IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-4358

UNITED STATES OF AMERICA,

Appellant,

v.

STEVEN J. ROSEN and KEITH WEISSMAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria
The Honorable T.S. Ellis III, District Judge

REPLY BRIEF OF THE UNITED STATES

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REPLY BRIEF OF THE UNITED STATES[1]

(U) The United States respectfully submits this reply to the Appellees' brief. As we show, Appellees have failed to refute our contention that the district court

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[1] The markings on each paragraph indicate the classification level of that paragraph, (U), (S), (TS) or (C), or that the paragraph contains sealed material (SM).

erroneously authorized the disclosure of irrelevant classified information at trial in this matter.

ARGUMENT

I. THE DISTRICT COURT'S ERRONEOUS ANALYSIS OF 18 U.S.C. § 793 PERVADED THE ENTIRE CIPA PROCESS.

(U) In our opening brief, we showed how the district court abused its discretion in ordering the disclosure of certain classified information. Specifically, we singled out two documents that reflected particularly egregious examples of two overarching errors – the district court improperly grafted on to Section 793 several additional intent elements that are nowhere to be found in the statute and the district court repeatedly mis-applied the test by which the government's classified information privilege is adjudged. In their response, the defendants proffer several arguments as to why – from their perspective – the court did not abuse its discretion with respect to these admissibility rulings. We address those specific arguments in detail below. But, first, we pause to correct a fundamental misunderstanding that permeates the defendants' response brief.

(U) In their brief, the defendants repeatedly emphasize the "extraordinary deference" due a "district court's CIPA relevance determination" and devote many pages of their brief to a detailed recitation of the district court's

"meticulous" and "careful" CIPA Section 6 process. *See, e.g.*, Def. Br. 14, 18, 20-24. We do not disagree that the district court has devoted a great deal of time and energy to the CIPA Section 6 process.[2] The defendants miss the point, however, when they exclusively focus on the CIPA process as it un-folded *after* the court articulated its understanding of the elements of the charged Section 793 offense, *i.e.*, *after* the court articulated its understanding of the substantive legal template by which it adjudged (a) relevancy and (b) application of the government's classified information privilege. For, as we noted in our opening brief, although we have chosen just two documents for this Court's particularized review, the district court's erroneous reasoning with respect to, *inter alia*, the requisite elements of a Section 793 violation "pervade[d] the entire CIPA process." Gov. Br. at 26; *see also id.* at 28 n.9. And, as we also noted, it is a fundamental truism that, where a district court's discretionary decision-making is premised on, for example, an "erroneous view" of a statute's elements – as was the

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[2] (U) The defendants go to great lengths (Def. Br. at 21-22) to numerically catalog the proceedings below, citing numbers of rulings, days of hearings and pages of orders. We do not disagree with the defendants' arithmetic. Rather, we disagree with their two-fold suggestion that numerous pages of transcript, for example, necessarily translate into substantively correct rulings and/or that multiple days of hearings necessarily means that the district court did not commit legal error before conducting those hearings.

case here with respect to Section 793 – the court's "admission of classified information . . . is, by definition, an abuse of discretion." *Id.* at 29.

(U) To understand fully the above point, it is first necessary to return to the basics of the CIPA process. As this Court explained in *United States v. Fernandez*, 887 F.2d 465 (4th Cir. 1989), CIPA was enacted to "confront the problem of a criminal defendant who 'threatens to reveal classified information during the course of his trial in hope of forcing the government to drop the criminal charge against him.'" *Id.* at 466 (citation omitted). Thus, once the defendant gives notice of the classified information he intends to disclose, the first step in the CIPA Section 6 process is a hearing at which the court "shall determine the 'use, relevance, or admissibility'" of the classified information. *Id.* (quoting CIPA Section 6(a)). Further, even if the district court determines that classified information is "relevan[t],"[3] when the government invokes its classified information privilege, the district court must further adjudicate "whether any relevant evidence was admissible in light of the applicable government privilege." *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985) (*en banc*). This, in turn, requires the district court to conduct the following assessment of the

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[3] (U) Relevance, of course, describes a relationship between an item of evidence and a matter properly provable at trial. *See* Fed. R. Evid 401.

proffered evidence: "A district court may order disclosure only when the information is at least 'essential to the defense'; 'necessary to his defense'; and neither merely cumulative nor corroborative; nor speculative." *Id.* (citations omitted); *see also United States v. Abu Ali*, 528 F.3d 210, 247 (4th Cir. 2008); *United States v. Moussaoui*, 382 F.3d 453, 476 (4th Cir. 2004) ("Under CIPA, once the district court determines that an item of classified information is relevant and material, that item must be admitted unless the government provides an adequate substitution."). As part of this assessment, this Court has articulated the following factors that a district court must consider: "A decision on disclosure of such information must depend on the particular circumstances of each case, taking into consideration the *crime charged*, the *possible defenses*, the *possible significance* of the [evidence,] and other relevant factors." *Abu Ali*, 528 F.3d at 247 (emphasis added; citations and internal quotation marks omitted).[4]

(U) Here, our point is a simple one – as we demonstrated in our opening brief (at 29-48), from the very outset of this case, the district court has been laboring under a basic misunderstanding about the elements of the "crime

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[4] (U) It is only after the district court has made these initial Section 6(a) rulings that the court then moves on to an assessment of substitutions, if any: "If the court authorizes disclosure of classified information, the United States may move that the court instead accept either a substitute admission of relevant facts or a substitute summary of the information." *Fernandez*, 887 F.2d at 466.

charged." Specifically, as we showed, one necessarily searches Section 793 in vain for the numerous judicial "glosses" that the district court imposed – way back in August of 2006 – on the statute's otherwise straightforward willfulness requirement.[5] As we also showed (at 33-36), the court's "glosses" fly in the face of this Court's many Section 793 precedents, such as *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), where this Court expressly approved a Section 793 jury instruction that defined willful intent as simply "'specific intent to do something the law forbids. That is to say, with a bad purpose to disobey or disregard the law.'" *Id.* at 1071; *see also United States v. Truong*, 629 F.2d 908, 919 (4th Cir. 1980) (same). Accordingly, the district court's subsequent CIPA Section 6(a) balancing assessment – whereby the court engaged in a weighing of the relevancy and necessity of the classified evidence in light of the "particular circumstances" of the case, including the "crime charged" and the "possible

[5] (U) As the district court summed up its ruling on the Section 793 elements, the government's "conspiracy charge fails absent proof of the[following] mental state elements" – "the defendants (i) knew that the information the conspiracy sought to obtain and disclose was NDI, *i.e.*, knew that the information was closely held by the government and that the disclosure of the information would be damaging to the national security, (ii) knew the persons to whom the disclosures would be made were not authorized to receive the information, (iii) knew the disclosures the conspiracy contemplated making were unlawful, (iv) had reason to believe the information disclosed could be used to the injury of the United States or to the aid of a foreign nation, and (v) intended that such injury to the United States or aid to a foreign nation result from the disclosures." 520 F. Supp. 2d at 793.

defenses" – has necessarily been tainted. The defendants are thus wrong when they suggest (Def. Br. at 7) that the government is improperly "seek[ing] to use this CIPA appeal as a backdoor to appeal the constitutional issues." The so-called "back door" constitutional issues are inextricably intertwined with the propriety of the district court's CIPA Section 6 Order.

(U) As to our "inextricably intertwined" point, we ask this Court to consider the following: throughout the lengthy CIPA process, the defendants not surprisingly used the district court's unique and, in our opinion, erroneous findings regarding the required mental state and intent elements of a Section 793 offense to define what evidence is, in their view, relevant to their proffered defenses; and the district court frequently agreed with their assessment. In this regard, as we noted in our opening brief, should this Court reverse the district court and redefine relevance as we suggest, a substantial amount of classified information would potentially be affected – not simply the FBI Report and the Israeli Briefing document. *See* Gov. Br. at 28 n.9. This is true because CIPA requires the district court to engage in a balancing of the government's and defendants' sometime competing interest. If one side of that equation changes, as we suggest it must, the outcome may change as well.

(U/SM)

(U/SM)

[6] (U/SM)

(U) This is why this Court cannot simply exercise "judicial restraint" and affirm the district court's admissibility rulings on alternative grounds as advocated by the defendants. The court's statutory construction, complete with its constitutional gloss, informed and guided many of its CIPA determinations. The alternative grounds advocated by the defendants are, therefore, equally affected by the district court's erroneous rulings. They are inseparable.

(U) We acknowledge that the doctrine of judicial restraint teaches that federal courts must consider non-constitutional grounds for decision, but only if those other grounds adequately dispose of the controversy. It is ironic that

defendants now cry for judicial restraint when they are, in fact, asking this Court to sanction a strained and unnecessary constitutional analysis by the district court, especially when that court could and should have followed this Court's precedent from other Section 793 cases. We, not the defendants, are asking this Court to impose such restraint on the court below.

(U) The rule of judicial restraint usually applies when a court is faced with a regulation or statute which, if interpreted or applied one way, raises constitutional questions, but if interpreted another way avoids those constitutional questions. *Diaz v. United States*, 853 F.2d 9-10 (1st Cir. 1988)(observing that, even if one ground for dismissal of a postal worker was constitutional, the other unconstitutional grounds played a part in the decision and remand was appropriate for reconsideration of the decision in light of the error), *citing Salt River Project Agricultural Improvement and Power District v. United States*, 762 F.2d 1053, 1061 n 8 (D.C. Cir. 1985); *Siang Wang v. INS*, 413 F.2d 287 (9th Cir. 1969); *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272, 1279 (D.C. Cir. 1981). Similarly, in *Jean v. Nelson,* 472 U.S. 846 (1985), cited by the defendants, the Supreme Court observed that the relief requested was available to the petitioner without the need to rule on the constitutional question. Here, we are similarly arguing that remand is appropriate for reconsideration of the CIPA findings

without regard to the unnecessary and flawed constitutionally-based construction of Section 793.

(U/SM) [redacted]

[redacted]; *see also* JAU 278 ("It seems

to me that it would be useful to have this matter reviewed at the Court of Appeals at this time, as well."). In this regard, the district judge quite forthrightly conceded that he "may not have gotten it right." JAU 279.

(U) In sum, the defendants are wrong when they repeatedly invoke *Fernandez*'s "extraordinary" and/or "great" deference as the beginning and end of this Court's CIPA review function. *See* Br. at 14, 18-19, 26, 50, 51. Application of *Fernandez*'s deference is only appropriate *if* the district court, first, has properly understood the elements of the "crime charged." For, absent such a proper understanding of the precise nature of the government's statutory burden, the district court cannot properly adjudicate either the relevancy of the classified information (the first step in the *Smith* Section 6(a) process) or the materiality of this classified information in the face of the government's classified information privilege (the second step in the *Smith* Section 6(a) process). We do not believe that the district judge has properly articulated the government's statutory burden. We thus concomitantly believe that his CIPA Section 6 rulings are not entitled to any particular deference, "extraordinary" or otherwise. Nor do we believe that this Court should feel restrained to ignore the district Court's erroneous statutory elements ruling. At any rate, as we show below, even if such restraint is exercised, the court's rulings still do not pass muster.

II. THE CLASSIFIED INFORMATION AT ISSUE IS NOT RELEVANT OR ESSENTIAL.

(U) As established in our opening brief, the defendants did not set forth any valid defense for which the Israeli Briefing Document or the un-redacted FBI Report is relevant and admissible. Gov. Br. at 29-53. In their brief, the defendants simply recite the erroneous bases upon which the court found the documents relevant and make many assertions unsupported by any citation to, or support from, the record below. *See, e.g.*, Def. Br. at 39.[7] Because the information is not relevant, it cannot be essential, such as to overcome the government's classified information privilege.

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[7] (U) Moreover, as an initial matter (Gov. Br. at 28-29), while the district court's determinations as to what particular item of classified information is relevant to a particular defense may be entitled to deferential review, the court's finding that a particular defense is a valid defense and available to the defendants is a mixed factual and legal question subject to *de novo* review. *See United States v. Anderson*, 872 F.2d 1508, 1515-16 (11th Cir. 1989)(in CIPA case, reviewing court must first determine whether a proffered defense was valid as a matter of law, before considering whether the exclusion of evidence in support of that defense was an abuse of discretion); *United States v. Cardoen*, 898 F.Supp. 1563, 1572 (S.D. Fla. 1994)(defendants at a CIPA hearing bear the burden of showing that their asserted defenses are valid and the validity of proffered defenses is a legal question); *United States v. Santiago-Godinez*, 12 F.3d 722, 727 (7th Cir. 1993)(*de novo* review is the appropriate standard to review a pretrial determination that the defendant did not present sufficient evidence to raise the defense of entrapment); *Horne v. Owens-Corning Fiberglass Corp.*, 4 F.3d 276, 280 (4th Cir. 1993)(admissibility of evidence purportedly covered by the attorney-client privilege is a mixed question of law and fact necessitating *de novo* review).

A. The Israeli Briefing Document Is Not Relevant or Essential.

(U/SM)

1.

The defendants begin their discussion of the Israeli Briefing Document (at 39-40) with a recitation of the "factual background." For many of these "factual" assertions, there is no evidence of them in the record sufficient to establish any relevance for the disclosure of the classified information.

[8] (U/SM)

2. The Israeli Briefing Document does not contain the classified information defendants obtained and disclosed.

(U) Notably, for all the unsupported assertions the defendants make, they do not once quote from the Israeli Briefing Document itself. Defendants claim (at 39), without citation, that "most" of the information Satterfield gave Rosen can be found in the Israeli Briefing Document. Review of the document itself and a comparison to the classified national defense information (NDI) Satterfield

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[9] (U) The Israeli Briefing Document's relevance is even further attenuated if the defendants did not attend the AIPAC briefing, or did not receive a briefing directly from the Israelis. In that instance, the "best evidence" would be the person(s) from whom the defendants received the briefing. Notably, although Rosen discusses the Kupperwasser briefing to the State Department, nowhere in any of the recorded conversations or email messages does either defendant definitively state that he attended a briefing by Kupperwasser.

disclosed to Rosen (and Rosen further disclosed) belies the defendants' assertions and the validity of their "defenses." *See* JAC 333-339.

(S)

(S)

[10] (U) Of course, the document also does not reveal anything relating to what, if anything the Israelis told AIPAC or the defendants.

[11] (S)

3. United States intelligence and Israeli intelligence are distinct.

(S) [redacted]

(S) [redacted]

[12] (S)

4.

(S)

5.

(U/SM

[13] (S)

[14] (S)

[15] (U) Defendants also contend that there is no difference between an "intent to injure the United States" and "'reason to believe" the disclosure will cause injury to the United States or aid a foreign country. Br. at 46, 54-55. They argue, in essence, that the district court really meant "reason to believe" when he said "intent." Br. at 54. The statute's plain language states: "Whoever, unlawfully having possession of. . . information relating to the national defense *which information the possessor has reason to believe could be used to the injury of the United States or to the advantage*

B. The Information Redacted from the FBI Report Is Irrelevant.

(U/SM) As we set forth in our opening brief, (58-60), the government sought, pursuant to CIPA Section 6(a)

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of any foreign nation . . ." 18 U.S.C. § 793(d) (emphasis added)(Section 793(e) contains the same language). The "reason to believe" set forth in the statute applies to the information -- not the disclosure. Thus, the government need not prove that the defendant had "reason to believe" the disclosure would result in injury to the United States or advantage to any foreign nation. Rather, the government need only prove that the possessor had reason to believe the information itself, regardless of any disclosure, could be used to such ends. The district court improperly transposed this standard from the information to the disclosure, contravening the statute's plain language. Consequently, the defendants' attempt to cure the court's error fails.

(S)

(U/SM)

(S)

(S)

[16] (S)

(U) That is the NDI at issue. Those are the details Weissman disclosed, and those are the details that are fully available to the defendants at trial in the proposed redacted FBI Report submitted by the government. The other information in the report, not otherwise seen or disclosed to or by the defendants, is not relevant.

(S)

(S)

[17] (U/SM) Defendants state that a government expert could not determine what is classified from a classified document because they could not determine "which of the potentially damaging sentences [in a classified paragraph] motivated the original classifier." Br. at 38. They assert this is especially true in the context of "policy information." *Id.*

,
64, 74. Additionally, of course, in this case, this is classified FBI investigative conclusions, not "policy information."

(S) This Court has recognized that "'[i]t is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.'" *United States v. Moussaoui*, 65 Fed. App'x 881, 887 (4th Cir. 2003) (unpublished) *quoting Alfred A Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975); *see also United States v. Pelton*, 696 F.Supp. 156, 158 (D. Md. 1986) ("[T]here is a difference between speculation and confirmation.").

(S)

[18] (U/SM)

(U/SM) Defendants are already able to demonstrate, from information available to them in the document, that it contains such details (as set forth in the "Summary" paragraphs JAC 309). The specifics are of no moment.

III. SECTION 793 IS NOT CONSTITUTIONALLY INFIRM AS APPLIED TO THE DEFENDANTS.

(U) Defendants aver that this Court need not reach the constitutional issues surrounding the application of the statute to this case, but, if this Court does so, it should first determine whether statutory construction would remedy any First Amendment and Due Process issues. Br. at 57-58.

(U) First, contrary to their contention, this is not simply a case of defendants engaged in the benign collection and discussion of foreign policy information, whose conduct enjoys First Amendment protections. Br. at 59. Indeed, electronic intercepts of defendants' conversations gathered during the investigation establish the requisite *mens rea* and satisfy the "willfulness" element of Section 793 without the need for the judicial glosses imposed by the district court. *See* Gov. Br. at 5-13. Had the district court properly analyzed the government's willful intent evidence when ruling on the application of the statute to this case, it should have rejected, outright, the defendants' "as applied" vagueness challenge. No additional intent elements are necessary in light of the compelling evidence of defendants' willful intent.[19]

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[19] (U) While the defendants cite (at 60, n.35, 62) a host of media and law review articles criticizing the district court's decision not to dismiss the indictment on First Amendment grounds, such sources merit no consideration. Given that many of the facts of the case are classified and, by necessity, shrouded from public scrutiny, these

(U) In *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), the First Amendment concerns were allayed not simply because of Morison's status as a government employee – as not all government employees have access to classified information, have intelligence expertise, or made explicit promises to protect classified information – but rather as a result, *inter alia*, of the knowledge he possessed by that employment, specifically that the information he communicated was classified and was intelligence information. In this case, while not government employees, recorded conversations and other facts establish that the defendants possessed the <u>same</u> type of knowledge as Morison – knowledge of classification, intelligence sources and methods, and the sensitivity of the information they obtained and disclosed.[20]

(U) Equally unpersuasive in the defendants' constitutional challenges is their contention that the Section 793 phrases "information relating to the national

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critics are uninformed and not privy to the very evidence they wrongly claim is deserving of First Amendment protection.

[20] (U) In sentencing co-conspirator Franklin on January 20, 2006, months before the district court's opinion adding new elements to Section 793, the district judge recognized that Franklin "didn't want to hurt the United States" but that what he had done was "a violation of the law, no matter what [his] motive may have been." The court also admonished Franklin that "all persons . . . who come into possession . . . of classified information, must abide by the law"; and "that applies to academics, lawyers, journalists, professors, whatever." JAU 282-83.

defense" and "not entitled to receive it" are impermissibly vague as applied to them. The cases that have addressed these vagueness claims draw no distinction in the class of defendants to which the statute has been applied. *See, e.g., Morison*, 844 F.2d at 1067 ("the legislative history does not justify the rewriting of this statute so as to nullify its plain language by limiting the statute's application to the 'classic' spy").

(U) This Court has previously held that vagueness attacks on the "information relating to the national defense" prong have been overcome through a combination of jury instructions on "willfulness" and a definition of "national defense." *Id.* at 1071-72; *Truong*, 629 F.2d at 919. In construing the phrase in the predecessor statute to 793, the Supreme Court in *Gorin v. United States*, 312 U.S. 19, 28 (1941), found that the phrase has a "well understood connotation" and is not impermissibly vague.

(U) Addressing vagueness challenges to the phrase "entitled to receive," this Court has held that "any omission in the statute is clarified and supplied by the government's classification system." *Morison*, 844 F.2d at 1074 (*citing* 18 U.S.C. App. 1); *Truong*, 629 F.2d at 919; *McGehee v. Casey*, 718 F.2d 1137, 1143-44 (D.C. Cir. 1983). Moreover, as well-educated foreign policy experts grounded in the inner workings of government, a demonstrated knowledge of the classification

system, and Rosen's prior security clearance, the defendants have at least, if not more than, the ordinary common sense necessary to sufficiently understand and comply with the terms set forth in a statute such that it will not be struck down as vague. *Arnett v. Kennedy*, 416 U.S. 134, 159 (1974).

CONCLUSION

(U) For the foregoing reasons, the district court's CIPA rulings, as detailed in our initial brief, were erroneous and should be reversed.

Respectfully Submitted,

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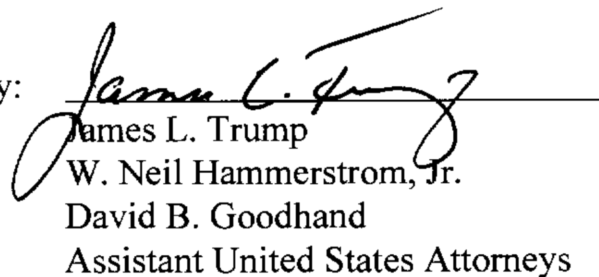
By: 
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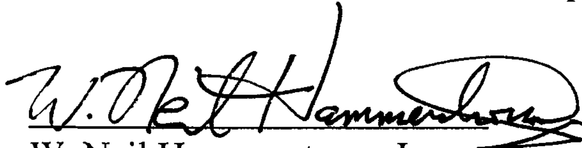

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2008, I electronically filed the foregoing redacted Government's Opening Brief with the Clerk of Court using the CM/ECF System.

I further certify that on September 12, 2008, I made available for pick-up the foregoing document and Volume I of the Supplemental Joint Appendix to the following:

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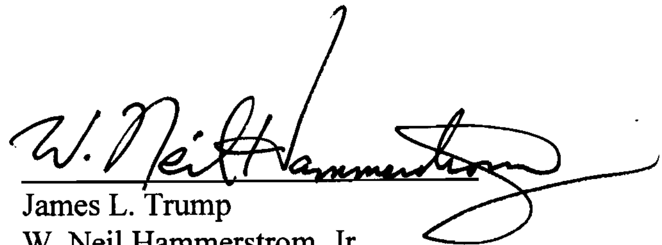

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