

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA :

v. :

12-CR-231 (RC) :

JAMES HITSELBERGER :

**DEFENDANT’S MOTION TO DISMISS
COUNTS FOUR, FIVE AND SIX OF THE SUPERSEDING INDICTMENT
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Mr. James Hitselberger, the defendant, through undersigned counsel, pursuant to Federal Rule of Criminal Procedure 12(b)(2), respectfully moves this Honorable Court to dismiss Counts Four, Five and Six of the Superseding Indictment. These counts allege that Mr. Hitselberger violated 18 U.S.C. § 2071(a) by unlawfully removing, taking and carrying away documents. The charged allegations do not constitute violations of § 2071(a). For this reason, these counts should be dismissed.

Background

Mr. Hitselberger is charged in a six-count superseding indictment with three counts of unlawfully retaining national defense information, in violation of 18 U.S.C. § 793(e) (Counts One, Two and Three), and three counts of unlawful removal of a public record, in violation of 18 U.S.C. § 2071(a) (Counts Four, Five and Six). Count Four charges that Mr. Hitselberger “willfully and unlawfully removed, took, and carried away papers and documents, that is, a Joint Special Operations Task Force (JSOTF) Situation Report (SITREP) dated April 11, 2012 (SITREP 104) and classified SECRET, and a Navy Central Command (NAVCENT) Regional

Analysis dated April 9, 2012, and classified SECRET, that were filed and deposited in a public office, that is, the office of the Joint Special Operations Task Force located at Naval Support Activity -- Bahrain.” Count Five charges that Mr. Hitselberger “willfully and unlawfully removed, took and carried away a paper and document, that is, a Joint Special Operations Task Force (JSOTF) Situation Report (SITREP) dated March 8, 2012 (SITREP 72) and classified CONFIDENTIAL, that was filed and deposited ” in the same office in Bahrain. And Count Six charges that Mr. Hitselberger did the same with “a Bahrain Situation Update dated February 13, 2012, and classified SECRET,” that was similarly filed.

As set forth in the Government’s Memorandum in Support of Detention [Dkt. #13], these charges are based on allegations that Mr. Hitselberger, who was working as a contract linguist for the military in Bahrain, printed copies of the four classified document referenced in the indictment, at his work place in Bahrain (a Restricted Access Area) and took the copies out of the Restricted Access Area. For purposes of this motion, Mr. Hitselberger does not dispute any of the facts alleged by the government. However, even if every fact alleged by the government is true, the indictment fails to charge violations of § 2071(a) because Mr. Hitselberger is alleged only to have taken *copies* of records and by doing so did not in any way deprived the government of its use of any record. *See, e.g., McInerney v. United States*, 143 F. 729 (1st Cir. 1906) (original papers and documents constitute records for purpose of statute); *United States v. Rosner*, 352 F.Supp. 915 (S.D.N.Y. 1972) (removing photocopies of public records not a violation of § 2071(a)). For this reason, as set forth more fully below, Counts Four, Five and Six should be dismissed.

Argument

Section 2071(a) provides:

Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.

This statute, originally enacted in 1853, was not intended to punish the theft of information, but instead to “prevent any conduct which deprives the Government of the use of its documents, be it by concealment, destruction, or removal.” *Rosner*, 352 F. Supp. at 919 (reviewing “sparse” legislative history and cases interpreting § 2071 and predecessor statutes); *see also McInerney*, 143 F. at 730 (statute “enacted for the purpose of protecting records, papers, and proceedings of courts of justice, and papers, documents, and records filed or deposited in the public offices of the federal government”); *United States v. De Groat*, 30 F. 764 (E.D. Mich. 1887) (“The object of the statute is to preserve the public records and papers intact from all kinds of spoliation, mutilation, or destruction.”).

The essence of the charge is “the rendering of information unavailable to the Government.” *Rosner*, 352 F. Supp. at 921. The purpose of the statute was to preserve documents “as evidence relating to things which concern the public and the government” and to punish those who seek to destroy such records. *McInerney*, 143 F. at 731; *see also United States v. Poindexter*, 725 F. Supp. 13, 20 (D.D.C. 1989) (“obvious purpose of the statute is to prohibit the impairment of sensitive government documents”). Thus, where the defendant removes only a

copy, the original is left in tact, and the government is not deprived of the use of the record, no violation of § 2071 occurs. *Compare United States v. Gottfried*, 58 F.3d 648 (D.C. Cir. 1995) (§ 2071 applied to defendant who served as Attorney Advisor to the Board of Veterans' Appeals who removed and destroyed records from files to reduce his workload), *and United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972) (§ 2071 applied to defendant who burned draft cards) *with Rosner*, 352 F. Supp. at 919 (§ 2071 not applicable to defendants who copied information from U.S. Attorney's files), *and Martin v. United States*, 168 F.198 (8th Cir. 1909) (predecessor statute not applicable to defendant who took document "during nights and Sundays, when it was not needed or used in the office, made a copy of it," and returned the original).

As one district court observed:

It is manifest that this statute is not broad enough and was not intended to punish the mere larceny or theft of the papers or documents as property, but that the essential element of the offense is the specific intent to destroy them as records of a public office; or, in other words, to obliterate or conceal them as the evidence of that which constitutes their value as public records, or to destroy or impair their legal effect or usefulness as a record of our governmental affairs, be that effect or usefulness what it may.

De Groat, 30 F. at 765; *see also United States v. North*, 708 F. Supp. 364, 369 n.3 (D.D.C. 1988) (citing *De Groat* and noting that § 2071 requires criminal intent). The statute "was not intended to make [] a withdrawal or removal which in no way interferes with the lawful use of the record or document in its proper place, and in no way injures or changes it, a crime." *Martin*, 168 F. at 204.

Only one court has interpreted § 2071 to apply to the removal of a copy of a record. *See United States v. Lang*, 364 F.3d 1210, 1221-22 (10th Cir. 2004) (upholding conviction under

§ 2071 for copying affidavit and removing copy from clerk's office). The *Lang* court did not address the legislative history or purpose of the statute, or cite to any case previously interpreting the statute. Instead, the *Lang* court simply rejected the argument that because § 2071 does not include the word "copies" it does not prohibit the removal of copies, citing *United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1976). *DiGilio* found that under 18 U.S.C. § 641, which omits the word copies, when an employee copies a record on government equipment, the duplicate copy is a record for purposes of the statute. *DiGilio*, 538 F.2d at 977. However, as the court in *Rosner* found, cases interpreting § 641 and similar statutes are not applicable because these statute prohibit theft or larceny, while § 2071 is not concerned with the theft of information, but rather the destruction of records. *Rosner*, 352 F. Supp. at 921-22. Although for purposes of theft offenses, such as § 641, the taking of copies may be the same as the taking of originals, the taking of a copy is not the same as destroying an original or interfering with the government's use of a record for purposes of § 2071. Because the *Lang* court fails to recognize this distinction or look to the purpose of § 2071 (or any other case interpreting § 2071 or its predecessors), this Court should not follow the *Lang* decision. Instead, looking to the text and purpose of the statute, along with the interpretation of the statute by numerous other courts, the Court should recognize that § 2071 does not apply to the circumstances of the instant matter.

This is not to say that the unlawful copying and removal of classified documents is not a crime, or that the government is without recourse under the alleged circumstances of this case. The government could charge Mr. Hitselberger with violations of 18 U.S.C. § 1924, which prohibits the unauthorized removal of materials containing classified information and focuses on the removal of information, rather than the destruction of documents. The government has

chosen not to do so and instead to proceed under the inapplicable § 2071(a), apparently because violations of § 1924 are misdemeanors, while violations of § 2071(a) are felonies. The Court should not permits such overreaching.

Conclusion

For the foregoing reasons, Counts Four, Five and Six of the Superseding Indictment should be dismissed.

Respectfully submitted,

A. J. KRAMER
FEDERAL PUBLIC DEFENDER

/s/

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