IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE REPLY TO**
v.	)	**GOVERNMENT RESPONSE**
	)	**TO MOTION FOR DIRECTED**
MANNING, Bradley E., PFC	)	**VERDICT ON THE 18 U.S.C. §641**
U.S. Army, xxx-xx-xxxx	)	**OFFENSES**
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 12 July 2013
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. COMES NOW PFC Bradley E. Manning, by counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 917(a), requests this Court to enter a finding of not guilty for Specifications 4, 6, 8, and 12 of Charge II.

STANDARD

2. A motion for a finding of not guilty should be granted when, viewing the evidence in the light most favorable to the prosecution, there is an "absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged." R.C.M. 917(d).

ARGUMENT

A. The Government's Apparent Contention that "Database = Records = Copies of Records = Information" Must be Rejected

3. After reading the Government's Response, the Defense still has no idea what the Government is saying it has charged PFC Manning with "stealing" or "converting" within the meaning of 18 U.S.C. §641. To the best of the Defense's ability to understand the Government's position, it appears to be saying it has charged PFC Manning with stealing the databases *and* the records contained in the database (and/or their copies) *and* the information contained in the records.[1] *See*

[1] The Defense cannot figure out what this means for the Government's position on valuation. It appears that since the Government is arguing that databases contain records which contain information, it is allowed to aggregate the value of the database *with* a value of the records *with* a value of the information contained in the records. *See* Government Motion, p. 20 ("Similarly, evidence of the cost of production for the databases and records contained therein cannot be separated from the information because the information requires protection.") If this is the Government's position, there is *no case* dealing with §641 that has permitted a theory of this nature to proceed. Cases have allowed the prosecution to proceed separately with *either* charging/proving theft of "records" (or copies of records, as the case may be) or theft of "information." No court has ever allowed a prosecution to proceed based

Government Motion ("the accused stole and converted the databases and records listed in the § 641 specifications" (p. 2); "the evidence proves the contents of the databases and the records were stolen or converted" (p. 2); "The United States charged that the accused compromised databases, to include the records contained in the databases" (p. 12); "the records include the information contained therein" (p. 13); "The accused both stole and converted the information he compromised" (p. 14); "The accused's admission provides a reasonable inference of his intent to deprive the United States Government permanently of the records and information contained therein" (p. 15); "the conveyance harmed the United State's [sic.] interest in exclusive possession of the information in the records, thereby further adding to the conversion caused by the accused." (p. 16); "The accused stole and converted records maintained on United States Government computer systems" (p. 17); "any distinction between copies of the records is feckless" (p. 17); "the accused is charged with stealing or converting databases, to include the records contained therein, and not documents" (p. 19)).

4. In short, it seems like the Government wants the word "database" to encapsulate everything under the sun—records, copies of records, information in records, and the exclusive possession of information contained in records. The problem for the Government is that it simply charged PFC Manning with stealing "databases" –not records, not copies, not information, or any variation thereof. Neither records, nor copies of records, nor information, is fairly embraced within the word "database." The Government's last-ditch and schizophrenic attempt to argue that the word "database" encapsulates all these other things (things which have independent meaning and value) must be rejected.

5. The Government's position seems to be that the relevant databases (CIDNE, NCD, SOUTHCOM) are coextensive, or synonymous, with the records that are housed in the database and, by further extension, the information that is contained within those records within the database. *See* Government Motion, p.13 ("By the plain meanings of the § 641 specifications, the records include the information contained therein. A database is '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 (9th ed. 2009). Similarly, a record is 'information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form.' Black's Law Dictionary (9th ed. 2009). The Charge Sheet informed the accused of the stolen *res* because the Charge Sheet described stolen records, which, by definition, includes the information in those records."). The fact that "database" is a different word than "record" indicates that the two are different things. The fact that "information" is also a different word than "database" and "record" further denotes that information is a different thing than a record or a database.

6. A database is a receptacle or container for information. If not populated with any records or information at all, it still remains a database—albeit an empty database. In this case, the databases contained things other than government records. They contained electronic means of searching, various fields, program commands and the like. If, for instance, there were no SIGACTs populating the CIDNE database, it would still be the CIDNE database. Similarly, if there were no cables populating the NCD database, it would still be the NCD database. Thus, a

---

on an amalgam of records and information. And, lest it be forgotten, the Government has not charged either "records" or "information."

database is far *more than* the records that it may contain at a given point in time. This is such a common sense proposition that the Government's own motion, while purporting to elide "database" and "records," in fact sharply distinguishes between them. *See* Government Motion ("The Court took judicial notice that WikiLeaks posted records *from* the CIDNE-Iraq database, CIDNE-Afghanistan database, and USSOUTHCOM database. SA Bettencourt confirmed that WikiLeaks posted the purported Department of State records *from* the NCD database." (p. 3); "This SD card contained a picture of the accused, in addition to more than 380,000 records *from* the CIDNE-Iraq database" (p. 3); The SD card with which the accused stored the records *from* the CIDNE-Iraq database (p. 4); SA Shaver testified that the accused stole, purloined, or knowingly converted more than 90,000 records *from* the CIDNE-Afghanistan database" (p. 7); "…used Wget to retrieve more than 700 records *from* the United States Southern Command database accessible through the Joint Task Force–Guantanamo (JTF-GTMO) Detainee Assessment Branch website on Intellipedia. … Mr. Jeffrey Motes confirmed that the records in the United States Southern Command database were stored by "DocumentID" and that the above *database consisted of* over 700 records" (p. 8); "The United States charged that the accused compromised databases, to include the records *contained in* the databases" (p. 12)). The fact that the Government repeatedly acknowledges that records are "from" certain databases, or that records are "contained in" certain databases establishes that the two (database and records) are not the same thing. Records are "contained in" databases; records "come from" databases. Records themselves, even when aggregated, are not databases.[2]

7. Moreover, the Government's argument that "databases = records" falls flat when one specifically considers the charged CIDNE databases. The Government alleges, for instance, that PFC Manning stole the CIDNE-Iraq and CIDNE-Afghanistan databases because he compromised thousands of records in the databases. What the Government fails to mention is that CIDNE-Iraq and CIDNE-Afghanistan databases had much more content than simply the SIGACTS. They contained, according to various witnesses, other records such as Human Intelligence Reports, Counter Improvised Explosive Device Reports, Psychological Operations Reports, etc. Thus, perhaps only 10% (for sake of argument) of the records contained within the database were copied and compromised. This fact alone demonstrates that there is a clear distinction between "database" and "records" – and that compromising certain records within the databases does not amount to stealing or converting the database itself.

B. The Government Must Now Own What it Pled in the Charge Sheet

8. As indicated in the Defense's Motion for a Directed Verdict, and the Government does not dispute, the Government has charged that PFC Manning stole *databases.* The Government has never charged that PFC Manning stole copies of records[3] or that he stole information. When the Defense asked for elaboration on what PFC Manning is alleged to have stolen in the Defense's

[2] Since the Government fails to understand the difference between a database and the contents of a database, perhaps another example will be of assistance. Westlaw is a legal database containing, among other things, cases, legislation, and commentary. If a person copied every single case, statute, journal article, etc. from Westlaw onto CD, they have not have stolen the database. They may have stolen, perhaps, a copy of the various items in the database (i.e. a copy of the contents of the database). But they have not stolen the database itself—the template, the search queries, the programming code, or the items contained in the database.

[3] The Government bizarrely does not believe there is a distinction between records and copies of records when it is clear from all §641 case law that there is a marked difference between the two.

Motion for a Bill of Particulars, the Government maintained that is "is clear what property is at issue," namely "specific, identified databases." In full, the Government's position was as follows:

> The defense request for particulars in paragraph 10a of the defense motion attempts to restrict the Government's proof at trial. The defense relies on *Newman* for the proposition that a bill of particulars may be used to "clarify the specific theory upon which the Government intends to rely." (Def. Mot. at 5.) That language or proposition does not appear in the opinion, nor is the United States aware of any authority that suggests such a wide-reaching purpose for a bill of particulars. The defense also asserts that the specifications at issue under this paragraph make the accused susceptible to unfair surprise at trial. *In fact, the specification is clear—the accused is on notice that the United States alleges he stole, purloined, or knowingly converted Government property.* As a practical matter, "steal" and "purloin" have the same meaning under the law. *United States Attorneys' Manual, Criminal Resource Manual at 1639*, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01639.htm. Any argument the accused will be misled or paralyzed by decisions over what evidence to present to refute whether conduct constituted "stealing" or "knowing conversion" is without merit. *Furthermore, the theft-related offenses alleged in this case are of specific, identified databases. There is no danger the accused will be subject to prosecution for the same offense at a later date because each specification is clear regarding what property is at issue.*

Appellate Exhibit XIV (emphasis added). Thus, when the Defense sought to clarify the property that was allegedly stolen, it was told in no uncertain terms: "the theft-related offenses alleged in this case are of specific, identified databases." *Id.*

9. The Court held that:

> … the purposes of a bill for particulars are to:
>
> a. inform the accused of the nature of the charge(s) with sufficient precision to enable him to prepare for trial;
> b. avoid or minimize the danger or surprise at the time of trial; and
> c. enable the accused to plead acquittal or conviction in bar of another prosecution when the specification itself is too vague and indefinite for such purpose.

Appellate Exhibit XXIX. The Court then concluded that "[t]he Government responses to the Defense Request for Bill of Particulars are sufficient to satisfy the purpose of a Bill of Particulars." *Id.* It is clear from the Bill of Particulars that the Government was alleging that PFC Manning stole "specific, identified *database*s" – not copies of records, or information. This was the charge that the court said held "sufficient precision" to enable PFC Manning to prepare for trial.

10. The Government, in fact, has always maintained that it is the *databases* that were stolen—not the records or the information contained within the records. This is clear when one looks at the Government's proposed Instructions[4]:

> **Specification 4 of Charge II: Violation of the UCMJ, Article 134**
>
> In Specification 4 of Charge II, the accused is charged with stealing or converting the Combined Information Data Network Exchange Iraq *database* containing more than 380,000 records belonging to the United States government, of a value of more than $1,000, in violation of 18 U.S.C. § 641. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:
>
> (1) That at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 5 January 2010, the accused did knowingly and willfully steal, purloin, or convert to his use or the use of another a record or thing of value, to wit: the Combined Information Data Network Exchange Iraq *database* containing more than 380,000 records;
>
> (2) That the CIDNE-I *database* belonged to the United States government or a department or agency thereof;
>
> (3) That the CIDNE-I *database* was of a value of more than $1,000;
>
> (4) That the taking by the accused was with the intent to deprive the United States government of the use or benefit of the property;
>
> (5) That, at the time, 18 U.S.C. § 641 was in existence; and
>
> (6) That, under the circumstances, the conduct of the accused (was to the prejudice of good order and discipline in the armed forces) (and) (was of a nature to bring discredit upon the armed forces).
>
> Adapted from *Benchbook*, paragraph 2-5-9; 18 U.S.C. § 641; Model Crim. Jury Instr. 8th Cir. 6.18.641 (2011) (Enclosure 3).
>
> Lesser-Included Offense
>
> The offense of stealing or converting the CIDNE-I *database*, of a value of less than $1,000, is a lesser-included offense of the offense set forth in Specification 4 of Charge II. When you vote, if you find the accused not guilty of the offense charged, that is, stealing or converting the CIDNE-I *database*, of a value of more than $1,000, then you should consider the lesser-included offense of stealing or

[4] This is the Government's proposed instruction for the CIDNE database. The additional specifications are identical except that they name other databases (CIDNE-Afghanistan Database; Net-Centric Diplomacy Database; United States Southern Command Database).

converting the CIDNE-I *database*, of a value of less than $1,000, in violation of 18 U.S.C. § 641. To find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of all of the elements of the greater offense, except for the value element. The offense charged, and the lesser-included offense of stealing or converting the CIDNE-I *database*, of a value of less than $1,000, differ in that the greater offense requires you to be satisfied beyond a reasonable doubt that the CIDNE-I *database* is worth more than $1,000.

Adapted from *Benchbook*, paragraph 2-5-10.

See Appellate Exhibit 199 (emphasis added). In this instruction, the Government referred to the charged "database" a total of *nine* times. It is crystal clear from the Government's proposed instructions that it sought to allege the theft or conversion of the databases. It is equally clear that the Government sought to value the databases. *See id.* ("That the CIDNE-I database was of a value of more than $1,000;"). This is fundamentally different than saying that copies of "records" had a value of more than $1,000 or that "information" had a value of more than $1,000.

11. Now, at the 11th hour, after the close of evidence by both parties, the Government seeks to concoct a charge which requires a string of assumptions: when we charged *databases*, we really meant the records *in the databases*, and when we meant the records in the databases, we really meant *the copies of records in the database,* and when we meant the copies of records in the database, we really meant *information in the copies of the records in the databases,* and when we meant the information in the copies of the records in the databases, we really meant *the United State's [sic] interest in exclusive possession of the information in the records*. *See* Government Motion at p. 16. None of this is even remotely encapsulated in the Charge Sheet, the Bill of Particulars, or in the Government's Instructions. It is a gargantuan leap to go from "databases" to "the United State's [sic] interest in exclusive possession of the information in the records."[5]

12. The Court, during extensive motions argument, heard the repeated refrain from the Government that "words matter" and that the Defense must provide "specificity." The Court will recall the incident where the defense requested "documents" from Quantico, but the Government did not believe that "emails" were encapsulated within the word "documents" and thus did not produce the emails pursuant to the Defense's discovery request. The Court will also recall the Defense asking for "investigative reports" or "damage assessments" during discovery. The Government responded that it did not have any investigative reports and that what the Defense was looking for was "working papers." The Court will also recall the Government's distinction between a "draft" and an "interim" report with respect to the Department of State

[5] The Government seems to think that the Defense should have objected to the Government's introduction of certain evidence regarding valuation of information and that the failure to do so means that the Defense believed the evidence was relevant. The Government is mistaken. In the *Marshall* case, it is doubtful that the defense counsel stood up and said, "Hey Government, why are you putting forward all this evidence on CPT Kreitman when it's clear that my client escaped from SSG Fleming? You should put forward evidence on SSG Fleming." *United States v. Marshall*, No. 08-0779 (C.A.A.F. 2009). So too is the case here. It would be ineffective assistance of counsel for the Defense to point out that the Government's evidence was irrelevant. It is not the job of the Defense to point out any inadequacies in the Government's proof.

damage assessment. In each of these instances, the Government vehemently maintained that "words matter." Well, words matter the most when we are dealing with charging documents. The 18 U.S.C. §641 offenses carry with them a total of 50 years in prison. If "emails" are not "documents" and a "draft" is not an "interim report", then neither is a "database" a "record" or "information." The Government has pled that PFC Manning stole databases and that is what it must prove (and what the Defense maintains it has not done).

13. The Government took almost one full year to draft the charges in this case. It could have, and should have, conducted research into the 18 U.S.C. §641 offenses. If it had, it would have realized that "records" and "information" are not the same thing in terms of the property allegedly taken (as discussed in more detail below); and they certainly are not the same thing in terms of valuation. The Government undoubtedly charged "database" because it was clear to the Government that databases generally cost millions of dollars to set up and run. Thus, the Government believed it would easily clear the $1000 valuation hurdle. However, it failed to consider what is apparently obvious to everyone else except the Government: PFC Manning did not steal or convert the *database* itself. The Government itself now appears to concede that PFC Manning did not steal the database, but rather certain records contained therein. *See* Government Motion, p. 12 ("The United States *charged that the accused compromised databases*, to include the records contained in the databases. *See* Charge Sheet. The United States admitted evidence to provide a reasonable inference *the records* were stolen and converted."; the Government did not argue that it proved that the databases themselves were stolen).

14. Since the Government charged PFC Manning with stealing or converting databases, it must now own what it pled and prove that PFC Manning stole or converted databases (not copies of records or information). The Court has previously held that the Government must prove what it pled and this instance is no different. *See* Appellate Exhibit 515 ("The Government elected to charge the communication under the 'information clause.' That clause carries with it the 'reason to believe' scienter requirement. The Government is required to prove beyond a reasonable doubt that the accused had reason to believe the communicated information could be used to the injury of the U.S. or to the advantage of any foreign nation…").

C. The Government Fails to Address 18 U.S.C. §641 Case Law Because Case Law Makes Clear that "Records" and "Information" Are Different Things

15. What is glaringly absent from the Government's motion is *any attempt* to grapple with, or distinguish, any of the case law cited by the Defense dealing specifically with 18 U.S.C. §641. Instead, the Government focuses extensively on a case dealing the wire and mail fraud. *See* Government motion at p. 15, 16, and 19. The reason for this is obvious: the §641 case law goes decidedly against the Government and its position in this case.

16. The Government's legal position on its premise that "records" includes "information" is replicated, in its entirety, below:

> *3. Information as part of records comports with precedent*
>
> Charging records and the information contained therein comports with applicable precedent in criminal law. The contents and information contained in government

> records determines the criminality of the theft of the records more than the form of the records. *See United States v. Bottone*, 365 F.2d 389 (2d Cir. 1966), *cert. denied*, 385 U.S. 974 (1966) ("When the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owners should be deemed immaterial."); *United States v. Lambert*, 446 F.Supp. 890, 894 (D.C. Conn. 1978). Under § 641, the transmission of the information contained in documents is just as larcenous as theft of the documents themselves. *United States v. Rosner*, 352 F.Supp. 915, 922 (D.C.N.Y. 1972) (noting that the importance of information in documents described in *Bottone* applies to § 641 charges).

Government Motion at p. 13-14. The Defense does not dispute that "[c]harging records and the information contained therein comports with applicable precedent in criminal law." *Id.* The problem is that the Government did *not charge* "the information contained therein." The Government simply charged the theft of the databases. Similarly, the Defense also does not take issue that "[u]nder § 641, the transmission of the information contained in documents [can be] just as larcenous as theft of the documents themselves."[6] The Government is not saying anything remarkable here. However, if the Government has not charged *the information*, it cannot then seek to convict PFC Manning on the basis that he stole or converted the information.[7]

17. The Government has not addressed any of the Defense's cases which point out that when the government is relying on the theft of "information," the word "information" appears in the Charge Sheet or Indictment. *See e.g. United States v. Jeter*, 775 F2d 670, *680-1 (6th Cir. 1985) ("The government charged that Jeter 'did willfully and knowingly embezzle, steal, purloin and convert to his own use and the use of others, and without authority did sell, convey and dispose of records and things of value of the United States, the value of which is in excess of $100.00, to wit, carbon paper and *the information contained therein* relating to matters occurring on October 5, 1983, before a grand jury'").

18. The Government has pointed to *no case* where a court has held that "information" is somehow fairly embraced in the word "record" for the purposes of 18 U.S.C. § 641. In fact, the cases are all to the contrary. In those courts that have accepted that information, as an intangible, is within the ambit of 18 U.S.C. §641, they have done so on the basis that information is a "thing of value"—not that information is a "record."[8] *See* 18 U.S.C. §641 ("Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or *thing of value* of the United States …");

---

[6] To clarify, the Defense contests that §641 applies to the theft of information (an intangible); however, the Defense acknowledges that there is legal authority in the form of case law to suggest that information can be charged as being in the ambit of the section.

[7] The Government is simply mistaken when it says, "The contents and information contained in government records determines the criminality of the theft of the records more than the form of the records." *See* Government Motion at p. 13-14. The theft of "information" is no more criminal than the theft of "records" under 18 U.S.C. §641. They are simply alternate charges under §641. *See e.g. United States v. Jeter*, 775 F2d 670, (6th Cir. 1985) (accused was charged with stealing carbon paper of a grand jury indictment, along with the information itself).

[8] Those courts that do not accept that information falls within the ambit of §641 do not believe that information is "a thing of value", much less "a record" within the statute's terms.

See United States v. DiGilio, 538 F.2d 972, 978, fn 10 (3rd 1976) ("The government obviously did not consider this merely a theft of information case, because the indictment charges defendants only with converting to their use government records. Section 641 also prohibits conversion of any 'thing of value', and the government would presumably rely on this term in an information case"); *United States v. Jordan*, 582 F.3d 1239, 1246 (11th Cir. 2009) (indictment under §641 alleged that defendant's "delivered the printouts which as property of the United States had a value in excess of $1000"; in a separate count, indictment alleged that defendant received "a thing of value of the United States, that is, information contained in the NCIC records."); *United States v. Girard*, 601 F.2d 69, 71 (D. Conn. 1979) ("we are impressed by Congress' repeated use of the phrase "thing of value" in section 641 and its predecessors. … The word "thing" notwithstanding, the phrase is generally construed to cover intangibles as well as tangibles. … Although the content of a writing is an intangible, it is nonetheless a thing of value").

19. The fact that cases have uniformly held that information falls under the "thing of value" prong of 18 U.S.C. §641 belies any interpretation that information is fairly encapsulated within any of the other words in the section—"record, voucher, money." *Id.* In other words, the fact that courts rely on "thing of value" to describe information means that information is not encapsulated within the word "record" under 18 U.S.C. §641. Thus, even if the Government had charged PFC Manning with stealing or converting "records" (which it did not—it charged databases), it has not charged him with stealing or converting "information." *See also United States v. Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991) ("Fowler was not charged with conveying abstract information. He was charged with conveying and converting documents, which, although copies, were things of value and tangible property of the United States. True, the documents contain information, but this fact does not deprive them of their qualities as tangible property and things of value.").

D. The Government Tries to Hide the Fact that "Records" and "Copies" Are Fundamentally Different for the Purposes of 18 U.S.C. §641

20. The Government seeks to gloss over the fact that "records" and "copies of records" are two very different things in terms of identifying the actual property that was allegedly stolen or converted and valuing that property. *See United States v. Morison*, 844 F.2d 1057, 1077 (4th 1988) (distinguishing between theft of original information versus theft of copies: "Those cases involved copying. The defendant's possession in both cases was not disturbed. This case does not involve copying; this case involves the actual theft and deprivation of the government of its own tangible property."); *See also United States v. Hubbard*, 474 F. Supp. 64, 79 (D.C.D.C. 1979) (indictment charging the defendant with stealing "documents and *photocopies* thereof"; "therefore the indictment's claim that the defendants violated section 641 by copying government documents through the use of government equipment withstands the defendants' motion to dismiss because government-owed copies were taken…").

21. The Government's position on this reads, in its entirety:

> The accused stole and converted records maintained on United States Government computer systems. The Defense argues that a fatal variance exists because the

> Charge Sheet specifies records and not copies of records. *See* Defense 641 Motion ¶ 4. The records compromised by the accused are the records maintained by the United States. The United States maintained copies of the records because they were digitally stored on United States Government computer systems. In this case, any distinction between copies of the records is feckless because the records were stored digitally. *See DiGilio*, 538 F.2d at 978 (referring to theft of copies as "an asportation of records owned by the United States") (emphasis added). This distinction cannot be a material variance because it does not change the nature of the offense, let alone substantially change the nature of the offense, increase the seriousness of the offense, or the punishment of the offense. Thus, any variance is not material.
>
> Moreover, any variance between a digital record and a digital copy of the same record is not prejudicial. The distinction does not place the accused at risk of another prosecution because the accused is charged with stealing and converting the actual records, which he in fact stole and converted. Nor did the distinction affect the accused's ability to prepare his defense because the United States charged the accused with stealing and converting the records using a term, "database," the accused himself used to describe the records he compromised.

Government Motion at p. 17. The Defense is not really sure what the Government is saying. Is the Government saying that PFC Manning stole the actual original records? Or is the Government saying that PFC Manning stole digital copies (i.e. that he downloaded the records onto CDs and then released those digital copies) but that the distinction is not relevant for the purposes of §641? Since there is no evidence that PFC Manning took the original digital records, the Defense will assume that the Government concedes that PFC Manning took a copy but believes there is no appreciable difference between an original and a copy. *See id.* ("In this case, any distinction between copies of the records is feckless because the records were stored digitally").

22. Whether one steals an original or a copy is of crucial significance to an 18 U.S.C. §641 prosecution. This is readily apparent when one considers the valuation prong of the section. The Government has failed to even attempt to address any of the Defense's cases drawing a sharp distinction between valuing a *copy* of a document, and valuing the *original*. *See e.g. United States v. DiGilio*, 538 F.2d 972, 977 (3rd Cir. 1976)(court held that the "a duplicate copy is a record for purposes of the statute, and duplicate copies belonging to the government were stolen." In terms of valuing this duplicate copy, the court held: "Irene Klimansky availed herself of several government resources in copying DiGilio's files, namely, government time, government equipment and government supplies.");[9] *United States v. Hubbard*, 474 F. Supp. 64 (D.C.D.C. 1979) (court allowed prosecution to proceed on theory that "the copies, allegedly made from government documents, by means of government resources, are records of the

[9] The Government cites *DiGilio* apparently for the proposition that it "refer[s] to theft of copies as "an asportation of records owned by the United States." *Id.* (emphasis in original). The Defense is not sure how this helps the Government at all. In *DiGilio*, the court distinguished between original records and copies of records. It held that the copies of records made by the accused with government resources were themselves "records" within the meaning of the statute and that these copies needed to be valued. This is exactly the position of the Defense.

government , and thus the copies were stolen). Thus, whether PFC Manning stole "records" or "copies of records" is not something that the Government can simply sweep under the rug as essentially "no big deal." What PFC Manning allegedly stole or converted, and its value, will determine whether he will face five separate convictions carrying with them fifty years of potential imprisonment.

23. As stated in the Defense's original motion, if the allegedly stolen or converted property is a copy of a record, then it is the value of the copy that must be established (e.g. the cost of the CD, the time spent copying, the use of government servers for the copying, etc.). The Government has introduced no evidence of the value of the copies allegedly stolen or converted in this case. It cannot rely on the value of the originals to establish the value of the copies.

CONCLUSION

24. The Government claims that there is no difference between a "database," a "record", a "copy of a record", or "information." Unfortunately, a database does not equal a record does not equal a copy of a record does not equal information. All of these are different things. And the Government must own what it charged: the databases. It is too late in the game, after the close of evidence, to explain what it "really meant." The Government had the Charge Sheet to explain what it "really meant." It had the Bill of Particulars to explain what it "really meant." It had the Instructions to explain what it "really meant." What it really meant is that PFC Manning stole certain databases. Full stop. If, in its mind, it conflated databases with copies of records with information, that is not the Defense's problem. The Defense was on notice that it had to defend against a charge that PFC Manning stole or converted certain "databases." PFC Manning did no such thing. Accordingly, the Defense renews its request for a finding of not guilty.[10]

25. The role of the Court is not to help the Government to clean up the mess it has created. The role of the Court is to determine, by looking at applicable federal case law, whether the Government has introduced any evidence of what it has charged: that PFC Manning has stolen or converted certain databases. And the Defense submits that it has not.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel

[10] If the Court does not grant this R.C.M. 917 motion and allows the Government to proceed with some variation of "records" or "information," the Defense will likely file an additional R.C.M. 917 motion seeking to dismiss the offense for lack of proof and/or to challenge whether "information" is properly within the ambit of §641.