

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v.

NGHIA PHO,

Defendant

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CRIMINAL NO. GLR-17-631

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**GOVERNMENT’S UNCLASSIFIED MEMORANDUM IN AID OF SENTENCING**

On November 29, 2017, the United States Attorney for the District of Maryland filed an Information charging the defendant with willful retention of national defense information, in violation of 18 U.S.C. § 793(e). *See* ECF No. 1. On December 1, 2017, the defendant pleaded guilty to the Information. *See* ECF No. 9. The plea was taken pursuant to an agreement in which the defendant admitted to certain facts and the parties agreed to certain Guideline calculations. *See* ECF 9.

The Government is in receipt of the final PSR. *See* ECF No. 37. On July 31, 2018, the Government filed a classified sentencing memorandum. The defendant filed his sentencing memorandum on September 13, 2018. The Government now submits its unclassified sentencing memorandum. For the reasons explained in this memorandum, a Guideline sentence of 96 months is appropriate.

**I. The Offense Conduct Was Extensive and Exceptional.**

In the Statement of Facts appended to his plea agreement, the defendant admitted to a lengthy history of compromising some of the nation’s most closely held types of intelligence. *See* ECF No. 9. For a period of at least *five years*, the defendant removed Top Secret and Sensitive

Compartmented Information (“SCI”)<sup>1</sup> from secure space at the National Security Agency (“NSA”) and retained it in his home—an unsecure residence. As further explained in the Government’s classified sentencing memorandum, the defendant’s criminal conduct demonstrated an extraordinary disrespect for national security.

## **II. The Defendant’s Mitigating Arguments Are Unpersuasive.**

The arguments in the defendant’s sentencing memorandum fit neatly within the § 3553(a) factors, and the Government responds within that rubric.

***History and Characteristics of the Defendant:*** The defendant points to his family, his love for his children, and his religion as reasons he should not receive a sentence of incarceration. However, all of those positive aspects were present when the defendant committed his extensive and time-consuming criminal conduct. Not one of the positive aspects of his life prevented him from removing classified information from secure space and retaining it in an unsecure location. And not one of them should prevent him from serving an extended term of imprisonment.

The defendant also would have the Court look favorably upon his decade of service at NSA. But as described below, his criminal conduct far outweighs any benefit that came from his technical skills. Due to the defendant’s conduct, the NSA was forced to abandon certain important initiatives, to protect itself and its operational capabilities, at great economic and operational cost.

The defendant also takes credit for failing to commit any comparable crime in the three

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<sup>1</sup> By definition, information may be classified as “TOP SECRET” only if its unauthorized disclosure reasonably could be expected to cause exceptionally grave damage to the national security. Exec. Order 13526 § 1.2. Access to SCI is further restricted. SCI is a type of classified information concerning or derived from sensitive intelligence sources, methods, or analytical processes. SCI must be handled within formal access control systems established by the Director of National Intelligence. One must receive explicit permission to access an SCI control system or compartment. Once it is determined a person should have access to an SCI compartment, that person signs a nondisclosure agreement specific to that compartment.

years since his home was searched. In that time, the defendant had no access to NSA space. He should not receive accolades because, through the NSA and FBI's swift efforts, he lost the ability to perpetuate the criminal conduct that had been his pastime for the previous five years.

It is also noteworthy that, as further described below, given the defendant's long history of government employment, and the numerous non-disclosure agreements signed by the defendant, the defendant clearly understood the trust the United States places in individuals who receive a security clearance. The defendant blatantly violated this trust.

**Circumstances of the Offense:** The defendant claims that he stored massive troves of classified information at his home without the intention of placing national security at risk. ECF No. 19 at 5. The defendant goes so far as to say, directly, that he "did handle the information with care." ECF No. 19-1 at 3. His actions speak to his intentions, and the facts do not support his contentions. For years, the defendant received training on how and where to store classified information and on why such precautions were critical to protecting national security. The defendant well knew that the mere removal of classified information from secure spaces, in itself, could endanger national security, and that retaining classified information in an unsecure location compounded this danger. Indeed, in his plea agreement, the defendant admitted that his extensive training informed him that "unauthorized removal of classified materials and transportation and storage of those materials in unauthorized locations risked disclosure and transmission of those materials, and therefore could endanger the national security of the United States and the safety of its citizens." ECF No. 19 at 9. For him to suggest otherwise at this late date is implausible.

The defendant also claims that his "sole focus" in stockpiling tremendous quantities of classified information "was to have those materials conveniently available to him at his home so that he could prepare a well-supported personnel evaluation with the hope and expectation that he

would be able to convince his supervisors as to the value and significance of his work within the NSA.” ECF No. 19 at 6. This assertion is belied by the facts. The defendant did not take home and retain classified information consistently for five years to work on an annual performance review. This argument especially does not apply to the classified material found in his home that was unrelated to his work or any personnel evaluation.

**Sentencing Disparity:** The defendant suggests, not so obliquely, that the Government would have handled the defendant’s case differently if he had a military title or more political stature. This argument is fanciful, and rests only on the thin reed that his criminal conduct really was just an “error of judgment.” ECF No. 19 at 8. Such a description does not fit the breadth, sophistication, and duration of what the defendant did.

The defendant compares himself favorably to General Petraeus.<sup>2</sup> The non-incarceration sentence handed down in that case has no bearing here. General Petraeus was convicted of a misdemeanor, in violation of 18 U.S.C. § 1924, which carried a maximum term of imprisonment of one year. Petraeus’s post-acceptance offense level was 8, resulting in an advisory Guideline range of zero to six months. The sentencing court concluded that a Guideline sentence of two years’ probation was appropriate, in part because of Petraeus’s “37-year record of service and high achievement as a military officer” and his reputation as “one of the finest military officers of his generation.” ECF No. 19-5 at 13. Though Petraeus received no term of imprisonment, he received a Guideline sentence. Here too the defendant should receive a Guideline sentence. The defendant was convicted of a felony that could have been charged as multiple felonies. The result of the

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<sup>2</sup> The defendant also seeks to have the Court compare his sentence to the Presidential pardon given to CIA Director Deutch. In addition to the differences in their conduct, the Court is tasked with considering disparities only among similarly situated federal defendants—not between a federal defendant (Pho) and one not involved in any justice system (Deutch). *See United States v. Clark*, 434 F.3d 684, 687 (4th Cir. 2006).

defendant's felonious conduct was far more debilitating to the Intelligence Community's operational capabilities than was Petraeus's misdemeanor conduct.

The defendant's memo also ignores two more relevant cases: Kenneth Ford and Christopher Glenn. Just like the defendant, both Ford and Glenn were convicted of violations of 18 U.S.C. § 793(e). In 2004, Ford took a couple of boxes of classified documents home when his employment at NSA concluded. In 2006, following a trial, Judge Messitte sentenced Ford to 72 months in prison for the § 793(e) violation, to run concurrent with his sentence for a violation of 18 U.S.C. § 1001. *See United States v. Kenneth Wayne Ford*, Crim. No. PJM-05-235 (D. Md.), *aff'd*, 288 F. App'x 54 (4th Cir. 2008). In 2012, Glenn removed and retained certain classified materials he obtained as an overseas civilian contractor for the military. In 2015, after he pleaded guilty pursuant to a plea agreement, Glenn was sentenced to 120 months in prison for violations of 18 U.S.C. §§ 793(e), 1030, and 371. *See United States v. Christopher Glenn*, Crim. No. KAM-14-80031 (S.D. Fla.).

**Left Unsaid:** The defendant's memo omits any mention of certain critical § 3553(a) factors, including the need for the sentence to reflect the seriousness of the offense, promote respect for law, provide just punishment for the offense, and afford adequate deterrence to criminal conduct. The offense was exceptionally serious and caused damage to national security. To underscore the seriousness of the defendant's offense, the then-Director of the National Security Agency authored a victim impact letter, appended as **Exhibit A**. According to Admiral Rogers:

Mr. Pho's conduct in improperly and unlawfully retaining national defense information, which included highly classified information, outside of secure space had significant negative impacts on the NSA mission, the NSA workforce, and the Intelligence Community as a whole. By taking highly classified material outside of the controlled space of NSA, Mr. Pho placed at risk some of NSA's most sophisticated, hard to achieve and important techniques of collecting from sophisticated targets of the NSA, including collection that is

crucial to decision makers when answering some of the Nation's highest-priority questions.

Because the NSA deals with significant collection tools that are subject to compromise, the NSA has a responsibility to assume that classified information removed from secure space has been compromised, sometimes invariably so. According to Admiral Rogers:

By removing such highly classified materials outside of secure space, Mr. Pho subjected those materials to compromise. It is a fundamental mandate in the Intelligence Community that classified material must be handled and stored in very specific and controlled ways. If classified material is not handled or stored according to strict rules, then the government cannot be certain that it remains secret. Once the government loses positive control over classified material, the government must often treat the material as compromised and take remedial actions as dictated by the particular circumstances. Depending on the type and volume of compromised classified material, such reactions can be costly, time consuming and cause a shift in or abandonment of programs.

Here, the defendant took, as noted by Admiral Rogers, "a tremendous volume of highly classified, sophisticated collection tools" from secure space and retained it in unsecure space. As a result, NSA was forced to abandon certain important initiatives, at the cost of the nation's security.

The defendant needs to be punished substantially for his substantial crimes. And the Court, sitting in the District that houses the NSA, should consider the need to deter others tempted to compromise classified information. If the Court sentences the defendant to a minimal term of imprisonment—or worse, to the defendant's recommended period of home confinement—other would-be criminals will take note. It would be an encouragement, not a warning, to those tempted to mishandle classified information, or to disclose classified information without authorization. Those bad actors would know that no consequences will come from their conduct, no matter how much the offense harms our country's security, including disruption to the offensive collection of

adversary information or the defensive protection of the intelligence community's sources and methods.

**III. The Sentencing Guidelines Recommend A Substantial Sentence.**

In the plea agreement, the parties agreed to certain Guideline factors. *See* ECF 9 ¶ 6. The base offense level of **29** is increased by **2** levels because the defendant abused a position of public trust in a manner that significantly facilitated the commission or concealment of the offense. The Government does not oppose the standard **2**-level acceptance credit and will make a motion for an additional **1**-level of acceptance credit based on the timeliness of the guilty plea. The final offense level stands at **28**. Importantly though, the parties also agreed that, had the Government elected to charge the defendant's conduct under multiple counts, those counts would not have grouped, and the final offense level would have increased by **5** levels.

The defendant's Criminal History Category is I. The advisory Guideline range for a 1/28 is 78 to 97 months.

**IV. The Government Recommends A Substantial Sentence.**

The Government will discuss each § 3553(a) factor at sentencing. Based on a consideration of all the § 3553(a) factors, the Government believes that the appropriate term of imprisonment is near the top of the advisory Guideline range—96 months. The Government also recommends that the Court impose three years of supervised release. The defendant will lose his pension by operation of law. *See* 5 U.S.C. § 8312(b)(1)(A).

Respectfully submitted,

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