

Excerpts from an Unofficial Draft Transcript of a Hearing of the Subcommittee on National Security, Emerging Threats, and International Relations of the Committee on Government Reform of the U.S. House of Representatives

March 14, 2006

**“Drowning in a Sea of Faux Secrets:
Policies on Handling of Classified and Sensitive Information”**

MR. WAXMAN. I want to focus my questions on the allegations of researchers who claim that the administration has been secretly removing documents from the National Archives that have already been declassified. Mr. Weinstein and Mr. Leonard, can you help us understand what is going on here? What agency is in charge of this program today?

MR. WEINSTEIN. That is a difficult question to answer. Let me explain why, Mr. Waxman. There has been speculation about the National Archives having secret agreements with various, multiple Federal agencies authorizing the re-review of declassified documents. I would like to clarify for the record that to the best of the knowledge of the Archivist, NARA has one classified Memorandum of Agreement pertaining to the issue of re-review, one.

The Memorandum of Agreement, MOA, is with a component of the Department of Defense and remains classified. The MOA is procedural in nature and deals with such things as proper archival procedures for handling accessioned records, recording any decision made by the agency, and ensuring that the records are managed according to NARA requirements, and I cannot say anything more about the MOA, which gets to the heart of your question, I am afraid, in an open session because it contains classified information.

MR. WAXMAN. So what—

MR. SHAYS. Are you sure it is actually sensitive information?

MR. WEINSTEIN. I was told classified, Mr. Chairman.

MR. WAXMAN. Therefore, I would one assume it is the Department of Defense that is taking the action, since that is the only group have a Memorandum of Understanding?

MR. WEINSTEIN. As I recall your question, it went to the heart of who was in charge of this process.

MR. WAXMAN. Who are the agencies in charge of the program, the whole process of reclassifying these documents?

MR. WEINSTEIN. That is what this audit is determined to find out, and if you can bear with us until the audit is completed, I think we will have an answer that will—

MR. WAXMAN. So we don't know who it is, but can you tell us what authority they are operating under to pull these documents from the shelves? These documents were already declassified. What authority do they have to do this?

MR. LEONARD. Just to build upon what Professor Weinstein indicated, in addition to the Department of Defense activity, Mr. Podonsky indicated that the Department of Energy has been conducting re-review of material at the National Archives since the late 1990s, as well as on occasion the Central Intelligence Agency has done it, as well, too.

If there is a common thread, it doesn't—this does not address every—

MR. WAXMAN. Let me ask the question . . . and then we will see if you have a direct answer to the question, and if you don't, why. We don't know exactly who is doing this and we don't know—you have not been able to respond to us under what authority they are doing it.

MR. LEONARD. I was just about to get to that, Mr. Waxman.

MR. WAXMAN. Okay.

MR. LEONARD. The authority that they are doing it under is under the framework of the Executive Order. Only agencies that have originated the information have the authority to declassify it. So one of the most common situations that has arisen is where, for example, if any agency declassifies its own records but it contains information that belongs to another agency and they did not afford that other agency the opportunity to review those records prior to the declassification action, pursuant to the order, that is not classification under proper authority, and so—

MR. WAXMAN. So this isn't pursuant to a Memo. of Understanding with the National Archives. It is pursuant to an Executive Order?

MR. LEONARD. Yes, sir.

MR. WAXMAN. Okay. Now, it is hard to still, even with that explanation, understand how these examples we have of records from 50 years ago would be changed—

MR. LEONARD. The simple answer is they don't. The exemplars that were provided to my office early this year as well as that has received coverage in the press, those exemplars clearly do not adhere to the classification standards of the order and are inappropriate—

. . . .

MR. WEINSTEIN. Congressman, could I respond just a half-a-second to that? In response to Mr. Leonard's advice that he has just given to you, to me, and in response to the situation, I took the actions which I took, which were based obviously on the fact that I could see no sensible use in classifying things that are 50 years old that have already been declassified.

MR. WAXMAN. Well, you called a halt to any further removal of documents while you conduct your audit, is that right?

MR. WEINSTEIN. Yes, that is correct

MR. WAXMAN. What was it that led you to decide to take this measure? Why did you conclude that these agencies should stop what they are doing until you examined their actions?

MR. WEINSTEIN. Well, to begin with, congressman, I wasn't aware of their actions and it was important for me to become aware of those actions. I learned about their actions from the New York Times, the way the American public did. Having been Archivist for a year, that struck me as being a rather impossible and absurd way to learn to know what is happening at your own agency and I acted immediately.

MR. WAXMAN. So you acted immediately and you stopped any removal of documents, and I am certainly pleased you are investigating the matter. Researchers are saying that there is an interagency memorandum and the only one that you are aware of is the one that the National Archives has with the Department of Defense?

MR. WEINSTEIN. Component of the Department of Defense, yes, sir.

MR. WAXMAN. And what does that Memorandum of Understanding say?

MR. WEINSTEIN. Well, as I indicated, Congressman, I would be happy to discuss this in a closed session, but unfortunately, for this discussion, it contains classified information which I am not prepared to discuss in open session.

MR. WAXMAN. And why is it classified?

MR. WEINSTEIN. Pardon?

MR. WAXMAN. Why is it classified?

MR. WEINSTEIN. Why is it classified?

MR. WAXMAN. Yes.

MR. WEINSTEIN. I don't know.

MR. WAXMAN. Is there something in the Memorandum of Understanding itself that will harm national security if it gets out?

MR. WEINSTEIN. I think I probably have to stand by my previous answer, Congressman.

MR. WAXMAN. That you can't say that in open session.

MR. WEINSTEIN. I would be happy to discuss it in a closed session.

MR. WAXMAN. Has there been any discussion within the administration about declassifying this MOU, if you know?

MR. WEINSTEIN. That I know of? Yes, I would say there has been,

MR. WAXMAN. And who wanted the MOU released and who didn't want it released?

MR. WEINSTEIN. Let me say that if it was released, I would have no trouble in conveying it, and that is as far as I would go on that square.

MR. WAXMAN. Does the MOU include any mechanisms to check against officials making these absurd classification decisions?

MR. WEINSTEIN. That is tough for me to answer, Congressman, as you might appreciate given what I said previously.

MR. WAXMAN. Mr. Chairman, given these responses and since so many of the details about this program remain classified, we are left with some significant questions. I would like to make two requests. First Mr. Chairman, would the subcommittee send a request for the classified MOU that governs this program? And secondly, could the subcommittee also request a classified briefing on this program with all the relevant agencies to obtain answers to these pressing questions?

MR. SHAYS. That will happen. We will do that. It makes sense. I am almost tempted to just tell my counsel, respond in a way, as well, because I am finding this—I don't know, Mr. Weinstein, if part of your answers are almost the exact kind of problem that we are trying to make in this hearing. Is the reason why some information isn't being responded to Mr. Waxman because they would embarrass people or is there a legitimate reason to classify or to suggest that this can't be said publicly?

MR. WAXMAN. He's caught in a catch-22 because—

MR. SHAYS. I know he is, but in a way, it is—I mean, the bottom line is, there is almost an absurdity of going into having a classified hearing about something that is sensitive but unclassified.

MR. WAXMAN. But the MOU is presumably classified.

MR. WEINSTEIN. Yes, sir.

MR. WAXMAN. So we want to get, one, a copy of the MOU—

MR. SHAYS. Right.

MR. WAXMAN. —and I hope you support that request—

MR. SHAYS. Yes.

MR. WAXMAN. —and secondly, we ought to get a classified briefing on this program, this whole program, because it is not just based on the MOU, but it seems to be based on some Executive Order and all other agencies are involved. . . . and we ought to see what is so pressing that—

MR. SHAYS. I am going to start first to ask that it be declassified, that we can have it in a public setting. If it can't be declassified, then we will have a classified setting hearing. But you can be assured that we will be finding it—there is going to have to be some real justification as to why it needs to be classified. Are you comfortable with that?

. . . . I am asking my staff to do this as counsel or someone with legal expertise because I find some of this almost silly and absurd. I find some of this destructive to our country, and I think what Mr. Waxman wants is very, very important, but I don't want to start doing the very thing that I am finding others doing. I don't want to start to suggest that some things need to be behind closed doors when, in fact, maybe they shouldn't be, and so that is what I am wrestling with.

MR. HALLORAN. Thank you, Mr. Chairman. For the record, to the Archivist, will the Archives provide the subcommittee under classified cover a copy of the MOU?

MR. WEINSTEIN. It is my understanding that that is entirely appropriate, but I would like to turn to my counsel, if I may, just to be sure that I am not misstating anything here. . . . One of the things about not being a lawyer, counsel, is one has to consult. The classifying authority, I have been told, is with the classifying agency, which would have to authorize the—without further action by the subcommittee, the release of the classified Memorandum of Agreement.

MR. HALLORAN. But you can't us to would whom such a request would be directed?

MR. WEINSTEIN. I suppose what we would do would be to convey your request to the classifying agency and try to get an immediate response so that we can accommodate the subcommittee.

MR. LEONARD. Again, it is a Department of Defense component, so it makes it very easy.

MR. WAXMAN. So the classified agency is a Department of Defense component, is that—

MR. WEINSTEIN. That is what I said in my statement.

MR. ROGALSKI. Mr. Chairman, the MOU does belong to the Department of Defense in conjunction with NARA. We have received a FOIA request for that MOU. We are looking at that now to see if it can be sanitized. But let me assure you that the rationale for classifying that was done in accordance with what the Executive Order determined by the original classification authority.

So we certainly have no objection to providing you a classified briefing on that MOA. We do not have a problem and we are going through the process of seeing can it be sanitized

now and being presented to you in an open forum. So that is happening as we speak. But again, I want to assure you that the basis for the classification, again, in my opinion, after reviewing that, was sound and between NARA and us. We can provide that to you.

MR. SHAYS. So the bottom line you are stating is that it was your recommendation that it be classified, or excuse me, that you concurred with the recommendation of others that it be classified?

MR. ROGALSKI. My office concurred with the classification done by the original classification authority responsible for that document, that is correct.

MR. SHAYS. And you think it would be unlikely that if we asked that it be reviewed to be declassified, it would be unlikely it would be declassified?

MR. ROGALSKI. We can certainly review that and determine—I don't want to give you a document with all black lines on it, redacted.

MR. SHAYS. No—

MR. ROGALSKI. I want to give you something that is beneficial—

MR. SHAYS. And we don't want a sanitized version. We want the real thing and we will do it—

MR. WAXMAN. Mr. Chairman, let us get both, because it may take them too long to figure out how to—

MR. SHAYS. Okay.

MR. ROGALSKI. And we have no problem briefing you on the rationale, the MOU and the rationale for the classification decision.

MR. SHAYS. I think Mr. Waxman's suggestion is important. Let us get the sanitized version that can be made public and then we would like to see the real McCoy. It will be a good opportunity for us to decide as a committee whether we think that we will ask all the committee members to see this document so that we—in the subcommittee to get their views, and we will issue a statement on what we think about that document and the justification we heard.

MR. LEONARD. If I could just add, it will be withheld, I presume, Mr. Chairman—

MR. SHAYS. Well, it may be sensitive but unclassified.

MR. LEONARD. And if I could just add something here to further shed some light on the issue, again, the audit that is currently underway, and I don't want to presuppose any final results, but I can tell you one of the things that we ascertained very early on, the exemplars that were provided

to our office and were released to the media and whatever, those exemplars were not pulled pursuant to the MOA. They were done—action taken quite a few years ago.

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MR. WAXMAN. Mr. Chairman, there is then the question of who did those and why—

MR. LEONARD. They were pulled by the CIA and they were pulled in response to a serious breakdown in quality control back in about the year 2000, where information that clearly was inappropriate for release ended up being release, and in an attempt to clean that up, it went too far the other way,

MR. SHAYS. With all due respect, about the year 2000, there is a big difference between the year 2000 and the year 2001. Was it in 2000?

MR. LEONARD. I believe it was the year 2000, yes, sir.

MR. SHAYS. So it was the previous administration in that case?

MR. LEONARD. Yes, sir.

MR. WAXMAN. The same CIA Director.

MR. WEINSTEIN. Mr. Chairman, if I could just add, what Bill Leonard has just mentioned gets to the heart of the complexity that I was discussing with Congressman Waxman of who did what, when and related to your initial question. We hope to have as many answers to that question as we can put them into the audit and we will look forward to getting you a copy of that audit.

MR. LEONARD. And actually, if I could just add, I mean, the whole confusion, the awkwardness and whatever cries out for transparency in this process. That is the one thing that we are committed to providing, not only transparency going back to 1995 for all such activity but continuing transparency for a number of good reasons. Number one, to ensure that any action taken along these lines is absolutely, positively necessary because people know that people will be watching, but even more so, to prevent perceptions being created that, quite frankly, harm the nation, harm the process, and are understandable but yet are unfortunate.

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MR. SHAYS. Mr. Van Hollen?

MR. VAN HOLLEN. Thank you, Mr. Chairman. As you said, this whole process seems to have sort of an Alice in Wonderland quality to it. Let me just make sure I understand the memo. The memo is between the Archives and an agency of DOD, is that right?

MR. LEONARD. Yes.

MR. VAN HOLLEN. What was the classification level of that memo? Is it secret? Is it top secret?

MR. LEONARD. I believe it is secret.

MR. VAN HOLLEN. Secret, okay. Now, as I understand it, there were many documents that were reclassified outside of that particular agreement.

MR. LEONARD. That is correct.

MR. VAN HOLLEN. In other words, there were other government agencies that came in and reclassified documents, is that right?

MR. LEONARD. Yes, sir.

MR. VAN HOLLEN. Okay, and those include the CIA and DOE.

MR. LEONARD. That is correct.

MR. VAN HOLLEN. Were there any others?

MR. LEONARD. Not that I have identified yet, but again, that is the whole purpose of the audit, is to fully flesh that out.

MR. VAN HOLLEN. All right. Now let me just focus on that category for a moment—

MR. LEONARD. Sure.

MR. VAN HOLLEN. —because what I am trying to understand—I understand this memorandum apparently regulates how the Archives deals with an agency of DOD, but let us take DOE, for example, since we have a representative from DOE here at the table and we don't have a CIA representative.

MR. LEONARD. Sure.

MR. VAN HOLLEN. If DOE wants to go back and—they can reclassify documents under the EO, as I understand it, which they were the original classifier of, is that right?

MR. LEONARD. Actually, the situation with DOE is even more unique, since, as Mr. Podonsky explained, their information which pertains to nuclear weapons is actually outside the scope of the EO and is classified pursuant to statute, the Atomic Energy Act.

MR. VAN HOLLEN. Okay, so let me just make sure I understand. The EO, though, the EO—so you are saying the Executive Order doesn't apply to DOE at all?

MR. LEONARD. It doesn't apply to DOE, at least with respect to restricted data and formerly restricted data which deals primarily with nuclear weapons, yes, sir.

MR. VAN HOLLEN. Okay. So if DOE has documents that they originate at DOE, they are at the Archives now, right? . . . Now they want to come in and reclassify documents. First of all, let me figure out how they got declassified to begin with. As I understand it, technically, DOE as the classifying agency, even under this other authority, are they still the ones that have the authority to declassify it and are they only ones that have the declassification authority?

MR. LEONARD. They have the authority, and what happens in that case is what happens in other case, as well, too, this kind of information will appear in another agency's record, for example, the Dept of State, and when they go to declassify it, they don't—the person who does it does not necessarily recognize that, hey, wait a minute, there is information here that belongs to another agency. I can't take unilateral action on it.

MR. VAN HOLLEN. I understand. So let me make—I understand that. So when DOE is going in to reclassify, the first question I have is, are they going in to reclassify only information that has been—DOE information that has been declassified by the State Department or other agencies, or have they also gone in to reclassify DOE information that they never—that they originally declassified?

MR. LEONARD. That is right on, because what has—again, our audit is in process, but one of the key issues that has come very early on is that when agencies are re-reviewing for a specific purpose, if they come across additional information that they believe was inappropriately declassified, that likewise is being put aside.

MR. WEINSTEIN. Let me add a little complexity beyond that, Congressman Van Hollen, if I can. It is fair to say that we are learning more with each day of doing this audit, and it is fair to say that in my position as Archivist, I am learning even more because until the news media provided me with that information, that was my first knowledge of this program and all of its complexities and I am not sure I have the complete handle on the story now. As a result of this audit, I hope to have it, and when I have it, obviously, the subcommittee will have it, as well.

MR. VAN HOLLEN. Thank you and I appreciate that. I understand. With the audit so far or with your research into this so far, you have discovered instances where the DOE has reclassified information that they themselves declassified? . . .

MR. LEONARD. It is unclear. I am not too sure if I have that depth of understanding.

MR. POKONSKY. Let me, since it is a hypothetical, let me just—I recognize it is a hypothetical, but again, as I said in my testimony, the DOE has not gone back into the National Archives and reclassified anything that was declassified. However, what we were asked to do in 1996 by the Congress is to go back in and take a look at all the records from other agencies that may have had RD or FRD, and then the Kyl amendment went in and said also go in and train other agencies to know how to look for RD or FRD, and then the Lott amendment said go in and also take a look at all documents that were already previously taken off the shelf at NARA. So hypothetically, we could be the agency that was doing it, but we are not.

MR. LEONARD. Congressman, let me . . . try to be as direct as I can to answer the question. The EO has a very high threshold that if an agency declassifies information and for whatever reason changes their mind, they have a very high threshold to meet. Agencies to date have represented to me that they have never done that. Based upon what I know to date, I don't think that is necessarily the case. I think they have, in fact, done that for a variety of reasons, may not have understood it to be that, but I do believe that there have been instances where agencies have gone back and reclassified information that they themselves have previously declassified without meeting the threshold that is spelled out in the EO.

MR. VAN HOLLEN. Okay. Let me just also briefly . . . try and understand the process by which the CIA or DOE, say they want to come back and take a look at whether other agencies have declassified information that they were the original classifiers of. What do they do, come over to the Archives, they knock on the door and say, where are our files, and they go in? Does the Archives have any ability to make an independent determination about whether what these agencies are doing is appropriate or not?

MR. LEONARD. The delineation of responsibilities is when records enter the National Archives and when they are accessioned into the Archive, they are under the control and the custody of the National Archives. They belong to the Archives. So no agency can just simply come in and rifle through records on their own.

MR. VAN HOLLEN. That is why you can have a moratorium?

MR. LEONARD. The information that is contained in those records, when it is classified information, the classification authority over that information remains with the agency, and so when agencies exercise declassification authority or reclassification authority or say that this was declassified improperly, that is an authority that they have that the Archives does not have. The archives cannot classify information on their own, so the Archives is hard pressed from that perspective to challenge an agency with respect to exercising their classification authority.