UNITED STATES OF AMERICA	)	
	)	**Government Response**
v.	)	**to Defense Motion for Judicial**
	)	**Notice of H.R. 553 and**
Manning, Bradley E.	)	**Congressional Hearings**
PFC, U.S. Army,	)	**Discussing Classification**
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 to take judicial notice of H.R. 553, as well as transcripts of House Committee meetings on the Espionage Act (16 December 2010) and Over-Classification (22 March, 26 April, and 28 June 2007). These congressional materials or documents are irrelevant during the merits phase. Additionally, the United States requests the Court find the cited testimony inadmissible under Military Rule of Evidence (MRE) 803(8).

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 set forth in paragraphs 3-5 of 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, as well as the other cited Appellate Exhibits.

LEGAL AUTHORITY AND ARGUMENT

In its motion of 16 November 2012, the defense requests this Court take judicial notice of H.R. 553, the "Reducing Over-Classification Act," as well as transcripts of House Committee meetings on the Espionage Act (16 December 2010) and Over-Classification (22 March, 26 April, and 28 June 2007) pursuant to MREs 201 and 201A. The defense argues that not only do the law and congressional records satisfy requirements for taking judicial notice, but that they are independently admissible under MRE 803(8) and also relevant. The defense arguments have no merit. It is appropriate to take judicial notice of the law in so far as it exists and is relevant. It is also appropriate to take judicial notice of the testimony in so far as the congressional record presents an accurate account of it, but not for the truth of the matters asserted.

APPELLATE EXHIBIT 431
PAGE REFERENCED: _____
PAGE ___ OF ___ PAGES

I. THIS COURT SHOULD DECLINE TO TAKE JUDICIAL NOTICE OF H.R. 553 ON THE MERITS AS, PURSUANT TO MRE 201A, ITS RELEVANCE TO THE ACTION AT ISSUE IS A PREREQUISITE FOR JUDICIAL NOTICE.

The Law: Judicial Notice and Relevance

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.* Moreover, Appendix 22 of the Manual for Courts-Martial, which sets forth analysis of the Military Rules of Evidence, explains that "adjudicative facts" are to be distinguished from "legislative facts." The Federal Rules of Evidence Advisory Committee defined "legislative facts" as rules "which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."

Domestic law may be judicially noticed pursuant to MRE 201A "insofar as a domestic law is a fact that is of consequence to the determination of the action."

Relevant evidence means evidence having any tendency to make the existence of any fact of consequence to the determination more or less probable than it would be without the evidence. MRE 401.

Application to the Facts

The defense is correct in stating that H.R. 553 "was signed into law by the President of the United States, and unquestionably qualifies as domestic law as contemplated by MRE 201A." However, MRE 201A also states that domestic law is appropriate for judicial notice only when it is a "fact that is of consequence to the determination of the action" at issue. *See* MRE 201A. Here, the law itself is not a fact determinative of any issue in the present case. Instead, the defense attempts to extract from the law certain conclusions. Such findings appear to set forth the factors motivating congressional attention to the issue. Therefore, they are not adjudicative facts in and of themselves, but rather appear to be precisely the sort of "legislative fact" contemplated by the Federal Rules of Evidence Advisory Committee. As such, they are not appropriate for judicial notice under MRE 201.

Additionally, the statements that the defense motion expresses interest in do not satisfy MRE 201A. These congressional findings, the defense alleges, indicate that over-classification

problems result in confusion about what information can be shared with whom. Moreover, they assert they are relevant in rebuttal against the accused's knowledge at the time of the misconduct. First, as indicated above, MRE 201A requires the law to be a fact of consequence to the action at issue. *See* MRE 201A. Therefore, while it would be appropriate to take judicial notice that H.R. 533 exists if the fact of the law's existence were determinative, it is not appropriate to take judicial notice of the content of the legislative opinions it contains—except insofar as the law truthfully expresses Congressional will. The law is not at issue. Thus, H.R. 533, and by extension, its conclusions, are not appropriate for judicial notice as contemplated by the plain language of MRE 201A.

However, assuming *arguendo* that the content of the law and the assertions contained within are the type of facts contemplated by MRE 201A, it would still need to have been a fact available to the accused at the time of his misconduct in order to affect his state of mind at the time and thus be relevant. As the law itself was not published until December of 2010, this is impossible. Moreover, even if the law is merely memorializing circumstances which existed at that time, contemporaneous evidence of those circumstances (which may have gone in to the making of the law) and not the later-published law itself is what the defense should seek to admit.

To conclude, defense seeks judicial notice of statements in a law and not of the law itself. This is not permitted by MRE 201A. Moreover, even if the facts within the law are those statements contemplated by MRE 201A, they cannot establish what the defense proffers and are thus irrelevant. For this reason, they cannot be relevant to the action at hand, and thus are not appropriate for judicial notice under MRE 201 and 201A.

II. THE COURT SHOULD DECLINE TO TAKE JUDICIAL NOTICE OF THE 2010 TESTIMONY OF THOMAS BLANTON AS THE TESTIMONY DOES NOT COUNT AS ADJUDICATIVE FACT, REPRESENTS HEARSAY WITHIN HEARSAY, AND IS ALSO IRELEVANT.

The Law of Judicial Notice

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.* Moreover, Appendix 22 of the Manual for Courts-Martial, which sets forth analysis of the Military Rules of Evidence, explains that "adjudicative facts" are to be distinguished from "legislative facts." The Federal Rules of Evidence Advisory Committee defined "legislative

facts" as rules "which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."

Application to the Facts

The content of Mr. Blanton's testimony before Congress does not represent adjudicative fact. It is the expression of his own opinion. The only judicially noticeable fact is that it was captured accurately by congressional reporting. As with the statement by John Conyers, which this Court declined to take judicial notice of in its 18 October 2012 ruling in Appellate Exhibit 356, despite the formal circumstances under which the statements were made, Mr. Blanton's statement reflects his personal conclusions. Moreover, given the forum of his testimony, it appears his statements were made to advise Congress as it considers the formulation of policy and thus, precisely the sort of "legislative facts" not appropriate for judicial notice.

The Law: Hearsay Exception MRE 803(8) and Hearsay within Hearsay

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.

MRE 805 states that "hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

Application to the Facts

The Court has stated that "a Congressional record could be admissible under MRE 803(A) if relevant." *See* Appellate Exhibit 356. As such, the Congressional record proffered by the defense could, if relevant, be admitted as an exception to hearsay for the truth of what it asserts. However, the truth of what this record asserts is not the truth of what Mr. Blanton asserts, but rather that Mr. Blanton asserted it the way he did. To illustrate this point, suppose Congress heard testimony of a bigot or racist, or perhaps a paranoid schizophrenic. Even if relevant, their statements should not be admitted for the truth of what they assert merely because captured by a reliable report. Instead, the method of reporting merely assures the Court that statements were truthfully reported. As a declarant unavailable to testify as to the truth of what he asserts, Mr. Blanton's testimony is hearsay not subject to exception under MRE 803(A). Moreover, to the extent that Mr. Blanton's testimony relates the findings and opinions of others

("Governor Tom Kean, head of the 9/11 Commission, after looking at all the al Qaeda intelligence . . . said, you know, 75 percent of what I saw that was classified should not have been"), the testimony constitutes hearsay within hearsay as described in MRE 805.

The Law: Relevance

Relevant evidence means evidence having any tendency to make the existence of any fact of consequence to the determination more or less probable than it would be without the evidence. MRE 401.

Application to the Facts

Assuming *arguendo,* that the testimony at issue is admissible as part of a Congressional record, it is still not relevant to the case. First, as the opinions expressed belong to Mr. Blanton, they have no bearing on the accused's state of mind at the time of his misconduct. Moreover, as Mr. Blanton's testimony is discusses over-classification generally and was delivered after the accused's misconduct, it does not speak at all to the specifications charged, or the accused's misconduct on which they were based. It is thus entirely irrelevant to the merits section of the case.

III. THE COURT SHOULD DECLINE TO TAKE JUDICIAL NOTICE OF THE CONTENT OF CONGRESSIONAL HEARINGS IN 2007.

The Law: Judicial Notice, Hearsay, and Relevance

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.* Moreover, Appendix 22 of the Manual for Courts-Martial, which sets forth analysis of the Military Rules of Evidence, explains that "adjudicative facts" are to be distinguished from "legislative facts." The Federal Rules of Evidence Advisory Committee defined "legislative facts" as rules "which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."

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.

Relevant evidence means evidence having any tendency to make the existence of any fact of consequence to the determination more or less probable than it would be without the evidence. MRE 401.

Application to the Facts

The comments expressed in the 2007 House hearings are not appropriate for judicial notice. These comments represent legislative and not adjudicative fact. It might be appropriate to take judicial notice of the fact that Congress held hearings in 2007, but not the content of the statements. Moreover, the statements do not constitute a congressional record under MRE 803(8)(A), as contemplated by Appellate Exhibit 356.

Further, the United States grants that the defense-cited testimony of the Director of Information Security Oversight Office differs from the other cited statements in that it (1) asserts a quantifiable fact not restated from another declarant, and (2) was offered prior to the alleged misconduct. Therefore, this specific utterance is more reliable than others. However, in order for this to be relevant on the merits to the accused's knowledge at the time of the misconduct, there must be evidence that the accused was aware of the over-classification issue. Lastly, any relevance this may have to an allegedly "broken system" is confined to pre-sentencing, not a merits inquiry.

CONCLUSION

The United States respectfully requests the Court deny the defense motion to take judicial notice of the congressional materials. The United States further requests the Court find these documents inadmissible under the theories proffered and irrelevant to the merits phase of the case at hand as outlined above. Additionally, based on this filing the United States intends to file a motion in limine for this Court to preclude the defense from raising evidence of over-classification at trial.

JODEAN MORROW
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.

JODEAN MORROW
CPT, JA
Assistant Trial Counsel