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 OMNIBUS REPLY IN SUPPORT OF HIS MOTIONS TO DISMISS THE INDICTMENT

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Defendant Stephen Kim, through counsel, respectfully submits the following Omnibus Reply in Support of his Motions to Dismiss the Indictment. The government's consolidated response spends considerable time mischaracterizing and misconstruing the arguments set forth in Mr. Kim's motions. This reply brief does not address each and every way in which the government has distorted Mr. Kim's position, but instead focuses on the most glaring flaws in the government's arguments and reiterates why Mr. Kim should be granted the relief he has requested.

I. Count One Is Barred By The Treason Clause

The government makes no effort to rebut the fact that the Framers saw that the very type of conduct the government has charged as espionage in this case had been punished as treason at common law, and that Congress deliberately chose a more restrictive definition of treason to prevent that same conduct from being punished in the United States. (*See* Def.'s Mot. Dismiss Count One at 1-20, Dkt. No. 23.) Indeed, the conduct alleged in this case—the passing of classified information to someone not entitled to receive it—is the very sort of "traitorous correspondence" that was punished before the more restrictive definition of treason was adopted in the Treason Clause. (*Id.* at 8.) For such conduct to be punishable, it had to rise to the level of disloyalty that is punishable as treason, as defined in the Treason Clause.

The government does not dispute any of this, but instead makes the peculiar argument that, while it did not charge Mr. Kim with treason, his espionage charge is very serious. The government highlights that he was "entrusted with extremely sensitive national defense information," and repeatedly claims he "betrayed that trust" through conduct "he had reason to believe could be used to the injury of the United States or to the advantage of a foreign nation." (Gov't's Resp. at 5, Dkt. No. 31.) But, if that is the case, the government should charge Mr. Kim

with the very serious offense of treason—as that is the only permissible charge that can be brought under the Constitution.

The government also does not attempt to refute Mr. Kim's Treason Clause argument with any meaningful explanation, but instead offers only conclusory citation to cases it maintains forecloses his argument. But none of the cases the government cites gets it very far, and none are controlling in this Circuit.

The government does cite one Supreme Court case—*Cramer v. United States*, 325 U.S. 1 (1945)—which it claims "rejected [Mr. Kim's] interpretation of the Treason Clause over sixty years ago." (*Id.* at 6.) But *Cramer* says no such thing. *Cramer* involved a charge of actual treason, and the only issue squarely before the Court was whether the actual charge of treason had been proven. The issue here, as to whether purely political offenses could be charged as some other crime, was not before the Court.

Cramer did recognize that offenses committed against the United States could be punished under generally applicable laws without resort to the Treason Clause. For example, the law generally punished trespass and murder, so a person who trespasses onto a military base and kills a U.S. soldier could be charged with trespass and murder, rather than treason. *Cramer*, 325 U.S. at 45. It is true that *Cramer* cited the Espionage Act as an example of such laws, but this *dicta* certainly cannot constitute a ruling as to the constitutionality of the Espionage Act in all its applications—a statute whose constitutionality was not before the Court whatsoever—and where the setting of the case was very different than the one at bar. *Id.* at 45 n.53. Moreover, the sections of the Espionage Act cited in *Cramer* certainly would be constitutional in many instances, for example, where an enemy spy (who could not be charged with treason because he owes no loyalty to the United States) violates the act or a U.S. citizen trespasses into a

government facility, steals government property and then delivers it to an enemy. The fact that *Cramer* suggested that some applications of the Espionage Act would be constitutionally permissible is hardly a holding that all applications of the Espionage Act would be constitutional.

Mr. Kim's charge under the Espionage Act is uniquely political (as the Founders used that word), rather than merely the enforcement of some generally applicable law. There is no allegation that Mr. Kim trespassed anywhere, obtained anything he was not entitled to receive or stole anything from the United States. Rather, Mr. Kim is charged with allegedly telling someone he was not supposed to tell some of the information that Mr. Kim was entitled to possess. Disclosing secrets is not a generally applicable crime, but is a crime in this context only because it is a political offense. If the government does not trust Mr. Kim to keep its secrets, it may withdraw his security clearance or even fire him. But if they want to charge him criminally for this allegedly disloyal speech, the only legitimate basis for doing so is a prosecution for treason.

The government cites three cases from the Second Circuit as having rejected Mr. Kim's argument, but those cases rejected a different argument altogether. (Gov't's Resp. at 7-9, Dkt. No. 31 (citing *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999); *United States v. Drummond*, 354 F.2d 132 (2d Cir. 1965); *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952)).)[1] In each of those cases, the defendant was charged with a crime other than treason, but then sought to have the Treason Clause's trial benefits, such as the two-witness rule, applied in their cases. The Second Circuit compared the elements of the various offenses the defendants were charged

[1] The government cites two other non-Second Circuit cases, but both stand for the same proposition that the court treated the offense charged as different from treason. *United States v. Rodriguez*, 803 F.2d 318, 320 (7th Cir. 1986) (seditious conspiracy "proscribes a different crime" than treason); *United States v. Thompson*, 2006 WL 1518968, at * 9 (E.D. Wisc. May 30, 2006) ("[A]n examination of the nature and elements of honest services fraud reveals it is a crime that is different in form, and lesser than, treason.").

with to the treason statute and held them not to be the same such that the Treason Clause's trial rights applied. *Rahman*, 189 F.3d at 112 (defendants were charged with seditious conspiracy and "seditious conspiracy . . . differs from treason not only in name and associated stigma, but also in its essential elements and punishment"); *Drummond*, 354 F.2d at 152-53 (rejecting claim espionage charge was in fact a charge of treason because the jury instructions demonstrated different elements); *Rosenberg*, 195 F.2d at 611 (explaining treason has at least one element that "is irrelevant to the espionage offense"). In short, the defendants in those cases were arguing that the *similarity* between the crimes they were charged with and treason required they be treated alike. By contrast, Mr. Kim is arguing that it is the *difference* between the crime he was charged with—espionage—and treason that is the problem. Mr. Kim was charged with a purely political offense and, as such, the Constitution proscribes the only charge that can be brought against him—treason.

In addition, none of the cases cited by the government are controlling in the D.C. Circuit and, the government has offered little analysis for why those cases are correct.[2] This Court is writing on a clean slate and need only concern itself with getting the law right. The Court should not concern itself with how to reconcile a correct interpretation of the law with dubious cases from other circuits that addressed Treason Clause issues in different contexts. The record here and the context of the charges should result in the dismissal of this indictment.

[2] Much of those decisions is questionable. *Rosenberg*, for example, relies heavily upon *Ex parte Quirin*, 317 U.S. 1 (1942), which it claims shows "United States citizens" can be prosecuted for something less than treason if their conduct could be charged as treason. *Rosenberg*, 195 F.2d at 610. *Quirin* is a cryptic opinion, and this misperception of its holding is somewhat common, but inaccurate. The government argued that the defendant was not a U.S. citizen because he was denaturalized by enlisting in the Nazi military. *See, e.g.*, *Quirin*, 317 U.S. at 20 (explaining the government argues the defendant "renounced or abandoned his United States citizenship"); Bert Neuborne, *Spheres of Justice: Who Decides?*, 74 G.W. L. Rev. 1090, 1108-09 n.123 (2006) (explaining the defendant "was almost certainly not a citizen"). *Quirin* has since been limited by the Supreme Court, which has signaled that this "controversial" decision may no longer be good law. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593

(continued…)

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

The government spends most of its brief arguing that Section 793(d) is not unconstitutionally vague, especially when applied to oral disclosures. But, despite the length of its brief, the government does not adequately address most of Mr. Kim's arguments.

A. The Language of the Statute Does Not Extend to Oral Communications

In his motion to dismiss Count One of the indictment, Mr. Kim made reference to the ambiguity of the word "information," as used in Section 793(d). Despite devoting several pages of its brief to explaining the "absurdity" of Mr. Kim's "interpretation" of Section 793(d), the government ultimately misses the point. (Gov't's Resp. at 9-13, Dkt. No. 31.) Mr. Kim agrees that the "the word 'information' . . . is a general term, the plain meaning of which is 'knowledge' that can be derived either from tangible or intangible sources." (*Id.* at 11.) But Section 793(d) does *not* give the word its ordinary meaning. It places the word at the end of a string of tangible terms, 18 U.S.C. § 793(d), requiring that the word receive a more limited construction. (*See* Def.'s Mot. Dismiss Count One at 8 n.3, Dkt. No. 24.) In addition, if "information" is given its plain meaning, then the statute's retention clause makes criminally liable anyone who "willfully retains [knowledge relating to the national defense] and fails to deliver it on demand to the officer or employee of the United States entitled to receive it." 18 U.S.C. § 793(d). It makes no sense to criminalize the retention of intangible information, as a person cannot relinquish knowledge he has acquired, voluntarily or otherwise. Thus, the government's construction of Section 793(d)'s imprecise terms produces an illogical result. Mr. Kim simply—and correctly—

(2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) (explaining *Quirin* was "not this Court's finest hour").

noted the internal incongruence of Section 793(d) as *one* example of how the statute's imprecision creates uncertainty as to the conduct it proscribes.

B. The Statute's Scienter Requirement Does Not Save Section 793(d)

In an attempt to mitigate Section 793(d)'s vagueness, the government relies on the provision's scienter requirement. But a scienter requirement cannot cure all defects for all purposes. *Cramp v. Bd. of Pub. Instruction of Orange Cnty.*, 368 U.S. 278 (1961) (finding oath requirement unconstitutionally vague notwithstanding the fact that the oath-taker was required only to affirm that he or she had never "knowingly" counseled or supported Communists); *United States v. Corrow*, 119 F.3d 796, 804 n.11 (10th Cir. 1997) ("We do not say that a scienter requirement alone will rescue an otherwise vague statute, recognizing 'it is possible willfully to bring about certain results and yet be without fair warning that such conduct is proscribed.'") (quoting 1 W. LaFave & A. Scott, Jr. *Substantive Criminal Law* § 2.3, at 131 (1986)); *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) ("It is settled that when the law is vague or highly debatable, a defendant, actually or imputedly, lacks the requisite intent to violate it."). And a scienter requirement does not automatically mitigate a statute's vagueness. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) ("the Court has recognized that a scienter requirement *may* mitigate a law's vagueness") (emphasis added). A rule that permits an unconstitutionally vague statute to survive merely because it has a scienter requirement is a rule that would effectively abolish the vagueness doctrine. It would allow Congress to repair an otherwise vague statute simply by inserting a specific intent requirement. Although there may be

some circumstances in which a scienter requirement can save an otherwise vague statute, this case is not one of them.[3]

A scienter requirement cannot eliminate vagueness if it is satisfied by an intent to do something that is itself ambiguous. *See Nova Records, Inc. v. Sendak*, 706 F.2d 782, 789 (7th Cir. 1983). Section 793(d)'s "willfulness" requirement requires the government to prove that the defendant willfully communicated information relating to the national defense "to any person not entitled to receive it." As Mr. Kim explained in his motion to dismiss Count One of the indictment, the phrase "not entitled to receive it" is unconstitutionally vague. The phrase is indispensable because it sets forth the actual conduct that Section 793(d) proscribes. And yet, as the government concedes, Section 793(d) does not anywhere define what the phrase means. (Gov't's Resp. at 22, Dkt. No. 31.) A scienter requirement cannot make definite that which is undefined. Because Section 793(d)'s scienter requirement modifies otherwise vague terms, it fails to render the statute's indeterminate language any more certain. Thus, the willfulness requirement does not vitiate the vagueness of Section 793(d).

While a scienter requirement can cure an otherwise vague statute, it does not do so here. The fact that the Fourth Circuit found it necessary to impose limiting constructions on Section 793(d) suggests that the statute's scienter and mens rea requirements fail to adequately clarify the provision's vague terms. The government implies that the *Morison* court relied exclusively on

[3] The government cites to *United States v. Ragen*, 314 U.S. 513 (1942) and *United States v. Hsu*, 364 F.3d 192 (4th Cir. 2004) in support of its argument. The *Ragen* case involved the application of a provision of a Federal income tax law criminalizing "willful attempts in any manner to evade or defeat any tax imposed." Unlike this case, *Ragen* did not involve a challenge to the vague terms of the operative statute itself. Instead, the case involved a determination as to whether the defendants could be held criminally liable for tax evasion when they made an "unreasonable" deduction in violation of a different tax provision. Accordingly, the holding in *Ragen* is inapposite. Furthermore, *Hsu* involved a criminal statute regulating economic activity. It is well-established that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation (continued…)

the "willfulness" requirement to reject a vagueness challenge to Section 793(d). (*Id*. at 16.) But the government is wrong. The holding in *Morison* was based on the court's finding that "the [Espionage statutes] can only be constitutionally applied to convict press leakers . . . by limiting jury instructions which sufficiently flesh out the statutes' key element of 'relating to the national defense.'" *United States v. Morison*, 844 F.2d 1057, 1085-86 (4th Cir. 1988) (Phillips J., concurring). Moreover, the court relied on the government classification regulations to limit and clarify the phrase "entitled to receive." *Id.* at 1075. As the decision in *Morison* demonstrates, Section 793(d)'s scienter requirement fails to mitigate the vagueness concerns raised in Mr. Kim's motion to dismiss Count One of the indictment.

C. The Government's Reliance on *Gorin* is Misplaced

In addressing Mr. Kim's vagueness challenge, the government argues that *Gorin v. United States*, 312 U.S. 19 (1941) is dispositive with respect to the phrase "information relating to the national defense." While the government correctly notes that one of the defendants in *Gorin* was charged with improper transmission of information both orally and in writing, it neglects to mention that the Supreme Court's constitutional analysis was based entirely on defendant Salich's unauthorized receipt of *documents* and his delivery of those documents to defendant Gorin. The Court made this clear in its description of the relevant charges:

> The joint indictment in three counts charged in the first count violation of § 1(b) by allegations in the words of the statute of obtaining *documents* "connected with the national defense;" in the second count violation of § 2(a) in delivering and inducing the delivery of these *documents* to the petitioner, Gorin, the agent of a foreign nation, and in the third count of § 4 by conspiracy to deliver *them* to a foreign government and its agent, just named.

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in advance of action.'" *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982). Thus, the holding in *Hsu* is also inapposite.

Gorin, 312 U.S. at 21 (emphasis added). In fact, section 1(b) of the Espionage Act speaks only of tangible items and contains no mention of oral transmissions.[4] Because the pertinent charges in *Gorin* involved defendant Salich's reproduction of a report in writing and his subsequent disclosure of that writing, the Court did not examine the constitutional infirmity of the phrase "related to the national defense" in the context of oral transmissions.

As the government concedes, the provisions at issue in *Gorin* required the prosecution to prove that the defendant acted with "intent or reason to believe that the information to be obtained *is* to be used to the injury of the United States, or to the advantage of any foreign nation." *Id.* at 27-28 (emphasis added). In contrast, the plain language of Section 793(d) requires only that the defendant had "reason to believe [that the information relating to the national defense] *could* be used to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. § 793(d) (emphasis added). In this respect, the statute at issue in *Gorin* imposed a more stringent scienter requirement than the mens rea and scienter requirements of Section 793(d) combined. Contrary to the government's assertion, *Gorin* does not stand for the proposition that any scienter requirement will adequately clarify a statute's indeterminate language. Rather, the Court held far more narrowly that §§ 1(b) and 2(a) of the Espionage Act of 1917 were properly delimited by their specific scienter requirements. It does not follow that the less demanding "willfulness" and "reason to believe" requirements of Section 793(d) save the statute from its vague terms.

[4] Section 1(b) of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217 applies to "whoever . . . copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note or anything connected with the national defense . . . ." *Gorin*, 312 U.S. at 22 n.1.

D. The Fourth Circuit has Acknowledged that the Plain Language of Section 793(d) is Vague and Overbroad

When adopting limiting instructions to clarify the meaning of Section 793(d), the Fourth Circuit acknowledged that the "Espionage Act statutes as now broadly drawn are unwieldy and imprecise instruments for prosecuting government 'leakers' to the press as opposed to government 'moles' in the service of other countries." *Morison*, 844 F.2d at 1085 (Phillips, J., concurring). The imprecision of Section 793(d) is what prompted the Fourth Circuit to define the phrase "relating to the national defense" to include only information that is "closely held" by the United States and the disclosure of which "would be potentially damaging to the United States or . . . might be useful to an enemy of the United States." *See Morison*, 844 F.2d at 1071; *see also United States v. Dedeyan*, 584 F.2d 36, 39-40 (4th Cir. 1978).[5] If the phrase "relating to the national defense" were not vague and overbroad, the Fourth Circuit would have had no need to judicially construct the phrase in *Morison*, *Dedeyan*, and *Squillacote*. *See, e.g., United States v. Squillacote*, 221 F.3d 542, 576 (4th Cir. 2000) (Sections 793 and 794 "provide no guidance on the question of what kind of information may be considered related to or connected with the national defense. The task of defining 'national defense' information thus has been left to the courts."). Absent such a judicial gloss, it is clear that the statue fails to make reasonably clear the conduct that it prohibits. *See United States v. Heine*, 151 F.2d 813, 815 (2d Cir. 1945) ("It seems plain that the section cannot cover information about all those activities which become

[5] This also appears to have been the impetus for the introduction of legislation intended to improve and modernize the vague and outdated espionage statutes, including 18 U.S.C. § 793(d). *See* S. 355, 112th Cong. (2011). The *Espionage Statutes Modernization Act*, reflects an understanding that the current espionage statutes, which derive from the Espionage Act of 1917, serve as an unwieldy instrument for addressing those cases that do not involve classic spying. In this vein, the Act endeavors to more narrowly tailor the espionage statutes to provide greater clarity as to the proscribed conduct. This legislation and the unanimous criticisms described at hearings that have occurred over the past two years serve as clear acknowledgements of the validity of the criticisms leveled against the espionage statutes by federal courts, legal scholars, and commentators.

tributary to 'the national defense' in time of war; for in modern war there are none which do not.").

In the most recent decision on Section 793(d), *United States v. Rosen*, 520 F. Supp. 2d 786 (E.D. Va. 2007), the district court construed the phrase "reason to believe" to require the United States to prove that a defendant charged with unauthorized oral disclosures under Section 793(d) was motivated by an "evil" purpose and "intended that . . . injury to the United States or aid to a foreign nation *result from the disclosures*." 520 F. Supp. 2d at 793 (emphasis added). The *Rosen* court, which was constrained by Fourth Circuit precedent, constructed Section 793(d) to require proof of intent to injure the United States or aid a foreign nation because that was the only way the statute could pass constitutional muster when applied to oral disclosures. The court explained that prosecution for oral disclosure of national defense information would be constitutionally infirm if, among other things, the statutory willfulness requirement did not require the government to prove "that the defendant had a bad faith purpose to harm the United States or to aid a foreign government." *Id.* Thus, under the *Rosen* court's formulation, Section 793(d) requires not just that the defendant had "knowledge that the conduct [at issue] was unlawful," as the government suggests, but also that the defendant had specific intent to engage in conduct with "bad faith" and an evil motive. *Id.*

Even though courts in the Fourth Circuit have limited the breadth of Section 793(d) in order to save the statute, this Court is not bound by those decisions. Working on a clean slate, this Court is free to consider whether the Fourth Circuit's narrowing constructions—or any limiting construction for that matter—are truly sufficient. The government has acknowledged, as it must, that this Court is free to "adopt one or both of the Fourth Circuit's narrowing constructions . . . ." (Gov't's Resp. at 19, Dkt. No. 31.) Alternatively, the Court is free to find

that judicial construction cannot be accomplished without effectively re-drafting the statute and, on that basis, declare the statute unconstitutional. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 884-85 (1997) (A court cannot "rewrite . . . law to conform it to constitutional requirements."). The Court also has the option of adopting an even narrower construction than that applied in the Fourth Circuit. *See Morison*, 844 F.2d at 1086 (Phillips, J., concurring) (noting need for "judicious case-by-case use of appropriate limiting instructions"). At minimum, the Court should adopt the latter approach as the Fourth Circuit's construction of "relating to the national defense" is almost as vague and overbroad as the statute itself. *Morison's* second limiting requirement—that the information is the type which, if disclosed, could be "potentially" damaging to the United States or might be useful to the enemy of the United States—has marginal clarifying effect, as it is difficult to imagine a situation in which information shown to have even a tenuous connection to the national defense could fail to have the mere "potential" to damage the United States or aid an enemy to the United States. In the document context, the *Morison* limiting instruction treads dangerously close to judicial creation of new law. In the context of oral transmissions of information, the instruction crosses that line.

Even if the Fourth Circuit's judicial gloss cured Section 793(d)'s vagueness in cases such as *Morison* and *Dedeyan*, those cases are distinguished by the fact that they involved the disclosure of tangible items, rather than oral transmissions—where the "disclosure" could be no more than the mere discussion of a general matter that happens to touch upon something that is information related to the national defense. While the Fourth Circuit has held that government classification of a tangible item, such as a report or photograph, provides notice that the item relates to the national defense, it does not follow, as the government argues, that the entire content of the tangible item relates to the national defense. Contrary to the government's bald

assertion, the entire contents of a TOP/SECRET/SCI intelligence report do not necessarily fall within the meaning of "information related to the national defense." (*See* Gov't's Resp. at 20, Dkt. No. 31.) Here, the government ignores the critical distinction between disclosure of a classified document and disclosure of some of the information contained therein. It is certainly true that the government's classification regulations establish that a classified document does not lose its classification status when it is the subject of an authorized disclosure. It is not true, however, that all of the information contained in a classified document is necessarily "closely held" and is therefore "information relating to the national defense."[6] The government's response serves as a perfect example of this fact. On page 52 of its response, the government asserts that the FBI 302s memorializing the "facts" of the FBI's interactions with Mr. Kim are classified. Despite the classification status of the FBI 302s, the government's response discusses in detail some of Mr. Kim's alleged communications with FBI agents—communications which are undoubtedly memorialized in the FBI 302s. While the government took care not to publicly disclose the FBI 302s, it had no problem discussing some of the content of those reports in a filing that is freely accessible to the public. (*See id.* at 50-54.)

As the government knows well, classified documents are supposed to be classified-marked by paragraph and sometimes even by line. In every classified document, there is non-classified information. However, if a person disclosed the entire document intending to disclose only the unclassified material, that would not save the person from having violated the statute.

[6] Moreover, when information is disclosed orally, the recipient of the information does not know that it is classified unless the speaker says that it is. As importantly, unlike documents that are clearly marked as "classified," a government employee's oral disclosure of information does not necessarily reflect the government's own official estimates of its strengths and weaknesses; nor does it necessarily carry with it the government's implicit stamp of correctness and accuracy. *See Squillacote*, 221 F.3d at 578.

On the other hand, if the person orally communicated only the unclassified information from a highly classified document, that could never be an offense.

E. Incorporation of the Classification System into Section 793(d) does Not Resolve the Statute's Constitutional Infirmity

Relying on the Fourth Circuit's narrow construction of Section 793(d), the government argues that reading the executive branch's classification system into the statute clarifies its terms. To be sure, Executive Order 13292, 68 Fed. Reg. 15,315 (March 25, 2003), lists the types of information that may be considered for classification and establishes requirements for receipt of classified information. As a threshold matter, Executive Order 13292 establishes that information may be originally classified only if "the information is owned by, produced by or for, or is under the control of the United States Government."[7] *Id.* When the "information" is "documentary material," such as an intelligence report, it is relatively simple to determine whether it is "owned by, produced by or for, or is under the control of the United States Government" by reviewing its classification markings. When the "information" is "knowledge that can be communicated," however, it becomes far more difficult to discern whether it is owned by or under the control of the United States Government. The simple fact that "knowledge" is contained in a classified report and the report is under the control of the United States does not mean that the knowledge is under the control of the United States.[8] As a result, Executive Order 13292 is itself vague. The uncertainty of Executive Order 13292 is exacerbated

[7] Executive Order 13292 defines "information" as "any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government."

[8] The very concept of ownership or control of knowledge is peculiar. Executive Order 13292 defines "control" as "the authority of the agency that originates information, or its successor in function, to regulate access to the information." This definition further confuses the issue because it is difficult to identify the original source of knowledge and, where a source of knowledge can be identified, that source is often not an agency of the United States government. Thus, a government agency might control an intelligence report (i.e., it originated the report and regulates access to it) even though it does not "control" all of the knowledge contained therein.

by the government's systemic over-classification of information. *See* Reducing Over-Classification Act, § 2(3), 124 Stat. 2648 ("Over-classification of information causes considerable confusion regarding what information may be shared with whom, and negatively affects the dissemination of information within the Federal Government and with State, local, and tribal entities, and with the private sector."); *Milner v. Dep't of the Navy*, No. 09-1163, 2011 U.S. LEXIS 2101, at *52 (U.S. Mar. 7, 2011) ("And both Congress and the President believe the Nation currently faces a problem of too much, not too little, classified material.") (Breyer, J., dissenting); Memorandum of May 27, 2009—Classified Information and Controlled Unclassified Information, 74 Fed. Reg. 26277, 26277 (May 27, 2009) (Presidential memorandum acknowledging the need for "[e]ffective measures to address the problem of over-classification"); Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25 ("It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification, and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."); H.R. Rep. No. 92-1419, at 15 (1972) (concluding that "[i]n too many cases, information is withheld, overclassified, or otherwise hidden from the public to avoid administrative mistakes, waste of funds, or political embarrassment").

When the government treats virtually everything it learns in the foreign policy arena as classified, it becomes impossible to determine what knowledge is actually under the government's control. Because the classification system is plagued by widespread over-classification, it does not adequately limit the vague terms of Section 793(d) and cannot cure the statute's constitutional infirmity. This is particularly true when Section 793(d) is applied to oral

transmissions of information, as such transmissions require the speaker to critically examine the source of his knowledge and whether his knowledge derives exclusively from public or nonpublic sources, or a combination of both. Thus, in the context of intangible information, reliance on the classification system does not cure the unconstitutional vagueness of Section 793(d).

III. The Lack of Section 793(d) Prosecutions for Unauthorized Disclosures Suggests that the Statute Allows for Arbitrary and Discriminatory Enforcement

The government points to its prosecutorial track record as evidence that Section 793(d) establishes sufficient guidelines to govern law enforcement. But, in its attempt to defend this statute, the government significantly undermines it. In 39 years, the government can only point to five prosecutions for unauthorized disclosure under Section 793(d). On its face, this is hardly a compelling case that Section 793(d) is specific enough to prevent arbitrary and discriminatory enforcement. Indeed, upon closer inspection, there were only three prosecutions for unauthorized disclosure from 1971 to 2009, and only one of those cases involved oral disclosure. Even more troubling is the fact that the oral disclosure case involved the two AIPAC defendants—a case that was ultimately dismissed when many of the same issues raised in this case were found to be insurmountable by the government.

To be sure, the government has brought two cases under Section 793(d) in 2010. But the government cannot claim that Section 793(d) is routinely and consistently enforced merely because it has decided to start bringing cases under it for the first time in more than 90 years. Given the widespread prevalence of government leaking, it is telling that the government has only brought five leaking cases in the past 40 years. If that fails to qualify as arbitrary and discriminatory enforcement, it is unclear what would. The prosecutorial history supports Mr.

Kim's argument that the vague terms of Section 793(d) have armed law enforcement officials with a convenient tool for arbitrary and discriminatory enforcement in only those leak cases that the government deems particularly unsavory – meaning a content-based decision which violates the freedom of speech.. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid"). Contrary to the notion of due process, the statute allows law enforcement officials to pursue their personal predilections on an ad hoc basis. Because the government essentially is allowed to enforce Section 793(d) at its whim, it is almost impossible to determine the circumstances under which the law will be applied to leakers.

IV. Section 793(d) is Not Narrowly Tailored

Mr. Kim has also argued that Section 793(d) violates the First Amendment. (Def.'s Mot. Dismiss Count One at 26-30, Dkt. No. 24.) Although the government claims that "Count One would withstand any First Amendment scrutiny," (Gov't's Resp. at 38, Dkt. No. 31), it does not adequately explain how Section 793(d) is narrowly tailored. Instead, it claims only that, by applying to "government employees who have a duty not to disclose [classified] information," *id*. at 39-40, Section 793(d) is narrowly tailored. Unfortunately for the government, Section 793(d) contains no such limitation to "government employees." Instead, it applies to "[w]hoever, lawfully having possession of, access to, or control over, or being entrusted with" classified documents. 18 U.S.C. § 793(d). To make matters worse, if not constrained to tangible items or documents, there is no limitation to the potential "information" that falls within the purview of this statute. At a minimum, narrow tailoring requires that when the government regulates certain protected communications that it does so in the most limited fashion possible. Instead, Section 793(d) is a clumsy and overbroad statute. *Morison*, 844 F.2d at 1085 (Phillips, J., concurring). Under these circumstances, the government has not met its burden of showing that the statute is specifically and narrowly framed to advance the government's interest in

preventing unauthorized disclosures of classified information. Because Section 793(d) sweeps too broadly, and the government has not met its burden, this Court should dismiss Count One of the indictment.

V. An Evidentiary Hearing on Mr. Kim's Motions to Dismiss Count Two of the Indictment and to Suppress Statements is Appropriate

The government's brief makes clear that there are disputed issues of material fact concerning Mr. Kim's interactions with government agents on September 24, 2009 and March 29, 2010. The government's recitation of its version of the facts pertaining to Mr. Kim's custodial status or the tone of the questioning or Mr. Kim's ability to leave or not to leave at the time of his interactions with government agents stands in stark contrast to the description of the facts set forth in Mr. Kim's motions. These disputed facts go to the core of whether Mr. Kim's encounters with government agents constituted custodial interrogations and, therefore, have a significant impact on Mr. Kim's separate motions to dismiss Count Two of the indictment and to suppress statements. Under Rule 12 of the Federal Rules of Criminal Procedure, the Court has discretion to hold an evidentiary hearing to resolve the material disputed facts and rule on Mr. Kim's motion to dismiss Count Two of the indictment. Mr. Kim's motion to dismiss establishes that there is a substantial likelihood that, if an evidentiary hearing is allowed, a set of facts can be proved on the basis of which the Court can dismiss the second count of the indictment. Moreover, "[a]n evidentiary hearing on a motion to suppress ordinarily is required if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question." *United States v. Licavoli*, 604 F.2d 613, 621 (9th Cir. 1971). Accordingly, an evidentiary hearing on

Mr. Kim's motions to dismiss Count Two of the indictment and suppress statements is warranted.

VI. Conclusion

For these reasons and the ones already set forth in Mr. Kim's motions to dismiss, this Court should dismiss Count One of the indictment. An evidentiary hearing is appropriate with respect to Count Two of the indictment to resolve the parties' disputed issues of material fact and there is no prejudice to the government or public to conduct such a hearing so that the Court can make its decisions on a full record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 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