IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 12-231 (RC)**
	:	
v.	:	
	:	
JAMES F. HITSELBERGER,	:	
	:	
Defendant.	:	

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNTS FOUR, FIVE, AND SIX OF THE SUPERSEDING INDICTMENT

Introduction

The defendant, James Hitselberger, has moved to dismiss Counts Four through Six of the Superseding Indictment, which charge him with unlawfully removing public records in violation of 18 U.S.C. § 2071(a). He contends that the allegations in the Superseding Indictment do not set forth a violation of the statute. In doing so, Hitselberger mischaracterizes what the Superseding Indictment charges – he incorrectly claims that the indictment charges him with removing copies of public records – and he seeks to have the Court graft onto the statute an element that is nowhere present in its plain language, claiming that the "papers" and "documents" he is charged with having removed must be originals. Hitselberger candidly acknowledges that the only court within a generation – and, in fact, the highest court ever – to consider the same objection to a similar charge under § 2071(a) has rejected it. Moreover, whether Hitselberger's conduct falls within the statute's prohibitions is a factual question for trial and is not an appropriate matter for resolution under Rule 12(b)(2), Fed. R. Crim. P., where the

government does not concede there are undisputed facts and objects to a pretrial resolution of the sufficiency of its evidence. The Court should therefore deny Hitselberger's motion to dismiss.

Background

As set forth in greater detail in other pleadings, Hitselberger was a contract linguist at the Naval Support Activity (NSA) in Bahrain from September 2011 through April 11, 2012. On April 11, 2012, he was caught removing two classified reports from the secure facility in which he worked. A subsequent search of his quarters led to the discovery of a portion of a classified report, dated March 8, 2012, from which the headers and footers revealing the level of classification had been removed.

On October 25, 2012, a grand jury in the District of Columbia returned a two-count indictment charging Hitselberger with violating 18 U.S.C. § 793(e) (illegal retention of national defense information). The first count related to the documents Hitselberger removed from the secure facility on April 11, 2012; the second count related to the altered report found in his room. On February 28, 2013, the grand jury returned a superseding indictment. It added a third 793(e) count, which pertained to a classified report to which Hitselberger was given access on or about February 13, 2012, and which he later sent to the Archives of the Hoover Institution. The Superseding Indictment also added three counts charging violations of 18 U.S.C. § 2071(a) (unlawful removal of public records). Each of these counts involves the same documents as the corresponding 793(e) counts.

At trial, the government's evidence would show that the U.S. military creates these reports in electronic format on a secure, classified computer network and maintains them on the network. The principal means for persons who are authorized to see these reports to access them is through this network.

Argument

I. Whether the Documents and Papers the Superseding Indictment Charges Hitselberger with Having Removed Are within the Statutory Definition Is a Factual Question and It Is Not Subject to Resolution via a Rule 12(b)(2) Motion to Dismiss

At the outset, it is important to recognize that Hitselberger makes a fundamental error in stating that he "is alleged only to have taken *copies* of records . . . ." Motion at 2 (emphasis in the original). To the contrary, the Superseding Indictment makes no such claim. Rather, the operative charging language in Counts Four through Six is that Hitselberger "willfully and unlawfully removed, took, and carried away papers and documents . . . ." On its face, the Superseding Indictment, which tracks the language of the statute, properly charges a violation of § 2071(a). Indeed, Hitselberger has made no claim that these counts are deficient as pled. Rather, he takes issue with the evidence underlying the counts and with whether that evidence is sufficient to support convictions. However, a motion under Rule 12(b)(2) is not a proper vehicle for testing the sufficiency of the government's proof.

"There is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context." *United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005). In *Yakou*, the defendant moved pursuant to Rule 12(b)(2), to dismiss the indictment, which charged him with violating the brokering provision of the Arms Export Control Act, 22 U.S.C. § 2778(b)(1)(A)(ii)(I), on the ground that the statute only applied to U.S. persons (which included lawful permanent residents) and that he had abandoned his status as a lawful permanent resident. 428 F.3d at 243. The government did not object to the district court's resolving this issue before trial and participated in the pretrial adjudication by proffering undisputed facts. *Id.* at 246. The D.C. Circuit ruled that, where the government does not object to a pretrial challenge

to the factual sufficiency of an indictment, the district court may resolve a motion to dismiss counts of the indictment under Rule 12(b)(2). *Id*. at 247.

Here, the government does object to the summary judgment type of procedure Hitselberger is seeking. As noted above, the Superseding Indictment properly alleges violations of § 2071(a) in Counts Four through Six. Hitselberger responds with a motion that relies on the factual assertion that the documents and papers he is charged with having removed are copies. The government disagrees with this claim, both factually and legally. That the U.S. military creates and maintains these reports in an electronic format on a secure computer network makes the issue of whether they fall within the statutory definition singularly unsuited for Rule 12(b)(2) resolution. *See Yakou*, 428 F.3d at 246 (Rule 12(b) authorizes courts to determine defenses, objections, and requests that do not require "trial of the general issue," which has been defined as "evidence relevant to the question of the guilt and innocence.") (citation omitted). The government is entitled to seek to prove at trial – and it believes it can prove at trial – that these materials fall within the statutory definition, even if the Court adds the gloss that such papers and documents must be originals.

II. There Is No Requirement in 18 U.S.C. § 2071(a) that the Papers or Documents a Defendant Unlawfully Removes Be Originals

In *United States v. Lang*, 364 F.3d 1210 (2004), the Tenth Circuit considered whether § 2071(a) applied only when the public record a defendant was charged with removing was the original.[1] The defendants in *Lang* were a husband and wife, and the wife worked in the clerk's office for the U.S. district court in Utah. 364 F.3d at 1212. Mrs. Lang took home a copy of a sealed affidavit for the installation of a tracking device to assist law enforcement in a narcotics

[1] In *Lang v. United States*, 543 U.S. 1108 (2005), the Supreme Court granted *certiorari*, vacated the judgment in *Lang*, and remanded the case for further consideration in light of the intervening decision in *United States v. Booker*, 543 U.S. 220 (2005). In *United States v. Lang*, 405 F.3d 1060, 1061 (2005), the Tenth Circuit reinstated its original opinion cited above, except for the sentencing issues affected by *Booker*.

investigation. *Id*. at 1212-13. She shared it with her husband, who then contacted one of the subjects of the affidavit and advised him that he was under electronic surveillance and that the police would be putting a tracking device on his car. *Id*. The FBI learned of these misdeeds through the wiretap on the target's phone. *Id.*

Among other offenses, the grand jury charged Mrs. Lang with violating § 2071(a), and the jury convicted her. On appeal, she argued that her conduct did not violate the statute because the sealed affidavit she removed was a copy, not the original. *Id*. at 1221. The Tenth Circuit rejected this interpretation of § 2071(a): "We find this argument without merit based on the text of the statute." *Id*. It concluded that any public document, be it a copy or an original, fell squarely within the statutory language. *Id*. Accordingly, "a copy of a government record itself functions as a record for purposes of § 2071." *Id*. at 1222. The court also noted that, as more government institutions were moving to electronic records, the distinction between original and duplicate records would be less crucial. *Id*., n.7.

One of the panel members in *Lang* dissented as to the court's resolution of the § 2071(a) challenge. Significantly, the dissenting judge raised the same arguments Hitselberger puts forth in his motion and relied on the same cases. *Compare* Motion at 2-5 *with Lang*, 364 F.3d at 1224-29. The majority was aware of these contentions. Through its holding, it rejected them.

Moreover, a careful reading of the three century-old cases on which Hiteselberger and the dissent in *Lang* rely in purportedly divining the intent behind § 2071(a) reveals that none of these decisions says anything about whether public records must be originals to fall within the statute, and any language suggesting such a statutory requirement is merely *dicta*.[2]

[2] Both Hitselberger and the dissent in *Lang* also invoke *United States v. Rosner*, 352 F. Supp. 915 (S.D.N.Y. 1972), as support for the conclusion that § 2071(a) requires proof that the records removed are originals. Because *Rosner*, in turn, relies heavily on the three late-19th, early 20th century decisions discussed above (*see* 352 F. Supp. at 919-22), the analysis of those cases likewise demonstrates why *Rosner* is not good authority.

In *United State v. De Groat*, 30 F. 764 (E.D. Mich. 1887), the defendants were convicted under a predecessor statute to § 2071(a) of taking federal internal revenue documents that a revenue collector had stored in a barn on his private property. The trial judge granted a judgment of acquittal because there was an absence of proof that the defendants knew that they were taking records that belonged to the United States. 30 F. at 765-67. As he observed:

> But it is plain that these ignorant men, belonging to the class of petty thieves that infest a large city, did not intend to destroy these papers as records of the United States. They had no motive to do that, and thought they were stealing old paper, private property, lying waste in the barn.

Id. at 766. *De Groat* otherwise says nothing about whether a record must be an original to fall within the statute.

Similarly, in *McInerney v. United States*, 143 F. 729 (1st Cir. 1906), the sole question was whether a defendant who had removed only a portion of a bound volume of naturalization records could be convicted under the predecessor statute to § 2071(a). The First Circuit answered that narrow question in the affirmative, but it had no occasion to consider whether copies of records fell within the ambit of the statute and expressed no view on the issue.

Finally, in *Martin v. United States*, 168 F. 198 (8th Cir. 1909), the defendant was an assistant to the one of the commissioners to the Five Civilized Tribes, working as an allotment clerk. 168 F. at 200. He took home over the weekend certain records from the commissioner's office and copied them. *Id*. at 201. He was convicted under a statute that made it unlawful for federal officers to fraudulently remove any records that were in their official custody. *Id*. at 200. The Eighth Circuit reversed the conviction on three grounds. First, it ruled that, as an allotment clerk, the defendant was not an "officer" within the meaning of the statute. *Id.* at 201-04. Second, it found that, because the records were not entrusted to the defendant, he could not be in custody of them. *Id.* at 204. Last, the Eighth Circuit found that the indictment was insufficient

because it had not pled the allegedly fraudulent intent with sufficient particularity. *Id*. at 205. The court also observed that it was hard to imagine what constituted the fraud when there was no harm to the government from the defendant's conduct. *Id*. at 205-06. But like *De Groat* and *McInerney*, *Martin* is silent as to whether the record in question had to be an original as opposed to a copy.

In sum, only one federal court of appeals – the Tenth Circuit in *Lang* – has ever directly addressed the issue of whether removal of a copy of a public document or paper violates § 2071(a). And it concluded that there is no requirement in the statute that the charged document or paper be an original, and it held that a copy satisfies the statutory definition.

Finally, both Hitselberger and the dissent in *Lang* take the *Lang* majority to task for relying on the conclusion in *United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1976), that a copy of a government document is as much a "record" for purposes 18 U.S.C. § 641 (theft of government property) as an original. *See* Motion at 5, *Lang* at 1227. Hitselberger contends that criminalizing the taking of a record under § 641 addresses a different government interest from that expressed in § 2071(a), which he contends, in part, is "interfering with the government's use of a record . . . ." Motion at 5. However, Hitselberger fails to articulate why different governmental interests underlying the two statutes mean similar, commonly understood terms like "record" or "document" must have different meanings under each law. He also ignores the harm that removal of a classified document in any form from a secure facility actually threatens to the "government's use of [that] record." *Id*. As for the *Lang* dissent's claim that the majority risked "a blurring of the lines between § 2071 and § 641" (364 F.3d at 1227), the dissent ignores how weak a tool § 641 can be in addressing the seriousness of an offense such as the removal of classified documents containing national defense information. Section 641 requires that the

value of items taken exceed $1000 before the crime becomes a felony. The valuation of national defense information contained within classified records is difficult, and § 2071, which has no such valuation element, provides the government with another option for holding a defendant such as Hitselberger accountable.

Conclusion

For the foregoing reasons, the Court should deny the defendant's Motion to Dismiss Counts Four, Five, and Six of the Superseding Indictment.

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Certificate of Service

I, Jay I. Bratt, certify that I served a copy of the foregoing Government's Memorandum in Opposition to Defendant's Motion to Dismiss Counts Four, Five, and Six of the Superseding Indictment by ECF on Mary Petras, Esq., counsel for defendant, this 10th day of May, 2013.

_____/s/_____
Jay I. Bratt