IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE RESPONSE**
	)	**TO PROSECUTION MOTION**
v.	)	**TO PRECLUDE REFERENCE TO**
	)	**ACTUAL HARM OR DAMAGE**
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 12 April 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. The Defense requests that this Court deny the Government's motion in its entirety for the reasons identified herein.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Government has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 Investigating Officer. The charges were subsequently referred without special instructions to a general court-martial on 3 February 2012.

LEGAL AUTHORITY AND ARGUMENT

I. The Government's Request is Premature, Internally Incoherent and Overbroad

a) The Government's Motion is Premature

5. The Government would seek to preclude the Defense from referencing at trial or in pretrial motions practice the content of damage assessments that the Defense has not yet seen and which the Government has vigorously attempted to prevent the Defense from seeing. Such a motion is premature since, if the damage assessments are not favorable for the Defense, the Defense will likely not seek to reference them during the merits or the sentencing portion of the trial. As such, the Court would be deciding a completely moot point. *See, e.g. United States v. West*, 2011 WL 856600, at * 7(N.D. Ill. Mar. 9, 2011) (court denied as premature the government's motion to preclude evidence or argument regarding a defense of duress where the motion was filed before completion of the government's document production). Although the Defense raised the concern with the Court that the Government's motion was premature, the Court has directed that the Defense respond substantively to the Government's position.[1]

b) The Government's Motion is Internally Incoherent

6. It is difficult to respond to the Government's motion, as the argument is internally inconsistent. In order to respond, the Defense must make the assumption that the damage reports are favorable to the Defense, in that they show that little to no damage was caused by the alleged leaks. However, the Government continues to imply in its motion that the damage reports will show that the leaks did cause damage to national security. For instance:

i) The Government refers repeatedly to the Defense's [redacted] Prosecution Motion for Appropriate Relief to Preclude Actual Harm or Damage from the Pretrial Motions Practice and the Merits Portion of Trial, p. 8 (emphasis added)[hereinafter "Government Motion"].

ii) The Government states [redacted][2] *Id.*

iii) The Government states that if [redacted]. Government Motion, p. 8-9.

7. Clearly, the Government's statements suggest that the damage assessments will prove that the alleged leaks caused harm or damage to the United States. If this is truly the case, why would

[1] Given that the Defense has not seen the damage assessments, it reserves the right, upon the Government providing discovery, to supplement its submissions in this Response.

[2] It is ironic to think that the Government is using its own discovery violations as a means to preclude the Defense from raising the issue of damage assessments.

the Defense seek to introduce evidence of damage assessments that show that the leaks did, in fact, cause damage to national security? By extension, why would the Government seek to preclude the Defense from doing something it would not do?

8. In short, the only way that the Government's motion makes any sense is to assume that the damage assessments reveal that the alleged leaks caused no harm to the United States. The Government should not be permitted to continue its practice of "smoke and mirrors" in suggesting that the damage assessments say otherwise. If they say otherwise (i.e. the alleged leaks caused harm), there would be absolutely no reason for this motion to preclude reference to them.

c) The Government's Motion is Overbroad

9. The Government requests that the Court preclude the Defense from [redacted] Government Motion, p. 1. It seems that the Government is not simply seeking to preclude the Defense from arguing that the alleged leaks did not cause harm, but also to preclude the Defense from referencing any [redacted] (emphasis added).[3] *Id.*

10. The Defense reads this to mean that the Government would seek to prevent the Defense from introducing anything that might be contained in a damage assessment from the merits portion of trial, because the damage assessment is documentary evidence [redacted] So if, for instance, a damage assessment provided reasons why no harm was done to the United States from the alleged leaks, the Defense would not be permitted to use that information in its case in chief. However, the reasons why the released information did not cause harm could bear on whether the information was of the type that could reasonably be expected to cause harm, as outlined in detail below.

11. The Government fails to draw a distinction between the Defense referencing the fact that the damage assessments concluded the leaks caused no harm, and the Defense referencing specific information contained in the damage assessments. The two are different things, but the Government would seek to lump them together. In either event, for the reasons discussed below, the Government's motion should be denied in its entirety because the evidence is relevant and not outweighed by the danger of unfair prejudice under M.R.E. 403.

II. The Court Should Not Preclude the Defense From Referencing a Lack of Actual Harm or the Content of the Damage Assessments

[3] The Government also seeks to preclude the Defense from raising or eliciting any discussion, reference, or argument related to actual harm from pretrial motions related to the merits portion of trial. The Defense believes that this would include motions related to discovery or production as well as the current Defense Motion to Dismiss All Charges with Prejudice. Clearly, requesting the Court to order the Defense from referencing actual harm in a motion to compel discovery of the damage assessments, for instance, is ludicrous.

a) The Absence of Harm Goes to An Element of Three Offenses

12. The Government repeatedly argues that [redacted] *See e.g.* Government Motion, p. 5. Notably, the Government does not state that the absence of harm is not relevant to the charged offenses; rather, it states that [redacted] is not relevant to any of the charges. This is plainly wrong on its face. If the Government chooses to show that the alleged leaks caused harm, this would be compelling proof that the leaked information could cause damage to the United States. In other words, if the Government could prove that the alleged leaks did damage to the United States, it would seem to follow that the leaks could cause damage to the United States. The Government's failure to understand this point—and box itself into a position where it maintains harm is not relevant to the charges—is baffling.

13. It does not follow, of course, that if the alleged leaks did not cause damage, this definitively proves that they could not cause damage. However, the absence of harm is probative of whether the information leaked was of the type that the accused reasonably believed could cause harm. More specifically, the lack of harm from the leaks is relevant to the 18 U.S.C. §793 and the 18 U.S.C. §1030 offenses and whether the accused had reason to know that the information released could be used to the injury of the United States or to the advantage of a foreign nation. *See* Charge Sheet. Further, the lack of harm from the leaks is relevant to whether the accused acted "wantonly," an element of the Article 134 offense. *Id.*

14. The 18 U.S.C. §793 and the 18 U.S.C. §1030 offenses require that the Government prove that "the accused had reason to believe" that the "information could be used to the injury of the United States or the advantage of any foreign nation." *Id.* The Government seems to think that an analysis of whether the information "could" be used to the injury of the United States or the advantage of any foreign nation takes place in a vacuum. The Government conveniently overlooks that the offenses require that the Government prove the accused had "reason to believe" the information "could be used to the injury of the United States or the advantage of a foreign nation." As such, this is not a merely hypothetical inquiry into the word "could." Rather, the offenses require the Government to show that the accused had "reason to believe" that the information could be used to the injury of the United States. *See United States v. Truong Dinh Hung*, 629 F.2d 908, 919 (4th Cir. 1980) (approving jury instruction that "reason to believe" meant that a defendant must be shown to have known facts from which he concluded or reasonably should have concluded that the information could be used for the prohibited purposes). The Article 134 involves a similar inquiry: whether PFC Manning acted "wantonly" (i.e. highly recklessly) in causing the charged information to the published on the internet.

15. The Defense is entitled to argue that, by virtue of his expertise and training, PFC Manning knew which documents and information could be used to the injury of the United States or to the advantage of any foreign nation. PFC Manning had access to a great deal of very sensitive information that, if disclosed, could have caused damage to the United States. By selecting the information that he allegedly did, PFC Manning deliberately chose information that could not cause damage to the United States. The reasonableness of his belief that the information could not cause damage is buttressed by the damage assessments which (presumably) say that the leaks

did not cause damage to the United States. In short, the Defense submits that the damage assessments confirm that PFC Manning did not have "reason to believe" that the information could cause damage to the United States or be used to the advantage of a foreign nation. Further, the lack of damage from the leaks supports the view that PFC Manning did not act "wantonly," an element of the Article 134 offense.

16. The Government believes that the classification level of the documents themselves is conclusive (or virtually conclusive) of whether the information could cause damage. The Government's argument in this respect—that [redacted]—is misleading. *See* Government Motion at p. 4. The Government cites small excerpts from cases which seem to suggest that courts must defer to classification rulings, presumably in the context of deciding whether classified information could cause damage.[4] These excerpts are misleading in that none of them deal with the issue at hand, i.e. whether classification decisions are entitled to great deference in determining whether the information could cause damage. In *United States v. Rosen*, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007), the court was deciding whether it should close the trial under a novel system proposed by the government owing to the classified information involved.[5] *United States v. Smith*, 750 F.2d 1215 (4th Cir. 1984) dealt with the admissibility of classified evidence in a proceeding. And *CIA v. Sims*, 471 U.S. 159 (1985) involved the powers of the Director of the CIA to withhold intelligence information from a Freedom of Information Act request. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1981) does not even deal with classified documents or information. Instead, it deals with the constitutionality of the Alien Registration Act. The Supreme Court in that case stated:

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Id. at 588-589. Thus, the Supreme Court was not talking about classification determinations in reference to "such matters" as the Government's citation would seem to suggest. *See*

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[4] Otherwise, it is not clear what the point of this discussion is.

[5] In that case, the Court refused to adopt the government's plan stating:

> Here, the government has not met its burden; instead, it has done no more than to invoke "national security" broadly and in a conclusory fashion, as to all the classified information in the case. Of course, classification decisions are for the Executive Branch, and the information's classified status must inform an assessment of the government's asserted interests under *Press-Enterprise.* But ultimately, trial judges must make their own judgment about whether the government's asserted interest in partially closing the trial is compelling or overriding. As noted, a generalized assertion of "national security interests," whether by virtue of the information's classified status or upon representation of counsel, is not alone sufficient to overcome the presumption in favor of open trials. Here, the government has not proffered any evidence about danger to national security from airing the evidence publicly, let alone an item-by-item description of the harm to national security that will result from disclosure at trial of each specific piece of information as to which closure is sought, as required by *Press-Enterprise.*

Id.

Government Motion at p. 4. Rather, it was talking about the United States' policy toward aliens. Similarly, the *Haig v. Agee*, 453 U.S. 280 (1981) case deals with the U.S.'s power to revoke a passport, not with whether courts should defer to classification determinations.

17. As is clear, the Government does not provide support for its proposition that classification decisions are worthy of great deference as it concerns the conclusion that classified information "could" cause harm. This is because military (and other) case law clearly establishes that the classification of a document is only probative, and not determinative, of the issue of whether information could cause harm. In *United States v. Diaz*, 69 M.J. 127 (C.A.A.F. 2010), C.A.A.F. stated:

> [C]lassification alone does not satisfy the *mens rea* requirement of §793(e). Surely classification may demonstrate that an accused has reason to believe that information relates to national defense and could cause harm to the United States. However, not all information that is contained on a classified or closed computer system pertains to national defense. Likewise not all information that is marked as classified, in part or in whole, may in fact meet the criteria for classification. Conversely, information that is not so marked may meet the standards for classification and protection. This is evident enough with respect to information received through oral means or information the recipient should have reason to believe warrants protection.

Id. at 133. Under *Diaz*, the Government cannot satisfy its burden of showing that the documents could cause damage merely by pointing to their classification.[6]

18. The Government cites *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988) for the proposition that "the government must only prove 'that [the compromised information] was in fact potentially damaging." (Government emphasis). The Government has failed to cite the more important part of the *Morison* holding:

> Though the point is to me a close one, I agree that the limiting instruction which required proof that the information leaked was either "potentially damaging to the United States or might be useful to an enemy" sufficiently remedied the facial vice. Without such a limitation on the statute's apparent reach, leaks of information which, though undoubtedly "related to defense" in some marginal way, threaten only embarrassment to the official guardians of government "defense" secrets, could lead to criminal convictions. Such a limitation is therefore necessary to define the very line at which I believe the first amendment precludes criminal prosecution, because of the interests rightly recognized in Judge Wilkinson's concurring opinion. This means, as I assume we reaffirm today, that notwithstanding information may have been classified, the government

[6] The Government cites *Diaz* for a completely unrelated proposition that is not at issue here. *See* Government Motion, p. 6. The motion to preclude evidence in *Diaz* was related to intent, not relevance. In *Diaz*, the military judge excluded evidence that the Defense contended would satisfy the heightened *mens rea* requirement in 18 U.S.C. §793(e). *Id.* at 137. Given that the Court concluded there was no heightened *mens rea* requirement for 18 U.S.C §793(e), the exclusion of the evidence was proper. This ruling does not speak at all to whether it is appropriate to exclude reference to actual harm in this case.

> must still be required to prove that it was in fact "potentially damaging ... or useful," i.e., that the fact of classification is merely probative, not conclusive, on that issue, though it must be conclusive on the question of authority to possess or receive the information. This must be so to avoid converting the Espionage Act into the simple Government Secrets Act which Congress has refused to enact.

Id. at 1086. As both *Diaz* and *Morison* demonstrate, the Government does not get a "free pass" on establishing whether information could cause damage by simply relying on the fact of classification itself. Under the 18 U.S.C. §793 and the 18 U.S.C. §1030 offenses, the Government must prove that the information could cause damage—and more specifically, that the accused had reason to know that the information could cause damage. The Defense should be entitled to rebut the allegation by showing that the accused did not have reason to believe that the information could cause damage and testing the reasonableness of that belief against the actual damage caused. Moreover, under the Article 134 offense, the Defense should be entitled to argue that PFC Manning did not "wantonly" cause intelligence information to be published on the internet . The lack of actual harm supports the view that any alleged disclosure of information was not wanton.

b) The Absence of Harm is Relevant Impeachment Evidence

19. In addition to going toward a key element of three separate offenses, the Defense maintains that the absence of damage is relevant for the impeachment of Government witnesses who claim that the leaks "could" cause damage. The Government, however, believes that the use of a damage assessment to impeach an Original Classification Authority (OCA) who prepared a classification review would be improper. Government Motion, p. 3. The Government provides no justification for its position. Why is it "improper" to use actual ex post knowledge to challenge the reasonableness or appropriateness of the ex ante classification decision which the Government relies on to show the documents could cause damage? As *Diaz* states, the classification level of the documents themselves is not determinative of whether the information "could" cause damage (or whether the accused had reason to believe they could cause damage). As such, the Defense should be able to probe the basis of a Government witness' testimony that the information could cause damage by using ex post damage assessments. *See United States v. Israel,* 60 M.J. 485, 486 (C.A.A.F. 2005) ("A defendant's right under the Sixth Amendment to cross-examine witnesses is violated if the military judge precludes a defendant from exploring an entire relevant area of cross-examination.") (citing *United States v. Gray*, 40 M.J. 77, 81 (C.M.A. 1994)).

20. For instance, suppose that a damage assessment revealed that Afghani sources were not compromised in the alleged leaks; the reason is that the sources were referred to in the leaked SIGACTS by initials and not name. The Defense should be able to use this information to question the Government witness about whether, when conducting the original classification review, he or she knew that the sources were referred to by initials. This could then form the basis for impeaching the witness' testimony that the leaks "could" cause damage. While the Government would neatly have the Court separate the OCA classification reviews from the OCA

damage assessments, the analysis is not that tidy. Evidence from the latter is directly relevant to the former and can be used to impeach a witness' credibility.

21. Moreover, the Government notes that the damage assessments look at the damage to national security given based, in part, on the nature of the information released. Government Motion at p. 2 (emphasis added). If the damage assessments conclude that the nature of the information is such that it would not cause harm, then the Defense should be able to use that information to challenge the OCAs' original determination that the information was of such a nature that it could cause harm.

IV. Reference to the Absence of Harm from the Alleged Leaks Should Not be Excluded Under M.R.E. 403

22. The Government believes that permitting the Defense to raise issues related to actual harm from the leaks (or the absence thereof) would: a) result in prejudice to the integrity of the proceeding; b) result in prejudice to the United States; c) fail the balancing test under M.R.E. 403.[7]

23. The Government makes no legitimate proffer that reference to actual harm will undermine the integrity of the trial process or cause prejudice to the Government. Indeed, the cases cited by the Government in this respect speak to prejudice to the accused—not the integrity of the process or prejudice to the United States. See, e.g., *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F 2009) ("[T]he term 'unfair prejudice' in the context of M.R.E. 403 'speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged.'")(emphasis added) (cited in Government Motion, p. 8).

24. The Government's argument seems to be that it will suffer great prejudice for the following reason: if the Defense references the fact that the leaks did not cause damage, the Government would be forced to rebut that evidence with its own evidence that the leaks did cause damage. Since the information would be classified, this would be a new form of graymailing. The government entities who own information related to actual harm or damage would be forced to approve the use of this classified information for the sole purpose of rebutting the defense's argument.

25. The Government's argument suffers from many weaknesses. First, the Defense plans on introducing any favorable damage assessments on sentencing; thus, the Government would be in a position where—if it wanted to refute the Defense's argument—it would already have had to secure the relevant approvals. Second, the Defense is not able to reference classified information contained in the damage assessment in "open court" as the Government suggests. *See* Government Motion, p. 8. So all of the proceedings where the Defense or the Government referenced classified information from the damage assessments would need to be in closed proceedings in any event. Third, the Government's "graymailing" theory is ludicrous. Why

[7] Again, the Defense would point out that it is virtually impossible to conduct a balancing test for information that the Court and the Defense has not yet seen.

would the Defense "graymail" the Government into disclosing documents or information that hurt the Defense?

26. The Government then cites miscellaneous other reasons why the Court should not allow the Defense to reference the damage assessments under M.R.E. 403: the statements are inadmissible hearsay, the documents are classified, closed sessions would be required to discuss the contents of the damage assessments. *See* Government Motion, p. 9. None of these are reasons for precluding the Defense from referencing the lack of damage caused by the leaks. The Defense would challenge the fact that these documents are inadmissible hearsay (and certainly the issue cannot be resolved as part of this motion). Further, thousands of documents in this case are classified and require approvals and closed sessions; the damage assessments are no different.

27. To the extent that there are any concerns about confusing the issues, the Court has the inherent power to control its own process. If, at the time the Defense references the damage assessment, the Court believes that the line of questioning is complicated or too attenuated, it can make the decision not to allow the Defense to continue. Moreover, if there is any confusion on this issue in the mind of the panel members, the Court can issue appropriate instructions. In short, there are simple remedies available to the Court that are far short of outright precluding the Defense from [redacted]
Government Motion, p. 1.

28. The court in *United States v. Drake*, in response to a motion by the prosecution to preclude the defense in that case from referencing certain evidence, expressed an unwillingness to foreclose a potential line of argument, especially given that the court had the inherent power to control the courtroom. The court stated in this respect:

> **THE COURT**: -- but my point is that, to preclude them from going down that path, I think, essentially prevents them from presenting a defense, that we can control the matter of whether or not there is reference to necessity or justification, and I'm fairly confident I'll be able to control the courtroom to do that. It's just a matter of where else we go with this motion, and it seems to me they're certainly entitled to get into this.
> ...
>
> **THE COURT:** As I interpret the Government's motion, or as I intend to interpret it, it doesn't mean that that evidence is -- although the Government seems very concerned with it amounting to a higher calling, necessity, or justification defense, I'm fairly confident that I can keep this case on track to correct you if you happen to make an inadvertent mistake in that regard, but you're certainly free to have at that in terms of the intent element, and that's how I see it.

Transcript of Record at M-100, M-103, *United States v. Drake,* No. RDB-10-181 (D. Md. Mar. 31, 2011) (emphasis added). The court's response in *Drake* was an eminently sensible one,

which recognized that there are reasonable alternatives short of outright preclusion available to address any concerns of prejudice or confusion.

CONCLUSION

29. For the reasons outlined herein, the Defense requests that this Court deny the Government's motion in its entirety. In the alternative, the Defense requests that this Court defer ruling on the motion until all relevant evidence has been produced. *See United States v. Swenson*, 51 M.J. 522, 526 (A.F. Ct. Crim. App. 1999) ("By deferring his ruling, the military judge often can better assess the relevance and necessity of the evidence.").

Respectfully submitted,

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