

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CASE NO.: 3:15CR47**

UNITED STATES OF AMERICA

v.

DAVID HOWELL PETRAEUS

**DEFENDANT'S SENTENCING MEMORANDUM
IN SUPPORT OF A SENTENCE OF PROBATION**

Defendant David Howell Petraeus, by and through counsel, respectfully submits this memorandum to assist the Court in fashioning an appropriate sentence pursuant to 18 U.S.C. § 3553(a).

On April 23, 2015, Defendant will plead guilty to a one-count Bill of Information charging a misdemeanor, Unauthorized Removal and Retention of Classified Documents or Material in violation of 18 U.S.C. § 1924. As reflected in the Plea Agreement filed with the Court on March 3, 2015, the United States has agreed not to oppose Defendant's request that he receive a non-custodial sentence. The parties further jointly recommend the imposition of a two-year term of probation and a \$40,000 fine.

Defense counsel respectfully submit that after the relevant factors in this case are taken into consideration, a sentence of probation and the agreed-upon fine satisfy the statutory goals of sentencing and constitute a sentence that is "sufficient, but not greater than necessary." See Kimbrough v. United States, 552 U.S. 85, 101 (2007) (quoting 18 U.S.C. § 3553(a)).

RELEVANT FACTUAL BACKGROUND

A. The Defendant's Background

The 21-page PSR describes Defendant's military and governmental service in detail, and his personal and family data, and we will not recapitulate that description here. Defendant served 37 years in the United States Army, including as commander of coalition forces in Iraq and Afghanistan, and as commander of the United States Central Command. Following retirement from the Army on August 31, 2011 as a four-star general, he served for 14 months as Director of the Central Intelligence Agency. Defendant's many military decorations and awards are set out at pages 14-15 of the PSR.

In support of Defendant's sentencing request, he has submitted in Appendix A to this Memorandum letters from thirty-four individuals attesting to Defendant's public service in the past and to his potential for public service in the future. We will not attempt to summarize here the remarkable range and diversity of these testimonials, but they counsel strongly against incarceration, both on account of Defendant's past public service and because of his ability to make meaningful future contributions to the safety of this country.¹ As the Court reviews these

¹ At a press briefing on March 16, 2015, White House Press Secretary Josh Earnest had this response to a question about the struggle against the Islamic State in Iraq and Syria (ISIS):

Q. And finally, there's a news report out there that the White House is getting advice on how to take on the Islamic State from former General David Petraeus. I'm wondering if you can confirm that.

MR. EARNEST: Well, Olivier, obviously, General Petraeus is somebody who served for a number of years in Iraq. He commanded a large number of American military personnel in that country. Over that time, he developed strong relationships with some of his Iraqi counterparts and with some of Iraq's political leaders. He is, I think, legitimately regarded as an expert when it comes to the security situation in Iraq, so I think it makes a lot of sense for senior administration officials to, on occasion, consult him for advice.

letters, we believe the Defendant's exceptional career and future potential is comprehensively described and evidenced.

B. The Offense

Defendant's offense is described in the one-count Bill of Information and Factual Summary filed with the Court on March 3, 2015. Defendant violated 18 U.S.C. § 1924. As an employee of the United States Government, Defendant possessed documents containing classified information and did unlawfully and knowingly remove such documents without authority and with the intent to retain such documents at unauthorized locations, being aware that these locations were unauthorized for such storage.² The Factual Basis, which Defendant has agreed to and signed, sets forth the particulars of this offense.³

C. The United States Sentencing Guidelines

As the Court is well aware, as a result of the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), the federal Sentencing Guidelines are "effectively advisory," id. at 245. A sentencing court must consider the Guidelines range, but it is not bound by this range.

In this case, the United States, Defendant, and the PSR are in agreement that the Sentencing Guidelines range applicable to this case is 0-6 months, Zone A, Criminal History Category I. Plea Agreement, ¶ 8; PSR ¶ 82.

Appendix B at 6.

² The first removal and improper storage alleged in the Bill of Information occurred on August 28, 2011 to September 1, 2011, in which Defendant shared his notebooks containing classified information ("Black Books") with his biographer, but the Factual Basis notes that "[n]o classified information from the Black Books appeared in the . . . biography." Factual Basis ¶ 25.

³ [REDACTED]

ARGUMENT

After calculating the proper offense level under the now-advisory Sentencing Guidelines, the Court must consider each of the § 3553(a) factors and “tailor the sentence” to fit the circumstances of the case. Booker, 543 U.S. at 245. Section 3553(a)(2) provides that an appropriate sentence must be based on the relevant facts and circumstances and be designed:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In the circumstances of this particular case, we believe the Court’s focus is appropriately on the factors identified in § 3553(a)(2)(A) and (B), and that a consideration of these factors leads to the conclusion that a sentence of probation is appropriate and fully justified.

A. Sentencing Precedents Under 18 U.S.C. § 1924

Perhaps the most reliable indicator of the equity, deterrent effect, reflection of seriousness of the offense, and promotion of respect for the law of a proposed sentence is a comparison of that sentence with other sentences imposed for that offense.

While 18 U.S.C. § 1924 authorizes a sentence of up to one year’s imprisonment, the prior § 1924 cases indicate that imprisonment is in fact rarely imposed and then only when there is a charge for another criminal offense. See the following cases involving 18 U.S.C. § 1924 offenses:

United States v. Anton, No. 14-cr-668 (D.S.C.) (imposing sentence consisting of three years’ probation and 100 hours of community service where defendant, an employee of a

contractor to the United States, removed classified materials from his office and retained them on electronic media in combat zones in Afghanistan and in his homes in Georgia and South Carolina).

United States v. Harwin, No. 13-mj-77 (E.D. Va.) (imposing sentence consisting of one year's probation and \$5,000 fine where defendant, an employee of the United States, removed two classified documents and retained them in his home and personal automobile).

United States v. Poster, No. 12-cr-110 (C.D. Cal.) (imposing sentence consisting of one year's probation and \$3,500 fine where defendant, an Air Force contractor, removed classified materials from his office and retained them at his house).

United States v. McGowan, No. 11-mj-781 (E.D. Va.) (imposing sentence consisting of \$250 fine where defendant, an FBI Signals Collection Analyst, removed classified materials from her office, retaining them in an unauthorized safe in her home, and where defendant initially denied removing classified information from her office but admitted to having altered the documents to make them unclassified before removing them).

United States v. Neely, No. 10-mj-311 (E.D. Va.) (imposing sentence consisting of three years' probation and a \$250 fine where defendant, an FBI investigative specialist, possessed classified materials in her home and her personal automobile).

United States v. McCain, No. 09-mj-691 (E.D. Va.) (imposing sentence consisting of one year's suspended probation where defendant, an employee of the Naval Sea Systems Company, removed nearly 1,000 classified documents and electronic files from his office and retained them on his home computer and other electronic media).

United States v. Stompf, No. 08-cr-1157 (D.S.C.) (imposing sentence consisting of two years' probation).

United States v. Uppal, No. 07-mj-274 (E.D. Va.) (imposing sentence consisting of one year's probation and a \$500 fine where defendant, an employee of a contractor to the Air Force, removed classified materials related to the design and control of missiles, radar systems, and aircraft control systems and retained them in his home and in a commercial storage facility).

United States v. Quintana, No. 07-cr-931 (D.N.M.) (imposing sentence of two years' probation where defendant, an employee at the Los Alamos National Laboratory, removed over 1,000 classified documents and electronic media containing classified materials from her office and retained them in her home, which was being used as an illegal meth lab).

United States v. Kirby, No. 07-mj-463 (E.D. Va.) (imposing sentence consisting of \$500 fine where defendant, a Defense Logistics Agency employee, removed classified materials from his office using a thumb drive, lost the thumb drive, and turned in to his superiors a second thumb drive that he falsely claimed to be the missing thumb drive, and where defendant admitted to having removed classified materials from his work computer 50 to 60 times).

United States v. Fettig, No. 07-cr-98 (W.D. Mich) (imposing sentence consisting of one year's probation and \$1,200 fine where defendant, who had met with Israeli intelligence agents two years earlier, removed classified materials from the U.S. embassy in Cairo and retained them in Lansing, Michigan, and where defendant lied to FBI agents about, among other things, his contact with Israeli intelligence agents).

United States v. Blauvelt, No. 06-cr-71 (E.D. Tenn.) (imposing sentence consisting of one year's probation and a \$5,000 fine where defendant, a National Nuclear Security Administration contractor, had stored classified material on both his unclassified and networked work computer and on his home computer, and where federal agents executing a search warrant on defendant's residence found him in the process of attempting to erase data from his computer, and where defendant falsely denied storing classified information on his home computer until he was told that classified information had been in fact recovered from it).

United States v. Berger, No. 05-mj-175 (D.D.C.) (imposing sentence consisting of two years' probation, fine and costs of \$56,905.52, 100 hours of community service, and no access to classified information for a period of three years where defendant, an advisor to the 9/11 Commission, removed five classified documents from the National Archives and when told by National Archive staff that the documents were missing initially failed to tell the staff that he had taken the documents).

United States v. Ha, No. 02-mj-1333 (E.D. Va.) (imposing sentence consisting of a \$500 fine).

United States v. Wallace, No. 01-cr-155 (D.D.C.) (imposing sentence consisting of one year's probation for § 1924 violation).

But see:

United States v. Jangraw, No. 14-cr-174 (D.D.C.) (imposing sentence consisting of eight months' imprisonment where defendant also pleaded guilty to violating the Arms Export Control Act (22 U.S.C. § 2778 and 22 C.F.R. Part 127.1) by selling munitions to customers in 34 different foreign countries via eBay, and, in addition, retaining classified materials at his home).

United States v. Hitzelberger, No. 12-cr-231 (D.D.C.) (imposing sentence consisting of time served where defendant, a contractor working for the United States Navy in Bahrain, removed classified materials and retained them in his backpack, and where defendant was originally charged only with violating the Espionage Act (two counts of violating 18 U.S.C. § 793(e)) and held without bond from October 26, 2012 to December 19, 2012 (65 days) because additional classified materials were found in his quarters, at least one document having been altered to remove the classification markings at the top and bottom of the document, and where defendant initially denied knowing that the materials found were classified).

United States v. Cannon, No. 12-cr-216 (E.D. Va.) (imposing sentence consisting of one year of imprisonment and one year of supervised release on a § 1924 charge to run concurrently

with sentence of 15 months' imprisonment on counts of conversion of money of an agency of the United States (18 U.S.C. § 641) and of money laundering (18 U.S.C. § 1957)).⁴

The facts of the present case are akin to those in the numerous cases, cited above, where a sentence of incarceration was not imposed. Indeed, the imposition of a sentence of imprisonment on the facts here would constitute a significant departure from the settled case law established by 18 U.S.C. § 1924 precedents and create an unwarranted disparity in the treatment of Defendant.

B. Exercise of Prosecutorial Discretion by the United States

The responsibility for sentencing rests solely with this Court, and the United States' agreement not to oppose Defendant's request for a non-custodial sentence is not binding upon the Court. However, insofar as the Court seeks to determine a sentence that will promote respect for the law, provide a just punishment for the offense, and afford adequate deterrence to criminal conduct, the United States' exercise of prosecutorial discretion in this case deserves to be given significant weight.

The agreement by the United States not to oppose Defendant's request for a noncustodial sentence is a consequence of the Justice Department's broad discretion to enforce the federal criminal laws, which stems directly from the President's constitutional responsibility to "take Care that the Laws be faithfully executed." United States v. Armstrong, 517 U.S. 456, 464

⁴ In cases of aggravated misconduct involving the improper removal or storage of classified documents, the United States has brought felony charges under 18 U.S.C. § 793(e) of the Espionage Act. See, e.g., Judgment, United States v. Kenneth Wayne Ford, Jr., No. 05-cr-0235 (D. Md.) (Mar. 31, 2006) (imposing sentence consisting of six years' imprisonment under the Espionage Act, 18 U.S.C. § 793(e), for removal and improper storage of several boxes of classified documents from the National Security Agency, with a concurrent three-year sentence for violation of 18 U.S.C. § 1001).

(1996) (quoting U.S. Const., art. II, § 3). It is significant that the United States has made the judgment that a sentence of imprisonment is not necessary in this case to “reflect the seriousness of the offense,” “to promote respect for the law,” or “to afford adequate deterrence to criminal conduct,” a judgment which (we believe) is at least partially grounded in a recognition of the typical sentence imposed in cases like this, as outlined in the previous section.

C. The Seriousness of the Non-custodial Punishment

The Bill of Information, Defendant’s guilty plea, the probationary supervision of Defendant, a fine of \$40,000, and collateral consequences, all convey the seriousness of, and provide appropriate punishment for, the offense described in the Factual Basis. As the Court is aware, 18 U.S.C. § 3553(a)(3) specifically directs the sentencing court to consider sentences other than imprisonment and emphasizes that the severity of a probationary sentence should not be underestimated. As the Supreme Court has noted:

We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. *See United States v. Knights*, 534 U.S. 112, 119 (2001) (“Inherent in the very nature of probation is that probationers ‘do not enjoy the absolute liberty to which every citizen is entitled’” (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987))). Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. USSG §5B1.3.

Gall v. United States, 552 U.S. 38, 48 (2007) (footnote omitted). As reflected in the PSR, 18 U.S.C. § 3561(c)(1) authorizes a sentence of probation in a case such as this, PSR ¶ 86, and a probationary sentence with a \$40,000 monetary fine constitutes significant criminal punishment. It is not irrelevant to note here the scathing media treatment and public humiliation which

Defendant suffered, attendant to his resignation as Director of the Central Intelligence Agency on November 9, 2012 and his apology for his conduct that led to this resignation.

CONCLUSION

The Supreme Court has made clear that “the punishment should fit the offender and not merely the crime.” Pepper v. United States, 562 U.S. 476, 131 S. Ct. 1229, 1240 (2011) (internal quotations omitted). Moreover, “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” Koon v. United States, 518 U.S. 81, 113 (1996).

In the unique facts of this case, Defendant Petraeus has, on the one hand, a long and distinguished record of service to this country and, on the other hand, conduct described in the Factual Basis for which he and he alone is responsible. In light of the circumstances here, undersigned counsel respectfully submit that the sentencing goals listed in § 3553(a) are satisfied by a sentence of probation which, with a monetary fine, will simultaneously reflect the seriousness of the offense, promote respect for the law, and provide a just but not unduly harsh punishment for Defendant’s offense.

Dated: April 15, 2015

Respectfully submitted,

TIN FULTON WALKER & OWEN PLLC

/s/ Jacob H. Sussman

Jacob H. Sussman (N.C. Bar No. 31821)
301 East Park Avenue
Charlotte, NC 28203
Telephone: (704) 338-1220
Fax: (704) 338-1312
jsussman@tinfulton.com

WILLIAMS & CONNOLLY LLP

/s/ David E. Kendall

David E. Kendall (pro hac vice)
Simon A. Latcovich (pro hac vice)
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Fax: (202) 434-5029
dkendall@wc.com
slatcovich@wc.com

Attorneys for Defendant David H. Petraeus

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has filed and served this sealed pleading with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel for the government.

Dated: April 15, 2015

/s/ Jacob H. Sussman