UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

OPPOSITION TO GOVERNMENT'S MOTION TO
ADMIT EVIDENCE PURSUANT TO FEDERAL RULE OF EVIDENCE 404(b)

Mr. James Hitselberger, the defendant, through undersigned counsel, respectfully submits this Opposition to the Government's Motion to Admit Evidence Pursuant to Federal Rule of Evidence 404(b) ("Government's Motion") [Dkt. #34]. The government seeks to admit at trial documents containing allegations and suggestions of uncharged misconduct. These documents are not relevant to the charged offenses, are not admissible under Rule 404(b), and should be excluded as more prejudicial than probative under Federal Rule of Evidence 403. For these reasons, as set forth below, the Court should deny the government's motion.[1]

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) (Counts One, Two and Three) and three counts of unauthorized removal of a public record, in violation of 18 U.S.C. § 2071(a) (Counts Four, Five and Six). The government's motion sets forth its factual

[1]In response to the government's motion, counsel addresses only the government's argument that the content of these documents is admissible under Rule 404(b). Counsel does not address and Mr. Hitselberger does not waive any objection to the foundational requirements for the admission of these documents or any other objection to the admission of these documents at trial. Mr. Hitselberger reserves the right to make any such evidentiary objections based on the government's presentation at trial.

allegations. In short: Counts One and Four are based on allegations that on April 11, 2012, after stopping Mr. Hitselberger leaving a secured area in Bahrain, government agents found in Mr. Hitselberger's backpack two documents ("SITREP 104" and an "NAVCENT Regionl Analysis") containing national defense information; Counts Two and Five are based on allegations that during a search of Mr. Hitselberger's living quarters in Bahrain conducted on April 11th, government agents found the first page of another document ("SITREP 72") containing national defense information;[2] and Counts Three and Six are based on allegations that during a search of the James F. Hitselberger collection at the Hoover Institution in California, government agents found a fourth document ("Bahrain Situation Update (13 FEB 2012)") containing national defense information.

In addition to proof of these allegations, the government now seeks to admit at trial six exhibits attached to its motion, which the government describes as:

> 1) evidence of letters, post-marked envelopes, and materials sent between the defendant and the Hoover Institution between 2005 and 2012, including three documents with overall classifications of Secret that agents located at the Hoover Institution [Exhibits 1 - 5, hereinafter "Hoover Correspondence and Documents"];
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> 2) the defendant's July 8, 2005, letter to an official of the Hoover Institution, under cover of which the defendant enclosed classified materials and discussed their classified status [Exhibit 1, page 1, hereinafter "Letter dated July 8, 2005"]; and

[2]The government's motion notes that this was a five-page document and refers to the content of pages two through four, which contained material classified as "Secret." Mr. Hitselberger is charged only with retaining (in violation of § 793(e)) and removing (in violation of § 2071(a)) the first page of this document, containing information marked "Confidential." He is not charged with retaining or removing pages two through four. The content of pages two through four is not relevant or admissible, and the government has not sought to admit the content of these pages under Rule 404(b).

> 3) statements that the defendant made in 2005 regarding the handling and storage of classified material and security clearances, while working as a contract linguist for Titan Corporation, in connection with an Army investigation of the possible mishandling of sensitive work-related materials (of which he was cleared of any wrongdoing) [Exhibit 6, hereinafter "2005 Statement"].

Government Motion at 1-2. The proposed exhibits are not admissible because they are not relevant, not related to an issue other than propensity, and more prejudicial than probative.

Argument

Under Rule 404(b), "other acts" evidence "is *not* admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b) (emphasis added).[3] "The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." *Huddleston v. United States*, 485 U.S. 681, 686 (1988). This rule is based on the presumption of innocence and the recognition that "[i]t is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is.'" *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980) (citation omitted). "The exclusion of bad acts evidence is founded not

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[3] Rule 404(b) provides in full:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of an y such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b).

on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds." *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985).

Although the D.C. Circuit has described Rule 404(b) as a rule of inclusion rather than exclusion, *United States v. Bowie*, 232 F.3d 923, 929 (D.C. Cir. 2000), it has also "repeatedly emphasized the narrow scope of the 'bad acts' evidence exceptions under Rule 404(b) . . . and the continuing applicability of the Rule 403 limitation on unduly prejudicial evidence even if an exception is satisfied," *United States v. Nicely*, 922 F.2d 850, 856 (D.C. Cir. 1991). To satisfy Rule 404(b), the evidence of other crimes or acts must be (a) relevant under Federal Rule of Evidence 401, (b) related to "a matter in issue other than the defendant's character or propensity to commit crime," and (c) "sufficient to support a jury finding that the defendant committed the other crime or act." *Bowie*, 232 F.3d at 930. "[S]uch evidence is *never* admissible unless it is 'necessary' to establish a material fact such as 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" *United States v. Shelton*, 628 F.2d 54, 56 (D.C. Cir. 1980) (emphasis added) (footnote omitted).

Even if the evidence at issue is offered for a legitimate, nonpropensity purpose under Rule 404(b), it must be excluded pursuant to Rule 403 if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. For the purposes of Rule 403, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the

factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). The D.C. Circuit has recognized that there are "unique dangers of unfair prejudice associated with evidence of other bad acts," *United States v. Lavelle*, 751 F.2d 1266, 1275 (D.C. Cir. 1985), and that such evidence creates "enormous danger of prejudice to the defendant" because "juries are prone to draw illogical and incorrect inferences from such evidence," *Shelton*, 628 F.2d at 56. *See also Bowie*, 232 F.3d at 931 ("Evidence of other crimes or acts having a legitimate nonpropensity purpose undoubtedly may contain the seeds of a forbidden propensity inference" and thus may be barred under Rule 403).

Courts should also exclude "other acts" evidence pursuant to Rule 403 if its introduction will create a "trial within a trial," *United States v. Aboumoussallem*, 726 F.2d 906, 912 (2d Cir. 1984) (quotation marks omitted), or if the government is likely to spend more time "dealing with alleged wrongful conduct not covered by the indictment than . . . dealing with the incidents" for which the defendant is charged, *United States v. Jones*, 570 F.2d 765, 769 (8th Cir. 1978). *See also United States v. Dennis*, 625 F.2d 782, 796-97 (8th Cir. 1980) ("Confusion of the issues warrants exclusion of relevant evidence if admission of the evidence would lead to litigation of collateral issues.").

The government bears the burden of demonstrating the relevance of the "prior bad acts" it seeks to have admitted. *See United States v. Hudson*, 843 F.2d 1062, 1066 (7th Cir. 1988); *United States v. Hogue*, 827 F.2d 660, 662 (10th Cir. 1987). The evidence at issue here is not admissible pursuant to Rule 404(b), because it is unreliable and irrelevant to any material issue other than propensity and is more prejudicial than probative.

I. HOOVER CORRESPONDENCE AND DOCUMENTS.

The government seeks to admit "evidence of letters, post-marked envelopes, and materials sent between the defendant and the Hoover Institution between 2005 and 2012, including three documents with overall classifications of Secret that agents located at the Hoover Institution." Government's Motion at 1, Exhibits 1-5 ("Hoover Correspondence and Documents"). The government broadly claims that this evidence is relevant to "demonstrate Mr. Hitselberger's knowledge of classified material, including how to read classified markings, and how to properly handle classified materials," and further contends that "evidence of defendant's prior retention of classified materials from his time in Iraq, and his dissemination of those materials to the Hoover Institution, show his intent in removing classified documents." Government Motion at 13. These arguments suggest that Mr. Hitselberger is charged with the unlawful removal or retention of classified materials, in violation of 18 U.S.C. § 1924 (a misdemeanor offense). He is not. Instead, the government has chosen to charge Mr. Hitselberger with retaining national defense information, in violation of § 793(e), and removing public documents, in violation of § 2071(a). These charges require no proof that the documents at issue were classified. Section 793(e) requires proof that the documents contained national defense information, and Section 2071(a) requires proof that the documents were public records. The classified nature of the documents is completely irrelevant to § 2071(a), which applies to any public document. With regard to § 793(e), the government has no burden to prove that Mr. Hitselberger knew that the documents were classified or knew that he was mishandling classified information. While the classified nature of the charged documents may support the government's claim that they contained national defense information, merely demonstrating that

the documents were classified does not prove this -- under § 793(e), the government must prove that Mr. Hitselberger knew that retain the charged documents could injure the United States or aid a foreign nation. And evidence that Mr. Hitselberger may have sent documents that at some point were labeled classified to the Hoover Institution years before the charged offenses is immaterial to whether or not he retained national defense information as alleged in the indictment.

The government argues that the prior unlawful possession of something is relevant to the charged unlawful possession of the same thing, but here the prior possession the government seeks to introduce is not the same thing. The government's argument that "proof of his prior possession of classified materials is highly probative" of his constructive possession of the documents at issue in this case is misleading because it erroneously conflates the possession of classified documents with the possession of national defense information. Significantly, the government does not claim that the classified documents allegedly found at the Hoover Institution contained national defense information, nor could they. In a supplemental sealed pleading, undersigned counsel will submit to the Court the full classified documents, demonstrating that they do not contain national defense information. Thus, even if Mr. Hitselberger sent these documents and they were classified when they were sent, he did not commit a violation of § 793(e) by doing so. Thus, the evidence is not admissible as a prior "unlawful" possession -- there was no prior unlawful conduct. The government should not be permitted to admit the evidence to falsely suggest otherwise.

The government also argues that the proposed evidence would "rebut arguments that the defendant did not realize that the materials he printed and removed from the RAA were

classified; or that he did not intend to retain the documents for his own possession or further dissemination, but rather intended to later return the documents to their rightful place, deliver them to a person or place authorized to receive the material, or dispose of the material once he was through reviewing it." Government Motion at 14. The government need not introduce the proposed evidence for this purpose because these are not defenses to the charged offenses. Proof of the defendant's knowledge that the materials were classified is not an element of the offense (nor is proof that the documents were classified), and therefore lack of knowledge of the classified nature of the documents is not a defense. Similarly, the government need not prove anything about what Mr. Hitselberger intended to do with the documents. He is not charged with disseminating national defense information. He is charged only with retaining it. Thus, what he intended to do with it is immaterial.

Because the proposed evidence is not relevant to any material issue, it must be excluded. The admission of this evidence would only serve to confuse the jury and suggest that because Mr. Hitselberger allegedly mishandled classified documents supposedly obtained when he was in Iraq, he retained national defense information when he was in Bahrain. That is precisely the inference that Rule 404(b) prohibits.

The admission of this evidence would put Mr. Hitselberger in the position of facing a trial of the Iraq allegations within the trial of the charged offense relating to Bahrain. This would be particularly prejudicial because of the nature of the evidence and the age of the allegations which would make it nearly impossible for Mr. Hitselberger to gather the necessary evidence to fight the suggestion that he mishandled classified information from Iraq.

In addition to seeking to introduce the three documents with classification labels allegedly found at the Hoover Institution, the government seeks to introduce letters and emails that include potentially prejudicial references and have no relevance to the instant matter. Pages 2-4 of Exhibit 1 are purportedly a letter from Mr. Hitselberger to "Mr. Bauer," indicating that Mr. Hitselberger was sending a book written by Sayyid Muqtada al-Sadr to Mr. Bauer. The contents of this letter have absolutely no relevance to the instant matter and the government's motion does not specifically refer to the letter or explain why it should be admitted. As the letter describes, Sayyid Muqtada al-Sadr fought against U.S. forces in Iraq and someone found in possession of the book may be accused of sympathizing with Sadr. The introduction of this letter could cause jurors to erroneously infer that Mr. Hitselberger sympathized with Sadr.

Page 5 of Exhibit 1 is also purportedly a letter from Mr. Hitselberger to Mr. Bauer, discussing handbills found in a trash can, surmising that the handbills were printed by U.S. intelligence officials as a ruse, and criticizing the U.S. translators. The content of this letter is at best completely irrelevant and at worst could erroneously imply some anti-American sentiment. Pages 6 and 7 of Exhibit 1 also contain irrelevant discussions of materials sent to the Hoover Institution, which could erroneously imply that Mr. Hitselberger somehow was doing something wrong by sending materials to Hoover. Similarly, Exhibit 5 contains emails with irrelevant discussions of issues unrelated to this case. The government offers no basis for the admission of the content of these letters and emails. Because the content of the letters and emails have no probative value, they should be excluded.

II. LETTER DATED JULY 8, 2005.

The government specifically seeks to admit a letter dated July 8, 2005, addressed to "Mr. Bauer." According to the government, Mr. Hitselberger wrote this letter and sent it along with a classified document to Mr. Bauer at the Hoover Institution. The letter notes that the document is marked "secret."

As with the other documents relating to Iraq, the introduction of this letter will require a trial within the trial, but Mr. Hitselberger will have no means of contesting the allegation that he improperly sent the document to the Hoover Institution. The government does not suggest that national defense information was retained or disseminated in connection with this letter, and thus, seeks to use this information to argue or suggest that Mr. Hitselberger previously mishandled classified information, without burdening itself with the need to prove that this happened, which it could not do. The letter itself explains that the documents enclosed with the letter were found with news reports in a public area. The documents, regardless of their markings, were not classified at that point. However, given the fact that this occurred more than eight years ago in a war zone, Mr. Hitselberger will have no means of locating witnesses to demonstrate where the document was found, why it was no longer classified, and who left the document for public disclosure. Allowing the government to admit this document and make a negative (and false) inference is particularly prejudicial where the government would have no obligation to prove that the document contained national defense information or even was in fact classified at the time it was sent to the Hoover Institution. The government seems to put great weight on the fact that the letter includes a reference to the declassification date on the document, inferring that the document must have been classified until that date. That, of course, is not the

case. Every intelligence report is required to have a default declassification date, and any intelligence report can be declassified before the default date, as this document was.

III. 2005 STATEMENT.

The government seeks to admit a document dated "12Mar05" and labeled "Statement of James Hitselberger." According to the government, this 2005 statement was given by Mr. Hitselberger in response to an Army investigation "triggered by an incident during which the defendant was observed working on an unclassified computer with sensitive materials including detainee profiles and images." Government Motion at 10. The government acknowledges that Mr. Hitselberger was cleared of any wrongdoing in relation to the incident and does not seek to introduce evidence of this incident. Nonetheless, the government wants to disparage Mr. Hitselberger's character by introducing the letter which is an obvious response to suggestions of wrongdoing. The government, therefore, would be permitted to attack Mr. Hitselberger's character by introducing mere allegations, without any proof of wrongdoing. This evidence is not only prejudicial, but is not relevant to any material issue.

The government claims that it seeks to introduce the 2005 Statement only as "an admission concerning knowledge of the proper handling and storage of classified information."[4]

[4]The government indicates that it "would be willing to characterize the defendant's statement as being made during the course of a general investigation into security practices at the forward operating base in Iraq," rather than a response to an investigation of Mr. Hitselberger, and claims that "in this context, Hitselberger's statement is not Rule 404(b) evidence, but rather an admission concerning knowledge of the proper handling and storage of classified information." Government Motion at 11. Such a characterization not only would be a false representation to the jury, which the Court should not condone, but also would not successfully hide the true nature of the inquiry. The 2005 Statement refers to "the search of [Mr. Hitselberger's] living space" and the "seizure of items in it." The letter obviously is a defensive statement in response to allegations of wrongdoing and there will be no way to hide that fact from the jury if the evidence is introduced.

Government Motion at 11. This claim is curious at best. To the extent the letter refers to Mr. Hitselberger's knowledge of the proper handling of documents, it demonstrates only his commitment to properly maintaining classified information and is exculpatory. If anything, the document demonstrates Mr. Hitselberger's knowledge that while there are rules for handling sensitive materials, the military does not always strictly adhere to these rules. This evidence simply does not supports the government's asserted purpose for using the evidence. The only value of this evidence to the government -- and presumably the true reason it seeks to use the evidence -- is to suggest that Mr. Hitselberger has a bad character, which is strictly prohibited under Rule 404(b).

The proper handling of information in a war zone during the Iraq war is not relevant to the proper handling of information on the base in Bahrain, which is what is at issue here. The letter discusses the proper handling of information obtained from Iraqis for use by coalition forces during the war, not the standard practices for handling classified documents in a secured area of a Naval base. The government's evidence that Mr. Hitselberger knew the proper procedures for handling classified information on the base will come not from this letter regarding events that occurred in 2005, but from its evidence of the training Mr. Hitselberger received prior to and after he arrived in Bahrain, which the government has set forth in great detail. *See* Government's Motion at 3; Government's Memorandum in Support of Detention at 4-5.

To the extent that Mr. Hitselberger's statements regarding his conscientious efforts to maintain the security of sensitive Iraqi materials and information during the Iraq war have any relevance to this case, that relevance is far outweighed by their prejudicial effect. The letter is a

four-and-a-half page single-spaced document that includes references to: (1) the search of Mr. Hitselber's quarters and the seizure of items from him; (2) Mr. Hitselberger's forced transfer to a new military unit; (3) military officials drawing negative inferences from Mr. Hitselberger's knowledge of Arabic; (4) a military officer inferring that Mr. Hitselberger had a cell phone and was "working 'on the other side' from within the base" during the Iraq war; (5) military officials drawing negative inferences from Mr. Hitselberger's desire to visit a friend in Kuwait; and (6) military officials suggesting that Mr. Hitselberger improperly possessed military items. None of this information is relevant to the charged offenses, but it paints a negative picture of Mr. Hitselberger, and some jurors could falsely assume that the suggestions of impropriety by military officials in Iraq had some basis in fact. There is no reason for the jury to hear of these disputes other than for the government to falsely imply that Mr. Hitselberger had anti-U.S. sentiments. There is no evidence that Mr. Hitselberger ever had any intention of disclosing information to enemies of the United States or had any nefarious purpose for allegedly retaining national defense information. The admission of the 2005 Statement would create "enormous danger of prejudice to the defendant" because "juries are prone to draw illogical and incorrect inferences from such evidence." *Shelton*, 628 F.2d at 56; *see also Bowie*, 232 F.3d at 931.

Conclusion

For the foregoing reasons, the Court should deny the government's motion and exclude the use of the proposed Rule 404(b) evidence.

Respectfully submitted,

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