

The National Academies
Committee on Science, Technology, and Law
Government-University-Industry Research Roundtable

Sensitive But Unclassified Information
at DHS Centers of Excellence

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Proceedings by:

CASET Associates, Ltd.
10201 Lee Highway, Suite 180
Fairfax, Virginia 22030
(703)352-0091

NOTE: This is an unedited verbatim transcript of the March 28, 2006 discussion on Sensitive But Unclassified Information at DHS University Centers of Excellence prepared by CASET Associates and is not an official report of The National Academies. Opinions and statements included in the transcript are solely those of the individual persons or participants at the meeting, and are not adopted or endorsed or verified as accurate by The National Academies, DHS, or any of the participants' institutions.

Table of Contents

	Page
<i>Welcome and Introductions</i>	
Dr. Jacques S. Gansler	1
Dr. Arthur Bienenstock	3
<i>The Need for Consideration of Sensitive But Unclassified Information at DHS Centers of Excellence: Benefits and Challenges</i>	
Dr. Mel Bernstein	8
<i>Proposal and Critical Questions</i>	17
Dr. Neville Clarke	
<i>Discussion</i>	31

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P R O C E E D I N G S (10:35 a.m.)

Agenda Item: *Welcome and Introductions* - DR.**GANSLER**

DR. GANSLER: A couple of words of introduction and then what I thought what we do was go around the table and meet each other. This got started because and I will blame Mel for this, at a meeting of the AAU last summer, this question kept coming up and, so Mel suggested that maybe we ought to have a separate meeting to discuss it. There is another National Academies study that Arty and I are both on along with Al's guest from MIT, that is looking at some of this from a much broader prospective in terms of science and security of which this is a subset. And so, ideas that come out of this meeting can be easily folded into that committee activity as well. This one is intended to be an informal off-the-record meeting, but I got to tell you that it's being recorded.

So, in consistent with one of the things that we will talk about, about openness and freedom of publication and so forth. The meeting is not advertised, so therefore, it's unlikely that people will ask for it. But, should they ask for a copy of the transcript, it is public. And therefore, I did want to give you a heads up, at least about that. It is not intended to be any report that comes out of this.

And so, as a result, what we are really looking for is an honest and open discussion about what is a very challenging question. I noticed they put up on the screen here, "sensitive and unclassified information." That's not what we are talking about now. That just happens to be the sign on the wall. In fact, as I'm sure will come out during the discussion, there are probably at least thirty-two different definitions. One for each agency and one subset of that for every individual as to what even this concludes.

We've sent around a lot of the literature that I think that all of you have seen. Because the Department of Homeland Security has these education-based centers, the Centers of Excellence at universities, this is a particularly important and challenging question for a lot of us and certainly for Arty and I.

I think the main thing that we would like to do is thank you for taking part today, and giving up the day for this. We realize that a lot of you and all of us have other things that you could have done today to use your time. But, I think that this is a growing issue. One of very, very important issue; And, at least at the university level we are seeing it increasingly coming up as an issue—increasing sensitivity frankly, even in the FBI and other places. Not just in Homeland Security. So, it's important that it be aired and open, and that some policy gets decided

on, in the not too distant future, I think. Art, do you want to say anything?

DR. BIENENSTOCK: No, except why don't we introduce everyone?

DR. GANSLER: That's what I was going to say, let's go around the table unless there was anything else that you wanted to say.

DR. BIENENSTOCK: Nothing else.

DR. GANSLER: Sam?

MR. ARMSTRONG: I'm Sam Armstrong and I'm retired from the Air Force and from NASA. And, I guess I'm here because the last several years I have been involved and trying to make sense out of the export control. It's a clear Nexus between the same sort of thing that we are talking about here.

DR. SILVER: I'm Howard Silver. I'm the Executive Director of the Consortium of Social Science Associations.

MR. HARDY: I'm Bob Hardy from the Council on Governmental Relations.

MS. GROESCH: Mary Groesch, NIH Office of Science Policy and our group manages the National Science Advisory Board for Biosecurity, which is grappling with some of the same issues. So, I'm hoping for some great insights here.

DR. GRANT: I'm Jeff Grant from OSTP. And among

other things I've been working on export controls and because of that, I've been arranging to Science and Security issues.

MS. KNEZO: I'm Gene Knezo, Congressional Research Service, Library of Congress.

DR. WILKENFELD: I'm Jon Wilkenfeld. I'm one of the Directors of the START Centers, University of Maryland. START stands for the Study of Terrorism and Responses to Terrorism.

DR. VON WINTERFELDT: I'm on the faculty of USC. I'm Director of CREATE Center for and Risk and Economic Analysis of Terrorism Events.

DR. CLARKE: My name is Neville Clarke. I'm Director of the DHS National Center for Foreign Animal and Zoonotic Disease Defense. Our headquarters is at Texas A&M University.

DR. BERNSTEIN: I'm Mel Bernstein. I'm the Acting Director of the Office of Research and Development. And, as you heard the titles of the centers you can see, basically why this is an important issue to us.

MS. PETONITO: Laura Petonito, Acting Director of University Programs of the Department of Homeland Security.

DR. KENNEDY: Shaun Kennedy, Deputy Director for the National Center for Food Protection and Defense and other Homeland Security Centers.

MR. HODGE: Well Good Morning. I'm James Hodge. I'm on the faculty of the Johns Hopkins Bloomberg School of Public Health. I'm specifically delighted to be here to represent the newest of the DHS Centers for Excellence, at the Johns Hopkins University representing a consortium of different universities as well.

MS. MARCSON: I'm Nicole Marcson. I'm in the Office of General Counsel at DHS, and I work with the Science and Technology Division and provide some legal support to University Programs. I'd also like to introduce my colleague, Elliott Avidan, who's in the corner. He is a new member of the Office of the General Counsel supporting S&T, and he is also providing support to a larger Office of General Counsel committee looking at our SBU policies and our information protection policies. A lot of the policies that we currently have, come from the management division of DHS writ large.

So, really we are here today to you know, be listeners, understand some of the issues, and communicate those back to the larger General Counsel committee that has been working on these items. This also falls into (SHSI) Sensitive Homeland Security Information and there's currently regulations that are in the process of being drafted to protect that area.

MR. SHORT: My name is Jim Short. I work for the

Director of Defense Research and Engineering (DDR&E). I'm responsible for the policies of how we protect technical information in the Department of Defense and last fall Mel and Laura gave me the privilege of setting on the review committee that was overlooking the University Centers. And I confess that I sat there very perplexed about the nature of information we were holding, and about what I could or could not do with it. Which, if it was the Department of Defense I wouldn't have had that consternation. We would have known.

MS. NORTH CUTT: I'm Amy Northcutt. I'm Deputy General Counsel at the National Science Foundation.

MR. SMITH: Toby Smith, I'm with the Association of American Universities.

MS. KATZ: Debbie Katz, I'm Deputy Director of the Office of Biodefense Research Affairs at NIH, and we have large centers programs and so, thank you for the invitation.

DR. EPSTEIN: Gerald Epstein, I'm the Senior Fellow for Science and Security, at the Center for Strategic and International Studies. And I wrestled with export controls, as Sam and a number of others of you at OSTP in a prior life.

MR. MORRISON: I'm Alan Morrison. I'm a Senior Lecturer at Stanford Law School. I've spent a lot of time doing information FOI cases and other government records

cases. And, I'm the Committee on Science Technology and the Law and I work for Anne-Marie.

(Introductions around the room.)

DR. GANSLER: Notice nobody from the press. Unusual for the Academies. Anne-Marie, do you want to introduce yourself?

DR. MAZZA: I'm Anne-Marie Mazza. I'm the staff to the committee organizing today's meeting

DR. BIENENSTOCK: Arty Bienenstock, Stanford University's, Dean of Research. But, in another life I also worked for Anne-Marie Mazza.

DR. GANSLER: Jack Gansler, University of Maryland. In another life I was under Security of Defense. I have an interest for this from both sides I guess. I would encourage you to speak up in this room, the acoustics aren't great and we don't have microphones. So let me encourage you to make sure you throw your voice out so everybody can hear. And, it's a little hard because people are in rows to make you can hear all around the room. The other thing that I would encourage you to do is to speak. Not just to speak up, but take part. We have a wide variety of perspectives, as you can tell going around the room. And, we want to encourage dialogue during this discussion. So with that, Mel do you want to start?

Agenda Item: *The Need for Consideration of Sensitive But Unclassified Information at DHS Centers of Excellence: Benefits and Challenges* - Mr. Bernstein

DR. BERNSTEIN: Why thank you Jack. Just perhaps a few words, a background as to why S&T within DHS, in particular the University Programs are so interested in this activity. And, I think that we can tell from the people who have come from across the federal agencies that this is a not a unique problem. It's one that we all have to face and that we all want to address.

The issue has become, I think, most telling within the Centers and it sort of serves as a way for us to sort of frame this larger issue. To remind all of us, the Centers in the enabling legislation for the creating of the Department of Homeland Security, Congress specifically identified the university community as a critical part of the response to terrorism, response to disasters, and talked about the fact that the universities bring very special unique talents; both, in terms of their ability to provide a new workforce for the next period of time and also to do cutting edge research. To be able to help us deal with knowledge gaps, to be able to have us anticipate the kinds of problems, and to really bring to bear that unique characteristic of this country, which is its academic research strength.

We have over the last several years' we've interrupted this and its set up -- I keep forgetting the numbers. I think we have six Centers. Johns Hopkins was mentioned, it is not quite born yet, it has been named. It is a Center now which is looking at broad issues in related to preparation for catastrophic events. But, I think as you've heard from each of the topics these Centers focused certainly on the main part; terrorism, response to terrorism, the issues behind terrorism, motivation and intent; How one deals with acts of terrorism. Things which are of critical importance to the country. But, which also really lend itself to the kind of research environment that universities provide.

That is, the ability to cut across disciplines. Each of these centers are multiple centers of people within an individual institution and across multiple institutions. So, within a state, across states, bringing private universities, public universities, universities whose traditional view of the world might be slightly to the left of the political center, others to the right of the political center. I come from a Boston area, you could sort of imagine my training and what I have been led to expect. But the thing that has been wonderful about these Centers is that there has been very little of that showing up in the kind of response to the broad agency announcements. As well

as to the kinds of activities, the kind of quality people that we can attract to do this work.

These Centers were established in the open, unclassified research, working across disciplines, reaching out across the campus, there has been a general understanding that people can work on this program as long as they have visas to be able to study and do research in this country. So, we have established the kind of research environment which is traditional for the university community.

However, the topics in the main can be viewed sometimes as slightly different than the kind of specific, highly-focused, fundamental studies that many faculty undertake and we recognized that early on. We knew that we were asking the Centers to sort of work in this hybrid world, to do fundamental research on critical problems which have, in many cases, some short-term issues attached to it.

So the Center director's begin talking about this a while ago, saying as the results of their studies come out, how do we now deal with issues of publications, dissemination? We can certainly deal with the traditional kind of caveats that are part of the university community, to be able to basically indicate that the views and findings of the university researchers' in no way reflects the policy positions of the sponsoring agency. That's sort of a

straight forwarded issue.

But I think that people are concerned that the kinds of results that could develop, would be ones that raise issues in terms of their sensitivity; Whether it is going to be *for official use only*; Sensitive, but unclassified; or probably, but very unlikely into the classified realm. So the Centers have worked over for some time to develop some general approaches that they think have the potential of working.

Now, while we were doing this, other things happened in Washington. Sam mentioned, deemed exports. There was a policy that came out of the Inspector General from the Department of Commerce. This caused enormous concern and consternation among a variety of people trying to interrupt the implications of that. And, it led then too, sort of long and lengthy discussions back and forth trying to find a policy that everyone could live with. It became clear to a lot of us that we should take advantage of that perspective to try to see if we could anticipate some of these issues earlier, and start to develop some possible ways to deal with sensitive, but unclassified. While as we did that, we also did some due diligence, we visited Jim Short and others at DOD. We've been to a variety of agencies. I think that it is fair to say that if we put a 100 people in a room and ask them to define *sensitive but*

unclassified, you'd get a 100 different interpretations of what that means. This is not a clean separation this is not the classified, non-classified issue. So, it makes the situation a little more challenging and a little more compelling.

In addition, we are now reaching the point, particularly with the Centers where their starting to develop a lot of findings, a lot of research activities, publications, and one now needs to anticipate those issues.

So, what we are asking people today, again as Jack mentioned I'll repeat this is not a formal request from Science & Technology or the Department of Homeland Security to shape a strategy for that organization. What we're doing is trying to get some background, some understanding, share some horror stories, war stories, progresses that have occurred. And then to be able to use that, with the Centers which again, are Centers that receive research grants to do research outside of the general research environment of the department, but their clearly working on important problems.

Give them guidance to go back to their institutions to be able to think about how to deal with this.

I start with, I'll sort of give you my two hopes that will come out of things like this, is that these problems will be rare. Is that in the main, research at universities will fall in the traditional fundamental

research realm and the fundamental research exemption. But, if there are cases we need to figure out how to deal with them and again, my hope is, is that there will be a general understanding that the critical first step of that has to reside within the university community and to think about how that plays itself out. So we're very grateful. We're grateful to Anne-Marie and to Mary Lee for using the good offices of the Academy which is always a way to get a lot of important, intelligent people together to talk about these problems and we're here to listen and learn along with everybody else.

DR. GANSLER: What we plan on doing next was actually, Neville is going to sort of present a prospective from a Center. And then, we could let some of the other Centers chime in. But, if there is any questions that you want to ask Mel directly on what his initials comments before we get into the substance part of it, feel free. Does anyone have any questions that they want to raise?

DR. EPSTEIN: What was the second hope?

DR. BERNSTEIN: Well, the second hope was that the universities themselves act as the arbiter of this particular issue. At least, and for most cases that should be sufficient.

MS. NORTHCUTT: Did you say that a policy decision had been made that a foreign national with a visa is allowed

to work in any of the Centers on any of the subject matter?

DR. BERNSTEIN: We have indicated to the Centers two things: One is that if somebody has received permission to study in this country, that person is eligible. What we also said is that you should use common sense. Think about a good match between the kind of projects that you are doing and the student's background.

MR. HARDY: Mel, in your actual award documents to the Centers do you address this issue at all as a funding condition?

DR. BERNSTEIN: We use our contracting agent is the Office of Naval Research. We use all of their constraints and conditions. I don't believe this is one of them, in terms of conditions.

DR. GANSLER: You might one to comment on this, but I don't think that the DOD until recently has even used *sensitive but unclassified*. They use *for official use only* and things like that, but it has been more government.

MR. SHORT: You scare me. When I was young and naïve, when I first got into DDR&E, I went on, maybe it was a Don Quixote like mission that I went on. I don't think that we used *sensitive but unclassified* anywhere in the Department of Defense. It was used in the past, it is no longer used and nothing new is being classified.

DR. GANSLER: And the official use only was used

in a very different context, as I understand it.

MR. SHORT: Right, the official use, I think is just for government.

DR. GANSLER: It's just for government budgeting kind of information or in process stuff.

MR. SHORT: We use it for anything where the marker feels that there is reasonable cause to believe it would be exempt from FOIA disclosure. And, it's very similar to what I see here. So I think that we are consistent in that way. I worked at the Office of Naval Research for eight years, and I don't know the terms and conditions of our contracts. But certainly through the FDP that Jeff and I will be discussing tomorrow, there are illusions to—what are there illusions to?

DR. GRANT: Classified information.

DR. GANSLER: Classifiable.

MR. SHORT: And there is a current proposal that we will be discussing tomorrow to make reference that when you talk about NSDD-189 and implied in NSDD-189 are subject to other statutory constraints which the implication is ITAR and EAR being the primary ones. So thereby, by possible implication.

DR. GANSLER: Someone had there hand up over there?

MS. KNEZO: Yes, I have two questions. Are the

Centers funded by grants or by contracts?

DR. BERNSTEIN: Grants.

MS. KNEZO: Ok. And, I see that your Item #2 under recommended procedures 2B appears to reflect the SUB Provision K for the DHS SUB policy. Could you define what developing?

DR. BERNSTEIN: I think we are getting a little ahead of ourselves.

DR. GANSLER: Let me put that one off and suggest that we hear from the Centers and come back. Save it, I promise we will let you.

MR. SHORT: Can I ask a follow-up of Genevieve's question? Are the Centers limited to doing fundamental research?

DR. BERNSTEIN: You don't limit University Centers to do; I mean basically what we work with the Centers to define a research agenda. Which they understand now speaks to subjects which have direct connection to departmental interests. I should add, and this is something that will come up in discussion, the center directors have received clearance, and that is only to allow them to access to conversations within the department. To have a sort of broader view of about what some of the problem sets are.

DR. BIENENSTOCK: Mel, are there any restrictions on publications? That's the definition we've been using in

the fundamental research and the export control discussions.

DR. BERNSTEIN: We've had situations and deadlock. The CREATE Center is sort of the furthest, it's our senior center so it's actually publishing a lot of things, and there have been some cases where the Center has chosen to have some of its reports treated somewhat differently than other reports. Some of this is changing the sanitization and the like.

DR. BIENENSTOCK: But a contractual limitation of a publication?

DR. BERNSTEIN: There is no contractual limitation.

DR. BIENENSTOCK: So by that definition, it's fundamental research. That is the definition we have been using in the export control world.

DR. GANSLER: That's the one though, that the IG's are questioning.

DR. BIENENSTOCK: Nevertheless, at the moment that is the definition.

DR. GANSLER: Okay, why don't we go ahead Neville and hear from one of the Centers. I would encourage others and other Centers to think about their comments as well.

**Agenda Item: Proposal and Critical Questions -
Mr. Neville Clarke**

MR. NEVILLE: Good morning. They have asked me to

briefly give you a prospective of the Center Directors and since my fellow Center Directors are here I will have to be fairly straight with you. I want to at least give them the opportunity to comment if I wonder too far from the field. I would like to begin by going back just a little bit.

I feel a little bit like my first reaction when I took my thesis proposal to my professor and asked him to read it. And he looked at it and said, "this is both new and interesting, but what is interesting is not new and vice versa." Perhaps what I will tell you is things that you already know very well. I hope to set the stage as we move along. So, I was asked to talk about the concept paper and then to comment on the questions and that's what I will be trying to do.

In a way of background, I think that most of us understand the definitions of classified and unclassified, and for "official use only" as at least an operational definition. As has already been said SBU has been around for a while, and is not very well defined yet. In the interest in security has certainly increased, particularly in the area that we Centers are funded in.

Since 911 we are wrestling with those enhanced concerns and as already been mentioned this morning, there are a number of issues that are fairly closely related to this that you all are considering in your deliberations and

that we must consider as well. So, in recent history we have had these concerns about sensitive information expressed to us by the Department.

There have been discussions among the Center Directors with the Office of the University Programs over the last few months, as Mel Bernstein has already told you. And then there is a set of recommendations that were invited from the Office of University Programs that have been made.

And, as a result you have I believe in front of you the draft of the current paper from the department that summarizes the status of where we are today.

So related history, in some places, in particular my state, it is very difficult to protect any kind of information, even *for official use only* from FOIA. So we have some concerns about that as we wrestle through the next. However, in the operational side of Homeland Security where they are engaging the industry, they are looking at relevant vulnerabilities of the industries, there is a mechanism for protecting, at least proprietary information that comes into the department. And I believe that protection is holding together fairly well. Some states have recent laws that protect *for official use only* and other kinds of information against FOIA.

Our state has legislation in Texas, for instance, immediately after 911 that says if it is related to Homeland

Security it is exempt from FOIA. It has not been challenged. I don't know whether it will last or not, its one of the states that has that. We have other states, such as Minnesota for instance, where you absolutely can't keep any secrets at all. We have a colleague from Dr. Kennedy's shop that says he never takes notes at meetings because his handwritten notes at meetings are subject to FOIA.

DR. GANSLER: I'm not a lawyer, but I'm curious about this question and perhaps Alan you could even comment on it. Can the states write a law that says Federal information listed as the Freedom Information Act, can not be released?

DR. KENNEDY: Any information under Minnesota is released to us without contractual limitations on its use, is public information.

DR. GRANT: Also, I would add if these Centers are being supported by grants that it is not Federal information, it's institutional information.

DR. KENNEDY: Is it probable that, as a land grant works, that when an arm of the state government is considered subject to within the practices of - do we have no ability to protect anything that is not already in written form? So if it is in writing any form whatsoever, we have to turn it over as requested.

DR. GANSLER: But then that's an individual state

issue then.

DR. KENNEDY: There is no state issue.

MR. MORRISON: It seems to me that it is two way problem. One is, what do you do with information that is in possession of a state agency which is not subject to Federal FOIA cause the Federal FOIA doesn't reach state agencies? But the state FOIA reaches state agencies, and what can the state do?

It seems to me, that the state can do anything they want subject to whatever limits there are, on the information as long as it is in the hands of a state university. I'll just use that as our example here. The second question is what happens when that information now gets in the hands of a Federal agency? At that point state FOIA is irrelevant; unless there is a specific Federal statute incorporating state FOIA's which there are none to my knowledge. Then you go back to the Federal FOIA with all of its exemptions.

So, its kind of a two edged thing you have to, if you are worried about protecting any information you have to worry about the two possible places it could be released. Subject to a request, either the state level when it's there or when it's the Federal level. And by the way, if you still keep a copy at the state level you're still subject to the state, unless you physically turn over all copies, which

it is probably forbidden under your state law, which requires you to take different measures.

DR. CLARKE: Well I'm sorry I brought this up.

MR. MORRISON: Well, I'm going to be a pain in the neck today. I'm going to talk about legal stuff, but we have to understand the framework.

DR. GANSLER: That's the reason I raised it. I think that it strikes me, well later we are going to come back and talk about some -- I know one California law that is troublesome. I think we need to understand at least, what the restrictions are or not in this area, above and beyond what somebody from DHS decides to make it.

DR. CLARKE: From our perspectives as Center Directors with multi-state consortiums as Neville has described, we basically nip this out on the bottom line to say that the uncertainties around this are one of the issues that we have to think about as we consider what we mean by SBU and take those into careful consideration.

The last one up here is to say things that again we already know, that some of the issues that we are concerned about are related to the implications of visa controls, international students, and that sort of thing as we go through this.

So our situation as we come to focus on the Centers is that the Academic Centers of Excellence, as Dr.

Bernstein has already said, usually, hopefully in the majority of our activities do not deal with the sensitive information. But, some of the Centers do and it varies from subject to subject within Centers.

The academic cultures from which the Centers come may not all be uniformed in terms of their commitment to, or their sensitivity to managing sensitive information. Some parts of our academic culture or perhaps are more interested in academic freedom while others' are more in-tuned to protecting sensitive information.

I'm not throwing stones at anyone, but there is a diversity of opinions and culture about the management of information. Constraints on the publication or sharing of information, pardon me, -- the concerns that arise there about academic freedom. The Centers and their faculty, generally I think, across all of our Centers and notwithstanding all the above, are generally committed to protecting sensitive information. That's why our faculty, that's why our Centers were selected in the first place.

But, Centers have the same rules as others in terms of dealing with classified information. I don't know if that's a nice clean cut, but we separate in our thinking that the management of classified information as something that fits into an established set of conditions. And we are coming up against the margin of that set of rules as we

think about SBU. But ultimately the DHS Centers, basically wind up even though they are concerned about SBU, and I know that we are talking to you because of this, we are essentially looking at how we fit these Centers into our institutional venues that already exist today.

One of the things that I think that we want to try to avoid as much as we can, is to not create any special conditions that pertain only to the DHS Centers of Excellence. Special rules that come up against very sensitive issues usually run into interpretation problems and the like. So we hope that general solutions from the kind of deliberations that you have will be forthcoming.

I thought maybe an example. Well, actually what I wanted to do is make sure that I told you something about our Center. So I have chosen an example that might give you some feeling for one of the situations that arises as we go about dealing with this.

We're in the process of doing a risk analysis in a fairly complicated, highly-intensified industry in one part of state that feeds about five million cattle at one time. In a fairly constrained geographic proximity they bring animals in from all over the U.S. They bring in feed and other supplies from all over the U.S. They have a very complex marketing and transportation system. And, we're in the process of trying to ascertain the key elements of the

vulnerabilities to that particular industry.

So as we do this, we are looking at this fairly intensive agricultural operation, a complex set of interrelated factors that are involved in access to the operation. We are in the process of developing models and amassing the data for quantitative assessment of the vulnerabilities and in that situation most of the data that we are dealing with is either unclassified or at most, priority privileged in terms of sensitivity for the industry.

But, we are basically looking at a situation emerging now in which our research will develop a set of methodologies that will almost certainly be unclassified. And, we are looking at a set of products that come from that analysis in terms of revealing individual industry vulnerabilities or vulnerabilities in the industry in the end of it that could be sensitive or perhaps even, could be classified. So we're watching that one fairly closely as we go along.

There are other examples that we could have chosen, the sequencing of the small pox virus and how you protect that is an area that science general has dealt with -- vulnerabilities generally in marketing and transportation and all kinds of risks and consequence analysis.

So far we see, I think you all will know far better than I, but I think that across the scientific domains we're seeing a good bit of activity and a good bit of responsibility in the part of particularly senior scientists in doing the right thing about protecting that kind of information.

So, what are the implications from our standpoint? One of the points that I think that we have to deal with as we think about SBU is that we may need to make this judgment before we do the experiment rather than terms of reviewing the publication after the experiment has already been done.

A lot of our emphasis has been placed on what do you do with the manuscripts. And basically if we can be careful enough to understand the possibilities of SBU, we need to do those things that will deal with that in terms of access by foreign nationals and others that might be implied in that. The review of manuscripts may be too late.

Who can participate is an interesting question? Consider the limitations on publications early on so that we don't for instance, get a graduate student half way through a thesis project and find that that person can't publish that sort of thing.

We face the interesting, but not insoluble problem of conducting compartmentalized research within the university community. Some universities know how to do this

others categorically don't want to do this. That's different within universities. And then creating a classified worksite either adjacent to or inside the university is something that has been done. But there is consideration all the way across our Centers of Excellence the concept is if we can avoid that kind of situation with the Centers of Excellence we would like to avoid that if possible. We would like to try to make SBU work if we can, and that's the important part of our discussion today.

So the concept paper I believe you all have in front of you, I will not review that paper in detail. I will just point out the main headlines so that it will be fresh on your mind as we go into discussion. Fundamental reply of research is exempted, I believe for another day. I hope that we don't discuss this today, but someday when you are out of things to do and you want to spend the day just trying to get a good definition of fundamental research and implied research and I guarantee you, as we say in the cattle business down in Texas, you'll work on that until its time to milk the cows that night.

Sensitive definitions are tenuous at least. So, sensitive information can emerge during in the process of doing this kind work. Our paper says that we want to look at those papers if we can, sanitize it if you like, remove the cite specific information, deal in generalities

that's keeps these publications from being sensitive. If that is not feasible, one then thinks about designating the *for official use only* thing, if that doesn't work and if we are up against a system for having to do classified work then we say that we will call that out. We can either then do the work in a classified research environment or not do the work at all. Those are the possibilities.

So there's a set of activities underway that we hope that you will contribute to today, that we hope will give us the opportunity to seek this framework and guidelines and policy that will make this more generally applicable and more clearly defined.

So we are considering the approaches for evaluation and oversight with the safeguards and one of the things that Mel has said is we will deal with the kind of exceptions that can arise and some of these are quite obvious if you have selected agents and select biological agents that you are working on.

If you do economic analysis or risk analysis, as the example that I showed you, it reveals specific vulnerabilities and how to avoid that. Avoid exposing the developing technology that hindered the DHS and or other missions. If they found that these exceptions occur, specific protocols may need to be established to deal with establishing under FOUO or be required to do the research,

as I said a moment ago.

Evaluation is done at the university level, Dr. Bernstein mentioned that, but my translation of that is that the last thing that we want to have to do is to have the feds tell us this if we can possibly avoid it. So we want to try to handle this as best as we can without getting into the bureaucratic processes in dealing with that.

But unresolved issues can occur and we refer these to, in our draft paper we propose to refer these to a joint center and the S&T Committee that would be chaired by the Director of the Office of University Programs. Again, the universities will ultimately be responsible for monitoring this and knowing where a problem is going to arise.

So, the next steps and things that we as Center Directors hope this discussion will help us to eliminate today. Can SBU be meaningfully defined? It's an unanswered question perhaps still at this stage.

Will self-policing activities work far in the universities for sensitive, but unclassified? We have an example I think, there are many examples. One that I'm particularly familiar with is the NIH Recombinant Advisory Committee, which was formed back at the turn of the eighties to deal with the environmental release of genetically engineered organisms. A process was designed and developed by the researchers who were doing the work in the area.

That became the set of rules that everybody agreed to operate under by agreement, and that worked very well at the time.

There are many other examples in the nuclear area, as well. Then there is a what we think and ask ourselves and pose to you at the end of the day today is, will this discussion today about SBU take us far enough along so that we can perhaps see the possibility of doing something like a similar conference that wrote the rules for the Recombinant Advisory Committee? Can this set of discussions led us to a detailed shirt sleeves rolled up interaction among the players that would help us write the description for how to make SBU work?

And so these are the discussion questions that were posed to you all and that have been put together by Anne-Marie and others. And, I believe this is where we are at this point to discuss anything that we want to about our presentation, but then to go on from there to deal with this.

As we looked at this list of questions and sort of anticipating what the order might be and in light of the presentation I have just given, I guess we came to wonder if the last question might be the first question in this discussion. If we can see a way forward, maybe not do it today but see a way forward in dealing with SBU in a way

that provides an operational definition then everything else becomes relevant. If we can't do that then maybe would have to look for a better mousetrap. So, thank you very much.

Agenda Item: Discussion

DR. GANSLER: While you have that up, can I ask you a question on the last item the one that you wanted to focus on? I don't know if it was a typographical error or an intentional one, but in your example case, you said that some of this may be classified, you didn't say what is sensitive. I think that one might ask the question on that part E - can we distinguish between sensitive and classified? As not just between sensitive and unclassified.

I mean I could imagine somebody deciding that the information that you gave in your example case might be even confidential classified.

DR. CLARKE: It is in places.

DR. GANSLER: And therefore, I think that it is a harder question almost to define what is sensitive and what's classified.

DR. CLARKE: I would certainly agree.

DR. GANSLER: And if you go to the classified then there is a whole regimen and a definition and its all clearer than this is. -- as a process of who can classify, and how frequently its gets redone, and what levels it's at, and all that sort of stuff. None of which

exists for sensitive. So, I think it strikes me that that question, the last question should be based particularly upon your statement, that this might end up being classified versus sensitive. We need to be able to distinguish between sensitive and classified, not just sensitive and unclassified.

DR. CLARKE: I agree with what you said. I'll come back over with the point that Mel makes in thinking about all of the Centers in the aggregate and that is that we hope that probably 90 percent of the research that we do will not be challenged by this set of deliberations. We have to deal with the 10 percent that is, obviously in a very careful way.

DR. GANSLER: Many universities have a firm position and will not do classified work. As you point out, these are multi-university consortia that are doing this in the Centers. There is a very distinct problem there when you say classified, somehow since no one knows what it is, sensitive is okay to discuss. People do have locked drawers at least, even if they don't have guards and things for classified. I was just sensitive to the fact that you led your example case right into classified, and it's a whole bag of worms that you turned up.

DR. SILVER: Since I represent historians, as well as other social scientists, have you had any discussions

about the question of sun setting these SBU classifications?

DR. CLARKE: I don't believe so, because we haven't got the definition to sunset yet.

DR. GANSLER: That is the point that I made with classified stuff does have a regular declassification period but sensitive doesn't.

DR. BIENENSTOCK: I wish I had a clear understanding of what the government hopes to achieve by SBU. In particular, clearly you want to be able to distribute material beyond the audience that gets classified information. What are you trying to achieve? What distribution are you trying to achieve with the SBU label?

DR. BERNSTEIN: Well you are looking at me, but I mean you said the government.

DR. BIENENSTOCK: Today you are the government.

DR. BERNSTEIN: I think that the intent of establishing Centers at universities was to provide as broad a mandate to be able to develop answers to critically important questions as possible and to use a time honored methodology of disseminating it and discussing it. I think that is the role of the Centers, it may not necessarily be the role of all parts of the Departments of the Homeland Security or the Department of Defense, or anybody else.

I think the issue arises because the topic areas

in this case overlap some issues of real concern. And as Neville said, we are trying to understand what happens when the activities sort of move further into this regimen where the information now has additional implications beyond scientific progress and how do we deal with that?

Certainly the Centers are encouraged and supported to be able to express themselves. To talk about the high-quality science that's going on. The issue here is what happens when some of that information then is interpreted or recognized as being particularly sensitive. I think Neville pointed out, there are other examples of this: Select agents are clearly one. There are certain common sense attitudes that researchers and universities have adopted.

The physicists, years' ago, understood their constraints on how they would talk about the development of nuclear weapons. Is this different now? Is there a different climate? Are these Centers dealing with issues which are demonstrably separated from the research that the NIH Regional Centers of Excellence are working on? Or the fact that the National Science Foundation has announced that \$400 million of its budget are going to be devoted to Homeland Security related research?

This is a broad issue. If the problem turns out to only be a problem to the Centers of Excellence, we could probably deal with that. But, I think that we're trying to

see if we can best understand those issues within this environment, which is much closer to the kind of sensitivity that has come up. I have always seen this as a much larger problem, just as deemed exports is a much larger problem.

MS. MARCSON: I'd also like to just add to Mel's point. I mean I think that one of the issues at Homeland Security is that we have a unique mission compared to other departments, in that we really need to have partners within industry, within the academic community, with the private sector to really try to protect the homeland. That involves a lot of information sharing.

That goes back to one of the fundamental missions of the department, which is to share sensitive information with local and state entities or with academia for their research to try to tackle some of these tough problems.

The problem is that the legislation, the regulation surrounding this information have not caught up with what I think the mission was envisioned. For University Programs and the S&T component as a whole, we have something of a struggle because we are just one component in a large agency -- you know writ large -- that established certain policies in the early days of the stand up of the department. This SBU management directive, which regulates all of the components, including S&T, was written probably within the first year or two of the department

standing up. I think that for all intents and purposes does not address some of these issues that do need to be addressed. There's no question this needs to be revisited by the department.

One of the issues though, is having the regulatory authority to protect the information that the department would like to. Particularly in this information sharing environment, and some of the hopes are pegged that on the SHSI Regulations, Sensitive Homeland Security Information, that when those regulations come out, those can address some of these issues as to: How do we share with our partners on the state, local, or academic level, so that there is access of information between governmental entities. But at the same time, a structure in place to protect the information the department is sharing. Which is part of our mission to do so.

And, so I think that what Mel is talking about, this is this is a very large issue for the entire department and other agencies in the government. That's really the struggle to get the regulatory mechanisms in place so that we do have teeth and we do have something that is consistent that people can look to for some firm guidance.

DR. GRANT: I wonder given some of these points, if it might be helpful over time to make some distinction in

type of publication or communication. It kind of tracks what the fundamental research versus supply. If we're talking about the kind of publications that ordinarily result from fundamental research and publications in the scientific literature that they might not ordinarily be sensitive.

But Nicole and Neville both have given examples of where that information becomes more applied and translates perhaps, either in reports to agencies or in your example Nicole, reports to state and local governments, it's translational that information if you will, begins to shift from what is completely fundamental into something that is more applied. Maybe there's some characteristics a long that line that we might be able to use to make some distinctions.

DR. BERNSTEIN: Maybe we can ask some of the Directors who have obviously -- most of the activities that are carried out at the Centers use graduate students or in some cases undergraduate students, depending on the nature of the research, so they are the ones that are most aware and most sensitive. So Detlof, do you want to tell us about some of the issues?

DR. VON WINTERFELDT: I can tell you a little bit about our experiences with this issue. CREATE is in existence about two years. We have produced well over a

hundred of papers and publications and well over a hundred presentations and twenty-five projects. So you can see the scope of trying to get your arm around what is coming in and what is going out is not easy. Just simply by using Mel's common sense rule, we identified about three or four instances of papers in the process of being drafted that common sense would suggest that there is information that you don't want terrorists to see.

So we basically suggested to the author, in some cases the co-author to edit this out. In one or two cases we even went further and had a commentologist person look through the papers and mark things. If you know commentologist people, they mark rather liberally. So, it was a test. I wouldn't suggest this as a general rule. But it was a test.

Our sense is that of the twenty-five projects that we have, many of the project's in advice by the nature of themselves, will never touch or produce sensitive information. They are so fundamental. As one project for example, Network Reliability Sarcastic Processing of Errors, without even defining what the network is that I can see, that it will not use sensitive information and very unlikely to produce it.

I think that we should have a process in place to exempt these projects up front. Kind of like you exempt

projects that will never touch human subjects up front from the IRB regulations. So, we are trying to develop a procedure up front so we can look at our project and say, will this one will not touch or produce sensitive information.

Some on the other hand, certainly will. As I look at our twenty-five projects probably five, maybe eight of those will touch sensitive information and will more likely produce sensitive information.

For example, we do case analyses of dirty bomb attacks or bioterrorism attacks where it is very hard to stay away from sensitive information. With those we are developing procedures internally for handling the sensitive information both upon receipt and upon release in terms of publications. They we would be much more strict in terms of scrubbing before it goes out into the publication stream.

Now we are using a working definition don't get all over me if you hear this working definition. It's a definition that the *sensitive but unclassified information* is information that is not readily available from open sources and is useful for terrorists in carrying out terrorists attacks. It's the end which I think is important here, and you can criticize this of course. But, if you don't do the end the first part of it is almost everything we do.

In other words, if I just say we're putting out information that is not readily available from open sources, if that is all that we say almost everything that we put out is of that nature, because by definition we're producing new stuff. That's kind of where we are and I sort of decided early on that we're the first Center and we don't want to be the first one who gets caught into this with sensitive information or God forbid with inadvertent classified information.

So that's why we have this commentologist person helping us out working both on the procedure side and giving us the examples of where she thinks that information is sensitive and should be taken out. I wish I could give you some examples of SBU, but I can't because this is taped. This is an open-forum so I guess I can't give you examples.

DR. GANSLER: Can you say that those things would you define as SBU, would not normally have been classified?

DR. VON WINTERFELDT: Clearly not. Well, okay now you got me because one case occurred in which information that I originally thought was sensitive, and most everybody even the commentologist person thought was sensitive, it was actually relatively easily accessible in the open literature-quite accessible. I talked to one DOD person who said he would lean to classify this information. Most of the information that we have, we looked at in either it's

unclassified and not sensitive or it's unclassified and possibly sensitive.

DR. GANSLER: Do you use in non-U.S. citizens either faculty or students?

DR. VON WINTERFELDT: Yes.

DR. GANSLER: In your Center?

DR. VON WINTERFELDT: Yes.

DR. GANSLER: On your eight of twenty-five, do they not take part is that how you differentiate it up front or once you got them turned on how do you remove them?

DR. VON WINTERFELDT: Well, I have so far followed informal rule that those projects are likely to be sensitive.

DR. GANSLER: My understanding is that in California the law, correct me on this, cause one of our group in a Maryland study, we asked them to identify the non-U.S. citizens and they said they can't by law. California doesn't allow that as a privacy question?

DR. VON WINTERFELDT: I wasn't aware of that.

DR. GANSLER: Is that true?

MR. MORRISON: I don't know the answer. The Federal government could of course, pass a law to override that.

DR. VON WINTERFELDT: The procedures that we are working on for dealing with projects that are sensitive

would allow foreign nationals under certain conditions to get access to it. But, they would have to subscribe to the procedures and sign forms that say we treat it in the following way.

MR. HARDY: Jack, we've been told by the University of California that when they get some of these contractual requirements from government sponsors that require the identities of any foreign nationals to be reported that state law in California does prevent them from reporting to the government sponsors the identity of those foreign nationals.

MR. SHORT: I believe, that in the case of the Department of Defense, if students come onto the Defense premises then we are entitled to that information, but if its out in the private sector we are not entitled to that information.

DR. GANSLER: In some departments it's more than 50 percent now for graduate students.

MS. NORTHCUTT: I have a question about your interest in the exemption. The examples you have of SBU that you've come across, is it your strong opinion that you could've in the first instance predicted the very projects that SBU would of been coming from?

DR. VON WINTERFELDT: It all occurred in the context of what we call case analyses or case studies where

we apply our methodologies to a particular terrorism scenario.

DR. BIENENSTOCK: Could you speak louder, I'm sorry I couldn't hear that.

DR. VON WINTERFELDT: All the cases where we detected in the process that sensitive information was used or generated were in the context of case analyses where we applied risks for economic analysis to particular scenarios of terrorist attacks.

MR. MORRISON: I would like to go back to question E there and say that the answer is not can we develop a definition. The answer is sure we can develop a definition, but there are going to be two problems.

The biggest problem of the definition is how it's going to be applied and for example, I've been litigating FOIA cases for thirty-five years' and we still can't agree on a definition.

I saw lots of discussion here on what exemption 2 is supposed to cover. In my view, its only one side of the prospective, the government's completely wrong on what exemption 2 covers. And that's been an issue that has been litigated off and on for thirty-five years. The same thing is true with the definition for classified information.

The problems are not in the definition, the problem is in how they are applied and most importantly

whose looking at it. That is, that Detlof just said, as we look at it there's no problem. The problem is that is the wrong "we"; it's the "we" that Mel and other departments are going to look at, and they are going to look at it differently. I'm not making a judgment about whose right or who's wrong. All I want to say is that I don't think that we should spend a lot of time hoping to come up with a definition that's going to answer how we are going to deal with this problem. I've got some other thoughts later on.

But one last thing, even on the definition that Detlof gave said, that its' not generally available, and I agree with what he said about that because it is very difficult to tell whether it is and to get the suits about that. But he said, and "is" helpful to terrorists. I bet that if you ask the DOD and Department of Homeland Security that the word "is" is not going to be acceptable. They're going to want to change that to "maybe".

DR. BERNSTEIN: It sounds like President Clinton there.

MR. MORRISON: No, it sounds like the difference between "is" and "maybe" is big difference in words. And so, hoping to get a definition that is going to answer our problems is not going to be very fruitful. In the end it's going to be hard to get an agreement, not in the university community or in the Centers community, but between the

Centers and the government. Second is when it comes to applying the definitions there are inevitably going to be disputes. So hoping that the definitions will solve the problem is not in my judgment the way to go.

DR. GANSLER: We have a couple more questions and I would like to try to rotate around to the other Centers if we could. Gerry?

DR. EPSTEIN: I want to come back to something that we had a little discussion of earlier which is the different categories of sensitive and the wish that maybe this discussion could inform other issues that DHS faces in terms of information sharing. I'm always looking for ways to make a problem not harder than we have too. I think we can actually narrow down this room's discussion from other issues of sharing classified information and how that is handled. If its government generated, or owned information, or information gotten from a private vendor which is somehow handed out to people that's one set of issues. You receive information you think is sensitive, what do you do with it.

The harder issue is the information generator buys something outside of the government's orbit. I think that's what we're here for, so if it's a matter of critical infrastructure information we can deal with that in another approach. I think what makes this problem hard is as information develops outside the government which if in the

government might well be classified. The point is that these are outside.

In terms of definitions, the definitions of classified in terms of grievous harm to national security, harm to national security, the problem with definitions like that is that there is no trade-off. That's why I appreciated your mentioning that it is something sensitive. Well the train schedule is sensitive. If I want to blow up a train I want to know when they come. The problem is that there's serious risks in making train schedules secret—that people can't take trains anymore. Somewhere imbedded in this entire discussion has to be some sense of what the trade-off is in trying to put restrictions on it. That's hard to capture.

The third is the hope that we might improve our regulation. I think you came to it earlier where you said, there's some things that you that's a matter of common sense you kind of do it such and such a way. I do not think it's possible to regulate common sense and I think if you look at the regulatory tools you end up with mechanisms like U.S. citizenship because there are laws that apply or don't apply based on citizenship. Which I think has less and less to do with what worries me nowadays. There are scary people in the United States and there's people I sure would like to work with around the world, many of whom are in our

universities. If you're forced to a regulatory legal approach or constitutional law approach, you end up drawing boundaries that don't really help you solve the problem I think. On the other hand, if you are backing up to what makes sense, the first time you are challenged in court that's going to collapse. It's just a hard problem.

DR. GANSLER: Well in fact this whole issue has to be addressed from the adverse effects, not just the positive effects. It's a risk benefit analysis.

DR. EPSTEIN: The definitions which don't have a balance are very difficult.

DR. GANSLER: Yes, the impact, clearly I would like to hear from some of the Centers as to what they perceive as both positive and negative impacts. If we just go through the policy we can easily end up with essentially just classifying it and that takes care of it. And you don't want to do that.

MS. MARCSON: I really like your analysis a great deal about information developed outside of the government. I just had two nuances. One is there is a nexus with the government funding, the originator which is outside of the government. So we do have interests through that funding mechanism. The second is it's almost more nuance because there is also this whole concept of derivative information. So for the government we may share information and then an

external entity expands upon that and may build upon that so that it something more sensitive. And so it's almost a combination of government originated and external originated information. So while we are thinking about this, this is probably broader and beyond the university program issue, but that's another nuance to add. How does that then break down for FOIA issues? To what extent can the government say while we're the originator so our FOIA laws apply when there is some derivative state added information.

DR. WILKENFELD: Just to remind you that I represent the START Center, which is a group of behavioral and social scientists who are attempting to develop new knowledge about basically motivation intent of either individuals or groups who may resort to violence and terrorism to achieve political, social, economic, cultural objectives. Not that behavioral and social scientists are unique in academia, but they are often less used to having their results actually paid attention to then in the policy community—that's a bit of an understatement. Certainly the research groups who got involved in producing the proposal which generated the Center were generally savvy to the notion that there's going to be interplay between the research community and the policy community.

But I don't think that everybody really appreciated the issues having to do with sensitive, but

unclassified as that got into the research. So let me just raise a couple of the concerns being coming forth from our end as opposed to the other end of things because it is very much a bidirectional kind of process.

So for example, should we be trying to anticipate when a particular research design is likely to generate findings which conceivably could be sensitive? Should we do that before we start or should we worry about after we've sort of generated the findings and then say to ourselves, well this finding is not exactly what we expected. Somebody may in fact be interested in it because it really does point to some possible problem.

Now some researches would say that once we started the research, you know that we are sort of out there and we're doing it with open sources. We don't do any research that is not based on open source. I think that's pretty much characteristic of all the Centers although there is certainly privileged information and industrially privileged information.

So one of the big issues for us is a sort of self-censorship, as it were. Several of our researchers and research projects would probably not want to go down a route that might result in restrictions on publication or even a review process beyond what is common in academic circles. I'm not saying all of the researchers convey that, but

certainly some of them do. So that's an issue for us.

DR. GANSLER: I'd like to interrupt and follow up, are you suggesting that some of the researchers that you would like to have either from your university or some of your partners would refuse to do the work if they thought that this might later result in publication constraints?

DR. WILKENFELD: I don't want to say categorically that I know that for sure. But certainly they have expressed considerable apprehension about the possibility of additional review of their work beyond the normal peer review that would vet their research or publication would be a problem. Now obviously as the Center Directors, we need to be sensitive to what we would sort of set researcher loose on if we were to worry about what the outcome might be.

Let me give you an example, I think that I can speak sort of generally about this example. One of the research projects that I supervise direct has to do with looking at various threatened minorities around the world which might resort to violence to achieve political goals. Some of those techniques might cross the line from legitimate protests to violence and terrorism as a means for achieving ends. We're trying to develop a typology of what characterizes those groups which have crossed the line in comparison to those groups which have not crossed the line.

Now that research which is ongoing and will be ongoing for a while, may result in the identification of organizations that have been spawned by certain of these groups. Let's say the U.S. government has not heretofore been paying too much attention to. But, they are similar to other groups which have spawned violence and terrorism so they may warrant some additional attention on part of the policy community -- the security community.

So, we get into this, I won't say quite innocently because we all know that there's a possibility that we will find something like it. But once we do find it, what are the restrictions then that might be imposed on us in terms of publishing those kinds of findings as legitimate academic research?

Now we all understand that we are not being funded here by the National Science Foundation. We're being funded here by an agency which has an operational mandate. All I'm saying is that the researchers in this community need to go through a process of retraining. This is not what they get in graduate school normally; this is a different kettle of fish. Let me stop there.

DR. GANSLER: Shaun?

DR. KENNEDY: Similar to Detlof's, we have a connection to the Center for Protection of Defense with a

broad range of academic disciplines from social scientists, economics, risk communication to detection diagnostics, supply management, public health response, and infectious disease epidemiology. We have followed a process somewhat similar to what they've done at the CREATE Center, where we have at the initial review stage of our project's we go over them and do a peer review of is this going to lead to something that we really don't want to see in the public domain.

As a result of that there is one project that we did not fund that we included in our original proposal because when we got down to the details of it after the reward we realized there was no way you could publish the output of this without it being a problem.

So that in a sense, is a process that can work. But there are some other challenges that come out. We also followed a similar thing to what they do at CREATE having voluntary review of manuscripts before they're submitted. Where we will have a group read it to make sure is there anything in there that really doesn't have to be in there for it to make its' scientific points, but is a complication for sensitive information disclosure.

There are two challenges of that though: It is voluntary, we can't force them to do that the way that our current grant is set up. The second is that while we've had

every manuscript that could possibly have been a problem come through for review, we've made some changes, as mentioned earlier this would go to subset under B. It's not only can universities self-regulate, but is it sufficient because those drafts that we review and say that you don't really need to say this, this, and this, are discoverable under the Data Practices Act; if someone knows well enough how to ask for it.

MR. HARDY: Shaun, who does the review?

DR. KENNEDY: Who does the review? It would be the other two directors and myself. On occasion we've asked for input from people in the Homeland Security offices of USDA and FDA for their prospective. Saying we don't think this is a problem, do you agree or not agree?

MR. HARDY: Do you mean the Federal Act? Is that the Act that you are referring to The Data Practices Act?

DR. KENNEDY: No, the Minnesota Data Practices Act. Which every state has there own version of it. If you want to look for the one that is more problematic, just come to Minnesota. It essentially says that unless you've been directly ordered by a Federal statute or state statute not to disclose it, its public.

So as an example to that, when we hired a search committee for the president of the university two year's ago, we sealed its records as is normal. Star Tribune

newspaper requested them and won in court. So they were able to then identify for the other universities which of their president's were trying to leave. It wasn't really stuff that they wanted to have in the public domain.

We also do project's as they are ongoing we have made course changes to tailor portions of the project so that information really doesn't fall into this domain. But again, that's a voluntary review process we're going through there are no formal teeth behind that after we've funded the project unless we terminated funding. Which we could do, but there's a delay factor because of the way that the grants were awarded.

One thing that has not come up here though, which has happened to us in one area with some interesting challenges. What do we when someone who is not within our Center publishes something that is not helpful in this area and contains errors? Do we publish something that does not contain the errors so that it becomes less threatening? Do we hide? There was a publication earlier this year which disclosed some vulnerabilities that were not necessary to disclose, and did it in a context that had errors in it. What do we do? We were called and asked to comment on it. The response was will that's his paper and that's fine, talk to him about it. But, if we know that we could publish something that would lessen the concern, should we?

DR. GANSLER: The test that you decided before hand might result in something that you decided not to accept as I gather, right?

DR. KENNEDY: One of the projects that was in our original proposal to the Department of Homeland Security when we did our peer review prior to funding the projects after the reward, we set out and said until we can solve this two particular problems on protection of information, we can not fund the project because it would very clearly expose a specific set of vulnerabilities in the public domain that don't need to be there.

DR. GANSLER: DHS's response?

DR. BIENENSTOCK: You can't pass that on to one of the Federal laboratories?

DR. BERNSTEIN: We might yeah. I mean the topic areas would naturally --.

DR. KENNEDY: What actually happened with that topic area is that a good portion of it is now imbedded in a program that is being conducted by the FBI with FDA and USDA that we're now commenting on to the extent that we can. That is a mechanism for how we can try to transfer things that we come up and say good research, not something we can deal with generally. So we have done that successfully once, but since all the stuff that we are doing primarily is coming off of publicly available information, it's the

intersection of the whole set of different data sets that in and of themselves are fine, you put them all together and add an olive and all of the sudden it's a problem.

While I would agree with Detlof that most of the time you can anticipate it, not all of the time, and that's where we have to have a mechanism for course correction. Specifically for us because in Minnesota that course correction still leaves us exposed. We can self-regulate ourselves, we can't self-regulate people who want to get information that we don't want to disclose.

MS. MARCSON: As far as the state FOIA laws are concerned when the states are originators of the information, unless there's a fix on the Federal level - that would need to be government-wide and some sort of legislation and that just doesn't exist.

DR. KENNEDY: The General Counsel of Minnesota said this more as kind of a wishful dream as opposed to an actual reality, but they would love to have a statue in place where if the university designated something as they perceive to be sensitive and then the government agreed that it would be protected.

So that the university is self-selecting not having publication restrictions put on it.

DR. GANSLER: Earlier you said it was voluntary from the perspective of the author so if you said, well I

think that they will take out these sentences and it has also been agreed by DHS that they should come out, that the author can still say, no I want to leave them in. Is that what you're saying?

DR. KENNEDY: At this point, yes. Our only recourse would be to call Homeland Security and say, would you please classify this?

MR. SHORT: I want to state that differently, and that is the fact that they are using the Office of Naval Research, that the Department of Defense Scientific Officer, that is the guy at ONR who's your technical overseer has a responsibility to watch the work that you are doing continuously.

If you start to do something that is strange and out of fundamental research, we are obliged to step in and terminate the grant or tell you to do something differently. And the fact that you have these grants that are subject to ONR constraints and I don't know the specific constraints. But I know as a Program Officer at ONR that's my job and if I don't do it I'm liable. I presume that the same liability extends to the DHS person. And so when you say step in and ask—I'm being flip here—but, I'm hearing dereliction of duty on the part of Defense, that his job is to provide the continuous governance and you shouldn't have to step in and ask. He should be a party to it in real time. He should be

inserting himself rather than waiting to be asked.

DR. BERNSTEIN: I think we're talking about a obviously, a hypothetical situation which actually existed.

MR. SHORT: So my question is, is the DHS Program Officer as conscientious as the ONR Officer or is the culture something different where you do feel that you might have to ask?

DR. BERNSTEIN: We model it after most agencies there's quarterly reports, there's continuous discussions, there's identification. We meet with the Directors of the Centers more frequently than I think most other agencies do.

MR. SHORT: So, in fact you know that NSDD-189 says you have to watch this continuously henceforth and forevermore and you know it's your job to step in at the appropriate time and say this grant is off? Side question: Do any or all the Centers have classification authority?

DR. BERNSTEIN: No, I don't think so.

MR. SHORT: None have classification authority.

I'm really distressed, and I'm feeling that déjà vu of doing the thing last fall. And that is what I heard you say Mel, and correct me if I'm wrong is that foreign students, are welcome to participate in the work at the Centers. You're the guy who owns classification authority, and the Centers who don't have classification authority have no clue how to apply the rules are the ones being expect to self-

police their students. That wouldn't fly in the Department of Defense.

DR. BERNSTEIN: From my experience as a researcher, researchers in universities never imagine that they have classification authority. I mean that they really abrogate that to their Program Officer, who needs to step in and make them aware of that.

MR. SHORT: And that's in getting back to the culture, I will hold up our pride and joy our best example. That is that I know what MIT does on campus, and I know what MIT does at the Lincoln Laboratory, and ought not your Centers model Lincoln Laboratory?

DR. BERNSTEIN: Let's not sort of take this to a extreme where the Centers are operating without a clue of what is going on. That is not the case. And I just want to reinforce this is not so unusual. I mean that DOE for decades has run the Advanced Scientific Computing Program where the faculty clearly understand, they develop algorithms when they open and when the research potentially becomes operationally interesting—in that case it is transferred into the national labs. All the bio-select agent work is similar, there's no different with these Centers. There not working so close to the edge of classification that this problem is always around. We're really talking about exceptions here.

MR. SHORT: I heard that. When you self-police what's my norm and what's his norm can be quite different. When you said that this would rarely would happen, I'm from Cincinnati, Ohio, and I know that ivory snow and ivory flakes are as pure—99-44/100 percent pure—and to me that's rare. I hear Detlof say, I think 90 percent and that caught my ears.

DR. BERNSTEIN: It's not a classification issue, Jim. This is really a SBU issue. I mean in the selection process for the Centers and the questions that we pose to the Centers the research topics that we asked them to look for are really not the ones being that are being carried out in the national labs or within the agencies. We look to knowledge gaps, fundamental gaps to allow others to be able to take that information and move forward.

MR. SHORT: One last question then I will step aside. That is a follow-up to Jack's question, I saw a vuegraph up here and it said classified. Did it mean classified? I'm lost. Your saying one thing, Neville's saying a different thing. I'm lost.

DR. CLARKE: I'm just saying over at the extreme of this whole continuum of things outside of SBU you are going to run up against the decision for the --

MR. SHORT: At the DHS Center of Excellence.

DR. BERNSTEIN: No, it could be anywhere.

MR. SHORT: I'm lost.

DR. BERNSTEIN: They are working on problems which taken to the extreme could lead to classification. And it's up to the Program Officer to recognize that early enough to prevent that from happening.

DR. GANSLER: I'm going to follow in Jim's point that I had a grant to write a paper, actually on one of Detlof's issues it was the sensitive of networks. And we had a conference and it was totally unclassified. Everyone's paper was referenced in terms of congressional testimony and open source and so forth. But this happened before the Department of Defense and therefore they wanted to review it afterwards. They gave me about one-third of it that they thought should be classified. And I had a choice of either classifying the whole report or taking out one-third of it.

But they didn't say that maybe some of this is sensitive. It was a black and white case and even if it hadn't been a third even. Even if it was seven sentences we'd run into the point that Shaun is saying it's voluntary.

I had a choice I could make the report classified or I could take out those sentences.

MR. SHORT: And that's where I mean you are doing fundamental research and I read on NSDD-189 and it says its public release, it's classified, there's nothing in the

middle. And that's where I get frustrated.

DR. BIENENSTOCK: Yeah but, didn't Nicole distinguish clearly this situation from the ones that you normally face, in the sense that we may as a nation want to broadly distribute to certain restrictive groups information that we couldn't distribute were it classified. And that's the essence of problem, isn't it? I mean that's what I learned today that really changes it from the classified --

MR. SHORT: There is information at the Defense Technical Information Center, that I think in times of urgency when the Department of Homeland Security needs to act, that we should be in a position share with the first responder and we don't have the authority to do it.

DR. BIENENSTOCK: Exactly and that is one of the fundamentals of the problem.

MR. ARMSTRONG: I want to say that so far I have maintained radio silence. When Anne-Marie sent me an email asking me if I would participate in this, first with a telecom with Jack, Arty, and others I thought that we were talking about SBU in a broad sense. Being too cold to play golf, I spent some time looking up sensitive, but unclassified. And I got some very good information from the Library of Congress, Congressional Research Service, and Georgetown University and the many many different categories of sensitive, but unclassified all termed differently.

So I said to myself this is really a hound dog's breakfast. Now for those of you who weren't brought up in Tennessee on a farm this may not have a meaning for you. But if I could borrow from Neville's example what that means is the first person down in the morning in the kitchen opens the door. The hound dog comes in from underneath the house or hound dogs looking for something to eat. So you take an old tin pie pan and look around for things to throw on it. Maybe from the counter, maybe from the icebox and the hound dog eats it.

Now this is not aesthetically pure and it's certainly not nutritionally pure, but the hound dog doesn't care. But it look to me that with all of these things that have been thrown together we're adding sense of what we're all doing. So then I said okay after they straighten me out, we not talking about the broad sense we're talking about it only in the Centers of Excellence. I said okay. But the idea of sensitive, but unclassified which is the idea of things is an oxymoron in many ways. If I were to say *sensitive but unclassified* then you would be happy with that. The fact is we have information, it's not just antiterrorism, we have information on privacy, people's information -- there's all sorts of things that need to be restricted.

So what we need to do is talk about things that we

want to restrict and develop a system where were restricting them. Now, what I have heard from the Centers, what I've heard from DHS people so far is that number one we hope that there's not going to be many cases. And secondly, we hope we do the right thing, but if not we will ask DHS.

Well, I read what DHS has published in terms its system it's about 13 pages. Nicole I graded the papers if you'd like to see my comments. I think DHS needs to have a policy that talks about restrictive information that the universities can keep too. Relegate the decision just down to the Centers of Excellence, there not going to have the guidance an order to make decisions. They're going to ask you, there going to have to do it on an individual basis. So, I think that if this were regarded as restricted information systems—it should be.

For instance, in my many years of dealing with classified information I knew how to do that, I knew how to safeguard it and so forth, special access, code words, etc. But, when something comes across your desk that says for official use only, I don't know what to do with it. I would probably safeguard the way I would confidential information. For instance in your thing it says, don't talk about *for official use only* information unless you're using STU-3(?), but you can if you have to. Or use a classified Internet, but if you can't it's okay. I mean what is it? What's

really missing is first, the definition of prescriptive and who can get it. Because sensitive is only one part of what you should restrict. You should restrict things that give away other kinds of information that you don't want people to have. There needs to be a classification system and there needs to be a restricted information system. And then you don't have this ubiquitous sensitive, but unclassified value that nobody can understand. That's the end of my sermon.

MR. SHEA: I have two things that I want to share. One is a definitional issue. When we talk about fundamental research it's being used actually in multiple contexts to talk about different things here in this presentation today. At one point we discussed fundamental and applied research. And then discussion under NSDD-189 of fundamental research and inclusions that arise from NSDD-189 and the existing export people. And it is important to realize that the dictionary definition and the policy definition of fundamental research are not the same. And to call fundamental research an equivalent to basic research for example is misleading and confusing when trying to talk about how to apply a fundamental research exclusion which actually, in policy terms, covers a large swathe of applied research as well.

The second issue is about this concept that

there's information that falls close to classification, but we'd like to disseminate to people who do not have clearances. Taking that as an idea and defining it and I think you have. Should that type of information be developed in a circumstance where the fundamental research exclusion under NSDD-189 applies? You could easily do that research and numerate the same information and not have it be fundamental research and not have any of the issues relating to fundamental research with it's exclusions under export control and the way that that could be controlled fall into play.

The simple example as you brought up, putting dissemination controls on contractor vehicles that would remove the fundamental research aspect. Now it does raise other issues of course and those issues may be greater than trying to figure out a way to handle the research results that are arising in the rare case. I did think it was something that should be brought up.

DR. GANSLER: I want to make sure that we cover all the Centers, so James if you want to make any comment on your new Center?

MR. HODGE: I would be delighted to be very brief because we have to do the luxury of not yet being a full-fledged Center of Excellence yet.

DR. BERNSTEIN: Which means he hasn't gotten the

money yet.

MR. HODGE: And no projects either yet that we have to task to work on. But we have been attuned to these particular concerns. The other luxury we have, perhaps it's different than what I'm hearing from the universities -- Texas A&M, and Southern California, Maryland, and Minnesota to my right is we're Johns Hopkins University, we're a private entity.

We don't adhere to, don't have to live under the same environment that a public institution does. FOIA requests don't matter a lot to a private entity like ours. But yet, many of our partners are public institutions. So we're highly cognoscente of these issues. And yet because of that private entity status that Hopkins enjoys as a private university, we have as a university staunchly defended for decades the university's right to engage in full-fledged academic scholarship without restriction. This is part of what will build into every type of federal grant that we do. This is not to say however, that we are not fully conscientious of the need for this particular policy. I think at least in regards to what we perceive in looking at these early drafts is that our comfort level with this is fairly good provided I think that two things are maximized. Perhaps this discussion can lead us towards that. One, I think the process through which this will be developed is

really key to us. We're hearing and I'm learning a lot about key definitions and key issues and things like that. It's the process, this university-driven process, I think Hopkins very strongly supports. Where and under what circumstances will federal intervention be involved that where will the call be, be stalled on the federal government versus the university, that I think will be a critical part of it.

It's that one word that we haven't yet put onto the table and I'm not going to suggest concerns researchers at Johns Hopkins like myself, and many other colleagues, but it's that censorship idea that we want to make sure that we're always at all times avoiding. That this is never a guise for censoring really solid research data and scholarly conclusions that are being made pursuant to any federal program or grant.

This is to my view based on the legal capacity that I know of and based on my perceptions with my Hopkins colleagues not the intent of this at all, in fact it's a very laudable policy. One of which we just want to help craft out the right procedures to ensure uniform application across the Centers and then as best as possible inherently driven university design types of decisions at first with the opportunity for federal intervention.

DR. GANSLER: Given the inputs from the other

four Centers, the likelihood of getting something out of one of your studies that has limitations is highly likely, isn't it?

MR. HODGE: We have a very, very diverse research agenda with all our partners. And as DHS knows what we have proposed is really extensive diverse and extensive across multiple sectors involving lots of different types of data.

And yet in the same vein knowing about this advance is really our strength. We have the policy and we have the potential I think, before we venture into each of these potential arenas to have the benefit of working through this with DHS and I think we look forward to that.

It's to everybody's credit that we are addressing these issues now. We feel comfortable that the policy as stated can be worked. But it's a matter of how much perhaps control over that that the university is given. And like I say the potential for government coming in with censor type policies is something we're not seeing as a big issue.

But yet, these are the sorts of things that have dominated I think private sector entities like Hopkins for decades, watching out for that from that perspective.

DR. BERNSTEIN: It almost sounds like people are thinking this is a new problem for universities. In the days when I was a Provost of a university and attended the AAU meetings of provosts, sixty of the top research

universities in the country, they had story after story of these kinds of issues. These are longstanding legitimate concerns. Whether it's one agency or another agency, whether it's done prospectively or retrospectively this is a real problem. I might argue about the difference between basic research and fundamental research but it's a difference when the topic areas are so interesting when you work on contemporary problems that you're now dealing with potentially sensitive results.

In a way this is truth in advertising. We're saying we know there's an issue here, we know that it's going to continue to come up, we're looking for the most effective way to be able to lay out a procedure that makes sense for us. Many of you know that there is an Executive Order from the President saying that every agency -- I think the 90-days are almost over -- has to report how they're going to deal not with classified information, but with sensitive information.

Toby is an ALU guy who can maybe speak to this issue.

MR. SMITH: I actually will ask a question, because I'm more interested in not looking at what fundamental basic researcher is, but trying to figure out the difference between classified and sensitive.

So, I go back to your definition Detlof of not

openly available from open sources and is useful to terrorists. My question is that sounds like it should be classified to me. The question is what's the difference? And I don't see the difference yet and I'm interested in whether we can come up with a difference.

And on a continuum there's fundamental, fundamental research I understand is should be openly shared and there should be no restrictions. Classified is information that shouldn't be shared. The question is, is sensitive then information that could be shared with some, but not others? What on the continuum are we talking about?

Now I know that classified means the only people that have access are the only people that have clearance. But what's the middle ground?

DR. GANSLER: They also said people have need to know and in this case I think they're expanding it to need to know also.

MR. SMITH: Well, I think that's the question we need to get to is, that is who needs to know and when?

DR. VON WINTERFELDT: I agree that the definition includes the classified piece its a large set including this classified piece. There's a large set though that clearly isn't classified but its something else that you don't want to spread widely.

Let me give you an example, we're working in

Radiological Dispersal Devices (RDV)-- or dirty bombs -- area with plumes that we get from Lawrence Livermore. And it's *for official use only* plumes and so that's certainly not classified though it's something that they don't want to spread, we don't want to spread so we treat it with caution.

When we publish we actually do fact plumes and we put a little bit of a spin to it so it's not real. So that's an example where it's clearly not classified.

In my whole experience we are over cautious at this point. We have not seen anything in the papers that we have produced that has been clearly identified as classified—and we looked pretty hard.

One more point in regards to James's comments that the classified world and the unclassified world is pretty clear. What we are talking about is this dubious world in the middle. My original impulse on this whole business was to push everything either into the totally unclassified, totally insensitive, or in the classified world.

And on the output side you can do that. I mean you can read the paper and say well obviously there's nothing classified in there because we shouldn't have never gotten that, if there's something sensitive in there—scrub it. At this point then hopefully, ideally with a good procedure it becomes non-sensitive, non-classified. Or you say well there's something more to it and we're going behind

the fence and we do some more work and then it becomes a piece of classified information for an agent. The only person in our Center who can do that is myself -- nobody else has a security clearance.

Having said that though I can control the output in that matter by pushing it either way what I can't control is the input. We get information like the NARAC(?) information from Lawrence Livermore is sensitive. There's lots of other pieces of information that is useful for us to carryout our work, but we safeguard it in some sense.

MS. KNEZO: I would like to follow-up on some of Toby's questions. How if the universities are given the opportunity to identify what might be useful to a terrorist and there may be or may not be input from DHS, how do they identify what might be useful to a terrorist without having intelligence information? And what does that mean for NSDD-189 and the fundamental research exclusion?

And I'd also like to point out that I think there are a number of questions that you've raised about distribution issues. Should there be a parallel system set up for distribution of sensitive, but unclassified information among researchers who have a need to know with the COE or outside community?

There have been proposals made by some researchers in the biological sciences area that there be a central body

to license folks who have a particular need to know who may indeed make more of greater contribution to the field if they have access to this SBU controlled information more so than others. But who is to determine who those researchers should be? And what is the federal government role or the professional association role in determining that?

DR. GANSLER: That's a key question obviously, the establishment if you made something then sensitive, but unclassified okay now who can have it? And who decides who can have it? Is that the university or is that Department of Homeland Security decision? In the document I believe worded is based on need to know as determined by the holder of information, that's the way it's written here. Now as soon as you got the document you become a holder of the information. So it's a nebulous definition.

MR. SHORT: I want to follow-up on this, and that is fundamental researchers as is in NSDD-189. When I am talking to my fundamental researchers, the advice that is I give them is if somebody offers you information that is privileged information. And I'll give an example if something is marked FOUO is privileged information, so my advice to them is don't accept it. Because if you need privileged information, if you need information that's not in the public domain to do your fundamental research there's a possibility that the output is going to become something

other than fundamental research. And there is a price to be paid for that, so I think in your case of getting these plumes is it from Lawrence Livermore? I'd say Lawrence Livermore I don't want the plumes, give me the fake plume and I'll analyze the fake plume and I'll publish it in good conscious. But, once you take that FOUO data you've crossed the NSDD-189 line—you're at risk. I mean argue with me.

MS. MARCSON: I would like to point out though for the department as a whole one of the goals is to reach out to academia for valuable input and how we analyze or fix some of these Homeland Security problems and we're paying for it.

Basically we're cheated if the university community doesn't want to deal with some of these sensitive areas for which we're paying as valuable partners in this.

I think this is the ground issue, like what you said earlier Tobin with how do we define sensitive information is it that we share it with some but not others? That's basically what it is, there's just not enough right now, regulations to nail this down.

But I think that the DHS mission is somewhat unique and different from DOD. And it does require for us to have this limited information sharing to our partners in the state, local, and academic communities. And that's what it is.

If universities want to completely stay in this non-sensitive information, non-*for official use only* realm, I would argue maybe they shouldn't work with DHS in the University Programs example cause that is what we're paying for.

DR. BERNSTEIN: That's an argument that we have different opinions on.

MR. SMITH: I just want to say that it gets down to a fundamental issue which is, is everything that's done in the academic environment and Centers going to be publishable? And some of our university Centers think that it should be, but at DHS that's a different opinion. That's where I think the crux of it comes and I think I agree with the statement that we it starts getting into usage -- an earlier question that I had maybe for Detlof is that when you look at those projects that you are worrying about outcome, you talked about both inputs and outputs being sensitive.

I heard Jonathan talk about a case where everything was public source going in it wasn't a problem in the output though might when combined result in something that you don't want to publish. Which I think is a very challenging issue. But if inputs are critical and sensitive how you define that is a question.

One of the questions was the head as you went

through that is our you determining to be likely to have sensitive outputs also the ones which have sensitive inputs? If that is in fact the case then I wonder in fact whether they are fundamental.

DR. VON WINTERFELDT: Well, let me answer in two ways. First of all, when you use sensitive inputs in the product obviously the product in the output is sensitive. The safeguard that we have in the product end is that we can scrub it, like we did with the fake plumes.

Let me push back a little bit on the notion that I should refuse any sensitive information as input. I think that would really hamper the realism of our intent to push forward the modeling of the analytic tools. If I didn't know what those plumes look like, at least in some form of approximation everything that I calculated is just speculation.

MR. SHORT: I agree with you a hundred percent and that's why what I'm hearing here is that I feel these Centers, that the universities should make the decision up front with the regard to the Center, and I understand there's a lot of special conditions for these Centers of Excellence. I think the university is de facto making the decision that I'm willing to accept other than public information and therefore I'm willing to abandon my NSDD-189 right's—Whatever those are with regards to this Center.

DR. VON WINTERFELDT: I don't see that connect.

MR. SHORT: NSDD-189 says it's public input, it's public output. But, as you said if it's public input combined with privilege input then you got to scrub the output then NSDD-189 may not apply.

DR. BIENENSTOCK: Suppose we look at it from a policy point of view, if I can put on my old OSTP hat. If I understand the situation, the vulnerabilities that we're facing are so broad and distributed in the society that it is probably not practical for the country to develop a Los Alamos approach or a NRL approach. But rather you're going to need a very broad community. You want to get the best people you can and by and large they're at the universities. You can't put this behind the fence you probably couldn't get the quality of people that we need nationally.

So that's why we decided to go out into the university community and then we are stuck with this problem. And it's not like a device where you see it and you classify it and you can feed it to the defense industry and we stay head because we have the technical ability to stay ahead.

On some of these problems we're not going to know how to ameliorate them for years. I mean look at New Orleans. So we really are in a dilemma here I think. And it's not as simple as most of the things that you face in

DOD which tend to be devicy and are more restrictable. Do I have the policy issue right?

DR. BERNSTEIN: Again I'm a little surprised by how comfortable people are about saying you do this or that. I've been in a lot of universities in my life and I can tell you that that divide does not exist. People either get that information because they serve on certain commissions or that they reach out because it is important as research where the information is given with the understanding that it's going to be handled in a very different way. But the products can be fundamental research.

Just naming one source, Carnegie Mellon University couldn't survive on the model that you have just described.

I think that it's a pretty good university. But they can separate out the importance of doing fundamental research from the occasional time that some of that research is going to be applied. It's going to be applied in ways that maybe some faculty members are very uncomfortable and those faculty should not work on those problems. It's one of the great things about the university system here we have a diversity faculty. Some of them are inspired by daunting complex problems which feed into these areas.

I think the biological community, if they basically said we are never ever going to discuss select agents ever again because there may some constraints you're

going to lose an awful lot of talent to this country.

I think Arty said it right. We're struggling with this problem, it's a real problem. We can isolate some of the best minds in the country to not help us work on this. We realize that occasionally we're going to run up against these challenges. How do we deal with it?

MR. SHORT: I think with the policy statement we are freeing up in society, I think my experience is that we run into complex questions like that that's where the freeing up in society is hard to deal with this kind of information.

I agree with what Detlof said, as you said, he takes this public information he takes this privileged information he scrubs it and he outputs fundamental research information—public information. He has his job of doing that. You described that different professors may look at the same data and scrub it in different ways. But then the consequences since you are taking money from the government to do this, or at least my case the Department of Defense, you also have the benefit of I get to scrub you too.

Just like you may disagree among your professors, we may disagree across the department line and because I own the money I know where the power is and that's the dilemma that we are facing now and it is hard.

DR. GANSLER: One last word and we are going to

take a break.

MR. MORRISON: If what Jim said right then was about DHS, then I heard something wrong before because I'm told that there were no conditions on the grants and money. Now if you got written conditions in there then you have the right to scrub. First question is do you have conditions in the grant? Because it is absolutely clear that DHS can control anything it wants in any way it wants as long as it puts conditions. The reason it hasn't put conditions is because it understands that as soon as it starts to put them in there people are going to back off.

And the problem you've got is what Gerald said earlier, is it's a tradeoff. We need to be first upfront and then try to figure out a way that we can reach an accommodation.

Sort of hoping that it will be rare and we'll be able to work it out in the end and at the end with have a remedy of slapping a classified stamp on it, isn't a very good way because soon people are going to start to realize if the government is serious—and I think it is serious about protecting a lot more than many people in the academic world would protect— then there are going to be a lot of people backing off and are going to be very unhappy when their publications are scrubbed in significant as opposed to ways that people can agree upon. And that's the problem

that we got to deal with. I think that you got to deal with it upfront because it's only going to get worse the more and more money there are and the more Centers there are.

DR. BERNSTEIN: Let me repeat again that when we write the broad agency announcements they're written by people who come — many of them from the academic community, like myself, we're very aware of trying to frame problems that will not fall into that realm. When we talk about the government watching us, again, DHS does not have its own contract team group. It relies on the Office of Naval Research who have terms and conditions. I'm only speaking to grants given to universities of the Centers for Excellence.

MR. MORRISON: This is a fact question. Do the conditions, wherever you got them from, do they say in the end we have the right to perfect publication? Yes or no?

MR. SHORT: I addressed that with embarrassment at the very beginning, that I was at ONR I don't know the answer to the question.

MR. HARDY: We've already answered it and the answer is no. Using the ONR terms and conditions the answer is no.

MR. MORRISON: But the question is did you put them in there? At some point there's going to be a big price.

DR. BIENENSTOCK: They do pay a price. A heavy price.

DR. BERNSTEIN: At most universities they won't and therefore you won't get the talent.

MR. SHORT: I want to say one more thing and then I'll shut up again. We can not let or requirement as federal employee, to honor and apply NSDD-189, 100 percent of the time. And so we have a requirement to continuously monitor the work and to say this is no longer a grant, stop working.

DR. GRANT: I just want to say to that point, and I'm not aware if there's a DOD implementation of NSDD-189, but my understanding of it is that it only addresses fundamental research or implied research, it only addresses classification as a control. It does not address for *official use only* and I was very concerned Jim, when I heard you say that if they accepted *for official use only* information that it then waives NSDD-189 or the fundamental research because I don't think that's the case at all.

MR. SHORT: We can't solve that here but that is an important distinguishment, yes.

DR. GANSLER: We have lunch and since there are obviously people who want to talk, we ask that you hold that until after lunch. Since we really do want to let you go by three o'clock as we said we would, let me suggest we just

take a half-hour lunch and try to get back here say one o'clock. We'll reconvene and start again.

(Luncheon recess at 12:30 p.m.)

AFTERNOON SESSION (1:00 p.m.)

DR. GANSLER: Since we have two hours and we do want to constrain the total time people have flights to catch and stuff, is to try to spend maybe the first hour on trying to get through these five questions, get people's opinions on the five questions, and then the wrap up portion of the session. If people have some comments specifically on the draft document that's been circulating we might want to give those some time.

This list of questions I should point out came from the Department of Homeland Security. While not necessarily intended to be totally encompassing could form the basis for some dialogue at least. And then we could go onto some of the other comments that Sam for example pointed out, within the document itself.

I'm almost reluctant to go backwards from what Neville was saying start with E. I have a feeling we have had a long discussion on E already.

So let me start with A. The question there as I interpret it at least, is whether or not one can even have a uniform --I'm reluctant to use the word "definition" because we've heard so much about the difficulties of defining, but on the other hand an understanding at least of whether it should be the same for the biotech field as it is for the social aspects of terrorism. I mean its kind of a

spectrum there that is so large rather one can in fact treat it. I mean from what people have said it seems as though the issue here is how do you restrict who can see what. And from that view point at least, everyone in one field knows who else is in their field. So in that since you may be able to have some degree of uniformity even though there is such a wide difference between the bioterrorist concerns and say, cyborgterrorists, or someone understanding who are the most likely suspects for recruiting - that is the kind of stuff that might come out of Jonathan's studies. Comments on that first question? That one's clear?

DR. KENNEDY: One example where it has gotten confusing in our area for food system protection, understanding how the supply food chain operates is an important aspect of how your vulnerabilities are accessed. The people are experts in supply chains resiliencies and its' weaknesses are not the same people who are expert in select agents and their ability to deliver the food.

So you have people that may not understand the intersection between the fields and how one person in their field what their talking about is not sensitive, and the other side is not sensitive, but the mix is. It's one of the challenging questions.

DR. GANSLER: As Mel said earlier in the beginning of the discussion, if you were trying to have the university

people who were involved making that decision you would undoubtedly either if it is purely the supply chain side or purely on the food chain side have people who are experts in those areas. If it's the mix, as the Director of the Center, you bring them both in and discuss it intimately, right?

DR. KENNEDY: Let me just point out that's really more where the differences come out. I think that I agree with you within the field everyone understands your field. It's when the fields are intersecting and potentially creating new fields that's a different challenge. But it's a manageable challenge.

DR. GANSLER: So is the answer to A, yes or no?

MR. MORRISON: It depends. Why did they ask the question?

DR. GANSLER: I think what their trying to get at-- and maybe Laura you might want to comment since these are your questions, but I assume that what you're trying to get at is whether or not there can be some uniformity to both the process and the rules.

MR. MORRISON: Have you decided who gets the material after it's potentially --

DR. GANSLER: A, who decides which is probably the most critical of the issues, and then who decides who can get it. So it's really the decision process that I think

most of you are focusing on in the morning discussion.

MR. HODGE: Jack, I'd like to throw in one other issue to that just thinking with my legal hat on completely, to the extent which these decisions could be shared, circulated, or made available to other Centers, so that were familiar with the types of decisions that other Centers have handed down and what DHS's responses have been to that.

Building up some body of precedence for what's been done will be certainly highly advantageous to new Centers like ours. But also I think to some of the forthcoming decisions which we will all have to make. I don't know how best to do that without producing sensitive data.

DR. GANSLER: That's what I was going to say. I mean you will automatically be receiving sensitive data by definition.

MR. HODGE: Right, but that's the idea whether or not it's the right way to communicate this. So we think about what the University of Maryland is deciding in conjunction with what's SBU's is not the polar opposite of what Johns Hopkins is deciding versus USC or Texas A&M. I think that is a value to DHS, but I don't know how to create a process for delivering this information that would not further involve circulating the type of data that we are trying to restrict.

DR. CLARKE: One of the things that we talked about in the earlier part of the day was the hope that we would have a solution to the SBU issue that would transcend and go past the individual Centers of Excellence and DHS. So as we are talking about how to put wheels under this, it seems to me that it would be helpful to keep asking ourselves are we aiming at a general solution are we trying to do something that works in other places besides the DHS Centers because it's my belief that these kinds of issues can arise in almost any place in science.

MR. ARMSTRONG: What James is suggesting is that in lieu of a statute is to develop case work. I think that's what you're talking about, right?

MR. HODGE: I think it could be extremely beneficial to any Center for Excellence to be knowledgeable to how another Center with perhaps like or unlike circumstances, has rendered a decision internally. I don't know whether DHS will see that as an opportunity, but to me that's going to be a real big part of how we judge the quality of the process, how we judge the legitimacy of these decisions being generated by universities, and to make sure that DHS is not found in a position where its' allowed one type of data to be used as non-SBU in one circumstance and limited it in another.

DR. GANSLER: To get to Neville's point, I think

if we could come up with even something that the output for the universities across the board, it need not cover every issue of *sensitive but unclassified*, but universities will clearly be getting this from other agencies. At least if there is a precedent that DHS could establish, it would probably will be one that other agencies could try to live with.

MR. ARMSTRONG: Well that's in the regulation there. Spelled out correctly, is that if you get something from somebody else you go along with the mark and continue with that and if you don't, you then mark it yourself. So I think that is spelled out correctly.

MR. BERSTEIN: I think to maybe take us away from terrorism for a minute, two of the major issues that are of concern and that the Centers are concerned about, are results from Katrina and upcoming issues about Amy and Alonzo(?). Both of those issues where the Centers and others are working very closely with agencies that at least at one stage, have claimed that they don't have to worry about these kind of problems cause they only work in fundamental research. It's the same researchers being funded by the different agencies looking at for example, what are the vulnerable populations for particular kind of outputs or what are the sum of issues which have more culturally sensitive in terms of national security.

So I think we come back to not every issue that the Centers or other researchers face, or whether we are deliberately telling Osama Bin Laden how to blow up the United States, but it's very much that they are core issues emerging which identify other vulnerabilities in the country, some of which are of natural occurrence. So that's sort of the field dependence. We always talked about it and it would be helpful to get some more input.

I think the social science community is going to have the hardest problem with this. A lot of the science communities at least have addressed the issue at various periods, and have come up with whether comfortable or uncomfortable at least certain kinds of expected procedures to be able to move forward.

But now we're dealing with risk issues, communication issues, resiliency issues, complex issues about how one deal's with the diversity in this country, some of which some people would claim is sensitive and should not be disseminated. That's I think the purpose of the first question.

MS. PETONITO: I'm not sure who generated it -- was it the security office of DHS?

MS. MARCSON: It came out of our management division.

MS. PETONITO: Oh, it came out of Janet Hale's

office? We certainly didn't participate in the drafting of this and so it presents other problems, additional problems.

MS. MARCSON: This has been frankly an issue of a lot of management directors. It was to give consistency to the different components, but it doesn't necessarily reflect all the components' issues.

DR. GANSLER: I'm not sure that there is a yes/no answer to this or in fact, to any of this.

DR. BERNSTEIN: Ambivalence is part of the academic pursuit.

DR. GANSLER: We will probably come back again to this question of who's going to decide and if it's within fields or across fields. Who decides whether it is sensitive first, and then who decides who else can get it, are the two issues, it strikes me may or may not be sensitive to which field it's in but the same sort of process is applied.

DR. WILKENFELD: Just to pick up on something that Neville said. Most of us who've been in the research community for a while are funded by multiple sources and sometimes its other government agencies, sometimes it's NSF, sometimes its foundations. There are obviously things that you can do with these different kinds of funding. But they sometimes merge in terms of a project and you may not know which piece of a project was actually funded by NSF as

opposed to or at least you should know, but in terms of how the final project got generated and which portion of funding came from which place and therefore who owns it and whose regulations you need to deal with, can become kind of fuzzy.

DR. GANSLER: Well that leads into the second Question - can universities self-regulator, can they do it?

MR. HARDY: I would like to go back to the question of federal regulations because I think it bears on a lot of this discussion and maybe go back and ask Nicole, now these draft regulations that you were talking about, which we have been waiting a long time to see and which I'm afraid to pronounce, frankly.

MS. MARCSON: It's sensitive Homeland Security Information and that is a class of information that currently the department is working on drafting regulations.

MR. HARDY: So will that just treat government information or will that treat, like Gerry's second category of information, information that might be generated as a result of government funding or otherwise? I think related to that question is will this just define this for DHS or will it define this government-wide?

MS. MARCSON: It's just for DHS. Its being drafted by a different component in the department. But one of the goals of my coming to the meeting is that I'm going to get in touch with this person when she is back in the

office next week and relay these issues because I'm not confident at this point, that it fully addresses these issues.

MR. MORRISON: I think, if my memory is right, that it only applies to certain categories that the government held information or information which has been supplied by outside of the government can be treated this way.

Unlike what we're dealing with here, there is a statutory term, it's a question of how broadly is going to be defined. It also applies to information that is supplied to other agencies and that has the potential if it is given to DHS can a be filter to avoid FOUO of the issues that have been going on. No matter how good the definition is or the writing is, it won't solve this problem. There are some overlaps, but it won't solve this problem.

MS. MARCSON: That is what I what to discuss with the people drafting because I'm curious as to what extent can information that is developed under that nexus of departmental funding be covered by some of these regulations. And that's the missing piece you know the nexus that we are funding the development of this stuff.

DR. GANSLER: In Mel's introduction he talked about Universities' self-regulating, so it's not a question of where the money came from. The question is can universities self-regulate? Question B.

MR. HARDY: I think my point is that there may be some limits to universities ability to self-regulate if we're faced with regulations of this kind of impact on that. And the other thing I would worry about some that I sort of heard in this discussion, is the proliferation of different definitions and different agencies defining these categories in different ways because I think from a compliance standpoint that is a real problem for us if we are faced with a multiplicity of definitions and a multiplicity of standards for how this kind of information is defined.

The advantage of NSDD-189, no matter how one might interpret it, is that it is government wide and it is a bright line and you can really sort of tell where you stand. This is just sort of going in the opposite direction and I think that's a concern.

DR. GANSLER: Well, Detlof, you started out by saying that we are going to use common sense. That's not a regulation.

DR. VON WINTERFELDT: Well that's what Mel told us to use.

(Laughter)

DR. GANSLER: That's self-regulation of a different sort.

DR. VON WINTERFELDT: We did a lot of thinking about procedures and with a little help from the rather

strict view from the con-intelligence side, I think we learn why. One of the things that we should do more often is sensitize our faculty and researchers of the issues, because some of them are just not yet quite as sensitive as maybe the leaders of the Centers.

DR. GRANT: I just want to underscore people are probably already sensitive enough, but underscore this issue that other agencies support and potentially differences in requirements.

The worst example of that right now may be trying to separate cost for expenditures for stem cell research. So we could potentially be in a similar arena here if the case is made that this particular scientific activity was conducted with Homeland support and this one was conducted with NSF support or something else, and the requirements are different. I'm in a position of trying to make distinctions between or among those things and it's very, very difficult.

DR. GANSLER: The inverse of that is asking them to make the decision and then you're getting back to the question earlier about the censorship.

MR. ARMSTRONG: Universities should be the first responders in trying to determine this, but their not going to be the ones who make the final decision. For instance, they would probably then go to the leader of their Center of Excellence and get their opinion, and if that is not

conclusive then they would go to DHS. I think that's the proper way to go about it. The problem I see is that they shouldn't -- unless there is some clear cut set of directions that the university can understand than all of these things are going to be bucked upstairs. You don't want that to happen. The first responders are going to have enough knowledge in order to make a knowledgeable decision.

DR. SILVER: Sam, who becomes a final arbiter?

MR. ARMSTRONG: Well I'm looking here at this I got on the internet, it says for *official use only* --

MS. MARCSON: That's actually not for *official use only* though. It pertains to *official use only* but in and of itself, it's not *for official use only*.

(Laughter.)

MR. ARMSTRONG: That is my point. This has got to be definitive and understandable enough that the universities at least on first opportunity can understand what it is. That's why I sort of object to the words *sensitive but unclassified*.

What we're really talking about is something being generated or something being obtained that the original person should say for various reasons; whether it's privacy or whether it's for national event, should be restricted. We don't want just anybody to be able to do it. This subject has come up earlier when you go to the

classification system its pretty clear as to how you have the need to know, pretty clear about how you safeguard and so forth. Here we have a situation where somebody makes the decision should this be restricted and for a number of reasons. It has to start with that. But until you understand how this is going to play out when it gets up to the DHS level, if it gets bucked that far, that's why this needs to be very clear if this is the only thing that we're talking about as the document that's going to float down to the university Centers and then to the university.

DR. GANSLER: Well I think James's early suggestion of at least making some case study available would I think be very helpful as that starts to accumulate.

MR. HODGE: That's how every university makes Strong, good decisions about how to regulate human subjects research and such, based on guidance that comes down with regards to legitimate decisions, legitimate interpretations of federal regulations that we can use through IRB's to self-regulate human subject research. That can happen here. I might agree with the General, I don't see the type of specificity here to allow universities to do that at the present extent. But I defer to Mel because he's made it very clear that these are not daily decisions like IRB decides; these are rare circumstances.

DR. GANSLER: You keep saying they're rare. But

Detlof said he had eight potential ones out of twenty-five.

I wouldn't define that as statistically rare. And then you do have the interesting question as you start circulating these cases that Minnesota may have a different definition than Texas on which ones are going to be sensitive and why.

There is a lot of subjectivity to this, but I think as Mel said that's probably good rather than bad because I mean you are going to get these hard rigid -- the tendency that I've perceived since 9-11 has been to tighten up on these interpretations. Even though we had things like this before. I mean I got my first subpoena from the FBI this week, some foreign student who happened to come from: (A) a country they considered undesirable, and (B) was working in an area that marginally might be considered undesirable. So they put a subpoena -- it was the first time that I ever seen that on a student that was doing nothing but taking classes. And so it's clear to me if you allow it to be unregulated or unspecified it's going to drift quite strongly. So I think the reason that people are holding these discussions is the concern that this could be damaging in the long run.

DR. EPSTEIN: On the second question, can the university self-regulate? I'd come around and ask can anybody else regulate? And again, we have a classification system which theoretically exists because it is possible to

draw a line that if you are outside of it you have very low expectation that you are going to be able to recreate something outside that lives inside. If the government wanted a contract to government centers to do research there's no process problem. No one could see the centers of Federal employees doing whatever they want inside fences. If they want to go to universities, the decision is they don't want that. They don't want to have something inside of the government fence. We want to reach out to another community. Which means it's probably not going to be something where you can specify guidance to the point where the university can't defend itself against prosecution or can't claim that it is about regulation work in a realm of ambiguity. That's why this is tough, if it were easy we would put it off in some other place. We are inherently in an area which is squishy, which I think makes it very difficult to regulate by traditional administrative mechanisms that the government regulations enforced by the government. Therefore I don't see any alternative, we're sort of back to self-regulation meaning not a legally enforceable binding thing but a bunch of people sitting around going how do we deal with this? I think that is where we are because while we are at the Centers doing it now. How do you write that down?

DR. GANSLER: How do you define common sense?

MR. MORRISON: I'm sure that we could set up a set of rules which the universities would all agree to, that the Centers would all agree to that they would all have the final say. I can not imagine this administration in these times agreeing to that and as several people pointed out, it's the government's money. Ultimately they have to agree to it if their money is going to go out. And so the question is how do you set it up so you don't at the other hand produce a system under which there's not occasional censorship but it goes on all the time with every single paper that goes out and it is regularly exercised?

How's this for an idea? The mechanism is not difficult, but that ultimately the government has some form of final review of what's disseminated. And they have two choices. They can either make suggestions and of course the university agrees it's fine. They can obviously stop future funding if they don't think the university is following what they want. But the third thing is with respect to specific documents they have to classify or don't do anything else. Not as a matter of law, but as a matter of policy. That is to say, if it's really serious then they have to classify it. Otherwise they have to take the risk. And that's the price they pay for getting university input. So that's an idea.

DR. BERNSTEIN: Basically that's not different

than what universities have been dealing with for a long time. Whether it's with industry, which has a different set of constraints and we'll talk about it. As Jim has pointed out with DOD who has the right to come in and either basically say that you don't want our money return it, because you're working in areas. A lot of universities do.

But there are other examples where the universities, the universities self-regulate themselves all the time. I mean they make judgments, they make sound judgments. Sometimes they don't make such sound judgments. Our government has grown to respect a university's ability with IRBs. That is something which is in many ways as daunting a problem and is potentially a serious problem.

Part of it I think that this is still, at least within the Homeland Security area, still early days until people develop some sense of confidence that there are characteristics here that make sense. But across these disciplines, whether it's back in the 60's and 70's when people were concerned about nuclear weapons or more recently with biological issues whether it's going to be the social scientists or others, universities traditionally have been very responsible.

They defended legitimately academic freedom, but they understand sort of the boundaries of it. I think we've since this again in those examples as we talk about industry

they've developed procedures—good and bad to be able to deal with that. And I might mention that in the document the Centers did build in an appeal mechanism. They said if you self-regulate your self and the department disagrees with you there is sort of an adjudication process that goes on having quite answered the question, what do you do if you continue to disagree with each other. That's what this script is going to help with.

DR. GANSLER: The other thing, Mel, it seems to me that all of your examples tend to be reviews on the front end. There it's a decision to whether or not a university will accept certain types of constraints, on a publication, for example. They usually are negotiated when you get a contract. Or if you are going to do it with industry the same thing you know, what is the basis for the review? For example, people don't object to having a review for security or privacy but they object to arbitrary.

DR. BERNSTEIN: Right. But there are many industrial contracts that run into problems afterwards saying well we didn't expect you to discover this.

DR. GANSLER: Counter to what we've been saying in our ads. Well let's talk about the C, the difference between industry requirements and government requirements -- are they similar or different? I assume here what you heading about is restrictions on publications primarily?

DR. BERNSTEIN: Well, it's usually delays, not restrictions. Well it's sort of the process that industry will negotiate a 60-day or a 90-day period.

DR. BIENENSTOCK: But only for patenting purposes at most of the research universities. That is the delay is specifically to get the patent in. Otherwise there is no review.

DR. KENNEDY: There is some cases where we give them the opportunity to review and comment, but no authority to modify the text. It's not necessary for patent reasons, they may not agree with the conclusions that were reached and they want to make sure they have an opportunity to comment.

DR. BIENENSTOCK: I should also say if we have provisions whereby we can accept proprietary or classified information that's incidental to the performance of the research, and in that case we give the sponsor the ability to ensure that we're not revealing proprietary or classified information in the publication.

DR. GANSLER: How does that compare to what they are asking for? It seems to me the difference is that you have a priori decided on the basis for the review whether it's security or proprietary.

MR. HARDY: It's a pretty grey line.

DR. GANSLER: As contrasted to we'll decide after

we get the report whether it's sensitive.

DR. BIENENSTOCK: We wouldn't accept a contract of that sort. We would accept a contract that allowed us to self-regulate, but no one in which the outside review either with industry or government. I mean I think if you gave that to a company where you were performing a clinical trial and you found out that their product was toxic, you don't want to give that away.

DR. EPSTEIN: I think that there is very little or zero chance that if you do research sponsored by a corporation that it does not give you proprietary information that somehow somebody will claim that what you end up with is proprietary. That can't happen -- you can only get proprietary from the input.

Government allegations are maybe different you can generate something that is sensitive or classified without any sensitive or classified input, so those two are very different.

MR. MORRISON: In drug testing they claim the results from drug testing are proprietary information at least to a point, even though obviously the doctor relation with the patient is not proprietary. The industry makes those claims; whether or not they're legitimate is a second question. Even in that context, but I think that generally speaking that certainly is.

MS. KNEZO: This is a little different. I was wondering whether or not there will be any constructive precedent in the case of select agent research and publication controls. Because there are controls on select agents now or at least they're identified. And there is sort of pseudo licensing and control of laboratories and access and such. But there are no prepublication controls except for those applied by the journals themselves and the professional associations which results from a dynamic interplay between the government and the professional researchers. The select agents obviously have serious implications for utilization by terrorists. I was wondering whether or not that might present any type of a precedent for procedures that could be developed in this area, whereby there would be a sort of code of ethics that the journal editors in the fields might develop and would play a significant role relating to judging publication possibilities for research that might result from the Centers. Of course we know the universities themselves also publish their own reports so there would have to be a judgment made at that end. But there might be some constructive precedent in that area.

DR. BERNSTEIN: What's the experience with that so far it's been in place for a while now, isn't it?

DR. EPSTEIN: All of SHSI's regulations and law

have nothing to do with the information subject. There all about conditions in which we access the bus and how we treat the physical access physical security of the biological organisms. The question about what research information may be developed during the course of biological research is very much in front of the community. We've been having meetings on that for at least three year's. In which January 2003, the Academy sponsored—in conjunction with CSIS—where there's a lot of acknowledgment that there is in it there, there is something there that we think falls into this category. It may not be wanting to push it to the world, but we don't quite know how to define it. We've now been three years since then and I am convinced that we are further away. And we do have a National Academy report that was very influential. It identified seven types of experiments which are often mischaracterized saying these are dangerous that's not what they were identified. These are seven areas in which someone needs to go look at the work that's proposed and decide what to do with, which by the way we haven't gotten very far, we don't know what we would do in these areas. We know how to define areas that have a name. Mary is here with the National Advisory Board of Biosecurity, which has a mission of overseeing a process of local review where our institutions will look at things on a proposal end, coming up with whatever it is that we can

come up with on the publication side. And so the precedent value is for three year's -- they got a head start and I hope we're further along, but I don't think we really think we are. In many ways I'm much less hopeful that we will come up with nice clear criteria than I might have been. I think what that precedent has show me is almost every case that has come up there are legitimate reasons of why of course it should have been published and legitimate reasons why oh my god are you crazy? And the easy decisions are the ones that don't have scientific merit. The ones where there's some scientific merit almost by definition there's probably one that can make. I haven't found one case where I think information was important and I think could have been written in longhand and given to the six vaccine manufacturers who needed it. I'm not sure that should be published to the world. But that is a case one out of what a million biological papers in the last couple of years. There short answers, they're further along on this issue, but there's not a whole lot of help there.

DR. BERNSTEIN: Now the journal's acting as --

DR. EPSTEIN: Very infrequently. The American Society of Microbiology publishes a number of journals. And they have a process where a reviewer or editor says gee I think this paper has some concerns, it will get looked at by other people. In two cases there have been changes made to

papers. At least in one of those the thing that was taken out of the paper was printed in the news section of *Science* rather than article section of *Science*. Every one of these that has come up in the past has become a news story because it has been so unusual. And again they're very exceptional cases. And the actions that have been taken have been sticking a little bit of justification so why we should synthesize 1918 flu as opposed to don't put that in the literature. Make sure the reader knows why we did. Again there is a lot of thinking given to that issue, but very little operational guidance. We are all waiting -- Mary is going to get the board in shape.

MR. ARMSTRONG: The more I think about that the more I like it. There's an old saying in the Air Force, you don't build sidewalks until you find out where the paths are. And one of the problems in writing this regulation that DHS has put out is they haven't anticipated the problems.

I like James's idea that there is a great opportunity for the Centers as sort of a place to do this. To get together and I think that it can be to get together and say here's this case that we had and this is the way we dealt with it. What do you guys think and from that develop from a case study standpoint. The beauty of that can be then transmitted, of course DHS would be sitting in, we would other experts sitting to render some thoughts on it.

Then they would be able to come back to the regulation that had more sense to it, because it's based upon some hard cases. Now the beauty of this is that the whole time that the agencies are dealing with this 90-day thing that Andrew Card put out. I don't think his resignation today eliminates that timeline. But nonetheless it says you're doing something constructive. So therefore you're not just putting it off, you're trying to do something. The process we're trying to understand better is how this applies at the university level as part of the Centers of Excellence.

I said it in the beginning I think that DHS ought to put out something that is more definitive than this. I've come around to the idea that I don't think they can much improve until they get more input and data as to what the problems really are.

DR. GANSLER: The problem with the case study methodology or as you suggest case law is that it's going to take a considerable period of time to build up enough cases to cover all of the examples that will come up.

MR. ARMSTRONG: I don't think that's bad.

MR. MORRISON: It's only after the fact. You can't give people much guidance until you got your case studies.

DR. GANSLER: One of my favorite bumper stickers is the real world is a special case. Each case is going to be different. And therefore it will take some time to build

up that history.

DR. BERNSTEIN: Just to remind everybody -- that document was not written with the Centers even remotely in anybody's thought process.

DR. GANSLER: The one that you sent around though that said --

MR. AVIDAN: You know I thought Nicole was very clear about that.

DR. MAZZA: The 13-page document, but then there's the 3-page document that was developed by the Center.

DR. BERNSTEIN: I though Sam was talking about the 13-page document.

DR. MAZZA: Sam was talking about the 13-page document. The 13-page one that's right.

DR. GANSLER: How about looking at the question that came up a number of times this morning. The D, what are the elements of a reasonable appeals process? One of the things that is very clear is, at least what I've observed in universities is that we have a wide variety of opinions by every professor and as a result someone will say this should be sensitive. And he or she will say I want to publish it and I don't think that it is sensitive. So there needs to be some form of an appeals process and it can't take more than 26 years and that's the second half of that question. Comments, thoughts on that? An appeals process,

or a reasonable time period for holding up some publications?

MR. HODGE: I absolutely strongly support that, not just because this is the Federal government involved and appeals are something of a constitutional norm. Even more of the case, what DHS eventually—not to speak for them — what they want is this built up body of case decisions. Absent that you have nothing to the appeals process to offer other than at some point we're going to allow somebody to make some discretionary decision, not based on anything per se, but rather their discretion on the facts.

So for example, in any appellant process that is constitutionally grounded you have some decider, some arbiter that making decisions based on prior decisions and trying to define likes/dislikes in the use of that process to the degree if possible. The appellate process that's built into this is really saying that we're going up the ramp as far as we have to go before somebody says I'm making the decision and here's where it's going to be.

I think this is going to be a little tough at some juncture for one or more of the universities to deal with in regards to these particular issues. This has to be spelled out a little more systematically to make sure that the final arbiter is without doubt known and we know what the arbiter will be basing there decision on and that people will learn

to live with that through hopefully reported or at least available case studies like these for analysis in the future.

DR. GANSLER: What do you suggest?

MR. HODGE: Without question it has to involve some fundamentals that fit, just to make sure. Really I'm talking about constitutional grounds of appeal. What could be a very substantive decision that could have some significant financial repercussions on the universities involved as well as first amendment issues. The elements of that are really quite neatly spelled out. The Supreme Courts is all over this. They have spelled out exactly what you have to do. I don't think this about trying to ramp it up to that level of appellant court.

But it is about providing certain protections just to make sure that people know what the route would be, how that's going to be spelled out and how that would be a very timely process. So that's just something that I don't quite see in the existing draft. But to all credit to DHS, I don't think that they suggested that this is a full appellate process here. They really just provided the suggestion that it's legal. With the idea that the body to develop decisions reported in a way that's non-sensitive as possible to help guide future cases will led to DHS's benefit not to it's discredit. To have that type of

document out there that could be extremely useful for future decisions.

DR. GANSLER: I would think that the universities would worry that that decision would go back to the government and then go to the security officer in the government. And I think I know the answer beforehand. So I think there ought to be something other than that as the basis for a decision. One of which could be the university being the court of last appeal or maybe another Center Director as the court of last appeal.

MR. HODGE: Maybe a different university will use its process.

DR. GANSLER: That's what I mean a different Center to make the decision. I would think that a university would be more comfortable with that than saying I'm going to have the security officer at DHS to handle it.

DR. BIENENSTOCK: There's something that I don't know the answer to that might be relevant here. Suppose you have an IRB that makes a decision, the hard ones for instance, are when do you allow children to be human subjects? There are always a set of issues in that one; is there an appeal process in that?

MR. HODGE: Yes.

DR. BIENENSTOCK: Who hears the appeal?

MR. HODGE: I'm not expert on IRB processes

with all apologies, and others in the room may know more about this. But, there are appellate processes involved. So an initial determination by an IRB can be cross reviewed by another IRB, and at the point in time which the final IRB decisions made as you may know from Maryland with our decisions in conjunction with Kennedy Kreiger Institute, that can be appealed to court as well.

If the decision is egregious, if it's contrary to the federal regulations that can be taken right up to the Maryland District Court. And you're off to court appellate process there. But that's of course related to harms, damages, and claims related in torts.

But the reality is there's no stopping the appellate process for review of IRB determinations if they result in injuries, or damage, or harm to others. I think there's a possibility that this process could result in some harm or damage or injury to individuals or to the university. And daresay that's why spelling this stuff out right, up front and really giving universities an opportunity to know where the final arbiter would be a critical part of that.

MR. MORRISON: Not only who's going to be in the Supreme Court of the United States on these questions, but also the prepublication review that's mostly for the CIA and other similar ones and also with review of classification

determinations. In theory there's a right but aside from the fact that you almost never win, it takes forever. And so the one thing you got to do is if your going to let the government do it at all you got to build in some real firm deadlines and that unless you decide to exercise whatever power you get by such and such a date we have the right to go ahead, rather than the other way around.

Because after all we started with unclassified material, the government may well object and that's going to have to be negotiated. But, don't expect anything to be done quickly. And of course in this area that's most sensitive and where publication is obviously vital to the researchers and to the rest of the world, time is a really serious problem.

DR. GANSLER: I mean these people, their tenured appointments are dependent upon it and publications. There is a trial going on now in Virginia over a 9-11 case that was a few years ago. I don't think that we want that to be the result of this. What's a reasonable time period?

DR. EPSTEIN: Another precedent to be aware of and not slip into automatically unless it's decided is that decisions are not appealable. You can not take them to court if you're ruled against that's fine. That is a security decision that is not in the competence of the courts to review. So it is not possible to appeal that.

And I think that it's probably not the appropriate answer here.

DR. GANSLER: I was wondering what you were leading up to.

DR. EPSTEIN: It falls as a security question, that's probably where you will end up unless you take a conscientious decision to not end up there.

DR. GANSLER: We are differentiating between classified and sensitive.

DR. EPSTEIN: Well that's not classified, that's export.

DR. BIENENSTOCK: Remember also there's a societal price for delaying often, too. You may delay information that could lead to the development of vaccine until after the flu has passed through or something. I mean delay is not just tenure of a faculty member.

DR. GANSLER: So what's the reasonable time period that we would put on this D question? The fact that unless that it is stopped by whomever we define does the process that it is assumed to have been approved. Is that six months, three months?

MR. HODGE: I'll throw 90 days on the table to say that should be adequate time.

MR. MORRISON: Are we talking about a five-page paper? And is the same paper reasonable for 5-pages as it

is for 90, 100, or 500?

DR. BIENENSTOCK: If 90 days is our traditional delay for patenting, the whole academic world seems to have agreed on that.

DR. GANSLER: That would be a very constraining decision.

DR. EPSTEIN: Only the appeal papers actually get out in 90-days.

DR. GANSLER: Publications may take two years after the appeal.

MR. MORRISON: But you can't send it to publication until you got it.

DR. GANSLER: But that's the reason you want to get it out before publication. Other comments on that question of D?

MS. KNEZO: I think there is a question of who can appeal. Is it the researcher whose paper isn't published or is it another researcher, or potential terrorist, or someone from the public? Who can make an appeal to get the information?

MR. HODGE: Well the two parties are the university and DHS.

DR. GANSLER: No it's the author.

MR. HODGE: Represented by the university. Obviously they are funded by DHS.

DR. GANSLER: No.

MR. BERSTEIN: No, no but the university may have a different opinion.

MR. HODGE: That's true.

DR. GANSLER: The author would like to publish. That's an a priori assumption. The university may be responsible and not wanting to be sued and therefore have a different prospective. The older document that said clearly that the author would have basically all the authority initially, and so that goes to your question. But I'm not sure what the answer is.

MS. KNEZO: I'm not either.

DR. BIENENSTOCK: I don't understand the university appealing. That is that I've never known us to claim ownership of intellectual ideas for things, only of tangible intellectual property. So I can't understand the university's appeal. I think it would have to be the author's.

MR. MORRISON: It would be nice to have the university support. We wouldn't want to preclude the university coming in and saying we think it out to be public and putting the university's weight as well as the author's desire because if I was the author I much rather have my university come in with me, not an independent appeal, but some sort of joint appeal.

DR. BIENENSTOCK: I would anticipate that Stanford would be in that case, a good place in most situations. I can't speak for other institutions.

DR. GANSLER: Now who are you appealing to?

MR. MORRISON: I don't know, general appeals go to the government.

DR. BIENENSTOCK: We were hoping to keep it within the universities.

DR. GANSLER: That is what I was saying, if the university has already decided a priori that they're always going to be on the author's side there's not much of an appeal there. Not an independent third party in effect.

DR. EPSTEIN: I think ultimately what the policy is silent on probably because it is a very hard question. Who is the ultimate last resort? Is it ultimately a government call or is it ultimately a university call?

We've heard it was government money therefore ultimately the government calls the shots. I think that's only if those strings are put on the money in the beginning and much government money is handed out without that string. I think, again if the government wants to pull that string it can. But I think if the government goes to universities it's giving up that string in this case.

I would suggest that the appeals court would be the eight Center Directors. They all live in similar

environments; it would be a little bit of a task for them. But they all know if they piss off DHS over and over again they're not going to get their Center back. So there is a little bit of governance there, but it's a little bit of a third vice because I don't think the ultimate arbiter could be the government. And you need somebody I would nominate some board of eight directors.

DR. BIENENSTOCK: There's a whole realm where the government delegates to the university the responsibility of research misconduct—the IRB's. The research misconduct rule has a provision in it that if the university cannot perform the function then the agency can step in or in other circumstances the government can step in. But to my knowledge it virtually never does.

With the IRB's we now have an accrediting system - - they're generated by AAU and AAMC. And it looks at whether you have systems in place and are using valid criteria and things of that sort. I would hope that in this realm as well that the responsibility would be delegated entirely to the university. I mean you do have lots of experience of us behaving responsibly.

MR. SHEA: I would just like to point out though as I understand it, the Centers are not solely located at individual universities. There's a lead university and other universities. So the procedures that are put in place

at each of the member universities for any particular Center may not be exactly the same. There may not be sense of confidence in another university's review of the publication that would be put forward.

If you are going to say that there is a final point of appeal, I think it needs to be not at the university of one of the author's who is wishing to put forth this paper. But instead, either a combination of the universities of the authors that are listed on the paper or the Center Directors.

This brings up the point that was raised earlier of what if you have a research paper that has mixed authorship. Some people who are in Centers with the funding coming from the Center and some people who are from unaffiliated universities and how would sensitive, but unclassified type papers be reviewed and appeals resolved in that circumstance? It seems not only would it potentially be holding the publication up of people who are members of the Center, but also publication of information of people not actually part of the Center.

MR. SHORT: I tried to keep my mouth shut; it's her fault. She taught me two years ago in her report on sensitive, but unclassified that the policy challenges to balance of science and security without compromising national security, scientific progress, constitutional law,

or statutory protections -- if it has to do with balance compromising scientific progress I think the universities would be a great court of appeal. If it has to do with constitutional and statutory protections I don't know what would be a great court of appeal. I'm not sure it's the universities.

Now I do have strong feelings if it has to do with compromising national security, I don't feel universities are a great court of appeal. Again it gets down to -- it's all your fault -- that we have to decide what's being compromised and I think where we go is different depending upon that decision.

DR. GANSLER: One of the reasons for getting all of the Center Directors cleared was so that if issues of that sort do come up that do require you to have access to classified information to determine if in fact this is going into that area that they should be qualified to make that decision.

MR. AVIDAN: If I may, sir. I think that earlier you suggested that one of the options that you've considered viable was leaving this with some anonymous security officer of DHS. And you suggested with good reason I'm sure --

DR. GANSLER: I think that it started a precedent.

MR. AVIDAN: -- everyone at the table probably

feels that his first inclination would be towards national security. I might suggest to you that in a mirror situation that that security officer and those people concerned with national security might feel the same way about those of you in an academic environment and I give you one case in point.

Recently, the Supreme Court decided a case in the Solomon(?) men which indicated that all universities must provide access to military recruiters. At that point it was overwhelming a case of academics against military, the Department of Defense, it was very much an "us" versus "them" sort of situation. Stereotypical views were espoused on both sides.

So whatever you suggest about people on the DHS side, maybe the DOD, and for the record I have to claim that I am not representing official DHS laws, I'm simply an interested bystander, I would suggest that we would have the same concerns about progressive elements and their desire to triumph academic freedom above all else.

And that being said, I'm participating as Nicole mentioned, in something called the SBU Working Group, which is a subset of a larger set of working groups right now that were created after the President's memorandum to executive agencies on December 16th, last year. It said that we need to come up with a common framework we need to develop an ISE (Information Sharing Environment). I think this is an

excellent input to that government effort. I seriously hope that you will come up with some viable suggestions for input into that.

As far as questions like a uniform or widely accepted definition of SBU, et cetera, I wonder if you all might not have an excellent and unique viewpoint that would be much appreciated in these working groups. I mean these people have six months, until the end of June, I believe, to come up with actual hard policy. So I commend you all for your efforts.

DR. GANSLER: Let me just for the record make sure you understand when I was distinguishing between a security officer and a policy maker within a government agency, they often will have differences of opinion. When I was under Secretary of Defense I frequently disagreed with the security officer. So I saying, the distinction here that I'm trying to make is that I have no problem with the policy maker making those decisions as contrasted to someone who's only viewing the issue from the prospective of security alone, as contrasted to security versus the benefits of having it published.

MR. AVIDAN: I'm simply trying to demonstrate that everyone has a multi-dimensional view or at least something much more multidimensional than we might initially believe.

DR. EPSTEIN: I appreciate the point about the

symmetry, but in a symmetric situation the security people could be just as afraid of the universities as the universities are afraid of the security people.

But I would submit that this is not a similar situation because again the government always has had the ability to keep things internally if it thinks it may bump into something where if the government doesn't make that last call our nation's survival is at risk.

These are all things for which that does not hold. These are all things for which our security depends on getting smart people that may not be American. Or it depends on doing analyses when one doesn't control the input information it's all out there. These are all things from the get go that do not live in the world where the government has the expectation that something might be so scary that we need to bottle it up. So I think it's not just a matter of the situation that we are already out there.

Going back to the Center Directors, these are competed by DHS, it says, here is the proposal, DHS should certainly as a condition of an award of a Center say, we trust the people running this. We think they have judgment to make these kinds of calls.

DR. BERNSTEIN: Present company aside.

(Laughter.)

DR. EPSTEIN: For future Centers. It seems to me again, if you think there loose then pick different ones next time. The thing that Jack that you're worried about, is people who are making trade-offs without having one of the scales there. Security people never have a concern about a stereotype never have concern about a mission. Government program directors theoretically have both concerns.

But often depending on what agency you're in you see a piece of your program you may not actually have a full balance. I think the Centers do have. The clearly have a lot of input on the university academic side, but the reason they exist is because this is a different kind of thing then the normally do in academia they are the result of the DHS and they are there precisely because these are questions on the border and that is or should be a condition of selection. So I do think that the balance is there.

DR. GANSLER: What do the Center Directors feel about that?

DR. WILKENFELD: I was going to come back to a point that was made earlier today which was the reason DHS established the Centers was because they wanted this kind of unique input which perhaps academics in a more independent environment are able to pursue. So, we do potentially bump up against more hard-nosed security issues.

But the real point is, I think as you said, if they want to do this internally they would have done it internally but they presumably saw some value in going outside of the usual box. When you go outside of the usual box you come in contact with all this messiness because we're outside the fence.

DR. CLARKE: I'm just trying to build a little broader package of things we're deliberating. What if we started out with the idea that we need to have fairly general guidelines on this that would come from the policy level and the security level of the agency we're dealing with and would come through the office of University Programs for interpretation to provide a set of guidelines that would pertain generally to the Centers. Those would still be relatively general and I'm going from the top down and coming back up on the other side in a moment.

But then when you get down to the individual Center levels where probably the best set of general understanding is about sensitivities, have those guidelines be interpreted at the Center level and made available to the PI so that they generally understand what the ground rules are. There can be some consensus building on that involves agreement but once the guidelines were in place then the review process of what the product is could be in the context of a set of guidelines that have to do with how the

research was designed and implemented and what the ground rules were.

So you have continuity from the early planning stages that would pull you all the way through the publication side. And if that had merit it seems to me that the one or two really important things that would solidify the process of thinking about this would be to come back as we said several times and say what does it mean? If you're going to have SBU, what does that mean in terms of who can handle the information? How it would be distributed? How it would be protected? Until we specify what that means I think that it's pretty hard to make good judgments about whether or not to classify that way.

DR. GANSLER: Who would you have as the appeals process in that model?

DR. CLARKE: I like the proposal that has come out so far that you would try to settle this at the lowest level you could within the university and you would hope that some large percentage of the time that that would be done at the university level because you would be implementing a policy that will have already been vetted and agreed and not something that came out of the blue. So do it mostly at the university level and use the appeals process rarely. And if you do, then do it as our present job says jointly between the university and S&T.

DR. GANSLER: Of course the contract doesn't say if there's still final disagreement between those two organizations.

DR. CLARKE: If it becomes the final disagreement then to me the sponsor has the final ruling but you would assume that would be infrequent. The concept would be to create something on the front end that let's everybody understand what the ground rules are and the expectations. So that when the review process comes into play you are dealing with a process for bases for making those decisions.

DR. GANSLER: The last question on this list is the question that we debated quite a bit this morning whether or not you could have a definition. I get the distinct impression is the answer came out pretty clear on that one. That at least as of now, until we get a case history and enough experience with this, we may be better off not trying to define it other than the very broad definitions for example, that Arty gave a few minutes ago, calling it restrictive in that sense.

That there are a class of people for whom it is applicable to distribute it and otherwise it's not for publication. That's kind of what I was hearing people saying.

DR. SILVER: Aren't we getting somewhere pretty

soon a definition from the project?

AUDIENCE: I actually sent the draft concept paper developed by the COE's. From what I saw in the last readings the standards in here on the second page, the exceptions could include, but are not restricted, to the following: The proposed research involves select agents, economic or risk analysis models that expose specific vulnerabilities, etc. Those are excellent.

DR. GANSLER: It's the "et cetera" that some people find unconstraining.

AUDIENCE: I forwarded that to the people who are working on the definition.

DR. GANSLER: Would you be willing to drop the "et cetera?" That's what is causing the concern, obviously. Other comments about the document?

DR. VON WINTERFELDT: I want to bring up point 3 on page two. There is this definition in the second part of that terrorist organizations could not independently infer the same information for open sources under reasonable conditions and/or the information provides specific guidance on how to effectively execute a terrorist attack.

If this was just the "or" I think we'd be in trouble. I think I would be much more comfortable with the "and". Because it's the "or" the first part of it could be operative, and I think a lot of the stuff that we do would

not be under reasonable conditions easily available because we're producing stuff that's usually in journals and it's not open. I'm worried about the "and" "or", as petty as this may sound.

MR. BERSTEIN: Jack, one of my hopes is that we can look at this in a larger landscape and you mentioned early on your also taking on a much larger study where this is one of the issues not the only issue. It's sponsored by two agencies, neither one of which is DHS. Maybe you can take a few minutes and sort of talk about what you hope to get out of that. I mean you have a catchy title, something like science and security.

DR. GANSLER: We can both comment on that and our expert over here on the right can comment even better. Gary Hart is one of the members. Gary keeps raising the issue, what is security? Are we dealing here with pathogens, are we dealing with terrorism, are we dealing with future nuclear powers, current rogue nuclear powers, so forth?

And then how do you therefore define what things you are going to constrain? And that can be broad/narrow and it's trying to also deal with the constraints that deemed export control also plays on the issue of foreign scholars, foreign students. You can look at how many Nobel prizes where people who were not born in the U.S. and how many of our people in Silicon Valley are not U.S. born.

So there are a lot of issues that are coming up now increasingly in terms of restrictions that have a very adverse effect to go to Gerry's point on scientific discovery in America. That if you start putting restrictions, and that is the reason that I made the comment about if it's only from the prospective of security and not from the purpose of long-term economic gain to the nation, than you are going to do a lot of things that you can assure will keep people out, that you can assure you won't publish anything. Go to the Russian model, sort of total constraint of everything, and the result would be I think very undesirable for the nation.

In general people have the impression that we are drifting that way. There's a lot (and this is obviously off the record) of action being taken on the Hill today that are extremely isolationist and that are very adverse to the effect's of the benefits to the economy and to science in general. So that's the broader prospective that we're taking in this other National Academy science and security study. Do you want to add anything to this?

DR. BIENENSTOCK: I think one of the other things that we want to do is get a broader discussion of these issues. So there will be three workshops, one in the Boston area, one in Atlanta, and one at Stanford. In which these issues are discussed certainly we want the American academic

field to consider the issues.

DR. GANSLER: We also have people who aren't from the academic community in the sense of former military, formal national security people, former intelligence community. The same person can cover all three of those.

DR. MAZZA: More efficient. I might just add that the committee has been sponsored by the National Science Foundation and the National Institutes of Health. We have been encouraged in doing this by the House Science Committee as well as OSTP. The point was to get the two communities broadly defined as academic community, academic researchers' community, together with the national security community to talk through and wrestle with these issues: One being SBU and other restrictions on publication and access. Another being the management of biological agents, and of course in that one, we're very mindful of NSABB and what their doing.

DR. GANSLER: We have one of their members on the board.

DR. MAZZA: Two actually. So we're looking at this in a very broad way. The first meeting was held in January, there's a regional meeting at MIT May 15-16, and then one in Georgia Tech on June 5-6, and then we'll go out to California probably in the fall. I'd be happy to put you all on the list and send you information so if you'd like to attend and participate you're welcome to do so.

DR. GANSLER: There will be one final conference in Washington and then the report coming out.

MR. BERSTEIN: Besides giving you a chance to brag about what you're doing, I think that the point was that those are issues that we are discussing here today. We tended to sort of embody some of the concerns here because we're dealing with terrorism. It's well beyond that, it's the same kinds of issues. I don't know what kind of product.

DR. GANSLER: That will have a final report.

MR. BERSTEIN: Final report but not a set of recommendations?

DR. GANSLER: Yes. We were asked to give options. There will be an Option A - do nothing; an Option C - do everything and then we'll make a recommendation.

DR. BIENENSTOCK: Mel, if you feel left out of Sponsorship -

(Laughter.)

DR. MAZZA: I was going to say, Mel, we've got a meeting for you.

DR. BERNSTEIN: It would actually be a big step forward to be able to actually be engage that community as well. It's a larger community, but the issues are the same.

DR. GANSLER: This is just simply a subset of that issue. Clearly when we talk in the future about security in

science, we are going to be talking about security that involves Homeland not just the traditional defense arena.

DR. GRANT: I would just add to that Mel, and this is saying the same thing from a slightly different prospective, we have a whole suite of national security policies which include visas, it includes OFAC, it includes ITAR, and there's a different regulatory agency for each of those.

So particularly from the standpoint federal-wide or OSTP prospective, ideally will get some input across each of those and we may be able to find some common principles, some common concepts, and so forth, could then inform each although obviously they will all be on their own independent path.

DR. BERNSTEIN: It is going to be very important for us to make sure that we're aligned with the kind of more general thinking that is going on.

DR. GANSLER: The problem is that that the general thinking is not aligned.

DR. BERNSTEIN: But hope springs eternal, right?

DR. GANSLER: Even the deemed export control we have a commerce and a DOD document that are quite significantly different. And now commerce has backed off and said they are going to wait a year. DOD hasn't. You can take that one home with you.

It's clear the point of your having this meeting is a very important one and I think that you deserve a lot of credit for doing it because you're raising the right issues. The fact is that there not resolved and they're not consistent within the government, the fact that the President says, why don't you guys get together and agree on what *sensitive but unclassified* is -- when there are probably at least thirty-two definitions out there now within government agencies. And then there is everybody else's interpretation thereof.

So we really have a lot of confusion in this area, everyone's sensitivity since 911 has gone up, but it may go overboard. The thing that mad America great was not having those restrictions and so that's where people are raising concerns. I think you heard that today, there's a lot of opinions.

DR. WILKENFELD: I wonder if in the interim if you have any advice for Centers as to how to proceed? We've heard about one model where the CREATE Center has sort of their own in-house security person whom they vet various papers and so forth.

DR. GANSLER: Their own in-house counter terrorist.

DR. WILKENFELD: I guess. We on the other hand have nothing. I'm sorry to admit but we have nothing in

place, we're pretty new so we haven't actually faced the issue yet. I suspect the other Centers are somewhere in between these two extremes.

DR. BERNSTEIN: Well this document largely, and maybe not be absolutely correctly, since not everybody is claiming ownership of this, really did come from some collective set of ideas not widely accepted. I mean the university community as we all know is not monolithic. I mean every institution has its' own particular point of view on the subject and they should.

And what this document is trying to start to do—and that's really what I think some additional conversation would be helpful --is to see if there's sort of the beginnings of an approach which each institution might have to modify depending on its' own particular point of view. But at the end of the day and I think that it was mentioned many times here, no one who wants to deliberately give information to somebody who wants to do something terrible to the United States.

What does that mean? What are gradations of that?

When does it really cross over into that realm? And those are subjective. I think we could go through the literature now and see things that some members of the broader community would say that never should have been published you know it's giving aid and comfort to the enemy.

It's the Centers responsibility in the end of the day is to be able to say can we live with some additional oversight internal ideally if not some other kinds of approach. Jim has pointed out that DOD believes it can exercise its' rights if it sees things developing in it's own research activities. I've been at universities where that was done retrospectively and the university gave the money back. And for the university to do that it's a painful thing, I can tell you.

You have to have on both sides the same concerns but they're viewed differently. The document here I think is an attempt to balance those two things. Again I will repeat what I said, notwithstanding Detlof's uneven statistics here, is that the issues should be infrequent because we try to select topics to ensure that that's the case.

We should allow the universities to self-regulate insofar as possible, but to feel comfortable enough to come and say, we don't really don't know the answer to this one and we're going to turn to others to help us think about it. Here's the hard part of course, if there continues to be disagreement at the end of the day how do we deal with that? And that is hard.

DR. BIENENSTOCK: Mel, I think there's a third factor. If we're thinking for the nation as a whole, these

groups at the centers or whoever makes the decision is going to have to make a decision; Is the nation better off withholding this information because it may aid some evil person or publishing the information so that the fix to the problem becomes real? Okay. That's a really difficult decision, it'll come about in many different arenas.

With biotoxins it would be the question; Are we delaying some cure or vaccine for the biotoxin? A lot will depend on the performance of your agency and the government ultimately to deal with information that is not made public in a way that truly achieves a fix or attempts to achieve a fix.

I have to say Katrina influenced us a lot. So as citizens we really have to see that if we withhold information from publication that you act on it in a way that increases our security rather than decreases it.

MR. ARMSTRONG: I've got a point that I would like to make James. And that is that I think there are a couple of guiding principles that come to me.

The first is that for many years now we've matched in the battle under the banner of NSDD-189 because that was pretty clear. And I think that is still the principle that we should live under. In other words, you should show cause why you should restrict anything as a starting point.

Now the second principle is that as you start

doing this and this is something that I put in my response to the deemed export thing is, that you have to have two parts of the equation. One part says, what's the likelihood of this getting into the hands that we don't like? The second one is if it does how much do we care?

Now there's an example brought out by BISS that said that the Boeing 777 flight manual should be controlled. Well I've used flight manuals for a long time and I didn't think any of them met that standard. And by the way, I think Boeing wouldn't like to have as many people as possible to read it that could not replicate the 777 just by reading the manual. So the chances of it becoming public are like five out of ten. The chances of us caring are one.

So for each of these determinations you first have to say, what's the likelihood -- we're talking about publishing, I think that it's broader than just publishing, I think that it is out in the public in some form. Maybe not published, maybe on the internet, maybe on some sort of data that transfers between -- and the DHS rule here does talk about e-mail it talks about other things. So it's more than just publishing from a pure academic standpoint.

First of all, somebody should be there to challenge each time somebody says something should be restricted. Why? To show cause. And then be required to show cause in terms of what is the likelihood of it getting

out and if it did what kind of harm would it cause?

Those are sort of the criteria that determine how we get there. I think Gerry brought this up to start with. I mean there's a downside to doing these things. If you want to restrict everything there's a downside, there's a societal downside, there's a science downside. So you have to go through the criteria, what is the likelihood, and then what do we care?

And if it doesn't meet a combination of an average of five on the Armstrong scale then you don't bother with it.

DR. BERNSTEIN: I think already pointed out, there is an interesting policy issue. The Secretary was criticized in some circles for pointing out that chemical plants are vulnerable and given actually a couple of specifics. The counterargument, which clearly I think is more widely believed, is that if you point that out you really indicate to everybody that your also aware of it and that you're doing something about it. I think that's the issue about over restriction. That's a policy issue about how you best deal with it.

I think with what we are trying to deal with here is something which is hopefully a little more clear cut. This is quality work, it clearly deserves to be published or disseminated, and in most cases and in fact ideally almost

every case it should be.

If the universities occasionally see something that they worry about -- the people in Minnesota worry about pointing out that there's a potential place in the supply chain that could jeopardize the food supply. I don't think that it weakens the quality of work if they don't say that Topeka Kansas happens to be the most vulnerable piece in the chain.

So I think that there's some common sense stuff that we can do. Hopefully that will serve the purpose.

DR. GANSLER: I think it may be helpful to you and certainly to the other test person we're doing, if the people around the table here were to comment back to you on this three page document. If you send a copy to Anne-Marie we could also coordinate among the agency. Words like "or" and "and" make significant difference. The fact that this doesn't have the 30-day and 90-day time response or it's approved kind of constraint on it.

You started off by saying two objectives, namely that the problems would be very rare and secondly, that the universities will decide essentially on sensitive information. Now whether this document will lead to those two is not as clear. And so a process that I think goes in that direction would be very much in the direction that I think that universities would like to see us going.

MR. SHEA: I would also like to suggest that perhaps this problem will not be as rare as we expressed. In general publishing of biological and select agent papers ASM looks at as I understand it, every single one. They had a very low rate of papers that they felt they needed to take even a second look at. And very few actions, if any, are requests for action from to the office. Without general research these aren't areas that have been specifically set up by DHS to be a Center of Excellence in an area that is germane to Homeland Security.

And so there are already several levels of filters that are bringing these research talents into areas that the results may have unintended or greater Homeland Security consequences than research directed by NSF or by NIAID.

In addition, those researchers who have put in proposals to become Centers of Excellence, are those researchers who want to work on these areas? So they're going to be thinking of the research problems that they can address that they see actually have a Homeland Security impact in the short-term.

So I would suggest that it may be very rare that there be *sensitive but unclassified* results. And that may actually be the case, but it also may not be the case. It may be that this is more frequent than we've been talking about around this table.

DR. GANSLER: Other final comment's that anyone would like to make?

DR. EPSTEIN: We've heard a couple of times that this is not a delusion, that's certainly the case for decades we've been living in the balance within the location of security. I think there are some things that are new about this.

When we did this in the Cold War we were looking at technology controls as a way to maintain a technological lead. If our planes were a little faster and turned a little tighter than these other planes we would shoot them down every time and in six months we would be six months further along, and we didn't care about that.

I don't want Al Qaeda to ever have a nuclear weapon design. I'm not going to feel comfort if they get it now, 10-years, 20-years, 30-years. So timeliness, your not protective a relative advantage. Ideally we'd like to keep them from getting an absolute war(?). So the tendency to want to protection may be much greater then but by the same token the ability to pull it off may be that much harder.

I think in the whole realm of is there such a thing of *sensitive but unclassified* literature. I think that it is common knowledge if we think it is as Arty said how are we going to use that? If you start looking at the details of if we have this who are we going to give it to

and how are they going to deal with it? If you can't figure out what to do with it I think the answer is we either publish it or disappears. We don't follow it up is the wrong answer. If there is something which doesn't merit publication by definition there's something that's pretty interesting and important there. And so we have to follow it up some way, classify it or come up with some way of handling it that makes sense.

And the last part is are you better off not going down the road and calling attention or using information for protection? That's a little tough because sometimes the protection is a decade off and maybe not feasible.

And in the computer security world you could always issue a patch, it's going to be a little harder to reboot the human body. And so again these observations about how things may be different from case to case they don't all point the same way. Some of those differences make information controls more attractive some can make them less attractive. But the bottom line I believe is that I just want to make people rethink some of the things that we've been looking at for a long time in light of where we are.

MS. KNEZO: One final thing that I pointed out in my paper and that is a few years' ago Congress passed a law called the Federal Information Security Management Act which

tried to deal with this question some of the issues that the General brought up. The law required the National Institute of Standards and Technology to basically develop some guidelines for agencies to follow which would nullify the static definition of sensitive that was in the Computer Security Act, which basically defined sensitive according to the kind of information it was and required agencies instead to categorize all information based on the sensitivity of the release of that information.

What problems would ensue if its' confidentiality, availability, and integrity were compromised? Which does extend to issues of terrorism I should say because national security information is not covered by this Act because that is concerned classified. But it does provide a way of thinking and procedures for agencies to handle all of their information and it may be something instructive for the Center Directors to look at. The guidance from NIST which is summarized in my report which I believe Anne-Marie sent to everyone.

MR. SMITH: I just had a few I don't know if they actually connect the dots. But first of all I think what Sam said about making sure we look at the actual risk. We were talking about how you know when it should be sensitive, but unclassified. Because it is sensitive, but unclassified in the first place I assume the risk of making the wrong

decision or publishing is much less than if it were classified.

I think there's a tendency to think that the consequences from sensitive, but unclassified are the same consequences if it were classified. And I think that's a misnomer and we have to remember that. That we are talking about a grey area that is very hard to distinguish in the first place. That's exactly why it's not classified.

This gets to a second point which is the Centers themselves I think are looking at some of these risks. They are in some sense a great place as guinea pigs for determining what should be released and what shouldn't. I mean maybe the Centers themselves should look at this.

Dealing with the export control issue I've learned that in some sense one reason it's hard to get good answers from the people who enforce them is ultimately it does come down to a case by case basis. It is hard to determine until you see it. And therefore, some of this common sense approach and people using their judgment and I also think it gets to us training faculty who are in these Centers that it's not business as usual. It's a different environment it's not the same environment that they work in everyday.

The last thing that I think is always important it gets to why the Centers were created and we haven't touched upon it today. But the Centers were created certainly to

bring people together to look at these issues differently because they are new issues. But they were also created and the reason the government is funding these Centers is to train people to look at these issues differently.

Which means it is a student environment and we can not forget that. So the product is not just trying to solve the problems, but trying to get a group of people together in an environment that will think differently to solve these problems and it is a training environment. So that therein presents the challenge that we at the universities are constantly faced with when we get into these areas and one of the reasons we don't accept classified research. Because we are trying to train people and this is an area that is going to pose continual challenges for us.

DR. BERNSTEIN: Amen.

DR. BIENENSTOCK: I just want to say that today has been for me, a really informative day. I'm thinking about things that I haven't thought about as clearly or as sufficiently before. I don't think that in the three and a quarter years that I was at the OSTP that I faced an issue as this one to really think through and resolve.

And as a university person I would like to thank the government representatives here for bringing this to us when you are far from having a regulation or rule so we can talk it through and we will continue to talk it through.

This was not business as usual in a lot of ways. And I for one very much appreciate it and I suspect my university colleagues and professional society colleagues feel the same way. So thanks Mel.

DR. BERNSTEIN: Thank you.

DR. GANSLER: Mel, do you want a last word?

DR. BERNSTEIN: I think I've spoken too much. But now that Laura is in charge of University Programs.

DR. GANSLER: Is this the Romeo and Juliet kind of thing?

DR. BERNSTEIN: Certainly if you have a chance to give us your comments on this document it would be very helpful.

DR. BIENENSTOCK: Please send them to Anne-Marie too, because we'll want them for the science and security program.

DR. GANSLER: Thank you all very much.

(Whereupon, the meeting adjourned at 2:35 p.m.)