IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	**RULING: GOVERNMENT**
	)	**MOTION TO PRECLUDE**
	)	**OVER-CLASSIFICATION**
	)	**EVIDENCE ON MERITS**
	)	**AND SENTENCING AND DEFENSE**
MANNING, Bradley E., PFC	)	**MOTION FOR JUDICIAL NOTICE**
U.S. Army, (b) (6)	)	**OF H.R. 553 AND CONGRESSIONAL**
HHC, U.S. Army Garrison	)	**HEARINGS DISCUSSING**
Joint Base Myer-Henderson Hall	)	**CLASSIFICATION**
Fort Myer, Virginia 22211	)	
	)	DATED: 31 January 2013

GOVERNMENT MOTION TO PRECLUDE EVIDENCE OF OVER-CLASSIFICATION:

On 14 December 2012, the Government moved to preclude the Defense from raising general over-classification during both the merits and sentencing phases of the trial. On 28 December 2012, the Defense filed a response opposing. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes as follows:

Findings of Fact:

1. The accused is charged with one specification of aiding the enemy in violation of Article 104, Uniform Code of Military Justice (UCMJ), one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting in violation of Article 134, UCMJ, eight specifications of violations of 18 U.S.C. § 793(e) and Article 134, UCMJ, five specifications of violations of 18 U.S.C. § 641 and Article 134 UCMJ, two specifications of violations of 18 U.S.C. § 1030(a)(1) and Article 134, UCMJ, and five specifications of violating a lawful general regulation, in violation of Article 92, UCMJ . The time period of the charged offenses is from on or about 1 November 2009 – on or about 27 May 2010.

2. Defense proffers that it will offer the following evidence for merits and sentencing:

a. Mr. Cassius Hall will testify that much of the charged information could not cause damage to the United States and was not closely held.

b. Mr. Charles Ganiel will testify that the vast majority of the information within the charged diplomatic cables was already in the public realm prior to the accused's alleged communications of that information.

c. Ambassador Peter Galbraith will testify that many Department of State cables are, in his experience, over-classified and that a secret classification does not mean the information is genuinely secret.

d. House Resolution (H.R.) 553 (Reducing Over-Classification Act) (7 October 2010), Transcripts of House Committee Meetings on the Espionage Act (16 December 2010) and 2007 House

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Committee Meetings on Over-Classification (22 March, 26 April, and 28 June 2007). In a separate motion, the Defense requests that the Court take judicial notice of this information.

3. H.R. 553 "Reducing Over-classification Act" was enacted into law on 7 October 2010 as Public Law (PL) 111-258. This was after the dates of the charged offenses and before the Original Classification Authority (OCA) classification reviews. The Court will henceforth refer to H.R. 553 as PL 111-258.

4. **Merits - Defense.** Defense argues that evidence of general over-classification is relevant to the merits for the offenses charged that violate 18 U.S.C. §§ 793(e) and 1030(a)(1) for the following reasons:

a. those offenses require the Government to prove that the accused had reason to believe information communicated could be used to the injury of the United States or to the advantage of any foreign nation. This necessarily requires the fact finder to consider the nature of the information. Evidence of over-classification is relevant to the nature of the information.

b. for 18 U.S.C. § 793(e) offenses only - general over-classification is relevant to whether the information communicated "relates to the national defense". This element requires that the information be "closely held" and that disclosure of the information would be potentially damaging to the United States or might be useful to an enemy of the United States.

c. Over-classification allows the defense to paint a full picture of the context in which the classification decisions were made. The significance of over-classification relates to what weight the Court should accord to the fact of classification itself to determine whether the accused had reason to believe the documents could cause damage to the United States and whether the documents at issue relate to the national defense.

d. Over-classification evidence is relevant evidence of bias of the Original Classification Authority (OCA), allowing both cross-examination and extrinsic evidence under MRE 608(c).

5. **Merits - Government:** The Government argues the following to preclude evidence of general over-classification on the merits as not relevant to any charged offense or cognizable defense:

a. Evidence of general over-classification is not relevant to whether the documents at issue were properly classified by the relevant OCA.

b. The accused is not an OCA and has no authority to determine whether information could injure the United States with respect to classification.

c. Evidence of general over-classification is not relevant as to the nature of the information communicated or to determine whether the charged information could be used to the injury of the United States or to the advantage of a foreign nation.

d. Evidence of over-classification after the dates of the charged offenses is not relevant to the accused's intent at the time of the offenses.

6. **Sentencing:** In its Motion for Judicial Notice of H.R. 553 and Congressional Hearings Discussing Classification, the Defense avers that evidence of general over-classification is relevant to sentencing in that evidence that the classification system was broken and its condition had negative consequences for the nation would tend to shift some of the culpability from the accused to the system itself, thus tending to lower his punishment. The Government argues evidence of general over-classification presents neither

matters in extenuation nor mitigation because the information was not in existence nor known to the accused at the time of the charged offenses and, even if relevant, should be excluded under MRE 403 as an undue waste of time.

7. The Government intends to prove on the merits that a relevant OCA conducted an original classification review of the information allegedly communicated in the charged offenses in accordance with Executive Order Number (EO) 13,526 (29 December 2009).

The Law:

1. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way in a matter at issue. The military judge has the initial responsibility to determine whether evidence is relevant under MRE 401. *U.S. v White*, 69 M.J. 236 (C.A.A.F. 2010).

2. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible. MRE 402.

3. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

4. MRE 608(c) provides that bias, prejudice, or any motive to misrepresent may be shown to impeach a witness either by examination of the witness or by evidence otherwise adduced. The rule allows both cross-examination of the witness and extrinsic evidence.

5. RCM 1001(c) governs matters to be presented by the Defense during sentencing. In relevant part, the rule allows the Defense to present matters in rebuttal to any material presented by the Government and matters in extenuation and mitigation. Matters in extenuation serve to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute legal justification or excuse. Matters in mitigation of an offense are reasons to lessen the punishment of an offense or to furnish grounds for recommendations of clemency.

6. Sentencing – Relaxed Rules. RCM 1001(c)(3) authorizes the military judge, with respect to matters in extenuation or mitigation or both, to relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability. R.C.M. 1001(c)(4) provides that when the rules of evidence have been relaxed for the Defense, they may be relaxed during rebuttal and surrebuttal to the same degree.

7. EO 13,526 governs Classified National Security Information. Only OCAs are authorized to determine what information is originally classified in accordance with EO 13,526 and the level of classification. Under EO 13,526, when an OCA classifies information at the Secret level, the OCA determines that unauthorized disclosure of the information could reasonably be expected to result in damage to the national security and identifies or describes the expected damage.

8. EO 13,526 Part 2 governs Derivative Classification. Persons who reproduce, extract, or summarize classified information or who apply classification markings derived from source material or as directed by a classification guide need not be OCAs.

9. Section 1.8 of EO 13,526 establishes procedures for authorized holders of information to challenge classifications they believe, in good faith, are improperly classified. These procedures do not include self-help communication of classified information such persons believe is improperly classified to those not authorized to receive the classified information.

10. For 18 U.S.C. § 793(e), classification may demonstrate that an accused has reason to believe that information relates to the national defense and could cause harm to the United States. Not all information that is contained on a classified or closed computer system pertains to national defense. Not all information marked as classified, in whole or in part, may, in fact, meet the criteria for classification. Information not marked classified may meet the standards for classification and protection, particularly with respect to information received through oral means or information the recipient should have reason to believe warrants protection. *U.S. v. Diaz*, 69 M.J. 127 (2010).

Conclusions of Law – Evidence of Over-Classification on the Merits:

1. Evidence of general over-classification is not relevant to the nature of the information allegedly communicated in the specifications alleging violations of 18 U.S. C. §§ 793(e) and 1030(a)(1). There is no nexus between general over-classification and the information allegedly communicated in this case.

2. Evidence of general over-classification is not relevant to whether the information charged in the specifications alleging violations of 18 U.S. C. § 793(e) relates to the national defense and was closely held. Information does not have to be classified to relate to the national defense. However, it does have to be closely held by the Government. Original classification of information by an OCA in accordance with EO 13,526 is evidence that the communicated information was closely held by the U.S. Government. It is not conclusive and can be rebutted by evidence that the information was made public by Congress or an Executive Branch agency and that the information may have been found in sources lawfully available to the general public at the time of charged communication. However, evidence of general over-classification goes to whether information *should be* closely held by the United States, not whether it *was* closely held at the time of the charged communication. Whether information *should be* closely held is a proper determination for the Executive and Legislative branches and is not at issue before this Court.

3. PL 111-258 did not make any changes to the classification criteria in EO 13,526. Facts at issue are whether each OCA properly classified the relevant information in accordance with (IAW) EO 13,526 and whether any derivative classifications of that information were conducted IAW EO 13,526 and the relevant derivative classification guides.

4. Whether evidence that PL 111-258 was enacted in response to Congressional concerns about over-classification and the substance of that law is relevant to bias of an OCA under MRE 608(c) is not ripe for consideration. Similarly, whether Mr. Leonard's statement and/or oral testimony given at the 2007 House Committee on Homeland Security Hearings is relevant on the merits to cross-examine OCA witnesses is not ripe for consideration. The Court defers ruling on these issues until such time as they are ripe. As set forth below, Mr. Leonard's statement and oral testimony, if relevant, are admissible under MRE 803(8) as a hearsay exception.

5. The testimony of Mr. Cassius Hall and Mr. Charles Ganiel, as proffered by the Defense, does not address general over-classification. The Court will make determinations regarding the scope of Mr. Galbraith's testimony if and when he testifies.

6. Evidence of general over-classification bearing no particularized nexus to the classified information at issue is not otherwise relevant as substantive evidence on the merits. Even if relevant, the probative value of evidence of such general over-classification is substantially outweighed by the danger of confusing the issues at trial IAW MRE 403.

Conclusions of Law – Evidence of Over-Classification on Sentencing:

RCM 1001(c)(1)(A) allows the Defense to present matters in extenuation serving to explain the circumstances surrounding the commission of the offense, including those reasons for committing the offense which do not constitute legal justification or excuse. At this point, there is no evidence before the Court that the accused was aware of any general over-classification problem or that such awareness influenced his intent or motive. The Court defers ruling until the matter is ripe for adjudication during sentencing.

DEFENSE MOTION FOR JUDICIAL NOTICE OF H.R. 553 AND CONGRESSIONAL HEARINGS DISCUSSING CLASSIFICATION:

1. On 16 November 2012, the Defense filed a motion, pursuant to Military Rules of Evidence (MRE) 201, 201A, and 803(8) for the Court to take judicial notice of H.R. 553, the "Reducing Over-Classification Act," and transcripts of the House Committee meetings on the Espionage Act (16 December 2010) and Over-Classification (22 March, 26 April, and 26 June 2007). Defense argues this information is relevant on the merits to rebut evidence that the accused knew or should have known that a document could cause injury to the United States or benefit a foreign nation based solely on the document's classification. The Defense further posits that this information is relevant to sentencing in that evidence that the classification system was broken and its condition had negative consequences for the nation would tend to shift some of the culpability from the accused to the system itself, thus tending to lower his punishment.

2. On 30 November 2012, the Government filed a response opposing the Defense motion. The Government argues that the Defense motion should be denied because the law and the statements and testimony in the Congressional record are irrelevant. The Government requests the Court to find the House Committee meeting testimony and statements to be inadmissible hearsay not qualifying for admission pursuant to MRE 803(8). The Government further avers that, as a general proposition, it is appropriate for a Court to take judicial notice of the law insofar as it exists, is relevant, and that a Congressional record presents an accurate account of testimony. Finally, the Government avers that judicial notice is not appropriate for the truth of the matter asserted.

3. After considering the filings and evidence presented by the parties and argument of counsel, and the ruling of the Court with respect to the Government Motion to Preclude Over-Classification, the Court finds and concludes as follows:

Findings of Fact:

<u>PL 111-258, the "Reducing Over-Classification Act"</u>

1. On 7 October 2010, President Obama signed H.R. 553, the "Reducing Over-Classification Act" into law. On that date, the Act became Public Law 111-258 (PL 111-258).

2. The "Reducing Over-Classification Act" requires the Secretary of Homeland Security to develop a program to prevent the over-classification of homeland security information. While the main thrust of the legislation is directed at the Department of Homeland Security, the legislation also contains several other provisions relating to "accurate classification" of information that each "Executive agency" that handles classified information is required to follow. *See, e.g.*, P.L. 111-258, section 7 ("The head of each Executive agency, in accordance with Executive Order 13526, shall require annual training for each employee who has original classification authority.")

3. Section 2 of P.L. 111-258 also contains several Congressional findings. Among these findings are:

> (1) The National Commission on Terrorist Attacks Upon the United States (commonly known as the "9/11 Commission") concluded that security requirements nurture over-classification and excessive compartmentalization of information among agencies.
>
> (2) The 9/11 Commission and others have observed that the over-classification of information interferes with accurate, actionable, and timely information sharing, increases the cost of information security; and needlessly limits stakeholder and public access to information.
>
> (3) Over-classification of information causes considerable confusion regarding what information may be shared with whom, and negatively affects the dissemination of information within the Federal Government and with State, local, and tribal entities, and with the private sector.

<u>16 December 2010 House Judiciary Committee – Testimony of Mr. Thomas Blanton</u>

1. On 16 December 2010, the U.S. House of Representatives Committee on the Judiciary held a hearing entitled "Espionage Act and the Legal and Constitutional Issues Raised by Wikileaks." The hearing featured seven witnesses, one of whom was Mr. Thomas Blanton, Director, National Security Archive, George Washington University.

2. In his testimony, Mr. Blanton stated, among other things, that the "government always overacts to leaks," that the "government's national security classification system is broken," and "we are well into a syndrome that one senior government official called 'Wikimania' where Wikimyths are common and there is far more heat than light – heat that will eventually produce more leaks, more crackdowns, less accountable government, and diminished security." Mr. Blanton's testimony and his statement repeat statements made by Governor Thomas Kean, Secretary of Defense Robert Gates, the editors of *Le Monde* and *The Guardian*, Secretary of Defense Donald Rumsfeld's deputy for counterintelligence and security, and Harvard Law Professor Jack Goldsmith.

3. Mr. Blanton's oral and written testimony was published in the hearing transcript verbatim, without modification by the Chairman of the committee.

<u>House Homeland Security Subcommittee Hearings on Over-Classification</u>

1. On 22 March, 26 April, and 28 June, 2007, the U.S. House of Representatives Homeland Security Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment held a three-part hearing on "Over-Classification and Pseudo-Classification."

2. The Hearing included statements from the following subcommittee members: The Honorable Jane Harman, The Honorable David G. Reichert, The Honorable Bennie G. Thompson, The Honorable Charles W. Dent, The Honorable Christopher P. Carney, and the Honorable James R. Langevin.

3. As part of these hearings, a number of agency and private witnesses with knowledge of classification activities were invited to provide oral and written testimony. Specifically, the hearings featured testimony from:

a. Mr. Scott Armstrong, Founder, Information Trust (22 March 2007)

b. Ms. Meredith Fuchs, General Counsel, The National Security Archive, George Washington University (22 March 2007)

c. Mr. J. William Leonard, Director Information Security Oversight Office, National Archives and Record Administration (NARA) (22 March 2007)

d. Mr. Michael P. Downing, Assistant Commanding Officer, Counter-Terrorism/Criminal Intelligence Bureau, Los Angeles Police Department (22 March 2007)

e. Chief Cathy Lanier, Metropolitan Police Department, Washington, DC (22 March 2007)

f. Ambassador Thomas E. McNamara, Program Manager, Information Sharing Environment, Office of the Director of National Intelligence (26 April 2007)

g. Dr. Carter Morris, Director, Information Sharing and Knowledge Management, Office of Intelligence and Analysis, U.S. Department of Homeland Security (26 April 2007)

h. Mr. Wayne M. Murphy, Assistant Director, Directorate of Intelligence, Federal Bureau of Investigation (26 April 2007)

i. Mr. Mark Zadra, Assistant Commissioner, Florida Department of Law Enforcement (26 April 2007)

j. Mr. Mark Agrast, Senior Fellow, Center for American Progress (28 June 2007)

k. Mr. Scott Armstrong, Founder, Information Trust (28 June 2007)

l. Mr. J. William Leonard Director Information Security Oversight Office, National Archives and Records Administration (28 June 2007)

m. Ms. Suzanne E. Spaulding, Principal, Bingham Consulting Group, LLC (28 June 2007)

4. The consolidated hearing record from all three dates contains the verbatim oral and written testimony of all subcommittee members and witnesses, without modification by the Chairman of the committee.

The Law: The Court incorporates the law as stated earlier in the Government Motion to Preclude Evidence of Over-Classification and adds the following:

Judicial Notice: Adjudicatory Facts

1. MRE 201 governs judicial notice of adjudicative facts. The judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *U.S. v. Needham*, 23 M.J. 383 (C.M.A. 1987); *U.S. v. Brown*, 33 M.J. 706 (A.C.M.R. 1991).

2. MRE 201(c) requires the military judge to take judicial notice of adjudicative facts if requested by a party and supplied with the necessary information.

3. When a military judge takes judicial notice of adjudicative facts, the fact finder is instructed that they may, but are not required to, accept as conclusive any matter judicially noticed.

4. Judicial notice of adjudicative facts puts "a stamp of judicial authority" on the evidence and effectively destroys the other party's right to reasonably dispute the evidence. *U.S. v. Richardson*, 33 M.J. 127 (C.M.A. 1991). As such, judicial notice is not appropriate for inferences a party hopes the fact finder will draw from the fact(s) judicially noticed. Legal arguments and conclusions are not adjudicative facts subject to judicial notice. *U.S. v. Anderson*, 22 M.J. 885 (A.F.C.M.R. 1985) (appropriate to take judicial notice of the existence of a treatment program at a confinement facility but not appropriate to take judicial notice of the quality of the program).

5. MRE 201 governs judicial notice of adjudicative facts, not legislative facts. An adjudicative fact is a fact that normally goes to a jury in a jury case and relates to the parties, their activities, and their businesses. Legislative facts do not concern the immediate parties and are relied upon by courts when they develop a particular law or policy. *U.S. v. Gould*, 536 F.2d 216 (8th Cir. 1976).

Judicial Notice: Domestic Law

MRE 201A(a) provides that a "military judge may take judicial notice of domestic law." This provision further provides, however, that "[i]nsofar as a domestic law is a fact that is of consequence to the determination of the action," then the procedural requirements of MRE 201 (except for section 201(g)) apply.

Hearsay: Public Records and Reports

MRE 803(8) provides that "records, reports, statements, or data compilations, in any form, of public office or agencies" are not excluded under the hearsay rule if the records or reports set forth:

> (A) the activities of the office or the agency, or (B) matters observed pursuant to duty imposed by law as to which there was a duty to report, excluding, however, matters observed by police officers and other personnel working in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Conclusions of Law – Admissibility/Relevance:

PL 111-258

1. Admissibility: PL 111-258 is a domestic law that the Court may take judicial notice of IAW MRE 201A. The Government posits that the "findings" (Section 2) in this law are "legislative facts" rather than "adjudicatory facts" and, therefore, are not appropriate for judicial notice. This is certainly the case with certain legislative materials that express merely personal opinions or legal theories. In this case, however, the findings in the law are taken from conclusions in the 9/11 Commission report, rather than mere expressions of Congressional opinion. Furthermore, the findings also stand independently for the fact that Congress believed over-classification was a potential issue and passed this legislation – which contains not just findings but specific statutory initiatives – to address that issue. *See, e.g., City of Charleston v. A Fisherman's Best Inc.*, 310 F.3d 155, 172 (4th Cir. 2002) (taking judicial notice of a National Marine and Fisheries Service final rule that summarized Congressional intent for the 1996 reauthorization of the Magnuson-Sevens Act). Accordingly, the Court is within its discretion to take judicial notice of the findings in Section 2 of PL 111-258 to the degree they are relevant. Such judicial notice would be the adjudicative fact that Congress made the findings, not that the findings are adjudicative fact.

2. Relevance: PL 111-258 was signed into law on 7 October 2010, after the dates of the charged offenses but prior to the dates of the original classification reviews of the information charged by the OCAs. In its ruling regarding the Government Motion to Preclude Over-Classification, the Court deferred ruling on whether evidence of general over-classification in PL 111-258 is relevant to impeach OCA witnesses IAW MRE 608(c) and whether evidence of general over-classification is relevant during sentencing. Thus, subject to a demonstration of relevance, the Court will take judicial notice of the existence of PL 111-258, to include the Congressional findings in Section 2, the date of introduction of H.R. 255 and the date the law was enacted. The Court will not take judicial notice of the truth of the matter asserted in PL 111-258 as adjudicative facts.

Testimony of Mr. Thomas Blanton

1. Admissibility: The testimony of Mr. Thomas Blanton is not admissible under MRE 803(8)(A). While Mr. Blanton's testimony is part of an official report – in this case a Congressional hearing record – it does not meet the other criteria of MRE 803(8)(A). Specifically, his testimony is not: (1) a report of the activities of the office or agency (i.e., Congress); (2) a matter observed by duty of law where there was a duty to report; or (3) factual finding against the government made pursuant to an investigation pursuant to authority under the law. Rather, Mr. Blanton's statement contains his personal opinions reprinted verbatim in a hearing record. It is hearsay within hearsay. To the extent Mr. Blanton repeats statements made by Governor Thomas Kean, Secretary of Defense Robert Gates, the editors of *Le Monde* and *The Guardian,* Secretary of Defense Donald Rumsfeld's deputy for counterintelligence and security, and Harvard Law Professor Jack Goldsmith, such statements are triple hearsay.

2. Relevance: Even if admissible, Mr. Blanton's prepared statement and oral testimony occurred after the dates of the communications alleged in the charged offenses. Mr. Blanton's statement and oral testimony are not relevant on the merits or during sentencing.

Admissibility – 2007 House Committee on Homeland Security Hearing Transcripts

1. Statements by Subcommittee Members – The statements by subcommittee members are not admissible under MRE 803(8). They do not document the activities of Congress. They do not set forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report, nor do they represent factual findings resulting from investigation under authority granted by law. These statements represent the personal opinions of individual subcommittee members.

2. Testimony of Mr. Armstrong, Ms. Fuchs, Mr. Agrast, and Ms. Spaulding. The oral statements and prepared testimony of Mr. Armstrong (22 March and 28 June 2007), Ms. Fuchs, Mr. Agrast, and Ms. Spaulding are not admissible under MRE 803(8)(A). The Defense states that the transcripts "document the activities of Congress" and therefore fall under MRE 803(8)(A). The Congressional record of testimony by these witnesses, however, does not document "activities" of Congress. Rather, it merely reprints verbatim their personal beliefs and opinions.

3. Testimony of Mr. Downing. The oral testimony and prepared statement of Mr. Downing is not admissible under MRE 803(8)(A). While it has been reprinted in an official Congressional transcript, this does not cure the fact that the testimony itself is not a record or report of the activities conducted by the Los Angeles Police Department (LAPD). Instead, it is a testimonial statement that details the general counter-intelligence activities of the LAPD and makes certain recommendations regarding declassification of information and further dissemination of those documents to state and local law enforcement authorities.

4. Testimony of Chief Lanier. The testimony of Chief Lanier is not admissible under MRE 803(8)(A). Like the testimony of Mr. Downing, it is not a record or report of the activities conducted by the Washington, D.C., Metropolitan Police Department (MPD). Instead, it is a testimonial statement that details the MPD's counter-intelligence operations, and calls for specific changes to allow further dissemination of classified documents to local law enforcement agencies.

5. Testimony of Mr. Zadra. The testimony of Mr. Zadra is not admissible under MRE 803(8)(A). It is not an official record or compilation of activities of the Florida Department of Law Enforcement. Rather, it largely reflects Mr. Zadra's personal opinion regarding the Controlled Unclassified Information (CUI) framework used by federal agencies.

6. Testimony of Ambassador McNamara, Dr. Morris, and Mr. Murphy. The testimony of Ambassador McNamara, Dr. Morris, and Mr. Murphy is not admissible under MRE 803(8)(A). The testimony is not a compilation of the records or activities of the agencies that the witnesses represent. Rather, each set of testimony consists mainly of a summary of completed agency action to deal with problems involving CUI. The testimony is also irrelevant. The specifications against the accused concern classified information, not CUI. Accordingly, the argument in the testimony – that CUI is sometimes mismarked – does not help disprove any element of the specifications charged.

7. Testimony of Mr. Leonard (22 March 2007). The 22 March 2007 testimony of Mr. Leonard is admissible under MRE 803(8)(A) if relevant. It can be distinguished from the other testimony by two key attributes.

a. First, unlike other witnesses, Mr. Leonard serves as Director of the Information Security Oversight Office (ISOO) within NARA that was established by Executive Order to provide policy oversight to the entire national classification system.[1] Pursuant to this authority, ISOO engages in outreach and information collection activities from agencies within the Executive Branch that classify information. Some of the information is also used to conducts audits and, in turn, suggest follow-up recommendations for agency classification systems.

b. Second, Mr. Leonard's testimony provides a formal recounting of the official activities of his office, as opposed to personal statements or beliefs. For example, the key assertion cited by the Defense, that trained government classifiers only made "clearly" correct classification decisions 64 percent of the time was based on an official audit. ("In an audit of agency classification activity conducted by my office approximately one year ago, we discovered that even trained classifiers, with ready access to the latest access to the latest classification and declassification guides, and trained in their use, got it right only 64 percent of the time in making determinations as to the appropriateness of classification.") The fact that the testimony is published as an official Congressional hearing record is immaterial, as it would be independently admissible as an ISOO report or record under MRE 803(8)(A) or (C).

8. All of the statements of subcommittee members and the prepared statements and oral testimony of the testifying witnesses except those of Mr. Leonard are hearsay and not admissible under MRE 803(8). *See Pearce v. The E.F. Hutton Group, Inc., et al,* 653 F. Supp. 810 812-815 (D.D.C. 1987). The Court declines to take judicial notice of the statements and testimony. Upon a showing of relevance, the Court will take judicial notice of the existence of Mr. Leonard's testimony in the Congressional record. The Court will not take judicial notice of the substance of Mr. Leonard's testimony as adjudicative facts.

Relevance – 2007 House Committee on Homeland Security Hearing Transcripts

[1] *See* Executive Order 12958, "Classified National Security Information," § 5.2.

1. The 2007 House Committee on Homeland Security Hearings testimony was delivered and published in a Congressional record prior to the date of communications in the specifications charging violations of 18 U.S.C. §§ 793(e) and 1030(a)(1).

2. With the exception of Mr. Leonard's 22 March 2007 statement and testimony noted below, the 2007 House Committee on Homeland Security Hearings are not relevant as substantive evidence of general over-classification on the merits or for sentencing. The Hearing is entitled "The Over-Classification and Pseudo-Classification Part I, II, and III." Almost all of the statements and oral testimony primarily address challenges in communications involving classified or pseudo-classified information among federal agencies and state and local law enforcement agencies. Pseudo-classification is not relevant to the charges at issue in this case, neither is communication involving classified and pseudo-classified information among federal, state, and local intelligence agencies. In addition, the hearings took place from March – June 2007, almost three years prior to the charged communications at issue in this case. Even if admissible on the merits or in sentencing as substantive evidence of general over-classification, the probative value of the 2007 House Committee on Homeland Security Hearings, with the exception of Mr. Leonard's statement and testimony, is substantially outweighed by the danger of confusion of the issues under MRE 403.

3. Mr. Leonard's 22 March 2007 statement and testimony is admissible under MRE 803(8) as a hearsay exception. Whether it is relevant on the merits to cross-examine the OCA witnesses is not ripe for consideration. The Court defers ruling on this issue and relevance for sentencing until the issues are ripe at trial.

RULING:

Over-classification Evidence: The Government Motion to Exclude Over-Classification Evidence on the Merits and Sentencing is **GRANTED IN PART** as set forth above.

1. Evidence of general over-classification is not relevant as substantive evidence on the merits portion of the trial. Even if relevant, the probative value of evidence of general over-classification is substantially outweighed by the prejudice of confusing the issues under MRE 403.

2. The Court defers ruling on whether PL 111-258 "Reducing Over-Classification Act" and the oral testimony and statement by Mr. Leonard is relevant for the limited purpose of cross-examining the OCAs under MRE 608(c) and for sentencing until such time as the issues are ripe.

Judicial Notice: The Defense motion to take judicial notice of PL 111-258, "the Reducing Over-Classification Act" and Congressional Hearings Discussing Classification is **GRANTED IN PART.**

1. The Court will take judicial notice of the existence of PL 111-258, and the existence of the 22 March 2007 testimony of Mr. William Leonard upon a showing of relevance as set forth above. The Court will not take judicial notice of the truth of the matter asserted as adjudicative facts.

2. The Court will not take judicial notice of the 16 December 2010 testimony of Mr. Thomas Blanton before the House Judiciary Committee or the statements by subcommittee members and the prepared statements and oral testimony of witnesses who testified before the 2007 House Committee on Homeland Security Hearings on Over-Classification and Pseudo-Classification other than Mr. Leonard's 22 March 2007 statement and testimony.

So **ORDERED** this 31st day of January 2013.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit