UNITED STATES	)	
	)	**DEFENSE REPLY TO**
v.	)	**PROSECUTION RESPONSE**
	)	**TO DEFENSE MOTION TO**
MANNING, Bradley E., PFC	)	**COMPEL DEPOSITIONS**
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 13 March 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. In accordance with the Rules for Courts-Martial (R.C.M.) 702(c)(2), the Defense requests that an oral deposition of the requested individuals be conducted prior to trial.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. The Defense incorporates its earlier facts and supplements as follows.

4. On 28 February 2012, the Defense renewed its request for contact information for the civilian OCAs. *See* Attachment A. In its email, the Defense reminded the Government of the Government's promise to provide the contact information. The Government had promised on 1 February 2012 to "[redacted]." *See* Attachment B. Only after the Defense renewed its request for the contact information did the Government provide a point of contact for [redacted], one of the three OCAs. The Government has still not provided the Defense with the relevant contact information for [redacted] or [redacted].

5. At the time the Government provided the point of contact information for [redacted], it also alerted the Defense to a possible "*Touhy* issue." *See generally, United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951). On 29 February 2012, the Government stated "[redacted]." *See* Attachment C. The Defense responded that it did not believe a *Touhy* request was applicable in cases where the United States was a party. *Id.* The Government replied "[redacted]" *Id.*

WITNESSES/EVIDENCE

6. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this Court to consider the referred charge sheet in support of its motion, as well as the Attachments referenced herein.

- Attachment A: Defense Email Reiterating Request for OCA Contact Information
- Attachment B: Government Email on 1 February 2012 Responding to Defense Request for OCA Contact Information
- Attachment C: Government's *Touhy* Requirements Assertion
- Attachment D: Reducing Over-Classification Act
- Attachment E: Investigating Officer's Determination on Unsworn Declarations by OCAs

LEGAL AUTHORITY AND ARGUMENT

7. In support of its position that the Court should deny the Defense's request, the Government states that once an Original Classification Authority (OCA) makes a classification determination it is presumed proper, and it is not the province of this Court to question that determination. *See* Prosecution Response to Defense Motion to Compel Depositions at page 7. The Government fails to appreciate the limitations of the classification determination in regards to the charged offenses. Classification determinations alone do not satisfy the *mens rea* requirement of 18 U.S.C. § 793(e). *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010) (holding that although "classification may demonstrate that an accused has a reason to believe that information relates to 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. Likewise, not all information that is marked as classified, in part or in whole, may in fact meet the criteria for classification.").

8. The Defense, contrary to the Government's assertion, has not conflated damage and potential impact on security. Instead, the Defense simply appreciates the limitations of the OCA classification determination. An OCA classification determination does not necessarily equate to proof that the accused knew or had a reason to believe the charged information could be used to the injury of the United States or to the advantage of any foreign nation.

9. The Government wants to treat the OCAs' determinations as the final statement regarding whether something "could" cause damage. *See* Prosecution Response to Defense Motion to Compel Depositions at page 7. A classification determination is not conclusive on the question of whether information "could" cause damage to the United States or be used to the advantage of any foreign nation. *United States v. Morison*, 844 F.2d 1057, 1086 (4th Cir.), *cert denied*, 488 U.S. 908 (1988). At most, the OCA determination is merely probative of the issue regarding whether information could cause damage to the United States. *Id.* at 1086 ("… I assume we reaffirm today, that notwithstanding information may have been classified, the government must still be required to prove that it was *in fact* 'potentially damaging … or useful,' i.e., that the fact

of classification is merely probative, not conclusive, on that issue...") (emphasis in original.) Additionally, while the OCAs' determinations were at one point in history "worthy of great deference," such is not necessarily the case anymore. The United States has acknowledged that it has a problem with over-classification. *See* Attachment D (passage of the Reducing Over-Classification Act by President Barack Obama on 7 October 2010 in order to attempt to deal with the problem of Government over-classification). Such a problem calls into question a determination whether certain items "could" cause damage based solely on the basis of its classification. As Justice Stewart of the Supreme Court so aptly stated in regards to the Pentagon Papers, "for when everything is classified, then nothing is classified. . ." *New York Times v. United States*, 403 U.S. 713, 729 (1971).

10. The OCA classification determination are only "conclusive on the question of authority to possess or receive the information." *Morison*, 844 F.2d at 1086. Whether the accused, in fact, knew or had a reason to believe the charged information could be used to the injury of the United States or to the advantage of any foreign nation is not determined by the OCA. *Id.* at 1086 (detailing the appropriate limitations of classification determinations to only the question of authority to possess or receive the information by holding "[t]his must be so to avoid converting the Espionage Act into the simple Government Secrets Act which Congress has refused to enact.").

11. Given the fact the OCA determinations are merely probative on the element of the 18 U.S.C. § 793(e) offense, the Defense should be entitled to examine the basis for the OCA determinations as to why the information was classified and the OCA's belief regarding whether the reviewed information really "could" cause damage to national security. The Defense was not given the ability to question the OCAs at the Article 32 hearing. The OCAs were essential witnesses that should have been produced. Their testimony went to the heart of one of the elements of the charged offenses. The Investigating Officer failed to appreciate the significance of the requested witnesses' testimony and improperly determined that each OCA witness was not reasonably available.

12. The Investigating Officer did not provide any support or reasons to buttress his conclusion that the OCAs were "not reasonably available." *United States v. Samuels*, 1959 WL 3613 (C.M.A.) (the investigating officer should set out the circumstances upon which the conclusion of the unavailability is predicated). Instead, the Investigating simply adopted the Government's bald assertions that the witnesses were unavailable. As the Government acknowledges, two of the requested OCAs, [redacted] and [redacted], were stationed at Fort Meade, Maryland. It is indefensible to suggest that neither was "reasonably available" to be produced at the Article 32 which was held at the OCAs' home base. The Investigating Officer ignored the Defense's request to require the government to at least inquire as to whether the OCA witnesses were available. Instead, the Investigating Officer chose to rely upon a rote recitation of the test for availability.

13. Once he determined that the OCA witnesses were not available, the Investigating Officer

proceeded to consider the unsworn statements of each of the OCAs.[1] Due to the Investigating Officer's determination, the Defense did not have an opportunity to cross-examine the OCAs at the Article 32. It is without question that the OCAs were vital witnesses. The Government justified repeated delays for over a year in order to obtain their classification reviews. If the OCA determinations were not vital, the Government would not have gone to such great lengths to ensure that the Investigating Officer consider the OCAs' unsworn statements.[2]

14. In addition to arguing that the Investigation Officer's determination on availability of the OCAs was correct, the Government argues that the Defense has incorrectly cited authority for its requested relief. The Government attempts to distinguish the cited authority cited by stating "[redacted]" This "critique" is without merit. The cases cited by the Defense deal with the enforcement of pretrial rights— the right of the accused to have the presence of a "key witness" at the Article 32. The cases also support the proposition that "if an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of this right, without regard to whether such enforcement will benefit him at trial." *See United States v. Chuculate*, 5 M.J. 143, 144-45 (C.M.A. 1978). Contrary to the Government's assertion, this standard of review is not limited to reopening the Article 32. Instead, it applies to the *enforcement* of a substantial pretrial right. *Id.* at 145.[3] Such enforcement is within the discretion of the military judge, and may be in the form of reopening the Article 32 or (as in this case) ordering a deposition.

15. The Government argues that the Defense's request is not timely in that there is no evidence that any of the requested witnesses will not be available for trial. The Government also states that it will "[redacted]." This promise by the Government to provide access as it "[redacted]" is why the Defense is requesting relief from the Court.

16. At the Article 32, the Government relied upon the importance of the duty positions of the various OCAs to deny access. In its response to the motion to compel depositions, the Government repeated this argument, and also pointed to the fact that [redacted]." *See*

[1] Although [redacted] is not an OCA, he is the individual the Government chose to conduct the classification review of Apache video. As such, he is the only witness that the Defense is aware of that could speak to the classification review.

[2] The Defense maintains its position that the Investigating Officer improperly considered, over Defense objection, the OCAs' unsworn statements under R.C.M. 405. Significantly, the Investigating Officer did not determine the unsworn declarations were in fact sworn declarations under R.C.M. 405. Instead, the Investigating Officer determined that although the OCA statements were unsworn, they carried with them the same "indicia of reliability" as sworn statements. *See* Attachment E.

[3] The *Chuculate* decision cites several examples of judicial enforcement of a substantial pretrial right such as: *United States v. Mickel*, 9 U.S.C.M.A. 324, 26 C.M.R. 104 (1958)(failure to provide Article 27(b) qualified counsel at an Article 32 hearing was a substantial pretrial right capable of judicial enforcement); *United States v. Donaldson*, 23 U.S.C.M.A. 293, 49 C.M.R. 542 (1975) (properly convened Article 32 investigation was a substantial pretrial right capable of judicial enforcement); *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976) (presence of key witnesses at Article 32 hearing was a substantial pretrial right capable of judicial enforcement); *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976) (failure to grant a motion for continuance to depose a witness (who was actually present for trial purposes) denial of a substantial pretrial right capable of judicial enforcement).

Prosecution Response to Defense Motion to Compel Depositions at 12. However, perhaps most troubling is the Government's recent reliance on *Touhy* regulations to restrict the Defense's access to the civilian OCAs. *See* Attachment C.

17. The Defense exchanged numerous emails with the Government in an attempt to flush out the Government's position on *Touhy* and how that would impact a ruling by the Court. Shockingly, the Government asserted that it first became aware of the possible *Touhy* issue earlier that very week (apparently from the requested OCAs). Such an admission by the Government is evidence of the Government's lack of due diligence in this case. The fact that the Defense wanted to interview the relevant OCAs was not a surprise to the Government. The Defense had requested that these witnesses be present at the Article 32; requested from both the SPCMCA and GCMCA to depose the relevant OCA witnesses; and requested contact information for the relevant OCAs. The fact that the Government was just now finding out that *Touhy* requirements may apply is inexcusable.

18. Ultimately, the Government appears to have restricted its interpretation of *Touhy* requirements to only the Defense's access to the non-DoD OCA witnesses. The Government does not seem to understand that discovery and access to witnesses flows through the trial counsel. The Government cannot hide behind *Touhy*. This is especially so if the Government actually has had access to the witness (i.e. to interview that person). In this instance, the Government has had access to the relevant OCAs. The Government's position, requiring the Defense to submit a *Touhy* request, is yet another example of the Government impeding the defense's access to these witnesses, and is also in violation of Article 46, UCMJ.

19. The Government's position on witness availability ignores the practical realities of the situation. Each of the OCAs is either a General Officer or a high ranking civilian employee.[4] Their respective duty positions require more than your average witness coordination. The Defense cannot simply drop by the OCAs' duty location or pick up a phone and call a specific OCA. The Defense would need to coordinate with each OCA to obtain a time and place for the interview. Given the topic of discussion, the interview would have to be in person, and at an approved location. Assuming the OCAs did agree to be interviewed, the Defense could not dictate the time or the location of the interview. The relative difficulty of dealing with different OCAs and given the location of each OCA almost assures that any interview would not take place in advance of trial.

20. The interviews of the OCAs should have taken place as part of the Article 32. The fact that these witnesses were improperly denied has placed the Defense in the position of relying upon the OCAs to make themselves available for (an adversarial) interview or upon the Government to coordinate access to these witnesses.

21. Given the improper denial by the Article 32 Investigating Officer of these witnesses; the Government's previous actions of refusing to provide contact information for the civilian OCAs; the Government's last-minute *Touhy* position; and the practical difficulties involved in

[4] This is true for each individual that conducted a classification determination with the exception of [redacted].

interviewing the requested OCAs, the Defense respectfully requests that the Court grant the Defense's request to depose these witnesses.

V. RELIEF REQUESTED

22. Accordingly, pursuant to the Rules for Courts-Martial (R.C.M.) 702(c)(2), the Defense requests that an oral deposition of the above-listed OCAs be conducted prior to trial.

Respectfully submitted,

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Civilian Defense Counsel