IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
	)	
v.	)	
	)	**CASE NO. 1:10-CR-225 (CKK)**
	)	
STEPHEN JIN-WOO KIM,	)	
	)	
Defendant.	)	

DEFENDANT STEPHEN KIM'S MOTION TO DISMISS
COUNT ONE OF THE INDICTMENT
ON DUE PROCESS AND FIRST AMENDMENT GROUNDS

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Defendant Stephen Kim, through undersigned counsel, respectfully submits the following Motion to Dismiss Count One of the indictment in this case:

INTRODUCTION

Every day, government officials meet with members of the press. During these routine meetings, officials share information with reporters in an effort to explain policy decisions, gauge the public pulse on prevailing policy issues, and help shape the public discourse. This free flow of information is an integral component of the checks and balances upon which our democracy is based. Without access to pertinent information, the populace is ill-equipped to govern itself through its chosen representatives, and our democracy suffers. As James Madison famously wrote, "[a] popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." 9 *Writings of James Madison* 103 (G. Hunt ed. 1910). Madison recognized that an informed public enhances the functioning of a democratic government. Because an informed public is so essential, suppression of public access to information is antithetical to the basic principles upon which this nation was founded.

Despite this country's vital tradition of free speech and democracy, and despite the importance of such exchanges to the development of better foreign policy, this Administration has used the Espionage Act of 1917 not just to prosecute spies and not just to stop the release of classified documents, but also to stop the types of oral exchanges that regularly take place between government officials and the outside world. In response, legislators, professors, and commentators have raised serious concerns about the constitutionality of stretching the law beyond its original intent and in a fashion that offends the protections for free speech, a free media, and the due process rights to fair notice and against vagueness in criminal statutes. This case provides the latest occasion to visit these issues.

The United States does not have an Official Secrets Act like the one enacted in the United Kingdom, which specifically criminalizes disclosure of sensitive government information by members of government. *See* Official Secrets Act, 1989, c. 6 (U.K.). Because there is no law in the United States that specifically prohibits disclosure of classified information to the media, the government has instead indicted the defendant, Stephen Kim, under the Espionage Act, 18 U.S.C. § 793(d).[1] As applied to this case and taking the allegations as true, Section 793(d) violates the Due Process Clause of the Fifth Amendment because it fails to provide sufficient constitutional notice to Mr. Kim that it was unlawful for him to verbally communicate information to the news media if that information was contained in or derived from a classified report. Alternatively, even if the statute does somehow reach this conduct, Section 793(d), as applied to the facts alleged, violates the First Amendment protections afforded to all individuals, including government employees.

FACTUAL ALLEGATIONS

The indictment in this case alleges that in or around June 2009, Stephen Kim lawfully obtained access to an intelligence report, marked Top Secret/Sensitive Compartmented Information, that concerned intelligence sources and/or methods and intelligence about the military capabilities of a particular foreign nation. (Dkt. No. 3, Count One). The indictment further alleges that Mr. Kim had reason to believe that the information contained in the report could be used to the injury of the United States and to the advantage of a foreign nation. *Id.* Despite that knowledge, according to the indictment, Mr. Kim allegedly communicated,

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[1] Mr. Kim has also been indicted on a separate count of false statements in violation of Title 18, United States Code, Section 1001(a)(2). Mr. Kim has moved to dismiss that count under a separate motion.

delivered, and transmitted that information to a reporter for a national news organization, in violation of 18 U.S.C. § 793(d). *Id.*[2]

Notably, the indictment does *not* allege that Mr. Kim stole or somehow gained unauthorized access to the intelligence report at issue in this case. It does *not* allege that Mr. Kim absconded with or secreted the report and then delivered it to a member of the news media. In does *not* allege that Mr. Kim provided tangible information, in the form of a document, report, or some other written material, to a person not entitled to receive it. Finally, it does *not* claim that Mr. Kim was offered, requested, or received anything of value or any form of compensation in exchange for his alleged disclosure. Instead, the indictment merely alleges that Mr. Kim communicated "information" to a member of the news media in violation of Section 793(d). (Dkt. No. 3, Count One).

ARGUMENT

I. Section 793(d), As Applied, Fails To Provide Constitutionally Adequate Notice.

Government leaking is not a new phenomenon. What makes these prosecutions particularly worthy of close scrutiny is the fact that the Executive Branch leaks classified information often to forward several of its goals and then prosecutes others in the same branch for doing the same thing. In fact, this country has a long and storied history of government officials leaking information to the press. In one of the earliest leaks in this country's history,

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[2] Even though there has been extensive media coverage of this case, the government still claims that the name of the foreign country at issue is classified and cannot be disclosed. This oddity—that everyone in the world knows the reporter involved, the media organization involved, and the country involved—underscores the danger with prosecuting people for the disclosure of "classified" information.

Benjamin Franklin publicly confessed to leaking letters authored by loyalist Thomas Hutchinson, which were later published in the *Boston Gazette*. 5 Albert Henry Smyth, *The Writings of Benjamin Franklin* 448 (1905). President George Washington was incensed upon discovering that the confidential terms of Jay's Treaty had been leaked to a newspaper editor. Todd Estes, *The Art of Presidential Leadership: George Washington and the Jay Treaty*, 109 Virginia Magazine of History and Biography (2001). In one of the most storied leaks in history, the *New York Times* published sections of the so-called "Pentagon Papers," a top-secret Department of Defense report on America's political and military involvement in Vietnam. Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. Times, June 13, 1971, at A1. The leak revealed a deliberate pattern of government deception to mislead the country about the government's intentions to expand the war efforts in Vietnam. *Id.* The Abu Ghraib prison abuse scandal is another example of a leak that called into question important policies the government had tried to keep secret. Seymour M. Hersh, *Torture at Abu Ghraib*, The New Yorker, May 10, 2004, at 42. And the disclosure of Valerie Plame as an operative for the CIA was a government leak, at the highest levels, to advance an important policy interest of the Bush Administration. David Corn, *Plamegate Finale: We Were Right; They Were Wrong*, The Nation (Oct. 22, 2007). In this country's history, sensitive information has routinely been leaked to the press by officials at all levels of government, causing *New York Times* reporter, James Reston to remark, "[t]he ship of state is the only known vessel that leaks from the top." David E. Rosenbaum, *First a Leak, Then a Predictable Pattern*, N.Y. Times, October 3, 2003.

The practice of leaking has evolved over time and has become so widespread that it is not uncommon to open a national newspaper and find multiples articles attributing their sensitive content to anonymous government sources. During meetings with the press, government

officials and members of their staffs routinely disclose sensitive information to further a variety of legitimate policy objectives. Members of the press then publish the information for consumption by the populace. As the government has imposed ever-more stringent restrictions on information, while simultaneously broadening its definition of what constitutes classified information, leaking has become essential to provide context for messages delivered to the public through official channels. Although reliance on a "leak system" is counterintuitive for a nation that prides itself on open government and places immense value on democratic traditions, it has become a necessary practice, facilitating the exchange of information between the government and its constituency. Such practices have become so critical that, when Congress passed a bill that would have made disclosure of classified information a felony, President Clinton vetoed the bill, reasoning that "[a]lthough well-intentioned, [the bill] is overbroad and may unnecessarily chill legitimate activities that are at the heart of a democracy." 146 Cong. Rec. H11852 (Nov. 13, 2000) (statement of Pres. Clinton). In asking President Clinton to veto the legislation, executives from the Washington Post, CNN, the Newspaper Association of America, and the New York Times wrote that "[a]ny effort to impose criminal sanctions for disclosing classified information must confront the reality that the 'leak' is an important instrument of communication that is employed on a routine basis by officials at every level of government." Raymond Bonner, *News Organizations Ask White House to Veto Secrecy Measure*, N.Y. Times, Nov. 1, 2000, at A32. As discussed in more detail below, Bob Woodward's *Obama's Wars* is yet another example of senior government officials and administration staff leaking information whenever it is convenient.

In this case, Mr. Kim stands accused of leaking classified information to a member of the press. Unlike the overwhelming majority of prosecutions arising under Section 793(d), however,

the government has not charged that Mr. Kim furnished a classified document to a member of the press. While the indictment is general in nature, it is intended to reach Mr. Kim's conduct even if that involved only verbal communication of information. When applied in this context, Section 793(d) is impermissibly vague and cannot pass constitutional muster. The simple fact that Mr. Kim was a government employee at the time of the alleged leak does not cure Section 793(d)'s constitutional infirmity. Accordingly, as set forth in more detail below, Mr. Kim did not have constitutionally adequate notice of what conduct would violate Section 793(d).

A. Due Process Demands That Criminal Statutes Provide Sufficient Notice.

A fundamental element of due process is that courts should not extend criminal statutes to conduct beyond that which Congress intended. Due process requires that individuals receive adequate notice of their legal obligations so that they have an opportunity to govern their behavior accordingly. "[The] principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)). This principle articulates the standard for what is commonly referred to as the "void for vagueness doctrine," which establishes that a statute is void and unenforceable if it so vague that it fails to provide the average person with adequate notice of what conduct is proscribed. The doctrine addresses four principal concerns.

First, the doctrine requires the legislature to define a criminal prohibition with sufficient particularity such that "men of common intelligence" are not forced to "guess at its meaning." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Because our system of laws is based on a presumption that individuals are free to steer between lawful and unlawful conduct, the Constitution demands that laws give the person of ordinary intelligence a reasonable opportunity

to understand what is prohibited, so that he may adjust his conduct accordingly. *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). "The *sine qua non* of constitutional certainty in the definition of crime is fair warning of the statutory prohibitions to those of ordinary intelligence—notice of the proscribed activities which is reasonable when gauged by common understanding and experience." *Ricks v. United States*, 414 F.2d 1111, 1117 (D.C. Cir. 1968). As is well-established, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999).

Second, the void for vagueness doctrine is intended to curtail arbitrary and discriminatory enforcement of penal statutes. *See Smith v. Goguen*, 415 U.S. 566, 572–573 (1974). Penal statutes must be understood not only by those who would seek to abide by them, but also by those who have been charged with the task of enforcing them. A vague law impermissibly delegates to policemen, prosecutors, judges, and juries the "inherently legislative task" of determining what conduct is sufficiently egregious to warrant punishment as a crime. *See United States v. Kozminski*, 487 U.S. 931, 949 (1988).

Third, the doctrine helps to diminish the need for judges to "judicially construct" a statute. Although interpretation of laws is an essential function of the judicial branch, penal statutes should not be so vague or imprecise that courts are forced to effectively create new law. While courts may supply some clarity "by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266 (citations omitted).

Lastly, the doctrine limits encroachment on constitutional rights, such as those protected by the First Amendment. A vague criminal statute presents special risks when it implicates other

constitutional rights because it has a chilling effect on protected activity. Where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." *Grayned*, 408 U.S. at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), and *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961)). Arbitrary and discriminatory enforcement of a vague penal statute forces citizens to "'steer far wider of the unlawful zone' . . . than [they would] if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (quoting *Baggett*, 377 U.S. at 372). Thus, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Each of the concerns underlying the void for vagueness doctrine is based on the accepted notion that it must have been "reasonably clear at the time that the defendant's conduct was criminal." *Lanier*, 520 U.S. at 267. In the present case, Section 793(d) failed to provide Mr. Kim with adequate notice of the conduct it proscribes and, therefore, runs afoul of the void for vagueness doctrine.[3]

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[3] As just one example, Section 793(d) speaks completely in terms of tangible things—"document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, [or] note[.]" 18 U.S.C. § 793(d). When it includes the word "information," at the end of that string of tangible items, the natural interpretation is that the word information refers to the kinds of tangible items described previously. As the D.C. Circuit has explained, "words are generally known by the company they keep." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 590 (D.C. Cir. 2001). As the Supreme Court has said, this doctrine, known as *noscitur a sociis*, is used "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Indeed, other sections of Section 793 talk in tangible terms as well, such as Section 793(f) which discusses when such information is "removed from its proper place of custody[.]" 18 U.S.C. § 793(f). Obviously, unlike documents and other tangible objects, oral communications cannot be removed, and have no proper place of custody, giving further support to the argument that Section 793 was never intended to reach such oral communications.

B. The Court Should Apply A Heightened Vagueness Standard When A Statute Criminalizes First Amendment Protected Political Speech.

The void for vagueness doctrine reflects a clear recognition of the perils associated with vague and imprecise penal statutes. By demanding statutory specificity, the Constitution prohibits Congress from simply "set[ting] a net large enough to catch all possible offenders" and then leaving it to the courts to decide who should or should not be rightfully held. *Morales*, 527 U.S. at 60.

The degree of vagueness the Constitution tolerates depends in part on the statute in question. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The Supreme Court requires greater specificity from criminal statutes than civil ones, because the consequences of imprecision are qualitatively more severe in the criminal context. *Id.* at 498–499; *Reno v. ACLU*, 521 U.S. 844, 871–872 (1997). Moreover, the "most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Hoffman Estates*, 455 U.S. at 499. If a law infringes upon fundamental rights to free speech under the First Amendment, the Constitution demands that the legislature state the law with a greater degree of specificity. Because the threshold for constitutional specificity is raised when a law implicates free speech rights, the court should conduct a more stringent review when such a law is challenged on vagueness grounds. As a result of this heightened review, courts should invalidate laws on vagueness grounds even if valid applications are conceivable. *See Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (citations omitted).

C. Section 793(d) Is Vague As Applied To The Facts Of This Case.

Due process requires that a penal statute be stated with sufficient definition so as to provide a person of ordinary intelligence fair notice that his contemplated conduct is criminal.

Courts considering a vagueness challenge must require, as due process demands, that the criminal statute "either standing alone or as construed, [make] reasonably clear at the relevant time that the defendant's conduct was criminal." *Lanier*, 520 U.S. at 267. In some circumstances, a court may determine that an otherwise vague statute has been cured through "judicial gloss," which, by clarifying the language of the statute, provides individuals with adequate notice of what conduct is forbidden. *See Skilling v. United States*, 130 S. Ct. 2896 (2010) (avoiding vagueness concerns by construing Section 1346 narrowly based on the statute's legislative history). In *Skilling*, for example, the Supreme Court reviewed the legislative history of the honest services fraud statute, 18 U.S.C. § 1346, and determined that Congress "intended § 1346 to reach *at least* bribes and kickbacks." *Skilling*, 130 S. Ct. at 2931. Acknowledging that "[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine," the Court held that "§ 1346 criminalizes *only* [bribes and kickbacks]." *Id.* Thus, by narrowing 18 U.S.C. § 1346 in accordance with its legislative history, the *Skilling* Court effectively cured the statute's inherent vagueness.

Such was the means by which an adjacent district "saved" application of the Espionage Act in a case in which the government alleged that foreign policy lobbyists leaked information they had received from government sources to others in their organization, the media, and officials in foreign governments. In *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), while denying the defendants motion to dismiss on grounds similar to those being raised here, the district court did so only because it bended and twisted the statutory language to impose on the government a high burden of proof whenever, such as in this case, a prosecution was based on what could have been verbal disclosures rather than the exchange of tangible classified material. *See* n.4, *infra.* This approach provides some protection that the Constitution requires,

but it is not the preferable way of addressing the infirmities that existed in that case and that remain in the present one.

Although judicial construction may be used to impart specificity into an otherwise vague statute, it should not be used to rewrite a criminal statute. Judicial revision of a criminal statute would constitute a "serious invasion of the legislative domain" and "sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'" *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (citations omitted). In effect, such revision would amount to judicial invention under the guise of judicial interpretation. Accordingly, the court should not be permitted to simply replace an unconstitutionally vague criminal standard, which was duly passed and adopted by Congress, with a pared down and more narrow standard that can pass constitutional muster. Instead, the court should "impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno*, 521 U.S. at 884.

In Count One of the indictment, Mr. Kim is charged with disclosing national defense information in violation of 18 U.S.C. § 793(d), which provides in pertinent part,

> Whoever, lawfully having possession of, access to, control over, or being entrusted with . . . 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 . . . the same to any person not entitled to receive it . . . [s]hall be fined under this title or imprisoned not more than ten years or both.

18 U.S.C. § 793(d). Based on its language, Section 793(d) is not confined to "classified information," but also extends to cover "information relating to the national defense." The statute fails, however, to define what constitutes "information relating to the national defense" or specify who is "entitled to receive" such information. These phrases are therefore unconstitutionally vague as applied to Mr. Kim, because they fail to provide him with adequate notice of what is proscribed under the statute.

The "starting point in discerning congressional intent is the existing statutory text." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted). A court may depart from strict construction of a statute's plain language where a literal reading of the statute "would lead to absurd results . . . or would thwart the obvious purpose of the statute." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978). Strict construction of 18 U.S.C. § 793(d) would almost certainly lead to absurd results. The phrase "information relating to the national defense" could encompass virtually any type of information and has almost limitless breadth, as almost all information has some tangential relationship to the national defense. Accordingly, the court must look beyond the confines of the plain language of the statute to discern its meaning.

Although this is a matter of first impression in this circuit, this is not the first time that a government official has challenged the Espionage Act as unconstitutionally vague. In prior challenges, other courts have acknowledged that the espionage statutes are "unwieldy and imprecise instruments for prosecuting government 'leakers' to the press as opposed to government 'moles' in the service of other countries." *See United States v. Morison*, 844 F.2d 1057, 1085 (4th Cir. 1988) (Phillips, C.J., concurring). Because the Espionage Act was not intended to apply to leaking when it was enacted, courts have crafted novel formulations of the plain language of the Act to cure its constitutional infirmity in leak cases. Courts have frequently sought to remedy the specific constitutional insufficiencies of Section 793 through limiting jury instructions that stretch the statute well beyond the limits Congress defined with sufficient clarity. These after-the-fact formulations fail to impart sufficient clarity into Section

793(d) in cases such as this one, where a government employee is accused of unauthorized verbal disclosure of the content of a classified report.

For example, in the most noted of the challenges, *United States v. Morison*, the defendant claimed that Section 793(d) and (e) are unconstitutional because the terms "relating to the national defense" and "not entitled to receive" violate the vagueness doctrine. *Morison*, 844 F.2d at 1066. Morison, a naval analyst in the Naval Intelligence Support Center, was charged with the unauthorized disclosure of satellite photographs (actual documents versus oral conversations in general) depicting a Soviet aircraft carrier under construction in a Black Sea naval shipyard. The photographs were clearly marked "Secret" and also contained a warning notice that, "Intelligence Sources or Methods Involved." *Id.* at 1061. In rejecting Morison's vagueness claims, the court embraced prior decisions which held that the phrase, "relating to the national defense," is well-understood to refer to information relating to "military or naval establishments and the related activities of national preparedness [for war]." *Id.* at 1071; *Gorin v. United States*, 312 U.S. 19, 28 (1941). The court determined that the phrase "not entitled to receive" was not constitutionally vague as applied to the defendant because it could be limited and clarified by the government's classification order. The court made much of the fact that Morison had been "instructed on all the regulations concerning the security of secret national defense materials" and was well-versed in the security classifications:

> [T]he materials involved here are alleged in the indictment and were proved at trial to be marked plainly "Secret" and that classification is said in the Classification Order to be properly "applied to information, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security." That definition of the material may be considered in reviewing for constitutionality the statute under which a defendant with the knowledge of security classification that the defendant had is charged.

Id. at 1074.

The court reached a similar conclusion in *United States v. Squillacote*, 221 F.3d 542, 577 (4th Cir. 2000). In that case, the court evaluated the constitutional challenge of a defendant accused of transmitting classified Department of Defense documents (not oral exchanges) and found that the district court's instructions were "clearly correct, and properly focused the jury's attention on the actions of the government when determining whether the documents were related to the national defense." *Id.* at 577. After finding that "the central issue is the *secrecy* of the information," the court then took the analysis a step further:

> [T]here is a special significance to our government's own official estimates of its strengths and weaknesses, or those of a potential enemy. When those estimates are included in an official document closely held by the government, those estimates carry with them the government's implicit stamp of correctness and accuracy. . . . While general, unofficial information about the same issues may be available in public sources, that information is merely speculative, and is no substitute for the government's official estimates. . . . [A] document containing official government information relating to the national defense will not be considered available to the public (and therefore no longer national defense information) until the *official* information in that document is lawfully available. . . . [M]ere leaks of classified information are insufficient to prevent prosecution for the transmission of a classified document that is the official source of the leaked information.

Id. at 578. Thus, in *Morison* and *Squillacote*, the courts incorporated the classification regulations into Section 793 to clarify the statute's vague terms. A recent district court decision explained the judicial gloss applied to Section 793 by the *Morison* and *Squillacote* courts as follows:

> [T]he rule regulating who is "entitled to receive" is the Executive Order setting forth a uniform classification system for national security information. The current classification system provides for the classification of information into one of three categories—Top Secret, Secret, and Classified—depending on the harm to the United States that would result from the information's disclosure . . . . Thus, while the language of the statute, by itself, may lack precision, the gloss of

> judicial precedent has clarified that the statute incorporates the executive branch's classification regulations, which provide the requisite constitutional clarity.

Rosen, 445 F. Supp. 2d at 622–623.[4]

While the judicial construction in *Morison* and *Squillacote* may make sense in the context of the unauthorized disclosure of an actual document that is clearly marked as classified, they fail to clarify whether Section 793(d) applies when information is communicated verbally, particularly when the information could have derived equally from a classified source or a source in the public domain. Admittedly, the judicial gloss applied in *Morison* and *Squillacote* could remedy the vague language of Section 793 when the case involves the unauthorized disclosure of tangible information such as a "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, [or] model." When classified in accordance with the government's classification provisions, these types of materials are marked with the level of classification, making clear to the recipient what impact unauthorized transmission will have on the United States. As a result, the defendants in *Morison* and *Squillacote* were not required to parse words, phrases, or sentences to understand that the materials in their possession, which were clearly stamped as classified, were in fact considered to be classified. There was no confounding element that created uncertainty in the defendants' minds as to whether the

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[4] Although the *Rosen* decision denied a motion to dismiss making many arguments similar to Mr. Kim's, it did so only after layering multiple limiting constructions upon each other, ultimately requiring the government to prove both (1) "that the defendants knew the information was NDI, *i.e.*, [(a)] that the information was closely held by the United States and that disclosure of this information might potentially harm the United States, and [(b)] that the persons to whom the defendants communicated the information were not entitled under the classification regulations to receive the information;" and (2) "that the defendants communicated the information . . . with 'a bad purpose either to disobey or to disregard the law.'" 445 F. Supp. 2d at 625. Ultimately, the government chose to dismiss its prosecution in that case rather than prove at trial what the court required of it.

documents themselves related to the national defense, as that relationship was implicit in the classification of the document itself.

Where the approach articulated in *Morison* and *Squillacote* fails, however, is in cases where improper disclosure of "national defense" information is alleged to have been or can be applied to cover information communicated orally. In the case at hand, there is no accusation that Mr. Kim committed a theft of any physical document, nor is there any allegation that Mr. Kim furnished an actual document to a person or organization unauthorized to receive it. The government does not charge that Mr. Kim clandestinely abstracted the report itself and then transmitted it to a reporter. Nor does the indictment allege that Mr. Kim orally communicated the "entire" content of the classified report. Instead, the indictment alleges only that Mr. Kim communicated "information" and not the report itself. This distinction is critical because the *Morison* and *Squillacote* formulations were premised on the disclosure of classified *documents* which, as established in *Squillacote*, do not lose their classification status simply because some of their substantive content is exposed to the public.[5] Verbal communication of information contained in a classified document presents an entirely different issue.

A simple example may help to clarify the issue. Two government officials, Official A and Official B, could read the same newspaper article that conveys information regarding a specific military issue. If Official A has also reviewed a classified report that contains the exact same information as the newspaper article on that issue, under the *Squillacote* formulation, the official *might* be precluded from discussing the information with anyone other than those entitled

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[5] Section 1.1(b) of Executive Order 13292 provides, in pertinent part, "[c]lassified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information."

to receive it. Official B, who did not have the benefit of reading the classified report, however, would not be precluded from discussing the information with anyone. But even though these hypothetical officers would share the exact same knowledge, it is not clear whether Section 793(d) would treat them the same. As a result, it is unclear if a reporter would be "entitled to receive" the information from Official A, even though there should be no question that Section 793(d) would not apply to the similarly situated Official B. In this circumstance, the imprecision of Section 793(d) cannot be remedied merely by imputing the classification provisions into the statute.

If the central issue under Section 793(d) is the secrecy of the information in question, which is determined by the government's actions, then the analysis necessarily starts with the government's treatment of the information. Where the government has classified the information, there is a presumption that the information is "closely held." The problem with using the government's actions as a starting point for verbal leaks is that it presumes that the government classification system operates with ideal precision. This presumption is a legal fiction. In an affidavit in connection with the Pentagon Papers litigation, the *New York Times'* Max Frankel wrote:

> We have been taught, particularly in the past generation of spy scares and Cold War, to think of secrets as secrets—varying in their "sensitivity" but uniformly essential to the private conduct of diplomatic and military affairs and somehow detrimental to the national interest if prematurely disclosed. By the standards of official Washington—government and press alike—this is an antiquated, quaint and romantic view. For practically everything that our Government does, plans, thinks, hears and contemplates in the realms of foreign policy is treated as secret—and then unraveled by that same Government, by Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information.

The New York Times Company v. United States 397–398 (James C. Goodale, compiler, 1971) (reprinting the affidavit of Max Frankel). The culture of government is one that promotes

systematic overclassification of information. For example, Steven Garfinkel, the former head of the Information Security Oversight Office, stated that more than 8 million secrets were classified in 1999 alone and over half those were classified by the CIA. David Wise, Editorial, *The Secrecy Police Will be Back Soon,* Los Angeles Times, December 10, 2000, at M2. Yet experts believe that 50% to 90% of our national security "secrets" could in fact be made public with little or no damage to real security. *See* Statement of Thomas Blanton to the U.S. House of Representatives Committee on the Judiciary, Hearing on the Espionage Act and the Legal and Constitutional Implications of Wikileaks (Dec. 16, 2010) at 8 (collecting expert opinions). As but one example of how the government's mentality has led to rampant over-classification, in 2000, the CIA determined that the total intelligence budget from 1947 was properly classified and, therefore, mere disclosure of the budget figure could damage national security. Steven Aftergood, Commentary, *The Big Chill; Anti-Leak Proposal Threatens Good Government*, Washington Times, August 27, 2001, at A19. In a May 27, 2009, release, President Obama acknowledged the need for "[e]ffective measures to address the problem of over-classification, including the possible restoration of the presumption against classification, which would preclude classification of information where there is significant doubt about the need for such classification[.]" Memorandum of May 27, 2009—Classified Information and Controlled Unclassified Information, 74 Fed. Reg. 26277, 26277 (May 27, 2009).

In the context of Section 793, then, the problem of over-classification is that the broader and more expansive the criteria for classification, the more difficult it becomes to discern what cannot be discussed. Justice Stewart wrote:

> For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system

> would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.

N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring). There is no better evidence of this gross over-classification than this very case. Even though the news media has reported extensively on this case, including reporting on the name of the "foreign country" it believes is at issue in Count One of the indictment, the prosecution claims that the name of that "foreign country" is classified. The same is true about the content of the story published—almost all of the information in that report can be found in other publicly available material at the time, but the government maintains that same information is "national defense information," meaning in part that it is being "closely held."

Because the government routinely over classifies information, reference to the classification systems cannot cure the vague language of Section 793(d) when it is applied to verbal transmission of information contained in a classified document. Over-classification creates a situation in which information that is already in the public domain is nevertheless classified by the government. It is far safer for a government official to err on the side of caution and classify a document than it is to designate the document unclassified and run the risk that disclosure will harm the government. From the official's perspective, there is no downside risk to classification. Similarly, there is no downside risk to designating the entire content of a document as classified rather than parsing the document for sensitive content. In addition, over-classification creates a situation in which information remains classified even after it is widely disseminated in the public domain. Under ideal circumstances, the government would promptly declassify information once as soon as it is no longer closely held, whether because of intentional publication, unintentional disclosure and confirmation, or other intervening circumstances. In practice, the process of declassifying information can be far more cumbersome, creating a

significant lag between the point at which information is no longer closely held and the point at which it is officially declassified. Decades can pass when information should have been declassified and has not been and yet the continuing classification of this stale information can still lead to a 793(d) prosecution.

Because the system of classification is an imperfect one, the court cannot simply interpret Section 793(d) to provide adequate constitutional notice any time the matter at hand pertains to a government employee alleged to have leaked classified information. Certainly in some cases—chiefly those involving the transmission of classified documents—the court's formulation will achieve its desired function. In the document context, the formulation works because a document can be "closely held" even where all of its content is not. In cases such this, where the government's charge will encompass more than the release of any document or tangible item, the judicial gloss that has been applied to Section 793 glosses over the realities of the government classification system. Under the system, government employees are required to parse classified documents to determine what information in the documents is classified, even though the document itself may be classified in its entirety.

Similarly, the application of 793(d) to conduct that could involve oral communications is problematic for another reason. Classified documents in general, and the ones implicated in this case, have information at different levels of classification. Some may be higher, some may be lower, and some information in a classified document may not be classified at all. So when the government seeks to prosecute someone for "talking," it makes precision even more important, yet more elusive. Without a tape of whatever was allegedly said, the government can prosecute someone who it appears was providing national defense information (for example because he

had access to a document in which such information was presented), but was careful to never disclose that material.

In these circumstances, Section 793(d), as it has been judicially constructed, fails to speak with sufficient constitutional clarity so as to notify the government employee what communications are forbidden.

D. Section 793 Fails The Arbitrary Enforcement Doctrine.

Because the United States does not have an Official Secrets Act, the government has instead relied on the Espionage Act to prosecute individuals accused of leaking sensitive information, even though the Act was originally intended to criminalize "classic spying." The effort to jury-rig the Espionage Act into a prohibition against government leaking has led to arbitrary enforcement of the Act's provisions. This is especially true in the case of those accused of verbally leaking classified information.

For centuries the government has leaked information, to the media and others, when it is convenient or advantageous to do so. Leaking is widespread and has become an essential tool that is frequently employed by officials at every level of government. As one former Director of Central Intelligence has explained:

> [T]he White House staff tends to leak when doing so may help the President politically. The Pentagon leaks, primarily to sell its programs to Congress and the public. The State Department leaks when it's being forced into a policy move that its people dislike. The CIA leaks when some of its people want to influence policy but know that's a role they're not allowed to play openly. The Congress is most likely to leak when the issue has political manifestations domestically.

S. Turner, *Secrecy and Democracy* 149 (1985). In fact, one survey of senior federal officials revealed that 42 percent of those officials had deliberately leaked what certainly could be described as "sensitive" information to the press. While this statistic suggests that an astonishingly high percentage of government officials leak information, it comports with the

high frequency with which news articles attribute "sensitive" information to an anonymous government source.

Leaking of classified information occurs at all levels of government, as government and military officers routinely authorize leaks for policy and political purposes. *See* Jack Nelson, *U.S. Government Secrecy and the Current Crackdown on Leaks, in Terrorism, War and the Press* 271 (N. Palmer, ed. 2003). In October 2002, for example, the Chairman of the Senate Intelligence Committee accused the Bush Administration of disclosing classified information that corresponded to its political agenda. *Id.* A *New York Times* article published a month later reported that government officials had confirmed a secret report about the monitoring of Iraqis in the United States in an apparent effort to rebut critics in Congress about the failing efforts of the U.S. intelligence community. *Id.* In 2005, the *Washington Post* reported on the location of secret international detention facilities being used by the CIA to house terrorism suspects. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Washington Post, Nov. 2, 2005, at A1. According to the article, even the mere existence of these facilities was highly guarded by the government. *Id.* Despite that fact, the article relied on classified documents and current and former intelligence officials for its information. *Id.* Moreover, the article acknowledged an agreement between the newspaper and "senior U.S. officials" to report on the existence of the secret facilities but not reveal their locations. *Id.* In a dramatic example of opportunistic leaking by the Executive Branch, Bob Woodward's *Obama's Wars* reveals details of the administration's inner workings and describes several highly classified programs and reports. The information

contained in Woodward's book could only have come from senior government officials.[6] The book describes in great detail the planning leading up to President Obama's decisions concerning the wars in Iraq and Afghanistan. Specifically, the very first chapter of the book describes President Obama's first post-election intelligence briefing from Mike McConnell, then the Director of National Intelligence. "Because the briefing contained highly classified information about 'sources and methods,' McConnell explained, only those 'designated to take a top national security cabinet post' could attend." Jack Goldsmith, *Classified Information in Woodward's Obama's Wars*, Lawfare (September 29, 2010). Nonetheless, in the book, Mr. Woodward recounts that highly classified information in detail, including several classified CIA and NSA programs (despite the inclusion of sources and methods information). The book also reveals that the CIA created, controls, and pays for a clandestine 3,000-man paramilitary army of local Afghans, known as Counterterrorism Pursuit Teams. The book describes a new National Security Agency capability that has dramatically increased the speed at which intercepted communications can be turned around into useful information for intelligence analysts and covert operators. The book even contains a previously classified six-page "terms sheet" that the President dictated himself. Most importantly, the book reveals that Woodward, while not a government official, received unprecedented access to classified information from the Obama administration. Thus, here is the latest example of the Executive Branch acting out of both sides of its mouth—it gives a specific journalist a vast amount of national defense information without

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[6] Although it is certainly possible that some of the seemingly sensitive information in Woodward's book was declassified prior to disclosure, it is highly unlikely that none of the information in the book remains classified.

blinking an eye and it indicts Mr. Kim for what, even if the allegations in the indictment are all true, is far less.

Given the prevalence of government leaking to the media, even at the highest levels of government, and the relative paucity of Section 793 prosecutions for such disclosures, it is virtually impossible to determine the circumstances under which Section 793 will be enforced. Even senior government officials within the intelligence community have expressed uncertainty and confusion about what is or is not covered by the terms of the statute. In a memorandum, then General Counsel of the CIA Anthony Lapham wrote:

> [Sections 793 and 794] are vague, and clumsy in their wording. For example, they describe the category of information to which they relate as "information relating to the national defense," which quite conceivably could include everything from the most vital national secrets to the daily stock market reports. . . . It remains unclear, however, whether as a matter of law these provisions could be applied to other very different forms of unauthorized disclosure, such as the publication of books or leaks to the press. It is extremely doubtful that the provisions were intended to have application in such situations[.]

Anthony A. Lapham, Memorandum for PRM/NSC-11 Subcommittee Members ¶ 2 (Mar. 18, 1977). General Counsel Lapham explained the lack of non-espionage prosecutions under Section 793 as "stemming from the absence of any clearly applicable statute." *Id.* ¶ 2 n.2.

Given the CIA General Counsel's difficulty understanding how Section 793 could possibly apply outside of the classic espionage context, it is of no surprise for other government officials who are less well-versed in the law to also have difficulty understanding what activity the statute prohibits. Moreover, given the frequency with which the government leaks information, and the infrequency with which it prosecutes government officials under Section 793 in the non-espionage context, it is clear that the statute lends itself to arbitrary and discriminatory enforcement. The vagueness doctrine is intended to prevent circumstances such as this, where the sweeping language of a statute allows for arbitrary and discriminatory

enforcement. *Grayned*, 408 U.S. at 108 ("if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them").

In its prosecution of Mr. Kim, the government is stretching Section 793 to reach conduct beyond that which Congress intended.[7] The vague language of the statute encourages this prosecutorial overreaching and allows for arbitrary enforcement of Section 793 in only those leak cases the government deems unsavory. This is clear from the government's decision to prosecute Mr. Kim while casting a blind eye to the plethora of leaks that spring forth from the pages of newspapers every day. Because the plain language of Section 793 is unconstitutionally vague and promotes arbitrary and discriminatory enforcement, it failed to provide Mr. Kim adequate notice of the proscribed conduct and violates the Due Process Clause of the Fifth Amendment.

II. Section 793(d) Violates The First Amendment.

Vagueness in the law is particularly troublesome when First Amendment rights are implicated. *See Grayned*, 408 U.S. at 108–109. The right to engage in political speech under the First Amendment is a fundamental protection. As the Supreme Court has recognized, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Political speech functions as a check and balance on our government and is essential to the preservation of

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[7] It is not surprising that the current controversy involving WikiLeaks has spurred numerous calls to change the Espionage Act to make clear all of the issues that are being raised in this motion. That itself merits strict scrutiny by this Court before it allows a prosecution to proceed today for what might not be crime tomorrow.

a free democratic society. In *Connick*, the Supreme Court explained the constitutional underpinnings of the First Amendment's free speech provisions, stating:

> The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, the Court has frequently reaffirmed that speech on public issues occupies "the highest rung of the hierarchy of First Amendment values," and is entitled to special protection.

Connick v. Myers, 461 U.S. 138, 145 (1983) (citations omitted). The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This is particularly true when the debate pertains to our nation's policy-making, particularly in the context of foreign policy. Unlike the legislative process, which incentivizes legislators to be forthcoming about their efforts, foreign policy-making is largely a function of the Executive Branch. The culture of secrecy that pervades the entire Executive Branch clouds the public's view of its foreign policy-making process. As Justice Stewart wrote in his concurrence in the Pentagon Papers case:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.

N.Y. Times. Co., 403 U.S. at 728 (Stewart, J., concurring).

A. When Applied, Or Capable Of Being Applied, To Information Communicated Verbally, Section 793(d) Is A Content-Based Regulation And Subject To Strict Scrutiny.

The indictment in this case does not allege that Mr. Kim disclosed a top secret intelligence report, or any other physical document. Instead, the indictment talks in the word "information" and purposely has been cast to include oral conversation that the government will

attempt to prove occurred. In that fashion, the charges allege that he communicated the "content" of such report to an individual not entitled to receive it. Accordingly, the analysis of whether the government's application of Section 793(d) to Mr. Kim's alleged conduct withstands First Amendment scrutiny must start with the premise that the government is prosecuting Mr. Kim for pure speech. Unlike *Morison* and *Squillacote*, this is not a case about Mr. Kim's conduct *per se* in secreting and transmitting documents. Instead, this case has been brought in a fashion to cover Mr. Kim's alleged statements[8] to a reporter for a national news organization. Because Mr. Kim's guilt or innocence can then hinge on the precise statements he made to the reporter, the inquiry is necessarily focused on whether the government can penalize Mr. Kim for the content of his statements.

If Section 793(d) reaches oral communications—and it is not clear that it does—then it is a content-based regulation, as it is a law that distinguishes favored speech from disfavored speech on the basis of the ideas expressed. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642–643 (1994). Only if a law is justified without reference to the content of the regulated speech can it be said to be content-neutral. *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989). Since a violation of Section 793 hinges on whether the content of a communication is "information relating to the national defense," it cannot be said to be content-neutral. Importantly, a statute can be content-based even if not viewpoint-based, or even if enacted for a content-neutral purpose. *Turner*, 512 U.S. at 642–643. The case law makes clear that if the speech in question is defined by its content, then the regulation at issue is content-based. Where,

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[8] The government has never stated to Mr. Kim or his counsel that they contend that he provided anyone with any document or tangible information of any kind. It is not alleged on the face of the indictment and the evidence at any trial would demonstrate that such was not done.

as here, the allegation is that the defendant communicated the "content" of a classified document to a reporter, the clear purpose of the communication is to furnish the reporter with the substantive content of the speaker's statement. As the Court explained in *Bartnicki* in discussing the disclosure of a tape recording:

> It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of a such delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of "speech" that the First Amendment protects. As the majority below put it, "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from expressive conduct."

Bartnicki v. Vopper, 532 U.S. 514, 527 (2001). Accordingly, there can be no real dispute that this case pertains to speech rather than conduct.

B. Strict Scrutiny Applies To The Prosecution Of This Case.

A content-based restriction can only pass First Amendment muster if it survives strict scrutiny. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). That is, the statute must be narrowly tailored to promote a compelling government interest. *Id.* Government action that suppresses certain speech on the basis of its content undermines the fundamental right protected by the First Amendment. Recognizing that fact, the Supreme Court has instructed courts to apply "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys.*, 512 U.S. at 642. Under this exacting scrutiny, courts must determine whether a statute is narrowly tailored. For a statute to be considered "narrowly tailored," the government must establish that the statute "does not unnecessarily circumscribe protected expression." *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002). The inquiry is not whether the prohibition serves the government's asserted interest in some way, but rather whether it is "narrowly tailored" in this fashion. *Id.* at 777 n.7. If the government's interests can be accomplished through a less restrictive alternative,

the legislature must use that alternative. *Playboy Entm't*, 529 U.S. at 813. The Supreme Court has made clear that it will be "rare" that a regulation will meet this exacting standard, and that the burden of persuasion falls on the government. *Id.* Assuming that Section 793(d) even can be applied to verbal communication of information, it must be narrowly tailored so that it does not unnecessarily infringe upon First Amendment rights.

C. Section 793(d) Cannot Satisfy Strict Scrutiny As Applied.

Strict scrutiny renders Section 793(d) unconstitutional when applied to the alleged facts of this case. No doubt, the government has a compelling interest, in appropriate cases, in protecting and preserving classified information from disclosure.[9] The problem here, however, is that neither Section 793(d) nor the way that the government has charged it in Mr. Kim's case is narrowly tailored to advance the government's interest. Indeed, when it comes to cases under Section 793, the government has treated the statue as a blunderbuss rather than a laser beam. In recent months, the government has taken a broad approach to the prosecution of potential leaks under 18 U.S.C. § 793, choosing to deter leaking through the quantity of cases rather than their quality. *See*, *e.g.*, Greg Miller, "Former CIA Officer Accused of Leaking Information about Iran," *The Washington Post*, A3 (Jan. 7, 2011) (collecting recent cases). The statute unfortunately facilitates such an expansive approach to its application through its use of expansive phrases, such as "information relating to the national defense," "reason to be believe

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[9] The government cannot merely avoid the application of the strict scrutiny standard by claiming that Mr. Kim was a government contractor. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that, even though the government may deny a benefit to a government employee, it may not do so "on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech"); *but see Snepp v. United States*, 444 U.S. 507, 508 (1980) (holding that a former CIA employee could be held to an agreement not to publish "any information or material relating to the [CIA]" without prior approval).

could be used to the injury of the United States" and "to any person not entitled to receive it[.]" 18 U.S.C. § 793(d). Indeed, it is apparently broad enough that, in this very case, the government has deemed classified the name of the very foreign country at issue (despite it repeatedly being reported). This is far from the kind of narrow approach that the Constitution permits when the government seeks to impose a content-based restriction on speech.

Again, this case must be distinguished from the First Amendment challenges raised in the *Morison* "leak" case. In *Morison*, the court rejected the defendant's claim that Section 793 was overbroad in infringing upon his First Amendment rights because his conduct could not be considered "pure speech" and was instead "conduct in the shadow of the First Amendment." Morison sold classified documents to a magazine. The court even remarked that it was "beyond controversy that a recreant intelligence department employee who had abstracted from the government files secret intelligence information . . . is not entitled to invoke the First Amendment as a shield to immunize his act of thievery." *Morison*, 844 F.2d at 1069. While *Morison* confirmed that the First Amendment does not confer on a government official a right to violate the law in order to disseminate information to the public, unlike Morison, Mr. Kim's constitutional challenge involves pure speech rather than the transmission of a document. Moreover, Mr. Kim is not trying to invoke the First Amendment as a shield to immunize acts of thievery. Instead, Mr. Kim is simply invoking his right to engage in the public discourse on matters of interest just like any other citizen.

Thus, the charges in this case have been brought in such a fashion that they are directed to and will cover Mr. Kim's oral statements. The statute and its application to him are not tailored to prevent "content-based" prosecution. As such, these charges do not pass constitutional muster.

CONCLUSION

The constitutional challenges in this case arise from the government's attempt to use the Espionage Act in a way that was never intended by Congress. The broad language of the Espionage Act, which was intended to address different methods of classic spying, becomes unconstitutionally vague and a violation of the First Amendment when it can be applied to a verbal communication of information to a reporter. For the reasons stated above, this Court should dismiss Count One of the indictment.

Respectfully submitted,

Dated: January 31, 2011

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	**CASE NO. 1:10-CR-225 (CKK)**)
STEPHEN JIN-WOO KIM,	)	
Defendant.	)	

[PROPOSED] ORDER

This matter came before the Court on Defendant Stephen Kim's Motion to Dismiss Count One of the indictment. Upon due consideration of the pleadings and the entire record herein, the Court finds that Count One of the indictment violates the Due Process Clause of the Fifth Amendment and the First Amendment to the United States Constitution, as applied to the defendant. It is hereby **ORDERED** that Defendant's Motion to Dismiss Count One of the indictment is **GRANTED.**

SO ORDERED.

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COLLEEN KOLLAR-KOTELLY
United States District Judge

Date: _____, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2011, I caused a true and correct copy of the foregoing to be served via the Court's ECF filing system to all counsel of record in this matter.

/s/ Abbe D. Lowell