IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE MOTION FOR**
v.	)	**INSTRUCTIONS ON LESSER**
	)	**INCLUDED OFFENSE (LIO)**
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 10 May 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law, Article 79, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 879 (2010), and Rule for Courts Martial (R.C.M.) 920(e)(2), requests this Court to instruct the members on the elements of Article 92(1) for a violation of Army Regulation 380-5 (AR 380-5) as a lesser included offense (LIO) of each of the offenses alleged in Specifications 1, 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to R.C.M. 905(c)(1) and (2)(A).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to 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.

4. Specifically, in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, PFC Manning is charged with unauthorized possession and disclosure of information relating to the national defense in violation of 18 U.S.C. Section 793(e). *See* Charge Sheet. In addition, each of these specifications allege that the conduct described therein is prejudicial to good order and discipline in the armed forces and is of a nature to bring discredit upon the armed forces, in violation of Article 134. *See id.* Finally, Specification 1 of Charge II charges PFC Manning with wrongfully

and wantonly causing United States intelligence to be published on the internet, having knowledge that the intelligence placed on the internet is accessible to the enemy, in violation of Article 134. *See id.*

5. Additionally, as stated by this Court in the "Factual Findings" section of its Ruling on the Defense's Motion to Dismiss Specification 1 of Charge II for Failure to State an Offense, "[a]t the time of PFC Manning's alleged unlawful actions, Army Regulation 380-5 (Department of the Army Information Security Program) was in effect. The regulation is a punitive lawful general order per paragraph 1-21[.]" *See* Appellate Exhibit LXXX at 1.

WITNESSES/EVIDENCE

6. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the following evidence in support of the Defense's motion:

a. Charge Sheet

b. Army Regulation 380-5.

LEGAL AUTHORITY AND ARGUMENT

7. Article 79 provides that "[a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein." 10 U.S.C. § 879. To determine whether an offense is "necessarily included" in a charged offense, *id.*, the Court of Appeals for the Armed Forces has adopted the "elements test." *See United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011); *United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 465, 468, 470-71 (C.A.A.F. 2010). Under the elements test, "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (quoting *Schmuck v. United States*, 489 U.S. 705, 716 (1989)); *see Bonner*, 70 M.J. at 2.

8. Analysis under the elements test begins by identifying and comparing the elements of the charged offense and the purported LIO:

> [O]ne compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.

Jones, 68 M.J. at 470. However, "[t]he elements test does not require that the two offenses at issue employ identical statutory language. Instead, the meaning of the offenses is ascertained by applying the 'normal principles of statutory construction.'" *Alston*, 69 M.J. at 216 (quoting

Carter v. United States, 530 U.S. 255, 263 (2000)); *see Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2.

9. Additionally, identification of the elements of the offenses under the elements test need not rely solely on the statutory text in the abstract, untethered to any consideration of how the offenses are charged in the particular case at hand. On the contrary, the Court of Appeals for the Armed Forces has made clear that "comparison of the statutory elements *as charged in the specification* is allowed." *Arriaga*, 70 M.J. at 54 (emphasis supplied); *see id.* at 55 ("Regardless of whether one looks strictly to the statutory elements *or to the elements as charged*, housebreaking is a [LIO] of burglary . . . . [T]he offense *as charged in this case* clearly alleges the elements of both offenses." (emphases supplied)); *see also United States v. Nealy*, 71 M.J. 73, ___, No. 11-0615, 2012 WL 1108134, at *7-8 & n.1 (C.A.A.F. March 30, 2012) (Baker, C.J., concurring in the result) (explaining that, under *Arriaga*, the specification itself may provide notice to an accused of the LIOs of the charged offense(s)); *Alston*, 69 M.J. at 216 (examining the elements as charged in the specification when conducting an elements test analysis).

10. Consideration of the elements of the offenses as charged is completely consistent with *Jones*. In *Jones*, the Court explained that the paramount concern of the elements test was ensuring that an accused has notice of the LIOs of which he could be convicted. *See* 68 M.J. at 468. The *Jones* Court made clear that the specification in any particular case could provide that notice: "[W]hat is general [in the statutory text of Article 134] is made specific through the language of a given specification. The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against." *Id.* at 472. In fact, the Government itself has recently acknowledged that the court can properly consider how offenses are alleged in the specification in making LIO determinations under the elements test. *See* Brief for Appellee United States, *United States v. Nealy*, 71 M.J. 73 (No. 11-0615), 2011 WL 5358403, at *7-10 (C.A.A.F. Oct. 25, 2011) (discussing continued vitality of the pleadings-elements test of *United States v. Weymouth*, 43 M.J. 329 (C.A.A.F. 1995), even after *Jones*); *id.* at *8 ("*Jones* . . . implicitly acknowledges reliance upon the 'pleadings-elements' test to ascertain the elements in any particular case."); *id.* at *9 ("[T]he 'elements' of any given offense cannot be based solely upon what Congress enacted, but must also include the specific pleading in any particular case."); *id.* at *10-12 (explaining how provoking speeches or gestures under Article 117 may be a LIO of communicating a threat under Article 134, "[d]epending on the [n]ature of the [a]llegation").

11. In the last analysis, the elements test is the approach used to determine whether one offense is a "subset" of another. *See Schmuck*, 489 U.S. at 716; *Bonner*, 70 M.J. at 2; *Jones*, 68 M.J. at 469. Where it is impossible to commit the greater offense without also committing the purported LIO, the elements test has been satisfied. *See Schmuck*, 489 U.S. at 719 ("To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." (quoting *Giles v. United States*, 144 F.2d 860, 861 (9th Cir. 1944)) (internal quotations omitted)); *Arriaga*, 70 M.J. at 55 (holding that housebreaking is a LIO of burglary because "it is impossible to prove a burglary without also proving a housebreaking.").

12. When a LIO is reasonably raised by the evidence, the court must instruct the members on the elements of that LIO. *See* R.C.M. 920(e)(2) ("Instructions on findings shall include: . . . (2) A description of the elements of each lesser included offense in issue"); *Arriaga*, 70 M.J. at 55 ("A military judge has a sua sponte duty to instruct the members on lesser included offenses reasonably raised by the evidence." (quoting *United States v. Upham*, 66 M.J. 83, 87 (C.A.A.F. 2008))); *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) ("[U]nder R.C.M. 920(e)(2), the military judge ha[s] a *sua sponte* duty to instruct the court members on LIOs under the prevailing law"); *Jones*, 68 M.J. at 468 ("[M]ilitary judges must instruct the members on LIOs reasonably raised by the evidence").

13. In the instant case, a violation of AR 380-5, chargeable under Article 92(1), is a LIO for each of the offenses alleged in Specifications 1, 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. Accordingly, the Defense requests that this Court instruct the members of the elements of this LIO. *See Arriaga*, 70 M.J. at 55; *Girouard*, 70 M.J. at 11; *Jones*, 68 M.J. at 468.

A. A Violation of Army Regulation 380-5, Chargeable Under Article 92(1), is a Lesser Included Offense of Each Specification Charging PFC Manning with a Violation of 18 U.S.C. Section 793(e) and Article 134

14. In Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, PFC Manning is charged with violations of Section 793(e) and Article 134. *See* Charge Sheet. Under the elements test analysis, a violation of AR 380-5, chargeable under Article 92(1), is a LIO for each of these specifications.

15. The first step in an elements test analysis is to identify the elements of each offense. *See Jones*, 68 M.J. at 470; *Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2. In Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, the Government has used the third clause of Article 134 to charge violations of Section 793(e). *See* 10 U.S.C. § 934 ("crimes and offenses not capital" clause). In general, "[i]f the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law[,]" Manual for Courts-Martial (MCM), Part IV, para. 60.b – here, Section 793(e). In this case, though the specific date ranges and the particular information at issue vary, the core elements of Section 793(e), charged as a violation of the third clause of Article 134, are identical in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. *See Arriaga*, 70 M.J. at 54-55 (resort to the specification in the particular case is proper in an elements test analysis); *see also Nealy*, 2012 WL 1108134, at *7-8 & n.1 (Baker, C.J., concurring in the result) (same). Those core elements are as follows:

> (1) The accused, at or near Contingency Operating Station Hammer, Iraq, between on or about [varying date ranges], had unauthorized possession of information;
>
> (2) The information was relating to the national defense, to wit: [the named information];

(3) The accused knew or had reason to believe that the information could be used to the injury of the United States or to the advantage of any foreign nation;

(4) The accused willfully communicated, delivered, or transmitted, or caused to be communicated, delivered, or transmitted the information to a person not entitled to receive it; and

(5) Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

See Charge Sheet; *see also* 10 U.S.C. § 934 (containing statutory text supporting element 5 above); 18 U.S.C. § 793(e) (containing statutory text supporting elements 1-4 above).

16. A violation of AR 380-5 charged under Article 92(1) would have the following elements:

(1) There was in effect a certain lawful general order or regulation in the following terms: Paragraphs 1-21 and 6-1, Army Regulation 380-5, dated 29 September 2000;

(2) The accused had a duty to obey this regulation; and

(3) That on divers occasions between on or about [varying date ranges], at or near Contingency Operating Station Hammer, Iraq, the accused violated this lawful general regulation by knowingly, willfully, or negligently disclosing classified or sensitive information to unauthorized persons.

See MCM, Part IV, para. 16.b(1); *see also* 10 U.S.C. § 892(1); AR 380-5, para. 1-21(a)(1).

17. After the elements have been identified, the next step in an elements test analysis is to compare the elements of the two offenses to determine whether the elements of one offense are "necessarily included" in the other. *See Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2; *Alston*, 69 M.J. at 216; *Jones*, 68 M.J. at 470. This comparison "does not require that the two offenses at issue employ identical statutory language. Instead, the meaning of the offenses is ascertained by applying the 'normal principles of statutory construction.'" *Alston*, 69 M.J. at 216 (quoting *Carter*, 530 U.S. at 263); *see Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2.

18. In this case, each of the elements of the Article 92(1) offense is necessarily included in one or more elements of the Article 134 offense charged in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. As all of the elements of the Article 92(1) offense are necessarily included in the Article 134 offense, the Article 92(1) offense is a LIO of the Article 134 offense.

19. Taking the elements in order, elements one and two of the Article 92(1) offense (existence of the lawful general regulation and accused's duty to obey it) are necessarily included in the first element of the Section 793(e) offense (the accused's unauthorized possession of information). The lawful general regulation – AR 380-5 – covers the handling of classified and

sensitive information. *See* AR 380-5, para. 1-1 ("This regulation establishes the policy for the classification . . . transmission, transportation, and safeguarding of information requiring protection in the interests of national security. It primarily pertains to classified national security information, now known as classified information, but also addresses controlled unclassified information, to include for official use only and sensitive but unclassified."). The regulation prohibits, among other things, "[c]ollecting, obtaining, recording, or removing, for any personal use whatsoever, of any material or information classified in the interest of national security[.]" *Id.*, para. 6-1. Any "unauthorized possession of information" relating to the national defense must necessarily implicate the duties imposed by AR 380-5. In other words, the duty to obey the regulation on handling classified and sensitive information imposed by AR 380-5 (the first two elements of the Article 92(1) offense) is a subset of the unauthorized possession of each charged Section 793(e) violation (the first element of the Section 793(e) offense). Thus, the first two elements of the Article 92(1) offense are necessarily included in the first element of the Section 793(e) offense.

20. Additionally, the third element of the Article 92(1) offense (violation of AR 380-5 by knowingly, willfully, or negligently disclosing classified or sensitive information to a person not authorized to receive it under paragraph 1-21 of the regulation) is necessarily included in the fourth element of the Section 793(e) offense (willfully communicated, delivered, or transmitted, or caused to be communicated, delivered, or transmitted information relating to the national defense to a person not entitled to receive it). Indeed, the third element of the Article 92(1) offense and the fourth element of the Section 793(e) offense are nearly identical, and the statutory language of the offenses need not mirror each other perfectly. *See Alston*, 69 M.J. at 216; *see Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2. While the Article 92(1) offense can be committed by a knowing, willful, or negligent disclosure, the inclusion of "knowingly" and "negligently" in this element is of no moment because "[t]he fact that there may be an 'alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense.'" *Arriaga*, 70 M.J. at 55 (quoting *United States v. McCullough*, 348 F.3d 620, 626 (7th Cir. 2003)). In this case, each of the willful communications, deliveries, or transmissions of information relating to the national defense to a person not entitled to receive it alleged in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II necessarily included a willful disclosure of classified or sensitive information to a person not authorized to receive it. The specific information related to the national defense identified in Specifications 3, 5, 7, 9, 10 and 15 of Charge II is alleged to be classified. *See* Charge Sheet. The information identified in Specifications 2 and 11 of Charge II, though not alleged to be classified, readily fits the definition of either "classified information" or "sensitive information," as those terms are used in AR 380-5. *See id.*; AR 380-5. Additionally, the conduct alleged in each of these specifications involved a willful disclosure of the information to a person not authorized to receive it. Therefore, the third element of the Article 92(1) offense is necessarily included in the fourth element of the Section 793(e) offense.

21. Moreover, the first two elements of the Article 92(1) offense are also necessarily included in the fifth element of the Section 793(e) offense, as the Government has charged that offense in this case. The Government has used clause 3 of Article 134 to charge the Section 793(e) offense and has alleged that the conduct underlying the Section 793(e) violation was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed

forces. *See* Charge Sheet. The alleged conduct that is to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces also, as it is alleged by the Government, necessarily includes a violation of the duty to obey the regulation on handling classified information. As the MCM instructs:

> A breach of a custom of the service may result in a violation of clause 1 of Article 134 . . . . Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive.

MCM, Part IV, para. 60.c(2)(B); *see* Appellate Exhibit LXXX at 4 ("Violations of customs of the service that are made punishable in punitive regulations should be charged under Article 92 as violations of the regulations in which they appear."). So it is here. The conduct that the Government alleges was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces – a Section 793(e) violation – necessarily included a breach of a custom of the service now set forth in a punitive regulation – AR 380-5. As the violation of the regulation is necessarily included in the conduct underlying the Section 793(e) violation, the duty to obey the regulation is also included in that conduct. Thus, the first two elements of the Article 92(1) offense are also necessarily included in the fifth element of the Section 793(e) offense, as the Government has charged that offense in this case.

22. In sum, because every element of the Article 92(1) offense is necessarily included in one or more elements of the Section 793(e) offense, as charged under clause 3 of Article 134, the Article 92(1) offense is a subset of the Section 793(e) offense. Every violation of Section 793(e) perpetrated by a member of the Army must, of necessity, include a violation of AR 380-5. It is impossible for a member of the Army to violate Section 793(e) in the manner alleged by the Government, *see Arriaga*, 70 M.J. at 54-55, without also violating AR 380-5. *See Schmuck*, 489 U.S. at 719 (explaining that when it is impossible to commit the greater offense without also committing the lesser offense, the lesser offense is a LIO); *Arriaga*, 70 M.J. at 55 (similar); *see also United States v. Baba*, 21 M.J. 76, 78 (C.M.A. 1985) (Cox, J., concurring in the result) ("The elements of an offense under Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 . . . are necessarily included in the elements of an offense under Article 134, UCMJ, 10 U.S.C. § 934, and 18 U.S.C. § 793(d).").

23. Thus, a violation of AR 380-5 charged under Article 92(1) is a LIO of each Section 793(e) violation charged in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. Accordingly, this Court should instruct the members on the elements of the Article 92(1) LIO for each of these specifications. *See Arriaga*, 70 M.J. at 55; *Girouard*, 70 M.J. at 11; *Jones*, 68 M.J. at 468.

B. A Violation of Army Regulation 380-5, Chargeable Under Article 92(1), is a Lesser Included Offense of Specification 1, of Charge II

24. In Specification 1 of Charge II, PFC Manning is charged with wrongfully and wantonly causing United States intelligence to be published on the internet, having knowledge that the

intelligence placed on the internet is accessible to the enemy, in violation of Article 134. *See* Charge Sheet. Under the elements test analysis, a violation of AR 380-5, chargeable under Article 92(1), is a LIO for this specification.

25. Specification 1 of Charge II charges a violation of Article 134 under the first and second clauses of that article. *See* 10 U.S.C. § 934 (the "all disorders and neglects to the prejudice of good order and discipline in the armed forces" clause and the "all conduct of a nature to bring discredit upon the armed forces" clause). In general, conduct punished under clause 1 and 2 of Article 134 requires proof of the following elements:

> (1) That the accused did or failed to do certain acts; and
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> (2) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, Part IV, para. 60.b. In this case, the elements of the clause 1 and 2 Article 134 offense are alleged in the specification, *see Arriaga*, 70 M.J. at 54-55 (resort to the specification in the particular case is proper in an elements test analysis), as follows:

> (1) The accused, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, wrongfully and wantonly caused to be published on the internet intelligence belonging to the United States, having knowledge that intelligence published on the internet is accessible to the enemy; and
>
> (2) Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

See Charge Sheet. A violation of AR 380-5 charged under Article 92(1) would have the same elements as outlined above, *see* Argument, Part A, *supra*, namely:

> (1) There was in effect a certain lawful general order or regulation in the following terms: Paragraphs 1-21 and 6-1, Army Regulation 380-5, dated 29 September 2000;
>
> (2) The accused had a duty to obey this regulation; and
>
> (3) That on divers occasions between on or about [varying date ranges], at or near Contingency Operating Station Hammer, Iraq, the accused violated this lawful general regulation by knowingly, willfully, or negligently disclosing classified or sensitive information to unauthorized persons.

See MCM, Part IV, para. 16.b(1); *see also* 10 U.S.C. § 892(1); AR 380-5, para. 1-21(a)(1).

26. Comparing the elements of these two offenses, the first and second elements of the Article 92(1) offense (existence of lawful general order or regulation and the accused's duty to obey it) are necessarily included in the second element of the clause 1 and 2 Article 134 offense (conduct of the accused to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces). The Government has alleged that wrongfully and wantonly causing intelligence to be published on the internet is the conduct that is prejudicial to good order and discipline and service discrediting. That same conduct, in the manner that it is alleged by the Government, necessarily includes a violation of the duty to obey the regulation on handling classified information. Moreover, the conduct underlying the clause 1 and 2 Article 134 offense necessarily included a breach of a custom of the service now set forth in a punitive regulation – AR 380-5. *See* MCM, Part IV, para. 60.c(2)(B) ("Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive."); *see also* Appellate Exhibit LXXX at 4. As the violation of the regulation is necessarily included in the conduct underlying the clause 1 and 2 Article 134 offense, the duty to obey the regulation is also included in that conduct. Therefore, the first and second elements of the Article 92(1) offense are necessarily included in the second element of the clause 1 and 2 Article 134 offense.

27. Additionally, the third element of the Article 92(1) offense (violation of AR 380-5 by knowingly, willfully, or negligently disclosing classified or sensitive information to unauthorized persons) is necessarily included in the first element of the clause 1 and 2 Article 134 offense (wrongfully and wantonly causing to be published on the internet information belonging to the United States, having knowledge that intelligence published on the internet is accessible to the enemy). It is true, as this Court has recognized, that the mens rea required by these two elements is different: "AR 380-5 punishes knowing, willful, or negligent disclosure of classified or sensitive information to unauthorized persons. It does not punish the 'wanton' conduct charged in Specification 1 of Charge II[.]" *See* Appellate Exhibit LXXX at 5. But this fact does not change the LIO analysis, as the two offenses need not employ mirror-image statutory language. *See Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2; *Alston*, 69 M.J. at 216.

28. The MCM does not define the term "wanton" in the context of disclosure of information, but it does define the term in two other contexts. *See* MCM, Part IV, para. 35.c(8) (defining "wanton" for purposes of Article 111); *id.*, Part IV, para. 100a.c(4) (defining "wanton" for purposes of Article 134, offense of "reckless endangerment"). Both definitions provided by the MCM are essentially the same: "'Wanton' includes 'Reckless' but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense." *Id.*, Part IV, para. 100a.c(4); *see id.*, Part IV, para. 35.c(8) ("'Wanton' includes 'reckless', but in describing the operation or physical control of a vehicle, vessel, or aircraft 'wanton' may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.").

29. Thus, "wanton" as used in the first element of the clause 1 and 2 Article 134 offense could potentially include "knowingly," "willfully," or "negligently," as "wanton" can cover recklessness, willfulness, or a disregard of probable consequences. Moreover, even if not every mens rea specified in AR 380-5 is included in "wanton," that fact does not mean that the Article

92(1) offense is not a LIO of the clause 1 and 2 Article 134 offense. "The fact that there may be an 'alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense.'" *Arriaga*, 70 M.J. at 55 (quoting *McCullough*, 348 F.3d at 626). At the very least, "wanton" can include "willful." *See* MCM, Part IV, para. 35.c(8); *id.*, Part IV, para. 100a.c(4). In this case, the Government has clearly indicated that the means by which PFC Manning wrongfully and wantonly caused intelligence to be published on the internet was his alleged willful disclosure of the information to WikiLeaks. *See Arriaga*, 70 M.J. at 54-55 (resort to the specification in the particular case is proper in an elements test analysis). In other words, the publication that PFC Manning wrongfully and wantonly caused necessarily included the willful disclosure and, therefore, necessarily included the violation of AR 380-5.

30. Additionally, the fact that the Article 134 offense "adds an additional element not included in the AR 380-5 offense, that the accused knew that the intelligence published on the internet is accessible to the enemy," Appellate Exhibit LXXX at 5, does not alter the conclusion that the third element of the Article 92(1) offense is necessarily included in the first element of the clause 1 and 2 Article 134 offense. A greater offense can have an additional element not included in the LIO; indeed, a greater offense "is called the greater offense because it contains all of the elements of [the LIO] along with one or more additional elements." *Jones*, 68 M.J. at 470.

31. This conclusion is also in no way cast into doubt by this Court's observation that the Article 134 offense "punishes the distribution of 'intelligence' which includes information that does not fall within AR 380-5." *See* Appellate Exhibit LXXX at 5. The fact that the term "intelligence" as used in the clause 1 and 2 Article 134 offense is a broad enough term to include information that is not confidential or sensitive is irrelevant to the LIO inquiry in this case.

32. It is clear from the way in which the Government has alleged the specifications, especially the date ranges provided in the clause 1 and 2 Article 134 offense, *see Arriaga*, 70 M.J. at 54-55 (resort to the specification in the particular case is proper in an elements test analysis), that the "intelligence" referenced in the clause 1 and 2 Article 134 offense includes the classified or sensitive materials identified in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. *See* Charge Sheet. Thus, for these reasons, the third element of the Article 92(1) offense is necessarily included in the first element of the clause 1 and 2 Article 134 offense.

33. Because each of the elements of the Article 92(1) offense is necessarily included in one or more of the elements of the clause 1 and 2 Article 134 offense, the Article 92(1) offense is a subset of the charged Article 134 offense. It is impossible for a member of the Army to violate Article 134 in the manner alleged by the Government, *see Arriaga*, 70 M.J. at 54-55, without also violating AR 380-5. *See Schmuck*, 489 U.S. at 719; *Arriaga*, 70 M.J. at 55; *see also Baba*, 21 M.J. at 78 (Cox, J., concurring in the result).

34. Therefore, a violation of AR 380-5 charged under Article 92(1) is a LIO of the clause 1 and 2 Article 134 offense charged in Specification 1 of Charge II. Accordingly, this Court should instruct the members of the Article 92(1) LIO for this specification. *See Arriaga*, 70 M.J. at 55; *Girouard*, 70 M.J. at 11; *Jones*, 68 M.J. at 468.

CONCLUSION

35. For the reasons articulated above, the Defense requests that this Court instruct the members on the elements of the Article 92(1) LIO of each offense alleged in Specifications 1, 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II.

Respectfully submitted,

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