IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	CRIMINAL NO. 1:05cr225
	)	
v.	)	Feb. 22, 2006, 10:00 a.m. Motion Hearing
	)	(Hon. T.S. Ellis III)
STEVEN J. ROSEN,	)	
	)	
KEITH WEISSMAN,	)	
	)	
Defendants.	)	

GOVERNMENT'S CONSOLIDATED RESPONSES
TO DEFENDANTS' PRETRIAL MOTION

The United States, by its attorneys, Paul J. McNulty, United States Attorney for the Eastern District of Virginia, Kevin V. Di Gregory and W, Neil Hammerstrom, Jr., Assistant United States Attorneys, and Thomas Reilly, Trial Counsel, U.S. Department of Justice hereby files this consolidated response to the following pretrial motions:[1]

1. DEFENDANTS' MOTION TO DISMISS COUNT ONE AS DUPLICITOUS
2. DEFENDANTS' MOTION FOR A BILL OF PARTICULARS
3. DEFENDANTS' MOTION TO DISMISS THE SUPERSEDING INDICTMENT
4. DEFENDANTS' MOTION FOR A JURY SELECTION PROCESS
5. DEFENDANTS' MOTION TO STRIKE OVERT ACTS AND SURPLUSAGE
6. DEFENDANTS' MOTION FOR DEPOSITIONS PURSUANT TO RULE 15 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

[1] The government is filing separately today, under seal, classified responses to the following pretrial motions: Defendants' Motion for Show Cause Hearing, Dismissal of Indictment, and Imposition of Sanctions; Defendants' Joint Motion to Dismiss The Indictment Based on Outrageous Government Conduct; Defendant Rosen's Motion To Dismiss Count III; and, Defendants' Supplemental Motion to Compel Discovery of FISA Materials.

1. DEFENDANTS' JOINT MOTION TO DISMISS COUNT ONE AS DUPLICITOUS

Defendants contend that Count One of the superseding indictment improperly charges at least two separate conspiracies in a single conspiracy count and is therefore duplicitous and should be dismissed. Because Count One properly charges .a single conspiracy to commit two substantive offenses, defendants' motion should be denied.

BACKGROUND

Count One of the superseding indictment charges defendants Rosen, Weissman, former defendant Franklin, and others, known and unknown, with conspiracy to communicate national defense information to persons not entitled to receive it. The defendants are charged under 18 U.S.C. § 793(g) with conspiring to commit two substantive offenses: the unlawful communication of national defense information by a person having *lawful* possession of said information, in violation of 18 U.S.C. § 793(d); and the unlawful communication of national defense information by a person having *unlawful* possession of said information, in violation of 18 U.S.C. § 793(e).

ARGUMENT

Count One properly charges the defendants and unindicted conspirators according to their respective roles in the conspiracy. As government employees, defendant Franklin and other unindicted conspirators bad lawful possession of national defense information which they unlawfully communicated to persons not entitled to receive it — Rosen and Weissman. In turn, Rosen and Weissman — in unlawful possession of this information — unlawfully communicated it to others.

Under Rule 8(b), Fed. R. Crim. P.:

> The indictment . . . may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the

> same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in **one or more** counts together. . . .

It is well settled that a single conspiracy **to** commit two or more separate crimes is not duplicitous, "for the conspiracy is the crime, and that is one, however diverse its object." *United States v. Marshall,* .332 F.3d 54,262 (4th Cir.), *cert. denied,* 540 U.S. 1024 (2003) (quoting *Braverman v. United States*, 317 U.S. 49,54(1942)).

The defendants argue that Count One improperly charges two - and possibly three — separate conspiracies in the single count. The question whether the evidence shows a single conspiracy or multiple conspiracies, however, is one of fact and is properly the province of the jury. *United States v. Urbanik,* 801 F.2d 692, 695 (4th Cir. 1986); *United States v. McGrath,* 613 F.2d 361, 67 (2d. Cir. 1979) (question is "singularly well-suited to resolution by the jury"). Nevertheless, the facts of this case establish a single conspiracy.

The basis of the defendants' contention is that there are three distinct time periods covered by Count One: the 1999 to 2002 time frame prior to Rosen and Weissman's first alleged contact with Franklin; the time during which Rosen and Weissman were meeting with Franklin; and the time during which Franklin was acting as a government cooperator. They further rely on the assertion that Rosen and Weissman could not have been part of an illegal agreement with Franklin before he was known to exist. Def. Mot. at p. 3-4. None of this undermines the validity of a single conspiracy count.

A single conspiracy can be found in a case involving multiple transactions where there is an overlap of key actors, methods and goals, indicating one overall agreement or one general business venture. *United States v. Crockett,* 813 F.2d 1310, .13 17 (4th Cir. 1987). At various times throughout the entire time-span of the conspiracy, Rosen and Weissman engaged in a common venture — using Franklin and others within the U.S. government to gather classified

information for unlawful communication to persons not entitled to receive it. *See* Manner and Means section, Count One.

The fact that Franklin entered the conspiracy well after it began and left before it was completed is of no consequence as charged in Count One. A particular co-conspirator "need not be involved in every phase of [the] conspiracy to be deemed a participant" in a single, ongoing conspiracy. *United .States v. Leavis, .853* F.2d 215, 218 (4th Cir. 1988). *See also United States v. Banks,* 10 F.3d 1044, *1054* (4th Cir. 1993) ("[O]ne maybe a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence."); and *United States v. Johnson,* 54 F.3d 1150, 1154 (4th Cir.), *cert. denied,* 516 U.S. 903 (1995) (concluding that .evidence established a single conspiracy even if the members of the conspiracy did not know each other or had limited contact with each other).

Because Count One properly charges that the defendants and others were part of a single conspiracy with multiple objects, the defendants' motion to dismiss as duplicitous should be denied.

2. DEFENDANTS' MOTION FOR A BILL OF. PARTICULARS

Defendants contend that Count One of the superseding indictment fails to include the requisite particularity and that they are entitled to a bill of particulars in order to be fully apprised of the essential elements .of the charged offenses. Because the indictment fairly informs the defendants of the charges, and permits them to adequately prepare a defense, avoid or minimize surprise at trial and to plead the indictment in bar of another prosecution for the same offense, their motion should be denied.

A. The Indictment Meets the Requirements of FED. R. CRIM. P. 7

An indictment fulfills .the requirements of the Federal Rules of Criminal Procedure when it is a "plain, .concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(l); *United States v. Duncan,* 598 F.2d 839, 848 (4th Cir. 1979), *cert. denied,* 444 U.S. 871 (1979); *United States v. Brown,* 784 F. Supp. 322, 323 (E.D. Va. 1992). Rule 7 mandates that all the essential elements of the offense be alleged along with sufficient additional facts to allow the indictment to be used as proof to bar a subsequent prosecution for the same offense. *Duncan,* 598 F.2d at 848. The facts alleged should also be sufficiently detailed to allow a defendant to prepare his defense. *Id.*

The superseding indictment in this case amply meets these requirements. Count One, which charges the defendants with conspiracy to communicate national defense information to persons not entitled to receive it, contains a "General Allegations" section, a "Ways Manner and Means of the Conspiracy" section, and 57 Overt Acts, all detailed in 17 pages. The indictment describes the key dates, locations and particular defendant involved in meetings or discussions in which their illicit conduct was alleged to have been committed. The nature of the government's allegations have been further amplified through discovery provided to the defendants, which includes numerous documents and hours of recordings of their relevant meetings and conversations. The defendants are well aware of the identities of unnamed individuals referenced in the overt acts through their review of this material. Moreover, the defendants have been provided with the government's CIPA § 10 notice of materials upon which the government expects to rely to establish the national defense or classified information element of the offense. A bill of particulars is not the proper vehicle for the information defendants seek, and, plainly, Fed. R. Crim. P. 7 does not require more than what is set forth in Count One of the superseding indictment.

B. A Bill of Particulars Is Not .a Tool for Discovery

The function of a bill of particulars under Fed. R. Crim. P. 7(f) is to provide any *essential* detail omitted from the indictment. *United States v. Anderson,* 481 F.2d 685, 690(4th Cir. 1973), *aff'd,* 417 U.S. 211(1974). "A bill of particulars should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which be is accused." *United States v. Torres,* 901 F.2d, 205, 234 (2d Cir.1990). Hence, the purpose of a bill of particulars is not to provide detailed disclosure of the government's evidence prior to trial, but rather to fairly inform a defendant of the charges so that he may adequately prepare a defense, avoid or minimize surprise at trial, and plead in bar of another prosecution for the same offense. *Wong Tai v. United States,* 273 U.S. 77, 82-83 (1927); *United States v. Fletcher,* 74 F.3d 49, 53 (4th Cir. 1996), *cert. denied,* 519 U.S. 857 (1996); *United States v. Automated Medical Laboratories, Inc.,* 770 F.2d 399, 405 (4th Cir. 1985); *United States v. Dulin,* 410 F.2d 363, 364(4th Cit 1969).[2]

A bill of particulars should be denied where underlying evidentiary matter is requested. A bill of particulars is not designed to compel the government to disclose its theory of the case, its witnesses, or a detailed description of the manner and means by which the crime was committed. *See, e.g., United States v. Colson,* 662 F.2d 13.89, 1391 (11th Cir. 1981) (motion for bill of particulars requesting identities of unnamed coconspirators, dates and locations of conspiratorial acts, and other detailed information properly denied because defendant failed to show prejudice and actual surprise at trail because bill of particulars not to be used merely as

[2] A motion for a bill of particulars is addressed to the sound discretion of the court whose decision to deny a bill of particulars will be overturned only if it rises to the level of abuse of discretion. *Wong Tai,* 273 U.S. at 82; *United States v. Bales,* 813 F.2d 1289, 1294(4th Cir. 1987); *United States v. Jackson,* 757 R2d 1486, 1491 (4th Cir), *cert. denied,* 474 U.S. 994 (1985).

discovery tool). The defendants are not entitled to have the government specify through a bill of particulars the details of overt acts already set forth in the indictment. *United States v. Kilrain,* 566 F.24 at 985; *United States v. Armocida,* 515 F.2d at 54; *United States v. Carroll,* 510 F.2d 507, 509 (2d Cir. 1975). Nor, are they are entitled to have the government furnish through a bill of particulars the precise manner in which the crimes char~e4 in the indictment were committed. *United States v. Andrews,* 381 F.2d 377, 377-78 (2d Cir. 1967).

Because the indictment omits no essential detail, and, in conjunction with discovery provided to defendants, amply allows the defendants to prepare their defense, the pretrial discovery the defendants seek through the vehicle of a motion for a bill of particulars should be denied.

3. DEFENDANTS' MOTION TO DISMISS THE SUPERSEDING INDICTMENT GOVERNMENT'S OPPOSITION TO DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE SUPERSEDING INDICTMENT

Defendants Motion seeks to dismiss the superseding indictment on the grounds that the statute fails to provide constitutionally sufficient notice that the defendants' conduct was unlawful and that application of the statute in this case is a violation of defendant's First Amendment rights. There is no authority whatsoever for defendants' assertion that Title 18, United States Code, Sections 793(d), (e) and (g), as applied in this case, fail to provide constitutionally sufficient notice that the conduct the defendants engaged in was unlawful. In fact, all authority 'is to the contrary.

A. 18 U.S.C. § 793 Is Not Unconstitutionally Vague

It is a sacrosanct principle of statutory construction that Congress is presumed to have said what it meant and, therefore, an examination of 18 U.S.C. § 793(d), (e) and (g) must begin

with the language of the statutes.[3] *Williams v. Taylor*, 529 U.S. 420, 431 (.000); *United States v. Midgett*, 198 F.3d 143, 145-146 (4th Cit 1999); *Faircloth v. Lundy Packing Company*, 91 F.3d 648,653 (4th Cit 1996). Unless the language is ambiguous or Congress clearly expressed that it meant otherwise, "[w]e give the words of a statute their 'ordinary, contemporary common meaning." *Williams, Id.* (quoting *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997)).

Both subsections that the defendants are charged with conspiring to violate begin with the word "whoever." 18 U.S.C. 793(d) and (e). The subsections do not begin, *whoever, except for lobbyists, who are "members of the Washington policy community."* (Defendants' Memorandum, p. 3)(emphasis added). Whoever means, "no matter who." Webster's II New College Dictionary, p. 1260 (Houghton Mifflin, 2001). As the Fourth Circuit noted in *United States v. Morison*, 844 F.24 1057, 1063-64 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988) both

---

[3] Title 18, United States Code, Section 793 (d), (e) and(g) provides:

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or 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 of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or 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 of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

Shall be fined under this title or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided 'for the offense which is the object of such conspiracy.

793(d) and (e) apply "whoever" violates their terms; the statute "covers 'anyone" and "it is difficult to conceive of any language more definite and clear."

Putting aside for the moment the alleged 'First Amendment protections to which the defendants claim entitlement, their argument on vagueness can be distilled to this: they were not on notice that their conduct was criminal because the government has not prosecuted a non-government employee for orally communicating classified information. Its lynchpin is that "information related to the national defense" is limited to "tangible" information. Indeed, defendants urge the court to usurp the legislative function by engrafting the word "tangible" onto Sections 793(d) and (e), suggesting that because Congress did not use the word "intangible," it must have meant "tangib1e." (See Defendants' Memorandum, p. 14). It is evident that Congress understood the meaning of the word tangible because each section includes a list of tangible items that anyone is prohibited from willfully communicating to anyone not entitled to receive them. "Information" means "knowledge derived from study, experience or instruction." Webster's II New College Dictionary, p. 568. Its meaning is not limited to tangible items reflecting or evidencing knowledge and therefore, the Court should reject the defendants' position that Congress did not say what it meant. Furthermore, since the defendants are "two individuals who were engaged in a practice that defines foreign policy lobbying — the sharing of *information* — it must be presumed that they knew and understood its meaning as well" (Defendants' Memorandum, p. 14) (emphasis added). Nor is defendants' argument sustained by the suggestion that section 793(e) also punishes the retention of "the same." Because information is not limited to the intangible, it may be retained. Thus, the term "information" is neither ambiguous, nor limited to tangible items. In any event, an inquiry into statutory ambiguity is informed "by reference to the language itself, the specific context in which that

language is used and the broader context of the statute as a whole." *United States v. Wildes*, 120 F.3d 468,469-70 (4th Cir. 1997) (quoting *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 849 (1997)). The statute as a whole is designed to prohibit and punish the disclosure of national defense information to those not entitled to receive it. It would be the height of absurdity to suggest that a person would be prohibited from handing over a document during lunch, but is free 'to read the document out loud.

The manners in which unlawful disclosures can occur are detailed in the statute. The defendants are charged with conspiring to willfully "communicate," which simply means to "make known" or "disclose." Webster's II New College Dictionary, p. 227. Finally, the Sentencing Guidelines Commission has recognized that 793(d) and (e) apply to 'intangible information. "If the defendant was convicted of 18 U.S.C. § *793(d)* or (e) for the willful transmission or communication of intangible information with reason to believe that it could be used to the injury of the United States or 'the advantage of a foreign nation, apply § 2M3.2(a)." *USSG* § *2M3.3, Commentary, Application Note 2*(emphasis added). The resulting application is a six level increase in the Base Offense Level recognizing not only that intangible information is contemplated by the statute, but that such a serious disclosure warrants significantly greater punishment. "Proof that the item was communicated with reason to believe that it could be used to the injury of the United States or 'the advantage of a foreign nation is required only where intangible information is communicated under 18 U.S.C. § 793 (d) or (e)~" *USSG* § *2M3.3, Commentary, Background* (emphasis added).

The defendants attempt to inappropriately commingle factual matters to be determined by jury with their legal arguments on vagueness and overbreadth.[4] However, "the vagueness doctrine is rooted in due process principles and is basically directed at lack of sufficient clarity and precision in the statute; overbreadth . . . would invalidate a statute when 'it 'infringe[s] on expression, to a degree greater than justified by the legitimate governmental need' which is the valued purpose of the statute." *Morison,* 844 F.2d at 1070. "It has been repeatedly stated that a statute which 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.,* (quoting *Connally v General Construction Co.* 269 U.S. 385, 391 (1926)).

Defendants aver that the term "information related to the national defense" is unconstitutionally vague. The use of this term in the predecessor statute to 18 U.S.C. 793 was unsuccessfully challenged as unconstitutionally vague in *Gorin v. United States,* 312 U.S. 19 (1941). The Court accepted the government's assertion that "[n]ational defense . . . is a generic concept of broad connotations referring' to the military and naval establishment and the related activities of national preparedness." *Id.,* p. 434. The Court cited with approval the jury instructions given by the District Court which referenced, in pertinent part, "information, documents, plans, maps, etc." *Id.* Defendants' argument that the national defense character of information can only be evidenced for purposes of notice by documentary classification is specious. The statutes at issue prohibit and punish the disclosure of national defense information, without any reference to classification, that is, the information must be related to the

[4] "It is elementary that a motion to dismiss and indictment implicates only the legal sufficiency of its allegations, not the proof offered by the Government." *United States v. Terry,* 257 F.3d 366, 371 (4th Cir. 2001 (King, J., concurring).

national preparedness and closely held in that it is not officially made publicly available. *See Gorin* at 29-30., *Morison* at 1071-76, *United States v. Squillacote,* 221 F.3d 542, 575-79. It is unbridled hubris for the defendants to assert that the Director of Foreign Policy for AIPAC and its Senior Middle East analyst on foreign policy issues, both of whom lobbied the Executive Branch, are unable to understand the meaning of the term "information related to the national defense."

The Fourth Circuit has rejected constitutional challenges to the espionage statutes on grounds of vagueness and overbreadth each time it has been presented. *See United States v. Dedeyan* 584 F.2d 36 (4th Cit. 1978); *United States v. Truong Dinh Hung,* 629 F.2d 908 (4th Cir. 1980); *Morison.* Defendants argue that the phrase "any person not entitled to receive it" is vague because "[w]hen information is transmitted verbally, the recipient has no way to determine who else can or cannot also receive the information unless specifically told." Similarly, appellant Morison argued "this phrase [is] vague because it does not spell out exactly who may 'receive' such material." *Morison,* 844 F.2d at 1074.

This argument was rejected' because "any omission in the statute is clarified and supplied by the government's classification system provided under 18 U.S.C. App. 1 for the protection of the national security and the district judge so ruled." *Id.* Upon reading the statutory prohibitions against the willful disclosure of national defense information at issue here in their entirety, and in context, the inference is crystal clear to the ordinary person that access to such information is severely restricted and clearly not available to the public. The clarification provided by the government's classification system only more specifically identifies how restrictive the access is with respect to particular information. Although Morison's familiarity with the classification system invariably exposes his vagueness claim as incredible, it does not follow that one must be

a government employee with a current security clearance in order to fail in making such a claim. Section 793(e) applies to those with unauthorized possession or access. "Unauthorized" includes both government employees with security clearances but without access to the information at issue, and the rest of the world. Congress could have easily limited application of the statute to government employees who exceed their authorized access; but it did not.[5] It provided, again, for "whoever" has unauthorized access. 18 U.S.C. § 793(e). Thus, Congress clearly contemplated and sought to prohibit and punish unlawful disclosures by the defendants or those similarly situated. The government respectfully submits that an "ordinary person exercising ordinary common sense" *(Morison,* at 107, quoting *Arnett v. Kennedy,* 416 US 134, 159 (1974)) would know that foreign officials, journalists and other persons with no current affiliation with the United States government would not be entitled to receive information related to our national defense. Certainly two 'highly educated men (both defendants hold Ph.D.s) who made a living discussing foreign policy issues related to a region of the world area that an ordinary person understands is vital to our national security cannot credibly claim ignorance of this concept.

In *Truong,* 629 F.2d at 919, the Fourth Circuit, citing *Gorin* and *Dedeyan,* held that because the scienter requirement in 793(e) was the "willful transmission of national defense information with 'reason to believe' that the national defense information could be used to harm the United States or aid a foreign nation," the statute was not overbroad. Truong was not a government employee, but was a Vietnamese citizen 'who, since his arrive in the United States had "pursued an active scholarly and political interest in Vietnam and the United 'States." *Id.*, at

[5] Indeed, in other statutes prohibiting the disclosure or misuse of classified information, Congress has specifically limited application of the statue to government employees or others with authorized access. *See e.g.,* 8 U.S.C. § 1924 (prohibiting the unauthorized removal or destruction of classified material by government employee, agent or contractor); 50 U.S.C. § 783 (a) (prohibiting disclosure of classified information by government officer or employee to a foreign agent).

911. Among other offenses, he was convicted of violating 18 U.S.C. § 793(e) and 18 U.S.C. §2 for procuring documents which related to the national defense from his co-defendant, a United States information Agency employee, and then providing them to ,a third person (unbeknownst to him an FBI confidential informant) for delivery to North Vietnamese representatives to the Paris peace negotiations with the United 'States. Neither his status as a non-government employee nor a *"re-transmitter"* of national defense information saved him from prosecution. Nor should the similarly situated defendants in this case be spared.

Defendants are not babes in the woods and incontrovertibly fit into a class of persons not authorized to possess protected national defense information. As such, they are in no position to assert a vagueness claim. See *Morison,* 844 F.2d at 1071. ("[I]t is settled beyond controversy 'that if one is not of the rare entrapped innocents but one to whom the statute clearly applies, irrespective of any claims of vagueness, he has no standing to challenge successfully the statute under which he is charged for vagueness").

Moreover, any alleged vagueness in the statute will fall away with the presentation of evidence at trial establishing that the defendants had the specific intent to willfully conspire to obtain and communicate national defense information and knew that in doing so, they were acting in bad faith and violating the law. *See Truong,* 629 F.2d at 719 ("bad faith" is an element of 793(e)); and *Morison,* 844 F.2d at 1071-72 (proper instructions on willfulness and national defense ameliorate any vagueness concerns); United States v. Lindh, 212 F.Supp.2d 541 (E.D.Va. 2002) (Ellis, J.) ("And, it is well settled that a 'requirement of willfulness makes a vagueness challenge especially difficult to sustain' because '[a] mind intent on willful evasion is inconsistent with surprised innocence."(citations omitted)). In other words, contrary to the defendants' efforts to have the Court evaluate the specificity of the statute in the abstract, the true

test of whether the statute provides fair notice to these defendants turns not merely on the words of the statute, but also on the nature of the evidence adduced and the 'instructions given during the trial. The allegations presented in the superseding indictment demonstrates the fair notice to the defendants and ameliorate all vagueness concerns in this case.

B. Defendants Have No First Amendment Right To Willfully Disclose National Defense Information

Defendants argue that they are shielded by the 'First Amendment from prosecution under Section 793. This position is contradicted by the plain language of the statute as well as Supreme Court and Fourth Circuit authority. As previously noted, both 793(d) and (e) apply to "whoever" violates their terms; the statutory language "covers 'anyone" and "[i]t is difficult to conceive of any language more definite and clear." *Morison*, 844 F.2d at 1063-64. There plainly is no exemption in the statutes for the press, let alone lobbyists like the defendants.

Guidance on this issue can be found in the *6-3, per curiam* opinion in the Pentagon Papers case *(New York Times v. United States,* 403 U.S. 713 (1971)). In that case, the United States sought to restrain the New York Times from publishing classified documents relating to the Vietnam war. Although not raised by the parties, the Court did discuss whether a prior restraint was required when the government could, potentially, charge the Times with a violation of the espionage statutes. While it did not decide the question whether the First Amendment immunizes the press from criminal prosecution for publishing national defense information given to them by a "leaker," five concurring justices at least questioned the existence of such blanket immunity. Justice White stated in a concurrence joined by Justice Stewart: "[F]rom the face of subsection (e) and from the context of the Act of which it was a part, it seems undeniable that a newspaper, *as well as others unconnected with the Government,* are vulnerable to prosecution under s 793 (e) if they communicate or withhold the materials covered by that section." 403 U.S.

at 740 (emphasis added). *See also* Justice Stewart concurrence, joined by Justice White, 403 U.S. 730 ("Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of *very colorable* relevance 'to the apparent circumstances of these cases)" (emphasis added). Two concurring justices concluded that Section 793(e) would not apply to the press because that statute punishes unlawful "communication," not "publication" of protected national defense information. 403 U.S. at 720-22 (Justice Douglas, with Justice Black, concurring). Even Justice Marshall recognized that subsection 793(e) "seem[ed] relevant to these cases" and that it was a "plausible construction" that it applied to publication of newspaper stories. 403 U.S. at 745.

Likewise, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which held that the First Amendment did not provide reporters with a blanket testimonial privilege in criminal proceedings, the Court noted that "[i]t would he frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws." Id. at 691. The Court noted further "[i]t suffices to say that however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing." 408 U.S. at 692 (quotation marks and citation omitted).

Stating this, we recognize that a prosecution under the espionage laws of an *actual* member of the press for publishing classified information leaked to it by a government source, would raise legitimate and serious issues and would not be undertaken lightly, indeed, the fact that there has never been such a prosecution speaks 'for itself. But none of those issues are

implicated in this case for the simple fact that the defendants, by their own admission, are not members of the press and enjoy no constitutional rights reserved to the press.

Neither the defendants nor the organization for which they worked during the relevant period are members of the press. During the conspiracy, they were lobbyists representing for all practical purposes the interests of a foreign country. Their contention that the information in which they trafficked related to foreign policy issues and attendant policy debate does not advance their position that they should be equated with the press. Most, if not all, national defense information could be linked to foreign affairs or public policy issues, and most, if not all, of the ordinary spies now sitting in jail could advance the same argument as the defendants. As the Supreme Court recognized in *Branzburg*, "[t]here are few restrictions on action 'which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry 'into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right." 408 U.S. at 684 n.22 (quotation marks and citation omitted).

In the same vein, one of the reasons the Court in *Branzburg* refused to confer a First Amendment-based testimonial privilege on the press is to avoid having to deal with a broad array of individuals who might plausibly claim that they qualify as members of the press. "The informative function asserted by representatives of the organized press in [this litigation] is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury." 408 U.S. at 704. Obviously, if

serving an expansively interpreted "informative function" standing alone gave an individual or organization immunity from prosecution for violating espionage laws, we would have to free all those spies sitting in jail and surrender utterly our ability to protect classified national defense information.

Defendants heavily rely on *Bartnicki v. Vopper*, 532 U.S. 514(2001), which they claim establishes that their prosecution would contravene their First Amendment freedom of speech. That case, however, is completely inapposite. *Barnicki* involved a private suit for damages against two defendants who disclosed recordings of plaintiffs' cellular phone conversation. The Court assumed, for purposes of the case, that the defendants knew or had reason to know that the tapes had been illegally intercepted under Title III. That statute proscribed the intentional disclosure of illegally intercepted conversations and provided monetary damages for such a violation. The Court held for the defendants on the ground that their First Amendment right to communicate the contents of plaintiffs' intercepted conversation, which directly related to an ongoing public controversy about a teachers' union dispute with the local school hoard, outweighed the *personal* privacy interest of the plaintiffs and the government's interest in deterring illegal eavesdropping in which the defendants had no part. The case did not remotely involve classified information, espionage, or national security issues.

In light of the great reliance defendants place on *Bartnicki*, a more specific summary of the facts is in order. During the course of a contentious and publicized dispute between a between two union officials was intercepted and recorded by an unknown person in violation of Title III. During that conversation, the union officials discussed the school board's "intransigence" and one of them said that "we're gonna have to go to their homes. . . . To blow off their front porches, we'll have to do some work on some of those guys." The unknown

person who had intercepted the call anonymously left a recording of it in the mailbox of the head of a local taxpayers' organization that opposed the union. That individual recognized the voices on the tape and 'provided it to a local radio commentator who also opposed the union. The commentator played the 'tape on the air, and its contents were rebroadcast by other media outlets. The two union officials sued the radio commentator and the person who gave him the tape. The defendants (or respondents as the Court characterized them) asserted a constitutional, freedom of speech defense.

Teeing up the First Amendment issue, the Court accepted 'the defendants' submission on three facts: "First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else." And, "[t]hird, the subject matter of the conversation was a matter of public concern." 532 U.S. at 525.

Bartnicki does not remotely aid the defendants. First, one of the facts on which the Court relied to distinguish that case from other cases involving disclosures of illegally intercepted communications, was that the individuals who made the disclosures in Bartnicki "played no part in the illegal 'interception" but "[r]ather found out about [it] only after it occurred, and in fact never learned the identity of the person or persons who made the interception." 532 U.S. at 525, 529, 535. Even assuming *arguendo* that 793(d) and 793(e) are an appropriate analytical analogue to the Title III provisions at issue in that case, which they are not, defendants certainly played a significant part in Franklin's subsection (d) violation. Indeed, they are alleged to have participated in a criminal conspiracy with him to violate that statute as well as section 793 (e).

Second, in holding that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about ,a matter of public concern" (532 U.S. at 535), the central countervailing interest weighed by the Court was the plaintiffs' right to the privacy of their cellular phone conversation — not an unimportant interest, but not one that reasonably trumped the free-expression right to timely communicate the fact that teachers' union officials had threatened covert physical violence against members of a local school board. As noted, national security interests were not implicated in *Bartnicki.* Those national security interests are simply not comparable to the personal privacy interests involved there. As Judge Wilkinson presciently noted in his *Morison* concurrence (844 F.2d at 1081-82): "In an ideal world, governments would not need to keep secrets from their own people, but in this world much hinges on events that take place outside of public view. Intelligence gathering is critical to the formation of sound policy, and becomes more so every year with the refinement of technology and the growing threat of terrorism." It is not surprising then that *no* case immunizes the unlawful compromise of national defense secrets on free speech grounds.

Finally, we think that it is absurd to suggest that the Court in *Bartnicki* would *sub silentio* rule subsection 793(e) unconstitutional under the free-speech clause as applied to persons who in bad faith transmit "leaked" hut classified national defense information to the press, a foreign power, and others not entitled to receive it where the information in question has some arguable relationship to public debate or issues. This absurdity is demonstrated by the numerous concurring opinions in the Pentagon Papers case which at some length discuss the applicability of espionage statutes to publication of "leaked" defense secrets — an issue that was not even presented there.

Indeed, in the civil context, the Supreme Court has addressed the scope of the First Amendment as it relates to the disclosure of classified information. In *Haig v. Agee, 453* U.S. 280, (1981), the United States revoked Agee's passport on national security grounds. Agee, a former CIA employee, had engaged in activities in foreign countries to purposefully expose undercover CIA officers and agents and United States intelligence sources. Agee 'challenged the revocation of his passport on the ground that it violated his First Amendment right to free speech and was designed to deter his criticism of government policies. The Court rejected Agee's First Amendment claim, holding that, "It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation. [citations omitted] Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized. Measures to protect the secrecy of our Government's foreign intelligence operations plainly serve those interests. *Id.* at 308. The Fourth Circuit has likewise recognized the government's right to secrecy in the face of a First Amendment claim. *Marchetti v. United States,* 466 F.2d 1309 ,($_4$th Cir.), cert. denied, 409 U.S. 1063 (1972). In *Marchetti,* the court reviewed a United States action to enjoin a former CIA employee from publishing a proposed book in violation of the employee's secrecy agreement and secrecy oath. Marchetti argued that the First Amendment foreclosed any prior restraint upon his publication. In rejecting Marchetti's First Amendment claim and relying on his secrecy agreement, the court held, "Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest." *Id.* at 1315.

In conclusion, Defendants' Motion to Dismiss the Indictment based upon purported constitutional deficiencies in the statute or violations of First Amendment Rights should be rejected.

4. DEFENDANTS' MOTION FOR A JURY SELECTION PROCESS

The defendants have requested that this Court adopt a '~jury selection process" in this case which would involve a questionnaire, voire dire procedures and additional peremptory challenges for the defendants. Defendants' request for a jury selection process unnecessarily and substantially deviates without authority from the standard practice of this Court.

A. The Court Has Wide Discretion In Conducting Voir Dire

In rejecting a claim that a defendant's Sixth Amendment right to an impartial jury was denied him when a trial court refused to conduct individual you dire on the issue of the effects of pretrial publicity, Chief Justice Rehnquist wrote, "our own cases have stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias." *Mu 'Min v. Virginia*, 500 U.S. 415,427 (1991). *See also, Ristaino v. Ross*, 424 U.S. 589, 594 (1976); *United States v. Bailey*, 112 F. 3d 758, 770 (4th Cir. 1997); *United States v. Bakker*, 925 F. 2d 728, 733 (4th Cir. 1991).

In *Bakker,* nationally known televangelist Jim Bakker argued that the district court erred by denying a request to submit a written questionnaire prepared by his defense team, refusing to allow counsel to question potential jurors and failing to conduct individual voir dire. The Fourth Circuit, citing Federal Rule of Criminal Procedure 24(a), noted that it was "well settled that a trial judge may conduct *voir dire* without allowing counsel to pose questions directly to,, the potential jurors." *Id.,* at 734. "In addition, it is well established that a trial judge may question prospective jurors collectively rather than individually." Id.(citing *United States v. Vest,* 842 F. 2d 1319, 1331-32 (1st Cir. 1988) and *United States v. Reeves,* 730 F.2d 1189, 1194.95 (8th Cir.

1984)). Furthermore, the court agreed with the government's assessment in that "the questionnaire was concerned less with ensuring an impartial jury and more with ensuring a jury inclined to acquit." *Id.*, at 733-34.

B. Defendants' Proposed Questionnaire Should Be Rejected

The defendants have proposed that a questionnaire be used in this case and that it be provided in advance of trial to a venire especially selected for this case. (Defendants Memorandum, p. 3). In pertinent part, the questionnaire asks potential jurors their race, ethnicity, religion, frequency of attendance at religious services, and political party identification.(Proposed Questionnaire, p.3, p.9). Thus, the jury selection process defendants urge erroneously and dangerously impresses upon prospective jurors that their ability to serve as impartial jurors is dependant upon one or more of those factors. Defendants failed to heed the warning given in a case cited in support of their motion and reemphasized by the Fourth Circuit. The Fourth Circuit wrote in *United States v. Barber,* 80 F. 3d 964,967 (4th Cir. 1996):

> Because '[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic *groups,' Rosales-Lopez,* 451 U.S. at 190, 101 S.Ct. at 1635, the courts must begin every trial with the idea of not focusing jurors' attention on the participants memberships in those particular groups. Particularly because we are a heterogeneous society, courts should not indulge in 'the divisive assumption... that justice in ,a court of law may turn upon the pigmentation of skin, the accident of birth , or the choice of religion.' *Ristaino v. Ross,* 424 U.S. 589, 596 n.8, 96 S.Ct. 1017, 1021, n. 8,47 L.Ed.2d 258 (1976) (defendants cite *Ristaino* at page 4 of their Memorandum).

No questionnaire is necessary and the defendants' proposed questionnaire is contrary to the principal purpose of voir dire to "probe each 'prospective juror's state of mind to enable the trial judge to determine actual bias and to allow counsel to assess suspected bias or prejudice." *United States v. Lancaster*, 96 F. 3d 734, 738 (4th Cir. 1996) *(quoting Scott v. Lawrence,* 36 F. 3d 871, 874 (9th Cir. 1994)).

C. Defendants' Request For Additional Peremptory Challenges Should 'Be Rejected

Without asserting any particular reason, other than the fact that this is a *"multiple"* defendant case, the defendants ask for 6 additional peremptory challenges to be split between them while suggesting the government receive only 2 additional peremptory challenges. (Defendants' Memorandum, p.5-6)(emphasis added). *See Fed R. Grim. P. 24(b).* Noting that the defense proposal would lead to a more favorable ratio of defense 'to government challenges than allowed by the rule and that there are only two defendants in this case, the government submits that there is no need for additional peremptory challenges for either side. Moreover, because of the anticipated brevity of this trial, the government respectfully suggests 'that the Court need only sit two alternates.

The government respectfully submits that the defendants' "jury selection process" proposal be rejected.

5. OPPOSITION TO DEFENDANTS' MOTION TO STRIKE OVERT ACTS AND SURPLUSAGE

The defendants' motion seeks to strike portions of the superseding indictment that are essential and relevant to the charged offenses, and are not inflammatory or prejudicial. Moreover, if any prejudice becomes apparent during the course of trial, this Court has the authority to strike surplusage from the indictment at that time. Therefore, the defendant's motion should be denied.

A. Legal Standard

"A motion to strike surplusage should be granted only if it is clear that the surplusage is (1) not relevant to the charges; (2) inflammatory; and (3) prejudicial." *United States v. Pleasant,* 125 F.Supp.2d 173, 184 n.9 (E.D.Va. 2000); *see also United States v. Cooper,* 384 F.Supp.2d 958,959 (W.D.Va. 2005). Language in an indictment that is merely unnecessary need not be

stricken. Only those portions of an indictment that are prejudicial to a defendant should be removed. *See United States v. Hartsell,* 1'27 F.3d 343,353 (4th Cir.1997) (declining to strike surplusage because "even if the paragraphs were unnecessary . . . we find no indication whatsoever that they were prejudicial"); *United States v. Allegheny Bottling Go.*, 1988 WL 32936, 3 (E.D.Va. 1988) (unpublished) (stating that "it is clearly established that the mere presence of surplusage in an indictment, absent prejudice, need not be stricken"). This is because "the purpose of striking surplusage under Rule 7(d) is simply to protect a defendant from unfairly prejudicial allegations in the event the indictment is read or submitted to the jury." *United States v. Church,* 2001 WL 1661706, 1 (W.D.Va. 2001) (unpublished) (citing *United States v. Poore,* 594 F.2d 39,41(4th Cir.1979)).

The defendants seek to strike five portions of the superseding indictment, namely: (1) overt acts related to false statements made by the defendants to agents of the Federal Bureau of Investigation (Count I, Overt Acts 49-52, and 54-57); (2) overt acts taken after Larry Franklin began cooperating with the government (Count I, Overt Acts 41-57); (3) the fact that Rosen previously held a security clearance and signed a United States government secrecy agreement acknowledging that he read and understood the provisions of the espionage laws, including 18 U.S.C. § 793 (General Allegations, ¶5-6); (4) the word "sensitive" as used in Count I, paragraph A; and lastly, (5) the word "about" as used in Count I, Overt Act 5. All of these portions of the indictment are either relevant to the charges at 'issue, or are simply not inflammatory or prejudicial.

B. Defendants' False Statements to the FBI are Relevant

In early August, 2004, FBI agents interviewed the defendants. The defendants falsely told the FBI agents that Franklin had never provided or discussed classified information with them, despite the fact that Franklin 'had done so just a few weeks 'prior. The defendants spend a great

deal of their memorandum arguing that their false statements to the FBI are not relevant to the charges in the superseding indictment. The defendants contend that in order to he relevant, the government would need to charge the defendants with some additional crime related to their false statements. This argument ignores the elementary proposition that evidence of a defendant's false statement shows "a manifestation of his consciousness of guilt," and is therefore relevant to the charged offense and is not prejudicial. *United States v. Simpson,* 910 F.2d 154, 158(4th Cit 1990) (evidence of defendant's lie about his true identity was relevant to consciousness of guilt and not prejudicial). This is equally true when a defendant is charged with conspiracy. *See United States v. D 'Anjou,* 16 F.3d 604,609(4th Cir. 1994) (in case involving defendant charged with drug conspiracy, court agreed with government's position that "lying is probative of consciousness of guilt" and that evidence of defendant's lie was not prejudicial). For this reason alone, Overt Acts 49-52, and 54-57 should not be stricken.

Additionally, the defendants' false statements to the FBI were part of the main objectives of the conspiracy as alleged in Count I of the superseding indictment, and are therefore relevant and need not be stricken. Count I charges on ongoing conspiracy between Rosen and Weissman that began in 1999. The object of the conspiracy was to illegally obtain classified national defense information and then disclose that information to individuals not authorized to receive it, including officials of a foreign government. Franklin later joined this conspiracy. Although Franklin ultimately began cooperating with the government, the conspiracy between Rosen and Weissman was ongoing, as alleged in detail in the superseding indictment. As part of Rosen's and Weissman's ongoing conspiracy, the defendants sought to conceal the fact that Franklin was one of their sources of classified national defense information so as to protect and maintain their access to Franklin and the classified information that he could provide. It was also part of

Rosen's and Weissman's conspiracy to conceal the fact that they had access to classified national defense information. The Fourth Circuit has recognized that evidence of a defendant's concealment is relevant to an ongoing conspiracy. *See United States v. Vogt*, 910 F.2d 1184,1202(4th Cit 1990) (holding that "evidence of overt acts by Vogt specifically designed to conceal his source of unreported income" relevant to ongoing income tax evasion conspiracy).

The defendants' reliance on *Grunewald v. United States*, 353 U.S. 391 (1957), is misplaced. The Court in *Grunewald* stated that there was "a vital distinction . . . between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime," *Id.* at 405 (emphasis in original). *Grunewald*, and the other cases cited by defendants, addressed the later situation, 'while Rosen's and Weissman's concealment involves the former. In other words, Rosen's and Weissman's acts of concealment took place during a time when their conspiracy to obtain and divulge classified national defense information was ongoing. In contrast, the cases cited by the defendants involve situations where the defendant's efforts to conceal were made well after the original conspiracy had come to an end. *See e.g., United States v. Runnells*, 36 F.Supp~2d 696,700 (E.D.Va. 1998) (stating that "[i)n this case, the main objective of the conspiracy was the operation of a fraudulent mortgage corporation. Efforts to cover up the crime and flee prosecution took place after the collapse of [the fraudulent mortgage corporation] and continued after the indictment was returned"). In light of the ongoing nature of the conspiracy charged in Count I, Rosen's and Weissman's falsehoods to the FBI and other efforts at concealment, as detailed in Overt Acts *49-52*, and *54-57* of the superseding indictment, are relevant to the charged conduct and should not be stricken. *See United States v. Oyefusi*, 28 Fed.Appx. 227,228-29(4th air. 2002) (unpublished) (conversation in

which one coconspirator informed another coconspirator that their activities had been discovered was relevant because conversation "took place while the conspiracy was ongoing and for the purpose of concealment in furtherance of the main criminal objectives of the conspiracy, rather than merely covering up the activities after the conclusion of the conspiracy's goal").

C. Overt Acts After Franklin Began Cooperating with the Government are Relevant

The defendants seek to strike all the overt acts alleged in Count I of the superseding indictment, Overt Acts 4 *1-57,* that took place after Franklin began cooperating with the government. Overt Acts 41-57 are relevant to the charged conduct and should not be stricken. As explained above, Count I charges an ongoing conspiracy that began between Rosen and Weissman, and was subsequently joined by Franklin. Although Franklin ultimately began cooperating with the government, the conspiracy between Rosen and Weissman continued. Therefore, evidence of Rosen's and Weissman's illegal activity is relevant to the conspiracy between those two men, regardless of the fact that Franklin began cooperating with the government. Overt Acts 41-57 should not be stricken.

D. Rosen's Prior Security Clearance And Secrecy Agreement are Relevant

Count I charges 'that the defendants "did unlawfully, knowingly and willfully" conspire to obtain and disclose classified national defense information. This same intent element is present in Count III, which charges Rosen with aiding and abetting Franklin's illegal disclosure of national defense information. To prove that a defendant acted with "specific" or "willful" intent, the government must prove that the defendant "acted 'with knowledge that his conduct was unlawful." *United States v. Bursey,* 416 F.3d 301,309(4th Cir. 2005) (quoting *Bryan v. United States,* 524 U.S. 184, 193 (1998)). The government need not establish that the defendant knew of the existence of the federal statute or regulations that criminalize his conduct. *Bursey,* 416 F.3d at 309. However, such evidence, if available, is obviously relevant to establishing that

the defendants knew their conduct was unlawful. *See United States v. Sun*, 278 F.3d 302,313(4th Cir. 2002) (finding "record is more than sufficient" to support defendant's conviction for "willful' violation of arms export laws in part because of defendant's knowledge of federal export licensing regulations). The fact that Rosen once held a security clearance, was familiar with the legal responsibilities associated with handling classified information, and signed an agreement acknowledging that he read and understood 18 U.S.C. § 793, the same law that is charged in Counts I and III of the superseding indictment, helps establish that Rosen knew that his conduct was unlawful. Paragraphs 5-6 in the General Allegations of the superseding indictment should not be stricken.

E. The Words "Sensitive" and "About" are not Inflammatory or Prejudicial

The word "sensitive" as used in Count I, Paragraph A, of the superseding indictment is not inflammatory or prejudicial. The word appears in a sentence stating that it was part of the defendants' conspiracy to "gather sensitive U.S. government information, including information relating to the national defense. . . ." The superseding indictment uses the word "sensitive" in this manner only once, and it is apparent that the sentence in which it is used focuses on "national defense information." Moreover, the evidence at trial will only relate to the defendants' efforts to obtain and disclose classified "national defense information." Thus, there is no chance that the jury will become confused or convict the defendants for obtaining and disclosing unclassified information. Moreover, the fact that the superseding indictment contains reference to "sensitive compartmented information" or "SCI" is irrelevant. Those words are used exclusively in the first and second paragraphs of the General Allegations to describe Franklin's security clearance and nondisclosure agreements. The fact that Franklin is ,not standing trial with the defendants significantly reduces the risk that the jury will somehow equate Franklin's security clearance with unclassified information obtained and disclosed by the defendants.

The word "about" as used in Count I, Overt Act 5, is also not inflammatory or prejudicial. When examining indictments, "Courts utilize a common sense construction." *United States v. Bowker,* 372 F.3d 365,376(6th Cir. 2004). The word "about" has an ordinary meaning that is permissibly used in indictments with regularity. Moreover, the word is not inflammatory or prejudicial when viewed 'in the context of the paragraph as whole. Over Act S details a meeting between the defendants and a United States government official who had access to certain classified information. Following this meeting, Rosen and Weissman spoke to a member of the media about the same classified information to which the United States government official had access. This conduct is consistent with, and relevant to, the object of the conspiracy that is charged in Count 1, and is not inflammatory or prejudicial. *See United States v. Dedeyan,* 584 F.2d 36,40(4th Cir. 1978) (affirming district court's denial of defendant's motion to strike words "classified Secret" from indictment because words were "relevant to the charge").

Lastly, striking the words "sensitive" or "about" at such an early stage of the proceedings is unnecessary. This Court has the authority to redact portions of the indictment before submitting the indictment to the jury. *See United States v. Coward,* 669 F.2d 180, 184 n,4 (4th Cir.1982). This Court will be in a far better position to determine whether' these words are inflammatory or prejudicial after it has seen and heard all of the evidence in this case. *See Beamon v. United States,* 189 F.Supp.2d 350, 360 (E.D.Va. 2002) (stating that "the inclusion of such surplusage is harmless when the evidence against the defendant is overwhelming"). Accordingly, the word "sensitive" and "about" should not be stricken at this time.

In conclusion, the defendants' motion should be denied because the portions of the superseding indictment that the defendants seek to strike are either relevant to the charges or not inflammatory or prejudicial.

6. OPPOSITION TO DEFENDANTS' MOTION FOR DEPOSITIONS PURSUANT TO RULE 15 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The defendants have requested depositions of Israeli government officials pursuant to Rule 15 of the Federal Rules of Criminal Procedure. The defendants have not established that the proffered testimony would be material and, for that reason alone, the defendants' motion must be denied. Assuming *arguendo* that the witnesses would provide the proffered testimony, such testimony would not be exculpatory and would be 'merely corroborative and cumulative of other evidence.[6] Defendants' Motion should be denied.

Background

The defendants seek to depose the three Israeli government officials identified in the superseding indictment as FO-l, FO-2 and FO-3 (foreign witnesses). According to an attorney representing that government, the foreign witnesses would not submit to interviews with defense counsel and would not be available to testify at trial.[7] The defendants make no representation that the foreign witnesses would submit to a Rule 15 deposition, or the procedural safeguards that would be attendant to such deposition.

The defendants contend that the witnesses will provide the following allegedly material testimony: that the defendants were not agents of the foreign government and were not

---

[6] Defendants' contend that they need only make a "plausible showing" of materiality and cite for support *United States v. Moussaoui,* 382 F.3d 453, 472 (*4*th Cir. 2004). Def. Mot. at *3.* The court in Moussaoui held that because Moussaoui did not have—and would not ever have—access to any of the witnesses at issue for national security reasons, he was permitted to make a "plausible showing" of materiality. Id. at 472. The court further noted that in determining whether Moussaoui had made a plausible showing the court would have to "bear in mind" that he had access to redacted summaries. Id. Of course in this case defendants had virtually unfettered access to the foreign witnesses during the course of their conspiracy. Additionally, at 'least one foreign witness meet with Rosen 'immediately after Rosen was approached by the FBI on August 27, 2005. Consequently, defendants' should be required to demonstrate actual materiality rather than simply "plausible materiality." However, under any standard, defendants' motion fails.

[7] Defendants' Motion states that they have attached a copy of a letter from this attorney to their motion. The government did not receive a copy of this letter in service.

compensated by the foreign government; they will explain the relationship between AIPAC and Israel and the fact that they regularly met with the defendants; that any actions that happened to inure to the benefit of Israel were always seen by Israel to benefit the United States; one witness will testify about the "unique nature" of a conversation on July 21, 2004; and the witnesses will explain that the United States and Israel have ongoing meetings about policy. Def. Mot. at 4-5. No affidavit or any other authority is offered to support defendants version of the proffered testimony. This testimony is allegedly material to show that the defendants were not agents of Israel and that there was "nothing untoward" about the defendants meeting with the Israeli officials and discussing policy issues that official representative of the United States were discussing with Israel.

None of the proffered testimony is material. Defendants admit that they have not been charged with acting as agents of Israel, consequently any proffered testimony on that point is wholly irrelevant. See Def. Mot. at 2. The defendants also have not been charged with having "untoward" meetings with Israeli officials. They have been charged with a conspiracy to obtain and communicate United States national defense information to persons not entitled 'to receive it. That conspiracy involves discrete overt acts in furtherance of that conspiracy wherein they met with, among others, Israeli officials and communicated national defense information. The government will offer specific evidence of those communications and the defendants willful communication of national defense information. The fact that the defendants may have had meetings that were not "untoward" is irrelevant to the willfulness of that communication. The proferred witness testimony of the content of a conversation is cumulative to the evidence already existing as 'to the content of the conversations at issue and defendants themselves can provide the proffered "unique nature" of the communications at issue.

ARGUMENT

A. Standards for Rule 15 Depositions

Depositions are generally disfavored in criminal cases. *United States v. Drougal,* 1 F.3d 1546, 1551 (11th Cir. 1993). Foreign depositions are particularly disfavored and suspect due to the absence of procedural protections afforded parties in the United States. *Id.* (citing cases). Depositions may be authorized, however, where the moving party establishes "exceptional circumstances" and that the depositions are "in the interests of justice." Fed.R.Crim.P 15(a); *Drougal,* 1 F.3d at 1551. Whether to authorize depositions is a matter committed to the sound discretion of the district court. *Drougal,* 1 F.3d at 1552.

This Court analyzed the moving party's burden to obtain depositions in *United States v. Hajbeh,* 284 F.Supp.2d 380 (E.D.Va. 2003)(Ellis, J.). In *Hajbeh,* the defendant was charged with unlawful possession of an alien registration card procured by fraud in violation of 18 U.S.C. §1546(a). *Id.* The fraud consisted of a false statement on the application for the card, wherein the defendant indicated that he was single, never married and had no children. Proof of the defendant's knowledge of the false statement was an element of the charged offense. *Id.* at 382, n. 4. The defendant sought to conduct a Rule 15 deposition of his brother-in-law, Hasan S. Hajibi. The defendant proffered that Hajibi would testify that Hajibi assisted the defendant in filling out the application due to defendant's lack of proficiency in English and that Hajibi filled out the form relying chiefly on another form defendant's mother had filled out earlier, which indicated that the defendant was unmarried and had no children. This proffered testimony, defendant argued, would show 'that the defendant did not know the form contained false information when he signed and submitted it. *Id.*

In rejecting the Rule 15 deposition request, this Court set forth the standard the defendant must meet to satisfy Rule 15. This Court held that "the analysis properly begins with the

question whether the proffered testimony is material." *Id.* (citing *Drougal).* This Court defined "material" in this context as evidence that is "exculpatory" and "not merely corroborative or cumulative of other evidence." *Id.* at 384-85 (citing cases). The Court accepted for purposes of argument that the witness would testify as proffered. The Court then analyzed the testimony for materiality as to whether it negated any element of the offense. The Court held that the evidence was "plainly exculpatory for defendant as it serve[d] 'to negate the requisite knowledge element of the offense." *Id.* at 385. However, the Court held that the evidence was also, "at best, cumulative and merely corroborative of testimony that the defendant himself is able to offer and hence 'not material." Consequently, the evidence was not material and the deposition was not authorized. *Id.* The fact that *this* may "encourage" the defendant to testify did not alter the analysis. *Id. at* 386. Finally, the Court held that "[t]he absence of materiality ends the analysis as it precludes the application of Rule 15(a)." Id.

B. The Proffered Testimony In This Case Is Irrelevant

Without any support, the defendants 'have set forth the testimony the witnesses would allegedly provide.[8] As discussed above, this testimony involves whether the defendants were agents of Israel, worked for Israel, and explanations concerning the various relations between the defendants and the witnesses, AIPAC and the Israeli government, and relations between official representatives of the United States government and Israel. A review of this purported testimony and the elements of the crimes charged establishes that this testimony is not exculpatory, not material, and is not even relevant.

[8] Because this proffered testimony is patently irrelevant, we accept for purposes of this Opposition that such testimony would be given.

To prove a violation of 18 U.S.C. § 793(d) and (e) the government must show that any person, in lawful or unlawful possession of information relating to the national defense, who, with reason to believe that such information could be used to the injury of the United States, or to the advantage of any foreign nation, willfully communicated or attempted to communicate such information to any person not entitled to receive it. 18 U.S.C. § 793(d) & (e).

The witnesses testimony that the defendant's did not work for Israel, receive money or direction from Israel is not relevant to the elements of the crime charged. Whether a defendant was an agent of a foreign government 'is not relevant. The statute applies to any person, whether they are acting as an agent, or acting on their own. The fact that the defendants were not agents of Israel, or any foreign nation, does not negate any element of the offense, and cannot be exculpatory. Moreover, the defendants themselves can provide this same testimony, therefore the foreign witness testimony is merely corroborative and cumulative.

Likewise, testimony relating to the relationship between AIPAC and Israel or official United States government relations with Israel and that the defendants met with Israeli officials as part of their jobs is irrelevant. Defendants do not proffer that the foreign witnesses will testify that specific conversations were not "untoward" (as they cannot possibly do so) but simply that the fact that they met was not "untoward." The fact that the defendants may have had legal discourse with Israeli officials is wholly irrelevant to the proof that on several discrete occasions the defendants illegally provided United States national defense information to those Israeli officials. As this Court has previously held in this case, "the absence of criminal conduct at certain times is neither helpful to the defense of the accused nor materially relevant to the existence of criminal conduct at other times." Order, November 8, 2005, at 2 (citing *United States v. Scarpa,* 897 F.2d 63, 70 (2nd Cir. 1990); *United States v. Gambino,* 818 F.Supp. 541,

552 (E.D.N.Y. 1993). Moreover, the defendants are able to provide evidence of their relationship with Israel or with any other persons, therefore this evidence is merely corroborative or cumulative and not material.[9]

The foreign witnesses' proffered testimony as to the "unique nature" of a particular conversation is likewise irrelevant. The foreign witness can testify to what the defendants told him. Such evidence has already been made available to the defendants and defendants have ,set forth no support to show that this evidence is in any way deficient or inaccurate as to its recitation of what the defendants told him. They have set forth no facts that would establish that the proffered testimony is material relating to this conversation — simply that the foreign witness will testify "about the unique nature of the alleged conversation." Def. Mot. at 5. The proffered witness testimony is not purported to prove that the conversation did not take place, that the defendants were not parties to the conversation or any other material fact. The foreign witness will simply propound on the nebulous "unique nature" of the conversation. The foreign witnesses' opinion of this conversation, which is all this really amounts to, is not exculpatory, not material and totally irrelevant. Moreover, the defendants as participants to the conversation, can provide this same evidence, and it is therefore merely corroborative and cumulative.

Finally, defendants assertion that the foreign witness will testify that "any actions that happened to inure to the benefit of Israel were always seen *by Israel* to benefit the United States" is not only not exculpatory, it is inculpatory. Def. Mot. at 5 (emphasis added). Significantly,

---

[9] Defendants also contend that United States government officials interviewed in the course of this investigation also could testify as to the nature of the relationship between AIPAC, the United States and Israel. Def. Mot. At 6, fn 3. Notably, the United States government officials defendants discuss did not say that the defendants were authorized to transmit national defense information to any person not entitled to receive it nor that the foreign witnesses were at any time authorized to receive the national defense information the defendants communicated. Moreover, defendants' recitation of this purported testimony by United States government officials further shows that the foreign witness testimony is merely corroborative and cumulative and therefore not material.

18 U.S.C. § 793 (d) and (e) make ,no distinctions between allies or enemies, friends or foes. As the Supreme Court held in *Gorin v. United States*, 312 U.S. 19, 29, 30 (1941), analyzing 18 U.S.C. § 794:

> The statute is explicit in phrasing the crime of espionage as an act of obtaining information relating to the national defense 'to be used. . .to the advantage of any foreign nation.' No distinction is made between friend or enemy. Unhappily the status of a foreign government may change. The evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain. If we accept petitioners' contention that 'advantage' means advantage as against the United States, it would be a useless addition, as no advantage could be given our competitor or opponent in that sense without injury to us.

It is not for any foreign nation to opine on whether the threat posed by an unauthorized disclosure of United States national defense information jeopardizes the national security of the United States or is a violation of United States law.

Notably, defendants do not cite, and properly do not rely upon, *United States v. Egorov*, 34 F.R.D. 130 (E.D.N.Y. 1963), in support of their Motion. In *Egorov*, several defendants were charged with conspiring to transmit national defense information to the Soviet Union and acting as an agent of the Soviet Union without prior notification to the Secretary of State (as then required). Ultimately, charges against other co-conspirators were dismissed and those defendants, along with other uncharged co-conspirators left the United States. The remaining defendants sought to depose the foreign co-conspirators. The defendant alleged that he did not know the co-conspirators, they did not know him, and they never agreed or conspired to commit the crimes charged in the indictment. The court found that due to exceptional circumstances in the case such as the charges involved, identity of persons whose depositions are sought and the fact that nobody knew how to find the witnesses, that the defendant should not be required to

comply literally and completely with Rule 15(a). With that finding, the court held that the testimony would be material to the issues in that case and granted the Rule 15 depositions.

In *Egorov*, unlike the case at hand, the Court found that exceptional circumstances excused the defendant from complying literally and completely with Rule 15(a). Defendants have set forth no such circumstances. There is no dispute that 'the defendants met with and knew the foreign witnesses, the foreign witnesses locations are known, the foreign witnesses were not charged or identified as co-conspirators and the foreign 'witnesses can offer no material evidence whatsoever.

C. This Court Need Not Review The Foreign Witnesses' Availability

In this case, as in *Hajbeh*, because the defendants have failed to set forth any material, exculpatory evidence that the foreign witnesses would even potentially provide, this Court need not review whether the defendants have established whether the witnesses are unavailable. 284 F.Supp.2d at 386. Of course, if this Court should grant defendants' Motion, defendants should be compelled to provide further proof that the foreign witnesses were unavailable before such depositions could be used. *Drougal*, 1 F.3d at 1553 ("A more concrete showing of unavailability, of course, may be required at the time of trial before a deposition will be admitted in evidence.")

For the foregoing reasons, because the defendants have failed to establish that any of the proffered testimony is exculpatory, the Defendants' Motion for Depositions Pursuant to Rule 15 of the Federal Rules of Criminal Procedure should be denied.

CONCLUSION

For the foregoing reasons Defendant's Pretrial Motions should be denied.

Respectfully submitted,
Paul J. McNulty
United States Attorney

By: _____
Kevin V. Di Gregory
Assistant United States Attorney

_____
W. Neil Hammerstrom, Jr.
Assistant United States Attorney

_____
Thomas Reilly
Trial Attorney
Department of Justice

Date: January 30, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing "Government's Consolidated Responses to Defendants' Pretrial Motions" was hand delivered at the United States District Courthouse this ___ day of January 2006 to:

Abbe David Lowell, Esq.
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

John N. Nassikas III, Esq.
1050 Connecticut Avenue., N.E.
Washington, D.C. 20036

W. Neil Hammerstrom, Jr.
Assistant United States Attorney