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Abbe David Lowell
Attorney at Law
adlowell@mwe.com
+1 202 756 8001

October 12, 2010

Mr. David Kris
Assistant Attorney General for National Security
National Security Division
Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530

Mr. Ronald C. Machen, Jr.
United States Attorney
United States Attorney's Office, District of Columbia
555 4th St., N.W.
Washington, DC 20530

Dear Messrs. Kris and Machen:

When the Department and U.S. Attorney's Office contacted us last spring and told us that you were contemplating charges in this case, one of the issues we raised was the unfairness of singling out our client for that which the Executive Branch does and condones. We are not arguing that law enforcement has pursued one person when everyone does a particular criminal act. No, our point is more fundamental – it rests in basic concepts of due process.

The Executive Branch is a single unit of government; the President is the chief enforcer of the law. Those who serve under the President—in the White House, at the Department of State or at the Department of Defense—all work in that Branch. And, the Department of Justice is the arm of that Branch that enforces the law.

Several weeks ago, reporter and author Bob Woodward published his book entitled "Obama's Wars." The book contains great detail about the plans leading up to the President's decisions concerning the wars in Iraq and Afghanistan. The material from which the book was written is clearly provided by members of the Executive Branch to get their point of view known, to explain their positions, to curry favor with the media and the public, and for other reasons and motives. These members of the Executive Branch decided to provide Mr. Woodward with details that could not contain any more sensitive classified information.

As just a few examples:

- the book contains a previously classified six page “terms sheet” that the President dictated himself.
- the very first chapter of the book describes President Obama’s first post-election intelligence briefing, on November 6, 2008, from Mike McConnell, then the Director of National Intelligence. “Because the briefing contained highly classified information about ‘sources and methods,’ McConnell explained, only those ‘designated to take a top national security cabinet post’ could attend.” Jack Goldsmith, “Classified Information in Woodward’s ‘Obama’s Wars,’” *Lawfare* (September 29, 2010). Nonetheless, in his book, Mr. Woodward recounts that highly classified information in great detail, including several classified CIA and NSA programs [despite the inclusion of sources and methods information]. *Id.*
- the book revealed that the CIA created, controls, and pays for a clandestine 3,000-man paramilitary army of local Afghans, known as Counterterrorism Pursuit Teams. Woodward describes these teams as elite, well-trained units that conduct highly sensitive covert operations into Pakistan as part of a stepped-up campaign against al-Qaida and Afghan Taliban havens there.
- Woodward describes a new capability developed by the National Security Agency that has dramatically increased the speed at which intercepted communications can be turned around into useful information for intelligence analysts and covert operators. “They talk, we listen. They move, we observe. Given the opportunity, we react operationally,” then-Director of National Intelligence Mike McConnell explained to Obama at a briefing two days after he was elected president.
- Woodward then recounts what a government official told him that a classified exercise in May showed that the government was woefully unprepared to deal with a nuclear terrorist attack in the United States. The scenario involved the detonation of a small, crude nuclear weapon in Indianapolis and the simultaneous threat of a second blast in Los Angeles.

The case brought against Mr. Kim alleges that he disclosed national defense information consisting of a description of what a country might do in response to international sanctions and that the media report that included this information also contained a reference to what the source of this information might be. The substance of the media report was completely unremarkable in every way. This country has been saying and doing the things reported for years and years. The things the country might be doing were being discussed in many public arenas and public sources. The reference in the media report to the source of the information is ambiguous at

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worst. In short, even if Mr. Kim did what the indictment alleges—something to which he has entered a not guilty plea—the event itself is very modest and tame.

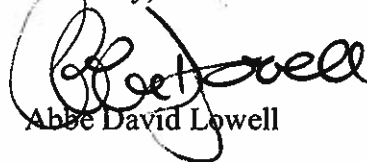
This is to be distinguished from what the Executive Branch did in the Woodward book—the knowing and intentional leaking of classified information, including information about “sources and methods” and apparently providing Mr. Woodward with access to actual documents. Before the Executive Branch continues to press this case, we would ask it to consider the fairness of doing so in light of its own conduct that implicates far more serious leaks of information. Indeed, it is clear that Mr. Woodward was even given access to highly classified documents. When measuring whether Mr. Kim acted with the requisite state of mind, when this is what he saw all around him (the Woodward book is the latest but as you know not the only example), you ought to keep this conduct by the Executive Branch in mind.

When the indictment in this case was brought, Mr. Kris said that “The willful disclosure of classified information to those not entitled to it is a serious crime. Today’s indictment should serve as a warning to anyone who is entrusted with sensitive national security information and would consider compromising it.” DOJ Press Release, August 27, 2010.

In light of what you (Mr. Kris) said, we can only wonder whether the Department is pursuing an investigation of the sources in the Woodward book as vigorously and with as many resources as it pursued Mr. Kim for a one-time alleged event. How can it be in the U.S. government’s interest to pursue Mr. Kim in the manner it has and allow this much more blatant event to go unaddressed? How can the Executive Branch order you to proceed and do what it did in this other situation?

We never did get to meet about this case before it was brought. I am hoping we might be able to do so now with the trial prosecutors before a lot more time is spent on the prosecution and all the attendant problems with disclosing classified information at a trial set to occur.

Sincerely,

A handwritten signature in black ink, appearing to read "Abbe David Lowell", written over a circular stamp or seal.

Abbe David Lowell

Cc: Michael Harvey, Esquire
Jonathan Mallis, Esquire
Patrick Murphy, Esquire