

DATE 1/19/06

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	)	The Honorable T.S. Ellis, III
KEITH WEISSMAN,	)	
	)	
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.<sup>1</sup>

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.<sup>2</sup>

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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<sup>1</sup> 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).

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> *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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<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

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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<sup>5</sup> *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.

<sup>6</sup> *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.<sup>7</sup> 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.<sup>8</sup>

### 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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<sup>7</sup> 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.

<sup>8</sup> *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.<sup>9</sup> 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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<sup>9</sup> 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-transmitters* 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 transmitters and re-transmitters 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<sup>10</sup> Indeed, unlike Dr. Rosen and Mr. Weissman, these

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<sup>10</sup> 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.

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*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.<sup>11</sup> Second, the United States does not have an

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<sup>11</sup> 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.<sup>12</sup> 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:

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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 . . . ."

<sup>12</sup> 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.<sup>13</sup>

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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<sup>13</sup> 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).<sup>14</sup> 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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<sup>14</sup> 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.<sup>15</sup>

**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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<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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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<sup>16</sup> 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.

<sup>17</sup> *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?<sup>18</sup>

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.<sup>19</sup> Gathering and retransmitting "sensitive" information is not a crime. "Sensitive" is not a legal classification, nor is it a legally meaningful term.<sup>20</sup> Virtually all internal government information can be considered "sensitive" to someone.

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<sup>18</sup> 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/markings/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.

<sup>19</sup> See Superseding Indictment, Count I, Ways, Manner and Means at ¶ A (emphasis added).

<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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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<sup>21</sup> 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.

<sup>22</sup> *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."<sup>23</sup>

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.<sup>24</sup> 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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<sup>23</sup> 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.

<sup>24</sup> 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.<sup>25</sup>

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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<sup>25</sup> *See* Factual Supplement.

discussion -- would follow the law and only disclose information that could be properly released to the public.<sup>26</sup>

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."<sup>27</sup> This clause does not survive the strict scrutiny required in a case with direct First Amendment implications.<sup>28</sup> *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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<sup>26</sup> *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.

<sup>27</sup> 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.

<sup>28</sup> 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.<sup>29</sup> 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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<sup>29</sup> 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.<sup>30</sup> 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).<sup>31</sup> The question on this prong is not whether discriminatory

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<sup>30</sup> 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.

<sup>31</sup> 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.<sup>32</sup> 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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<sup>32</sup> *See* Factual Supplement.

