IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA	*	
	*	
v.	*	**Case No. RDB 10 CR 1081**
	*	
THOMAS ANDREWS DRAKE,	*	
	*	
Defendant.	*	
	******	

GOVERNMENT'S MOTION FOR PRETRIAL CONFERENCE
UNDER SECTION 2 OF THE CLASSIFIED INFORMATION PROCEDURES ACT

The United States of America respectfully moves this Court, pursuant to Section 2 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, §§ 1–16, to hold a pretrial conference to consider matters relating to classified information that will arise in connection with the above-captioned prosecution.[1] In support, the United States submits the following to inform the Court of the applicability of CIPA and its procedures to issues involving classified information that will arise before and during the trial of this case. Finally, this motion shall serve notice that the United States intends to use classified information, albeit in redacted form publicly, in the prosecution of this case.

I. Introduction to CIPA

Two of the most important duties of the Executive Branch are prosecuting violations of federal criminal laws and protecting the nation's security secrets. The Supreme Court duly noted

[1]Pending the security clearances for counsel for Drake, a pretrial conference need not be immediately scheduled. Rather, the Court may wish to discuss the scheduling of this conference at the upcoming pretrial conference currently scheduled for June 10, 2010.

that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). "'The Government has a substantial interest in protecting sensitive sources and methods of gathering information,'" *United States v. Abu Ali*, 528 F.3d 210, 247 (4th Cir. 2008) (quoting *United States v. Smith*, 780 F.2d 1102, 11085 (4th Cir. 1985)), and "'in protecting both the secrecy of information to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.'" *Abu Ali*, 528 F.3d at 247 (quoting *C.I.A. v. Sims*, 471 U.S. 159, 175 (1985)).

Congress enacted CIPA "`to combat the growing problem of graymail, a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the charge against him.'" *United States v. Moussaoui*, 591 F.3d 263, 281 (4th Cir. 2009) (quoting *Smith*, 780 F.2d at 1105). Prior to the enactment of CIPA, the government could not evaluate such disclosure claims before trial started and had to abandon prosecution rather than risk the possible disclosure of classified information. *Abu Ali,* 528 F.3d at 246 (citing *Smith*, 780 F.2d at 1105). Thus, CIPA attempts to reconcile a defendant's right to obtain and introduce exculpatory material with the government's duty to protect from disclosure classified information that could compromise national security. *See United States v. Rezaq,* 134 F.3d 1121, 1142 (D.C. Cir. 1998).

CIPA establishes pretrial, trial, and appellate procedures for federal criminal cases in which the public disclosure of classified information potentially exists. Utilizing these procedures, typically through *ex parte* and/or *in camera* hearings, the court can address and resolve issues concerning the discoverability of classified information by the defendant, and the

government can learn prior to trial whether or not classified information will have to be disclosed in open criminal proceedings. This allows the government to make an informed decision concerning the costs of going forward with the prosecution.

A key to the CIPA process is the requirement that the defendant provide pre-trial, written notice of the classified information that he reasonably expects to disclose, a stage in the proceedings commonly known as the "Section 5 notice." The government then may file a motion seeking a pre-trial hearing and ruling to determine if the classified information that the defendant expects to disclose is relevant and admissible, a stage of the CIPA proceedings known as the "Section 6(a) hearing." If the court rules any of the classified information to be admissible, Section 6(c) of CIPA allows the government to move for substitution of a summary or, alternatively, of a statement admitting facts that the classified information would tend to prove, thereby obviating the need for disclosure of the specific classified information. Finally, if the Court finds the substitution inadequate to preserve the defendant's right to a fair trial, and the government continues to object to the use of the classified information, the Court must order the defendant not to disclose the classified information, but also must fashion an appropriate sanction, including possible dismissal of the indictment.

CIPA provides for *ex parte* and *in camera* procedures in order to protect classified information subject to discovery under Fed. R. Crim. P. 16, *Brady v. Maryland,* 373 U.S. 83 (1963), and Rule 26.2 (formerly the *Jencks* Act, 18 U.S.C. § 3500 (1976)). At the government's request, all or part of these proceedings may be held *in camera*. *See United States v. Pappas*, 94 F.3d 795 (2nd Cir. 1996).

In sum, "CIPA vests district courts with wide latitude to deal with thorny problems of

national security in the context of criminal proceedings." *Abu Ali,* 528 F.3d at 247 (4th Cir. 2008). Each one of the pertinent sections of CIPA are addressed in more detail below.

II. Definitions, Pretrial Conference, Protective Orders, and Discovery under CIPA

A. Definition of Terms

Subsection 1(a) of CIPA defines classified information as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security." Subsection (b) defines "national security" to mean the "national defense and foreign relations of the United States." The decision whether information is classified is confided to the Executive Branch. Courts "'have no authority[ ] to consider judgments made by the Attorney General concerning the extent to which the information . . . implicates national security.'" *Abu Ali,* 528 F.3d at 253 (quoting *United States v. Fernandez,* 913 F.2d 148, 154 (4th Cir. 1990)).

B. Pretrial Conference

Section 2 provides that "[a]t any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution." Following such a motion, the district court "shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 [to determine the use, relevance, or admissibility of classified information] of this Act." The hearing envisioned by Section 2 is precisely what this motion seeks.

Section 2 also provides that "the court may consider any matters which relate to classified information or which may promote a fair and expeditious trial." Consequently, the court may take up matters concerning security procedures, clearances, and the like. The legislative history of CIPA emphasizes that while this provision gives the district court the same latitude as under Rule 17.1, no substantive issues concerning the discovery or use of classified information are to be decided in a pretrial conference under Section 2. *See* S. Rep. No. 823, 96th Cong., at 5-6, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4298-4299. Instead, CIPA requires such issues to be decided under Sections 4 and 6.

C. Protective Orders

Section 3 requires the court, upon the request of the government, to issue an order "to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case . . . ." The protective order applies to all materials furnished to the defense under the government's discovery obligations, and may be used to prevent the defendant from disclosing classified information already in his possession. The government hopes to file a proposed protective order under Section 3 that is agreeable to all of the parties, but if not, will move separately for such a protective order under Section 3.

III. Discovery of Classified Information to the Defendant

Section 4 of CIPA provides that

> [t]he court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United

> States to make a request for such authorization in the form of a written statement to be inspected by the court alone.

Section 4 does not create any new rights of or limits on discovery, but rather "provides a procedural framework by which a court balances the defendant's interest in a fair trial and the Government's interest in protecting national security information." *United States v. Passaro*, 577 F.3d 207, 219 (4th Cir. 2009). *See also Moussaoui*, 591 F.3d at 281-82. Section 4 "allows the district court to authorize the government to redact information from classified documents *before* providing such documents to the defendant during pre-trial discovery." *Id*. at 282 (quoting *United States v. Moussaoui,* 333 F.3d 509, 514 n. 6 (4th Cir. 2003) (emphasis added).

Thus, upon the request of the government, a court may permit alternatives to discovery of classified information to the defendant. Section 4 further provides that the government may demonstrate that the use of such alternatives is warranted in an *in camera* and *ex parte* submission to the court. *See United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988).

IV. Sections 5 and 6: Pretrial Evidentiary Rulings

Sections 5 and 6 of CIPA "'establish[ ] a pretrial procedure for ruling upon the admissibility of classified information.'" *Moussaoui*, 591 F.3d at 282 (quoting *Smith*, 780 F.2d at 1105). There are three critical pretrial steps in the handling of classified information under Sections 5 and 6 of CIPA. First, the defendant must specify in detail to "the government and the court of classified information he expects to use, and the defendant is prohibited from "disclos[ing] any information known or believed to be classified . . . until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of [CIPA]." *Moussaoui*, 591 F.3d at 282.

Second, upon the defendant's notice of intent to introduce classified information and a motion of the government, the court shall hold a hearing pursuant to Section 6(a) "at which the court shall determine the 'use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding.'" *Id*. (quoting *Smith*, 780 F.2d at 1105). Third, following the Section 6(a) hearing and formal findings of admissibility by the Court, the government may move that, rather than disclosure of specific classified information, "the court approve the use of a substitution in the form of 'a statement admitting relevant facts that the specific classified information would tend to prove' or 'a summary of the specific classified information.'" *Moussaoui*, 591 F.3d at 282 (quoting *Smith*, 780 F.2d at 1105). Pursuant to Section 6(c)(1), "[t]he court *shall* grant such a motion of the United States 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 specific classified information." *Moussaoui*, 591 F.3d at 282.

A. The Section 5(a) Notice Requirement

Section 5(a) of CIPA requires a defendant who reasonably expects to disclose or to cause the disclosure of classified information at any trial or pretrial proceeding to provide timely pretrial written notice to the attorney for the government and the Court. *United States v. Hammoud*, 381 F.3d 316, 338 (4th Cir. 2004). Section 5 specifically provides that notification shall take place "within the time specified by the court or, where no time is specified, within thirty days prior to trial."

The Section 5(a) notice must be specific because it is the central document in the procedures envisioned under CIPA. Section 5(a)'s requirement that "such notice shall include a brief description of the classified information" does not mean "a vague description." *United*

States v. Collins, 720 F.2d 1195, 1199-1200 (11th Cir. 1983). Nor does it matter that "the government can locate specific data about defendant's knowledge of sensitive information in its own records." *Id*. Instead, the "Section 5(a) notice requires that the defendant state, with particularity, which items of classified information entrusted to him he reasonably expects will be revealed by his defense in this particular case." *Id*. "The court, the government and the defendant should be able to repair to the Section 5(a) notice and determine, reliably, whether the evidence consisting of classified information was contained in it." *Id*. For a court to "countenance a Section 5(a) notice which allows a defendant to cloak his intentions and leave the government subject to surprise" would simply "require the defendant to reduce 'greymail' to writing." *Id*.

The particularization requirement applies both to documentary exhibits and to oral testimony, whether it is anticipated to be brought out on direct or cross-examination. *See id.; United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984). The Section 5(a) notice, however, does not require a defendant to provide argument in support of the relevance of particular noticed documents in the notice itself.

Section 5(b) permits the court to preclude the disclosure of classified information by the defendant if he fails to provide a sufficiently detailed notice far enough in advance of trial to permit implementation of CIPA procedures. *See United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987). Similarly, if a defendant attempts to disclose classified information at trial that had been described in his Section 5(a) notice, a court may preclude disclosure of the classified information under Section 5(b). *See United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985).

B. The Section 6(a) Hearing

Once the defendant files a notice of intent to disclose classified information under Section 5, the government may then petition the court for a hearing under Section 6(a). The purpose of the hearing under Section 6(a) of CIPA is "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceedings." 18 U.S.C. App. 3, § 6(a). "CIPA does not [] alter the substantive rules of evidence, including the test for relevance: thus, it also permits the district court to exclude irrelevant, cumulative, or corroborative classified evidence." *Passaro*, 577 F.3d at 220.

"When evaluating the governmental privilege in classified information which CIPA serves to protect, [] district courts must ultimately balance 'this public interest in protecting the information against the individual's right to prepare his defense." *Abu Ali,* 528 F.3d at 247. "A decision on disclosure of such information must depend upon '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*. (quoting *Smith*, 780 F.2d at 1107). However, the classified information privilege "must . . . give way when the information . . . 'is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.'" *United States v. Rosen*, 557 F.3d 192, 195 n.4 (4th Cir. 2009) (quoting *Smith*, 780 F.2d at 1107)). *See Fernandez,* 913 F.2d at 154 (4th Cir. 1990)(stating that "*Smith* requires the admission of classified information" once the defendant has satisfied this standard).

At the Section 6(a) hearing, the defendant has the burden of establishing that the evidence is relevant and material. *See United States v. Miller*, 874 F.2d 1255, 1276-77 (9th Cir. 1989). The defendant "must come forward with something more than speculation as to the usefulness of

such disclosure.'" *Abu Ali,* 528 F.3d at 248 (quoting *Smith*, 780 F.2d at 1107). Upon hearing the defense's proffer and the arguments of counsel, the court must determine whether or not the classified information identified by the defense is relevant under the standards of Fed. R. Evid. 401.

The Court's inquiry, however, does not end there as the Court still must determine whether or not the classified information is excludable under Rule 403. *Smith*, 780 F.2d at 1106) (stating that "the ordinary rules of evidence determine admissibility under CIPA."). *See also United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984). Similarly, evidence whose probative value may be substantially outweighed by the "distraction and confusion" of a fair determination of the issues for the jury or the creation of "side issues or mini trials resulting in undue prejudice, undue delay, and waste of time." *United States v. Mohamed*, 410 F. Supp.2d 913, 917-18 (S.D. Ca. 2005).

In sum, the Court "may order disclosure only when the information is at least essential to the defense, necessary to [the] defense, and neither merely cumulative nor corroborative, nor speculative." *Abu Ali,* 528 F.3d at 248 (quoting *Smith*, 780 F.2d at 1110). Moreover, a Section 6(a) "hearing must be conducted *in camera* if the government certifies `that a public proceeding may result in the disclosure of classified information.'" 18 U.S.C.A. App. 3 § 6(a). *Moussaoui*, 591 F.3d at 282 n.16. At the conclusion of the Section 6(a) hearing, CIPA requires the court to state in writing the reasons for its determinations as to each item of classified information.

C. Substitutions Pursuant to Section 6(c)

In the event that the Court rules that one or more items of classified information may be admitted, the government has the option of offering substitutions pursuant to Section 6(c) of

CIPA. These include either (1) a statement admitting relevant facts that the classified information would tend to prove or (2) a summary of the classified information instead of the classified information itself. *See Rezaq*, 134 F.3d at 1142-43.

"The government must also 'provide the defendant with notice of the classified information that is at issue.'" *Moussaoui*, 591 F.3d at 282 n.16 (quoting 18 U.S.C. App. 3, § 6(b)(1)). "If the classified information has been produced to the defendant, it must be specifically identified. If it has not been made available to the defendant, it 'may be described by generic category, in such form as the court may approve.'" *Moussaoui*, 591 F.3d at 282 n.16 (quoting 18 U.S.C.A. App. 3, § 6(b)(1)). A motion for substitution shall be granted if the "statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." 18 U.S.C. App. 3, § 6(c)(1).

A Section 6(c) hearing must be conducted *in camera* at the government's request, and the government may require that the court examine *in camera* and *ex parte* 'an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information.'" *Moussaoui*, 591 F.3d at 282 n.17. (quoting 18 U.S.C.A. App. 3, § 6(c)(2)). The Court may approve the substitutions provided by the government if, after conducting a detailed *in camera* comparison of the originals with the proposed substitutions, the court determines that the substitutions protect the defendant's right to a fair trial. *Abu Ali,* 528 F.3d at 253-54. *See also Rezaq,* 134 F.3d at 1142-1143.

D. Sealing of Records of *In Camera* Hearings Under Section 6(d)

If the Court rules that classified information may not be used, Section 6(d) requires the

court to seal and preserve for use in the event of an appeal the records of any *in camera* hearing held under the Act to decide such questions of admissibility. The defendant may seek reconsideration of the Court's determination prior to or during trial.

E. Section 6(e)'s Prohibition on Disclosure of Classified Information by Defendant and Relief for Defendant When the Government Opposes

When the Court determines that specific items of classified information are relevant and admissible and then denies the government's motion for substitution under Section 6(c), Section 6(e)(1) permits the government, by affidavit from the Attorney General, to object to the disclosure of the classified information at issue. In such cases, the Court "shall order that the defendant not disclose or cause the disclosure of such information." 18 U.S.C.A. App. 3, § 6(e)(1).

Section 6(e) lists the sliding scale of sanctions which the court may impose against the government as a means of compensating for the defendant's inability to present proof regarding specific items of classified information.

V. Other Relevant CIPA Procedures

A. Interlocutory Appeal

Section 7(a) of the Act provides for an interlocutory appeal by the government from any decision or order of the trial judge "authorizing the disclosure of classified information . . . . [or] refusing a protective order sought by the United States to prevent the disclosure of classified information." The term "disclosure" within the meaning of Section 7 includes both information that the court orders the government to divulge as well as information already possessed by the defendant that he intends to make public. *See Pappas*, 94 F.3d at 799-800. Section 7(b) instructs

the courts of appeals to give expedited treatment to any interlocutory appeal filed under subsection (a).

B. Introduction of Classified Information

Section 8(a) provides that "[w]ritings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status." This provision simply recognizes that classification is an executive function, and not a judicial one. Thus, Section 8(a) implicitly allows the classifying agency, upon completion of the trial, to decide whether the information has been so compromised during trial that it could no longer be regarded as classified.

In order to prevent unnecessary disclosure of classified information, Section 8(b) permits the court to order admission into evidence of only a part of a writing, recording, or photograph. Alternatively, the court may order into evidence the entire writing, recording, or photograph with redaction of all or part of the classified information contained therein. However, Section 8(b) does not provide grounds for excluding or excising part of a writing or recorded statement which ought in fairness to be considered contemporaneously with it. Thus, the court may admit into evidence part of a writing, recording, or photograph only when fairness does not require the whole document to be considered.

Section 8(c) provides a procedure to address the problem presented during a pretrial or trial proceeding when the defendant's counsel asks a question or embarks on a line of inquiry that would require the witness to disclose classified information not previously found by the court to be admissible. If the defendant knew that a question or line of inquiry would result in disclosure of classified information, he presumably would have given the government notice under Section

5 and the provisions of Section 6(a) would have been implemented. Section 8(c) serves, in effect, as a supplement to the hearing provisions of Section 6(a) to cope with situations which cannot be handled effectively under Section 6, where the defendant does not realize that the answer to a given question will reveal classified information. Upon the government's objection to such a question, the Court must take suitable action to avoid the improper disclosure of classified information.

A district court "may consider steps to protect some or all of the [classified] information from unnecessary public disclosure in the interest of national security and in accordance with CIPA." *Abu Ali*, 528 F.3d at 255. Indeed, CIPA "specifically contemplates such methods as redactions and substitutions as long as these alternatives do not deprive the defendant of a fair trial." *Id*. Thus, some courts, including the Fourth Circuit, have sanctioned the use of the "silent witness rule" or some variation thereof to introduce and disclose classified information to the jury, the court, and the parties, but not the public. *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir.1987). *Accord Abu Ali*, 528 F.3d at 250 & n.18. Under the "silent witness 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 rial, but the defense would be able to present that classified information to the jury.

Zettl, 835 F.2d at 1063. Similarly, other courts have permitted the of pseudonyms, for example, to protect the identity of people or places in the interests of national security. *Moussaoui,* 382

F.3d at 456 n.1, 480 n.37 (noting that the district court could use "alternate names for people or places" in creating substitutions for those defense witnesses' proposed testimony to protect national security interests); *United States v. Marzook,* 435 F. Supp.2d 708 (N.D. Ill. 2006) (allowing use of pseudonyms at a suppression hearing to protect the classified identities of secret agents of the Israel Security Agency); *United States v. George,* Nos. 91-0521 & 92-0215, 1992 WL 200027, at *3 (D.D.C. July 29, 1992) (withholding witnesses' names from the public, but disclosing them to defendant, the court, and government's counsel via a "key card" filed under seal); *United States v. Pelton,* 696 F. Supp. 156, 157-60 (D. Md. 1986)(allowing recorded conversations containing classified information to be played only to the court, counsel, defendant, and the jury, while making only a redacted trial transcript available to the public). Of course, the use of the "silent witness rule" requires that the defendant receive a copy of the underlying classified documents *and* any proposed substitution or summary. *Abu Ali*, 528 F.3d at 255; *Fernandez*, 913 F.2 at 155.

VI. Conclusion

Based upon the foregoing, the United States requests that the Court schedule a pretrial conference under Section 2 of CIPA to consider matters relating to classified information that may arise in connection with the above-captioned case. The United States respectfully suggests that the Court set a date for the Section 2 conference at the upcoming pretrial conference on June 10, 2010.

Respectfully submitted this 4th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused an electronic copy of the *Motion for Pretrial Conference Under Section 2* to be served via ECF upon James Wyda and Deborah Boardman, counsel for defendant Drake.

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