UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S MOTION TO DISMISS COUNTS ONE, TWO AND THREE OF THE SUPERSEDING INDICTMENT BECAUSE 18 U.S.C. § 793(e) IS UNCONSTITUTIONALLY VAGUE AS APPLIED AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Mr. James Hitselberger, the defendant, through undersigned counsel, respectfully moves this Honorable Court to dismiss Counts One, Two and Three of the superseding indictment. These counts allege that Mr. Hitselberger violated 18 U.S.C. § 793(e) by unlawfully retaining national defense information. This statute is unenforceable as written. Prosecuting Mr. Hitselberger under this statute violates the fair notice requirements of the Due Process clause because multiple terms contained in § 793(e) are so vague that they fail to provide him with notice of what conduct is criminal and what conduct is not. The statute seeks to impose a criminal penalty on those who willfully retain documents containing information relating to the national defense. The phrase "relating to the national defense" covers such a massive quantity of information that the statute fails to draw a clear line between criminal and non-criminal conduct. In addition, § 793(e) fails to identify with the requisite specificity what constitutes a culpable state of mind. Finally, § 793(e) states that conduct is criminal if a person retains information that the person has reason to believe could be used to the injury of the United States. This phrase is

also unconstitutionally vague. For these reasons, the statute is unconstitutional as applied, and the Court should dismiss Counts One, Two and Three of the indictment.

Argument

The espionage statute has been described as "so sweeping as to be absurd" and bearing constitutional flaws that "go well beyond tolerable limits." Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 1031-32 (1973) (hereinafter *The Espionage Statutes)*. Section 793(e), one of the espionage statutes and a relic of World War I, last modified during the Cold War, is "undoubtedly the most confusing and complex of all the federal espionage statutes." *The Espionage Statutes*, 73 Colum. L. Rev. at 998. Section 793(e) is unenforceable as written. *Id.* Indeed, no court has found that its plain language satisfies the notice requirements of due process. *See Morison*, 844 F.2d at 1086 (Phillips, J., concurring) (concluding that the statute is both constitutionally overbroad and vague, but reluctantly agreeing despite having "grave doubts" that the limiting instructions brought the statute within a constitutional orbit). Multiple of its terms are so vague as to violate due process, thereby failing to give Mr. Hitselberger fair notice of what conduct the statute proscribes. The literal meaning of the statute is sweeping and "almost certainly unconstitutionally vague and overbroad," but "the statutory language does not point toward any one confined reading as a means of saving them." *The Espionage Statutes*, 73 Colum. L. Rev. at 1000. Although several courts have tried to impose some definition and limits on the breadth of its sweep in order to rescue the statute from the widely-acknowledged vagueness, these attempts cannot save the statute. These attempts at limitation far exceed imposing a "judicial gloss" on the statute, which can sometimes bring a vague statute within an

acceptable sphere of definition, but have instead reached the level of judicial re-drafting of the statute. This has essentially created a federal common law crime. This the Constitution does not allow. The statute is unconstitutionally vague and continuing with this prosecution would violate Mr. Hitselberger's rights under the Due Process Clause of the Fifth Amendment.

The indictment charges Mr. Hitselberger with three violations of 18 U.S.C. § 793(e). That statute imposes a criminal penalty on "[w]hoever having unauthorized possession of, access to, or control over any document . . . relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, . . . willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it[.]" The statute defines none of its terms.

Commentators and courts alike conclude that this statute, as written, is seriously constitutionally flawed. In particular, the clauses "relating to the national defense;" "reason to believe that the information could be used to the injury of the United States;" and "willfully retains" are all unconstitutionally vague. No judicial gloss can save this vague statute.

Because the vagueness doctrine is an "as applied" doctrine, the same statute may be unconstitutionally vague in one case, but may not run afoul of the Due Process Clause in another. Section 793(e) and similar subsections of the espionage laws provide examples. This statute, first enacted in 1917 and then modified in 1950, has typically been used as a tool to prosecute those who we consider "spies"; most of the reported cases in the past 50 years involved conduct that did not occur at the margins of constitutionality. Instead, most of the reported decisions involve clear-cut scenarios, such as stealing documents relating to weapons systems and selling

those documents to agents of the U.S.S.R. *See, e.g., United States v. Walker*, 796 F.2d 43 (4th Cir. 1986); *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1979); *United States v. Lee*, 589 F.2d 980 (9th Cir. 1979). But this case is anything but clear-cut. And no pre-existing judicial gloss on 18 U.S.C. § 793(e) has drawn a clear line between the conduct Mr. Hitselberger allegedly engaged in and conduct that would be lawful.

The Fourth Circuit has previously held that § 793(e) is not unconstitutionally vague as applied to a defendant who disclosed satellite images to the press. *See Morison*, 844 F.2d at 1071-72. The court reached that conclusion only because the trial judge had given certain jury instructions limiting the broad *mens rea* and narrowing the meaning of "national defense." *Id.* Although *Morison* is certainly instructive, in that it concludes that the statute cannot be applied as written and identifies at least two elements that must be limited before enforcement of the statute can proceed, the case does not control the instant case. Two of the judges deciding *Morison* explicitly noted the necessity of "judicious case-by-case use of appropriate limiting instructions[.]" *Id.* at 1086 (Phillips, J., concurring); *see also id.* at 1084-85 (Wilkinson, concurring) (leaving open distinct possibility that statute could not be constitutionally applied to those "who truly expose governmental waste and misconduct"; emphasizing that case does not involve application of espionage statute to facts relating to the press and classified materials). One judge nevertheless expressed "grave doubts about the sufficiency of the limiting instructions[.]" *Id.* at 1086 (Phillips, J., concurring). And in the 25 years since that case was decided, other courts have weighed in on the questionable elements of 793(e), narrowing them beyond what the Fourth Circuit mentioned in *Morison*. *See, e.g., Rosen*, 445 F. Supp. 2d at 626.

Moreover, the conduct at issue in *Morison* is sufficiently different from the conduct at

issue here that limiting instructions that may have provided Morison with fair notice of the statute's reach will not provide Mr. Hitselberger with the same fair notice. The defendant in *Morison* had stolen satellite photos of a Russian aircraft carrier and sold the photos to the press for personal monetary gain. *Morison*, 844 F.2d at 1061. Mr. Hitselberger is charged with possessing classified documents on a U.S. military base, outside of the secured area on the base.

The Due Process Clause of the Fifth Amendment requires that any law that imposes criminal liability must give potential defendants fair warning of what conduct is proscribed. Criminal liability cannot be imposed without "'fair warning . . . in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *United States v. Lanier*, 520 U.S. 259, 265 (1997) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). Due process "bars enforcement" of a statute that uses "'terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id*. at 266 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

When examining a statute with vague terms, courts may impose a "judicial gloss" to supply the "clarity at the requisite level . . . on an otherwise uncertain statute[.]" *Id*. This "gloss," however, is limited. First, due process prevents a court from applying a novel construction of a criminal statute in any given case; the statute, standing alone or as previously construed, must make it reasonably clear at the time that the defendant engages in the conduct targeted by the prosecution that the conduct was criminal. *Id*.; *see also id.* at 265 n.5 (describing the principle that conduct may not be treated as criminal unless it has been so defined by a competent authority before the conduct has occurred).

Second, the "gloss" must be just that – minor clarifications and limitations. "Federal crimes are defined by Congress, not the courts[.]" *Id.* at 267 n.6 (citation omitted). A judicial construction of a statute cannot effectively re-draft the legislation. The "judicial gloss" may only go so far as necessary to give effect to congressional intent. *See id.* A court "may impose a limiting construction on a statute only if it is readily susceptible to such a construction." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997) (quotation omitted). This gloss cannot add omitted terms or redefine existing ones. A court cannot "rewrite a . . . law to conform it to constitutional requirements." *Id.* at 884-85 (quotation omitted). Courts that have interpreted § 793(e) in the past have had to rewrite the statute, adding omitted terms, and changing others. As discussed below, even with the existing constructions of the statute, § 793(e) fails to give fair notice under the Due Process Clause.

I. THE *MENS REA* ELEMENT OF § 793(E) IS UNCONSTITUTIONALLY VAGUE.

Section 793(e) seeks to proscribe the willful retention of certain documents. But "willful," as applied to Mr. Hitselberger, is unconstitutionally vague. "'Willful' is one of the law's chameleons, taking on different meaning in different contexts." *The Espionage Statutes*, 73 Colum. L. Rev. at 1038 (footnote omitted). Although the term "willful" certainly requires a specific intent to violate the law, a more precise definition of willfulness is not provided in this statute. Courts and commentators alike agree that some additional limitation on the culpable intent addressed by § 793(e) is necessary, lest it fail to survive due process scrutiny. But there has been no agreement as to what is required.[1]

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[1] *See Rosen*, 445 F. Supp. 2d at 625-27; Hearing Before the Senate Committee on the Judiciary, Subcommittee on Terrorism and Homeland Security, *The Espionage Act: A Look Back and a Look Forward*, written testimony of Stephen I. Vladeck (p. 9 (May 12, 2010)) (describing

Although the Supreme Court has never addressed the scienter requirement of § 793(e), it has discussed the intent element in the precursor statute that included some of the identical terms. In *Gorin v. United States*, 312 U.S. 19 (1941), the Court read the term willfulness in connection with the phrase "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of a foreign nation." *Id*. at 27-28, 32 n.17. The Court held "[t]his requires those prosecuted to have acted in bad faith." *Id.* at 28. Thus, the Supreme Court held that the government must prove an evil motive or bad purpose on the part of the defendant in order for the prosecution to satisfy the scienter requirement of the Espionage Statutes. *Id. See also Hartzel v. United States*, 322 U.S. 680, 686 (1944) (holding that "willfulness" as used in the Espionage Statutes require proof of "a specific intent or evil purpose" – deliberately narrowing the scienter requirement because of the restrictions on the freedom of expression occasioned by the statutes); *see also United States v. Squillacote*, 221 F.3d 542, 577 (4th Cir. 2000) (describing the scienter element of the Espionage Statutes as requiring "those prosecuted to have acted in bad faith") (quotation omitted); *Morison*, 844 F.2d at 1071 (approving a jury instruction on the intent element of § 793(e) – without much analysis regarding wilfulness – requiring a "bad purpose") (quotation omitted).

The most recent decision to interpret the scienter required by § 793(e) is *United States v. Rosen*, where the court held that § 793(e) imposes "an additional and significant scienter requirement" over and above the standard definition of "willfulness." 445 F. Supp. 2d at 625. Like in *Gorin*, the court analyzed the term "willfully" in conjunction with the phrase "reason to believe" that disclosing or retaining the information would injure the United States. The Court

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the *mens rea* requirement in the statute as "lax").

concluded that a standard specific intent jury instruction would be insufficient to save § 793(e) from unconstitutional vagueness. The court reasoned that specific intent alone – acting with the knowledge that the conduct violated the law and the knowledge that disclosing the information could threaten national security – would nevertheless encompass conduct that the defendant may have undertaken with "some salutary motive." *Id.* at 626. Accordingly, the court held that § 793(e) includes an additional scienter requirement: the government must prove that the defendant disclosed the information "with a bad faith purpose to either harm the United States or to aid a foreign government." *Id*. *See also* Nimmer, 26 Stan. L. Rev. at 325 ("[F]ailure to require an intent to injure the United States or aid a foreign nation makes the provision relating to disposition of documents fatally overbroad.") (footnote omitted). Thus, § 793(e) included not simply a specific intent to do something the law prohibited, but also to engage in that conduct with "bad faith" and an evil motive. *Rosen,* 445 F. Supp. 2d. at 626-27. *See also United States v. Truong Dinh Hung*, 629 F.2d 908, 919 (4th Cir. 1980) (rejecting the possibility that the offense could be committed negligently or by mistake and holding that the intent element of a related statute requires proof that the defendant acted "willfully and with an intent or reason to believe that the information would be used to injure the United States or to aid a foreign power" and requiring the proof that the conduct was "prompted" by some "underhanded motive.").

Although it may be tempting to agree with the court in *Rosen* that § 793(e) can be saved by reading a scienter into the statute that includes the evil motive discussed in *Gorin* and requires the government to establish beyond a reasonable doubt that the defendant acted with more than simple willfulness, also acting with the intent to injure the United States or aid a foreign nation, this Court should not do so. Including this scienter element is more than adding a "judicial

gloss" to the statute; it requires the court to rewrite the statute and add omitted terms. "Given the clear statutory language, the statement of legislative intent, and the prior construction of this language by the Supreme Court, it seems clear that a trial court could not narrowly construe [either § 793(d) or (e)] in order to save it from constitutional invalidity without in effect rewriting it." Nimmer, *Free Speech*, 26 Stan. L. Rev. at 325-26.

The legislative history suggests that Congress did not intend a special meaning for "willfully" in this statute.[2] Although §§ 793(a) and (b) require a *mens rea* that the defendant act with the "purpose or knowledge that the primary use to which information will be put is the injury of the United States or the advantage of a foreign nation," § 793(e) does not include the same explicit limitation. *The Espionage Statutes*, 73 Colum. L. Rev. at 1046.[3] Although courts and commentators have concluded that a similar interpretation for "willfulness" is necessary to save § 793(e) from vagueness, the text and legislative history does not indicate that Congress intended this. *Id*.

Because of the constitutional flaws in this statute, "courts struggling with [this] defect have reached disparate conclusions as to the requisite *mens rea* that individuals must have to violate the Act." Vladeck, *supra* note 2 at 2. "Undeniable but poorly articulated constitutional concerns have compelled courts to read into the statute requirements that aren't supported by its language." *Id.* The fact that courts have reached different conclusions, as discussed in

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[2] For an in depth discussion of the legislative history regarding the term "willfully," *see The Espionage Statutes*, 73 Colum. L. Rev. at 1038-46.

[3] *See also* Vladeck Prepared Statement, *supra* note 2 at 1-2 ("[T]he plain text of the Act fails to require a specific intent either to harm the national security of the United States or to benefit a foreign power.").

commentary on this statute, means that the statute is not "readily susceptible" to a limiting construction. *Reno*, 521 U.S. at 884 (quotation omitted). This Court should not rewrite the law in order to conform it to the Constitution. *Id.* at 884-85. Instead, this Court should dismiss the charges in the indictment as unconstitutionally vague.

II. THE PHRASE "RELATING TO THE NATIONAL DEFENSE" IS UNCONSTITUTIONALLY VAGUE.

Section 793(e) prohibits the willful retention of information "relating to the national defense." This statutory phrase is also unconstitutionally vague because it does not give fair notice of what documents or information an individual may not disclose or unlawfully retain. *See Squillacote*, 221 F.3d at 576 ("The statutes at issue unfortunately provide no guidance on the question of what kind of information may be considered related to or connected with the national defense.").

The Supreme Court examined this phrase in the precursor statute to § 793(e). The Court held that the words "national defense" carry a meaning of "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *Gorin*, 312 U.S. at 28 (quotation omitted); *see also Morison*, 844 U.S. at 1071 (defining "national defense" broadly). The Court approved a jury instruction providing a broad definition of "national defense," and including the admonition that "the connection [between the information and the national defense] must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct." *Gorin,* 312 U.S. at 31 (quotation omitted). Regarding § 793(e), the *Rosen* court noted that the phrase has "consistently been construed broadly to include information dealing with military matters and more generally with matters

relating to United States foreign policy and intelligence capabilities." 445 F. Supp. 2d at 620.

But this limiting construction of the phrase has been deemed insufficient to narrow the statute to constitutional requirements. *Id*. Information that "refer[s] to the military and naval establishments" includes innocuous information of alarming breadth. *United States v. Heine*, 151 F.2d 813, 815 (2d Cir. 1945) (quotation omitted) (explaining that the *Gorin* definition includes railway maps, lists of engineering schools, and the average yield of arable land). "There are innumerable documents referring to the military or naval establishments, or related activities of national preparedness, which threaten no conceivable security or other government interest that would justify punishing one who 'communicates' such documents." Nimmer, *Free Speech*, 26 Stan. L. Rev. at 326. Because the statute has such weighty First Amendment implications, prohibiting the disclosure or retention of information so broadly defined, even if done with the culpable scienter discussed above, could not withstand constitutional scrutiny. Therefore, courts have taken a series of steps to narrow the meaning of the phrase.

One of the first of these steps is to limit the information to that which is not public – limiting the reach of the statutes to information that is "closely held" by the government. If the information already exists in the public domain, it cannot qualify as "relating to the national defense" under 18 U.S.C. § 793(e). Information that is "lawfully available to the general public does not relate to the national defense." *United States v. Dedeyan*, 584 F.2d 36, 40 (4th Cir. 1978). The Fourth Circuit has approved a jury instruction that defines the term as limiting the disclosure of information and documents that are "closely held in that they have not been made public and are not available to the general public." *Morison*, 844 F.2d at 1071-72 (bracket and ellipses omitted) (footnote omitted).

Nevertheless, these judicially imposed constraints on the broad statutory phrase fail to narrow the statute to within the limits that due process requires. The statutory phrase remains unconstitutionally vague because these limits do not cabin the type of information sufficiently to give a possible defendant fair notice of what information or documents may not be possessed, disclosed, or retained. Even requiring that the document or information be classified fails to provide notice of what the statute covers. The executive branch does not exercise the classification system with any clarity. *The Espionage Statutes*, 73 Colum. L. Rev. at 1052. And the limitation fails to address situations "where individuals disclose classified information that should never have been classified in the first place, including information about unlawful government programs and activities." Vladeck, *supra* note 2 at 4. Stamps on a document identifying it as classified "are at most circuitous references" to regulations other than the Espionage Act and do not give meaning to the phrases within that Act. *The Espionage Statutes*, 73 Colum. L. Rev. at 1057.

As discussed above, courts have thus reached different conclusions regarding the meaning of the phrase "relating to the national defense." Continually dissatisfied with the limitations placed on the phrase by earlier decisions, succeeding opinions add more and more refinements to the definition. The phrase therefore is not amenable to a limiting construction without judicial rewriting of the phrase. *See Reno*, 521 U.S. at 884-85. The phrase remains unconstitutionally vague. Any further limiting of the definition now would be to impose a novel construction on a statute – a construction not in place when the alleged conduct occurred. That would also render the statute unconstitutionally vague. This Court should therefore dismiss Counts One, Two and Three of the indictment because they fail to give fair notice of what type of information the

possession, disclosure, or retention of which is criminal.

III. THE PHRASE "INJURY TO THE UNITED STATES OR TO THE ADVANTAGE OF ANY FOREIGN NATION" IS UNCONSTITUTIONALLY VAGUE.

A third way in which § 793(e) fails to provide fair notice of what conduct constitutes a crime, and what conduct does not, is in the phrase "injury to the United States or to the advantage of any foreign nation." Under the plain terms of the statute, conduct is criminal if the person possesses, communicates, or retains information and the person has reason to believe that the information could be used to "the injury of the United States." This phrase is also constitutionally flawed.

Initially, the fact that the phrase is written in the disjunctive, covering either information that could injure the United States or aid a foreign nation, creates a sweep of such breadth as to violate the Constitution. It criminalizes conduct that does not injure the United States, yet may provide some advantage to a foreign nation. *See* Nimmer, *Free Speech*, 26 Stan. L. Rev. at 330. "But if a communication does not work an injury to the United States, it would seem to follow logically that no government interest can be asserted to overcome the first amendment's guarantee of freedom of speech." *Id.* (footnote omitted).

No existing judicial gloss saves this phrase. Courts use the phrase when they infer a scienter requirement – reasoning that evil motive, bad purpose, and acting with the intent to injure the United States is the *mens rea* necessary to save the statute from the constitutional graveyard. *See, e.g.*, *Rosen*, 445 F. Supp. 2d at 625-26; *Truong Dinh Hung*, 629 F.2d at 918-20. But the actual statute uses the phrase to describe the type of information, not the state of mind. The phrase modifies "relating to the national defense." The statute lists the types of documents it covers, so long as they relate to the national defense, then continues, "or information [in

addition to documents] relating to the national defense *which information* the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. § 793(e) (emphasis added). Moreover, because the phrase has been judicially transferred to describing the *mens rea* rather than the type of information covered by the statute, any attempt to define the scope of the statute necessarily become increasingly circular. Each term and element can only be defined using the other terms and elements. Therefore, no judicial interpretation of the statute serves to clarify any of the vague terms.

The judicial constructions that delete the statutory phrase modifying the scope of information covered by the Act, *see* Nimmer, *Free Speech*, 26 Stan. L. Rev. at 330, and use it as a modifier to the culpable intent, obscure an element of the offense and constitute one of the most significant constitutional flaws in the statute. Under the plain terms of the statute, the government must prove that the defendant has reason to believe that disclosing or retaining the documents or information could injure the United States or aid a foreign nation, but the statute fails to provide any guidance on what that injury or aid must be. Moreover, no judicial construction of the statute identifies the type or magnitude of injury at issue.

A significant government interest must be implicated in order to justify abridging an individual's First Amendment rights and criminalize speech, as § 793(e) does, but the Espionage Act fails to identify what that interest is or how significant the injury must be. The bare bones language in § 793(e) is too general to survive First Amendment scrutiny. "Since such a standard would never be acceptable in other speech contexts, there is no reason that it should be more acceptable where the antispeech interest is national security." Nimmer, *Free Speech*, 26 Stan. L. Rev. at 331. The First Amendment requires that "there must be 'narrow, objective, and definite

standards to guide'" criminal enforcement. *Id.* (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)). There are no guideposts here, only that the defendant has reason to believe that disclosure of the information could injure the United States or aid a foreign nation. These statutory requirements, however, is far too abstract a standard to satisfy this requirement. There is nothing "narrow, objective, or definite" about the phrase or the limits on the type of information that would bring disclosure within the realm of criminal conduct.

Justice Brennan's opinion in the Pentagon Papers case discusses the type of injury to the United States that could trigger a governmental interest sufficient to overcome an individual's First Amendment rights. *See New York Times v. United States*, 403 U.S. 713, 725-27 (1971) (Brennan, J., concurring). The First Amendment tolerates no "surmise or conjecture" when considering harm to the United States. *Id.* at 725. "[M]ere conclusions" by the executive branch that the government would be harmed or that disclosure of the information *would* or *could* injure the United States is insufficient. *Id.* at 727. Instead, "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Id.* at 726-27. An abstract, undefined injury, that "could" occur – as described by 18 U.S.C. § 793(e) – fails to even approximate this standard.

The phrase "injury to the United States or to the advantage of any foreign nation" fails to restrict the type of information covered by § 793(e) with sufficient clarity to provide a defendant with fair notice of what constitutes criminal conduct. The phrase is too abstract. Moreover, it contemplates punishing conduct even when no identifiable government interest is harmed. No judicial construction limits the phrase; the only constructions of the phrase employ it as a means

of creating an additional scienter requirement, rendering any further use of the phrase circular. Using the phrase in this way simply highlights the significant constitutional problems with the statute. The phrase leaves only conjecture and surmise about what the government must prove in order to secure a conviction. That conjecture and surmise is insufficient to give fair notice under the Due Process Clause.

IV. IN THE ALTERNATIVE, THE COURT MUST PROVIDE LIMITING INSTRUCTIONS THAT NARROW THE BREADTH AND DEFINE THE VAGUE TERMS.

If this Court disagrees with Mr. Hitselberger and concludes that § 793(e) can withstand constitutional scrutiny, the Court must provide limiting instructions informed by *Morison*, *Rosen*, and the leading constitutional scholars commenting on the espionage statutes. At a minimum, the Court should provide the jury with instructions regarding the vague phrase "relating to the national defense" and the term "willfully."[4]

A. Relating to the National Defense

When defining "relating to the national defense," the Court should instruct the jury that the government must prove beyond a reasonable doubt that, if disclosed, the information at issue could be damaging to the United States. *See Morison*, 844 F.2d at 1071. The government must prove beyond a reasonable doubt that the information at issue must be the sort that, if disclosed, would have a reasonable and direct chance of damaging national security, not a strained or distant likelihood. *See Gorin*, 312 U.S. at 31. The government must prove that the documents

[4] These are not the only elements of the offense. The Court also will have to instruct the jury on the meaning of "having unauthorized possession of, access to, or control over any document." Mr. Hitselberger intends to offer additional proposed jury instructions on this and other trial-related issues as this case proceeds. The instructions included here, however, address the constitutional arguments raised in this motion.

contain information that, if disclosed, would "imperil the environment of physical security which a functioning democracy requires." *Morison*, 844 F.2d at 1082 (Wilkinson, J., concurring). The Court should instruct the jury that the government must prove, beyond a reasonable doubt, that "damaging to the United States" means that disclosure of the information would be likely to cause imminent serious injury to the United States. *See New York Times*, 403 U.S. at 726-27 (Brennan, J., concurring); Nimmer, *Free Speech*, 26 Stan. L. Rev. at 331-32. The government must prove that the harm is serious, inevitable, and directly linked to the retention of the information. *See New York Times*, 403 U.S. at 726-27 (Brennan, J., concurring).

B. Relating to the National Defense – Closely Held

When defining the phrase "relating to the national defense," the Court should further instruct the jury that the government must prove beyond a reasonable doubt that the government closely held the information at issue and that the defendant knew the information was closely held. At a minimum, this means that the government must prove that the documents were classified, but it is not enough for the government to only prove that the documents were classified. The government must also prove beyond a reasonable doubt that the information was not otherwise available to the public and that the information in the document could in fact damage the security of the United States. Not every document that is classified contains information relating to the national defense. *See Morison*, 844 F.2d at 1086 (Phillips, J., concurring); *Rosen*, 445 F. Supp. 2d at 624-25.

C. *Mens Rea*

A standard specific intent instruction would not be sufficient to satisfy the *mens rea* requirements under this statute. *See Rosen*, 445 F. Supp. 2d at 625-26. As to § 793, the term

"willfully" has three components that must be proven. First, the Court should instruct the jury that the government must prove beyond a reasonable doubt that Mr. Hitselberger specifically intended to violate 18 U.S.C. § 793(e), and that he acted with a bad or underhanded purpose, not by an honest mistake. *See Morison*, 844 F.2d at 1071. Second, the Court should instruct the jury that the government must prove beyond a reasonable doubt that Mr. Hitselberger knew that information contained in the documents related to the national defense, *i.e.*, that if disclosed, that information would harm national security. *See Rosen*, 445 F. Supp. 2d at 626 (citing *Morison*). Finally, the jury should be instructed that the government must prove beyond a reasonable doubt that Mr. Hitselberger knew that the information contained in the documents was closely held. In addition to these instructions on "willfully," the Court also should instruct the jury that the government must prove that Mr. Hitselberger had "reason to believe [the information in the documents] . . . could be used to the injury of the United States or to the advantage of any foreign nation." *Id.* That additional scienter requirement is necessary in this case. If the government cannot prove beyond a reasonable doubt these *mens rea* requirements, then the jury must acquit Mr. Hitselberger.

Conclusion

Section 793(e) is a statute of alarming breadth and little definition. Because the statute is vague, this Court should dismiss Counts One, Two and Three of the indictment.

Respectfully submitted,

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/s/
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