IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	FILED IN CAMERA AND UNDER SEAL WITH THE COURT SECURITY OFFICER OR HER DESIGNEE
v.	)	
	)	**CRIMINAL CASE NO. 1:05CR225**
STEVEN J. ROSEN and KEITH WEISSMAN,	)	**The Honorable T.S. Ellis, III**
Defendants.	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS STEVEN J. ROSEN'S AND KEITH WEISSMAN'S MOTION TO DISMISS THE SUPERSEDING INDICTMENT

Defendants Steven J. Rosen and Keith Weissman, per the Court's invitation at the March 24, 2006, Motions Hearing, respectfully submit the following Supplemental Brief in support of their motion to dismiss the Superseding Indictment, filed with the Court on January 19, 2006 ("defendant's Opening Brief"). As the hearing made clear, the government has no legitimate answer to the Court's questions as to the overbreadth and vagueness issues posed by this prosecution, and serious constitutional infirmities continue to require dismissal of the Superseding Indictment in this case.

SUMMARY OF ARGUMENT

This Brief addresses only the specific issues of concern identified by the Court during the Motions Hearing. First, this Brief will set out why a strict scrutiny analysis is applicable to the First Amendment challenges at issue here, and will detail why the statute is both unconstitutional as applied, and overbroad on its face, under the appropriate First Amendment standard. The notion advanced by the government that the First Amendment's Petition Clause stands on some lesser constitutional footing than the free press or free speech guarantees is

entirely meritless; to the contrary, the Petition Clause lends even greater support for the conclusion that the statute is unconstitutional.

Second, this Brief will address the Court's concerns about the vagueness of 18 U.S.C. § 793(e) per the *Lanier* "fair notice" requirement. In particular, the Brief will answer the various hypotheticals posed by the Court during the Motions Hearing and demonstrate how those hypotheticals prove that the statute cannot comport with due process. The government's position that the Court can be reassured by reliance on prosecutorial discretion as a cure for an otherwise vague statute is both untenable as a matter of law, and, in fact, spotlights the very vagueness of the statute.

Third, this Brief will address the textual question raised by the Court. As set forth in the Opening Brief and the Reply Brief, the constitutional issues in this case can be avoided if the Court does not accept the government's reading that § 793 applies to oral information or to non-government officials in these circumstances.

ARGUMENT

I. Strict Scrutiny Compels a Finding that the Statute Violates the First Amendment as Applied

The defendants' Opening Brief raised two distinct First Amendment claims: (1) that the statute violates the First Amendment as applied to oral conversations of non-government officials of the kind in this indictment and (2) that the statute, because it reaches a substantial amount of protected speech, is unconstitutionally overbroad. During the Motions Hearing, the Court asked "[b]ut assuming that the First Amendment attacks require strict scrutiny, then how in the world does this statute survive?" *See* Transcript of March 24, 2006 Motions Hearing [hereinafter "T."] at 70. The Supreme Court has suggested that it does not:

> It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas. When First Amendment compliance is the point to be proved, the risk of non-persuasion -- operative in all trials -- must rest with the government, not with the citizen.

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 818 (2000) (Kennedy, J.).

The Court quite correctly opined that strict scrutiny is required here. *See* T. at 60-61.[1] As set forth in the defendants' Opening Brief at p. 42-43, the Superseding Indictment sets forth a theory of criminality based solely on oral communications -- i.e. speech. These defendants' guilt or innocence under § 793 will turn on whether the words that they said constitute a crime. As the Court is aware, the answer to that question itself depends solely on the content of their discussions, and whether that content consisted of national defense information.

A. Section 793 is a Content-Based Regulation of Speech

Because it imposes liability based solely on the content of the communications, if it reaches oral communications at all, § 793(e) is a content-based regulation. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642-43 (1994). Only if a law is justified without reference to the content of the regulated speech can it be said to be content-neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Since section 793 turns on whether the content of a communication is "information relating to the national defense," it cannot be said to be content-neutral. A statute can be content-based even if not viewpoint-based, or even if

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[1] The government's response to the Opening Brief did not contest the applicability of a strict scrutiny analysis. While the government changed course and claimed during oral argument that strict scrutiny was not applicable, it offered the Court (and there is) no legal basis for that position.

enacted for a content-neutral purpose. *Turner*, 512 U.S. at 642-43.[2] The case law is clear that if the speech in question is defined by its content, then it the regulation at issue is content-based. *Playboy Entertainment*, 529 U.S. at 811.

Nor can there be any real dispute (as the Court's questions confirmed) that this case involves speech, since the government has premised its theory of culpability on the words spoken by the defendants. During oral argument, the government attempted to convert any speech into conduct by finding a label to turn talking into some other verb. It suggested that this case involved conduct because "we're talking about a disclosure, which is conduct . . . not speech." T. at 70. This argument is flatly wrong. First, as the Court noted, the central issue in this case is whether the words spoken by and to the defendants contained "national defense information," an issue which turns on the content of the communications. Second, the Supreme Court in *Bartnicki* expressly rejected the government's argument, finding that the disclosure of a tape recording constitutes "speech" not "conduct" for First Amendment purposes:

> It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of the recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of "speech" that the First Amendment protects. As the majority below put it, "[i]f the acts of 'disclosing' and publishing information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct."

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[2] *See also Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002) (state prohibition on statements by candidates in judicial elections content-based even though not limited to particular viewpoints); *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (Opinion of O'Connor, J.) (regulation is content-based even if not viewpoint-based because the "First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic").

Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) (emphasis added). The point here is that while the act of talking always entails some conduct, when the purpose is to provide the listener with the content of the words, the law categorizes that act as "speech." There can be no doubt that under the case law, this case is about speech, not conduct.

B. Strict Scrutiny Applies To The Prosecution Of This Case

A content-based law that restricts speech or seeks to limit what speech is permissible can only pass First Amendment muster if it satisfies strict scrutiny. *See Playboy Entertainment*, 529 U.S. at 813.[3] Government action that stifles speech on account of its message contravenes the "essential right" protected by the First Amendment, a right upon which "[o]ur political system and cultural life rest.. . ." *Turner Broadcasting System*, 512 U.S. at 641. Accordingly, the Supreme Court has directed courts to apply "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content." *Id.*[4]

To satisfy strict scrutiny, a statute must be "narrowly tailored to promote a compelling Government interest." *Playboy Entertainment*, 529 U.S. at 813. To be "narrowly

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[3] The fact that the ostensible justification for the law is national security does not save this prosecution. The Supreme Court has stated clearly that when defining the border between individual freedoms and state power, it is the character of the individual right, not the nature of the state's limitation on that right, that determines what standard applies. *Thomas v. Collins*, 323 U.S. 516, 529 (1945). The government cannot diminish rights that are the foundation of our republican form of government simply by trying to wrap itself in the current heightened sense of national security.

[4] It is notable that even though the Supreme Court in *Bartnicki* described the regulation at issue as content-neutral, the dissent was quick to observe that the Court still applied strict scrutiny in its analysis. *See Bartnicki*, 532 U.S. at 544 (Rehnquist, C.J., dissenting); *see also Bowley v. City of Uniontown Police Dep't.*, 404 F.3d 783, 787 (3d Cir. 2005) (applying strict scrutiny to regulation prohibiting disclosure of juvenile law enforcement records). If strict scrutiny was applicable in *Bartnicki* and *Bowley*, it is certainly the correct standard here.

tailored," the government must show that the statute "does not unnecessarily circumscribe protected expression." *Republican Party of Minnesota*, 536 U.S. at 775 (internal cit. omit.). The question is not whether the regulation serves the government's asserted interest at all, but whether it is "narrowly tailored" in this fashion. *Id.* at 777 n.7. If a less restrictive alternative would serve the government's purpose, the legislature must use that alternative. *Playboy Entertainment*, 529 U.S. at 813. As noted above, the Supreme Court has stated that it will be "rare" that a regulation can ever meet this standard, and that the burden of persuasion falls on the government. *Id.* at 818.

C. Strict Scrutiny Cannot Be Satisfied Here

The application of § 793 to oral communications by persons outside of government cannot withstand strict scrutiny. This is for a multitude of reasons. As an initial matter, the Court correctly noted that none of the prior cases in this circuit addressing constitutional challenges to § 793 control here, since none of those cases dealt with the alleged transmission of oral information by persons outside government. T. at 63; Opening Brief at 44.[5]

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[5] At oral argument, the government contended that "every court that has considered an overbreadth challenge to this statute has decided that the statute is not fatally overbroad." Tr. at 63. As the Court noted, each of the cases initially identified by the government in support of this proposition were cases involving documents, not oral communications. The only case that the government identified as possibly involving oral communications was *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987). T. at 64. *Pelton*, however, is distinguishable at every level and does not support the government's assertion. First, Pelton was a former NSA employee who was convicted under section 794 -- not section 793 -- for disclosing classified information obtained by him during the course of his government employment. *Id.* at 1069-70. Second, contrary to the government's claim, the *Pelton* court did not address or make clear that the information that Pelton disclosed was oral. Third, *Pelton* did not consider the constitutionality of section 794 under the First Amendment, the overbreadth doctrine, or the

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1. Substantial Speech Clause and Petition Clause Rights are Unnecessarily Compromised by the Application of Section 793 to this Case

During oral argument, the Court asked the government an important question: whether a prosecution of members of the press would be different from the prosecution of members of a foreign policy lobbying organization. T. at 52. Looking for any answer that could distinguish this prosecution from the case law, the government's attorneys made the astounding statement that all First Amendment rights are not of the same stature. *Id.* This claim is incorrect, and reveals a profound misunderstanding by the government of the extent of the protected First Amendment rights that are "unnecessarily compromised" (to use the strict scrutiny formulation) by the application of section 793 to this case.

It is well-established that while members of the press have an important place in a free society, ordinary citizens enjoy the same First Amendment rights. *See Bartnicki*, 532 U.S. at 525 n.8 (drawing no distinction for First Amendment purposes between members of media and their private citizen sources); *Cooper v. Dillon*, 403 F.3d 1208, 1212 n.3 (11th Cir. 2005). The Supreme Court has long held that the various expression freedoms enumerated in the First Amendment are "cut from the same cloth," "inspired by the same ideals of liberty and democracy," and are "inseparable." *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985) (*citing Thomas v. Collins*, 323 U.S. 516, 530 (1945)).[6] The government cannot therefore distinguish

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void for vagueness doctrine. *Id. Pelton*, therefore, offers no support for the government's claim.

[6] "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are

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between the press and the defendants for purposes of the strict scrutiny analysis in this case. Indeed, as discussed in the defendant's Opening Brief, *Bartnicki* drew no distinction between the press and private citizens. Despite its vague invocation of prosecutorial discretion in response to the Court's question, if the government's broad reading of 793 is upheld, there is no limiting legal principle that would preclude its application to the press.

The defendants' Opening Brief explains at length how the alleged speech in this case stands at the core of the First Amendment Speech Clause, as it constitutes political speech by persons acting on behalf of a political organization. *See* Opening Brief at 40 *et seq.* Indeed, this case involves not only political speech, but political speech in the area of foreign policy -- an arena of public life that is conducted behind closed doors and where "the only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry." *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

In addition, as discussed at the Motions Hearing, the alleged conduct in this case also squarely implicates the Petition Clause of the First Amendment. That clause guarantees "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. 1. The Supreme Court has described this right as implicit in the very idea of republican government, *see United States v. Cruikshank*, 92 U.S. 542, 552 (1876), and its historical roots long antedate the Constitution. *See generally McDonald*, 472 U.S. at 482 (outlining history of Petition Clause). Subsequent cases have made clear that the Petition Clause does not apply

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> cognate rights, and therefore are united in the First Amendment's assurance." *Thomas*, 323 U.S. at 530 (internal cit. omit.).

solely to petitioning the Congress; lobbying the Executive Branch is also within its ambit. *See, e.g., BE&K Construction Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (right to petition applies "in an attempt to persuade the legislature or the executive to take particular action . . . the right to petition extends to all departments of the Government").

Like other rights guaranteed by the First Amendment, courts have further held that the Petition Clause requires the protection of "breathing space" needed to preserve "the effective exercise of the rights that it protects." *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 933 (9th Cir. 2006). In the seminal case of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-43 (1961), for example, the Court extended a Petition Clause based immunity from liability not only to a party's direct communications with legislators, but also to its public relations campaign, finding that the aim of the latter conduct was to influence the passage of favorable legislation. The Supreme Court later extended this immunity (known as the *Noerr-Pennington* doctrine) to any conduct "incidental" to a valid effort to influence government action. *See Sosa*, 437 F.3d at 934 (citing cases). The Petition Clause required such a broad scope because, to exercise its petitioning rights meaningfully, a party may not be subjected to liability for "conduct intimately related to its petitioning activities." *Id.*

The alleged conduct in this case represents both direct petitioning of the Executive Branch on matters of foreign policy (a/k/a "lobbying," *see Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1183 (9th Cir. 2005)), as well as conduct well within the breathing space identified by *Noerr* and its progeny. According to the Superseding Indictment, Dr. Rosen and Mr. Weissman committed the alleged crimes by meeting government officials in public places, during regular business hours, and discussing matters bearing directly on U.S. policy in the Middle East. They then allegedly shared this information with others within the foreign

policymaking community -- namely think tank fellows, colleagues at AIPAC, foreign policy journalists, and foreign embassy officials. As the government is well aware, this is precisely how foreign policy is informed, verified, and properly influenced in the United States. All these acts are necessary, and, at a minimum "incidental," to the exercise of Petition Clause rights.

The right to petition the government is meaningless if one cannot engage in petitioning activity while a policy decision at issue is being decided. In the foreign policy arena, this means that a lobbyist must engage the government in discussions (and attempt to shape those discussions) before the policy has been adopted behind closed doors in the State Department, Defense Department, NSC, etc. As a result, the right to petition the government on foreign policy inherently includes the right to try to learn what the policy choices are and the reasons behind them, and to share information about these developments with fellow advocates and then back to the government officials in order to influence that policy. The government's theory in this case would subject this conduct to criminal sanction.

The practical effect of the application of section 793 to the circumstances of this case is that foreign policy lobbyists and journalists would be unnecessarily deterred from engaging in protected speech and petitioning. As the Supreme Court explained in another context, foreign policy advocates may well conclude that the safe course is to avoid controversy; as a result, protected speech and political activity would be blunted or reduced. *See Turner*, 512 U.S. at 654. Just as a free press "cannot be made to rely solely upon the sufferance of government to supply it with information," *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 104 (1979), political advocates cannot rely on the sufferance of government to decide when they can petition the

government for a better foreign policy. Substantial First Amendment rights are "unnecessarily compromised" by the application of section 793 to this case.[7]

2. The *Landmark -- Florida Star -- Bartnicki* Line of Cases Demonstrates that Sanctioning Third Parties for the Government's Failure to Preserve Confidential Information Does Not Satisfy Strict Scrutiny

In a line of cases dating from *Landmark Communications, Inc., v. Virginia*, 435 U.S. 829 (1978), through and including *Bartnicki*, the Supreme Court has consistently rejected legislative efforts to punish private citizens outside government for divulging or publishing confidential government information where, as here, there is no allegation that the third party obtained the information by illegal means (such as theft or bribery). While these cases have focused on litigants who were members of the press, the Court has not limited its reasoning to the press. *See Landmark Communications*, 435 U.S. at 837 (stating that legal question concerned "third persons . . . including the media" responsible for "divulging or publishing" confidential information) (emphasis added). Applied to this case, these precedents establish that section 793 as applied here cannot overcome strict scrutiny and compromise the protected First Amendment conduct described above.

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[7] "Although Congress agreed to statutes aimed at espionage, it specifically rejected a request of the President that it enact a criminal statute to punish the publication of defense information in violation of presidential regulations. *Concern for the public debate of defense issues* and distrust of a war-time president's powers converged to defeat the proposal to criminalize the publication of classified information. Similar attempts were unsuccessful immediately after World War II, in the late 1950's, in the mid 1960's, and in the 1970's."

United States v. Truong, 629 F.2d 908, 928 (4th Cir. 1980) (emphasis added).

In *Landmark*, the Court found that a state could not criminalize a non-participant for divulging confidential information about proceedings before a closed judicial review commission under a non-disclosure law. 435 U.S. at 838. The Court relied in great measure on a distinction between participants in the confidential process and nonparticipants, suggesting that whatever justifications may exist for applying the non-disclosure law to persons with original control over the confidential information, the same justifications cannot apply to persons outside of the process. *Id.* at 841. The same can be said for the distinction between persons within government who have responsibility for preserving the secrecy of national defense information, and persons outside the government who obtain such information from government officials in the course of their core First Amendment jobs. *See also Smith v. Daily Mail*, 443 U.S. 97, 103 (1979) (government must prove need to further state interest of "highest order" when seeking to suppress truthful information about matter of public significance).

In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), a police officer disclosed the name of a rape victim to a newspaper, which then reported the name in violation of a state law prohibiting the media from doing so. Applying *Landmark* and *Smith*, the Court held that the law violated the First Amendment. Assuming the validity of the government's interest in protecting the privacy of this information, the Court found that the statute was not narrowly tailored. *See id.* at 534-35. The Court relied in great measure again on the insider-outsider principle elucidated in *Landmark*, finding that the government itself had the best means to create and enforce procedures to prevent the disclosure of the information, and to enforce liability against a government official whose "mishandling of sensitive information leads to its dissemination." *Id.* at 534. Importantly, the Court held:

> Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the

> dissemination of private facts. . . . But where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release.

Id. at 534-35. This logic applies directly to the "national defense information" context at issue in the present case. The information at issue is entrusted to the government, and a less drastic means than punishing the dissemination of persons outside government engaging in First Amendment protected activity is available: sanctioning the persons responsible for the leak.

Florida Star is directly analogous to the instant case for another reason. Florida law at the time prohibited police officers from causing the name of a rape victim to be published. *See Florida Star*, 491 U.S. at 536. As a result, the original release of the information by a government official to a person outside of government was an illegal, unauthorized disclosure of confidential material. This is precisely the same situation that the government has alleged with respect to Larry Franklin, USGO-1, and USGO-2. Yet, the fact that the information was released to an outsider in violation of the government official's lawful duty did not change the constitutional analysis as to the outsider's speech. *Id.* In other words, it did not matter to the Court whether the government officially approved the initial disclosure; the state still could not sanction a private citizen for retransmitting the information.

The Court relied on this fact in deciding that the statute could not withstand strict scrutiny as applied:

> [W]here the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech. . . . Where, as here, the government has failed to police itself in disseminating information, it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity.

Id. at 538. If a civil damages remedy in the *Florida Star* context is not narrowly tailored, it cannot be the case that felony criminal liability and incarceration under section 793 are narrowly tailored when the government again has failed to police itself.[8]

The Third Circuit recently reached a similar conclusion in *Bowley v. City of Uniontown Police Department*, 404 F.3d 783 (3d Cir. 2005). In that case, a local police officer informed a newspaper about the arrest of a juvenile, in violation of a state law prohibiting the disclosure of juvenile arrest records. The newspaper then published the arrest information in violation of the same statute. Applying *Bartnicki*, *Florida Star*, et al., the Third Circuit held that the First Amendment would not permit the newspaper to be sanctioned. *Id.* at 788. The court found that "when the government has stewardship over confidential information, not releasing the information to the media in the first place will more narrowly serve the interest of preserving confidentiality than will punishing the publication of the information once inappropriately released." *Id.* The exact same constitutional principle applies in the present case.

The Supreme Court has clarified that a key component of its First Amendment analysis in the *Landmark* cases was the fact that the government itself defined the content of the transmissions that would trigger liability. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (holding that *Landmark*, *Smith*, and *Florida Star* do not apply to promissory estoppel

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[8] In *Cooper*, the Eleventh Circuit, applying the *Landmark* cases, rejected a state statute criminalizing the disclosure by private citizens of non-public information relating to an internal law enforcement investigation. As in *Florida Star*, the court found that the government's asserted need for secrecy was undercut by the fact that the information in question was divulged by a state agency. *Id.* at 1217-18. "If maintaining the secrecy of the information was crucial to the investigative process, the [agency] would not have released it in the first place." *Id.*

context). The present case represents the extreme situation where the government is able to define the content of the ostensibly illegal transmissions by virtue of a process where it gets to define even after the fact what is "information related to the national defense." Mr. DiGregory brought this point into sharp relief during the Motions Hearing, when asked by the Court whether a statement about "military operations with respect to County X" relates to the national defense:

> Attorney DiGregory: It would depend on the information. And if the information was deemed by the persons owning that information, an intelligence agency, the Defense Department, the State Department, whoever generated the information, that it were national defense information ---

T. at 46. In other words, the government gets to define what information offends the statute, not in the statute itself, but by merely "deeming" the information to qualify after the fact. Under *Florida Star*, § 793 fails strict scrutiny as applied by virtue of this fact alone. *See also Butterworth v. Smith*, 494 U.S. 624, 635-36 (1990) (rejecting under *Landmark* state law that prohibited grand jury witness from ever disclosing his testimony, and noting that provision would allow government to control individual's ability to speak freely about matters of public concern by subjecting individual to testimony on such matters before grand jury).

The *Landmark* -- *Florida Star* line of cases has limited the government's ability to sanction private citizens for retransmitting confidential government information, holding that such sanctions cannot withstand strict scrutiny when core First Amendment interests are at stake. The legal precepts set forth in these cases were further crystallized in *Bartnicki*, *supra*, which held that the retransmission of illegally obtained information relating to matters of public concern is protected from liability under the First Amendment. As set forth at length in the defendants' Opening Brief and Reply Brief, *Bartnicki* should control here. While the application of severe criminal sanctions against government officials may survive strict scrutiny, that does

not mean that punishing retransmissions of information released by government officials is also narrowly tailored. *See Bowley*, 404 F.3d at 788.[9]

3. The Asserted National Security Interest Does Not Alter the Strict Scrutiny Analysis Which Renders this Prosecution Unconstitutional

The government argues that its prosecution can survive because it is motivated by the important interest of national security. While the government's national security interest may be more compelling than the privacy or government secrecy interests at issue in the *Landmark* cases, it is still insufficient to warrant the application of section 793 to the instant criminal case (where the sanction sought by the government is more severe) under a strict scrutiny analysis. Breaches of security by government employees and public discussion of national security matters by the citizenry are distinct issues; while both pose some hazards, the comparable hazards of prohibition are very different. *See* Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. C.R.-C.L. L. Rev. 349, 403 (1986).

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[9] At oral argument, the government once again asserted that *Bartnicki* does not apply here because the defendants participated in the initial illegality. T. at 52. For the reasons set forth in the defendants' Reply Brief at 14-15, this argument is meritless since it simply was not illegal for the defendants to listen to (i.e., simply receive) information provided by USGO-1, USGO-2, or Lawrence Franklin. There is no allegation in the Superseding Indictment that the defendants solicited, paid for, or stole the alleged national defense information at issue -- acts which could conceivably be construed as being part of the initial illegality. *See also Bartnicki*, 532 U.S. at 517-18 (even defendants' reason to know interception was illegal did not make them part of initial illegality). The recent divided decision of the D.C. Circuit is inapposite. *Boehner v. McDermott*, -- F.3d -- , 2006 WL 769026 at *9 (D.C. Cir. Mar. 28, 2006) (Sentelle, J., dissenting). Again, the very nature of the oral information here -- which was not alleged to be, for example, troop movements -- demonstrates how in doing normal lobbying jobs in normal ways, the defendants here were not part of any illegality in simply receiving oral information.

Landmark, *Florida Star*, and *Bowley* all recognize the insider/outsider distinction described by Edgar and Schmidt. Whether dealing with a government interest in privacy or the secrecy of government investigations, these cases have uniformly held that narrow tailoring does not permit the government to sanction a private citizen engaged in protected First Amendment activity (the outsider) when a government official is responsible for providing the allegedly offending information in the first place. These cases uniformly concluded that a less restrictive alternative is available -- protecting the information at the source.

The same result should apply here. In all the prior cases, the type of confidential information that could subject a citizen to liability was clearly defined in the statute (name of rape victim, juvenile arrest record, grand jury testimony, etc.). Even still, the courts found that the statute could not survive narrow tailoring. In the present case, for the reasons discussed below, the defendants have to face the added burden of trying to guess what information qualifies as "national defense information," and what does not (as well as when they are "authorized" and when (and to whom) they can retransmit). This leads to an even greater potential chilling effect if section 793 is constitutional as applied here. *See Florida Star*, 491 U.S. at 536 (upholding statute would force upon media onerous obligation of sifting through government information to prune out material arguably unlawful for publication).

The government's theory presents an even more disturbing anomaly. As the Court is aware, press reports have identified USGO-2 as David Satterfield, currently the Deputy Ambassador in Iraq. If this is correct, Deputy Ambassador Satterfield -- who allegedly provided the classified information to Steven Rosen on two occasions -- has been promoted, while Dr. Rosen has been prosecuted. The net result is that a private citizen is being made even more

responsible for protecting classified information than the government source. This certainly cannot be squared under strict scrutiny and the cases cited above.

Section 1(b) of the 1950 Act of Congress amending section 793 in the face of the communist threat expressly states that nothing in the legislation "shall be construed to authorize, require, or establish military or civilian censorship *or in any way infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States*." (emphasis added). Congress was clear that it did not adopt the prosecutors' view that whatever national security interest may be at stake in this case could overcome the defendants' First Amendment rights. The statute cannot survive strict scrutiny, and is therefore unconstitutional as applied.

II. The Statute is Overbroad on its Face

Even if the Court determines that section 793 does not violate the First Amendment as applied to the oral conversations alleged in the indictment against Dr. Rosen and Mr. Weissman, the defendants may still challenge the constitutionality of the statute pursuant to the overbreadth doctrine. That doctrine allows for the invalidation of a law that punishes a substantial amount of protected free speech, as judged in relation to the statute's plainly legitimate sweep. *See generally Virginia v. Hicks*, 539 U.S. 113, 118 (2003). The law allows this remedy out of concern that the threat of enforcement of an overbroad law may chill constitutionally protected speech. *Id.* at 119; *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (noting that severity of punishments increases likelihood of chilling effect, warranting application of overbreadth doctrine).

The strict scrutiny standard and the overbreadth doctrine are inextricably intertwined when a content-based regulation is at issue.[10] As a result, courts often apply the strict scrutiny analysis and an overbreadth claim simultaneously, as the strict scrutiny standard informs the question of whether the statute reaches a substantial amount of constitutionally protected speech. *See, e.g., PSINET, Inc., v. Chapman*, 362 F.3d 227, 233-39 (4th Cir. 2004) (applying strict scrutiny and overbreadth analysis simultaneously). When a statute imposes a direct restriction on protected First Amendment activity, the statute is properly subject to a strict scrutiny standard to determine the relative number of permissible versus impermissible applications. *See Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984); *see also Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636, 639 (1980) (applying strict scrutiny standard in overbreadth analysis). After applying strict scrutiny, a court must see to what extent the statute punishes protected speech and to what extent the statute legitimately punishes unprotected speech. If, after application of strict scrutiny, the law punishes a substantial amount of protected free speech, it is fatally overbroad.

For the reasons set forth in the defendants' Opening Brief, section 793 is substantially overbroad. *See* Opening Brief at 56-59. Section 793 sweeps within its ambit statements by the press, as well as individuals lobbying Congress, engaged in protest, and other core First

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[10] The relationship is a complex one, arising from the two uses of the term "overbreadth" in the jurisprudence. As used in *Hicks*, the term refers to a doctrine that allows a litigant whose own conduct is unprotected to assert the rights of others to challenge the statute; it has also been used generally to refer to facial challenges to a statute that in all respects directly restrict protected First Amendment activity. *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 966 n.13 (1984). In the latter usage, it is well-established that the strict scrutiny analysis would apply to a content-based restriction. *Id.*

Amendment speech. It does so without distinction and therefore chills a substantial volume of protected speech. Under *Florida Star* and *Bartnicki*, the First Amendment protects the retransmission of non-public information if (a) the information was provided by the government, either properly or in violation of a lawful duty to protect the information; or (b) obtained illegally by a source other than the retransmittor. Section 793 on its face does not make such distinctions, nor does it distinguish between persons within and outside government, a factor that was of great importance in cases such as *Landmark* and *Florida Star*. After *Bartnicki*, the failure to make such distinctions renders the statute substantially overbroad.

Moreover, section 793 does not require the government to prove that the defendant obtained the national defense information from a government source. The prosecution of a government official, this missing element is typically of no moment, as the defendant obtains the information by virtue of his employment. But when we turn to the case of retransmittors of oral information who are not government employees, the absence of this element highlights the substantial overbreadth of the statute. As construed by the government, section 793 would allow for the prosecution of an individual who acquired and retransmitted oral national defense information from another private citizen -- or even from the public domain -- so long as that information also happened to be contained somewhere in a classified document. This would infringe on a potentially endless pool of speakers exercising their constitutional right to speak on matters of public concern.

This point was brought into stark relief at the Motions Hearing by the Court. The Court asked the government "how many retransmissions would [the statute] apply to . . . Would it continue to apply ad infinitum?" T. at 54-55. The government was unable to answer this question, positing instead that it would depend on whether there was evidence of willful intent.

T. at 55. In other words, there are no limitations on the number of retransmissions between private citizens with varying Speech Clause and Petition Clause rights (as well as the press) that could fall within the ambit of the statute. This plainly violates the Constitution.

The substantial overbreadth of section 793 after *Bartnicki* judged in relation to its legitimate sweep is also apparent. As noted *supra*, newspapers regularly print stories in which admittedly classified information is transmitted to a broad audience of persons lacking appropriate clearances. Members of these audiences could include those foreign officials from an enemy nation who take the simple step of buying a newspaper. Compared to the number of prosecutions of actual spies and leakers within the government ranks, the number of potential press prosecutions is exponentially higher, creating a dramatic chilling effect on the First Amendment.[11] The same comparison can be made with members of foreign policy organizations like AIPAC whose very existence is defined by an attempt to influence the Executive Branch on matters relating to both foreign and defense policy, and which, like the press, occupies a space at the core of the First Amendment.

Certainly Congress may pass laws to protect the national security, and certainly Congress may use the threat of criminal sanction to further that goal. But the prospect of crime -- even a crime affecting the national security -- "by itself does not justify laws suppressing protected speech." *Free Speech Coalition*, 535 U.S. at 245. The government may not suppress lawful speech as a means to prevent unlawful speech; "the possible harm to society in permitting

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[11] Indeed, before now, the statute had only been applied in limited circumstances to persons transmitting marked government documents making their classified status clear.

some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *See id.* at *255* (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). There is a very real possibility in this case that allowing such an overbroad law to be in force will chill core democratic activity. Thus, even if section 793 properly prohibits some speech in the interest of national security, the statute is too overbroad in its scope to withstand the exacting scrutiny demanded by the First Amendment.

III. The Hypotheticals Posed by the Court Also Demonstrate that the Statute Violates the "Fair Notice" Requirement of Due Process

It is a fundamental element of due process that the courts should not extend a criminal statute to a defendant who has not been provided "fair warning" that his conduct could be considered criminal. As the Court noted at the Motions Hearing, there are three related manifestations of this requirement: (1) the vagueness doctrine; (2) the canon of strict construction and the rule of lenity; and (3) the doctrine precluding courts from applying a novel construction of a criminal statute to conduct that no prior judicial decision has disclosed to be within the scope of the statute. *United States v. Lanier*, 520 U.S. 259, 265 (1997). Each of these doctrines is based on the idea that it must have been reasonably clear at the time of the conduct that a defendant's acts were criminal. *Id.* at 267. Moreover, a heightened vagueness standard applies when the statute at issue threatens to interfere with free speech rights. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Smith v. Goguen*, 415 U.S. 566, 573 (1974). The defendants' Opening Brief and Reply Brief set forth in detail their arguments as to why each of the *Lanier* manifestations is violated in this case. During the Motions Hearing, the Court posed a number of hypotheticals, the answers to which highlight why the fair notice requirement is not met here.

At the outset, the defendants agree with the Court that there is no vagueness issue with respect to whether a government official could be prosecuted for either (a) transmitting a document that he knows to contain national defense information, or (b) providing the same information in oral form to a person not entitled to receive it. *See* T. at 14-15. In both cases the government official is charged with the responsibility for protecting government secrets, and has the knowledge of what information can or cannot be disclosed.

A. Hypothetical #1: Troop Movements

The Court posed the hypothetical of a DoD employee who provided oral information about troop movements to a lobbyist, and asked if the lobbyist could be prosecuted under section 793 for retransmitting that information. Assuming the Court's assertion that information relating to troop movements is clearly within the definition of "information relating to the national defense," the statute would still not provide the hypothetical lobbyist with fair notice. This is because a number of other words in the statute come into play and the lobbyist, for example, has no way of knowing whether the government official was "authorized" to tell him the information and, as a result, whether he was authorized to receive the information and/or disclose it to others (even if the information was represented to be "classified"). A citizen should reasonably expect that if a government official tells him something, he is permitted to hear it. As a result, the lobbyist still cannot know whether he is in possession of contraband information. He further cannot know who else is or is not "entitled to receive" the information, to guide his decision as to whom he can retransmit the data. *See* Opening Brief at 21-22.

The Court's hypothetical spotlights the multiple levels of vagueness in the statute, particularly as applied to the retransmission of oral information by persons outside government. While troop movements may be sufficiently understood to be "information relating to the

national defense," the statute is not limited to troop movements. Indeed, the Superseding Indictment seeks to impose criminal liability based not on troop movements, but information relating to "internal deliberations about" a "classified internal United States government policy document."[12] Unlike the hypothetical troop movements, it simply impossible for a person outside government to know whether oral information "about" a policy decision constitutes "information relating to the national defense." Any discussion of foreign policy relates in some manner to internal deliberations about a policy document.[13]

The hypothetical also demonstrates that the vagueness is not limited to the phrase "information relating to the national defense." As noted above, and discussed in the defendants' Opening Brief, the phrase "not entitled to receive it" adds a second layer of vagueness in the oral information context. When a lobbyist receives oral information from a government official acting in the course of his normal job duties, the lobbyist has no means to determine whether or to what extent that information is restricted, and thus cannot know who is "entitled" to receive it or what bars to further retransmission, if any, exist. Unlike a government official, he cannot check the files or ask a colleague or supervisor for guidance. An ordinary person would reasonably conclude that since he himself was an outsider, and he heard the information, it was permissible to tell that information to another outsider. Yet, the government asserts that an

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[12] *See* Overt Acts 17, 18, 24, 25, 26, 27, 29, 30 34.

[13] *See generally* Anthony A. Lapham, Memorandum for PRM/NSC-11 Subcommittee Members ¶ 2 (Mar. 18, 1977), http://fas.org/sgp/othergov/lapham.html (last visited Jan. 19, 2006) ("[Sections 793 and 794] are vague, and clumsy in their wording. For example, they describe the category of information to which they relate as 'information relating to the national defense,' which quite conceivably could include everything from the most vital national secrets to the daily stock market reports. . . .").

ordinary person would somehow intuitively know that the information cannot be retransmitted -- whatever form the information took, and whether the information dealt with troop movements or policy disputes. This is not reasonable.

B. Hypothetical #2: Sputnik

During oral argument, the government conceded -- quite correctly -- that just because a document is classified does not mean that it contains national defense information for purposes of section 793. *See* T. at 38. The government made this comment in response to a second hypothetical posed by the Court, in which still-classified information about Sputnik dating to 1957 is disclosed in the present day. The government opined that the disclosure of this classified information would not be actionable under section 793 because it did not relate to the "national preparedness."[14] *Id.*

Yet, this answer reveals yet another layer of vagueness in the statute. By the government's own logic, even if a government official says that oral information is classified, the listener still does not know conclusively whether the information is actionable under section 793. Instead, the listener must intuit whether the information relates to the "national preparedness," a term which itself is no more clear, is not defined in the statute, and has not been refined in the case law. It is unreasonable to posit that a person outside government would reasonably know that discussions of a policy dispute not identified by the speaker as classified **is** "national defense

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[14] If this is the case, of course, then the fact that the DoD employee tells the lobbyist in the first hypothetical that his information is "top secret" is not dispositive, since the classification status of the information does not necessarily mean that it is national defense information. That "national defense information" is not co-extensive with "classified" adds even further vagueness in a person informing his conduct and having fair notice.

information," and that a classified document relating to Soviet space exploration **is not** "national defense information."

C. Hypothetical #3: The "Big Story"

The third hypothetical posed by the Court brings the vagueness problem into even sharper relief. The Court asked the government whether it would violate the statute for a DoD employee to tell a person outside government that "a big story is coming out this weekend that relates to Country X and military operations with respect to Country X." Instead of articulating a principle on which a listener could determine whether his conduct violated section 793, the government replied that liability "would depend" on whether the relevant government agency "deemed" the information to be national defense information. T. at 46.

This is a staggering admission of fatality by the government. As the Court intimated in its response, there is no manner in which a potential defendant could determine whether his conduct violates the law when the violation depends upon whether a government agency has "deemed" (at some undefined time) the information to be actionable. T. at 46. While this may make sense in the case of marked documents and/or when the defendant is a government official, such a regime clearly violates the arbitrary enforcement prong of the vagueness doctrine in this case, which prohibits the legislature from "entrusting lawmaking to the moment-to-moment judgment of the policeman on his beat." *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999). "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes." *Id.* Yet that is exactly the result of the government's theory.

IV. The Exercise of Prosecutorial Discretion Does Not Cure the Constitutional Infirmities

Despite repeated requests by the Court, the government was unable to articulate any limitation during oral argument on what is within the definition of "national defense

information." If the government is unable to define the limits on this term, it cannot be the case that the defendants -- non-governmental persons -- could reasonably be on notice that the alleged information in this case was within the ambit of the statute.

The only answer offered by the government was that they would exercise their prosecutorial discretion and "carefully scrutinize" whether or not facts give rise to a violation. *See, e.g.*, T. at 50. But as the Court noted, if the matter is left up to prosecutorial discretion, "what you've done is spotlighted the vagueness." T. at 80. Moreover, the Supreme Court has made plain that a court cannot construe a criminal statute in a manner that would "delegate to prosecutors and juries the inherently legislative task" of determining what types of activities should be punished as crimes. *United States v. Kozminski*, 487 U.S. 931, 949 (1988).[15] To the contrary, the very purpose of the vagueness doctrine is to ensure that there are appropriate boundaries for prosecutorial discretion. *United States v. Brunshtein*, 344 F.3d 91, 98 (2d Cir 2003); *see also New York v. Ferber*, 458 U.S. 747, 772 n. 26 (1982) (noting that loyalty oath cases were invalidated on vagueness grounds as the "entire scope of the laws was subject to the uncertainties and vagaries of prosecutorial discretion.")

The "most important factor" affecting the clarity demanded by the Constitution is whether the law "threatens to inhibit the exercise of constitutionally protected rights." *Village of*

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[15] "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains. . . . Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."

Baggett v. Bullitt, 377 U.S. 360, 373 (1964).

Hoffman Estates, 455 U.S. at 499. That risk is paramount here, and the Constitution does not allow the discretion of even a well-intentioned prosecutor to substitute for the notice required by Due Process.

V. Construing the Statute to Apply Only to the Transmission of Tangible Items or Government Officials Eliminates the Constitutional Issues Before the Court

As the Court noted during the Motions Hearing, it is required to address the textual question of whether § 793(e) even applies to the transmission of oral information by persons outside government. T. at 63. If the statute does not apply to this circumstance as a matter of statutory construction, then the Court does not need to reach the constitutional questions. *Id.*

For the reasons set forth in the defendants' Opening Brief, there is ample basis in the legislative history to conclude that Congress did not intend for the statute to be applied to persons such as the defendants, despite the use of the term "whoever" in § 793(e). The contemporaneous record reveals that Congress drew a line between spies on one hand, and those who sought to inform the public. As one Senator explained, a distinction must be made:

> between the normal, innocent habits of our people and the designing conduct of the spy. It is a very reprehensible thing to draw a statute in such ways that it can be used to prevent publicity in a republican form of government, that it can be used in such ways as to punish a citizen who is doing a patriotic thing in proclaiming that his country is undefended, and pointing out where her defenses should be strengthened.

54 Cong. Rec. 3593 (1917). If Congress intended to punish disclosures by spies -- and not leaks per se -- it clearly did not envision punishing the recipients of national defense information, nor public policy lobbyists "doing a patriotic thing" in attempting to advance a policy agenda.[16]

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[16] In 1946, the congressional committee investigating the attack on Pearl Harbor urged Congress to enact legislation prohibiting the disclosure of any classified information. *See*

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Moreover, various principles of statutory construction suggest that the term "information" as it is used in section 793(e) should be limited to tangible items.[17] First, there is no specific reference anywhere in §§ 793(d) or (e) to oral or intangible information. Second, all the terms used in the statute other than the generic "information" refer to tangible items. Under the related canons of *noscitur a sociis* and *esjudem generis*, a statutory term gathers meaning from the words around it. These canons remove a statutory phrase from the abstract and provide it with the meaning that the context demands. *United States v. Andrews*, -- F.3d --, 2006 WL 168054 (4th Cir, Jan. 25, 2006).

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Report of the Joint Committee on the Investigation of the Pearl Harbor Attack, S. DOC. No. 244, 79th CONG., 2d Sess. 252-531 (1946). Congress rejected this, enacting instead 18 U.S.C. § 798, which prohibits the disclosure of only specified categories of communications intelligence -- a subset of classified information that "is both vital and vulnerable to an almost unique degree." H.R. REP. No. 1895, 81st CONG., 2d Sess. 2 (1950). A similar attempt failed in 1957 to make it a crime for "any person willfully to disclose without proper authorization for any purpose whatsoever, information classified, knowing such information to have been so classified." *See National Security Secrets and the Administration of Justice: Report of the Senate Select Comm. on Intelligence*, 95th CONG., 2d Sess. 18 (1978). Legislation that would have amended section 793 to make all disclosures of classified information criminal was again rejected in 1962. *See* 108 CONG. REC. 23140-41 (1962). And once again in 1983, Congress failed to enact proposed legislation (H.R. 66) that would have imposed criminal sanctions on "any individual" who knowingly communicated classified information to a person not authorized to receive it.

[17] The government would not be without tools to prosecute the improper disclosure of "oral" information that "relates to the national defense" under appropriate circumstances not present here. First, the best enforcement occurs are the level of the source. There is little ambiguity over the prosecution of a government official who has improperly disclosed -- orally or via documents -- national defense information. Second, the government might charge a private citizen who is engaged in classic espionage activity or improper activity for a foreign government (under FARA, 22 U.S.C. § 611 *et seq.*, for example) where the elements of those offenses are present without having the flaws of applying the vague terms of § 793 where they do not belong or create constitutional issues. Third, Congress could always amend § 793 to avoid the vagueness problems posed by this prosecution, within Constitutional limits.

The canon of *ejusdem generis* provides that where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. Black's Law Dictionary 556 (8th ed. 2004). The canon is applied to determine the meaning of a catch-all phrase by examining the common elements enumerated in a statutory list. *Andrews, supra.* Thus, for example, "birds" would not qualify as "other live animals" in a statute that otherwise listed horses, mules, cattle, and sheep. *Id.* Similarly, a Bureau of Prisons officer should not be considered a "law enforcement officer" for purpose of a statute that otherwise makes specific reference to the enforcement of tax and customs laws. *Id.* In *Lanza v. Sugarland Run Homeowners Assn.,* 97 F. Supp. 2d 737, 740 (E.D. Va. 2000), this Court applied *ejusdem generis* to a provision of the Fair Labor Standards Act that enumerated the remedies available under the statute. The Court found that since all of the enumerated forms of relief were compensatory in nature, any unlisted remedies similarly must be compensatory in nature. *Id.*

Applied to the present case, these canons compel the finding that the term "information" as used in §§ 793(d) and (e) should be limited to tangible items. All the enumerated items in the statute refer to tangible things: document, writing, code book, sketch, photograph, etc. This suggests that Congress was concerned solely with tangible information, not oral information as the government suggests.[18] As in the cases discussed above, the term

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[18] During oral argument, the government suggested that the reference to "intangible information" in the commentary to Sentencing Guideline 2M3.3 is instructive of the legislative intent to criminalize oral, not just documentary exchanges. T. at 66-69. Not only is the term "intangible" not synonymous with oral, but inclusion of "intangible" in a guideline adopted by the Sentencing Commission in 1987 offers no insight into Congressional intent in

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"information" should be limited to tangible items to avoid extending the statutory scope beyond that intended by the legislature. *Andrews, supra.*

Moreover, recent case law construing the Petition Clause of the First Amendment and the *Noerr-Pennington* doctrine holds that courts must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise. *See Sosa*, 437 F.3d at 931. In this respect, the Court should apply a variant of the canon of constitutional avoidance, which requires a statute to be construed so as to avoid serious doubts as to the constitutionality of an alternate construction. *Id.* at 931 n.5. As discussed above, criminalizing the oral transmissions in this case directly implicates conduct by the defendants that is protected by the Petition Clause. Either limiting the term "information" to tangible items or "whoever" to government employees and contractors (both

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> 1917 and 1950, when the statute was enacted and amended. After the fact pronouncements, even by Members of Congress, are not deemed useful tools in statutory construction. *See Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 232 (1981) ("But the postenactment pronouncements of individual legislators purporting to construe an earlier statute have little, if any, weight in the judicial construction of the statute. . . . And according any weight to the pronouncements of a single legislator is particularly unjustified when the legislator . . . was not even a Member of Congress when the law was enacted.") (internal cit. omit.); s*ee also United States v. United Mine Workers of America*, 330 U.S. 258, 281-82 (1947).
>
> Moreover, as the Court recognized and the government conceded, there is no precedent for a prosecution under 793 based on the facts presented here, namely oral retransmission by a private citizen. Accordingly, the propriety, scope and applicability of the Sentencing Guidelines have never been tested under the facts presented in this case. Indeed, an attempt to apply the Guidelines to the facts of this case would reveal the tension in application to oral exchanges. Specifically, the Guidelines differentiate degrees of punishment based on the type of information communicated. See 2M3.1; 2M3.3. Unlike where a document is clearly marked, in the context of an oral communication, the listener cannot know whether information is designated confidential, secret or top secret. In this respect, the guidelines actually serve to highlight, not remedy, the statutory vagueness with respect to the conduct alleged in this case.

plausible constructions) would avoid impinging on a private citizen's petition rights. By so limiting the statute, the Court still allows section 793 to be used to protect against the dissemination of classified documents while avoiding the First Amendment and Due Process problems posed by the criminalization of the type of oral transmissions at issue here.

CONCLUSION

It is for very good reason that there are no precedents to this prosecution under a statute which has been in existence for 90 years. There is real reason to conclude that Congress knew it could not extend the reach of 793 to oral conversations of non-government officials and did not include words to reach that speech, and there is real reason to conclude that Congress' admonitions not to have the statute "infringe" on First Amendment freedoms meant exactly that. However, when the government attempts to stretch the words of the statute as far as it has here, the result is a contorted law that then runs afoul of the First Amendment and Due Process standards. Accordingly, the Superseding Indictment must be dismissed.

Respectfully submitted,

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