NOTE

THE "BENEFIT" OF SPYING: DEFINING THE BOUNDARIES OF ECONOMIC ESPIONAGE UNDER THE ECONOMIC ESPIONAGE ACT OF 1996

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The nation's first jury trial on charges of economic espionage fizzled in November 2009 when jurors deadlocked on counts alleging that the defendants possessed stolen trade secrets with the intent to benefit the Chinese government. Jurors later reported intractable disagreement and confusion over the statutory element of economic espionage that requires the government prove that the defendants intended or knew that the crime would benefit a foreign government. Is it sufficient for the government to allege, as it did during trial, that stolen trade secrets would be used to start a business that would pay taxes to the Chinese government? That scenario—and others like it—presents a difficult question to courts interpreting the Economic Espionage Act of 1996 (EEA): how far down the benefit chain of causation can the statute reach?

This Note analyzes the relevant text and legislative history of the statute and argues that courts seeking to define the limits of the foreign benefit element of economic espionage should not frame the issue in terms of whether the benefit alleged by the government is a "benefit" under the statute. Instead, courts should focus on the defendant's mens rea, asking whether the government has proven that the defendant "intended or knew" of the alleged benefit. This approach: (1) forces the parties to argue the difficult line-drawing issue presented by the statute, (2) eschews disingenuous arguments about whether a benefit is really a benefit, and (3) avoids overbroad resolutions of cases. The Note concludes by drawing on case law from analogous statutes to offer a test that courts could use to define the mens rea of the foreign benefit element in a way that limits the reach of the law while respecting the text of the statute.

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INTRODUCTION

In November 2009, federal jurors in San Jose delivered a mixed message to courts and prosecutors with their verdict in *United States v. Lan Lee*,[1] the first-ever jury trial on charges of economic espionage under the Economic Espionage Act of 1996 (EEA). While they acquitted defendants Lan Lee and Yuefei Ge on counts related to one alleged victim, the jury deadlocked on charges associated with a second victim, with nine jurors voting to acquit and three voting to convict on the economic espionage charge.[2] In brief conversations with jurors following the mistrial, attorneys for both sides caught a glimpse of the is-

1. No. CR-06-00424 (N.D. Cal. Oct. 27, 2010).

2. Howard Mintz, *Spying Case Ends, Valley Techs Walk: Mistrial Declared for Two Engineers Accused of Stealing Trade Secrets with Backing from China*, SAN JOSE MERCURY NEWS, Nov. 21, 2009, at 1C.

sues that hung the jury.[3] One of those issues, the definition and boundaries of the foreign benefit element of the economic espionage charge, is the topic of this Note.

Specifically, this Note discusses how courts should interpret and constrain the foreign benefit element of the economic espionage statute. The foreign benefit element requires the government to prove that the defendant intended or knew that the trade secret theft would benefit a foreign government, instrumentality, or agent. This Note argues that relying on a narrow interpretation of the word "benefit" to limit the reach of the foreign benefit element is inappropriate in light of the text and legislative history of the statute.[4] Instead of asking whether a particular benefit is the kind of benefit covered by the statute, courts should reframe the issue in terms of the defendant's mens rea, focusing on whether the defendant intended or knew of a benefit to a foreign government, instrumentality, or agent. This framing avoids disingenuous arguments that certain benefits are not actually benefits and asks the real question confronting courts in scenarios like the *Lan Lee* case: how far down the benefit chain of causation can the EEA reach in criminalizing possession of stolen trade secrets?

Part I of this Note connects this issue to the larger problem of incoherent and vague definitions of mens rea and harm in federal white collar criminal statutes, and then provides an overview of the *Lan Lee* case relevant to a discussion of the foreign benefit element. It also puts *Lan Lee* in context, arguing that the resolution of this issue in early cases like *Lan Lee* will have an especially broad impact in light of the relative infancy of federal prosecutions under the EEA juxtaposed with the significant federal law enforcement effort targeting espionage.

Because this issue presents a question of statutory interpretation, the analysis begins with a discussion of the statute. Part II first discusses the relevant text of the EEA, arguing that the law's language strongly favors a broad interpretation of the word "benefit." Part II then analyzes the legislative and drafting history of the EEA, describing the statute's purpose and identifying two different approaches to constraining the foreign benefit element that Congress articulated during the legislative process—neither of which involved a narrow interpretation of "benefit." The first approach, limiting the definition of "foreign instrumentality," does not help courts faced with a scenario like the *Lan Lee* case. The second approach, focusing on the mens rea and limiting the definition of knowledge or intent, however, does provide an appropriate framework for addressing such issues.

3. *See* Interview with Daniel Olmos, Att'y for Defendant Lan Lee, in Palo Alto, Cal. (Feb. 24, 2010).

4. This Note takes no position on the merits of the case or the ultimate resolution of this issue on the facts of *Lan Lee*. It disagrees only with the *Lan Lee* court's framing of the issue—not the outcome.

Part III discusses three advantages of framing the issue in terms of the mens rea over framing it as a question of "benefit." First, the mens rea formulation more accurately reflects the actual dispute between the parties and allows both sides to present their best arguments to the court for consideration. Second, the definitions of "knowledge" and "intent" are inherently flexible, providing courts an obvious and traditional means of limiting the reach of a criminal statute, whereas "benefit" has much less flexibility without resorting to disingenuous arguments. Third, framing the question in terms of the defendant's mens rea preserves the role of the factfinder and remains sensitive to the nuances of different cases, while the narrow-benefit approach categorically excludes entire classes of prosecutions without regard for the potential strength of the evidence.

In Part IV, this Note looks to the case law on statutes analogous to the EEA, arguing that courts faced with similar questions under other espionage statutes have rejected a focus on the "benefit" and embraced a closer look at the defendant's mens rea by incorporating the concept of proximate cause into the analysis. Borrowing from those cases, Part IV offers one test that courts might use to interpret the mens rea of the foreign benefit element.

I. THE PROBLEM: SETTING BOUNDARIES ON THE EEA

A. *The Larger Problem: Congress's Clumsy Definitions in White Collar Criminal Statutes*

The "confused and inconsistent ad hoc approach" to defining and interpreting mens rea in federal criminal statutes has been well documented and lamented for decades.[5] With over one hundred different varieties of mens rea standards appearing in Title 18 of the United States Code alone,[6] courts confronted with new criminal statutes can rely on neither a uniform Model Penal Code-like clarity in the meaning of any particular word nor consistent results when reasoning by analogy to statutes with similar language.

In particular, in the context of white collar criminal statutes, Congress's clumsy and vague definitions of the harm it is seeking to address further confuse courts charged with defining the boundaries of white collar statutes.[7] At-

5. Note, *Mens Rea in Federal Criminal Law*, 111 HARV. L. REV 2402, 2402 (1998) (quoting U.S. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 123 (1970)); *see also* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 230 (2007).

6. William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1065 (1992).

7. *See* David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1385-86, 1397-98, 1435-36 (2008) (describing Congress's vague definitions of the harm in corruption, honest services fraud, and securities fraud statutes).

taching a fifteen-year prison term to the vague notion of intent to benefit a foreign government is not an aberration, but rather is the latest example of a trend of criminalizing intentions to cause other vague harms like "corruptly giv[ing]" money to a public official, "depriv[ing] another of the intangible right of honest services," or "defraud[ing] in 'connection with a security.'"[8]

In defense of Congress, however, crystal clear statutes may not be realistic or desirable. Indeed, vague definitions could be the unavoidable byproduct of the very concept of "white collar crime," an amorphous label that often attaches to any sophisticated or complex economic crime.[9] Moreover, Congress may deliberately avoid clearly and narrowly defining the proscribed activity because it perceives the government to be at a comparative disadvantage to the wealthy and powerful defendants the statutes often target.[10] Or, it could just be poor drafting. Regardless, the result is statutes with certain core applications and uncertain boundaries that courts are left to define on their own.[11]

While a comprehensive solution to this problem is both beyond the scope of this Note and unlikely as a practical matter,[12] the bottom line for legislators and practitioners is that the current system gives courts significant power and flexibility in setting boundaries on white collar statutes.[13] Judges can and do legitimately interpret a "knowing" mens rea requirement in one statute to be entirely different from a "knowing" requirement in a different statute. If Congress wants to avoid surprises in the way its statutes are molded in the crucible of real-world application, it should err on the side of detailed textual evidence of its intent coupled with comprehensive legislative history to curtail interpretations unmoored from the actual purpose of the law.

8. *Id.* (internal quotation marks omitted) (discussing 18 U.S.C. §§ 201, 1346, 1348 (2006)).

9. *See* John Hasnas, *The Significant Meaninglessness of* Arthur Andersen LLP v. United States, 2005 CATO SUP. CT. REV. 187, 196-200 (arguing that white collar crimes are particularly difficult to define and enforce); J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1204-11 (1999) (describing various ways of defining white collar crime in theory and practice).

10. *See* Strader, *supra* note 9, at 1253-55.

11. *See id.*; *cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 565-66 (2001) (describing the interplay between the legislature and the courts in defining the core and periphery of the conduct proscribed by criminal statutes).

12. For a thoughtful discussion of the practical hurdles and disadvantages to creating a uniform mens rea scheme in federal criminal law, see Stuntz, *supra* note 11, at 582-86.

13. *See* Brown, *supra* note 5, at 262-63 (arguing that courts have tended to adopt strict interpretations of mens rea requirements in white collar statutes); Stuntz, *supra* note 11, at 557-58 (describing the law of mens rea as "judge-made"); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1023 (1999) (arguing that the Supreme Court enforces a "moral culpability" requirement on criminal statutes through the inherent flexibility of mens rea interpretations); *cf.* Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 361-96 (1998) (describing the Supreme Court's inconsistent interpretations of the "willfulness" mens rea element in criminal statutes).

B. *The Specific Issue: Applying the EEA's Foreign Benefit Element (*United States v. Lan Lee*)*

This Note addresses an issue raised during a recent prosecution of two defendants under the Economic Espionage Act of 1996.[14] The case, *United States v. Lan Lee*, was the first jury trial ever conducted in the United States charging a defendant with economic espionage for violating 18 U.S.C. § 1831.[15] Section 1831 makes it a crime to, among other things, possess a stolen trade secret intending or knowing that the offense will benefit a foreign government.[16] The government alleged that the two defendants, Lan Lee and Yuefei Ge, stole trade secrets from their Silicon Valley employer as part of a plan to start a competing business in China.[17] The government further alleged that the defendants intended to obtain seed money for the business from a Chinese government program that provided grants to start-up businesses in select high-technology fields.[18]

To prove the element of § 1831 requiring that the defendants knew or intended that the crime would benefit a foreign government, the prosecution offered an expert on the 863 Program, the Chinese government funding source the defendants allegedly pursued.[19] During direct examination, the prosecutor elicited testimony from the expert that the Chinese government would benefit economically from funding a start-up business through the 863 Program by way of an increase in tax revenues that the successful start-up business would contribute to China.[20]

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14. 18 U.S.C. §§ 1831-1839 (2006).

15. *See* Craig Anderson, *Economic Espionage Acquittal*, CAL. LAW., Nov. 2009, http://www.callawyer.com/story.cfm?eid=905991&evid=1.

16. Section 1831 states:

> (a) In General.—Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly—
>
> (1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret;
>
> (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret;
>
> (3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;
>
> (4) attempts to commit any offense described in any of paragraphs (1) through (3); or
>
> (5) conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,
>
> shall, except as provided in subsection (b), be fined not more than $500,000 or imprisoned not more than 15 years, or both.
>
> (b) Organizations.—Any organization that commits any offense described in subsection (a) shall be fined not more than $10,000,000.

17. *See* Superseding Indictment ¶¶ 1(d), 12, United States v. Lan Lee, No. CR-06-00424 (N.D. Cal. Oct. 27, 2010).

18. *See id.* ¶ 8(j).

19. *See* Transcript of Proceedings at 1666-700, *Lan Lee*, No. CR-06-00424.

20. *Id.* at 1698-1700.

The judge sustained a defense objection to the testimony about tax revenue benefits and instructed the jury to disregard it.[21] Later, the judge instructed the jury that a "'benefit' to a foreign government, instrumentality or agent is more than a benefit to a foreign country, generally that might flow from doing business there."[22] After the jury hung on two of the three counts charging economic espionage, the judge granted the defendants' pending motions for a judgment of acquittal on the grounds that the word benefit "must be interpreted to refer to the benefits ordinarily associated with 'espionage.'"[23] This Note discusses how courts should interpret the foreign benefit element of § 1831, and in doing so, challenges the categorical exclusion of certain benefits to foreign governments from the benefits triggering criminal liability under § 1831.[24]

This question is especially important in light of the significance of early cases like *Lan Lee* in guiding future courts and prosecutors on the boundaries and application of the EEA.[25] While over fourteen years old, the EEA has generated only six prosecutions under § 1831,[26] summarized in Table 1.

21. *Id.* at 1700-21 ("Paying taxes is not a benefit that is among those that can be the subject of a criminal case. And so I'm going to instruct you to disregard all the testimony about the payment of taxes and how the payment of taxes would benefit the government of China.").

22. Second Revised Closing Instructions at 7, *Lan Lee*, No. CR-06-00424.

23. Order Granting in Part and Denying in Part Defendants' Motion for Judgment of Acquittal at 8, *Lan Lee*, No. CR-06-00424. For a discussion of why the Fourth Circuit rejected this same logic when interpreting a similar espionage statute, see Part IV.B.1.

24. The issue of what type of benefit the government could and did seek to prove in *Lan Lee* was more complex than the summary presented here suggests. The tax benefit was only one of several theories argued by the government. In addition, the defense argued that the prosecution had voluntarily limited itself to a narrower concept of benefit in pretrial filings and statements, and the judge included an additional jury instruction consistent with that theory. *See* Order Granting in Part and Denying in Part Defendants' Motion for Judgment of Acquittal, *supra* note 23, at 8-13; Transcript of Proceedings, *supra* note 19, at 1700-21. To maximize the relevance of the analysis to future economic espionage cases, however, this Note will ignore those case-specific nuances and discuss the broader question of the foreign benefit element of § 1831 generally.

25. 18 U.S.C. §§ 1831-1839 (2006).

26. Mark L. Krotoski, *Common Issues and Challenges in Prosecuting Trade Secret and Economic Espionage Act Cases*, U.S. ATT'YS' BULL., Nov. 2009, at 2, 7, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5705.pdf.

TABLE 1
Cases Prosecuted Under § 1831

Name	*Summary of Facts/Allegations*	*Outcome*
United States v. Takashi Okamoto	Defendants took trade secrets (genetic material) stolen from former employer to new job working for Japanese government laboratory	Pending[27]
United States v. Xiaodong Meng	Defendant stole trade secrets from former employer and attempted to sell them to foreign governments, including China, while working for foreign competitor	Pled guilty[28]
United States v. Fei Ye	Defendants entered into venture capital relationship with Chinese municipality to start business in China using stolen trade secrets	Pled guilty[29]
United States v. Dongfan Chung	Defendant worked as Chinese government agent for several decades and transferred many trade secrets related to aerospace industry	Bench trial: guilty[30]
United States v. Lan Lee	Defendants stole trade secrets from former employer and sought funding from Chinese government to start competing business in China	Jury trial: acquittal on one count; mistrial on second count[31]
United States v. Hanjuan Jin	Defendant stole trade secrets from former employer and accepted position with competing Chinese company that intended to sell trade secrets to Chinese military	Pending[32]

27. *See* Eliot Marshall & Dennis Normile, *Alzheimer's Researcher in Japan Accused of Economic Espionage*, 292 SCIENCE 1274 (2001); Press Release, U.S. Dep't of Justice, First Foreign Economic Espionage Indictment; Defendants Steal Trade Secrets from Cleveland Clinic Foundation (May 8, 2001), *available at* http://www.justice.gov/criminal/cybercrime/Okamoto_SerizawaIndict.htm; Press Release, U.S. Dep't of Justice, Scientist Pleads Guilty to Providing False Statements Regarding Trade Secret Theft from Cleveland Clinic Foundation (May 1, 2002), *available at* http://www.cybercrime.gov/serizawaPlea.htm. Okamoto's case permanently stalled after he successfully challenged extradition from Japan. *See* Susan W. Brenner & Anthony C. Crescenzi, *State-Sponsored Crime: The Futility of the Economic Espionage Act*, 28 HOUS. J. INT'L L. 389, 439 (2006); Tetsuya Morimoto, *First Japanese Denial of U.S. Extradition Request: Economic Espionage Case*, 20 INT'L ENFORCEMENT L. REP. 288, 288 (2004).

28. Superseding Indictment at 4-5, 15, United States v. Xiaodong Sheldon Meng, No. CR-04-20216 (N.D. Cal. Dec. 2006); Dan Levine, *Calif. Judge Imposes First Economic Espionage Sentence*, LEGAL INTELLIGENCER, June 20, 2008, at 4, *available at* 2008 WLNR 27142492.

29. Indictment at Counts 1, 2, 4, United States v. Fei Ye, No. CR-02-20145 (N.D. Cal. Dec. 4, 2002), 2002 WL 32153617; Press Release, U.S. Dep't of Justice, Two Men Plead Guilty to Stealing Trade Secrets from Silicon Valley Companies to Benefit China (Dec. 14, 2006), *available at* http://www.justice.gov/criminal/cybercrime/yePlea.htm.

30. United States v. Dongfan Chung, 633 F. Supp. 2d 1134, 1135 (C.D. Cal. 2009); Edvard Pettersson, *Ex-Boeing Engineer Chung Guilty of Stealing Trade Secrets (Update3)*, BLOOMBERG NEWS, July 16, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aCeCvWPvvEdM.

31. *See supra* notes 2, 17-18, and accompanying text.

32. *See* Superseding Indictment at 1-4, 8-9, United States v. Hanjuan Jin, No. 08-CR-192 (N.D. Ill. Dec. 9, 2008) (charging Jin with economic espionage in Counts 5 and 6).

Of those prosecutions, *Lan Lee* is only the second trial,[33] and the first jury trial, ever conducted.[34] These small numbers belie the aggressive federal law enforcement effort directed at economic espionage. The FBI describes espionage as "the FBI's number two priority—second only to counterterrorism"[35]—with over 350 agents assigned to the task of Chinese espionage as of 2006.[36] Many more cases have been brought under alternative charges, such as export control laws, or are still under investigation.[37] Thus, while the Department of Justice (DOJ) has been conservative in charging under § 1831, the scarcity of economic espionage prosecutions appears to be a result of internal policy rather than a lack of potential cases.

Indeed, the DOJ's administrative requirements for bringing charges under the EEA suggest that prosecutions under § 1831 could increase dramatically in October 2011. One of the compromises that led to the passage of the EEA was a requirement that for five years after the passage of the law, high level DOJ officials (the Attorney General, Deputy Attorney General, or Assistant Attorney General) would have to approve all prosecutions under the EEA before line-level prosecutors charged defendants.[38] When the five-year period expired, the Attorney General let the approval requirement lapse for prosecutions under the general theft of trade secrets statute, § 1832, but renewed it for economic espionage prosecutions under § 1831 until October 2011.[39] While hard numbers are not available, prosecutions under § 1832 have increased since the approval requirement was lifted,[40] suggesting that there would be a similar in-

33. *See* Mintz, *supra* note 2 ("Although a number of defendants have pleaded guilty, only one other has gone to trial . . . .").

34. Anderson, *supra* note 15.

35. *FAQs, Investigative Programs: Counterintelligence Division*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/investigate/counterintelligence/economic-espionage#faq (last visited Oct. 14, 2010).

36. David J. Lynch, *FBI Goes on Offensive vs. Tech Spies*, USA TODAY, July 24, 2007, at 1B.

37. *See* Pedro Ruz Gutierrez, *DOJ Revs Up Export Prosecutions of Individuals, Companies*, NAT'L L.J. (Dec. 20, 2007), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005559222 (noting that the FBI had over 125 open economic espionage investigations and describing criminal cases brought under export control laws).

38. *See* 142 CONG. REC. S12,201, S12,214 (daily ed. Oct. 2, 1996) (statement of Sen. Kohl); *see also* 28 C.F.R. § 0.64-5 (2006) (amended 2007).

39. *See* 28 C.F.R. § 0.64-5 (2010); Joseph W. Cormier et al., *Intellectual Property Crimes*, 46 AM. CRIM. L. REV. 761, 768-69 (2009); Memorandum from John Ashcroft, Att'y Gen., to all U.S. Att'ys, First Assistant U.S. Att'ys, Criminal Chiefs, & Criminal Div. Section Chiefs & Office Dirs. (Mar. 1, 2002), *available at* http://www.justice.gov/criminal/cybercrime/eea1996.pdf.

40. *See* U.S. DEP'T OF JUSTICE, PRO IP ACT FIRST ANNUAL REPORT 2008-2009, at 20-21 (2009) (discussing the general increase in intellectual property prosecutions without disclosing statistics for § 1832 prosecutions specifically); Krotoski, *supra* note 26, at 7 ("It is anticipated that there will be many more trade secrets cases opened in the next several years, in part based on more focused investigatory resources in this area."); Tyler G. Newby, *Criminal Enforcement of Federal Intellectual Property Laws—An Overview*, 50 ADVOCATE,

crease in economic espionage prosecutions if the restrictions lapse in 2011.

In addition, the Department of Justice's internal guidance to prosecutors takes an aggressive stance on the meaning of "benefit" in § 1831. The handbook *Prosecuting Intellectual Property Crimes* states that "[t]he 'benefit' to the foreign entity should be interpreted broadly,"[41] a position repeated in two internal bulletins interpreting the language of the EEA.[42] Prosecutors taking these statements at face value would presumably not hesitate to encourage investigations and bring charges against defendants whose activities result in more indirect benefits like those alleged in *Lan Lee*.

The benefit issue presented in *Lan Lee* is thus especially important for two reasons. First, so few cases have been prosecuted under § 1831 that the Department of Justice's standards for charging under the EEA are not yet clear and probably in flux. While the guidance available to line-level prosecutors encourages a liberal reading of the foreign benefit element, the outcome in early cases like *Lan Lee* could translate into a more aggressive or conservative stance on § 1831 prosecutions generally. Second, the handful of prosecutions that have been brought reflect a focus on cases involving benefits accruing to China,[43] and benefits flowing from connections to the 863 Program in particular.[44] Thus, early cases like *Lan Lee* send an especially strong message to prosecutors on the viability of cases under § 1831 involving a foreign benefit theory rooted in ties to the 863 Program.

Aug.-Sept. 2007, at 37, 38; Michael P. Simpson, Note, *The Future of Innovation: Trade Secrets, Property Rights, and Protectionism—An Age-Old Tale*, 70 BROOK. L. REV. 1121, 1136 (2005); Press Release, U.S. Dep't of Justice, Attorney General Highlights Department of Justice's Efforts to Enforce and Protect Intellectual Property Rights (June 20, 2006), *available at* http://www.justice.gov/opa/pr/2006/June/06_ag_379.html (describing DOJ's focus on intellectual property crimes generally and the increase in prosecutions generally).

41. MICHAEL BATTLE ET AL., U.S. DEP'T OF JUSTICE, PROSECUTING INTELLECTUAL PROPERTY CRIMES § IV.B.4, at 158 (3d ed. 2006), *available at* http://www.cybercrime.gov/ipmanual/index.html.

42. George Dilworth, *The Economic Espionage Act of 1996: An Overview*, U.S. ATT'YS' BULL., May 2001, at 41, 46; Thomas Reilly, *Economic Espionage Charges Under Title 18 U.S.C. § 1831: Getting Charges Approved and the "Foreign Instrumentality" Element*, U.S. ATT'YS' BULL., Nov. 2009, at 24, 26.

43. In fact, *Lan Lee* was only one of "approximately a dozen" cases of economic espionage with suspected ties to China that the FBI's Palo Alto office was investigating in 2006 alone. K. Oanh Ha, *Silicon Valley a Hotbed of Economic Espionage?*, ARGUS (Fremont, Cal.), Sept. 29, 2006, *available at* 2006 WLNR 16889362.

44. *See* Aaron J. Burstein, *Trade Secrecy as an Instrument of National Security? Rethinking the Foundations of Economic Espionage*, 41 ARIZ. ST. L.J. 933, 969-70 (2009). Two of the six cases brought under § 1831 involved allegations of funding from the 863 Program. *See* Superseding Indictment, *supra* note 17, ¶ 12; Indictment, *supra* note 29, at Count 2 ¶ 1. Five of the six cases involve China. *See supra* Table 1. *See generally* Jonathan Eric Lewis, *The Economic Espionage Act and the Threat of Chinese Espionage in the United States*, 8 CHI.-KENT J. INTELL. PROP. 189, 205-22 (2009) (discussing prosecutions of economic espionage cases involving China).

II. THE STATUTE

A. *Text*

The Economic Espionage Act of 1996[45] created two new federal crimes related to the theft of trade secrets: 18 U.S.C. § 1831 and 18 U.S.C. § 1832. Section 1832, entitled "Theft of trade secrets," criminalizes the theft of trade secrets generally. Section 1831, entitled "Economic espionage," provides more severe penalties for the theft of trade secrets with the knowledge or intent that the crime will benefit a foreign government, foreign instrumentality, or foreign agent.[46]

While both statutes use the word "benefit," § 1832 limits the type of benefit triggering application of the statute while § 1831 does not. Section 1832 makes it illegal for a person to, among other things, possess a stolen trade secret with the intent to convert that trade secret to the "*economic* benefit of anyone other than the owner thereof."[47] Section 1831, however, does not modify or limit the benefit; it criminalizes possession of a stolen trade secret "intending or knowing that the offense will benefit any foreign government."[48]

This difference between the two statutes forecloses one narrow interpretation of § 1831, and strongly suggests a broad reading of the word "benefit." First, it is extremely unlikely that Congress meant to limit § 1831 to economic benefits, as it is clear that Congress knew how to impose such limits with the language it used in § 1832. Similarly, the absence of any words modifying "benefit" in § 1831, compared to the use of a modifier in § 1832, suggests that Congress did not mean to limit the word at all, and thus embraced the full scope of its facially broad meaning.

To obtain a conviction under § 1831, the government must prove two or three elements, depending on which subsection it charges. Section 1831(a)(3), the subsection charged in *United States v. Lan Lee*, requires proof that the defendant: (1) knowingly possessed, received, or bought a trade secret; (2) while knowing the trade secret to have been stolen or appropriated, obtained, or converted without authorization; and (3) intended or knew that the offense would benefit any foreign government, foreign instrumentality, or foreign agent.[49] The foreign benefit element is common to all subsections of § 1831.

The EEA also includes a definition section.[50] That section defines the terms "foreign instrumentality," "foreign agent," "trade secret," and "owner,"

45. 18 U.S.C. §§ 1831-1839 (2006).

46. *See id.* § 1831(a) (providing a maximum punishment of fifteen years, instead of ten years under § 1832).

47. *Id.* § 1832(a), (a)(3) (emphasis added).

48. *Id.* § 1831(a), (a)(3).

49. *Id.*; *see also supra* note 16 (giving the full text of § 1831).

50. *Id.* § 1839.

but does not define "benefit."[51] Absent that definition, a preliminary question is whether "benefit" has a plain, unambiguous meaning on its face. Arguably, the inquiry could end here, as practically all plausible dictionary definitions of "benefit" treat tax revenues as beneficial to a foreign government.[52] A more detailed review of the legislative history, however, sheds light on whether Congress intended "benefit" to mean something other than the broad dictionary definitions.

B. *Legislative History*

1. *Purposes of the EEA*

The House and Senate reports accompanying the EEA identify three major concerns motivating the passage of the law. First, Congress emphasized the growing importance of trade secrets to the strength of the U.S. economy and the link between U.S. economic strength and national security.[53] Second, both chambers expressed concern over the increase in documented incidents of the theft of trade secrets, especially theft by foreign companies and foreign governments.[54] Finally, a new law was needed because trade secret theft fell between the cracks of existing federal criminal statutes, leading to unsuccessful prosecutions under laws not designed to address the specific problem of trade secret theft.[55]

While these broad purposes could provide both sides with fodder for ar-

51. *Id.*

52. *See, e.g.*, AMERICAN HERITAGE COLLEGE DICTIONARY 132 (4th ed. 2004) ("[t]o be helpful or useful to"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 114 (11th ed. 2003) ("to be useful or profitable to"); 2 THE OXFORD ENGLISH DICTIONARY 112 (2d ed. 1989) ("[t]o do good to, to be of advantage or profit to").

53. *See* H.R. REP. NO. 104-788, at 4 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4021, 4023 (discussing the "growing importance of proprietary economic information" to the nation's economy, and noting that "threats to the nation's economic interest are threats to the nation's vital security interests"); S. REP. NO. 104-359, at 2, 6 (1996) (finding that trade secrets are "essential to maintaining the health and competitiveness of . . . the national economy," and devoting a section of the report to the "growing importance of" trade secrets to the nation).

54. *See* H.R. REP. NO. 104-788, at 5 (describing testimony by the director of the FBI that law enforcement was investigating "allegations of economic espionage activities conducted against the United States by individuals or organizations from 23 different countries"); S. REP. NO. 104-359, at 7-9 (including a section of the report entitled "increasing incidents of theft of proprietary economic information," and highlighting incidents of "'foreign governments . . . actively target[ing] U.S. persons, firms, industries, and the U.S. government itself'" (omission in original) (quoting the director of the FBI)).

55. *See* H.R. REP. NO. 104-788, at 6 ("The principal problem appears to be that there is no federal statute directly addressing economic espionage or which otherwise protects proprietary information in a thorough, systematic manner."); S. REP. NO. 104-359, at 10 ("[N]o Federal law protects proprietary economic information from theft and misappropriation in a systematic, principled manner.").

guing for a broad or narrow interpretation of the word "benefit" in the foreign benefit element, the House Report goes on to specifically address this question. It stated:

> In [§ 1831], "benefit" is intended to be interpreted broadly. The defendant did not have to intend to confer an economic benefit to the foreign government, instrumentality, or agent, to himself, or to any third person. Rather, the government need only prove that the actor intended that his actions in copying or otherwise controlling the trade secret would benefit the foreign government, instrumentality, or agent *in any way*. Therefore, in this circumstance, benefit means not only an economic benefit but also reputational, strategic, or tactical benefit.[56]

The report then contrasted this with the benefit in the general theft of trade secrets subsection, noting that the general section required the government to prove an "economic benefit not abstract or reputational enhancements."[57]

This discussion leaves little room for debate about the intended breadth of the word "benefit" in the foreign benefit element. While the version of the bill discussed in the House Report was amended before it was ultimately passed, the amendment changed only the mens rea requirement, not the "benefit" wording.[58] The details of the statute's drafting history and debate provide valuable information about what Congress understood the limits of the statute to be, and which parts of the text were meant to be more flexible than others when applying the law to difficult boundary cases.

2. *The four iterations of § 1831's wording*

Congress considered four different versions of a statute criminalizing the theft of trade secrets benefitting a foreign government before settling on the language of § 1831. None of the versions included a modifier before the word "benefit," but the changes in wording from one version to the next and the accompanying floor statements shed some light on Congress's thinking about the meaning of the foreign benefit element and its relationship with the overarching purposes of the law. Table 2 summarizes these four versions.

56. H.R. REP. NO. 104-788, at 11 (emphasis added).

57. *Id.* at 15.

58. *See infra* Table 2.

TABLE 2
Versions of Foreign Benefit Element Language in Legislative History

Bill	*Language*	*Introduced*	*Sponsor(s)*
S. 1557	Any person who, with intent to, or reason to believe that it will, injure any owner and benefit any foreign nation, government, corporation, institution, instrumentality, or agent	February 1, 1996	Sens. Specter & Kohl
H.R. 3723	Whoever with the intent to, or with reason to believe that the offense will, benefit any foreign government, foreign instrumentality, or foreign agent	June 26, 1996	Reps. McCollum, Schumer & Hamilton
S. Amendment No. 5384 to H.R. 3723	Any person who, with knowledge or reason to believe that he or she is acting on behalf of, or with the intent to benefit, any foreign government, instrumentality, or agent	September 18, 1996	Sens. Specter & Kohl
H.R. Amendment to H.R. 3723 (enacted)	Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent	September 28, 1996	Rep. McCollum

The first version, introduced by Senators Specter and Kohl as a companion bill to a more general theft of trade secrets statute, had arguably the broadest wording of the four iterations. In particular, it included "foreign corporation" in the list of entities that would trigger application of the statute.[59] While the bill later defined foreign corporations as corporations controlled by a foreign government,[60] no other version of the statute explicitly listed corporations as a type of foreign entity covered by the statute.

Senator Specter practically apologized for the bill as he introduced it, noting that he "believe[d] there are legitimate questions about the need for federal criminal penalties in this context," and further explaining that he was introducing the bill "with the expectation that it will generate discussion and debate and assist us in developing the best approach to this problem."[61] In describing the impetus behind the bill, Senator Specter referred several times to "economic espionage by foreign governments" and the activities of "foreign intelligence services."[62] Not surprisingly given its lukewarm introduction, this version died in committee.

The second version originated in the House of Representatives, and

59. Economic Security Act of 1996, S. 1557, 104th Cong. § 3 (1996).
60. *Id.*
61. 142 CONG. REC. S741 (daily ed. Feb. 1, 1996) (statement of Sen. Specter).
62. *Id.*

emerged from the House Judiciary Committee in a form quite similar to the failed Senate bill, but without the reference to foreign corporations. In this version, however, the general theft of trade secrets crime and the harsher foreign benefit theft crime appeared as different subsections of a single statute.[63]

During floor debates, Representative Schumer, one of the cosponsors of the bill, described the law as a tool to "help Federal investigators and prosecutors stop economic competitors from pilfering [trade secrets]."[64] He added it would "send a clear message to foreign governments, including many of our traditional allies, that are currently spying on America's private companies. Their agents will now be held accountable for their criminal activity."[65] While none of the floor debates surrounding this second version raised concerns about the potential overbreadth of the foreign benefit element, those concerns surfaced soon after during consideration of the third version of the statute.

After the House passed the second version and submitted it to the Senate, Senators Specter and Kohl revived their version of the bill, still languishing in committee, by offering it as an amendment to the House bill.[66] In this third version, however, the Senators retracted the scope of the foreign benefit element through a subtle but significant change in wording from the House version. Under the House version, a person "with reason to believe that the offense will[] benefit any foreign government" was guilty of economic espionage. Under the new Senate amendment, however, a person "with . . . reason to believe that he or she is acting on behalf of . . . any foreign government" was guilty of economic espionage.[67] The Senate version tied the defendant's mens rea to the relationship with the foreign government, while the House version connected the mens rea to the benefit.

In a floor statement introducing the amendment, Senator Kohl explained that the new wording was designed to ensure that the law "not apply . . . to foreign corporations when there is no evidence of foreign government sponsored or coordinated intelligence activity," and he encouraged enforcement agencies to keep this limiting principle in mind when administering the law.[68] Senator Kohl further explained that

> [t]his particular concern is borne out in our understanding of the definition of "foreign instrumentality" . . . . We do not mean for the [foreign instrumentality definition] to be mechanistic or mathematical. The simple fact that the majority of the stock of a company is owned by a foreign government will not suffice under this definition, nor for that matter will the fact that a foreign government only owns 10 percent of a company exempt it from scrutiny. Rather the pertinent inquiry is whether the activities of the company are, from a prac-

63. Economic Espionage Act of 1996, H.R. 3723, 104th Cong. § 2 (1996).
64. 142 CONG. REC. H10,461 (daily ed. Sept. 17, 1996) (statement of Rep. Schumer).
65. *Id.*
66. 142 CONG. REC. S10,862 (daily ed. Sept. 18, 1996) (Amendment No. 5384).
67. *See supra* Table 2.
68. 142 CONG. REC. S10,885 (daily ed. Sept. 18, 1996) (statement of Sen. Kohl).

tical and substantive standpoint, foreign government directed.[69]

Although the amendment passed and was included in the version passed by the Senate and sent to the House, the final version of § 1831 retained the House's wording that tied the defendant's mens rea to the benefit, not the relationship to the foreign government.[70]

Even though the amendment did not ultimately survive the legislative process, Senator Kohl's explanation of the thinking behind it highlights Congress's recognition of the potential overbreadth of the foreign benefit element. More importantly, it reveals that in crafting a solution to the problem, Congress focused on limiting what qualified as a "foreign government, instrumentality, or agent" under the law—not on limiting the definition of "benefit."

The final change to the statute occurred in the House, where Representative McCollum introduced an amendment that included the language ultimately passed by both chambers and signed into law.[71] The final version changed the statute in two important ways: First, it broke the general theft of trade secrets prohibition and the economic espionage benefitting a foreign government prohibition into two separate crimes, instead of listing them as alternative subsections of a single statute.

Second, it increased the mens rea required for conviction from previous permutations of "intent or reason to believe" to "intending or knowing."[72] In his floor statements explaining the amendment, Representative McCollum said that the language was "based in large part on draft legislation . . . from the Department of Justice and the Federal Bureau of Investigation . . . . [It] reconciles the differences between [the House and Senate] versions of this bill and is the result of negotiations with the majority and minority of both bodies."[73] While the record gives no indication of what issues were discussed in those negotiations, Representative McCollum did identify and respond to two specific concerns raised by the State Department later in his remarks:

> The principal purpose of new section 1831 of title 18 is to prevent and punish acts of economic espionage involving foreign government, foreign instrumentalities, or foreign agents. . . . [W]hen this is not the case, a foreign corporation or company should not be prosecuted under the section dealing with economic espionage . . . .
>
> . . . [T]his act should not give rise to a prosecution for legitimate economic data collection or reporting by personnel of foreign governments or international financial institutions . . . where the person collecting or reporting the information does not know (or should not be charged with knowing) that their

69. *Id.*

70. *See supra* Table 2.

71. *See* 142 CONG. REC. H12,137-44 (daily ed. Sept. 28, 1996) (statement of Rep. McCollum).

72. *See id.* at H12,144.

73. *Id.*

actions . . . was [sic] without the authorization of the owner.[74]

The amendment passed, and the House sent the final version back to the Senate, where it also passed. Senators Specter and Kohl both gave floor statements reiterating previous explanations of the purposes of the bill, citing "mounting evidence that many foreign nations and their corporations have been seeking to gain competitive advantage by stealing the trade secrets . . . of inventors in this country."[75] Senator Kohl also introduced a copy of the Managers' Statement into the record, commenting that it "reflects our understanding on this measure."[76]

The Managers' Statement included two sections especially relevant to the foreign benefit element. First, it contained several verbatim excerpts of Senator Kohl's previous remarks about § 1831, made when he introduced the third version of the bill in the Senate.[77] Also, it included a paragraph explaining that the Department of Justice had assured Congress that its internal regulations would require approval from high-level officials for each prosecution brought under the Economic Espionage Act for several years.[78] President Clinton signed the EEA into law on October 11, 1996.[79]

3. *Congress's two methods of constraining the reach of the EEA*

Considered as a whole, the EEA's legislative history reveals two different approaches to setting boundaries on the foreign benefit element. Senator Kohl's statements accompanying the second version, repeated in the Managers' Statement to the bill, reflect the belief that the best way to ensure that the law was applied with its "principle purpose" in mind was to restrict the definition of "foreign instrumentality."[80] This approach does less work than Congress probably believed it would.

Lan Lee is an excellent example of a fact pattern where limiting the definition of "foreign instrumentality" does not help a defendant with a plausible claim that the statute should not apply to him.[81] In *Lan Lee*, both sides agreed that the defendants had no formal or informal relationship with a foreign intelligence agency, and their only tie to a foreign government was an application to a public funding program. While the defense had an intuitive argument about a

74. *Id.*

75. 142 CONG. REC. S12,208 (daily ed. Oct. 2, 1996) (statement of Sen. Specter).

76. *Id.* at S12,212 (statement of Sen. Kohl).

77. *Id.*; *see supra* note 69 and accompanying text.

78. *Id.* at S12,214; *see supra* notes 38-39 and accompanying text.

79. Statement on Signing the Economic Espionage Act of 1996, 2 PUB. PAPERS 1814 (Oct. 11, 1996). President Clinton's statement never mentioned the word "benefit." *Id.*

80. 142 CONG. REC. S12,212 (daily ed. Oct. 2, 1996) (statement of Sen. Kohl).

81. In other cases, of course, this limitation could be essential to constraining the foreign benefit element. This Note focuses on the class of cases where this limitation does not apply but the foreign benefit element is still the focus of the controversy.

gap between the facts of the case and traditional notions of espionage, the defendants were not in a position to argue that the Chinese government's tax coffers were not part of a foreign government, foreign instrumentality, or foreign agent. Unable to argue that tax revenues do not implicate foreign governments, the defense turned to the definition of "benefit" to argue that tax revenues fell outside of the purview of § 1831. Yet, the plain meaning and legislative history of the word "benefit" indicate no such limitations on the word. Tax benefits are, after all, benefits.

The legislative history, however, includes a second approach to limiting the foreign benefit element that could be of use to defendants charged under a *Lan Lee* foreign benefit theory. In Representative McCollum's floor statements responding to State Department concerns over the final version of the bill, he sought to assure Congress that personnel of foreign governments and institutions conducting legitimate economic data collection and reporting could not be prosecuted under § 1831 because "the person . . . does not know (*or should not be charged with knowing*) that their actions . . . was [sic] without the authorization of the owner."[82] Taken literally, the statement may have been guidance directed at senior officials in the Department of Justice who have to approve all prosecutions under the Economic Espionage Act before an Assistant United States Attorney could bring charges against a defendant in any district.[83]

But a second, subtler implication of the statement is that important boundary-setting work can be done by courts when interpreting the mens rea of the foreign benefit element. By elevating the mens rea in the final version of the bill to "intending or knowing," and commenting that limits should be placed on what a defendant is charged with "knowing" in the context of economic espionage, Congress provided a solution to the problem faced by the defendants in *Lan Lee*.

III. ADVANTAGES OF THE MENS REA APPROACH TO LIMITING THE REACH OF THE EEA

Taking Representative McCollum's cue, the defense in *Lan Lee* could have argued that the defendants did not know of or intend tax benefits to China. Ultimately, this framing creates another boundary-setting task for courts: deciding what qualifies as knowledge of or intent to benefit a foreign government under § 1831. Still, that question has three significant advantages over the *Lan Lee* court's framing of the issue as a question of whether tax revenues are "benefits" to foreign governments.

82. 142 CONG. REC. H12,137, H12,144 (daily ed. Sept. 28, 1996) (statement of Rep. McCollum) (emphasis added).

83. *See supra* notes 38-39 and accompanying text.

A. *Focusing on the Real Controversy*

First, focusing on the defendants' mens rea rather than the definition of "benefit" more accurately reflects the real controversy over the tax benefit theory, allowing both sides to submit their best arguments for the court's consideration. The logical force of the defense's objection in *Lan Lee* lies in the idea that tax revenues are too attenuated, indirect, and insubstantial to trigger a fifteen-year prison sentence under § 1831. Surely, the argument goes, Congress did not enact the EEA to punish people for unintended and unavoidable consequences of doing business in a global economy, because those are not benefits that criminal law considers within the knowledge or intent of the defendants. Indeed, hardly anyone intends or knows anything about a foreign government's tax revenues.

But the prosecution would have strong counterarguments that these defendants cannot be accurately characterized as hapless entrepreneurs accidentally affecting China because of the evidence of their intent to seek direct funding from the Chinese government to start a multimillion-dollar business in China. The 863 Program, far from being a charitable foundation, is an arm of the Chinese government designed to benefit China.[84] Under this view, the defendants must have known that there is no such thing as free money, and if China was willing to fund the venture, the defendants had to understand that the government was getting some benefit in return. Both arguments present plausible stories to the factfinder and marshal relevant facts that cut to the heart of the issue instead of debating in the abstract at the periphery about whether tax revenues are really "benefits."

B. *Avoiding Disingenuous Arguments*

Second, framing the foreign benefit issue in terms of a defendant's mens rea seeks flexibility in traditionally flexible concepts,[85] while trying to constrain the word "benefit" results in disingenuous arguments and conclusions. The *Lan Lee* court's order granting the defendants' motion for a judgment of acquittal demonstrates the tenuous logic necessary to read the word "benefit" narrowly. After selectively quoting from floor debates and drafting history—conspicuously ignoring the only part of the legislative history actually discussing the scope of the word "benefit"[86]—the court embarks on a distinction between "foreign country" and "foreign government," concluding that § 1831 does not apply when a defendant takes a stolen trade secret to a foreign country unless he intends to "give it [to] or use it for the foreign government."[87]

84. *See, e.g.*, Burstein, *supra* note 44, at 969; Deming Liu, *The Transplant Effect of the Chinese Patent Law*, 5 CHINESE J. INT'L L. 733, 745 (2006).

85. *See supra* Part I.A.

86. *See supra* note 56 and accompanying text.

87. Order Granting in Part and Denying in Part Defendants' Motion for Judgment of

Under the court's creative definition, then, a defendant who took stolen biological weapons technology to a foreign country and sold it to all of the nation's private defense contractors would not be benefitting a foreign government, instrumentality, or agent, even though the government and its military would obviously reap the advantages of having such a technology for use and development within its borders. It is fair to assume that such a scenario is precisely the kind of activity Congress was trying to criminalize when it enacted § 1831.

The biological weapons example demonstrates the dangers of crafting a new concept of "benefit" out of whole cloth, without guidance from Congress or precedent, to decide which benefits are "actually" benefits under § 1831. In contrast, every student of criminal law quickly learns that the words "intent" and "knowledge" defy consistent definition,[88] creating a natural flexibility that courts could use to set boundaries on the foreign benefit element.

C. *Maintaining Fact Sensitivity*

The third advantage of the mens rea formulation is that it avoids overbroad resolutions of cases that foreclose entire classes of future prosecutions without regard for their potential factual merit. The question of whether the evidence in a particular case establishes the defendant's knowledge of or intent to benefit a foreign government beyond a reasonable doubt is highly fact-sensitive and will turn on the factfinder's assessment of the nuances of that case. But when a court declares that certain benefits are not benefits under the EEA as a matter of law, it effectively takes a sledgehammer to the fly by ignoring the possibility that a set of facts could arise in the future consistent with such a benefit and the purposes of § 1831.[89] If, for example, an appellate court were to affirm the *Lan Lee* court's ruling that tax benefits are not benefits under § 1831, no defendant could ever be charged under a tax benefit theory in the Ninth Circuit, even if the government gathered irrefutable proof of a defendant's conscious plan to benefit the Chinese government by using stolen trade secrets to funnel large amounts of money to China in the form of tax revenues.

Acquittal, *supra* note 23, at 9-11.

88. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW §§ 5.2(a)-(b), at 244-49 (4th ed. 2003) (noting the various meanings courts have given to "intent" and "knowledge").

89. The thrust of the defense argument under the *Lan Lee* court's framing of the issue is that the benefit alleged in the case was not a "benefit" under the EEA, a question of law for the judge. A case could, of course, present a legitimate question to the factfinder of whether the government had offered evidence of a benefit, but this was not the issue confronting the *Lan Lee* court that this Note addresses.

IV. CASE LAW FROM ANALOGOUS STATUTES SUPPORTS THE MENS REA APPROACH

Since *Lan Lee* is the first time a court has interpreted the foreign benefit element of the EEA, the case law on analogous statutes offers the best source of information on how courts might adopt the approach suggested in this Note and constrain the foreign benefit element through the definition of the defendant's knowledge or intent. The case law confirms that this approach to interpreting the foreign benefit element is workable in practice and consistent with courts' approach to interpreting two other espionage statutes: the Trading with the Enemy Act and the Espionage Act.

A. *Trading with the Enemy Act and* Von Clemm*: No Benefit Means Not One Dollar*

The Trading with the Enemy Act of 1917[90] (TWEA) generated case law interpreting language similar to the foreign benefit element of § 1831. In *Von Clemm v. Smith*,[91] a federal district court concluded that the word "benefit" in the context of espionage control statutes should not be read narrowly or limited to benefits flowing from a particular type of espionage. *Von Clemm* was a civil action under TWEA. A major issue in the case was whether the plaintiff was "an 'agent' of the government of a country, i.e., Germany, with which the United States was at war."[92] Relying on precedent, the court defined "agent" as "one who acts directly or indirectly *for the benefit of [a] foreign government*."[93] As a result, the *Von Clemm* court was interpreting the phrase "benefit of a foreign government," language very similar to the Economic Espionage Act's foreign benefit element.

The court first disposed of the argument that only particular types of formal intelligence gathering could benefit a foreign government. Conceding that benefits may, of course, flow from classical spying activities like propaganda and intelligence gathering, the court explained that benefits were not limited to such activities: "A man may be an agent of a foreign government even though he is not on its payroll and even though his work is less dramatic than espionage."[94] Nicely summarizing the purpose of a statute prohibiting benefits to a foreign government, the court concluded that "[t]he intention was to make it impossible for a dollar to inure to the advantage of [a foreign government]."[95]

To a foreign government, a tax dollar is just as beneficial as any other dollar. The *Von Clemm* court's straightforward "not one dollar" bottom line is an

90. 50 U.S.C. app. §§ 1-44 (2006).

91. 255 F. Supp. 353 (S.D.N.Y. 1965), *aff'd*, 363 F.2d 19 (2d Cir. 1966).

92. *Id.* at 367.

93. *Id.* at 368 (emphasis added).

94. *Id.*

95. *Id.* (quoting Stadtmuller v. Miller, 11 F.2d 732, 733-34 (2d Cir. 1926)).

important lesson for courts interpreting the Economic Espionage Act's foreign benefit element. Benefits are defined in terms of impact on the entity benefitted, not in terms of the actions of the person causing the benefit. While *Von Clemm* was a civil case interpreting a different statute, the phrase it specifically interpreted is functionally equivalent to the language in the EEA, and both statutes share the common purpose of controlling espionage.

B. *The Espionage Act: Applying a Foreign "Advantage" Element*

The phrase "intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent" is unique to § 1831. The closest analog with relevant interpretive case law in the United States Code is another criminal espionage statute: 18 U.S.C. § 793(d). Section 793(d) criminalizes the transmission of certain national defense materials to anyone "not entitled to receive it" when the materials "could be used to the injury of the United States or to the advantage of any foreign nation."[96] Two important differences between the foreign benefit element of § 1831 and the foreign advantage element of § 793(d) stand out. Most obviously, § 793(d) uses the word "advantage" instead of "benefit."[97] Just as significant is the disjunctive nature of § 793(d)'s "advantage" element; it can be satisfied by either advantage to a foreign nation *or* injury to the United States.

Both statutes, however, criminalize the use of certain "secret" information for the benefit or advantage of a foreign nation, and thus the case law interpreting § 793(d)'s foreign advantage element is a useful source of information on how other courts would, and perhaps should, interpret § 1831's foreign benefit element. Two cases are particularly helpful. The first, *United States v. Morison*,[98] illustrates how courts have rejected an expansive interpretation of the analog to "benefit" in the foreign benefit element. The second, *Gorin v. United States*,[99] supports an interpretive approach that focuses on the mens rea in the foreign benefit element and offers one test courts could use in defining "intend-

96. 18 U.S.C. § 793(d)-(f) (2006) ("Whoever, lawfully having possession of, access to, control over, or being entrusted with 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 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 communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.").

97. Another criminal espionage statute, *id.* § 798(a), is quite similar to § 793(d) and even uses the word "benefit" instead of "advantage"; however, no cases have interpreted § 798(a)'s foreign benefit element, so it is not discussed in this Note.

98. 844 F.2d 1057 (4th Cir. 1988).

99. 312 U.S. 19 (1941).

ing or knowing" under § 1831.

1. Morison*: benefit means benefit*

Despite the text and legislative history discussed above, a defendant facing economic espionage charges under § 1831 might not be willing to abandon a direct attack on the definition of "benefit." Even if a tax benefit to a foreign government is a benefit within the dictionary meaning of the word, it does not necessarily follow that it is the kind of benefit that Congress meant to address when it passed the Economic Espionage Act. In *United States v. Morison*, a defendant facing espionage charges under § 793(d) of the Espionage Act made such a congressional purpose argument.[100] Morison argued that the crimes created under the Espionage Act, "whatever their facial language, were to be applied only to 'classic spying' and that they should be limited in their application to this clear legislative intent."[101]

The Court rejected this argument on two grounds. First, it relied on a textualist rule of statutory construction that "when the terms of a statute are clear, its language is conclusive and courts are 'not free to replace . . . [that clear language] with an unenacted legislative intent.'"[102] Then, it concluded that even if the court were to consider the legislative history of the statute, the defendant would still lose.[103] Driving that conclusion was the observation that the statute at issue, § 793(d), was part of a larger statutory scheme of espionage control. In designing that scheme, Congress "br[oke] down into separate offenses various aspects of espionage activity and [made] each separate aspect punishable as provided separately."[104] Notably, one of those statutes, § 794, addressed the act of "classic spying," as reflected in its severe penalty scheme.[105]

These observations are equally true in the context of the Economic Espionage Act. While a defendant could point to various parts of the legislative history of the EEA discussing congressional concern over the prospect of foreign intelligence agents stealing U.S. trade secrets, those concerns do not change the language of the statute nor do they limit § 1831's application to activities governed by other statutes. Moreover, the legislative history explicitly rejects characterization of economic espionage as limited to traditional notions of "spying."[106] Ultimately, the statute means what it says: possession of stolen trade

100. 844 F.2d at 1064.

101. *Id.*

102. *Id.* (alteration and omission in original) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring)).

103. *See id.*

104. *Id.* at 1065 (quoting Boeckenhaupt v. United States, 392 F.2d 24, 28 (4th Cir. 1968)).

105. *Id.* (noting that § 794 authorizes the death penalty).

106. *See* H.R. REP. NO. 104-788, at 5 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4021, 4024 ("It is important, however, to remember that the nature and purpose of industrial espio-

secrets with knowledge or intent that the possession will benefit a foreign government is a crime.

2. Gorin*: endorsing a broad reading of "benefit" and focusing on the mens rea*

The Supreme Court interpreted § 793(d)'s foreign advantage element in *Gorin v. United States*.[107] In *Gorin*, the defendant challenged the Espionage Act[108] as void for vagueness.[109] The Court rejected that argument, stating:

> The obvious delimiting words in the statute are [in the foreign advantage element]. This requires those prosecuted to have acted in bad faith. . . . Where there is no occasion for secrecy . . . there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government. . . .
>
> . . . .
>
> Nor do we think it necessary to prove that the information obtained was to be used to the injury of the United States. . . . The evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain.[110]

The Court highlighted a relationship between the nature of national defense materials and the foreign advantage element, stating that the government's failure to prove the secrecy needed to establish the existence of national defense materials all but foreclosed its ability to show an intent to provide an advantage to a foreign government.[111] The Court recognized that secret national defense materials by definition confer an advantage to a foreign government receiving them, and a defendant seeking to prove the absence of intent to advantage a foreign government should thus focus on whether the materials she possessed were indeed secret national defense materials under the statute.

The analysis under the Economic Espionage Act is similar, with an important distinction. Trade secret information is, by definition, economically valuable. Thus, any direct transmission of that information to a foreign government, instrumentality, or agent confers an economic benefit on the entity receiving it. But while the Espionage Act subsection at issue in *Gorin* criminalized only such direct communication, delivery, or transmittal,[112] the Economic Espionage Act is broader in its prohibitions. Section 1831 criminalizes, among other things, mere possession of a trade secret with the intent or knowledge that it will benefit a foreign government. As a result, the government may choose to

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nage are sharply different from those of classic political or military espionage. . . . All of these forms of industrial espionage . . . . will be punished under this bill.").

107. 312 U.S. 19, 29-30 (1941).

108. *Gorin* was interpreting the predecessor statute to 18 U.S.C. § 793(d) (2006); however, the language from the "advantage element" was the same.

109. *See Gorin*, 312 U.S. at 27.

110. *Id.* at 27-30.

111. *See id.* at 28.

112. *See* 18 U.S.C. § 793(d).

charge a violation of § 1831 when the defendants intend to use the trade secrets to benefit a foreign government in ways other than direct transmission, as the government did in *Lan Lee*.

Despite the differences between § 793(d) and § 1831, the logic of *Gorin* carries over to the facts of *Lan Lee*. Trade secrets necessarily confer economic benefits.[113] The intentional use of a trade secret to run a business in a foreign country necessarily confers an economic benefit on that business, which the foreign government will inevitably siphon off through taxes, resulting in an economic benefit to the foreign government. As the *Gorin* Court suggested, arguing that such a tax benefit is not actually a benefit fights the wrong battle.

a. *Reining in the foreign advantage/benefit element:* Gorin*'s solution*

Defendants facing such broad constructions of the word "benefit" have a powerful objection: what is the limiting principle? The potential reach of this expansive understanding of benefit is significant. Consider the following hypothetical: Smith possesses a stolen trade secret that he intends to use to start a business in the United States. He has never contacted any foreign government, instrumentality, or agent, nor does he intend to do so, for assistance in starting or funding this business. But, because he believes Sweden to be the economic future in this industry, he intends to obtain all of his raw materials from Swedish companies in order to build key business relationships as part of a plan to expand sales operations into Sweden in the near future. Smith's business plan will inevitably confer an economic benefit on Sweden through taxation of the raw materials suppliers' increase in business, as well as future taxes on Smith's planned business operations in Sweden. Is this economic espionage in violation of § 1831?

The *Gorin* Court was not blind to this problem. A careful parsing of the language reveals an unwillingness to endorse the broadest possible reading of the foreign advantage element from the Espionage Act. The Court stated that "[w]here there is no occasion for secrecy . . . there can, of course, in all likelihood be no *reasonable intent* to give an advantage to a foreign government."[114] The Court hedged by reading a reasonableness requirement into the mens rea of the "advantage" element—a requirement not found in the language of the statute.

The curious phrase "reasonable intent" is rare in Supreme Court precedent, appearing a total of six times, with the five cases preceding *Gorin* all decided in the nineteenth century.[115] In *Hetzel v. Baltimore & Ohio Railroad Co.*, the

113. *See* 18 U.S.C. § 1839(3) (defining "trade secret" in terms of economic value).

114. *Gorin*, 312 U.S. at 28 (emphasis added).

115. *Id.*; Hetzel v. Balt. & Ohio R.R. Co., 169 U.S. 26, 38 (1898); Cedar Rapids & Mo. River R.R. Co. v. Herring, 110 U.S. 27, 35 (1884); Garfielde v. United States, 93 U.S. 242,

Court defined "reasonable intent" in the context of a civil suit over a railroad's interference with the use of private property adjacent to the railroad. Turning to the question of the property owner's damages, the Court, drawing on contract law principles, observed:

> Certainty to reasonable intent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. Such a result would be regarded as having been within the contemplation of the parties and as being the natural accompaniment and the proximate result of the violation of the contract.[116]

The Court folded the concept of proximate cause into a definition of intent, an approach that solves the problem posed by the foreign benefit element in the economic espionage statute. While the meaning of "benefit" might be quite broad, at some point the law must refuse to hold an individual responsible for benefits accruing to a foreign government too far down the chain of causation, or risk criminalizing behavior like that described in the Smith hypothetical above.

b. *Extending* Gorin*'s insight: a proposed test for use with § 1831 cases*

Hetzel offers one line-drawing test that courts could use to bring the concept of proximate cause into an analysis of a defendant's mens rea under the EEA. While *Hetzel* specifically defined "reasonable *intent*," the Court's distinction between "absolute" and "reasonable" was a means of tying proximate cause to the analysis. Thus, in the context of a mens rea requirement of "intending or knowing," the proximate cause language would carry over to a definition of "reasonable knowledge."

The Court actually offered a series of definitions in *Hetzel* that could be read as either alternative phrasings of the same concept or necessary elements of a single definition. Thus, a contemporary court looking to *Hetzel* could define "reasonable intent" or "reasonable knowledge" of a foreign benefit as requiring some version or combination of a benefit being: (1) so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the offense, (2) a probable and direct result of the offense, (3) within the contemplation of the defendant, and (4) the natural accompaniment and proximate result of the offense.[117]

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245 (1876); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 610 (1870); Walton v. Cotton, 60 U.S. (19 How.) 355, 358 (1857).

116. 169 U.S. at 38 (quoting U.S. Trust Co. v. O'Brien, 38 N.E. 266, 267 (N.Y. 1894)).

117. Defining an element of a crime with reference to the crime itself is troublingly circular; however, this is precisely how Congress defined § 1831. *See* 18 U.S.C. § 1831(a) ("Whoever, intending or knowing that *the offense* will benefit any foreign government . . . ."

The use of proximate cause analysis in a definition of mens rea raises two potential objections. First, the relevance of proximate cause is not immediately intuitive because proximate cause addresses the legal connection between a result and the defendant's conduct. Section 1831, however, may be charged as an inchoate crime, and no benefit to a foreign government must actually result—the foreign benefit element requires only that the defendant intended or knew of a benefit to a foreign government at the time he possessed stolen trade secrets, not that the foreign government in fact benefitted.[118] The foreign benefit result, however, should be thought of as nested within the larger statute as a part of the foreign benefit element. Because the government must prove that the defendant intended or knew of a benefit, the question remains what conduct the defendant intended or knew, and that conduct must be the proximate cause of a foreign benefit to trigger the criminal penalties of § 1831.

A second objection to *Hetzel*'s "reasonable intent" definition is that the cases are so readily distinguishable as to remove all bases for useful comparison. After all, a nineteenth century common law contracts case discussing what damages follow from breach is a far cry from a twenty-first century criminal case interpreting an espionage statute. Because, however, the borrowed analysis is useful only by means of analogy and not as controlling authority, these differences only matter to the extent that they undermine the analogy between the foreign benefit element of the EEA and the damages in a breach of contract case. Both questions address which results of the defendant's conduct the law considers fairly traceable to the defendant. Taking this view, the differences between *Gorin* and *Lan Lee* militate in favor of a more defendant-friendly version of the proximate cause test consistent with criminal law's notions of fairness to criminal defendants and the Rule of Lenity,[119] rather than arguing against its use at all.[120] Moreover, using concepts associated with proximate cause as a means of defining the harm caused by a criminal defendant is hardly a radical concept. For example, the United States Sentencing Guidelines define the "actual loss" associated with economic crimes as "the reasonably foreseeable pecuniary harm that resulted from the offense,"[121] effectively incorporating notions of proximate cause into the definition of loss.[122]

Of course, contemporary courts need not necessarily read the specific "reasonable intent" requirement into the Economic Espionage statute to take advantage of the *Gorin* Court's fundamental insight. The thrust of the Court's mes-

(emphasis added)).

118. *See id.*

119. *See, e.g.*, United States v. Santos, 128 S. Ct. 2020, 2026 (2008) (plurality opinion) (discussing and applying the rule of lenity).

120. *See* LAFAVE, *supra* note 88, § 6.4(c), at 337 (arguing that criminal law should require "a closer relationship between the result achieved and that intended or hazarded" than tort law, and noting this is not necessarily borne out in the case law).

121. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. 3(A)(i), at 86 (2010).

122. *See* Mills & Weisberg, *supra* note 7, at 1443.

sage was that imposing artificial constraints on the inherently expansive concept of "advantage"—or "benefit" in the case of economic espionage—will not work; instead, courts should shift their focus to the question of whether the defendant intended (or knew) such an advantage would result. Courts are free to analyze the mens rea question using the "reasonable intent" framework provided by *Gorin* and *Hetzel*, other definitions of "reasonable intent" from lower courts,[123] or more general notions of the boundaries of intent and knowledge in the context of a criminal statute.[124]

CONCLUSION

A court interpreting § 1831 must decide which part(s) of the foreign benefit element will do the most work limiting the reach of the statute. The *Lan Lee* court chose to push on the meaning of the word "benefit," and concluded that tax revenues to a foreign government are never benefits under § 1831 as a matter of law. But the text and legislative history of the EEA are unequivocal in embracing a broad definition of "benefit" in § 1831.

A better approach to the problem would have focused on the defendants' mens rea, forcing both sides to argue whether the defendants had the requisite knowledge or intent given the facts of the case, while properly limiting what knowledge or intent can be attributed to the defendants by incorporating proximate cause into the definition of "intending or knowing." This approach is both more flexible, because it puts the question to the jury and allows for fact-specific determinations, and intellectually honest, because it avoids dubious arguments that certain benefits are not benefits. While appellate case law on this question does not yet exist, this approach is consistent with the scant case law interpreting analogous provisions of other espionage statutes.

123. *See, e.g.*, Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185, 1188 n.4 (9th Cir. 1986) (discussing "reasonable intent" in terms of analysis in light of all of the circumstances).

124. *See, e.g.*, Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 523-24 (1994) (observing that "action undertaken with knowledge of its probable consequences" can satisfy a "knowing" mens rea requirement in a criminal statute (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978))).