IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	FILED IN CAMERA AND UNDER SEAL WITH THE COURT SECURITY OFFICER OR HER DESIGNEE
v.	)	**CRIMINAL CASE NO. 1:05CR225**
LAWRENCE ANTHONY FRANKLIN, STEVEN J. ROSEN, and KEITH WEISSMAN,	)	**The Honorable T.S. Ellis, III**
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS STEVEN J. ROSEN'S AND KEITH WEISSMAN'S MOTION TO DISMISS THE SUPERSEDING INDICTMENT

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Defendants Steven J. Rosen and Keith Weissman, through counsel, respectfully submit the following Memorandum of Law in support of a motion to dismiss the Superseding Indictment in the instant case:

INTRODUCTION

> That is a difficult statute to interpret. It's a very -- a statute you ought to carefully apply. . . . The average American may not appreciate that there's no law that specifically just says if you give classified information to somebody else, it is a crime. There may be an Official Secrets Act in England; there are some narrow statutes, and there's this one statute that has some flexibility in it. So there are people who should argue that you should never use that statute because it will become like the Official Secrets Act. I don't buy that theory, but I do know that you should be very careful in applying that law because there are a lot of interests that could be implicated in making sure that you pick the right case to charge that statute.

These words of caution were not spoken by the Reporters Committee for Freedom of the Press; they were not spoken by a first amendment attorney. They were the words of Special Counsel Patrick Fitzgerald explaining why he did not bring charges under the Espionage Act, 18 U.S.C. §

793, against either the government officials who leaked the name of a CIA agent to the press or the reporters who subsequently published that name to millions of readers all over the world.[1]

Special Counsel Fitzgerald echoed the words of one of this country's founders, James Madison, who wrote in the early years of the Republic that

> [a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.[2]

Rather than following the caution of a special prosecutor who was put into office for the sole purpose of pursuing a case against leaks of classified information, the prosecutors in this case have taken the unprecedented step of criminalizing an alleged leak not just against the government official who was charged with the responsibility of protecting such information, but also members of a public policy organization with First Amendment protection who listened to what this government official had to say. Were this not chilling enough, the prosecutors have decided to pursue this course when all that was exchanged was oral information where whatever classified status of anything contained therein would be impossible for a listener to know.

If this indictment is allowed to stand, a statute which in the first instance is intended to address classic spying will not only be applied to erring government officials but now will be applied to private American citizens pursuing first amendment protected activities. This statute will be stretched far beyond constitutional limits to criminalize speech by persons not employed

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[1] Special Counsel Patrick Fitzgerald, Press Conference Announcing the Indictment of I. Lewis Libby (Oct. 28, 2005) (transcript provided by *The New York Times*) (emphasis added).

[2] 9 *Writings of James Madison* 103 (Gaillard Hunt ed., 1910) (*cited in Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982)).

by the government, not responsible for the preservation of classified information, and not involved in the violation of any Executive Order or regulation. It will be expanded to cover the oral exchange of information any particular portion of which would be impossible for a listener to know was or was not classified.

Dr. Rosen and Mr. Weissman have been indicted on a charge of conspiring to improperly transmit information relating to the national defense to persons not entitled to receive it, in violation of Title 18, United States Code, Section 793(g). Dr. Rosen is also charged separately with aiding and abetting a section 793(d) violation by co-defendant Lawrence Franklin. As applied to this case, these statutes violate due process, as they failed to provide sufficient constitutional notice to persons outside government that it was criminal to receive and retransmit unsolicited oral information. Moreover, if the statute does reach this conduct, it violates the First Amendment protections due to a lobbying organization whose policy activity and civic engagement is the very justification for a free press and free speech.

According to the fifty-seven overt acts set forth in Count I of the Superseding Indictment, Dr. Rosen and Mr. Weissman accomplished the alleged conspiracy by (a) meeting various government officials in public places, always during regular business hours and typically during meals; (b) hearing information relating to various foreign policy issues which may have included information relating to the national defense during those conversations; and (c) passing some of that same verbal information along to others. This is what members of the media, members of the Washington policy community, lobbyists and members of congressional staffs do perhaps hundreds of times every day. Dr. Rosen and Mr. Weissman were not themselves government officials responsible for the determination of what information could or could not be passed outside of government. Nowhere is it alleged that Dr. Rosen or Mr. Weissman stole, paid for or

even solicited the information that they allegedly received. Indeed, because the information involved in this case is entirely oral, there was no way for Dr. Rosen or Mr. Weissman to (a) know conclusively what portion -- if any -- of it was classified (despite what Mr. Franklin may have stated), and (b) what restrictions were placed on the further disclosure of the information.

What the Superseding Indictment attempts to do is impose criminal sanctions against the recipient of what might be called verbal "leaks" of classified information -- not on the "leaker" inside government but, through the guise of a conspiracy charge, on those non-government persons who allegedly receive orally "leaked" information and themselves pass that information along to others. Since the substantive charges do not survive constitutional scrutiny, the conspiracy charge must be dismissed. *See United States v. Ventimiglia*, 242 F.2d 620, 625-26 (4th Cir. 1957).

FACTUAL ALLEGATIONS

The indictment in this case makes a number of allegations. Dr. Steven J. Rosen was the Director of Foreign Policy Issues for the American Israel Public Affairs Committee ("AIPAC"), located in Washington D.C. Superseding Indictment, General Allegations ¶ 4. AIPAC is a policy organization that lobbies both the Congress and the Executive Branch on issues related to Israel and U.S. policy in the Middle East more generally. *Id.* It was Dr. Rosen's responsibility to lobby on AIPAC's behalf with officials within the Executive Branch. *Id.* Co-Defendant Keith Weissman worked with Dr. Rosen at AIPAC as the Senior Middle East Analyst in AIPAC's Foreign Policy Issues department. *Id.* at ¶ 7. He also was responsible for lobbying members of the Executive Branch on such foreign policy issues. *Id.*

According to the Superseding Indictment, Rosen and Weissman developed relationships with persons within and outside government, and used these contacts to gather "sensitive"

government information.[3] Superseding Indictment, Ways, Manner, and Means of the Conspiracy ¶ A. On approximately ten occasions from 1999 to 2004, Rosen and/or Weissman obtained this "sensitive" information, which is alleged to either be, derive from, or relate to classified information. Superseding Indictment, Count I, Overt Acts ¶¶ 1, 3, 5, 6-7, 8-10, 17-18, 28, 35, 43, 44-48. The government alleges that on approximately seven of these ten occasions, Rosen and/or Weissman transmitted the sensitive information to other persons, including other members of AIPAC, members of the media, and/or foreign officials.[4] *See, e.g., id.*

There are no allegations in the indictment that Dr. Rosen or Mr. Weissman solicited classified information from any person, whether inside or outside government. Nor is there any allegation that either asked any government official to violate the law. The only allegation relating to a specific request for information pertains to non-classified information, and there is no allegation that Dr. Rosen or Mr. Weissman ever received that information. *Id.* at ¶ 32. Moreover, there are similarly no allegations that Dr. Rosen or Mr. Weissman ever stole, secreted, purloined, paid for or otherwise obtained classified information from any person -- inside or outside government -- by any illegal means. There is no allegation that either Dr. Rosen or Mr. Weissman sought these meetings, exchanged this information, or took any action outside the

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[3] Executive Orders 12958 (April 17, 1995) and 13292 (March 25, 2003) set forth the classification categories for classified government information. *See* Exec. Order No. 12958, 3 C.F.R. 333 (1995); Exec. Order No. 13292, 3 C.F.R. 196 (2003). "Sensitive" information is not a classification category within this scheme.

[4] On approximately three occasions, the government alleges that Rosen and Weissman received the sensitive information, but there are no corresponding allegations of retransmission. *See id.* at ¶¶ 28, 35, 43.

scope of their regular and proper employment for a well-known and well-reputed national policy lobbying organization. Finally, there is no allegation that either of these men offered Mr. Franklin anything of value to act as he did nor that they were provided anything of value from anyone (outside their normal salaries for doing their jobs).

All of the sensitive information allegedly disclosed to Rosen and Weissman was done verbally. That is, Rosen and Weissman obtained the alleged information during the normal course of doing their jobs by having discussions with the government officials identified in the Superseding Indictment. *See, e.g., id.* at ¶¶ 7, 8, 17, 35, 43, 44. There is no allegation that these men sought or received any information in writing where classification markings would be evident and obvious.[5]

On only one occasion does the government allege that a government official attempted to transmit a document ostensibly derived from classified information. *Id.* at ¶ 28. There is no allegation, however, that either Dr. Rosen or Mr. Weissman solicited this document or knew how it was derived or even received this document or retransmitted it to another person not entitled to receive it.[6]

The exchange of information between members of the government and non-governmental organizations is precisely what policy lobbying (as well as every day news reporting) is all about.

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[5] *See* Factual Supplement, filed separately with the Court. The supplement has been filed separately, under seal, and *in camera*, because it contains information derived from the classified discovery in this matter. A copy has been served on the government through the Court Security Officer.

[6] *See* Factual Supplement. The Court also now knows that the sender of this document, Larry Franklin, adamantly denies that the document (which he typed himself) was classified.

Members of organizations like AIPAC that are committed to pursuing particular policy objectives conduct their business, in part, by facilitating an information exchange among members of the government, members of policy think tanks, and members of the press. When foreign policy issues are at stake, this information exchange will also involve representatives of foreign governments.[7] Government officials who disclose information to members of policy groups like AIPAC are certainly aware of how such information will become part of the larger policy debate.[8]

SUMMARY OF ARGUMENT

Although the constitutionality of section 793 has been the subject of previous cases, the breathtaking application of that law to this set of facts breaks new legal ground. Whether section 793 can be extended to the unsolicited receipt of verbal information that allegedly relates to the national defense, and the oral retransmission of information by a third-party (i.e. not by a government official, but by the original recipient, such as a lobbyist or the press) was a question reserved by the Supreme Court in the famous Pentagon Papers case. *See New York Times v. United States*, 403 U.S. 713, 738 n.9 (1971) (White, J., concurring). Recent cases demonstrate,

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[7] It is clear from the face of the Superseding Indictment that the United States Attorney's Office and the FBI simply do not understand how foreign policy lobbying works. Even a cursory review of the affidavit of Special Agent Eric Lurie, filed in support of a search of the AIPAC offices in August 2004, reveals a complete misunderstanding of the basic fact that lobbyists and policy advocates of all sorts trade in information. *See, e.g.*, Affidavit of Special Agent Eric Lurie at ¶ 42 (attached as sealed appendix hereto). The United States Attorney's Office and the FBI also appear unable to grasp the simple idea that members of AIPAC -- an organization that lobbies on U.S.-Israel relations -- will often meet with Israeli officials as part of their responsibilities.

[8] *See* Factual Supplement.

however, that this question must be answered in the negative. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001).

For the reasons set forth below, neither the plain text of section 793 nor its legislative history envision its application to the alleged facts of this case. In the ninety years since section 793 was originally crafted as part of the Espionage Act of 1917, there have been no reported prosecutions of persons outside government for repeating information that they obtained verbally, and were thus unable to know conclusively whether or to what extent that information could be repeated.[9] And there certainly have been no reported convictions for merely receiving an unsolicited facsimile with no classification markings that may have contained some classified information. Due process requires that a defendant be given "fair warning" that his conduct could fall within the ambit of a criminal statute. Because of the novelty of the government's theory here, Dr. Rosen and Mr. Weissman lacked such warning, and Count I must be dismissed accordingly.

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[9] There is only one reported case in which the disclosed information may have been oral. *See United States v. Smith*, 592 F. Supp. 424 (E.D. Va. 1984). To begin with, the charges in that case were filed against the government official involved -- an Army intelligence officer -- not a private citizen who simply heard (and did not solicit) verbal national defense information. In that respect, *Smith* was a classic espionage case. In addition, that case ended in an acquittal, indicating that the government should have thought twice before now trying to stretch the statute even further. *See* Caryle Murphy, *Smith Gains Acquittal in Spy Case*, WASH. POST, Apr. 12, 1986, at A1; UNITED PRESS INT'L, *Smith Trying to Adjust After Spy Trial*, Apr. 24, 1986 ("According to Justice Department records, Smith was the first American to be acquitted of espionage charges since at least 1970. Retired CIA Deputy General Counsel Walter Pforzheimer said only a handful of others dating back to the Revolutionary War have been found innocent.").

Moreover, there are at least two independent First Amendment doctrines that require the dismissal of Count I. First, the application of section 793 to the facts alleged in Count I cannot withstand strict scrutiny as a content-based limitation on political speech at the core of the First Amendment. In particular, the government's application of section 793 to Dr. Rosen and Mr. Weissman as *re-transmittors* of verbal information falls afoul of the Supreme Court's decision in *Bartnicki*, *supra*. Second, section 793 is substantially overbroad as applied to the instant facts, as it fails to adequately distinguish between transmittors and re-transmittors of information as required after *Bartnicki*.

The implications of this prosecution cannot be overstated. Every day members of the press and members of policy organizations meet with government officials. These meetings are a vital and necessary part of how our government and society function. The Founders provided for them in the Bill of Rights. During the meetings information is exchanged and sometimes the government officials provide information about the state of internal policy deliberations. Sometimes this exchange occurs before government leaders are ready for official or formal pronouncements of the issue involved, and sometimes the government officials make the decision to recount information that may relate to such classified information. Lobbyists properly use these exchanges to inform their clients or constituencies.

With regularity, members of the press publish the information they obtain from these meetings. On many occasions, the media boldly state that they have classified material in their possession as a result of these meetings[10] Indeed, unlike Dr. Rosen and Mr. Weissman, these

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[10] *See, e.g.*, Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Dana Priest and Josh White, *Before the War, CIA Reportedly Trained a Team of*

(Cont'd on following page)

reporters actually solicit the leaking of classified information and seek to get this information in writing.

If the instant indictment and theory of prosecution are allowed to stand, lobbyists who seek information prior to its official publication date and reporters publishing what they learn can be charged with violating section 793. If the instant indictment and theory of prosecution are allowed to stand, Dr. Rosen, Mr. Weissman, and other foreign policy advocates who, like the press, report to their constituents on the development of policy positions within the government would find themselves speaking on matters of great public concern at the risk of criminal prosecution – undoubtedly resulting in precisely the "chilling effect" that the First Amendment was intended to avoid.

(Cont'd from preceding page)

Iraqis to Aid U.S., WASH. POST, Aug. 3, 2005, at A12; Dafna Linzer, *Iran Is Judged 10 Years From Nuclear Bomb*, WASH. POST, Aug. 2, 2005, at A1; Dafna Linzer, *U.S. Says It Did Not Carry Out Plans to Back Iraqis in Election*, WASH. POST, July 18, 2005, at A4; Douglas Jehl, *2 C.I.A. Reports Offer Warnings on Iraq's* Path, N.Y. TIMES, Dec. 7, 2004, at A1; Deborah Sontag, *Mystery of the Islamic Scholar Who Was Barred by the U.S.*, N.Y. TIMES, Oct. 6, 2004, at A1; Carlotta Gall and David Rhode, *Afghan Abuse Charges Raise New Questions on Authority*, N.Y. TIMES, Sept. 17, 2004, at A10; Douglas Jehl and Eric Schmitt, *Army's Report Faults General in Prison* Abuse, N.Y. TIMES, Aug. 27, 2004, at A1; William M. Arkin, *A New Nuclear Age – Planners Design Technology to Withstand the Apocalypse*, L.A. TIMES, July 6, 2003, at M1; Barton Gellman, *4 Nations Thought to Possess Smallpox – Iraq, N. Korea Named, Two Officials Say*, WASH. POST, Nov. 5, 2002, at A1; Eric Schmitt, *U.S. Plan for Iraq is Said to Include Attack on 3 Sides*, N.Y. TIMES, July 5, 2002, at A1; Bill Gertz, *Russian Merchant Ships Used in Spying – Target Nuclear Subs in Pacific Northwest*, WASH. TIMES, Nov. 6, 2000, at A1.

ARGUMENT

I. Section 793, as Applied, is Vague and Does Not Provide Constitutionally Adequate Notice That it Criminalizes Foreign Policy Lobbying by Persons Outside Government

The practice of the media and others meeting with government officials and seeking information, the release of which some in the government might want to control, has gone on since our country was formed. This exchange is part of the very checks and balances on which the democracy has worked. This practice has become even more extensive throughout the lifespan of the Espionage Act. Until now, no administration has attempted to address what it may perceive as annoying or premature "leaks" by criminalizing the receipt and use of unsolicited oral information obtained as part of the lobbying or reporting process. Indeed, "only a single non-espionage case of unauthorized disclosure of classified information has been prosecuted in over 50 years." Attorney General John Ashcroft, *Report to Congress on Unauthorized Disclosures of Classified Information* (Oct. 15, 2002). That case was *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), which involved the leak of a classified document by a Naval employee to the media -- a case brought against the government "leaker." There has never been a successful prosecution of an alleged leak by persons outside government -- persons with no contractual or legal obligation to preserve classified information.

This absence of precedent is not surprising. First, sections 793(d) and (e) do not prohibit the simple receipt of classified information.[11] Second, the United States does not have an

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[11] Section 793(d) prohibits, in relevant part:

> Whoever, lawfully having possession of . . . any document . . . or information relating to the national defense which information the possessor has reason to believe could be used to the

(Cont'd on following page)

Official Secrets Act prohibiting *per se* the disclosure of national security information. Third, the legislative history of section 793 makes plain that Congress was concerned with spying, not leaking -- and particularly not leaking by persons outside government. Fourth, the idea that a person outside government can even be a "leaker" is nonsensical. A "leak," by definition, is an unapproved disclosure by someone with access to restricted government information. Once that information breaches the wall of government, the "leak" has already sprung. The subsequent use of that information by the media or those conducting other First Amendment protected activity is integral to an open and democratic society.

As discussed in more detail below, Dr. Rosen and Mr. Weissman (let alone the entire media community and people all over this country) lacked constitutionally adequate notice that their conduct could run afoul of the criminal code.[12] It is a fundamental element of due process that courts should not extend criminal statutes to conduct when it is unclear that the legislature intended the statute to reach that conduct, and the defendant has not been provided "fair warning" that his conduct could be considered criminal:

(Cont'd from preceding page)

> injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it.
>
> Section 793(e) contains the same prohibition, but applies it to "[w]hoever having unauthorized possession . . . ."

[12] These arguments apply with equal force to the charge of aiding and abetting alleged against Dr. Rosen in Count III, which is premised merely on the act of providing a fax number and (perhaps) passively receipting a fax that happened to contain alleged classified information. This argument is addressed in Dr. Rosen's motion to dismiss Count III, filed separately with the Court.

> . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. . . . [The] principle is that no man shall be held criminally responsible for conduct which could not reasonably understand to be proscribed.

United States v. Lanier, 520 U.S. 259, 265 (1997) (*quoting McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (internal cit. omit.)); *see also Dowling v. United States*, 473 U.S. 207 (1985).

There are three related manifestations of this "fair warning" requirement. First, the vagueness doctrine bars enforcement of a statute which forbids an act in such vague terms that "men of common intelligence" must speculate as to its meaning. *See Lanier*, 520 U.S. at 266. When, as here, the statute affects interests squarely protected by the First Amendment, this rule carries particular force. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). Second, the canon of strict construction of criminal statutes and the rule of lenity ensure fair warning by resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. *Lanier*, 520 U.S. at 266. Third, while courts may supply some clarity "by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.*

Each of these three manifestations is based on the notion that it must have been "reasonably clear at the time that the defendant's conduct was criminal." *Id.* at 267. Applied to the present case, such reasonable clarity was severely lacking. Never has a lobbyist, reporter or any other non-government employee been charged, let alone convicted for receiving oral information the government alleges to be national defense material as part of that person's normal First Amendment protected activities. There are, moreover, no reported convictions for the retransmission of verbal information (i.e., retransmitting to the public or to others in their

jobs), a situation where is it impossible to know the limits on whether and to what extent the information can be repeated to others. It would be fundamentally unfair for the Justice Department to usurp the province of the Congress and create some type of Official Secrets Act through the prosecution of a test case against two individuals who were engaged in a practice that defines foreign policy lobbying -- the sharing of information -- in which lobbyists and members of the press engage every day.[13]

It is important to note at the outset that the constitutional issues raised by this prosecution can be avoided if the Court construes sections 793(d) and (e) in the most logical fashion -- to apply only to the transmission of tangible information. This construction is supported by the text of the statute. First, neither section (d) nor (e) make specific reference to verbal/intangible information. Second, the context of the use of the term "information" (the only term that could conceivably cover intangible items) in the statute suggests that Congress was concerned solely with tangible information, as all the other terms in the statute refer to tangible items: document, writing, code book, signal book, sketch, photograph, etc. Under the canon of *noscitur a sociis*, a statutory term is known by the company that it keeps and gathers meaning from the words around it. *See, e.g.*, *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *Neal v. Clark*, 95 U.S. 704, 708-09 (1878); *United States v. Chambers*, 985 F.2d 1263 (4th Cir. 1993). Third, in addition to prohibiting the improper transmission, a person who has received improperly disclosed national defense information commits a crime if he "willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it." This provision,

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[13] *See* Factual Supplement.

however, cannot and does not reach orally communicated information, as all recipients of such information "retain" it in memory and it is physically impossible to "deliver" it back to the United States. The government's entire attempt to prosecute under this theory and the problems it creates starts with stretching 793 out of the context of its own words.

A. The Text of Section 793 is Vague as Applied

Due process requires that a criminal statute provide a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *Thomas v. Davis*, 192 F.3d 445, 455 (4th Cir. 1999). If a law is "vague or highly debatable, a defendant -- actually or imputedly -- lacks the requisite intent to violate it." *United States v. Mallas*, 762 F.2d 361, 363 (4th Cir. 1985).[14] Criminal prosecution for the violation of an unclear duty "itself violates the clear constitutional duty of the government to warn citizens whether particular conduct is legal or illegal." *Id.* A statute cannot be construed so as to delegate to prosecutors and juries the "inherently legislative task" of determining what type of discussions of national defense information are so reprehensible as to be punished as crimes. *See United States v. Kozminski*, 487 U.S. 931, 949 (1988) (rejecting construction of criminal statute that would "delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes").

The vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited (i.e. the "fair notice" requirement) and in a manner that does not encourage arbitrary and discriminatory

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[14] The vagueness of a law is decided by the Court as an issue of law. *Mallas*, 762 F.2d at 364 n.4.

enforcement. *See Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *United States v. Lindh*, 212 F. Supp. 2d 541, 573 (E.D. Va. 2002). The doctrine exists to protect both free speech and due process values. *Lindh*, 212 F. Supp. 2d at 573. Although section 793 has withstood facial vagueness challenges in the past, *see Morison*, *supra*, those challenges were in a much different context. The statute stretched to apply to the facts of this case is constitutionally defective.[15]

1. The Court Should Apply a Heightened Vagueness Standard When a Statute Criminalizes First Amendment Protected Political Speech

The primary purpose of the fair notice requirement is to enable an ordinary citizen to conform his/her conduct to the law. *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Id.* (*quoting Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). The Constitution does not permit the legislature to "set a net large enough to catch all possible offenders" and leave it to the Courts to decide who should or should not be rightfully held. *Id.* at 60.

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[15] In *Morison*, the Fourth Circuit addressed a number of vagueness challenges to section 793. Although related to the issues raised in this case, the distinct factual scenario presented by *Morison* renders the Fourth Circuit's rulings inapplicable to the present scenario. The defendant in *Morison* was a Navy employee responsible for holding and keeping national defense information. In violation of that duty, he secreted certain top secret photographs from a co-worker's desk, removed the classified markings, and forwarded the photos to the editor of a naval operations magazine. On appeal, the defendant contended that two elements of the statute rendered it infirm on vagueness grounds: the "related to the national defense" and "not entitled to receive" prongs. The defendant challenged the latter clause on the ground that the statute does not define who may/may not receive material related to the national defense. *See* 844 F.2d at 1074. The court rejected this claim, positing that the words "entitled to receive" could be limited and clarified by the classification orders. *Id.* at 1075. As all the alleged information transmitted in *Morison* was proven to be classified as "secret," and the defendant was a government employee well-versed in classification matters, the court was able to conclude easily that the statute was not vague in that case, and that the defendant clearly understood the meaning of who was "not authorized to receive" the secret documents at issue. *Id.* at 1074-75.

The degree of vagueness that the Constitution tolerates depends in part on the nature of the statute. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The Supreme Court has expressed relatively lesser tolerance of potentially vague enactments with criminal rather than civil penalties because the consequences of imprecision are qualitatively more severe in the criminal context. *See id.* at 498-99; *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (noting particularly severe chilling effect caused by criminal sanctions in First Amendment context). Moreover, the "most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates*, 455 U.S. at 499. If the law interferes with free speech rights, the Constitution demands a greater degree of specificity, and a more stringent vagueness test should apply. *See id.*; *Smith v. Goguen*, 415 U.S. 566, 573 (1974). As a result, the Supreme Court has invalidated such statutes on vagueness grounds even if valid applications were possible. *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (citing cases).

2. The Statute is Vague as Applied to Verbal Retransmissions by Non-Government Employees

Dr. Rosen and Mr. Weissman are charged in Count I with conspiring to violate §§ 793(d) and (e). Section 793 on its face is not limited to "classified information," but extends to cover "information relating to the national defense." The term "national defense" is a "generic concept of broad connotations" not restricted to military matters. *United States v. Truong*, 629 F.2d 908, 918 (4th Cir. 1980). Applying this language in the context of verbal information is unconstitutionally vague. *See generally United States v. Heine*, 151 F.2d 813, 815 (2d Cir. 1945) (noting that every part of the national economy and "everything tending to disclose the national mind" will potentially relate to the national defense during time of war).

Multiple components of those statutes are impermissibly vague as applied to this case. First, the statutes require that the defendant transmit "information relating to the national defense." Although *Morison* overruled a vagueness challenge to this clause, that decision is distinguishable here, as the allegations in *Morison* surrounded the transmission of (a) a tangible document that (b) was clearly marked classified (c) by a government employee who was responsible for handling such information. In this case, by contrast, all the alleged information obtained and transmitted by Dr. Rosen and Mr. Weissman was oral. Unlike *Morison* -- which involved the transmission of a document that bore explicit "Top Secret" markings -- one cannot determine solely from the nature of the information itself the restrictions on any particular portion of the oral information involved in this case.[16]

Indeed, unlike a document bearing a classified stamp, a recipient of verbal information cannot readily ascertain what aspect or portion of an oral discourse is classified, even if he is told in the conversation that the information is or relates to classified material. It is simply impossible for any person to know, without access to the original classified documents, what restrictions actually have been placed on the information.[17] By definition, not every sentence spoken by the government's cooperating witness in this case was "classified." Even if oral receipt of any of that classified material was a violation of law, how would a putative defendant,

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[16] The same contrast can be made with *Truong*, which involved the transmission of diplomatic cables and other classified papers procured "surreptitiously" from the government. *See* 629 F.2d at 911-12.

[17] *See* Factual Supplement.

a grand jury considering a charge, a judge overseeing a trial and crafting jury instructions, or a petit jury know what portion was offensive?[18]

The inherent vagueness on this point is apparent from the face of the Superseding Indictment. The government has alleged that Dr. Rosen and Mr. Weissman conspired to "gather **sensitive** U.S. government information, **including** classified information relating to the national defense" for subsequent unlawful transmission.[19] Gathering and retransmitting "sensitive" information is not a crime. "Sensitive" is not a legal classification, nor is it a legally meaningful term.[20] Virtually all internal government information can be considered "sensitive" to someone.

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[18] The Defense Department's own training materials emphasize the importance of written classification markings. The "DoD Guide to Marking Classified Documents," for example, states in its Foreword that written markings "alert holders to the presence of classified information, identifying the exact information or portion that needs protection." *See* http://www.dss.mil/isec/marking/page1.htm (last visited Jan. 19, 2006) (emphasis added). Similarly, the DoD manual for government contractors who have access to classified information states that "it is essential that all classified information and material be marked to clearly convey to the holder the level of classification assigned, the portions that contain or reveal classified information, the period of time protection is required, and any other notations required for the protection of the information or material. Department of Defense NISP Manual at 4-200, http://www.dss.mil/isec/ch4-2.htm (last visited Jan. 19, 2006). Indeed, the DoD manual directs that if marking the classified material is "not practical," then "written notification of the markings shall be furnished to recipients." *Id.* at 4-203.

[19] *See* Superseding Indictment, Count I, Ways, Manner and Means at ¶ A (emphasis added).

[20] As noted above, Executive Orders 12958 (April 17, 1995) and 13292 (March 25, 2003) set forth the classification categories for classified government information. *See* Exec. Order No. 12958, 3 C.F.R. 333 (1995); Exec. Order No. 13292, 3 C.F.R. 196 (2003). "Sensitive" information is not a classification category within this scheme.

By the terms of this indictment, the government could extend section 793 to all such information, which clearly fails to provide a potential defendant with fair notice.[21]

Similarly, the conspiracy charge is premised in substantial part on Dr. Rosen and Mr. Weissman's retransmission of "national defense information relating to a classified draft internal United States government policy document" and "internal United States government deliberations about the document." *See* Overt Acts ¶¶ 17, 18, 24, 25, 26, 27, 29, 30, 34. It is important to note that there is no allegation that either (a) the defendants received or transmitted the allegedly classified document itself, or (b) that the defendants received or transmitted a specific item of information contained in the document that was classified. In each instance, it is alleged only that they received and transmitted information relating to a classified document or internal deliberations about the document.

Combined with the fact that all the information was presented verbally, the vagueness of the statute in this circumstance is patent. It is simply impossible for a person to know that a conversation "relating to" a classified document contains legally restricted information.[22] The same can be said for a discussion of policy deliberations "about" a classified document. The terms "about" and "relating to" have no limits; it would take no great leap of logic to conclude that any discussion about foreign policy "relates to" a classified document at some level. Yet,

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[21] This unlawful expansion of section 793 is reiterated at ¶ C, which alleges that Dr. Rosen and Mr. Weissman exchanged "information, **including** classified information" with Mr. Franklin. By its own terms, this clause would criminalize the exchange of all government information. Such a result would be unprecedented. The government generally loves to chill the exchange of information it wants to control, but the vehicle to do this is not an overbroad, vague invention of criminal liability.

[22] *See* Factual Supplement.

under the prosecutors' theory, such a person commits a crime if he/she then re-transmits the verbal information even if its connection to the national defense or anything actually classified is as attenuated as the phrase "related to."[23]

Section 793 further requires that a defendant willfully transmit the information to a person "not entitled to receive it." This provision similarly fails to provide fair warning.[24] When information is transmitted verbally, the recipient has no way to determine who else can or cannot also receive the information, unless specifically told. Moreover, unlike the defendant in *Morison*, neither Dr. Rosen nor Mr. Weissman had regular responsibilities for handling classified information. The Fourth Circuit based its decision denying Morison's vagueness claim in large measure upon the fact that Morison was a government official who worked in a restricted, vaulted government facility, and was familiar with the regulations on classified materials. *See*

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[23] The verbal nature of the information in this case renders the Fourth Circuit's decision in *United States v. Dedeyan*, 584 F.2d 36 (4th Cir. 1978) distinguishable. In *Dedeyan*, the court construed § 793(f)(2) and found that "relating to the national defense" as used therein was not constitutionally vague. As the court recognized, however, subsection (f)(2) requires that the defendant know that the information at issue had been illegally abstracted, stolen, or destroyed. *See* 18 U.S.C. § 793(f)(2); *Dedeyan*, 584 F.2d at 39. As the court held, "certain injury to the United States" could be inferred from this conduct. Such an additional scienter requirement is not present in §§ 793(d) or (e). Moreover, § 793(f)(2) only applies to persons "entrusted with" information relating to the national defense, a limitation that necessarily implies that the defendant knows that the information at issue does, in fact, relate to the national defense. This is distinct from § 793(e), which applies to persons not authorized to receive the alleged information.

[24] It is notable that alleged co-conspirator Lawrence Franklin stated at his plea hearing that he conspired with Dr. Rosen and Mr. Weissman to transmit certain information to the latter's contact at the National Security Council. *See* Plea Hearing Tr. 44-45, Oct. 5, 2005. ("I asked them to use their contacts to get this information back-channeled to people on the NSC."). If true, then this conspiracy cannot be cognizable under section 793, since the alleged conspirators agreed to pass information to people (NSC personnel) who were certainly entitled to receive it.

844 F.2d at 1074. Under the scheme of the law, he is the person responsible for keeping the information properly. It was thus beyond dispute that Morison knew that the press was not entitled to receive the intelligence documents contained in that facility. Dr. Rosen and Mr. Weissman, by contrast, were not government employees and did not have access to the written materials underlying the verbal information that they allegedly received. Accordingly, they, like any ordinary persons, were in no position to be able to evaluate what information was restricted in its distribution, or who was or was not "entitled to receive" the verbal information.[25]

The fact that Dr. Rosen at one time in his career obtained a security clearance, *see* Indictment, General Allegations ¶¶ 5-6, does not change this result. While the government may be able to prove that Dr. Rosen 20 years ago was generally aware of some regulations then in effect on classified material, that general awareness does not mean that he can determine what distribution limits apply to any given tidbit of verbal information -- especially as regulations governing classification procedures vary by agency and change over time. This is particularly the case when the information is provided orally without any indication as to its classified status. Dr. Rosen, like any person with or without a prior security clearance, would be flatly unable to determine who was not authorized to receive information based solely on the fact that the information concerned defense policy or intelligence matters and some part of it was said in some context that was not explained that it was "classified agency stuff." It would be more reasonable for Dr. Rosen to assume that the government officials to whom he was speaking -- who, by definition, were themselves aware of the classification status of the information under

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[25] *See* Factual Supplement.

discussion -- would follow the law and only disclose information that could be properly released to the public.[26]

The lack of notice provided by the statute is not remedied by the vague requirement that a defendant have "reason to believe" that the information "could be used to the injury of the United States" or "to the advantage of a foreign nation."[27] This clause does not survive the strict scrutiny required in a case with direct First Amendment implications.[28] *See infra* § II.A. Having a "reason to believe" that the information could be used to the advantage of another nation or to the injury of the United States is virtually meaningless in the context of foreign policy where the

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[26] *See* Factual Supplement. Dr. Rosen's employment by AIPAC, and the *modus operandi* of AIPAC in lobbying on matters of foreign policy was certainly no secret to the government officials who met with him. It would be reasonable for an ordinary person in Dr. Rosen's position to presume that the government officials would understand what uses he would make of information provided to him, and would therefore also be reasonable for Dr. Rosen to presume that any information he received could be retransmitted to the public. Calling something "classified" may refer to its actual status when some part of it is conveyed, but it also may describe what it was in the past or the generic category in which it belongs. The hearer has no way of knowing.

[27] We note that Count I contains no specific allegation that Dr. Rosen or Mr. Weissman knew that the information they allegedly received and/or transmitted "could be used to the injury of the United States and to the advantage of any foreign nation" as alleged generally in Count I. On that basis alone, Count I is deficient for omitting one qualifier that adds a required element of scienter.

[28] In *Gorin v. United States*, 312 U.S. 19, 26-27 (1941), the Supreme Court held that the presence of a "reason to believe" clause rendered the "relating to the national defense" clause in the predecessor statute to section 793 sufficiently specific. That case is distinguishable for three reasons. First, *Gorin* raised no First Amendment issues, and thus was resolved under a lower standard of scrutiny. Second, the applicable section of the Espionage Act in that case was limited to transmissions to foreign nations and their representatives. *See id.* at n.1. Under such circumstances, a "bad faith" requirement could render the statute constitutionally sound. *See id.* at 27. The present indictment contains no such limitation. Finally, *Gorin* was a document case, not involving the alleged oral transmission of classified information.

government is charging an offense by the oral transmission of information that "relates" to national defense or classified material. Aside from the most *de minimis* cases, any information relating to the national defense could, by its own, give rise to such a reason to believe. Dr. Rosen and Mr. Weissman could only speculate as to whether their retransmission of that information would run afoul of the Espionage Act.

The fact that the statute contains a "willfulness" scienter requirement also does not sufficiently mitigate this problem. The existence of a scienter requirement in the law may, in some circumstances, mitigate a law's vagueness with respect to a notice claim. *See Village of Hoffman Estates*, 455 U.S. at 499.[29] At the same time, the Court cannot allow a statute to be so free of meaningful content that its specific intent requirement "amounts to little more than an assurance that the defendant sought to do 'an unknowable something.'" *Kozminski*, 487 U.S. at 950. Such is the case here. If national defense information is transmitted to someone outside government (such as a lobbyist or member of the press) in verbal form, the recipient has no way of knowing that he has obtained the information improperly and knowing who can/cannot receive it. Under such circumstances, the "willfulness" element cannot overcome the inherent vagueness of the statute as applied.

Moreover, the "most important factor" affecting the clarity demanded by the Constitution is whether the law "threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates*, 455 U.S. at 499. That risk is paramount here. The recipient of verbal information cannot *ask* a third-party whether or not he is authorized to receive the information,

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[29] It does not mitigate an arbitrary enforcement vagueness claim, however.

as doing so would reveal the content of the message. The result would be a chilling effect, since the only safe option would be not to disclose the information to anyone. Yet, this result is precisely what would be prescribed if the United States adopted an Official Secrets Act -- a result that Congress has never enacted.

Hence, the vagueness of the statute in the present factual context provides insufficient notice and makes it impossible for citizens to conform their conduct to the law.[30] This vagueness is particularly egregious, as it has the potential for a substantial chilling effect that would cover not only lobbyists and policy advocates, but members of the press as well. Count I should be dismissed.

3. Section 793 Also Fails the Arbitrary Enforcement Doctrine

The arbitrary enforcement prong of the vagueness doctrine recognizes that if a vague statute reaches a substantial amount of innocent conduct, the Constitution cannot allow the legislature to "entrust lawmaking to the moment-to-moment judgment of the policeman on his beat." *Morales*, 527 U.S. at 60. A criminal law cannot permit law enforcement officers and prosecutors to conduct a "standardless sweep" to "pursue their personal predilections." *Id.* at 65 (O'Connor, J., concurring).[31] The question on this prong is not whether discriminatory

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[30] The vagueness as applied also arises with respect to the applicable penalty for violating section 793. Under sections 2M3.2 and 2M3.3 of the Sentencing Guidelines, a defendant's guideline range and potential sentence depends upon whether the information was classified at the top secret level. In the case of an alleged document transmission, a defendant is on notice of the putative sanction that could attach to his conduct. In the case of verbal information, no such notice is provided. Accordingly, the statute is unconstitutional from the penalty standpoint as well.

[31] *See also* David H. Topol, *United States v. Morison: A Threat to the First Amendment Right to Publish National Security Information*, 43 S.C. L. Rev. 581, 600 (1992) (noting that

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enforcement actually occurred in this case, but whether the law is so imprecise that discriminatory enforcement is a real possibility. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991). This inquiry is of "particular relevance" when one of the classes most affected by the law has the "professional mission to challenge actions of the State." *Id.* In *Gentile*, that class was the criminal defense bar, whose speech generally involves criticism of the government. *Id.* The same can be said in this case of policy organizations like AIPAC, that, at times, may advocate policy choices different from those espoused by the Executive or may seek policy information before officials in the government want that information officially announced.

That the vagueness described *supra* results in arbitrary enforcement in the context of retransmission of verbal information can be found looking no farther than the allegations in this case. The Superseding Indictment alleges that three people provided verbal classified information to Dr. Rosen and/or Mr. Weissman: USGO-1, USGO-2, and Lawrence Franklin. Clearly the government believes that it can prove that these conversations occurred, and that the information transmitted falls within the ambit of the statute. Otherwise, these alleged conversations would be irrelevant and should be struck as overt acts in furtherance of the conspiracy. Yet, only Mr. Franklin has been charged. *The New York Times* has identified USGO-2 as David Satterfield, a high-ranking diplomat now stationed in Iraq -- perhaps the most sensitive post *vis a vis* classified defense information in the world at this time. *See* David Johnston and James Risen, *U.S. Diplomat is Named in Secrets Case*, New York Times, Aug. 18,

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current law allows the Executive Branch to choose what to classify and what to make public, allowing the Executive to use classification procedures to manipulate public debate).

2005, at A22. *The Times* also has reported that the Department of Justice advised the State Department that the present investigation posed no impediment to Mr. Satterfield's post in Baghdad. *Id.* How this investigation could pose no impediment to Mr. Satterfield is difficult to imagine, since his transmission of information to Dr. Rosen is alleged as an overt act, and Dr. Rosen's retransmission of the same information is further alleged to be evidence of a section 793 violation. In other words, if Dr. Rosen has violated section 793, it appears likely that David Satterfield did as well.[32] If *The New York Times* report is accurate, it demonstrates the exact type of arbitrary enforcement in the application of section 793 to the verbal information context that the law warns against.

Moreover, the press routinely cites classified information in its coverage of national defense and foreign policy topics. *See* footnote 10, *supra.* In these articles, the authors knowingly solicit, obtain, and then retransmit (even written) classified information relating to the national defense to as broad an audience as they possibly can. Yet, the government has decided not to seek charges as to this conduct, arguably much more damaging to U.S. interests than anything that Dr. Rosen and Mr. Weissman are alleged to have done. Indeed, Count I is premised on Dr. Rosen's and Mr. Weissman's disclosure of classified information to members of the press. For purposes of argument, one can assume that these individuals then re-transmitted portions of the information to others including a wide reading audience in written stories. Yet those members of the press themselves are not charged as co-conspirators.

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[32] *See* Factual Supplement.

We do not suggest that the press should be prosecuted for the publication of these stories, nor do we suggest that USGO-1 and 2 should be prosecuted for their actions. These examples are provided to demonstrate the arbitrary manner in which section 793 can and is being applied because of its imprecision in the verbal information context -- and the effects that such arbitrariness can have on vital First Amendment rights. The Constitution does not allow the legislature to "entrust lawmaking to the moment-to-moment judgment" of the FBI, *see Morales*, 527 U.S. at 60, and the "executive branch possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests." *In re: Grand Jury Subpoena (Judith Miller)*, 397 F.3d 964, 998 (D.C. Cir. 2005) (Tatel, J., concurring in the judgment).[33]

Because "leak" cases can "reveal mistakes that high-level officials would have preferred to keep secret, the administration may pursue the source with excessive zeal, regardless of the leaked information's public value." *Id.* at 998-99. Absent more specific constraints on the ability of law enforcement to prosecute alleged retransmissions of allegedly leaked verbal information under section 793, this zeal cannot be constrained within Constitutional limits, as it must be. The indictment must therefore be dismissed.

B. Strict Construction and the Rule of Lenity Require Restraint in Construing Vague Statutes

The Supreme Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute" both out of concern for the fair warning requirement and out of

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[33] As noted *supra*, this is particularly dangerous in the present context, where the United States Attorney's Office and the FBI appear to wholly misunderstand the difference between foreign policy lobbying and espionage. *See* Affidavit of Special Agent Eric Lurie.

deference to the prerogatives of Congress. *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2134 (2005).[34] Such restraint is "particularly appropriate" when the conduct underlying the conviction is itself innocuous. *Id.* In *Arthur Andersen*, the Court found that persuading a person to withhold testimony from a government proceeding falls into this category because such behavior "is not inherently malign." *Id.* The same can be said here. Speaking with reporters, foreign officials, or other members of the foreign policy community is "not inherently malign." To the contrary, it is the very essence of democracy and the protection for petitioning the government. Accordingly, strict construction is particularly appropriate here.

In assessing the reach of a criminal statute, the Court should pay "close heed" to the language, legislative history, and purpose of the statute "in order strictly to determine the scope of the conduct the enactment forbids." *Dowling*, 473 U.S. at 213. Moreover, it is improper to infer criminal liability when a statute and its legislative history fail to state that the conduct is prohibited; the burden is the inverse. *United States v. Hodge*, 321 F.3d 429, 438 (3d Cir. 2003).

1. The Text of the Statute Does Not Clearly Contemplate the Retransmission of Verbal Information by Persons Outside Government

On its face, section 793 does not envision the prosecution of private citizens (let alone lobbyists or others engaged in First Amendment activity) for receiving and then using as part of their work unsolicited oral information obtained during the course of their normal discussions with persons inside government. The law does not impose strict liability on recipients or

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[34] *See also Dowling*, 473 U.S. at 213-14 (*citing United States v. Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C.J.)).

communicators of sensitive information.[35] The relevant provisions require the government to prove that the defendants possessed the requisite scienter. That is, they were "'not prompted by an honest mistake as to one's duties,'" but prompted by some bad faith motive.[36]

The indictment contains no allegation that Dr. Rosen or Mr. Weissman solicited the alleged national defense information. While they have been accused of conspiring to obtain national defense information, obtaining such information simply is not a crime under section 793(d) or (e). Without an allegation that the defendants specifically solicited classified information, there can be no inference that they, as unwitting recipients of verbal information, retransmitted the information in bad faith. Unlike the active process of speaking, passive listening does not require any mental state beyond sentient consciousness, let alone the requisite bad motive. And where, as here, the information is conveyed orally, the absence of scienter is doubly evident. Again, unlike the taking of a tangible object, passive listening does not require

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[35] *See Truong*, 629 F.2d at 927 (noting that Congress has refused to enact legislation making criminal the mere unauthorized disclosure of classified information); *Smith*, 592 F. Supp. at 429-30.

[36] *See Truong*, 629 F.2d at 919 (quoting trial jury instructions). *See also Gorin v. United States*, 312 U.S. 19, 27-28 (1941). Absent such a motive, the statute would clearly be constitutionally unsound. In *Gorin*, the Supreme Court rejected the contention that prohibition against disclosure of "information relating to the national defense" in the predecessor to section 794(a) was unconstitutionally vague and indeterminate. It so held because the indeterminacy of that phrase was saved by the express scienter requirement in 794(a), which "requires those prosecuted to have acted in bad faith." *Gorin*, 312 U.S. at 28. Although the provisions at issue in this case, sections 793(d) and (e), do not contain the same scienter requirement, the Fourth Circuit has saved these provisions from similar constitutional infirmity by reading a requirement of bad motive into the statute's requirement of "willfulness." *Truong*, 629 F.2d at 919.

any forethought. The law simply does not impose a duty on an individual to cover his ears if someone volunteers sensitive information.[37]

To illustrate, consider the crime of retention under 18 U.S.C. 793(e). A person who has received improperly disclosed national defense information commits a crime if he "willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it." This provision, however, cannot and does not reach orally communicated information, as all recipients of such information "retain" it in memory and it is physically impossible to "deliver" it back to the United States.[38]

Similarly, sections 793(d) and (e) stand in marked contrast to section 793(c), the only provision in the statute that expressly criminalizes the receipt of information connected to the national defense. We have found no case under section 793(c) where recipients of oral information have been prosecuted, and this can be no accident. Unlike sections 793(d) and (e), section 793(c) only prohibits the receipt of tangible items containing information connected to the national defense. Although the legislative history of this provision is sparse, surely Congress recognized the practical and constitutional issues that would arise in any effort to prosecute those who receive oral information related to the national defense, particularly if the information was

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[37] Other possible elements of bad faith also are not alleged in this case. The defendants did not pay for the information, nor were they paid by anyone to receive or use it, other than as part of any compensation received as employees of AIPAC. There were no alleged furtive activities as all the alleged conduct was conducted in open at public places (underscoring that the participants believed their conduct was proper).

[38] Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1049 (1973) ("The law proscribes 'retention' of both ['document' and 'information'], but surely this command is meaningless as to information not in tangible form.").

received without solicitation. Most notably, to do so would lead to the absurd result of criminalizing the passive receipt of sensitive information blurted out in conversation, which is what allegedly occurred here. Instead, Congress logically limited the provision's reach to tangible items, because such items -- unlike information transmitted orally -- can be refused if offered.

2. The Legislative History Does Not Clearly Contemplate the Retransmission of Verbal Information by Persons Outside Government

The legislative history of the espionage statutes demonstrates that section 793 was never intended to be extended to sanction public policy advocates whose receipt and use of national defense material came about from verbal conversations as part of their ordinary jobs. Section 793 was originally enacted by Congress as part of the Espionage Act of 1917, shortly after war had been declared on Germany. The record from that time makes two points clear: (1) that Congress rejected proposed broad prohibitions on the dissemination of national defense information (even during a time of war); and (2) that Congress' concern about the First Amendment impact of such legislation was not limited to members of the press. As Judge Winter summarized in *Truong*:

> Although Congress agreed to statutes aimed at espionage, it specifically rejected a request of the President that it enact a criminal statute to punish the publication of defense information in violation of presidential regulations. *Concern for the public debate of defense issues* and distrust of a war-time president's powers converged to defeat the proposal to criminalize the publication of classified information. Similar attempts were unsuccessful immediately after World War II, in the late 1950's, in the mid 1960's, and in the 1970's.

Truong, 629 F.2d at 928 (emphasis added).

On the first point, each of the versions of the Espionage Act rejected by Congress in 1917 -- S. 8148, S. 2, H.R. 291 and the conference bill -- included sections allowing for the

sanctioning of those who merely published information relating to the national defense in the time of war. None of these provisions were enacted.[39] Ultimately the only explicit prohibition on publication that remained in the Act was section 794(b), which prohibited the publication of specific types of information (e.g. troop movements and military plans) during a time of war with the intent that the same shall be communicated to the enemy.

On the second point, the contemporaneous record indicates that Congress was not only concerned with press freedoms, but with the right of the public to be informed about matters relating to the national defense.[40] As a result, Congress did not draw a sharp line between the press and other members of the public, protecting the former and opening the latter to sanction. Instead, Congress drew a line between spies on one hand, and those who sought to inform the public. As one Senator explained, a distinction must be made:

> between the normal, innocent habits of our people and the designing conduct of the spy. It is a very reprehensible thing to draw a statute in such ways that it can be used to prevent publicity in a republican form of government, that it can be used in such ways as to punish a citizen who is doing a patriotic thing in proclaiming that his country is undefended, and pointing out where her defenses should be strengthened.

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[39] Section 2(c) of S. 8148, in fact, made it a crime during a time of war to "collect, record, publish, or communicate" information relating to the national defense in violation of regulations promulgated by the President.

[40] In one then-famous exchange, for example, one senator successfully argued that it would be better for the public to know of the Navy's secret plan to spread a net across New York harbor to intercept enemy submarines "than that the mouths of the citizens of the United States be gagged or the press be muzzled." 55 CONG. REC. (1917) 2073, 2112. Another congressman similarly opined that "anybody who merely publishes matters here at home and does it in the discharge of what seems to him to be a duty by way of criticism ought not to be prosecuted nor punished under any portion of the bill." *Id.* at 1719.

54 Cong. Rec. 3593 (1917). If Congress intended to punish disclosures by spies -- and not leaks per se -- it clearly did not envision punishing the recipients of national defense information, nor public policy lobbyists "doing a patriotic thing" in attempting to advance a policy agenda.

Since the Espionage Act was passed in 1917, Congress has on many occasions revisited this portion of the criminal code. On each occasion, attempts to broaden prohibitions on the public dissemination of defense information have failed. When section 793 was amended in 1950 to add the "information" clause that ostensibly covers verbal transmissions, Attorney General Clark made its limited scope clear to Congress, noting that "nobody other than a spy, saboteur, or other person who would weaken the internal security of the nation need have any fear of prosecution." 95 Cong. Rec. 9749 (1949). Indeed, Congress ultimately inserted a section into the text of the legislation itself clarifying that nothing in the act should be construed to infringe upon freedom of speech. 64 Stat. 987 (1950).[41]

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[41] In 1946, the congressional committee investigating the attack on Pearl Harbor urged Congress to enact legislation prohibiting the disclosure of any classified information. *See Report of the Joint Committee on the Investigation of the Pearl Harbor Attack*, S. DOC. No. 244, 79th CONG., 2d Sess. 252-531 (1946). Congress rejected this, enacting instead 18 U.S.C. § 798, which prohibits the disclosure of only specified categories of communications intelligence -- a subset of classified information that "is both vital and vulnerable to an almost unique degree." H.R. REP. No. 1895, 81st CONG., 2d Sess. 2 (1950). A similar attempt failed in 1957 to make it a crime for "any person willfully to disclose without proper authorization for any purpose whatsoever, information classified, knowing such information to have been so classified." *See National Security Secrets and the Administration of Justice: Report of the Senate Select Comm. on Intelligence*, 95th CONG., 2d Sess. 18 (1978). Legislation that would have amended section 793 to make all disclosures of classified information criminal was again rejected in 1962. *See* 108 CONG. REC. 23140-41 (1962). And once again in 1983, Congress failed to enact proposed legislation (H.R. 66) that would have imposed criminal sanctions on "any individual" who knowingly communicated classified information to a person not authorized to receive it.

In 2000, Congress for the first time passed a bill covering the unauthorized disclosure of all forms of classified information by persons within or outside government. *See* Nelson, *supra*, at 272. This legislation, which demonstrates the congressional understanding that section 793 was not designed to be an all-purpose Official Secrets Act, was roundly vetoed by the President. *Id.*[42] In his statement accompanying the veto, the President noted that the legislation would have a "chilling effect on those who engage in legitimate activities. . . . Incurring such risks is unnecessary and inappropriate in a society built on freedom of expression and the consent of the governed and is particularly inadvisable in a context in which the range of classified materials is so extensive." *Id.* at 298.[43] A similar anti-leak measure was reintroduced in 2001, but was ultimately dropped by the Senate Intelligence Committee. *Id.* at 285.

In short, the legislative history of section 793 demonstrates that Congress intended to punish spies, not lobbyists, policy advocates, and members of the press engaging in protected First Amendment speech. While the *Morison* decision expanded the pool of government

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[42] Prior to President Clinton's veto, a number of experienced journalists who opposed the bill met with a group of Justice Department attorneys to make their case that an expansive anti-leak law would be bad for both the press and the government. *See* Nelson, *supra*, at 283. During this meeting, it was apparent to the journalists that the Justice Department failed to understand the way leaks had become a commonplace part of the way government operated. *Id.* That is, the Justice Department failed to appreciate that when, for example, the Secretary of Defense speaks for the record, a reporter may interview other officials on the topic of his speech, and that those officials, in an effort to explain the Secretary's comments, might use classified information. *Id.*

The instant indictment makes plain that the Justice Department still does not understand this fundamental aspect of democratic government.

[43] The total number of classification actions during the first fiscal year of the G.W. Bush Administration set an all-time record. *See* Nelson, *supra*, at 272.

employees who could fall within the ambit of the statute, the legislative history does not support a further expansion to cover non-governmental employees involved in the process of foreign policy-making. When the terms of the statute are grievously ambiguous, and the legislative history provides no clarity, the rule of lenity provides that the ambiguity should be resolved in favor of the defendants. *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. Ehsan*, 163 F.3d 855, 857-58 (4th Cir. 1998). Such is the case here.

C. A Novel Expansion of § 793 is Not Warranted By Prior Decisions

It is certainly the case that a court may interpret a statute within constitutional limits. But when interpreting a criminal statute that does not explicitly reach the conduct in question, the Court should be "reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.'" *Dowling*, 473 U.S. at 218. As the Court stated in *Kozminski*:

> It is one thing to recognize that some degree of uncertainty exists whenever judges and juries are called upon to apply substantive legal standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis.

487 U.S. at 951. As noted above, there is no precedent for the expansion of section 793 to the present context. Only once has the statute been successfully applied outside of the espionage context. Never has the statute been applied to retransmissions of alleged leaks by non-governmental employees. The fair notice doctrine requires that a person not be subject to such an unprecedented prosecution, even if the Court believes that it logically follows from past applications. As Justice Holmes wrote almost seventy-five years ago construing a statute that turned on the meaning of the word "vehicles":

> To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it

> may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.

McBoyle v. United States, 283 U.S. 25, 27 (1931). Section 793 does not speak to alleged leaks by non-governmental officials and no prior precedent warrants such an expansion. Accordingly, the Court should not allow it to be so extended.

Not only have there been no prosecutions of the sort now being attempted, but it is well known that the government itself leaks, often to the same types of private citizens it is now charging, when it is convenient for it to do so. This process has become an essential tool employed by officials at every level of government.[44] As one former Director of Central Intelligence has explained:

> [T]he White House staff tends to leak when doing so may help the President politically. The Pentagon leaks, primarily to sell its programs to the Congress and the public. The State Department leaks when it's being forced into a policy move that its people dislike. The CIA leaks when some of its people want to influence policy but know that's a role they're not allowed to play openly. The Congress is most likely to leak when the issue has political ramifications domestically.

S. Turner, *Secrecy and Democracy* 149 (1985).[45] Indeed, one survey of senior federal officials revealed that a whopping 42 percent of those officials had deliberately leaked what certainly could be described as "sensitive" information to the press.[46]

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[44] *See* Factual Supplement.

[45] *See also* Topol, *supra*, at 600 (noting that leaks of classified information are used by people within government to create "false consensus" of support for administration policies and prevent domestic criticism).

[46] *See* M. Linksy, *Impact: How the Press Affects Federal Policy-making* 172, 238-39 (1986).

Leaking of classified information occurs at all levels of government, as government and military officers routinely authorize leaks for policy or political purposes. *See* Jack Nelson, *U.S. Government Secrecy and the Current Crackdown on Leaks, in Terrorism, War and the Press* 271 (N. Palmer, ed. 2003). In October 2002, for example, the Chairman of the Senate Intelligence Committee accused the Bush Administration of disclosing classified information that corresponded to its political agenda. *Id.* An article appearing in the *New York Times* one month later reported that government officials had confirmed a secret report about the monitoring of Iraqis in the United States in an apparent effort to rebut critics in Congress about the failing efforts of the U.S. intelligence community. *Id.* By selectively leaking information to non-governmental policy advocates, members of government -- including members of the intelligence community -- attempt to influence the shape of current policy debates by enlisting the public in its democratic role.

More recently, the Washington Post reported on the location of secret international detention facilities being used by the CIA to house terror suspects. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Washington Post, Nov. 2, 2005, at A1. According to the article, even the mere existence of these facilities was highly guarded by the government. *Id.* The article, however, was based on classified documents and current and former intelligence officials. *Id.* Moreover, the article acknowledged an agreement between the newspaper and "senior U.S. officials" to report on the existence of the secret facilities but not reveal their locations. *Id.* Thus, not only did the government not seek to prosecute the reporter or *The Washington Post* for reporting on these leaks of classified information -- it negotiated the manner in which the information would be reported.

Similar circumstance emerged with the revelations by *The New York Times* of the secret NSA domestic spying program. Once again, the government negotiated the manner in which the information would be reported. *See* James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, New York Times, Dec. 16, 2005, at A1. Moroever, members of Congress have initiated the declassification of documents relating to the program as legislators attempt to deal with the political ramifications. *See* Eric Lichtblau and Scott Shane, *Files Say Agency Initiated Growth of Spying Effort*, New York Times, Jan. 4, 2006, at A1 (discussing letter declassified at request of Rep. Nancy Pelosi (D-CA)).

In light of this prevalent practice, even government officials at the highest levels of the intelligence community have expressed their own lack of understanding about what is or is not captured by the terms of the statute. In a memorandum, then General Counsel of the CIA Anthony Lapham stated:

> [Sections 793 and 794] are vague, and clumsy in their wording. For example, they describe the category of information to which they relate as "information relating to the national defense," which quite conceivably could include everything from the most vital national secrets to the daily stock market reports. . . . It remains unclear, however, whether as a matter of law these provisions could be applied to other very different forms of unauthorized disclosure, such as the publication of books or leaks to the press. It is extremely doubtful that the provisions were intended to have application in such situations . . . .

Anthony A. Lapham, Memorandum for PRM/NSC-11 Subcommittee Members ¶ 2 (Mar. 18, 1977), http://fas.org/sgp/othergov/lapham.html (last visited Jan. 19, 2006). General Counsel Lapham explained the lack of non-espionage prosecutions under § 793 in part as "stemming from the absence of any clearly applicable statute." *Id.* ¶ 2 n.2

If the CIA General Counsel cannot understand how § 793 could apply outside of the classic espionage scenario, it would be impossible for a civilian such as Dr. Rosen or Mr. Weissman to know that their lobbying activity could fall within the ambit of the statute. This is

particularly the case since "only a single non-espionage case of unauthorized disclosure of classified information has been prosecuted in over 50 years." Attorney General John Ashcroft, *Report to Congress on Unauthorized Disclosures of Classified Information* (Oct. 15, 2002).[47] And we are aware of no case in which an unauthorized disclosure case has been prosecuted against a non-governmental employee. Under such conditions of disuse, it would be unreasonable to conclude that Dr. Rosen and Mr. Weissman were on fair notice that their conduct could be prosecutable under § 793 and improper to extend the statute to cover such conduct for the first time.

II. The Statute as Applied Violates The First Amendment

A. The Alleged Conduct Stands at the Core of the First Amendment

It is axiomatic that political speech and association constitute the core of the activities protected by the First Amendment. *See generally Vieth v. Jubelirer*, 541 U.S. 267, 324 (2004). Indeed, the Supreme Court has stated that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The Constitution affords political organizations themselves special protection, as "according protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. U.S. Jaycees*, 468 U.S. 609,

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[47] *See also* James B. Bruce, *The Consequences of Permissive Neglect*, 47 Studies in Intelligence (2003) (noting that *Morison* was the only prosecution for an intelligence leak and complaining that the absence of prosecutions "establishes a law enforcement climate of utter indifference -- actually permissive neglect"). Bruce was the Vice Chairman of the DCI Foreign Denial and Deception Committee.

622 (1984). The political actions of associations dedicated to the advancement of particular policy agendas stand squarely within the ambit of the First Amendment, as "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976); *see also FEC v. NCPAC,* 470 U.S. 480, 493 (1985). The dissemination of truthful information about matters of public concern -- a function that such policy organizations share with the media -- is a core First Amendment activity. *See Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001).

Nowhere is this function more essential to the preservation of a free democratic society than in the context of foreign policy. Unlike the legislative process, which is conducted in the halls of Congress for all to see (as well as under the bright lights of C-SPAN), foreign policy-making is largely a function of the Executive Branch. As such, it is not formulated with the transparency of the legislative process. As Justice Stewart wrote in his concurrence in the Pentagon Papers case:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government.

New York Times v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). While the Executive Branch is entitled to operate with a degree of secrecy in order to maintain the national defense, and while Congress also has the power to enact appropriate laws to preserve such secrecy, *see id.* at 729-30, neither the Executive prerogative nor the lawmaking power of Congress can inhibit the public's central right to associate, advocate, and speak in an effort to shape foreign policy. Indeed, the Supreme Court has stated:

> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. . . . For speech concerning public affairs is more than self-expression; it is the essence of self-government.

Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).[48]

B. Section 793 as Applied to Verbal Information is a Content-Based Regulation Subject to Strict Scrutiny

The alleged criminal conduct in this case took place while defendants Rosen and Weissman were employed by the American Israel Public Affairs Committee ("AIPAC"), an organization devoted to helping shape U.S. policy on issues relating to Israel and the Middle East. *See* Indictment, General Allegations ¶ 5. Steven Rosen was AIPAC's Director of Foreign Policy Issues, responsible, as perhaps the main aspect of his job, for lobbying on AIPAC's behalf with officials within the Executive Branch. *See id.* at ¶ 4. In other words, Dr. Rosen's job was to speak with members of the government, and others, in an effort to help shape U.S. policy on Middle East affairs. Such acts, as noted above, are squarely within the core of the First Amendment.

In drafting Count I of the Superseding Indictment, the government has set forth a lengthy list of alleged overt acts. Taken together, these acts can fairly be read to constitute the conduct by which the government intends to prove a violation of § 793(g). What is apparent from these allegations is that all the alleged national defense information received and transmitted by Dr. Rosen and Mr. Weissman was in verbal form.[49] Accordingly, in order to analyze whether the

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[48] *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("informed public opinion is the most potent of all restraints upon misgovernment").

[49] Overt Act 28 alleges that Lawrence Franklin faxed a document to Dr. Rosen's "office fax machine" in March 2003. There is no allegation that Dr. Rosen either received or

(Cont'd on following page)

government's application of § 793 withstands First Amendment scrutiny, one must start with the premise that Dr. Rosen and Mr. Weissman are being prosecuted for pure speech. This is not a case about conduct, as one could argue when documents are being transmitted, this is a case about what Dr. Rosen and Mr. Weissman *heard and said* in the course of their meetings with members of the press and the Middle East policy community on matters of public policy concern. Since the evaluation of their guilt or innocence will turn on the precise words spoken during these meetings, the question is whether the government can penalize these individuals for the specific content of their discussions.

This renders § 793 a content-based regulation, as it is a law that, if it reaches oral communications at all, distinguishes favored speech from disfavored speech on the basis of the ideas expressed. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642-43 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (law justified based on content of speech being regulated cannot be said to be content-neutral). The obvious purpose of an alleged verbal transmission of national defense information is to provide the recipient with the substantive content of the speaker's statement; "it is like the delivery of a handbill or a pamphlet, and, as such, it is the kind of 'speech' that the First Amendment protects." *Bartnicki*, 532 U.S. at 527. As the Supreme Court recently noted, if the act of "disclosing" information does not constitute speech, it is hard to imagine what does not fall within that category. *Id.*

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retransmitted this document. This is the only time in the indictment that a document is allegedly transmitted.

A content-based restriction can only survive if it satisfies strict scrutiny. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). That is, the statute must be narrowly tailored to promote a compelling government interest. *Id.* If a less restrictive alternative would serve the government's purpose, the legislature must use that alternative. *Id.*

The courts in this Circuit have had a number of prior occasions to review the constitutionality of section 793. *See, e.g., United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000); *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988); *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980). All of those cases dealt with the transmission of documents. And they all involved prosecution of the government official [or other] who initially disclosed the information that was supposed to be held closely. None of those cases -- indeed, no reported case whatsoever -- deal with the criminalization of pure speech as the present indictment attempts to do by private individuals who have heard what a government official had to say and then re-transmitted that information as part of their jobs (let alone in a First Amendment context). For the reasons set forth *infra*, this is a critical distinction -- if section 793 can be applied to verbal transmissions, to be narrowly tailored any such restriction must be limited to government employees and contractors who, by virtue of their relationships with the government and authorization to deal with classified and other sensitive information, have accepted the responsibility associated with controlling the disclosure of such information.

C. The First Amendment Protects Speech That Involves the Retransmission of Information that was Illegally Obtained by a Third Party

The government contends in the Superseding Indictment that Steven Rosen and Keith Weissman obtained classified verbal information from various sources, including USGO-1, USGO-2, and Lawrence Franklin. This alleged receipt, in and of itself, is not criminal. As noted above, the United States does not have an Official Secrets Act, like the type that exists in Great

Britain, prohibiting any disclosures of information designated as official secrets,[50] and section 793 does not criminalize the mere receipt of classified verbal information.[51] There is also no allegation in the indictment that either Rosen or Weissman was involved in any illegality leading to their receipt of said information. That is, there is no allegation that Rosen or Weissman stole classified documents, hacked into government computers, paid bribes for classified materials, or even in any way solicited classified information.[52] Further, neither Rosen nor Weissman was a government employee charged with maintaining the secrecy of classified information.

As a result, Rosen and Weissman's liability under section 793 arises, if at all, by virtue of their agreement to retransmit the allegedly classified information to others (such as others in their organization or the press or members of a foreign embassy) after they received it without solicitation and in oral form. In *Bartnicki v. Vopper*, *supra*, the Supreme Court held that the re-transmission of illegally obtained information relating to matters of public concern is protected from liability under the First Amendment, so long as the secondary transmittor was not involved

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[50] Official Secrets Act, 1911, c.28, § 1 (U.K.). *See generally* Benjamin S. Duvall, Jr., *The Occasions of Secrecy*, 47 U.PITT.L.REV. 579, 593 (1986).

[51] Section 793(c) criminalizes the receipt of documentary material relating to the national defense under particular circumstances and with a particular specific intent. *See* 18 U.S.C. § 793(c). No such allegations have been made in the instant case.

[52] It is important to recall that section 793 does not proscribe the mere receipt of classified information. Thus, the fact that Rosen and Weissman are charged with a conspiracy under § 793(g) does not change this analysis. The only viable object of that conspiracy is the transmission of proscribed information. That Rosen and Weissman allegedly conspired to obtain said information from government source does not make them responsible for the wrongful decision by a government official to release that information. In other words, there is nothing criminal about Rosen and Weissman allegedly conspiring to obtain classified information, because the mere acquisition of that information would not be a crime.

in the initial illegality -- even if the secondary transmittor knew that the initial transmission was unlawful. *See* 532 U.S. at 517-18, 529-35. Although arising in the Title III context, the logic of *Bartnicki* compels the dismissal of Count I here.

The facts of *Bartnicki* can be easily summarized. During the course of a highly contentious public labor dispute, an unknown individual illegally intercepted a cellular telephone conversation between the two plaintiffs, who were officers of the labor union at issue and who were at the time discussing a violent response to management's intransigence. This unknown person left a tape of the intercepted call for defendant Yocum, the head of a local organization opposed to the union. Yocum, after receiving the tape, provided it to defendant Vopper, who was a radio commentator also critical of the union. Vopper played the tape on-air, and the contents were picked up by a number of other media outlets. *See* 532 U.S. at 518. The plaintiffs sued Yocum and Vopper under Title III, which prohibits the intentional disclosure of any wire communication obtained through an illegal interception. *See* 18 U.S.C. § 2511(1)(a), (c).

For purposes of its analysis, the Supreme Court assumed that both Yocum and Vopper had reason to know that the phone call had been intercepted illegally, and thus would be subject to liability unless application of the statute would violate the First Amendment. *Id.* at 525. The Court also assumed three other facts: (1) that the defendants were not involved in the illegal interception; (2) their access to the information was obtained lawfully, even though the information itself was obtained unlawfully by someone else; and (3) the subject matter of the information was a matter of public concern. *Id.* at 525. All of the same can be said about the instant case.

As discussed *supra*, neither Rosen nor Weissman was a government employee with a duty to preserve confidential information, and there is no allegation that they stole or otherwise

misappropriated the information at issue. By all accounts in the overt acts, Rosen and Weissman allegedly conspired to obtain, and then obtained, the information by sitting and listening to USGO-1, USGO-2, and Lawrence Franklin -- acts which are not prohibited by the U.S. Code. That USGO-1, USGO-2, and/or Franklin may have violated section 793 by providing the information in these meetings renders Dr. Rosen and Mr. Weissman no different from defendant Yocum in *Bartnicki*. *See also Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (even if state official by law should not disclose information, not unlawful for third party to receive said information absent statute to contrary). Finally, the information at issue concerns allegedly sensitive issues of U.S. foreign policy, and, by definition, is thus a matter of public concern.

On the facts of *Bartnicki*, the question for the Supreme Court was whether the government could punish the ensuing publication of information acquired unlawfully by a newspaper or a source -- as distinct from punishing the unlawful acquisition of the information. *Bartnicki*, 532 U.S. at 528.[53] Importantly, the Court did not distinguish between the media defendant (Vopper) and his non-press source (Yocum) in answering this question. *See id.* at 525 n.8. Thus, for purposes of the First Amendment analysis, there is no distinction in the present case between Rosen and Weissman and the members of the media to whom they allegedly transmitted classified information.

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[53] The Court noted that this question was raised, but not resolved, in the Pentagon Papers case, and was again reserved in *Landmark Communications, Inc., v. Virginia*, 435 U.S. 829, 837 (1978). The decision in *Landmark Communications* also drew upon the distinction between those persons who acquire ostensibly secret government information by legal versus illegal means. *See* 435 U.S. at 837-38 (rejecting state's attempt to criminalize third-party transmission of confidential judicial inquiry proceedings).

The Court determined that liability for the secondary transmission could not be permitted under the First Amendment. The Court reasoned that enforcement of the statute would implicate the core purposes of the First Amendment, because it "imposes sanctions on the publication of truthful information of public concern." *Id.* at 533. The fact that the information was derived from another person's initial illegality did not compel a different result. "A stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 535. Further, the Court reasoned that imposing sanctions on Yocum/Vopper would provide no meaningful deterrent to the illegality sought to be deterred by the statute -- i.e. the initial illegal interception. *Id.* at 529-30.[54] *Cf. Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) (state can only punish publication of truthful information about matter of public significance absent need to further state interest of the highest order).

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[54] If Yocum and Vopper had participated in the illegal wiretap, then the First Amendment would not have shielded them from liability. *See Bartnicki*, 532 U.S. at 532 n.19. Under the rule of *Branzburg v. Hayes*, 408 U.S. 665 (1972), the First Amendment does not confer a license to break laws of general applicability in the name of news reporting, even if the enforcement of those laws has an incidental effect on the ability to report and gather news. *See Food Lion, Inc., v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999). Because Rosen and Weissman, like Yocum and Vopper, have not been accused of illegally obtaining the alleged information at issue (indeed, there is no crime of illegally receiving classified information), *Branzburg* is not applicable here. Moreover, the Supreme Court has held that the *Branzburg* rule does not affect those situations in which the government defines the law such that the content of the communication triggers liability. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991). Such is the case with section 793, which only applies to those verbal communications that relate to the national defense, particularly those communications that the Executive itself has decided to classify.

The rule that emerges from *Bartnicki* has not been limited to the Title III context.[55] In *Bowley v. City of Uniontown Police Department*, 404 F.3d 783 (3d Cir. 2005), the Third Circuit applied *Bartnicki* to the retransmission of juvenile law enforcement records leaked by a government official. In that case, a local newspaper reported that Bowley, a minor, had been arrested on rape charges. According to the alleged facts, the paper had received its information from a Uniontown police officer. Bowley sued the municipality and the newspaper under a state statute prohibiting the disclosure of juvenile law enforcement records. *See* 404 F.3d at 785. The statute at issue clearly prohibited the officer from revealing the arrest information; like section 793, however, it did not prohibit the mere receipt of the information, only disclosure. *See id.* at 787.

Applying *Bartnicki*, the Third Circuit concluded that the newspaper could not be held liable for its retransmission of the arrest information, as that information had been obtained lawfully and concerned a matter of public significance. *See id.* at 788. Dr. Rosen and Mr. Weissman respectfully submit that this Court should reach the same conclusion here. In the present case, as in *Bowley*, the government is attempting to sanction the retransmission of allegedly confidential information that was released from confidence by a government employee. *Bartnicki* and *Bowley* stand for the proposition that while it may be proper to sanction the government employee for this conduct, the First Amendment does not allow the government to punish subsequent transmissions by non-government employees who were not responsible for

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[55] This reasoning is also not limited to the civil context. *Bartnicki*'s jurisprudential antecedent, *Landmark Communications*, dealt with the imposition of criminal sanctions. *See* 435 U.S. at 837.

the initial disclosure.[56] By the same logic, the First Amendment also prohibits the criminalization of an agreement to obtain this information by the same means for the purpose of retransmission. Such is the case alleged against Dr. Rosen and Mr. Weissman.

The competing government interest protected by the anti-wiretapping statute at issue in *Bartnicki* was the personal right of privacy. While the government interest in this case, securing the national defense, is admittedly of a different kind, it does not compel a different result. While the interest may be greater, the sanction the government seeks to impose is harsher. If the above cases seeking civil liability are not sustainable, certainly an effort to impose criminal penalties is even worse. As discussed *supra*, the purpose of section 793 is to prevent espionage and, to the extent authorized by *Morison*, leaks of particular classified documents by government employees. It was not designed to create any new limitations on First Amendment freedoms held by the public, political associations, or the press. Indeed, section 1(b) of the 1950 Act of Congress amending section 793 in the face of the communist threat expressly states that nothing in the legislation "shall be construed to authorize, require, or establish military or civilian censorship *or in any way infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States*." *See New York Times v. United States*, 403 U.S. 713, 722 (1971) (Douglas, J. concurring) (emphasis added).

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[56] This Court's decision in *Truong* does not compel a different result. The facts of *Truong* involved the transmission of documents in furtherance of classic espionage activities, and were thus not about speech *per se*. There are fundamental differences between espionage and policy lobbying, recognized by Congress throughout the history of its deliberations over the espionage statutes, that are of obvious constitutional dimension. Moreover, the question of how the First Amendment deals with the retransmission issue was not raised and, at all events, *Truong* was decided prior to *Bartnicki*.

Allowing the application of the statute to persons outside government would not serve the purpose of section 793, and would only serve to chill the use of truthful information on matters of extreme public concern to advance the public's interest in the foreign policy process. Maintaining vigilance to the requirements of the First Amendment is particularly important in the arena of foreign policy, as so-called "secrecy dilemmas" will tend to arise in the context of vigorous policy disputes, and the "[e]xecutive is inherently self-interested in expanding the scope of matters deemed 'secret'; the more that is secret, the more that falls under executive control." Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. C.R.-C.L. L. Rev. 349, 354 (1986).[57] While secrecy is undoubtedly essential to the conduct of foreign relations, "it stifles domestic democratic processes and citizens' first amendment rights to debate controversial issues of national policy." *Id.* at 352. Or, as Chief Justice Hughes stated in 1937, the greater the threat to the security of the community:

> the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

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[57] A recent report reveals that the amount of material classified each year by the government is growing. Overall, the government spent $7.2 billion in 2004 stamping 15.6 million documents "top secret," "secret" or "confidential." That almost doubled the 8.6 million new documents classified as recently as 2001. *See Government Secrecy Grows, Costs More, Report Says*, Associated Press, Sept. 3, 2005. Last year, the number of pages declassified declined for the fourth straight year to 28.4 million. *Id.* In 2001, 100 million pages were declassified; the record was 204 million pages in 1997. *Id.* These figures cover 41 federal agencies, excluding the CIA, whose classification totals are secret. *Id.*

DeJonge v. Oregon, 299 U.S. 353, 365 (1937). Or, as Justice Black reiterated almost 35 years later in the Pentagon Papers case:

> The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

New York Times, 403 U.S. at 719.

In this light, penalizing the retransmission of information by persons involved in policy advocacy (or, for that matter, the press), and who did not obtain information illegally, cannot withstand the strict scrutiny that attaches to the regulation of pure speech. When a government employee inappropriately releases otherwise confidential information, the imposition of sanctions on the retransmission of that information by the press or a policy advocate can hardly be said to be a narrowly tailored means for safeguarding the security of that information *ab initio*. *See Florida Star v. B.J.F.*, 491 U.S. 524, 535, 538 (1989); *Bowley*, 404 F.3d at 788.[58] As the Third Circuit noted in *Bowley*, "when the government has stewardship over confidential information, not releasing the information to the media in the first place will more narrowly serve the interest of preserving confidentiality than will publishing the publication of the information once inappropriately released." 404 F.3d at 788.

United States v. Morison, supra, is not to the contrary. The decision in *Morison* dealt with the claim that the First Amendment would not permit disclosures to the media to be

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[58] While *Florida Star* and *Bowley* both dealt solely with retransmission by the media, *Bartnicki* states clearly that the press and its sources (such as Dr. Rosen and Mr. Weissman are alleged to be in this case) are treated equivalently in this type of First Amendment analysis. *See Bartnicki*, 532 U.S. at 525 n.8.

criminalized under section 793. *See* 844 F.2d at 1063. The Fourth Circuit rejected this claim under the *Branzburg* line of cases, holding that section 793 lawfully criminalizes willful disclosures by "a delinquent governmental employee," and that the First Amendment would not shield his acts of "thievery." *Id.* at 1069-70. Steven Rosen and Keith Weissman are not government employees, and the allegations against them do not involve an act of thievery. While willful disclosures to the press by government employees may fall outside the scope of the First Amendment, the constitutional issues raised by applying the same sanction to non-governmental employees -- whether the media or those operating under similar constitutional protections -- retransmitting verbal information in the context of policy advocacy are distinct.

The constitutional imperative compelling dismissal in this case has been clearly expressed in the scholarly literature on section 793:

> It is essential to recognize that spying, breaches of secrecy by government employees and public discussion of defense matters by the press and citizenry at large are distinct issues. While these activities pose somewhat similar dangers to national security, the hazards of prohibition and zealous enforcement are very different. *Above all, the legitimate social values underlying many leaks and publications require separate treatment. Lumping them together can only produce unnecessary difficulties in prosecuting true spies . . .* and utter confusion in the rules applicable to both publishers and audience. As a result, all-or-nothing prohibitions either permit publication without significant restraint, or subject it to sweeping restrictions that are appropriate to spying but not to concerned debate about national policy. Publication and espionage should not be encompassed within a single prohibition, except in those rare instances where the type of information at issue is extremely sensitive and of little value to informed political debate.

Edgar & Schmidt, *supra*, at 407 (emphasis added). The forgoing was written in 1986, prior to the Supreme Court's ruling in *Bartnicki*. After *Bartnicki*, it is clear that section 793 cannot treat equally government officials who illegally disseminate classified information over which they exercise access and control, and members of the public who obtain information legally and

disseminate it in furtherance of the democratic process.[59] *Bartnicki* makes clear that retransmittors of information have a constitutionally distinct status from those involved in the initial illegality. In this case, that distinct status compels a finding that the section 793 charge against Dr. Rosen and Mr. Weissman must be dismissed.

III. *Bartnicki* Renders Section 793 Constitutionally Overbroad on its Face and as Applied to Dr. Rosen and Mr. Weissman

For the reasons set forth in the last section, this Court should dismiss the Superseding Indictment as being an improper application of section 793 under the First Amendment. In addition, for the reasons set forth below, the Supreme Court's *Bartnicki* decision also makes plain that section 793 is overbroad in a manner that cannot be cured by limiting instructions to the jury. Accordingly, the indictment must be dismissed on this basis as well.

Dr. Rosen and Mr. Weissman recognize that the Fourth Circuit has addressed questions of overbreadth as they relate to section 793 on prior occasions. None of those decisions, however, deal with the problems of criminalizing oral retransmission by non-governmental officials posed here. Furthermore, all of those decisions were rendered prior to *Bartnicki*, when the question of retransmission under the First Amendment was still undecided by the Court. Thus, the Fourth Circuit's prior decisions (discussed *infra*) are not dispositive of the unique issues presented in this case.

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[59] It is important to note that while members of policy lobbying groups or political action organizations or the press may have claims to special First Amendment status, the government's construction of section 793 would allow for the punishment of any private citizen who obtains classified information -- regardless of how or why -- and then discloses it to another private citizen. Such a result would be profoundly disturbing.

The First Amendment overbreadth doctrine allows for the invalidation of a law that punishes a substantial amount of protected free speech, as judged in relation to the statute's plainly legitimate sweep. *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). The law allows this remedy "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech -- especially when the overbroad statute imposes criminal sanctions." *Id.* at 119. The overbreadth doctrine is based on the recognition that many persons will choose to abstain from engaging in protected speech rather than undertake the "considerable burden" of vindicating their rights through case-by-case litigation -- and that this result will harm society by depriving the polity of an uninhibited marketplace of ideas. *Id.* An overbreadth claimant bears the burden of demonstrating from the text of the law and from actual fact that substantial overbreadth exists. *Id.* at 122. While a defendant whose speech is within the scope of unprotected activity still may mount an overbreadth challenge based on threats to others not before the Court, a defendant who is prosecuted for protected speech that is incidentally covered by a broader ban on unprotected activity may also bring an as-applied challenge. *See Newsom v. Albemarle County School Board*, 354 F.3d 249, 257 (4th Cir. 2003); *United States v. Hammoud*, 381 F.3d 316, 330 n.4 (4th Cir. 2004).

The issue of the possible overbreadth of section 793 has arisen in the Fourth Circuit's prior decisions, although the precise issue raised here has not been decided. In *United States v. Truong*, *supra*, the defendants challenged section 793(e) on the ground that it lacked a proper *mens rea* requirement. *See* 629 F.2d at 918. The Fourth Circuit found that 793(e)'s "willfulness" requirement cured this overbreadth problem, as defined to require that the defendant acted in bad faith. *Id.* at 919. In *Morison*, *supra*, the defendant contended that the terms "national defense"

and "one not entitled to receive" were overbroad on their face. *See Morison*, 844 F.2d at 1076. The court found that both terms could be limited so as to avoid any constitutional concerns. *Id.*

Unlike *Truong* and *Morison*, the overbreadth issue here is not confined to particular statutory terms of art that can be subjected to curative limiting instructions. Under *Bartnicki*, the First Amendment protects the retransmission of secret information if the speaker is not involved in the original illegality. Section 793 on its face, however, does not distinguish between persons inside government and outside government, and, more importantly, does not distinguish between transmittors and retransmittors of the same information. After *Bartnicki*, the failure to make such a distinction results in substantial overbreadth.

This is particularly the case with respect to the verbal information at issue here. As discussed *supra*, it is a daily part of Washington life that persons within the Executive Branch meet with persons outside government to trade in information and attempt to influence the larger policy debates. Unlike an offer of a document marked "top secret," a participant in one of these conversations cannot parse which sentence, which phrase, which item of information is derived from or relates to classified material. And even in those instances where that fact can be gleaned, *Bartnicki* and *Bowley* make plain that the listener can not be sanctioned for retransmitting those disclosures that a government official (rightly or wrongly) elects to make. Section 793 on its face is incapable of making such distinctions, as the prosecution in this case amply demonstrates.

Moreover, section 793 does not require the government to prove that the defendant obtained the national defense information from a government source. In the case of a government official, this missing element is typically of no moment, as the defendant obtains the information by virtue of his employment. *See, e.g.*, *Morison*, 844 F.2d at 1068-70. But when we

turn to the case of retransmittors of verbal information who are not government employees, the absence of this element highlights the substantial overbreadth of the statute. In *United States v. Squillacote*, 221 F.3d 542, 578-79 (4th Cir. 2000), the Fourth Circuit ruled that a section 793 prosecution could be premised on the transmission of a classified document even if the information contained in that document had previously been leaked into the public domain. This decision was based on the notion that the existence of unofficial information in the public domain does not automatically remove the information in closely-held documents from the realm of "national defense information." *See id.* at 579.

While this reasoning may be sensible in the context of actual, marked and specific classified documents, it creates great mischief if applied to the retransmission of verbal information of the type in this case. As construed by the government, section 793 would allow for the prosecution of an individual who acquired and retransmitted verbal national defense information from the public domain, so long as that information also happened to be contained somewhere in a classified document. This would infringe on a potentially endless pool of speakers exercising their constitutional right to speak on matters of public concern.

The substantial overbreadth of section 793 after *Bartnicki* judged in relation to its legitimate sweep is also apparent. As noted *supra*, newspapers regularly print stories in which admittedly classified information is transmitted to a broad audience of persons lacking appropriate clearances. Members of these audiences could include those foreign officials from an enemy nation who take the simple step of buying a newspaper. Compared to the number of prosecutions of actual spies and leakers within the government ranks, the number of potential press prosecutions is exponentially higher. The same can be said for members of foreign policy organizations like AIPAC whose very existence is defined by an attempt to influence the

Executive Branch on matters relating to both diplomatic and defense policy, and which, like the press, occupies a space at the core of the First Amendment.

The current iteration of the Espionage Act statutes "are unwieldy and imprecise instruments for prosecuting government 'leakers' to the press as opposed to government 'moles' in service to other countries." *Morison*, 844 F.2d at 1085 (Phillips, J., concurring specially). While the Fourth Circuit has found that this overbreadth could be cured by limiting instructions to deal with government leaks to the press, the same cure is not available for alleged "re-leakers" who are outside the government.[60] Limiting instructions based on the nature of the information may be sufficient, as *Morison* finds, to curtail government leakers without threatening the vital function of the media and public policy organizations in a representative democracy. But when the government removes section 793 from its moorings and applies it to members of those same extra-governmental organizations, the limiting instructions are no longer sufficient. The nature of the information and the nature of the recipient, relied upon as limiting factors in *Morison*, cannot distinguish among the class of retransmittors of ill-gotten information on matters of public importance protected by *Bartnicki*. Accordingly, section 793(g) is overbroad as applied to this case, and the Superseding Indictment must be dismissed.

CONCLUSION

The government may not want people to meet with officials to find out what is going on in areas of foreign policy; the government may want to control when a policy initiative is

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[60] The idea of a "leak" being perpetrated by someone who was not entrusted with government secrets is itself oxymoronic. But it is the acceptance of the proposition that a leak can be committed by a non-government employee that results in the substantial overbreadth here.

announced so that it cannot be changed or modified; the government may hope that government employees know when and how to disclose sensitive or even once classified information. Whether any of these goals is valid in a democratic society, the means to achieve them is not an unprecedented criminal prosecution of individuals doing their jobs in First Amendment protected activity and hearing and restating what they only heard in routine meetings with public officials. This stretch of the law to this conduct is unconstitutional.

WHEREFORE, for the reasons set forth above, the Superseding Indictment should be dismissed.

Respectfully submitted,

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CERTICATE OF SERVICE

I certify that I filed the foregoing pleading in person with the Court Security Officer on January 19, 2006.

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