UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.		**12-CR-231 (RC)**
	:	
JAMES HITSELBERGER	:	

DEFENDANT'S MOTION TO COMPEL ELECTION
BETWEEN MULTIPLICIOUS COUNTS
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Mr. James Hitselberger, the defendant, through undersigned counsel, respectfully moves this Honorable Court to issue the attached proposed order compelling the government to elect before trial between the Count One and Count Two of the superseding indictment, both of which charge the same offense of unlawful retention of national defense information, in violation of 18 U.S.C. §793.

Background

Mr. Hitselberger is charged in a six count superseding indictment with three counts of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e) and three counts of unauthorized removal of a public record, in violation of 18 U.S.C. § 2071(a). Counts One and Two arise out of an incident that occurred on April 11, 2012. On that date, officers of the United States military stopped and searched Mr. Hitselbeger on the U.S. naval base in Bahrain and allegedly found two classified documents in his backpack. Later that day, government agents searched Mr. Hitselberger's room on the base and allegedly found an

additional classified document. According to the government, these three documents contained national defense information.

Although both the search of Mr. Hitselberger's backpack and the search of his room occurred on April 11, 2012, he is charged based on this conduct in two counts of the indictment with two separate violations of § 793(e). Count One charges this offense as having occurred on or about April 11, 2012, and refers to the two documents allegedly found in Mr. Hitselberger's backpack. Count Two charges this offense as having occurred on or about March 8, 2012, and refers to the one document allegedly found in Mr. Hitselberger's room on April 11, 2012. According to the indictment, the document is dated March 8, 2012. However, the government's evidence will demonstrate only that this document was allegedly found in Mr. Hitselberger's room on April 11, 2012. The government has produced during discovery and will offer at trial *no* evidence that he possessed this document prior to that date. Thus, if Mr. Hitselberger knowing and willfully retained national defense information, as the government alleges in Counts One and Two, he did so on a single date, April 11, 2012, constituting a single offense. Charging this one offense in two separate counts is multiplicious.

Argument

Federal Rule of Criminal Procedure 7(c)(1) prohibits the government from trying a defendant on multiple counts charging the same offense. Rule 7(c)(1) permits the government to allege in a single count "that the defendant committed [an offense] by one or more specified means." As the Advisory Committee Note explains, this provision "is intended *to eliminate the use of multiple counts* for the purpose of alleging the commission of the offense by different means or in different ways." Fed. R. Crim. P. 7, Advisory Committee Note to Subdivision (c);

see also United States v. Allied Chemical Corp., 420 F.Supp. 122, 123-24 (E.D. Va. 1976). "An indictment is multiplicious , and thereby defective, if a single offense is alleged in a number of counts, unfairly increasing a defendant's exposure to criminal sanctions." *United States v. Harris*, 959 F.2d. 246, 250 (D.C. Cir. 1992) (*per curiam*). By exposing a defendant to multiple punishments for the same offense, a multiplicious indictment not only violates Rule 7, but also violates the Double Jeopardy Clause of the Fifth Amendment. *See United States v. Conley*, 291 F.3d 464, 470 (7th Cir. 2002); *United States v. Weathers*, 186 F.3d 948, 952 (D.C. Cir. 1999).

When a defendant raises a timely multiplicity objection, the proper remedy is to require the government to elect between the multiple counts. *See, e.g.*, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952) (affirming the dismissal of surplus counts of charging single offense consisting of continuing course of conduct); *United States v. Ketchum*, 320 F.2d 3 (2d Cir. 1963) (if only one violation alleged, election appropriate remedy); *United States v. Wilder*, 2008 WL 2004256 (E.D. Wisc. 2008) (requiring government to elect between multiple charges for simultaneous possession of firearm and ammunition); *United States v. Phillips*, 962 F.Supp 200, 201 (D.D.C. 1997) (same). Presenting a jury with an indictment that charges a single offense in multiple counts "may prejudice the jury against the defendant by creating the impression of more criminal activity on his part than in fact may have been present." *United States v. Carter*, 576 F.2d 1061 (3d Cir. 1978) (citing Wright & Miller, I *Federal Practice and Procedure, Criminal* § 142, at 311 (1969)); *see also United States v. Clarridge*, 811 F.Supp 697, 702 (D.D.C. 1992) (multiplicious indictment may falsely suggest defendant committed several offenses). Multiplicious counts also afford the government an unfair advantage by increasing the likelihood that the jury will convict on at least one count, if only as the result of a compromise

verdict. *Clarridge*, 811 F.Supp. at 702 ("Compromise verdicts or assumptions that, with so many charges pending the defendant must be guilty on at least some of them, pose significant threats to the proper functioning of the jury system."). Requiring the government to elect between multiplicious counts before trial prevents this unfair prejudice and advantage.

The test for determining whether two counts of an indictment are multiplicious is "whether each [count] requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see United States v. Harris*, 959 F.2d. at 251 n.3 (quoting *Blockburger*). Where, as here, multiple counts charge violations of the same provision, the court must look to what Congress intended as the unit of prosecution. *See United States v. Johnson*, 909 F.2d 1517, 1518 (D.C. Cir. 1990) (citing *United States v. McDonald*, 692 F.2d 376, 377 (5th Cir. 1982)); *United States v. Conley*, 291 F.3d 464, 470 (7th Cir. 2002). The "critical factor is the intent of Congress," and "where the language of the statute or the statutory scheme in general does not fix the punishment 'clearly and without ambiguity,' a 'rule of lenity' requires that courts resolve doubts about congressional intent against 'turning a single transaction into multiple offenses.'" *United States v. Alexander*, 471 F.2d 923, 932 (D.C. Cir. 1973) (footnote omitted); *see also Ladner v. United States*, 358 U.S. 169 (1958) ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."

Section 793(e) provides in relevant part:

> Whoever having unauthorized possession of . . . any document . . . 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 retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it [has committed a federal offense.]

The issue hear is whether Congress intended that the simultaneous retention of more than one document allegedly containing national defense information constitutes one violation of § 793(e) or multiple violations. The statute prohibits the retention of "information," and the retention of any amount of information at a given time constitutes a single unit of prosecution. It is the course of conduct of retaining information that is the unit of prosecution. *Cf. United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952) (treating as one offense under Fair Labor Standards Act "all violations that arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse'"). For this reason, the government cannot charge the retention of information contained in separate documents on the same date in relatively the same location (the base in Bahrain) as separate offense. Thus, the government must elect upon which charge to proceed.

<u>Conclusion</u>

For the foregoing reasons, Mr. Hitselberger respectfully requests that the Court enter an Order requiring the prosecution to elect which of the two multiplicious unlawful retention of national defense information counts it will elect to proceed upon at trial, Count One or Count Two.

Respectfully submitted,

A. J. KRAMER
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/s/

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