

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

DEFENSE RESPONSE TO
GOVERNMENT TARGETED
BRIEF ON THE RELEVANCE
OF DOS TESTIMONY
DATED 14 MAY 2013

17 MAY 2013

RELIEF SOUGHT

The Defense requests this Court find that testimony from Department of State officials relating to the geopolitical situations in numerous nations is not relevant on the merits.

LEGAL AUTHORITY

Military Rule of Evidence (MRE) 401 establishes that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Per MRE 402, "[e]vidence which is not relevant is not admissible."

A finding of relevance does not necessarily equate to admissibility. MRE 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

ARGUMENT

It is uncontroverted that PFC Manning's pleas constitute lesser included offenses of the charged offenses. The issue that remains for the Court, however, is not whether expert testimony is appropriate generally as argued by the Government. Rather, the issue is whether the *type* of expert testimony elicited by the Government at the 8 May 2013 closed session is relevant to the remaining elements required for the Government to prove up the greater offenses. The Defense contends that such testimony is not relevant and will discuss the charges in turn.¹ Should the Court find that such testimony is relevant to a remaining element the Defense believes it would be properly excluded under MRE 403.

¹ The Government did not proffer that "context" testimony was relevant with respect to Specification of I of Charge II or Charge III. As such, the Defense will not address those charges.

I. The Evidence in Question is Not Relevant With Respect to Specifications of Charge II Assimilating 18 U.S.C. §793(e) and 18 U.S.C. 1030(a)(1).

On 26 November 2012 this Court provided the parties with its draft instructions for the charged offenses. *See* AE 410a. With respect to the specifications assimilating §793 the Court established that the Government must prove:

- (1) At or near Contingency Operating Station Hammer, Iraq...;
- (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. *Id.* At 7-8

With respect to the specifications assimilating §1030, the Court established the Government must prove:

- (1) That at or near Contingency Operating Station Hammer, Iraq...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...
- (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. *Id.* at 10-1

In order for the Government to prove up the greater offense, it must establish elements two and three for the §793 offenses and element three for the §1030 offenses.² That is, they must establish the charged documents related to the national defense and PFC Manning had reason to believe their release could be used to the injury of the United States or to the advantage of any foreign nation.

Pursuant to the Court's draft instructions information relates to the national defense if its disclosure "would be potentially damaging to the United States or might be useful to an enemy of the United States," and is closely held. *Id.* at 9. Information is not closely held if it is lawfully available to the public and the Government has made no effort to guard it. *Id.* To establish the elements above a witness need only speak about the four corners of a document. Discussion about the geopolitical climate in country X does not impact whether the information contained in the document is lawfully available, nor does it make it more or less likely that the Government took steps to safeguard the information.

The Court also ruled, "[r]eason 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." *Id.* Here, the nature of the information involved is classified information. The context surrounding the document does not change the nature of information. If a document is classified, then that is its nature and it remains such regardless of any context. Testimony from a witness could be used to establish the nature (e.g. classified) of information, but context is not required to do so. As we saw during the 8 May 2013 hearing, witnesses are able to establish whether a document was properly classified at a given time without discussing the context surrounding the information. Additionally, in most cases the OCA witness is not the individual who originally classified the document. Rather, the *author* is the individual who originally classified the document using derivative authority. Certainly, the contextual information known by an OCA cannot be imputed to each individual who has derivative classification authority. As such, an OCA's testimony about context fails to make any contested element more or less likely.

Moreover, testimony from a witness, expert or otherwise, about the context of a document does not make it more or less likely PFC Manning should have known the

² For the 1030 offense, the Government must also prove that PFC Manning exceeded his authorized access on a Secret Internet Protocol Router Network

information's release could be used to the injury of the United States. The Government has not proffered any evidence to demonstrate that PFC Manning knew the context information to which each of the OCA witnesses would testify.³ If PFC Manning did not know the context, then this information should not be considered in an analysis of what he could have or should have known about the consequences of releasing information. Absent testimony that PFC Manning knew such context information at the time of the releases, that context information does not make it more or less likely that PFC Manning knew or should have known the release of the information could cause injury to the United States or aid any foreign nation. Because context information does not make any contested element more or less likely it is not relevant and should be excluded.

II. The Evidence in Question is Not Relevant With Respect to Specifications of Charge II Assimilating 18 U.S.C. §641.

On 26 November 2012 this Court provided the parties with its draft instructions for the charged offenses. *See* AE 410a. With respect to assimilating §641 the Court established that the Government must prove:

- (1) A or near Contingency Operating Station Hammer, Iraq,
- (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;
- (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. *Id.* at 4-5

Context information does not make any of the above elements more or less likely. The Defense acknowledges that Government witnesses are permitted to testify as to alleged value of the information and to any alleged "thieves market" for the information. Since value is based upon face, par, or market value, these witnesses should be permitted to state how this information is valued. Establishing the alleged value (face, par, or market) of the charged information does not require the witness to testify about any information beyond the four corners of the document. The "context" to the information within the charged document and how that

³ It is worth noting that if the Government did proffer evidence that PFC Manning was aware of the context information it would cut against their argument suggesting an expert is necessary for this type of testimony.

information could or could not impact on other information is simply not relevant.⁴ The charged information has value, if at all, based upon its content and not based upon contextual information surrounding the document.

III. The Evidence in Question is Not Relevant With Respect to Charge I

On 26 November 2012 this Court provided the parties with its draft instructions for the charged offenses. *See* AE 410a. With respect to Charge I the Court established that the Government must prove:

(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. *Id.* at 1.

Here, again, testimony elicited from witnesses in order to provide context will not make a fact in consequence more or less likely. Specifically, the Government indicated that context will be helpful to this Court in determining whether the information is true. This does not require the witness to testify about any information beyond the four corners of the document to provide "context" in order to demonstrate that the information is true, at least in part. It should be noted that the charged cables do not contain facts in a vacuum. For example, a State Department cable itself provides context. They are drafted in such a manner that the reader, whomever it may be, does not need to be an expert on the geopolitical climate in *every* country in the world to understand the meaning of the document. This is particularly true of the SIPDIS cables, which were intended for a wide audience of over one million people. Moreover, adding contextual information from an individual who did not draft the cable would do nothing to support the truth of a matter within a charged document. Relevant contextual information, if any, could only come from the author, as the knowledge of one cannot be imputed on another.

⁴ The Government also suggests that testimony related to the motives and resources of foreign adversaries are relevant to prove value. The Defense is aware of no Government witness who qualifies as a "foreign adversary." As such, any witness testimony regarding the motives or resources of foreign adversaries should be precluded due to the witness's lack of personal knowledge and the speculative nature of the testimony.

IV. Even if Relevant, Context Evidence Should be Excluded Pursuant to MRE 403


Should the Court find context evidence is relevant to an element at issue, the Defense believes such evidence should nonetheless be excluded under MRE 403. Allowing the Government to elicit such testimony will, the parties agree, entitle the Defense to cross examine the witness on that context testimony, and to call its own witnesses to contradict the testimony given by the Government witnesses. In such a scenario, the Defense could elicit context from a perspective alternative to a Government witness or elicit testimony that the contextual situation was well-known. International politics are no different than domestic politics; there are always multiple perspectives on a situation and plenty of individuals who are willing and able to contribute to the debate. It is easy to imagine the court devolving into hours of testimony over trivial matters like the extent to which a nation's tribal factions get along or whether a political figure thought a particular course of action was a good idea. To indulge such a debate over issues that are tangential at best would be a colossal waste of time for all parties and would detract from the actual issues at hand.

By way of illustration, let's suppose a cable stated "Eddie graduated from the Ohio State University and roots for the Buckeye football team." Despite the four corners of the document, the Government wished to show context in order to demonstrate the statements truth, and elicited testimony that Eddie grew up in Ohio, comes from a family of Buckeye fans, and has a basement full of Ohio State memorabilia. The Defense could then introduce contradictory evidence. For example, they might elicit that Eddie went to the same high school as several Wolverine football legends, that Eddie's brother went to Michigan, and that Eddie has a Wolverine decanter in his basement bar. All of this context testimony dances around the actual issue; does Eddie root for the Buckeyes? In the scenario we could spend hours or even days going back and forth with "context" testimony.

In the case at hand, we are dealing with over one hundred charged cables and over one hundred charged SIGACTs. Allowing the Government to drag the Court and the Defense into a debate over the context of each charged diplomatic cable and each SIGACT will detract from the actual issues and cause undue delay and waste of time.

CONCLUSION

As indicated above, the Defense respectfully requests the Court rule that "context" testimony from witnesses is inadmissible.



JOSHUA J. TOOMAN
CPT, JA
Defense Counsel

I certify that I served or caused to be served a true copy of the above on MAJ Ashden
Fein, via electronic mail, on 17 May 2013.

A handwritten signature in black ink, appearing to read 'Joshua J. Tooman', with a stylized, sweeping flourish extending to the right.

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel