IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	**Criminal No. 1:10-cr-0181-RDB**
THOMAS ANDREWS DRAKE	*	

DEFENDANT'S MOTION FOR RELIEF FROM PROTECTIVE ORDER

The defendant, Thomas Drake, through his attorneys, hereby moves this Honorable Court for an Order granting defense expert witness, J. William Leonard, relief from the Protective Order governing unclassified discovery. Mr. Leonard seeks the Court's permission to publicly discuss the "What a Success" document (charged in Count One of the Indictment) and the government's rationale for classifying the document, which, in his opinion, contained absolutely no classified information. It is Mr. Leonard's firm belief that an open discussion about the government's actions in this important case is essential to protect the integrity of the Executive Branch's national security information classification system.[1]

I. Introduction

J. William Leonard is the former Director of the Information Security Oversight Office (ISOO), a position colloquially referred to as the "Classification Czar." As the Classification Czar, Mr. Leonard was responsible to the President for policy oversight of the Executive Branch's national security information classification system. His qualifications as a subject matter expert in the field of classification of national security information are unimpeachable.

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[1] Defense counsel requested the government's consent to this motion, but the request was denied. It should be noted at the outset that all of the information Mr. Leonard seeks to discuss publicly is unclassified. He never had access to the classified discovery produced in this case, and neither he nor the defense is seeking permission to disclose any classified information.

Mr. Leonard was prepared to testify for the defense as an expert witness at trial. Among the information he was going to share with the jury and the public was his opinion that the "What a Success" document did not contain any information that met the standards of the classification system and that the government's proffered reasons in support of classification were baseless. Because this case was resolved short of trial, Mr. Leonard was not able to testify and share his opinions with the public. He nevertheless retains a deep interest in the government's conduct in this important case, and he wants to discuss his concerns with the public.

In support of his request, Mr. Leonard has drafted and signed the attached affidavit in which he explains why he believes a public discussion of the government's decision to classify the "What a Success" document is important to maintain the integrity of the classification system. See Exhibit A (J. William Leonard Affidavit, dated May 16, 2012). In his 34 years of federal government service, Mr. Leonard has "seen many equally egregious examples of the inappropriate assignment of classification controls to information that does not meet the standards for classification," but he has "never seen a more willful example." Id. ¶ 12. Mr. Leonard believes "the Government's actions in the Drake case served to undermine the integrity of the classification system and as such, have placed information that genuinely requires protection in the interest of national security at increased risk." Id. ¶ 14. He also believes that "sunshine focused on agencies actions [is] the most effective means to counter abuses of the classification system." Id. ¶ 16. It is for that reason – to provide "impetus for appropriate action by the Government to address the abuse not only in this instant case, but in future situations as well" – that Mr. Leonard requests permission from the Court to discuss and disclose the "What a Success" document, the two expert witness disclosures that contain the government's

classification rationale, and his complaint to ISOO. Id. ¶ 17.

II. Background

In April 2010, Mr. Drake was charged in a ten-count Indictment with five counts of willfully possessing documents containing national security information. One of the five charged documents – an "attaboy" email entitled "What a Success" – was found on Mr. Drake's computer and had been shared with a newspaper reporter. See Exhibit B ("What a Success" document) (filed under seal). The government took the position that, when the "What a Success" document was found on Mr. Drake's computer in November 2007 and when the Indictment was issued in April 2010, it contained two paragraphs that were classified at the "Secret" level. See Exhibit C (November 29, 2010, Expert Witness Disclosure) (filed under seal). That position soon changed. Three months after the Indictment issued, the National Security Agency decided that the two paragraphs in the "What a Success" document previously classified as "Secret" were no longer classified – a decision that rendered the entire document unclassified. See Exhibit D (March 7, 2011, Expert Witness Disclosure) (filed under seal).[2] This decision was shared with Mr. Leonard, who reviewed the now-unclassified document and the government's expert witness disclosures identifying the reasons for the initial classification and the subsequent declassification. Mr. Leonard was prepared to testify that the "What a Success" document contained no classified information; that the government's reasons for classifying it were meritless; that the reasons for declassification were inconsistent with the reasons for classification; and that the "What a Success" document was an innocuous, internal

[2] The fact that the "What a Success" document was no longer classified was not disclosed to the defense until March 7, 2011, nine months after the declassification decision was made.

communication that never should have been classified in the first place. Because the government dismissed the ten felonies it had brought against Mr. Drake a few days before trial, Mr. Leonard's important testimony was never heard by the jury or the public.

III. The Protective Order and Mr. Leonard's Complaint

The only barrier to a public discussion of the unclassified "What a Success" document is the Protective Order governing unclassified discovery, which Mr. Leonard, as a defense expert witness, signed.[3] The Protective Order provides that unclassified discovery may be disclosed only in connection with the criminal proceedings or "by further Order of this Court." See Protective Order ¶ 4. On July 29, 2011, the Court entered an Order granting a similar request from Mr. Leonard for partial relief from the Protective Order.[4] See Dkt. No. 175. Pursuant to that Order, the Court allowed Mr. Leonard to file a formal letter of complaint with the current Director of ISOO, John P. Fitzpatrick (the current "Classification Czar"), regarding the government's decision to classify the "What a Success" document. Consistent with the Court's Order, Mr. Leonard filed a letter of complaint the following day. See Exhibit E (July 30, 2011, J. William Leonard letter to John P. Fitzpatrick) (filed under seal). Almost ten months have passed since Mr. Leonard filed his complaint, and he has received no response. See Leonard Aff. ¶ 15 (Ex. A). He now would like to share his concerns with the public.

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[3] The classified discovery in this case is subject to a separate Protective Order. That Order is not at issue here, because Mr. Leonard did not review any classified information in this case and the defense is not seeking public disclosure of classified information. The defense is also not seeking disclosure of the names of NSA employees that are identified in the "What a Success" document. If this motion is granted, the defense would redact the employees' names, and Mr. Leonard would not discuss them.

[4] The government did not oppose the previous request for relief from the Protective Order.

IV. The Need for Open Debate about Public Issues

Mr. Leonard is a staunch defender of the classification system. He is neither pro-government nor pro-defendant; his loyalty is to the classification system. It is because of his loyalty to the classification system that he agreed to serve as an expert witness. He spent many evening and weekend hours working on this case. At his insistence, he worked on a *pro bono* basis. Mr. Leonard made very clear that his "motivation for becoming involved in the Drake case was [his] concern for the integrity of the classification system." Id. ¶ 8. At trial, Mr. Leonard was expected to testify that the integrity of the classification system depends on adherence to the standards in the Executive Order and that the government's tendency to classify information that does not meet the classification standards in the Executive Order undermines the uniformity, integrity, and efficacy of the classification system. To combat this destructive government tendency to classify information that does not meet the classification standards, Mr. Leonard has found "the most useful tool" to be public disclosure of government conduct. It is fair to say that Mr. Leonard subscribes to Justice Stewart's philosophy: "I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained." New York Times Co. v. United States, 403 U.S. 713, 729 (1971).

The Supreme Court has long recognized that open discussion of public issues is essential to a free, democratic society. In New York Times Co. v. United States, 403 U.S. 713 (1971), the Supreme Court extolled the virtues of public discussion of important national issues as it rejected unjustified and unnecessary government secrecy:

> Secrecy in government is fundamentally anti-democratic, perpetuating

> bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate.

Id. at 728 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 269-270 (1964)). It is through open debate and discussion that the citizenry may check the largely unchecked power of the Executive:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Id. Mr. Leonard's request is in the best tradition of the First Amendment doctrine and our nation's constitutional commitment to an informed public debate, especially about these vital issues of national security.

For all these reasons, and the reasons stated in Mr. Leonard's affidavit, the defense respectfully moves this Court for an Order granting J. William Leonard permission to disclose and discuss the "What a Success" document, the government's two expert witness disclosures dated November 29, 2010, and March 7, 2011, and his July 30, 2011, letter of complaint to ISOO.

Respectfully submitted,

/s/

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AFFIDAVIT OF J. WILLIAM LEONARD

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

1. At the request of defense counsel, I had agreed to testify as an expert witness in the matter of United States v. Thomas Andrews Drake based upon the expertise I developed during the course of a 34 year career as a Federal public servant in the national security arena.

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 ensure that there were no leaks of classified information, to ensure 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 up to that point in time since it was created by then President Carter in 1978. The Director of ISOO is known colloquially as the "Classification Czar" because the Director is responsible for oversight of the government-wide classification system. The Director of ISOO has inherent authority to access more classified information than anyone in the government other than the President and Vice-President, and ultimately can be denied access only by the President. Aside from the President, as the Director of ISOO, I was 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 by Federal agencies meets the President's 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 the Chief Operating Officer of a not-for-profit, non-governmental organization.

7. In or around October 2010, I was approached by Deborah Boardman, Assistant Federal Public Defender, representing Thomas Drake, who was seeking advice with respect to the Federal government's classification system for national security information. I demurred, explaining that I had embarked on a new career with a new full-time job and that I no longer served as a consultant in the field. Ms. Boardman was quite persistent and persuasive, so I agreed to meet with her in order to provide a tutorial on the classification system. This meeting

led to additional telephonic question and answer sessions, followed by an agreement on my part to file an affidavit with the Court, which was never filed, and finally by an agreement to serve as an expert consultant and witness for the defense in the Drake case. The many hours of assistance I provided in this case took place during nights and weekends and were provided on a pro bono basis.

8. I made it very clear to Ms. Boardman and others that my motivation for becoming involved in the Drake case was my concern for the integrity of the classification system. I did not know Mr. Drake at the time, I had never met him, and only knew of his case through the media. I also explained that my testimony would most likely cut both ways and could, in part, be harmful to Mr. Drake. I strongly believe that classification is a critical national security tool and that the responsibilities of cleared individuals to properly protect classified information are profound. At the same time, government agencies have equally profound responsibilities and in this regard I had long witnessed and battled the over classification of information within the Executive branch due to the failure of agencies to fulfill these responsibilities. In this way, the actions of agencies can actually undermine the integrity of the classification system in that to be effective, it must be used with precision. As Justice Potter Stewart said in the Pentagon Papers case, when everything is secret nothing is secret.

9. In 2008 and 2009, following my retirement from the Federal government, I provided expert advice for the defense in the case of United States v. Rosen, in the U.S. District Court for the Eastern District of Virginia regarding the Government's over classification of information relating to the national defense, namely the practice of classifying information that is neither closely held nor damaging to national security if disclosed. My involvement in this case confirmed for me the importance, especially in criminal prosecutions, of not allowing

representatives of the Executive branch to simply assert that certain information is classified. Rather, restricting the dissemination of information in the interest of national security is based upon the President's Article II constitutional authority as commander-in-chief and chief executive responsible for foreign relations. The President has delegated this authority to certain government official through Executive orders. These Orders set forth the standards that must be satisfied in order for the legal protections of the classification system to apply to specific information. It also sets forth the limitations and prohibitions which must not be exceeded.

10. In the Drake case, I was prepared to convey to the jury the President's standards for the classification of information as well as the prohibitions and limitations that the President imposes upon the use of classification authority. I was also prepared to affirm for the jury that they were qualified to assess whether the Government in the Drake case had adhered to its own rules for classification or were simply asserting that the information was classified.

11. I also was prepared to testify about the document highlighted in count one of the indictment, entitled "What a Success." This document was initially designated by the government as classified at the "Secret" level, but during the pendency of the criminal case, the Government informed Mr. Drake's counsel that it had been determined after the indictment was issued that it no longer required the protection of the classification system and thus was no longer considered by the Government to be a classified document. After the determination by the Government that the "What a Success" document was, in fact, unclassified, it was provided to me by defense counsel for my review. Until that point, I had not seen any of the documents charged in the indictment (or any other classified information in the case) because I did not have an active Top Secret security clearance, and due to my professional obligations, I was not in a position to renew it and travel to Baltimore to review the purported classified information.

12. Had I testified in the Drake case, I was prepared to focus on the "What a Success" document and testify that it contained no information which met the standards of the classification system. I have devoted over 34 years to Federal service in the national security arena, to include the last 5 years of my service being responsible for Executive branch-wide oversight of the classification system. During that time, I have seen many equally egregious examples of the inappropriate assignment of classification controls to information that does not meet the standards for classification; however, I was prepared to testify that I have never seen a more willful example.

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

14. From my expert perspective, I believe the Government's actions in the Drake case served to undermine the integrity of the classification system and as such, have placed

information that genuinely requires protection in the interest of national security at increased risk. For this reason, I petitioned this court to grant me relief from the Protective Order associated with this case in order to permit me to file a formal complaint with the Director of my former office who, pursuant to Executive Order 13526, has the responsibility to "consider and take action on complaints ... from persons within or outside the Government with respect to the administration of the program established under this order." This court granted such relief on July 29, 2011. On July 31, 2011, I filed my formal complaint with the ISOO Director, John P. Fitzpatrick, in which I asked him to ascertain if employees of the United States Government, to include the National Security Agency (NSA) and the Department of Justice (DoJ), had willfully classified or continued the classification of information in violation of the Order and its implementing directive and thus should be subject to appropriate sanctions in accordance with Section 5.5(b)(2) of the Order. I further indicated that failure to subject the responsible officials at both the NSA and the DoJ involved in the inappropriate classification and continuation of classification of the "What a Success" document to appropriate sanctions would render this provision of the Order utterly feckless.

15. On August 19, 2011, I personally met with Mr. Fitzpatrick and conveyed to him the essence of the information contained in this affidavit and my motivation for filing the complaint. In follow-up emails, Mr. Fitzpatrick informed me that he would keep the matter moving with hopeful resolution in the Fall, 2011. On December 21, 2011, I once again followed-up via email and this time was informed "Be assured, you'll hear when our agency interactions are complete." On that same date, I followed-up once more via email expressing my concern that based upon my experience, without established timelines, matters such as this can be dragged out indefinitely. I have not heard anything regarding my complaint since then.

16. As Director of ISOO, my responsibilities included changing agency behavior whenever an agency failed to fulfill its responsibilities under the President's Executive order governing classification of national security information. Although I had the authority to direct agency action under certain circumstances, I would use this as a last resort. Instead, I found the most useful tool at my disposal was the public report I was required to submit to the President at least annually on the implementation of the Executive order. Following the adage of Justice Louis Brandeis, I found that "sunshine" focused on agencies actions was the most effective means to counter abuses of the classification system.

17. I continue to have grave concerns for the integrity of the classification system for national security information. While government workers, members of the military and government contractors are routinely disciplined or prosecuted for unauthorized disclosures, I know of no case in which an official was sanctioned for inappropriately classifying information. Such a track record fosters the continued over classification of information and places genuine national secrets at increased risk. It is for this reason that I petition the Court to grant me relief from the Protective Order associated with this case in order to permit me to publicly disclose the "What a Success" email that the Government previously considered to be classified and to discuss the Government's basis for classification identified by the Department of Justice in two unclassified expert disclosures. I request this so as to provide "sunshine" focused on the abuse of the classification system in this case and to provide additional impetus for appropriate action by the Government to address the abuse not only in this instant case, but in future situations as well.

18. I recognize that the Government considers some portions of the "What a Success" email and the expert witness disclosures to be "Unclassified/For Official Use Only (FOUO)."

For Official Use Only (FOUO) is a document designation, not a classification. This designation is used by Department of Defense and a number of other federal agencies to identify information or material which, although unclassified, may not be appropriate for public release. DoD defines "For Official Use Only" information as "unclassified information that ***may*** be exempt from mandatory release to the public under the Freedom of Information Act (FOIA)." As such, the FOUO designation should not necessarily restrict public discussion of the information. The Government should be required to establish why it should not be publicly disclosed. In any event, the Government has not currently designated as "For Official Use Only" the sections of the "What a Success" document previously purported to be classified. The paragraphs formerly designated as classified are marked simply as "Unclassified." Thus, by virtue of the Government's own policies, there should be no valid basis to continue to withhold from the public the sections they previously (and inappropriately) considered classified.

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

Executed in Washington, D.C. on May 16, 2012.

J. William Leonard

District of Columbia : SS
Subscribed and Sworn to before me
this 16th day of May, 2012

Ramon P. Navarro, Notary Public, D.C.
My commission expires April 30, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	**Criminal No. 1:10-cr-0181-RDB**
THOMAS ANDREWS DRAKE	*	

ORDER

Upon consideration of the Defendant's Motion for Relief from the Protective Order, and for the reasons stated in the motion and for good cause shown, it is hereby ORDERED that defense expert witness, J. William Leonard, the former Director of the Information Security Oversight Office (ISOO), may disclose and discuss with the public the following unclassified documents: (1) the document charged in Count One of the Indictment, entitled "What a Success," except for NSA employees' names identified in the document, which shall be redacted and shall not be disclosed; (2) the government's November 29, 2010, expert witness disclosure; (3) the government's March 7, 2011, expert witness disclosure; and (4) Mr. Leonard's July 30, 2011, letter of complaint to John P. Fitzgerald, Director of ISOO.

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THE HONORABLE RICHARD D. BENNETT
United States District Judge