

FORMAL STATEMENT

J. William Leonard

Former Director, Information Security Oversight Office

before the Committee on Oversight and Government Reform

U.S. House of Representatives

“Examining the Costs of Overclassification on Transparency and Security”

December 7, 2016

Chairman Chaffetz, Mr. Cummings, and members of the Committee, I want to thank you for holding this hearing on the costs of overclassification on transparency and security and for giving me the opportunity to testify. The ability and authority to classify national security information is a critical tool at the disposal of the federal government and its leaders to protect our nation and its citizens. However, when negligently or recklessly applied, overclassification of information can undermine the very integrity of the system we depend upon to ensure that our nation’s adversaries cannot use national security-related information to harm us and can place at increased risk truly sensitive information. Overclassification also creates needless impediments to transparency that can actually undermine our form of government and the constitutional system of checks and balances intended to preclude, among other objectives, overreach by the executive branch.

I have over 40 years of experience in dealing with classified national security information. This includes overseeing the implementation of the president’s executive order governing the classification of information within the Department of Defense (DoD) as a Deputy Assistant Secretary in the Clinton and Bush administrations and within the entire executive branch as Director of the Information Security Oversight Office in the Bush administration. As a result of this experience I have come to the conclusion that on its own, the executive branch is both incapable and unwilling to achieve true reform in this area. I also believe it is unreasonable to expect it to do so.

With respect to the executive branch’s incapability to achieve self-reform in this area, I believe most observers would agree that absent external pressure from either the legislative or judiciary branches of our government, true reform within the executive branch when the matter involves the equities of multiple agencies can only be achieved with direct leadership emanating from the White House at the most senior level. Over the last 40 years, we have seen only one White House-led attempt at classification reform and that was in the 1990’s during the Clinton administration. Having been involved in the process during that period, I can assure you that the bureaucracy’s response to these attempts at reform were typical. Specifically, delay and foot-drag because agency officials know that sooner or later every administration eventually goes

away, a reality that will provide new opportunities to rollback attempts at reform. I know of this because I was a part of the bureaucracy at that time and was involved in the subsequent classification reform rollbacks that occurred during the Bush administration. As a DoD official I participated in this pushback effort. There were a number of classification reform issues that were problematic for the department, especially from a budgetary perspective. Other agencies, such as the CIA, had different issues that were troublesome for them. Thus, absent White House leadership, the interagency process is reduced to mere consensus and the process becomes one of horse-trading and logrolling. The outcome is thus inevitably reduced to the lowest common denominator among multiple agencies with differing imperatives. When I became ISOO Director and in my new role attempted to resist further rollback efforts, my effectiveness in doing so was likewise hampered absent strong White House support.

With respect to the executive branch's unwillingness to implement real classification reform, I believe it is unreasonable to expect it to do so, primarily since the unconstrained ability to classify information is such an attractive tool for any administration in order facilitate implementation of its national security agenda. In this regard, especially in the years since 9-11, we have seen successive administrations lay claim to new and novel authorities, and to often wrap these claims in classification. This can amount to unchecked executive power. I acknowledge that it has long been recognized that the president must have the ability to interpret and define the constitutional authority of the office and, at times, to act unilaterally. However, the limits of the president's authority to act unilaterally are defined by the willingness and ability of Congress and the courts to constrain it. Of course, before the Congress or the courts can act to constrain presidential claims to inherent unilateral powers, they must first be aware of those claims. Yet, a long recognized power of the president is to classify and thus restrict the dissemination of information in the interest of national security – to include access to certain information by Congress or the courts. The combination of these two powers of the president – that is, when the president lays claim to inherent powers to act unilaterally, but does so in secret – can equate to the very open-ended, non-circumscribed, executive authority that the Constitution's framers sought to avoid in constructing a system of checks and balances.

Thus, absent ongoing congressional oversight or judicial review of executive assertions of the need to restrict the dissemination of information in the interest of national security, no one should ever be surprised that the authority to classify information ends up being routinely abused, either deliberately or not, in matters both big and small. For example, over the years I have seen agencies improperly deny information in response to access demands under the auspices of either the Freedom of Information Act (FOIA) or the executive order governing the declassification of information. Even more disturbing is when agencies abuse the classification system in order to attain unfair advantage against a fellow citizen.

In the years since my retirement from public service, I have personally been involved as a pro bono expert for the defense in three criminal cases in which the prosecution ultimately did not prevail in large part due to government-overreach in its claims that certain information was classified. In these instances I made it clear to defense counsel that I would become involved in their case not as an advocate for the defendant but rather as an advocate for the integrity of the classification system, which I saw being undermined by the government's own actions. In each of these cases – *U.S. v. Rosen*, *U.S. v. Drake*, and the special court-martial of a former Marine

Captain who faced charges arising out of an operation in Afghanistan during which four Marines were videoed urinating on enemy corpses – the government abused the classification system and used it not for its intended purpose of denying sensitive information to our nation’s enemies but rather as leverage to carry out an entirely different agenda. The opaque nature of the classification system can give the government a unilateral and almost insurmountable advantage when it is engaged in an adversary encounter with one of its own citizens, an advantage that is just too tempting for many government officials to resist.

I have attached to this statement a number of documents that provide greater detail for each of the above cases. Included as attachment 2b is a copy of the actual email from the Drake case that the government asserted had been properly classified and, in fact, served as the first count of its felony indictment and for which the government was prepared to send Mr. Drake to prison for up to 35 years. There was no doubt in my mind that had this matter gone to trial, I would have been able to convince a jury of Mr. Drake’s peers that they could use their own common sense and judgment in coming to the conclusion that the information contained therein did not meet the government’s own standards for classification.

In the face of this long history of failure by the executive branch to effectively deal with the issue of overclassification I believe there are steps that the Congress can and should take in order to address this matter, an issue that this committee aptly points out impacts both transparency and security. This morning I’d like to focus on two such steps.

The first is the issue of accountability. Over the past several decades, tens of millions of individuals have been afforded access to classified information. Although comparably small, the number of individuals during this same period who have been rightly held accountable for improperly handling, possessing or disclosing classified information is nonetheless significant. Many have been subject to criminal sanctions, countless others to administrative sanctions. During this same period, the number of individuals who have been held accountable for improperly classifying information or otherwise abusing the classification system is likewise countless. However, in the latter instance, the number is countless because to my knowledge no one has ever been held accountable and subjected to sanctions for abusing the classification system or for improperly classifying information. This is despite the fact that the president’s executive order governing the classification of information treats unauthorized disclosures of classified information and inappropriate classification of information, whether knowing, willful, or negligent, as equal violations of the order subjecting perpetrators to comparable sanctions, to include “reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.”¹

¹ Sec. 5.5, E.O. 13526, “Classified National Security Information Memorandum.”

² “Audit Report – Withdrawal of Records from Public Access at the National Archives and Records Administration for Classification Purposes,” April 26, 2006. See: <https://fas.org/sgp/isoo/audit042606.pdf>

³ Sec. 5.3, E.O. 13526, op. cit.

⁴ Ibid, Sec. 3.5.

⁵ ISOO “2015 Report to the President,” p. 28. See: <https://fas.org/sgp/isoo/2015rpt.pdf>

⁶ Ibid.

⁷ Section 311 of the Intelligence Authorization Act for Fiscal Year 2014, Section 365 of the Intelligence Authorization Act for Fiscal Year 2010, Section 2 of the Public Interest Declassification Board Reauthorization Act of 2012, Section 602 of the Implementing

Thus, although intended as a safeguard against overclassification and abuse of the classification system, this provision of the current and prior president's orders governing classification has proven over the decades to be utterly feckless. As such, it is no surprise that overclassification occurs with impunity. From the perspective of the typical individual with a clearance, such an outcome is understandable. Everyone with a clearance knows that if he or she improperly discloses or otherwise mishandles information that should be classified, even inadvertently, he or she will be subject to sanction, perhaps even to criminal penalties. However, cleared individuals likewise know if they overclassify information, whether willfully or negligently, there will most likely be no personal consequences. Given this disparity, it's no wonder that the attitude "when in doubt, classify" prevails, notwithstanding any admonition to the contrary. The proven lack of accountability in this regard within the executive branch is one area worthy of legislative attention.

Another area worthy of possible legislative attention is that of providing a mechanism for independent expert review of agency classification decisions; especially as a potential tool to be made available to the executive's two coequal branches of government when exercising congressional oversight and judicial action. Both Congress and the courts are frequently overly deferential to assertions of classification by the executive branch. This is understandable since there is often an unwillingness to override the judgment of executive branch subject matter experts. Furthermore, since the order governing classification is permissive and not prescriptive, the decision to originally classify information is ultimately one of discretion – the order clearly states what **can** be classified, not what **must** be classified. Nonetheless, it is also important to note that when deciding to apply the controls of the classification system to information, government officials are in-turn obligated to follow the standards set forth by the president and not exceed the governing order's prohibitions and limitations. Thus, it is not only possible but also entirely appropriate to conduct a standards-based review of classification decisions, one that does not necessarily second-guess the discretion of an original classification authority. I have attached to this statement (Attachment 4) an updated methodology for such a review that I had originally developed when I was the ISOO director. This standards-based methodology can be employed to evaluate the appropriateness of classification decisions, both original and derivative. A fundamental point of this methodology is that agencies cannot simply assert classification; they must be able to demonstrate that they have adhered to the governing order's standards. Most notable is the need to be able to identify or describe the damage to national security that could be expected in the event of unauthorized disclosure, a standard that the government failed to meet in the Drake case as evidenced by the government's own declarations included at Attachment 2.

It is worthy of note that when independent review of agency classification decisions does occur, the results clearly highlight the extent of rampant overclassification within the executive branch. For example, when I was at ISOO, I oversaw the audit² of all re-review efforts undertaken by a number of agencies in their belief that certain records at the National Archives and Records Administration (NARA) had not been properly reviewed for declassification, but had been made available to the public. The audit found that these agency efforts resulted in the withdrawal of at

² "Audit Report – Withdrawal of Records from Public Access at the National Archives and Records Administration for Classification Purposes," April 26, 2006. See: <https://fas.org/sgp/isoo/audit042606.pdf>

least 25,315 publicly available records. In reviewing a sample of the withdrawn records, the audit concluded that nearly one third of the sampled records did not, in fact, contain information that clearly met the standards for continued classification. What this meant is that even trained classifiers, with ready access to the latest classification and declassification guides, and trained in their use, got it clearly right only two thirds of the time in making determinations as to the appropriateness of continued classification. This is emblematic of the challenge confronting the millions of cleared individuals who are confronted daily with the ability to label information as being classified.

Equally revealing are the actions of the president's own Interagency Security Classification Appeals Panel (ISCAP). The President created the ISCAP by executive order in 1995 in order to, among other functions, decide on appeals by persons who have filed classification challenges under the governing order. It is also responsible to decide on appeals of agency decisions by persons or entities such as researchers, the media and other members of the public who have filed requests for mandatory declassification review (MDR) under the governing order³. The permanent membership is comprised of senior-level representatives appointed by the Secretaries of State and Defense, the Attorney General, the Director of National Intelligence, the Archivist of the United States, and the Assistant to the President for National Security Affairs. The President selects the Chairperson. I served as both the DoD member of this panel in the early 2000's and as its Executive Secretary from 2002-2007.

Under the governing order, the MDR process requires a review of specific classified national security information in response to a request seeking its declassification⁴. The public must make MDR requests in writing and each request must contain sufficient specificity describing the record to allow an agency to locate the record with a reasonable amount of effort. Agencies must also provide a means for administratively appealing a denial of a mandatory review request. MDR remains popular with some researchers as a less litigious alternative to requests under FOIA. It is also used to seek the declassification of Presidential papers or records not subject to FOIA.

After being denied both the initial request and an appeal to the agency itself, requestors have the further ability to appeal to the ISCAP. Particularly noteworthy is that in FY 2015 (the most recent year for which data is available) agency decisions to retain the classified status of requested information were overridden by the panel, either entirely or in part, 92% of the time⁵. Since the ISCAP's initial decision in 1996 through the end of FY15, agency decisions to retain the classified status of requested information has been overridden by the panel, either in whole or in part, 75% of the time⁶. I believe these numbers speak for themselves. In essence, even when specifically asked to review information in order to ascertain if it still meets the standards for continued classification, agency officials specifically trained for this task get it wrong far more often than not. Based upon personal experience, I can attest that even as effective as the ISCAP is, the typical interagency horse-trading and logrolling occurs there as well and even more

³ Sec. 5.3, E.O. 13526, op. cit.

⁴ Ibid, Sec. 3.5.

⁵ ISOO "2015 Report to the President," p. 28. See: <https://fas.org/sgp/isoo/2015rpt.pdf>

⁶ Ibid.

information would be determined not to meet the standards for continued classification if the information had been subject to a truly independent review.

With respect to the mechanics and effectiveness of an independent panel of experts to review classification decisions of the executive, I believe that Congress can look to entities such as the already existing Public Interest Declassification Board⁷, which has members appointed by both the president and congressional leadership. Potential enhancements to this Board's role and authority are one place to start.

There is one final point I would like to make. I have been an ardent supporter of agency Inspectors General (IGs) becoming more involved in auditing the appropriateness of agency classification decisions as one means to address the critical issue of overclassification. IGs, of course, have dual reporting responsibility to both the executive and legislative branches. In the "Reducing Overclassification Act" of 2010 (Public Law 111-258), IGs were assigned specific responsibilities in this area. I believe with the proper training and direction, they can accomplish much more and prove to be an effective tool in the exercise of congressional oversight in this area. Potential enhancements to the role and responsibilities of agency IGs in combatting overclassification are another area worthy of congressional attention.

I applaud this committee for focusing on this critical topic to our nation's well-being and I again thank you for inviting me here today, Mr. Chairman. I would be happy to answer any questions that you or other committee members might have.

⁷ Section 311 of the Intelligence Authorization Act for Fiscal Year 2014, Section 365 of the Intelligence Authorization Act for Fiscal Year 2010, Section 2 of the Public Interest Declassification Board Reauthorization Act of 2012, Section 602 of the Implementing Recommendations of the 9/11 Commission Act of 2007, and Section 1102 of the Intelligence Reform and Terrorism Prevention Act of 2004 extended and modified the PIDB as established by the Public Interest Declassification Act of 2000 (P.L. 106-567, title VII, Dec. 27, 2000, 114 Stat. 2856).

Secrecy News

AIPAC Case: New Ruling May Lead to Acquittal

Posted on Feb.19, 2009 in [Secrecy](#) by [Steven Aftergood](#)

A federal court this week ruled that J. William Leonard, the former director of the Information Security Oversight Office, may testify for the defense in the long-running prosecution of two former officials of the American Israel Public Affairs Committee (AIPAC) who are charged with illicitly receiving and transmitting classified information that prosecutors say is protected from disclosure.

Prosecutors had sought to prevent Mr. Leonard, a preeminent expert on classification policy, from testifying for the defendants, on grounds that he had briefly discussed the case with prosecutors while he was still in government. They even suggested that he could be liable to a year in jail himself if he did testify. To protect himself against such pressures, Mr. Leonard (represented by attorney Mark S. Zaid) moved to challenge the subpoena in the expectation that the court would order him to testify, thereby shielding him from any potential vulnerability. (["To Evade Penalty, Key AIPAC Witness Seeks to Quash Subpoena,"](#) Secrecy News, September 2, 2008). The court [has now done so](#).

In a [February 17, 2009 memorandum opinion](#) (pdf), Judge T.S. Ellis, III affirmed the subpoena and directed Mr. Leonard to testify for the defendants.

The ruling's consequences for the AIPAC case are likely to be momentous, because government secrecy policy has become a central focus of the proceeding and because Mr. Leonard is the strongest witness on that subject on either side.

More than almost any other litigation in memory, the AIPAC case has placed the secrecy system itself on trial. In Freedom of Information Act lawsuits and other legal disputes, courts routinely defer to executive branch officials on matters of classification. If an agency head says that certain information is classified, courts will almost never overturn such a determination, no matter how dubious or illogical it may appear to a third party.

But in this case, it is a jury that will decide whether or not the information in question "might potentially damage the United States or aid an enemy of the United States." Far from granting automatic deference on this question, [Judge Ellis wrote](#) that "the government's classification decision is inadmissible hearsay"!

The dispute over whether or not the classified information that was obtained by defendants Steven J. Rosen and Keith Weissman qualifies for protection under the Espionage Act will be "a major battleground at trial," Judge Ellis observed, and it will be addressed at trial "largely through the testimony of competing experts."

Attachment 1

U.S. v. Rosen

While the prosecutors naturally have their own classification experts, including former CIA Information Review Officer William McNair, none of those experts have Mr. Leonard's breadth of experience and none of them reported to the President of the United States on classification matters as he did.

Judge Ellis wrote with perhaps a hint of admiration that the defense "understandably characteriz[es] Leonard's experience and expertise as 'unsurpassed'."

As noted in the new opinion, Mr. Leonard will testify for the defense on the "pervasive practice of over-classification of information," "the practice of high level officials of disclosing classified information to unauthorized persons (e.g. journalists and lobbyists)," whether the classified information in this case qualifies for protection under the Espionage Act, and "whether... the defendants reasonably could have believed that their conduct was lawful."

In other words, the prosecution probably just lost this case.

The new memorandum opinion has not been posted on the court web site for some reason, but a copy was obtained by Secrecy News. Other significant AIPAC case files may be found [here](#).

A nominal trial date has been set for April 21, 2009 but that date is likely to slip as a pre-trial appeal by the prosecution remains pending at the Court of Appeals. (Update: The trial has been rescheduled for June 2, 2009.)

https://fas.org/blogs/secrecy/2009/02/aipac_case-2/

P.O. Box 2355
Leonardtown, MD 20650

July 30, 2011

Mr. John P. Fitzpatrick
Director
Information Security Oversight Office
700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

Dear Mr. Fitzpatrick:

I am writing to you pursuant to Section 5.2(b)(6) of Executive Order 13526, "Classified National Security Information" (the Order) which assigns to you the responsibility to "consider and take action on complaints ... from persons within or outside the Government with respect to the administration of the program established under this order." Specifically, in the matter of United States v. Thomas Andrews Drake (Case No. 10 CR 00181 RDB) I am requesting you to ascertain if employees of the United States Government, to include the National Security Agency (NSA) and the Department of Justice (DoJ), have willfully classified or continued the classification of information in violation of the Order and its implementing directive and thus should be subject to appropriate sanctions in accordance with Section 5.5(b)(2) of the Order.

In count one of an indictment dated April 14, 2010, the United States Government charged that Mr. Drake, "having unauthorized possession of a document relating to the national defense, namely, a classified e-mail (attachment 1) entitled 'What a Success', did willfully retain the document and fail to deliver the document to the officer and employee of the United States entitled to receive it." In a letter dated November 29, 2010, (attachment 2) the Department of Justice informed Mr. Drake's counsel that this document is classified overall as SECRET because the information contained therein reveals classified technical details of NSA capabilities. As a plain text reading of the "What a Success" document reveals, this explanation is factually incorrect -- it contains absolutely no technical details whatsoever. The aforementioned DoJ letter went on to state that the document also revealed a specific level of effort and commitment by NSA. Notwithstanding that as a basis for classification this notion is exceedingly vague, it is also factually incorrect in view of the fact the the document is absolutely devoid of any specificity. All that is revealed in this otherwise innocuous "rally the workforce" missive is multiple unclassified nicknames with absolutely no reference to the classified purposes, capabilities, or methods associated with the programs or other events or initiatives represented by the unclassified nicknames.

In a letter dated March 7, 2011, (attachment 3) the DoJ provided supplemental information to Mr. Drake's counsel. In this letter, the Government belatedly informed counsel that the "What a Success" document "no longer required the protection of classification," ostensibly because the classification guide for this information was

Attachment 2a
U.S. v. Drake

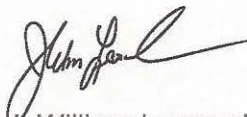
updated on July 30, 2010. This letter went on to state that one of the unclassified nicknames revealed in the document related to a malicious attack on a U.S. government computer system. The letter goes on to rightfully state the reasons why specific information associated with a malicious attack on a U.S. government computer system could be classified; however, as supported by a plain text reading of the document, no such information is contained therein. Obviously, if it did contain such information, it should rightfully continue to be classified to this day and its difficult to understand how the update of a classification guide would change this.

Various government officials affiliated with this case have publicly stated that cleared individuals do not get to choose whether classified information they access should be classified, the government does. Nonetheless, when deciding to apply the controls of the classification system to information, government officials are in-turn obligated to follow the standards set forth by the President in the governing executive order and not exceed it's prohibitions and limitations. Failure to do so undermines the very integrity of the classification system and can be just as harmful, if not more so, than unauthorized disclosures of appropriately classified information. It is for that reason that Section 5.5 of the Order treats unauthorized disclosures of classified information and inappropriate classification of information as equal violations of the Order subjecting perpetrators to comparable sanctions, to include "reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation."

I have devoted over 34 years to Federal service in the national security arena, to include the last 5 years of my service being responsible for Executive branch-wide oversight of the classification system. During that time, I have seen many equally egregious examples of the inappropriate assignment of classification controls to information that does not meet the standards for classification; however, I have never seen a more willful example. Failure to subject the responsible officials at both the NSA and DoJ involved in the inappropriate classification and continuation of classification of the "What a Success" document to appropriate sanctions in accordance with Section 5.5(b)(2) of the Order will render this provision of the Order utterly feckless.

I look forward being informed of the results of your inquiry into this matter and any action you take in response to this formal complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "William Leonard", written in a cursive style.

W. William Leonard

cc:

Honorable Tom Donilon
Assistant to the President for National Security Affairs

Honorable Eric H. Holder, Jr.
Attorney General of the United States

General Keith B. Alexander, USA
Director, National Security Agency

~~SECRET//REL TO USA, FVEY~~ u//FOUO

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

WHAT A WONDERFUL SUCCESS!

You should all be extremely proud of the part you played in our Spin 1 efforts to demonstrate TURBULENCE. The Director of NSA saw first-hand what you've accomplished, and everyone in the room associated with TURBULENCE was just BEAMING with pride (especially me!)....

U//FOUO

John McHenry did an outstanding job representing us, explaining how TURBULENCE worked and explaining what was happening during the actual demo. The Director was extremely engaged, and knew all about TURBULENCE and the projects associated with it. He asked lots of questions and your teammates around the room provided the detailed information that the Director needed. Thanks to all of you who did - Bill Cocks, Larry Johnson, Jeff Undercoffer, Linda Shields, Jim Bieda, Bill Christian - forgive me if I left anyone out...

UNCLASS

~~SECRET//REL TO USA, FVEY~~

During the briefing/demo portion of the meeting, the Director suggested that an application for TURBULENCE might be the Byzantine Hades effort (in conjunction with work being done in TAO). [As an aside, TUTELAGE is mentioned in Byzantine Hades briefings as being part of the solution.] When TRAFFICTHIEF was introduced as being part of the TURBULENCE effort, he interjected, "Clearly the best thing we've done at this Agency up to this point is TRAFFICTHIEF." He asked a lot of questions about how TRAFFICTHIEF and XKEYSCORE interact. In reference to TURBULENCE follows the quick spin philosophy, the Director mentioned that just this morning, in his discussions with Congress, it was mentioned that rapid spins need to be more widely used, because change in technology is so rapid. He wants to get those congressmen here and show them how we're demonstrating TURBULENCE using spins.

Classified per TURBULENCE and TUTELAGE classification guide

Approp. Classification at time of signature

U//FOUO

The Director wants you to know that there's "nothing more important in this Agency" than what you're doing. He wants us to have "unfettered access" to him (and mentioned that Pat Dowd is probably the person he deals with the most). Pat, in turn, pointed out that when the Director pings him, the way TURBULENCE is structured, he goes directly to the tech leads and the people working TURBULENCE, so there's a direct line of communication.

has been declassified UNCLASS per

The Director emphasized that his goal is that "we are moving out as quickly as possible and as smartly as we can." No pressure! Once the system is stabilized, he "wants us to get it out to the field, be pragmatic, but deliver it." The environment is "changing so quickly we have to use it as soon as possible."

U//FOUO

His primary concerns are twofold: 1) The Global War on Terrorism, and 2) Net Warfare. And the work you've done to MAKE TURBULENCE HAPPEN will have a profound impact on those two concerns. He "wants to make sure you are getting all the support you need" and he wants to "help you deal with the multiple layers of bureaucracy" that may hinder progress. (At that point, almost jumped out of my seat and cheered!)

Tutelage Class Guide

10-12

He then reiterated TURBULENCE is "really, really important to this Agency, to this Nation and we have to overcome the risks" associated with making it work. He talked about the "fight on the network" and used the analogy of the Wright Brothers - they did not build a plane thinking that it would give us such a strategic advantage in WWI. "In the Information Age, we have to win by getting there first."

dated 30 Jul 2010

cm

The Director talked about how "our Agency has tremendous talent across the board" (and Pat chimed in that the TURBULENCE team represents the best). As "we get into this Net Warfare front," we will have to increase the number of folks who have skills in EE, and CompSci and High Performance Computing (we already have the best talent in Math).

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~SECRET//REL TO USA, FVEY~~ u//FOUO

NSA(u)000687

cm

Attachment 2b U.S. v. Drake

W/Fowd

~~SECRET//REL TO USA, FVEY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

He predicted that "the fight on the network is going to come on in the near-term." We need to GET THERE FIRST! We need to be the "fastest with the most." He talked about how important this demo was to him, apologized for the delay in his coming to see the demo, and thanked us for jumping through hoops to provide today's demo on such short notice. He complimented John on his excellent briefing, and noted that the slides were great and wanted to get a copy.

He ended the meeting by saying again: "What you're doing is extremely important. Pat gets more attention than anyone else in the Agency." He made a joke of what we could deliver out to the field by Spin 4, looked at my shocked expression, and suggested that Spin 3 might be a better goal. My response was "please." ☺ He said "you are leading the path, are the advanced scouts" and are key in how we get there.

He left the conference room, but before he left the building, he greeted the entire test team in the lab (who worked behind the scenes to make sure the demo was successful). Kurt Dawson did an excellent job briefing him on the Stage 1 TURMOIL rack. Thanks, Kurt!

Classified per
TURBULENCE and
TUTELAGE
classification guide

~~SECRET//REL
TO USA, FVEY~~

UNCLASS

THANKS to all of you. What a GREAT team we have.

Based on today's success and the Director's comments, we have appended our vision:

MAKE TURBULENCE HAPPEN

AND

GET THERE FIRST!

*Approp. Class.
at time of
origination. Has
been declassified
per Tutelage Class
Guide 10-12
dtd 30 Jul 2010*

W/Fowd

~~SECRET//REL TO USA, FVEY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

cm

UNCLASSIFIED//FOR OFFICIAL USE ONLY



U.S. Department of Justice
Criminal Division

Washington, D.C. 20530

UNCLASSIFIED//FOR OFFICIAL USE ONLY

November 29, 2010

James Wyda, Esq.
Deborah Boardman, Esq.
Office of the Federal Public Defender
100 South Charles Street
BankAmerica Tower II, Ninth Floor
Baltimore, MD 21201

Re: United States v. Thomas Andrews Drake
Case No. 10 CR 001811-RDB

Rule 16(a)(1)(G) Expert Summary Disclosure

Dear Counsel:

(U) Pursuant to your request for expert disclosures, the written discovery agreement, and our obligation under Rule 16(a)(1)(G), this letter is a written summary of the testimony of Catherine A. Murray, an Original Classification Authority (hereinafter "OCA") for the National Security Agency (hereinafter "NSA"). This letter does not set forth each and every fact about which Ms. Murray will testify, but rather sets forth her qualifications and a written summary of her testimony, including the bases and reasons for her opinions.

(U) We hereby request production of any and all discovery relating to your experts pursuant to Rule 16(b).

UNCLASSIFIED//FOR OFFICIAL USE ONLY

*Attachment 2c
U.S. v. Drake*

Qualifications

(U) Ms. Murray has been employed at NSA for approximately 28 years in a variety of positions primarily within the signals intelligence mission. While assigned as the Chief S02 (SID Policy), she was also a designated Agency OCA. Ms. Murray's OCA-specific duties and responsibilities include mandatory annual training in the basis of classification in accordance with Executive Order 13526; reviewing and determining the proper level of classification for NSA documents and information; reviewing the work of other NSA classification advisory officers; and serving as an expert in federal court.

Summary of Testimony

(U) Ms. Murray will testify that the authority of an OCA generally derives from Executive Order 13526 and its predecessors. The purposes of the Executive Order are to prescribe a uniform system for classifying, safeguarding and declassifying national security information, and to protect information critical to national security while also balancing an interest in an open government. Ms. Murray will define some of the terms and phrases important in understanding original classification, including, but not limited to, "national security information," "information," and other terms and phrases necessary and helpful to the jury's understanding of the process of original classification. Ms. Murray also will testify that the original classification authority is non-delegable, and that the uniform system of classification would fail if others could make their own independent determination of the proper classification of information.

(U) Ms. Murray also will testify regarding what conditions must be met in order for information to be classified. By way of example only, these conditions include that: the information must be classified by an OCA, the information must be owned by, produced by or for, or under the control of the U.S. Government, the information must relate to intelligence activities, and the unauthorized disclosure of information reasonably could be expected to cause damage, and the OCA can identify or describe that damage.

(U) Ms. Murray will testify about the different levels of classification. She will define and discuss what is "Confidential," "Secret," and "Top Secret" information, as well as "Sensitive Compartmented Information ("SCI") information. "Confidential" information is information that, if subject to unauthorized disclosure, can reasonably be expected to cause damage to the national security of the United States. "Secret" information is information that, if subject to unauthorized disclosure, can reasonably be expected to cause grave damage to the national security of the United States. "Top Secret" information is information that, if subject to unauthorized disclosure, can reasonably be expected to cause exceptionally grave damage to the national security of the United States.

Ms. Murray will describe some of the factors that go into a classification decision. These factors can include, but are not limited to, foreign government information, intelligence activities to include sources, methods, and means, resource commitment or investment, compromise, safety, equity considerations of partners, and foreign relations. Ms. Murray will explain how

UNCLASSIFIED//FOR OFFICIAL USE ONLY

documents containing classified information are marked, including header and footer markings, portion markings, and the methods required to disseminate classified information.

(U) In addition, she will define and discuss markings and acronyms that may appear on certain documents, such as "COMINT," "FOUO," and other similar types of markings. Ms. Murray also will testify about other aspects of the Executive Order, such as what to do if there is significant doubt about the need to classify information (i.e. not classify) or the appropriate level of classification (i.e. adopt the lower level of classification), or inappropriate reasons for classification (e.g. concealment of violations of law, prevention of agency embarrassment, etc.). In addition, Ms. Murray will testify about the procedures to review classification decisions to determine if classifications need to be modified.

(U) Ms. Murray will testify about the general restrictions on access to classified information, including the requirements of appropriate security clearances, non-disclosure agreements, and the "need to know." She will testify about how NSA is a closed system, and each NSA employee's responsibility to safeguard classified information, including the tools and guides available to each and every employee to assist them in making an initial classification when creating a document. She will testify that no NSA employee may remove classified information from NSA without proper authorization.

(U) Based upon her training and experience, as a twenty-eight year NSA employee and as an OCA, and consistent with the classification guide(s) relevant to the documents and information at issue in this case, Ms. Murray will testify as follows:

1. "Collections Sites" Document

(U//FOUO) This document is classified overall as "Top Secret," because the information contained therein reveals physical locations of collection activity, including undeclared and potentially single source collection activity; the forward deployment of employees; and classified technical details of NSA capabilities to a degree that adversaries could design or employ countermeasures. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

2. "Trial and Testing" Document

(U//FOUO) This document is classified overall as "Top Secret," because the information contained therein reveals classified technical details of NSA capabilities to a degree that adversaries could design or employ countermeasures. In addition, the document contains "Secret" information, because the information contained therein reveals classified technical details of NSA capabilities, but not to a degree that adversaries could design or employ countermeasures. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

3. "Volume is our Friend" Document

UNCLASSIFIED//FOR OFFICIAL USE ONLY

UNCLASSIFIED//FOR OFFICIAL USE ONLY

(U//FOUO) This document is classified overall as "Top Secret," because the information contained therein reveals classified technical details of NSA capabilities to a degree that adversaries could design or employ countermeasures. In addition, the document contains "Secret" information, because the information contained therein reveals classified technical details of NSA capabilities, but not to a degree that adversaries could design or employ countermeasures, and classified budget information that demonstrates a specific level of effort and commitment by NSA. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

4. "What a Success" Document

(U//FOUO) This document is classified overall as "Secret," because the information contained therein reveals classified technical details of NSA capabilities and a specific level of effort and commitment by NSA, but not to a degree that adversaries could design or employ countermeasures. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

5. "Regular Meetings" Document

(U//FOUO) This document is classified overall as "Secret," because the information contained therein reveals covered operations and sources and methods, but not to a degree that adversaries could design or employ countermeasures. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

6. "Shoestring Budget" Document

(U//FOUO) This document is classified overall as "Top Secret," because the information contained therein reveals classified technical details of NSA capabilities to a degree that adversaries could design or employ countermeasures. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

7. "BAG" Document

(U//FOUO) This document is classified overall as "Confidential," because the information contained therein reveals a connection between classified technical details of NSA and a specific program. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

8. "Buy vs. Make" Document

(U//FOUO) This document is classified overall as "Top Secret," because the information contained therein reveals classified technical details of NSA capabilities to a degree that adversaries could design or employ countermeasures. In addition, the document contains "Secret" information, because the information contained therein reveals classified technical

UNCLASSIFIED//FOR OFFICIAL USE ONLY

UNCLASSIFIED//FOR OFFICIAL USE ONLY

details of NSA capabilities, but not to a degree that adversaries could design or employ countermeasures, and classified budget information that demonstrates a specific level of effort and commitment by NSA. Finally, the document contains "Confidential" information, because the information contained therein reveals personnel strength and a specific level of effort and commitment by NSA. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

9. "9-11 Commission" Document

(U//FOUO) This document is classified overall as "Confidential," because the information contained therein reveals personnel strength and a specific level of effort and commitment by NSA. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

10. "TT Notes" Document

(U//FOUO) This document is classified overall as "Secret," because the information contained therein reveals classified budget information that demonstrates a specific level of effort and commitment by NSA. Finally, the document contains "Confidential" information, because the information contained therein demonstrates personnel strength and a specific level of effort and commitment by NSA. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

11. "Terrorism Threat" Document

(U//FOUO) This document is classified overall as "Secret," because the information contained therein reveals classified technical details of NSA capabilities, but not to a degree that adversaries could design or employ countermeasures, and classified budget information that reveals a specific level of effort and commitment by NSA. Finally, the document contains "Confidential" information, because the information contained therein reveals sources and methods associated with a specific program of NSA. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

12. "Note Card 1" Document

(U//FOUO) This document is classified overall as "Secret," because the information contained therein reveals classified budget information that demonstrates a specific level of effort and commitment by NSA. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

13. "Note Card 2" Document

(U//FOUO) This document is classified overall as "Secret," because the information contained therein reveals classified budget information that demonstrates a specific

UNCLASSIFIED//FOR OFFICIAL USE ONLY

UNCLASSIFIED//FOR OFFICIAL USE ONLY

level of effort and commitment by NSA. In addition, the classified information in this document appears in other "source" documents, and these documents are classified at a similar level.

(U//FOUO) The United States reserves the right to supplement this expert summary. You may schedule an appointment at the NSA to review Ms. Murray's classification review of the aforementioned documents.

Very truly yours,

By:



WILLIAM M. WELCH II
Senior Litigation Counsel
Criminal Division
United States Department of Justice



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

March 7, 2011

VIA EMAIL

James Wyda, Esq.
Federal Public Defender
Deborah Boardman, Esq.
Assistant Federal Public Defender
100 South Charles Street
BankAmerica Tower II, Ninth Floor
Baltimore, Maryland 21201

Re: United States v. Thomas Andrews Drake
Case No. 10 CR 00181 RDB

Dear Attorneys Wyda and Boardman:

This letter shall supplement the previous unclassified Rule 16(g) expert summary of Catherine Murray.

4. "What a Success" Document

(U//FOUO) This document is classified overall as "SECRET," because the information contained therein reveals classified technical details of NSA capabilities and a specific level of effort and commitment by NSA, but not to a degree that adversaries could design or employ countermeasures. More specifically, the combination of the cover terms for this network architecture implied a level of effort, scale, and scope by NSA, and a level of activity and commitment by NSA, to this network architecture such that the information was classified as "SECRET."

(U//FOUO) On July 30, 2010, the classification guide for this information was updated by NSA in accordance with the Executive Order, and NSA determined that this information no longer required the protection of classification. The information, however, was appropriately classified as "SECRET" through the time of the defendant's possession, which ended on November 28, 2007, and through the date of the indictment, April 14, 2010.

(U//FOUO) In addition, this document also discussed NSA efforts related to a malicious computer attack by an external actor or third party on a U.S. government computer system. This fact was classified as "SECRET//REL TO USA, FVEY." Additionally, the document included a specific cover term that had been assigned to this intrusion in order to protect the sensitive nature of the discovery and vulnerability to U.S. government computer networks. The fact that a

Attachment 2d
U.S. v. Drake

INFORMATION SECURITY OVERSIGHT OFFICE
NATIONAL ARCHIVES and RECORDS ADMINISTRATION
700 PENNSYLVANIA AVENUE, NW, ROOM 100 WASHINGTON, DC 20408-0001
www.archives.gov/isoo



December 26, 2012

J. William Leonard
P.O. Box 2355
Leonardtown, MD 20650

VIA E-MAIL

Dear Mr. Leonard,

I am responding to your letter of July 30, 2011, in which you asked that I, in accordance with my assigned duties under Executive Order 13526, "Classified National Security Information" ("the Order"), consider and take action with regard to what you viewed as a violation of the Order. Specifically, you requested I "ascertain if employees of the United States Government, to include the National Security Agency (NSA) and the Department of Justice (DOJ), have willfully classified or continued the classification of information in violation of the Order" in the matter of *United States v. Thomas A. Drake*. I have concluded my inquiries into this matter, having consulted with the above-mentioned agencies, drawn upon the Order, its implementing Directive, and examined relevant portions of each agency's security regulations, and now share with you my findings and observations.

With regard to your complaint, I conclude that neither employees of the Department of Justice nor of the National Security Agency willfully classified or continued the classification of the "What a Wonderful Success" document in violation of the Order. I wish to note that your complaint suggests this was done "in the matter of *United States v. Thomas A. Drake*." I think it is important to point out that my process in addressing your complaint examined (and distinguished between) the classification of the document in its first instance and any continuation of its classification "in the matter of *United States v. Thomas A. Drake*." I find no violation in either case. In fact, as materials you provided with your complaint make clear, NSA discontinued the classification of the document in question and represented the same to the court "in the matter of *United States v. Thomas A. Drake*."

In examining the "What a Wonderful Success" document, I find that the NSA did not violate the Order's requirements for appropriately applying classification at document creation, nor did the agency violate the Order's expectation that information shall be declassified when it no longer meets the standards for classification. While my examination of the matter has led to my conclusion that the content and processing of the document fall within the standards and authority for classification under the Order and NSA regulations, that does not make them immune to opinions about how substantial the document's content may or may not be. I find, simply, that those opinions do not rise to the level of willful acts in violation of the Order. That said, such commentary on the culture of classification fits well in discussions of policy reform. In such fora, including the work of the Public Interest Declassification Board, your experience and observations would continue to be welcome.

Separate and apart from the specifics of the Drake matter, there are important aspects of the classification system worth noting in this larger discussion of the scope of classification guidance. As you are aware, section 1.1 of the Order grants both responsibility and latitude to Executive branch officials with original classification authority. These officials are the chief subject matter experts in government concerning information that could be damaging to national security if compromised or released in an unauthorized manner.

In light of this, section 2.2 of the Order directs officials with original classification authority to prepare classification guides to facilitate the proper and uniform classification of information. A well-constructed classification guide can foster consistency and accuracy throughout a very large agency, can impart direction concerning the duration of classification, and ensure that information is properly identified and afforded necessary

Attachment 2e
U.S. v. Drake

protections. Throughout the Executive branch, officials strive to impart proper classification guidance that is accurate, consistent, and easy to adopt in workforces that operates under tight time constraints. It seems quite clear, however, that the system would benefit from greater attention of senior officials in ensuring that their guidance applies classification only to information that clearly meets all classification standards in section 1.1 of the Order. For emphasis, I draw specific attention to language in Section 1.1 (a)(4) "... that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security..." and, 1.1 (b) "If there is significant doubt about the need to classify information, it shall not be classified."

I have a few observations about these matters in the context in which you raised them, namely, the matter of the *United States v Thomas A. Drake*. I have no basis to comment about the disposition of the case in the courts; that is not my purview. The conduct of the case did, however, bring to light actions and behaviors I will comment on briefly, for emphasis. The Order does not grant any individual the authority to safeguard classified information in a manner that is contrary to what the Order, its implementing directive, or an agency's security regulations require. The Order does not grant authorized holders of classified information the authority to make their own decisions concerning the classification status of that information. Furthermore, individuals are provided the means to challenge classification either formally or informally. Section 1.8 of the Order provides all authorized holders of classified information with the authority to issue challenges to classification actions. It explicitly states that individuals are "encouraged and expected" to challenge the classification status of the information through appropriate channels, and every agency is required to implement procedures whereby any authorized holder may issue a challenge without fear of retribution. I know, through the work of this Office, that the National Security Agency is well practiced in the Order's requirements concerning classification challenges. It is my understanding that Mr. Drake made no attempts to challenge the classification status of the information in question.

I note that neither version of the Order in force during the Drake case's time frame [Executive Order 13526 (29 December 2009) and its predecessor Executive Order 12958 (17 April 1995)] provides much in the way of guidance or direction, on its own, to influence the use of classified information in building prosecutions such as this. In general, the Department of Justice defers to the judgment of the "victim" agency as to what constitutes classified information. In building a case, victim agencies, for their part, tend to provide evidence that they deem sufficient to obtain a conviction with the hopes of protecting their most sensitive information and activities from release during court proceedings. The Directive (32 CFR 2001.48) requires only that agency heads "use established procedures to ensure coordination with" the Department of Justice and other counsel. All of this assumes that other influences will be at work to pursue only worthwhile prosecutions, but one interpretation of the Drake case outcome might suggest that this "coordination" was not sufficient. I would welcome your thoughts on whether there is role for policy to provide clearer, more effective guidance in the manner in which such cases are built.

I thank you for your diligent, care-filled observations and comments concerning classification matters. You continue to serve the public well by remaining engaged in the dialogue around the use of secrecy by the government. I can assure you that we take these viewpoints to heart.

Sincerely,

<Signed>

JOHN P. FITZPATRICK
Director, Information Security Oversight Office



From: Bill Leonard
Date: December 31, 2012, 4:10:23 PM EST
To: John Fitzpatrick
Subject: Re: Complaint

John:

Thanks very much for your [reply](#). While I appreciate the time, effort and consideration you put into this matter, I am nonetheless disappointed in the substance of your reply. Some of my final thoughts on this matter include:

1. It took almost one and a half years to respond to a rather straightforward yet serious [request](#). I recognize the need for coordination; nonetheless, irrespective of the nature of the reply, responsiveness is essential for a system to be able to be self-correcting.
2. As we discussed when we met in August 2011, I have never taken real issue with the classification of the "What a Success" document in the first instance, which although improper was, by all appearances, a reflexive rather than willful act. Nor did I take issue with its eventual "declassification," which I regarded as NSA simply coming to the proper conclusion, albeit belatedly. What I did and continue to take issue with is that in between those events, senior officials of both the NSA and DoJ made a number of deliberate decisions to use the supposed classified nature of that document as the basis for a criminal investigation of Thomas Drake as well as the basis for a subsequent felony indictment and criminal prosecution. Even after NSA recognized that the document did not meet the standards for continued classification and made the unprecedented decision to declassify an evidentiary document while an Espionage Act criminal prosecution was still pending, senior officials of both the NSA and DoJ still willfully persisted and made yet another deliberate decision to stand by the document's original classification status. I cannot imagine a clearer indication of willfulness on the part of senior government officials to "continue the classification of information in violation" of the governing order through numerous deliberate and collaborative decisions made over the course of years. Based upon my extensive experience, I find the provenance of this document's classification status to be unparalleled in the history of criminal prosecutions under the Espionage Act.
3. You ascribe the merits of my complaint as constituting a mere honest difference in opinion. However, this complaint is more than a question of the document failing to pass what I call the "guffaw test" (i.e. common sense). Rather, as I pointed out in my original complaint and yet you did not address, at the heart of this issue are matters of fact. In justifying the deliberate decision to represent during the Drake prosecution that the "What a Success" email was a legitimately classified document, NSA and DoJ officials did not cite some amorphous classification standard or classification guide - rather they made factual representations which simply were not true and, in one instance, inherently contradictory (i.e. "information contained therein **reveals ... a specific level** (emphasis

Attachment 25
U.S. v. Drake

added) of effort ..." and that the same information "**implied a level** (emphasis added) of effort ..."). Keep in mind that these determinations were not made on the fly by NSA and DoJ but were in fact deliberate representations made over a period of time and subsequently further qualified but never disavowed. They were intended to demonstrate that the document met the standards of classification that require the original classification authority to identify or describe the damage to national security that could reasonably be expected to result from the unauthorized disclosure. A familiarity with classification standards is not required to determine that these official representations were on their face factually incorrect when compared with a plain text reading of the "What a Success" email. All too often, representatives of the Executive branch believe all they need to do is simply assert classification rather than adhere to the president's own standards, as apparently was the situation in the Drake case. That attitude must change and I will continue to do all I can to help make it foster change.

4. You comment on the fact that the Order does not grant any individual the authority to handle classified information in a manner contrary to the Order and other pertinent regulations. While reference to alleged actions taken or not taken by Mr. Drake are gratuitous and have no bearing on the merits of my complaint, I nonetheless agree with your sentiment. However, allow me to add my own observations, not only as one of your predecessors but also as the only individual who has played an integral role for both defense teams in the only two Espionage Act prosecutions (Drake and AIPAC) not to result in either a conviction or a plea of guilty. In both instances (in which I provided my services pro bono) my decision to get involved was not to defend the actions of the accused but rather to defend the integrity of the classification system, a highly critical national security tool. I have long held that when government agencies fail to adhere to their responsibilities under the governing order and implementing directive, they in turn compromise their ability to hold cleared individuals accountable for their actions. Accountability is crucial to any system of controls and the fact that your determination in this case preserves an unbroken record in which no government official has ever been held accountable for abusing the classification system does not bode well for the prospect of real reform of the system. This phenomenon, the readily apparent inclusion in the Order of a feckless provision which infers that accountability cuts both ways has once again been proven to be a major source of why most informed observers both inside and outside the government recognize that the classification system remains dysfunctional due to rampant and unchecked over-classification. It is disappointing to note that a genuine opportunity to instill an authentic balance to the system has been forfeited in this instance.

As to your request for my recommendations as to the potential for clearer guidance when the classification status of information is integral to a criminal prosecution, I would recommend requiring coordination with an independent body such as the Interagency Security Classification Appeals Panel. In the two cases I referenced above, the fact that the government did not obtain a criminal conviction under the Espionage Act actually bode well for the integrity of the classification system -- otherwise, the perceived wisdom in the reflexive over-classification of information would have been codified in case law.

Finally, I stand ready to share my experiences and observations with the Public Interest Declassification Board and other fora as seen fit.

Thanks again for the reply, John. While I admire the job you do and the challenges you face, I obviously disagree with the content of your reply. Nonetheless, I am appreciative of the courtesy.

Best wishes for the New Year.

jwl

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, *

v. *

Criminal Action No. RDB 10-00181

THOMAS ANDREWS DRAKE, *

Defendant. *

* * * * *

MEMORANDUM ORDER

Presently pending before this Court is Defendant Thomas Andrews Drake's Motion for Relief from Protective Order (ECF No. 180). This motion requests that permission be given to the defense's expert witness, J. William Leonard, the former Director of the Information Security Oversight Office (ISOO), to disclose and discuss three unclassified documents which are subject to this Court's Protective Order (ECF No. 13) governing unclassified discovery. The three unclassified documents at issue are (a) the document charged in Count One of the Indictment, entitled "What a Success," (b) the government's November 29, 2010 expert witness disclosure, and (c) the government's March 7, 2011 expert witness disclosure. Mr. Leonard has indicated that he seeks to use these documents to have an open discussion about the government's actions in this case as they pertain to the Executive Branch's national security information classification system.

The government has opposed this motion on the grounds that both Defendant Drake and Mr. Leonard lack standing to bring this motion. Additionally, the government contends that Mr. Leonard should elect to obtain these documents by filing a Freedom of Information Act ("FOIA") request with the National Security Agency ("NSA"). Moreover,

*Attachment 29
U.S. v. Drake*

on July 26, 2012, the government notified this Court that similar FOIA requests had been approved for six other individuals, that Mr. Leonard's request, once filed, would be immediately approved and that he would be able to "use the documents as he pleases." Notice to the Court at 2, ECF No. 193. Despite the government's willingness to provide these documents to Mr. Leonard, it continues to request that this Court deny Defendant's Motion for Relief from Protective Order (ECF No. 180).

Nevertheless, the government's arguments in this case are inapposite. As is aptly stated in the Defendant's Reply (ECF No. 192), Mr. Leonard is bound by the terms of the Protective Order and is therefore required to seek relief from the order to discuss unclassified information. The explicit language of the Order provides that it applies to "experts or consultants assisting in the preparation, trial and appeal of this matter" and that "[t]he contents of the Protected Material . . . shall not be disclosed to any other individual or entity in any manner except to a photocopy service as agreed by the parties or *by further order of this Court.*" Protective Order, ECF No. 13 (emphasis added). Moreover, the government has repeatedly insisted that this Protective Order remains in force despite the resolution of this case. Additionally, a FOIA request would not have been sufficient to permit Mr. Leonard's public use of these documents. In fact, while a FOIA request would have permitted him to receive the documents in question, he would not have been permitted to discuss them as he would remain bound by this Court's Protective Order.

In light of the foregoing and adopting the Defendant's reasoning in its Reply (ECF No. 192), it is this 10th day of September 2012, ORDERED that Defendant Thomas Andrews Drake's Motion for Relief from Protective Order (ECF No. 180) is GRANTED.

Specifically, Defense expert witness, J. William Leonard, may disclose and discuss with the public the following unclassified documents: (a) the document charged in Count One of the Indictment, entitled "What a Success," except for NSA employees' names identified in the document, which shall be redacted and shall not be disclosed; (b) the government's November 29, 2010, expert witness disclosure; and (c) the government's March 7, 2011 expert witness disclosure. Additionally, Mr. Leonard is permitted to discuss his July 30, 2011 letter complaint to John P. Fitzgerald, Director of ISOO.

The Clerk of the Court transmit copies of this Memorandum Order to Counsel.

/s/ Richard D. Bennett
Richard D. Bennett
United States District Judge

How Classification Abuse Leads to Manipulation of UCMJ Process

(Unpublished Op-ed, August 2014)

When used properly, the system to classify national security information can protect service members from harm by denying information to the enemy on the battlefield. In the hands of calculating superiors willing to undermine the system's integrity, classification can be used to manipulate the military justice process and deny service members the due process to which they are entitled. Such was the case in a special court-martial of former Marine Captain James Clement who faced charges, which were subsequently dismissed, arising out of a July 2011 operation in Helmand Province, Afghanistan during which four Marines were videoed urinating on enemy corpses.

The use of classification in this case was problematic from the very beginning. With legal counsel for the Commandant of the Marine Corps taking the lead, unofficial images depicting mistreatment of corpses and other violations of the law of armed conflict were classified notwithstanding President Obama's governing executive order which clearly prohibits the use of the classification system to conceal illegal or embarrassing conduct. Additionally, use of classification in this instance was contrary to the clear precedent that was established in the wake of the Abu Ghraib torture and prisoner abuse scandal. In that instance, as director of the Information Security Oversight Office, I was instrumental in getting the Department of Defense to acknowledge that classification of the Article 15-6 Investigation into the abuse was inappropriate and that corrective action was required to ensure that similar misuse of the classification system did not occur in the future. Furthermore, as recently as five years ago, all three branches of our Federal government evidently believed that the use of classification to conceal similar images was inappropriate. Specifically, facing a court order under the Freedom of Information Act directing the release of a trove of undisclosed images of abuse at Abu Ghraib and elsewhere, Congress felt compelled to pass legislation in October 2009 giving the Pentagon special authority to ban the release of these or similar images without the use of classification.

After a lengthy internal debate within the Marine Corps, the preponderance of the images as well as most of the attendant command and criminal investigations into the circumstances surrounding the urination video, were declassified. Not declassified were a number of critical exculpatory sworn interviews which Captain Clement's defense team sought to use in his Article 32 hearing. However, the prosecution objected claiming unavailability under the military's rules for the use of classified information in UCMJ proceedings, thus denying Captain Clement the benefit of critical testimony. His counsel was further advised that critical portions of the testimony at another Marine's Article 32 hearing were classified and unavailable for Captain Clement's defense despite the fact that the hearing itself was public. Notwithstanding having the requisite security clearances and official access to the actual statements, Captain Clement's defense counsel was never advised as to why the statements were classified; a clear violation of President Obama's order that information must be uniformly and conspicuously marked so as to leave no doubt about the classified status. Thus, exculpatory sworn statements could not be used, not even as the basis for interviews of other witnesses. I was thus brought on as a pro-bono expert consultant for the defense in order to assist in compelling the government to adhere to its own responsibilities under the classification system. Shortly thereafter, the criminal charges against Captain Clement were dismissed and instead he was subjected to an administrative proceeding.

While I was never provided access to the purportedly classified statements critical to Captain Clement's defense, due to the Marine Corps' ineptitude in applying classification and declassification decisions, it readily became apparent to me the specific information the government was claiming to be classified. Specifically, a section of the unclassified version of the command investigation report details what another Marine back at the combat operations center was able to observe of the ill-fated operation in real-time. The investigative report then goes on to state in the very next paragraph "that (original statement is classified technology SECRET//NOFORN) can provide persistent video surveillance of an area." Thus, exculpatory sworn statements which contained references to how the combat operations center was able to maintain real-time video surveillance on events in the field were placed beyond defense counsel's use based upon the bogus claim by the government that reference to such surveillance platforms was classified.

Evidence of the falsity of claims to legitimate classification in the interest of national security is contained in the unclassified version of the command investigation report itself which includes a number of references to the surveillance platforms by name (i.e. "Aerostat" and "ScanEagle"). For example, while the name of the platform was redacted from the body of the report, the enclosure referenced when discussing the unnamed platform was not removed from the report. This enclosure is a fact sheet prepared by the defense contractor Raytheon and approved by the Department of Defense for public release. It provides details of the "Rapid Aerostat Initial Deployment (RAID) system and its sensor suites (EO/IF sensor, radar, flash and acoustic detectors) (that) provide unprecedented elevated persistent surveillance (EPS)". It goes on to describe the Aerostat's capabilities and how it is deployed in-theater in far greater detail than any of the information contained in the purportedly classified statements. Furthermore, unclassified statements included in the command investigation report include references, for example, as to how the Aerostat is used to counter indirect fire and how ScanEagle (which is actually an unclassified commercial drone) is used to conduct battle damage assessments. In addition, the classification guide eventually cited by the government as justification for classification does not specifically address these surveillance platforms. Finally, by simply Googling "Aerostat" or "ScanEagle" and "Afghanistan" anyone, to include the enemy, can access numerous articles, photographs and videos released by Department of Defense elements as to how these two surveillance platforms are employed in-theater.

Clearly, ineptitude permeated almost every classification and declassification decision associated with this investigation. For example, an official in the office of the Marine's Deputy Commandant for Plans, Policies and Operations (DC, PP&O) stated in an email that the DC, PP&O never even reviewed the video which was cited more than any other video in the command investigation report and which contained evidence of multiple unlawful acts to include mistreatment of enemy corpses; thus the video with the most inflammatory images second to urination video was never "considered in his classification decision." This despite the fact that the purported rationale for classifying the images and videos in the first place was that their dissemination could encourage attacks against service members in-theater.

However, more than ineptitude was entailed when classification was invoked in this matter. For example, the legal advisor to the Consolidated Disposition Authority in Captain Clement's case indicated in an email that direction was given to trial counsel "to let those DC's (defense counsel) know who have been extended the NJP (non-judicial punishment) deal pre-preferred that if they allow this investigation to go unclass (i.e. wait until the investigation is declassified), their clients will probably be looking at preferred

charges. This needs to be moving and right now the only way to move this is through the pre-preferred NJP deals. That will no longer be the case once the investigation becomes unclassified." Clearly, Marines were being pressured to accept plea deals before an investigation that contained exculpatory information and which never should have been classified in the first place became declassified.

Finally, the Commandant of the Marine Corps himself gave very clear insight into the real intent for the classification of these images and the attendant investigation when he addressed fellow Marines in June 2012 at the Marine Barracks in Washington, DC during his "Heritage Tour." When specifically addressing the issues of images associated with the urination video, the Commandant does not bother to mention even in passing the ostensible reasons why the Marine Corps initially classified these images. He did not, for example, say that the Marine's conduct and the public dissemination of related images jeopardized the lives of fellow Marines by potentially inciting violence. He did not say that the dissemination of the images undermined the military objectives of the war or potentially damaged foreign relations. Rather, in talking about all the various images of the inevitable consequences of war that the American public is exposed to, he states: "But we are right smack in the middle of it. We're lumped right in there with everybody. I don't want to be lumped in with anybody else. We are United States Marines. We're different. Our DNA is different. I don't want to be lumped in with anyone else. We've got issues; we'll solve it. We'll take care of it ourselves. And we will police ourselves..." Thus, from the Commandant's perspective, the ability to hold others accountable ends with him. The Congress and the public, for example, have no right to the images and other information necessary to assess not only his accountability but the accountability of society as a whole in acknowledging responsibility for some of the inevitable consequences of repeatedly sending the same men and women off to war for more than a decade.

Classification is a critical tool that is intended to be used for the benefit, not detriment, of service members. Yet, the experience of Captain Clement where the classification system is deliberately abused in order to manipulate the UCMJ process is not unique. While military rules governing the use of classified information in UCMJ procedures require trial counsel to first ensure that purportedly classified information relevant to the case is properly classified in the first place, the mechanisms to ensure this is done properly are woefully inadequate and lacking the impartiality required in the interest of justice. Thus, Congress must step in and act. For example, the UCMJ could be revised in order to provide avenues for the independent and impartial review of purported classified information integral to an UCMJ action, exercised perhaps by an entity such as the already existing Public Interest Declassification Board which has members appointed by both the president and congressional leadership. Such a reform is essential if the classification system is to continue to serve as the critical national security tool it is intended to be rather than a trump action exercised at the whim military superiors.

J. William Leonard was Director of the Information Security Oversight Office from 2002-2008 and prior to that served as the Deputy Assistant Secretary of Defense (Security & Information Operations) in the Clinton and Bush administrations.

The New York Times

Official Backs Marines' Move to Classify Photos of Forces With Taliban Bodies

By CHARLIE SAVAGE JUNE 10, 2014

WASHINGTON — In an apparent expansion of the government's secrecy powers, the top official in charge of the classification system has decided that it was legitimate for the Marines to classify photographs that showed American forces posing with corpses of Taliban fighters in Afghanistan.

President Obama's executive order governing secrecy bars use of the classification system to cover up illegal or embarrassing conduct. But the official, John P. Fitzpatrick, the director of the Information Security Oversight Office, accepted the Marines' rationale for classifying the photographs: that their dissemination could encourage attacks against troops.

Mr. Fitzpatrick laid out his conclusion in a May 30 letter to a Marine lawyer who had filed a whistle-blower complaint saying that the secrecy violated the executive order. It could be an important precedent for allowing the military to keep future war-zone photographs depicting abuses by American soldiers hidden from the public.

The decision stands in contrast to the government's position in a legal fight over hundreds of photographs depicting the abuse of detainees in Iraq, which the American Civil Liberties Union sought in a long-running Freedom of Information Act lawsuit.

In that case, military officials raised similar concerns that disseminating the photographs could cause significant harm, provoking attacks on forces in the war zone. But neither the Bush nor the Obama administration claimed they were classified. Instead, Congress passed a special law in 2009 allowing the secretary of defense to block the photographs' release.

J. William Leonard, a former director of the information office, called the move "a significant and disturbing shift" in the government's secrecy policy.

"As recently as five years ago, all three branches of government agreed that the executive did not have power to classify such images," Mr. Leonard said.

Mr. Fitzpatrick said in an email that his decision did not amount to a broad new

Attachment 3b
marine court-martial

executive branch policy, and that questions about classifying war-zone photographs showing wrongdoing by American troops had to be evaluated on a case-by-case basis.

“Because a decision was found to be permissible in one instance does not require it to apply in all, or even in any other instance(s),” he wrote. “In the U.S.M.C. matter, the temporal nature of the decision as relates to a specific set of circumstances in that threat environment at that point in time is key.”

The White House declined to comment on whether it agreed with Mr. Fitzpatrick’s interpretation of Mr. Obama’s executive order.

The dispute traces back to January 2012, when [a video was posted](#) online showing four Marines urinating on three dead Taliban fighters. A military investigator obtained several dozen other so-called trophy images, which were not made public, showing troops posing with corpses.

The Marines decided to classify the photographs, along with other materials gathered in the investigation. But several military officers argued that there was no legal basis for doing so. Among them was Maj. James Weirick, a Marine lawyer who was advising the general overseeing the investigation. Major Weirick later filed whistle-blower complaints about the case, making several allegations, among them that the [classification decision was illegal](#). Mr. Fitzpatrick handled that question and concluded that the Marines’ rationale for classifying the photographs fell within the rules.

While Mr. Obama’s executive order explicitly bars the use of classification to prevent the public from learning about a criminal or embarrassing act, Mr. Fitzpatrick pointed in his email to another section that allows information related to military operations to be classified, saying that it implicitly encompassed “force protection” concerns.

“That reaction to the material would make coalition forces vulnerable, perhaps even to actions by Afghan forces fighting with the coalition, was an immediate concern,” he wrote, calling the classification of the photographs “a tactically oriented decision meant to prevent immediate backlash/harm.”

The Marines later asked for a second opinion from the United States Central Command, and the photos were declassified, although they have not been published.

Major Weirick said he was disappointed with Mr. Fitzpatrick’s decision, which was first reported on Tuesday on the [Secrecy News blog](#). “That would allow every bad thing to be covered up,” he said.

In a related twist, the dispute brought to light a [Central Command regulation](#) that says information about past operations is to be kept unclassified if it meets

several criteria, including that it “does not embarrass any coalition members.”

Asked on Tuesday how that regulation squared with the executive order’s prohibition on classifying information because it is embarrassing, a military spokesman said he was researching the question and had no immediate answer.

A version of this article appears in print on June 11, 2014, on page A13 of the New York edition with the headline: Official Backs Marines’ Move to Classify Photos of Forces With Taliban Bodies. Order Reprints | Today’s Paper | Subscribe

METHODOLOGY FOR DETERMINING APPROPRIATENESS OF AN ORIGINAL CLASSIFICATION DECISION

- Who made the decision?
 - Was the individual an original classification authority (OCA)? (§1.1 (a) (1), Order*)
 - Was the individual properly delegated the authority?
 - By the President (§1.3 (a), Order); or
 - If Top Secret, by an official designated by the President (§1.3 (a) (2), Order)
 - If Secret or Confidential by an official designated by the President pursuant to §1.3 (a) (2), Order or by a Top Secret OCA designated pursuant to §1.3 (c) (2), Order (§1.3 (a) (3), Order)
 - Was the delegation in writing; did it identify the official by name or title? (§1.3 (c) (4), Order)
- Is the information owned by, produced by or for, or is under the control of the US Government? (§1.1 (2), Order)
- Does the information fall within one of more of prescribed categories of § 1.4, Order?
 - military plans, weapons systems, or operations
 - foreign government information
 - intelligence activities (including covert action), intelligence sources or methods, or cryptology
 - foreign relations or foreign activities of the United States, including confidential sources
 - scientific, technological, or economic matters relating to the national security
 - United States Government programs for safeguarding nuclear materials or facilities
 - vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security
 - the development, production, or use weapons of mass destruction
- Can the OCA identify or describe damage to national security that could be expected in the event of unauthorized disclosure? (§1.1 (4), Order)
 - If Top Secret, can its unauthorized disclosure be reasonably expected to cause exceptionally grave damage to the national security?
 - If Secret, can its unauthorized disclosure be reasonably expected to cause serious damage to the national security?
 - If Confidential, can its unauthorized disclosure be reasonably expected to cause damage to the national security?

* Executive Order 13526, "Classified National Security Information"

- Is the information subject to prohibitions or limitations with respect to classification? (§1.7, Order)
 - Is the information classified in order to conceal violations of law, inefficiency or administrative error?
 - Is the information classified in order to prevent embarrassment to a person, organization, or agency?
 - Is the information classified in order to restrain competition?
 - Is the information classified in order to prevent or delay the release of information that does not require protection in the interest of national security?
 - Does the information relate to basic scientific research not clearly related to national security?
 - If the information had been declassified, released to the public under proper authority, and then reclassified:
 - Was the reclassification action taken under the personal authority of the agency head based on a document-by-document determination by the agency that reclassification is required to prevent significant and demonstrable damage to the national security?
 - Was that official's determination in writing?
 - Was the information reasonably recoverable without bringing undo attention to the information?
 - Was the Assistant to the President for National Security Affairs (National Security Advisor) and the Director of the Information Security Oversight Office notified of the reclassification action?
 - If the information had not previously been disclosed to the public under proper authority but was classified or reclassified after receipt of an access request:
 - Does the classification meet the requirements of this order (to include the other elements of this methodology)?
 - Was it accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official?
 - If the classification decision addresses items of information that are individually unclassified but have been classified by compilation or aggregation:
 - Does the compilation reveal an additional association or relationship that meets the standards for classification under this order?
 - Was such a determination made by an OCA in accordance with the other elements of this methodology?
 - Is the additional association or relationship not otherwise revealed in the individual items of information?

METHODOLOGY FOR DETERMINING APPROPRIATENESS OF A DERIVATIVE CLASSIFICATION DECISION

- Who made the decision?
 - Does the decision relate to the reproduction, extract or summation of classified information, either from a source document or as directed by a classification guide? (§2.1 (a), Order*)
 - Is the person who applied the derivative classification markings identified in a manner apparent for each derivative classification action? (§2.1 (b) (1), Order)
 - Is the decision directly attributable to and does it *accurately* reflect an appropriate original classification decision by an OCA, to include the level and duration of classification? (§2.1 (b) (2), Order)
- Is the information owned by, produced by or for, or is under the control of the US Government? (§1.1 (2), Order)
- Does the information fall within one of more of prescribed categories of § 1.4, Order?
 - military plans, weapons systems, or operations
 - foreign government information
 - intelligence activities (including covert action), intelligence sources or methods, or cryptology
 - foreign relations or foreign activities of the United States, including confidential sources
 - scientific, technological, or economic matters relating to the national security
 - United States Government programs for safeguarding nuclear materials or facilities
 - vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security
 - the development, production, or use weapons of mass destruction
- Can damage to national security be expected in the event of unauthorized disclosure? (§1.1 (4), Order)
 - If Top Secret, can its unauthorized disclosure be reasonably expected to cause exceptionally grave damage to the national security?
 - If Secret, can its unauthorized disclosure be reasonably expected to cause serious damage to the national security?
 - If Confidential, can its unauthorized disclosure be reasonably expected to cause damage to the national security?
- Is the information subject to prohibitions or limitations with respect to classification? (§1.7, Order)
 - Is the information classified in order to conceal violations of law, inefficiency or administrative error?

* Executive Order 13526, "Classified National Security Information"

- Is the information classified in order to prevent embarrassment to a person, organization, or agency?
- Is the information classified in order to restrain competition?
- Is the information classified in order to prevent or delay the release of information that does not require protection in the interest of national security?
- Does the information relate to basic scientific research not clearly related to national security?
- If the information had been declassified, released to the public under proper authority, and then reclassified:
 - Was the reclassification action taken under the personal authority of the agency head based on a document-by-document determination by the agency that reclassification is required to prevent significant and demonstrable damage to the national security?
 - Was that official's determination in writing?
 - Was the information reasonably recoverable without bringing undo attention to the information?
 - Was the Assistant to the President for National Security Affairs (National Security Advisor) and the Director of the Information Security Oversight Office notified of the reclassification action?
- If the information had not previously been disclosed to the public under proper authority but was classified or reclassified after receipt of an access request:
 - Does the classification meet the requirements of this order (to include the other elements of this methodology)?
 - Was it accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official?
- If the classification decision addresses items of information that are individually unclassified but have been classified by compilation or aggregation:
 - Does the compilation reveal an additional association or relationship that meets the standards for classification under this order?
 - Was such a determination made by an OCA in accordance with the other elements of this methodology?
 - Is the additional association or relationship not otherwise revealed in the individual items of information?

J. WILLIAM LEONARD

Mr. Leonard currently serves as the chief operating officer of a private nonprofit dedicated to the advancement of human rights.

Mr. Leonard retired from 34 years of Federal Service (to include 12 years as a member of the Senior Executive Service) in 2008. His most recent Federal position was as the Director of the Information Security Oversight Office (ISOO). As such, he was responsible to the President of the United States for policy oversight of the Government-wide security classification system and the National Industrial Security Program (NISP). ISOO receives its policy and program guidance from the National Security Council (NSC) and is an administrative component of the National Archives.

Before his most recent Federal appointment, Mr. Leonard served in the Office of the Deputy Assistant Secretary of Defense (Security and Information Operations) as both the Deputy Assistant Secretary as well as the Principal Director. As such, he was responsible for programmatic and technical issues relating to the DoD's information assurance, critical infrastructure protection, counterintelligence, security and information operations programs.

Prior to coming to the staff of the Secretary of Defense in 1996 as Director of Security Programs, Mr. Leonard served as an Assistant Deputy Director at the Defense Investigative Service (DIS). In that capacity, he was responsible for a wide range of policy and operational matters pertaining to the DOD's administration of the NISP, both within the U.S. and overseas. Mr. Leonard was instrumental in the establishment of the DIS Counterintelligence Office.

From 1989-1992, Mr. Leonard served as the Director, Office of Industrial Security International in Brussels, Belgium. Previous assignments included additional tours at Headquarters, DIS, as well as serving as an Instructor at the Defense Industrial Security Institute in Richmond, VA. He was also a Command Security Officer at a DoD activity, as well as an Industrial Security Representative in the New York City area. He joined the Federal service in 1973.

Mr. Leonard holds a Bachelor of Arts degree in History from St. John's University in New York City and a Master of Arts degree in International Relations from Boston University. Noteworthy awards that he has received include the DIS Exceptional Service Award (1987 & 1996), the DIS Meritorious Service Award (1989 & 1993), the Office of the Secretary of Defense Medal for Meritorious Civilian Service (2000), and the Department of Defense Medal for Distinguished Civilian Service (2001 & 2002, with Bronze Palm). In 2002, the President conferred upon Mr. Leonard the rank of Meritorious Executive.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – “Truth in Testimony”
Required by House Rule XI, Clause 2(g)(5)

Name: J. William Leonard

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

NONE

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

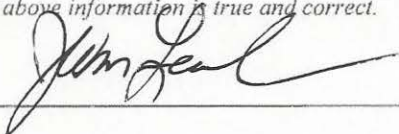
NONE - I am representing myself as a public citizen only.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

NONE

I certify that the above information is true and correct.

Signature:



Date:

12-4-16
