**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**GOVERNMENT'S SUPPLEMENTAL MEMORANDUM**
**IN OPPOSITION TO MOTIONS TO SUPPRESS EVIDENCE**

Following a motions hearing, the Court requested supplemental briefing on several questions related to defendant's motion to suppress classified documents recovered from his backpack and during a command authorized search of his quarters on a naval base in Bahrain. The government's responses to the Court's questions, set forth below, demonstrate that both searches were reasonable under the circumstances, and therefore did not violate defendant's Fourth Amendment rights. As a result, the evidence should not be suppressed.

## I. Overview

The touchstone of any Fourth Amendment analysis is reasonableness. Reasonableness dictates whether a person has a legitimate expectation of privacy, such that an invasion of it would constitute a "search" or "seizure," and reasonableness dictates whether a search or seizure has violated the Fourth Amendment. Consequently, a Fourth Amendment inquiry into reasonableness must turn on the unique facts of each case.

The facts of this case, as established through detailed testimony at the motions hearing, are that a government employee went into a restricted access area, a highly regulated environment for work involving sensitive information. He went on to a government computer that was not his own, and used specially marked, classified machines to view marked, classified

documents before printing them to a marked, classified printer, in two separate, distinct acts, committed in the middle of a crowded office in the plain view of at least two soldiers. All of this occurred on board an isolated military base in a hostile corner of the world, a base where military operations of the most sensitive nature were undertaken. Strict security was the norm upon that base, with walls, checkpoints, controlled access, armed patrols, and warnings that entry on base could lead to searches of person or property. Even stricter security was the reality at that time, due to the threat of a Shia uprising just outside the gates, which had led to increased security measures on base and the voluntary evacuation of some personnel. The crimes alleged in this case were committed by an experienced military contractor who had lived and breathed this security environment for months and who had been trained in the special security factors related to classified information. In these circumstances, defendant's reasonable expectations of privacy, if he had any at all, were vanishingly small.

It is in this context that the evidence at issue was recovered. Soldiers watched defendant improperly remove classified documents from their authorized area. Knowing that classified information can be quickly converted to dangerous use in the wrong hands, the soldiers – not trained law enforcement officers – promptly acted to stop the defendant and recover the documents. They acted not on an arbitrary basis or upon mere suspicion, but based on first-hand knowledge that defendant was carrying contraband and was probably committing a crime. Using the most minimally invasive approach possible, the soldiers instructed defendant to return the documents, and then let him go. Later the same day, agents with the Naval Criminal Investigative Service ("NCIS") engaged in a thorough, deliberative process of applying for and obtaining the base commander's authorization to search defendant's living quarters, employing procedures that closely resemble those used to obtain a civilian search warrant upon probable

cause. Throughout, everyone's actions were taken to protect the lives, safety, and mission of those on base. These actions were eminently reasonable, and suppression is not appropriate. The Court's questions are addressed more specifically below.

## II. Fourth Amendment Standards

The first Clause of the Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .." "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 107, 113 (1984). Consistent with the fact that the Fourth Amendment proscribes only *unreasonable* searches and seizures, courts "have long held that the 'touchstone of the Fourth Amendment is reasonableness.'" *United States v. Robinette*, 519 U.S. 33, 38 (1996) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Id*.

While at NSA Bahrain, Mr. Hitselberger, "as a civilian, retain[ed] those substantive rights guaranteed by the Fourth Amendment." *United States v. Rogers*, 388 F.Supp. 298, 301 (E.D.Va. 1975). Military members are subject to a different body of law from civilians, in recognition of the special needs inherent in a military environment. "Just as military society has been a society apart from civilian society, so '[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'" *Parker v. Levy*, 417 U.S. 733, 743 (1974) (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)). The defendant is not a military member and is not subject to the jurisdiction of a court martial. The United States does not ask the Court to treat defendant as though he were a service member.

As a practical matter, though, this does not make much difference, because military courts have typically afforded the protections of the Bill of Rights, and specifically the Fourth Amendment, to military members facing court martial, though these rights may apply differently to military members. *See United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009); *United States v. Simmons*, 59 M.J. 485, 495 (C.A.A.F. 2004); *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992); *United States v. Jacoby*, 29 C.M.R. 244, 246-47 (C.M.A. 1960). In doing so, the courts have drawn on the same body of Supreme Court case law as civilian courts do when construing the Fourth Amendment. *United States v. Curry*, 46 M.J. 733, 736 (N.M. Ct. Crim. App. 1997) ("In framing the issue of expectation of privacy, military courts have generally followed civilian case-law precedent."). *See also United States v. Gallagher*, 66 M.J. 250 (C.A.A.F. 2008). In addition, the Military Rules of Evidence, enacted through an Executive Order, codify the same substantive and procedural principles governing search and seizure that have been developed at common law under the Fourth Amendment, and are construed in light of that case law. *See* Military Rules of Evidence 311-316; *see also Gallagher*, 66 M.J. 250.

Though Mr. Hitselberger retains the full protections of a civilian, this is not to say that the military context of this case is unimportant. To the contrary, it is vital for the Court to consider that this case took place within a closed, sensitive military installation. In weighing Hitselberger's expectations of privacy, the Court also should consider that Hitselberger chose to live and work on the base, that he was an experienced contractor with training in handling classified information, and that he had been on NSA Bahrain for months, with ample opportunity to observe the heightened security measures on the base. All of these factors, especially Hitselberger's voluntary choice to take up long-term residence and employment upon the base,

demonstrate that his expectations of privacy would be greatly reduced when compared to those of a regular civilian in regular civilian life.

**A. The search of Mr. Hitselberger's quarters was reasonable**

The search of Hitselberger's living quarters, conducted pursuant to a command search authorization, was reasonable under the Fourth Amendment. As the United States has noted, searches are commonplace on closed, sensitive military installations like NSA Bahrain. *See* Government's Consolidated Response to Defendant's Motion to Suppress Tangible Evidence [Docket #45] (Apr. 5, 2013) at 9-11. "The power to maintain order, security, and discipline on a military reservation is necessary to military operations." *United States v. Banks*, 539 F.2d 14, 16 (9th Cir. 1976); *see also Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). The base commander has authority "to place restrictions on the right of access to a base," including subjecting a person to a search upon request. *United States v. Ellis*, 547 F.2d 863, 866 (5th Cir. 1977). Courts have often ruled warrantless searches on military bases "exempt from the usual Fourth Amendment requirement of probable cause" and "[t]he 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." *United States v. Jenkins*, 986 F.2d 76, 78 (4th Cir. 1993). While these cases have often used the language of express or implied consent, they also recognize that privacy expectations are greatly reduced on a military 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.

Any expectation of privacy on NSA Bahrain would certainly be low, if not non-existent. The Court heard detailed testimony from multiple witnesses describing NSA Bahrain, its geographic location, the functions it serves, and the security situation in the area. Much of this testimony came from Master Sergeant Michael Holden and NCIS Special Agent Raffi Kesici. Master Sgt. Holden testified that the base had "pretty high security," with high concrete walls topped with wire and access points that were "heavily guarded" by armed patrols. Sept. 6 Tr. At 9:8-22. Special Agent Kesici testified that Bahrain is a small, isolated country situated close to Iran, a hostile nation. *Id.* at 94:10-18; *see also* Exhibit 1 (map of Persian Gulf region). It is home to several sensitive military functions, including the Fifth Fleet and a multi-national military coalition. *Id*. at 95:6-15. At all times relevant to this case, the domestic situation in Bahrain, including in neighborhoods just outside the gates of the military base, was volatile. Protests led by the Shia majority against the Sunni government were ongoing and unruly, involving "[p]rotesting, occasional bombings, tire burnings lasted for several months." *Id*. at 96:5-6, 905:23-96:10. Beyond the security level normally associated with such a base, the local unrest led to "heightened alertness" on NSA Bahrain with respect to security, *id*. at 96:21, including an increase in random inspections, *id*. at 96:20, the imposition of curfews and off-limits areas outside the base for military and civilian employees, and a voluntary withdrawal of dependent family members. *Id.* at 96:24-97:7.

This heightened security environment came on top of the normal security measures that were part of base life. The base was ringed with concrete walls and barriers, *id*. at 98:5-6, and patrolled by security forces with weapons and trained dogs. *Id*. at 98:15-23. Entry to the base could only be made at controlled checkpoints, at which guards checked the identification of any entrant, whether military or civilian. *Id*. at 99:24., 99:9-17; 99:19-25. Signs at every entrance

warned that only authorized personnel could enter, and that any personnel who entered were subject to search, *id*. at 101-04, including at the entrances defendant was known to use. *Id*. at 106-07; *see also* Exhibits 2-3, 5-9. Master Sergeant Holden also testified about the particular security measures employed in the Restricted Access Area where Mr. Hitselberger worked, and where the events in this case took place. Sept. 6 Tr. at 13-15. For instance, to use a Secret computer in the Restricted Access Area, a worker would have to insert his personal identification card into the machine and log on using his credentials. *Id*. at 17:18-23. Similarly, Secret computers and printers were labeled as such, both on the computer screen and on the physical computer. *Id*. at 13-20. In addition, all personnel had to scan their identification cards when entering and exiting areas in the base, such that their movements could be monitored. *Id*. at 178. As someone who had a clearance, Mr. Hitselberger was required to report to authorities any close and continuing personal relationships that he developed with foreign nationals. *Id*. at 182-84.

The Court has inquired whether the cases involving warrantless searches of civilians on military bases "apply with equal force to Mr. Hitselberger who, although a civilian, was not a visitor to the base?" Order at 2. The answer is yes. Nothing in those cases purported to turn on whether the civilian was a visitor or had some other status. 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). As such, any civilian on base is in essence a visitor who is present with the permission of the commander. Indeed, Mr. Hitselberger can be said to have even lower privacy expectations than a temporary visitor would have, since he voluntarily chose to live and work on the base. Further, his long-term presence on base

repeatedly exposed him to the security measures present there and the reduced privacy of life in military quarters. As a result, it would be especially unreasonable for him to harbor high expectations of privacy.

The line of cases dealing with implied consent to search typically deal with searches conducted while the subject was entering or exiting the base, or while the subject moved about the base. For instance, in *Jenkins*, the defendant had been on the base for some time before he was stopped while moving about the base. *Jenkins*, 986 F.2d 76. The cases do not appear to address whether implied consent, or the accompanying reduced expectation of privacy, apply equally to more private areas such as living quarters. This may be because the normal practice under the Military Rules of Evidence, where evidence of a crime is being sought, is to obtain command search authorization for a search of living quarters unless a recognized exception applies. *See United States v. Bowersox*, 72 M.J. 71, 75 (C.A.A.F. Apr. 2, 2013) (where primary purpose of search is to obtain evidence of crime, search should be conducted pursuant to command authorization, not under the exception for inspections related to safety and military fitness); Mil. R. Evid. 311-316; Sept 6 Tr. 203, 226-27 (testimony of Lt. Cmdr. Peck that where basis for search is a quest for evidence of crime, military practice is to obtain command authorization for search).

The Court has also inquired whether members of the military implicitly consent to search in the same circumstances as civilian visitors to military bases, or whether such searches are governed by a different body of law. As noted above, military members are subject to different law, though that body of law draws upon Fourth Amendment principles and for most practical purposes ends up being the same. In general, though, the reasonable privacy expectations of service members in their living spaces are diminished. *See generally*, Fredric I. Lederer &

Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 3 Wm. & Mary Bill of Rights Journal 219 (1994) (the authors, one of whom wrote the Military Rules of Evidence, acknowledge that this is an open question). For instance, the Fourth Amendment does not require the equivalent of an arrest warrant for the apprehension of a service member in a shared barracks area. *United States v. McCarthy*, 39 M.J. 398 (C.M.A. 1993); *see also United States v. Bowersox*, 72 M.J. 71, 73 (C.A.A.F. Apr 2, 2013) (while service members have some privacy expectation in barracks rooms, "a soldier has less of an expectation of privacy in his shared barracks room than a civilian does in his home."); *Curry*, 46 M.J. at 739 ("A military barracks is not a place intended for the intimate activities associated with family privacy. It is subject to pervasive and continuing governmental regulations and controls, including periodic inspections. On the other hand, a barracks room is not completely devoid of privacy like an open field."). The Military Rules of Evidence do afford some protection to military members in areas where they have a reasonable expectation of privacy – whether or not this is constitutionally compelled. While these legal authorities could rest on the consent of service members implicit in their joining the military, the authorities have focused instead on the other side of the same coin, the reasonable privacy expectations of service members.

In any event, the United States is not asking the Court to hold that the search of Mr. Hitselberger's room was justified solely on the basis of consent. Rather, the fact that Mr. Hitselberger implicitly consented to search while entering, exiting, and moving about the base is one of several factors indicating that he had a reduced expectation of privacy in his quarters, which further goes to show the reasonableness of the search conducted therein. When considering Hitselberger's privacy expectations, the Court also should consider the high security level of NSA Bahrain and the sensitive nature of the work that goes on there. "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."[1] *Jenkins*, 986 F.2d at 78. The highly sensitive, dangerous work conducted at NSA Bahrain should factor significantly in the Court's analysis.

Based on all of these circumstances, the search of Mr. Hitselberger's living quarters was reasonable. The search was based on probable cause and the authorities who conducted the search followed military procedure for obtaining the command search authorization. "A military commander may authorize a search based upon probable cause with respect to persons or property under the control of the commander in accordance with M.R.E. 315(d)(1)." *United States v. Huntzinger*, 69 M.J. 1, 5 (C.A.A.F. 2010). Because this authority extends to all persons and property under the commander's control, a command search authorization can validly support a search of a civilian or his property on a military base. *See, e.g., United States v. Rogers*, 388 F.Supp. 298, 301 (E.D. Va. 1975) (command authorized search of the apartment, car, and locker of civilian employee working on naval base); *United States v. Burrow*, 396 F.Supp. 890, 900 (D. Md. 1975) (command authorized search of civilian). Military Rule of Evidence 315, which governs probable cause searches conducted pursuant to a command search authorization, "includes a definition of probable cause which is substantially identical to probable cause in non-military situations," and contains procedural requirements that "are, in substance, very similar" to those imposed by Federal Rule of Criminal Procedure 41 on the

[1] It is proper for courts to consider the nature of the need that underlies a warrantless search, as they do in the related context of "special needs" searches. *See, e.g., MacWade v. Kelly*, 460 F.3d 260, 268 (2d Cir. 2006). Here, the need to maintain security is compelling.

issuance of search warrants by a civilian court. *United States v. Brown*, 784 F.2d 1033, 1036 (10th Cir. 1986).

Had Hitselberger been a military member, this search would have been deemed reasonable under the Military Rules of Evidence, as it complied with their requirements. *See* Mil. R. Evid. 315. While compliance with the Military Rules would not excuse a violation of Mr. Hitselberger's Fourth Amendment rights as a civilian, compliance with those rules is evidence of the reasonableness of official conduct in this case and the absence of overreaching on the part of authorities. Further, compliance with those rules also demonstrates that the authorities who executed the search acted in good faith reliance on the command search authorization. As a result, the good-faith exception applies and counsels against suppression.[2] *United States v. Glover*, 681 F.3d 411, 418 (D.C. Cir. 2012).

**B. Defendant had no reasonable expectation of privacy in the classified documents in his backpack**

The Court has requested briefing from the parties on whether defendant had a reasonable expectation of privacy in the classified documents he took on April 11, 2012, or in their contents. As demonstrated below, he did not. Even if he did, however, any "search" or "seizure" that occurred was eminently reasonable under the circumstances. Based on the totality of the circumstances, Hitselberger could not have maintained a reasonable expectation of privacy in the classified documents for at least three reasons: (1) he retrieved the documents using a classified government computer to access classified information from a classified server within a restricted access office area, and thus could have no expectation of privacy in the information he accessed; (2) he retrieved the documents, printed them, and placed them in his backpack in plain view of multiple soldiers in a busy office area; and (3) he was on a closed, overseas military base in

[2] The good-faith exception is also recognized in military law. *See* Mil. R. Evid. 311(b)(3).

which any expectation of privacy would be greatly diminished, if not completely unreasonable. Particularly when they are taken together, these factors demonstrate that Mr. Hitselberger had no reasonable privacy interest in the first place. Of course, any violation of a reasonable privacy expectation that did occur was amply justified by both probable cause and exigent circumstances.

*1. Defendant had no reasonable expectation of privacy in classified government information obtained from a classified government network*

First, Mr. Hitselberger accessed the two documents at issue on a classified, Secret-level computer, and then printed the documents to a special Secret printer. The Court heard testimony about the many restrictions involved in handling classified information, and the labeling of the computer, computer screen, printer, and actual documents at issue. All of these factors combined to put defendant on notice that he was dealing with government information that had to be handled in a precise manner within a highly regulated environment. It would be unreasonable for any person to harbor expectations of privacy in such information. Further, defendant was accessing the documents not from his own computer but from a soldier's computer, which he had to ask permission to use, and he did so in the middle of a busy office space occupied by numerous other workers. All of the devices that defendant used to access and print the documents were government property, and of course the actual documents themselves were government property of the most sensitive nature, and were clearly marked as such.

No reasonable person could expect privacy in such papers. It has been held in other cases that employees do not have a reasonable expectation of privacy in employer-owned computers, especially where warning banners advise them that they are subject to monitoring.[3] *See, e.g.,*

[3] Because the defense did not raise the issue the Court has raised concerning whether the defendant had a reasonable expectation of privacy in the documents he was accessing on the classified network, the government did not offer evidence of the banner that appeared on the computer every time he logged on. The government proffers here that the Secret computer system Mr. Hitselberger accessed on April 11, 2012, contained a banner that advised him that he had no expectation of privacy while on the system and that his use of the system was subject to monitoring. If the Court desires, the government can formally supplement the record to introduce the banner.

*United States v. Simons*, 206 F.3d 392 (4th Cir. 2000); *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002); *United States v. Thorn*, 375 F.3d 679 (9th Cir. 2004), *vacated on other grounds*, 543 U.S. 1112 (2005). It would be unreasonable for anyone to think that they had a privacy interest in classified government information obtained in this manner, under these circumstances.

*2. Defendant had no reasonable expectation of privacy in classified documents that he obtained, viewed, printed, and carried away in the plain view of a room full of people*

Second, defendant could not have a reasonable privacy expectation in the documents because he had acted publicly in viewing, accessing, printing, and placing the documents in his bag. By holding the documents out in plain view, defendant could not have reasonably expected to maintain privacy in them just moments later. It is well settled that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection," because the exposure withdraws any expectation of privacy. *Katz v. United States*, 389 U.S. 347, 361 (1967). As a result, there is no Fourth Amendment search when "the police merely gaz[e] upon what the world ha[s] already seen." *People v. Hayes*, 584 N.Y.S.2d 1001, 1003 (N.Y.Sup.Ct. 1992). When Mr. Hitselberger pulled the documents up on his screen, he did so in plain view of Master Sergeants Holden and Christensen, and when he printed the documents out and placed them in his bag, he did so within their plain view as well. Indeed, Mr. Hitselberger repeated this entire sequence a second time when it came to the second document. The whole time, Hitselberger was in a busy, working office space occupied by numerous people. Even if defendant had some expectation of privacy in the other contents of his backpack, he could not have reasonably expected to maintain any privacy in the classified government information he was carrying, since he had publicly displayed his possession of the documents.

Under the plain view doctrine, officers may seize an object without a warrant if the officers are lawfully in the position from which they view the object, the object's incriminating

character is immediately apparent in the position from which they view the object, and the officers have a lawful right of access to the object. *California v. Horton*, 496 U.S. 128 (1990). Because of the way in which Hitselberger exposed the documents for the soldiers to see, he could not reasonably maintain an expectation of privacy in them.

The facts here bear similarity to those in *Holt v. United States*, 675 A.2d 474 (D.C. 1996), in which a suspect in a shooting, who had himself sustained a gunshot wound, walked into a hospital to receive treatment. After medical personnel removed his clothing and placed it in a bag, investigating officers looked into the open, unsealed bag and observed the clothing, which matched a lookout description. The D.C. Court of Appeals reasoned that "[j]ust as Holt had no reasonable expectation of privacy in his physical appearance, handwriting, or voice, he had no reasonable expectation of privacy in the appearance of his publicly worn clothing." *Holt*, 675 A.2d at 480.

Moreover, courts have held that "a search of . . . a container is permissible under the plain view doctrine when 'the contents of a seized container are a foregone conclusion.'" *United States v. Davis*, 690 F.3d 226, 235 (4th Cir. 2012) (quoting *United States v. Williams*, 41 F.3d 192, 197 (4th Cir. 1994). For instance, *Davis* was another hospital case, where, because a police officer knew from experience that a closed bag underneath a hospital bed would contain evidence of a crime – the clothing worn by a shooting victim – a warrantless search of the bag was upheld, even though the contents of the bag were not in plain view. *Davis*, 690 F.3d at 233-39. Since the contents of the bag were a foregone conclusion, a defendant has no reasonable expectation of privacy in them, so there is no "search" at all for Fourth Amendment purposes. *Id*. at 232 n.11. For the same reasons, a defendant has no reasonable expectation of privacy in the contents of a transparent container. *United States v. Ramos*, 960 F.2d 1065, 1067 (D.C. Cir.

1992). Similarly, "gun cases and similar containers support no reasonable expectation of privacy if their contents can be inferred from their outward appearance." *United States v. Taylor*, 497 F.3d 673, 680 (D.C. Cir. 2007). Each of those decisions state a variant of the plain view doctrine: where a defendant has exposed an item to plain view, or where the nature of the item can obviously be inferred from the nature of what he has exposed to plain view, then the defendant has evinced no expectation of privacy and there is no Fourth Amendment interest at stake.

In this case, Hitselberger possessed the classified documents in plain view before placing them into his bag. Mr. Hitselberger remained within the view of Holden and Hering for all but a few seconds. As a result, it was a foregone conclusion to these two soldiers that the contraband documents were in the backpack when they stopped Mr. Hitselberger, and no inference was even necessary.

*3. Defendant had no reasonable expectation of privacy in classified government documents that he was carrying while moving about a closed military installation located overseas*

Third, any expectation of privacy that Mr. Hitselberger may have had in his person or any of his effects would be greatly diminished, if not entirely unreasonable, due to his presence on a closed military base in an overseas location. As discussed above, the nature of NSA Bahrain means that Hitselberger had no reasonable expectation of privacy while exiting the Restricted Access Area facility, or while moving about the base. Indeed, his presence there constituted implied consent to a search while he moved about the base. In any event, the nature of the base would greatly diminish his privacy expectations.

**C. The recovery of the documents was reasonable under all the circumstances**

For the reasons set forth above, Mr. Hitselberger did not have a reasonable expectation of privacy in the classified documents, so there was no "seizure" of the documents for Fourth

Amendment purposes. If a seizure did occur, it was limited only to the two documents. No physical inspection of the bag occurred. *See* Transcript of Motions Hearing on September 6, 2013 ("Sept. 6 Tr.") at 25:10-12 (Q: "Now, did you actually end up physically searching the defendant's backpack?" A: "I did not." Q: "How about Captain Hering; did he physically search the defendant's backpack?" A: "No."); *see also id.* 74:10 ("I never touched his backpack."). Though this was not established at the hearing, the United States can proffer that Capt. Hering viewed at least some of the other contents of the backpack when Mr. Hitselberger unzipped it, based on a statement provided by Capt. Hering, which was provided to defendant in discovery. For all of the reasons set forth above, however, the United States submits that Mr. Hitselberger's diminished expectation of privacy while moving about the base means that he also did not have a Fourth Amendment interest in the other contents of his bag. The United States maintains its position that Hitselberger implicitly consented to search while moving about the base.

If defendant is deemed to have had some reasonable expectation of privacy in his backpack (though the United States contends this would be a diminished expectation), the government concedes that in taking the documents, the two soldiers executed a "seizure" of them. But for all of the reasons set forth above, whatever search and seizure occurred was perfectly reasonable. Based on exigent circumstances, the soldiers could have seized and searched the entire bag without obtaining a warrant, and they certainly were justified in taking the less invasive step of simply seizing and viewing the two classified documents. This seizure was justified by the exigent circumstances exception, which would have justified a full-blown warrantless search of the entire backpack. The search, predicated on probable cause, was justified by the exigent circumstances exception 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, 298-99 (1967); *see also* Government's Consolidated Response to Defendant's Motion to Suppress Tangible Evidence, at 11-17 (collecting authorities on exigent circumstances doctrine).

The exigency in this case was abundantly clear. Master Sergeant Holden testified that he stopped Mr. Hitselberger "because some of the materials you can print off the secret side of the internet can be harmful and cause people to lose their lives. So I thought, regardless who you are, you're going to be stopped." Sept. 6 Tr. at 28:13-17. This was reasonable, as the unauthorized disclosure of "Secret" information can, by definition, be expected to cause serious damage to the national security. *Id*. at 108:16-17. Sgt. Holden also knew that the classified information Hitselberger was carrying included a situation report, which reported on the activities and plans of military units, and in Bahrain such reports were always classified "because some of the work we were doing was very sensitive." *Id*. at 19:11-13; *see also id*. at 18-19. As such, Sgt. Holden considered it "my obligation as a soldier" to prevent Mr. Hitselberger from leaving the area with the classified documents. *Id*. at 28:7-9. Given the nature of these exigencies, the soldiers, who were not trained law enforcement officers, acted reasonably in seizing the documents on the spot, rather than waiting to obtain command search authorization, and running the risk that the documents were no longer in the bag.[4]

Under all these circumstances, the soldiers acted reasonably and there was no Fourth Amendment violation. Given the exigencies, the reduced expectations of privacy, and the

[4] Even if the Court concluded that the soldiers had a basis to seize the bag, but should have waited to obtain a command search authorization before searching it and seizing documents from within it, suppression would not be appropriate, based on the doctrine of inevitable discovery. There should be little doubt that the facts testified to by Master Sgt. Holden would have supplied ample probable cause to obtain a command search authorization (indeed, Holden's sworn statement was critical in establishing probable cause for the authorization to search Hitselberger's room). "[W]hen . . . the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Nix v. Williams*, 467 U.S. 431, 448 (1984). *See also United States v. Gale*, 952 F.2d 1412, 1416 (D.C. Cir.), *cert. denied*, 503 U.S. 923 (1992). As a result, suppression still would not be warranted.

minimally invasive nature of the intrusion at issue, the conduct of the two soldiers was reasonable and did not violate the Fourth Amendment.

**CONCLUSION**

For the foregoing reasons, as well as those stated at the motions hearing, defendant's motions to suppress evidence should be denied.

Respectfully submitted,

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**Certificate of Service**

I, Thomas A. Bednar, certify that I served a copy of the foregoing Government's Supplemental Memorandum in Opposition to Motions to Suppress Statements by ECF on Mary Petras, Esq., counsel for defendant, this 16th day of November, 2013.

_____/s/ Tom Bednar_____
Thomas A. Bednar