UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, v. STEVEN J. ROSEN, KEITH WEISSMAN, Defendants-Appellees.	No. 08-4358	FILED MAY 09 2008 US Court of Appeals 4th Circuit

GOVERNMENT'S MOTION TO DISMISS DEFENDANTS' CROSS-APPEAL AND STAY BRIEFING SCHEDULE

Pursuant to Fourth Circuit Local Rule 27(f), the United States of America, by and through its undersigned attorneys, moves to dismiss the defendants' cross-appeal for lack of jurisdiction.

BACKGROUND

This is an Espionage Act prosecution involving two defendants who conspired to and did obtain classified information from their government sources and then passed that information to a foreign government, members of the news media, and others not entitled to receive it. This appeal is centered around the district court's rulings on the government's motion to redact, substitute, or

summarize classified information for use at trial – rulings that were contained in a March 19, 2008 Order issued by the district court pursuant to Section 6(c) of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3. The government filed this appeal pursuant to CIPA Section 7 which permits the government – and the government alone – to pursue an interlocutory appeal from a district court's rulings regarding the disclosure of classified information.[1]

The defendants filed a cross-appeal that was initially docketed as a separate case, Case No. 08-4410, but was subsequently consolidated with this appeal. On April 28, 2008, the defendants filed a docketing statement for their cross-appeal. According to the defendants' docketing statement, the "statute or other authority establishing jurisdiction" for their cross-appeal included "18 U.S.C. App. 3 § 7 (CIPA § 7)" and the "collateral order doctrine." The defendants' cross-appeal seeks to dismiss the indictment on the ground that the Espionage Act is

[1] The government filed a notice of appeal in the district court on March 27, 2008. This notice identified four orders that were the subject of the appeal. These included the district court's March 19, 2008 CIPA Section 6(c) Order, as well as three orders and opinions that governed the CIPA Section 6(c) Order: an August 9, 2006 Memorandum Opinion, a November 1, 2007 Memorandum Opinion, and a November 16, 2006 Order.

unconstitutional and overturn the district court's ruling on the admissibility and use of certain classified information.[2]

The defendants also filed a motion to dismiss the government's appeal. In their motion to dismiss, the defendants concede that this Court has jurisdiction over the government's appeal from the CIPA Section 6(c) Order, but erroneously argue that this Court is without jurisdiction to consider the other opinions and orders referenced in the government's notice of appeal. The government's opposition was filed simultaneously with this motion to dismiss the defendants' cross-appeal. In the simultaneously-filed opposition, we show that CIPA Section 7 confers jurisdiction over those opinions and orders that govern the district court's CIPA Section 6(c) Order. Similarly, in this motion, we show below that CIPA Section 7 only confers jurisdiction over <u>the United States'</u> appeal, not the

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[2] The defendants' cross-appeal "will argue that the Constitution compels dismissal of the indictment or, at a minimum, a heavier burden of proof at trial than the district court has required." *Defendants' Docketing Statement* § F. The defendants' cross-appeal will address "[w]hether the district court erred in holding that the instant prosecution does not violate the First Amendment and the Due Process Clause; whether the so-called 'silent witness rule' is inconsistent with and barred by the Classified Information Procedures Act and/or the Sixth Amendment; whether the district court erred in excluding classified information at trial and/or approving various redactions, substitutions, and uses of the silent witness rule." *Id.* at § G.

defendants' cross-appeal. This Court should therefore dismiss the defendants' cross-appeal.

ARGUMENT

"The requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 94. (quoting *Ex parte McCardle,* 7 Wall. 506, 514 (1868)). As a general rule, "finality of a judgment is a predicate for federal appellate jurisdiction." *United States v. Lawrence*, 201 F.3d 536, 537 (4th Cir. 2000). "In a criminal case the rule prohibits appellate review until conviction and imposition of sentence." *Flanagan v. United States*, 465 U.S. 259, 263 (1984). The Supreme Court "has also long held that 'this policy is at its strongest in the field of criminal law.'" *United States v. Smith*, 851 F.2d 706, 710 (4th Cir. 1988) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)).

The defendants' docketing statement concedes that they are not appealing from a final judgment, as the defendants have not yet been convicted and sentenced. In the absence of a final judgment, a defendant's disagreement with a

district court's ruling "ordinarily is not appealable by way of interlocutory appeal." *United States v. Bundy*, 392 F.3d 641, 644 (4th Cir. 2004). There are, however, two exceptions. Congress has authorized interlocutory appeals by statute in certain situations. *Johnson v. Jones*, 515 U.S. 304, 310 (1995). The Supreme Court has also "carved out a narrow exception to the normal application of the final judgment rule, which has come to be known as the collateral order doctrine." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). The defendants claim that jurisdiction for their cross-appeal is rooted in both statute (CIPA Section 7) and the collateral order doctrine. Neither permit this Court to hear the defendants' cross-appeal and it should therefore be dismissed.

I. CIPA Does Not Permit the Defendants to Appeal

Section 7(a) of CIPA provides for interlocutory appeals only by the government: "[a]n interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information . . . ." (emphasis added). The statute does not contain any provision authorizing an interlocutory appeal by a defendant. In fact, the only

time a defendant's right to appeal is mentioned in CIPA Section 7 is in the context of an "appeal from a judgment of conviction."[3]

Congress clearly intended for CIPA's interlocutory appeal provision to apply only to the government. "CIPA was enacted in 1980 to combat the problem of 'graymail,' an attempt by a defendant to derail a criminal trial by threatening to disclose classified information." *United States v. Hammoud*, 381 F.3d 316, 338 (4th Cir. 2004) (citing S.Rep. No. 96-823, at 2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4295).[4] "Prior to the enactment of CIPA, the government had no method of evaluating such disclosure claims before trial actually began. Oftentimes it would abandon prosecution rather than risk possible disclosure of classified information." *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985). CIPA's enactment was "designed to eliminate the guesswork, surprise, and fear from such a crucial decisionmaking process" so that "the government can make a reasoned determination as to whether to proceed with a prosecution." H.R.

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[3] CIPA Section 7(b) states that the government's interlocutory appeal "shall not affect the right of the defendant in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial."

[4] The Fourth Circuit's opinion in *Hammound* was vacated by the Supreme Court on sentencing issues. 543 U.S. 1097 (2005). The Fourth Circuit subsequently reinstated all other portions of its opinion, including the part dealing with CIPA. 405 F.3d 1034 (4th Cir. 2005).

Rep. No. 96-831, 96th Cong. 2d Sess. pt. 1, 10 (1980). CIPA's grant of an interlocutory appeal was "essential to the statutory scheme" because without it "[t]he government would [] face a choice of disclosing information or having the case dismissed, for under [pre-existing] law, the government [had] no right to appeal such a decision." S.Rep. No. 96-823, at 10. There was simply no question that under such a scheme, only the government could pursue an interlocutory appeal. As one member of Congress flatly declared, "I think there is no dispute about the fact that the interlocutory appeal is only a Government appeal. The reason for that, if there is any confusion, is because, of course, the defendant has a full right of appeal after trial, and that is a better right of appeal, tactically, from the defendant's point of view." *Graymail Legislation: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong. at 21 (1979) (comment by Rep. Robert McClory).[5] As a consequence, both the House and Senate version of the legislation provided for government appeals only. H.R. Rep. No. 96-831, at 5; S.Rep. No. 96-823, at 10.

It is not a new tactic for defendants to file an interlocutory appeal of a district court's pre-trial ruling using a statute that does not confer jurisdiction over

[5] Representative McClory was described as "the ranking minority member of the subcommittee" who "contributed significantly" to development of the House version of the CIPA legislation. *Id.* at 2.

their claims. Numerous defendants have made such efforts using 18 U.S.C. § 3731, which provides the government with a general interlocutory right to appeal in criminal cases. Like CIPA Section 7, Section 3731 explicitly provides for appeals by the United States alone.[6] Every court of appeals to consider the issue has held that Section 3731 does not provide jurisdiction for cross-appeals by defendants. *See United States v. Marasco*, 487 F.3d 543, 546 (8th Cir. 2007); *United States v. Abdi*, 463 F.3d 547, 550 n.2 (6th Cir. 2006) (Section 3731 "provides no avenue for the defendant to cross appeal orders favorable to the Government," thus appeals court will only consider defendant's issue upon conviction and appeal of that conviction); *United States v. Williams*, 413 F.3d 347, 354 (3d Cir. 2005); *United States v. Ferguson*, 246 F.3d 129, 137-38 (2d Cir. 2001); *United States v. Shameizadeh*, 41 F.3d 266, 267 (6th Cir. 1994); *United States v. Eccles*, 850 F.2d 1357, 1362 (9th Cir. 1988); *United States v.*

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[6] Section 3731 provides in relevant part: "An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence, or requiring the return of seized property in a criminal proceeding; not made after the defendant has been put in jeopardy and before the verdict or finding or an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."

DiBernardo, 775 F.2d 1470, 1474 n.8 (11th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986).

Given that CIPA's plain text and legislative history provide for appeals by the United States only, there is simply no statutory basis for this Court to exercise jurisdiction over the defendants' cross-appeal. This conclusion is bolstered by analogous case law finding no appellate jurisdiction over a defendant's cross-appeal under Section 3731. Without a statutory basis for their appeal, the defendants are left to rely solely on the collateral order doctrine.

II. The Collateral Order Doctrine Does Not Permit the Defendants to Appeal

If, as is the case here, there is no statutory basis for jurisdiction, then it is not this Court's function to create it. *Carroll v. United States*, 354 U.S. 394, 399 (1957). Rather, "it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." *Id.* at 407. That said, the Supreme Court has recognized that federal appellate courts can consider the appeal of "a limited class" of non-final orders even in the absence of statutorily granted jurisdiction. *Midland Asphalt Corp.*, 489 U.S. at 799. These so-called "collateral orders" have a "limited application in criminal cases," *Lawrence*, 201 F.3d at 538, and are a "narrow exception,"

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985), to the requirement that a defendant be convicted and sentenced as a prerequisite to appeal.

A court of appeals can only exercise jurisdiction over a collateral order when three conditions are met: "First, it [the collateral order] must conclusively determine the disputed question; second it must resolve an important issue completely separate from the merits of the action; third it must be effectively unreviewable on appeal from a final judgment." *Flanagan*, 465 U.S. at 265. These requirements are applied "with the utmost strictness in criminal cases." *Id.*

At the very least, the defendants in this case cannot meet the third requirement, which mandates that a defendant assert a right "that would be irrevocably lost if he awaits final judgment." *Lawrence*, 201 F.3d at 538. As the Supreme Court has stated: "[t]he requirement that the issue underlying the order be 'effectively unreviewable' . . . means that failure to review immediately may well cause significant harm." *Johnson*, 515 U.S. at 311.

The defendants say that they want to appeal "[w]hether the district court erred in holding that the instant prosecution does not violate the First Amendment and the Due Process Clause." *Defendants' Docketing Statement* § G. They "will argue that the Constitution compels dismissal of the indictment or, at a minimum, a heavier burden of proof at trial than the district court required." *Id.* at § F. The

defendants also say their cross-appeal will address "whether the so-called 'silent witness rule' is inconsistent with and barred by the Classified Information Procedures Act and/or the Sixth Amendment; [and] whether the district court erred in excluding classified information at trial and/or approving various redactions, substitutions, and uses of the silent witness rule." *Id.* at § G.

No harm will come to the defendants by waiting until after conviction and sentencing to appeal the issues they have identified in their docketing statement; and certainly it cannot be said that their rights will be "irrevocably lost" if they await final judgment. The constitutionality of the Espionage Act, for example, can adequately be addressed after conviction. In fact, defendants have repeatedly been able to mount post-conviction constitutional challenges to the Espionage Act in this Court, albeit without success. *United States v. Morison*, 844 F.2d 1057, 1063-76 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988); *United States v. Truong*, 629 F.2d 908, 917-19 (4th Cir. 1980); *United States v. Dedeyan*, 584 F.2d 36, 39-41 (4th Cir. 1978). Defendants have also been fully capable of launching post-conviction attacks against CIPA and rulings made thereunder. *United States v. Fowler*, 932 F.2d 306, 310 (4th Cir. 1991); *United States v. Walker*, 796 F.2d 43, 47-48 (4th Cir. 1986); *United States v. Wilson*, 721 F.2d 967, 975-76 (4th Cir. 1983). Simply put, there is no harm that will come to the defendants if they are required – as

every other defendant has been – to raise their attacks against the Espionage Act and CIPA until after final judgment.

That is not to say, of course, that the defendants cannot raise arguments in this appeal. The defendants' response to the government's brief can argue for affirming the CIPA rulings that are appealed by the government. They can even raise arguments that were not adopted by the district court but were "presented to the District Court and . . . would provide an alternative basis for affirming . . . ." *United States v. Valle Cruz*, 452 F.3d 698, 705 (8th Cir. 2006). But the defendants cannot, as they seek to do, obtain an interlocutory appeal in order to seek dismissal of the indictment, to overturn the district court's CIPA rulings or raise arguments about CIPA rulings that are not the subject of the government's appeal. *Shameizadeh*, 41 F.3d at 267. Those types of arguments can and should be confined to an appeal by the defendants after they are convicted and sentenced.

Lastly, this Court should stay the briefing schedule until the government's motion to dismiss is granted. Permitting the parties to move forward under the current schedule is an invitation for voluminous and unnecessary briefing on

subjects that are not involved in the government's appeal and on issues that this Court has no jurisdiction to hear.[7]

[7] Staying the briefing schedule until the government's motion to dismiss is granted is not inconsistent with the relief sought in the government's opposition to the defendants' motion to dismiss (which seeks an immediate dismissal of the defendants' motion or consideration of it during the course of the government's appeal). Both parties agree that the government can file an interlocutory appeal in this case; the defendants' motion to dismiss merely seeks to limit the scope of that appeal. In contrast, the defendants cannot file an interlocutory appeal at all, no matter what the scope.

CONCLUSION

For the reasons explained above, there is no statutory or other basis for this Court to exercise jurisdiction over the defendants' cross-appeal and it should be dismissed.

Respectfully submitted,

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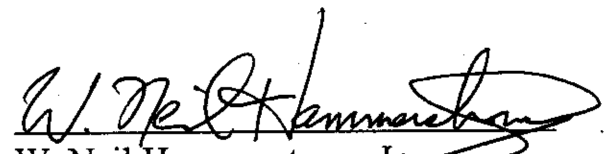
STATEMENT BY COUNSEL PURSUANT TO LOCAL RULE 27(a)

The United States of America, by and through its undersigned attorney, states that counsel for the defendants was informed of the government's intent to file this motion, and the defendants stated that they did not consent to the granting of the motion and intend to file a response in opposition.

Respectfully submitted,

Chuck Rosenberg
United States Attorney

By: 
W. Neil Hammerstrom, Jr.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing "Government's Motion to Dismiss Defendants' Cross-Appeal and Stay Briefing Schedule" was sent by first-class mail this 8th day of May 2008 to:

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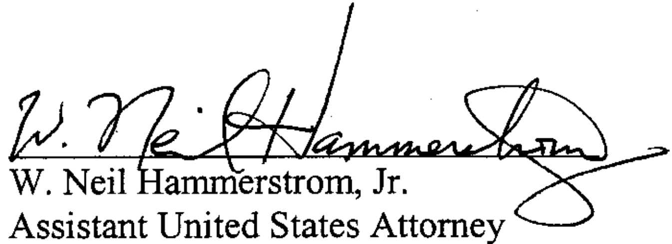

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