UNITED STATES OF AMERICA	)	
	)	**Government Response**
v.	)	**to Defense Motion for Judicial**
	)	**Notice of ONCIX, IRTF, and**
Manning, Bradley E.	)	**DOS Damage Assessments**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**30 November 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court deny the Defense Motion for Judicial Notice of Department of State (DOS), Office of the National Counterintelligence Executive (ONCIX), and Information Review Task Force (IRTF) Damage Assessments.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. *Manual for Courts-Martial (MCM), United States*, Rule for Courts-Martial (RCM) 905(c)(2) (2012). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

FACTS

The United States stipulates to the facts as set forth in the defense motion.

WITNESSES/EVIDENCE

The United States requests this Court consider its Ruling on the Defense Motion for Judicial Notice of Adjudicative Facts – Finkel Book and Public Statements, dated 18 October 2012.

LEGAL AUTHORITY AND ARGUMENT

The defense requests this Court take judicial notice of the ONCIX, DOS, and IRTF damage assessments pursuant to Military Rule of Evidence (MRE) 201. The defense proceeds to argue that not only do the damage assessments satisfy requirements for taking judicial notice, but that they are also independently admissible. The defense arguments have no merit. The damage assessments are inappropriate for judicial notice, and also inadmissible under MREs 801 and 803. Each issue with the defense motion is addressed below.

I. THE COURT SHOULD DECLINE TO TAKE JUDICIAL NOTICE OF THE DAMAGE ASSESSMENTS AT ISSUE, AS THE CONTENT OF THE DOCUMENTS IS NOT AN ADJUDICATIVE FACT.

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The Law

MRE 201 governs judicial notice of adjudicative facts. *See* Appellate Exhibit 356. Judicially noticed facts must be those not subject to reasonable dispute in that they are either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See id.* The military judge must take judicial notice of adjudicative facts if requested by a party and supplied with the necessary information. MRE 201(d).

Judicial notice is only appropriate for adjudicative facts, not for inferences a party hopes the fact finder will draw from the fact(s) judicially noticed. *See* Appellate Exhibit 356. Accordingly, judicial notice is not appropriate for legal arguments and conclusions. *Id.*

Application to the Facts

The damage assessments produced by the IRTF, ONCIX, and DOS are a compilation of subject matter experts' opinions assessing the state of affairs at the time the relevant assessment was finalized or otherwise drafted by the organization. They were geared toward documenting the impact of the accused's misconduct on department or organization operations. The documents themselves do not purport to express facts only. Moreover, neither the information contained within them, nor the conclusions of their authors, are based on information generally known or capable of accurate and ready determination. With respect to the DOS draft assessment, the document was never finalized nor officially vetted; thus, it is questionable whether the assessment is reliable at all. The United States is therefore prepared to accept judicial notice be taken that (1) these documents exist, and (2) they purport to convey their respective Department's qualitative assessment of the impact of the accused's misconduct at a specific period in time. However, for the reasons detailed, the United States does not find it appropriate to take judicial notice of the content of the assessments, and in so doing, afford the conclusions contained within the assessments the imprimatur of fact.

II. THE COURT SHOULD DECLINE TO ADMIT THE DAMAGE ASSESMENTS AT ISSUE UNDER BOTH THE NON-HEARSAY AND HEARSAY EXCEPTION THEORIES OFFERED BY THE DEFENSE.

As Non-Hearsay: Admissions by a Party Opponent Under MRE 80l(d)(2)(B) or MRE 801(d)(2)(D)

The Law

In its ruling on 18 October 2012, this Court adopted the three-part test articulated by the Second Circuit in *United States v. Salerno* to determine if the statements at issue in the defense motion were admissible against the government and worthy of judicial notice. *See* Appellate Exhibit 356. The test requires the Court, "[to] be satisfied that the prior [statement] involves an assertion of fact inconsistent with similar assertions in a subsequent trial. Second, the court must

determine that the [statements] were such as to be the equivalent of testimonial statements . . . Last, the district court must determine by a preponderance of the evidence that the inference that the proponent of the statements wishes to draw is a fair one and that an innocent explanation for the inconsistency does not exist." *Id.*

This Court has ruled that "to qualify for admission as a statement against a party opponent, the statement must bear such a close resemblance to in-court testimony that they may be considered its functional equivalent." *Id.* Inconsistency highlighted by the use of a party admission should moreover be clear and obviate any need for the trier of fact to explore other circumstances surrounding the issuance of the prior statement. *See id.* Casual statements made to private individuals, with no expectation of conveyance beyond the listener, are not testimonial, even if highly incriminating to another. *Id.* Moreover, statements are not testimonial if the declarant did not make the statements thinking they would be available for use at a later court proceeding. *Id.*

Application to the Facts

In its motion, the defense argues that the "damage assessments are statements made by individuals that clearly qualify as a party opponent" as the departments are "closely related to the prosecution in this case" and were "directly affected by the leaks for which [the accused] has been charged." Def. Mot. at 3. However, as indicated above, the prosecution must generally manifest its belief in the truth of such statements. To date, the prosecution has not manifested its belief in the truth of any of the statements made in the damage assessments.

Additionally, the defense states that "the primary purpose of [the assessments] was to convey unambiguous, factual information to the highest levels of our government." Def. Mot. at 3. The defense is speaking out of both sides of its mouth. They argue that the damage assessments convey unambiguous factual information, knowing full well that the assessments are basically a compilation of subject matter experts' opinions assessing the state of affairs at the time the relevant assessment was finalized or otherwise drafted by the organization.

Moreover, the damage assessments are not admissible under the three-part test articulated by the Second Circuit in *Salerno* and set forth above. There is no reason to expect witnesses from the organizations to testify inconsistently with the damage assessments, nor any reason to hold the prosecution responsible for assessment conclusions absent any prior manifestation by the prosecution indicating a belief in their veracity. Also, should a witness from the department concerned testify in a manner that contradicts the content of the assessment, there is no reason to believe there is not an innocent explanation for this inconsistency, nor any reason to believe further inquiry into the circumstances surrounding the assessment's formulation could not resolve any apparent inconsistency. Lastly, these damage assessments are not testimonial in nature. This is especially true for the DOS assessment, as the Court has acknowledged its nature as a draft document. Finally, the damage assessments were not done in anticipation of litigation, but because of each organization's own operational priorities. In fact, damage assessments are generally not completed until after the conclusion of criminal proceedings.

As Exception to Hearsay: MRE 803(6)

The Law

MRE 803(6) permits records of regularly conducted activity to be admitted as evidence as an exception to hearsay. It reads in relevant part:

> A memorandum, report, record, or data complication, in a any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Mil. R. Evid. 901(11) or any other statute permitting certification in a criminal proceeding in a court of the United States unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness.

Application to the Facts

The defense asserts that Army Regulation 380-5, para 10-5(a), requires information holders to notify original classification authorities (OCAs) of information compromise, and also provides that these OCAs will, in turn, conduct an investigatory damage assessment. *See* Def. Mot. at 4. It offers this authority presumably to establish that such assessments are routine business activity. However, AR 380-5 is a regulatory authority internal to the Army. It holds no authority over the larger Department of Defense and the Department of State, and no authority over ONCIX. Additionally, damage assessments are by nature ad hoc and reactive. As the compromise of closely held information is not a regular business activity, damage assessment evaluating the impact of unauthorized disclosures are hardly regular.

As Exception to Hearsay: MRE 803(8)

The Law

MRE 803 (8) provides that public records and reports are also exceptions to hearsay evidentiary limitations. It states, in relevant part, that:

> Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other personnel acting 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.

The analysis of this rule notes that "great care must be taken to distinguish such factual determinations from opinions, recommendations, and incidental inferences." Appendix 22, MCM.

Application to the Facts

The damage assessments at issue do none of the things covered in MRE 803(8). They do not set forth the activities of the agency. Instead, they are designed to assess the impact of a particular incident. Moreover, they are not a simple recitation of events observed, but instead the subjective evaluation and analysis of events. Finally, the damage assessments are not the result of an investigation conducted pursuant to authority granted by law.

CONCLUSION

The United States respectfully requests the Court deny the defense motion to take judicial notice of the DOS, ONCIX, and IRTF damage assessments. The United States further requests the Court find these documents inadmissible under the theories proffered by the defense.

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CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Defense Counsel via electronic mail on 30 November 2012.

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