government’s interpretation, does this implicate the “documents” or the “information” clause of 18 U.S.C. Section 793(e)? In other words, is the electronic ‘document’ tangible or intangible? The Defense submits that the information that is transmitted is intangible—it is a series of “1’s” and “0’s” that is sent through an elaborate network of wires and connections. The Government would likely submit that despite its actual intangible form, this should still be considered tangible information subject to the documents clause. The point is that there is no clear dividing line as to what differentiates tangible from intangible information—or, otherwise stated, what exactly differentiates the “documents” clause from the “information” clause.

**Hypothetical 2:** The accused has a physical hard-copy of a classified document in front of him. He reads the document verbatim over the phone to someone not authorized to receive the document. Has the accused communicated tangible or intangible information? The Defense submits that this would be considered intangible information because it involved an oral communication over the phone; no document (whether electronic or paper) ever changed hands. The Government would likely submit that this involves the ‘documents’ clause since the accused had a tangible item in front of him, even though he transmitted the information in a non-tangible way. Again, the point is that there is not a clear dividing line between “documents” and “information” under the Government’s reading of 18 U.S.C. 793(e).

**Hypothetical 3:** On Day 1, the accused reads a two-sentence classified memo which he memorizes (he does not physically or electronically retain the memo). On Day 2, the accused communicates the two-sentence classified memo verbatim, from memory, to someone not authorized to receive it. In this scenario, it is likely that all would agree that this implicates the so-called “information”/“intangible” clause of 18 U.S.C. Section 793(e) since the accused orally communicated information that was stored, so to speak, in his memory bank. In this scenario, should the accused benefit from a better *mens rea* (“reason to believe”) than if he had simply handed the memo to that same unauthorized person on Day 1?

19. The point of canvassing these various hypotheticals is to show that the interpretation advanced by the Government of the section is fundamentally flawed. The distinction between “documents” and “information” is an untenable one. Further complicating the matter is that courts have introduced an equally unhelpful proxy— “tangible”/“intangible”—to figure out whether something falls within the “documents” or “information” clause of 18 U.S.C. Section 793(e). There is no principled reason why the following scenarios should be treated differently:

- (1) The accused hands a one page hard copy classified document to someone not authorized to receive it;

- (2) The accused emails a one-page electronic copy of a classified document to someone not authorized to receive it;
- (3) The accused reads a one-page hard copy classified document over the phone to someone not authorized to receive it;
- (4) The accused reads a one-page electronic copy of a classified document over the phone to someone not authorized to receive it;
- (5) The accused memorizes the one-page document, later writes down the information, and gives the hand-written document to someone not authorized to receive it;
- (6) The accused memorizes the one-page document and, based on memory, relays the information to someone not authorized to receive it.

And yet, under the wholly unworkable “documents”/“information” framework being set up by the Government, it is likely that these scenarios would, in fact, be treated differently—not because one scenario is fundamentally different than another scenario, but because of an artificial construct of labeling something as a “document” or “information.” Should the *mens rea* of an offense which carries with it 10-years imprisonment be subject to a technical classification which is largely illusory? The Defense submits that a criminal statute’s scienter requirement should not turn on such fine, not to mention arbitrary, distinctions.

### CONCLUSION

20. For foregoing reasons, the Defense respectfully requests that this Court deny the Government’s requested relief.

Respectfully submitted,



DAVID E. COOMBS  
Civilian Defense Counsel