

UNITED STATES

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DATED: 10 April 2013

Findings of Fact:

2. The Government has charged the 18 U.S.C. 793(e) specifications of Charge II in relevant part as follows: "the accused....having unauthorized possession of information related to the national defense, to wit:

Specification 2 - a video file named "12 Jul 07 CZ ENGAGEMENT ZONE 30 GC ANYONE.avi"

Specification 3 - more than one classified memorandum produced by a U.S. government intelligence agency

Specification 5 - more than 20 classified records from CIDNE Iraq database

Specification 7 - more than 20 classified records from CIDNE Afghanistan database

Specification 9 - more than 3 classified records from a U.S. Southern Command database

Specification 10 - more than 5 classified records relating to a military operation in Farah Province, Afghanistan occurring on or about 4 May 2009

Specification 11- a file named "BE22 PAX.zip" containing a video named "BE22 PAXX.wmv"

Specification 15 - a classified record produced by a U.S. Army intelligence organization, dated 18 March 2008

with reason to believe such information could be used to the injury of the U.S. or the advantage of any foreign nation, willfully communicated.....to a person not authorized to receive it.”

3. The Government argues that despite the fact that the specifications include the additional “reason to believe” scienter, the Government is required to prove this additional scienter requirement beyond a reasonable doubt only if the Court finds the charged matter communicated is intangible information. If the Court finds the charged matter communicated is tangible information, then the Government is not required to prove the “reason to believe” scienter beyond a reasonable doubt. The Court could except the additional “reason to believe” scienter language from the specifications and find the accused guilty of violating 18 U.S.C. Section 793(e) and Article 134, UCMJ under the “documents” clause.

The Law: When interpreting a statute, the Court employs the following process: (1) Give the terms of the statute their ordinary meaning if the terms are unambiguous; (2) If the terms of the statute are ambiguous, then the Court examines the purpose of the statute and its legislative history to resolve the ambiguity; and (3) If a reasonable ambiguity still exists, the Court applies the rule of lenity and resolves the ambiguity in favor of the accused. *United States v. Starr*, 51 M.J. 528, 532 (A.F. Ct. Crim. App. 1999).

Conclusions of Law:

1. 18 U.S.C. 793(e) penalizes the willful communication of (1) any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or (2) information relating to the national defense which information the possessor has reason to believe could be used to the injury of the U.S. or to the advantage of any foreign nation. The Court refers to these clauses as “the documents clause” and “the information clause”, respectively. The Court also refers to “which information the possessor has reason to believe could be used to the injury of the U.S. or to the advantage of any foreign nation” as “the reason to believe” scienter requirement.

2. *U. S. v Rosen* was the first prosecution under 18 U.S.C. 793(e) of a person for the oral transmission of information related to the national defense. 445 F. Supp.2d at 613-614 (E.D. Va 2006). In addressing various constitutional challenges to the statute, *Rosen* found that “information” under 18 U.S.C. 793(e) is a general term that includes knowledge derived from both tangible and intangible sources. The *Rosen* court looked to the legislative history of 18 U.S.C. 793(e) and held that the additional “reason to believe” scienter requirement applies only to communication of intangible information and that this heightened scienter also required the Government to prove the defendant’s bad faith purpose to either harm the United States or to aid a foreign government. 445 F. Supp.2d at 625-626.

3. Post –*Rosen* courts addressing communication of information under 18 U.S.C. 793(e) have uniformly held that the Government is not required to prove that the defendant intended to harm the U.S. or aid a foreign government when the Government charges communications under the “information clause.” *U.S. v. Diaz*, 69 M.J. 127 (C.A.A.F. 2010); *U.S. v. Steele*, 2011 WL 414992 (A.Ct. Crim. App); *U.S. v. Kiriakou*, 2012 WL 4903319 (E.D. Va.).

4. 18 U.S.C. 793(e) is not ambiguous. It penalizes communications under the “documents clause” (any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan,

map, model, instrument, appliance, or note relating to the national defense) or communications under the "information clause" (information relating to the national defense which information the possessor has reason to believe could be used to the injury of the U.S. or to the advantage of any foreign nation). The "information clause" can include tangible and/or intangible information. There is no "tangible information" clause in 18 U.S.C. 793(e).

5. Communications charged under the "documents clause" do not require the Government to prove the additional "reason to believe" scienter requirement. *U.S. v. Drake*, 818 F. Supp. 2d 909 (D. Md. 2011) (charged with retention of classified documents under the "documents clause" – "reason to believe" scienter not required element); *U.S. v. Kim*, 808 F. Supp.2d 44 (D.D.C. 2011) (oral disclosure of classified information – intangible information – "Congress's decision to impose a scienter requirement for the communication, delivery, or transmission of "information" but not for tangible items demonstrates that Congress understood and embraced the distinction between the tangible items listed in the statute and intangible information.")

6. Communications of tangible or intangible information charged under the "information clause" require the Government to prove beyond a reasonable doubt the additional "reason to believe" scienter. *Diaz*, 69 M.J. 130 (printed list of detainees held at Guantanamo – tangible information); *Steele* (retained classified material – tangible information); *Kiriakou* (oral communication – intangible information – "The parties contest what that heightened scienter requirement entails because the indictment specifically charges Kiriakou with violating the information clause not the documents clause."); *Drake*, 818 at 916-917 ("Thus, only the second 'information' clause requires proof of the 'reason to believe' element'.")

7. The Government equates "the document clause" and "tangible information". They are not the same. It is possible that tangible information could also meet the definition of one or more of the series of terms which comprise the "documents clause" (any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense). In such case, the Government could charge a violation of 18 U.S.C. 793(e) under the "documents clause" (no "reason to believe" scienter required); under the "information clause" ("reason to believe" scienter required) or, in the alternative, if there was concern that the tangible information at issue might not qualify as any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense in the "documents clause".

8. In this case, the matter constituting the charged communications in specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II is tangible information. Actual physical matter, not oral communication, was communicated. The Government elected to charge the communications under the "information clause". That clause carries with it the "reason to believe" scienter requirement. The Government is required to prove beyond a reasonable doubt that the accused had reason to believe the communicated information could be used to the injury of the U.S. or to the advantage of any foreign nation for the accused to be found guilty of a violation of 18 U.S.C. 793(e) as charged in these specifications.

Ruling: The Government Motion for the Court to find that under the "documents" or "tangible information" clause of 18 U.S.C. 793(e) the Government is not required to prove the accused "had reason to believe to the information transmitted could be used to the injury of the United States or to the advantage of any foreign nation" because this additional scienter requirement applies only to communications of "intangible information" is **DENIED**.

So **ORDERED** this 10th day of April 2013.

A handwritten signature in black ink, appearing to read 'D. R. Lind', with a stylized flourish at the end.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit