IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE UNITED STATES OF AMERICA

*

v. **Criminal No.: RDB-10-0181**

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THOMAS ANDREWS DRAKE

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DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION FOR AN *IN CAMERA* HEARING AND MOTION FOR ORDER PURSUANT TO SECTIONS 6 AND 8 OF THE CLASSIFIED INFORMATION PROCEDURES ACT

The government's motion requesting an *in camera* hearing pursuant to the Classified Information Procedures Act (CIPA) may appear perfunctory on its face, but it is not. The government makes a number of misstatements that must be corrected or clarified. And it makes an extraordinary request to employ the so-called "silent witness" rule. That request must be rejected.[1]

I. This Court Should Not Allow the Government to Employ the Silent Witness Rule.

A. Introduction.

In its motion, the prosecution asserts that "[t]o facilitate the introduction into evidence of the classified information contained in the government's proposed exhibits, the United States will move the court to allow their admission pursuant to the 'silent witness rule.'" Gov't Mot. at 9-10. The "proposed exhibits" that the government seeks to introduce through the silent witness rule include evidence at the heart of this case: the five allegedly classified documents that were found in Mr. Drake's home and that form the basis for the five willful retention counts in the Indictment; the underlying source documents for the documents charged in the Indictment; the notes of the

[1] This response does not address every point in the government's motion, but merely addresses the central areas of dispute the motion raises. The defense anticipates filing additional briefing on many of the issues raised in the motion.

government's classification expert that reflect the classification review of the documents; and written statements by the government's classification expert that purport to explain why certain documents are classified. The allegedly classified nature of the government's proposed exhibits will be vigorously challenged on cross-examination and by defense witnesses. It will impossible to effectively contest and dissect the government's evidence before a jury if the Court permits use of the silent witness rule. It should not.

The silent witness rule is an extraordinary evidentiary procedure that has rarely been utilized in cases involving classified information. Under that rule

> the witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel and the jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury.

United States v. Zettl, 835 F.2d 1059, 1063 (4th Cir. 1987). Thus, pursuant to the silent witness rule, certain evidence identified by the prosecution is revealed to the judge, the jury, counsel, and witnesses, but is completely withheld from the public. A witness who refers to this evidence in answering a question posed by counsel does not specifically identify or describe it, but instead refers to it by citing the page and/or line numbers of a document, or, more commonly, by the use of some form of a code system. While the jury, counsel, and the judge have access to some key document that sets forth the meaning of the various code designations, the public does not.

In the 30 years since the Classified Information Procedures Act § 1 *et. seq.*, 18 U.S.C. App. 3 (CIPA) was enacted, the silent witness rule has been used in only a tiny fraction of cases. Use of

the rule has never been approved by the Fourth Circuit;[2] indeed, "[t]here is a paucity of reported cases on the propriety of using the silent witness rule under CIPA, as the rule has been infrequently proposed and even less frequently employed." *United States v. Rosen*, 487 F. Supp. 2d 703, 713 (E.D. Va. 2007). At least two courts have rejected use of the rule in a CIPA case, *see United States v. North*, 1988 WL 148481 (D.D.C. Dec. 12, 1988); *Rosen*, 487 F. Supp. 2d at 715-21, and the Fourth Circuit has rejected a government proposal that was quite similar to the rule. *See United States v. Fernandez*, 913 F.2d 148, 162 (4th Cir. 1990) (rejecting a "key card proposal" similar to the silent witness rule; emphasizing that such a proposal was an "artificial means of presenting evidence" which "might confuse or distract the jury"). This Court should also refuse to allow the government to use the silent witness rule in this case. *See North*, 1988 WL 148481 at *3 ("[T]his technique for denying public access to the full proof in the interests of protecting national security cannot serve the requirements of this particular case which will involve thousands of pages of redacted material and numerous substitutions. Cross-examination would still be stultified and confusion would undoubtedly increase.").

In this case, the government cannot use, and certainly has not justified the need to use, the silent witness rule, for several reasons. First, use of the rule is precluded by CIPA itself as well as by Rule 26 of the Federal Rules of Procedure. In CIPA, Congress established an intricate and

[2] In *Zettl*, the Fourth Circuit did not rule on the legality of the silent witness rule in CIPA cases. Rather, the court merely noted the district judge's approval of a limited use of the rule which was not objected to by defense counsel, and affirmed on other grounds. *See* 835 F.2d at 1063; *see also United States v. Rosen*, 487 F. Supp. 2d 703, 713 n.14 (E.D. Va. 2007) (explaining that in *Zettl* the Fourth Circuit merely noted that the district judge had approved use of the silent witness rule as to some documents, "but [did] not analyz[e] the issue on appeal); *id.* at 713 ("*Zettl*, closely read, is not an endorsement of the silent witness rule by the Fourth Circuit[.]").

comprehensive set of procedures to be utilized by courts, prosecutors, and defense counsel in cases involving classified information. The government cannot add to these procedures by invoking a rule that is based in neither statutory nor constitutional law.

In addition, even assuming that the silent witness rule can be used in some cases involving classified information, an assumption with which the defense does not agree, the government has not even attempted to justify its use in this case. Use of the silent witness rule here carries with it the very real danger of violating Thomas Drake's right to a fair proceeding under CIPA itself, as well as his right to a fair trial under the Fifth and Sixth Amendments. The rule does so by causing awkwardness in the manner in which the defense will present its case; by almost certainly resulting in jury confusion; by preventing witnesses and counsel from exploring fully facts protected by the silent witness rule; and by prejudicing the defense by employing a procedure that suggests to the jury that the information being discussed is in fact classified, that it does relate to the national defense, and that Thomas Drake acted with the specific intent required under 18 U.S.C. § 793(e), which are all factual determinations that the jury itself must decide.

Finally, the rule violates Mr. Drake's right to a public trial under the Sixth Amendment. Use of the silent witness rule results in a partial but highly significant closure of the proceedings, because it hides essential information from the public. *See Rosen*, 487 F. Supp. 2d at 710-21 (E.D. Va. 2007) (use of the silent witness in case involving classified information did not satisfy fairness requirements of CIPA and violated defendant's right to a public trial); *United States v. Rosen*, 520 F. Supp. 2d 786, 798 (E.D. Va. 2007) ("[I]t is appropriate to reject any use of the [silent witness rule] that is unfair to defendants.").

For all these reasons, at the very least the government must meet a very high standard to

justify use of the silent witness rule here. It cannot just blithely state that it intends to use the rule without explaining in detail why such use does not violate Mr. Drake's statutory and constitutional rights.

B. Use of the Silent Witness Rule is Barred by the Classified Information Procedures Act and Rule 26 of the Federal Rules of Criminal Procedure.

The silent witness rule cannot apply to cases that involve classified material under CIPA. Through its exhaustive procedures, CIPA provides the exclusive means for dealing with classified information in criminal trials. This is reflected not only by the plain meaning of CIPA's text (and its title – the "Classified Information Procedures Act"), but also by the statute's structure. *See Alexander v. Sandoval*, 532 U.S. 275, 288 n.7 (2001) ("[O]ur methodology is . . . well established in earlier decisions, which explain that the interpretive inquiry begins with the text and structure of the statute, and ends once it has become clear that Congress did not" authorize the requested procedure) (citations omitted).

In enacting CIPA, Congress put in place a procedural structure that cannot be amended by the prosecution. Under CIPA, § 5(a), defense counsel in a criminal case must provide notice to the government of any classified information they reasonably expect to disclose or to cause the disclosure of "in any manner" at trial or any pretrial proceeding. This notice requirement applies even to classified information that may be revealed by a defendant's own testimony, as well as classified information that defense counsel expect to elicit from prosecution witnesses on cross-examination, or defense witnesses during direct examination, and classified information that may be revealed by counsel's very questions to those witnesses.

Under CIPA § 6(a), the government may request that the court conduct a hearing to make all

determinations concerning the use, relevance, or admissibility of such information. If the court subsequently authorizes the disclosure of specific classified information under the procedures established by CIPA, the government may, under § 6(c)(1), move that, in lieu of the disclosure of such classified information, the court order "(A) the substitution for such classified information of a statement admitting relevant facts that the specified classified information would tend to prove; or (B) the substitution for such classified information of a summary of the specific classified information." The court shall grant the government's motion only if it finds "that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." *Id.*; *see also Fernandez*, 913 F. 2d at 151 (describing CIPA procedures).

Thus, the plain meaning of CIPA's text makes clear that the statute was designed to be the sole procedure governing the use of classified information in a criminal case, and fully addresses the exact problem that use of the silent witness rule is supposedly designed to alleviate – the disclosure of classified information during the questioning and cross-examination of witnesses in a criminal trial.[3] *See United States v. Libby*, 467 F. Supp. 2d 20, 24 (D.D.C. 2006) ("The CIPA establishes the procedures for providing pretrial notification of a defendant's intent to use classified information at his trial and the process for determining exactly what information the defendant will be permitted to introduce as evidence. It was enacted to permit the government to ascertain the potential damage

[3] This reading of the plain meaning of CIPA is further affirmed by a well-understood and fundamental canon of statutory construction: *expressio unius est exclusio alterius*, reflecting the notion that a statute's "expression of one thing is the exclusion of another." *Providence Square Associates, L.L.C. v. G.D.F., Inc.*, 211 F.3d 846, 852 (4th Cir. 2000). Under this interpretive canon, the fact that CIPA establishes a specific and limited set of procedures for the handling of classified information in criminal cases necessarily precludes the use of any other type of procedure, including the silent witness rule.

to national security of proceeding with a given prosecution before trial.") (citation and quotation omitted). If the government is concerned that the examination of witnesses will expose classified information to the public, CIPA requires that it provide a suitable substitution for such classified information, either by a statement admitting relevant facts that the specified classified information would tend to prove, or by a summary of such information. It does not authorize use of the silent witness rule.

For these reasons, it is CIPA this Court should look to resolve issues relating to classified information, not an extraneous mechanism such as the silent witness rule. The court should not judicially amend CIPA by allowing the government to invoke the silent witness rule, when CIPA already provides adequate and just procedures enacted by Congress.

In addition, use of the silent witness rule is barred by Rule 26 of the Federal Rules of Criminal Procedure. Rule 26 states that "[i]n every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-2077." The silent witness rule is not based on any statute or any properly codified rule, and its use is therefore precluded by Rule 26.

C. Even Assuming for Argument's Sake That the Silent Witness Rule is not Barred by CIPA, its Use Violates Mr. Drake's Right to A Fair Trial Under CIPA and the Fifth and Sixth Amendments.

It is a fundamental guarantee of the Sixth Amendment to the United States Constitution that a criminal defendant has the right to present a defense to the charges he is facing. *See Taylor v. Illinois*, 484 U.S. 400, 409 (1988). This fundamental right includes "the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies." *Washington*

v. Texas, 388 U.S. 14, 19 (1967). In addition, a defendant has a right to a fair trial under the Due Process Clause of the Fifth Amendment. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). Finally, fairness is guaranteed by CIPA itself. *See United States v. Moussaoui*, 591 F.3d 263, 281 (4th Cir. 2010) ("CIPA provides procedures for protecting classified information without running afoul of a defendant's right to a fair trial.") (footnote omitted).[4]

Even assuming for argument's sake that CIPA allows for the use of the silent witness under certain circumstances, the rule does not meet CIPA's requirement of fairness in this case. Nor is it consistent with Mr. Drake's constitutional rights to a fair trial.

To prove that use of the silent witness rule does not result in an unfair trial, the government must show that the rule does not impede the defendant from fairly presenting evidence, or intrude on the defense's cross-examination of witnesses and argument to the jury about the facts protected by the rule; that an ordinary juror will be able to follow the evidence and argument despite the use of the silent witness rule; and that prejudice from the rule's use is curable by an instruction or otherwise. *See Rosen*, 520 F. Supp.2d at 799.

The government in this case has not even attempted to satisfy these criteria, nor can it. Use of the silent witness rule in this case would seriously prejudice Mr. Drake and totally eviscerate his

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[4] *See also United States v. Poindexter*, 698 F. Supp. 316, 320 (D. D.C. 1988) ("Fortunately, Congress was alert to the fact that special cases might create special problems. It made clear that in any case involving classified information the defendant should not stand in a worse position because of such information than he would have if there were no such statutory procedures."); *United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (CIPA's "fundamental purpose" is to protect and restrict discovery of classified information in a way that does not impair defendant's right to a fair trial; in this regard, "[i]t is essentially a procedural tool").

right to a fair trial. Application of the rule would result in (a) an awkwardness in presenting the defense's case and the jury confusion that would almost certainly result; (b) the witnesses' and counsel's inability to explore fully (and counsel's inability to adequately argue to the jury) facts protected by the silent witness rule; and (c) prejudice the defense by employing a procedure that suggests to the jury that the information being discussed, and Mr. Drake's specific intent in allegedly retaining that information, are sufficient to justify his conviction under § 793(e), which, of course, are the central questions that the jury itself must decide in this case. *See Rosen*, 487 F. Supp. 2d at 711-15.

The exhibits that the government seeks to introduce through the silent witness rule are the primary pieces of evidence in this case. They include the five allegedly classified documents found in Mr. Drake's home that form the basis for the five willful retention counts in the Indictment (Counts 1-5). They also include the notes of the government's classification expert that reflect her classification review of the documents, as well as her written statements that purport to explain why certain documents are classified. Whether the information in the documents is classified will be a hotly contested issue in this case. Indeed, the jury's decision on that question likely will decide Mr. Drake's fate. Because the contents of the documents are of paramount importance to the defense, counsel intends to vigorously cross-examine the government's expert witness about them, about the expert's classification review of them, and about the basis for conclusion that they are classified. If counsel cannot freely ask specific and pointed questions about the substance of the documents, the defense will not be able to effectively cross-examine government witnesses. Talking in code, nodding, or pointing to paragraphs and line numbers simply cannot replace effective cross-examination. And it would unfairly suggest to the jury that the documents are so secret that counsel

cannot talk about them, when their alleged secrecy is the very issue of fact the jury needs to decide. The myriad reasons why using the silent witness rule would be unworkable in this case are too numerous to count and too difficult to predict. But, what is certain is that employing the silent witness rule in this case would be terribly prejudicial and unfair to Mr. Drake.

Specifically, the silent witness rule would be particularly prejudicial to Mr. Drake, because, along with the other elements of an offense under § 793(e), the government must show that the information and documents he allegedly retained did in fact "relat[e] to the national defense," *i.e.*, the information would potentially damage the national defense if disclosed. The government also must establish that the information was closely held by the United States to prove it related to the national defense. The government must prove both of these facts beyond a reasonable doubt to obtain a valid conviction under § 793(e). *See United States v. Morison,* 844 F.2d 1057, 1071-72 (4th Cir. 1988).[5]

In cases such as this one, where there is a real question as to whether the information at issue related to the national defense under § 793(e), the silent witness rule neither meets CIPA's requirement of fairness, nor is consistent with Mr. Drake's constitutional right to a fair trial. *See Rosen*, 487 F. Supp. 2d at 710-11 ("Where, as here, a central issue in the case is whether the government's alleged [national defense information] is indeed genuinely [such information] . . . it cannot be said that the procedure affords defendants 'substantially the same ability to make [their] defense as would disclosure of the specific classified information.' CIPA § 6(c)."); *see also id.* at 720 (silent witness rule "is not a 'substitution' authorized by CIPA, and even if it were, it would not

[5] In addition, of course, the government must prove that Mr. Drake acted with the specific intent required under § 793(e), and that he had unauthorized possession of the alleged information.

afford defendants substantially the same opportunity to present their defense as the specified classified information").

In this case, Mr. Drake will "wish to show, and indeed to emphasize, the dissimilarities between [information relating to the national defense under § 793(e)] and the information [he allegedly] obtained." *Id.* at 711. "Plainly, [he] would be significantly hobbled in doing so by use of [the silent witness rule], inasmuch as the specific information could not be used in open court." *Id*. "The silent comparison of paragraphs or sentences, even where supplemented by codes, would effectively preclude defense counsel from driving home important points to the jury." *Id*. For these reasons, the silent witness rule "essentially robs [Mr. Drake] of the chance to make vivid and drive home to the jury [his] view that the alleged [national defense information] is no such thing. . . ." *Id*. Such impaired cross-examination could very well also rise to the level of a violation of the Confrontation Clause. *See id*. at n.13.

Accordingly, application of the silent witness rule to allegedly classified information in this case would make it virtually impossible for Mr. Drake to conduct effective cross-examination as to the question of whether the allegedly national defense information would be damaging to national security if disclosed. *See id*. at 712 (it is "simply not plausible" to argue that defense counsel could effectively cross-examine witnesses about whether information is potentially damaging to national security via use of a virtually incomprehensible system of code; defense counsel's closing jury arguments would also be similarly limited and adversely affected) (footnotes omitted). *See also Rosen*, 520 F. Supp. 2d at 798 ("[I]t is appropriate to reject any use of the [silent witness rule] that is unfair to defendants. This is so for several reasons. . . ."); *North*, 1988 WL 148481, at *3 (rejecting use of silent witness rule because under the rule cross-examination would "be stultified and

confusion would undoubtedly increase").

Finally, as the Court is aware, the heart of the defense's case is that Mr. Drake did not act with the specific intent necessary under § 793(e). Yet, use of the silent witness rule "would unfairly hinder [defense counsel] in their effort to explain why [their client] believed any information [he] sought to [retain] . . . was not [national defense information]. In this regard, [the defense] must be able to explain precisely what [Mr. Drake] knew and when, and from whom or what [he] learned it, and why [he] did not believe the material was [national defense information] [he was] not authorized to have, or otherwise lacked the requisite *mens rea*." *Rosen*, 487 F. Supp. 2d at 712.

For all these reasons, use of the silent witness rule would violate Mr. Drake's constitutional and statutory right to a fair trial.

D. Use of the Silent Witness Rule in This Case Would Violate Mr. Drake's Constitutional Right To A Public Trial.

Once again assuming for argument's sake that the silent witness rule may be utilized in at least some criminal cases involving classified information, the government must meet a very high standard before it can invoke the rule, because the rule seriously endangers Mr. Drake's right to a "public trial" under the Sixth Amendment. The silent witness rule prevents the public from seeing and hearing the complete body of evidence in the case, and thus effectively results in at least a partial but constitutionally significant closure of the trial. *See Rosen*, 487 F. Supp.2d at 715 n.20 (noting that "the government sensibly appears to have abandoned its original position that the proposed use of the silent witness rule . . . does not close the trial" because such an argument would lead to an "absurd result"). Accordingly, to justify use of the rule, the government must meet the standards set forth in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984), which

establishes the criteria that must be met before a trial may be closed to the public. *See also Waller v. Georgia*, 467 U.S. 39, 48 (1984) (applying *Press-Enterprise* in cases where the right to a public trial is asserted by a defendant).

Under *Press-Enterprise* and *Waller*, a party seeking to close a trial must advance an overriding interest that is likely to be otherwise prejudiced, and demonstrate that closure is no broader than necessary to protect that interest. In addition, the trial court must consider reasonable alternatives to closing the proceeding, and must make findings adequate to support closure. *See Waller*, 467 U.S. at 48; *see also Bell v. Jarvis*, 236 F.3d 149, 166 (4th Cir. 2000) (same). In cases involving classified information, the prosecution must show, at the very least, why substitutions under CIPA are not sufficient to meet the government's needs. *See Rosen*, 487 F. Supp.2d at 716 (applying *Press-Enterprise* test to determine whether use of silent witness rule in CIPA case violated defendant's right to public trial). In this regard, the government's justification in denying the public access to evidence at trial "must be a weighty one." *Press-Enterprise*, 464 U.S. at 509-10. There is a strong presumption in favor of allowing the public to view and consider all the evidence presented by both parties in a criminal case, because "[o]penness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise*, 464 U.S. at 508.

E. Conclusion.

The silent witness rule "is a highly artificial means of presenting evidence that could, in many circumstances, inhibit the ability of witnesses and counsel to communicate with the jury, to the detriment of defendants' ability to present their defense fairly." *Rosen*, 520 F. Supp. 2d at 798 (quotation omitted). The Fourth Circuit has recognized as much. *See Fernandez*, 913 F.2d at 162

("key card proposal" that was very similar to silent witness rule "is an artificial means of presenting evidence" that "might confuse or distract the jury"). For all the reasons discussed above, this Court should either rule that the silent witness may not be utilized by the government in this case, or demand that the government meet the lofty standards required to ensure that use of the rule does not violate Mr. Drake's constitutional and statutory rights.

II. Under CIPA, Procedural Rules Must Be Applied in a Manner That Does Not Place the Defendant in a Worse Position Than He Would Be In If the Case Did Not Involve Classified Information.

In its motion, the government gives an overview of the pretrial procedures established by CIPA. Most, but not all, of the overview is accurate. As the Court knows, CIPA establishes procedures for determining the use, relevance, and admissibility of classified information that the defense reasonably expects to disclose at trial or in connection with pretrial proceedings. *See Fernandez*, 913 F.2d at 151 (describing procedures). The statute is intended to permit this determination without placing the defendant in a worse position than he otherwise would be in if the case did not involve classified information. *See United States v. Moussaoui*, 382 F.3d 453, 477 (4th Cir.2004). *See also United States v. Libby*, 467 F. Supp. 2d at 24("[In enacting CIPA,] Congress made clear that [the Act] 'rests on the presumption that the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without this [A]ct.'") (quoting S. Rep. No. 96-823, at 9 (1980), reprinted in 1980 U.S.C.C.A.N. 4294, 4302). "Although CIPA contemplates that the use of classified information be streamlined, courts must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim of innocence." *Fernandez*, 913 F.2d at 154.

III. The Defense Should Not Be Required to Meet a Heightened Standard for Admissibility of Evidence Because this Case Involves Classified Information.

A. The "Classified Information Privilege" Should Not Be Applied to Determine Admissibility.

In its motion, the government indicates that its "classified information privilege" should be considered when the Court makes determinations on use, admissibility, and relevance of evidence under § 6(a). *See* Gov't Mot. at 4-5. The defense disagrees that the "classified information privilege" may be invoked when determining the admissibility of classified evidence, but recognizes that the Fourth Circuit has held otherwise. *See United States v. Smith*, 780 F.2d 1102, 1107-08 (4th 1985) (creating a privilege for classified information similar to the informant's privilege in *Rovario v. United States*, 353 U.S. 53 (1957)).[3] The *Smith* holding has been rejected by other courts as contrary CIPA. *See*, *e.g.*, *United States v. Libby*, 453 F. Supp. 2d 35, 42 (D.D.C. 2006) (refusing to follow *Smith* and finding that its admissibility standard for classified evidence was explicitly rejected by Congress when considering the enactment of CIPA).

B. The "Classified Information Privilege" Must Yield to the Defendant's Right to a Fair Trial.

Even though the Fourth Circuit has held that the "classified information privilege" may be invoked, the privilege "is 'a qualified one' in the sense that it must give way when the information

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[3] The Fourth Circuit is the only court of appeals that recognizes the "classified information privilege" to determine admissibility of classified evidence at trial. The Supreme Court has not ruled on this issue. Indeed, the Supreme Court has never recognized a "classified information privilege." Such hesitation makes sense. The Supreme Court has counseled against ready recognition of new common law evidentiary privilege. *See, e.g., University of Pennsylvania v. EEOC*, 493 U.S. 182, 189-90 (1990); *Trammel v. United States*, 445 U.S. 40, 50-51 (1980). Other courts have observed that common law evidentiary privileges "'are not lightly created nor expansively construed, for they are in derogation of the search for the truth.'" *United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

'is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.'" *United States v. Abu Ali*, 528 F.3d 210, 247 (4th Cir. 2008) (citing *Smith*, 780 F.2d at 1107). As the Fourth Circuit has explained:

> [t]he trial court is required to balance the public interest in nondisclosure against the defendant's right to prepare a defense. A decision on disclosure of such information must depend on the 'particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the [evidence,] and other relevant factors.'

Id. (citations omitted). If the Court determines that the information is "helpful to the defense of an accused, or is essential to a fair determination of a cause," it must be admitted. *Id.* (citations and quotations omitted). The Fourth Circuit has made clear that the government's interest in protecting national security "cannot override the defendant's right to a fair trial." *Id.* (citing *Fernandez*, 913 F.2d at 154); *see also Moussaoui*, 382 F.3d at 466 n. 18 ("There is no question that the Government cannot invoke national security concerns as a means of depriving [the defendant] of a fair trial.").[4]

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[4] The defense disagrees that the government may invoke any privilege that seeks to heighten the admissibility standard under CIPA, but to the extent it may, the privilege should be based on the state secrets privilege, not the classified information privilege, because the states secrets privilege is subject to judicial scrutiny – a necessary check on the Executive's power. To invoke the state secrets privilege, the government must show that "there is 'a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged.'" *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2009) (quoting *Reynolds v. United States*, 345 U.S. 1, 8 (1953)). *See also El-Masri v. United States,* 479 F.3d 296 (4th Cir. 2007). In *Aref*, the Second Circuit held that CIPA presupposes a governmental privilege against disclosing classified information. 533 F.3d at 78. The court went on to hold that the state secrets privilege, with its well-established procedural requirements, was applicable to CIPA cases. The state secrets privilege – as opposed to the classified information privilege – preserves the role of the judiciary in evaluating evidentiary privileges and properly balances the interests of the government and the defendant. *See Aref*, 533 F.3d at 78-79.

IV. CIPA's Substitution Provision Ensures that the Defendant has Substantially the Same Ability to Make His Defense As He Would if the Confidential Information Were Disclosed.

The government makes two incorrect and misleading statements regarding substitutions under § 6(c) that must be corrected. It claims that substitutions should be approved by the Court if they "protect the defendant's right to a fair trial," *see* Gov't Motion at 8, or if "the defendant's ability to make his case is not prejudiced." *See id.* at 11. Neither of those is the correct standard for substitutions.

CIPA permits the use of a substitution for classified information only if the Court finds that the "statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." 18 U.S.C. App. 3 § 6(c)(1) (emphasis added); *see, e.g., Moussaoui*, 382 F.3d at 477 (substitutions must "place the defendant, as nearly as possible, in the position he would be in if the classified information . . . were available to him"); *Fernandez*, 913 F.2d at 154 (same). Congress adopted the "substantially the same ability to make his defense" standard "to make it clear that alternate disclosure was to be allowed only if the court found that it was, in effect, equivalent disclosure." H. Rep. No. 96-831, pt. 1, at 20 (1980); *see* H. Rep. No. 96-831, pt. 2, at 6 (1980) (by ratifying the substitution provision of CIPA, the House Judiciary Committee "does not mean to suggest that any hardship to the defense should be permitted. . . . It is the Committee's intent that there be no impairment of either the defendant's ability to present his case or his right to a fair trial as a result of the operation of this section."); *see also* S. Rep. No. 96-823, at 9 (substitution provision "rests on the presumption that the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would

without this Act"), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4294, 4302.[5]

V. The Proposed Limitations on Cross-Examination of Witnesses Should Be Rejected.

The government states that it will "move the court to order counsel for both the government and the defendant not to ask questions which reveal classified information, unless it has been previously addressed by the 'silent witness rule' or substitutions." Gov't Mot. at 11. It is unclear exactly what the government is proposing, and the defense will wait to hear the basis for the government's anticipated motion before responding. But, any limitations on the defendant's ability to effectively cross-examine the government's witnesses will be challenged. Depending on the nature of the limitations the government might seek, the defense may request permission to file additional briefing on this issue.

CONCLUSION

For these reasons and any others that may develop at a hearing on this motion, Thomas Drake requests that the Court issue an order denying the Government's Motion for An *In Camera* Hearing

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[5] The government's statement that substitutions should be granted as long as they protect the defendant's "right to a fair trial" was squarely rejected by Congress when it drafted CIPA. In fact, the use of substitutions for classified information proved controversial during the drafting of CIPA. The initial bills in the House and Senate authorized the use of substitutions "if [the court] finds that the defendant's right to a fair trial will not be prejudiced." *See* Graymail Legislation: Hearings Before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence of the House of Representatives, 96th Cong., 1st Sess., at 200 (Aug. 7, 1979). *See also id.* at 171 & 188 (citing two other bills with similar "fair trial" language). This language was contested in the House and Senate by individuals concerned that the substitutions violated the defendant's constitutional right to present his defense and to cross-examine adverse witnesses. In light of these constitutional concerns, the "fair trial" standard was replaced with the "substantially the same ability to make his defense" standard that ultimately became law. *See* Graymail, S. 1482: Hearing Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, United States Senate, 96th Cong., 2d Sess., Serial No. 96-57, at 53 (Feb. 7, 1980). The more stringent standard was adopted "to make it clear that alternate disclosure was to be allowed only if the court found that it was, in effect, equivalent disclosure." H. Rep. No. 96-831, pt. 1, at 20 (1980).

and Motion for Order Pursuant to Sections 6 and 8 of the Classified Information Procedures Act to the extent the motion seeks to use the silent witness rule and is otherwise inconsistent with CIPA.

Respectfully submitted,

/S/

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