

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

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) **GOVERNMENT'S TARGETED**
) **BRIEF ON "REASON TO BELIEVE"**
) **ELEMENT IN 18 U.S.C. § 793(e)**
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) **29 March 2013**
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The United States, by and through undersigned counsel, provides the following brief reiterating and clarifying its position on the elements of 18 U.S.C. § 793(e), and the difference between the "documents" and "information" clauses in the statute. This filing will also briefly address the issues raised by defense counsel during oral argument at the Article 39(a) session on 26 February 2013. The issue is ripe for consideration by the Court because the accused's providence inquiry established every element of the charged specifications alleging misconduct in violation of 18 U.S.C. § 793(e), with the exception of the "national defense information" and "reason to believe" elements. However, in cases involving tangible items relating to the national defense – including digital computer documents – the United States is not required to prove the accused had "reason to believe" the tangible items "could be used to the injury of the United States or to the advantage of any foreign nation."

PREVIOUS FILINGS ADDRESSING THE ISSUE

In the Government's Response to the Court's Clarification of Ruling on Lesser-Included Offenses, dated 16 November 2012, the Government wrote:

However, under 18 U.S.C. § 793(e), the Government is not required to prove that the accused had reason to believe the information "could be used to the injury of the United States" when the accused had unauthorized possession of any "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense." *See* 18 U.S.C. § 793(e). In other words, the "reason to believe" scienter requirement only applies to intangible information relating to the national defense, not the tangible items listed above. *See United States v. Kiriakou*, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) ("Importantly, § 793[e] differentiates between 'tangible' NDI, described in the 'documents' clause ('any document, ... or note relating to the national defense'), and 'intangible' NDI, described in the 'information' clause ('information relating to the national defense')."); *United States v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) ("Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to

include ‘information relating to the national defense,’ but modified this additional item by adding a scienter requirement....”).

See Appellate Exhibit 391. The Government’s argument was that the proffered specifications (in the defense plea) were directly analogous to a violation of 18 U.S.C. § 793(e) for purposes of calculating the maximum punishment for the each specification.

In the Government’s Response to the Accused’s Proffered Statement and Associated Instructions, dated 14 February 2013, the Government wrote:

In an abundance of caution, the United States requests the Court instruct the accused during the providence inquiry that under the “documents” or “tangible items” clause of 18 U.S.C. § 793(e), the Government is not required to prove that the accused had reason to believe the information transmitted “could be used to the injury of the United States.” In other words, the “reason to believe” scienter requirement only applies to intangible information relating to the national defense. *See United States v. Kiriakou*, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) (“Importantly, § 793[e] differentiates between ‘tangible’ NDI, described in the ‘documents’ clause (‘any document, ... or note relating to the national defense’), and ‘intangible’ NDI, described in the ‘information’ clause (‘information relating to the national defense’).”); *United States v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) (“Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to include ‘information relating to the national defense,’ but modified this additional item by adding a scienter requirement....”); *United States v. Drake*, 818 F. Supp. 2d 909, 916-17 (“As the Government points out, however, Defendant’s brief conflates the different *mens rea* requirements required for criminal violations involving the ‘documents’ clause and the ‘information’ clause of Section 793(e)...Thus, only the second ‘information’ clause requires proof of the ‘reason to believe’ element.”).

See Appellate Exhibit 496. Aside from the Government’s cite to additional authority on 14 February 2013 (the *Drake* case above), the two filings addressing the targeted issue are essentially the same.

ADDITIONAL AUTHORITY AND ANALYSIS

Because the documents and videos charged in this case are tangible items, the Government is not required to prove that the accused had reason to believe the charged documents, records, and videos “could be used to the injury of the United States or to the advantage of any foreign nation” in order to establish a violation of 18 U.S.C. § 793(e).

18 U.S.C. § 793(e) reads:

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 an officer or employee entitled to receive it;

18 U.S.C. § 793(e) (emphasis added). The statute has two different clauses: a “documents” clause and an “information” clause. *See* 18 U.S.C. § 793(e). The “documents” clause includes the enumerated, tangible items described in the statute. The “reason to believe” element only modifies the “information” clause, an interpretation of the statute which is supported by its plain reading and cases that have examined this issue. For example, the trial court in *United States v. Morison* stated that the “plain language” of §§ 793(d) and (e) supported the Government’s interpretation of the intent requirement—namely, the “requirement [that the possessor must have “reason to believe” the information could be used to the injury of the United States] is not present for the delivery or retention of photographs or documents.” *United States v. Morison*, 604 F. Supp. 655, 658-59 (D. Md. 1985), *aff’d*, 844 F.2d 1057 (4th Cir. 1988). In a later opinion in *Morison*, the trial court further clarified that the “reason to believe” element is not required by the statute under the “documents” clause:

It is also worthwhile to note, for the purpose of clarity, that the first half of both parts (d) and (e) of 18 U.S.C. § 793 defines the types of items or information which is unlawful to either retain or transmit. It defined all kinds of tangibles: “any document, writing...or note relating to the national defense,” and also describes intangibles: “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.” The language “has reason to believe” does not create a subjective test for the entire statute and does not change or modify the meaning of willfulness. Instead, it modifies and explains what type of information is included within the statute’s scope.

United States v. Morison, 622 F. Supp. 1009, 1010-11 (D. Md. 1985), *aff’d*, 844 F.2d 1057 (4th Cir. 1988).

This reading of the statute is also compelled by the structure of § 793(e). In the statute, the phrase “national defense” is repeated, once for the “documents” clause and again for the “information” clause. *See* 18 U.S.C. § 793(e). However, the “reason to believe” language appears only once, modifying the word “information.” *Id.* Further, there is no comma after “information relating to the national defense,” suggesting that “reason to believe” modifies “information” only. The result of this plain reading makes perfect sense in the context of the statute. Section 793(e) provides for different scienter requirements depending on the character of the national defense information at issue in the case. In cases involving documents, digital or otherwise, the accused must transmit the information “willfully.” The statute recognizes that an accused will readily understand that a document or enumerated item relates to the national defense based on its content, design, or markings. In this case, the documents, records, or videos at issue were either conspicuously marked with classifications or downloaded from classified systems. Intangible (orally transmitted) or derivative “information” (such as information cut and pasted from an original document) does not share these same characteristics—thus, the statute requires an accused to also have “reason to believe” the information could be used to the injury of the United States.

This interpretation of the statute is also supported by the legislative history. Indeed, in discussing the legislative history of the 1950 amendments to 18 U.S.C. § 793(e), Justice White in the Pentagon Papers case stated that “[i]t seems clear...that in prosecuting for communicating or withholding a ‘document’ as contrasted with similar action with respect to ‘information’ the Government need not prove an intent to injure the United States or to benefit a foreign nation but only willful and knowing conduct.” *New York Times Co. v. United States*, 403 U.S. 713, 738 n.9 (1971) (White, J., concurring) (discussing S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 8-9 (1950) (“The phrase ‘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’ would modify only ‘information relating to the national defense’ and not the other items enumerated in the subsection.”)); *see also* Enclosure 1, at 4 and 7.

A NOTE ON STEELE AND DIAZ

During oral argument on 26 February 2013, defense counsel argued that because the *Steele* and *Diaz* opinions discussed the “reason to believe” element in cases alleging misconduct in violation of 18 U.S.C. § 793(e), it follows that the Government must prove the element in order to establish a violation of 18 U.S.C. § 793(e). This argument has no merit. In those cases, trial counsel chose to charge the accused under the “information” clause.¹ *See United States v. Steele*, 2011 WL 414992 (Army Ct.Crim.App.); *United States v. Diaz*, 69 M.J. 127 (C.A.A.F. 2010); *see also* Enclosures 2 (*Diaz* Charge Sheet) and 3 (*Steele* Charge Sheet). Accordingly, the relevant specifications in those cases included the “information” scienter requirement and the Government was required to prove that element in order to establish a violation of the specification. Furthermore, this particular defense argument is uniquely misleading, as the *Steele* opinion clearly and concisely explained, while rejecting the assertion that “reason to believe” meant “bad faith,” that 18 U.S.C. § 793(e) defined two types of national defense information

¹ At least in the *Diaz* case, the Government assumes that trial counsel proceeded under the “information” clause because the list of detainee names and information, when printed from the JDIMS system, were not marked with a classification label. *See Diaz*, 69 M.J. at 130. In this case, all the documents were marked with classification labels.

(NDI): “a. ‘documents, writing...or note,’ or b. ‘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.*” *Steele*, 2011 WL 414992, at *3 (emphasis in original). Additionally, appellant’s counsel in *Steele* acknowledged the difference between the two types of NDI. *Id.* In short, the *Diaz* and *Steele* cases only confirm the difference between the “documents” clause and the “information” clause in the statute.

ON THE NATURE OF “INTANGIBLE INFORMATION”

According to the defense, computer files or documents are not among the tangible, enumerated items in the statute. See 18 U.S.C. § 793(e) (“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....”). Instead, the defense asserts that computer files are intangible information. Interestingly, the Government notes the *Steele* court certainly thought that computer files were tangible. See *Steele*, 2011 WL 414992, 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*.”). This court has also indicated that for purposes of Rule for Courts-Martial 701(a)(2)(A), emails are not intangible, but “documents” within the meaning of the rule. See Appellate Exhibit 494, at 33 (“Although the Defense discovery request stated ‘documents’ and not ‘emails’, emails can be ‘documents’ for purposes of RCM 701(a)(2)...”). In short, there is no authority for the defense proposition that a computer document, memorandum, or file is not a “document” or other tangible item within the meaning of 18 U.S.C. § 793 unless it is in paper form. The defense position on this point is untenable.

CONCLUSION

Under the facts of this case, the Court can find that the accused violated 18 U.S.C. § 793(e) by transmitting documents and videos relating to the national defense without finding that the accused had “reason to believe” the information could be used to the injury of the United States or to the advantage of any foreign nation.



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Enclosures

1. Legislative History
2. *Diaz* Charge Sheet
3. *Steele* Charge Sheet

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 29 March 2013.


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