UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Mr. James Hitselberger, the defendant, through undersigned counsel, respectfully submits the following in reply to the Government's Memorandum in Opposition to Defendant's Motion to Dismiss Counts Four, Five, and Six of the Superseding Indictment [Dkt. # 61]. Counts Four, Five and Six charge violations of 18 U.S.C. § 2071(a) by unlawfully removing, taking and carrying away documents. Because the charged allegations do not constitute violations of § 2071(a), Mr. Hitselberger has moved to dismiss these charges. In an effort to avoid the obvious conclusion that the government's allegations do not constitute violations of § 2071(a), the government accuses the defense of mischaracterizing the charges and seeks to convince the Court that there is some factual dispute for a jury to resolve. The charges are set out in the indictment, and there is no factual dispute. For purposes of his motion, Mr. Hitselberger concedes every factual allegation made by the government with regard to the charged offenses. The issue before the Court is whether § 2071(a) criminalizes the conduct alleged by the government. It does not.

I. WHEN, AS HERE, THERE IS NO FACTUAL DISPUTE, FEDERAL RULE OF CRIMINAL PROCEDURE 12AUTHORIZES THE RESOLUTION OF A MOTION TO DISMISS.

The Superseding Indictment charges that Mr. Hitselberger "willfully and unlawfully removed, took, and carried away papers and documents . . . 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."[1] The government alleges that the charged "papers and documents" were reports attached to emails sent to Mr. Hitselberger. According to the government, "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." Gov't Opp'n 2. The government alleges that Mr. Hitselberger printed the reports at issue and removed them from a restricted access area on the base. For purpose of this motion, Mr. Hitselberger concedes these allegations.

Despite this lack of a factual dispute, the government claims that the Court cannot resolve Mr. Hitselberger's motion pretrial because the government does not "concede" that there is no factual dispute. The Court should reject the government's effort to avoid Mr. Hitselberger's substantive claim. The United States Supreme Court has interpreted the language of Federal Rule of Criminal Procedure 12 to permit pretrial resolution of a motion to dismiss the indictment when "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57,

[1]To constitute a violation of § 2071(a), the document must be removed (or concealed, mutilated, obliterated or destroyed) *or* taken and carried away with the intent to remove (or conceal, mutilate, obliterate or destroy). Thus, the indictment must be read as charging the removal of the records or the taking and carrying away of the records with intent to remove.

60 (1969);[2] *see also United States v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005) (recognizing that "the existence of undisputed facts obviated the need for the district court to make factual determinations properly reserved for a jury"). In opposing Mr. Hitselberger's motion, the government quotes *Yakou* for the proposition that "[t]here is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context." *Id.* at 247 (quoted in Gov't Opp'n 3). The government fails to note that the *Yakou* court followed that statement with: "Instead, Rule 12(b) of the Federal Rules of Criminal Procedure provides that '[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." *Id*. The court then affirmed the dismissal of an indictment based on a pretrial motion alleging insufficiency. *Id.* 251.

While the court in *Yakou* did not specifically address a situation in which the government objected to the district court's pretrial determination of a defendant's motion to dismiss, the court did not, as the government's argument suggests, hold that a motion to dismiss could be considered only when the government does not object. The issue is not whether or not the government objects, but whether or not there are disputed factual issues. Where there are no *factual* disputes and the defense concedes every factual allegation made by the government for purposes of the motion, the government should not be permitted to force a defendant (and the Court) to endure a trial under a statute that does not apply simply by refusing to "concede" that

[2]Rule 12 has been amended several times since *Covington* was decided. As of 1969, the authorizing language of Rule 12 was found in subsection (b)(1), which read: "Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion." *See Covington*, 395 U.S. at 60. The Advisory Committee Notes to the 1974 and 2002 amendments make clear that the change in wording was stylistic only and no change in practice was intended.

there is no factual dispute. *See United States v. Levin*, 973 F.2d 463 (6th Cir. 1992) (based on undisputed facts, affirming dismissal of all but 15 counts of 560 count indictment).

In *Levin*, the district court granted pretrial dismissal of a criminal indictment, over the government's objection, where "the undisputed extrinsic evidence" showed that the defendants could not, as a matter of law, have formulated the necessary criminal intent. 973 F.2d at 469-70. In its colloquy with the government at the hearing on the defendant's motion, the district court observed: "[I]f this is your evidence, it would be a directed verdict at the end, and I don't know why I have to sit through two or three weeks while you put on what we know the evidence will be. There doesn't seem to be a dispute of the facts in this case. It's an unusual criminal case in that sense." *Id.* at 468 n.1. Echoing the district court's sentiments and relying, *inter alia*, on the Supreme Court's decision in *Covington*, the Sixth Circuit affirmed, noting that, because "the operative facts . . . were undisputed[, . . .] a two or three week trial of the substantive criminal charges would not have assisted the district court or this court in deciding the legal issues" raised by the defendant's pretrial motion to dismiss." *Id.* at 467; *see also United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976) (upholding district court's pretrial dismissal of indictment because "[t]he facts surrounding the alleged offense were virtually undisputed and trial of the substantive charges would not substantially assist the Court in deciding the legal issue raised by the motion to dismiss the indictment").

In this district, courts routinely entertain pretrial motions to dismiss based on undisputed facts courts. *See, e.g.*, *United States v. Sunia*, 643 F. Supp. 2d 51 (D.D.C. 2009) (Walton, J.); *United States v. Naegele*, 367 B.R. 1 (D.D.C. 2007) (Friedman, J.); *United States v. Naegele*, 341

B.R. 349 (D.D.C. 2006) (Friedman, J.); *United States v. Hsia*, 24 F. Supp. 2d 33 (D.D.C. 1998) (Friedman, J.) (reversed on other grounds).

Here, there are no facts in dispute and thus no facts for a jury to find. The government does not proffer any fact to which Mr. Hitselberger is not willing to stipulate for the purposes of his motion.[3] The facts regarding the government's allegations are clear and the only issue raised for the Court to decide is whether those facts constitute a violation of § 2071. Therefore, consideration of Mr. Hitselberger's motion to dismiss is entirely appropriate. *See Covington*, 395 U.S. at 61 (when there is no "factual controversy," motion to dismiss appropriate before trial unless the government can "show[] a need for further factual inquiries"); *see also United States v. Smith*, 866 F.2d 1092, 1097 (9th Cir. 1989) (one of the purposes of Rule 12(b) is "conservation of judicial resources by facilitating the disposition of cases without trial").

In an attempt to manufacture a factual dispute, the government seizes on the defense's use of the word "copies" in its motion and implies that it intends to demonstrate that the printed reports were somehow "originals." To be clear, the government alleges that the documents were created electronically and does not (and will not) allege that Mr. Hitselberger destroyed the electronic version of the report or anyone's ability to access the report. The facts, as the government alleges them, are not in dispute. Whether a printed verison of an electronic report is a "copy" or an "original" is not a factual dispute for a jury to decide, but a question of semantics perhaps relevant to the legal issue of whether or not Mr. Hitselberger's conduct (as alleged by the

[3]Courts generally favor stipulations, as they "are entered into in order to dispense with proof over matters not in issue, thereby promoting judicial economy at the convenience of the parties." *See United States v. Montgomery III*, 620 F.2d 753, 757 (10th Cir. 1980) (quoting 9 J. Wigmore, Evidence §§ 2588-2597 (3d ed. 1940)).

government) constitutes a violation of § 2071. The dispute here is not a sufficiency of the evidence dispute -- Mr. Hitselberger does not claim that the government cannot prove its allegations. Rather the dispute is a legal question of whether the allegations constitute a violation of the charged offense.

II. THE CONDUCT ALLEGED BY THE GOVERNMENT DOES NOT CONSTITUTE A VIOLATION OF § 2071.

In arguing that a violation of § 2071 can occur even when the original document is not removed, the government relies primarily on *United States v. Lang*, 364 F.3d 1210 (10th Cir. 2004). As set forth in the defense motion, this Court should not rely on *Lang* because it fails to consider the plain language of the statute, the history of the statute, and every other case to have considered the statute. The government emphasis that the Tenth Circuit in *Lang* is the "only court within a generation," Gov't Opp'n 1, to consider this issue, suggesting that great weight should be given this decision.[4] To the contrary, "[i]t is telling that in the long history of § 2071, there does not appear to be a single reported case [other than *Lang*] in which the statute was successfully employed to prosecute conduct like that at issue in this case." *Lang*, 364 F.3d 1210, 1229 (Murphy, J., dissenting). The fact that the *Lang* decision stands alone does not support an argument that it is persuasive. Instead, the conclusion the Court should draw from this lack of authority is that the government's attempted use of § 2071 to reach Mr. Hitselberger's conduct is a unique and misguided effort to charge misdemeanor conduct as a felony violation. *Compare* §

[4]The government also inaccurately claims that the Tenth Circuit is "the highest court ever," Gov't Opp'n 1, to consider this issue. The Eighth Circuit also has considered the issue, finding that the statue does not criminalize a removal that "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 . . . ." *Martin v. United States*, 168 F. 198, 204 (8th Cir. 1909).

2071 *with* 18 U.S.C. § 1924 (unauthorized removal of materials containing classified information misdemeanor offense). The history of the statute and the weight of the authority interpreting it simply does not support such overreaching.

The government also suggests that the numerous cases supporting Mr. Hitselberger's position are not good authority because they date back late 1800 and early 1900 hundreds. *See*, *e.g.*, *McInerney v. United States*, 143 F. 729 (1st Cir. 1906); *Martin v. United States*, 168 F. 198 (8th Cir. 1909). The government ignores the fact that the statute was enacted in 1853, and these cases soundly assess the purpose of the statute.

Moreover, the Court need look no further than the plain language of the statute to determine its purpose. The government focuses on copy versus original, but the language of the statute requires the focus to be on whether the defendant's conduct deprived the government of use by "concealing, removing, utilizing, obliterating, or destroying." Section 2071 applies to an individual who "conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, *with the intent to do so* takes and carries away any record . . ." Thus, the focus is not the taking and carrying away of information, but on the taking of a record from the public record by concealment, removal, mutilation, obliteration or destruction or with the intent to conceal, remove, mutilate, obliterate or destroy.

While the government suggests that *Lang* is well reasoned, *Lang* did not address the issues presented in Mr. Hitselberger's motion regarding the purpose of the statute and the distinction between § 2071 and theft statutes. Notably, the decision in *Lang* was split with a strong dissent that correctly found that "[t]he plain language of § 2071(a), verified within its historical context, demonstrates that it was intended to criminalize the obliteration, destruction,

or theft of documents from the public record, rather than the disclosure of the information contained in those documents." *Lang*, 364 F.3d at 1224 (Murphy, J., dissenting). As Judge Murphy noted, § 2071 is one of six provisions in chapter 101 of title 18, that relate to either "(1) the concealment, removal, mutilation, or falsification of government records or reports, or (2) the failure by government officials to file reports as required by law." *Id.* at 1225. This "placement in chapter 101 with other provisions relating to the accuracy of the record of government affairs, [demonstrates] that § 2071 was designed for the narrow purpose of criminalizing the obliteration of information from the record of public affairs." *Id.*

As the dissent in *Lang* noted, even the government did not advocate the rule adopted by the *Lang* court that the removal of a photocopy is always a violation of § 2071. *Id.* at 1227. Instead, the government argued that the removal of a photocopy would constitute a violation only when the record's secrecy was the value of the record. The government hints at a similar argument here, suggesting that because the document was classified, the taking somehow fit within § 2071, because it "threatens" the government's use of the record. Gov't Opp'n 7. Section 2071 does not criminalize *all* conduct that threatens the government's use of its records. The government's argument would criminalize conduct that did not even require the copying of a record -- if a defendant memorized the content of a classified record and disclosed it, the same loss would occur to the government. As the dissent in *Lang* noted, courts have no authority to rewrite criminal statutes to suit the government, and this argument seeks to rewrite the statute to criminalize the disclosure of secret information. These facts are not within the plain language of § 2071. Rather, removal of classified information -- that does not obliterate information from the public record -- is criminalized under 18 U.S.C. § 1924 (prohibiting unauthorized removal of

materials containing classified information), and, when national defense information is involved, under 18 U.S.C. § 793.[5]

Conclusion

For the foregoing reasons and the reasons set forth in Mr. Hitselberger's motion, the Court should dismiss Counts Four, Five and Six of the Superseding indictment.

Respectfully submitted,

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[5]The government complains that 18 U.S.C. § 641 would be "weak tool" to use to prosecute cases such as this because it "requires that the value of items taken exceed $1,000 before the crime becomes a felony." Gov't Opp'n 8. That Congress has chosen to make the conduct alleged -- removal of classified information -- a misdemeanor under § 1924 is not a valid basis for the government to misapply another statute simply to obtain a felony conviction.