UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	**Criminal No.: 10-225 (CKK)**
	)	
v.	)	
	)	
STEPHEN JIN-WOO KIM,	)	
also known as Stephen Jin Kim,	)	
also known as Stephen Kim,	)	
also known as Leo Grace,	)	
	)	
Defendant.	)	

CONSOLIDATED RESPONSE OF THE UNITED STATES TO THE DEFENDANT'S PRETRIAL MOTIONS

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I. Introduction

On August 19, 2010, a federal grand jury empaneled in the United States District Court for the District of Columbia returned a two-count indictment against Stephen Jin-Woo Kim. Count One charges the defendant with Unauthorized Disclosure of National Defense Information, in violation of 18 U.S.C. § 793(d).[1] More specifically, the indictment alleges that in or about June 2009, the defendant had lawful possession of information relating to the national defense – that is, a specific intelligence report marked TOP SECRET/SENSITIVE COMPARTMENTED INFORMATION (SCI) that concerned intelligence sources and/or methods and intelligence about the military capabilities of a particular foreign nation – which information the defendant had reason to believe could be used to the injury of the United States or to the advantage of a foreign nation, and that the defendant willfully communicated that information to a person not entitled to receive it, namely a reporter for a national news organization. Count Two charges the defendant with False Statements, in violation of 18 U.S.C. § 1001(a)(2). The indictment alleges that on or about September 24, 2009, the defendant lied to agents of the Federal Bureau of Investigation (FBI), by falsely denying that he had had any contact with a named reporter for a national news organization since meeting the reporter in March 2009.

The defendant has now filed four pretrial motions. The defendant moves to dismiss Count One, arguing that the charge conflicts with the Treason Clause of the Constitution **[Document 23]**. The defendant moves separately to dismiss Count One on Due Process and First Amendment

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[1] As will be discussed more fully below, Section 793(d) was first enacted as one part of the Espionage Act of 1917. Section 793(d) was later amended in 1950. See United States v. Morison, 844 F.2d 1057, 1064-66 (4th Cir. 1988). Although frequently referred to by the overall name of the original act, Section 793(d) was "not intended to be restricted in application to 'classic spying' but [was] intended to criminalize the disclosure [of national defense information] to anyone 'not entitled to receive it.'" Id. at 1066.

grounds, contending variously that Section 793(d) does not prohibit unauthorized oral disclosures of national defense information, that the statute's terms are unconstitutionally "vague," and that the First Amendment shields a government employee with a TOP SECRET/SCI security clearance from prosecution in these circumstances **[Document 24]**. The defendant moves to dismiss Count Two, claiming that a pretrial evidentiary hearing would show that he was impermissibly caught in a "perjury trap" and that he recanted his false statements six months later, thereby entitling him to the protections of a statute governing the recantation of false testimony before a federal grand jury **[Document 25]**. Finally, the defendant moves to suppress his statements to the FBI on September 24, 2009, and March 29, 2010, contending that he was "in custody" within the meaning of the Fifth Amendment at the time that he made those statements **[Document 26]**.

None of these motions has any merit. We address them in the order of their filing.

II. Defendant's Invocation of the Treason Clause has No Bearing on this Prosecution

The defendant asks this Court to dismiss Count One of the indictment on the ground that "the continued prosecution of this case violates the Treason Clause of the Constitution." See Defendant's Motion to Dismiss Count One of the Indictment under the Treason Clause of the Constitution ("Def. Treason Mot.") at 3. The Treason Clause provides in full:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

U.S. Const. Art. III, § 3. Tracking closely the language of the Constitution, the crime of treason is presently codified at 18 U.S.C. § 2381 and is a death penalty-eligible offense.[2]

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[2] While other parts of the Espionage Act provide for death penalty-eligible offenses, see 18 U.S.C. § 794, the defendant faces a maximum term of ten years of incarceration for violating

After a lengthy discussion of the history of treason from the time of King Edward III of England in the fourteenth century through our Nation's colonial period to the drafting and inclusion of the Treason Clause in the Constitution (Def. Treason Mot. at 4-21), the defendant concludes that Count One violates the Treason Clause. Id. at 22-23. In short, the defendant argues that he has been charged with "a purely political offense" under a statute that "punishes treason under a different name, but without providing [the defendant] with the substantive and procedural guarantees that he is entitled to under the Constitution." Id. at 23.

As an initial matter, the United States rejects the defendant's characterization of the charge contained in Count One as a "purely political offense," with the attendant minimizing connotation. The indictment alleges that the defendant, entrusted with extremely sensitive national defense information concerning both the sources and methods of intelligence gathering and the underlying intelligence about the military capabilities of a foreign nation that was so gathered, betrayed that trust by disclosing that information to someone who he knew was not authorized to receive it. The indictment further alleges that the defendant's betrayal of trust concerned information that he had reason to believe could be used to the injury of the United States or to the advantage of a foreign nation. See Classified Addendum filed with this Consolidated Response. Finally, the indictment alleges that the defendant acted willfully, that is, with knowledge that his conduct was illegal. In circumstances similar to this case, the Fourth Circuit described such conduct as an "act of thievery" committed by a "recreant intelligence department employee." Morison, 844 F.2d at 1069.

On the merits, the defendant's argument misses wide of the mark. The defendant acknowledges and then quickly attempts to distinguish contrary authority from the Second Circuit,

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18 U.S.C. § 793(d).

see Def. Treason Mot. at 23 n. 8, but he ignores the fact that the Supreme Court rejected his interpretation of the Treason Clause over sixty years ago in Cramer v. United States, 325 U.S. 1 (1945). Although he cites repeatedly to Cramer in his motion (see Def. Treason Mot. at 4, 12, 14, 18), the defendant omits any reference to the Supreme Court's holding in that case and, more importantly, the Court's explicit discussion of the implication of its holding on Congress' constitutional authority to proscribe specific acts, like the offense with which the defendant is charged in Count One.

In Cramer, the Supreme Court for the first time reviewed a conviction for treason. Cramer's prosecution arose from his "association with two of the German saboteurs who in June 1942 landed on our shores from enemy submarines to disrupt industry in the United States[.]" 325 U.S. at 3. Before reaching the issue presented in the case, the Supreme Court reviewed the history of treason. Id. at 8-28. Based on its historical review, the Court observed that the "concern uppermost in the framers' minds, that mere mental attitudes or expressions should not be treason, influenced both definition of the crime and procedure for its trial." Id. at 28.

The controversy in Cramer, as the Supreme Court described it, was the "fundamental issue as to what is the real function of the overt act in convicting of treason." 325 U.S. at 34. The Court held that the "very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy" and that every such overt act "must be supported by the testimony of two witnesses." Id. The Court reversed Cramer's conviction for insufficiency of the overt acts submitted to the jury under the Treason Clause standard articulated in the Court's decision. Id. at 35-45, 48.

In explaining its ruling, the Supreme Court directly addressed in Cramer the government's contention at that time that the Court's interpretation of the Treason Clause would make it too difficult to prove treason, to the detriment of national security. 325 U.S. at 45. The Court rejected that contention, observing that "the treason offense is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security." Id. Fatal to the defendant's argument here, the Court then expounded on the limited implications of setting such a high standard for the charge of treason under the Treason Clause: "[W]e do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name. But the power of Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety." Id. The Court further observed: "The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and the trial thereof may be focused upon [the] defendant's specific intent to do those particular acts thus eliminating the accusation of treachery and of general intent to betray which have such passion-rousing potentialities." Id.[3] To drive its point home, the Court identified specific examples of existing statutory prohibitions that fell outside of the ambit of the Treason Clause, citing, among other statutes, the Espionage Act. Id. at 45 n. 53.

Since Cramer, every court to consider a Treason Clause challenge to a prosecution under another federal statute has rejected such a challenge. Although the defendant cites only two cases from the Second Circuit, see Def. Treason Mot. at 23 n. 8, the Second Circuit has thrice rejected Treason Clause claims like the one that the defendant advances here. In United States v. Rahman, 189 F.3d 88, 111-14 (2d Cir. 1999), and in United States v. Rosenberg, 195 F.2d 583, 609-11 (2d

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[3] A legal scholar in this area, James Willard Hurst, on whose writings the defendant heavily relies (see Def. Treason Mot. at 3, 8, 10-12, 14, 15, 19), reviewed this language from the Supreme Court's opinion and concluded that it was an "invitation to Congress" to pass legislation without running afoul of the Treason Clause. James Willard Hurst, The Law of Treason in the United States 218 (1971).

Cir. 1952), both cited by the defendant, the Second Circuit rejected the claim that the defendants were charged and convicted of offenses – Seditious Conspiracy and Espionage Act violations, respectively – that were "treason by another name," but without the substantive and procedural safeguards of the Treason Clause.

The defendant suggests that these cases are distinguishable on the basis that the defendants in Rahman and Rosenberg did not challenge Congress' constitutional authority to pass the statutes under which they were convicted, but rather claimed entitlement to the procedural safeguards of the Treason Clause. See Def. Treason Mot. at 23 n. 8. At least as to Rahman, the defendant is incontrovertibly mistaken. In Rahman, the Second Circuit noted that the defendant's constitutional claim included the assertion that the Seditious Conspiracy statute, 18 U.S.C. § 2384, was itself "unconstitutional" under the Treason Clause. 189 F.3d at 112. But the defendant's effort to recast his Treason Clause challenge to distinguish it from these Second Circuit cases is unavailing for a more fundamental reason. In Cramer, the Supreme Court specifically approved of Congress' authority to proscribe "specific acts thought to endanger our security," and included Congress' passage of the Espionage Act as an example of the proper exercise of that authority. 325 U.S. at 45 and n. 53.

In a third case, not cited by the defendant, United States v. Drummond, 354 F.2d 132 (2d Cir. 1965), the Second Circuit rejected another Treason Clause challenge to an Espionage Act conviction. In so doing, the Second Circuit observed that the differences between the crime of treason and a violation of 18 U.S.C. § 794 "may not be very great . . . [b]ut the Supreme Court plainly regards them as sufficient to make the two-witness rule [of the Treason Clause] inapplicable," noting that the Supreme Court in Cramer "cited the forerunner to 18 U.S.C. § 794 as an example of a crime affecting our national security which is *not* merely treason by another name." Id. at 152 (emphasis

added). Of course, if Treason Clause challenges to Section 794 prosecutions have been rejected, so must the defendant's challenge to this Section 793(d) prosecution. See footnote one above.

Two other courts have rejected similar Treason Clause challenges. In United States v. Rodriguez, 803 F.2d 318, 320 (7th Cir. 1986), the Seventh Circuit, relying on Cramer, rejected Rodriguez's Treason Clause challenge to his conviction for Seditious Conspiracy. In distinguishing the crime of Seditious Conspiracy, the Seventh Circuit observed that treason is "the most serious national crime and is punishable by death." Id. See also United States v. Thompson, No. 06-CR-020, 2006 WL 1518968 (E.D. Wisc. May 30, 2006) (magistrate judge recommending denial of motion to dismiss scheme to defraud count on basis of its alleged conflict with the Treason Clause).

The defendant's motion to dismiss Count One on Treason Clause grounds must be denied as contrary to the Supreme Court's controlling decision in Cramer.

III. Defendant's Due Process and First Amendment Challenges to Count One Fail

Stripping away its rhetoric, the defendant's second motion to dismiss Count One makes four *legal* arguments: (1) that oral disclosures of national defense information fall outside the bounds of 18 U.S.C. § 793(d); (2) that the terms of Section 793(d) are unconstitutionally vague as applied to the defendant's conduct; (3) that the government's alleged past arbitrary enforcement of Section 793(d) prohibits prosecution of the defendant now; and (4) that Section 793(d) cannot withstand strict scrutiny under the First Amendment. Defendant's Motion to Dismiss Count One of the Indictment on Due Process and First Amendment Grounds ("Def. Mot. Dismiss Count One") at 8, 11, 21-25, 25-30. As demonstrated below, none of the defendant's four legal arguments has merit.

A. Section 793(d) Covers Oral Disclosures of National Defense Information

Before addressing the defendant's constitutional arguments, it is necessary to respond to his assertion that the word "information" in Section 793(d) should be interpreted to include only tangible

(i.e., not oral) information. See Def. Mot. Dismiss Count One at 8 n. 3. Such a construction, if accepted, would create a gaping hole in the coverage of the Espionage Act. It would impact not only Section 793(d), but also Sections 793(e), 793(f), and 794(a), all of which use the same operative language. Specifically, it would preclude the application of these statutes in all cases involving unauthorized oral disclosures of national defense information whether by government employees to the general public or by spies working for hostile foreign governments.[4] As the defendant reads them, while these statutory provisions would prohibit a spy from handing a TOP SECRET document regarding U.S. troop movements to an agent of a hostile foreign intelligence service, *these statutes would permit the spy's reading of that same classified document to the foreign agent.* As demonstrated below, nothing in the language of the statute, or the case law interpreting it, requires such an absurd result.

The starting point for statutory interpretation is the plain meaning of the statute's words. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003). Section 793(d) provides in pertinent part:

> (d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, *or information relating to the national defense* which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it . . . shall be fined under this title or imprisoned not more than ten years or both.

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[4] Section 794(a) is one of the principal statutes employed by the United States to prosecute espionage. It proscribes the transmission of national defense information to "any foreign government," to "any faction or party or military or naval force within a foreign country," or to "any representative, officer, agent, employee, subject, or citizen thereof." 18 U.S.C. § 794(a).

18 U.S.C. § 793(d) (emphasis added). The word "information," on which the defendant's nonsensical construction of the statute rests, is a general term, the plain meaning of which is "knowledge" that can be derived either from tangible or intangible sources. See, e.g., Webster's Third New International Dictionary of the English Language 1144 (Philip Babcock Gove et al. eds., 1986) (defining information as "knowledge communicated by others or obtained from investigation, study, or instruction."). That "information" here includes oral disclosures is further supported by statute's use of the word "communicate." A person can "communicate" information orally, but is not normally thought to "communicate" tangible items, like documents, writings, code books, or the like. Thus, construing Section 793(d) as limited to only unauthorized disclosures of tangible items, as the defendant proposes, ignores the statute's plain meaning. It is well established, however, that "when the statutory language is plain," the statute "must [be] enforce[d] . . . according to its terms." Jimenez v. Quarterman, 129 S. Ct. 681, 685 (2009).

In fact, every court that has interpreted Section 793 has held that this language was intended to differentiate "between 'tangible' information, i.e., the laundry list of items in the statute, and 'intangible' information, i.e., knowledge." United States v. Aquino, 555 F.3d 124, 131 n. 13 (3d Cir. 2009) (interpreting Section 793(e)); accord United States v. Rosen, 445 F. Supp. 2d 602, 614-17 (E.D. Va. 2006) (interpreting Section 793(d) and (e)); United States v. Morison, 622 F. Supp. 1009, 1010-11 (D. Md. 1985) (same). And with regard to the latter, Congress added the additional mens rea requirement – i.e., "which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation" – to address "concerns that the category of illegally communicated intangible information was potentially overbroad." Aquino, 555 F.3d at 131 n. 13 (citing H.R. Rep. No. 647, at 4 (1949)). Thus, the defendant's restrictive reading

of "information" to include only tangible items should be rejected as contrary to the plain language of the statute.

Indeed, the United States has prosecuted unauthorized oral disclosures of national defense information under Section 794 and its predecessor statute for more than 60 years. See, e.g., Gorin v. United States, 111 F.2d 712, 715 (9th Cir. 1940) (oral transmission of contents of intelligence reports to the Soviets), aff'd, 312 U.S. 19 (1941); United States v. Rosenberg, 195 F.2d 583, 588 (2d Cir. 1952) (oral transmission of national defense information to the Soviets); United States v. Pelton, 835 F.2d 1067, 1070-71, 1074 (4th Cir. 1987) (same). Given that the Supreme Court upheld the convictions in Gorin for the disclosure of intangible national defense information under the predecessor to Section 794(a) in 1941, see 312 U.S. 19, "it is reasonable to conclude that the 1950 drafters [of Section 793(d)] intended to adopt the same meaning" of "information" as it was understood in Gorin. Rosen, 445 F. Supp. 2d at 616. See also Woodford v. Ngo, 548 U.S. 81, 107 (2006) ("We presume, of course, that Congress is familiar with [Supreme Court] precedents and expects its legislation to be interpreted in conformity with those precedents.").

Nor does this plain language interpretation of the word "information" lead to an "absurd" result as suggested by the defendant. See Def. Mot. Dismiss Count One at 8 n. 3. The defendant's assertion – that Section 793(f)'s prohibition on the "remov[al]" of national defense information "from its proper place of custody" more naturally describes the removal of tangible objects – is misleading. The very next phrase of Section 793(f) states "*or* delivered to anyone in violation of his trust," a phrase which could also encompass the oral disclosure of national defense information. See 18 U.S.C. § 793(f) (emphasis added).

Indeed, as stated previously, if anything, it is the defendant's interpretation of the statute that is absurd and should be rejected. The purpose of Sections 793 and 794 is to prohibit and punish the

unauthorized disclosure of national defense information. It would be the height of absurdity to suggest, as the defendant does here, that those provisions prohibit the unauthorized disclosure of a document containing national defense information, but would not prohibit reading that very same document over the telephone. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

B. Section 793(d) Provided Constitutionally Adequate Notice to this Defendant

Relying on the Fifth Amendment's Due Process Clause, the defendant also argues that Count One of the indictment should be dismissed, because the terms of Section 793(d) are unconstitutionally vague "as applied" to his conduct. Def. Mot. Dismiss Count One at 3, 9-21. The defendant does not assert a facial vagueness challenge to Section 793(d). Nor could he, because there are no First Amendment rights implicated in this case. See United States v. Mazurie, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); United States v. Brown, 859 F.2d 974, 976 (D.C. Cir. 1988). Indeed, given that the proscription of Section 793(d) so "clearly applies to" the defendant's conduct, he would not be permitted to mount a facial vagueness challenge to the statute. McGehee v. Casey, 718 F.2d 1137, 1147 (D.C. Cir. 1983). "One to whose conduct a statue clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756 (1974). As demonstrated below, the defendant's vagueness challenge must be rejected for three independent reasons: (1) Section 793(d)'s "willfulness" requirement vitiates any possible vagueness concerns with respect to the statute's other terms; (2) numerous courts have upheld the statute's terms against vagueness challenges; and (3) the defendant was repeatedly put on actual notice of what his obligations were under Section 793.

At the outset, it is well established that even where First Amendment concerns are implicated – which they are not here, as discussed below in section III.D. – the Due Process Clause does not require "that a person contemplating a course of behavior know with certainty whether his or her act will be found to violate the proscription." United States v. Thomas, 864 F.2d 188, 195 (D.C. Cir. 1988). As the D.C. Circuit has instructed, "language is unavoidably inexact, . . . and statutes cannot, in reason, define proscribed behavior exhaustively or with consummate precision." Id. (citation omitted). Rather, all that the Due Process Clause requires is "that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal." Buckley v. Valeo, 424 U.S. 1, 77 (1976). Indeed, it is often sufficient that the proscription mark out only "*the rough area* of prohibited conduct." Thomas, 864 F.2d at 194 (emphasis added). While the Due Process Clause "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior decision has fairly disclosed to be within its scope," United States v. Lanier, 520 U.S. 259, 266 (1997) (citations omitted), "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute." Id.

Further, under an as-applied challenge, like the one the defendant makes here, a statute must be examined only in light of the facts of the case at hand. See Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2720 (2010); Thomas, 864 F.2d at 198. This means that the reviewing court need only determine "the existence of the actual notification" to the defendant of the prohibited conduct which would demonstrate "fair notice that the [law] applied to [his] contemplated conduct." Thomas, 864 F.2d at 198. Any consideration as to whether Section 793(d) would be vague if applied to other government employees, journalists, private citizens or anyone else is inappropriate under an as-applied vagueness review. See id.

Measured by these well-established standards, the defendant's as-applied vagueness challenge to Count One of the indictment is meritless.

1. Section 793(d)'s Willful Scienter Requirement Vitiates Any Possible Vagueness as to the Meaning of the Statute's Other Terms

The defendant's concern that Section 793(d) may ensnare his otherwise innocent oral communications, because it allegedly did not provide him with fair warning of the conduct proscribed (see Def. Mot. Dismiss Count One at 21), is misplaced. Section 793(d) requires the United States to show that the defendant acted "willfully." 18 U.S.C. § 793(d). Thus, to prove a violation of Section 793(d), the United States must establish beyond a reasonable doubt that the defendant had "knowledge that the conduct [at issue] was unlawful." Bryan v. United States, 524 U.S. 184, 196 (1998); see also United States v. Moore, 612 F.3d 698, 703-04 (D.C. Cir. 2010) (adopting Bryan definition of "willfulness"). By including a "willfulness" requirement within Section 793(d), Congress thereby ensured that the statute would not entrap the innocent precisely because "[a] mind intent upon willful evasion is inconsistent with surprised innocence." United States v. Ragen, 314 U.S. 513, 524 (1942); see also United States v. Hsu, 364 F.3d 192, 197 (4th Cir. 2004).

Moreover, with respect to oral disclosures of national defense information, Section 793(d) also requires the United States to prove, in addition to the "willfulness" requirement, that the defendant had "reason to believe" that the information in question "could be used to the injury of the United States or to the advantage of a foreign nation." See 18 U.S.C. § 793(d); Hsu, 364 F.3d at 197 n. 1. This additional mens rea requirement further ensures that the defendant had fair notice that the statute proscribed any unauthorized oral disclosures of national defense information.

As the Supreme Court has repeatedly said, such "scienter requirements alleviate vagueness concerns." Gonzales v. Carhart, 550 U.S. 124, 149 (2007). Most importantly here, both the

Supreme Court and the D.C. Circuit have held that a willfulness scienter requirement, like the one in Section 793(d), substantially undercuts any vagueness challenge to a statute's other terms. See Ragen, 314 U.S. at 524; United States v. Bast, 495 F.2d 138, 144 (D.C. Cir. 1974); accord United States v. Hescorp, Heavy Equipment Sales Corp., 801 F.2d 70, 77 (2d Cir. 1986). Indeed, in United States v. Morison, 844 F.2d 1057, 1071-71 (4th Cir. 1988), the Fourth Circuit relied on the "willfulness" scienter requirement in Section 793(d) to reject a Due Process vagueness challenge to that statute.

The result should be no different here. If, as he claims, the defendant was truly unaware that his conduct was unlawful at the time of the disclosure, see Def. Mot. Dismiss Count One at 16-17, 20, then he did not act willfully; therefore, he cannot be held to account under the statute. Obviously, the United States rejects the defendant's claim. In any event, such factual disputes are for the jury to resolve, see Gorin, 312 U.S. at 32; Morison, 844 F.2d at 1073-74. They do not render Section 793(d) unconstitutionally vague, nor do they provide a basis for the pretrial dismissal of an indictment, see Hsu, 364 F.3d at 197 n. 1.

2. The Other Terms of Section 793(d) are Not Unconstitutionally Vague As Applied to this Defendant

Even setting aside its "willfulness" requirement, the other terms of Section 793(d) survive the defendant's as-applied Due Process vagueness attack. The defendant asserts that two of the statute's phrases are unconstitutionally vague especially in the context of oral communications: (a) "information related to the national defense;" and (b) "any person not entitled to receive it." Def. Mot. Dismiss Count One at 11-15. Courts have consistently rejected vagueness challenges to each of these phrases. Moreover, the defendant was on actual notice of what those terms proscribed.

a. "Information Related to the National Defense"

The Supreme Court's decision in Gorin v. United States, 312 U.S. 19 (1941), which the defendant makes no attempt to distinguish, is dispositive of the defendant's vagueness challenge to the phrase "information related to the national defense." In Gorin, the Supreme Court considered the same phrase in section 2(a) of the Espionage Act and held that it satisfied the requirements of the Due Process Clause. See id. at 21 n. 1. Moreover, it did so, like here, in a case involving the oral transmission of national defense information by a government employee. In Gorin, defendant Salich, a government investigator for the Naval Intelligence Office, provided to co-defendant Gorin, a citizen of the Soviet Union, the "substance of the information contained in" Naval intelligence reports obtained in the course of investigating the activity of Japanese persons primarily inside the United States. See Gorin v. United States, 111 F.2d 712, 714-15 (9th Cir. 1940). The Ninth Circuit was clear that "[t]he reports . . . were not physically given to Gorin. Salich communicated the substance thereof to Gorin orally or in writing." Id. at 715. Both Salich and Gorin were convicted, among other things, of communicating "information relating to the national defense" and conspiring to communicate "information relating to the national defense." Id. at 716.

On appeal Salich asserted, as the defendant argues here, that the phrase "relating to the national defense" was unconstitutionally vague and infringed "upon the traditional freedom of discussion of matters connected with national defense which is permitted in this country." Gorin, 312 U.S. at 23. The Supreme Court rejected this argument. Id. at 28. Unconcerned by either the oral communications at issue or any potential First Amendment implications arising therefrom, the Supreme Court, in a unanimous decision, held that there was "*no uncertainty in this statute* which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law." Id. at 27 (emphasis added).

First, the Supreme Court noted that the statute could not be unconstitutionally vague because "[t]he sanctions apply only when scienter is established." 312 U.S. at 29. The Court also rejected the defendants' vagueness argument because the phrase "national defense" had a "well-understood connotation." Id. It described the phrase "as a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." Id. at 28. Adopting this definition of the term, the Court concluded that phrase was "sufficiently definite to apprise the public of prohibited activities and is consonant with due process." Id.

To be sure, the scienter requirement found sufficient to overcome the vagueness challenge in Gorin was section 2(a)'s requirement of a subversive "intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation." 312 U.S. at 21 n. 1. The Supreme Court did not hold that such subversive intent *was required* for the statute to survive the Due Process challenge, however. Rather, the Court held, as it had in prior cases, that an intent element associated with the proscribed conduct undercuts any vagueness concerns in the language of the statute (n.b., the Supreme Court did not find the term "national defense information" vague). Id. at 27. See section III.B.1. above. Following Gorin, no court has held that the precise subversive scienter requirement at issue in Gorin was *necessary* to overcome vagueness challenges to other sections of the Espionage Act. See, e.g., United States v. Dedeyan, 584 F.2d 36, 39 (4th Cir. 1978) (holding that "knowledge of a document's illegal abstraction" was sufficient to overcome vagueness challenge to Section 793(f)). As mentioned above, the Fourth Circuit in Morison, 844 F.2d at 1071, rejected a vagueness challenge to Section 793(d) based in part on its "willfulness" scienter requirement. Indeed, properly defined, a "willfulness" scienter requirement more directly addresses vagueness concerns than the subversive scienter requirement at issue in Gorin, because only the

former requires the United States to demonstrate that the defendant knew that his actions were unlawful.

The continued vitality of Gorin's holding has been recognized by many courts, including in cases involving charges brought under Section 793 and oral disclosures of national defense information. See Morison, 844 F.2d at 1070-1073 (upholding the language of Section 793(d) and (e)); Dedeyan, 584 F.2d at 39 (upholding the language of Section 793(f)); United States v. Boyce, 594 F.2d 1246, 1252 n. 2 (9th Cir. 1979) (upholding the language of Sections 793 and 794); United States v. Rosen, 445 F. Supp. 2d 602, 617-622 (E.D. Va. 2006) (upholding the identical language found in Section 793(d) and (e) in context of oral communications). Conversely, no court has found the phrase "relating to the national defense" to be unconstitutionally vague in any context. Accordingly, the defendant's vagueness challenge to this phrase in Section 793(d) should be rejected on this basis alone.

It is true that the Fourth Circuit further defined the phrase "relating to the national defense" to include only information that is "closely held" by the United States and the disclosure of which "would be potentially damaging to the United States or . . . might be useful to an enemy of the United States." See Morison, 844 F.2d at 1071-72; Dedeyan, 584 F.2d at 39-40. But the Fourth Circuit noted more recently that these judicial glosses on the meaning of "related to the national defense" arguably offer "more protection to defendants than required by Gorin." United States v. Squillacote, 221 F.3d 542, 580 n. 23 (4th Cir. 2000). In any event, even were this Court to adopt one or both of the Fourth Circuit's narrowing constructions on that phrase (which it need not), as indicated in Gorin "the central issue" must remain "the *secrecy* of the information, which is determined by the government's actions," not by the actions of the government employees who

disclose national defense information without authorization, Squillacote, 221 F.3d at 577 (emphasis in original), a point that the defendant concedes. See Def. Mot. Dismiss Count One at 17.[9]

Further, there is no question that the subject of the defendant's unauthorized disclosure – the contents of a TOP SECRET/SCI[10] intelligence report concerning intelligence sources and methods and foreign intelligence information concerning the military capabilities and preparedness of a particular foreign nation – plainly falls within the meaning of "information related to the national defense." See Classified Addendum. The Supreme Court in Gorin held that the unauthorized disclosure of the intelligence reports at issue there constituted "information related to the national defense." 312 U.S. at 29. According to the Supreme Court, such "reports . . . are a part of this nation's plan for armed defense. The part relating to espionage and counterespionage cannot be viewed as separated from the whole." Id. A finding of unconstitutional uncertainty with regard to the meaning of "information related to the national defense" as applied to the intelligence report identified in the indictment would thus "be a negation of experience and common sense," Ragen,

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[9] For the same reason, the defendant wrongfully (and rather brazenly) derides the United States for maintaining the classification of the information that was the subject of his unauthorized disclosure. Def. Mot. Dismiss Count One at 3 n. 2, 19. As the Fourth Circuit properly recognized in Squillacote, it is manifestly not the case that information loses its classification status when it is the subject of an unauthorized disclosure. 221 F.3d at 577. It is the action of the United States that matters, not that of the recreant government employee who, having been entrusted with his Nation's secrets, acted in breach of that solemn obligation. The defendant acknowledged as much when he agreed to the Court's entry of the protective order under the Classified Information Procedures Act. See CIPA Protective Order **[Document 10]**, ¶ 7 (provision governing classified information found in the public domain).

[10] Under the Executive Order applicable at the time of the charged disclosure, i.e., Executive Order 12958, as amended by Executive Order 13292, information is classified TOP SECRET where its disclosure could reasonably result in "exceptionally grave" damage to the national security. Categorizing classified information as SCI restricts even further the dissemination and handling of the information. Such definitions from the applicable Executive Order may "be considered in reviewing for constitutionality the statute under which a defendant with the knowledge of security classification that the defendant had is charged." Morison, 844 F.2d at 1074.

314 U.S. at 524, and contrary to the Supreme Court's holding in Gorin. In light of the actual national defense information at issue here, the defendant's as-applied vagueness challenge to that phrase is specious. See Humanitarian Law Project, 130 S. Ct. at 2720 ("[T]he dispositive point here is that the statutory terms are clear in their application to plaintiffs' . . . conduct, which means that plaintiffs' vagueness challenge must fail.").

Moreover, the United States will prove at trial that the defendant knew that he disclosed intelligence that was "information related to the national defense." For this independent reason, the defendant's as-applied Due Process vagueness challenge should fail. See Morison, 844 F.2d at 1073-74 (analyzing Morison's actual knowledge concerning the sensitivity of the disclosed information at issue in rejecting his as-applied vagueness challenge to phrase "information related to the national defense"). As in Morison, the defendant here was a very experienced intelligence analyst who had been repeatedly instructed on the regulations concerning the security of classified, national defense information. Id. As in Morison, the intelligence report that is the subject of the defendant's unauthorized disclosure had clear classification markings. And, just as in Morison, the defendant executed multiple Classified Information Nondisclosure Agreements in which he acknowledged substantially the following:

> [that he had received] a security indoctrination concerning the nature and protection of Sensitive Compartmented Information including the procedure to be followed in ascertaining whether other persons to whom [he] contemplate[d] disclosing this information have been approved for access to it and [he] under[stood] these procedures . . . .
>
> [that he had been] advised that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of Sensitive Compartmented Information by [him] could cause irreparable injury to the United States or be used to advantage by a foreign nation . . . .
>
> [that he had been] advised that any unauthorized disclosure of Sensitive Compartmented Information by [him] may constitute violations of United States criminal laws, including the provisions of Section 793 . . . .

Id. at 1060. Accordingly, just as in Morison, this Court should deny the defendant's Due Process vagueness challenge because:

> With the scienter requirement [of] section[ ] 793(d) . . . , bulwarked with the defendant's own expertise in the field of governmental secrecy and intelligence operations, [and] the language of the statute[ ], "relating to the national security" was not unconstitutionally vague as applied to this defendant . . . .

Id. at 1073.

b. "Any Person Not Entitled to Receive It"

The defendant also attacks as unconstitutionally vague Section 793(d)'s phrase "any person not entitled to received it." Def. Mot. Dismiss Count One at 11. As with the phrase "information related to the national defense," multiple courts have rejected Due Process vagueness challenges to this phrase. See Morison, 844 F.2d at 1065-66, 1074; Rosen, 445 F. Supp. 2d at 622-23; see also United States v. Truong, 629 F.2d 908, 919 n. 10 (4th Cir. 1980) (analyzing "unauthorized possession" in Section 793(e)). No court, on the other hand, has held that this phrase is unconstitutionally vague, even in the context of oral communications. See Rosen, 445 F. Supp. 2d at 622-23.[11]

While the defendant is correct that Section 793(d) does not define the phrase "any person not entitled to received it," see Def. Mot. Dismiss Count One at 11, it hardly follows that the phrase is

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[11] Congress' use of the phrase "anyone not entitled to receive it" also addresses the defendant's passing comments that Section 793(d) was only "intended to criminalize 'classic spying.'" Def. Mot. Dismiss Count One at 21; see id. at 12 ("the Espionage Act was not intended to apply to leaking when it was enacted"). As the district court said in Morison, "[i]f Congress had intended [Section 793(d)] to apply only to the classic espionage situation, where the information is leaked to an agent of a foreign and presumably hostile government, then it could have said so by using the words 'transmit . . . to an agent of a foreign government.'" 604 F. Supp. at 660; see also Morison, 844 F.2d at 1063-68. Instead, Congress used the "definite and clear" language "anyone not entitled to receive it." Morison, 844 F.2d at 1063. Congress did not engraft upon the statute a disclosure-to-the-press exception, and nothing in the legislative history suggests such an exception was contemplated. See Morison, 844 F.2d at 1064-67 (reviewing legislative history of Section 793(d)); Morison, 604 F. Supp. at 659-60 (same).

unconstitutionally vague. As the district court held in United States v. Morison, 604 F. Supp. 655, 662 (D. Md. 1985), "[t]he phrase 'not entitled to receive' is not at all vague when discussed in reference with the classification system, which clearly sets out who is entitled to receive (those with proper security clearance and the 'need to know') and [the defendant who] was certainly aware of the [proscriptions] of the classification system." Other courts in the Fourth Circuit have similarly referred to the applicable Executive Order(s) delineating the classification system to address any conceivable vagueness concerns associated with this phrase. See Morison, 844 F.2d at 1074; Rosen, 445 F. Supp. 2d at 622-23; Truong, 629 F.2d at 919 n. 10. This approach is consistent with Supreme Court case law as well as with cases from other jurisdictions. See United States Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 574-79 (1973) (employing Commission's regulations to rejected vagueness challenge to Hatch Act); United States v. Girard, 601 F.2d 69, 71-72 (2d Cir. 1979) (holding that a federal agency's "own rules and regulations forbidding . . . disclosure [under 18 U.S.C. § 641] may be considered as both a delimitation and a clarification of the conduct proscribed by" the statute's phrase "without authority"). This settled interpretation of the phrase's meaning soundly defeats the defendant's as-applied vagueness challenge. See Lanier, 520 U.S. at 267 (constitutional vagueness concerns do not arise where an accused is charged with violating a "'right which has been made specific either by the express terms of the Constitution or laws of the United States or *by decisions interpreting them*'") (emphasis added) (quoting Screws v. United States, 325 U.S. 91, 104 (1945)).

The legislative history concerning that phrase is consistent with the interpretations provided by the courts. In discussion of nearly-identical phrases used elsewhere in the Espionage Act, the legislative history demonstrates that Congress intended the phrase's meaning to be further delimited by rule or regulation, including by the President. Specifically, during the debates over the passage

of the Espionage Act of 1917, Senator Overman stated that the phrase "one not entitled to receive it" meant as "against any statute of the United States or against any rule or regulations prescribed." Morison, 844 F.2d at 1065 (quoting 54 Cong. Rec. 3586 (1917)). Similarly, Senator Sutherland observed that the phrase:

> "[L]awfully entitled" mean[t] nothing more and nothing less than that the particular information must have been forbidden, not necessarily by an act of Congress; because in dealing with military matters the President has very great powers.

Id. at 1065-66 (quoting 54 Cong. Rec. 3489 (1917)). In other words, "Congressional drafters viewed the phrase 'entitled to receive' as an unfilled vessel into which the Executive Branch could pour more detailed content consistent with the phrase's plain meaning and the statute's purpose." Rosen, 445 F. Supp. 2d at 622.

That is precisely what occurred. The Executive Orders in place at the time of the unauthorized disclosure charged in Count One provided all the clarity to the phrase "any person not entitled to receive it" that is constitutionally required. Under Executive Order 13292 (which amended Executive Order 12958), a person is authorized to receive classified information only if he has an appropriate security clearance, has signed a Classified Information Nondisclosure Agreement, and needs to gain access to the information because it is necessary to the performance of his official government duties. See Exec. Order No. 13292, § 4.1, 68 Fed. Reg. 15315 (March 25, 2003). Thus, the Executive Order clarifies precisely who may, and who may not, receive classified information, a fact that the United States will prove at trial the defendant knew when he made his unauthorized disclosure. In so doing, the Executive Order cures any possible vagueness with respect to Section 793(d)'s phrase "anyone not entitled to receive it."[12]

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[12] The defendant's complaint that the system of classification under the applicable Executive Orders may result in over-classification in general is legally irrelevant. Def. Mot. Dismiss Count One at 17-21. While the government's classification of the intelligence report identified in

Moreover, the defendant's status as an experienced government intelligence analyst exposes as incredible his as-applied vagueness claim with regard to the phrase "anyone not entitled to receive it." See Morison, 844 F.2d at 1074 (relying on government employee's knowledge of Executive Order, work within a vaulted area, and nondisclosure agreements in holding the phrase "anyone not entitled to receive it" not unconstitutionally vague as applied to Morison). By virtue of his security clearance, security training, and execution of multiple Classified Information Nondisclosure Agreements, the defendant knew that TOP SECRET/SCI information could not be transmitted to a national news reporter or any other member of the general public. Indeed, as described more fully below at section V.B.1., the United States will prove at trial that, at the time of his unauthorized disclosure, the defendant worked in a vaulted area that prohibited entrance by unauthorized individuals. The defendant certainly knew that the classified information that he acquired inside his vaulted workspace, including the TOP SECRET/SCI information at issue, could not be disseminated to uncleared individuals outside of it. The United States will also demonstrate at trial that the defendant's efforts to conceal his relationship with the reporter and the secretive nature of their communications speak volumes about the defendant's knowledge of who was, and who was not, entitled to receive the TOP SECRET/SCI national defense information at issue. Accordingly, for this independent reason, the defendant's as-applied Due Process vagueness challenge to the phrase "anyone not entitled to receive it" should be rejected.

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the indictment will be presented at trial for the jury's consideration, see Dedeyan, 584 F.2d at 40; Rosen, 445 F. Supp. 2d at 623, the ultimate determination as to whether the charged information was "related to the national defense" is for the jury to decide. See Gorin, 312 U.S. at 32; Morison, 844 F.2d at 1073-74.

C. Section 793(d) Does Not Violate the Arbitrary Enforcement Doctrine

The defendant's contention that Section 793(d) is unconstitutionally vague because it violates the arbitrary enforcement doctrine also fails. Def. Mot. Dismiss Count One at 21-25. That prong of the Due Process vagueness analysis requires legislatures to "establish minimal guidelines to govern law enforcement." Kolender v. Lawson, 461 U.S. 352, 358 (1983) (internal quotation marks omitted). Otherwise, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id.

Here again, however, Section 793(d)'s scienter requirement negates the defendant's argument. Just as it ensures that the statute's proscriptions will not ensnare the innocent, see section III.B.1. above, the willfullness requirement also "narrow[s] the scope of [the statute's] prohibition and limit[s] prosecutorial discretion." Gonzales, 550 U.S. at 150. Indeed, as other Circuit Courts have held, an "intent requirement alone tends to defeat any vagueness challenge based on the potential for arbitrary enforcement." United States v. Klecker, 348 F.3d 69, 71 (4th Cir. 2003); accord United States v. Hofstatter, 8 F.3d 316, 322 (6th Cir. 1993).

Further, even setting aside Section 793(d)'s willfulness requirement, it cannot be said that the statute's other terms permit a "standardless sweep" or "vest[ ] virtually complete discretion in the hands of [law enforcement] to determine whether the suspect has satisfied [its provisions]." Kolender, 461 U.S. at 358. The statute sets forth numerous specific elements that the United States must prove, namely, (1) that the defendant had lawful possession of, access to, control over, or was entrusted with (2) documents, other tangible items, or information "related to the national defense," and (3) that the defendant communicated the same to a "person not entitled to receive it." 18 U.S.C. § 793(d). In cases involving oral disclosures, the United States must also have sufficient evidence to prove (4) that the defendant had "reason to believe" that the information "could be used to the

injury of the United States or to the advantage of any foreign nation." Id.[13] Overlaying these elements is, of course, the requirement that the defendant acted willfully, knowing that his conduct was illegal. Id. No court has ever found any of these terms unconstitutionally vague. Taken together, they establish far more than the "minimal guidelines" for law enforcement required by the

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[13] The district court in Rosen read the "reason to believe" requirement for oral disclosures under Section 793(d) and (e), as mandating that the United States prove that the defendant was motivated by an "evil" purpose, i.e., that he "*intended that . . . injury to the United States* or aid to a foreign nation *result* from the disclosures." United States v. Rosen, 520 F. Supp. 2d 786, 793 (E.D. Va. 2007) (emphasis added); see Rosen, 445 F. Supp. 2d at 627 n. 35. This interpretation of Section 793 is incorrect. First, it conflicts with the plain language of the statute which does not require a showing of an actual "intent" that the national defense information at issue "is to be used to the injury of the United States or to the advantage of a foreign nation," but only that the possessor had a "*reason to believe*" that the information "*could be used* to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. § 793(d) and (e) (emphasis added). The district court in Rosen thus confused "reason to believe" with "intent." See Gorin, 111 F.2d at 721. It also equated the mens rea element of Section 793(d) and (e) with the "evil intent" element of Section 794(a), a death penalty-eligible offense, thereby ignoring the clear distinctions that Congress drew among the varying mens rea requirements in the Espionage Act for crimes of varying seriousness. See United States v. Perkins, 47 C.M.R. 259, 263 (A.F.C.M.R. 1973). It is therefore not surprising that the Fourth Circuit noted on interlocutory appeal in Rosen that it was "concerned by the potential that the [district court's] § 793 Order impose[d] an additional burden on the prosecution not mandated by the governing statute." See United States v. Rosen, 557 F.3d 192, 199 n. 8 (4th Cir. 2009).

The district court's interpretation of the phrase "reason to believe" also conflicts with a decision in another Circuit (see United States v. Abu-Jihaad, 630 F.3d 102, 135 (2d Cir. 2010)), other decisions within the Fourth Circuit (see United States v. Morison, 622 F. Supp. 1009, 1011 (D. Md. 1985)), and with other decisions by the district court in Rosen itself (see United States v. Rosen, 240 F.R.D. 204, 209-10 (E.D. Va. 2007)), none of which required the United States to show an "evil" purpose to prove a violation of Section 793(d). In any event, that feature of the district court's reading of Section 793 in Rosen has no application here. This is so, because that case involved the receipt and re-transmission of national defense information by non-governmental lobbyists and not, as here, the disclosure of national defense information by a government intelligence analyst. Rosen, 445 F. Supp. 2d at 607-08. Indeed, upon sentencing cooperating defendant Franklin, the government employee in Rosen, for his violations of 18 U.S.C. § 793(d), (e), and (g), and 18 U.S.C. § 783, the district court made clear that Franklin's alleged "noble motives" did not excuse his criminal violations. United States v. Franklin, Nos. 05-CR-225 and 05-CR-421, Motions Hearing Tr. (E.D. Va. June 22, 2009) at 38, 39-40.

Due Process Clause, see Kolender, 461 U.S. at 358, and belie any assertion that Section 793(d) charges can be brought at the whim of the prosecutor.

The defendant's related complaint that the United States has not prosecuted enough cases under Section 793(d) to bring charges against him (see Def. Mot. Dismiss Count One at 22-23), also falls flat. As the Fourth Circuit correctly stated in Morison, "the rarity of the use of [Section 793(d)] as a basis for prosecution is at best a questionable basis for nullifying the clear language of the statute." 844 F.2d at 1067.

In any event, the defendant's assessment of the government's enforcement of Section 793(d) is uninformed. As the Fourth Circuit observed in Morison:

> It is unquestionably true that the prosecutions generally under the Espionage Act, and not just those under section 793(d), have not been great. This is understandable. Violations under the Act are not easily established. The violators act with the intention of concealing their conduct. They try, as the defendant did in this case, to leave few trails. Moreover, any prosecution under the Act will in every case pose difficult problems of balancing the need for prosecution and the possible damage that a public trial will require by way of the disclosure of vital national interest secrets in a public trial.

844 F.2d at 1067. Nevertheless, despite the many challenges posed by the prosecution of government employees for the unauthorized disclosure of national defense information, the United States has, in fact, brought such prosecutions in the past. For example,

- In 1971, Daniel Ellsberg, a former U.S. military analyst, was charged in the Central District of California with violating Section 793(d) for his role in disclosing the Pentagon Papers to the New York Times. See United States v. Russo, No. 9373-WMB-CD (C.D. Cal.), dismissed May 11, 1973;

- In 1985, Samuel Morison, a Naval intelligence analyst, was indicted and found guilty of violating Section 793(d) in the District of Maryland for selling U.S. spy satellite photographs to Jane's Defence Weekly. See Morison, 844 F.2d at 1060-63;

- In 2006, Lawrence Franklin, a Department of Defense analyst, was convicted of conspiring to violate Section 793(d) in the Eastern District of Virginia for his role in communicating TOP SECRET/SCI information to lobbyists and a national news organization. See United States v. Franklin, Nos. 05-CR-225 and 05-CR-421 (E.D. Va.);

- In 2010, Shamai Leibowitz, an FBI contract linguist, was convicted of violating 18 U.S.C. § 798(a) in the District of Maryland for disclosing classified information concerning communication intelligence activities to the host of a public web log. See United States v. Leibowitz, No. AW09-CR-0632 (D. Md.); and

- In 2010, Jeffrey Sterling, a former CIA agent, was indicted in the Eastern District of Virginia with violating, among other statutes, Section 793(d) for communicating classified national defense information to an author. See United States v. Sterling, No. 10-CR-485 (E.D. Va.).

Thus, the defendant's suggestion that the charges against him are somehow unique is false.

The United States charged the defendant with violating Section 793(d) not for arbitrary reasons. Rather, while he may wish it were otherwise, some of the difficulties inherent in these kinds of investigations and prosecutions, as noted in Morison, are not present here. That bringing the defendant's case was not as problematic as in other instances does not make his indictment ripe for dismissal under the arbitrary enforcement doctrine of the Due Process Clause.

D. Defendant had No First Amendment Right to Disclose Our Nation's Secrets

Apart from his Fifth Amendment Due Process arguments, the defendant contends that the application of Section 793(d) to his conduct violates the First Amendment. See Def. Mot. Dismiss Count One at 25. As he frames the issue, the First Amendment analysis turns on the difference between tangible and intangible (i.e., oral) disclosures of national defense information. Id. at 30. The defendant appears to agree, as he must, that a government employee has no First Amendment right to disclose national defendant information to any unauthorized person in tangible form, for example by passing a classified document. Indeed, the defendant accepts the Fourth Circuit's holding in Morison as a correct statement of the law "that the First Amendment does not confer on a government official a right to violate the law in order to disseminate information to the public." Id.

The defendant posits, however, that in this setting there is a difference of enormous constitutional significance in *how* a government employee violates Section 793(d) – that is, the

difference between passing a document (no First Amendment protection) versus reading aloud its contents (First Amendment strict scrutiny). Id. In so doing, the defendant ignores that the Supreme Court has long held that there is no such distinction in First Amendment analysis. See Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word."). See also Carlson v. California, 310 U.S. 106, 113 (1940) (First Amendment covers speech "whether by pamphlet, by word of mouth or by banner"). The defendant's acknowledgment about tangible disclosures necessarily forecloses his First Amendment argument about oral disclosures. If, as the defendant acknowledges, a government employee cannot rely on the First Amendment to immunize his otherwise criminal act of passing a classified document across the table to an unauthorized recipient, then he cannot find any First Amendment protection in reading the same document aloud to the unauthorized recipient. That should be the end of the matter. Nevertheless, the defendant's First Amendment claim fails on multiple, additional grounds.

1. The First Amendment Affords No Protection for this Type of Conduct

The defendant simply assumes that the First Amendment affords him protection from prosecution because his unauthorized disclosure of national defense information involved the use of spoken words – as he puts it, "pure speech." See Def. Mot. Dismiss Count One at 30. The defendant is wrong.

To the extent that the defendant's conduct constitutes speech, that speech is wholly unprotected by the First Amendment. Speech used willfully to convey national defense information to any person not entitled to receive it is speech effecting a crime, like the words that constitute a criminal conspiracy or any number of federal statutes that are violated through the use of written or

spoken words. As the Supreme Court held in Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), speech integral to a crime is undeserving of First Amendment protection.

In Giboney, the Supreme Court considered a First Amendment challenge to an injunction against picketers, which picketing the lower court found to have been in violation of state law. 336 U.S. at 498. The Court stated:

> It has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.

Id. The Supreme Court recognized the continuing validity of Giboney just last term. In United States v. Stevens, a case involving a First Amendment challenge to a statute banning depictions of animal cruelty, the Supreme Court listed the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." 130 S. Ct. 1577, 1584 (2010) (citation and internal quotation marks omitted). Citing to Giboney, the Court included "speech integral to criminal conduct" as one such class of unprotected speech. Id.

Although the defendant complains throughout his motions that he is being prosecuted for "political speech," the indictment alleges no such thing. To the extent that the defendant's speech is at issue, it is only because he may have uttered words to commit the offense, by using words to transmit the national defense information described in the indictment. Under Giboney, such use of words integral to criminal conduct finds no protection under the First Amendment. Accord Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 743 (1983) ("false statements are not immunized by the First Amendment right to freedom of speech"); United States v. Hsia, 176 F.3d 517, 525 (D.C. Cir. 1999) (rejecting Hsia's claim that because she "was simply soliciting political contributions, her actions [ ] were protected speech [and] therefore the indictment [charging false

statements under 18 U.S.C. § 1001] must be subject to strict scrutiny."); United States v. Mendelsohn, 896 F.2d 1183, 1185-86 (9th Cir. 1990) (collecting cases where speech was an integral part of the charged crime and therefore unprotected by the First Amendment); United States v. Marchetti, 466 F.2d 1309, 1314 (4th Cir. 1972) ("Threats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal."); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) (citing statutory examples of where speech is the "very vehicle of the crime itself" and therefore undeserving of First Amendment protection); see also Branzburg v. Hayes, 408 U.S. 665, 691 (1972) ("It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.").

Moreover, the Supreme Court has held that the First Amendment provides no protection for the type of conduct prohibited by the Espionage Act. The Court, in opinions authored by Justice Holmes, made that clear soon after the original enactment of that statute. In Schenck v. United States, 249 U.S. 47 (1919), the defendant was charged with conspiring to obstruct military recruiting and enlistment, in violation of the Espionage Act of 1917. The defendant challenged his conviction on First Amendment grounds. Writing for a unanimous court, Justice Holmes rejected this argument. Although recognizing that the defendant's activity "in many places and in ordinary times . . . [may] have been within their constitutional rights," the Supreme Court held that it did not regard the defendant's speech "as protected by *any* constitutional right." Id. at 52 (emphasis added).

In a case decided two months later, Frohwerk v. United States, 249 U.S. 204 (1919), the Supreme Court upheld another defendant's conviction for conspiracy to violate the Espionage Act of 1917. Frohwerk involved the publication of a newspaper that caused "disloyalty, mutiny and refusal of duty in the military and naval forces of the United States." Id. at 205. Again writing for

the Court, Justice Holmes applied the reasoning of Schenck and added that "the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language." Id. at 206. The Supreme Court and lower courts have continued to find conduct in violation of the Espionage Act undeserving of First Amendment protection. See, e.g., Haig v. Agee, 453 U.S. 280, 308-09 (1981) (Agee's "repeated disclosures of intelligence operations and names of intelligence personnel" not protected by the First Amendment); Gorin, 312 U.S. at 23 (rejecting defendants' complaint that their prosecution under the Espionage Act infringed "upon the traditional freedom of discussion of matters connected with national defense which is permitted in this country"); United States v. Regan, 221 F. Supp. 2d 666, 671 n. 3 (E.D. Va. 2002) (citation and internal quotation marks omitted) ("[I]t is well established that the communication to a foreign government of secret material connected with the national defense can by no far-fetched reasoning be included within the area of First-Amendment protected free speech.").

Indeed, the Fourth Circuit in Morison equated the unauthorized disclosure of national defense information by a government employee to theft – not free speech – which crime was undeserving of First Amendment protection. Faced with a First Amendment challenge not unlike the defendant's, the Fourth Circuit in Morison stated that "it seems beyond controversy that a recreant intelligence department employee . . . is not entitled to invoke the First Amendment as a shield to immunize his act of thievery. To permit the thief thus to misuse the Amendment would be to prostitute the salutary purposes of the First Amendment." 844 F.2d at 1069-70. In upholding Morison's convictions under

Section 793, the Fourth Circuit said "we do not perceive *any* First Amendment rights to be implicated here." Id. at 1068 (emphasis added).[14]

2. This Defendant, in Particular, Cannot Rely on the First Amendment

Even assuming that the First Amendment were otherwise implicated here, this defendant has no basis to invoke its protections for two additional reasons. First, because of the special position of trust that he occupied at the time of the offense, the defendant had no First Amendment right to disclose the national defense information that he obtained by virtue of that position. The D.C. Circuit recently held that a government employee has no First Amendment right to disclose sensitive information in analogous circumstances.

In Boehner v. McDermott, 484 F.3d 573 (D.C. Cir. 2007) (en banc), the D.C. Circuit held that a Congressman, who was bound by congressional ethics rules not to disclose investigative information, had no First Amendment right to disclose to the press the contents of an illegal tape recording. In that case, a Florida couple used a police radio scanner to eavesdrop on a conference call among members of the Republican Party leadership, including Representative Boehner, concerning an investigation then pending before the House Committee on Standards of Official Conduct (commonly known as the House Ethics Committee). Id. at 575. The couple intercepted and recorded the call, in violation of 18 U.S.C. § 2511(1)(a), and eventually provided the tape recording to Representative McDermott, who was the ranking Democrat on the Ethics Committee. Id. at 576. In turn, Representative McDermott disclosed the contents of the tape recording to two reporters. Id. Representative Boehner then filed a lawsuit, alleging that Representative McDermott had violated

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[14] Although the concurring opinions in Morison discuss what those judges perceived to be substantial First Amendment concerns, the defendant here correctly cites to the Fourth Circuit's controlling opinion in that case and unconvincingly seeks to distinguish it on its facts. See Def. Mot. Dismiss Count One at 30 ("unlike Morison, [the defendant's] constitutional challenge involves pure speech rather than the transmission of a document").

18 U.S.C. § 2511(1)(c) when he disclosed the tape recording of the illegally-intercepted conversation. After protracted litigation, the district court granted summary judgment in favor of Representative Boehner. The D.C. Circuit, sitting en banc, affirmed the district court's decision.

In affirming the district court, the D.C. Circuit assumed "arguendo that Representative McDermott [had] lawfully obtained the tape" recording from the Florida couple. 484 F.3d at 577. The D.C. Circuit nevertheless concluded that Representative McDermott had no First Amendment right to disclose it. Id. at 581. The D.C. Circuit considered whether "Representative McDermott's position on the Ethics Committee imposed a 'special' duty on him not to disclose this tape in these circumstances," id. at 579, and after reviewing the applicable Ethic Committee rules answered that question in the affirmative. Id. at 579-81.

Pertinent to its analysis, the D.C. Circuit considered a variety of federal statutes and rules that "forbid individuals from disclosing information they have lawfully obtained," including Section 793(d) of the Espionage Act. 484 F.3d at 578. The D.C. Circuit also relied on the Supreme Court's decision in United States v. Aguilar, 515 U.S. 593 (1995). In Aguilar, the Supreme Court held that a federal judge had no First Amendment right to disclose information about a wiretap, authorized by another judge, to the subject of the wiretap. Referring to Aguilar as "closely analogous," the D.C. Circuit stated that "Aguilar stands for the principle that those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information." 484 F.3d at 578-79. As a government intelligence analyst with a TOP SECRET/SCI security clearance working inside of a vaulted area, the defendant, like Representative McDermott and Judge Aguilar, held a position of trust that imposed a special duty on him not to disclose the national defense information that he had obtained in that position. Like those government officials, the defendant has "no First Amendment defense"

to criminal liability for disclosing that information. Id. at 580 and n. 6. Accord Rosen, 445 F. Supp. 2d at 635 ("There can be little doubt, as defendants readily concede, that the Constitution permits the government to prosecute [government employees] for the disclosure of information relating to the national defense[.]").

The defendant has no First Amendment defense for an additional, related reason – namely, his express written waivers of any right to disclose the national defense information that he obtained while in his government position. In order to gain lawful access to classified information, including the national defense information at issue in this case, as mentioned above the defendant executed numerous Classified Information Nondisclosure Agreements. The validity of such waivers has long been recognized. The Supreme Court has enforced such agreements in the face of the most powerful First Amendment challenge, namely the claim of an unconstitutional prior restraint on the right to speak or publish.[15]

In Snepp v. United States, 444 U.S. 507, 508 (1980), the Supreme Court reviewed the government's right to enforce an agreement entered into by a former CIA employee, that he would not "publish . . . any information or material relating to the Agency [or] its activities . . . without specific prior approval by the Agency." Snepp violated that agreement by publishing a book

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[15] The "Pentagon Papers" case, New York Times Company v. United States, 403 U.S. 713 (1971), may best illustrate this point. The Supreme Court famously held that the United States had not met its "heavy burden of showing justification for the imposition of [a prior] restraint." Id. at 714. Yet, as Justice White made clear in his concurrence: "Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way." Id. at 733. Conversely, where a prior restraint is upheld, the United States has met its highest burden under the First Amendment. See Rosen, 445 F. Supp. 2d at 636 ("Because prior restraints on speech are the most constitutionally suspect form of a government restriction, it follows from this proposition that Congress may constitutionally subject to criminal prosecution anyone who exploits a position of trust to obtain and disclose [national defense information] to one not entitled to receive it.") (citing New York Times Co., 403 U.S. 713).

containing some information about the CIA without obtaining prior permission from the CIA. Id. In rejecting Snepp's claim that his agreement was unenforceable as a prior restraint on protected speech, the Supreme Court stated:

> [T]his Court's cases make clear that – even in the absence of an express agreement – the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment . . . . The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service . . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest."

Id. at 509 n. 3 (citations omitted).[16]

In Haig v. Agee, 453 U.S. 280 (1981), the Supreme Court again had occasion to consider restrictions contained in a CIA employment contract. Agee, a former CIA employee, held a press conference in London to announce a campaign to expose CIA officers and agents around the world. Id. at 283. Agee then traveled extensively overseas to carry out that campaign. Id. at 284. The Secretary of State subsequently revoked Agee's passport. Id. at 286. Agee filed suit to challenge that action. Id. at 287. Agee claimed that the government's revocation of his passport was, in part, a denial of his freedom of speech under the First Amendment. Id. at 306. In rejecting Agee's claim, the Supreme Court first observed that Agee's agreement contained language identical to Snepp's. Id. at 284 n. 5. The Court then stated that: "Agee is as free to criticize the United States Government as when he held a passport – always subject, of course, to express limits on certain rights by virtue of his contract with the Government." Id. at 309 (citing Snepp). See also McGehee v. Casey, 718 F.2d 1137, 1146 (D.C. Cir. 1983) ("The 'secret' and 'top secret' classifications place

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[16] The defendant acknowledges the existence of Snepp in a fleeting reference in a footnote at the end of his motion, but fails to discuss the impact on his First Amendment claim of the Supreme Court's holding in that case. See Def. Mot. Dismiss Count One at 29 n. 9.

constitutional burdens on the speech of former CIA agents."); United States v. Marchetti, 466 F.2d 1309, 1316-17 (4th Cir. 1972) ("[T]he Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment."); Stillman v. CIA, 517 F. Supp. 2d 32, 38 (D.D.C. 2007) ("Courts have uniformly held that current and former government employees have no First Amendment right to publish properly classified information to which they gain access by virtue of their employment."); Berntsen v. CIA, 618 F. Supp. 2d 27, 29 (D.D.C. 2009) ("[T]he CIA's enforcement of its secrecy agreement, and the corresponding prohibition on Berntsen's publication of classified information, do not implicate the first amendment.").

Thus, even assuming that the defendant would otherwise have had a First Amendment right to disclose the national defense information at issue (which, for the reasons stated above, he did not), he surrendered that right when he executed numerous Classified Nondisclosure Agreements that specifically prohibited such disclosure. Under Snepp, Agee, McGehee, Marchetti, Stillman, and Berntsen, the constitutionality of such limitations on a government employee's speech is beyond question. As the Fourth Circuit stated in subsequent litigation related to Marchetti, "by his execution of the secrecy agreement and his entry into the confidential employment relationship, [Marchetti] effectively relinquished his First Amendment rights" with respect to classified information. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1975).

3. Count One Would Withstand Any First Amendment Scrutiny

Having assumed that the First Amendment applies to the type of conduct at issue in Espionage Act cases (which it does not) and having further assumed that he is entitled to its protection for his willful act of disclosing national defense information to one not entitled to receive it (which he is not), the defendant argues that the application of Section 793(d) to his conduct fails

First Amendment strict scrutiny analysis. See Def. Mot. Dismiss Count One at 29. The defendant limits his First Amendment claim to an "as-applied" challenge to the statute. Id. Although the defendant concedes that the United States has a "compelling interest, in appropriate cases, in protecting and preserving classified information from disclosure," this case – in the defendant's view – is not one of them. Id. Setting aside his rhetoric and his constitutionally-meaningless distinction between written and oral speech (as discussed above), the defendant provides no support in fact, law, or logic why this is so.

The closest the defendant gets to a rationale in support of his strict scrutiny claim is his assertion that he is "simply invoking his right to engage in the public discourse on matters of interest just like any other citizen." See Def. Mot. Dismiss Count One at 30. But the defendant is not charged with engaging in public discourse, which he was, and remains, free to do. The defendant is charged with willfully disclosing national defense information to one not entitled to receive it. As with the defendants in Snepp, Agee, McGehee, Marchetti, Stillman, and Berntsen, this defendant's First Amendment right to engage in public discourse does not extend to the unlawful disclosure of our Nation's secrets. Were the law otherwise, the United States would have no means to vindicate its "compelling interest in protecting . . . the secrecy of information important to our national security." Snepp, 444 U.S. at 509 n. 3.

In any event, having conceded, as he must, that the United States has a compelling interest in protecting and preserving its classified information, the defendant has nowhere to go with his strict scrutiny argument. Section 793(d) prohibits the willful disclosure of national defense information to one not entitled to receive it. As applied to him, it seeks to protect our Nation's secrets by deterring the unlawful disclosure at the source – that is, the government employee entrusted with those secrets. By circumscribing the conduct of government employees who have a

special duty not to disclose such information and who sign express agreements foreswearing such disclosure, Section 793(d)'s application to the defendant's conduct could hardly be more narrowly tailored. See also Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2722-30 (2010) (upholding material support statute, 18 U.S.C. § 2339B, in face of as-applied First Amendment strict scrutiny challenge). The defendant does not seriously suggest otherwise. Therefore, even assuming that the application of First Amendment strict scrutiny analysis were appropriate in this case, which it is not, the defendant's claim must fail.

Nevertheless, we do not mean to suggest that strict scrutiny would even be the correct First Amendment test for evaluating Section 793(d)'s limitation on a government employee's speech. The Supreme Court has recognized that the speech of public employees on matters of public concern may be restrained in ways that, if imposed on the general public, would violate the Constitution. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). At most, Section 793(d)'s limitation on the defendant's speech would only be subject to the balancing test of Pickering. See United States v. National Treasury Employees Union, 513 U.S. 454, 465 (1995) (citing Snepp as an example of a permissible "restraint [ ] on the job-related speech of public employees" under Pickering's balancing test). As applied to government employees like the defendant, Section 793(d)'s prohibition on the willful disclosure of national defense information to one not entitled to receive it would easily pass the Pickering test. See Weaver v. USIA, 87 F.3d 1429, 1439 (D.C. Cir. 1996) (recognizing that the Supreme Court in Snepp "essentially applied Pickering . . . . and seemed to view the provision [in Snepp's agreement] as obviously constitutional."). As the Supreme Court said in Snepp, "even in the absence of an express agreement" the United States can impose "reasonable restrictions on employee activities" to uphold the government's compelling interest in protecting classified information. 444 U.S. at 509 n. 3. The criminal prohibition on willful disclosure of national defense

information to persons not entitled to receive such information is unquestionably a reasonable restriction on the activities of a government employee with a TOP SECRET/SCI security clearance.

IV. Defendant's Motion to Dismiss Count Two is Procedurally and Substantively Meritless

Relying on Fed. R. Crim. P. 12(b)(3), the defendant moves to dismiss Count Two of the indictment and requests an evidentiary hearing in order to "further develop the facts, which are in dispute and determinative of this motion." See Defendant's Motion to Dismiss Count Two of the Indictment and for an Evidentiary Hearing ("Def. Mot. Dismiss Count Two") at 2. As mentioned above, Count Two charges the defendant with making false statements to FBI agents on or about September 24, 2009, when he falsely denied having had any contact with a named reporter for a national news organization since meeting the reporter in March 2009; all in violation of 18 U.S.C. § 1001(a)(2).[17] The defendant contends that he was caught in a so-called "perjury trap," because – according to the defendant – the FBI agents who interviewed him on September 24, 2009, "likely already knew the answer" to the questions that they asked before the defendant answered. Def. Mot. Dismiss Count Two at 2. The defendant further argues that because he later purportedly recanted his false statements, this Court should incorporate the recantation provision of a separate perjury statute, 18 U.S.C. § 1623(d) (concerning recantation of grand jury testimony), into the false statements statute, 18 U.S.C. § 1001, and dismiss Count Two on this alternate ground. In short, the defendant asks this Court to receive evidence on his supposed defenses to the false statements

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[17] Section 1001(a)(2) provides in pertinent part:

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation shall be fined under this title, imprisoned not more than 5 years or . . . both.

charge, resolve the factual disputes in his favor, and then dismiss that count. The defendant's motion must be rejected on both procedural and substantive grounds.

A. The Court Cannot Resolve Contested Facts on a Pretrial Motion to Dismiss

At the outset, although the defendant expressly relies on Fed. R. Crim. P. 12(b)(3) (see Def. Mot. Dismiss Count Two at 2), his motion is based on his purported defenses to the false statements charge and is therefore governed by a different rule. Fed. R. Crim. P. 12(b)(2) addresses pretrial motions raising "any defense." The pertinent section of that rule provides:

> A party may raise by pretrial motion any defense . . . that the court can determine without a trial of the general issue.

Fed. R. Crim. P. 12(b)(2). As the D.C. Circuit stated in United States v. Yakou, 428 F.3d 241 (D.C. Cir. 2005), the phrase "general issue" means "evidence relevant to the question of guilt or innocence." Id. at 246 (citations and internal quotation marks omitted). Where the facts central to the charged offense are in dispute, as the defendant states that they are here, Rule 12(b)(2) does not permit the district court to resolve those factual disputes pretrial. See Wright & Leopold, Federal Practice and Procedure: Criminal 4th § 191 at 393 ("A pretrial motion is not the proper method for raising a defense that would require a trial on the merits."). This is so, because "the government is usually entitled to present its evidence at trial." Yakou, 428 F.3d at 247. Indeed, in a case decided over forty years ago, United States v. Knox, 396 U.S. 77 (1969), the Supreme Court reversed the pretrial dismissal of false statements charges brought under 18 U.S.C. § 1001. Although not central to its holding, the Court observed that Knox had raised certain "evidentiary questions" pertaining to potential defenses to those charges and that those questions "must be determined initially at his trial." Id. at 83 and n. 7 (citing to a prior version of Fed. R. Crim. P. 12(b)(2)). The Federal Rules of Criminal Procedure do not allow for what the defendant seeks here, a dispositive pretrial ruling on his purported defenses.

B. Defendant's Purported Defenses to Count Two are Not Legally Cognizable

Apart from its procedural defect, the defendant's motion fails because it is premised on substantive defenses that are not available to him – not now, and not even at trial. First, the defendant asserts as a purported defense to the false statements charge the so-called "perjury trap" defense. See Def. Mot. Dismiss Count Two at 3-8. The defendant contends that he cannot be prosecuted under 18 U.S.C. § 1001, arguing that, because the FBI agents asked him questions the answers to which the United States already knew, such a prosecution is inconsistent with the statute and fundamentally unfair. Id. Even assuming that the defendant's recitation of the facts were accurate, which it is not, there is no such defense to a false statements charge. The Supreme Court said so in Brogan v. United States, 522 U.S. 398 (1998).

Remarkably, the defendant discusses the legislative history of the false statements statute, the unreported Solicitor General's memorandum in Nunley v. United States, 434 U.S. 962 (1977), and the United States Attorney's Manual[18] in support of his motion (see Def. Mot. Dismiss Count Two at 3-5), but he fails to discuss the facts of Brogan or its pertinent legal analysis. Brogan merits only a passing reference in his brief. Id. at 6. This is especially remarkable, given the fact that the Supreme Court in Brogan expressly rejected the very claims that the defendant advances here.

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[18] The defendant's reliance on the United States Attorneys' Manual ("USAM") is unavailing. First, he misleadingly omits the second sentence of the provision that he cites. See Def. Mot. Dismiss Count Two at 1 (citing only the first sentence of the USAM § 9-42.160). That section provides: "It is the Department's policy not to charge a Section 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government. *This policy is to be narrowly construed, however; affirmative, discursive and voluntary statements to Federal criminal investigators would not fall within the policy.*" USAM § 9-42.160 (emphasis added). The defendant's false statements to the FBI agents that he had had no contact with the reporter since March 2009 do not constitute a mere false denial of guilt. Thus, the false statements charge in this case is consistent with the Department's policy. Moreover, the USAM confers no legal rights on a criminal defendant. See United States v. Mahdi, 598 F.3d 883, 896-97 (D.C. Cir. 2010). The defendant's invocation of the USAM is, therefore, irrelevant to his legal claim.

In Brogan, the defendant agreed to be interviewed by federal agents and was asked whether he had received any cash or gifts from a unionized real estate company when he was a union leader. 522 U.S. at 399. Brogan said, "no." Id. The agents then told Brogan that they had records from the company that contradicted his statement. Id. at 400. Although advised that lying to federal agents was a crime, Brogan did not change his answer. Id. Brogan was subsequently charged and convicted of making a false statement, in violation of 18 U.S.C. § 1001. Id.

Brogan asked the Supreme Court to read an exception into Section 1001 in these circumstances for the so-called "exculpatory no," which had been adopted by many Circuit Courts. Id. at 401. In support of his argument, Brogan claimed (like the defendant does here) that falsely denying a fact that the government investigators already knew was not covered by Section 1001. Id. at 401-02. Brogan further complained (as the defendant does here) that his false statements prosecution violated the "'spirit' of the Fifth Amendment" and amounted to an unfair "piling on" of charges. Id. at 404-05.

The Supreme Court declined Brogan's invitation to depart from the text of the statute on the asserted policy grounds. The Supreme Court found that the plain language of 18 U.S.C. § 1001 covered "any" false statement, id. at 400, and held that there was no "exculpatory no" exception to the statute. Id. at 407. The Court concluded that, however "alluring the policy arguments" for narrowing the statute, it was for Congress, not the federal courts, to create any exceptions to 18 U.S.C. § 1001. Id. at 408.[19]

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[19] The defendant has obviously read closely Justice Ginsburg's concurrence in Brogan, lifting significant portions from it, including the two quotations in her concurrence from the Solicitor General's unpublished memorandum in Nunley v. United States, 434 U.S. 962 (1977). Compare Def. Mot. Dismiss Count Two at 5, with 522 U.S. at 414-15. This makes all the more curious the defendant's failure to identify and discuss the holding of Brogan, which forecloses his argument before this Court.

The defendant's second purported defense is likewise unavailable. The defendant invites this Court to re-write Section 1001 to incorporate the recantation provision of 18 U.S.C. § 1623(d). Section 1623 criminalizes false sworn declarations before any court or grand jury. It contains an express recantation provision which serves as a bar to prosecution under that section if certain conditions are met. The recantation provision provides:

> Where, in the same continuous court or grand jury proceeding in which the declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

18 U.S.C. § 1623(d). In light of Brogan, the defendant's alternate argument is deserving of little attention. The defendant invites the Court to create a new exception to Section 1001 for false statements that are later recanted within the requirements of Section 1623(d). As the Supreme Court said in Brogan, Section 1001 contains no exceptions. 522 U.S. at 400 ("By its terms, 18 U.S.C. § 1001 covers 'any' false statement – that is, a false statement 'of whatever kind'") (citation and internal quotation marks omitted). In support of his argument, the defendant relies on a single, pre-Brogan case from the Eighth Circuit: United States v. Cowden, 677 F.2d 417 (8th Cir. 1982). See Def. Mot. Dismiss Count Two at 9-10. The defendant's reliance on Cowden is misplaced. Preliminarily, contrary to the defendant's assertion, the Eighth Circuit did not "embrace[ ] the recantation defense in the false statement context" in Cowden. See Def. Mot. Dismiss Count Two at 9. In Cowden, the Eighth Circuit reversed a false statements conviction on materiality grounds. 677 F.2d at 419 ("We find it unnecessary to reach any issue other than that of materiality."). The Eight Circuit said nothing about recantation under 18 U.S.C. § 1623(d).

Furthermore, the unique facts of Cowden bear no resemblance to this case. Cowden had initially denied on a Customs form that he was carrying over $5,000. Id. at 418. But Cowden almost

immediately corrected his false statement by a true oral statement before the currency that he was carrying had been found and then offered to amend the form to report that currency. Id. Notwithstanding governing regulations that would have permitted Cowden to amend his initial false statement, he was not permitted to do so. Id. at 418, 420. Expressly relying on those governing regulations, the Eighth Circuit concluded that Cowden should have been permitted to amend the form on which he made his initial false statement. Id. at 420-21. Under these circumstances, the Eighth Circuit found Cowden's argument "against the materiality of his false statement" as "persuasive." Id. at 420.

Quite unlike the facts of Cowden, the defendant's self-described "subsequent correction" (see Def. Mot. Dismiss Count Two at 9) occurred six months after he made the false statements charged in the indictment. To the extent that the defendant intimates that he may have recanted his false statements during his first interview on September 24, 2009 (see id. at 2), he is wrong. Indeed, rather than recant his false statements at his first interview on September 24, 2009, the defendant repeated them during his second interview on March 29, 2010, that is, until he was confronted with some of the evidence contradicting those statements. See discussion below at section V.B.

As mentioned, Brogan forecloses the defendant's argument to this Court to incorporate Section 1623(d)'s recantation provisions into Section 1001. Although the defendant fails to mention it in his brief, every Circuit Court that has been presented with the same offer has rejected it. See, e.g., United States v. Stewart, 433 F.3d 273, 318 (2d Cir. 2006) ("We agree with the decisions from other circuits that have concluded that there is no safe harbor for recantation or correction of a prior false statement that violates section 1001."); accord United States v. Sebaggala, 256 F.3d 59, 64 (1st Cir. 2001) ("The appellant cites no authority that would support transplanting the provisions of section 1623(d) into the unreceptive soil of section 1001."); United States v. Beaver, 515 F.3d 730,

742 (7th Cir. 2008) (same; finding defendant's reliance on Cowden to be "misplaced"); United States v. Meuli, 8 F.3d 1481, 1486-87 (10th Cir. 1993) (same); United States v. Fern, 696 F.2d 1269, 1275 (11th Cir. 1983) (same). Finally, even assuming that the recantation provision of 18 U.S.C. § 1623(d) would otherwise apply here, the defendant's argument would still fail because he did not make his "subsequent correction" until after he was confronted with evidence of the falsity of his prior statements. United States v. Moore, 613 F.2d 1029, 1043 (D.C. Cir. 1980) (defendant, who was known to have lied to the grand jury, could not claim the benefit of the recantation provision of 18 U.S.C. § 1623(d)).

V. Defendant's Suppression Motion is Groundless, Because He was Never in Custody

In his fourth and final motion, the defendant claims that his statements to the FBI on September 24, 2009, and on March 29, 2010, were obtained in violation of the Fifth Amendment of the United States Constitution and therefore must be suppressed. See Defendant's Motion to Suppress Statements and for an Evidentiary Hearing ("Def. Mot. Suppress") at 3. The defendant contends that his encounters with the FBI on those occasions constituted "custodial interrogation" within the meaning of the Fifth Amendment (id. at 3-6), that he never received any warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) (id. at 6-8), and that he never waived his constitutional rights (id. at 8-9), and therefore his statements must be suppressed. The United States agrees that the FBI agents questioned the defendant without advising him of the well-familiar Miranda warnings. The only issue in dispute is whether the defendant was in custody at the time that he made his statements. Because he unquestionably was not, the defendant's motion to suppress must be denied.

A. What "In Custody" Means under the Fifth Amendment

Under Miranda, statements taken during custodial interrogation must generally be preceded by specified warnings in order for them to be admissible in the government's case-in-chief. Miranda warnings, however, are not required in every instance of official questioning. See Oregon v. Mathiason, 429 U.S. 492, 495-96 (1977) (per curiam) (Miranda warnings not always required, even though "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it"). Instead, Miranda warnings are necessary "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Id. at 495. In a series of post-Miranda decisions, the Supreme Court has made clear that, in order to determine whether an individual was in custody at the time of the questioning, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting Mathiason, 429 U.S. at 495); accord Thompson v. Keohane, 516 U.S. 99, 112 (1995); Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam); Berkemer v. McCarty, 468 U.S. 420, 440 (1984). The Supreme Court has also emphasized that, in making that determination, the reviewing court must examine the totality of circumstances in order to determine "how a reasonable person in [the individual's] position would perceive his or her freedom to leave." Stansbury, 511 U.S. at 325. In other words, it is an objective, not a subjective, test. As noted by the Supreme Court, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Id. at 323.

Additionally, in cases where the individual being questioned was told that he was free to terminate the interview, Circuit Courts have consistently concluded that the individual was not in custody for Miranda purposes. In United States v. Czichray, the Eight Circuit observed:

> That a person is told repeatedly that he is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview. So powerful, indeed, that no governing precedent of the Supreme Court or this court, or any case from another court of appeals that can be located (save one decision of the Ninth Circuit decided under an outmoded standard of review, United States v. Lee, 699 F.2d 466, 467-68 (9th Cir. 1982) (per curiam)), holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning.

378 F.3d 822, 826 (8th Cir. 2004); accord United States v. Hayden, 260 F.3d 1062, 1066 (9th Cir. 2001); United States v. Menzer 29 F.3d 1223, 1232-33 (7th Cir. 1994). Moreover, where an individual was questioned at his work, in his home, or in other familiar surroundings, Circuit Courts have also routinely held that the individual was not in custody. See, e.g., United States v. Bassignani, 575 F.3d 879, 885-86 (9th Cir. 2009) (interview in conference room at defendant's workplace); United States v. Panak, 552 F.3d 462, 466-67 (6th Cir. 2009) (interview in defendant's home); United States v. Nishnianidze, 342 F.3d 6, 14 (1st Cir. 2003) (interview in apartment where defendant was staying); United States v. Parker, 262 F.3d 415, 419 (4th Cir. 2001) (interview in defendant's home); United States v. Crossley, 224 F.3d 847, 861 (6th Cir. 2000) (interview in classroom at defendant's workplace); United States v. James, 113 F.3d 721, 727 (7th Cir. 1997) (interview at defendant's workplace during business hours). See also Beheler, 463 U.S. at 1125 ("we have explicitly recognized that Miranda warnings are not required simply because the questioning takes place in the station house") (citation and internal quotation marks omitted).

It is the defendant who bears the burden of proving that he was in custody by a preponderance of the evidence. See United States v. Walters, 563 F. Supp. 2d 45, 51 (D.D.C. 2008) (citing United States v. Goldberger, 837 F. Supp. 447, 452 n. 4 (D.D.C. 1993)). See also United States v. Moore, 104 F.3d 377, 392 (D.C. Cir. 1997) (Silberman, J., concurring) ("Of course, it is the appellant's burden to establish factually that he was in custody as a pre-condition to an argument that the

Constitution protects his silence in that situation."). For the reasons that follow, the defendant cannot meet his burden here.

B. Defendant was Never "In Custody" During the Questioning by the FBI

The defendant's brief is notable in what it does not say. The defendant does not say that the interviewing agents ever placed him under arrest during his questioning or threatened him with arrest. He does not assert that the agents ever handcuffed him or restrained his physical movement in any way. The defendant does not contend that the agents displayed their weapons or used any physical force of any kind. The defendant does not even suggest that he ever affirmatively sought to exercise his right to refuse to speak with the agents. Instead, setting aside the assertions in his brief about his subjective beliefs (which are legally irrelevant), the defendant claims that he was "in custody" because two of the interviews were conducted in a SCIF (the acronym for a Secure Compartmented Information Facility), the interviewing agents never told him that he was free to leave "but instead allowed him to believe that his participation was . . . mandatory," and the questioning was "verbally aggressive." Def. Mot. Suppress at 4-6. A recitation of the facts demonstrates that the defendant's "in custody" claim is specious.

1. September 24, 2009: Voluntary Interview in Defendant's Office in SCIF

The defendant was first interviewed on September 24, 2009, in his office in the headquarters building of the Department of State. The defendant's office was itself part of a SCIF, because the defendant and other individuals working in his office suite routinely handled classified material that was classified up to the TOP SECRET/SCI level. As is required for access to a SCIF, the interviewing agents were required to sign the access log to enter the defendant's office suite. The defendant sat at his desk in his office during the interview. At the outset of this interview, which

began at approximately 10:30 a.m., the defendant was presented with a multi-page questionnaire. The written instructions on the questionnaire read in part:

> You are being asked to complete this questionnaire on a voluntary basis without any actual or implied promise, threat, or coercion of any kind whatsoever. At this time, this questionnaire is being provided to you in lieu of a request that you submit to a voluntary interview. Whether or not you complete the questionnaire, you also may be requested to submit to a voluntary interview on a future date. If you do not wish to complete this questionnaire, please return it to one of the FBI agents who has presented it to you.

The questionnaire contained a series of written questions. The first three questions were preliminary in nature. They were:

> 1. Do you understand that you are being asked to complete this questionnaire as part of a criminal investigation being conducted by the FBI, not an administrative inquiry by the Department of Justice or any other U.S. government agency?
>
> 2. Do you understand and agree that your review and completion of this questionnaire is voluntary, and is not the product of any actual or implied promise, threat, or coercion?
>
> 3. Do you understand that making false statements to the FBI in connection with a federal criminal investigation is a violation of law, including but not limited to, a violation of Title 18, United States Code, Section 1001?

The defendant reviewed the questionnaire, answered each of the first three questions in the affirmative, and signed that document. Based on answers that the defendant gave to other, substantive questions in the questionnaire, the agents then asked to interview the defendant. The defendant voluntarily agreed to be interviewed at that time. It was during this first interview that the defendant made the false statements that are the subject of Count Two of the indictment. The interview concluded about an hour after it had begun, at which time the interviewing agents left the defendant's office.

2. March 29, 2010: Voluntary Interview in Work Room in DOE's SCIF

At approximately 8:40 a.m. on March 29, 2010, an FBI agent contacted the defendant

telephonically to request a follow-up interview of him. The defendant agreed to the interview and said that he was available at 10:00 a.m. that same day. The defendant advised the FBI agent that he was no longer working at the Department of State, but instead was working for the Lawrence Livermore National Laboratory (LLNL), which was (and still is) a contractor for the Department of Energy (DOE), at a location in L'Enfant Plaza, Washington, D.C. Cognizant of the sensitive nature of subject matter of the interview,[20] the defendant further advised the FBI agent that his LLNL office was not inside a SCIF and agreed to meet the interviewing agents inside a SCIF at the headquarters building of DOE.

Later that morning, the defendant and the interviewing agents met at DOE headquarters, where a DOE investigator escorted them to a SCIF for the interview. The defendant and the interviewing agents signed the access log to the SCIF. The defendant was offered a bathroom break prior to the start of the interview, but he declined the offer. The defendant and the interviewing agents were led by the DOE investigator to a work room inside the SCIF for purposes of the interview. The work room was large enough to accommodate multiple computer terminals, filing cabinets, and the chairs used by the defendant and the interviewing agents. The defendant was seated in the chair nearest the unlocked door of the work room. The interviewing agents thanked the defendant for meeting with them and advised him that he could leave at any time. The defendant told the interviewing agents that he had a meeting at 11:00 a.m. that he did not want to miss. The interviewing agents told the defendant that his departure at 11:00 a.m. was not an issue and that he could leave at any time. During the course of this second interview, the defendant reviewed the

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[20] The FBI 302s memorializing the defendant's interviews are classified. They have been provided to the defense and the defendant in classified discovery pursuant to the Court's CIPA Protective Orders. Although this production was delayed until February 18, 2011, because of the classification review process, defense counsel and the defendant had been made privy to the substance of the defendant's statements in pre-indictment discussions.

questionnaire that he had completed on September 24, 2009. After reviewing the questionnaire, the defendant repeated the false statements that he made on September 24th that form the basis for Count Two of the indictment. The defendant was immediately confronted with documentary evidence contradicting those false statements. The defendant agreed to continue the interview.

At approximately 11:00 a.m., the interviewing agents advised the defendant of the time. The defendant requested a break to telephone the person he was scheduled to meet, in order to advise that person that he would be late. The interviewing agents told the defendant that he was free to leave at any time in order to attend the meeting. The defendant declined the agents' offer and said that he could simply meet that person later. In the presence of the interviewing agents, the defendant made a telephone call from inside the work room and said, in sum and substance, "I will be tied up much longer." A short time later, the defendant left the SCIF on his own to use the restroom. The defendant returned to the SCIF and took his seat closest to the unlocked door of the work room.

At approximately 11:45 a.m., the interviewing agents told the defendant that he was running late for his meeting and that he was free to leave if necessary. The interviewing agents also told the defendant that they wanted to conduct a search of his residence and personal computers. The defendant agreed to provide his consent to the search. The defendant said that he would cancel his meeting and ride the Metro home, where he would meet the agents. The defendant said that he did not want to specify a time to meet in case he was running late and to allow enough time for his wife to leave the residence. The defendant said that he did not want his wife present at their residence so that she would not know about the search and the investigation. The interviewing agents advised the defendant that it was not necessary for him to cancel his meeting, and that he could meet them at his residence afterward. The defendant declined that offer. At approximately 12:05 p.m., the

defendant left the SCIF on his own, agreeing to call one of the interviewing agents to inform him about when the defendant would meet at his residence for the consensual search.

Beginning at approximately 12:35 p.m., the defendant initiated a series of telephone calls with one of the interviewing agents to advise the FBI that he would consent to a search of his residence and personal computers and to schedule a time for that. The calls focused on the timing of the agents' arrival at the defendant's residence, because the defendant did not want his wife to be present during the consensual search.

3. March 29, 2010: Voluntary Interview in Defendant's Home

At approximately 2:30 p.m. on March 29, 2010, the defendant met the two interviewing agents at his residence. Upon entering the defendant's residence, the interviewing agents politely removed their shoes; the defendant already had his shoes off. The two interviewing agents then discussed with the defendant the scope of the consensual search. The defendant was advised that the FBI wanted to have four more agents assist in the search in order to expedite the process. Although expressing displeasure at having more agents involved in the search, the defendant not only consented to the search itself, but he also consented to having the additional agents enter his residence. The other agents also removed their shoes upon entering the defendant's residence.

At one point the defendant asked the interviewing agents if he should obtain legal counsel. One of the interviewing agents told the defendant that the FBI could not provide legal guidance to him, but that he could obtain legal counsel at any time. The defendant did not request an attorney. The defendant executed a written consent to search form. After providing that written consent, the defendant agreed to continue speaking with the interviewing agents in his home. The defendant and the interviewing agents spoke while seated at the defendant's dining room table. The interview concluded at approximately 6:05 p.m. At the conclusion of the interview, the defendant agreed to

contact the interviewing agents the next day for a follow-up interview. The defendant remained at his residence after the FBI agents departed.[21]

The following day the interviewing agents contacted the defendant for a follow-up interview. The defendant declined to be interviewed further.

As an evidentiary hearing on this matter will show, the defendant was never "in custody" within the meaning of the Fifth Amendment and therefore the interviewing agents were not required to provide him with any Miranda warnings. In sum, the defendant was interviewed in three familiar locations (his office, his ultimate employer's office, and his home); the defendant was advised in writing at the outset of the questioning that the interviews were voluntary and he was repeatedly reminded of that fact; and the defendant was repeatedly told that he could end the interviews at any time. A reasonable person in the defendant's position would have felt free to terminate the questioning. Thus, having chosen to speak with the interviewing agents, the defendant has no constitutional basis to object to the admission of his voluntary statements in the government's case-in-chief at trial.

Finally, although he does not develop this argument, the defendant suggests that any fruits of his statements should also be suppressed. See Def. Mot. Suppress at 1 (requesting suppression of his statements and "any evidence gathered as a result of those statements"). Yet the defendant does not claim anywhere in his brief that his statements were involuntary within the meaning of the Fifth Amendment. Nor could he, as the facts set forth above demonstrate. Indeed, in a website that

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[21] The defendant suggests that an FBI agent referred to him in a racist manner during the interview at his residence. See Def. Mot. Suppress at 2 ("At one point, one of the agents, apparently referring to [the defendant's] Korean descent, used the phrase 'you people[.]'"). This suggestion is not only false; it is also disappointing. No such derogatory remarks were made. Moreover, we note that the supervisory special agent who was on the scene is, coincidentally, Asian American.

he has established for purposes of this case, the defendant admits that his statements to the FBI were voluntary. See http://www.stephenkim.org/questions.html ("Stephen has cooperated with the government from the very beginning till the actual indictment. He twice voluntarily agreed to speak to the FBI without legal counsel even though it was his constitutional right [not] to do so.") (last visited on March 2, 2011). Therefore, even assuming that the defendant had been entitled to Miranda warnings, which he was not, this feature of the defendant's claim is foreclosed by the Supreme Court's decision in United States v. Patane, 542 U.S. 630, 640-42 (2004) (holding that exclusionary rule does not apply to unwarned but voluntary statements).

VI. Conclusion

For the foregoing reasons, the Court should deny the defendant's motions in their entirety.

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CERTIFICATE OF SERVICE

On this 2nd day of March, 2011, a copy of the foregoing was served on counsel of record for the defendant via the Court's Electronic Filing System.

/s/
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