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

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 1:05CR225
v.	)	
	)	Hon. T.S. Ellis, III
STEVEN J. ROSEN,	)	
	)	
KEITH WEISSMAN,	)	
	)	
Defendants.	)	

GOVERNMENT'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE SUPERSEDING INDICTMENT

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The United States, by its undersigned counsel, hereby submits this supplemental response. On March 24, 2006, at oral argument on the defendants' pretrial motions, this Court requested supplemental briefing on the Defendants' Motion to Dismiss the Superseding Indictment on the ground that 18 U.S.C. § 793 is unconstitutionally vague and violates the First Amendment. The Court further requested limited supplemental briefing on Defendant Rosen's Motion to Dismiss Count III. By separate filing today, the United States also submits a classified exhibit setting forth a statement of facts demonstrating the willfulness of the defendants' criminal conduct in this case.

INTRODUCTION

The defendants' argument that Section 793 is unconstitutionally vague because they are non-government employees who obtained national defense information through oral communications is without merit. Section 793's requirement that the government prove Rosen and Weissman acted with specific, willful intent to violate the law negates

the defendants' vagueness arguments. The case law overwhelmingly supports this position. Over sixty years ago, the Supreme Court explicitly rejected a vagueness challenge against the espionage statutes in a case involving a non-government employee who received national defense information orally, largely because of the statute's specific intent requirement. In the years that followed, the Fourth Circuit and the Supreme Court have upheld convictions under the espionage statutes in cases involving non-government employees, and disclosures by oral communication. The espionage statutes have never been held unconstitutionally vague, and the result in this case should be no different.

The defendants' also argue that Section 793 violates the First Amendment and should be subject to strict scrutiny. No court has ever applied strict scrutiny to the espionage statutes. In fact, the cases make clear that the type of conduct prohibited by the espionage statutes is in no way protected by the First Amendment. Even if this court were to conclude that disclosing national defense information to foreign government officials, and others, was protected by the First Amendment, Section 793 would survive any level of constitutional scrutiny. This is because the statute's specific and precisely defined elements restrict its application to a narrow scope of criminal activity, so as to promote the government's compelling interest in protecting this nation's security.

ARGUMENT

I. Section 793 is Not Unconstitutionally Vague as Applied to the Defendants

A. Section 793 is Not Unconstitutionally Vague Due to the Statute's Willful Intent Requirement

The defendants argue that Section 793 is vague as applied to them largely because they are non-government employees who obtained national defense information through "oral communications," as opposed to written communications. Based on this distinction, the defendants argue that Section 793 is vague because "it is simply impossible" for the defendants to know that they had obtained national defense information from Lawrence Franklin and other government officials. Def. Mem. at 18. The defendants also argue that Section 793 is vague as applied to them because, as non-government employees, the defendants "were in no position" to know who was, or was not, entitled to receive the national defense information they obtained. Def. Mem. at 22. None of these arguments are persuasive, particularly when viewed against Section 793's heightened intent requirement.[1]

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[1] "The first step in analyzing any vagueness . . . challenge is to determine the scope of the statute . . . [i]f a reasonable construction of it will result in a finding of constitutionality, that construction must be adopted." *United States v. Demott*, 45 Fed. Appx. 230, 234 (4th Cir. 2002) (unpublished) (citing *United States v. Cassiagnol*, 420 F.2d 868, 873 (4th Cir. 1970). In its initial response to the defendants' motion, the government argued that Section 793 was not vague given the plain meaning of the statute's words. Rather than repeat these same arguments again, the government incorporates them into this memorandum.

The government does, however, wish to respond to the defendants' argument that Section 793 must be construed to apply only to tangible items, and not oral communications, because the statute requires a person "to deliver" such information to the United States government. The defendants claim that Section 793 must only apply to tangible items because it is "impossible" to deliver information obtained orally that is already in a person's head. Def. Mem. at 15. It is obvious that the delivery requirement of Section 793 does not apply only to tangible items. Certainly one of the goals of the delivery requirement is to recover stolen documents. But another goal is to insure that

"The vagueness doctrine is rooted in due process principles and is basically directed at lack of sufficient clarity and precision in the statute." *Willis v. Town of Marshall, N.C.*, 426 F.3d 251, 261 (4th Cir. 2005) (quoting *United States v. Morison*, 844 F.2d 1057, 1070 (4th Cir. 1988)). A statute can be unconstitutionally vague for two different reasons. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *United Seniors Ass'n Inc. v. Social Security Admin.*, 423 F.3d 397, 408 (4th Cir. 2005) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). The defendants raise both of types of vagueness challenges, neither of which is meritorious.

It is important to make clear at the outset that the defendants only assert an "as-applied" vagueness challenge. Def. Mem. at 11, 15, 17. The defendants do not assert a "facial" vagueness challenge. The distinction is important. Under a facial challenge, the court analyzes whether Section 793 is vague as a hypothetical defendant. *See United States v. Hsu*, 364 F.3d 192, 196 (4th Cir. 2004) (stating that facial challenge involved the question whether statute provided "hypothetical defendant fair notice"). Under an as-applied challenge, however, Section 793 "must be examined in the light of the facts of the case at hand." *United States v. Sun*, 278 F.3d 302, 309 (4th Cir. 2002) (quoting *United States v. Mazurie,* 419 U.S. 544, 550 (1975)). This means that the court "need only determine whether the statute and regulations were vague as applied to these

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the government is knowledgeable about who obtained the information (whether communicated orally or in writing) so that a damage assessment can be made and countermeasures adopted. In any event, the defendants' so-called "impossibility" is present in instances where documents or other tangible items are disclosed. People who obtain documents read them, and thus "retain" the information in their head. Obviously this does not absolve them of their duties under the statute.

particular defendants-i.e., whether [Rosen and Weissman] *in fact* had fair notice that the statute and regulations proscribed their conduct." *Hsu*, 364 F.3d at 196 (emphasis in original). Any consideration as to whether Section 793 would be vague if applied to government employees, journalists, other lobbyists, private citizens, or anyone else aside from Steven J. Rosen and Keith Weissman is not appropriate under an as-applied vagueness analysis.

Given that the analysis focuses exclusively on whether Rosen and Weissman in fact had fair notice of Section 793's prohibitions, it makes sense that the statute's intent requirement plays a significant part in the court's legal analysis. Section 793 requires the government to prove that the defendants acted with specific, willful intent. To prove willful intent, the government must show that the defendants "acted with knowledge that [their] conduct was unlawful."[2] *United States v. Bursey*, 416 F.3d 301, 309 (4th Cir. 2005) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)). As this court has explained, "it is well settled that a requirement of willfulness makes a vagueness challenge especially difficult to sustain because a mind intent on willful evasion is

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[2] The defendants are simply wrong when they assert on page 2 of their reply memorandum that the Fourth Circuit in *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980), "imported a 'bad faith' [scienter] standard into the statute that increases the government's burden beyond what appears on the face of the text of section 793." The Court did no such thing. Rather, the Fourth Circuit approved a trial court's jury instruction that defined "willfulness" under the statute to mean "bad faith," or "design to mislead or deceive another. That is, not prompted by an honest mistake as to one's duties, but prompted by some personal or underhanded motive." *Truong*, 629 F.2d at 919. The Supreme Court has explained that "a variety of phrases have been used to describe" the term "willful intent," including "bad purpose," an "evil mind," or "without justifiable excuse." *Bryan*, 524 U.S. at 192 n.12. The Supreme Court has boiled these various phrases down to mean that "the willfulness requirement . . . does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required." *Id.* at 196. The Fourth Circuit in *Truong* was simply approving of the district court's correct definition of "willfulness."

inconsistent with surprised innocence." *United States v. Lindh*, 212 F.Supp.2d 541, 574 (E.D.Va. 2002) (Ellis, J.) (holding laws prohibiting material support to terrorists are not unconstitutionally vague). Likewise, the Supreme Court has stated that a "scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). And the Fourth Circuit has explained that "[a]fter all, under the specific intent required as an element of this offense, the government must prove that a defendant intended to violate the law to obtain a conviction, thereby eliminating any genuine risk of holding a person criminally responsible for conduct which he could not reasonably understand to be proscribed." *Hsu*, 364 F.3d at 197.

At trial in this case, the government will present overwhelming evidence of the defendants' specific, willful intent to violate Section 793. The government will prove–often using the defendants' own words–that Rosen and Weissman knew that they had obtained classified national defense information, knew that it was unlawful to disclose that information, knew that the foreign officials and members of the media to whom they disclosed the information were not entitled to receive it, and yet, knowing all of these things, decided to disclose the information in any event. *See* Government's Classified Statement of Facts, filed separately.

When presented with such overwhelming evidence of a defendant's willful intent, the Fourth Circuit has not hesitated to hold that a statute is not unconstitutionally vague. *United States v. Marshall*, 332 F.3d 254, 261 (4th Cir. 2003) (statute not

unconstitutionally vague "as applied to egregious facts such as those present in this case").

The defendants barely attempt to refute the decisive impact that Section 793's willfulness requirement has on their vagueness argument. Throughout the course of their 59 page memorandum and 18 page reply, the defendants devote one paragraph to explaining why, in their view, the willfulness scienter requirement does not operate to defeat their vagueness claims. *See* Def. Mem. at 24. Their argument boils down to a redundant refrain: "If national defense information is transmitted to someone outside government (such as a lobbyist or member of the press) in verbal form, the recipient has no way of knowing that he has obtained the information improperly and knowing who can/cannot receive it." *Id.* Hypothetical lobbyists and members of the press are irrelevant to an as-applied vagueness challenge. What matters is whether Rosen and Weissman were, in fact, on notice of Section 793's prohibitions. On that score, there is evidence beyond a reasonable doubt.

B. The Fact that the Defendants Obtained National Defense Information in "Oral Communications" is Irrelevant

The defendants' arguments rely heavily on the incorrect view that the oral nature of their communications somehow makes Section 793 vague as applied to them. Communicating national defense information by tongue, rather than by written word does not make Section 793 unconstitutional. Over sixty years ago, the Ninth Circuit Court of Appeals and the Supreme Court rejected a vagueness challenge to the espionage statutes in a case, like this one, involving oral disclosures of national defense information to a person who was not a government employee. *Gorin v. United States*, 312 U.S. 19

(1941); *Gorin v. United States*, 111 F.2d 712 (9th Cir. 1940) (analyzing early version of 18 U.S.C. § 794).[3]

Gorin was a Soviet citizen who began living in the United States in 1936 and worked at a company organizing tourist excursions from the United States to the Soviet Union. 111 F.2d at 715. Gorin was never a government employee.[4] Gorin eventually met Salich, a United States citizen who was an investigator for the Naval Intelligence Office. *Id.* at 714. As part of Salich's duties, he would read reports that were kept in another person's desk. These reports contained information that was obtained in the course of investigating the activity of Japanese individuals inside the United States. Neither the Court of Appeals nor the Supreme Court described the reports as classified. They did, however, describe the reports as "innocuous." 111 F.2d at 716. "None of the reports contained any information regarding the army, the navy, any part thereof, their equipment, munitions, supplies or aircraft or anything pertaining thereto." *Id.* Moreover, the reports were not connected "with other material which the Naval Intelligence may have, so that the importance of the reports does not appear." *Id.* The reports contained information that, on its face, was of seemingly minor importance.[5]

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[3] The government regrets not bringing the factual underpinnings of *Gorin* to the Court's attention in its original pleadings.

[4] Any attempt by the defendants to distinguish *Gorin* on the ground that Gorin was an agent of the Soviet Union is meritless. The Fourth Circuit in *Morison* rejected the notion that Section 793 applies only to "classic spying." 844 F.2d at 1070.

[5] To illustrate this point, the Ninth Circuit quoted from one report:

> "George Ohashi, of San Diego, is reported to have made a statement at a JACL meeting that he was not a fascist. Couple other members, Paul Nakadate and George Suzuki took exception to this remark and accused George Ohashi of being a communist and subsequently beat him up. Ohashi and his wife own a beauty shop in San Diego which was found

In 1938, Salich met with Gorin and provided him "the substance of the information contained in some 43 reports." 111 F.2d at 715. The Ninth Circuit was clear, however, that "[t]he reports mentioned above were not physically given to Gorin. Salich communicated the substance thereof to Gorin orally or in writing." *Id.*

Gorin and Salich were eventually convicted of three counts under the Espionage Act of 1917, including communicating "information relating to the national defense," and conspiracy to communicate information relating to the national defense. *Id.* at 718. On appeal, the defendants argued that the statute was unconstitutionally vague because it used the phrase "relating to the national defense." Both the Ninth Circuit and the Supreme Court rejected this argument. 321 U.S. at 28; 111 F.2d at 721. In a unanimous decision, the Supreme Court stated "we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law." 312 U.S. at 27. As an initial matter, the Court noted that "the obvious delimiting" words in the statute were those requiring specific intent. The statute could not be unconstitutionally vague because "[t]he sanctions apply only when scienter is established." *Id.* at 28. The Court also rejected the defendants' vagueness argument because the phrase "national defense" has "a well understood connotation." *Id.* The

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burglarized one day and the place searched." 111 F.2d at 716.

The Supreme Court noted, however, that the reports gave "a detailed picture of the counter-espionage work of the Naval Intelligence . . . A foreign government in possession of this information would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country's efficiency in ferreting out foreign espionage. It could use the reports to advise the state of the persons involved of the surveillance exercised by the United States over the movements of these foreign citizens. The reports, in short, are a part of this nation's plan for armed defense. The part relating to espionage and counter-espionage cannot be viewed as separated from the whole." 312 U.S. at 29.

phrase was first used by Congress in the Defense Secrets Act of 1911. It was a phrase understood to be "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *Id.*; 111 F.2d at 719 ("Unquestionably, the words [national defense] were used in a broad sense and with a flexible meaning."). The Court held that "the words of the statute are sufficiently specific to advise the ordinary man of its scope." *Id.* at 32.; *see also United States v. Dedeyan*, 584 F.2d 36, 39 (4th Cir. 1978) (phrase "relating to the national defense" in Section 793 not unconstitutionally vague).

In the years since *Gorin*, the government has prosecuted other espionage cases involving oral disclosures. For example, the defendant in *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988), provided information to his Soviet handlers orally. According to the Fourth Circuit, Pelton's espionage "had not involved the simple transmission of documents. Rather, Pelton contacted the Soviets and allowed them to ask him questions on matters that were of interest to them." 835 F.2d at 1074. The court further described that "Pelton generally conveyed the information by responding to questions from his Soviet contacts."[6] *Id.* at 1070-71. Similarly, in *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952), non-government employees were charged with conspiracy to violate the espionage statutes, namely Section 794. As part of that conspiracy, the defendants convinced a woman to obtain national defense information from her husband, who was a soldier stationed at the Los Alamos atomic research laboratory. The woman was instructed to obtain the

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[6] Surely, had the government been able to obtain jurisdiction over the Soviet handler who collected Pelton's information and retransmitted it to the Soviet government, that handler would not have been immune to prosecution because Pelton's disclosures were oral.

information from her husband and then "commit this information to memory and tell it to Julius upon her return to New York, for ultimate transmittal to the Soviet Union." 195 F.2d at 588. The fact that oral disclosures were made in *Pelton* and *Rosenberg* did not render the espionage statutes unconstitutionally vague.

The defendants cannot escape the weight of these cases. In *Gorin*, the Supreme Court was considering a defendant who, like Rosen and Weissman, was a private individual, not a government employee. The Supreme Court was considering a defendant who, like Rosen and Weissman, entered into a conspiracy with a government employee to communicate national defense information. The Supreme Court was considering a defendant who, like Rosen and Weissman, obtained national defense information through oral conversations with his government source. And finally, the Supreme Court was considering a defendant who, like Rosen and Weissman, alleged that the statute was unconstitutionally vague because he could not determine whether the information he had obtained was prohibited by the statute. The vagueness arguments that Rosen and Weissman make to this court are not new. They were considered, and rejected, over sixty years ago by the Supreme Court. This court should do the same.

C. The Fact that the Defendants Were Not Government Employees is Irrelevant

In addition to *Gorin* and *Rosenberg*, the espionage statutes have been used to prosecute other non-government employees involved in disclosures of national defense information. *See United States v. Abel*, 258 F.2d 485 (2d Cir. 1958), *affirmed*, 362 U.S. 217 (1960) (non-government employee convicted of conspiracy to violate espionage statute, namely Section 794). Most recently, in *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1981), a non-government employee was

convicted under Section 793, and that conviction was upheld by the Fourth Circuit. Truong was a Vietnamese citizen who came to the United States in 1965. Truong never was a government employee. In words that could easily describe the defendants in the present case, the Fourth Circuit said that after arriving in the United States, Truong "pursued an active scholarly and political interest in Vietnam and the relationship between Vietnam and the United States." This interest led Truong to befriend Krall, who's husband, Humphrey, was a United States naval officer. Humphrey provided Truong with diplomatic cables and classified documents. However, before giving them to Truong, Humphrey "removed their classification markings." *Truong*, 629 F.2d at 911. The court did not cite any evidence that Truong was aware that the classification markings had been removed. Truong then gave the documents to Krall for delivery to North Vietnamese officials at the Paris Peace negotiations. At trial, Truong contended, like the defendants in this case, that "his interest in the cables obtained from Humphrey was a benign scholarly preoccupation with Vietnam and Vietnamese-American relations." *Id.* at 930.

Rosen and Weissman repeatedly claim that Section 793 is unconstitutionally vague as applied to them because they received national defense information orally and are not themselves government employees. According to the defendants, these two facts render Section 793 vague because it is impossible for them to know that the information they obtained from U.S. government officials was national defense information that could not be shared with officials of a foreign power and members of the media. The defendants contend that "unlike a document bearing a classified stamp, a recipient of verbal information cannot readily ascertain what aspect or portion of an oral discourse is

classified, even if he is told in the conversation that the information is or relates to classified material." Def. Mem. At 18. This argument must fail.

Like defendants Rosen and Weissman, Truong was a private individual who obtained national defense information that lacked classification markings. Yet, this did not preclude Truong's prosecution, or present any meritorious vagueness challenge. In fact, the Fourth Circuit rejected Truong's arguments attacking the meaning of "national defense information." 629 F.2d at 918.

D. Section 793 Does Not Violate the Arbitrary Enforcement Doctrine

As mentioned previously, the defendants contend that Section 793 is unconstitutionally vague because it will result in "discriminatory enforcement." Def. Mem. at 26. Here again, the willful intent requirement of Section 793 negates the defendants' argument–a proposition that the defendants do not even contest in their voluminous memorandum. The Fourth Circuit has held that "[t]he intent requirement alone tends to defeat any vagueness challenge based on the potential for arbitrary enforcement." *United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003); *see also Ward v. Utah*, 398 F.3d 1239, 1253 (10th Cir. 2005) (statute's specific intent requirement defeats defendant's arbitrary enforcement argument because specific intent "is an objectively verifiable requirement with a long history in American jurisprudence"). This is because without evidence that a potential defendant knew his conduct was illegal, the government cannot establish an element of the offense, and therefore cannot obtain a conviction. Translated into the realm of the espionage statutes, this means that the government cannot prosecute an individual under Section 793(d) or (e) unless it has sufficient evidence to establish that the defendant knew he had obtained national defense

information, knew it was illegal to communicate that information to a person not entitled to receive it, and, in cases involving intangible information, had reason to believe that the information could be used to the injury of the United States or advantage of a foreign nation. These are extremely rigorous evidentiary hurdles that protect the arbitrary enforcement of the Section 793.[7]

In addition, the Supreme Court has explained that "the more important aspect" of the arbitrary enforcement analysis is the requirement that Section 793 "establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (emphasis added). These minimal guidelines are necessary to prevent "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* Sections 793(d) and (e) contain far more than just "minimal guidelines." The statute sets forth numerous specific elements that must be proven. For example, the information that is communicated must relate to "the national defense." The Fourth Circuit has defined this term to include only information that the United States government has taken steps to keep from official public disclosure. *See United States v. Squillacote*, 221 F.3d 542, 577 (4th Cir. 2000) (citing *United States v. Heine,*

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[7] The Fourth Circuit has recognized that these evidentiary requirements, and the nature of espionage in general, mean that prosecutions under the espionage statutes are relatively rare, but no less important: "Violations under the [Espionage] Act are not easily established. The violators act with the intention of concealing their conduct. They try, as the defendant did in this case, to leave few trails. Moreover, any prosecution under the Act will in every case pose difficult problems of balancing the need for prosecution and the possible damage that a public trial will require by way of the disclosure of vital national interest secrets in a public trial. All these circumstances suggest that the rarity of prosecution under the statutes does not indicate that the statutes were not to be enforced as written. We think in any event that the rarity of the use of the statute as a basis for prosecution is at best a questionable basis for nullifying the clear language of the statute, and we think the revision of 1950 and its reenactment of section 793(d) demonstrate that Congress did not consider such statute meaningless or intend that the statute and its prohibitions were to be abandoned." *Morison*, 844 F.2d at 1067.

151 F.2d 813, 816 (2nd Cir.1945)). In addition, in cases like this one involving intangible communications, the possessor of the information must have "reason to believe" that the information "could be used to the injury of the United States or to the advantage of any foreign nation." The government must also prove that the possessor communicated the information to a "person not entitled to receive it." Overlaying these elements is, of course, the requirement that the defendant acted willfully, knowing that his conduct was illegal. All of these elements have been held constitutional when attacked by defendants on vagueness grounds. *See Gorin*, 312 U.S. at 27 (phrase "reason to believe" and "national defense" not unconstitutionally vague); *Squillacote*, 221 F.3d at 580 (phrase "relating to the national defense" in Section 793 not unconstitutionally vague); *Morison*, 844 F.2d at 1071-72, 1074 (phrase "relating to the national defense," phrase "entitled to receive," and term "willfully" in Section 793 not unconstitutionally vague); *Dedeyan*, 584 F.2d at 39 (phrase "relating to the national defense" in Section 793 not unconstitutionally vague). Taken as a whole, these evidentiary requirements demonstrate that Section 793(d) and (e) charges cannot be brought at the whim of the prosecutor or to pursue his "personal predilections."

E. Section 793 is Not Unconstitutionally Vague Under a Facial Challenge

The government notes that the defendants incorrectly assert in their memorandum that this court should apply a "heightened" vagueness standard to Section 793 because First Amendment rights are at issue. Def. Mem. at 16. The defendants' so-called "heightened" standard is, in fact, a reference to a "facial" vagueness challenge–which the defendants clearly do not assert. The Fourth Circuit has explained that "the approach to 'vagueness' governing [an as-applied case] is different from that

followed in [facial challenge] cases arising under the First Amendment. There we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct." *Sun*, 278 F.3d at 309 (quoting *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963)). If a statute does not implicate First Amendment rights–which, as explained below, the espionage statutes do not–then only an as-applied vagueness challenge is available to the defendants. *See United States v. Williams*, 364 F.3d 556, 559 (4th Cir. 2004) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."). In light of the fact that the defendants offer no developed argument asserting a facial challenge to Section 793, and given that no First Amendment rights are implicated by Section 793's application to these defendants, there is no need for this court to analyze a facial challenge to the statute.

Even if a facial challenge was at issue in this case, Section 793 would not be unconstitutionally vague. As mentioned previously, a facial challenge to a statute considers whether the statute gives a "hypothetical defendant fair notice" of its prohibitions. *Hsu*, 364 F.3d at 196. However, defendants rarely succeed in asserting a facial challenge to a statute. This is because "[s]triking down ordinances (or exceptions to the same) as facially void for vagueness is a disfavored judicial exercise. Nullification of a law in the abstract involves a far more aggressive use of judicial power than striking down a discrete and particularized application of it." *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999). As a consequence, the Fourth Circuit has explained that "speculation about possible

vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *United Seniors Ass'n, Inc. v. Social Sec. Admin.*, 423 F.3d 397, 408 (4th Cir. 2005) (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)). A statute "will not be struck down as vague, even though marginal cases could be put where doubts might arise." *Morison*, 844 F.2d at 1071 (quoting *Arnett v. Kennedy,* 416 U.S. 134, 159 (1974)).

The elements of an offense under Section 793 which defeat an as-applied vagueness challenge just as easily refute a facial challenge. The numerous and specific elements in Section 793 that the government must prove make it likely that the statute would be valid in the vast majority, if not all, of its intended applications. The willful intent requirement is a particularly strong guarantee against the unconstitutional application of Section 793. The Fourth Circuit recognized this truth when it held in *Morison* that Section 793 was not vague. The court explained that "it is settled beyond controversy that if one is not of the rare 'entrapped' innocents but one to whom the statute clearly applies, irrespective of any claims of vagueness, he has no standing to challenge successfully the statute under which he is charged for vagueness." *Morison*, 844 F.2d at 1071 (citing *Parker v. Levy*, 417 U.S. 733, 756 (1974). By requiring the government to prove that the defendants knew their conduct was illegal, Section 793 insures that an "entrapped innocent" will not fall within the statue's confines. Section 793 is not unconstitutionally vague.

II. The Defendants Do Not Have a First Amendment Right to Conspire to Obtain or Disclose National Defense Information

A. Defendants' Distinction Between Oral and Documentary Disclosures is Irrelevant

The center piece of the defendants' First Amendment argument is that the government is seeking to criminalize "verbal" communications that are "pure speech," and are therefore protected by a strict scrutiny analysis under the First Amendment. Def. Mem. At 42-43. The defendants claim that "this is not a case about conduct, as one could argue when documents are being transmitted." Def. Mem. at 43. Rather, the defendants allege that Section 793 is unconstitutional because it regulates "oral communications" and "distinguishes favored speech from disfavored speech on the basis of ideas expressed." *Id.* By focusing on the oral nature of their communications, the defendants try to distinguish this case from all previous prosecutions under the espionage statutes—which the defendants incorrectly claim all involved the disclosure of documents or writings.[8]

The defendants' argument misses a critical point. When analyzing the First Amendment, there is simply nothing special or unique about "oral communications" as opposed to other methods of communication. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word."). The First Amendment protects all expression, be it oral or otherwise. *See Carlson v. California,* 310 U.S. 106, 60 113 (1940) (protecting a person's First Amendment right to speak "whether by pamphlet, by word of mouth or by banner"). As a result, the Supreme

[8] As discussed above, *Gorin*, *Rosenberg* and *Pelton* all involved disclosures via oral communication.

Court has held that the First Amendment prohibits regulations of divergent types of "speech," from flag burning to nude dancing. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (nude dancing subject to intermediate scrutiny); *Johnson*, 491 U.S. at 412 (flag burning subject to strict scrutiny).

Most significantly for this case, the Court has long applied the highest level of constitutional protection to laws aimed at the dissemination of written words and documents when the activity is protected under the First Amendment. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341 (1995) (First Amendment protects handing-out "pamphlets, leaflets, brochures and even books"); *Martin v. City of Struthers,* 319 U.S. 141, 145 (1943) (First Amendment protects handing-out leaflets door-to-door). This protection applies to written words that communicate ideas about foreign policy or other important matters of public debate. *City of Ladue v. Gilleo,* 512 U.S. 43, 54-57 (1994) (First Amendment protected sign calling for "Peace in the Gulf."). The consequence of this is that, if the defendants' argument is to be believed, then the disclosure of documents containing national defense information would be subject to strict scrutiny. Yet, as discussed below, no court has so held.

B. Section 793 is Not Subject to Strict Scrutiny Because the Conduct it Prohibits is Not Entitled to Any First Amendment Protection

Despite the First Amendment's heightened protection for the dissemination of spoken and written words, no espionage statute has ever been subject to strict scrutiny. This is because the First Amendment simply does not protect the type of conduct prohibited by the espionage statutes. In *United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988), the defendant was convicted of violating Section 793 when he passed national defense information to a foreign news outlet. The

defendant challenged his conviction on the ground that Section 793 violated the First Amendment. In analyzing the statute, the Fourth Circuit did not apply strict scrutiny. Instead, the court stated "we do not perceive any First Amendment rights to be implicated here." 844 F.2d at 1068 (emphasis added). The Fourth Circuit explained that "[t]his conclusion in our view follows from the decision in *Branzburg v. Hayes,* 408 U.S. 665 (1972)." In *Branzburg*, a newspaper reporter had witnessed criminal activity and written a newspaper article about it. The Supreme Court held that requiring the reporter to give testimony before a state or federal grand jury did not violate the First Amendment. 408 U.S. at 667. The Fourth Circuit in *Morison* quoted at length from a passage of *Branzburg* in which the Supreme Court made "certain rulings which are pertinent" for purposes of analyzing Section 793. In doing so, the Fourth Circuit adopted the view that "[i]t would be frivolous to assert-and no one does in these cases-that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws."[9] *Morison*, 844 F.2d at 1068.

From the earliest days of the espionage statutes' history, the conduct prohibited therein has never been protected by the First Amendment. In *Schenck v. United States*, 249 U.S. 47 (1919), the defendant was charged with conspiring to obstruct military recruiting and enlistment in violation of the Espionage Act of 1917.[10] The defendant

[9] The First Amendment analysis in *Branzburg* did not hinge on the manner of the newspaper reporter's communication (be it oral or written) or whether the person whose First Amendments rights were at stake was a private person or a government employee.

[10] In fact, Justice Holmes' opinion in *Schenck* gave birth to the commonly used phrase that "a false cry of fire, conceivably tolerable in some places, will not be protected if shouted in a crowded theater." *N. L. R. B. v. Kayser-Roth Hosiery Co.*, 388 F.2d 979, 981 (4th Cir. 1968) (citing *Schenck*, 249 U.S. at 52 ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may

sought to print and circulate leaflets strongly opposing the draft and argued that criminalizing such conduct violated the First Amendment. Writing for a unanimous court, Justice Holmes rejected this argument. Although recognizing that the defendant's activity "in many places and in ordinary times . . . [may] have been within their constitutional rights," the Court held that it did not regard the defendant's speech "as protected by any constitutional right." 249 U.S. at 52 (emphasis added). The Court explained that:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id.

Justice Holmes applied the same reasoning in another Supreme Court decision upholding a defendant's conviction for conspiracy to violate the Espionage Act of 1917; a case which involved the publication of a newspaper that caused "disloyalty, mutiny and refusal of duty in the military and naval forces of the United States." *Frohwerk v. United States*, 249 U.S. 204, 205 (1919). Adopting the reasoning in *Schenck*, the Court added that "the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language." *Id.* at 206. *Schenck* and *Frohwerk* make clear that from the earliest days of the espionage statutes, the Supreme Court has never considered the proscribed conduct to be protected by the First Amendment.

In the years since *Schenck*, courts in the Fourth Circuit have continued to recognize the validity of Justice Holmes' reasoning, *see Collinson v. Gott*, 895 F.2d 994,

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have all the effect of force.")).

999 (4th Cir. 1990), and have applied it in the context of modern espionage prosecutions. As one court in this district recently said, "[i]t is well established that the 'communication to a foreign government of secret material connected with the national defense can by no far-fetched reasoning be included within the area of First-Amendment protected free speech.'" *United States v. Regan*, 221 F.Supp.2d 666, 671 n.3 (E.D.Va. 2002) (quoting *Rosenberg,* 195 F.2d at 591).

In other areas of the criminal law, certain types of activities, which on their face may appear to be protected "speech," nevertheless fall outside of First Amendment protection. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children."); *see also Accountant's Soc. of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) ("the Supreme Court has emphasized it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed"). As the Supreme Court has explained, "it is not rare," that otherwise protected speech may be prohibited if "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake." *New York v. Ferber*, 458 U.S. 747, 763-64 (1982). When the speech at issue "bears so heavily and pervasively" on the public welfare, "we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment." *Id.* at 764.

For example, courts have held that false statements in violation of 18 U.S.C. § 1001, whether committed orally or in writing, are not protected by the First Amendment. *See Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983) (stating that "false statements are not immunized by the First Amendment right to freedom of speech"); *United States v. Hsia*, 176 F.3d 517, 525 (D.C. Cir. 1999) (rejecting defendant's claim that she "was simply soliciting political contributions, her actions [] were protected speech [and] therefore the indictment [involving Section 1001] must be subject to strict scrutiny"). Similarly, speech that is uttered as part of a criminal conspiracy is not protected by the First Amendment. *See United States v. Pulido*, 69 F.3d 192, 209 (7th Cir. 1995) (rejecting defendant's argument that conspiracy statute subjects "mere thoughts and conversations to criminal prosecution and imprisonment" and therefore violates the First Amendment).

Another example was provided by this court in *United States v. Lindh*, 212 F.Supp.2d 541 (E.D.Va. 2002) (Ellis, J.). The defendant in *Lindh* argued that a law prohibiting the provision of material support to terrorists infringed on his First Amendment rights. In rejecting that argument, this court did not apply a strict scrutiny analysis, but instead held that the defendant's activities were simply not afforded any First Amendment protection. According to the court, "[t]here is . . . a clear line between First Amendment protected activity and criminal conduct for which there is no constitutional protection." *Lindh*, 212 F.Supp.2d at 569 (emphasis added). This court found particularly persuasive Justice Douglas' statement in *Dennis v. United States*, 341 U.S. 494, 581 (1951), that "[t]he freedom to speak is not absolute; the teaching of

methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality." *Id.*

C. The Defendant's Conspiracy to Obtain and Disclose National Defense Information is Not Protected by the First Amendment

Rosen's and Weissman's conspiracy to obtain national defense information and, as soon as the get it, report it to members of a foreign government, among others, is also "beyond the pale," and not protected by the First Amendment. Disclosing this country's national defense information to a foreign power has never been considered one of the "forms of discourse critical of government, its policies, and its leaders, which have always animated, and to this day continue to animate, the First Amendment." *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 249 (4th Cir. 1997). In fact, just the opposite is true. The Supreme Court's holdings in *Schenck* and *Frohwerk* demonstrate that from the earliest days of the espionage statutes, conduct prohibited thereunder has never been considered to fall within the ambit of the First Amendment. This principle has been reaffirmed in recent cases outside the espionage context.

In *Rice*, the Fourth Circuit—citing *Schenck* and *Frohwerk*—held that a "Hit Man" instruction book was not protected by the First Amendment because it is the "type of speech that the Supreme Court has quite purposely left unprotected, and the prosecution of which, criminally or civilly, has historically been thought subject to few, if any, First Amendment constraints." 128 F.3d at 249-50. The same reasoning is true with respect to the disclosure of national defense information in violation of Section 793. In the more than eighty years since the espionage statutes were first passed, no court has ever held that the First Amendment protected anyone from prosecution for the disclosure of national defense information, let alone conspiring to do so. Jeopardizing this country's

ability to defend itself by passing on its national defense information to a foreign government, or anyone else not entitled to receive it, is simply not the type of "discourse" that has "animated" the First Amendment at any point in this nation's history; and the defendants cite no case to the contrary.

With no case law in their favor, the defendants resort to mischaracterizing the conduct that is at issue in this case. The defendants repeatedly describe their conduct as "lobbying on AIPAC's behalf with officials within the Executive Branch." Def. Mem. at 42. The conduct at issue in this case is not about lobbying or petitioning the government.[11] This case is about Rosen's and Weissman's conspiring with each other, and others, to illegally obtain national defense information and communicate it to foreign officials, and others, to further their own interests at the expense of the United States' national security. The fact that Rosen and Weissman chose to mix protected speech (lobbying) with non-protected criminal conduct (conspiring to obtain and disclose national defense information) is irrelevant. *See New York v. Ferber*, 458 U.S. 747, 761-62 (1982) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.").

The defendant in *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000), unsuccessfully tried to draw a similar distinction in the context of child pornography. In *Matthews*, a bona fide journalist was convicted under a statute which, like Section 793, prohibited the communication of a certain type of information, namely

[11] At oral argument, counsel for Rosen admitted as much. In response to the Court's questioning, counsel conceded that neither Rosen nor Weissman ever used the national defense information they obtained to petition Congress or the Executive branch. Instead, counsel admitted that they divulged it to a foreign power and members of the media. *See* Hearing Transcript, March 24, 2006, p. 29.

pornography depicting real children. The journalist claimed that he sent the images as part of a news investigation he was conducting on the evils of child pornography. The defendant argued that the First Amendment protected the use of child pornography in works of "academic, educational, or political significance," including "journalistic uses." 209 F.3d at 344. The Fourth Circuit rejected this argument, and held that the government can ban non-obscene child pornography—even child pornography that has "serious literary, artistic, political, or scientific value"—because of the government's interest in preventing the "sexual exploitation and abuse of children." *Id.* at 345. If the First Amendment does not prohibit the government from banning works of serious literary, artistic, political or scientific value in order to protect against child abuse, then it must also be true that the First Amendment does not prohibit the government from preventing the disclosure of national defense information to protect our nation's security. Holding otherwise "implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends." *Branzburg*, 408 U.S. at 692.

For yet another reason, the defendants' foundational premise–that their conduct is protected by the First Amendment–is completely undermined by the Fourth Circuit's First Amendment analysis in *Morison*. The court in *Morison* recognized Sections 793(d) and (e) as essentially and exactly what they are: prohibitions against stealing national defense information and then passing on this stolen property to someone not entitled by its owner to have it. In addressing Morison's argument that he should be exempted from the statute's coverage because he disclosed the information to the press, the court called him what he was, a thief. The court characterized Morison's conduct as theivery, saying

he "is being prosecuted for purloining from the intelligence files of the Navy national defense materials clearly marked as 'Intelligence Information' and 'Secret' and for transmitting that material to 'one not entitled to receive it.'" *Morison*, 844 F.2d at 1067 (emphasis added). At a minimum, *Morison* stands for the principle that Sections 793(d) and (e) punish the stealing of national defense information and that the thief, even if he claims to act in the public interest, gets no First Amendment protection.

The same is true with respect to Rosen and Weissman. Samuel Morison stole government property. Rosen and Weissman are charged with conspiring with United States government officials to gather and transmit national defense information to those not entitled to receive it. In essence, they are charged with conspiring to steal national defense information and, under the law, are responsible for the acts of their co-conspirators done in furtherance of their criminal agreement. *See United States v. Ward*, 171 F.3d 188, 194 (4th Cir. 1999) (there is "no doubt that a conspirator is responsible for the acts of others in furtherance of the conspiracy which acts are known or reasonably foreseeable to him"). If one of those acts is the "purloining" of national defense information by a government employee, then not only do the defendants stand in the shoes of the thief, they stand in those of Morison. Of Samuel Morison the court said, "[t]o permit the thief . . . to misuse the Amendment would be to prostitute the salutary purposes of the First Amendment." *Morison*, at 1069-70. To permit Rosen and Weissman to conspire to steal national defense information would be similarly abusive.

D. Fourth Circuit Precedent Resolves First Amendment Issues in Espionage Cases Through an Overbreadth Analysis, Not Strict Scrutiny

Rather than applying a strict scrutiny, intermediate scrutiny or a rational-basis test to Section 793, the Fourth Circuit in *Morison* addressed the alleged free speech issues in

the context of the defendant's overbreadth challenge. The *Morison* court conducted an overbreadth analysis despite its holding that "we do not perceive any First Amendment rights to be implicated here."[12] *Morison*, 844 F.2d at 1068 (emphasis added). In the time since *Morison* was decided, the Fourth Circuit has made clear that no overbreadth analysis is necessary when First Amendment rights are not implicated. *See Willis*, 426 F.3d at 262 ("Our conclusion that dancing is not protected speech forecloses," defendant's vagueness and overbreadth arguments); *United Seniors Ass'n Inc.*, 423 F.3d at 406 (if statute does not "reach a substantial amount of constitutionally protected conduct . . . then the overbreadth challenge must fail"). Thus, this court should reject Rosen's and Weissman's overbreadth arguments on the ground that the conduct prohibited by Section 793 simply falls outside the realm of First Amendment protection.

Assuming for the sake of argument that an overbreadth analysis is proper when no First Amendment rights are at issue, the court's overbreadth discussion in *Morison* clearly refutes the defendants' arguments in this case. At the outset, the Fourth Circuit in *Morison* cautioned that the overbreadth analysis is "strong medicine to be applied with hesitation and then only as a last resort, and only if the statute cannot be given a narrowing construction to remove the overbreadth." 844 F.2d at 1075 (quoting *Ferber*, 458 U.S. at 769). It is an extremely limited doctrine that applies only in the context of the First Amendment. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

Of great significance for this case, the Fourth Circuit described Section 793 as a statute "which regulate[s] 'conduct in the shadow of the First Amendment'," rather than

[12] Again, it is of no import that *Morison* involved documents or that the defendant was a government employee. If the activity were in fact protected by the First Amendment, neither of those facts would relieve the court of its obligation to apply the appropriate constitutional review.

"pure speech." 844 F.2d at 1075 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). In so holding, the court relied on the Supreme Court's decision in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). *Broadrick* involved a state prohibition on government employees' political activity. The Supreme Court said that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." 413 U.S. at 614. The Court held that the regulation at issue in *Broadrick* was just such a statute because it was "not a censorial statute, directed at particular groups or viewpoints . . . [but] rather, seeks to regulate political activity in an even-handed and neutral manner." *Id.* at 616. The Fourth Circuit adopted this same reasoning in concluding that Section 793 prohibits "conduct" and not "pure speech." 844 F.2d at 1075.

To determine whether Section 793 was overbroad, the Fourth Circuit adopted the view that the overbreadth doctrine could be applied to Section 793 only if one of three conditions were met: (1) when the governmental interest sought to be implemented is too insubstantial, or at least insufficient in relation to the inhibitory effect on first amendment freedoms; (2) when the means employed bear little relation to the asserted governmental interest; and (3) when the means chosen by the legislature do in fact relate to a substantial governmental interest, but that interest could be achieved by a less drastic means-that is, a method less invasive of free speech interests." *Morison*, 844 F.2d at 1075. The court concluded that, with respect to Section 793, the first two circumstances were not present. *Id.* at 1076 ("Unquestionably, these statutes are expressions of an important and vital governmental interest and have a direct relation to the interests

involved here"). Only the final condition was implicated by Section 793, and it was of no constitutional concern given the precise meaning of the terms in the statute. *Id.*

Applying the same analysis to this case, it is apparent that Section 793 is not overbroad. None of the three conditions specified by the Fourth Circuit are present. As the court held in *Morison*, the government interest sought to be implemented in Section 793 (protecting the nation's national security) is not insubstantial, and the means employed (prohibiting the communication of national defense information) have a direct relation to the government's interest. 844 F.2d at 1075. Nor can the government's interest be achieved by a method less invasive of free speech. This is true because, as an initial matter, there is simply no First Amendment right to disclose national defense information. In addition, the numerous and specific elements of a Section 793, which have been described in detail above, limit the application of the statute and greatly reduce the possibility that its reach would extend to innocent, legal speech.

Defendants' sole argument on this point is the unpersuasive claim that cases involving documents are different. They argue that the court should limit Section 793's scope to government employees who communicate actual documents with classification markings. This in no way achieves the compelling government interest behind Section 793, namely the security of our nation. Congress specifically did not limit Section 793 to government employees. Recognizing that any person who communicates national defense information could be a danger to our nation's security, Congress made it illegal for "whoever" to communicate national defense information to a person not entitled to receive it.

In fact, Section 793 is already less drastic than it could be. As the defendants recognize, this statute does not apply to all classified information–only national defense information. Further, it applies only to national defense information which the government has taken steps to prevent from official public disclosure. *See Squillacote*, 221 F.3d at 577. Section 793 also is limited in cases involving intangible communications to national defense information which the possessor has reason to believe could be used to the injury of the United States or the advantage of any foreign nation. Finally, it restricts disclosure, not to everyone, but only to those persons not entitled to receive it. Section 793 is already extremely limited and does not intrude into the "shadow" of the First Amendment.

E. Section 793 Passes "Less Stringent" or Intermediate Scrutiny

Even if this court were to find that Section 793 prohibited some form of protected speech, which it does not, the statute is content-neutral and should be reviewed under intermediate scrutiny, not strict scrutiny. As the Fourth Circuit has explained:

> The level of First Amendment scrutiny a court applies to determine the "plainly legitimate sweep" of a regulation depends on the purpose for which the regulation was adopted. If the regulation was adopted to burden disfavored viewpoints or modes of expression, a court applies strict scrutiny. If, by contrast, the regulation was adopted for a purpose unrelated to the suppression of expression-e.g., to regulate conduct, or the time, place, and manner in which expression may take place-a court must apply a less demanding intermediate scrutiny.

Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 512-13 (4th Cir. 2002). To determine whether a statute is content neutral "the principal inquiry . . . is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." *Satellite Broad. & Communications Ass'n v. F.C.C.*, 275 F.3d 337, 353 (4th Cir. 2001). "If the governmental purpose in enacting the regulation is unrelated

to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien* for evaluating restrictions on symbolic speech." *City of Erie*, 529 U.S. at 289 (citing *Johnson*, 491 U.S. at 403 and *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

The purpose of Section 793 is to prohibit the disclosure of national defense information and protect the national security of the United States. *See Morison*, 844 F.2d at 1065-66. Any burden on speech is merely incidental to the purpose of the statute. A governmental regulation which leads to incidental restrictions on protected speech passes constitutional muster if the regulation is "within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

Section 793 meets all four requirements. First, it cannot be disputed that the government has the constitutional power to control access to national defense information. *See U.S. Constitution*, Art.I. , Sec. 8 (Congress has the power to raise and support armies and a Navy and to issue rules governing and regulating them); *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (President has constitutional authority, apart from any congressional power, to control access to national security information); *United States v. Hammoud,* 381 F.3d 316, 329 (4th Cir. 2004); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000) (Federal government can restrict the dealings of United States citizens and foreign entities). Second, surely one of the most compelling government interests is the preservation of

our national security. "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *United States v. Snepp*, 444 U.S. 507, 510, n.3 (1980). Third, the purpose of the statute is to prohibit the disclosure of national defense information and to control and punish activities related to espionage, thereby protecting the nation's security. *See Morison*, 844 F.2d at 1065 (stating that Sections 793 and 794 both "dealt in common with national defense materials . . . [b]oth prohibit disclosure"); *see also Boeckenhaupt v. United States*, 392 F.2d 24 (4th Cir. 1968). In *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004), the Fourth Circuit applied the *O'Brien* test to determine whether the prohibition against material support of terrorism found at 18 U.S.C. §2339B ran afoul of the First Amendment's guarantee of freedom of association. Addressing the third prong, it concluded that the "[g]overnment's interest in curbing terrorism is unrelated to the suppression of expression" because "Hammoud is free to advocate in favor of Hizballah or its political objectives–§2339B does not target such advocacy." *Hammoud*, 381 F.3d at 329. Similarly, Section 793 does not target advocacy. The defendants remain free to advocate on behalf of AIPAC, its membership, and anyone else. The defendants are not, however, entitled under the First Amendment to use stolen government secrets to do so.

With respect to the fourth prong, the *O'Brien* test requires that "the restriction is no greater than essential to the furtherance of the government's interest." *City of Erie*, 529 U.S. at 299. All disclosures of national defense information, in whatever form, to persons not entitled to receive that information can harm our national preparedness. Although communicating this information may arguably enhance any foreign policy

discussion, its absence does not restrict the defendants' ability to freely discuss foreign policy issues and effectively advocate their cause. Publicly available information and the intellectual capacities of those involved in the discourse of the "foreign policy community" provide ample opportunity for these defendants to convey their message.

Finally, as has been argued previously, the statute contains numerous elements that greatly restrict its application, including the requirement that the information communicated relate to "the national defense," the requirement that the possessor of intangible information have reason to believe that the information could be used to harm the United States or benefit a foreign nation, the requirement that the information be communicated to a person not entitled to receive it, and the requirement that the defendant act willfully, knowing that his conduct is illegal. These elements insure that Section 793 in no way restricts the defendants' ability to discuss foreign policy issues or engage in public policy discussion. Debate over whether the United States should be more or less supportive of any country in the Middle East is neither chilled nor disfavored by the statute. Section 793 only restricts the communication of national defense information to those persons not entitled to receive it. This is a limited statute that does not constrain speech; it is a statute that is necessary to further the government's important interest in protecting national security. Section 793 passes intermediate scrutiny.

F. Section 793 Passes Strict Scrutiny

Even if this court were to find that disclosing national defense information to officials of a foreign government and members of the media was the type of speech at the core of the First Amendment, and that prohibiting such disclosures was a content-based

regulation subject to the most rigorous level of constitutional analysis in the form of strict scrutiny, Section 793 would still be valid. To pass strict scrutiny, "a law must be necessary to serve compelling governmental interests by the least restrictive means available." *American Life League, Inc. v. Reno*, 47 F.3d 642, 648 (4th Cir.), *cert. denied*, 516 U.S. 809 (1995). Content-based regulations of speech "are subjected to this most exacting scrutiny because they 'rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Thorne v. U.S. Dept. of Defense*, 916 F.Supp. 1358, 1369 (E.D.Va. 1996) (Ellis, J.) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991)). Of course, the espionage statutes in no way drive ideas or viewpoints from the marketplace. Rosen and Weissman, or anyone else, can express their ideas and views about foreign policy as loud as they want, as often as they want, and to whom ever they want; all without any possibility of criminal sanction. Section 793 only prohibits the willful communication of national defense information to those individuals not entitled to receive it. It does not prohibit ideas, opinion, or viewpoints.

Even assuming that Section 793 did drive ideas or viewpoints from the marketplace, Section 793 would meet the requirements of strict scrutiny. There is no doubt that preventing the disclosure of national defense information to those individuals not entitled to receive it is a compelling government interest. *Snepp*, 444 U.S. at 510 n.3. The critical question is whether Section 793 provides the least restrictive means to accomplish this compelling government interest. Section 793 is narrowly tailored to achieve the government's compelling interest. As has been argued previously, the statute contains numerous elements that greatly restrict its application. All of these elements

serve to narrowly tailor the statute's reach to only a small subset of conduct. *See Schleifer*, 159 F.3d at 851 (statute would survive strict scrutiny because of its "limited scope").

It is also important in the First Amendment analysis to highlight the practical issues involved in this case. As Justice Holmes said in *Schenck*, context is critical. 249 U.S. at 52 (stating the First Amendment issues were "a question of proximity and degree"). If oral communications of national defense information to non-government employees were to render the espionage statutes unconstitutional, this country would face a new era in which unconstrained espionage would flourish. Foreign agents and other individuals intent on obtaining the nation's most secret information would merely need to engage in verbal discussions with their sources in order to thwart law enforcement. It is obvious that in passing the espionage statutes, Congress never intended such an absurd result. It is also obvious from *Gorin* that the Supreme Court recognized the constitutionality of prosecuting a non-government employee who obtains national defense information through oral communications. Since *Gorin*, the government has prosecuted oral communications and non-government employees–none of which were held unconstitutional. *See Pelton*, 835 F.2d at 1067 (oral communications); *Truong*, 629 F.2d at 908 (non-government employee).

In the final analysis, this case is not about free speech, foreign policy lobbying, or petitioning the government. This case is about the willful conduct of two defendants; two defendants who conspired to obtain national defense information, knew they had in fact obtained national defense information, knew that communicating that information to

foreign agents and members of the press was illegal, and yet chose to do so anyway. The First Amendment offers no sanctuary for their criminal conduct.

III. *Bartnicki v. Vopper* Is Inapposite

The defendants contend in their briefs, and at oral argument, that *Bartnicki v. Vopper*, 532 U.S. 514 (2001), provides First Amendment protection for their criminal conduct in this case. As we explained in our Response Brief, it does not. First, the Supreme Court expressly limited its holding in *Bartnicki* to the facts presented in that case. Second, those facts differ in several critical apsects from the facts in this case. Finally, *Bartnicki* and related privacy cases support a finding that the defendants' unlawful conspiracy to obtain and disclose national defense information is not protected by the First Amendment.

A. *Bartnicki* Applies Only in a Limited Factual Scenario, Which is Not Present in this Espionage Prosecution

The facts in *Bartnicki* were set forth in the parties' briefs, but bear some repeating here. In *Bartnicki*, a private cell phone conversation between persons involved in contentious union negotiations was illegally intercepted and recorded by unknown parties. The recording was then delivered anonymously to the head of a local union. He then delivered it to a media outlet.[13] The media outlet played the tape on the air. The parties on the intercepted call sued the media outlet based upon a violation of a federal statute prohibiting the illegal interception and disclosure of wire, electronic and oral

[13] The defendants are correct that the Court did not distinguish between the first recipient of the tape and the media outlet. Def. Mem. at 47. As explained below, no such distinction was necessary because neither had any knowledge as to how the recording was made nor participated in its illegal collection. *See* 532 U.S. at 519.

communications. 18 U.S.C.§ 2511.[14] The media outlet claimed that its disclosure was protected by the First Amendment.

Before it began its analysis, the Supreme Court restricted its holding to a very specific factual scenario present in that case. First, the Court noted that the media "played no part" in the illegal interception, knew of the interception only after it occurred and never knew who did the interception. Second, the media lawfully obtained the tapes, even though the recording was unlawfully intercepted by someone else. *Id* at 525. Finally, the Court assumed that the subject matter on the tape was a matter of public concern. *Id*.

The facts in this case are very different from those in *Bartnicki*. The defendants have attempted, unsuccessfully, to conform the facts and the charges in this case to fit into the very narrow, limited facts presented in *Bartnicki*. The critical difference between this case and *Bartnicki*, is that Rosen and Weissman were directly involved in the illegal disclosure and, by their own statements and conduct, were aware that the disclosure was illegal. If one wants to try and pigeonhole the defendants properly into the *Bartnicki* mold, the defendants are the unknown party who illegally intercepted the call and mailed the tape to the media. They are not head of the union who received an anonymous package, nor are they the media who broadcast the tape without, both unaware of its illegal collection (the respondents). Viewed in their more accurate role, *Bartnicki* and related cases teach that the defendants' conduct is not protected by the First Amendment.

[14] The statute at issue was 18 U.S.C. §2511(c) & (d). Title 18 U.S.C. § 2511(c) proscribes the intentional disclosure of the contents of any wire disclosure, knowing or having reason to know the communication was obtained in violation of 18 U.S.C. § 2511.

Id. at 529, n.19. Indeed, the Supreme Court stated, "[o]ur holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully." *Id.*[15]

The *Bartnicki* Court noted that *New York Times v. United States*, 403 U.S. 713, 535 (1971) (*per curiam*), raised, but did not resolve, the question "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition but the ensuing publication as well." 532 U.S. at 528 (emphasis in original). The Court stressed in *Bartnicki* that it was not answering that question here. The Court took pains to make it clear that this case was limited to its facts and answered a very narrow question: can the government punish a publisher who has obtained the information in a manner lawful in itself, but from a source who has obtained it unlawfully? *Id*. (citing *Boehner v. McDermott*, 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Sentelle, J., dissenting)). The Court refused to present the issue more broadly, following a line of cases addressing the privacy interest versus First Amendment protections. *See Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989). Justice Breyer, in a concurring opinion joined by Justice O'Connor, was even more explicit about his understanding of the opinion's narrow scope. In his concurring opinion, he stated that he agreed with the "narrow holding

[15] Additionally, quoting from *Branzburg*, 408 U.S. at 691, the Court stated, "[i]t would be frivolous to assert–and no one does in these cases–that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." 532 U.S. at 532. The defendants concede that the illegal inteceptor would not be shielded from liability by the First Amendment. Def. Mem. at 48 n.54. Recognizing that they more properly are placed in that role, the defendants misstate the charges in this case–the defendants have in fact been charged with a criminal conspiracy to have national defense information illegally communicated to them and have therefore participated in the numerous illegal disclosures at issue in this case. *See* Superseding Indictment, Count One.

limited to the special circumstances" in the case, specifically that the respondents acted lawfully up to the time of final disclosure and the information publicized was a matter of unusual public concern. 532 U.S. at 536.

The Court then sought to determine whether the First Amendment protected the media under these specific facts. *Id* at 522. The Court examined statute's two purposes: one, removing the incentive for parties to intercept private communications and, two, minimizing harm to persons whose conversations have been illegally intercepted. *Id*. at 529. The Court found that achieving the statute's first purpose could only be served by punishment of the person who illegally intercepted the communication. *Id*. at 529-30. The Court found the second purpose considerably stronger, in that the protection of the privacy of communications would encourage "the uninhibited exchange of ideas and information among private parties . . . ." *Id*. at 532 (quoting from Brief for United States). The Court found that this governmental interest, protecting the secrecy of these communications to foster the uninhibited exchange of information and ideas, could be a "valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message, even if that prohibition does not play a significant role in preventing such interceptions from occurring in the first place." *Id*. at 533. Again, Justice Breyer stated the competing constitutional concerns even more explicitly in his concurring opinion:

> I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits? What this Court has called "strict scrutiny"-- with its strong presumption against constitutionality--*is normally out*

> *of place where, as here, important competing constitutional interests are implicated*.

Id. at 536 (emphasis added). Justice Breyer went on to state, "the Federal Constitution must tolerate laws of this kind because of the importance of these privacy interests and speech-related objectives." *Id*. He further stated, "I would not extend [this] holding beyond these present circumstances." *Id*.

It is evident that the narrow and limited holding of *Bartnicki* provides the defendants no relief. Most importantly, the charges in this case, and the defendants actions and statements, establish that *Bartnicki* is inapplicable. Contrary to the defendants' assertions, and unlike the respondents in *Bartnicki*, the Superseding Indictment makes it clear that the defendants are in fact charged with acting illegally in connection with the communication of the national defense information at issue in this case. The defendants did not, as they contend, just "sit and listen" to the United States government officials from whom they collected national defense information. Def. Mem. at 47. They are in fact charged with a five year conspiracy to get the United States government officials to give them that national defense information in violation of 18 U.S.C. § 793(g). They were not, and in the face of the evidence to be presented at trial, cannot claim they were innocent, unwitting recipients of information.

The defendants try to spin other facts in an attempt to make this case look more like *Bartnicki*. Through their conspiracy, the defendants were the recipients of classified United States government intelligence and classified United States government information concerning national security options and deliberations facing United States government officials–not, as they contend, simply issues of "U.S. foreign policy." The information in the numerous disclosures subject to the defendants' criminal conspiracy

was classified national defense information, which the evidence will show, the defendants were aware they were not entitled to possesses. These were not academic discussions of public information; these were private discussions with co-conspirators, and others, of specific United States government information the defendants knew they were not entitled to possess. In light of the substantial government interest in protecting its national defense information and in punishing those who would conspire to illegally obtain it and illegally disclose it, any "strict scrutiny" as applied in *Bartnicki* is, as Justice Breyer stated, out of place given the important constitutional interests which are implicated. The narrow holding in *Bartnicki* can have no bearing on this conduct.

B. *Boehner v. McDermott* Establishes That the Defendants' Conduct Is Not Protected By the First Amendment

On March 28, 2006, the Court of Appeals for the District of Columbia decided *Boehner v. McDermott*, ____ F.3d ____, 2006 WL 769026 (D.C. Cir. 2006) (*Boehner II*) (attached hereto as Exhibit 1). This case holds that the First Amendment does not protect a Congressman who disclosed the contents of an illegally recorded conversation where he was aware that it was illegally recorded, even though he had no part in its illegal interception and his receipt of the tape was not, in itself, unlawful. *Id*. at *4.

The facts in *Boehner* show that Congressman Boehner was a participant on a cell phone conference call in December 1996 discussing pending Congressional issues of significant importance concerning an ethics violation by the then Speaker of the House, Newt Gingrich. A married couple used a scanner to intercept this call. They recorded it and tried to give it to their Congresswoman. On advice of counsel, the Congresswoman declined to accept the tape when she learned how it had been obtained. She instructed the couple to give it to the House Ethics Committee. The couple delivered the tape to

Congressman McDermott, who was then on the Ethics Committee, in a sealed envelope and spoke with him briefly about the tape. Attached to the envelope containing the tape was a letter advising that they had heard the call over a scanner. McDermott later listened to the tape, and let a New York Times reporter listen to the tape and make a copy of it. McDermott was quoted, anonymously, in the press, saying that the call had been heard on a scanner. 332 F.Supp.2d at 149.

Boehner then brought an action against McDermott for a violation of 18 U.S.C. § 2511, the same statute at issue in *Bartnicki*. *See* 332 F.Supp.2d at 152 (setting forth full procedural history of the case). The District court reluctantly dismissed the complaint, holding that the First Amendment protected McDermott's disclosure of the illegally intercepted call, believing such a result was called for by *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that a newspaper has a First Amendment right to publish information it has lawfully obtained from a public disclosure by the government). *Boehner v. McDermott*, 191 F.3d 463, 470-71 (D.C. Cir. 1999) (*Boehner I*).[16] The court of appeals reversed the district court, rejecting the finding that McDermott had a First Amendment right to disclose the illegally intercepted call. *Boehner I*, 191 F.3d at 463. The Court of Appeals reviewed whether McDermott's conduct fell within the First Amendment and held that the proper framework for review was provided by *United States v. O'Brien*, 391 U.S. 367, 376, (1968). The Court held that the statute was content neutral in that it neither favors nor disfavors a particular viewpoint and does not look to who makes the disclosure. *Boehner I*, 191 F.3d at 467. The Court held that the "government regulation is sufficiently justified if it was within the constitutional power of the government; if it

[16] The opinion, despite being vacated and remanded, still serves as a valuable source of guidance on the legal issues raised in it. *See Boehner*, 332 F.Supp.2d 149 (D.D.C. 2004).

furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id*. at 468 (quoting *O'Brien*, 391 U.S. at 377). The Court held that the substantial interest furthered by the statute was the promotion of free speech, by punishing those who would intercept and disclose private conversations. *Id*. In this analysis the court compared McDermott's culpability to those who originally intercepted the call and found that while the original inteceptors may appear more culpable, "in terms of damage to the privacy of the conversations and to the freedom of speech, McDermott's alleged actions had a far more devastating impact." *Id*. at 469.

The Court also found that the government had a substantial interest in punishing McDermott for his disclosure, because without such a prohibition, "the government would have 'no means to prevent the disclosure of private information, because criminals like the [original inteceptors] can literally launder illegally intercepted information' and there would be 'almost no force to deter exposure of any intercepted secret." *Boehner I*, 191 F.3d at 470 (quoting *Boehner v. McDermott*, 1998 WL 436897 (D.D.C. 1998)).

The court of appeals explained that "[u]nless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded." *Id*. The court recognized that the government's interest in protecting the secrecy of communications could not be accomplished if only the original illegal actor could be punished, because one would not expect them to reveal publicly the contents of the communications because that would incriminate themselves. "It was therefore 'essential' for Congress to impose upon third

parties, that is, upon those not responsible for the interception, a duty of nondisclosure." *Id*. at 470.

McDermott, like the defendants in this case, also argued that he had "lawfully obtained" the tape because he committed no offense in accepting it. *Id*. The district court cautioned that this argument was "a slippery one, as it not only defends, but even encourages, the circumnavigation of wiretap statutes, which are designed to prevent the disclosure of private conversations." *Id*. at 471. The court of appeals rejected McDermott's arguments, finding that the federal law prohibited anyone from disclosing the contents of a call they knew was illegally collected. *Id*.

This analysis is especially instructive in the instant case. Both *Bartnicki* and *Boehner I* expressly recognize that there is a substantial governmental interest in the privacy of communications, that indeed this restriction on speech encourages private speech; the exchange of frank ideas and expressions without fear of public disclosure. In the instant case the government's interest is even more substantial, the national security of the United States. Moreover, the point made in these cases, that the protection of private communications enhances the free exchange of private conversations applies with equal force in the national defense arena. The frank and free exchange of classified intelligence information and national security information among authorized U.S. government officials necessary to our nation's security is enhanced when those officials, like ordinary citizens using a cell phone, know that those frank exchanges will be protected from illegal disclosure. The potential that a person could "launder" the national defense information through a knowing and witting intermediary like Rosen or Weissman would allow, and even encourage the circumnavigation of the espionage

statutes and render the United States unable to punish those who conspire or endeavor on their own to get hold of national defense information to which they are not entitled.[17]

Ultimately, the Supreme Court vacated *Boehner I* and remanded it to the court of appeals in light of *Bartnicki*, 532 U.S. 1050 (2001). The court of appeals, in turn, remanded the case to the district court for consideration of the constitutional issues raised in light of *Bartnicki*. 22 Fed. Appx. 16 (2001). On remand, the District court held that the First Amendment did not shield McDermott from liability for disclosure of the tape's contents to the media. 332 F.Supp.2d at 149. The District court examined the First Amendment's application in light of *Bartnicki* and held that McDermott had obtained the tape through illegal means, even though his receipt of the tape itself was not illegal. *Id*. at 165. The district court noted the Supreme Court's instruction that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* (quoting *Bartnicki*, 532 U.S. at 535). The district court, however, held that this was the critical distinguishing factor, where the recipient "knows of both the identity and the illegal means by which a source has obtained the information," then *Bartnicki* did not apply. *Id*. "Moreover," the court held, "the distinction drawn creates sound policy because a recipient's present knowledge of illegality of a disclosure implicates the choice to condone it by accepting the information or to prevent it by declining to participate." *Id*. Finally, the district court held that McDermott did indeed actively accept the tape and knew how it was illegally obtained. *Id*.at 168. Therefore, McDermott's claimed First Amendment defense failed in light of the applicable intermediate scrutiny. *Id*. at 169.

[17] "The right to speak and publish does not in other words, 'carry with it the unrestricted right to gather information." *Boehner I*, 191 F.3d at 462 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).

Just this week, the Court of Appeals for the District of Columbia affirmed the district court's opinion. *Boehner II*, 2006 WL 769026 (D.C. Cir. 2006). The sole issue on appeal was whether the undisputed facts prove that McDermott "unlawfully" obtained the illegal tape recording. *Id*. at *1. McDermott argued that *Bartnicki* stands for the proposition that any individual "who did not participate in the illegal interception of a conversation has a First Amendment right to disclose it." *Id*. at *3. The court of appeals flatly rejected this argument, discussing the limited holding of *Bartnicki* and the critical distinction that McDermott had acted unlawfully in accepting the tape, even though accepting it by itself was not illegal. *Id* at *3-4. Significantly, the court held that simply because McDermott knew the inteceptors had illegally intercepted the conversation, he did not obtain the information lawfully. "It is of little moment whether [McDermott's] complicity constituted aiding and abetting [the original interceptors'] criminal act, or the formation of a conspiracy with them, or amounted to participating in an illegal transaction." *Id*. at *6.

In the instant case, the defendants' criminal complicity in the original disclosure is overwhelming and is the very basis of the conspiracy charge in this case. The defendants in this case were well aware that they were not entitled to national defense information, that it was a crime for U.S. government officials to provide national defense information to them and that it was illegal for them to communicate that information to foreign officials and members of the media. The *Boehner II* court did not apply First Amendment protection in a case where the governmental interest at stake was the protection of private communications of citizens. The *Boehner II* court did not apply First Amendment protection where the person disclosing the information did not

participate in its illegal collection, but was simply aware of its illegal collection. This Court should not apply First Amendment protection where the governmental interest is the protection of national defense information. This Court should not apply First Amendment protection where the defendants were active participants in the criminal conspiracy which triggered the initial illegal disclosures at issue. Defendants' conduct is not protected by the First Amendment.

IV. The Defendants' Motion to Dismiss Count III Should be Denied

Defendant Rosen is charged in Count III of the Indictment with unlawfully, knowingly and willfully aiding and abetting Larry Franklin's unlawful communication of national defense information to a person or persons not entitled to receive it in violation of 18 U.S.C. §§ 793(d) and 2. In our initial response we established that the indictment was sufficient, was not unconstitutionally vague and did not criminalize the mere receipt of a document. Gov't Response to Defendant's Motion To Dismiss Count III, 3-9. At oral argument, Rosen's counsel argued that Count III should be dismissed because the "legal theory" of the charge would create criminal liability for the receipt of the document and second, that Franklin's statements at his plea colloquy establish that Franklin did not have criminal intent. Hearing Transcript, March 24, 2006, p. 93.

At oral argument the Court presented the government with two related questions to be addressed in this supplemental response:

1. "What do you say to the argument that Franklin says he had no criminal intent with respect to that in his plea, that that ends the issue?" Transcript, p. 95.

2. "If the principal has no criminal intent, there can't be an aiding and abetting, can there?" Transcript, p. 97.

We believe it would first be helpful to set forth exactly what Franklin said.

At the plea colloquy the following exchange took place with respect to the document Franklin faxed to Rosen and Weissman:

> The Court: Now, was that recitation of the facts by Mr. Hammerstrom true and accurate in all respects?
>
> Attorney Cacheris: Would you forgive me?
>
> The Court: Yes, go ahead, Mr. Cacheris
>
> (Counsel conferring with defendant)
>
> The Court: All right, let me ask you again, Mr. Franklin, was that recitation of the facts by Mr. Hammerstrom true and accurate in all respects?
>
> The Defendant: I would say that generally it is accurate. There is one point that I would like to make. The one-page document called "the document," was really a sheet, one-page sheet that I faxed to Mr. Rosen, which was
>
> (Three words not transcribed by request of Court)
>
> Attorney Hammerstrom: Your Honor --
>
> The Defendant: – (three words not transcribed by request of Court)
>
> The Court: Just a moment. You are now revealing information.
>
> The Defendant: But it was unclassified – in my opinion, sir, it was unclassified, and it is unclassified.
>
> But the rest of it is fine.
>
> Attorney Hammerstrom: Your Honor, of course, as I said, that's what – the government would prove that it was classified.
>
> The Court: All right.
>
> The Defendant: Not a chance.
>
> The Court: Now other than that – Mr. Franklin, remain there. That's not really a contradiction of anything Mr. Hammerstrom said. So I take it, it's more of an elaboration or a clarification. But is everything Mr. Hammerstrom said otherwise true and accurate in all respects?
>
> The Defendant: Yes, sir.
>
> The Court: And was this statement of facts that you signed and made a part of your plea agreement true and accurate in all respects?
>
> The Defendant: Yes, sir.
>
> The Court. All right.

Earlier, the government advised the Court that it would prove the following beyond a reasonable doubt:

> On March 17, 2003, Mr. Franklin faxed from his office at the Pentagon, to Mr. Rosen's office fax machine, a document that he had prepared that contained national defense information which appeared in the classified appendix to the classified draft internal policy document that Mr. Franklin had previously discussed with Rosen and Weissman on February 12, 2003.

Transcript of Plea Colloquy, p. 4. Franklin admitted at his plea colloquy that the government could prove the above fact beyond a reasonable doubt - even in spite of his statements concerning the classification of the document. Consequently, Franklin did not state that he did not have any criminal intent in sending the document to Rosen. Indeed, his admission that the government could prove this fact beyond a reasonable doubt establishes his criminal intent. As we pointed out in our initial Response, p. 2, the government would present evidence showing that defendant Rosen and Franklin had previously discussed this document, the Franklin had previously attempted to fax the document to Rosen, that Franklin was concerned that Rosen be present to pick it up, as well as other evidence concerning Franklin's preparation of the document and his source for the information in the document. Further the government may present expert testimony establishing that this information relates to the national defense. All of this evidence may be used to rebut Franklin's position, taken at his plea colloquy, that the document was not classified. Moreover, Franklin's testimony at trial may not be the same as his statements made at the plea colloquy. We submit that it would be unfair to judge the weight of this one piece of information when no evidence is properly before the Court. Defendant's arguments about the evidence are premature, "a pre-trial motion to dismiss under Rule 12(b) Fed. R. Crim. P., 'cannot be based on a sufficiency of the evidence argument because such an argument raises factual questions embraced in the general issue." *Lindh*, 212 F.Supp.2d at 576 (quoting *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987). At this stage it is the legal sufficiency of the indictment, not the evidentiary sufficiency.

For purposes of proof at trial, a defendant is guilty of aiding and abetting if he has "knowingly associated himself with and participated in the criminal venture." *United States v. Winstead*, 708 F.2d 925, 927 (4th Cir.1983). To prove association, the government must establish that the defendant participated in the principal's criminal intent, which requires that a defendant be cognizant of the principal's criminal intent and the lawlessness of his activity. *See id.* "To be convicted of aiding and abetting, '[p]articipation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result.'" *United States v. Arrington*, 719 F.2d 701, 705 (4th Cir.1983), *cert. denied*, 465 U.S. 1028 (1984) (quoting *United States v. Hathaway*, 534 F.2d 386, 399 (1st Cir.), *cert. denied,* 429 U.S. 819 (1976)). The same evidence establishing a defendant's participation in a conspiracy may support a conclusion that a defendant participated in the principal's unlawful intent to communicate national defense information, thereby proving guilt of aiding and abetting as well. *See id.* at 705-06. In this case, the government's proof at trial may well overwhelm any statement Franklin makes concerning his actions. At all events, this is not the proper stage to decide that question.

CONCLUSION

For the foregoing reasons, Section 793 is not unconstitutionally vague and does not violate the First Amendment. The Defendants' Motion to Dismiss the Superseding Indictment should be denied. In addition, the Defendant's Motion to Dismiss Count III should be denied.

Respectfully submitted,

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Date: March 31, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing "Government's Supplemental Response to Defendants' Motion to Dismiss the Superseding Indictment" was hand delivered at the United States District Courthouse this ____ day of March 2006 to:

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