IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:10cr485 (LMB)
	)	
JEFFREY ALEXANDER STERLING	)	

RESPONSE OF THE UNITED STATES TO DEFENDANT'S SECOND MOTION TO COMPEL

The United States, through the undersigned counsel, hereby responds to Defendant's Second Motion to Compel (Dkt. 152).

INTRODUCTION

The defendant has moved to compel the production of extremely sensitive, classified information about this country's intelligence on Iran's nuclear weapons capabilities from 1997 to the present. This extraordinary request was apparently prompted by an unclassified National Intelligence Estimate entitled "Iran: Nuclear Intentions and Capabilities," published in November 2007 by the National Intelligence Council (Attachment A).[1] Based on what, we believe, is a misreading of this document and lacking an adequate factual predicate or legal basis, the defendant claims to need this classified information to show that the disclosure of the CIA program at issue in this case was not potentially damaging to the United States or useful to a foreign power. This motion, we submit, is not intended as a means of obtaining discoverable

[1] The National Intelligence Council (NIC) is the U.S. Intelligence Community's center for midterm and long-term strategic thinking. The NIC supports the Director of National Intelligence (DNI) in his role as the head of the Intelligence Community. *See* Declaration of Brian Lessenberry (Attachment B). The NIE (Attachment A) is also Exhibit 1 to Mr. Lessenberry's Declaration.

trial evidence; rather, it is a calculated attempt to find a subject which is so sensitive the government will be forced to give up its case rather than produce in discovery or disclose at trial the information requested. In other words, it is graymail.

Congress enacted the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3 1-16, to address the uncertainty surrounding the admissibility of classified information prior to trial, including the problem of "graymail," which arose in prosecuting espionage and criminal leak cases. *See* S.Rep. No. 96-823, 96th Cong., 2d Sess. (1980). A defendant is said to "graymail" the government when he threatens to disclose classified information during a trial, and the government is forced to choose between tolerating such disclosure or dismissing the prosecution altogether. *See United States v. Pappas,* 94 F.3d 795 (2d Cir.1996) (discussing "graymail" and CIPA's legislative history); *United States v. Poindexter,* 725 F.Supp 13, 31 (D.D.C.1989) (same); *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985) (CIPA "enacted by Congress in an effort to combat the growing problem of graymail, a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the charge against him."); *United States v. Fernandez*, 913 F.2d 148 (4th Cir.1990); *United States v. Moussaoui*, 591 F.3d 263, 281 (4th Cir. 2010); *United States v. Abu Ali*, 528 F.3d 210, 245 (4th Cir. 2008).

Our response to the motion to compel is set forth in detail below. We discuss (1) how the applicable legal standards inform and guide the Court's dual obligations to protect classified information and the due process rights of the defendant; (2) why the classified information unlawfully communicated by the defendant is information relating to the national defense; (3) that the unclassified 2007 NIE does not state "Iran does not have a nuclear weapons program and

did not have such a program in 2000 or thereafter"; it says something quite different; (4) that the classified 2007 NIE is consistent with the unclassified 2007 NIE, and, consequently, any expert testimony regarding national defense information (NDI) on this issue can be based on the unclassified NIE and other unclassified reporting on this subject; and (5) that the classified CIA and DIA analytical reports demanded by the defense do not contradict the unclassified reporting on this issue. In sum, we show that the defendant has not met his burden of demonstrating that the requested discovery information is relevant, material or otherwise essential to a fair determination of the NDI issue and, consequently, his motion to compel should be denied.

I. DISCOVERY PROCEDURES UNDER CIPA

CIPA provides a procedural framework by which a court balances the defendant's interest in a fair trial and the government's interest in protecting national security information. *United States v. Passaro*, 577 F.3d 207, 219 (4th Cir. 2009). The discovery of classified information is governed by CIPA Section 4. This section creates no new rights or limits on discovery; it contemplates an application of the general law of discovery in criminal cases to classified information. *United States v. Yunis*, 867 F.2d 617, 621 (D.C.Cir.1989); *United States v. Libby*, 429 F.Supp.2d 1, 8 (D.D.C. 2006). The starting point of a court's inquiry when confronted with a request for discovery of classified information is whether the information is discoverable under Rule 16 of the Federal Rules of Criminal Procedure or *Brady*.[2] If not, the information is not disclosed. If the information is discoverable but classified and privileged, the court must then

[2] *Brady v. Maryland*, 373 U.S. 83 (1963); *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995). For a discussion of *Brady* in this context, *see United States v. Moussaoui*, 591 F.3d at 285.

decide whether the information is relevant or helpful to the defendant.[3]

Here, the defendant contends that he is entitled to discovery of these classified materials because "the requested information is relevant and material to a fair determination in this case," citing *United States v. Smith*, 780 F.2d 1102, 1107-10 (4th Cir. 1985). Dkt. 152 at 3. *Smith*, however, goes further than "relevant and material." The standard articulated by the Fourth Circuit in *Smith* is whether the information is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id.* at 1107. The court explained that this standard is more restrictive than the ordinary rules of relevancy would dictate, *id.* at 110, contrary

[3] This standard is expressed in a variety of ways ("relevant" rather than "material"; "useful" or "essential" rather than "helpful"), but to the same end, *i.e.*, a threshold for discovery that is higher than Rule 16 (which requires discovery of documents and objects "material" to preparing the defense), given that the documents are privileged. *See United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989)(holding that "classified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information is entitled only to information that is at least helpful to the defense of accused," quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (internal quotations omitted); *United States v. Aref*, 533 F.3d 72, 78-80 (finding that if the evidence is discoverable but the information is privileged, the court must next decide whether the information is helpful or material to the defense, *i.e.*, useful to counter the government's case or to bolster a defense) (citations and internal quotations omitted); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (1998) (holding that, in order to determine whether the government must disclose classified information, the court must determine whether the information is "relevant and helpful to the defense of an accused"); *United States v. Varca*, 896 F.2d 900, 905 (5th Cir.1990) (stating "the government is not required to provide criminal defendants with information that is neither exculpatory nor, in some way, helpful to the defense"); *United States v. Pringle*, 751 F.2d 419, 427-28 (1st Cir. 1984) (holding that classified information was properly withheld from the defense because it was not relevant to the determination of the guilt or innocence of the defendants, was not helpful to the defense, and was not essential to a fair determination of the cause); *United States v. Rosen*, 2005 WL 5925549 (E.D. Va. 2005) (stating that "where the classified information is neither material to the determination of guilt or innocence nor helpful to the defense or essential to a fair determination of the case, then if may be properly excluded from discovery").

to what the defendant suggests here.[4]

CIPA, Rule 16 and other pertinent authorities do not authorize discovery based on conjecture and speculation; and saying that the discovery is needed, without more, does not satisfy the "relevant and helpful" standard. Simply put, the defendant has made no showing that any discoverable information even exists in the materials sought. Some showing is necessary. Speculation is insufficient. *Smith*, 780 F.2d at 1110; *United States v. Grisham*, 748 F.2d 460, 464 (8th Cir. 1984).[5]

---

[4] The Fourth Circuit's *en banc* decision in *Smith* concerned the standard for the admissibility at trial of classified information, although it is often cited, as here, as the standard for discovery of classified information as well. *See, e.g.*, *Aref*, 533 F.3d at 80; *Rosen*, 2005 WL 5925549 at 1.

[5] *Grisham* concerned the informant's privilege (as did *Roviaro*), and is cited by the Fourth Circuit in *Smith*. The *Grisham* court succinctly stated:

> [t]he burden is on the defendant to show the materiality of the informant's testimony, *United States v. Pantohan*, 602 F.2d 855, 858 (9th Cir.1979), and it requires more than speculation that the evidence an informant may provide will be material to overcome the government's privilege to withhold the identity of the informant. *See United States v. Skeens*, 449 F.2d at 1070. *Roviaro* requires that the trial court balance the Government's privilege to withhold the informant's identity against the defendant's right to discover information. When the degree of materiality of the informant's knowledge is evident, the trial court has significant discretion in determining whether to order disclosure. When allegations as to the materiality of the informant's knowledge are based on mere conjecture, however, a trial court is in no position to determine what to balance against the Government's privilege; at best, this turns the sensitive balancing required by *Roviaro* into a judicial guessing game. *United States v. Lopez*, 328 F.Supp. 1077, 1091 (E.D.N.Y.1971). Or at worst, as noted in *Miller v. United States*, 273 F.2d 279 (5th Cir.1959), *cert. denied*, 362 U.S. 928, 80 S.Ct. 756, 4 L.Ed.2d 747 (1960):
>
> > If the informer's relation to the acts leading directly to or constituting the crime may be assumed from a fertile imagination of counsel, the Government in practically every case would have to prove affirmatively that the informant had not done any such likely acts. Having done that, all would be revealed and the informer privilege, deemed essential for the public interest, for all practical purposes would be no more.

II. INFORMATION RELATING TO THE NATIONAL DEFENSE

The classified information the defendant demands on discovery is necessary, he says, to challenge -- through expert testimony -- the government's assertion that the disclosure of the CIA program discussed in detail in Risen's book *State of War* (Classified Program No. 1, which includes, of course, the disclosure of Human Asset No. 1 and certain classified methods), was not information "related to the national defense."

The defendant is charged in Counts One, Four and Six of the indictment with the communication and attempted communication of information relating to the national defense, in violation of Title 18, United States Code, Section 793(d), and in Counts Two, Five and Seven with the communication and attempted communication of a document relating to the national defense, in violation of Title 18, United States Code, Section 793(e). To convict on any of these six counts, the government must prove that the information and/or document at issue relates to the national defense.

In *Gorin v. United States,* 312 U.S. 19, 28 (1941), the Supreme Court held that the phrase "national defense information" in Section 794 is "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *See also United States v. Truong*, 629 F.2d 908, 918 (4th Cir. 1980) (finding that the legislative history of the espionage statutes demonstrates that Congress intended national defense to encompass a broad range of information and rejected attempts to narrow the reach of the statutory language); *United States v. Rosen*, 445 F.Supp.2d 602, 620 (E.D. Va. 2006) (stating that the phrase "has consistently been construed broadly to include information dealing with military matters and more generally with matters relating to United States foreign policy and

intelligence capabilities").

The Fourth Circuit, in *United States v. Morison*, 844 F.2d 1057, 1070-71 and 1076 (4th Cir. 1988), added a "judicial gloss" to this element to avoid vagueness concerns or conflict with the First Amendment. Specifically, the court held that to prove the defendant communicated "information relating to the national defense," the government must *also* prove that the information be "closely held," and be "potentially damaging to the United States or might be useful to its enemies." *Id*. at 1071-72.

The indictment identifies the national defense information at issue in Counts One, Four and Six as "information about Classified Program No. 1 and Human Asset No. 1," and in Counts Two, Three, Five, and Seven as "a letter relating to Classified Program No. 1." Counts One and Two allege communications of national defense information by the defendant as of January 2006. Counts Three, Four and Five allege communications of national defense information by the defendant as of April 2003; and Counts Six and Seven allege attempted communications of national defense information as of April 2003. The indictment further describes Classified Program No. 1 in paragraph no. 15 and Human Asset No. 1 in paragraph no. 14. The letter relating to the classified program is mentioned in the indictment and, of course, quoted in the book.

The government recently provided the defense with its notice of expert testimony (Attachment C) in which it described the potential damage to the national security caused by the disclosure of classified information relating to Classified Program No. 1 and Human Asset No. 1. The potential damage falls into three categories: (1) damage caused by the disclosure of classified intelligence methods; (2) damage caused by the disclosure of classified intelligence

sources; and (3) damage to foreign liaison relationships and foreign relations. The expert notice also indicated that the government will present evidence regarding the CIA's obligation to provide the nation's leaders with timely and accurate information about the proliferation of nuclear weapons and the development of nuclear weapons by other countries, including countries openly hostile to the United States and its allies. One of the purposes of Classified Program No. 1 was to provide this type of intelligence regarding Iran, and the government will prove at trial that the disclosure of the program compromised the ability of the CIA to accomplish its goals in this regard.[6] In other words, the potential harm to the United States as a result of the charged conduct far exceeds the simplistic description offered by defendant ("The gravamen of the charges in this case is that the alleged disclosures had the potential to aid Iran in its nuclear weapons program."). Dkt 152 at 1.[7]

The defendant suggests, without citing any authority, that the passage of time and subsequent, intervening events mitigate his culpability, and he should be able to prove to the jury that eight years later little or no damage to the United States has occurred:

> The Government, through discovery, has posited a parade of horribles that could have potentially occurred, over a long period of time, from the publication of the book. On the other hand, given the fact that eight years have passed since the date of the alleged disclosure, there is an actual record of what has transpired since the

---

[6] The purposes of the Classified Program No. 1 are discussed in the documents submitted to the Court and the subject of our Section 6 CIPA filing. For example, see no. C02911. These documents remained classified.

[7] We are not sure what the defendant means by this remark. A theme of Chapter 9 of *State of War*, which the defense seems to embrace, is that Classified Program No. 1 could have helped Iran build a nuclear weapon, which, of course, is not true. *See* Dkt. 152 at 3: "this case is just the type of alleged leak that is merely embarrassing to the public officials that provided nuclear blueprints to the enemy." In this context, however, "aid Iran" may mean that the disclosures revealed the existence of Classified Program No. 1 to Iran.

disclosure that is plainly material to this case.

Dkt. 152 at 3.

The "actual" record of what transpired in this case is that a potential source of valuable intelligence was compromised by the defendant's unlawful disclosures about Classified Program No. 1. The compromise of this potential source of valuable intelligence was damaging. Whether we call it "potential" or "actual" damage is of no matter. It happened.

And that is why the appropriate legal standard, is "potential," not "actual" damage, and why juries are not asked to predict the future or analyze ten years worth of intelligence data to determine the harmful or damaging effects of an unlawful disclosure of national defense information. As discussed above, national defense information is information that is "potentially" damaging to the United States and/or useful to a foreign power. *Morison*, 844 F.2d at 1070-71. In *Morison*, one of the specific issues on appeal was whether the trial court properly defined national defense information as "potentially damaging." The defendant claimed that the word "actual" should have been used instead of "potentially." The Fourth Circuit disagreed, citing to Justice White's concurring opinion in *New York Times v. United States*, 403 U.S. 713, 739 (1971), and *United States v. Dedeyan*, 584 F.2d 36, 40 (4th Cir. 1978).[8] This is simple common sense. A defendant does not escape criminal responsibility for the unlawful communication of national defense information because the government took steps to minimize the potential damage of the disclosures, because the government was not able to quantify with

[8] The jury in *Dedeyan* was instructed that, in order to show the necessary relationship to the national defense, the government must prove that disclosure of information would be potentially damaging to the national defense or that the information might be useful to an enemy of the United States.

precision the actual damage the disclosures may have caused, or intervening events reduced the actual damage caused by the disclosures.[9] For example, if a defendant were caught in the act, so to speak, of passing classified information to an enemy, but the enemy was not able to use the information to its advantage because of the fortunate intervention of the government, the defendant would not be immune from prosecution because no damage resulted. The potential for damage existed at the time the communication (or attempted communication) occurred.[10] Similarly, if a government agent publicly revealed the identity of a secret source, but the source subsequently died from illness or by accident, the government agent does not get a free pass because the source did not die at the hands of an enemy. The potential damage to the government's intelligence capabilities existed the moment the source was publicly disclosed.

The appropriate legal framework, therefore, for evaluating the defendant's motion to compel discovery of this classified information is whether the information sought is relevant and helpful to the defense in establishing that the disclosure of Classified Program No. 1 was not potentially harmful to the United States or potentially beneficial to a foreign power as of April 2003 and January 2006.

---

[9] In this case, of course, two of the counts in the indictment allege the attempted disclosure of national defense information, and the indictment discusses specific actions the government took to minimize the harm caused by the defendant. *See* Indictment ¶¶ 39 through 43.

[10] This example is similar to what actually occurred in *United States v. Truong Dinh Hung*, 629 F.2d 908, 917-18 (4th Cir. 1981). Truong obtained classified documents from a co-conspirator and thought he was passing these classified documents to the North Vietnamese in Paris through a friend; in fact, the friend was an informant for the FBI and CIA, and all of Troung's activities, including the packages of classified documents, were monitored by the FBI. The court had no problem dismissing the defendant's argument on appeal that the documents Troung acquired and transmitted did not contain national defense information within the meaning of Title 18 U.S.C. §§ 793(e) and 794(a) and (c). "On the facts of this case, there can be no doubt that the information transmitted was information 'relating to the national defense.'" *Id.*

III. THE 2007 UNCLASSIFIED NIE ON IRAN

The defendant contends that the "defense has the right to argue to the jury, however, that Iran does not even have a nuclear weapons program and did not have such a program in 2000 or thereafter." Dkt. 152 at 1-2. There is no source given for this factual assertion. We can only guess that it may be based on the unclassified 2007 NIE report, as this is one of the documents alluded to in the motion. However, the unclassified judgments from the 2007 NIE on Iran's nuclear intentions states that Iran halted its nuclear weapons program in 2003 (a term specifically defined in the report). The report does not end there, however, and goes on to make other "Key Judgments" about Iran's nuclear intentions. Attached is the declaration of Brian Lessenberry, who is the National Intelligence Officer for Weapons of Mass Destruction and Proliferation for the National Intelligence Council, the body responsible for the 2007 report. In a nutshell, Mr. Lessenberry explains, among other things, that, according to the judgments in the unclassified 2007 NIE, prior to fall 2003, Iran is working to develop nuclear weapons; Iran is keeping open the option to develop nuclear weapons; Iran is continuing to develop technical capabilities that could be applied to producing nuclear weapons; and convincing the Iranian leadership to forego the eventual development of nuclear weapons will be difficult. Attachment B at ¶¶ 6-7. Significantly, the NIE concludes that Iran's decision to halt its nuclear weapons program is inherently reversible. *Id.*

The defendant indicates that he has retained an expert who will explain how this and other unclassified reports translate to an opinion that no national defense information was disclosed in Chapter 9 of *State of War*. Dkt 152 at 2. The defendant certainly has a right to pursue any theory of expert testimony he sees fit, and the Court will have an opportunity at some

point to determine whether such testimony will be admissible. But here, the defendant is asking the Court to sanction additional discovery of highly sensitive, classified information, a request based on a false premise and without any explanation of how the requested discovery is relevant and helpful to the defense and not purely speculative. The defendant should not be permitted to peruse through a decade's worth of highly sensitive, classified reporting without first making this necessary showing.

The defendant has retained an expert, and the expert has expressed a preliminary opinion on this issue based on public information. Dkt 152 at 2. At a minimum, the defense should be required to state that preliminary opinion, the facts upon which that opinion is based, the causal connection between those facts and the NDI issue, and what additional facts will be gleaned from the requested information that are relevant and helpful to the defense on this issue and not merely speculative.[11] Only in this fashion will the Court and the government know more precisely what information the defense believes is discoverable and how that information is essential to prove that the charged disclosures in this case are not national defense information. Without this type of proffer, we can not provide a more informed response to the discovery request, and CIPA's balancing test is turned into a "judicial guessing game." [12]

---

[11] Disclosure of this information does not prejudice the defendant, as he must soon file an expert notice. Moreover, CIPA requires "both prosecutors and defense counsel to disclose, well before trial, certain aspects of their trial strategy, including the identity of potential witnesses and the nature and thrust of expected trial testimony and jury arguments." *United States v. Rosen*, 520 F.Supp.2d 786, 790 (E.D. Va. 2007).

[12] The need for a preliminary opinion or proffer in this context is further underscored by what appears to be a completely different position taken by the defendant in a prior motion. In its motion for discovery of information relating to the actual harm caused by the publication of *State of War*, the defendant suggests that the disclosures about Classified Program No. 1 could not be national defense information because the information is not closely held. The defense writes: "The fact alone

We submit that this proffer should also address how the loss of any possible intelligence sources with regard to Iran and its nuclear weapons capabilities and intentions -- which is the "potential" harm at issue here -- is not national defense information. In other words, even though Iran halted its nuclear weapons program as described in the unclassified 2007 NIE, the United States nevertheless "continues to regard Iranian proliferation of weapons of mass destruction a threat to the national security of the United States" and "retains the need for the most accurate intelligence possible regarding this threat." Attachment B at ¶ 11 and the discussion of other government reports on Iranian nuclear weapons development, below. Unless this expert's preliminary opinion credibly demonstrates that the Intelligence Community no longer has a vital national security interest in obtaining the most accurate intelligence possible regarding Iran's nuclear capabilities and intentions, the opinion does not address the potential damage to the United States, and the requested information cannot be considered relevant and helpful to the defense or essential to a just determination of this issue.

IV. THE CLASSIFIED 2007 NIE AND OTHER REPORTS

The unclassified 2007 NIE regarding Iran's nuclear intentions contains the best judgments of the Intelligence Community on that subject at that time. The defendant demands access to the classified version of this report but, as discussed above, does not say why he believes access to the classified report is essential to a fair determination of the NDI issue. Mr.

---

that the United States is opposed to the Iranian nuclear weapons program is no secret. Nor is it a secret that the United States and its allies have taken many steps to delay or stop the Iranian nuclear program. Hardly a day passes when some story is not published regarding the Iranian nuclear progra and the efforts of Israel and the United States to stop it . . . . Here is an example of just how 'closely held' the idea that the United States and Israel are seeking to delay Iranian nuclear ambitions and are taking actions in that regard . . . ." Dkt 133 at 6.

Lessenberry is familiar with both documents, and he states that none of the unclassified Key Judgments of the unclassified 2007 NIE are inconsistent with the classified version of the 2007 NIE. Attachment B at ¶ 6. In other words, whatever opinion the expert wishes to express about Iran's nuclear intentions and the status of its nuclear program can be fairly and reasonably based on the unclassified document.

Mr. Lessenberry is also familiar with the other documents requested by the defendant and described in paragraphs (A) and (B) of the defendants motion. Dkt. 152 at 2. Similarly, Mr. Lessenberry states that "[n]one of the documents that would be responsive to requests (A) and (B) are inconsistent with or contradict the following unclassified judgments in the 2007 NIE: (a) Until fall 2003, Iranian military entities were working under government direction to develop nuclear weapons, (b) Iran, at a minimum is keeping open the option to develop nuclear weapons, and (c) Iranian entities are continuing to develop a range of technical capabilities that could be applied to producing nuclear weapons, if a decision is made to do so. Attachment B at ¶10.

Mr. Lessenberry also notes that there are subsequent unclassified statements from the Intelligence Community regarding Iran and weapons of mass destruction. These reports make clear that the United States continues to regard the Iranian proliferation of weapons of mass destruction as a threat to the national security of the United States and that the United States retains the need for the most accurate intelligence possible regarding this threat. For example, in his March 2011 statement on the Worldwide Threat Assessment of the U.S. Intelligence Community for the Senate Armed Services Committee, the Director of National Intelligence stated: "We continue to assess Iran is keeping open the option to develop nuclear weapons in part by developing various nuclear capabilities that better position it to produce such weapons, should

it choose to do so . . . . Iran has the scientific, technical, and industrial capacity to eventually produce nuclear weapons . . . ." Attachment B at ¶ 11. Such statements from prior years are publicly available. Mr. Lessenberry further states that the classified documents that would be responsive to the defendant's requests (A) and (B) "support, and do not contradict, these publicly available assessments." Attachment B at ¶ 12. The defense expert, therefore, can reasonably rely on these unclassified statements and reports in rendering an opinion.[13]

V. CLASSIFIED CIA AND DIA REPORTS

The defendant demands production of all CIA and DIA "published" reports on Iranian nuclear weapons programs and proliferation for the past decade. Dkt. 152 at 3, paragraph (C). If by "published" the defendant means unclassified, those are accessible through public sources and available to the defendant. There are numerous such reports. For example, each year, the CIA prepares an Unclassified Report to Congress on the Acquisition of Technology Relating to Weapons of Mass Destruction and Advanced Conventional Munitions. Each of those reports includes a section on Iran, and subsections on Nuclear, Ballistic Missiles, and Chemical and Biological. The DNI publishes reports, testimony before Congress, and other materials. The National Counterproliferation Center within the Office of the Director of National Intelligence also publishes reports on this subject. The State Department publishes materials on Iran's nuclear threat. The International Atomic Energy Association (IAEA) and the United Nations

[13] Again, the defendant says he "needs" the information to show that the United States suffered no damage from the unlawful disclosures about Classified Program No. 1. Dkt. 152 at 3. How the loss of an intelligence source regarding Iran's nuclear weapons capabilities and intentions is not damaging to the United States in light of this assessment by the DNI escapes us, but we will leave that to the defense expert to explain. The point here is that he can render his opinion based on unclassified reporting.

have released statements, reports and other materials on the threat of Iranian nuclear weapons development and proliferation. Nothing in the public domain that we have reviewed supports the premise that Iran is no longer a nuclear threat.

We assume, however, that the defendant is demanding discovery of classified reports from the CIA and DIA. These agencies have searched for reports that would be responsive to the defendant's requests. The undersigned counsel have not had the opportunity to review all of these documents prior to filing this response. As is the case with the NIC documents discussed above, the reports we have reviewed support and do not contradict the publicly available intelligence assessments on the Iran nuclear weapons issue as discussed above. The defendant, consequently, has an adequate basis to develop expert testimony without the need for additional classified discovery.

CONCLUSION

The United States asks that the Court deny the defendant's motion to compel discovery on the grounds that the defendant has not met his burden of demonstrating to the Court that the information sought is relevant and helpful to the defense, essential to a fair determination of the NDI issue, or otherwise exculpatory within the meaning of *Brady*.

Respectfully submitted,

Neil H. MacBride
United States Attorney

William M. Welch II
Senior Litigation Counsel
Criminal Division
United States Department of Justice

Timothy J. Kelly
Trial Attorney
Public Integrity Section
United States Department of Justice

James L. Trump
Senior Litigation Counsel
United States Attorney's Office
Eastern District of Virginia

By: /s/

James L. Trump
Attorney for the United States of America
United States Attorney's Office
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Phone: 703-299-3726
Fax: 703-299-3981
Email Address: jim.trump@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that I caused an electronic copy of the foregoing *Response of the United States to Defendant's Discovery Motion* and served via ECF on Edward B. MacMahon, Jr., and Barry J. Pollack, counsel for the defendant.

By: /s/

James L. Trump
Attorney for the United States of America
United States Attorney's Office
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Phone: 703-299-3726
Fax: 703-299-3981
Email Address: jim.trump@usdoj.gov

National Intelligence Estimate

Iran: Nuclear Intentions and Capabilities

November 2007

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

The Director of National Intelligence serves as the head of the Intelligence Community (IC), overseeing and directing the implementation of the National Intelligence Program and acting as the principal advisor to the President, the National Security Council, and the Homeland Security Council for intelligence matters.

The Office of the Director of National Intelligence is charged with:

- Integrating the domestic and foreign dimensions of US intelligence so that there are no gaps in our understanding of threats to our national security;
- Bringing more depth and accuracy to intelligence analysis; and
- Ensuring that US intelligence resources generate future capabilities as well as present results.

NATIONAL INTELLIGENCE COUNCIL

Since its formation in 1973, the National Intelligence Council (NIC) has served as a bridge between the intelligence and policy communities, a source of deep substantive expertise on critical national security issues, and as a focal point for Intelligence Community collaboration. The NIC's key goal is to provide policymakers with the best, unvarnished, and unbiased information—regardless of whether analytic judgments conform to US policy. Its primary functions are to:

- Support the DNI in his role as Principal Intelligence Advisor to the President and other senior policymakers.
- Lead the Intelligence Community's effort to produce National Intelligence Estimates (NIEs) and other NIC products that address key national security concerns.
- Provide a focal point for policymakers, warfighters, and Congressional leaders to task the Intelligence Community for answers to important questions.
- Reach out to nongovernment experts in academia and the private sector—and use alternative analyses and new analytic tools—to broaden and deepen the Intelligence Community's perspective.

NATIONAL INTELLIGENCE ESTIMATES AND THE NIE PROCESS

National Intelligence Estimates (NIEs) are the Intelligence Community's (IC) most authoritative written judgments on national security issues and designed to help US civilian and military leaders develop policies to protect US national security interests. NIEs usually provide information on the current state of play but are primarily "estimative"—that is, they make judgments about the likely course of future events and identify the implications for US policy.

The NIEs are typically requested by senior civilian and military policymakers, Congressional leaders and at times are initiated by the National Intelligence Council (NIC). Before a NIE is drafted, the relevant NIO is responsible for producing a concept paper or terms of reference (TOR) and circulates it throughout the Intelligence Community for comment. The TOR defines the key estimative questions, determines drafting responsibilities, and sets the drafting and publication schedule. One or more IC analysts are usually assigned to produce the initial text. The NIC then meets to critique the draft before it is circulated to the broader IC. Representatives from the relevant IC agencies meet to hone and coordinate line-by-line the full text of the NIE. Working with their Agencies, reps also assign the level of confidence they have in each key judgment. IC reps discuss the quality of sources with collectors, and the National Clandestine Service vets the sources used to ensure the draft does not include any that have been recalled or otherwise seriously questioned.

All NIEs are reviewed by National Intelligence Board, which is chaired by the DNI and is composed of the heads of relevant IC agencies. Once approved by the NIB, NIEs are briefed to the President and senior policymakers. The whole process of producing NIEs normally takes at least several months.

The NIC has undertaken a number of steps to improve the NIE process under the DNI. These steps are in accordance with the goals and recommendations set out in the SSCI and WMD Commission reports and the 2004 Intelligence Reform and Prevention of Terrorism Act. Most notably, over the last year and a half, the IC has:

- ***Created new procedures to integrate formal reviews of source reporting and technical judgments.*** The Directors of the National Clandestine Service, NSA, NGA, and DIA and the Assistant Secretary/INR are now required to submit formal assessments that highlight the strengths, weaknesses, and overall credibility of their sources used in developing the critical judgments of the NIE.

- ***Applied more rigorous standards***. A textbox is incorporated into all NIEs that explains what we mean by such terms as "we judge" and that clarifies the difference between judgments of likelihood and confidence levels. We have made a concerted effort to not only highlight differences among agencies but to explain the reasons for such differences and to prominently display them in the Key Judgments.

Scope Note

This National Intelligence Estimate (NIE) assesses the status of Iran's nuclear program, and the program's outlook over the next 10 years. This time frame is more appropriate for estimating capabilities than intentions and foreign reactions, which are more difficult to estimate over a decade. In presenting the Intelligence Community's assessment of Iranian nuclear intentions and capabilities, the NIE thoroughly reviews all available information on these questions, examines the range of reasonable scenarios consistent with this information, and describes the key factors we judge would drive or impede nuclear progress in Iran. This NIE is an extensive reexamination of the issues in the May 2005 assessment.

This Estimate focuses on the following key questions:

- What are Iran's intentions toward developing nuclear weapons?
- What domestic factors affect Iran's decisionmaking on whether to develop nuclear weapons?
- What external factors affect Iran's decisionmaking on whether to develop nuclear weapons?
- What is the range of potential Iranian actions concerning the development of nuclear weapons, and the decisive factors that would lead Iran to choose one course of action over another?
- What is Iran's current and projected capability to develop nuclear weapons? What are our key assumptions, and Iran's key chokepoints/vulnerabilities?

This NIE does *not* assume that Iran intends to acquire nuclear weapons. Rather, it examines the intelligence to assess Iran's capability and intent (or lack thereof) to acquire nuclear weapons, taking full account of Iran's dual-use uranium fuel cycle and those nuclear activities that are at least partly civil in nature.

This Estimate does assume that the strategic goals and basic structure of Iran's senior leadership and government will remain similar to those that have endured since the death of Ayatollah Khomeini in 1989. We acknowledge the potential for these to change during the time frame of the Estimate, but are unable to confidently predict such changes or their implications. This Estimate does not assess how Iran may conduct future negotiations with the West on the nuclear issue.

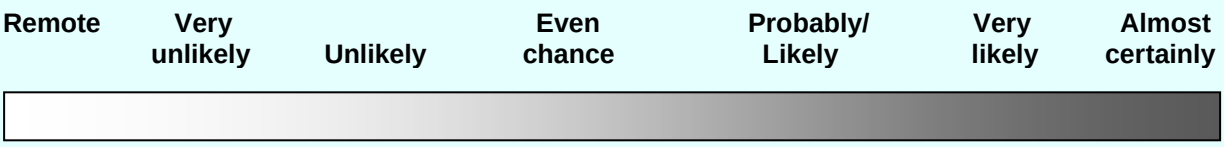
This Estimate incorporates intelligence reporting available as of 31 October 2007.

What We Mean When We Say: An Explanation of Estimative Language

We use phrases such as *we judge, we assess,* and *we estimate*—and probabilistic terms such as *probably* and *likely*—to convey analytical assessments and judgments. Such statements are not facts, proof, or knowledge. These assessments and judgments generally are based on collected information, which often is incomplete or fragmentary. Some assessments are built on previous judgments. In all cases, assessments and judgments are not intended to imply that we have "proof" that shows something to be a fact or that definitively links two items or issues.

In addition to conveying judgments rather than certainty, our estimative language also often conveys 1) our assessed likelihood or probability of an event; and 2) the level of confidence we ascribe to the judgment.

Estimates of Likelihood. Because analytical judgments are not certain, we use probabilistic language to reflect the Community's estimates of the likelihood of developments or events. Terms such as *probably, likely, very likely,* or *almost certainly* indicate a greater than even chance. The terms *unlikely* and *remote* indicate a less then even chance that an event will occur; they do not imply that an event will not occur. Terms such as *might* or *may* reflect situations in which we are unable to assess the likelihood, generally because relevant information is unavailable, sketchy, or fragmented. Terms such as *we cannot dismiss, we cannot rule out,* or *we cannot discount* reflect an unlikely, improbable, or remote event whose consequences are such that it warrants mentioning. The chart provides a rough idea of the relationship of some of these terms to each other.



Confidence in Assessments. Our assessments and estimates are supported by information that varies in scope, quality and sourcing. Consequently, we ascribe *high, moderate,* or *low* levels of confidence to our assessments, as follows:

- *High confidence* generally indicates that our judgments are based on high-quality information, and/or that the nature of the issue makes it possible to render a solid judgment. A "high confidence" judgment is not a fact or a certainty, however, and such judgments still carry a risk of being wrong.

- *Moderate confidence* generally means that the information is credibly sourced and plausible but not of sufficient quality or corroborated sufficiently to warrant a higher level of confidence.

- *Low confidence* generally means that the information's credibility and/or plausibility is questionable, or that the information is too fragmented or poorly corroborated to make solid analytic inferences, or that we have significant concerns or problems with the sources.

Key Judgments

A. We judge with high confidence that in fall 2003, Tehran halted its nuclear weapons program[1]; we also assess with moderate-to-high confidence that Tehran at a minimum is keeping open the option to develop nuclear weapons. We judge with high confidence that the halt, and Tehran's announcement of its decision to suspend its declared uranium enrichment program and sign an Additional Protocol to its Nuclear Non-Proliferation Treaty Safeguards Agreement, was directed primarily in response to increasing international scrutiny and pressure resulting from exposure of Iran's previously undeclared nuclear work.

- We assess with high confidence that until fall 2003, Iranian military entities were working under government direction to develop nuclear weapons.

- We judge with high confidence that the halt lasted at least several years. (Because of intelligence gaps discussed elsewhere in this Estimate, however, DOE and the NIC assess with only moderate confidence that the halt to those activities represents a halt to Iran's entire nuclear weapons program.)

- We assess with moderate confidence Tehran had not restarted its nuclear weapons program as of mid-2007, but we do not know whether it currently intends to develop nuclear weapons.

- We continue to assess with moderate-to-high confidence that Iran does not currently have a nuclear weapon.

- Tehran's decision to halt its nuclear weapons program suggests it is less determined to develop nuclear weapons than we have been judging since 2005. Our assessment that the program probably was halted primarily in response to international pressure suggests Iran may be more vulnerable to influence on the issue than we judged previously.

B. We continue to assess with low confidence that Iran probably has imported at least some weapons-usable fissile material, but still judge with moderate-to-high confidence it has not obtained enough for a nuclear weapon. We cannot rule out that Iran has acquired from abroad—or will acquire in the future—a nuclear weapon or enough fissile material for a weapon. Barring such acquisitions, if Iran wants to have nuclear weapons it would need to produce sufficient amounts of fissile material indigenously—which we judge with high confidence it has not yet done.

C. We assess centrifuge enrichment is how Iran probably could first produce enough fissile material for a weapon, if it decides to do so. Iran resumed its declared centrifuge

[1] For the purposes of this Estimate, by "nuclear weapons program" we mean Iran's nuclear weapon design and weaponization work and covert uranium conversion-related and uranium enrichment-related work; we do not mean Iran's declared civil work related to uranium conversion and enrichment.

enrichment activities in January 2006, despite the continued halt in the nuclear weapons program. Iran made significant progress in 2007 installing centrifuges at Natanz, but we judge with moderate confidence it still faces significant technical problems operating them.

- We judge with moderate confidence that the earliest possible date Iran would be technically capable of producing enough HEU for a weapon is late 2009, but that this is very unlikely.

- We judge with moderate confidence Iran probably would be technically capable of producing enough HEU for a weapon sometime during the 2010-2015 time frame. (INR judges Iran is unlikely to achieve this capability before 2013 because of foreseeable technical and programmatic problems.) All agencies recognize the possibility that this capability may not be attained until *after* 2015.

D. Iranian entities are continuing to develop a range of technical capabilities that could be applied to producing nuclear weapons, if a decision is made to do so. For example, Iran's civilian uranium enrichment program is continuing. We also assess with high confidence that since fall 2003, Iran has been conducting research and development projects with commercial and conventional military applications—some of which would also be of limited use for nuclear weapons.

E. We do not have sufficient intelligence to judge confidently whether Tehran is willing to maintain the halt of its nuclear weapons program indefinitely while it weighs its options, or whether it will or already has set specific deadlines or criteria that will prompt it to restart the program.

- Our assessment that Iran halted the program in 2003 primarily in response to international pressure indicates Tehran's decisions are guided by a cost-benefit approach rather than a rush to a weapon irrespective of the political, economic, and military costs. This, in turn, suggests that some combination of threats of intensified international scrutiny and pressures, along with opportunities for Iran to achieve its security, prestige, and goals for regional influence in other ways, might—if perceived by Iran's leaders as credible—prompt Tehran to extend the current halt to its nuclear weapons program. It is difficult to specify what such a combination might be.

- We assess with moderate confidence that convincing the Iranian leadership to forgo the eventual development of nuclear weapons will be difficult given the linkage many within the leadership probably see between nuclear weapons development and Iran's key national security and foreign policy objectives, and given Iran's considerable effort from at least the late 1980s to 2003 to develop such weapons. In our judgment, only an Iranian political decision to abandon a nuclear weapons objective would plausibly keep Iran from eventually producing nuclear weapons—and such a decision is inherently reversible.

F. We assess with moderate confidence that Iran probably would use covert facilities—rather than its declared nuclear sites—for the production of highly enriched uranium for a weapon. A growing amount of intelligence indicates Iran was engaged in covert uranium conversion and uranium enrichment activity, but we judge that these efforts probably were halted in response to the fall 2003 halt, and that these efforts probably had not been restarted through at least mid-2007.

G. We judge with high confidence that Iran will not be technically capable of producing and reprocessing enough plutonium for a weapon before about 2015.

H. We assess with high confidence that Iran has the scientific, technical and industrial capacity eventually to produce nuclear weapons if it decides to do so.

Key Differences Between the Key Judgments of This Estimate on Iran's Nuclear Program and the May 2005 Assessment

2005 IC Estimate	2007 National Intelligence Estimate
Assess with high confidence that Iran currently is determined to develop nuclear weapons despite its international obligations and international pressure, but we do not assess that Iran is immovable.	Judge with high confidence that in fall 2003, Tehran halted its nuclear weapons program. Judge with high confidence that the halt lasted at least several years. (DOE and the NIC have moderate confidence that the halt to those activities represents a halt to Iran's entire nuclear weapons program.) Assess with moderate confidence Tehran had not restarted its nuclear weapons program as of mid-2007, but we do not know whether it currently intends to develop nuclear weapons. Judge with high confidence that the halt was directed primarily in response to increasing international scrutiny and pressure resulting from exposure of Iran's previously undeclared nuclear work. Assess with moderate-to-high confidence that Tehran at a minimum is keeping open the option to develop nuclear weapons.
We have moderate confidence in projecting when Iran is likely to make a nuclear weapon; we assess that it is unlikely before early-to-mid next decade.	We judge with moderate confidence that the earliest possible date Iran would be technically capable of producing enough highly enriched uranium (HEU) for a weapon is late 2009, but that this is very unlikely. We judge with moderate confidence Iran probably would be technically capable of producing enough HEU for a weapon sometime during the 2010-2015 time frame. (INR judges that Iran is unlikely to achieve this capability before 2013 because of foreseeable technical and programmatic problems.)
Iran could produce enough fissile material for a weapon by the end of this decade if it were to make more rapid and successful progress than we have seen to date.	We judge with moderate confidence that the earliest possible date Iran would be technically capable of producing enough highly enriched uranium (HEU) for a weapon is late 2009, but that this is very unlikely.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	No. 1:10cr00485 (LMB)
v.	)	
	)	
JEFFREY ALEXANDER STERLING,	)	
	)	
Defendant	)	

DECLARATION OF BRIAN LESSENBERRY

I, Brian Lessenberry, declare the following to be true and correct:

1. I am the National Intelligence Officer for Weapons of Mass Destruction and Proliferation, a position I have held since June 2011. I joined the National Intelligence Council in 2009 as Deputy National Intelligence Officer for Weapons of Mass Destruction with responsibility for the arms control and counterproliferation strategy portfolio. I am a career intelligence officer and previously served as a senior proliferation analyst at the National Geospatial-Intelligence Agency between 1998 and 2007, specializing in strategic assessments of foreign nuclear capabilities and intentions. From 2007 to 2009 I served as a Director of National

Intelligence Fellow assigned to support the National Security Staff.

2. The National Intelligence Council (NIC) is composed of senior analysts within the Intelligence Community as well as substantive experts from the public and private sector. Under the direction of the Director of National Intelligence the members of the NIC constitute the senior intelligence advisors of the Intelligence Community for purposes of representing the views of the Intelligence Community within the United States Government.

3. Pursuant to the National Security Act of 1947, the NIC is required to produce national intelligence estimates (NIE's) for the United States Government, which must include alternative views held by elements of the Intelligence Community. NIEs are the Director of National Intelligence's most authoritative written judgments concerning national security issues. They contain the coordinated judgments of the Intelligence Community regarding the likely course of future events.

4. I am the principal subject matter expert on Weapons of Mass Destruction ("WMD") at the NIC. I have read the Defendant's Second Motion to Compel (Dkt. 152) and the document attached thereto in the captioned case. I make this declaration in connection with the Government's opposition to that motion.

5. At all times relevant to the Defendant's request, the United States has had a vital national security interest in obtaining the most accurate intelligence possible regarding weapons of mass destruction threats. *See, e.g.*, National Strategy to Combat Weapons of Mass Destruction, December 2002 ("A more accurate and complete understanding of the full range of WMD threats is, and will remain, among the highest U.S. intelligence priorities, to enable us to prevent proliferation, and to deter or defend against those who would use those capabilities against us. Improving our ability to obtain timely and accurate knowledge of adversaries' offensive and defensive capabilities, plans, and intentions is key to developing effective counter- and nonproliferation policies and capabilities. Particular emphasis must be accorded to improving: intelligence regarding WMD-related facilities and activities; interaction among U.S. intelligence, law enforcement, and military agencies; and intelligence cooperation with friends and allies.")

6. I am personally familiar with the contents of the documents that would be responsive to requests (A) and (B) in the Defendant's motion, which were produced by the NIC. These documents are highly classified and contain highly sensitive information regarding intelligence sources and methods. I note that an unclassified version of the Key Judgments in the 2007

NIE entitled *Iran: Nuclear Intentions and Capabilities* ("the 2007 NIE"), was made available to the public in December 2007, and is described below. *See* Exhibit 1. None of the unclassified Key Judgments of the 2007 NIE are inconsistent with the classified version of the 2007 NIE.

7. As is stated in the 2007 unclassified Key Judgments, the Intelligence Community assessed with high confidence in the 2005 NIE entitled *Iran's Nuclear Weapons Program: At a Crossroads*, "that Iran currently is determined to develop nuclear weapons despite its international obligations and international pressure, but we do not assess that Iran is immovable." Ex. 1 at p. 9. In 2007 the Intelligence Community published an updated assessment that assessed "with high confidence that until fall 2003, Iranian military entities were working under government direction to develop nuclear weapons." *Id.* at 6. The 2007 NIE also judged "with high confidence that in fall 2003, Tehran halted its nuclear weapons program" which was defined as "Iran's nuclear weapon design and weaponization work and covert uranium conversion related and uranium enrichment-related work." *Id.* The Intelligence Community also assessed with moderate-to-high confidence that "Tehran at a minimum is keeping open the option to develop nuclear weapons." *Id.* The NIE also concluded that "convincing the Iranian leadership to forgo the eventual development of nuclear weapons

will be difficult" and that "[i]n our judgment, only an Iranian political decision to abandon a nuclear weapons objective would plausibly keep Iran from eventually producing nuclear weapons--and such a decision is inherently reversible." *Id.*

8. The 2007 NIE also included a judgment that "centrifuge enrichment is how Iran probably could first produce enough fissile material for a weapon," and that "Iran resumed its declared centrifuge enrichment activities in January 2006." *Id.* at 6-7. The 2007 NIE assessed with moderate confidence "that Iran probably would be technically capable of producing enough [highly enriched uranium] for a weapon sometime during the 2010-2015 time frame." *Id.* at 7. Moreover, the 2007 NIE concluded that Iran was continuing "to develop a range of technical capabilities that could be applied to producing nuclear weapons." *Id.* Finally, it assessed with high confidence that "since fall 2003, Iran has been conducting research and development projects with commercial and conventional military applications -- some of which would also be of limited use for nuclear weapons." *Id.*

9. Nothing in the 2007 NIE suggested that Iranian proliferation of weapons of mass destruction was not a threat to the national security of the United States, or that the United States did not retain a vital national interest in obtaining the most accurate intelligence as possible regarding this threat.

To the contrary, the 2007 NIE made clear that Iranian proliferation remained a threat and underscored the need for such intelligence.

10. In addition, none of the documents that would be responsive to requests (A) and (B) are inconsistent with or contradict the following unclassified judgments in the 2007 NIE:

a. "[U]ntil fall 2003, Iranian military entities were working under government direction to develop nuclear weapons."

b. "Tehran at a minimum is keeping open the option to develop nuclear weapons."

c. "Iranian entities are continuing to develop a range of technical capabilities that could be applied to producing nuclear weapons, if a decision is made to do so."

11. Subsequent unclassified statements from the Intelligence Community also make clear that the United States continues to regard the Iranian proliferation of weapons of mass destruction as a threat to the national security of the United States and that the United States retains the need for the most accurate intelligence possible regarding this threat. In his March 2011 Statement for the Record on the Worldwide Threat Assessment of the U.S. Intelligence Community for the Senate Committee on Armed Services, the Director of National Intelligence noted, "We continue to assess Iran is keeping open the option to develop nuclear weapons in part by developing various nuclear

capabilities that better position it to produce such weapons, should it choose to do so." While noting that "we do not know . . . if Iran will eventually decide to build nuclear weapons," the statement included the judgment that "Iran's technical advancement, particularly in uranium enrichment, strengthens our assessment that Iran has the scientific, technical, and industrial capacity to eventually produce nuclear weapons, making the central issue its political will to do so." The statement further observed that "there is a real risk that [Iran's] nuclear program will prompt other countries in the Middle East to pursue nuclear options."

12. The classified documents that would be responsive to requests (A) and (B) in the Defendant's motion support, and do not contradict, these publicly available assessments.

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

Executed on the 26 day of August, 2011.

Brian Lessenberry

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:10cr485 (LMB)
	)	
JEFFREY ALEXANDER STERLING	)	

NOTICE BY THE UNITED STATES OF INTENT TO USE EXPERT TESTIMONY

The United States, through the undersigned counsel, hereby gives notice pursuant to Fed. R. Crim. P. 16(a)(1)(G) of the government's intent to use expert testimony. The United States will present evidence at trial concerning a number of subjects, as more fully described in Part I, below, through the factual and expert opinion testimony of approximately seven witnesses. The witnesses are identified below in Part II.

I. SUBJECT MATTERS OF EXPERT TESTIMONY

A. Classification Procedures

The classification of national defense information is governed by statutes, executive orders and federal regulations. National security information is information relating to the national defense or foreign relations of the United States. National security information is classified at various levels depending on the expected harm caused by its unauthorized disclosure. For example, information is classified as "top secret" if its unauthorized disclosure reasonably could be expected to result in exceptionally grave damage to the national security; "secret" if its unauthorized disclosure reasonably could be expected to result in serious damage to the national security; and "confidential" if its unauthorized disclosure reasonably could be

expected to result in damage to the national security. In addition to classification designations, certain CIA programs have special access requirements and specialized procedures for the handling, transmission, storage, and disclosure of information.

The program that is the subject of the indictment and disclosed in Chapter Nine of *State of War* (Classified Program No. 1) was classified. Information relating to this program was also subject to special access and handling procedures.

Access to classified information requires what is commonly known as a "security clearance." The procedures for who may obtain a clearance and at what level are governed by executive orders and regulations. There are several requirements for access to classified information, including a security clearance and a need-to-know the information.

B. Training and Experience

CIA case officers are trained to protect classified information. They are trained in and understand the proper procedures for the handling, transmission, storage, and disclosure of classified information. Case officers are trained to protect the sources and methods used to gather intelligence and conduct intelligence operations. Case officers understand through their training and experience the actual and potential harm caused by the unauthorized disclosure of classified information. They understand through their training and experience the actual and potential harm caused by the unauthorized disclosure of classified intelligence sources and methods.

C. Harm Caused by Unauthorized Disclosures of Classified Information

The potential damage to the national security caused by the disclosure of classified information relating to Classified Program No. 1 and Human Asset No. 1 includes (1) damage

caused by the disclosure of intelligence methods; (2) damage caused by the disclosure of intelligence sources; and (3) damage to foreign relations.

1. Intelligence Methods

Intelligence methods are the means by which the CIA accomplishes its mission, and the CIA strives to protect its classified intelligence methods from being revealed to foreign governments and terrorist organizations. One of the primary missions of foreign intelligence services is to discover the classified intelligence methods used by the CIA and other U.S. intelligence agencies. Certain intelligence methods are effective only so long as they remain unknown and unsuspected to the actual and potential targets of the methods. Once a classified and previously undisclosed intelligence method is revealed, the targets or potential targets of the method may take countermeasures to hinder the ability to the United States to accomplish its intelligence mission utilizing this method.

Knowledge about or insight into the specific classified intelligence methods used by the United States is of tremendous value to those countries or organizations who wish to detect, penetrate, counter, or evaluate the activities of U.S. intelligence agencies. In this case, Chapter Nine of *State of War* disclosed a number of intelligence methods related to Classified Program No. 1. The unauthorized disclosure of these methods through the publication of *State of War* revealed these methods not only to the targeted country, but to the world, including to other intelligence services and to adversaries of the United States.

Unauthorized disclosure of intelligence methods negate or reduce their effectiveness by putting foreign governments, including the government targeted in Classified Program No. 1, on alert to these types of operational activities. This, in turn, damages national security by

adversely impacting the CIA's ability to collect foreign intelligence and to carry out other intelligence operations. Moreover, because the development of intelligence methods requires time, money, and resources, when an intelligence method is compromised, the United States is damaged by that loss and must devote additional time, money, and resources to compensate, if that is even possible.

2. Intelligence Sources

In gathering intelligence, the CIA often depends on information collected with the assistance of human intelligence sources. Indeed, the gathering of intelligence through human sources is critical to the Agency's mission. The relationship between the CIA and a human source depends on absolute secrecy. This promise of secrecy extends to both the existence of the source and the source's relationship with the CIA. A human source typically works closely with a case officer. The most important function of any case officer is maintaining the secrecy of the identity of his or her human sources and their relationship with the CIA.

Human sources often put themselves in grave danger by working with the CIA, and they will furnish intelligence information only when confident that their relationship with CIA will remain secret. If a source's identity and relationship with the CIA is compromised, the source's life is completely disrupted. The source, the source's family and friends, the CIA case officers who have had contact with the source, and the source's fellow employees are placed in danger by the compromise of the source's identity. They could be arrested, prosecuted, tortured, or killed. Foreign intelligence services are known to retaliate against persons who support the United States and our allies in gathering intelligence about them. Even if only some information about a source is leaked, the leaked information may be sufficient for foreign counterintelligence

officials to identify the source. The CIA may not know whether this has occurred but often must assume that it has. This erodes the ability of these human sources to continue to assist the CIA and diminishes the Agency's ability to continue operations that rely on the source.

When information is leaked that the United States has recruited a human source from a foreign country and that the human source was in possession of very valuable sensitive information, the foreign country is put on notice that the United States may now be in possession of that valuable sensitive information. The foreign country may then take counter measures to protect itself from any damage caused by the compromise of the sensitive information, thereby making it more difficult for the United States to obtain this type of intelligence information in the future.

Any unauthorized disclosure of information about a human source, especially when such information is leaked to the press and widely disseminated, could damage ongoing relationships with other sources and hinder the ability of the CIA to recruit human sources in the future. Sources and potential sources will likely be discouraged from cooperating with the CIA if they believe that the United States Government is unable to maintain the confidentiality of its relationships with its sources. A breach of secrecy about a human source by a case officer is particularly damaging, as a case officer often has a very personal relationship with a source, and a source must place enormous trust in that relationship. The disclosures in this case could lead other CIA sources to question their relationship with the CIA, or cease or curtail their cooperation with the Agency.

3. Foreign Relations

The unauthorized disclosure of classified information such as that disclosed in this case

can reasonably be expected to harm the United States by damaging the Government's relationships with foreign countries, including the CIA's liaison relationships with foreign countries. The CIA works closely with foreign countries who cooperate with the CIA. These foreign countries do so because they are confident that the CIA can and will do everything in its power to prevent the public disclosure of their cooperation. The unauthorized disclosure of classified information, whether directly to a foreign country or to the public through the press, tells our foreign partners that the CIA cannot protect its own information and may cause them to be less willing to share information with the CIA in the future. In addition, the unauthorized disclosure of classified information in this case can reasonably be expected to create undue suspicion among foreign governments that the CIA is conducting classified operations on their soil. This belief could cause some foreign governments to curtail their relationships with the CIA.

D. Nuclear Proliferation

One of the greatest threats to the nation's security is posed by the proliferation of nuclear, biological and chemical weapons -- weapons of mass destruction. One of the CIA's most important missions is gathering intelligence about this threat. For a long time, the intelligence community's resources in this regard were trained on only a few targets (*e.g.*, the Soviet Union). By comparison, today there are dozens of countries together with many nebulous transnational terrorist organizations and proliferation networks who aspire to acquire, develop and possibly use these weapons.

With respect to the proliferation of nuclear weapons and the development of nuclear weapons by other countries, including countries openly hostile to the United States and its allies,

it is important that the CIA provide the nation's leaders with timely and accurate information about these programs.

II. WITNESSES

The United States expects to call the following witnesses to testify regarding the subject matters summarized in Part I, above:

A. Mr. C. (F00007 - 08)

B. Mr. S. 2 (F00610 - 13; F00615 - 19)

C. Mr. M. (F00105 -108)

D. Mr. W. (F00228 - 34)

E. Mr. F. (F00033 - 40; F00042 - 00045)

F. Mr. S. (F00184 - 85; F00187 - 92; F00213 - 14; F00194 - 211; F00315 - 20)

G. David Shedd (F00178 - 82)

H. Elizabeth Culver

I. Jill M. Eulitz

All but one (Ms. Eulitz) of the above witnesses is a current or former employee of the CIA. We will provide additional information about the background and experience of these witnesses in a separate document.

Respectfully submitted,

Neil H. MacBride
United States Attorney

William M. Welch II
Senior Litigation Counsel
Criminal Division
United States Department of Justice

Timothy J. Kelly
Trial Attorney
Public Integrity Section
United States Department of Justice

James L. Trump
Senior Litigation Counsel
United States Attorney's Office
Eastern District of Virginia

By: /s/

Timothy J. Kelly
Attorney for the United States of America
United States Attorney's Office
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Phone: 703-299-3726
Fax: 703-299-3981
Email Address: timothy.kelly@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2011, the foregoing *Notice of the United States of Intent to Use Expert Testimony* was served via e-mail on Edward B. MacMahon, Jr., and Barry J. Pollack, counsel for the defendant.

By: /s/

Timothy J. Kelly
Attorney for the United States of America
United States Attorney's Office
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Phone: 703-299-3726
Fax: 703-299-3981
Email Address: timothy.kelly@usdoj.gov