IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	FILED IN CAMERA AND UNDER SEAL WITH THE COURT SECURITY OFFICER OR HER DESIGNEE
v.	)	
	)	**CRIMINAL CASE NO. 1:05CR225**
STEVEN J. ROSEN and KEITH WEISSMAN,	)	**The Honorable T.S. Ellis, III**
Defendants.	)	

MOTION FOR LEAVE TO FILE ATTACHED REPLY BRIEF AND FOR ADDITIONAL ORAL ARGUMENT

Defendants Steven J. Rosen and Keith Weissman, through counsel and, in light of the various pleadings filed with the Court on Friday, March 31, 2006, respectfully submit the following Motion for Leave to File the Attached Reply Brief and For Additional Oral Argument:

1. During the initial oral argument on March 24, 2006, the Court pursued various lines of questioning and analysis which, in part, led the Court to seek additional briefing. Supplemental briefs have been filed by the government and the defendants. Defendants suggest that a short amount of additional oral argument on what the Court has called "uncharted waters," *see* Transcript of March 24, 2006, Hearing at 77, would be beneficial to the parties and the Court.

2. Leave to file the attached reply brief is also warranted by the number of arguments raised for the first time in the government's supplemental brief. For example, in their supplement, the government now relies upon the holding of *Gorin v. United States*, 312 U.S. 19 (1940), suggesting that that case supports its position on the vagueness issue. The government

had not invoked *Gorin* as its central case before, and thus the defendants never had cause to address in detail the applicability of a case that, on its face, is clearly inapposite.

3. The defendants will not attempt to respond to all the arguments in the government's supplemental brief, but will highlight some of the flaws in the government's reasoning. Remaining issues can be addressed at the Court's direction at oral argument, which defendants respectfully submit provides the most fluid manner in which to quickly allow the parties to address the issues most important to the Court. On March 24, defense counsel could only respond to the arguments in the government's prior response to the defendants' Motion to Dismiss -- which, as the Court recognized, failed to address in sufficient detail many of the arguments raised by the defendants. Additional oral argument will provide defense counsel with a fair opportunity to respond to the new claims set forth in the government's supplement.

4. These new claims include the government's complete mischaracterization of defense counsel's statements during oral argument. For example, in arguing that the conduct at issue in this case was not lobbying but something else, the government writes:

> [I]n response to the Court's questioning, counsel conceded that neither Rosen nor Weissman ever used the national defense information that they obtained to petition Congress or the Executive branch. Instead, counsel admitted that they divulged it to a foreign power and members of the media.

Govt. Supplemental Brief at 28 n.11. In actual fact, counsel for the defendants said just the opposite:

> This information, they did not petition the Congress, <u>but they petitioned other people in the Executive Branch</u>. . . . The allegations in the indictment are that they shared this information with journalists, and they also shared it with officials of a foreign country. <u>But that is in the process of petitioning the government.</u> This foreign policy organization, like some many others, doesn't just provide the United States government with information that they obtained from their own heads. They search and they provide information from what they hear from journalists, what they hear from foreign officials

> who are allies, want they hear from others who have information on the same subject. And the result is a better foreign policy of the United States.

Transcript of March 24, 2006, Hearing at 28 (emphasis added). Allowing the defendants leave to file the attached reply brief and scheduling additional oral argument will provide defense counsel with a needed opportunity to address such inaccuracies in the government's brief.

5. The defendants also note that the government has filed a purported statement of facts under seal in conjunction with its supplemental briefs. As this matter is at the motion to dismiss stage where the government's case must stand or fall on the face of the indictment itself, the government's purported proof at trial is irrelevant. Even then, the government's presentation is a cut-and-paste list of statements taken out of context. Accordingly, defendants will not address the government's characterization of the expected facts unless directed by the Court to do so.

Respectfully submitted,

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	)	**CRIMINAL CASE NO. 1:05CR225**
STEVEN J. ROSEN and KEITH WEISSMAN,	)	**The Honorable T.S. Ellis, III**
Defendants.	)	

DEFENDANTS' REPLY TO GOVERNMENT'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE SUPERSEDING INDICTMENT

Defendants Steven J. Rosen and Keith Weissman, through counsel, respectfully submit the following Reply to the Government's Supplemental Response to Defendants' Motion to Dismiss the Superseding Indictment. As noted in the motion for leave to file this reply, submitted separately to the Court today, this brief will not attempt to correct all the errors in the government's pleading, but will instead highlight some of the significant ways in which the government's legal position is flawed.

I. Vagueness

The government's Supplemental Response makes no effort to address -- indeed does not even mention -- the critical hypotheticals raised by the Court during oral argument. Moreover, the government's supplement also fails to even address the second and third manifestations of the *Lanier* standard, each of which provides an independent basis for finding that the statute does not provide "fair notice." *United States v. Lanier*, 520 U.S. 259, 265 (1997). Instead, the government devotes much of its attention to the applicable vagueness standard. As noted below, the government's arguments are without merit.

A. This Case Requires Heightened First Amendment Vagueness Scrutiny

The government posits that a less restrictive vagueness standard is applicable in this case because it does not implicate First Amendment rights.[1] For the reasons discussed at length in the defendants' prior submissions and at the Motions Hearing, this claim is wholly meritless. *See, e.g.*, Transcript of March 24, 2006, Hearing at 71 (Court noting that case is about speech). Where a statute's "literal scope" is "capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). The heightened First Amendment vagueness standard is certainly triggered in this case where the statute is not only "capable" of reaching protected speech, it directly regulates speech. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (applying "facial" challenge to loitering statute that has "potential" to suppress First Amendment liberties even if not facially regulating speech).[2]

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[1] The government relies in large measure on *United States v. Hsu*, 364 F.3d 192, 196 (4th Cir. 2004), and *United States v. Sun*, 278 F.3d 302, 309 (4th Cir. 2002), for the proposition that the heightened First Amendment vagueness standard is inapplicable here. Why the government would make these arguments is difficult to understand as *Hsu* and *Sun* deal with statutes that regulate economic activity, which the Supreme Court has held to a lower standard. *See Kolender v. Lawson*, 461 U.S. 352, 358 n. 8 (1983); *Sun*, 278 F.3d at 309. In *Hsu*, moreover, the defendants did not even claim that First Amendment interests were at stake. *See* 364 F.3d at 196. Accordingly, the vagueness analysis applied in those cases is inapplicable here and the government's citation is erroneous.

[2] The government also ignores the Supreme Court's holding in *Kolender* that a higher "standard of certainty" is required when the vagueness challenge is to a criminal statute. *Kolender*, 461 U.S. at 358 n.8. The Court has noted that this means a criminal statute may be invalid on its face even if it has conceivably valid applications. *Id.*

B. The Government Erroneously Relies on *Gorin* and *Pelton*

In their supplement, the government relies primarily on *Gorin v. United States*, 312 U.S. 19 (1940), suggesting that that case supports its position on the vagueness issue. Curiously citing not to the actual precedent -- the Supreme Court's opinion -- but only a portion of the lower court's decision, the government claims that *Gorin* rejected a vagueness challenge to a prosecution based on oral information. The Supreme Court stated in its opinion, however, that the relevant charges in *Gorin* -- and the Court's opinion -- dealt with the certainty of documents. *See* 312 U.S. at 21.[3] Moreover, the provision of the Espionage Act at issue in *Gorin* was not even the present-day § 793(e), but a predecessor version of section 794 that specifically prohibited transmissions to foreign governments -- regardless of whether or not the recipient was "entitled to receive it." *Id.* Further, the statute at issue in *Gorin* required the government to prove that the defendant had reason to believe that the information "**is**" to be used to the injury of the United States or the advantage of a foreign nation. Section 793, by contrast, only requires

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[3] "The joint indictment in three counts charged in the first count violation of section 1(b) by allegations in the words of the statute of obtaining documents 'connected with the national defense'; in the second count violation of section 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 section 4 by conspiracy to deliver them to a foreign government and its agent, just named." *Gorin*, 312 U.S. at 21 (emphasis added). While the lower court's opinion states that defendant Salich, a government employee, provided defendant Gorin with the substance of Naval Intelligence reports "orally or in writing," the Supreme Court's decision did not address the alleged oral transmissions. The lower court opinion itself makes clear that the information at issue was not wholly "innocuous," *see* Government's Supplemental Brief at 11, but in fact included the names of Japanese individuals "suspected of being interested in intelligence work." *See Gorin v. United States*, 111 F.2d 712, 721 (9th Cir. 1940). It was this information -- relating to "possible spy suspects" -- that the Ninth Circuit relied upon in determining that the government had proven that the information "related to the national defense." *Id.*

proof of reason to believe that it "**could**" be used to those ends. The latter implicates a less stringent *mens rea*, mitigating the ability of that element to cure an otherwise vague statute. By the same token, Gorin, the recipient of the information, was a citizen of the Soviet Union alleged in the indictment to be an "agent of a foreign government," *see supra* n.1, who paid defendant Salich (a U.S. intelligence employee) for information. That too is not the situation alleged here. The government cannot seek refuge in the facts (i.e., foreign agent, money paid), context (i.e., involved documents), or law (i.e., espionage statute) of *Gorin,* which is an utterly different and distinguishable case.

The government similarly relies in error on *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987). While the Fourth Circuit's discussion of the facts in that case could be read to suggest that oral information was at issue, there was no discussion of that fact in the opinion. More importantly, the issue of unconstitutional vagueness was not raised or ruled on in *Pelton*, and thus that decision has no precedential or persuasive value. Further considering that the defendant was a former government employee (not a private citizen) who sold (not doing a lobbying job) classified information obtained from his time at the NSA, and considering that (like *Gorin*) he was prosecuted under section 794 (not 793), *Pelton* is also wholly distinguishable from the present case.[4]

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[4] *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952), was also a section 794 case, and thus is inapposite on the question of the vagueness of section 793 as well.

II. First Amendment

The government continues to shift its arguments in an effort either (a) to find some way to posit that what Dr. Rosen and Mr. Weissman stand accused of doing is not "speech," or (b) to dramatically suggest that granting this motion is the thin end of a dangerous wedge that will deprive the government of any tools to combat true espionage. Their efforts fail on both accounts.

During oral argument, the government contended that the oral communications in this case were not speech but "a disclosure, which is conduct . . . and not protected speech." Tr. at 70. The Court quite correctly rejected this contention. *See id.* at 71; *see also* Defendants' Supplemental Brief at 4. Having been found unpersuasive on this point and attempting to create the specter of a slippery slope, the government has now reversed itself and adopted the opposite position -- arguing that there is no difference between oral and written communications and that the defendants' position, if adopted, would entail the application of strict scrutiny to "the disclosure of documents containing national defense information." Government's Supplemental Brief at 22. The government's reversal strongly suggests that their claims are no more than a result in search of a principle.

A. The Statute Warrants Strict Scrutiny Review

For the reasons set forth in the defendants' Supplemental Brief, strict scrutiny applies in this case. *See* Defendant's Supplemental Brief at 3-6. The government attempts to rebut this conclusion by relying on cases such as *Schenck v. United States*, 249 U.S. 47 (1919) and *Frohwerk v. United States*, 249 U.S. 204, 205 (1919). *Schenck* and *Frohwerk*, however, dealt with completely inapposite provisions of the Espionage Act of 1917 that have no relevance to the current § 793. In *Schenck*, the defendant was accused of a conspiracy to cause insubordination in

the military and obstruct recruiting efforts. 249 U.S. at 49. In *Frowwerk*, the defendant was accused with attempting to cause mutiny and refusal of duty. 249 U.S. at 206. Such statutes are not informative on the question of whether a private citizen can be prosecuted for speaking on a matter of public policy, when the success of that prosecution turns completely on the content of the words that are spoken.

The government also relies on *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988). *Morison*, as the Court is aware, dealt with the transmission of documents by a government official who disclosed the information that he unquestionably knew was supposed to be held closely and did so for money. Neither *Morison* nor any of the cases cited by the government address the criminalization of pure speech (as the present indictment attempts to do) by private individuals who have heard what a government official had to say and then re-transmitted that information as part of their normal jobs (let alone in a First Amendment context). The government is correct that Fourth Circuit rejected Morison's First Amendment claim under the *Branzburg* line of cases, holding that section 793 lawfully criminalizes willful disclosures by "a delinquent governmental employee," and that the First Amendment would not shield his acts of "thievery." *Id.* at 1069-70. Steven Rosen and Keith Weissman, however, are not government employees, and the allegations against them do not involve an act of thievery. While willful disclosures to the press by government employees may fall outside the scope of the First Amendment, the constitutional issues raised by applying the same sanction to non-governmental employees retransmitting oral information in the context of policy advocacy are distinct.

The government writes that no court has ever held that the First Amendment protected "anyone" from prosecution for the disclosure of national defense information.

Government's Supplemental Brief at 27. This may be because that in the history of the Espionage Act, the government has never embarked on a prosecution like this one -- of private citizens outside government, not accused of espionage, for receiving and retransmitting oral information in the context of their jobs as foreign policy advocates protected by the First Amendment. What is unprecedented is not the First Amendment theory, but the prosecution.

B. Section 793 is Not "Extremely Limited"

It its effort to argue that section 793 does not run afoul of the First Amendment as applied here, the government makes yet another startling claim that § 793 is "extremely limited" and "less drastic than it could be." Government's Supplemental Brief at 34. The first claim is untenable and the latter is not a response to strict scrutiny analysis.

It is impossible to comprehend how § 793 could be viewed as "extremely limited" under the theory of this prosecution. If the present case survives strict scrutiny, § 793 could be applied to a private citizen outside of government who obtains "information relating to the national defense" from any source -- within government or without. The prosecution could go forward even if the information already appeared in the public domain -- or even if the defendant obtained the information from the public domain so long as it was technically still classified as national defense information somewhere within the government. *See generally United States v. Squillacote*, 221 F.3d 542, 578-79 (4th Cir. 2000).

Indeed the government stated during oral argument that so long as the government at some point "deems" the information to relate to the national defense, it is actionable under § 793. Tr. at 46. Further, under the government's theory § 793 could be applied to an individual who disclosed the alleged information to a member of Congress while trying to persuade the member how to vote on a pending bill -- i.e. what the government itself believes to be core Petition

Clause activity. Under the government's construction, § 793 could apply to any journalist who writes an article citing classified sources -- implicating yet another clause of the First Amendment. The government's use of the law would apply to second, third and fourth re-transmitters of information -- including anyone who reads the journalist's article and passes it on to friends and family. Finally, under the government's aiding and abetting theory (per Count III of the Superseding Indictment) an individual could be prosecuted under § 793 for the mere receipt of national defense information so long as he gives a government official his fax number, despite the fact that no law exists to make unlawful the mere receipt of even classified information.

In this light, it cannot be credibly asserted that § 793 is "extremely limited." To the contrary, it is difficult to imagine what would not be subject to potential prosecution under this statute if it can be constitutionally applied here. As noted in the defendants' Supplemental Brief, the government was unable to articulate a limit at oral argument on the meaning of "related to the national defense," and retreated into the promise that it would do the right thing in the exercise of its prosecutorial discretion. That alone demonstrates that § 793 as applied here cannot withstand strict scrutiny and, alternatively, is overbroad.[5]

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[5] The government should not prevail even under the *O'Brien* test that they contend should apply. *See* Government's Supplemental Brief at 35-36 (*citing United States v. O'Brien*, 391 U.S. 367 (1968)). Prong 3 of that test demands that the government's interest be unrelated to the suppression of free expression. As applied to this case, section 793 directly relates to the suppression of free expression, as it would curtail the nature of information that can be discussed by policy advocates attempting to influence U.S. foreign policy. It is an empty gesture for the government to claim that the defendants would remain free to advocate if the government can control what they say in the process. It would allow the government to control the debate over policy matters through the unchecked classification process. It would

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C. *Bartnicki* is Not Distinguishable

The government's supplemental brief continues to contend that the reasoning of *Bartnicki v. Vopper*, 532 U.S. 514 (2001) is inapplicable to this case. The government attempts to distinguish *Bartnicki* on the ground that the defendants were involved in the alleged initial illegal disclosure, asserting that the defendants conspired to "get" government officials to provide them with national defense information. The government either does not understand, wants to ignore, or wants the Court to ignore that seeking national defense information, and even obtaining national defense information, is simply not a crime under § 793(e). There is no crime unless and until there is a qualifying willful retransmission. Thus, as discussed in the defendants' prior pleadings, they were not involved in the initial illegality and are covered by *Bartnicki*.

The government attempts to find support for its argument in *Boehner v. McDermott*, --- F.3d --, 2006 WL 769026 (D.C. Cir. 2006) (*Boehner II*). *Boehner II*, however, is both distinguishable from this case and legally unpersuasive. As noted in the dissent of Judge Sentelle, the majority in *Boehner II* utterly misapplied *Bartnicki*. *See id.* at *9.[6] Indeed, the

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create a substantial chilling effect, since individuals (lobbyists, journalists, or otherwise) would have to speculate whether their conversations with government officials contained national defense information. The result would be a diminished capacity of the public to influence government on national affairs.

Prong 4 of the government's test requires the restriction on speech to be no greater than is essential to the furtherance of the government's interest. The restriction in this case is greater than essential. What is essential is that the government prevent the disclosure of secret information at the source -- i.e. with the government officials charged with protecting it.

[6] *Boehner II* attempts to distinguish its facts from those in *Bartnicki* on the ground that the defendant in *Boehner II* knew that the information had been illegally obtained while the defendants in *Bartnicki* did not. *See Boehner II*, *supra*, at *6. This distinction, upon which

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Supreme Court granted *certiorari* to resolve the conflict between the first D.C. Circuit decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999) (*Boehner I*) -- which reached the same conclusion as *Boehner II* -- and the lower court decision in *Bartnicki*. *See* 532 U.S. at 522. By affirming the Third Circuit's decision in *Bartnicki*, the Supreme Court necessarily rejected the logic of *Boehner I*, which was reiterated in *Boehner II*. *See Boehner II*, 2006 WL 769026 at 7 (Sentelle, J., dissenting). *Boehner II* should be rejected by this Court.[7]

The more apt precedent is *Bowley v. City of Uniontown Police Department*, 404 F.3d 783 (3d Cir. 2005), in which the Third Circuit applied *Bartnicki* to the retransmission of juvenile law enforcement records leaked by a government official. In the present case, as in *Bowley*, the government is attempting to sanction the retransmission of allegedly confidential information that was released from confidence by a government employee. *Bartnicki* and *Bowley* stand for the proposition that while it may be proper to sanction the government employee for this conduct, the First Amendment does not allow the government to punish subsequent transmissions by non-government employees who were not responsible for the initial disclosure.[8]

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the government apparently relies in its brief, was expressly rejected in *Bartnicki*. *See* 532 U.S. at 517-18.

[7] For the same reason, the Court should reject the government's reliance on the legal reasoning of *Boehner I*. As with its reliance on the Ninth Circuit's decision in *Gorin*, the government continues to seek authority in cases that have been vacated, rejected, or superseded by the Supreme Court.

[8] For the same reason, the government's allusion to the "laundering" of national defense information is nonsensical. *See* Government's Supplemental Brief at 48. Nothing prevents the government from prosecuting a government official who discloses national defense information -- whether he provides it directly to an improper recipient or through an intermediary.

III. Conclusion

A Court can know that something is amiss when a party relies so heavily on waving one bloody flag or another to prevail. Cries that a decision will destroy effective law enforcement, that it will neuter government action, or, as the government does here open a "new era in which unconstrained espionage would flourish," Government's Supplemental Brief at 39, are what parties do to substitute for reason, logic or precedent. The government retains a range of tools to combat espionage and the improper disclosure by government officials of national defense information, as well as the improper conduct of private citizens who actually steal government files or bribe government officials to obtain classified data.[9] Nothing in a ruling in favor of the defendants on vagueness or as applied First Amendment grounds would prevent the government from prosecuting proper cases under § 793. Moreover, the government retains the ability to use § 794 against foreign agents (perhaps even in the case of oral information) in the manner approved by cases such as *Gorin*. This case does not affect § 794 and would not inhibit the government's use of § 793 in the manner intended by Congress and as it had been applied for 50 years prior to this case. The motion to dismiss should be granted.

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[9] *See, e.g.*, 18 U.S.C. §§ 794, 795, 797, 798.

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