IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 12-231 (RC)**
	:	
v.	:	
	:	
JAMES F. HITSELBERGER,	:	
	:	
Defendant.	:	

GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS TANGIBLE EVIDENCE SEIZED FOLLOWING UNLAWFUL STOP AND SEARCH OF BACKPACK AND DEFENDANT'S MOTION TO SUPPRESS TANGIBLE EVIDENCE SEIZED FOLLOWING EXECUTION OF COMAMND AUTHORIZATION

The United States of America, through its undersigned attorneys, offers the following arguments and authorities and any other such arguments and authorities that may be offered at a hearing on this matter.

I. Background

A. Factual Background

In June 2011, the defendant, James Hitselberger accepted a position as a linguist with Global Linguist Solutions (GLS), a government contractor headquartered in Reston, Virginia. Hitselberger was assigned to be an Arabic linguist at the Naval Support Activity -- Bahrain (hereinafter "Naval Base").[1] Before leaving for Bahrain, Hitselberger went through two weeks of training at GLS' Reston office, where he received instruction on the proper handling of classified and sensitive material. He received further guidance and training regarding the proper handling of classified materials in August and September 2011. Hitselberger initially received

[1] Naval Support Activity -- Bahrain is located in the Kingdom of Bahrain, just east of Saudi Arabia, and is the home to over 4,000 United States military personnel. Several elements of the United States armed forces are based there, including the Navy's Fifth Fleet and the Joint Special Operations Task Force – Gulf Cooperation Council (JSOTF-GCC).

an interim Secret level clearance which became permanent in January 2012.[2] However, he never became an authorized courier of classified information and thus could not handle classified materials outside of an approved secure facility.

In September 2011, Hitselberger arrived in Bahrain. He was assigned to work for the Joint Special Operations Task Force (JSOTF), Naval Special Warfare Unit Three (NSWU-3). NSWU-3 conducts such missions as unconventional warfare, training, direct action, combating terrorism, and special reconnaissance. NSWU-3 relied on Hitselberger's expertise in the Arabic language and sent raw data to him regularly for translation. Through this work, Hitselberger obtained intimate knowledge of sensitive source operations, including the true names and addresses of sources. While in Bahrain, he received additional training and regular reminders concerning the proper storage and handling of classified information.

During his time in Bahrain, Hitselberger both lived and worked on the Naval Base. The Naval Base is located in a part of the world where the threat level to U.S. persons and interests is high. A heavily armed Naval Security Force (NSF) guards the facility 24 hours a day, and members of the Force are present throughout the Base. Hitselberger worked out of the JSOTF work spaces, which were located in a warehouse called Bay 4, situated on the southwest side of the Navy Base; and he lived in the Navy Gateway Inn and Suites, which was situated approximately 150 yards away from Bay 4 on the northeast side of the Naval Base. The Naval Base had four entrances, two of which – the Pedestrian Gate and the Banz Gate -- were

[2] Pursuant to Executive Order No. 13526 (December 29, 2009), there are three levels of classified information: Confidential, Secret, and Top Secret. The designation "Confidential" is applied to information, the unauthorized disclosure of which could reasonably be expected to cause damage to national security; the designation "Secret" is applied to information, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security; and the designation "Top Secret" is applied to information, the unauthorized disclosure of which could reasonably be expected to cause exceptionally grave damage to the national security. Information is classified by an individual known as an original classification authority (OCA) who has been delegated the power to determine that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security.

accessible by pedestrians or bicyclists. The other two entrances were only open to vehicle traffic. Hitselberger did not own or use a vehicle while working in Bahrain, but he did have a bicycle.

At the Pedestrian Gate there was a guarded post and a turnstile that one passed through each time he entered or exited the base. At the Banz Gate there was also a guarded post and turnstile through which pedestrians would enter and exit, and a small gate through which bicyclists would pass. During the seven months that Hitselberger lived and worked at the Naval Base (and still today), large white signs were posted at both the Pedestrian Gate and the Banz Gate that read:

WARNING
US NAVY PROPERTY
AUTHORIZED PERSONNEL ONLY
AUTHORIZED ENTRY ONTO
THIS INSTALLATION CONSTITUTES
CONSENT TO SEARCH OF
PERSONNEL AND THE PROPERTY
UNDER THEIR CONTROL

See Exhibit1 (Pedestrian Gate photos) and Exhibit 2 (Banz Gate photos). The signs measured about 2 and ½ by 3 feet and bore lettering that measured about 2 inches.

Both a taxi stand and a street called "American Alley"[3] were located just beyond the Pedestrian Gate. Hitselberger was known to frequent the taxi stand on a regular basis. While speaking to Naval Criminal Investigative Service (NCIS) Special Agents on April 12, 2012, Hitselberger stated that he visited the taxi stand in the evenings to practice his Arabic.

B. The Events Leading Up To The Stop And Search Of The Defendant

On the morning of April 11, 2012, Hitselberger was working with other linguists and two of his JSOTF supervisors in a Restricted Access Area (RAA). This was a structure within the

[3] "American Alley" is a street located beyond the Pedestrian Gate where a number of American fast-food chain restaurants and shops are located. Hitselberger was known to frequent both the taxi stand and American Alley.

JSOTF work spaces inside Bay 4 that was approved for the processing and handling of classified information up to the Secret level. There was a cipher lock on its reinforced door, and the classified hard drives used in the RAA were stored in a locked vault.

Around 11:15 a.m., everyone took a break. Hitselberger asked his supervisor Master Sergeant General (MSG) Dain Christensen if he could check his email on Christensen's computer. Hitselberger then tried to sign onto his Secret Internet Protocol Router Network (SIPRnet) account, which was located on a secure, Secret level computer system. He was unable to do so because Christensen was logged in, so he asked Christensen to log off. Christensen confirmed that Hitselberger knew he was signing onto his SIPRnet account, to which Hitselberger confirmed he did. Hitselbeger then signed onto his SIPRnet account. Two of his supervisors, Christensen and MSG Holden, observed Hitselberger viewing JSOTF Situation Reports (SITREPs), which were classified Secret. They also saw Hitselberger print multiple pages of Secret documents from a Secret printer. Christensen and Holden then observed Hitselberger take the classified documents from the printer, fold them, and place them into an Arabic-English Dictionary, which he then put into his backpack. Christensen could see the footer of a document that read "**SECRET NOFORN**" sticking out from the dictionary. Hitselberger proceeded to leave the RAA. As he was leaving, he did not indicate where he was going or make any reference to the documents that he had just printed and stored in his backpack. As noted above, Hitselberger did not have the requisite authority to remove classified documents from the RAA. Christensen and Holden knew that Hitselberger's backpack was not an authorized courier bag which could properly be used to transport classified information.

After witnessing the event, Holden immediately notified his commanding officer, Captain Brendan Hering, who was also in the RAA at the time. Holden and Hering left the RAA to

follow Hitselberger. As they were following Hitselberger, Holden told Hering what he had just observed. Holden and Hering stopped Hitselberger near a picnic table outside of the Bay 4 building where the RAA was located. They told Hitselberger that they needed to see what was in his bag and to produce the documents that he had just printed. Hitselberger first removed only one classified document from inside the dictionary. When Holden asked Hitselberger for the other document, Hitselberger surrendered an additional document. Hitselberger told Holden and Hering that he did not know that the documents that he had printed and removed from the RAA were classified; and that he did not know that one was not allowed to remove classified documents from the RAA. He then repeatedly diverted the conversation to unrelated topics. Holden and Hering did not place Hitselberger under arrest or further detain him at this time. Hitselberger was allowed to leave the area and began to walk away from the Bay 4 building, while Holden and Hering returned to Bay 4 with the classified documents to report the incident to their superiors.

One of the two documents was that day's JSOTF SITREP (SITREP 104). It had **SECRET//NOFORN** in red, bold type (all capitals) in the header and footer of each page. On the first page of the document, and continuing on to the second page, is a multi-paragraph portion marked **(S//NF)**. It contains an analyst's assessment of the availability of certain improvised explosive devices in Bahrain. Elsewhere in the document, in portions marked **(S)**, are the schedule for the monthly travel of a high-ranking commander at Naval Support Activity-Bahrain and information about the locations of U.S. armed forces in the region and their activities.

The second document was a Navy Central Command (NAVCENT) Regional Analysis dated April 9, 2012. It bears the following header and footer on each page: **SECRET//REL TO**

USA, FVEY.[4] On the third page of the document are five bullet points, marked **(S//REL)**, discussing gaps in UNITED STATES intelligence concerning the situation in Bahrain, which, at the time, was volatile. Original classification authorities from the Navy have reviewed both SITREP 104 and the April 9, 2012, NAVCENT Regional Analysis. These Navy officials have determined that both documents were properly classified and contained national defense information.

C. Facts Surrounding The Command Authorization for Search and Seizure

On April 11, 2012, NCIS Special Agent (SA) Raffi Kesici prepared an Affidavit In Support of a Search and Search Authorization (hereinafter "Affidavit") to support a Command Authorization for Search and Seizure (CASS) for Hitselberger's living quarters at the Navy Gateway Inns and Suites.[5] He prepared his Affidavit by speaking to other NCIS Agents involved in the investigation of Hitselberger and by reviewing the sworn witness statements provided by Holden, Hering, and Christensen. After drafting his Affidavit, SA Kesici met with Staff Judge Advocate (SJA) Brendan Peck, who is a lawyer. SJA Peck reviewed the affidavit and provided edits to SA Kesici, which he then inputted.

Captain Colin Walsh, the Commanding Officer (CO) of the Naval Base, was briefed several times throughout the day regarding the incident and the investigation of Hitselberger. As the CO, he had the authority to authorize a CASS for Hitselberger's living quarters. SJA Peck spoke with Captain Walsh approximately three times by telephone on the afternoon of April 11, 2012, to provide him with continuing updates regarding the incident with Hitselberger. Captain

[4] REL is an abbreviation for "releasable to." FVEY is an abbreviation for a group of allied nations known as the "Five Eyes," which are the United States, the United Kingdom, Canada, Australia, and New Zealand.

[5] A CASS is the military equivalent of a criminal search warrant. A CASS may be authorized by the Commanding Officer (CO) of a military installation upon a showing of probable cause. See e.g. United States v. Burrow, 396 F.Supp. 890, 896-897 (1975).

Walsh was also briefed by Assistant Special Agent in Charge (ASAC) Robert Flannery regarding the incident.

At approximately 7:15 p.m., SA Kesici presented his affidavit to Captain Walsh. See Exhibit 3. SA Kesici spoke with Captain Walsh for an additional ten to fifteen minutes before Captain Walsh signed the CASS. During that period, Captain Walsh sought information that he believed was necessary to ensure that the search of Hitselberger's quarters was appropriate. At the time that he signed the CASS, Captain Walsh was aware that Hitselberger resided on the Naval Base; that he had been working as a contract linguist for the Navy and had had access to classified materials for that time period; and that his living quarters were located less than 200 yards from the JSOTF work spaces from which Hitselberger had been working that morning.

SA Kesici's Affidavit did not include a signature block for his signature. However, the CASS itself included the printed type "Affidavit(s) having been made before me by NCIS Special Agent Raffi KESICI," see Exhibit 4, and SA Kesici presented his Affidavit to Captain Walsh in person. SA Kesici's Affidavit also did not include Hitselberger's address. However, in the first paragraph of his Affidavit, SA Kesici wrote " [S]hort or long term possession of such classified material and/or documents is known to be stored in locations deemed private to include residences, vehicles and personal spaces. **Identified residence is located in close proximity to work location and subsequent origin of classified material**" (emphasis added). Furthermore, the CASS itself recited the address of Hitselberger's living quarters.[6] The Affidavit also did not reference a specific code violation. However, in the second paragraph of the Affidavit, SA Kesici referenced sworn statements that he had received from Holden, Hering, and Christensen:

[6] The description of Hitselberger's quarters from the CASS contained a typographical error. While the description of his address from the CASS reads "Navy gateway Inn and Suites, Building S317B, room 317B," the proper address was Building 264, Room 317B.

> who observed Mr. James Francis Hitselberger, while at his place of work, physically take classified documents from a classified printer and place it into his personal backpack. Mr. Hitselberger was then observed walking out of the office carrying his backpack and the classified document that he had just placed in it.

SA Kesici went on to describe that Hitselberger was then stopped outside of the building and found to be in possession of "multiple documents that were classified as Secret and Secret No Foreign."

The search of the defendant's quarters began at approximately 7:54 p.m. While searching, NCIS Agents located a classified document on top of Hitselberger's desk. The document was folded in half, and the top and bottom of the document had been cut off, effectively removing the classification markings in the header and footer, which concealed its overall classification. However, the document retained its individual paragraph markings, including a paragraph marking of (C//REL TO US FVEY), indicating that the information was at the Classified level. The document also retained its title "SITREP 72 as of 082100z MAR 12, Period Covered: 072101z FEB 12 to 082100z MAR 12." These Classified paragraphs contained an intelligence analyst's assessment of the situation in Bahrain, which had experienced recent civil unrest.

The Agents learned that the document in question was JSOTF SITREP 72 (SITREP 72) from March 8, 2012. This SITREP is five pages long and has **SECRET** in red in the headers and footers. Like SITREP 104, it contained highly sensitive information about the location of United States forces and their undisclosed activities in the region. An original classification authority from the Navy has reviewed SITREP 72 and has confirmed that the document is properly classified and that it contains national defense information. Review of the defendant's SIPRnet e-mail indicated that he received this document on his SIPRnet account on or about March 8, 2012.

II. Argument

A. The Defendant Knew He Was Subject To A Search Of His Person Or Property At Any Time While He Was On The Naval Base And Impliedly Consented To The Search Of His Backpack And His Living Quarters.

As of April 11, 2013, the defendant had been living and working on the Naval Base for approximately seven months. Throughout this period, the sign posted at the pedestrian entrance was prominently displayed. Every time the defendant entered or exited the Naval Base on foot, he walked past the sign, which put him on notice that he consented to a search of his person or the property under his control every time that he set foot on the Naval Base.

The Supreme Court has recognized that the commanding officer of a military installation "has the historically unquestioned power . . . to exclude civilians from the area of his command." Greer v. Spock, 424 U.S. 828, 838 (1976) (internal citation and quotation marks omitted). Thus, it is within a base commander's authority "to place restrictions on the right of access to a base," to include subjecting a person to a search upon request. United States v. Ellis, 547 F.2d 863, 866 (5th Cir. 1977). Indeed, courts have long-sanctioned searches on military bases as being "exempt from the usual Fourth Amendment requirement of probable cause." United States v. Jenkins, 986 F.2d 76, 78 (4th Cir. 1993). As the Fourth Circuit set forth in Jenkins:

> The rationale is the same for why the base is closed in the first place: to protect a military installation that is vital to national security. Police on a closed military base confront a host of security concerns not present in an ordinary civilian locale. . . . The more the public or national interest is involved, as in the case of a closed, top-security installation, the more the judiciary may weigh this in the scale in determining whether the recognized constitutional right of individuals, including civilians who seek and gain entrance to military installations, to be free from unreasonable searches has been invaded. [Appellee] had no right of unrestricted access to Andrews Air Force Base; he thus had no right to be free from searches while on the base. A base commander may summarily exclude all civilians from the area of his command. It is within his authority, therefore, also to place restrictions on the right of access to a base. Nor did the validity of [Appellee's] search turn on whether he gave his express consent to search as a condition

> of entering the base. Consent is implied by the totality of all the circumstances. The barbed-wire fence, the security guards at the gate, the sign warning of the possibility of search, and a civilian's common-sense awareness of the nature of a military base-all these circumstances combine to puncture any reasonable expectations of privacy for a civilian who enters a closed military base.

Id. at 78-79 (internal quotation marks and citations omitted).

Hitselberger knew the Naval Base was heavily guarded and located in a volatile part of the world. He also was undoubtedly aware of the Pedestrian Gate sign that he confronted every time he entered the Naval Base. And by his own admissions, he often visited the taxi stand – which is located beyond the pedestrian gate – to visit with friends and practice his Arabic. Additionally, as noted by the Jenkins court in finding implied consent in that matter, Hitselberger was well-aware that the Naval Base was a closed, secure military installation. By choosing to enter, work, and live on the Naval Base, he impliedly consented to a search of his person or his property at any time. See Morgan v. United States, 166 Fed. Appx. 292, 295 (9th Cir. 2006) (civilian who entered a closed military base that was marked by signs indicating "all personnel and the property under their control are subject to search," "had impliedly consented to the search"); United States v. Roundtree, 2008 WL 4327365 *4 (N.D. Fla. 2008) (denying motion to suppress where defendant drove vehicle onto Naval Air Station through main gate bearing signs that vehicles were subject to search, and where defendant "'certainly should have realized'" he would be subject to search where he "twice passed signs clearly indicating that his vehicle would be subject to a search"); Sanders v. Nunley, 634 F. Supp. 474, 477 (N.D. Ga. 1985) ("It is generally understood in the military community that access to the Naval Air Station facilities is conditioned upon consent to be searched at any time, and it is routine for security personnel to search persons who have entered the Naval Air Station, including the Navy Exchange."). See also United States v. Doran, 482 F.2d 929, 932 (9th Cir. 1973) (finding defendant gave "consent

in fact" by attempting to board an airplane where "signs and public address warnings announc[ed] that all passengers were subject to search"); United States v. Prevo, 435 F.3d 1343, 1348 (11th Cir. 2006) (expectation of privacy is "rendered negligible" once a person passes "two signs warning visitors that cars entering the property are subject to search" on prison grounds); United States v. Kelley, 393 F. Supp. 755, 757 (W.D. Okl. 1975) (defendant, a prison employee, had no reasonable expectation of privacy after entering prison and passing two signs which warned that all persons and packages entering the prison were subject to search, and his testimony that he did not see the signs was unbelievable considering the length of time the signs had been in place).

The relevant case law clearly demonstrates that Hitselberger's supervisors did not need probable cause or a search warrant to search his backpack on April 11, 2012, because Hitselberger had impliedly consented to a search of his backpack. Likewise, NCIS Agents did not need probable cause or a CASS to search his living quarters. By choosing to enter, live, and work on a closed military installation that posted signage warning him that his entry onto the Naval Base "constitute[d] consent to search of personnel and the property under their control," the defendant consented to a search of his living quarters. Therefore, there is no basis to suppress the evidence retrieved from his backpack or from his living quarters on April 11, 2012.

B. The Stop Of The Defendant And Search Of His Backpack Was Warranted Under The Exigent Circumstances Exception To The Warrant Requirement.

In addition to having Hitselberger's implied consent to search his backpack, Holden and Hering were also justified in directing him to produce the classified materials from his backpack without a warrant because they were operating under exigent circumstances.

"Government agents must have probable cause to rely on the exigent circumstances exception." United States v. Duran, 884 F. Supp. 552, 556 (D.C. 1995). "The test for exigent

circumstances is whether the police had an urgent need or an immediate major crisis in the performance of duty afford[ing] neither time nor opportunity to apply to a magistrate." United States v. (James) Johnson, 802 F.2d 1459, 1461 (D.C. Cir. 1986) (citing Dorman v. United States, 435 F.2d 385, 391 (D.C.Cir.1970) (en banc) (internal quotation marks and additional internal citation omitted); see In re Sealed Case, 153 F.3d 759, 766 (D.C. Cir. 1998). The government bears the burden to prove urgent need, which is evaluated by the totality of the circumstances and by an objective standard. In re Sealed Case, 153 F.3d at 766. Analysis of the existence and degree of exigency must be "shaped by realities of the situation." United States v. Harris, 629 A.2d 481, 487-488 (D.C. Cir. 1993) (internal quotation marks and citations omitted). "Some of the factors that have been applied in assessing whether a need of this magnitude is present include (1) the time necessary to obtain a warrant; (2) the reasonableness of the officer's belief that contraband may be lost or destroyed; (3) indications that the suspects are aware of the police presence; and (4) the ease with which the suspected contraband could be destroyed." (James) Johnson, 802 F.2d at 1461 n.3.

This exception to the Fourth Amendment's warrant requirement emerged in part because the "Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." Warden v. Hayden, 387 U.S. 294, 298-299 (1967). Thus, "exigent circumstances, e.g., danger to police or others, may excuse a warrantless entry to make an arrest even where there is no hot pursuit." United States v. Harris, 629 A.2d 481, 487 n.6 (D.C. Cir. 1993). Furthermore, the likelihood of destruction of evidence may create exigent circumstances that excuse the warrant requirement. See Schmerber v. California, 384 .U.S. 757, 770-771 (1966); (James) Johnson, 802 F.2d at 1462 ("The need to preserve evidence that may be lost or destroyed if a search is delayed is and has long been

recognized as an exigent circumstance."). Therefore, where probable cause exists, "and there is danger that evidence will be removed or destroyed before a warrant can be obtained, a warrantless search and seizure can be justified." United States v. Tartaglia, 864 F.2d 837, 840-841 (D.C. Cir. 1989).

Here, Holden watched Hitselberger print multiple documents from SIPRnet and remove them from the RAA. At the time that Holden and Hering approached the defendant, they were unaware of exactly which documents Hitselberger had printed, what information those documents contained, and what U.S. interests would be compromised by disclosure of the information. But they knew the documents were classified. Moreover, while they had no indication of what Hitselberger intended to do with the documents, possible scenarios included passing them (or the information that they contained) to people unauthorized to receive the information, to include persons unfriendly to the United States; or photographing or scanning the information and forwarding it to someone unauthorized to receive it. Holden and Hering knew that documents circulated on SIPRnet included Secret information that could be used to the harm or detriment of U.S. armed forces and U.S. civilians stationed on the Naval Base or in the region. They were also aware that the Naval Base is home to the United States Naval Forces Central Command and the United States Fifth Fleet, and that well over 4000 military service personnel were stationed there. The possible threat to public safety hazarded by unauthorized disclosure of information from SIPRnet documents created an exigency to which Holden and Hering needed to respond immediately.

Clearly, probable cause existed to believe that Hitselberger had committed a crime, and that he was going to commit further crimes with the documents that he had taken. See Duran, 884 F. Supp. at 556. It is equally clear that Holden and Hering had an urgent need to stop

Hitselberger from passing or compromising the information contained in these documents to unauthorized persons who could use the information to harm vital U.S. interests. See Dorman, 435 F.2d at 392. Had they allowed Hitselberger to walk away with those documents, and then spent the several hours that it would have taken to obtain a CASS, the information contained in the documents and the documents themselves may have already been passed to unfriendly hands, compromised, or destroyed. See Welsh v. Wisconsin, 466 U.S. 740, 751 (1984) ("An important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made"); Mascorro v. Billings, 656 F.3d 1198 (10th Cir. 2011) (exigent circumstances permitting officers to enter a suspect's home without a warrant in pursuit of the suspect must involve a serious offense coupled with the existence of an immediate and pressing concern such as destruction of evidence, officer or public safety, or the possibility of imminent escape); United States v. MacDonald, 916 F.2d 766, 769 (2nd Cir. 1990) (question is whether law enforcement faced "an urgent need to render aid or take action").

In a seminal case from this Circuit, Dorman, the appellate court outlined a number of considerations material to the question of whether law enforcement was acting under exigent circumstances when conducting a warrantless entry to make an arrest. Those factors included whether: 1) a grave offense was involved, particularly one that was a crime of violence, vis à vis a "'complacent' crime[], like gambling"; 2) the suspect is reasonably believed to be armed; 3) there was not a minimum showing but rather a clear showing of probable cause; 4) there was strong reason to believe that the suspect is in the premises being entered; 5) the suspect would escape if not swiftly apprehended; 6) the entry is made peaceably; 7) and the entry is made at night. 435 F.2d at 392-393. In Dorman, the court sanctioned a warrantless entry to arrest a suspect four hours after a criminal offense had occurred, in part because "police were still

dealing with a relatively recent crime, and prompt arrest might locate and recover the instrumentalities and fruits of the crime before otherwise disposed of." Id. at 393.[7]

The Dorman factors, when applied to the instant facts, demonstrate that Holden and Hering's search of Hitselberger's backpack was justified by exigent circumstances. First, the offense at hand is fairly characterized as grave. The defendant had removed current, classified information from a restricted area. He did so while working on a closed U.S. military base in the Middle East, in a country that had recently undergone and continued to suffer civil and political unrest. He removed the documents without providing any explanation of what he planned to do with them (and instead, by taking affirmative measures to hide them). Additionally, the defendant was known to have many contacts with local Bahrainis who lived and worked outside of the military base, which heightened the concern regarding Hitselberger's intentions. Second, Holden and Hering did not believe Hitselbeger was armed. Third, there was a "clear showing of probable cause" to believe that Hitselberger had committed a crime; Holden had personally observed Hitselberger committing the crime at issue. Fourth, Holden had good cause to believe that the classified information was inside the defendant's backpack – he had personally witnessed Hitselberger place them there. Fifth, under the circumstances at the time, Holden and Hering had every reason to believe that the documents may not remain in Hitselberger's backpack – or in his possession – at some later point that day. See United States v. (Michael) Johnson, 488 F.3d 690, 697 (6th Cir. 2007) (finding no Fourth Amendment violation where officers had reasonable suspicion "that evidence would likely be destroyed if they followed the

[7] The Dorman court also noted that the police had "acted reasonably" in seeking the suspect in closets and behind sofas, and not through the "rummaging of drawers" to cloud their purpose. 435 F.2d at 394. Similarly here, Holden and Hering did not personally search Hitselberger's backpack or person. They only directed him to return the contraband Secret documents that he had removed from the RAA in order to protect and preserve this evidence, and to prevent Hitselberger from taking any actions with the documents that could cause harm to U.S. military personnel, civilian personnel, or other U.S. interests. They then released Hitselberger to go on his way.

knock-and-announce rule") (internal citation and quotation marks omitted); cf. United States v. Minick, 455 A.2d 874, 881 (D.C. Cir. 1983) (en banc) (exigent circumstances doctrine is applied to the facts "as perceived by the police at the time of entry"). Sixth and seventh, Holden and Hering approached Hitselberger in a peaceful fashion, limited their search and seizure to simply telling the defendant to retrieve the documents that he had printed in the RAA, and approaching him during the day in broad daylight.[8]

C. Holden and Hering Had Probable Cause To Stop The Defendant And Search His Backpack.

Holden and Hering were also justified in stopping the defendant and directing him to return the classified materials he had taken from the RAA because they had probable cause to believe that he had committed a crime and that evidence of that crime was inside Hitselberger's backpack.

Probable cause exists when, considering the totality of the circumstances, a reasonably prudent person applying "common sense conclusions about human behavior" would believe that a crime has been committed or is being committed. United States v. Lucas, 778 F.2d 885, 887 (D.C. Cir. 1985) (quoting Illinois v. Gates, 462 U.S. 213, 230 (1983)). Just minutes before stopping Hitselberger, Holden had observed Hitselberger reading classified reports on SIPRnet. He then observed Hitselberger send classified documents to a classified printer, retrieve them from the printer, place them inside a dictionary and into his backpack, and exit the RAA while carrying the backpack. Before leaving the RAA to follow Hitselberger, Holden had confirmed his observations with MSG Christensen, who had also seen Hitselberger reading and printing classified materials and placing them inside of a dictionary. Holden then observed Hitselberger

[8] After considering the seven Dorman factors, courts are then directed to consider if the police unreasonably delayed their warrantless search or entry into a home. See e.g. Minick, 455 A.2d at 881. The Court need not address that issue here because Hering and Holden stopped Hitselberger and searched his backpack only moments after he left the RAA with classified material.

exit the Bay 4 building while carrying the backpack. Clearly, Holden and Hering had every reason to believe that Hitselberger had just removed classified materials from a secure space in violation of U.S. law. See e.g. 18 U.S.C. § 793; 18 U.S.C. § 1924; 18 USC § 2071(a); 18 U.S.C. § 641.

Indeed, courts have routinely sustained arrests and searches on findings of probable cause based on less compelling evidence than is present here. See U.S. v. Lawson, 410 F.3d 735, 740-741 (D.C. Cir. 2005) (officers had probable cause to seize vehicle that matched other witness' descriptions of getaway car and where latex gloves were viewed in front passenger area); Lucas, 778 F.2d at 887-888 (officer had probable cause to effect drug arrest based on receipt of anonymous tip, corroboration of certain details of the tip, and observation of a hand-to-hand exchange of an object for a green object that appeared to be currency); United States v. Young, 598 F.2d 296 (D.C. Cir. 1979) (where actions of defendants conformed to modus operandi used to cash stolen treasury checks and continued for one hour officers had probable cause for arrest); cf. United States v. Bookhardt, 277 F.3d 558, 564 (D.C.Cir.2002) ("an arrest will be upheld if probable cause exists to support arrest for an offense that is not denominated as the reason for the arrest by the arresting officer").

Because Holden and Hering had probable cause to arrest Hitselberger, they would have been entitled to search his person and his backpack incident to that lawful arrest. In re Sealed Case, 153 F.3d 759, 767 (D.C. Cir. 1998) (incident to a lawful arrest police may search area within arrestee's immediate control) (citing Chimel v. United States, 394 U.S. 752, 763 (1960)).

D. SA Kesici's Affidavit And The Supplemental Briefings to Captain Walsh Established Probable Cause For The CASS For The Defendant's Living Quarters.

Agents searched Hitselberger's quarters on April 11, 2012, pursuant to a valid CASS that was supported by probable cause provided by the Affidavit presented by SA Kesici, and the

supplemental briefings that SA Kesici, ASAC Flannery, and SJA Peck provided to Captain Walsh before he signed the CASS.

"A federal judge evaluating a search-warrant application to determine whether it demonstrates probable cause must 'simply . . . make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . . including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" United States v. Oladokun, 760 F.Supp. 2d 57 (D.D.C. 2011) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)). In order to show a sufficient nexus between evidence of the criminal activity sought and the premises to be searched, an issuing magistrate must find a "reasonable basis to infer from the nature of the illegal activity observed, that relevant evidence will be found in the residence." United States v. Thomas, 989 F.2d 1252, 1255 (D.C. Cir. 1993).

In evaluating whether the CASS at issue here was grounded in a showing of probable cause, the Court must consider not only the four corners of SA Kesici's affidavit, but also the additional facts presented to Captain Walsh prior to signing the CASS. This is in part because a CASS need not be supported by oath or affirmation, and not all of the information that a Commanding Officer uses to decide if probable cause exists need derive from a sworn affidavit. See United States v. Abernathy, III, 6 M.J. 819, 821 (U.S. Navy Court of Military Review 1978). Courts have repeatedly held that, while civilians working on military installations retain "substantive rights guaranteed by the Fourth Amendment," "the military need not be bound by all of the procedural formalities that are imposed upon civilian law enforcement agencies." United States v. Rogers, 388 F. Supp. 298, 301 (E.D. Va. 1975). See United States v. Burrow et al., 396 F. Supp. 890, 900 (D.C. Md. 1975) ("searches of civilians and their property, in the

military context, need not always comply with the strict Fourth Amendment standards imposed in the civilian context."). In Rogers, the district court upheld searches of the apartment, car, and locker of a civilian employee who was working on a naval base, pursuant to a CASS. There, a Naval Investigative Service (NIS) Agent presented a request for authorization to search, and further "supplemented his written reasons with an oral presentation setting out the background of the investigation." Id. at 300. In upholding the validity of the search, the Rogers court noted that the agents "knew just what they were looking for;" the CASS "stated with reasonable specificity the items to be seized;" and although the evidence was not presented under oath, "military procedure does not require that an oath or affirmation be given." Id. at 304. See Burrow, 396 F. Supp. at 898 ("It is precisely because of the unique status of military installations that the Court concludes that a warrantless search [of a civilian], authorized on the basis of probable cause unsupported by oath or affirmation, was reasonable under the facts and circumstances of this case."); United States v. Stuckey, 10 M.J. 347, 360-364 (U.S. Court of Military Appeals 1981) (Fourth Amendment does not require that military commander's authorization for search and seizure be supported by sworn testimony); United States v. Brown, 784 F.2d 1033, 1037 (10th Cir. 1986) (oral affidavits and oral authorization of search warrants are constitutionally firm). Notably, counsel for Hitselberger fails to cite any authority for the proposition that unsworn statements cannot be used to obtain a CASS to search the property of a civilian on a military installation.

SA Kesici's affidavit and briefing to Captain Walsh set forth the essential facts of Hitselberger's crime, including that the witness' observations were corroborated by the fact that Hitselberger had been caught with classified materials secreted in his backpack. SA Kesici also set forth his belief that classified material "is known to be stored in locations deemed private to

include residences . . . and personal spaces." The language of the affidavit plainly set forth facts that established multiple crimes under United States code relating to the authorized removal and retention of classified materials. See e.g. 18 U.S.C. § 793; 18 U.S.C. § 1924; 18 USC § 2071(a); 18 U.S.C. § 641. Counsel notes that the affidavit does not include a citation to a U.S. code violation, but that is of no import, because the facts described in the CASS set forth multiple possible violations of U.S. law.

Furthermore, as discussed above, see supra at 6-8, Captain Walsh received oral briefings from ASAC Flannery, SJA Peck, and SA Kesici that apprised him that Hitselberger was a civilian Navy contract linguist who was not authorized to carry classified information outside of the RAA; that he had been working on the Naval Base for a period before the incident occurred, and that he had had access to classified information during this period; and that he lived at the Navy Gateway Inn and Suites, which were located less than 200 yards away from the JSOTF work spaces where the incident had occurred. He was aware of the underlying facts that caused SA Kesici to believe that Hitselberger had the opportunity to remove classified materials from the JSOTF work spaces on prior occasions; and he knew that Hitselberger's living quarters were located in close proximity to the JSOTF work spaces, and that, in SA Kesici's experience, classified material was known "to be stored in locations deemed to be private to include residences." Therefore, Captain Walsh had a "reasonable basis to infer from the nature of the illegal activity observed, that relevant evidence w[ould] be found in the residence." Thomas, 989 F.2d at 1255. Cf.

Furthermore, the fact that the Affidavit and CASS did not include a criminal code citation is of no moment. See United States v. Hill, 55 F.3d 479, 480–81 (9th Cir. 1995) (search warrant was valid, even though neither affidavit nor warrant identified the specific offense to which the

items to be seized were believed to be related). Both SA Kesici, SJA Peck, and Captain Walsh were well aware that unauthorized removal or retention of classified information violated U.S. law, and that Hitselberger's actions constituted criminal acts. The defense fails to cite any authority to show that failure to include a legal citation in a search warrant or CASS may negate probable cause.

E. The NCIS Agents Who Executed The CASS Relied In Good Faith On The Validity of the CASS

The exclusionary rule was adopted "to deter unlawful searches by police, not to punish the errors of magistrates and judges," Massachusetts v. Sheppard, 468 U.S. 981, 990 (1984). The rule "has limited force in cases involving a search with a search warrant. In particular, reviewing courts may not exclude evidence 'when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.'" United States v. Glover, 681 F.3d 411, 418 (D.C. Cir. 2012) (quoting United States v. Leon, 468 U.S. 897, 920 (1984)). However, exceptions to this doctrine may exist where 1) an affidavit contained "knowing or reckless falsity;" 2) the magistrate was merely a rubber stamp and did not perform her neutral and detached function; or 3) the affidavit did not provide sufficient information to allow the magistrate to determine that there was probable cause. Leon, 468 U.S. at 914-915.

There is no basis for exclusion of the evidence located in Hitselberger's room because, even if the CASS were defective or lacking in probable cause, the facts indicate that SA Kesici reasonably relied in good faith upon the validity of the CASS that he received from Captain Walsh. This is particularly so considering the steps that SA Kesici took before presenting his Affidavit to Captain Walsh, which included discussing the facts of the case with other NCIS Agents as he prepared his affidavit; showing the affidavit to an attorney -- SJA Peck -- for his review and edits, and then inputting the recommended edits; and presenting the affidavit to

Captain Walsh after providing him further briefing, and after learning that Captain Walsh had received further briefing regarding the facts of the case from SJA Peck and ASAC Flannery earlier that day.

Furthermore, there is no evidence that any of the Leon exceptions would apply. The defendant makes no allegations that SA Kesici's Affidavit contained false information; there is no evidence that Captain Walsh abandoned his function and simply acted as a rubber stamp, where on the contrary, he was briefed by multiple people regarding the facts of the case before he signed the CASS; and as discussed above, see supra at 6-8, SA Kesici's Affidavit -- coupled with the further information that Captain Walsh received during multiple oral briefings -- provided sufficient information to allow him to make a reasoned determination regarding probable cause. Cf. United States v. Salamanca, 990 F.2d 629, 634 (D.C. Cir. 1993) (where executing officers justifiably relied in good faith on the magistrate's determination that probable cause existed, their reliance was immune from attack unless the underlying affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable") (citing and quoting Leon, 468 U.S. at 923).

A. Conclusion

For the foregoing reasons, the Court should deny the defendant's motions to suppress evidence.

Respectfully submitted,

RONALD C. MACHEN JR.
United States Attorney

_____/s/_____
MONA N. SAHAF
Assistant United States Attorney

National Security Section
555 4th Street, NW, 11th Floor
Washington, D.C. 20530
Tel: (202) 252-7080
D.C. Bar 497854
mona.sahaf@usdoj.gov

JAY I. BRATT
Assistant United States Attorney
National Security Section
555 4th Street, NW, 11th Floor
Washington, D.C. 20530
Tel: (202) 252-7789
Illinois Bar No. 6187361
jay.bratt2@usdoj.gov

DEBORAH CURTIS
Trial Attorney
Counterespionage Section
National Security Division
UNITED STATES Department of Justice
600 E Street, NW, 10th Floor
Washington, D.C. 20530
Tel: (202) 233-2113
deborah.curtis@usdoj.gov

CERTIFICATE OF SERVICE

On this 5th day of April 2013, a copy of the foregoing was served on counsel of record for the defendant, Ms. Mary Petras, via the Court's Electronic Filing System.

/s/
Mona N. Sahaf
Assistant United States Attorney

Exhibit 1

USAO_002945


WARNING
U.S. NAVY PROPERTY
AUTHORIZED PERSONNEL ONLY
AUTHORIZED ENTRY ONTO
THIS INSTALLATION CONSTITUTES
CONSENT TO SEARCH OF
PERSONNEL AND THE PROPERTY
UNDER THEIR CONTROL.
INTERNAL SECURITY ACT OF 1950

Exhibit 2


PROPERTY
ERSONNEL ONLY
TRY ONTO THIS IN-
STITUTES CONSENT
ERSONNEL AND THE
ER THEIR CONTROL.
CURITY ACT OF 1950
21; 50 U.S.C. 797

USAO_003194


NO SMOKING
WITHIN
50 FEET
WARNING
U.S. NAVY PROPERTY
AUTHORIZED PERSONNEL ONLY
THORIZED ENTRY ONTO THIS IN-
ALLATION CONSTITUTES CONSENT
SEARCH OF PERSONNEL AND THE
PERTY UNDER THEIR CONTROL.
TERNAL SECURITY ACT OF 1950
SECTION 21; 50 U.S.C. 797

Exhibit 3

AFFIDAVIT IN SUPPORT OF SEARCH AND SEARCH AUTHORIZATION

1. Your Affiant, Special Agent Raffi Kesici, US Naval Criminal Investigative Service (NCIS) graduated from the US federal Law Enforcement Training Center (FLETC) as a Federal Criminal Investigator, consequently completed NCIS Special Agent Basic Training and has worked as NCIS Special Agent since November 2007 and as a Department of Defense Criminal Investigator since April 2002. He has worked on a specialized unit within General Crimes and Counterintelligence investigations in Patuxent River, MD until transferred to the NCIS Middle East Field Office in 2010. Currently he is assigned to the Counterintelligence and Counterterrorism Investigation and Operations Squad – related case such as Suspicious Incidents, Compromises, Loss of Classified Matter, and Unauthorized Disclosure well as other felony level crimes. In his career, he has conducted General Crime investigations to include narcotics, sexual assault, child pornography and other crimes against persons. Based on Affiants background and training, unauthorized storage, reproduction, and dissemination of classified material and/or documents have been conducted via hard copy and through various electronic/digital sources. Additionally, short or long term possession of such classified material and/or documents is known to be stored in locations deemed private to include residences, vehicles and personal spaces. Identified residence is located in close proximity to work location and subsequent origin of classified material.

FACTS AND CIRCUMSTANCES

2. As a background, NCIS reactive investigation identified as CCN: 11APR12-MEBJ-0209-3XNA and titled S/HITSELBERGER, JAMES FRANCIS was initiated upon receipt of information via signed sworn statements from Master Sergeant Michael A. HOLDEN, Captain Brendan G. HERING, Master Sergeant Dain CRISTENSEN who observed Mr. James Francis Hitselberger, while at his place of work, physically take classified documents from a classified printer and place it into his personal backpack. Mr. Hitselberger was then observed walking out of the office carrying his backpack and the classified document that he had just placed in it. Mr. Hitselberger was followed out of the building and asked about the contents of his backpack while outside, as he was walking away from the building. Mr. Hitselberger volunteered to share the contents of his backpack which disclosed multiple documents that were classified as Secret and Secret No Foreign.

3. Based on the affiant's training and knowledge on the behavior of handling classified material and based on the totality of the circumstances surrounding the aforementioned factors and details, it is probable that the classified material and/or documents found in Mr. Hitselberger backpack was intentionally searched, printed and subsequently removed from his classified work space for unknown reasons. The backpack that was utilized by Mr. Hitselberger was also previously identified as belonging to him and seen in his passion multiple times in the past.

ITEMS TO BE SEIZED AND THEIR DEFINITION

4. Classified information to include hard copy documents, electronic/digital computer storage media, data files, to include text and graphical image files, contained on the digital storage media attached to and/ or accompanying seizure equipment (such as but not limited to computer or other devices) for investigative purposes pursuant to the investigation listed above.

ENCLOSURE (A)

5. Computer hardware described as any and all computer equipment, including any electronic devices which are capable of collecting, analyzing, creating, displaying, converting, storing, concealing, or transmitting electronic, magnetic, optical, or similar computer impulses or data. These devices include but are not limited to any data processing hardware such as central processing units; internal and peripheral storage devices(such as fixed disks, external hard disks, floppy disk drives and diskettes, tape drives and tapes, optical storage device and other memory storage devices); peripheral input/output devices, and related communication devices(such as modems, cables, and connections, recording equipment, and RAM or ROM units); as well as any devices, mechanisms or parts that can be used to restrict access to such hardware(such as physical keys and locks).

6. Computer software described as any and all information, including any instructions, programs or program code, stored in the form of electronic, magnetic, optical, or other media that are capable of being interpreted by a computer or it's related components. Computer software may also include certain data, data fragments or controlled characters integral to the operation of the computer software. These items include but not limited to operating system software, applications software, untitled programs, compilers, interpreters, communication software, and other programming used or intended for use to communicate with computer components or in the case of peer-to-peer software always for communication and transmission of files between independent computers.

7. This data may be more fully described as any information stored in the form of electronic, magnetic, optical or other coding on computer media or on media capable of being read by a computer or computer related equipment. This media includes but is not limited to fixed disks, external hard disks, removable hard disk cartridges, floppy disk drives and diskettes, tape drives and tapes, optical storage devices, laser disk and other storage devices.

8. All electronic communications, including those previously received or transmitted, and those in transmission, or held in temporary, intermediate storage incident to transmission. The terms "records, documents, and materials, including those used to facilitate communications" as used above shall include any and all communications, previously received, transmitted, downloaded or stored. Because such communications are believed to facilitate the sharing of classified material.

9. The terms "records, documents, and materials, include those used to facilitate communications" as used above shall also be read to include any and all electronic information and/or electronic data stored in any form, which is used or has been prepared for use either for periodic or random backup or any computer or computer system. The form such information might take include but is not limited to, floppy diskettes or fixed hard drives.

10. Such electronic data in the form of electronic records, documents, and materials, including those used to facilitate communications constitutes evidence of the commission of a criminal offense. The material are therefore subject to seizure pursuant to Rule 41 of the Federal Rules of Criminal Procedure, and the devices used to store/facilitate storage of such material may be retained as evidence in the commission of a crime for a reasonable period of time and maybe examined, analyzed, and tested for a reasonable period of time as evidence in the commission of a crime.

Exhibit 4

Search Authorization

Command Authorization for Search and Seizure

UNITED STATES OF AMERICA
VS.
Mr. James Francis Hitselberger

TO: Special Agent in Charge, NCIS, Middle East Field Office, Bahrain.

Affidavit(s) having been made before me by NCIS Special Agent Raffi KESICI

That there is reason to believe that on the person of and/or on the premises known as:
Navy gateway Inn and Suites, Building S317B, room 317B

which is/are under my jurisdiction,

there is now being concealed certain property, namely:
Classified information to include hard copy documents, electronic/digital computer storage media, data files, to include text and graphical image files, contained on the digital storage media attached to and/or accompanying seizure equipment (such as but not limited to computer or other devices) for investigative purposes

I am satisfied that there is probable cause to believe that the property so described is being concealed on the person and/or premises above described and that grounds for application for issuance of a command authorized search exist as stated in the supporting affidavit(s).

YOU ARE HEREBY AUTHORIZED TO SEARCH the person and/or place named for the property specified and if the property is found there to seize it, leaving a copy of this authorization and receipt for the property taken. You will provide a signed receipt to this command, containing a full description of every item seized.

Any assistance desired in conducting this search will be furnished by this command.

Dated this 11TH day of APRIL 2012

C S Wadl
Signature of Person Authorizing Search

CAPT USN Commanding Officer
Rank, Service, Title

NSA BAHRAIN
Command

ENCLOSURE (B)

NCIS 5580/7 (2/1999) (Formerly NCISFORM 024/08-92)