RECORD NO. 08-4358

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

SEALED

Appellant,

v.

STEVEN J. ROSEN and KEITH WEISSMAN,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Virginia at Alexandria
The Honorable T.S. Ellis III, District Judge

BRIEF OF APPELLEES

Abbe David Lowell
Erica E. Paulson
Roy L. Austin, Jr.
MCDERMOTT WILL & EMERY LLP
600 Thirteenth St., N.W.
Washington, DC 20005
(202) 756-8000

John N. Nassikas III
Baruch Weiss
Kate B. Briscoe
ARENT FOX LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 857-6000

Attorneys for Appellees Steven J. Rosen and Keith Weissman

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JURISDICTIONAL STATEMENT

This is an interlocutory appeal from a order entered pursuant to Section 6(c) of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, by the District Court (Ellis, J.) on March 19, 2008. In this appeal, the government argues that the District Court erred in allowing the defense to use two ostensibly classified documents at the upcoming criminal trial of the two Defendants, Steven J. Rosen and Keith Weissman. They are charged with violating the Espionage Act of 1917, 18 U.S.C. § 793.

In its jurisdictional statement, the government contends that the District Court's ruling is appealable pursuant to CIPA § 7, which authorizes a government interlocutory appeal from a district court ruling allowing the defense to introduce classified evidence at trial. Because the government has not demonstrated that the relevant portions of the documents are classified, and because it did not properly invoke the classified information privilege, the matter is *not* appealable. Defendants demonstrate the non-appealability of the District Court's ruling in the accompanying Second Motion to Dismiss. In case this Court denies that Motion, Appellees also file this substantive brief on the merits.

STATEMENT OF THE ISSUES

1. Should this Court affirm the District Court's nonconstitutional relevance rulings admitting the two documents on appeal given the meticulous determinations the District Court made in the CIPA process?

2. Was the District Court's ruling that the two documents on appeal were relevant on any one of four nonconstitutional grounds sufficient such that the constitutional issues raised in the case need not be addressed in this interlocutory appeal?

3. If this Court decides to reach the constitutional issues, was the District Court correct in interpreting the "willfulness" requirement of Section 793 of the Espionage Act to save this prosecution from constitutional challenge?

STATEMENT OF THE CASE

This is a criminal case under the Espionage Act of 1917, 18 U.S.C. § 793, charging Defendants Rosen and Weissman with a conspiracy to obtain and disclose classified information.[1] Rosen and Weissman were pro-Israel foreign policy advocates with the American Israel Public Affairs Committee ("AIPAC"), a well respected lobbying organization. In this unprecedented prosecution, Defendants

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1 The indictment alleges nine "episodes" of disclosure by Defendants. Only two episodes, are at issue in this appeal.

are charged with repeating information about Middle East issues learned in discussions with various high-level U.S. government officials.[2]

On January 19, 2006, Defendants filed a motion to dismiss the Superseding Indictment on vagueness and First Amendment grounds. In an August 9, 2006 decision, the District Court determined that the conduct at issue "is at the core of the First Amendment's guarantees," but still denied the motion. *United States v. Rosen*, 445 F. Supp. 2d 602, 630 (E.D. Va. 2006) ("*Rosen I*") (JAU 120-87).

The District Court found the prosecution was constitutional because in addition to the explicit mental state elements in the statute—that Defendants must have acted "willfully" and with "reason to believe that the information . . . [communicated could] be used to the injury of the United States, or to the advantage of any foreign nation" (a requirement that the District Court interpreted as requiring proof of "bad faith")[3]—the court interpreted the "willfulness" element to require that the government also prove:

- that Defendants knew that the information they are accused of receiving and disclosing was national defense information ("NDI"), meaning that they knew it was closely held by the United States government and would be potentially damaging to the national security of the United

[2] Until this prosecution, there has never been a reported case of foreign policy lobbyists—non-government employees—being criminally charged for engaging in First Amendment-protected conversations with U.S. government officials and repeating what those officials told them to others outside of government.

[3] *Rosen I*, 445 F. Supp. 2d at 625, 627.

States if disclosed;[4] and

- that Defendants knew that the persons to whom they communicated the information were not entitled under the classification regulations to receive it, but proceeded nonetheless.[5]

In a subsequent Memorandum Opinion, the District Court clarified that the government in the context of this case must prove that Defendants intended that injury to the United States or aid to a foreign nation result from their disclosures. *United States v. Rosen*, 520 F. Supp. 2d 786, 793 (E.D. Va. 2007) ("*Rosen X*") (JAU 190-213).

Although it prevailed, the government was dissatisfied with the District Court's rationale. It was of the view that the District Court imposed mental state elements that neither the statute nor the Constitution required. JAU 39 at Docket #351. On August 18, 2006, the government filed a "motion for clarification" that the District Court construed as a motion for reconsideration and denied. JAU 189.

The parties have also been engaged in substantial pre-trial proceedings under the procedures outlined in CIPA. ADD- 5-9 (CIPA §§ 6, 7, 8).

despite the fact that the government concedes that neither Defendant ever received or disclosed a document marked classified, and that the

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4 *Id.* at 618-22, 626, 641.

5 *Id.* at 625, 643.

allegations in the case arose from their *oral* transmission of information. Once the government stated its intent to inject the documents into the case, Defendants identified these same documents in their January 30, 2006 filing under the notice procedures of CIPA § 5, as documents that the defense also intended to use.[6] JAU 21 at Docket #186.

The District Court held a total of eleven days of CIPA § 6(a) hearings, culminating in a CIPA § 6(a) Order, issued on January 17, 2007, that addresses the use, relevance, and admissibility of the classified materials. JAU 44 at Docket #403.

Following the CIPA § 6(a) proceedings, on May 24, 2007, the United States filed a motion pursuant to CIPA § 6(c) seeking a large number of redactions of classified information and proposing a smaller number of substitutions.[7] CIPA requires the lower court to grant the government's motion if it finds that the

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6 CIPA § 5 requires that a defendant must notify the court and the United States in writing if it reasonably expects to disclose or to cause the disclosure of classified information at trial. Defendant's responsive designation of that which the government provided in discovery is the "large amount of classified information" referred to in the government's brief. Government's Brief ("Br.") at 3.

7 This was actually the government's second § 6(c) motion. The first motion sought to close significant portions of the trial through techniques such as the so-called "silent witness rule." Defendants objected that the government's proposal amounted to an unconstitutional closure of the trial, and the District Court agreed. *See United States v. Rosen*, 487 F. Supp. 2d 703, 707-08 (E.D. Va. 2007) ("*Rosen VII*").

proposed summary or substitution will provide defendants with "substantially the same ability to make [their] defense as would disclosure of the specific classified information." CIPA § 6(c)(1), ADD- 5-6. Defendants sought to ensure that when the government introduced classified documents, the documents would be introduced in a form that enabled Defendants to present their various defenses.

The CIPA § 6(c) hearings lasted twenty-two days over seven months and covered transcript pages. The District Court considered

On March 27, 2008, the government filed its notice of appeal. In that notice, the government sought to include orders other than the March 19, 2008 CIPA § 6(c) Order. For example, the government included in its notice the August 9, 2006 Opinion denying Defendants' motion to dismiss on constitutional grounds and the November 16, 2006 Order denying the government's motion for clarification. JAU 214. Recognizing that CIPA § 7 grants jurisdiction to hear an appeal only from an order authorizing the disclosure of classified information, this Court on June 20,

2008 issued an Order granting Defendants' motion to dismiss those portions of the government's appeal that were outside the CIPA § 6(c) Order.[8] JAU 217-18.

The government now appeals only two of the documents included in the § 6(c) Order:

("the FBI Report") and

("the Israeli Briefing Document"). While appealing the District Court's ruling on the admissibility of these two documents, the government also seeks to use this CIPA appeal as a backdoor to appeal the constitutional issues. In so doing, the government ignores the fact that this Court dismissed the portion of the government's appeal that sought review of the lower court's constitutional opinions and that there are nonconstitutional bases for admitting the two documents.[9]

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[8] In its June order, the Court also dismissed Defendants' notice of cross-appeal, which they filed in the event that this Court denied their motion to dismiss and allowed the government's appeal to go forward on the constitutional issues.

[9] The government also wants to shoehorn the District Court's 240 other findings into this appeal when it states "this Court's rulings on the erroneous reasoning underlying these two documents will assist the district court in reviewing its previous rulings on this large amount of other classified information . . . ." (Br. at 28.) If the government believes that the lower court's orders with respect to the other documents contained in the 278-page CIPA § 6(c) Order were erroneous, it must address each separately because, just as the government acknowledges with

STATEMENT OF FACTS

In an attempt to make this prosecution appear to be the espionage case it wants versus the First Amendment case that it is, the government presents its version of the "facts." Although not necessary to resolve the narrow issue of the admissibility of the two documents on appeal, the government sketches its version of what allegedly took place in each of the Superseding Indictment's nine alleged episodes of disclosures. Because of this one-sided presentation of facts by the government, Appellees present their own Statement of Facts. As proponents of the disputed documents, Defendants are entitled to have their version of facts taken as true.[10]

Rosen and Weissman have worked in the foreign policy area for forty and twenty years, respectively. By 1999, when the government alleges the conspiracy

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respect to the two documents it does appeal, the lower court stated multiple grounds for each of its decisions. This Court's decision on these two documents will not necessarily govern the other rulings in the CIPA § 6(c) Order.

10 *See, e.g., United States v. Tokash*, 282 F.3d 962, 967 (7th Cir. 2002). The government asserts that this Court "must assume that all facts proffered by the government are true." (Br. at 33 n.11) (quoting *United States v. Terry,* 257 F.3d 366, 367 (4th Cir. 2001)). The government misstates the proposition of law and the case by failing to include the first part of the sentence it quotes: "[b]ecause this case comes to us after a *dismissal* of the indictment by the District Court." *Terry* at 367 (emphasis added). This interlocutory appeal does not arise from the dismissal of the indictment but from Defendants' requests to use evidence. In this context, in fact, a court takes the allegation of the requestor as true. *See Tokash*, 282 F.3d at 967.

in the case began, Rosen had risen to become Director of Foreign Policy Issues at AIPAC, and Weissman was serving as AIPAC's Senior Middle East Analyst. In their roles as foreign policy advocates, Defendants petitioned the government on behalf of their organization and its pro-Israel causes and related issues. As part of their work, Defendants had meetings with innumerable U.S. government and foreign officials to discuss matters of foreign policy.

The evidence at trial will show that with respect to the alleged conduct, Defendants were acting precisely as others in the foreign policy community do every day[11] and as Defendants have done literally hundreds of times in their interactions with U.S. government officials. For example: (a) they were operating as foreign policy advocates for AIPAC; (b) they were discussing issues of importance to the U.S., Israel, U.S.-Israeli relations, and AIPAC; (c) they were following foreign policy issues closely and endeavoring to stay well-informed and learn of issues before it was too late to influence policy; (d) they neither were seeking nor receiving any documents marked classified; (e) they were engaging in

[11] In an attempt to distinguish Defendants from others in the foreign policy community and to demonstrate Defendants' alleged willfulness, the government culls out of context a number of phrases or statements Defendants made over the years. In doing so, the government regularly presents incomplete "facts."

oral conversations, not documents; (f) they neither paid any government officials nor received any payment from a government official; (g) they misrepresented neither their roles nor identities in any meeting; (h) neither stole any information or asked government officials to do so; (i) neither asked any government official to reveal classified information;[12] and (j) they always held their meetings in completely public places (usually restaurants over meals) without elements of secrecy.

During 1999 to 2004—the period of the alleged conspiracy—Defendants met with dozens of U.S. government officials. Defendants often were sought out by administration officials who wanted to test foreign policy ideas, find out the views of the pro-Israel lobby, or even use AIPAC as a back channel to find out Israel's view before a policy was announced. Recognizing that Defendants' meetings with these officials were no different in Defendants' minds than the meetings with officials charged against them in the indictment, the District Court has ruled that testimony of these officials is relevant and admissible and has denied

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[12] While the government in its version of the "facts" tries to paint a picture of men engaged in espionage and attempting to obtain NDI, Defendants were in reality doing their jobs to find out about foreign policy before it was too late to

"Sensitive" is not a classification category, *see* JAU 219-46, "intelligence" is a word used in a host of contexts; and stating that information came from "the Agency" does not indicate classified information as the CIA disseminates an enormous volume of unclassified material.

the government's objections to Defendants' subpoenas. Among the government officials under subpoena are Secretary of State Condoleezza Rice, National Security Advisor Stephen Hadley, former Deputy Secretary of Defense Paul Wolfowitz, former Special Middle East Envoy General Anthony Zinni, National Security Council official Elliot Abrams, and Undersecretary of Defense for Policy Douglas Feith. *See United States v. Rosen*, 520 F. Supp. 2d 802 (E.D. Va. 2007) ("*Rosen XI*") (allowing testimony of government officials to establish that Defendants did not have the requisite mental states necessary for conviction).

Despite the hundreds of conversations among Defendants and senior U.S. government officials such as those listed above, the Superseding Indictment focuses on Defendants' interactions with only three officials:

and Lawrence Franklin. , identified in the indictment as USGO-1 and USGO-2, respectively, are alleged illegally to have disclosed classified NDI to Defendants.

neither has been charged nor disciplined for the alleged disclosure that Rosen is charged with receiving from him and then passing along to others. Indeed, been promoted several times during the course of this case.

never has been charged or cited for his disclosures to Defendants of information in this case.

In its brief on appeal, the government emphasizes Rosen and Weissman's interaction with the third government employee, Franklin, a former Department of Defense employee. However,

where they had meetings and spoke with dozens of U.S. government officials. Despite this level of scrutiny, it was not until after the government arranged a scripted "sting" with Franklin that the prosecutors charged Defendants in 2005 with the illegal disclosure of NDI.

Franklin was persuaded to act as a government cooperator after government agents overheard a conversation he had with reporters and after they discovered that Franklin inappropriately kept classified documents in his West Virginia home (events having nothing to do with Defendants). Despite his assistance, the government later charged Franklin, who pled guilty.

Although the government's brief discusses Franklin at length, neither of the two documents on appeal (described in greater detail in the Argument) had anything to do with Defendants' dealings with Franklin. The indictment alleges that one of the documents (the Israeli Briefing Document) involved the disclosures made by to Rosen, and the indictment does not identify any specific

government official with respect to the allegation ot the other document (the FBI Report).

Defendants' conversations with government officials were informed by what they read in newspapers, internet sites, and other publicly available sources.

44, Docket # 403 at 17-28.

Finally, at trial, Defendants will demonstrate, among other things, that they acted with innocent states of mind, believing they were acting in the national interest, that officials were authorized to disclose the information to them, and that their conduct was lawful and necessary to save both American and Israeli lives. They will demonstrate that the information at issue was in the public domain, was not damaging to national security, and was not even classified.

SUMMARY OF ARGUMENT

With respect to both documents, under the general rules of relevance and admissibility, the District Court made the correct decisions. The lower court was steeped in the facts and nuances of this case, spending more than thirty-three days conducting CIPA hearings. Its review of the documents on appeal as well as the

other forty or more documents in the CIPA process was on a line-by-line, often a word-by-word basis. In each of its rulings, the District Court considered and properly applied the CIPA standard—whether a government request for a redaction, substitution, or summary would provide Defendants with "substantially the same ability to make their defense" as would the specific classified information. 18 U.S.C. App. 3 § 6(c)(1), ADD- 5-6. The lower court also then considered the government's assertion of its classified information privilege, applied this Circuit's law on the issue, *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985), and its progeny, and found that two of the documents, the FBI Report and the Israeli Briefing Document, were "relevant and helpful" and "essential to a fair determination of the cause." Because of the District Court's scrupulous consideration and the applicable law, this Court should give great deference to these relevance and admissibility decisions and can overturn them only "under the most extraordinary circumstances." *United States v. Fernandez*, 913 F.2d 148, 154-55 (4th Cir. 1990) (citation omitted). Here, no such circumstance exists. The two documents are clearly relevant and essential to show various of the defenses in the case, and the decisions below should be affirmed.

Although this appeal is about the admissibility of two documents, the government tries to convert it into an appeal of constitutional issues. The government presses that effort despite the fact that this Court, in granting

Defendants' first appellate motion to dismiss, determined that the orders on constitutional issues were not properly on appeal, unless they somehow control the admissibility of the two documents. The government concedes that the FBI Report and four grounds for admitting the Israeli Briefing Document do not implicate the constitutional issues. As to the two other grounds for the Israeli Briefing Document, the argument below demonstrates that none of the reasons proffered by the District Court trigger any need for review of the constitutional issues.

Finally, if the Court decides to reach the constitutional issues, it must conclude that the District Court was correct that this prosecution under the Espionage Act implicates the First Amendment and the Due Process Clause. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Consequently, the District Court was obligated to undertake an effort to interpret the mental state elements in a way that would save the statute as applied from constitutional challenge. The government is wrong in faulting the District Court for undertaking that effort. Whether that interpretive effort was successful is not an issue presented for resolution on this interlocutory appeal.

ARGUMENT

I. Because the Two Documents Are Admissible on Nonconstitutional Grounds, the Court Should Not Reach the Constitutional Issues

The government appeals the District Court's rulings with respect to two documents: the FBI Report and the Israeli Briefing Document. The government

does not contend that the rulings with respect to the FBI Report implicate the District Court's August 2006 ruling on the constitutionality of 18 U.S.C. § 793. The government argues, however, that the admissibility of the second document, the Israeli Briefing Document, does require a review of the District Court's constitutional determinations.

But even with respect to the Israeli Briefing Document, the government acknowledges that the District Court's admissibility rulings rested on six independent grounds and that only two of those six reasons hinge on the constitutional issues. Consequently, this Court can and should affirm the District Court's rulings on the nonconstitutional grounds articulated in the four reasons and, in so doing, follow the well-established canon of judicial restraint and decline to rule on the constitutional questions relating to § 793 included among the government's appeal. That canon requires that "prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a

constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").[13]

Where an appellate court can affirm a decision on nonconstitutional grounds, it should do so and decline to decide a constitutional question. *See, e.g., Jean v. Nelson*, 472 U.S. 846, 854-55 (1985) (affirming remand on nonconstitutional issue and declining to decide constitutionality of statute); *Gulf Oil*, 452 U.S. at 99 (applying judicial restraint, court did not decide constitutionality of district court order limiting communications with class members where there was initial determination that district court's order was abuse of discretion under the Federal Rules).

Following this principle of judicial restraint, the Court should decide the nonconstitutional issues presented in the government's appeal and consider the constitutional issue only if unavoidable. *See Strawser v. Atkins*, 290 F.3d 720, 729-30 (4th Cir. 2002). Because the FBI Report raises no constitutional issues and that the Israeli Briefing Document has four nonconstitutional bases for admissibility, this Court need not and should not address the government's

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[13] *See also Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); *Yahr v. Resor*, 431 F.2d 690, 691 (4th Cir. 1970) ("Constitutional questions should be decided only when unavoidable, and this is particularly true when the issue is raised on appeal from an interlocutory order.").

constitutionality argument in this interlocutory appeal. As demonstrated below, the four nonconstitutional reasons are sufficient to affirm.

II. The District Court's Decisions Concerning the Two Documents Were Correct and Should Be Affirmed on Nonconstitutional Grounds

A. Under *United States v. Fernandez*, the District Court's CIPA Determinations Are Entitled to Extraordinary Deference

The standard of review that governs this interlocutory appeal is set forth in *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990). *Fernandez* makes clear that this Court accords extraordinary deference to a district court's CIPA relevance determinations.

In *Fernandez*, the trial court ruled that the defendant was entitled to introduce classified evidence at trial in unredacted form. The trial court rejected the government's proposed unclassified substitutions because they failed to meet CIPA § 6(c)'s requirement that substitutions offer the defendant substantially the same ability to make his defense as would disclosure of the specific classified information. *Id.* at 152-53. The government pursued an interlocutory appeal of those rulings.

In *Fernandez*, this Court recognized that its role was "circumscribed" and involved only "a series of very narrow, fact-specific evidentiary determinations." *Id.* at 154. The Court applied a deferential standard of review and announced that it would overturn the trial court only "under the *most extraordinary*

circumstances. *Id.* at 154-55 (internal quotations omitted) (emphasis added). This Court explained that "[t]he trial court was immersed in the complicated facts of this case for several months, and its familiarity with the particulars of this prosecution far exceeds our own." *Id.* at 155.

In addition to detailing the deference that this Court owes the District Court's fact-finding, *Fernandez* also set forth the legal standards that guide the District Court in making its factual determinations. While a trial court must "take into account" the government's national security concerns, the court is *required* to admit relevant classified information if the evidence is "helpful to the defense . . . or is essential to a fair determination of a cause." *Id.* at 154 (citing *United States v. Smith*, 780 F.2d 1102, 1107 (4th Cir. 1985)). The Court further explained that "a finding that particular classified information is necessary to the defense is enough to defeat the contrary interest in protecting national security." *Id.* at 157. The government, of course, retains sole authority under CIPA to decide whether to proceed with disclosure of the information or to incur sanctions at trial. *See id.* at 154.

As demonstrated below, the District Court's fact-finding process was meticulous and, although the District Court did not agree with the government's characterization of the *Smith* standard, ended up applying it nonetheless. The lower court's determinations are therefore impervious to attack on appeal.

B. The District Court's Determinations Were Factually Meticulous and Legally Accurate

1. The District Court's Factual Determinations Were Meticulous

A review of the various proceedings conducted by the District Court demonstrates how meticulous and careful it was, how immersed it was in the facts, the documents, and the tapes in this case, and how familiar it was with the competing contentions of the prosecution and defense. The District Court made its rulings with a comprehensive understanding of the issues, both legal and factual. Consequently, its relevancy determinations deserve extraordinary deference.

Between June 26, 2006 and March 14, 2008, the District

Court held thirty-three CIPA hearings. Many of these were full days; the hearings cover pages of transcript.[14]

Rarely did these rulings raise issues of law; rather, they constituted exercises of the lower court's discretion in determining whether specific pieces of classified evidence were relevant to Defendants' case, and whether the government's proposed substitutions offered Defendants substantially the same ability to make their defense as would disclosure of the specific classified information. *See* CIPA § 6(c)(1), ADD – 5-6; *see also Fernandez*, 913 F.2d at 152.

[14] A detailed history of the CIPA proceedings in this case is contained in *United States v. Rosen*, 487 F. Supp. 2d 703, 706-07 (E.D. Va. 2007) ("*Rosen VII*").

Overall, when counting not only the CIPA hearings but all the other hearings and conferences that have been held since the Superseding Indictment was filed in

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this case, there have been a total of sixty-four days spent in court, 803 docket entries, and over 100 orders or opinions, eleven of them published. It is rare in a criminal case that a district court gets as immersed—before trial—in the facts of the case as this meticulous judge has in this exceedingly complex case.

2. The Legal Standard Applied by the District Court

In determining whether Defendants should be permitted to use a particular piece of classified information, the District Court repeatedly contended with the government's assertion of the common law classified information privilege. This Court first recognized that privilege in *United States v. Smith,* 780 F.2d 1102 (4th Cir. 1985) (en banc), and the District Court recognized it as well. *See Rosen X,* 520 F. Supp. 2d. at 800-02.

Smith and subsequent cases have held that the government's privilege in classified information is overcome when a defendant in a criminal case demonstrates that the information is "relevant and helpful to the defense . . . or is essential to a fair determination of a cause." *Smith,* 780 F.2d at 1107, 1111; *see also United States v. Abu Ali,* 528 F.3d 210, 247 (4th Cir. 2008); *United States v. Moussaoui,* 382 F.3d 453, 472 (4th Cir. 2004).

This *Smith* holding was the standard the District Court applied during the course of the CIPA § 6(c) proceedings. There it sought to determine whether the

Defendants were entitled to disclosure of classified information over which the government asserted its privilege.

While professing to adhere to this standard, the government actually opposed it. The language in *Smith* is in the disjunctive, suggesting that the determination is *either* "relevant and helpful" *or* "essential." The government read this language as if it were in the conjunctive, "relevant and helpful" *and* "essential." Thus, on appeal, the government continues to maintain that Defendants bear the burden of showing that the classified information they seek to introduce is "essential to the defense, necessary to his defense, and neither merely cumulative nor corroborative, nor speculative." (Br. at 55.) The District Court, however, applied the correct standard:

> The disjunctive is not accidental. Thus, a defendant need not show that testimony is essential to his defense to overcome the government's assertion of its classified information privilege; a defendant can defeat the privilege by showing that the evidence as to which the privilege is claimed is either "relevant and helpful to the defense" **or** "essential to a fair determination of a cause."

Rosen X, 520 F. Supp. 2d. at 801 (citing *Moussaoui*).

Nevertheless, this disagreement between the parties about the legal standard is simply not an issue for this appeal.

There simply is no legal issue regarding that standard presented on this appeal.

C. The Deferential *Fernandez* Standard of Review, As Applied to the District Court's Meticulous Factual Findings and Legal Conclusions, Mandates Affirmance

Given the exacting nature of the District Court's factual review, its intimate knowledge of the case, and its "essential" factual findings, this Court must review its determinations under the deferential standards of *Fernandez*. By those standards, there is no doubt that its determinations must be affirmed.

In fact, at least in the context of the FBI Report, this is even a stronger case for deference than *Fernandez*. In contrast to this case, the district court in *Fernandez* rejected the use of substitutions altogether, but this Court nonetheless upheld that determination on appeal.

Defendants demonstrate below the relevance of each of the documents. Under the relevant standard of review, those findings cannot be overturned.

D. The FBI Report Is Essential to the Defense

1. Factual Background

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

[18] Aside from Leonard, Defendants' experts will include Steven Garfinkel, also a former Director of ISOO; Carl Ford, former Director of Intelligence and Research in the U.S. Department of State; Morton Halperin, former Director, Policy Planning Staff for the Department of State and former Special Assistant to the President for the National Security Council; Samuel Lewis, former U.S. Ambassador to Israel; Mark Parris, former U.S. Ambassador to Turkey and former National Security Council official; and Edward Walker, former U.S Ambassador to Israel, Egypt and United Arab Emirates.

REDACTED

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Specifically, in making its case that Arafat, Hezbollah and Iran were responsible parties, Israel made some very public pronouncements. For example, the Israeli Defense Minister Benjamin Ben-Eliezer publicly "stressed that the attempt to bring the weapons ship to the Gazan coast was a collaborative effort between the PA [Palestinian Authority, headed by Arafat], Iran and Hezbollah."[28] JAU 270.

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26 Indeed, on January 22, a day before the government alleges Rosen made an illegal disclosure of what he had learned on January 18 from . Rosen and three other officials from pro-Israel organizations had dinner in a public place with General Anthony Zinni, then President Bush's Special Envoy to the Middle East. Zinni had just returned from the Middle East where he met with Arafat, among others. Zinni also told Rosen and the others details about the Karine-A and his meeting with Arafat. Oddly, these disclosures, which were also passed on by Rosen, have not been charged by the government. Defendants subpoenaed General Zinni as their witness to place in even fuller context what Rosen heard from the Israelis and Satterfield and others. After its objections were heard numerous times, the government's motion to quash the subpoena was denied. The trial court ruled that Zinni's conversation on the same topic in the same week was relevant to the issues in the case (*e.g.*, whether what the U.S. knew and details of the seizure were closely held, whether Rosen had a reason to believe his actions were assisting the U.S., and whether Rosen acted in good faith).

27 Hence, another defense will be that the information was therefore in the public domain and not closely held.

Eight days before the supposedly illegal disclosure by Rosen, the U.S. was making public its conclusion and identifying its source as "extensive and compelling evidence" provided by Israel:

> Powell . . . took issue with the Palestinian leader's insistence that he knew nothing about the Karine-A . . . Boucher said. He said the secretary [sic] of State told Arafat "that the indications of Palestinian involvement were deeply troubling to us, and that that's what we felt required a full explanation."
>
> . . . .
>
> The State Department said Israel had provided "extensive and compelling evidence" about the direct involvement of senior figures in the Palestinian Authority . . . .

JAU 272.

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REDACTED

[31] On January 18, 2002, UPI reported that "U.S. officials said Thursday that recent briefings from Israeli intelligence have convinced the United States that Palestinian leader Yasser Arafat did know about a 50-ton shipment of arms seized by Israel in the Red Sea Jan. 3. . . . According to administration sources familiar with the briefing, U.S. officials were allowed to hear highly secret intercepts, made by members of Israeli military intelligence unit 504, of conversations between Fuad al-Shobaki, the Palestinian Authority's chief financial officer, and Arafat." JAU 274.

The government has never claimed, and cannot claim, that § 793 can criminalize the disclosure of Israeli information.

In assessing whether the government has met its burden of proving that the information at issue was NDI under § 793, one of the sub-elements that the government must prove is that the disclosure of the information was potentially

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III. Even the Last Two Bases for the District Court's Ruling on the Israeli Briefing Document Do Not Raise Constitutional Issues

As a CIPA § 7 appeal, the only issue is the admissibility of classified information. This is not a vehicle for the airing of constitutional determinations with which the government may disagree. Therefore, a critical premise of the government's attempt to have this Court take up the constitutional issues is its contention that it was the District Court's erroneous application of constitutional principles that led it to admit the ostensibly classified Israeli Briefing Document. (Br. at 29.)

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[33] The government's argument is that the lower court "created" new elements, Br. at 29-49, as if the District Court pulled its language out of thin air. The District Court's judicial gloss comes from the statute itself or Supreme Court or this Court's cases interpreting (not "creating") the statute in light of its constitutional issues. *See, e.g., Gorin v. United States*, 312 U.S. 19 (1941); *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000); *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980).

REDACTED

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Thus, even if this Court finds that the District Court was wrong on all four of the ordinary nonconstitutional relevance bases for the admission of the Israeli Briefing Document and then turns to reasons five and six, that is no reason to embark on the constitutional analysis the government seeks. It will be a moot exercise that will have no impact on the only issue of relevance: the admissibility of the ostensibly classified Israeli Briefing Document.

IV. The District Court Properly Sought an Interpretation of Section 793 That Avoided Constitutional Issues

As demonstrated in Sections I, II and III of the Argument, this Court can and should affirm the CIPA decisions of the lower court without ever reaching any constitutional issue. The government, however, urges this Court to take up the constitutional issues and then conclude that the statute and its application to this case raise no constitutional problems. In addition, the government asks this Court to find that the language of the statute is clear as written, and therefore not susceptible of any interpretation requiring any new mental state elements. (Br. at 30.) Defendants submit that this is not the right mode of analysis.

A. Under the Doctrine of Constitutional Avoidance, If a Constitutional Issue Exists, a Court Must First Look to the Statute and Determine Whether It Is "Susceptible of More Than One Construction"

Should this Court ever reach the constitutional issues, the first step in the analysis is not to render a decision on whether the statute is constitutional, but only to determine whether the statute poses a constitutional question substantial enough to warrant an effort at an alternate interpretation. "We are obligated to construe the statute to avoid [constitutional] problems if it is fairly possible to do so." *Boumediene v. Bush,* 128 S. Ct. 2229, 2271 (2008) (internal quotation marks omitted) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)). "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson,* 285 U.S. 22, 62 (1932).

Thus, if this Court reaches a constitutional analysis, it should determine whether First Amendment and Due Process issues exist and then look to determine whether any statutory construction would remedy any problem. In following that procedure, the District Court was correct.[34]

[34] In the lower court and if this case gets to this Court after trial, Defendants' position is that no judicial gloss can save this prosecution of alleged oral disclosures of foreign policy issues by non-government lobbyists with no indicia of secrecy or bad faith, but that issue is not yet presented on appeal. *See* JAU 217-18.

B. The District Court Was Correct That This Case Raises Substantial Constitutional Issues

1. As Applied to Defendants, This Statute Certainly Presents a Substantial First Amendment Issue

Defendants' conduct at issue in this case involves "collecting information about United States' foreign policy and discussing that information with government officials (both United States and foreign), journalists, and other participants in the foreign policy establishment." *Rosen I*, 445 F. Supp. 2d at 630. Such activities are "indispensable to the healthy functioning of a representative government" and directly implicate Defendants' First Amendment rights. *Id.* at 633; *see also McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 346 (1995) (First Amendment's protection of political speech "reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.") (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); *Burson v. Freeman*, 504 U.S. 191, 196 (1992) ("a major purpose of that Amendment was to protect the free discussion of governmental affairs.") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). For that reason, Defendants' First Amendment interests "are significant and implicate the core values the First Amendment was designed to protect." *Rosen I*, 445 F. Supp. 2d at 633.

The government's efforts to establish that disclosure of NDI should be treated like child pornography and "'categorically excluded from First Amendment protection' because it ha[s] 'no social value,'" Br. at 43 (quoting *United States v. Williams*, 128 S. Ct. 1830, 1841 (2008)), ignores the fact that information related to the conduct of our government in protecting the security of its people, unlike child pornography, is at the heart (or "core") of the First Amendment. As Judge Wilkinson rightfully observed:

> The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words "national security." . . . No decisions are more serious than those touching on peace and war; none are more certain to affect every member of society. Elections turn on the conduct of foreign affairs and strategies of national defense, and the dangers of secretive government have been well documented.

United States v. Morison, 844 F.2d 1057, 1081 (4th Cir. 1988) (concurring); *see also id.* at 1086 (Phillips, J., concurring).

Under these standards, Defendants' pro-Israel advocacy efforts, and their discussion of Middle East affairs with government officials, at the very least raise a substantial First Amendment issue.[35]

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[35] The government's statement that it is not even a "close case," Br. at 30, that this prosecution raises constitutional issues is wishful thinking. Indeed, the lower court's decision not to dismiss the indictment has been severely criticized not because it incorrectly identified a serious First Amendment problem, but because it *undervalued* the problem by not dismissing the indictment. *See, e.g.*, Mary-Rose Papandrea, *Lapdogs, Watchdogs, And Scapegoats: The Press And National Security Information*, 83 Ind. L.J. 233, 297-98, 303 (2008); Heidi Kitrosser,

2. As Applied to Defendants, This Statute Presents a Substantial Vagueness Issue

The District Court was not alone in its concern that Section 793 of the Espionage Act raises a serious vagueness problem. Justice Harlan criticized § 793(e) as "a singularly opaque statute," *New York Times Co. v. United States*, 403 U.S. 713, 754 (1971) (Harlan, J., dissenting), and Judge Phillips described it as "unwieldy and imprecise," *Morrison*, 844 F.2d at 1085 (Phillips, J., concurring). Although vague criminal laws are never permitted by the Due Process Clause, there is a heightened analysis of those laws when, as here, they implicate the First Amendment. *See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

Section 793's terms "information relating to the national defense" and "not entitled to receive it" are particularly ambiguous in the context of this case, which is unlike any brought before —applied to non-government officials under no duty to protect classified information, who did not steal or bribe or receive payment or misrepresent themselves to obtain any information, who were working as foreign

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Classified Information Leaks And Free Speech, 2008 U. Ill. L. Rev. 881, 902 (2008); Judson O. Littleton, *Eliminating Public Disclosures Of Government Information From The Reach Of The Espionage Act*, 86 Tex. L. Rev. 889, 903-04 (2008); William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 Am. U. L. Rev. 1453, 1514-15 (2008); *Recent Case*, 120 Harv. L. Rev. 821, 824 (2007); Laura Barandes, *A Helping Hand: Addressing New Implications Of The Espionage Act On Freedom Of The Press*, 29 Cardozo L. Rev. 371, 402 (2007).

policy lobbyists, and who were dealing with oral conversations that by their very nature do not bear classification markings. They did what lobbyists and journalists do on a daily basis; they simply held conversations about important matters of public policy with high-ranking government officials. *See, e.g.*, Dorothy Rabinowitz, *First They Come For The Jews*, Wall St. J. (Apr. 2, 2007) at A17 (this case is "the indictment of two individuals for activities that go on every day in Washington, and that are clearly protected by the First Amendment").

In this context, it is not possible for any private citizen to know which part of what a government official voluntarily tells him orally is classified NDI, improperly classified, simply sensitive or even public. Moreover, a reasonable person in the position of Rosen or Weissman would reasonably believe that when an undisputedly patriotic government official such as Deputy Assistant Secretary of State David Satterfield volunteers information to him, the official is intentionally disclosing it so that it can be disseminated through back channels because it would be good for the United States. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (a statute is unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application").

There can be no doubt that questions of vagueness and notice are at stake in this specific case.

3. To Satisfy the Constitutional Requirements, Defendants Cannot Be Convicted Unless Their Actions Constituted a "Clear and Present Danger"

As the government concedes, Br. at 42, when it seeks to punish conduct at the core of the First Amendment, the prosecution can succeed only if the speech creates "a clear and present danger … [of] the substantive evils that Congress has a right to prevent." *Rosen I*, 445 F. Supp. 2d at 631 (quoting *Schenk v. United States*, 249 U.S. 47, 52 (1919)).

The "clear and present danger" test has been refined and expanded over time. *See, e.g., United States v. Williams*, 128 S. Ct. at 1855 (Souter, J., dissenting). Currently, to satisfy the "clear and present danger" test, the government must prove that the danger is extremely serious, *e.g., Bridges v. California*, 314 U.S. 252, 263 (1941); imminent, *e.g., Hess v. Indiana*, 414 U.S. 105, 108 (1973) (citing *Brandenburg*, 395 U.S. at 447); specific, *Bridges*, 314 U.S. at 260-61; of "serious consequence," *Morison*, 844 F.2d at 1085, or "substantial." *Bridges*, 314 U.S. at 262.

In addition, in a First Amendment prosecution, the government must prove not only the existence of a clear and present danger, but also that Defendants knew of the clear and present danger. This mental state requirement is indispensable in protecting the purpose of the First Amendment. *See, e.g., Hess*, 414 U.S. at 108 ("since there was no evidence or rational inference from the import of the

language, that his words were *intended to* produce . . . imminent disorder, those words could not be punished.") (emphasis added). That is the only way that the "clear and present danger" test will fulfill its purpose of protecting "the free discussion of governmental affairs." *Rosen I*, 445 F. Supp. 2d at 630 (citing and quoting *Mills*, 384 U.S. at 218).

C. In Light of These Constitutional Issues, the District Court Was Correct to Attempt a Construction That Would Render the Statute Constitutional in This Case

The District Court took the middle ground between Defendants' argument that prosecution was unconstitutional on First Amendment and Due Process grounds and the government's position that no constitutional issue was even presented. It found, as any court would, that Defendants' foreign policy advocacy was at the "core of the First Amendment's guarantees." *Rosen I*, 445 F. Supp. 2d at 630; *see also id.* at 633, and that there were serious vagueness issues. *Id.* at 617-20.

The District Court correctly sought (although Defendants contend ultimately unsuccessfully) to save the statute as applied in this prosecution by looking to determine, as the rule of constitutional avoidance requires, Section IV.A, *supra*, if there are terms in a statute that are susceptible of more than one construction. Here, looking at the statute's own mental state elements, the District Court found such terms existed.

"Willfulness" is a classic example in the criminal law of a term susceptible of more than one construction. The Supreme Court has pointedly stressed that willful "has a wide range of meanings, and its construction [is] often . . . influenced by it context." *Bryan v. United States,* 524 U.S. 184, 191 (1998) (quoting *Ratzlaf v. United States,* 510 U.S. 135, 141 (1994) (internal quotation marks omitted).

Utilizing the ambiguity in "willfully," the District Court was required to find an interpretation avoiding the constitutional issues, and one consistent with the "clear and present danger" test. The District Court interpreted "willfully" to require knowledge on the part of Defendants not only that their conduct was unlawful ("bad purpose either to disobey or to disregard the law"), but also knowledge (a) that that the information involved is potentially damaging to national security; (b) that the government is closely holding the information; and (c) that the person to whom Defendants communicated the information was not entitled, under the classification system, to receive it. *Rosen I*, 445 F. Supp. 2d at 625 & n.30. With this additional interpretive gloss on "willfully," the District Court found the statute to be constitutional as applied.

Without these requirements, Defendants could be convicted even if they believed the information they disclosed was public, was of the sort that could not harm national security, or that they were communicating it to someone authorized to receive it. A statute and prosecution that allowed this result (one with just the

plain mental state elements the government advocates) would violate both the First Amendment and Due Process Clause, and would utterly fail the "clear and present danger" test.

The government wants this Court to proceed as if no attempt at a judicial gloss is necessary because, in its view, no constitutional issues exist in the case. It does not take issue with the District Court's view that its gloss would eliminate such constitutional problems if they existed, but only the conclusions that constitutional issues exist and that the statute suffers from sufficient uncertainty in its language to allow for a remedial gloss.[36] But, for the reasons stated, the government is wrong: there do exist constitutional issues, the statute suffers from no small measure of uncertainty, and, therefore, the District Court was obligated to attempt to add a judicial gloss to the statute in order to avoid the constitutional issues. Because the government does not challenge the curative impact the judicial gloss would have, once it is proven wrong on its faulty premise that no gloss is needed, it must then live with the District Court's solution.

As a final note, the Court should be aware that the government itself previously took the position—inconsistent with its position on appeal—that there

[36] Defendants' position is that statutory interpretation was required (because constitutional issues exist) but that no judicial gloss ultimately can save the prosecution of Defendants in the unique setting of the case. Should this Court decide to take on the full constitutional arguments in this interlocutory appeal, it should seek fuller briefing on all the issues, as occurred in the lower court.

cannot be a final determination of constitutionality in this case until after trial, because only at that time will the Court be able to see precisely how through evidentiary rulings and instructions, the statute was applied to Defendants. In response to Defendants' Motion to Dismiss on constitutional grounds, the government stated:

> [C]ontrary to the defendants' efforts to have the Court evaluate the specificity of the statute in the abstract, the true test of whether the statute provides fair notice to these defendants turns not merely on the words of the statute, but also on the nature of the evidence adduced and the instructions given during the trial.

JAU 21, Docket #179 at 15-16. The government seems to have forgotten its own words. Given that the government appeals two documents which do not require any constitutional analysis and given that the constitutional issues in the case provided the lower court with sufficient basis in this pre-trial stage to attempt a statutory gloss, the two documents are not the right vehicle and this is not the time to determine whether or not the prosecution is constitutional.

CONCLUSION

For the foregoing reasons, this Court should conclude that the government has not perfected its appeal or, if it reaches the merits, that the District Court's admissibility finding on two documents should be affirmed.

Respectfully submitted,

Kate B Briscoe

Baruch Weiss
John N. Nassikas III
Kate B. Briscoe
ARENT FOX LLP
1050 Connecticut Ave., NW
Washington, DC 20036
202-857-6000

Counsel for Keith Weissman

Abbe David Lowell /eep

Abbe David Lowell
Roy L. Austin Jr.
Erica E. Paulson
McDERMOTT WILL & EMERY LLP
600 Thirteenth St., NW
Washington, DC 20005
202-756-8000

Counsel for Steven J. Rosen

Dated: August 20, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-4358 **Caption:** United States v. Steven J. Rosen and Keith Weissman

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(s) Erica E. Paulson

Attorney for Steven J. Rosen

Dated: August 20, 2008

ADDENDUM

ADDENDUM

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18 U.S.C. App. 3 § 8 9

Effective: October 11, 1996

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part 1. Crimes (Refs & Annos)
Chapter 37. Espionage and Censorship (Refs & Annos)
→ **§ 793. Gathering, transmitting or losing defense information**

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or

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transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

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

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer--

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

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

(h)(1) Any person convicted of a violation of this section shall forfeit to the United States, irrespective of any provision of State law, any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, from any foreign government, or any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, as the result of such violation. For the purposes of this subsection, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1) of this subsection.

(3) The provisions of subsections (b), (c), and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853(b), (c), and (e)-(p)) shall apply to--

(A) property subject to forfeiture under this subsection;

(B) any seizure or disposition of such property; and

(C) any administrative or judicial proceeding in relation to such property,

if not inconsistent with this subsection.

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(4) Notwithstanding section 524(c) of title 28, there shall be deposited in the Crime Victims Fund in the Treasury all amounts from the forfeiture of property under this subsection remaining after the payment of expenses for forfeiture and sale authorized by law.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 736; Sept. 23, 1950, c. 1024, Title I, § 18, 64 Stat. 1003; Aug. 27, 1986, Pub.L. 99-399, Title XIII, § 1306(a), 100 Stat. 898; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(L), 108 Stat. 2147; Oct. 14, 1994, Pub.L. 103-359, Title VIII, § 804(b)(1), 108 Stat. 3440; Oct. 11, 1996, Pub.L 104-294, Title VI, § 607(b), 110 Stat. 3511.)

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United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Appendix 3. Classified Information Procedures Act (Refs & Annos)
→ **§ 1. Definitions**

(a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

CREDIT(S)

(Pub.L. 96-456, § 1, Oct. 15, 1980, 94 Stat. 2025.)

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Title 18. Crimes and Criminal Procedure (Refs & Annos)
Appendix 3. Classified Information Procedures Act (Refs & Annos)
→ **§ 6. Procedure for cases involving classified information**

(a) Motion for hearing

Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice

(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a), the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

(c) Alternative procedure for disclosure of classified information

(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order--

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

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(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

(d) Sealing of records of in camera hearings

If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(e) Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure

(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such informa- tion.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to--

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

(f) Reciprocity

Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order

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the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

CREDIT(S)

(Pub.L. 96-456, § 6, Oct. 15, 1980, 94 Stat. 2026.)

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United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Appendix 3. Classified Information Procedures Act (Refs & Annos)
→ **§ 7. Interlocutory appeal**

(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

CREDIT(S)

(Pub.L. 96-456, § 7, Oct. 15, 1980, 94 Stat. 2028.)

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Appendix 3. Classified Information Procedures Act (Refs & Annos)
→ **§ 8. Introduction of classified information**

(a) Classification status

Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(b) Precautions by court

The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.

(c) Taking of testimony

During the examination of a witness in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the United States to provide the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

CREDIT(S)

(Pub.L. 96-456, § 8, Oct. 15, 1980, 94 Stat. 2028.)

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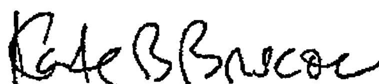
CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2008 I hand delivered the original and four copies (for redaction/filing) of the foregoing Brief of Appellees to the Court Security Officer or her designee, pursuant to instructions from the Clerk's Office of the Fourth Circuit Court of Appeals and, hand delivered two service copies to:

James L. Trump
W. Neil Hammerstrom, Jr.
David B. Goodhand
Assistant United States Attorneys
Office of the United States Attorney
for the Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, Virginia 22314

Thomas Reilly
Michael C. Martin
Trial Attorneys
U.S. Department of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20530



Kate B. Briscoe
ARENT FOX LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036