IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	
	)	**CRIMINAL CASE NO. 1:05CR225**
STEVEN J. ROSEN and	)	
KEITH WEISSMAN,	)	**The Honorable T.S. Ellis, III**
Defendants.	)	

DEFENDANTS' REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION FOR AN ORDER AUTHORIZING THE EXPERT WITNESS TESTIMONY OF DEFENSE EXPERT J. WILLIAM LEONARD

Defendants Steven J. Rosen and Keith Weissman, through counsel, respectfully submit this reply to the Government's Opposition to the Defendants' Motion for an Order Authorizing the Expert Witness Testimony of Defense Expert J. William Leonard (the "Opposition"). Defendants file this brief pursuant to the Court's April 1, 2008 Order granting their motion for an extension of time to reply to the Opposition.

The Defendants' Motion for an Order Authorizing the Expert Witness Testimony of Defense Expert J. William Leonard (the "Motion") seeks an order pursuant to the Ethics in Government Act, 18 U.S.C. § 207 (the "Act"), permitting Mr. Leonard to testify as a defense expert at trial because the request meets all the aspects of the statute. The Act expressly contemplates that district courts will issue such orders, as both the applicable case law and the government-issued ethics opinion in this matter confirm. Courts have recognized that a subpoena is insufficient to meet the requirement of a court order and therefore is not the appropriate process in this matter. Mr. Leonard's testimony is critical to the defense and is entirely consistent with the relevant ethics provisions.

As discussed in detail below, the Court should issue the requested order as both necessary and appropriate, and the government's attempt to prohibit this testimony is not consistent with the facts or law and may well reflect their concern over its substance and impact at trial.

I. Summary of Argument

Mr. Leonard's expert testimony is critical to the defense. As the government's former "Classification Czar," he has unsurpassed expertise in the issues involved in this case, and his insights into how and why the government classifies, protects, and discloses sensitive information squarely refute the prosecution's theory of the case.

In an attempt to keep Mr. Leonard and other former officials from testifying, however, the government claims that the Act prohibits their expert testimony for the defense (but not for the government). (*See* Opp'n 3 n.1.) So intent is the government to chill this testimony that will undercut their case that they even suggest that these witnesses could face criminal prosecution if they do testify for the defense. (*See id.* at 3).

The crux of the government's argument is its erroneous claim that Mr. Leonard "participated personally and substantially" in this case as a government employee when he had a "discussion with the government prosecution team" in March 2006, the purpose of which was to evaluate Mr. Leonard as a potential expert witness for the government. (*See id.*) The government's argument is completely undermined by the facts and the applicable law. Indeed, the Opposition exaggerates Mr. Leonard's involvement in this case as a government employee, misreads the plain language of the Act, and perverts the purpose of the Act, seeking to use thinly veiled threats of prosecution to silence Mr. Leonard. The government's argument should be rejected.

In truth, Mr. Leonard did not participate substantially in this case as a government employee, and the Act's restrictions therefore do not apply. Further, even stretching the facts beyond reason to assume for the sake of argument that he did participate substantially as a government employee, the Act recognizes that such testimony might still be important and expressly permits his testimony with the permission of the Court. A court order granting that permission is warranted under the applicable case law and the federal government's own ethics opinion in this matter.

Indeed, if Mr. Leonard is prevented from testifying, the defendants' constitutional rights to present a complete defense and to call witnesses in their favor would be infringed. In addition, the defendants' due process rights compel the Court to maintain a balanced playing field between the government and the defense. Because here the government invokes Section 207 to argue that Mr. Leonard and other former officials can testify as experts for the government but not for the defense, the statute threatens to create an unfair and uneven playing field, in violation of defendants' right to due process.

For all of these reasons, the Court should grant the defendants' Motion.

II. Background

Mr. Leonard's expertise and experience in the government's classification policies and practices are unsurpassed. From 2002 until his retirement in January 2008, Mr. Leonard served as the Director of the Information Security Oversight Office ("ISOO"), a position colloquially referred to as the government's "Classification Czar." (Leonard Aff. ¶ 3, attached as Exhibit A.) As Director of ISOO, Mr. Leonard had access to more classified information than anyone in the government other than the President. After the President, Mr Leonard was usually the final

arbiter of classification decisions, with authority to overrule even the decisions of cabinet members. (*Id.*)

Prior to heading up ISOO, Mr. Leonard worked for the Department of Defense ("DoD") for about 30 years in various capacities, including as the Director of Security Programs from 1996 to 1999 and as the Deputy Assistant Secretary of Defense between 1999 and 2002. (*Id.* at ¶ 2.) His responsibilities at DoD included developing and overseeing policies to ensure that there were no leaks of classified information, that leaks were investigated when they did occur, that information that should be classified was in fact classified, and that information that should not be classified was not. (*Id.*)

Mr. Leonard has extensive, high level experience with the government's policies and practices regarding classified information, including during the period of alleged wrongdoing by the defendants in this case. His experience crosses agency lines and therefore was not shaped by the particular culture of any one agency. (*See id.*) Although the defense has a number of other potential experts, none of the others has the experience that crosses so many agency lines. As one example, Mr. Leonard has a unique overview of what is and is not truly damaging to the national security of the United States, as opposed to one particular agency's or department's view.

Despite his extensive work on classification policies and practices, however, Mr. Leonard never worked on this case as part of his official duties as a government employee. He never pursued any leak investigations related to this case, was never notified that any such leaks had occurred, was never asked to classify or de-classify information at issue in this case, was never asked to opine whether any information leaked was in fact classified, and was never asked to

opine on the potential danger, if any, that the information at issue in this case might present to national security. (*Id.* at ¶ 14.)

Given his unsurpassed expertise and his lack of involvement in this case, Mr. Leonard is perfectly situated to become an expert witness at trial. Indeed, at one point, the government prosecutors clearly thought so too. In March 2006, members of the prosecution team requested a meeting with Mr. Leonard to consider him as a potential government expert witness. (*Id.* at ¶ 7.) Although serving as an expert on behalf of the government was not one of Mr. Leonard's official functions, and although he had never done that previously (or since), Mr. Leonard agreed to meet with the prosecution team and answer their questions. (*Id.*)

The meeting is described aptly as a preliminary screening interview, and it lasted for only about one hour. (*Id.* at ¶¶ 8, 12.) The discussion was general and perfunctory. (*Id.* at ¶¶ 8-12.) They did not discuss the facts of this case. (*Id.* at ¶ 8.) The prosecutors did not show Mr. Leonard any evidence such as documents, tapes, or investigative reports. (*Id.*) They did not reveal the defendants' alleged disclosures, did not show Mr. Leonard any antecedent classified documents, and did not discuss *any* classified information. (*Id.*) The meeting, in fact, took place in Mr. Leonard's office, not in his SCIF. (*Id.*)

The non-classified discussion focused generally on how the National Security Council develops policies, why those policies may be classified, and what damage to national security could occur if classified policies are disclosed. (*Id.* at ¶ 9.) They did not discuss the specific countries or specific policies at issue in this case. (*Id.*) Indeed, the nature of the meeting was that the prosecution team asked Mr. Leonard general questions, rather than telling him details about the case. (*Id.* at ¶ 8.) During the meeting, Mr. Leonard also shared his views on the

problem of over-classification in the United States government and indicated that he had a long paper trail critical of the classification policies of government agencies. (*Id.* at ¶ 10.)

Once they heard what Mr. Leonard had to say in even the most preliminary fashion, the prosecution team never contacted Mr. Leonard again. (*Id.* at ¶ 11.) He was left with the distinct impression that they did not like what he had to say, especially about over-classification, and therefore had decided not to use him as an expert. (*Id.*)

After retiring from government service, defense counsel asked Mr. Leonard to become an expert witness in the case, and Mr. Leonard agreed. Mr. Leonard then sought and received an ethics opinion on January 22, 2008 (the "Ethics Opinion," attached as Exhibit B) from Christopher Runkel, the Ethics Official at the National Archives and Records Administration. The Ethics Opinion addressed the federal ethics laws and regulations applicable to Mr. Leonard's expert testimony. (Ethics Op. 1.) Mr. Runkel, however, was unable to determine the ethics of Mr. Leonard's testimony in the absence of a court order. For example, he stated that he did not have sufficient facts to determine if the restrictions of Section 207(a)(1) applied because he was unsure if Mr. Leonard had participated "substantially" in this case as a government official. (*See id.* at 2.) Mr. Runkel likewise did not have sufficient facts to determine whether the applicable regulations barred Mr. Leonard's testimony in the absence of a court order. (*See id.* at 4.) Nonetheless, Mr. Runkel stated that, *with a court order,* Mr. Leonard could testify consistent with the Act and the applicable regulations. (*Id.* at 2, 4.) He therefore concluded that, "it is the trial court's decision whether to approve you as a witness." (*Id.* at 1.) Notably, Mr. Runkel did not raise any of the issues that have now been concocted by the prosecution. Pursuant to the guidance from the government's own ethics official and because of Mr. Leonard's importance to

the defendants' case, defendants moved the Court on March 19, 2007 for an order permitting Mr. Leonard's testimony.

It should be emphasized that Mr. Leonard is one of the defendants' most important and irreplaceable witnesses. Both because of his unsurpassed credentials as an expert and in its substance, Mr. Leonard's expected testimony is critical to the defense. As indicated in the defendants' expert disclosure on March 14, 2008, Mr. Leonard will testify about classification processes and practices in the United States government; about the extensive problem of over-classification, i.e., that information classified on its face is often *not* the type which could damage national security if disclosed; that government officials of a sufficiently high level routinely disclose information contained in classified documents; and that such disclosures frequently advance national security interests instead of harming them. Mr. Leonard has also carefully examined the classified information at issue in this case,[1] and, applying the expertise he amassed over many years of assessing classified information for the government, he is prepared to opine on whether the information was demonstrably classified, potentially damaging to national security, closely held, and other related matters. He also will testify that the defendants reasonably could have believed that their conduct was appropriate. In short, Mr. Leonard's expected testimony seriously undercuts the government's case.[2]

Apparently cognizant of this fact, the government has decided to stridently oppose what should have been an uncontested, procedural motion to allow testimony. In its Opposition, the government argues that Mr. Leonard is prohibited from testifying as a defense expert (but not as

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[1] Steven Garfinkel, the ISOO Director who preceded Mr. Leonard and served for more than 20 years, has also agreed to testify for the defense. He, however, has decided not to review the classified information and thus his testimony is far more limited than that of Mr. Leonard.

[2] The defense incorporates by reference herein the Rule 16 disclosure delineating Mr. Leonard's expected testimony.

a government expert) because he allegedly participated "substantially not only in this very matter, but in this very litigation in his discussion with the government prosecution team" and the discussion allegedly included "a discussion of the facts of this case." (Opp'n 3.) The government offers no specific evidence of its claim (and has not checked with Mr. Leonard before making these inaccurate assertions); nor does the government cite any case law in support of this mistaken claim, and in truth, the evidence and case law squarely refute the argument, as discussed below. The Opposition also recites the applicable criminal penalties for violations of Section 207, stating that "[k]nowing violations of the law can be punished by not more than one year in jail and fine, and willful violations may be punished by up to five years in prison and fines." (*Id.*) The government's thinly veiled threat perverts the purpose of "The Ethics in Government Act." Finally, the Opposition erroneously claims that the Court lacks any "basis, grounds or authority" to grant the Motion. (*Id.*) The claim confronts neither the plain language of Section 207 nor the applicable case law, both of which conclusively demonstrate otherwise.

III. Argument

A. The Act Does Not Prohibit Mr. Leonard's Expert Testimony for the Defense

1. Mr. Leonard's Testimony is Entirely Consistent with the Purpose of the Act

The Act, inter alia, establishes criminal liability for former federal employees who:

> knowingly make[], with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter--
> (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
> (B) in which the person participated personally and substantially as such officer or employee, and
> (C) which involved a specific party or specific parties at the time of such participation.

18 U.S.C. § 207(a)(1). Congress passed the Act to address "the problem of individuals who attempt to utilize the knowledge and influence gained in government service to further private ends." *Martin Oil Service, Inc. v. Koch Refining Co.*, 718 F.Supp. 1334, 1338 (N.D. Ill. 1989).[3] Indeed, the Senate Report explained that the Act was responding to the fear "that officials may use information, influence, and access acquired during government service at public expense, for improper and unfair advantage in subsequent dealings with that department or agency." S. Rep. 95-170, at 33 (1977), as reprinted in 1978 U.S.C.C.A.N. 4216, 4249.

Similarly, the Office of Government Ethics ("OGE") adopted regulations under Section 207 stating that the purpose of the restrictions is to prohibit conduct that "undermines the confidence in the fairness of proceedings" or uses government-based relationships for "private ends." 5 C.F.R. § 2637.101(c)(1)-(4). The Act's restrictions, however, are limited and do not "bar employment even on a particular matter in which the former Government employee had major official involvement except in certain circumstances involving persons engaged in professional advocacy." 5 C.F.R. § 2637.101(c)(5). As a result, "only certain acts which are detrimental to the public confidence in the Government are prohibited." *Id.* Violations of the statute were prosecuted, for example, in recent cases arising out of former lobbyist Jack Abramoff's conviction in which legislative aides cashed in their unique access on Capitol Hill by improperly lobbying their former Congressional offices. *See, e.g.*, Plea Agreement at 1-2, *United States v. Robert W. Ney*, No. 06-cr-272-ESH (D.D.C. Oct. 13, 2006) (Congressman's guilty plea to conspiracy to violate 18 U.S.C. § 207).

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[3] *Accord United States v. Dorfman*, 542 F.Supp. 402, 407 (N.D. Ill. 1982) (explaining that Congress passed the Act to address "the public's impression that public service is but a vehicle to enhance private gain and that a 'revolving door' exists between the private bar and government service through which the private practitioner enters upon government service only to emerge a short time later to represent those whom he or she regulated, investigated or prosecuted during their term of public office.").

By invoking the Act in an attempt to keep Mr. Leonard from testifying for the defense in this case, the government perverts the statute's purpose. Mr. Leonard will not testify to "further private ends." He does not seek to use "influence [he] gained in government service" for some special interest but rather to share his expert knowledge and insights with the jury at trial. And, as the official who was recently the government's premier authority on classification practices, his testimony for the defense cannot possibly undermine public confidence in government proceedings. To the contrary, the public's confidence will be undermined only if the government succeeds in silencing Mr. Leonard through its strong-armed tactics which include a misrepresentation of the facts and law and no attempt to get their position correct by speaking again with Mr. Leonard. To that end, while claiming that Section 207 permanently bars Mr. Leonard from "appearing as an expert witness on behalf of any party in this matter *except the United States*," the government indicates that Mr. Leonard would be subject to criminal punishment if he testifies for the defendants. (Opp'n 3 (emphasis added).) The government's heavy-handed approach distorts the purpose of the Ethics in Government Act beyond recognition, and as discussed below, ignores the plain terms of the Act.[4] In short, Mr. Leonard's testimony would not run afoul of any of Section 207's goals. The Court should reject the government's attempt to silence Mr. Leonard.

[4] At least one court has sharply criticized prosecutors after they invoked 18 U.S.C. § 207 to threaten criminal prosecution of a defense attorney unless the attorney withdrew from the case. *See United States v. Gonzalez-Florido*, 986 F.Supp. 687, 689 (D.P.R. 1997) (stating that the government's threat "treads perilously close to a violation of the accused's Sixth Amendment right to counsel.... The United States can use a sword, never a bludgeon, in exercising its responsibilities."). Using such a threat in an effort to silence an expert witness likewise treads perilously close to violating a defendant's constitutional rights, as discussed in part C., *infra*.

2. Mr. Leonard Did Not Substantially Participate in this Matter as a Government Employee

The Act prohibits a former government official from communicating on behalf of a third party before a court only where the official "participated...substantially" in the matter while working for the government. 18 U.S.C. § 207(a)(1)(B). Mr. Leonard did not "participate" in this matter as the term is defined by the Act, and, even assuming for the sake of argument that he did participate, his participation was not "substantial" but perfunctory and peripheral. The restrictions of Section 207(a)(1) therefore do not apply.

The Act defines the term "participated" as "an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action." 18 U.S.C. § 207(i)(2). As avowed in Mr. Leonard's affidavit, he did not make any decisions in the government's prosecution or investigation of the defendants, he did not approve or disapprove any of the government's actions, he did not give advice or recommendations on how the government should conduct its case, and he did not help investigate the case for the government. (Leonard Aff. ¶ 13.) Mr. Leonard, in fact, is not a lawyer, so it is farfetched to think that the prosecutors would have given him any responsibility for taking action in this case. As defined in the Act, Mr. Leonard therefore did not participate in this matter as a government employee.

Even assuming that Mr. Leonard "participated" solely by having a preliminary general discussion with a prosecutor after the case was indicted, this "participation" was clearly not substantial. The Senate Report reveals that Section 207(a)(1) was intended to close a loophole in the previous statute that "allowed former officials to aid and assist private parties on matters in which they were *intimately involved* during government service." S. Rep. 95-170, at 32, 1978

U.S.C.C.A.N. at 4248 (emphasis added). The OGE regulations interpreting Section 207(a)(1)(B)'s substantiality limitation provide the following elaboration:

> 'Substantially,' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.

5 C.F.R. § 2637.201(d)(1); *see also United States v. Clark*, 333 F.Supp.2d 789, 794 (E.D. Wis. 2004) (quoting and applying 5 C.F.R. § 2637.201(d)(1)); *United States v. Martin*, 39 F.Supp.2d 1333, 1334 (D. Utah 1999) (same). Here, in the course of a government investigation and prosecution that already has lasted nearly a decade and involved scores of federal agents and prosecutors, Mr. Leonard's single discussion with members of the prosecution team after the charges were brought and in the context of the government's search for expert witnesses certainly did not constitute "intimate involvement" and was not "of significance to the matter."

This discussion consisted of a single meeting in March 2006 between Mr. Leonard and members of the prosecution team – scheduled at the government's request – so that the prosecutors could evaluate Mr. Leonard as a potential expert witness *for the government*. (Leonard Aff. ¶ 7.) At the meeting, they did not discuss the specific facts of the case, and the government did not share with Mr. Leonard any of the evidence in the case or any classified information. (*Id.* at ¶ 8.) No documents were shown; no specific allegations of alleged NDI were disclosed or revealed; and the meeting did not even take place in a SCIF. (*Id.*) Mr. Leonard gave the prosecution team a general description of how the National Security Council develops policies about certain countries, why such policies are classified, and what damage could come

from disclosure of that information. (*Id.* at ¶ 9.) Neither the specific countries involved in this case nor the alleged disclosures were discussed. (*Id.* at ¶¶ 8-9.)

Thus, the meeting is best described as a preliminary screening interview that the government conducted in its search for expert witnesses. (*See id.* at ¶ 12.) Such a screening interview is hardly "intimate involvement." It does not suggest that the "effort devoted" by Mr. Leonard was "important" to the prosecution's case, and the interview certainly was not a "critical step" in the prosecution. Mr. Leonard merely cleared an hour of his schedule on a single day to be interviewed as a potential witness for the government. (*See id.* at ¶ 8.) The government's claim that "Mr. Leonard participated personally and substantially not only in this very mater, but in this very litigation" is at best disingenuous. (*See* Opp'n 2.) Tellingly, the government Opposition provides no evidence and fails to cite a single case in support of its bald assertion.

The case law, in fact, strongly supports the conclusion that the Act permits Mr. Leonard to testify for the defense. To be sure, a few courts have relied on Section 207 to prevent conflicts of interest in federal prosecutions, but those cases are glaringly distinguishable from the situation here. For example, in *Clark*, Rodney Cubbie, a supervising Assistant United States Attorney ("AUSA") actually participated in the drug trafficking investigation of Clark by, among other things, reviewing investigative reports, discussing the investigation with the lead AUSA, attending at least one debriefing, and assisting in obtaining various records for the investigation. 333 F.Supp.2d at 794. Cubbie subsequently left government service, and Clark, after being indicted, retained him as his defense attorney. *Id.* at 791. In granting the government's motion to disqualify Cubbie, the court – predictably – found that his involvement in the case as an AUSA had been substantial, and that disqualification thus was appropriate to serve Section 207's

purpose of limiting the "revolving door" between government service and private practice. *See id.* 795-96.

Other cases similarly involve former prosecutors who sought to represent criminal defendants *in the very cases they had investigated as government attorneys*. *See Martin*, 39 F.Supp.2d 1333 (disqualifying defense attorney where, as an AUSA, he had authorized and directed various investigative steps against the defendant in the same case); *Dorfman*, 542 F.Supp. 402 (denying former United States Attorney's motion to appear on behalf of defendant because the investigation had occurred during the United States Attorney's tenure); *cf.* Conflict of Interest - Former United States Attorney, 1 Op. Off. Legal Counsel 1, 1977 WL 18004 (opining that a United States Attorney's participation was not "sufficiently substantial to give rise to the permanent bar in 18 U.S.C. § 207(a)" where he only reviewed a prosecution file and assigned it to an AUSA); *see also In re Asbestos Cases*, 514 F.Supp. 914 (E.D.Va. 1981) (disqualifying a former government attorney who had represented the government in asbestos cases from representing private litigants in the same litigation). All of these cases involve former officials seeking to use the "revolving door" between the government and private sector for their personal benefit; all of the cases involved earlier "substantial participation" by the government attorney on the other side of the same case; and all of the cases likely would have undermined public confidence in the integrity of government proceedings if the conflict-of-interest had been permitted.

None of the circumstances justifying disqualification in those cases is present here. Far from using a revolving door to switch sides from the government to the private sector, Mr. Leonard simply has agreed to testify about his insights and opinions regarding classification procedures and practices and how those procedures and practices relate to the information at

issue in this case. He would have agreed to share those same insights and opinions as a government expert, but the prosecution simply disagrees with his views and now wants to make sure that a jury never hears them. Mr. Leonard remains on the same side he has always been on, committed to protecting national security by ensuring that potentially damaging sensitive information – and *only* such information – is given the protections of the classification system.

As demonstrated in Mr. Leonard's affidavit, the government's interview of Mr. Leonard at most constitutes perfunctory involvement in this matter. Because he never participated substantially in this matter as a government employee, under the Act, Mr. Leonard may testify as an expert for the defense in this case. The Court therefore should grant the Motion.

3. Mr. Leonard's Discussion with Members of the Prosecution Team Was Not Part of his Official Duties

Section 207 (a)(1) expressly applies only where a government employee acts "*as* such officer or employee." 18 U.S.C. § 207 (a)(1)(B) (emphasis added). In other words, the government official must be acting as part of his official duties to be subject to the Act's prohibitions. Defense counsel is aware of no cases that have applied this prohibition based on an act of a former official that was outside the scope of his official duties, and the government cites no such cases. *Cf., e.g., Clark*, 333 F.Supp.2d at 794 (discussed *supra*).

However, when interpreting 18 U.S.C. § 208 – the related conflict-of-interest statute that applies to *current* government employees and which uses nearly identical language as the Act –, the Fifth Circuit requires the government to prove that a defendant "participated personally and substantially *in his official, governmental capacity* in a matter." *United States v. Nevers*, 7 F.3d 59, 62 (5th Cir. 1993). Given the similarity of the two statutes' language and purpose, the Act likewise must be read to apply only where the employee participated substantially in his official capacity in a matter. Indeed, Congress could have made the Act's prohibitions applicable to any

acts occurring "when" a person was a government employee but instead chose to limit the statute's reach where there was participation "as" a government employee.

Mr. Leonard's discussion with the prosecution team was not part of his official duties. (*See* Leonard Aff. ¶ 7.) In fact, in more than 30 years of government employment, the interview was the only time Mr. Leonard has ever been approached by prosecutors about the possibility of serving as an expert witness. (*Id.*) Mr. Leonard therefore did not attend the meeting in his official capacity. In this respect, it is important to recognize that an expert does not act in an "official, governmental capacity" simply by virtue of testifying for (or consulting for, or interviewing with) government prosecutors. The discussion Mr. Leonard had with the prosecution team could have occurred after he retired, but that would not have changed the nature of the meeting. Indeed, the government utilizes expert witnesses who are not government officials, even to testify about national security issues. *See United States v. Hammoud*, 381 F.3d 316, 335-36 (4th Cir. 2004). Because those witnesses are not current government officials, they cannot be acting in an official capacity.

Mr. Leonard therefore was not acting in his official capacity when he met with members of the prosecution team and, for this additional reason, the prohibitions of Section 207 (a)(1) do not apply.

B. The Court Should Issue an Order Authorizing Mr. Leonard's Testimony

Even if the Court were to entertain the government's misrepresented factual and unsubstantiated legal claim that Mr. Leonard participated substantially in this matter in his official capacity as a government employee, and even if the Court accepts that prohibiting Mr. Leonard from testifying could be consistent with the purpose of the Act, Mr. Leonard

nonetheless is permitted to testify under an exception to the Act's prohibitions. The Act provides:

> Nothing in this section shall prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. Notwithstanding the preceding sentence—
>
> (A) a former officer or employee of the executive branch of the United States (including any independent agency) who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, *except pursuant to court order*, serve as an expert witness for any other person (except the United States) in that matter.

18 U.S.C. § 207(j)(6) (emphasis added). The plain language of the provision thus authorizes Mr. Leonard to testify "pursuant to a court order," as the defendants' seek in their Motion. Although the statute does not establish a standard for issuing such an order, other courts have issued such orders in varying circumstances. *E.E.O.C. v. Exxon Corp.*, 202 F.3d 755, 758 (5th Cir. 2000) (affirming district court's order permitting former DOJ officials to testify as paid experts for private company and noting that Section 207 "is silent" on when such orders should be issued); *F.D.I.C. v. Refco Group, Ltd.*, 46 F.Supp.2d 1109, 1111 (D. Colo. 1999) (appointing plaintiff's witness as expert and enjoining the government from enforcing its ethics rules against the expert for his testimony); *Dean v. Veterans Administration*, 151 F.R.D. 83, 84-86 (N.D. Ohio 1993) (denying motion to quash and declining to apply ethics regulations to restrict government employees from serving as expert witnesses); *Krupp v. United States*, No. 8-96-CV-648, slip op., 1999 WL 34793089 at *5 (D. Neb. 1999) (ordering that plaintiff's expert witnesses would be permitted to testify). These courts recognized the propriety of such orders, and the orders, in fact, are not meaningfully different than orders courts routinely issue directing witnesses to testify. *See, e.g., United States v. Rosen*, 520 F.Supp.2d 802, 814 (E.D.Va. 2007) ("*Rosen XI*") (discussing the Court's order directing that various witness subpoenas be issued). The above decisions also reflect that a subpoena is insufficient to meet the statute's requirement of expert

testimony "pursuant to a court order." Indeed, in analyzing similar language under the Privacy Act, the D.C. Circuit concluded that a subpoena does not qualify as a court order unless the subpoena has been specifically approved by a court. *Doe v. DiGenova*, 779 F.2d 74, 85 (D.C. Cir. 1985).

Furthermore, the Ethics Opinion makes clear that the government's own ethics official believes that a court order is appropriate to resolve any ethical uncertainties relating to Mr. Leonard's testimony, and the defendants filed their Motion pursuant to that advice. Now, a court order is particularly necessary given the government's *in terrorem* recent warning about Mr. Leonard's potential criminal liability if he testifies without an order. *See Gonzalez-Florido*, 986 F.Supp. at 689 (denying prosecutors' request to disqualify the defendant's attorney under Section 207 and sharply criticizing the government's threats of prosecution).

Finally, as demonstrated above, strong reasons exist for the Court to issue an order permitting Mr. Leonard to testify. The Act was never intended to prohibit expert testimony in these circumstances; Mr. Leonard never participated substantially in this matter; and he did not attend the meeting in his official capacity. Any one of these grounds provides ample justification for the Court to issue the requested order. The Court thus has ample authority to issue the requested order, and such an order is appropriate in this case.

C. If the Court Denies the Motion, or if the Government Uses Threats of Prosecution to Keep Him from Testifying, the Defendants' Constitutional Rights Will Be Violated

1. The Right to Present a Complete Defense

The Fifth and Sixth Amendments guarantee criminal defendants "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). This right is abridged where court rulings "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.*

(internal quotations omitted); *see also Cagle v. Branker*, __ F.3d __, 2008 WL 697691 at *5 (4th Cir. 2008) (quoting *Holmes*). Both of these elements are present here.

As the Fourth Circuit explained in *Cagle*, the first element – infringement of a weighty interest of the defendant – is met where a court "exclude[s] a defense witness's testimony during conviction or sentencing proceedings." 2008 WL 697691 at *5. Indeed, there is a long line of Supreme Court cases reversing criminal convictions where such witness exclusion occurred. *See id.* at *4-*5 (citing *Holmes*, 547 U.S. 319; *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam); *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Washington v. Texas*, 388 U.S. 14 (1967)). Here, the government argues that Mr. Leonard is prohibited from testifying for the defense, that he is subject to criminal prosecution if he does so without a court order, and that no basis exists for issuing such an order. (*See* Opp'n 2-3.) Further, the Ethics Opinion advises Mr. Leonard to obtain a court order before he testifies to resolve any ethical uncertainties. In these circumstances, if the Court accepts the government's arguments and denies the Motion, the effect will be to exclude a key defense witness. The first element of the *Holmes* standard therefore is met.

The second element is also met because excluding Mr. Leonard's testimony would serve no legitimate purpose. As explained in Part III., A., 1., *supra*, the Act's purpose was to prevent improper influence on government agencies and to ensure that government-based relationships are not abused for private ends. *See* 5 C.F.R. § 2637.101(c)(1)-(4). Those legitimate goals are not served by excluding Mr. Leonard's testimony. Instead, the government's only purpose in seeking to exclude Mr. Leonard is to avoid highly credible testimony that undermines the prosecution by directly refuting disputed elements of the alleged crime. As a premier expert on these issues, he is expected to testify, for example, that disclosed information was not the type

that could damage national security. Such "penetrating evidence of actual innocence" is precisely the type which cannot be excluded under the second prong of the *Holmes* test. *See Cagle*, 2008 WL 697691 at *5. Further, the government's *legitimate* interest in criminal prosecutions – that "justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935) – would be frustrated, rather than served, if Mr. Leonard is not permitted to testify, especially on such flimsy grounds that the government has invented.. Accordingly, the defendants' right to present a complete defense would be infringed if government succeeds in preventing Mr. Leonard from testifying.

2. The Right to Compulsory Process

Closely related to the right to present a complete defense is the Sixth Amendment's guarantee that every criminal defendant shall have "compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. As the Supreme Court has stated, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers*, 410 U.S. at 302; *see also United States v. Rosen*, 520 F.Supp.2d 802, 810 (E.D.Va. 2007) ("*Rosen XI*") (quoting *Chambers*). The Fourth Circuit likewise has emphasized that, "[t]he importance of the Sixth Amendment right to compulsory process is not subject to question -- it is integral to our adversarial criminal justice system." *United States v. Moussaoui*, 382 F.3d 453, 471 (4th Cir. 2004). This right entitles a defendant to a witness's testimony where the defendant makes a "plausible showing" that the testimony "would be (i) relevant to the charged crimes, (ii) material, in that the testimony might have an impact on the outcome of the trial, and (iii) favorable to the defense." *Rosen XI*, 520 F.Supp.2d at 812; *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Mr. Leonard's expected testimony easily meets this standard.

The expert disclosure defense counsel submitted on March 14, 2008, amply makes the required "plausible showing" as to all three requirements. For example, Mr. Leonard's expected testimony that information disclosed in this case could not damage national security, was not closely held, and was not demonstrably classified, is obviously relevant, material, and favorable. Such testimony will directly refute a necessary element of the charged crime, and given Mr. Leonard's unsurpassed expertise, his testimony is likely to impact the outcome of trial. Similarly, Mr. Leonard's expected testimony that high level government officials frequently disclose information contained in classified documents for the purpose of advancing national security interests instead of harming them is also relevant, material, and favorable to the defense on the question of the defendants' intent. As this Court has explained in a similar context, "defendants are entitled to show that... the meetings charged in the Indictment were simply further examples of the government's use of AIPAC as a diplomatic back channel." *Rosen XI*, 520 F.Supp.2d at 812-13.

In *Rosen XI*, this Court ruled that the Compulsory Process Clause entitles the defendants to compel testimony like that which Mr. Leonard is expected to offer. *See id.* In so ruling, the Court noted that:

> nothing in the Sixth Amendment right to compulsory process requires, nor should it require, an accused to refrain from calling government officials as witnesses until he has exhausted possible non-governmental witnesses to prove a fact.... this point is particularly clear where, as here, the forecasted testimony would likely be more credible and probative were it to come from a government official.

Id. at 811-12. The same reasoning applies here[5]. Thus, even if the Court agrees with the government that the Act's restrictions on government officials prohibit Mr. Leonard's testimony, the Sixth Amendment would override the Act because a defendant need not "refrain from calling

[5] Indeed, where else can a defendant find a well-qualified expert on the issues involved in this case other than seeking a someone with the type of government experience of Mr. Leonard?

government officials as witnesses," especially when, as here, the testimony would be highly credible and probative.

3. The Right to Due Process

The Due Process Clause requires a "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). In *Wardius*, the Supreme Court held that, absent a strong state interest to the contrary, any discovery obligation placed on a criminal defendant must be accompanied by a corresponding reciprocal discovery obligation on the government. *Id.* at 475-76. The Seventh Circuit recently applied *Wardius* in context of an imbalance in expert testimony and stated that, "[a]ccess provided to private experts retained by the prosecution must be provided to private experts retained by the defense." *United States v. Shrake*, 515 F.3d 743, 747 (7th Cir. 2008). Although *Shrake* dealt with an expert's pretrial access to evidence, the same principle applies with at least as much force at trial.

Here, the government argues that Section 207 prohibits Mr. Leonard and other former officials from testifying for the defense but permits them to testify for the government. (*See* Opp'n 2-3). If the Court accepts the government's view that Section 207 requires the Court to bar their testimony for only the defendants, the Act would operate unilaterally to preclude Mr. Leonard and other former officials from testifying as defense witnesses, thus creating an impermissible imbalance between the government and the accused. *See Wardius*, 412 U.S. at 474. Indeed, under the government's view, it could conduct screening interviews, like the one it held with Mr. Leonard, of all government employees who later may become adverse experts in a matter and thereby disqualify them from testifying. By contrast, if the defendants interviewed a prospective expert, regardless of where he worked previously, such an interview of course would not disqualify the expert as a government witness. Construing the Act to require such

disqualifications here, as the government urges, would violate the Due Process Clause by creating a fundamentally unfair balance of forces at trial.

4. The Right to Free Speech

Finally, Mr. Leonard's right to free speech would be violated if the Act prevents him from testifying for the defense.[6] It is well established that the First Amendment protects even a current government employee's right to speak as to matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Mr. Leonard's testimony in this case unquestionably will involve matters of significant public concern, directly touching on national security matters and the issue of secrecy in our government. Mr. Leonard's First Amendment rights therefore override the Act unless the government shows that its interests outweigh the interest in free expression. *See id.* at 418. Because Mr. Leonard is a *former* government employee, however, the government's interest here is limited. Indeed, as discussed in detail above, the government has no legitimate interest in preventing Mr. Leonard's testimony. Thus, the ethics restrictions invoked by the government cannot overcome Mr. Leonard's First Amendment right to testify for the defendants in this case. *See Hoover v. Morales*, 164 F.3d 221, 226 (5th Cir. 1998) (affirming district court's enjoinment of enforcement of state ethics laws to prevent state employee from testifying as expert witness against the state); *see also Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002) (same). For this reason as well, the Court should grant the Motion.

IV. Conclusion

As provided in the Act and as supported by the case law and the Ethics Opinion, this Court has authority to issue an order authorizing Mr. Leonard's testimony at trial. The defendants need such an order to ensure that Mr. Leonard can testify safely, particularly in light

[6] Mr. Leonard has been advised of this First Amendment issue and has indicated his desire to assert his First Amendment rights herein.

of the government's shot across the bow regarding Mr. Leonard's potential criminal liability. Such an order is also appropriate because the Act, by its purpose and terms, clearly permits Mr. Leonard to testify for the defense in this case. Further, even if, by the Act's terms, Mr. Leonard was prohibited from testifying, the defendants' Fifth and Sixth Amendment rights would trump the Act and justify the requested court order. Accordingly, Defendants respectfully request that the Court grant the Motion.

Respectfully submitted,

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April 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2008, Defendants' Reply to the Government's Opposition to Defendants' Motion for an Order Authorizing the Expert Witness Testimony of Defense Expert J. William Leonard was served by electronic mail, on the following:

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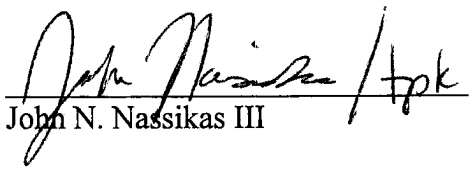

John N. Nassikas III

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	
	)	**CRIMINAL CASE NO. 1:05CR225**
STEVEN J. ROSEN and	)	
KEITH WEISSMAN,	)	**The Honorable T.S. Ellis, III**
Defendants.	)	

EXHIBITS TO DEFENDANTS' REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION FOR AN ORDER AUTHORIZING THE EXPERT WITNESS TESTIMONY OF DEFENSE EXPERT J. WILLIAM LEONARD

Defendants Steven J. Rosen and Keith Weissman, through counsel, respectfully submit the attached exhibits to their reply to the government's opposition to the defendants' motion for a court order authorizing Mr. J. William Leonard to testify as an expert. The exhibits were inadvertently omitted when defense counsel filed the reply brief on April 11, 2008.

Respectfully submitted,

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April 14, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2008, these Exhibits to Defendants' Reply to Government's Opposition to Defendants' Motion for an Order Authorizing the Expert Witness Testimony of Defense Expert J. William Leonard were served by email on:

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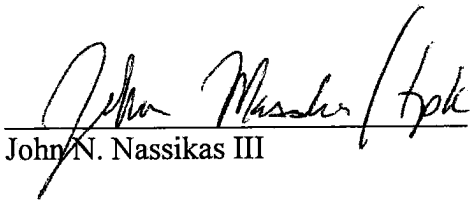

John N. Nassikas III

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CRIMINAL CASE NO. 1:05CR225
	)	The Honorable T.S. Ellis, III
STEVEN J. ROSEN and	)	
KEITH WEISSMAN,	)	
Defendants	)	

AFFIDAVIT OF J. WILLIAM LEONARD

I, J. WILLIAM LEONARD, hereby depose and swear as follows:

1. At the request of defense counsel, I have agreed to testify as an expert witness in this case. I understand that the prosecutors oppose my testimony and contend, in part, that I should be barred from testifying because, in their view, I participated personally and substantially in this case when I submitted to one government interview in 2006 conducted by members of the prosecution team. I submit this affidavit to describe the circumstances of that interview.

2. I was employed by the Department of Defense ("DoD") from 1973 to 2002. From 1996 to 1998, I served as the Director of Security Programs for DoD, and from 1999 to 2002, I served at times as the Deputy Assistant Secretary of Defense responsible for security and information operations and at other times as the Principal Director in that office. Part of my responsibility was to develop and oversee policies to insure that there were no leaks of classified information, that such leaks were investigated when they did occur, to ensure that information that should be classified was in fact classified, and to ensure that information that was not supposed to be classified was not.

3. From 2002 to January 2008, I served as the Director of the Information Security Oversight Office ("ISOO"), one of only three individuals to have been appointed to that position since it was created by then President Carter in 1978. Michael Blouin was ISOO's first Director, and he served until 1980. Steven Garfinkel then served as Director from 1980 until 2002, when I was appointed. The Director of ISOO is known colloquially as the "Classification Czar" because the Director is responsible for oversight of the government-wide classification system. My authority as Director extended to all federal executive branch agencies. The Director of ISOO has authority to access more classified information than anyone in the government other than the President, and ultimately can be denied access only by the President. Aside from the President, the Director of ISOO is the primary official charged with the responsibility to direct that information classified in violation of the governing executive order be declassified, with authority to overrule even the decisions of Cabinet members, subject to appeal to the President.

4. I also sat on the Interagency Security Classification Appeals Panel ("ISCAP") from 1999 to 2002 as the DoD representative, and from 2002 to January 2008, I served as the Executive Secretary of the ISCAP. ISCAP's responsibilities include reviewing appeals of agency mandatory declassification review decisions to determine if information designated as classified meets the standards required for classification.

5. In my various capacities with the federal government, it was my responsibility on a regular basis to determine whether information which an agency sought to classify or keep classified met the classification criteria. As part of that responsibility, I had to determine whether and to what extent the information at issue was the sort of information that would be potentially damaging to national security if disclosed. I also assessed on a regular basis whether

purportedly classified information that had been leaked or disclosed was demonstrably classified or not, and whether it was closely held or not.

6. In January 2008, I retired as Director of ISOO and Executive Secretary of the ISCAP. I currently serve as an unpaid Senior Counselor to the Archivist of the United States, in the capacity of "special Government employee." In that capacity, I work only part time, whenever a particular issue comes up. In the future, I may also become a paid part time employee of the Office of Personnel Management, in the capacity of "re-employed annuitant."

7. In or around March 2006, while I was Director of ISOO, a Department of Justice prosecutor, Tom Reilly, requested a meeting with me. My understanding was that Mr. Reilly was looking for an expert witness to testify in the AIPAC case about how the National Security Council develops foreign policy, why those policies may be classified, and what damage to national security could occur if classified policies are disclosed. I understood the purpose of this preliminary meeting was to determine whether or not I should serve as a government expert. Although serving as an expert on behalf of the prosecution was not formally one of my official functions -- this was the only instance I had ever been approached while employed by the government about possibly serving as a prosecution expert -- I agreed to meet with the prosecution team and answer their questions.

8. In or around March 2006, I met with Mr. Reilly and other members of the prosecution team in my office. I recall that the meeting lasted about an hour. At the meeting, we did not discuss the specific facts of this case. The government did not show me any evidence such as documents, tapes, or investigative reports. Mr. Reilly did not reveal the defendants' alleged disclosures, did not show me the antecedent classified documents, and we did not discuss any classified information. Indeed, the meeting took place in my office, not in my SCIF. The

nature of the meeting was that Mr. Reilly asked me general questions, rather than telling me details about the case.

9. As expected, our non-classified discussion focused generally on how the National Security Council develops policies, why those policies may be classified, and what damage to national security could occur if classified policies are disclosed. We did not discuss the specific countries or specific policies at issue in this case. We may have also discussed the classification process in general terms.

10. During the meeting, I also shared with Mr. Reilly my views on the problem of over-classification in the United States government and indicated that I had a long paper trail critical of the classification policies of government agencies.

11. After the meeting, I do not recall hearing back from Mr. Reilly or anyone else on the prosecution team. At no time did Mr. Reilly or anyone else tell me that the government had decided to call me as an expert witness. In fact, to my recollection, at no time thereafter did anyone from the prosecution team contact me at all except for one unrelated phone call from an FBI agent in attendance. My impression from the interview was that they did not like what I had to say, especially about over-classification, and decided not to use me as an expert.

12. I believe the meeting is best described as a screening interview that Mr. Reilly conducted in his search for an expert witness. I would also describe our discussion as general and preliminary. By virtue of the fact that he never contacted me since, Mr. Reilly clearly decided not to utilize my services as an expert.

13. I did not make any decisions in the government's prosecution or investigation of this case at the meeting or at any other time. I did not approve or disapprove the government's actions in this case. I did not give the government advice or recommendations on how it should

conduct the case, and I did not investigate the case for the government. I believe that my involvement in this case as a government official is described accurately as insubstantial.

14. In my governmental duties, whether at DoD, ISOO, or ISCAP, I was never asked to pursue any leak investigations related to this case; I was never notified that any such leaks had occurred; I was never asked to classify or de-classify the information at issue in this case; I was never asked to opine whether any information allegedly leaked was in fact classified or closely held; and I was never asked to opine on the potential danger, if any, that the specific information at issue in this case might present to national security.

I certify under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C. on April 10, 2008.

J. William Leonard

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss:

Subscribed and Sworn ~~to (Affirmed)~~ before me in my jurisdiction this 10th day of April, 2008.
In Witness Whereof, I hereunto set my hand and seal.

Melissa T. Jones, Notary Public
Washington, D. C.
My Commission Expires January 31, 2010

EXHIBIT B

National Archives and Records Administration

8601 Adelphi Road
College Park, Maryland 20740-6001

Date: January 22, 2008

To: J. William Leonard

From: NGC-DAEO

Subject: Ethics rules applicable to expert testimony

This responds to your request for guidance regarding the federal ethics laws and regulations applicable to expert testimony.

I must emphasize that, ultimately, I have no authority to approve or disapprove your service as either a consultant or expert witness for the defense in the subject case. My research into this area of the law reveals that it is the trial court's decision whether to approve you as a witness. The Government may attempt to contest your service through its trial counsel, but my role is solely to analyze for you those parts of the post-employment conflict of interest statute, 18 U.S.C. § 207, and the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), 5 C.F.R. part 2635, that apply to this situation.

Background

You retired from the Senior Executive Service on January 3, 2008. Effective January 7, 2008, the Archivist appointed you to be a Senior Counselor to him under the Government's general expert-consultant authority. Your duties as Senior Counselor are different than your former duties as Director of the Information Security Oversight Office (ISOO). You are expected to serve in the unpaid capacity as Senior Counselor for less than 130 days during 2008, making you a "special Government employee" (SGE) for purposes of federal ethics laws and regulations, including the Standards of Conduct. In addition to being an SGE, you remain subject to the post-employment restrictions set forth at 18 U.S.C. § 207(j)(6), which addresses a former employee's service as an expert witness for persons other than the United States.

You have been contacted by the defense about possibly serving as an expert witness in what you have called the AIPAC Espionage Act case, *U. S. v. Rosen*, Case No. 05-cr-225. This is not your first contact with the *Rosen* case. In the Spring of 2006, you were interviewed by Government attorneys and possibly FBI agents in connection with the same proceeding. My understanding of that interview is as follows, based on your January 9, 2008, e-mail to me and our January 11, 2008, telephone conversation. The Government was potentially interested in having you testify as to whether and to what extent the alleged wrongdoing in the subject case damaged national security. During this interview, you were asked about your familiarity with certain NSC policy documents, the way in which those documents were developed, the kinds of information in them, and the damage to national security if the documents or the information in them were disclosed. You also discussed how the classification system is supposed to work. Following the 2006 interview, you learned that the Government did not

intend to use you as one of its experts. The 2006 interview was your sole contact with the current case until now.

Disclaimer

My advice is advisory only, and is provided in accordance with 18 U.S.C. § 207, the Standards of Conduct, 5 C.F.R. § 2635.107, and the Office of Government Ethics' (OGE) guidance on 18 U.S.C. § 207, which is found at 5 C.F.R. part 2637 and 5 C.F.R. § 2641.201. I am providing advice in my official capacity. As such, I am acting on behalf of NARA and the United States, and not as your representative. There is neither an attorney-client relationship nor privilege created between you and me and the information you have provided for my use in preparing this advice is not confidential or privileged.

Analysis and Discussion

Based on the information you have provided me, I believe two provisions potentially limit your ability to serve as an expert witness for the defense in the subject case. One is 18 U.S.C. § 207(j)(6) and the other is part of the Standards of Conduct, 5 C.F.R. § 2635.805.

18 U.S.C. § 207(j)(6)

Section 207 of Title 18, U.S.C., imposes a number of restrictions on former Government employees. One restriction, found at 18 U.S.C. § 207(a)(1), makes it illegal for a former –

> [O]fficer or employee . . . of the executive branch . . . [to] knowingly [make], with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . ., on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter – (A) in which the United States . . . is a party or has a direct and substantial interest, (B) in which the person participated personally and substantially as such officer or employee, and (C) which involved a specific party or specific parties at the time of such participation.

Even though you currently serve NARA as an SGE, you are considered a former employee for purposes of § 207(a)(1). The *Rosen* case is a "particular matter" in which the U. S. is a party. Given my understanding of the case's time line, I also believe the matter is one which involved specific parties in the Spring of 2006 when the prosecution interviewed you. Therefore, as testifying at the trial of this case would be a communication or appearance with the intent to influence under the statute, a critical question is whether you "participated personally and substantially" as an officer of the U.S. when you were interviewed by the Government in 2006. If you did participate to that degree in the *Rosen* matter, then, in theory, it would require a court order for you to serve as an expert witness at the trial. I base this conclusion on the language of 18 U.S.C. § 207(j)(6), which is one of the exceptions to the prohibition in § 207(a)(1). Section 207(j)(6) states the following, in pertinent part:

> **(6) Exception for testimony.**--Nothing in this section [§ 207] shall prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. Notwithstanding the preceding sentence – **(A)** a former officer or employee of the executive branch of the United States (including any independent agency) who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the United States) in that matter . . . .

I do not have sufficient facts to determine whether you participated personally and substantially in *Rosen* when you were interviewed by the prosecution. I am fairly confident that you participated "personally" when you were interviewed by Government counsel, because you took part in pre-trial preparations directly. *See* 5 C.F.R. § 2637.201(d)(1). Whether you participated "substantially" for purposes of § 207 depends on whether your participation in terms of interview answers or other information provided to Government counsel was significant in some way. *Id.* For example, a possible test of significance is whether your answers helped the Government make decisions about how to prepare its case. I cannot answer that question.

Even though I have raised the restriction in 18 U.S.C. § 207(a)(1) as a possible bar to your service as an expert witness for the defense, that restriction applies, so far as I can tell, only to your actual testimony. You would not violate the statute by talking to defense counsel about serving as an expert, or by participating in pre-trial procedural matters. Finally, if you were proposed as an expert witness, an order from the trial judge approving such service would meet the requirements of the exception in § 207(j)(6).

5 C.F.R. § 2635.805

This section of the Standards of Conduct states the following, in pertinent part:

> (a) Restriction. An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party . . ., unless the employee's participation is authorized by the agency under paragraph (c) of this section. Except as provided in paragraph (b) of this section, this restriction shall apply to a special Government employee only if he has participated as an employee or special Government employee in the particular proceeding or in the particular matter that is the subject of the proceeding.
>
> (b) [Terms do not apply unless you work more than 60 days for NARA in a 365-day period.]
>
> (c) Authorization to serve as an expert witness. Provided that the employee's testimony will not violate any of the principles or standards set forth in this part, authorization to provide expert witness service otherwise prohibited

by paragraphs (a) and (b) of this section may be given by the designated agency ethics official of the agency in which the employee serves when:

(1) After consultation with the agency representing the Government in the proceeding or, if the Government is not a party, with the Department of Justice and the agency with the most direct and substantial interest in the matter, the designated agency ethics official determines that the employee's service as an expert witness is in the interest of the Government; or
(2) The designated agency ethics official determines that the subject matter if the testimony does not relate to the employee's official duties within the meaning of Sec. 2635.807(a)(2)(i).

(d) Nothing in this section prohibits an employee from serving as a fact witness when subpoenaed by an appropriate authority.

The restriction in Section 805 potentially applies to you because you did participate in the *Rosen* case as Director of ISOO when Government counsel interviewed you. However, I base that conclusion on the plain meaning of "participate." The term is not defined in the Standards of Conduct and apparently has not been defined by case law. Further, while the Standards of Conduct seem to give me the power to authorize your service as an expert witness, my understanding from the Office of Government Ethics (OGE) is that expert witness issues involving former federal employees or SGEs are normally decided either by agreement of opposing counsel or court order. For this reason, and because the § 207 issue discussed above has not been resolved, I cannot make a determination one way or the other under § 2635.805 at this time.

Conclusion

For the reasons discussed above, I cannot say whether you may pursue service as an expert witness in the *Rosen* case. I am available to answer any follow-up questions you may have regarding the applicable laws and regulations. You are free, of course, to share this memorandum with defense counsel and to use its analysis in deciding what you will do. At OGE's urging, I have spoken with Government counsel in the case. Government counsel advised that it could play no role in my rendering of advice to you under 18 U.S.C. § 207 or the Standards of Conduct. It has neither played any role nor participated in the drafting of this memorandum in any way.

CHRISTOPHER M. RUNKEL
Designated Agency Ethics Official