RECORD NO. 08-4358

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

BRIEF OF THE UNITED STATES

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BRIEF OF THE UNITED STATES

JURISDICTIONAL STATEMENT

(U)[1] This is an Espionage Act prosecution involving defendants who conspired to obtain classified information from government sources and passed that

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[1] This document is portion marked, by paragraph, to indicate material that is unclassified (U); Top Secret Compartmented Information (TS/SCI); Secret (S); and unclassified but sealed material (U/SM) for materials UNDER SEAL below.

information to a foreign government, journalists and others, in violation of 18 U.S.C. § 793(g). The district court had jurisdiction over this case pursuant to 18 U.S.C. § 3231. On March 19, 2008, the court issued a pre-trial order on the government's motion to redact, substitute or summarize classified information for use at trial pursuant to Section 6(c) of the Classified Information Procedures Act (CIPA), 18 U.S.C., App. 3. The government filed a notice of appeal on March 27, 2008. This Court's jurisdiction is premised upon CIPA § 7.

STATEMENT OF THE ISSUES

(U) 1. Did the district court improperly find that a classified United States government memorandum memorializing an intelligence briefing by a foreign government was relevant and admissible based in part on the district court's erroneous interpretation of the elements required to prove a violation of 18 U.S.C. § 793?

(U) 2. Did the district court improperly rule that the government's classified information privilege was overcome with respect to the above-mentioned document, as well as a classified FBI report, where the information in those documents was not alleged to have been disclosed to or by the defendants and is not the basis for the charges in this case?

STATEMENT OF THE CASE

(U) On August 4, 2005, a grand jury returned a superseding indictment charging the defendants with conspiracy to communicate national defense information, in violation of 18 U.S.C. § 793(g). Rosen was also charged with aiding and abetting a communication of national defense information, in violation of 18 U.S.C. §§ 793(d) and 2.[2]

(U) Pursuant to CIPA § 5, defendants indicated that they expected to disclose a large amount of classified information during trial. On March 28, 2006, the government filed a motion pursuant to CIPA § 6(a) seeking a hearing on the use, relevance and admissibility of this classified information. Thereafter, the district court issued a CIPA § 6(a) Order on January 17, 2007, finding that a significant portion of the classified information the defendants sought to disclose was relevant and admissible at trial. On May 24, 2007, the government filed a second CIPA § 6(c) motion[3] that permitted defendants to disclose at trial a significant amount of classified information, yet still sought to redact, substitute or summarize certain

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[2] (U) The superseding indictment also charged coconspirator Lawrence Franklin (a Pentagon employee), who pled guilty and was sentenced to twelve years imprisonment.

[3] (U) The government's first motion was struck. *See United States v. Rosen*, 487 F.Supp.2d 703 (E.D.Va. 2007).

classified information. On November 1, 2007, the court issued a Memorandum Opinion which served "to identify and elucidate the legal principles that govern disposition of the government's [second CIPA § 6(c)] motion." *United States v. Rosen*, 520 F.Supp.2d 786, 789 (E.D.Va. 2007). This Memorandum Opinion, in turn, was based, in large part, on an opinion issued on August 9, 2006 dealing with the constitutionality of Section 793. *United States v. Rosen*, 445 F.Supp.2d 602 (E.D.Va. 2006).

STATEMENT OF FACTS

A. The Defendants' Criminal Conduct

(U) Defendants worked in Washington, D.C. for the American Israel Public Affairs Committee (AIPAC). Rosen was AIPAC's Director of Foreign Policy Issues; his subordinate, Weissman, was AIPAC's Senior Middle East Analyst. Rosen previously held a TOP SECRET U.S. government security clearance and worked on classified projects while employed with a government contractor in the late 1970s and early 1980s. JAU 96-98.[4]

(U) From 1999 to 2004, defendants conspired to obtain classified information from contacts they cultivated in the U.S. government. They then disclosed the classified information to individuals not entitled to receive it, including Israeli government officials, journalists and other AIPAC employees. Statements captured in court-authorized recordings under the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*, reveal that defendants knew and believed their conduct was illegal. JAC 279-92.

[4] "JAU" denotes the unclassified Joint Appendix. "JAC" denotes the classified Joint Appendix. The United States may file a supplemental appendix if appellees have any additional designations.

(U) In September 2000, in conversations with reporters, Rosen explained how it was illegal to place classified information on unclassified laptop computers, adding that doing so "was always a crime under the law" and that "I know 'cause I used to be in this world of classified work." JAC 283-84.

5

(U) On May 3, 2001, Rosen spoke with a television correspondent concerning legislation dealing with sanctions on Iran and Libya. Rosen told the correspondent that a particular State Department official had "written a very elaborate paper . . . to convince the President to end [the legislation] altogether" and that "it's a classified paper." When the correspondent asked whether Rosen had seen the paper, he replied: "No. But I know about it. I know what's in it." *Id.*

(U) On July 23, 2002, Weissman called Rosen and advised that he would soon meet a particular NSC official and asked whether there was "anything besides the obvious" that Rosen wanted him "to try to get out of her." Rosen suggested that Weissman "fish around with her" about "a very sensitive" rumor that the U.S. had been given permission by Syria to move U.S. troops through that country into Iraq.

Rosen warned Weissman it was "not exactly [the NSC official's] topic," and "it'll make her feel very defensive . . . so you might want to save that for later . . . ." *Id.*

(U) On March 10, 2003, defendants met with Franklin at Union Station to discuss the classified draft document. During the meeting, they moved from one restaurant to another to find a quiet place to talk and avoid someone overhearing their conversation; they finished the meeting in an empty restaurant. *Id.*

(U) On March 18, 2003, Rosen had a telephone conversation with a reporter about the classified draft document. Rosen described the contents of the document and stated, "I'm not supposed to know this." He then advised the reporter to question his sources inside the Administration, concluding "I've given you good information." *Id.*

(U) Immediately after the meeting, Weissman returned to his AIPAC office and disclosed to Rosen the classified information he received from Franklin. Defendants then called an Israeli official and disclosed the same to him. Rosen told the Israeli official that the information "came from an unimpeachable source." Weissman added, "the information comes from the Agency." JAC 291.

(U) On August 3, 2004, FBI agents interviewed Rosen in his AIPAC office. Rosen falsely stated that Franklin never discussed, or provided him with, classified information. Immediately after the interview, Rosen called Weissman and told him about the agents' questions and his responses. In a similar interview with the FBI six days later, Weissman falsely denied ever discussing with Franklin, or receiving from him, classified information. JAC 291-92.

(U) On August 27, 2004, the FBI separately interviewed defendants, and both lied about whether Franklin provided them classified information. Following

the interview, Rosen called one of the Israeli officials to whom defendants had previously disclosed classified information and suggested they meet at the "usual place" about a "serious matter" involving the FBI. *Id.*; JAU 110.

B. The District Court's Creation of New Elements

(U) Defendants filed a pre-trial motion to dismiss the indictment, arguing that, as applied to them, Section 793 was unconstitutionally vague, overbroad and violated their First Amendment rights. The government filed an opposition and a classified statement of facts in support of its opposition. On August 9, 2006, the district court denied defendants' motion, finding that the statute was constitutional, but only if the government proved a number of additional elements. *United States v. Rosen*, 445 F.Supp.2d 602 (E.D.Va. 2006).

(U) The plain text of Sections 793(d) and (e) requires proof of two intent elements. First, in cases such as this, which involve the oral disclosure of national defense information (NDI), the statute requires proof that the defendants had "reason to believe" that the NDI at issue "could be used to the injury of the United States or to the advantage of any foreign nation." The statute also requires the government to prove that defendants "willfully" communicated the information. In its August 9, 2006 Memorandum Opinion, however, the court interpreted the statute's willful intent element to require proof of three new elements:

(1) defendants knew that the information they disclosed "was closely held by the United States"; (2) defendants knew that "disclosure of this information might potentially harm the United States"; and (3) defendants knew "that the persons to whom the defendants communicated the information were not entitled under the classification regulations to receive the information." 445 F.Supp.2d at 625. The court added a fourth element in its November 1, 2007 Memorandum Opinion: the defendants "intended that . . . injury to the United States or aid to a foreign nation result from the[ir] disclosures." 520 F.Supp.2d at 791-93.

C. The Two Classified Documents at Issue in this Appeal

1. The Israeli Briefing Document

(a) Factual Background

[6] (U) NOFORN is a control designation indicating that the information may not be disclosed to foreign persons, even if those foreign persons are authorized to receive classified U.S. government information.

[7]

(b) CIPA Procedural History

(U/SM

(U/SM)

2. *The FBI Report*

(a) Factual Background

(b) CIPA Procedural History

(U/SM)

(U/SM)

(U/SM)

8

(U/SM)

SUMMARY OF ARGUMENT

(U) Applying an erroneous understanding of the government's burden with respect to the intent elements of Section 793 and an overly broad conception of the standard adopted by this Court in *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985) (en banc), the district court improperly authorized the disclosure of classified information. This appeal addresses two documents specifically (the Israeli Briefing Document and the FBI Report), but the court's erroneous reasoning pervades the entire CIPA process.

(U/SM)

(U/SM)

ARGUMENT

(U) In its March 19, 2008, CIPA § 6(c) Order, the district court erroneously ordered the disclosure of classified information contained in numerous documents. We have selected just two of these documents for appeal. They have been chosen because the court's disclosure decision reflects egregious examples of two particular errors: first, the court has improperly grafted on to Section 793 several additional intent elements that are nowhere to be found in the statute; and second, the court's application of the *Smith* standard is overbroad and contrary to governing precedents. To differing degrees, these errors also implicate a significant number of the court's

ruling to disclose other classified information.[9] The government believes that this Court's rulings on the erroneous reasoning underlying these two documents will assist the district court in reviewing its previous rulings on this large amount of other classified information -- as well as provide guidance for the district court in its future CIPA rulings.[10]

I. The District Court Erroneously Admitted the Israeli Briefing Document.

A. Standard of Review

(U) The district court's decision to reject the government's CIPA § 6 proposals are reviewed under the abuse of discretion standard. *United States v. Fernandez*, 913 F.2d 148, 155 (4th Cir. 1990). However, "[t]he elements of a statutory offense . . . involve questions of law subject to de novo review." *United States v. Fiel*, 35 F.3d 997, 1005 (4th Cir. 1994). The district court's admission of

[9]

[10] (U) CIPA § 6 litigation is ongoing in the district court because defendants recently filed a new CIPA § 5 Notice indicating they intend to disclose additional classified information at trial.

classified information based on an erroneous view of Section 793's elements is, by definition, an abuse of discretion. *United States v. Prince-Oyibo*, 320 F.3d 494, 497 (4th Cir. 2003).

B. Analysis

(U/SM)

1. The District Court Erroneously Created New Intent Elements.

(U/SM)

(U) Whenever a court creates new elements of a criminal offense it acts at the very edges of its constitutional power. This is because "[f]ederal crimes are defined by Congress, not the courts . . . ." *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997). "[S]o long as Congress acts within its constitutional power in enacting a criminal statute, this Court must give effect to Congress' expressed intention concerning the scope of conduct prohibited." *United States v. Kozminski*, 487 U.S. 931, 939 (1988). While it is true that courts are permitted to add clarity to vague criminal statutes "by judicial gloss" – as the district court purported to do here – such an approach is a rarity and can only be done when the statute at issue is "otherwise uncertain." *Lanier*, 520 U.S. at 266. The notion that a court "should strive to interpret a statute in a way that will avoid unconstitutional construction is useful in close cases, but it is not a license for the judiciary to rewrite language enacted by the legislature." *Chapman v. United States*, 500 U.S. 453, 464 (1991).

(U) This is not a "close case[ ]." The statute at issue is not "otherwise uncertain," and the reasoning for creating these elements is seriously flawed. As such, the district court not only manufactured unwise and unnecessary new elements of a federal criminal offense, but in doing so exceeded its constitutional authority and replaced its judgment for that of the Congress.

(U) The district court held that Section 793 is unconstitutional for two independent reasons: (1) that, in the absence of the new elements, Section 793 was unconstitutionally vague as applied to these two defendants, and (2) that, in the absence of the new elements, Section 793 violated the First Amendment rights of the defendants, as well as the First Amendment rights of "third parties not currently before the Court who may be prosecuted under the statute in the future." 445 F.Supp.2d at 629.

(U) Section 793 is not unconstitutionally vague as applied to the defendants, largely because the statute, as currently written by Congress, requires the government to prove that the defendants acted with willful intent. Nor does Section 793 violate the First Amendment rights of these defendants or hypothetical individuals. The statute's prohibitions simply do not encompass conduct that is protected by the First Amendment. And even if it did, Section 793's existing elements limit the statute's application so that its reach is not overbroad.

(U) The district court's vagueness and First Amendment analysis shared the same reasoning, namely that additional elements were necessary because the defendants communicated NDI orally, as opposed to passing documents: the "oral transmission of information relating to the national defense makes it more difficult for defendants to know whether they are violating the statute." 445 F.Supp.2d at

624, 627; *see also* 520 F.Supp.2d at 792-93. Without the new elements, the court believed that there was a serious risk of subjecting "non-governmental employees to prosecution for the innocent, albeit negligent, disclosure of information relating to the national defense." 445 F.Supp.2d at 640-41; 520 F.Supp.2d at 793. The court further held that it created the new elements as "glosses on the statutory willfulness requirement" in cases involving oral disclosures rather than document disclosures. 520 F.Supp.2d at 793.

(a) Section 793 is Not Vague As Applied to Defendants.

(U) "Vagueness doctrine is an outgrowth . . . of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008). Before delving into the district court's analysis of whether Section 793 was vague, it is important to bear in mind that the defendants only raised – and the district court only considered – whether Section 793 was vague "as applied to them." 445 F.Supp.2d at 617. When defendants assert an as-applied vagueness challenge, the statute at issue "must be examined in the light of the facts of the case at hand." *United States v. Sun*, 278 F.3d 302, 309 (4th Cir. 2002) (quoting *United*

States v. Mazurie, 419 U.S. 544, 550 (1975)). This means that the district court "need only determine whether the statute . . . [was] vague as applied to these particular defendants – *i.e.*, whether [Rosen and Weissman] in fact had fair notice that the statute and regulations proscribed their conduct." *United States v. Hsu*, 364 F.3d 192, 196 (4th Cir. 2004). Any consideration of whether Section 793 would be vague if applied to journalists, other lobbyists, private citizens, or anyone else except for defendants Rosen and Weissman is not appropriate.[11]

(U) As drafted by Congress, Section 793 requires the government to prove that defendants conspired to "willfully" communicate NDI. The Supreme Court has explained that "a variety of phrases have been used to describe" the term "willful intent." *Bryan v. United States*, 524 U.S. 184, 193 (1998). The Court, however, has boiled these phraseologies down into a simple, clear rule of law: to prove willful intent, "all that is required" is for the government to establish that the defendants had "knowledge that the conduct was unlawful." *Id.* at 196. This Court has adopted this definition, *United States v. Bursey*, 416 F.3d 301, 309 (4th Cir. 2005), and has even approved jury instructions in prosecutions under Section 793

[11] (U) The district court created these new elements by ruling on pre-trial motions. As a result, the district court – and this Court – "must assume that all facts proffered by the government are true." *United States v. Terry*, 257 F.3d 366, 367 (4th Cir. 2001).

that are almost identical to the jury instruction upheld by the Supreme Court in *Bryan*. *Compare Bryan*, 524 U.S. at 190 (approving jury instructions defining "willful" to mean "intent to do something the law forbids, with the bad purpose to disobey or to disregard the law") *with United States v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988) (approving Section 793 jury instruction defining willful intent as "specific intent to do something the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law"); *United States v. Truong*, 629 F.2d 908, 919 (4th Cir. 1980) (same).

(U) In none of these – or any other – prior espionage cases has any court seen it necessary to invent new intent elements above and beyond the congressionally approved requirement of willful intent. *Morison*, 844 F.2d at 1071 (Section 793 not unconstitutionally vague because of statute's specific intent requirement); *Truong*, 629 F.2d at 919 (same); *United States v. Dedeyan*, 584 F.2d 36, 39 (4th Cir. 1978) (same). This is because the district court's concerns about Section 793 being used to convict individuals engaged in "innocent," "negligent," or "unwitting" conduct are simply unfounded when the government must prove specific, willful intent. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1628 (2007) ("scienter requirements alleviate vagueness concerns"). "After all, under the specific intent required as an element of this offense, the government must prove

that a defendant intended to violate the law to obtain a conviction, thereby eliminating any genuine risk of holding a person criminally responsible for conduct which he could not reasonably understand to be proscribed." *Hsu*, 364 F.3d at 197.

(U) The district court's fourth new element – which requires the government to prove that defendants intended "injury to the United States or aid to a foreign nation [to] result from their disclosures," 520 F.Supp.2d at 793 – was a particularly serious error because it directly contradicts the plain language of the statute and circuit precedent.

(U) Section 793's plain language already requires an additional intent element for oral disclosures of NDI. In the oral disclosure context, the government must prove that defendants had "reason to believe" that information "could" be damaging to the United States or beneficial to a foreign nation. Proof that the defendant actually intended injury to the United States is not required, as this Court has held. In *Truong*, the defendant was a non-government employee who was convicted under, *inter alia*, Section 793 for obtaining NDI from his government source and then passing that information to the North Vietnamese. 629 F.2d at 912. Truong's government source supplied him with documents, but the source "removed their classification markings" before giving them to the defendant. *Id.* at 911. Like Rosen and Weissman, Truong alleged that Section 793 was unconstitutional because

it did not require the government to prove that he had the "intent to injure the United States or aid a foreign nation." *Id.* at 918. In language similar to the district court's here, Truong argued that without proof of his intent to injure the United States, he "could be convicted for mere negligence." *Id.* at 918-19. This Court rejected Truong's complaint as "insubstantial" because the statute requires proof that the defendant had *reason to believe* that the information *could* be used to injure the United States or aid a foreign nation. *Id.* In addition, this Court cited the district court's instruction to the jury on the statute's willful intent requirement, which "more than cured" any possible constitutional infirmities. *Id.*

(U) In the final analysis, the district court's creation of new intent elements was predicated solely on the notion that a higher evidentiary burden is necessary when a defendant obtains or discloses NDI orally. As we have shown, however, Section 793's plain language already accounts for oral disclosures by imposing on the government the additional burden of proving the "reason to believe" element. In fact, the history of espionage prosecutions in this country contain numerous examples of defendants communicating NDI orally or without documents. In none of those instances were additional intent elements found to be necessary.

(U) The first modern espionage prosecution was such a case. In *Gorin v. United States*, 312 U.S. 19 (1941), the defendant Gorin, a non-government

employee who organized tourist excursions to the Soviet Union, conspired with Salich, an investigator for the Naval Intelligence Office. As part of Salich's duties, he would read reports about the Navy's counter-intelligence investigations of Japanese individuals in the U.S. However, the reports were not described as classified. Salich provided Gorin "the substance of the information contained in some 43 reports," but the reports "were not physically given to Gorin. Salich communicated the substance thereof to Gorin orally or in writing." *Gorin v. United States*, 111 F.2d 712, 715 (9th Cir. 1940). Following their convictions for communicating NDI in violation of the Espionage Act, Gorin and Salich argued that the statute was unconstitutionally vague. The Supreme Court rejected this argument because "the obvious delimiting" words in the statute were those requiring specific intent. The statute could not be unconstitutionally vague because "[t]he sanctions apply only when scienter is established." 321 U.S. at 28.

(U) There have been several espionage prosecutions involving oral disclosures of NDI since *Gorin* – in none of them was there a judicially imposed heightened intent standard. For example, in *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952), defendants, non-government employees, convinced a woman to obtain NDI from her husband, who was a solider stationed at Los Alamos. The woman was instructed to obtain the information from her husband and then "commit

this information to memory and tell it to Julius upon her return to New York, for ultimate transmittal to the Soviet Union." *Id.* at 588. Similarly, in *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), the defendant's espionage "had not involved the simple transmission of documents. Rather, Pelton contacted the Soviets and allowed them to ask him questions on matters that were of interest to them." *Id.* at 1074.

(U) More recently, in *United States v. Campa*, 529 F.3d 980 (11th Cir. 2008), non-government employees were convicted of conspiracy to obtain NDI by observing activities at U.S. military installations and then passing that information to Cuba. *Id.* at 988. None of the information the defendants obtained was actually classified, but it was "information that the government has endeavored to keep from the public." *Id.* at 1005. Despite the fact that the defendants never obtained documents, let alone classified documents, no additional intent elements were required.

(U) What these cases show is that it is a classic form of espionage for a non-government employee to receive classified information orally from his government source, and then pass that information back to the foreign government. It was done in this manner 70 years ago in *Gorin*. It was done in this manner in *Rosenberg* and *Pelton* during the Cold War. And it was done in this manner by Rosen and

Weissman. In none of the prior cases was there any suggestion by any court that the Espionage Act was unconstitutionally vague without additional intent elements.

(U) The district court distinguished this line of precedents by noting that all prior oral disclosure cases involved prosecutions under 18 U.S.C. Section 794, rather than Section 793. 445 F.Supp.2d at 614. Section 794 is similar to Section 793 in many respects, although it does contain a different intent element and significantly higher punishments. Yet these differences do not carry any significance for a constitutional vagueness analysis. While Section 794 requires proof that the defendant had "intent or reason to believe that [the NDI] is to be used to the injury of the United States or to the advantage of a foreign nation," it does not require proof of a willful communication, as does Section 793. Moreover, for cases involving the communication of oral information, Section 793 requires the government to prove – in a similar fashion as Section 794 – that the defendant had "reason to believe [that the NDI] could be used to the injury of the United State or to the advantage of any foreign nation . . . ." Section 793's willfulness and "reason to believe" elements may be different from Section 794's, but they achieve the same thing, namely the assurance that negligent or innocent conduct will not be criminally punished.

(U) When a criminal statute requires the government to prove specific, "willful[] intent" (as Section 793 does), and when defendants are on tape admitting the illegality of their conduct, it cannot be said that Section 793, as applied to them, is unconstitutionally vague.

(b) Section 793 Does Not Violate the First Amendment.

(U) The district court also held that, in the absence of the new intent elements, Section 793 violated the First Amendment as applied to these defendants and was overbroad as applied to third parties not before the court. 445 F.Supp.2d at 629, 643. Again the district court erred.

(U) Holding a statute to be unconstitutionally overbroad "is strong medicine that is not to be casually employed." *Williams*, 128 S. Ct. at 1838. The Supreme Court has repeatedly explained that overbreadth challenges are "disfavored" for a variety of reasons, not the least of which is that they "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process." *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2007). Even when overbreadth challenges are employed, the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838.

(U) The district court's first error was holding that unlawfully conspiring to obtain NDI was "unquestionably . . . deserving of First Amendment" protection, 445 F.Supp.2d at 630, and that the statute "implicates the core values the First Amendment was designed to protect." *Id.* at 633. In doing so, the district court

became the first court to hold that unlawfully conspiring to steal this nation's secrets and pass them to a foreign government was among the First Amendment "core values."

(U) Early decisions involving the espionage statutes never extended First Amendment protection to the conduct prohibited therein. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (defendant's violation of Espionage Act not protected by First Amendment because defendant's speech was not "protected by any constitutional right"). This Court has also stated that "there is no First Amendment right implicated" in a prosecution of a defendant under Section 793. *Morison*, 844 F.2d at 1070. Other courts have similarly ruled that "[i]t is well established that the 'communication to a foreign government of secret material connected with the national defense can by no far-fetched reasoning be included within the area of First Amendment protected free speech.'" *United States v. Regan*, 221 F.Supp.2d 666, 671 n.3 (E.D.Va. 2002) (citation omitted); *see also United States v. Gowadia*, 2006 WL 2520599, *4 (D. Haw. 2006) (unpublished) (Section 793 defendant "does not have a First Amendment right to communicate classified national defense information").

(U) The district court rejected this authority by claiming that the government was seeking a "categorical rule that espionage statutes cannot implicate the First

Amendment." 445 F.Supp.2d at 629-30. The government was not, and is not, seeking such a rule. Indeed, the government agrees with the district court that oftentimes the pertinent question will be "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." *Id.* at 631. But to say that a First Amendment analysis should be contextual does not automatically mean that the conduct in question is worthy of First Amendment protection. In the Supreme Court's most recent case involving free speech, for example, the Court recognized that the First Amendment and the overbreadth analysis "seeks to strike a balance between competing social costs" but nonetheless held that the speech at issue was "categorically excluded from First Amendment protection" because it had "no social value." *Williams*, 128 S. Ct. at 1838, 1841. When speech "bears so heavily and pervasively" on the public welfare, "we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment." *New York v. Ferber*, 458 U.S. 747, 763-64 (1982). As a result, entire categories of material have been held to be without any form of First Amendment protection, including defamation, incitement, obscenity, pornography produced with real children, and offers to engage in illegal

transactions. *Williams*, 128 S. Ct. at 1841; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002). "[I]t is not rare" that seemingly protected speech may be prohibited if "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake." *Ferber*, 458 U.S. at 763-64.

(U) The district court also rejected this Circuit's precedent in *Morison*, where, in a prosecution of a government employee under Section 793, this Court stated "we do not perceive *any* First Amendment rights to be implicated here." 844 F.2d at 1068 (emphasis added). The court noted that the two concurring judges believed that the First Amendment interests in *Morison* were not "insignificant," *id.* at 1081 (Wilkinson, J., concurring), and were "real and substantial." *Id.* at 1085 (Phillips, J., concurring). Yet, even these concurring judges recognized that a First Amendment analysis in a prosecution under Section 793 should not be subjected to the same "aggressive balancing" that has "characterized the judicial role in other contexts." *Id.* at 1082. They explained how "the Government has a compelling interest in protecting . . . the security of information important to our national security" and opined that "in the national security field" the courts should perform their "traditional balancing role with deference to the decisions of the political branches of government." *Id.* Ultimately, the concurring judges were both convinced that Section 793 was constitutional because of the requirements that the

government prove that the defendant communicated "information relating to the national defense," that the information was communicated to a person "not entitled to receive it," and that the defendant acted willfully and with "reason to believe" that the information "could be used to injury of the United States or to the advantage of any foreign nation." *Id.* at 1084-85. Accordingly, they concluded, "the potential overbreadth of the espionage statute is not real or substantial in comparison to its plainly legitimate sweep . . . ." *Id.* at 1084.

(U) The district court itself recognized that "in some instances the government's interest is so compelling, and the defendant's purpose so patently unrelated to the values of the First Amendment, that a constitutional challenge is easily dismissed." 445 F.Supp.2d at 637. The court cited the "obvious example" of a non-government employee who discloses troop movements or military technology to hostile foreign powers. *Id.* Yet, the court concluded in perfunctory fashion: "this is not such a case." *Id.*

(U) As the *Morison* concurring judges emphasized, an "intelligent inquiry" of the government's interest would require knowledge of intelligence collection systems, "access to the most sensitive technical information," and "background knowledge of a range of intelligence operations." 844 F.2d at 1082. Even if such information were provided to the judiciary, "courts obviously lack the expertise needed for its evaluation" because judges have "neither aptitude, facilities nor responsibility" for such matters. *Id.* at 1083. The district court's view that unlawfully conspiring to disclose classified information about troop movements to a foreign government is "patently" unprotected by the First Amendment, but disclosing classified information to a foreign government about terrorist attacks on those same troops is a "core value" of the First Amendment proves the point that "judges . . . have little or no background in the delicate business of intelligence gathering." *CIA v. Sims*, 471 U.S. 159, 176 (1985).

(U) The district court endeavored to buck the weighty authority of *Morison* and the other cases discussed above, by misapprehending defendants' conduct. The court claimed that defendants were unlike Morison because they conspired to illegally obtain the government's classified information "all within the context of

seeking to influence United States foreign policy relating to the Middle East by participating in the public debate on this policy." 445 F.Supp.2d at 631. As an initial matter, the defendants' knowingly unlawful acquisition of NDI arguably removes them from the realm of protected speech altogether. *See Bartnicki v. Vopper*, 532 U.S. 514, 527-28, 535 (2001) (First Amendment protection available to respondents who "played no part in the illegal interception" and information "obtained lawfully"). At any rate, clandestinely obtaining and passing U.S. government classified information to the Israeli government does not represent participation in a "public debate" to "influence United States foreign policy." The fact that defendants may have at some point in the conspiracy mixed lawful conduct with their illegal conspiracy to obtain and disclose NDI is irrelevant. *Ferber*, 458 U.S. at 761-62.

(U) In the final analysis, the question here is whether the intrusion on First Amendment rights is so great as to outweigh the compelling government interest in preventing conspiracies to illegally obtain NDI and disclose it to foreign powers. The answer is plain. Conspiring to illegally obtain NDI for passage to foreign countries has never been one of the "forms of discourse critical to government, its policies, and its leaders, which have always animated, and to this day continue to animate, the First Amendment." *Rice v. Paladin Enter., Inc.*, 128 F.3d 233, 249

(4th Cir. 1997) (holding that "Hit Man" instruction book not protected by First Amendment). To engage in such conduct threatens our national security. "The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Sims*, 471 U.S. at 175. On the other side of the scale, the risk of the statute ensnaring individuals engaged in legitimate forms of free speech is minimal. The statute's numerous elements – not the least of which are the willful intent and "reason to believe" requirements – mean that any such risk "is not real or substantial in comparison to its plainly legitimate sweep . . . ." *Morison*, 844 F.2d at 1084. And certainly it can be said that if the facts proffered by the government are taken to be true, as they must, then these two defendants were not engaged in merely innocent "foreign policy" discussions or "public debate."

* * * * *

(U) At the close of its August 9, 2006 Opinion, the district court admonished Congress to "engage in a thorough review and revision" of Section 793. 445 F.Supp.2d at 646. The court may believe it wise to conduct a thorough revision of Section 793, but the duty of the district court is to apply the statute as written by Congress. *See United States v. Hamrick*, 43 F.3d 877, 893 (4th Cir. 1995) (Ervin,

C.J., dissenting) ("to do more is to transgress the boundaries of the Articles of the Constitution and to engage ourselves as legislators rather than jurists, to allow ourselves to say what we think the law is, or ought to be, rather than what Congress has told us it is"). Granted, courts are permitted to add their own judicial gloss to otherwise vague statutes; they may also interpret statutes to avoid unconstitutional constructions. But a judicial gloss or reinterpretation is inappropriate here because the statute's existing elements ensure its constitutional application.

2. *The Israeli Briefing Document is Not Admissible in the Absence of the District Court's New Intent Elements.*

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(a) *The*

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(b) The

(U/SM)

(c)

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(d)

(U/SM)

* * * * *

(U) In short, the Israeli Briefing Document has nothing to do with this case. To this very day, defendants have never seen this document or the information in it. Defendants are not alleged to have disclosed this document or the information in it. And the government will offer no proof at trial regarding this document or its contents. The district court erred when it ruled that this document was relevant.

II. The District Court Misapplied the *Smith* Standard in Concluding that the Government's Classified Information Privilege was Overcome with Respect to the FBI Report and the Israeli Briefing Document

A. Standard of Review

See Part I.A. *supra.*

B. Analysis

1. The Smith Standard

(U) In *Smith*, this Court recognized the government's privilege in classified information. Under the *Smith* standard, classified information is only admissible if it is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." 780 F.2d at 1107. This means that a "district court may order disclosure only when the [classified] information is at least essential to the defense, necessary to his defense, and neither merely cumulative nor corroborative, nor speculative." *Id.* at 1110. This Court's subsequent cases are in accord with *Smith*. *United States v. Abu Ali*, 528 F.3d 210, 248 (4th Cir. 2008) (citing *Smith* and adopting language quoted above); *United States v. Moussaoui*, 382 F.3d 453, 471-72, 746 (4th Cir. 2004) (citing *Smith* and holding that privilege overcome because information was "essential to Moussaoui's defense"); *Fernandez*, 913 F.2d at 155-56 (same).

(U) A district court's decision on whether the government's classified information privilege has been overcome obviously depends in large part on the context and circumstances of each case. But this Court's previous applications of the privilege are instructive here. In *Smith*, the defendant worked on intelligence matters for the U.S. Army. 780 F.2d at 1104. Smith was charged with violating Sections 793 and 794 when he disclosed classified information about Army intelligence double agent operations to a Soviet agent. Smith defended "the charges against him solely on the grounds that he did not have the necessary intent or reason to believe the information would be used to harm the United States or to give advantage to a foreign nation. Instead, he claim[ed] that he thought he was aiding the United States by working for the CIA in setting up a double agent operation." *Id.* at 1106. Smith alleged that he was approached by two men, White and Ishida, who said they were CIA agents. *Id.* at 1104. To help set-up the double agent operation, White and Ishida allegedly asked the defendant to gain the trust of the Soviets by supplying them with classified information. *Id.*

(U) During the pre-trial CIPA § 6(a) hearing, Smith noticed his intention to introduce at trial "several pieces of classified information to support his defense that he thought he was working for the CIA when he sold the information to the Russians." *Id.* The district court "permitted Smith to introduce into evidence broad

classes of classified information" about other CIA double agent programs in the Far East that were "not related to the current charges." *Id.* at 1110 n.13. The district court, for example, found relevant "the activities of a CIA agent known as Richard Cavanaugh," and the fact that Cavanaugh engaged in covert activities without authorization and had a "free lance style." *Id.*

(U) This Court disagreed, concluding that the information was "of marginal relevance at best," because Smith "failed to connect Cavanaugh to his [Smith's] double agent operation." *Id.* Nor could Smith establish "that White and Ishida would testify that they worked for Cavanaugh." *Id.* Because there was no direct connection between the crimes charged and the classified information Smith sought to introduce, this Court ruled that the district court abused its discretion in admitting this classified information – despite the fact that the information had at least some relevance to Smith's state of mind. *Id.* at 1108 n.12, 1110 n.13.

(U) The same situation applies here. None of the classified information in the FBI Report or the Israeli Briefing Document that the government sought to prevent from disclosure has anything to do with this case. To this day, the defendants have never seen this information. The defendants have "failed to connect" the irrelevant redacted classified information to the relevant criminal conduct at issue: the specific instances of their receipt and disclosure of classified

information alleged in the indictment. 780 F.2d at 1110 n.13. Because this classified information is "not related to the current charges," it remains "of marginal relevance at best" and does not negate the government's classified information privilege. *Id.*

2. *The District Court Erroneously Held that the FBI Report is Essential to the Defense.*

(U/SM)

(U/SM) [redacted]

(U/SM) [redacted]

(U/SM)

(U) At the end of the day, defendants are graymailing the government with a speculative and tenuous theory of relevancy – a situation CIPA and the classified information privilege were designed to prevent. 780 F.2d at 1105 (describing purpose of CIPA and privilege). Additionally, the district court's faulty relevance ruling would negatively impact future espionage prosecutions. Spies would communicate, orally or otherwise, chosen portions of extremely sensitive documents and then argue they are entitled to disclose the entire contents for comparison purposes. This would create a low threshold for disclosure of classified information and greatly impair the government's ability to protect national security by prosecuting espionage cases.

3. *The District Court Erroneously Held that the Israeli Briefing Document is Essential to the Defense.*

(U) As argued above, the Israeli Briefing Document is not relevant and, as such, cannot even meet the threshold requirements of the *Smith* standard. But the document also does not meet the *Smith* requirements because it is cumulative.

(U/SM)

CONCLUSION

(U) For the foregoing reasons, the district court's CIPA rulings on the Israeli Briefing Document and FBI Report were erroneous and should be reversed.

Respectfully Submitted,

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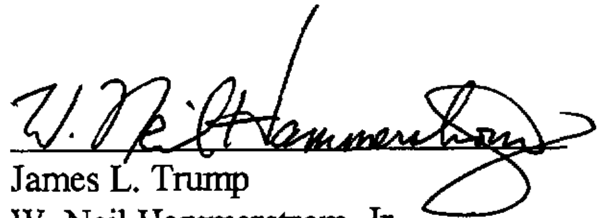
By: 
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Attorney for the United States

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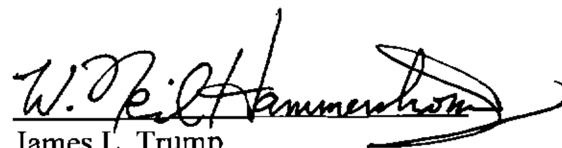

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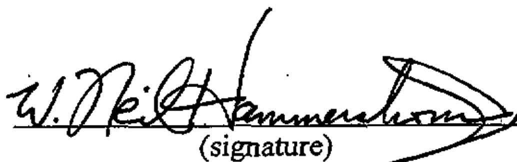
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