IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	Crim. App. Dkt. No. 20130739
	)	USCA Dkt. No. 18-0317/AR
Private First Class (E-3) **CHELSEA E. MANNING,** United States Army	)	
Appellant	)	

NANCY HOLLANDER
Attorney at Law
Freedman Boyd Hollander
Goldberg Urias & Ward P.A.
20 First Plaza, Suite 700,
Albuquerque, NM 87102
(505) 842-9960
USCAAF Bar Number 37036

VINCENT J. WARD
Attorney at Law
Freedman Boyd Hollander
Goldberg Urias & Ward P.A.
20 First Plaza, Suite 700,
Albuquerque, NM 87102
(505) 842-9960
USCAAF Bar Number 37037

CHRISTOPHER D. CARRIER
Lieutenant Colonel, Judge Advocate
Chief, Capital and Complex Litigation
Defense Appellate Division
9275 Gunston Road
Ft. Belvoir, VA 22060
(703) 695-9853
USCAAF Bar Number 32172

J. DAVID HAMMOND
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Ft. Belvoir, VA 22060
(315) 930-2473
USCAAF Bar Number 36272

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER, UNDER ARTICLE 13, UCMJ, THE MILITARY JUDGE ERRONEOUSLY FOUND PFC MANNING WAS NOT HELD IN SOLITARY CONFINEMENT AND THAT THE SOLITARY CONDITIONS WERE NOT SO EGREGIOUS OR EXCESSIVE TO CONSTITUTE PUNISHMENT?

II.

WHETHER THE MILITARY JUDGE MISINTERPRETED THE DEFINITION OF "EXCEEDS AUTHORIZED ACCESS" IN THE COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. § 1030(a)(1)(SPECIFICATION 13 OF CHARGE II)?

III.

WHETHER 18 U.S.C.§ 793(e) VIOLATES THE DUE PROCESS CLAUSE AND FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION?

IV.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ADMITTING TESTIMONY FROM THE GOVERNMENT'S COUNTERINTELLIGENCE EXPERT ON THE VALUE OF THE INFORMATION AT ISSUE IN SPECIFICATIONS 4, 6, 8, AND 12 OF CHARGE II?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

Between February 23, 2012 and August 21, 2013, a military judge sitting as a general court-martial convicted Private First Class (PFC) Chelsea E. Manning, pursuant to her pleas, of violating a lawful general regulation and conduct prejudicial to good order and discipline and of a service discrediting nature (two specifications), in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934.

Contrary to her pleas, the military judge convicted PFC Manning of violating a lawful general regulation (four specifications); violating 18 U.S.C. §

641 (five specifications), 18 U.S.C. § 793(e)(six specifications), and 18 U.S.C. § 1030(a)(1) under clause 3 of Article 134; and conduct prejudicial to good order and discipline and of a service discrediting nature, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934.

The military judge sentenced PFC Manning to total forfeiture of pay and allowances, reduction to the grade of E-1, confinement for thirty-five years, and a dishonorable discharge. The military judge credited PFC Manning with 1,293 days of confinement against the sentence to confinement. The convening authority approved the sentence as adjudged and credited PFC Manning with 1,293 days of confinement against the sentence to confinement. On January 17, 2017, after almost seven years of confinement, the President of the United States granted PFC Manning clemency, reducing her confinement to time-served plus 180 days.

On May 31, 2018, the Army Court affirmed the findings of guilty and the sentence. (Appendix). Appellant was subsequently notified of the Army Court's decision. In accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel previously filed a Petition for Grant of Review on July 27, 2018.

The Judge Advocate General of the Army has designated the undersigned military counsel to represent appellant, who along with undersigned civilian

counsel hereby enter their appearance and file a Supplement to the Petition for Grant of Review under Rule 21.

Reasons to Grant Review

Pursuant to Rule 21(b)(5) of this Honorable Court's Rules, this Court should grant PFC Manning's petition for three reasons.

First, this Court should review the military judge's refusal to grant sentencing relief under Article 13, UCMJ, to PFC Manning for the nine months she spent in solitary confinement while awaiting trial. The military judge's ruling conflicts with *United States v. King*, 61 M.J. 225, 229 (C.A.A.F. 2005), in which this Court found "solitary segregation" to constitute punishment. The underlying ruling is based on the erroneous finding that PFC Manning was not in "total isolation" because she had incidental contact with brig officials as well as her lawyer and advocates. The ruling ignores a well-developed body of federal law and scientific literature on the topic of solitary confinement, its harmful and debilitating effects on prisoners, particularly those with mental illness, and what it means to be in "isolation." The military judge's factual and legal findings underscore the necessity for this Court to provide clear guidance on the topic of solitary confinement and its relationship to Article 13.

Second, this Court should review PFC Manning's conviction under the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030(a)(1) because the

conviction is based on a strained interpretation of the Act that has been expressly rejected by the United State Court of Appeals for the Ninth and Fourth Circuits. In fact, no court has ever interpreted the CFAA as broadly as the military judge in this case. The prosecution theory—that PFC Manning violated the CFAA by using a software program called W-get to quickly download State Department cables that she without question had authority to access—does not fall within the scope of the Act. This Court has a longstanding practice of applying the rule of lenity to protect the rights of accused in circumstances such as this. For these reasons, this Court's review is appropriate.

Third, this Court should grant review of PFC Manning's conviction under the Espionage Act, 18 U.S.C. § 793(e) because the statute's vague and overly broad language infringes on a broad swath of protected speech—speech that goes to the very core of our democratic system. The government will argue the Act concerns national security, an important issue to be sure. But the military's national security interests cannot trump two of our Constitution's most cherished rights, the rights to due process and free speech.

Finally, this Court should grant review of the military judge's admission of expert testimony because the military judge decided a question of law in conflict with applicable decisions of this Court when she admitted Daniel Lewis' opinion on the value of the information at issue in this case. The military judge incorrectly

applied the well-settled *Daubert* framework prior to admitting expert testimony that met none of the factors set forth in that case. The military judge also did not apply this Court's analysis in *United States v. Houser* when making her conclusions of law. 36 M.J. 392 (C.A.A.F. 1992). By granting review of this issue, the Court has an opportunity to clarify the obligations of a military judge under Military Rule of Evidence 702 when a party seeks to offer unique expert opinion testimony.

I.

WHETHER, UNDER ARTICLE 13, UCMJ, THE MILITARY JUDGE ERRONEOUSLY FOUND PFC MANNING WAS NOT HELD IN SOLITARY CONFINEMENT AND THAT THE SOLITARY CONDITIONS WERE NOT SO EGREGIOUS OR EXCESSIVE TO CONSTITUTE PUNISHMENT?

Standard of Review

Whether the charges should be dismissed or more sentencing credit granted under Article 13, UCMJ, involves mixed questions of fact and law. *King*, 61 M.J. at 227. This Court "defer[s] to the findings of fact by the military judge where those findings are not clearly erroneous. However, [its] application of those facts to the constitutional and statutory considerations, as well as any determination of whether [PFC Manning] is entitled to credit for unlawful pretrial punishment involve independent, de novo review." *Id.*

Statement of Facts

PFC Manning seeks sentencing relief under Article 13, UCMJ, for pretrial confinement served at Marine Corps Base Quantico (MCBQ) between July 29, 2010 and April 20, 2011. The Army detained PFC Manning in Iraq before transferring her to MCBQ. PFC Manning was provisionally diagnosed with depression and anxiety. (App. Ex. 461 at 11). She was moved to MCBQ after the deputy commander of the Theater Field Confinement Facility, where she was confined at the time, recommended transfer to a facility with specialized psychiatric services. (App. Ex. 461 at 8). The military judge found MCBQ did not offer the mental health services she required. (App. Ex. 461 at 11).

Upon transfer, MCBQ rated PFC Manning for medium custody, but the brig duty supervisor overrode the decision and placed her on suicide watch. (App. Ex. 461 at 12-13). By August 9, 2010, PFC Manning's mental health provider recommended taking her off suicide watch (App. Ex. 461 at 12). The brig commander declined to follow the advice, which caused a breakdown in the working relationship between the brig's leadership and medical professionals. "There was no meaningful communication between [brig leadership] and [the mental health provider] regarding [PFC Manning's] mental health condition and what, if anything, that condition and [her] behaviors contributed to the necessity of maintaining [her] on [Prevention of Injury] POI status." (App. Ex. 461 at 14).

While in segregated status, PFC Manning was prevented from any meaningful human contact and subjected to unusually harsh and unnecessary conditions. For example, she was restricted to her cell except for exercise (which was no more than one hour, and frequently less than 20 minutes) and limited calls (i.e., sunshine, television, library, etc.). (App. Ex. 461 at 15). Brig guards always monitored PFC Manning, and for all practical purposes prohibited her from engaging in any social contact with other inmates. (App. Ex. 258 at 8).[1] When PFC Manning left her cell the brig prohibited her from having contact with any other detainees. (App. Ex. 258 at 8). She was allowed occasional non-contact visitors during limited hours on weekends and holidays and only permitted contact visits with counsel. (App. Ex. 461 at 16).

In January 2011, the brig's leadership and medical professionals again disagreed on the necessity of PFC Manning's segregated status. (App. Ex. 461 at 17). A new medical provider stated with confidence that PFC Manning "did not need to be segregated from the general population due to a treatable mental disorder, and that [she] required routine further examination." (App. Ex. 461 at 17). That same month, the brig commander ordered a review of

[1] This is a topic of dispute. The military judge states that PFC Manning could talk in a low tone to inmates in adjacent cells, but in reality the cells adjacent to PFC Manning were rarely occupied and when PFC Manning attempted to speak to inmates several cells over, guards stopped her. (App. Ex. 258 at 8).

MCBQ to determine if it had the appropriate resources to serve as a joint or regional pretrial confinement facility. "The review found in relevant part that MCBQ was not resourced to house long-term pretrial detainees for more than 180 days and was not resourced to house high profile pretrial detainees requiring maximum security and with complex mental health issues." (App. Ex. 461 at 21)(emphasis added).

The brig commander ignored all the medical providers' recommendations and kept PFC Manning segregated for another three months until 20 April 2011, when she was transferred to Joint Regional Confinement Facility (JRCF), Fort Leavenworth, Kansas, where PFC Manning was classified for medium custody, *immediately put into population*, and remained in that status through trial. (App. Ex. 461 at 21).

Law and Argument

1. PFC Manning's confinement conditions were tantamount to solitary confinement.

The military judge erred when she found PFC Manning was not placed in solitary confinement because she had "daily human contact." (App. Ex. 461 at 23). In her ruling, the military judge defined solitary as "alone and without human contact." (App. Ex. 461 at 23). This is not the correct definition of solitary confinement. "A servicemember is entitled, both by statute and the Eighth Amendment, to protection against cruel and unusual punishment." *United States v.*

Avila, 53 M.J. 99, 101 (C.A.A.F. 2000). Although solitary confinement is not a per se violation of the Eighth Amendment, it is certainly a significant factor when fashioning an appropriate remedy under Article 13.

Human contact does not itself address whether confinement is solitary. "[I]solating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total." *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988). The constitutional interest in protecting detainees from solitary confinement arises when they are subjected to "23 hour-a-day in cell isolation, limited physical exercise, and limited human contact[.]" *Wilkerson v. Goodwin*, 774 F.3d 845, 856 (5th Cir. 2014). Solitary confinement can arise merely from being placed in protective custody, which necessarily will include contact with prison staff. *United States v. Amaro*, 2009 CCA LEXIS 235 (A.F. Ct. Crim. App. 16 June 2009).

This Court effectively addressed this issue in *King*. There, the Court granted pretrial confinement credit where the accused was placed in "segregation in a six-by-six, windowless cell." 61 M.J. at 228. "Placing King in a segregated environment with all the attributes of severe restraint and discipline, without an individualized demonstration of cause in the record, was so excessive as to be punishment and is not justified by the Barksdale AFB confinement facility space

limitations." *Id.* at 229. As in *King*, the MCBQ had no legitimate reason to hold PFC Manning in segregation for months on end.

2. The military judge failed to consider that PFC Manning suffered from serious mental illness while in solitary confinement.

The military judge should have also considered, as most courts do, the harm such practices can have on inmates with serious mental illnesses.

Judge Tanya Pratt from the United States District Court for the Southern District of Indiana explained the harms associated with this practice:

> [T]here are three ways in which segregation is harmful to prisoners with serious mental illness. The first is the lack of social interaction, such that the isolation itself creates problems. The second is that the isolation involves significant sensory deprivation. The third is the enforced idleness, permitting no activities or distractions. These factors can exacerbate the prisoners' symptoms of serious mental illness. This condition is known as decompensation, an exacerbation or worsening of symptoms and illness.

Indiana Prot. & Advocacy Servs. Comm'n v. Comm'r, Indiana Dep't of Correction, 2012 U.S. Dist. LEXIS 182974, *38 (S.D. Ind. Dec. 31, 2012). *See also Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995)(holding that policy of placing mentally ill inmates in segregation constituted cruel and unusual punishment); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1118 (W.D. Wis. 2001)("Credible evidence indicates that Supermax is not appropriate for seriously mentally ill inmates because of the isolation resulting from the physical layout, the inadequate level of staffing and the customs and policies.").

3. Review is appropriate to determine whether the sentencing relief adequately considered the impacts of solitary confinement and PFC Manning's mental illness.

The brig officials knew PFC Manning suffered from severe mental illness while in pretrial confinement. She was diagnosed with several conditions, including anxiety and depression. PFC Manning's mental condition deteriorated while confined and segregated, no doubt because of the oppressive and solitary conditions. This constituted punishment and should have factored into the sentencing remedy.[2]

II.

WHETHER THE MILITARY JUDGE MISINTERPRETED THE DEFINITION OF "EXCEEDS AUTHORIZED ACCESS" IN THE COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. § 1030(a)(1)(SPECIFICATION 13 OF CHARGE II)?

Standard of Review

This Court reviews questions of statutory interpretation de novo. *See United States v. Atchak*, 75 M.J. 193 (C.A.A.F. 2016); *United States v. Vargas*, 74 M.J. 1, 5 (C.A.A.F. 2014).

[2] Counsel acknowledge the clemency reduced PFC Manning's sentence to seven years, however that was considerably longer than it should have been.

Statement of Facts

In Specification 13 of Charge II, the government charged PFC Manning under clause 3 of Article 134 with violating 18 U.S.C. § 1030(a)(1) for knowingly exceeding authorized access on a Secret Internet Protocol Router Network (SIPR) computer to obtain classified cables maintained in a State Department database. (Charge Sheet). At the time of referral, the government's theory was that PFC Manning had violated the Army's acceptable use policy (AUP) by accessing the cables for an unauthorized purpose. (App. Ex. 91 at 2).

After considerable pretrial litigation regarding the appropriateness of the charge and specification, the government revised its theory to allege that PFC Manning "bypassed the ordinary method of accessing information by adding unauthorized software [i.e., W-get] to a Secret Internet Protocol computer and using that software to rapidly harvest or data-mine the information. W-get was not available on the computers used by the accused or authorized as a tool to download the information." (App. Ex. 188 at 5). The government argued the Army's policy of prohibiting the use of unauthorized software on classified computers was *an access restriction* within the meaning of the CFAA. (App. Ex. 188 at 3).

W-get is a free "network utility" that permits a user to "retrieve files" from the internet.[3] The software is not a hacking tool. In other words, W-get does not permit a user to hack into or otherwise bypass code-based restrictions to enter a secure network. W-get merely allows the user to download content of a website faster than if they were to click on individual web pages.

Law and Argument

The military judge convicted PFC Manning of violating the CFAA for using W-get in a manner that was contrary to the Army's computer use policies. Title 18 U.S.C. § 1030(a)(1) makes it unlawful to knowingly access a computer "without authorization or to exceed authorized access" to obtain classified or other restricted information with reason to believe such information could be used to the injury of the United States.

The statute defines "exceeds authorized access" as "**access[ing] a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter**." 10 U.S.C. § 1030(e)(6)(emphasis added). Congress enacted the CFAA **"**to address the growing problem of computer hacking, recognizing that, 'in intentionally trespassing into someone else's computer files, the offender obtains at the very least information as

[3] https://www.gnu.org/software/wget/faq.html#What_is_Wget.3f (last accessed August 15, 2018).

to how to break into that computer system.'" *United States v. Nosal (Nosal III)*, 676 F.3d 854, 858 (9th Cir. 2012)(quoting S. Rep. No. 99 – 432, at 9 (1986), 1986 U.S.C.C.A.N. 2479, 2487 (Conf. Rep.)).

1. The military judge's interpretation of the Act is untenably broad.

Two prevailing views exist regarding the meaning of the phrase "exceeds authorized access." Some courts interpret the phrase broadly to prohibit misuse of information (such as where an employee violates a computer use policy). *See, e.g., United States v. John*, 597 F.3d 263 (5th Cir. 2010); *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010). Other courts have narrowly construed the law to prohibit wrongful access (such as where an employee accesses information he or she has no right or permission to view). *See, e.g., United States v.*, 807 F.3d 508 (2d Cir. 2015); *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199 (4th Cir. 2012); *Nosal III*, 676 F.3d 854.

During extensive pretrial litigation over the issue the military judge adopted the "narrow meaning of 'exceeds authorized access'" which she found to be "limited to restrictions on *access* to information, and not restrictions on its 'use.'" (App. Ex. 139 at 9)(emphasis in original). In post trial litigation, however, the military judge oddly ruled that because the CFAA imposed more "stringent" protections for classified information than for other types of information, the phrase "exceeds authorized access" could be interpreted to prohibit knowing

violations of "access restrictions designed to ensure the security and protection of the classified information and to prevent the classified information from exposure to viruses, trojan horses or other malware." (App. Ex. 609 at 6).

To support the interpretation, which was clearly meant to provide greater protections for classified information than other types of information, the military judge interpreted the word "so" in the definition of "exceeds authorized access" to mean "in a manner or way indicated or suggested" (relying on the dictionary definition of the word "so"). *See* Appendix at 11. From this, the military judge derived Congressional intent to punish manner or method of access restrictions. No court, however, has interpreted the CFAA so broadly.

In *Nosal III*, for example, the Ninth Circuit sitting en banc expressly rejected the military judge's reading of the CFAA for two reasons. First, the plain language of the statute did not support it. *Id.* (refusing to define the word "so" in the statutory definition of exceeds authorized access, 18 U.S.C. § 1030(e)(6), to mean "in a manner" because if "Congress meant to expand the scope of criminal liability to everyone who uses a computer in violation of computer use restrictions—which may well include everyone who uses a computer—we would expect it to use language better suited to that purpose."). Second, the legislative history contradicted the government's reading of the statute:

> [a]lthough the legislative history of the CFAA discusses this anti-hacking purpose, and says nothing about

> exceeding authorized use of information, the government claims that the legislative history supports its interpretation. It points to an earlier version of the statute, which defined "exceeds authorized access" as "having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend." Pub. L. No. 99–474, § 2(c), 100 Stat. 1213 (1986). But that language was removed and replaced by the current phrase and definition. And Senators Mathias and Leahy — members of the Senate Judiciary Committee—explained that the purpose of replacing the original broader language was to "remove[] from the sweep of the statute one of the murkier grounds of liability, under which a[n] . . . employee's access to computerized data might be legitimate in some circumstances, but criminal in other (not clearly distinguishable) circumstances." S. Rep. No. 99–432, at 21, 1986 U.S.C.C.A.N. 2479 at 2494. Were there any need to rely on legislative history, it would seem to support Nosal's position rather than the government's.

Id. at 858 n.5.

The Fourth Circuit also rejected the military judge's reading of the statute in *WEC Carolina Energy Solutions LLC*, 687 F.3d at 206. There the court considered a civil claim brought by an employer against an employee who had downloaded and copied information from a computer in violation of company policy. In rejecting plaintiff's argument the court found, "Congress has not clearly criminalized obtaining or altering information 'in a manner' that is not authorized. Rather, it has simply criminalized obtaining or altering information that an individual lacked authorization to obtain or alter." *Id.*

2. The meaning of "exceeds authorized access" is ambiguous.

"Unless the text of a statute is ambiguous, the plain language of a statute will control unless it leads to absurd results." *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013)(citation and internal quotations omitted). *See also United States v. Santos*, 553 U.S. 507, 519 (2008), "We interpret ambiguous criminal statutes in favor of defendants, not prosecutors."

The phrase "exceeds authorized access" is unquestionably ambiguous. As the military judge acknowledged, the phrase has been subject "to differing interpretations among the [United States] Circuit Courts of Appeals thereby indicating the statutory language is not definitive and clear." (App. Ex. 139 at 5). Earlier this year the Second Circuit found the statute ambiguous for this precise reason. *See Valle*, 807 F.3d at 524. Nor does the legislative history support the military judge's reading of the CFAA. *See Nosal III*, 676 F.3d 858 at n.3. The word "so," therefore, does not have a sufficiently clear meaning to support the government's prosecution theory.

3. Review will ensure the rule of lenity is properly applied.

Because of the enormous constitutional interests at stake, including the right to fair notice and due process, this Court has "long adhered to the principle that criminal statutes are to be strictly construed, and any ambiguity [should be] resolved in favor of the accused." *United States v. Thomas*, 65 M.J. 132, 135 n.2

(C.A.A.F. 2007)(describing the reasons for the rule of lenity). *See also Santos*, 553 U.S. at 519. This is true even where the criminal allegations involve classified materials and national security. For these reasons this Court should review whether the Army Court and military judge's interpretation of the CFAA is constitutionally fair and appropriate.

III.

WHETHER 18 U.S.C.§ 793(e) VIOLATES THE DUE PROCESS CLAUSE AND FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION?

Standard of Review

This court reviews de novo issues involving the constitutionality of an act of Congress. *See United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005).

Statement of Facts

In Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, PFC Manning was charged under clause 3 of Article 134 with unauthorized possession and disclosure of classified information in violation of 18 U.S.C. § 793(e)(Espionage Act). The military judge convicted PFC Manning of all the Espionage Act offenses except Specification 11. As discussed below, 18 U.S.C. § 793(e) violates PFC Manning's due process and First Amendment rights. Two of the Act's essential elements are unconstitutionally vague and overbroad: (1) whether the classified records related to the "national defense" and (2) whether PFC Manning had reason to know the

records could be used "to the injury of the United States or to the advantage of any foreign nation."

Before trial the defense sought to dismiss the Espionage Act specifications on constitutional grounds, specifically vagueness and overbreadth. (App. Ex. 88). The military judge denied the motion and issued draft instructions prior to PFC Manning's election of a judge-alone trial. (App. Exs. 138, 410a). The instruction defines the relevant terms. (App. Ex. 410 at 9).

Regarding the second element, "injury to the United States or to the advantage of a foreign country," the draft instruction states the injury "must not be remote, hypothetical, speculative, far-fetched, or fanciful." (App. Ex. 410a at 10).

PFC Manning challenges the conviction as a matter of law because the Espionage Act is unconstitutional facially and as applied.

Law and Argument

1. 18 U.S.C.§ 793(e) is unconstitutionally vague.

"Due process requires 'fair notice' that an act is forbidden and subject to criminal sanction." *United States v. Caporale*, 73 M.J. 501, 504 (A.F. Ct. Crim. App. 2013)(*quoting United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)). An act must be sufficiently clear for "ordinary people [to] understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* (*quoting Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The military judge relied on *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), *United States v. Kim*, 808 F. Supp. 2d 44 (D.D.C. 2011), and *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), *aff'd on other grounds*, 557 F.3d 192 (4th Cir. 2009), for the proposition that the statute is sufficiently clear and provides fair warning. No military court has ever decided this issue, therefore; these cases are at best only persuasive.

Nor do these cases address the concerns raised in *Johnson v. United States*, 135 S. Ct. 2551 (2015), a case about whether the residual clause in the Armed Career Criminal Act violates due process. Writing for the Court, Justice Antonin Scalia expressed apprehension with a criminal statute that "asks whether the crime '*involves conduct*' that presents too much risk of physical injury." *Id*. at 2557 (emphasis in original). Such indeterminate language, he wrote, "denies fair notice to defendants and invites arbitrary enforcement by judges." The Espionage Act suffers from the same problem.

As to the phrase "relating to the national defense," the military judge interpreted it "broadly" to cover virtually anything having to do with the military. (App. Ex. 410a at 9). Moreover, the disclosure of such information need only be "potentially damaging." (App. Ex. 410a at 9). The definition of the phrase "to the injury of the United States or to the Advantage of any Foreign Nation" is even less clear. The instruction merely states the injury must not be remote, hypothetical,

speculative, far-fetched, or fanciful." (App. Ex. 410a at 9). It does not even attempt to explain what constitutes an injury.

This leaves too much "uncertainty about how to estimate the risk posed by a crime." *Johnson*, 135 S. Ct. at 2557. Like the statute at issue in *Johnson,* the Espionage Act is abstract and written in a manner that gives no assurance that it relates to "real world" conduct. *Id.* It therefore violates the due process clause.

2. 18 U.S.C. 793(e) is unconstitutionally overbroad.

To establish a First Amendment violation, an accused bears the burden of establishing the statute "prohibits a substantial amount of protected speech." *United States v. Taylor*, 2016 CCA LEXIS 108, *6-7 (A.F. Ct. Crim. App. 25 Feb. 2016)(*quoting United States v. Williams*, 553 U.S. 285, 292 (2008)). The Espionage Act unquestionably regulates speech concerning our nation's national defense.

The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words "national security." National security is public security, not government security from informed criticism. No decisions are more serious than those touching on peace and war; none are more certain to affect every member of society. Elections turn on the conduct of foreign affairs and strategies of national defense, and the dangers of secretive government have been well documented. *Morison*, 844 F.2d at 1081 (Wilkinson, J., concurring).

In *Morison*, on which the military judge relied, the court found 18 U.S.C. § 793(e) constitutionally sufficient because the district court reasonably narrowed its instructions to "confine national defense to matters under the statute which "'directly or may reasonably be connected with the defense of the United States.'" *Id.* at 1076. In this case, however, the military judge defined the term broadly to include anything having to do with the "military" and "all activities of national preparedness." (App. Ex. 410a). But *Morison* did not go this far. When a court interprets a statute so broadly as to bring virtually any speech within its sweep, then as a matter of law it is unconstitutional. *Williams*, 553 U.S. at 292.

Given the vast record, we have no way of knowing whether the military judge would have found PFC Manning guilty of all the Espionage Act specifications had she correctly applied a more limiting standard. Under these circumstances this Court has discretion to remand for a new trial or to affirm the lesser-included offense to which PFC Manning pleaded guilty and reassess the sentence. *See United States v. Roa*, 12 M.J. 210, 213 (C.M.A. 1982).

Between the two options, the most efficient way to reconcile the error is to affirm the lesser-included offenses to which PFC Manning pleaded guilty. This is more efficient and will cause less disruption to the Army. Finally, the lesser-included offenses capture the gravamen of the offenses. The interests of justice are not served by retrying the merits of the case—not when PFC Manning has pleaded

guilty—and it is well established that 18 U.S.C. § 793(e) is one of the least serious Espionage Act offenses.

3. Review is appropriate given the constitutional interests at stake.

Perhaps no issue is as fundamentally important to our democracy than the interplay between free speech and national security. This Court is one of the most authoritative voices on the connection between these issues. No court has recently considered the issue PFC Manning has raised here—whether the Espionage Act violates First Amendment and due process protections—therefore it is appropriate and indeed necessary for this Court to review.

IV.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ADMITTING TESTIMONY FROM THE GOVERNMENT'S COUNTERINTELLIGENCE EXPERT ON THE VALUE OF THE INFORMATION AT ISSUE IN SPECIFICATIONS 4, 6, 8, AND 12 OF CHARGE II?

Standard of Review

This Court reviews de novo the question of whether a military judge correctly followed the *Daubert* framework. *United States v. Henning*, 75 M.J. 187, 191 (C.A.A.F. 2016). If the *Daubert* framework is properly followed, a military judge's decision to admit or exclude expert testimony over defense objection is reviewed for an abuse of discretion. *Id.*; *United States v. Sanchez*, 65 M.J. 145, 148 (C.A.A.F. 2007).

Statement of Facts

To prove the required value element of the 10 U.S.C. §641 offenses in Specifications 4, 6, 8, and 12 of Charge II, the government introduced evidence purporting to show the value on a "thieves market" of the information contained within the relevant databases. (R. at 9465-771). This evidence came through opinion testimony from Daniel Lewis, a counterintelligence (CI) advisor at the Defense Intelligence Agency. (R. at 9466).

Mr. Lewis admitted during cross-examination that he previously told the defense team he did not consider himself an expert at valuing classified information (R. at 9494), that he could not put specific values on documents (R. at 9506), and that he had never received any training on valuing classified information for a foreign intelligence service, or valuing information of any kind. (R. at 9496-500).

Mr. Lewis testified that he had never been an offensive CI agent, never sold information (R. at 9501) and never managed any offensive CI operations. (R. at 9506). Instead, his experience with offensive CI operations came from his "visibility" over those operations as the Chief of the Counterespionage Division and the Counterintelligence Field Activity. (R. at 9475, 9478, 9480, 9500-02). Due to this "visibility," Mr. Lewis claimed he could assess the cost of information sold to foreign intelligence organizations. (R. at 9539 (redacted)).

No court had previously accepted Mr. Lewis as an expert in valuing classified information from a foreign intelligence service. (R. at 9502). He did not subscribe to journals dedicated to the valuation of information, nor did he know if any existed, and he had never attended conferences at which the value of information was discussed. (R. at 9502-03).

Mr. Lewis admitted that everything he had learned during his oversight of offensive CI operations came from reading case files or talking to case officers. (R. at 9546). He would read "reporting from the field" to inform briefings to high-level officials and Congress. (R. at 9547).

Since Mr. Lewis had never valued information or engaged in operations that would result in placing a value on information, he prepared for his participation at trial as a valuation expert by requesting a sample of information from a report entitled the Essential Elements of Information (EEI). (R. at 9551, 9616). The EEI is a quarterly report which contains, generally, information on "what the foreign adversaries were looking for." (R. at 9552, 9616). The EEI is generated from information obtained through completed offensive CI operations. (R. at 9616, 9618).

Mr. Lewis did not request actual quarterly EEI reports due to their large volume. (R. at 9552). Instead, he only requested a "snapshot of information" in

reports from 2008 through 2010. (R. at 9552-53). He did not independently verify the accuracy of the information provided in the "snapshot." (R. at 9553).

The EEI reports—and thus the sample Mr. Lewis obtained—contained no value data. The samples only listed types of information. Thus, to prepare for his testimony, he requested value data from a different, unrelated source. But he only requested value data on the "most and least successful offensive CI operations," (R. at 9553-56, 9661, 9685), not "unsuccessful or failed CI operations." (R. at 9619, 9661). He used the sampling of information in the EEI snapshot in conjunction with the unrelated value data to determine the value of information in this case. (*See* App. Exs. 589 and 590).

Approximately one week before his testimony, the government asked Mr. Lewis to attempt to place values on documents relevant to this case. (R. at 9557). At that time, trial counsel gave Mr. Lewis access to the Department of State Net-Centric Diplomacy (NCD) database and asked him to do some keyword searches for specific information in the database. (R. at 9557, 9642). Trial counsel also showed Mr. Lewis about forty records from both the CIDNE-A and CIDNE-I databases. (R. at 9558-59).

Mr. Lewis compared the results of his keyword searches of the DoS NCD database and his review of the CIDNE documents to the data he obtained in his earlier preparation for this trial. (R. at 9559-61, 9642). Mr. Lewis depended only

on the historical data others provided in the EEI snapshot and the unrelated successful CI operations to arrive at his valuation opinion. (R. at 9553-54, 9560-61). He did not examine the records of the actual offensive CI operations from which this data was derived. (R. at 9560). Nor did he consider whether the information in the charged documents was already publicly known, a factor which he admitted might have an impact on the value of the information. (R. at 9642). Moreover, he testified he could not render his opinion using only his memory or experience. He needed the sampling of data to arrive at his opinion. (R. at 9560-64). Significantly, until he began preparing for his testimony one week before testifying, Mr. Lewis had never valued a classified document. (R. at 9566).

In an unclassified ruling, the military judge ruled Mr. Lewis could "testify and offer an opinion with regard to value of certain charged documents upon laying a proper foundation within the parameters of the oral classified supplement to this ruling." (App. Ex. 591).

In her oral classified ruling, she added that Mr. Lewis was also qualified as an expert in offensive CI operations, and the fact his experience came from oversight and not direct involvement as a case agent went only to the weight of his testimony. (R. at 9664). She further ruled that Mr. Lewis could discuss his use of key terms to find relevant information in the charged documents, compare this information to the data he requested in preparation for his testimony, and provide

an opinion on the value of the information in the charged documents. (R. at 9664-65). Mr. Lewis then rendered his substantive testimony on value during a closed session, testifying that between 2008 and 2010, certain foreign intelligence services would value information within the charged documents at certain amounts. (R. at 9641-9726).

Law and Argument

An expert's opinion is admissible only if the testimony: (1) "is based upon sufficient facts or data," (2) "is the product of reliable principles and methods," and (3) the principles and methods have been applied "reliably to the facts of the case." M.R.E. 702. The military judge is the gatekeeper, "tasked with ensuring that an expert's testimony both rests on a reliable foundation and is relevant." *Sanchez*, 65 M.J. at 149 (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)).

The proponent of expert testimony must demonstrate the six *Houser* factors. *Houser*, 36 M.J. at 397. In *Daubert*, the Supreme Court set out four non-exclusive factors which a judge may use to ensure the reliability of expert testimony. *Daubert*, 509 U.S. at 593-94; *Kumho Tire*, 526 U.S. at 141 (applying *Daubert* to non-scientific expert testimony). Although *Houser* was decided before *Daubert*, the decisions are consistent and the military judge should consider the factors from

both cases. *Sanchez*, 65 M.J. at 149; *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999).

The military judge failed to adequately perform the gatekeeping role and abused her discretion when she admitted unreliable opinion testimony that exceeded the scope of the witness' expertise. Mr. Lewis' opinions on the value of information were analytical leaps detached from his actual experience. He relied upon incomplete data and an unreliable method concocted at the eleventh hour in preparation for his testimony.

1. Mr. Lewis' testimony did not meet a single *Houser* or *Daubert* factor.

The military judge did not cite *Houser* in her ruling, nor is there any indication she carefully applied its framework. (App. Ex. 591). She cited the *Daubert* factors, but she did not explain how they applied to Mr. Lewis' opinions. (App. Ex. 591). A correct application of these principles shows the decision to admit this evidence was manifestly erroneous because the testimony met none of the factors set forth in those cases.

A. Mr. Lewis was not qualified to value information and the subject matter of his testimony exceeded the scope of his actual qualifications.

As to the first and second *Houser* factors, Mr. Lewis was not qualified through "knowledge, skill, experience, training, or education" to offer an opinion on the subject matter here—the value of information. M.R.E. 702. He repeatedly admitted he did not have the knowledge or skill necessary to offer an opinion on

the value of information, telling the defense during several pretrial interviews that he was not an expert in valuing classified information and he could not value a specific document. (R. at 9494, 9506). It was not until he testified that he suddenly found himself so qualified.

Nor had Mr. Lewis received training or education on valuing classified information for a foreign intelligence service, or valuing information of any kind. (R. at 9496-500). To his knowledge, no such training existed within the Department of Defense. (R. at 9497). He did not know of any professional periodicals dedicated to the valuation of information and he had never attended any conferences in which the value of information was discussed. (R. at 9502-03).

Finally, and most importantly, Mr. Lewis lacked relevant experience. He had never valued information of any kind before PFC Manning's court-martial. (R. at 9500-01). Every job he held in the field of CI was focused on the investigation of espionage. (R. at 9470-78, 9500-01). But the investigation of espionage has little if anything to do with the valuation of information, as Mr. Lewis acknowledged when he admitted he had never valued classified information, nor would he have occasion to, during a CI investigation. (R. at 9501).

Since CI investigators gain no expertise or ability to value information, a significant focus of Mr. Lewis' foundational testimony was on the extent of his experience in offensive CI operations, where information *is* exchanged for money.

(R. at 9477, 9479-80, 9500-02, 9506-07, 9516-18, 9523-25). But Mr. Lewis never actually conducted offensive CI operations or managed a single offensive CI operation. (R. at 9500-1, 9506). Everything he learned about offensive CI operations came from reading case files. (R. at 9546 (redacted)). In short, Mr. Lewis' "oversight" of offensive CI operations never placed him in a position to value U.S. government information, or any other information for that matter.

The military judge's conclusion that this lack of experience only "goes to weight" was manifestly erroneous because no other area of Mr. Lewis' experience could arguably qualify him to value information. In upholding the military judge's decision to admit Mr. Lewis' valuation testimony, the Army Court glossed over this shortcoming, citing Mr. Lewis' "experience with similar exchanges." (Appendix at 22). But the record of trial demonstrates he had no such experience.

B. The information underlying Mr. Lewis' opinion was not of the type a relevant expert would reasonably rely upon.

The third *Houser* factor, the basis for the expert testimony, addresses the facts and data an expert may appropriately rely upon in forming his opinion. To reach his conclusion on the value of the charged documents, Mr. Lewis relied upon three sources of information: (1) the EEI "snapshot," (2) the unrelated value data he obtained in preparation for his testimony, and (3) his "memory" and "experience." (R. at 9559-60, 9685, 9703, 9727-28, 9739).

Under M.R.E. 703, an expert's opinion may be based upon experience and inadmissible evidence, including "documents supplied by other experts." M.R.E. 703; *Houser* 36 M.J. at 399. However, an expert opinion is admissible only if the expert has relied on information reasonably relied upon by experts in the particular field in forming opinions on the subject. M.R.E. 703.

Mr. Lewis' experience and memory alone did not give him the ability to value information. (R. at 9553-54, 9560-64). He could not view a document and determine its value without reference to additional data. (R. at 9553-54, 9564-65). Thus, for Mr. Lewis' valuation opinion to be admissible, the additional data he referenced to arrive at his conclusions must be of the type reasonably relied upon by an expert in valuing information.

But the record provides no reason to believe an expert in the relevant field—valuing U.S. government information—would rely upon any of Mr. Lewis' three sources of information. The government offered no evidence that experts have relied upon the additional data Mr. Lewis relied upon to value information.

Mr. Lewis stated that he relied upon this information to brief Congress. (R. at 9574). However, Congress did not rely on his briefings or the data to value information as Mr. Lewis did in this case. To the contrary, the record indicates Mr. Lewis did nothing more than summarize the progress of ongoing operations so Congress could fulfill its fiscal obligations. (R. at 9479-80).

The military judge's ruling that the data was reliable failed to consider Congress' purpose in relying on it. Impressed by the data's inclusion in high-level briefings to Congress, the judge simply cited the preparation of these briefings. (App. Ex. 591 at 3). The Army Court did the same in its decision, stating only that the data was "used to prepare briefings at the highest levels." (Appendix at 22). Both the military judge and the Army Court overlooked the third *Houser* factor by failing to consider the purpose of the data Mr. Lewis relied upon.

C. Mr. Lewis' valuation method failed the *Daubert* reliability standard and lacked "alternative indicia of reliability."

As to the fourth and fifth *Houser* factors of relevance and reliability, Mr. Lewis' opinion was neither relevant nor reliable. Unreliable expert testimony is not relevant. *United States v. Dimberio,* 56 M.J. 20, 27 (C.A.A.F. 2001). The military judge improperly applied the *Daubert* framework in finding otherwise.

That framework provides detailed guidance on the *Houser* prongs of relevance and reliability. *Griffin,* 50 M.J. at 284. The government must demonstrate reliability by relying on the four *Daubert* factors or on "alternative indicia of reliability." *United States v. Billings,* 61 M.J. 163, 168 (C.A.A.F. 2005). Mr. Lewis' testimony lacked sufficient hallmarks of reliability because it failed to meet a single *Daubert* factor and lacked "alternative indicia of reliability."

First, although the military judge cited *Daubert* in her ruling, her conclusions of law meet none of its factors. (App. Ex. 591). Mr. Lewis' technique

for valuing classified information had never been tested, subjected to peer review or publication, had any discernable error rate or standards controlling its operation, nor had any acceptance within the CI community. The Army Court's opinion did not address whether the military judge properly applied the *Daubert* framework, or mention this crucial test.

Second, the military judge compounded this error by failing to cite any "alternative indicia of reliability" that would otherwise save Mr. Lewis' testimony. Instead, the military judge apparently accepted the connection between Mr. Lewis' testimony and the existing data simply because he had worked in the CI field for decades. (App. Ex. 591 at 1-2). But this experience says nothing about the reliability of the technique underlying Mr. Lewis' valuation opinion. *See Griffin*, 50 M.J. at 284; *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 ("But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."); *United States v. Flesher*, 73 M.J. 303, 314 (C.A.A.F. 2014)("We first question how an individual can be characterized as an expert based simply on his or her job title.")

Mr. Lewis had never valued information of any kind until he was asked to do so at PFC Manning's court-martial. (R. at 9566, 9735 (redacted)). He demonstrated no particular or specialized knowledge on any of the information

within the charged documents, such as diplomacy or military and detainee operations. He viewed the charged documents for the first time a week before he testified. (R. at 9557, 9736 (redacted)). He only spent a few hours reviewing "very small" samples of documents to arrive at purported values for entire sets of documents, yet he was not qualified to conduct statistical analysis and infer propositions based on sample sizes. (R. at 9557, 9736-45). *See, e.g., Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 642 (S.D.N.Y. 2007) (excluding probability testimony of colorimetry expert because expertise in colorimetry "does not establish his expertise as a statistician").[4]

Mr. Lewis' testimony established he was aware that a market for classified information generally exists, nothing more. His methodology for determining value in this market was not reliable, neutral, or trustworthy. For example, he would perform a keyword search in the charged documents for certain types of information that had been sold in the past. (R. at 9557, 9642). He would then simply conclude that similar information in the charged documents must have some value. (R. at 9561). But he did not compare the content of the actual

[4] *See also Kolokowski v. Crown Equip. Corp.*, No. 05-4257, 2009 U.S. Dist. LEXIS 77474, at *33-34 (D.N.J. Aug. 27, 2009)(expert's methodology "overly simplistic" and "far too inferential" where no statistical analysis performed to support inferences); *Ortiz v. Yale Materials Handling Corp.*, No. 03-3657, 2005 U.S. Dist. LEXIS 18424, at *25 (D.N.J. Aug. 24, 2005)(expert's "simple review of the numbers" without incorporation of "any kind of statistical or mathematical analysis" rendered ultimate opinion unreliable).

information sold in the past to the information in the charged documents to ensure this purported similarity, despite his apparent ability to do so. (R. at 9740-42). Nor did he account for numerous factors that might alter the information's value at the time of the sale, such as the information's availability in open source reporting or elsewhere, or whether the passage of time had altered its current value. (R. at 9642).

Moreover, Mr. Lewis only considered past successful sales of classified information, wholly ignoring those instances in which an attempted transaction did not result in an actual sale of information.[5] (R. at 9616, 9619, 9661, 9734). It is a basic economic principle that price in any market is dependent upon demand. Thus, failed transactions in a marketplace affect value just as much as successful ones. The military judge recognized as much when she repeatedly asked trial counsel to explain how Mr. Lewis' opinion could be reliable when he failed to consider unsuccessful transactions. (R. at 9608-17). Although the judge recognized Mr. Lewis' data did not include information on unsuccessful or failed CI operations, she did not explain how his method remained reliable despite this glaring shortcoming. (R. at 9661).

[5] Information on unsuccessful transactions was apparently available to Mr. Lewis, but he neither asked for it nor considered it. (R. at 9626-27).

As to the final *Houser* factor, the probative value of Mr. Lewis' testimony was substantially outweighed by the danger of unfair prejudice. Mr. Lewis' opinion was worthless to the factfinder because it met none of the *Daubert* or *Houser* factors. Its prejudicial effect was unfair because the military judge relied on this testimony to find PFC Manning guilty of every Section 641 specification. (App. Ex. 625 at 5).

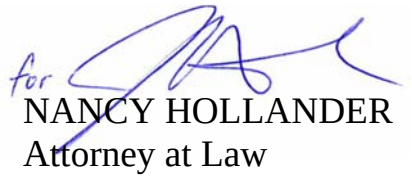
2. The admission of Mr. Lewis' testimony materially prejudiced a substantial right of PFC Manning.

Under Article 59(a), UCMJ, this Court must test the military judge's error in admitting this evidence for prejudice. "The test for nonconstitutional evidentiary error is whether the error had a substantial influence on the findings." *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001). The government bears the burden of demonstrating the admission of Mr. Lewis' testimony was harmless. *United States v. Berry*, 61 M.J. 91, 97-98 (C.A.A.F. 2005).

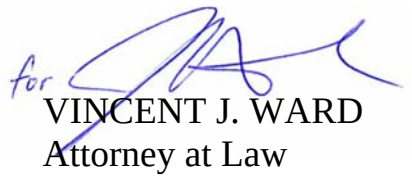
Mr. Lewis' testimony is the only evidence in the record to support the value element of Specifications 4, 6, and 12 of Charge II. Thus, if this Court grants review and finds the admission of this evidence was error, the Court should affirm only the lesser included Section 641 offense of stealing, purloining, or converting records or things of value belonging to the United States with a value of $1,000 or less.

Conclusion

WHEREFORE, PFC Manning respectfully requests this Honorable Court grant her petition for review.



NANCY HOLLANDER
Attorney at Law
Freedman Boyd Hollander
Goldberg Urias & Ward P.A.
20 First Plaza, Suite 700,
Albuquerque, NM 87102
(505) 842-9960
USCAAF Bar Number 37036



VINCENT J. WARD
Attorney at Law
Freedman Boyd Hollander
Goldberg Urias & Ward P.A.
20 First Plaza, Suite 700,
Albuquerque, NM 87102
(505) 842-9960
USCAAF Bar Number 37037

CHRISTOPHER D. CARRIER
Lieutenant Colonel, Judge Advocate
Chief, Capital and Complex Litigation
Defense Appellate Division
9275 Gunston Road
Ft. Belvoir, VA 22060
(703) 695-9853
USCAAF Bar Number 32172

J. DAVID HAMMOND
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Ft. Belvoir, VA 22060
(315) 930-2473
USCAAF Bar Number 36272

APPENDIX

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAMPANELLA, CELTNIEKS, and HAGLER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class BRADLEY E. MANNING (nka CHELSEA E. MANNING)
United States Army, Appellant

ARMY 20130739

U.S. Army Military District of Washington
Denise R. Lind, Military Judge
Colonel Corey J. Bradley, Staff Judge Advocate (pretrial)
Colonel James R. Agar, II, Staff Judge Advocate (post-trial)

For Appellant: Vincent J. Ward, Esquire (argued); Captain J. David Hammond, JA; Lieutenant Colonel Jonathan F. Potter, JA; Vincent J. Ward, Esquire; Nancy Hollander, Esquire (on brief); Lieutenant Colonel Christopher D. Carrier, JA.

Amicus Curiae:

For Electronic Frontier Foundation, National Association of Criminal Defense Lawyers, and the Center for Democracy and Technology: Jamie Williams, Esquire; Andrew Crocker, Esquire (on brief).

For Amnesty International Limited: John K. Keker, Esquire; Dan Jackson, Esquire; Nicholas S. Goldberg, Esquire (on brief).

For American Civil Liberties Union Foundation: Esha Bhandari, Esquire; Dror Ladin, Esquire; Ben Wizner, Esquire (on brief).

For Open Society Justice Initiative: James Goldston, Esquire; Sandra Coliver, Esquire (on brief).

For Appellee: Captain Catherine M. Parnell, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Steve T. Nam, JA; Captain Timothy C. Donahue, JA; Captain Jennifer A. Donahue, JA; Captain Samuel E. Landes, JA (on brief); Captain Allison L. Rowley, JA.

31 May 2018

OPINION OF THE COURT

CAMPANELLA, Senior Judge:

A military judge sitting as a general court-martial convicted appellant, in accordance with her pleas, of one specification of violating a lawful general regulation and two specifications of general disorders in violation of Articles 92 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 934 (2006). The military judge also convicted appellant, contrary to her pleas, of four specifications of violating a lawful general regulation, one specification of wantonly causing intelligence to be published, six specifications of violating 18 U.S.C. § 793(e), one specification of violating 18 U.S.C. § 1030(a)(1), and five specifications of violating 18 U.S.C. § 641, in violation of Articles 92 and 134, UCMJ.[1]

The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for thirty-five years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The military judge credited, and the convening authority approved, 1,293 days of confinement credit, 112 days of which was Article 13, UCMJ, credit.

On 17 January 2017, President Barack Obama commuted appellant's sentence of thirty-five years imprisonment to time served plus 120 days, leaving intact all other conditions and components of the sentence. Thereafter, appellant conceded two of the initial assigned errors as moot based on the President's commutation.[2]

This case is before us for review pursuant to Article 66, UCMJ. Appellant asserts eight assigned errors, five of which merit discussion, one of which merits relief. We have also considered the matters appellant personally asserted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and conclude appellant's *Grostefon* matters do not warrant relief.

BACKGROUND

In 2007, appellant joined the Army as an all-source intelligence analyst. Appellant attended and passed the Army intelligence analyst advanced skill training, which included lessons on terrorist use of information on the internet and lessons on information security. Appellant's information security training was extensive and

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[1] The court acquitted appellant of one specification of aiding the enemy in violation of Article 104, UCMJ, and one specification of transmitting defense information under 18 U.S.C. §793(e), in violation of Article 134, UCMJ.

[2] Specifically, appellant conceded the assigned errors of whether the military judge abused her discretion by admitting certain sentencing testimony and whether this court should re-adjudge the sentence based on cumulative errors alleged to have occurred throughout the case.

included instruction regarding why information is classified, restriction on access to classified information, and storage and safekeeping of classified information to ensure unauthorized persons do not gain access.

Appellant was taught how to use numerous information sources to conduct intelligence analysis and create intelligence reports. Intelligence reports produced by analysts are intended to provide situational awareness to forces during military operations. Appellant's training warned that operational information should not be discussed on the internet or in email, and to assume the enemy is always able to view and read information on the internet. Appellant obtained a security clearance that allowed her access to classified information in order to conduct her job.

During her pre-deployment train-up, appellant obtained a higher security clearance, which allowed her access to even more sensitive classified compartmentalized information. On 7 April 2008 and 17 September 2008, appellant signed two separate nondisclosure agreements, acknowledging she understood the security indoctrination concerning the nature and protection of classified information and that unauthorized disclosure could cause irreparable damage to the United States. Appellant avowed not to divulge classified information to those not authorized access and acknowledged doing so would be a criminal act.

In addition to learning about the need to protect classified information, appellant, on at least one occasion, also taught others. On 13 June 2008, appellant created a slide show entitled "Operations Security," which defined critical sensitive information and listed common security breaches. The conclusion of the presentation advised avoiding public disclosure of classified sensitive information—to include posting it on the internet.

On 11 October 2009, appellant deployed to Forward Operating Base (FOB) Hammer, Iraq, with the 10th Mountain Division. Appellant was assigned to work in the Intelligence Section of the 2nd Brigade Combat Team as an all-source intelligence analyst. As such, appellant had access to and reviewed voluminous amounts of classified and sensitive information across the intelligence spectrum. This included classified significant activity reports (SIGACTs) in both Afghanistan and Iraq, U.S. Southern Command (SOUTHCOM) detainee intelligence reports, and U.S. State Department diplomatic cables. The data to which appellant had access contained a vast amount of information related to past and present military operations, revealing such restricted information as tactics, techniques, and procedures used by allied forces both offensively and defensively, the names of suspected enemies, the names of covert cooperatives, code words, unit locations, specific military missions, and other controlled records.

Appellant's job included downloading, indexing, and plotting SIGACTs on maps based on locations and enemy threats. Appellant knew the enemy engaged in a

similar pattern of analysis regarding United States operations. By all accounts, for her rank and experience, appellant was an excellent intelligence analyst, able to skillfully synthesize large volumes of information and provide particularly helpful reports as requested by her superiors.

In order to use the secret classified computer network (SIPRNET), appellant agreed to an "acceptable use policy" (AUP) wherein she promised to: 1) use the network for only authorized purposes; 2) protect classified information; and 3) not to put unauthorized software on the computer network.

In 2009, appellant began visiting the Wikileaks website. Wikileaks was a clearinghouse for making sensitive government information public on its internet site. Wikileaks solicited its website users to obtain and reveal sensitive government information to it—and, in turn, Wikileaks would post the information on its public website, without identifying the source of the information. Wikileaks also ran online chatrooms where participants discussed political current events and computer-related topics.

Appellant conducted computer searches in government databases looking for specific information solicited by Wikileaks on its website. Appellant also conducted research about Wikileaks. She accessed a website run by the U.S. Army Counterintelligence Center (USACIC) that contained a report concerning the Wikileaks organization. The report stated Wikileaks was a threat to U.S. operational security, information security, and counterintelligence security, because of its public posting of classified and sensitive information. Additionally, the report concluded that Wikileaks' public posting of classified and sensitive information could be valuable to insurgents, terrorists, and foreign military forces collecting information against the United States and in planning attacks. In other words, the report opined Wikileaks' operations were a threat to national security.

One day while working in the secure classified information facility (SCIF), appellant downloaded thousands of classified SIGACTs from both the Combined Information Data Network Exchange for Iraq (CIDNE-I) and for Afghanistan (CINDE-A) onto a compact disc (CD). She then removed the CD from the SCIF and took it to her quarters where she copied the contents onto her personal laptop computer and copied the information onto a memory card.

In January 2010, while in Maryland on mid-tour leave from her deployment, appellant uploaded the classified information contained on the memory card to the Wikileaks website. Within this unauthorized transmission of the classified information to Wikileaks, appellant also uploaded a smiling self-photo and the following remarks:

Items of Historical Significance for Two Wars:

> Iraq and Afghanistan Significant Activities (SIGACTs) Between 0000 on 1 JAN 2004 and 2359 on 31 DEC 2009 (Iraq local time, and Afghanistan local time)
>
> CSV [comma separated value, data format] extracts are from the Department of Defense (DoD) Combined Information and Data Exchange (CIDNE) Database.
>
> It's already been sanitized of any source identifying information.
>
> You might need to sit on this information, perhaps 90-180 days, to figure out how to best release such a large amount of data, and to protect source [sic].
>
> This is possibly one of the more significant documents of our time, removing the fog of war, and revealing the true nature of the 21st century asymmetric warfare.
>
> Have a good day.

Upon returning to Iraq from mid-tour leave, appellant, using SIPRNET, conducted a computer search of the Department of State's (DoS) Net-Centric Diplomacy (NCD) database, a site where classified State Department materials concerning sensitive diplomatic relations and activities were stored. Through appellant's online Wikileaks chats, appellant learned of Wikileaks' interest in a diplomatic controversy involving the United Kingdom, the Netherlands, and Iceland. In January 2010, appellant searched for documents related to the controversy and found a sensitive DoS cable entitled "10 Reykjavik 13" concerning the dispute. Appellant downloaded the classified cable to a CD, again took the CD to her quarters, uploaded the cable to her personal laptop, and sent it to Wikileaks. Shortly thereafter, Wikileaks posted the cable to their public website.

Appellant also downloaded an aerial video of a helicopter weapons team engaging targets during a combat engagement. The aerial video illustrated a great deal of sensitive technical and tactical facts to include the helicopter's use of lasers, the angle of engagement, and its speed and altitude. Appellant uploaded the aerial video to Wikileaks and informed the organization through the chatroom to "expect an important submission."

In early March 2010, appellant began chatting directly with Wikileaks' leader, Julian Assange. Appellant asked Assange for help in bypassing the SIPRNET security systems to allow appellant to anonymously navigate the SIPRNET system therein. On 7 March 2010, appellant asked Assange about the value of the U.S.

Southern Command detainee assessment memoranda regarding Guantanamo detainees. The memoranda contained information related to detainee identity, capture information, background, intelligence summaries, and detainee cooperation, among other things. Assange indicated the reports would be valuable. Appellant then downloaded 700 detainee assessments from the SIPRNET to a CD along with the USACIC assessment report regarding Wikileaks and sent them to Wikileaks.

On 15 March 2010, Wikileaks posted the USACIC report regarding Wikileaks on its website. On 5 April 2010, Wikileaks released the aerial video. On 25 April 2011, Wikileaks released the 700 detainee assessment reports.

Additionally, appellant transferred an unauthorized computer program called Wget to the SIPRNET computer at her workstation in late March 2010. Wget is a computer program that facilitates downloading and copying enormous amounts of information quickly, so as to avoid manually downloading each piece of data. Wget operates in the background of the computer, while the user is working separately on other tasks. Wget bypassed the ordinary method of accessing cables via the DoS portal. Appellant used Wget to download and copy batches of sensitive cables from the DoS's NCD portal to CDs. She then took the CDs to her living quarters. The forensic evidence indicated appellant downloaded approximately 250,000 cables from the portal. The larger file was corrupted and appellant was not able to upload all the information to Wikileaks. Ultimately, appellant pleaded guilty to transmitting more than seventy-five classified cables to Wikileaks. The cables included information concerning foreign government information that was protected for national security purposes.

Also, in March 2010, appellant downloaded and copied a classified report from the U.S. Central Command database regarding an administrative investigation into an airstrike. The report contained information related to: troop movements; close air support procedures; and other sensitive tactics, techniques, and procedures. Appellant once again took the CD to her quarters and uploaded the investigation to the Wikileaks website.

On 7 May 2010, Wikileaks solicited military email addresses from its users. Shortly thereafter, appellant created a tasker on her computer reminding herself to acquire the Global Address List from the Unites States Forces-Iraq Microsoft/Outlook server (USF-GAL). On or about 13 May 2010, appellant downloaded approximately 74,000 military email addresses from the unclassified computer network and transferred them to her personal computer. The forensic investigation into appellant's activities eventually uncovered the email addresses located in the unallocated space of appellant's personal computer—indicating they were deleted but not written over. No evidence was introduced at trial indicating appellant disclosed the email addresses to Wikileaks.

On 20 May 2010, using an encrypted messaging system, appellant began chatting with Adrian Lamo, a computer hacker, wherein appellant admitted she gave information to Wikileaks. Appellant used the code name "bradass87" in her exchanges with Mr. Adrian Lamo. The following messages were exchanged between the two:

> bradass87: the air gap [the separation between standalone networks and the wider internet] has been penetrated[.]
>
> bradass87: lets just say *someone* i know intimately well, has been penetrating US classified networks, mining data like the ones described . . . and been transferring that data from the classified networks over the "air gap" onto a commercial network computer . . . sorting the data, compressing it, encrypting it, and uploading it to a crazy white haired aussie who can't seem to stay in one country very long[.]
>
> . . .
>
> bradass87: Hilary Clinton, and several thousand diplomats around the world are going to have a heart attack when they wake up one morning, and finds an entire repository of classified foreign policy is available, in searchable format to the public[.]
>
> . . .
>
> bradass87: funny thing is . . .we transffered so much data on unmarked CDs . . . everyone did . . . videos . . . movies . . .music all out in the open . . . bringing CDs too and from the networks was/is a common phenomenon
>
> adrianlamo: is that how you got the cables out?
>
> bradass87: perhaps. i would come in with music on a CD-RW labelled with something like "Lady Gaga". . . erase the music . . . then write a compressed split file . . . no-one ever suspected a thing. =L kind of sad
>
> adrianlamo: and odds are, they never will
> bradass87: i didnt even have to hide anything . . . everyone just sat at their workstations . . . watching music

videos / car chases / buildings exploding . . . and writing more stuff to CD/DVD . . . the culture fed opportunities

adrianlamo: what do you consider the highlights?

bradass87: The Gharani airstrike videos and full report Iraq war event log the "Gitmo papers" and the State Department cable database.

. . .

bradass87: waiting to redeploy to the US, be discharged . . . and figure out how on earth im going to transition ... all while witnessing the world freak out as its most intimate secrets are revealed.

. . .

bradass87: I just . . . couldn't let these things stay inside of the system . . . and inside of my head . . .

. . .

bradass87: i could've sold to russia or china, and made bank?

adrianlamo: why didn't you?

bradass87: because it's public data

adrianlamo: i mean, the cables

bradass87: it belongs in the public domain . . . . information should be free . . . it belongs in the public domain

. . .

adrianlamo: embassy cables?

bradass87: yes. 260,000 in all

(errors in original).

On 25 May 2010, Mr. Lamo reported to law enforcement that appellant admitted to him through online chats that appellant had disclosed thousands of classified documents. On or about 30 May 2010, appellant was placed in pretrial confinement at FOB Hammer, Iraq, for compromising classified information.

LAW AND DISCUSSION

A. Computer Fraud and Abuse Act

THE DEFINITION OF "EXCEEDS AUTHORIZED ACCESS" IN THE COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. § 1030(a)(1) (SPECIFICATION 13 OF CHARGE II)[3]

The Computer Fraud and Abuse Act (CFAA)

Appellant was convicted of one specification of Article 134, UCMJ, for violating 18 U.S.C. § 1030(a)(1) of the CFAA by using the Wget software program to access, search and download diplomatic cables maintained in a classified DoS database.[4]

Pursuant to 18 U.S.C. § 1030(a)(1), the government must prove appellant intentionally accessed a computer without authorization or *exceeded* her authorized access, and in doing so obtained information determined by the United States government to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data from a protected computer and then willfully communicated, delivered, or transmitted that information to any person not entitled to receive it, or willfully retained the same.

While appellant pleaded guilty to obtaining and transmitting the classified cables to Wikileaks pursuant to Article 134, UCMJ, she challenges the assimilated crime of violating 18 U.S.C. § 1030(a)(1), asserting the military judge's

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[3] Two related assignments of error were raised by Electronic Frontier Foundation, National Association of Criminal Defense Lawyers, and Center for Democracy and Technology, and adopted by appellant: 1) whether the Computer Fraud and Abuse Act prohibits violations of computer use restrictions; and 2) whether the military judge's reading of the act renders the statute unconstitutionally vague.

[4] Appellant pleaded guilty to an Article 134, UCMJ, offense of knowingly accessing more than seventy-five classified United States DoS cables, and willfully communicating, delivering, transmitting, or causing to be communicated, delivered, or transmitted the said information, to a person not entitled to receive it, and that such conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces.

interpretation of that statute was erroneous. Appellant asserts she had the right of *access* to the DoS information she downloaded and transferred to Wikileaks and that the use of the Wget program cannot by itself establish appellant exceeded authorized access within the meaning of the CFAA. Appellant argues the term "exceeds authorized access" is ambiguous and the statute does not encompass use violations but only access violations. Appellant asks this court to apply the rule of lenity and dismiss the specification.

The statute thus provides two ways of committing the crime of improperly accessing a protected computer: 1) accessing without authorization; or 2) exceeding authorized access. 18 U.S.C. § 1030(a)(2)(C). Section 1030(e)(6) defines "exceeds authorized access" as meaning "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser [sic] is not entitled so to obtain or alter."[5]

Since appellant pleaded guilty to accessing the SIPRNET system, obtaining DoS cables, and willfully transmitting them to Wikileaks, the question presented is whether appellant's use of the system exceeded her authorized access. In the military justice system, this is a case of first impression. As there is no relevant case law on this issue from military appellate courts, we look to federal courts for guidance. Within federal jurisprudence, a split of opinion amongst the circuits exists. The United States Courts of Appeals for the First, Fifth, Seventh, and Eleventh Circuits read "exceeds authorized access" broadly; the Second, Fourth, and Ninth Circuits have reached a narrower interpretation of this language, or have resolved the issue in favor of appellants based on the rule of lenity.

Under the broad view, "exceeding authorized access" may be shown by how one uses information obtained from a computer system.[6] For example, using the

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[5] "Viewing material on a computer screen constitutes 'obtaining' information under the CFAA." *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 648 (E.D. Pa. 2007) (citing legislative history for CFAA).

[6] In the case of *United States v. Rodriguez*, 628 F.3d 1258, 1260 (11th Cir. 2010), an employee of the Social Security Administration was subject to a policy that forbade "accessing information on its databases for nonbusiness reasons." Rodriguez was charged with violating the CFAA by using his access to copy the personal records of seventeen people for nonbusiness reasons. *Id.* At trial, Rodriguez argued he was authorized to access these databases. *Id.* at 1263-64. The Eleventh Circuit upheld Rodriguez' conviction because he "exceeded his authorized access . . . when he

(continued . . .)

information for an improper purpose (e.g. contrary to a company computer use policy) could show a user "exceeded authorized access." Under the narrower interpretation, users cannot exceed authorized access within the meaning of section 1030(e)(6) when they access information they are authorized to access, even if their access is motivated by an improper purpose or if they use the information for an unauthorized purpose.[7] In other words, a user must gain access to the information through some unauthorized means, for example bypassing controls or misusing a password.

The statute's definition of "exceeds authorized access" provides that the statute is violated when a computer user uses her initial authorized access to then obtain or alter information that she "is not entitled *so* to alter or obtain." 18 U.S.C. § 1030(e)(6) (emphasis added). The "surplusage" canon provides that, "if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). The definition of the word "so" is "in a manner or way indicated or suggested." *Webster's Collegiate Dictionary* 1113 (10th ed. 1999). Given the normal use and meaning of the word "so," we conclude Congress contemplated the statute to reach

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(continued . . .)
obtained personal information for a nonbusiness reason." *Id.* at 1263. The Eleventh Circuit interpreted "exceeds authorization" to mean outside the scope of the intended authorization. *Id.*; *see also United States v. John*, 597 F.3d 263, 272 (5th Cir. 2010) (one can exceed authorized access when he exceeds the "purposes for which access is 'authorized.'"); *Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420-21 (7th Cir. 2005) (under an agency-theory, when appellant's adverse interests breached his duty of loyalty, he terminated his authorization to access the company laptop.); *Ef Cultural Travel Bv v. Explorica*, 274 F.3d 577, 581-82 (1st Cir. 2001) (affirming summary judgment because appellant's breach of his broad confidentiality agreement "exceeded authorized access" under the CFAA).

[7] *See e.g. United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012); *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1135 n.7 (9th Cir. 2009) (stating in dicta that defendant does not "exceed 'authorized access' under the CFAA when he breaches a duty of loyalty to authorizing party"); *Bell Aero. Servs. v. U.S. Aero. Servs.*, 690 F. Supp. 2d 1267 (M.D. Ala. 2010); *Orbit One Communs. v. Numerex Corp.*, 692 F. Supp. 2d 373 (S.D.N.Y. 2010); *Nat'l City Bank, N.A. v. Republic Mortg. Home Loans, LLC*, 2010 U.S. Dist. LEXIS 36946 (W.D. Wash. 2010); *ReMedPar, Inc. v. AllParts Med., LLC*, 683 F. Supp. 2d 605 (M.D. Tenn. 2010); *US Bioservices Corp. v. Lugo*, 595 F. Supp. 2d 1189, 1192 (D. Kan. 2009) (collecting cases); *Jet One Group, Inc. v. Halcyon Jet Holdings, Inc.*, 2009 U.S. Dist. LEXIS 72579, at *5-6 (E.D.N.Y. 2009); *Brett Senior & Assocs., P.C. v. Fitzgerald*, 2007 U.S. Dist. LEXIS 50833, at *4 (E.D. Pa. 2007).

users whose initial access to information is authorized, but who later use their access to obtain that information in an unauthorized manner.

Here, appellant's SIPRNET access was limited by a number of memorialized restrictions concerning official use, unauthorized software, and unauthorized introduction of executable files. First, in order to obtain access to her SIPRNET account, appellant agreed to an AUP. The AUP proclaimed that "[a]ccess to [these] network[s] is for official use and authorized purposes as set forth in DOD 5500.7-R 'Joint Ethics Regulation' or as further limited by this policy." The AUP also prohibited the use of unauthorized hardware or software on a SIPRNET system, and the introduction of executable code without authorization.[8] Appellant's computer use was also governed by Army Regulation 25-2, Information Management: Information Assurance (23 March 2009). Army Regulation 25-2 prohibits the use of shareware or freeware, absent authorization. Finally, appellant signed numerous non-disclosure agreements. While some of these sources create restrictions on use of information, others are plainly restrictions on access.

The military judge found 18 U.S.C. § 1030(a)(1) to be ambiguous. She applied lenity and rejected the broad approach. The military judge did not consider appellant's purpose or appellant's transmission of the information to Wikileaks as proof of "exceeding authorized access." She found *how* appellant accessed the information violated the authorized use policy and thus exceeded access. We need not decide which interpretation, narrow or broad, applies to military courts. Here the military judge followed the narrow approach and found appellant's conduct to be an access violation. We agree this was an access violation as discussed below.

Appellant's argument conflates "use" violation with "access" violation. Appellant argues that any access restriction must be code-based or technical. We do not read that requirement into the statute. This case does not hinge on a violation in the use of information—nor did the military judge find a use violation. Rather, the *method and manner* in which appellant accessed the classified State Department system exceeded her authorization. Had appellant gone through all the individual clicks necessary to access the DoS's portal, find and download the files, and repeat those steps seventy-five times—this would present a different issue. We find appellant's use of Wget allowed her to access the cables by circumventing the DoS portal and contacting the server directly, which allowed her to directly download the cables onto her hard drive, and ultimately transmit seventy-five classified cables to Wikileaks.

Based on the foregoing, we conclude computer access *beyond the manner* authorized, meets the element of "exceeds authorized access." Therefore, we find,

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[8] Executable code includes .exe, .com, .vbs, and .bat files.

as the military judge did, appellant's use of the Wget program exceeded her authorized access, and thus violated the CFAA.

Clauses 1 and 2 of Article 134, UCMJ.

The military judge found appellant guilty of all three clauses under Article 134, UCMJ. In addition to assimilating 18 U.S.C. § 1030 via clause three of Article 134, UCMJ, in Specification 13 of Charge II, the government also charged and appellant pleaded guilty to violations of clause one and clause two. The military judge found appellant's conduct prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces, pursuant to Article 134, UCMJ. Even assuming appellant's actions fell outside the scope of 18 U.S.C. § 1030(a)(1), appellant's conviction for this Article 134 offense would still stand. Based on the evidence presented, we find appellant's plea provident and conviction legally and factually sufficient under both clauses one and two.

B. The Espionage Act (18 U.S.C. § 793(e))

THE DUE PROCESS CLAUSE AND FIRST AMENDMENT AS APPLIED TO 18 U.S.C. § 793(e)

Appellant asserts 18 U.S.C. § 793(e) is unconstitutionally vague in that the term "relating to national defense" as applied to classified records is not sufficiently clear as to provide fair notice and invites arbitrary law enforcement. Appellant also asserts the statute is unconstitutionally overbroad in that it prohibits a substantial amount of protected speech. We disagree on both counts.

This court reviews de novo the constitutionality of an act of Congress. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005).

Void for Vagueness

The phrase "information relating to the national defense" is not defined in 18 U.S.C. § 793(d). Nonetheless, courts have held that "'national defense' had acquired a well-known meaning 'as a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.'" *United States v. Rosen*, 445 F. Supp. 2d 602, 619 (E.D. Va. 2006) (citing *Gorin v. United States*, 312 U.S. 19, 28 (1941)); *see also United States v. Truong Dinh Hung*, 629 F.2d 908, 918 (4th Cir. 1980); *United States v. Drummond*, 354 F.2d 132, 151 (2d Cir. 1965); *United States v. Heine*, 151 F.2d 813, 817 (2d Cir. 1945).

As observed by the Supreme Court:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Colten v. Kentucky, 407 U.S. 104, 110 (1972).

The question in this case is whether the words "information relating to national defense" provide sufficient notice that disclosing information relating to national defense is "unauthorized" and whether appellant's conduct "is plainly within" the terms of the statute.

We reject appellant's claim that the statute is too vague to provide fair notice of the criminal nature of disclosing classified documents. The facts of this case leave no question as to what constituted national defense information. Appellant's training and experience indicate, without any doubt, she was on notice and understood the nature of the information she was disclosing and how its disclosure could negatively affect national defense.

The military judge construed 18 U.S.C. § 793 in a manner consistent with existing precedent. Appellant's conduct falls within that definition. Accordingly, we find no error.

Overbreadth and the First Amendment

Appellant asserts her actions in disclosing classified information related to national security are protected by the First Amendment and that she did not have reason to know the records she disclosed could be used "to the injury of the United States or to the advantage of any foreign nation." We disagree. Appellant had no First Amendment right to make the disclosures—doing so not only violated the non-disclosure agreements she signed, but also jeopardized national security.

United States courts have repeatedly held that the First Amendment does not protect unauthorized disclosures of classified information. A statute is facially overbroad when no set of circumstances exists when it could be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). In the context of the First Amendment, a statute is "overbroad" when a substantial number of its applications are unconstitutional when compared with the statute's plainly legitimate sweep. *United States v. Stevens*, 599 U.S. 460, 490-91 (2010). First Amendment overbreadth challenges are an exception to the general rule. *United States v. Morison*, 844 F.2d 1057, 1075 (4th Cir. 1988).

In the face of a similar First Amendment challenge, the United States Court of Appeals for the Fourth Circuit, in *Morison*, upheld the Espionage Act convictions of an employee of the Naval Intelligence Support Center who had a Top Secret security clearance and had also signed a non-disclosure agreement. *Id.* at 1060. The accused unsuccessfully argued his conviction under the Espionage Act could not stand because he leaked the classified information to the press, rather than to a foreign power. *Id.* at 1063.

The Fourth Circuit stated:

> [T]hough he cannot point to anything in the legislative record which intimates that Congress intended to exempt "leaks to the press," as the defendant describes it, he argues that, unless such an exemption is read into these sections they will run afoul of the First Amendment. Actually we do not perceive any First Amendment rights to be implicated here . . . . It is a prosecution under a statute, of which the defendant, who, as an employee in the intelligence service of the military establishment, had been expressly noticed of his obligations . . . is being prosecuted for purloining from the intelligence files of the Navy national defense materials clearly marked as "Intelligence Information" and "Secret" and for transmitting that material to "one not entitled to receive it" . . . . We do not think that the First Amendment offers asylum under those circumstances . . . merely because the transmittal was to a representative of the press.

Id. at 1068 (citing *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) ("It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.")).

We squarely reject appellant's First Amendment challenge and firmly hold that a soldier who willfully communicates information relating to the national defense "is not entitled to invoke the First Amendment as a shield to immunize his act of thievery." *Morison*, 844 F.2d at 1069-70 ("To permit the thief thus to misuse the Amendment would be to prostitute the salutary purposes of the First Amendment.").

C. Stealing, Purloining, or Converting (18 U.S.C. §641)

NOTICE, MAJOR CHANGE, AND LEGAL AND FACTUAL SUFFICIENCY TO SUSTAIN CONVICTIONS FOR VIOLATING 18 U.S.C. § 641, TO WIT, STEALING, PURLOINING, OR CONVERTING "DATABASES" (SPECIFICATIONS 4, 6, 8, 12, AND 16 OF CHARGE II)

Appellant was found guilty of five specifications of violating 18 U.S.C. § 641 for stealing, purloining, or knowingly converting various "databases," in Specifications 4, 6, 8, and 12 of Charge II and for stealing, purloining, or knowingly converting the "USF-GAL" in Specification 16 of Charge II. The military judge granted the government's motion to amend Specifications 4, 6, and 16 of Charge II to include the words "a portion of" in front of the words "database" and the "USF-GAL" and then found appellant guilty in accordance with the amended specifications. In other words, appellant was found to have stolen, purloined or converted "information" from those databases—only a portion of the contents of the database—not the database itself. In the remaining two specifications, appellant was found guilty of stealing the entire SOUTHCOM and DoS NCD database.

Appellant asserts she was not on notice to defend against stealing, converting, or purloining various documents and records contained *within* each database she was alleged to have stolen or converted. She asserts the amendments of Specifications 4, 6, and 16 of Charge II created major changes, leaving her unprepared to defend against said specifications.

For the following reasons, we find appellant was properly on notice to defend against the records contained within the databases and thus, the military judge created no major change.

Notice

It is well understood that the military is a notice-pleading jurisdiction. As our superior court has held:

> The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

United States v. Sell, 3 U.S.C.M.A. 202, 206, 11 C.M.R. 202, 206 (1953). Rule for Courts-Martial (R.C.M.) 307(c)(3) also provides for notice pleading.

Appellant argues the government should have specifically included the particular documents alleged to have been stolen by appellant within each specification so as to provide notice. Under the facts of this case, we do not see this as necessary. Each specifications apprised appellant of the essential elements of the crime under 18 U.S.C. § 641 to include the conduct (steal, purloin, or convert), what (records), when, and the value of the items. We find the specifications were sufficient to apprise appellant of what she needed to defend herself against, and to protect her from subsequent prosecution for the same conduct.

Major Change

We turn next to the military judge's decision to grant the government's motion to amend the charge sheet with respect to Specifications 4, 6, and 16 of Charge II. Appellant argues that the military judge fundamentally changed the nature of the charged property from 'databases' to 'information and records' contained within the databases and thus created a major change.

"Whether a change made to a specification is minor is a matter of statutory interpretation and is reviewed de novo." *United States v. Reese*, 76 M.J. 297, 300 (C.A.A.F. 2017) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)). Rule for Courts-Martial 603(a) provides "[m]inor changes in charges and specifications are any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." The government can make minor changes to a charge and specification before arraignment. R.C.M. 603(b). Major changes, or "[c]hanges or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification affected is preferred anew." R.C.M. 603(d).

Generally, "changes in the alleged time or date of an offense are permissible since they normally do not affect the substance of the offense, preclude invocation of the statute of limitations, or mislead the accused as to that which he must defend against." *United States v. Longmire*, 39 M.J. 536, 538 (A.C.M.R. 1994) (internal citations omitted)). Applying the plain language of R.C.M. 603, we do not find the military judge erred in finding the changes were minor.

First, the change did not alter the substance of the offenses and the overt acts remained the same. The alleged conduct remained essentially the same. Second, the change did not affect a substantial matter not fairly included in the previously preferred charges and specifications.

The plain meaning of the word "database" necessarily includes the records that make up the database.[9] In the charged specification, each specific database identified is followed by the phrase "containing more than [a number] records." By numbering the records within the database, the government explicitly noted that the databases are made up of many records. It would seem that finding appellant guilty of stealing only a portion of the records within the database is the equivalent of finding her guilty of a lesser-included offense.

Given this modification, we see no palpable way in which defense counsel would have altered their trial defense strategy, which was: to justify appellant's takings as excusable; attacking whether a purloining, stealing, or converting had actually occurred; and attacking whether appellant's actions seriously and substantially interfered with the government's rights in the information. We do not find appellant was misled in any meaningful way by this change thereby prejudicing her defense trial strategy.

Further, the change did not expose appellant to greater punishment. It actually reduced the amount of information alleged to have been stolen. The nature of the offense did not change nor is appellant at some risk for another prosecution for the same conduct in that a new charge would contain the same information. Accordingly, this court finds, as the military judge did, appellant was on notice the specifications alleged the theft of documents contained within the databases and that the substituted language was a minor change. To that end, we conclude changing the specifications from alleging specific databases containing records to alleging "a portion of" those databases neither materially altered the specifications nor was the change likely to mislead appellant.

Factual and Legal Sufficiency Regarding "Stealing, Purloining, and Converting" Records and Information

Appellant asserts the evidence was factually and legally insufficient to support appellant's convictions for stealing, purloining, and converting records and information. Specifically, appellant argues the government failed to prove the records themselves, or the information contained within those records, were stolen or converted because they never left the government's possession and appellant's actions did not deprive the government of use of benefit of the information either temporarily or permanently. We disagree.

We review factual and legal sufficiency de novo. UCMJ art. 66(c). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the

[9] Database is defined as "a compilation of information arranged in a systematic way and offering a means of finding specific elements it contains, often today by electronic means." *Black's Law Dictionary*, 422 (8th ed. 1999).

members of [this court] are [ourselves] convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). In conducting this fresh look, we apply "neither a presumption of innocence nor a presumption of guilt" but rather make an "independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014) (quoting *United States v. Bennitt*, 72 M.J. 266, 268 (C.A.A.F. 2013)).

Appellant argues a digital copy is distinct from the original digital record contained within the database and that appellant's actions did not seriously interfere with the government's property rights in the database because the information never left the government's possession.

In *United States v. DiGilio,* the United States Court of Appeals for the Third Circuit considered a similar issue. 538 F.2d 972 (3rd Cir. 1976). DiGilio and his associates were indicted for conspiracy to defraud the United States, and for converting to their own use photocopies of official files of the Federal Bureau of Investigation. *Id.* at 975. DiGilio argued that the government was not deprived of the use of the information within these records, and thus his conduct did not fall within § 641. *Id.* at 977. DiGilio further argued that the copies are not themselves "'records' within the meaning of the statute." *Id.* In support of this argument, he urged the court "that at most, the government lost exclusive possession of the information contained in its confidential records, and that Congress never intended [18 U.S.C.] § 641. . . to protect the governmental interest in exclusive possession of information." *Id.* The court found appellant used government time, resources, and supplies to make the copies. The court held "[a] duplicate copy is a record for purposes of the statute, and duplicate copies belonging to the government were stolen." *Id. see also United States v. Fowler*, 932 F.2d 306, 309-10 (4th Cir. 1991) (appellant attempted to argue that documents and the information contained within those documents were different; the court rejected this argument, held "information is a species of property and a thing of value.").

In this case, the evidence supports, and we find beyond a reasonable doubt, that appellant created duplicates of the records contained within the databases, took the duplicate records, and at the time she took the duplicate records, she intended to send them to Wikileaks, depriving the government of their exclusive use and benefit. We find the government had a property interest in the information, including the right to protect classified information by storing it in a secure location and further restricting access. Consistent with the military judge's findings, we conclude ample

evidence exists to satisfy the evidentiary requirements of "stealing, purloining, or knowingly converting" for the purposes of 18 U.S.C. § 641.

D. Expert Testimony

THE GOVERNMENT'S COUNTERINTELLIGENCE EXPERT ON THE VALUE OF THE INFORMATION AT ISSUE IN SPECIFICATIONS 4, 6, 8, 12, AND 16 OF CHARGE III

Appellant challenges the military judge's decision to permit expert testimony on the value of records in Specifications 4, 6, 8, and 12 of Charge II.

We review a military judge's decision to permit expert testimony pursuant to Military Rule of Evidence (Mil. R. Evid.) 702 for an abuse of discretion. *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005). "The military judge has broad discretion as the 'gatekeeper' to determine whether the party offering expert testimony has established an adequate foundation with respect to reliability and relevance." *United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000); *see also United States v. Sanchez*, 65 M.J. 145, 148-49 (C.A.A.F. 2007). Whether the military judge properly followed *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-97 (1993) is reviewed de novo. *McElhaney*, 54 M.J. at 130.

Determining Value

The military judge defined value, with respect to 18 U.S.C. § 641, as:

> "Value" means the greater of 1) the face, par, or market value, or 2) the cost 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.

Value is an essential element of the crime in a prosecution under 18 U.S.C. § 641. Therefore the government must prove beyond a reasonable doubt that the property stolen had value. *United States v. Lignon*, 440 F.3d 1182, 1184 (9th Cir. 2006) (citing *United States v. Seaman*, 18 F.3d 649, 650 (9th Cir. 1994)). If the value of the property exceeds $1,000, the maximum punishment is confinement for ten years. 18 U.S.C. § 641. If the value of the property is $1,000 or less, the maximum punishment is confinement for one year. *Id.* As the statute reads, there are two major measures of value: the measure of value in exchange (face, par, or market) and the measure of value as calculated by the cost to the government for creation or acquisition (wholesale or retail). *United States v. Kroesser*, 731 F.2d 1509, 1516-17 (11th Cir. 1984).

This is not a case where intellectual property is stolen and a company can assess the value of that stolen information based on profit loss or some other quantitative measurement. Thus there is no "readily ascertainable" market value. In such a situation, courts agree that "any reasonable method may be employed to ascribe an equivalent monetary value to the items." *Ligon*, 440 F.3d at 1184 (internal citations omitted); *see also United States v. Batti*, 631 F.3d. 371, 374 (6th Cir. 2011). This includes the value in what is referred to as the "thieves market." *United States v. Drebin*, 557 F.2d 1316, 1328 (9th Cir. 1977); *see also United States v. Langston*, 903 F.2d 1510, 1514 (11th Cir. 1990) and *United States v. Wright*, 661 F.2d 60, 61 (5th Cir. 1981).

The government offered evidence of this measure of value using different types of information for various specifications. This is not inappropriate. With respect to the information at issue in Specifications 4, 6, and 12 of Charge II (CIDNE-I, CIDNE-A, DoS NCD respectively), the government offered both cost price and market value. The military judge ultimately only accepted the market value information. For Specification 8 of Charge II (SOUTHCOM), the government offered both cost price and thieves' market value and the military judge accepted both measures. Finally, for Specification 16 of Charge II (USF-GAL), the government offered cost price (maintenance and creation) and thieves' market value. The military judge accepted the creation cost and thieves' market value.[10]

The measure of value offered by the government was appropriate. We turn now to the issue of whether the basis for that measure of value, the opinion testimony of Mr. Lewis, was appropriate.

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[10] The military judge declined to consider database management, hardware, software, or maintenance costs. Instead, she considered only evidence of costs associated with the creation of the individual records or email accounts as part of the "cost price" for Specifications 8 and 16.

Mr. Lewis' Qualifications and Ability to Opine on Value

In the instant case, the defense did not object to Mr. Lewis' qualifications as an expert in counterintelligence (CI).[11] They did, however, object to his expertise in the "valuing of government information by foreign intelligence services" (valuation). After a substantial hearing on the matter, with both open and closed sessions, the military judge found Mr. Lewis to be an expert in CI, but not an expert in the valuation of all government information by foreign intelligence services.

Instead, the military judge ruled that Mr. Lewis could offer his opinion on the value of certain documents if a proper foundation was laid. This is what occurred. The military judge found a foundation was properly laid showing how Mr. Lewis was familiar with the value of specific information to specific potential buyers based on his experience with similar exchanges.

The military judge found that Mr. Lewis was basing his testimony on information gathered through offensive CI operations that was systematically entered into a system employed by the Counter Espionage Division of the Defense Intelligence Agency (DIA). She further found those systems were used to prepare briefings at the highest levels, including before Congress, and are generally accepted as accurate. The military judge concluded the data collected by those systems was reliable. The military judge approached her rulings in a methodical manner, and placed her findings and analysis on the record. Finally, we find the opinion testimony regarding valuation did not exceed the scope of the witness's expertise. *United States v. Flesher*, 73 M.J. 303, 315 (C.A.A.F. 2014).

The Value of the USF-GAL

While we find the classified information that accounts for Specifications 4, 6, 8, and 12 of Charge II has value in a thieves' market clearly in excess of $1,000.00,

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[11] Mr. Lewis was the Senior Expert and Counterintelligence Advisor to the Directorate of Science and Technology for the DIA. He regularly advised the most senior officials in the DIA, and provided briefings to the Secretary and Undersecretary of Defense for Intelligence and to Congress. He has spent nearly thirty years in the field of CI, holding many different roles and having varying levels of responsibility. We are confident that Mr. Lewis is more than qualified in the field of CI. We also find that without enlightenment "from those having a specialized understanding of the subject," the factfinder would not be qualified to determine intelligently and to the best possible degree the valuation of the property at issue. *United States v. Houser*, 36 M.J. 392, 399 (C.A.A.F. 1993) (quoting *State v. Chapple*, 135 Ariz. 281, 292-93, 660 P.2d 1208, 1219-20 (1983)) (internal citations omitted)).

we are not so convinced of the value of the USF-GAL, which accounts for Specification 16 of Charge II. *Rosario*, 76 M.J. at 117.

The record reflects that appellant downloaded 74,000 .mil email accounts from the USF-GAL, and that she did so at the request of Wikileaks. We find the evidence of the value of the USF-GAL email addresses, both in terms of cost price and the thieves' market, to be more speculative, unlike evidence of classified information with which Mr. Lewis is more familiar. Accordingly, we are not convinced beyond a reasonable doubt that the value of the email addresses exceeded $1,000—but rather find the USF-GAL email addresses have *some* value. *Id.* We grant relief in our decretal paragraph.

E. Article 13 Credit

WHETHER THIS COURT SHOULD DISMISS ALL CHARGES, OR ALTERNATIVELY, AWARD MORE SENTENCING CREDIT, WHERE THE MILITARY JUDGE FOUND MULTIPLE VIOLATIONS OF ARTICLE 13, UCMJ, BUT FAILED TO CONSIDER THAT PFC MANNING WAS IN SOLITARY CONFINEMENT FOR APPROXIMATELY NINE MONTHS WHILE STRUGGLING WITH SEVERE MENTAL ILLNESS?[12]

Article 13, UCMJ, prohibits: 1) punishment of an accused prior to trial and, 2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure an accused's presence for trial. Prong one involves the examination of both the purpose of the conditions of confinement and the intent behind the use of those conditions by government officials. Prong two involves examining whether the conditions of pre-trial confinement are so excessive as to constitute punishment. *See United States v. King*, 61 M.J. 225, 227-28 (C.A.A.F. 2005).

The question of intent to punish is "one significant factor in [the] judicial calculus" for determining whether there has been an Article 13 violation. *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)). An appellate court will defer to the findings of fact by the military judge where those findings of fact are not clearly erroneous. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002) (internal citation omitted). We will review de novo the ultimate question whether an appellant is entitled to credit for a violation of Article 13, UCMJ. *Id.* Further, the sufficiency of relief for violations

[12] The related assignment of error of whether appellant's confinement was unconstitutional and unlawful was raised by Amnesty International Ltd. and adopted by appellant.

of Article 13, UCMJ, is reviewed for an abuse of discretion. *United States v. Williams*, 68 M.J. 252, 257 (C.A.A.F. 2010).

The burden is on appellant to establish entitlement to additional sentence credit because of a violation of Article 13. *See* R.C.M. 905(c)(2). Whether appellant is entitled to credit for a violation of Article 13 is a mixed question of fact and law. *Mosby*, 56 M.J. at 310-11 (internal citations omitted).

After a lengthy review of witness testimony concerning the facts and circumstances related to the conditions of appellant's confinement, the military judge found the government did not intend to punish appellant, but rather intended to ensure she was safe, did not hurt herself, and was present for her court-martial.

Despite this finding, the military judge also found confinement conditions placed on appellant more onerous than necessary to ensure appellant's presence at trial. As such, the military judge gave appellant credit for four Article 13 violations. First, she gave appellant seventy-five days confinement credit for being held in "prevention of injury" (POI) status against the recommendation of mental health professionals from 1 November 2010 through 17 January 2011. Second, appellant received twenty-five days credit for being kept in POI status against the recommendations of mental health professionals after 1 April 2011. Third, she received ten days credit for being allowed only 20 minutes rather than one hour of outside recreation time a day from 29 July to 10 December 2010. Fourth, appellant received seven days credit for being held in suicide risk (SR) status against the recommendation of mental health professionals from 7-11 August 2010 and 19-20 January 2011. Cumulatively, the military judge granted appellant 112 days of pretrial confinement credit.

Based on appellant's conditions of confinement, the military judge found appellant was not held in solitary confinement. She found appellant was not alone and without human contact. She found appellant was held in a cell similar to that of other detainees at the facility and that appellant could see and hear what was going on in the hallway. Appellant also had weekly visits from her counsel and health care professionals and daily visits by brig staff. We do not find the military judge's findings to be clearly erroneous.

Appellant has not established the government's intent to punish appellant through her conditions of confinement. Both the direct and circumstantial evidence upon which the military judge made her decision support the military judge's determination. Based on the record before us, we hold the military judge's findings are not clearly erroneous. We further find the military judge did not abuse her discretion in determining the amount of credit to give appellant.

Even if this court were to find appellant was entitled to additional Article 13, UCMJ, credit, we take note that prior to the President's commutation, appellant requested this court either dismiss the charges or in the alternative provide appellant with 2640 days of confinement credit (roughly seven years credit). This would have reduced appellant's sentence from 35 years confinement to 28 years confinement. The President's commutation puts appellant in a better position than the confinement credit she requested.

CONCLUSION

The court AFFIRMS only so much of the finding of guilty of Specification 16 of Charge II as finds that the appellant

> Did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 May 2010 and on or about 27 May 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: a portion of the United States Forces – Iraq Microsoft Outlook / SharePoint Exchange Server global address list belonging to the United States government, of some value, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

The remaining findings of guilty are AFFIRMED.

In accordance with the principles articulated by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), we are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and the President's commutation of appellant's sentence.

In evaluating the *Winckelmann* factors, the penalty landscape was reduced by nine years from ninety years to eighty-one years. Additionally, the remaining offenses capture the gravamen of appellant's misconduct. Finally, the sentence was adjudged by a military judge so we may reliably determine what sentence would have been imposed at trial. We are confident that based on the entire record and appellant's course of conduct, the military judge would have imposed a sentence of at least that which was adjudged.

Reassessing the sentence based on the noted error and the remaining findings of guilty, we AFFIRM the sentence as adjudged and approved. We find this

reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored.

Judge CELTNIEKS and Judge HAGLER concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

CERTIFICATE OF COMPLIANCE WITH RULES 21(b) and 37

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 8,572 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

J. DAVID HAMMOND
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
315-930-2473

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Manning*, Army Dkt. No. 20130739, USCA Dkt. No. 18-0317/AR, was electronically filed with the Court and the Government Appellate Division on August 20, 2018.

J. DAVID HAMMOND
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
(315) 930-2473