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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No. 10-225 (CKK)
v.	)	
STEPHEN JIN-WOO KIM,	)	Filed with the Classified Information Security Officer CISO CMI PS Date 10/7/2013
Defendant.	)	

DEFENDANT STEPHEN KIM'S RESPONSE TO THE GOVERNMENT'S FIRST MOTION FOR A HEARING UNDER SEAL PURSUANT TO CIPA SECTION 6(a)

Defendant Stephen Kim, by and through undersigned counsel, respectfully submits the following response to the government's first motion for a hearing under seal pursuant to CIPA section 6(a). In its motion, the government contests the use, relevance, and admissibility of each of the items of classified information contained in defendant's first CIPA section five notice. With respect to roughly half of these items, however, the government improperly conflates CIPA section 6(a) with section 6(c), which separately addresses substitutions. The government also invites this Court to apply an erroneous legal standard at the CIPA section 6(a) stage, asserting that its classified information privilege can "outweigh" the defendant's interest in presenting evidence material to his defense. For the reasons set forth below, the Court should reject the government's proposed "balancing" test and proceed with appropriate hearings under CIPA sections 6(a) and 6(c).

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Procedural Framework Established by CIPA

CIPA "establishes the procedures for pretrial determinations of the disclosure and admissibility at trial of classified information in federal criminal proceedings." United States v.

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Libby, 453 F. Supp. 2d 35, 37 (D.D.C. 2006). CIPA "creates no new rule of evidence regarding admissibility," United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989), but "was designed to reconcile, on the one hand, a criminal defendant's right to obtain prior to trial classified information and introduce such material at trial, with, on the other hand, the government's duty to protect from disclosure sensitive information that could compromise national security." Libby, 453 F. Supp. 2d at 37. "As such, the CIPA creates pretrial, trial, and appellate procedures for federal criminal cases where there is a possibility that classified information will be disclosed through a defendant's defense." Id.

CIPA section five requires any defendant who "reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant" to "notify the attorney for the United States and the court in writing" of the anticipated disclosure. 18 U.S.C. App. 3 § 5(a). Such notice must include "a brief description of the classified information" at issue. Id. If the defendant fails to notify the government and the Court of any classified information that he expects to disclose at trial, "the court may preclude disclosure of [the information] and may prohibit the examination by the defendant of any witness with respect to any such information." Id. § 5(b).

Contrary to repeated suggestions in the government's brief, see Mot. at 11, 34, "CIPA section five does not require a defendant to provide detailed argument in support of the relevance of particular noticed documents in the notice itself." United States v. Rewald, 889 F.2d 836, 855 (9th Cir. 1989) (emphasis added). Rather, defendant's CIPA section five notice must simply make "the government ... aware, prior to trial, of the classified information, if any, which will be compromised by the prosecution." United States v. Collins, 720 F.2d 1195, 1197 (11th Cir.

1983). The relevance of classified information noticed by the defendant is properly addressed during the actual section six hearings, which are discussed below. See Rewald, 889 F.2d at 855. The government's complaint that defendant's section five notice does not contain argument is particularly misplaced in this case, as the Court afforded the government an opportunity to object to the form or sufficiency of the notice when it was filed. See Dkt. 119. The government stated that it had no objection. See Dkt. 148.

After the defendant files a section five notice, CIPA section 6(a) permits the government to "request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding." 18 U.S.C. App. 3 § 6(a). Prior to the hearing, the government must "provide the defendant with notice of the classified information that is at issue" by "identify[ing] the specific classified information" that the government seeks to contest at the section 6(a) hearing. Id. § 6(b)(1). Only the information noticed by the government will be subject to section 6(a) hearings. See Collins, 720 F.2d at 1200 ("If the government wishes to avail itself of Section 6 to eliminate or ameliorate classified information disclosure, it must provide the defendant with notice of those items of classified information in the defendant's Section 5(a) notice which are the subject of the Section 6 procedure."). The government's section 6(a) motion "serves to limit the issues and make the procedures under Section 6 to the point and manageable." Id.

Once the government has moved for a hearing under section 6(a), the Court "shall conduct a hearing," and "shall set forth in writing the basis for its determination" as to the use, relevance, or admissibility of the classified information at issue. Id. The parties dispute the legal standards applicable under CIPA section 6(a). See Section II below. However, no matter which standard is applied, any governmental privilege in classified information "must give way when

disclosure of the information is relevant and helpful to the defense of an accused." Yunis, 867 F.2d at 622 (internal quotation omitted).

"Upon any determination by the court authorizing the disclosure of specific classified information" under section 6(a), CIPA section 6(c) permits the government to file a motion proposing substitutes for the "specific classified information" ruled relevant and admissible under section 6(a). See 18 U.S.C. App. 3 § 6(c)(1). The government may propose the use of "a statement admitting relevant facts" or "a summary" of the classified information "in lieu of the disclosure of" classified information that would otherwise be admissible at trial. Id. If the government files such a motion, section 6(c) again provides that the Court "shall conduct a hearing," and shall grant the motion only 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." Id. The burden is on the government to demonstrate that its proposed substitutes satisfy section 6(c)'s requirements. See United States v. Baptista-Rodriguez, 17 F.3d 1354, 1363 (11th Cir. 1994) ("If the evidence would be admissible at trial, the burden shifts to the government to offer in lieu of the classified evidence either a statement admitting relevant facts that the classified information would tend to prove or a summary of the specific classified information."); United States v. Scarfo, 180 F. Supp. 2d 572, 581 (D.N.J. 2001) (holding that "the United States met its burden in showing that [its proposed substitute] would provide [defendant] with substantially the same ability to make his defense as would disclosure of the specific classified information").

Even if the Court rejects the government's substitutions, the government still has the power to prevent the defendant from using the contested material at trial. See Libby, 453 F. Supp. 2d at 43. Section 6(c)(2) permits the government to "submit to the court an affidavit of the

Attorney General certifying that disclosure of [the information at issue] would cause identifiable damage to the national security ... and explaining the basis for the classification of such information." 18 U.S.C. App. 3 § 6(c)(2). Section 6(e)(1) provides that, whenever the court denies a motion for substitution under section 6(c) and the Attorney General files the affidavit required by section 6(c)(2) objecting to disclosure, "the court shall order that the defendant not disclose or cause the disclosure of such information." 18 U.S.C. App. 3 § 6(e)(1). Such an order may result, however, in dismissal of the indictment. See 18 U.S.C. App. 3 § 6(e)(2).

CIPA thus establishes a straight-forward, seriatim, four-step process for determining whether classified information may be used by a defendant at trial:

- First, under CIPA section five, the defendant must provide notice of any classified information that he reasonably expects to disclose at trial.
- Second, the government must determine whether it objects to the disclosure of any of the noticed material. If so, the government must seek a hearing under CIPA section 6(a) and identify the specific classified information at issue.
- Third, upon the government's request, the Court must then conduct such a hearing to determine whether the classified information at issue is relevant and admissible.
- Fourth, if the government objects to the disclosure of any classified information that the Court finds relevant and admissible, the government may file a motion under CIPA section 6(c) to substitute "a statement admitting relevant facts" or "a summary" for the classified information that otherwise would be disclosed at trial.

B. CIPA Proceedings In This Case

Although the procedural framework mandated by CIPA is clear, the government has sought to amend those procedures in this case by both changing the order of the CIPA process

and inventing new steps. Claiming that it would help "streamline" the CIPA process, the government provided what amounts to a set of section 6(c) substitutions even before defendant had filed his first CIPA section five notice. The government's decision to propose section 6(c) at this early stage impacts the issues presently pending before the Court, as the defense explains below.

1. Defendant's First CIPA Section Five Notice

Pursuant to the Court's order, see Dkt. 119, defendant filed his first CIPA section five notice on July 30, 2013. Defendant's first CIPA section five notice addressed two discrete categories of documents produced by the government: (1) the first set of "treat as classified" documents, which had only recently undergone classification review and been deemed classified;[1] and (2) the government's so-called "trial ready" set of documents, which the government described as the "core" classified documents that it intends to use at trial. The "trial ready" set consisted of documents that had already been produced to the defense during classified discovery, but in a far different form. Specifically, the "trial ready" versions contained additional substitutions and redactions made by the government that had not been approved previously by the parties or the Court.

Defendant's section five notice addressed these documents in two ways. First, with respect to the "treat as classified" documents, the defendant identified those classified documents produced by the government after classification review that he reasonably expects to disclose at

[1] "Treat as classified" was a phrase used by the prosecutors during discovery to identify material that had not undergone full classification review, but which the prosecutors believed to be classified. The prosecutors produced hundreds of pages during classified discovery that bore this "treat as classified" header, but apparently did not submit these materials for classification review until the defense requested an update on their classification status while preparing defendant's first CIPA section five notice. Despite representing to the Court that all of the "treat as classified" materials contained classified information, the government later determined that several of the "treat as classified" documents were, in fact, unclassified.

trial. Second, with respect to the "trial ready" documents, the defendant identified the "core" documents that he reasonably expects to disclose at trial in their originally produced form, *i.e.*, without the additional substitutions and redactions added by the government to the "trial ready" set. Although it was under no obligation to do so, the defense explained that the additional substitutions and redactions proposed by the government in its "trial ready" set failed to provide the defendant with substantially the same ability to make his defense. Defendant therefore never noticed the government's "trial ready" versions of the "core" documents in his section five notice, as he has no intent of using those documents in their altered state at trial.

2. The "Failed" Meet-and-Confer Session

Once the defendant filed his first CIPA section five notice, the burden then fell on the government to move for a hearing under CIPA section 6(a) if it wished to challenge the use, relevance, or admissibility of any of the specific classified information contained in defendant's notice. See 18 U.S.C. App. 3 § 6(b). Before filings its motion, however, the government insisted on holding another meet-and-confer session. CIPA does not call for this, and the defense was dubious of its utility prior to the filing of the government's section 6(a) motion.

The government spends several pages of its brief accusing the defense of "refusing to meet-and-confer without preconditions" and failing to "engage in any discussion about the defense's intended use of [the information contained in its section five notice] at trial." See Mot. at 12-14. Even if these statements were accurate, they are plainly improper. It is neither productive nor consistent with the spirit of the meet-and-confer process for the prosecutors to air alleged grievances about these confidential discussions with the Court.[2]

[2] This is the second time in the past month that the prosecutors have misrepresented positions taken by the defense during the meet-and-confer process to the Court. In its opposition to defendant's fifth motion to compel discovery, the government asserted that the defense conceded

Because the government raised this issue, however, the defense must correct several misstatements made by the government in its brief. First, it is simply not the case that the defense "refused to meet-and-confer without preconditions." Mot. at 12. The government fails to mention that, after defendant filed his first CIPA section five notice, the parties met-and-conferred by telephone on August 21, 2013. During that call, the government expressed its belief that the parties might be able to agree on certain substitutions and redactions (*i.e.*, agree to skip forward to the section 6(c) process) that would eliminate the need for some of the documents noticed by the defendant to pass through the CIPA process (presumably because all classified information in those documents would be substituted or redacted). In response, the defense asked the prosecutors to prepare a letter identifying the classified information at issue and specifying which documents (and which information in those documents) the government proposed to redact or substitute. The defense explained that such a letter was necessary to allow the defense to review the specific documents at issue and determine whether the government's proposal would provide Mr. Kim with substantially the same ability to make his defense. The government agreed to provide such a letter.

However, on August 27, 2013, the government provided a letter containing "a list of topics and questions concerning the defendant's first CIPA Section 5 notice." See Ex. 1. Rather than providing information, the letter propounded a series of interrogatories on the defense,

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a discovery request was overbroad when it offered to help identify documents that best satisfied the request. The defense's offer was made in the spirit of trying to negotiate a compromise solution, in an effort to accommodate the government, and was not a concession of any kind. The government has also repeatedly provided terribly inaccurate information during the meet-and-confer process, stating, for example, that government witnesses were mistaken when they claimed that the information at issue in this case had been included in a [redacted] After assuring the defense and the Court that no such document existed for several months, the government produced [redacted] containing the information at issue on November 30, 2012, more than two years after Mr. Kim was indicted.

asking, for example, whether the defense would "provide the government with a transcription of the handwriting [of the defendant]" to facilitate classification review of certain photographs, or whether "the parties [can] reach an agreement as to the treatment of substitutes and redactions in at least some of the documents at issue." Id. at 2. The letter also repeatedly asked the defense "to confirm" positions that the defense has never actually taken, and which directly contradict the defendant's decision to include certain documents and information in his first section five notice. Id. Contrary to the parties' August 21st teleconference, the letter did not list the specific documents noticed by the defendant whose disclosure the government would oppose, nor did it describe the government's corresponding proposals to redact or substitute information from those documents. Id.

Notwithstanding the government's failure to do what it had said, the defense agreed to meet-and-confer. On September 3, 2013, the parties met to discuss the government's letter. The defense again requested a written description of the specific documents noticed by the defendant that the government found objectionable, and the government's proposed means of resolving those objections (*i.e.*, the same information that was supposed to be included in the government's August 27th letter). The government refused to state which documents it planned to challenge under CIPA section 6(a), and persisted in asking the defense a series of questions about its intended use of the documents contained in Mr. Kim's first section five notice. The defense explained that this approach was contrary to CIPA, which plainly places the burden on the government to identify those documents noticed by the defendant whose use, relevance, or admissibility it seeks to challenge under section 6(a).[3] The defense reiterated that, if the

[3] The government's brief evinces a great deal of confusion on this point. At the meet-and-confer session, the defense did not argue that the government bears the burden of establishing the irrelevance or inadmissibility of the material it seeks to challenge, see Mot. at 12 n.4, nor did the

government was willing to provide the defense with notice of the specific documents or information that it planned to challenge under section 6(a) and its proposed means of resolving those disputes, the defense would review those documents in its SCIF and consider the government's specific proposals. The government was apparently unwilling to do so.[4]

3. Evidence of the Government's Confusion or Bad Faith

The government has been quick to accuse the defense of delay and "procedural graymail," even though it was the government—not the defense—that chose to bring a case in which most of the meaningful documents are classified. The government's accusations are neither true nor helpful. But once such accusations have been raised, a clear record is needed. While the parties' inability to streamline the issues during the meet-and-confer process was unfortunate, the defense remains concerned by one particular exchange that took place during this process. That exchange, which is described below, demonstrates either deep confusion or bad faith on the part of the government.

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defense request that the government waive any and all objections to a particular document if the defense agreed to substitute or redact specific information from that document, see id. at 13. Rather, the defense simply requested that the government notify the defense of the specific documents and information to which the government objected and intended to place at issue during the section 6(a) process, so that the defense could review those documents in their entirety ahead of time and determine whether the government's proposal would actually narrow the issues before the Court. It does not serve Mr. Kim's interests for defense counsel to engage in open-ended conversations with the government regarding potential limits on the use of evidence at trial unless defense counsel understand exactly what the government is proposing.

[4] Contrary to the assertions in the government's brief, see Mot. at 13-14, the September 3rd meet-and-confer session ended with the government stating that it would consider the defense's offer to meet again once the government provided a letter affirmatively stating its position (rather than asking the defense a series of questions). When the government failed to respond to this offer, the defense memorialized its position in a letter dated September 9, 2013. See Ex. 2. Far from "detailing the multiple steps that it would require the United States to take before the defense would be willing to meet again," Mot. at 14, the defense's letter simply restated the requests originally communicated to the government during the August 21st teleconference.

Exhibit 3 is an FBI-302 from an interview with Eric Richardson, an analyst in the State Department's Bureau of East Asian and Pacific Affairs ("EAP"). See Ex. 3 (CLASS_1031 to 1033). Mr. Richardson covered North Korean issues for EAP, and had been in contact with James Rosen prior to the alleged disclosure. Id. The Court will note that, in the version of the FBI-302 originally produced to the defense (Exhibit 3), every paragraph was marked "(U)" for unclassified, although the document itself bore the "Treat as Classified" header. By virtue of this header, the Richardson FBI-302 was one of the documents submitted by the government to the intelligence community for classification review.

Exhibit 4 is the Eric Richardson FBI-302 as produced to the defense on July 17, 2013, following the government's classification review. The Court will note that the portion marking on the second-to-last paragraph of the second page has been changed from "(U)" to "(S//OC/NF)," *i.e.*, from unclassified to classified. See Ex. 4 (CLASS_3374 to 3376). That paragraph contains information that, if disclosed, might prove embarrassing to the United States and its allies, namely that the U.S. State Department has had "issues ... with their South Korean counterparts disclosing classified information to South Korean reporters" and that "South Korean press has easy access to South Korean Foreign Service Officers and areas in which classified is held." Id. According to Richardson, "[m]uch of this compromised information, especially as it relates to North Korea, was provided by the U.S. to South Korea." Id.

The defense doubted that this information was properly classified, as potential embarrassment to a person or organization is not a valid basis to classify a document. ACLU v. U.S. Dept. of Defense, 628 F.3d 612, 624 (D.C. Cir. 2011); see also Ray v. Turner, 587 F.2d 1187, 1209 (D.C. Cir. 1978) (Wright, J., concurring) (noting concerns that "the federal government exhibits a proclivity for overclassification of information, especially that which is

embarrassing or incriminating...."). However, based on the government's revised classification determination, defendant included the Eric Richardson FBI-302 in his first CIPA section five notice. The government was therefore on notice that defendant intended to use the paragraph now marked "classified" at trial.

During the August 21st teleconference, the government raised the Richardson FBI-302 with the defense,[5] stating that if the defense agreed not to use the recently-classified paragraph, it would not object to use of the document during CIPA section 6(a) hearings. The defense was not willing to make this concession.

The government raised the issue again in its August 27th letter, noting that "[t]he Eric Richardson FBI-302 contains only a single paragraph of classified information" and asking whether the defense intended to use that paragraph at trial. See Ex. 1, Item 7. During the September 3rd meet-and-confer session, the government again asked the defense to agree to redact the "classified" paragraph, stating that redaction of the paragraph in question would resolve the government's section 6(a) objections to the document. The defense again declined to make any such concession.

After thrice attempting to convince the defense to redact the previously-unclassified paragraph from the Richardson FBI-302, the government now states in its section 6(a) motion that "[a]fter further consultation with the Intelligence Community following the filing of the defendant's First CIPA Section 5 Notice, Mr. Richardson's FBI 302 was deemed to contain no classified information other than the FBI case number for this investigation that was redacted

[5] The government raised this issue obliquely on the August 21st teleconference, as the call took place on an open line. The government referred to the document as "a 302 containing only one paragraph of classified information." The context made clear that the government was referring to the Richardson FBI-302, however, as this was the only document meeting that description that had been included in defendant's first CIPA section five notice. This understanding was subsequently confirmed by the government's August 27th letter. See Ex. 1, Item 7.

prior to the production of the FBI 302 in classified discovery." Mot. at 55. The paragraph the government repeatedly urged the defense to redact, in other words, turns out not to contain any classified information (as its original markings indicated).

The defense obviously does not disagree with the government's decision to confirm that the Richardson FBI-302 is not classified, and to declassify it. But the chronology detailed above should give this Court pause in accepting the government's blanket statements regarding its "equities," its characterizations of the discovery process, and even its ex parte submissions (which have never been tested by the adversarial process). The paragraph containing information that would be embarrassing to the United States and its allies went from being unclassified to classified to unclassified within the space of eight weeks. At the same time, the government attempted to leverage its classification determination and the "meet-and-confer" process to convince the defense to agree not to use the potentially embarrassing information. When those efforts failed, the government claims to have engaged in "further consultation" with the intelligence community regarding a document that was supposed to have undergone full classification review two months earlier, only to conclude that the original, "unclassified" marking was accurate. The sequence of events suggests that the classification status of the Richardson FBI-302 was improperly affected by litigation considerations, rather than the actual content of the document. In any event, it is beyond dispute that Mr. Kim should not have been required to notice the Richardson FBI-302 in his first section five notice, as it was not properly classified.[6] To require him to do so was a misapplication of the CIPA process and a waste of the defense's time and resources, which are not endless.

[6] In its motion, the government implies that the Richardson FBI-302 was classified in part because it contained a classified FBI case number. See Mot. at 55. This is a red herring. As the government admits, the FBI case number "was redacted prior to the production of the FBI 302 in

4. The Government's CIPA Section 6(a) Motion

On September 18, 2013, the government responded to defendant's first CIPA section five notice by moving for a hearing pursuant to CIPA section 6(a). Only the relevant issues[7] raised in the government's 62-page motion are discussed in turn below. To help frame this discussion, however, two introductory points are in order.

First, although the government claims that it has "unilaterally" sought to "narrow and simplify" the CIPA litigation in this case, see Mot. at 14, the content (and length) of its motion suggests otherwise. Stripped of its rhetoric, the government's motion makes clear that *the government objects to the use of every single piece of classified information contained in the defendant's first CIPA section five notice*, no matter how plainly relevant or admissible. Mot. at 6, 16-17. The government attempts to mask its position by claiming that "at the CIPA Section 6(a) stage the defendant has the burden of establishing the use, relevance, and admissibility *of each and every item* of classified information that he intends to use at trial." Mot. at 34 (emphasis added). But that is simply not the case. While the defendant bears the burden of demonstrating use, relevance, and admissibility at the section 6(a) hearing, the decision whether

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classified discovery," and therefore did not appear on the document produced to the defense (and subsequently included in defendant's first section five notice). Mot. at 55; see also id. at 11 n.3. The FBI case number therefore does not explain why the Richardson FBI-302 was, at one time, deemed "classified." Moreover, the government has repeatedly produced materials during unclassified discovery in this case containing the same, redacted FBI case number. See, e.g., Ex. 5 (US-15775, US-15778). These unclassified documents further undermine any claim that the presence of a redacted FBI case number served as the basis for the government's classification determinations, and further explains why the defense and the Court cannot simply accept the government's explanations of its "equities" at face value.

[7] It seems that the government cannot submit a pleading without including a long recitation of how it sees the underlying (and disputed) facts of the case, an assessment of the strength of its evidence, a description of the allegedly massive efforts it has undertaken to help the defense and the Court through discovery, and an assertion that it has provided far more discovery than is required under the Rules. The defense will not respond to these non-issues, as they are not germane to proceedings under CIPA section 6(a).

to contest "each and every item of classified information" is left solely to the government. See 18 U.S.C. App. 3 § 6(b).[8] CIPA certainly does not require the Court to assess the use, relevance, and admissibility of every piece of classified information noticed by a defendant, see Mot. at 16-17, unless the government chooses to place that information at issue in its section 6(a) motion.

Second, although it objects to the disclosure of every classified document contained in defendant's first CIPA section five notice, the government also concedes that roughly one-half of the documents noticed by Mr. Kim survive scrutiny under CIPA section 6(a) and are ready for proceedings under CIPA section 6(c), which addresses the use of substitutes. Given the premature nature of the government's proposed substitutes and the contrary positions asserted in its brief, however, clarification is necessary.

As explained above, one of the two general categories of documents addressed in defendant's first CIPA section five notice was the "trial ready" set of core classified documents that the government intends to use at trial. The "trial ready" set contains two separate sets of substitutions and redactions. Only one of these two sets of substitutions and redactions is presently at issue.

The first set of substitutions and redactions occurred before the documents were produced to the defense during classified discovery. The defense challenged the government's right to make such substitutions and redactions unilaterally at the discovery stage, particularly in a case involving cleared defense counsel. The government elected to address this issue with the Court

[8] The government appears to fundamentally misunderstand the process described in CIPA sections five and six, as it repeatedly states or implies that the defendant decides "what classified information [he] intends to litigate" at the section 6(a) hearing." Mot. 7, 34-35. CIPA could not be clearer that it is up to the government, not the defendant, to identify which classified information will be contested before the Court during section 6(a) hearings. See 18 U.S.C. App. 3 § 6(b).

ex parte, depriving the defense of its ability to contest the nature and substance of the government's substitutions and redactions.

The defense objected, and continues to object, to this ex parte process, as the documents at issue lie at the heart of the government's case against Mr. Kim (as the government acknowledges by including them in the set of documents it intends to use against him at trial). Nonetheless, the government claims that its initial substitutions and redactions were approved by the Court in an ex parte order. See Mot. at 11, 35. The defense is obviously in no position to "re-litigate" or seek "reconsideration" of the Court's ruling, see Mot. at 16, 35, as the defense was excluded from that ex parte process and remains unaware of the basis for the Court's decision.[9] The government is raising a non-issue. Contrary to the government's assertions, see Mot. at 15, 34-35, however, defendant also did not list wholly unredacted versions of those documents in his first CIPA section five notice, as the defense has never seen, let alone possessed, those documents. The substitutions and redactions that were made by the government and approved by the Court ex parte therefore are not presently at issue. The starting point for purposes of CIPA sections five and six is the set of documents the defense actually received and noticed.

As the government acknowledges, however, its "trial ready" set also contains a second set of substitutions and redactions that have not been approved by the Court. See Mot. at 34-35. This second set of substitutions and redactions reflects the way in which the government proposes to present these core documents to the jury. Id. The defense reviewed these

[9] The defense once again preserves its objections to the substitutions and redactions made by the government to the core classified documents at issue in this case, as well as the ex parte proceedings employed by the government to seek ratification of its substitutions and redactions. The defense reiterates that cleared defense counsel still have not been permitted to view unredacted copies of many of the core classified documents that the government intends to use against Mr. Kim at trial.

substitutions and redactions before filing its first section five notice, but decided that they were not acceptable substitutes under CIPA section 6(c) because they fail to provide the defendant with substantially the same ability to make his defense. Defendant therefore noticed the core classified documents provided by the government "in their original form, *i.e.*, without additional substitutions, redactions, and markings" added by the government to the "trial ready" set.

Although the government includes a discussion of the "trial ready" set in its section 6(a) motion, that motion itself makes clear that the dispute between the parties with respect to these documents will center on CIPA section 6(c), not 6(a). The government concedes that the documents included in its "trial ready" set "will be declassified for use at trial when the jury is sworn" and therefore "do not need to go through the CIPA Section 6 proceedings." Mot. at 34. The government also states that, because the defense has "challenged"[10] the substitutions and redactions made to the "trial ready" set, its motion "focuses on the difference between the version of those documents as produced originally in classified discovery and the versions produced as the trial ready set." Mot. at 15-16.

The process described by the government of comparing documents noticed by the defendant to substitute versions of the same documents proposed by the government is, of course, exactly what the parties and the Court must do during CIPA section 6(c) proceedings in order to determine whether the proposed substitutions provide defendant with substantially the same ability to present a defense. By providing proposed substitutions and acknowledging that the government itself intends to declassify and use these "core" documents against Mr. Kim at

[10] The government's repeated references to the defense "challenging" its substitutions further demonstrate that the issues raised by the government with respect to the "trial ready" documents are properly addressed under CIPA section 6(c), not 6(a). The adequacy of the government's proposed substitutes is not at issue until CIPA section 6(a) proceedings have concluded and the government has filed a section 6(c) motion.

trial, the government has already conceded these documents are "relevant and admissible" and thus satisfy the threshold requirements of section 6(a). In other words, the Court should not require the defense to argue the use, relevance, and admissibility of these documents, as that threshold is conceded by the government. Instead, these documents should be deferred to CIPA section 6(c), after the section 6(a) process has concluded.

Although the government's discussion of the "trial ready" set largely conflates sections 6(a) and 6(c), the government's position with respect to the first set of "treat as classified" materials is much more consistent with standard CIPA procedures as described in section I.A. above. The defendant noticed several of the "treat as classified" documents in his first section five notice, and the government moved for a hearing as to the use, relevance, and admissibility of those "treat as classified" documents that have not subsequently been declassified. The first set of "treat as classified" materials is therefore ripe for a hearing before the Court under CIPA section 6(a).

II. LEGAL STANDARDS

Under CIPA section 6(a), the government may seek pre-trial determinations as to the use, relevance, and admissibility of classified information the defendant reasonably expects to disclose as part of his defense. See 18 U.S.C. App. 3 § 6(a). CIPA itself does not define the terms "use," "relevance," or "admissibility," but the Act's legislative history makes clear "that the statute did not alter the rules governing the admissibility of evidence during a trial." United States v. Libby, 453 F. Supp. 2d 35, 39 (D.D.C. 2006). A court conducting section 6(a) hearings must therefore apply the normal, Federal Rules of Evidence to determine whether the classified information at issue is relevant and admissible, and whether its use should be limited to a particular purpose. Id. at 39. The only difference between a CIPA case and a normal criminal

case is that CIPA permits the government to request such determinations ahead of time, and to present substitutes for any evidence found relevant and admissible so long as such substitutes "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(a), (c); see also United States v. Smith, 780 F.2d 1102, 1106 (4th Cir. 1985) (en banc) (noting that CIPA was "not intend[ed] to alter the existing law governing the admissibility of evidence" and "was merely a procedural tool requiring a pretrial court ruling on the admissibility of classified information").

In its motion, the government agrees that – at least as a first step – the Court must apply the Federal Rules of Evidence to determine whether the classified information identified in the government's section 6(a) motion is relevant and admissible, and whether its use should be limited. See Mot. at 17-18. Those basic standards therefore are not in dispute. The government proceeds to argue, however, that even if the Court were to conclude that classified information is relevant and admissible under the Federal Rules, it must also add on an "additional balancing-screening" test before permitting the defendant to use that information at trial. Id. at 22-30. The government's argument for an express balancing test under CIPA section 6(a) should be rejected, for several reasons.

A. The Government's Classified Information Privilege Cannot Outweigh the Defendant's Right to Present Evidence That Is "Relevant and Helpful" to the Defense

In its motion, the government asserts that, "[e]ven where classified information is relevant and helpful to the defense, the classified information privilege is not overcome unless a balancing of the need to protect the government's information against the defendant's interest in disclosure weights in favor of the latter." Mot. at 22. This argument runs counter to Supreme Court precedent and should be rejected. The law is clear that, whatever standard is ultimately

applied under CIPA section 6(a), the defendant is entitled to use classified information that is "relevant and helpful to the defense" at trial.

In its motion, the government relies primarily on the Fourth Circuit's[11] decision in Smith to support its claim that the classified information privilege can "outweigh" the defendant's interest.[12] See Mot. at 22. In Smith, the Fourth Circuit analogized the classified information privilege to the confidential informant privilege recognized by the Supreme Court in Roviaro v. United States, 353 U.S. 53 (1957), and adopted the "Roviaro standard of admissibility" for proceedings under CIPA section 6(a). See Smith, 780 F.2d at 1108-10. The court described the Roviaro standard as "one that calls for balancing the public interest in protecting the information against the individual's right to prepare his defense." Id. at 1105.

Although Smith thus endorsed some form of balancing under CIPA section 6(a), the Fourth Circuit did not stop there. Rather, in a passage ignored by the government, the Fourth Circuit noted that while some form of balancing was necessary to protect the government's privilege, the privilege was "a qualified one" and "must give way" when the information was "relevant and helpful" to the defense. Smith, 780 F.2d at 1107 (internal quotation omitted). This holding was consistent with Roviaro, which expressly held that "[w]here the disclosure [of the

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[11] The defense cannot help but note the irony in the government's ever-changing use or rejection of Fourth Circuit precedent, depending on what it wants this Court to conclude. In support of its argument for some type of balancing test, the government cites a line of Fourth Circuit cases including Morison, the same case that the government urged this Court to reject when interpreting the substantive provisions of the Espionage Act. See Mot. at 32.

[12] The government also cites the Ninth Circuit's decision in United States v. Sarkissian, 841 F.2d 959 (9th Cir. 1988), in support of its balancing argument. See Mot. at 22-24. Sarkissian, however, addressed "issues of discovery," not admissibility. See 841 F.2d at 965. Moreover, Sarkissian certainly did not hold that the government's interest in national security can outweigh a defendant's right to admit evidence that is "relevant and helpful" to his defense, as Sarkissian's discussion of balancing is in fact limited to a single paragraph that fails to cite, let alone discuss, Roviaro.

information at issue] is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Roviaro, 353 U.S. at 60-61.[13]

In the twenty-seven years since Smith was decided, the Fourth Circuit has repeatedly clarified that Smith did not hold that the classified information privilege can trump the defendant's right to present classified evidence that is "relevant and helpful" to the defense. In United States v. Fernandez, 913 F.2d 148 (4th Cir. 1990), for example, the Fourth Circuit explained:

> Although Smith requires a court to take into account the government's interest in protecting national security, it also stresses that this interest cannot override the defendant's right to a fair trial. Thus, Smith requires the admission of classified information that is "helpful to the defense of an accused, or is essential to a fair determination of a cause." Were it otherwise, CIPA would be in tension with the defendant's fundamental constitutional right to present a complete defense.

Fernandez, 913 F.2d at 154 (quoting Smith, 780 F.2d at 1107). Similarly, in United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004), the Fourth Circuit noted that, under the standard adopted in Smith, "a defendant becomes entitled to disclosure of classified information upon a showing that the information 'is relevant and helpful to the defense ... or is essential to a fair determination of a cause." Id. at 472 (quoting Smith, 780 F.2d at 1107). Indeed, Moussaoui went on to explain that, "In all cases of this type—cases falling into what might loosely be called the area of constitutionally-guaranteed access to evidence—the Supreme Court has held that the defendant's right to a trial that comports with the Fifth and Sixth Amendments prevails over the

[13] Roviaro was, in fact, careful to note that "the scope of the privilege is limited by its underlying purpose," as well as "the fundamental requirements of fairness." 353 U.S. at 60. In addition to holding that "the privilege must give way" when information is "relevant and helpful" to the defense, the Supreme Court thus also held that, "where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." Id.

governmental privilege." Id. at 474; see also United States v. Abu Ali, 528 F.3d 210, 247-48 (4th Cir. 2008) (holding that the privilege recognized in Smith "is nonetheless 'a qualified one'" and "cannot override the defendant's right to a fair trial").

Contrary to the government's assertions, see Mot. at 22, Roviaro, Smith, Fernandez, and Moussaoui all make clear that even under the government's proposed balancing test, the government's classified information privilege cannot outweigh the defendant's right to present classified information that is "relevant and helpful" to his defense at trial. If classified information is "relevant and helpful" to Mr. Kim's defense, it overcomes any privilege asserted by the government and thus satisfies the requirements of CIPA section 6(a).

B. A Balancing of Interests Is Not Warranted Under CIPA Section 6(a)

Aside from its assertion that the classified information privilege can "outweigh" the defendant's interests in using classified information, the government also argues more generally that the Court must conduct an "additional balancing-screening" test under CIPA section 6(a) to determine whether the government's interest "in protecting sensitive sources and methods" is "superior" to the defendant's interest in using classified information at trial. See Mot. at 22-26. As the government acknowledges, however, see Mot. at 26-31, another member of this Court already rejected the government's proposed section 6(a) balancing test in United States v. Libby, 453 F. Supp. 2d 35 (D.D.C. 2006) (Walton, J.), which held that such a balancing test ignores the distinction between a defendant's discovery and trial rights and is inconsistent with CIPA's legislative history. This Court should decline the government's invitation to depart from Libby and engage in a type of balancing that finds no support in CIPA's text, legislative history, or the case law interpreting its provisions.

During section 6(a) proceedings in Libby, the government espoused adoption of the same "balancing" test it now urges on the Court in this case. Specifically, the government argued that "when it asserts a classified information privilege," the information at issue "should be precluded from use at trial unless the Court determines (1) that the document is relevant; (2) that the document is 'helpful to the defense,' and (3) that the defendant's interest in disclosure of the document outweighs the government's need to protect the classified information." 453 F. Supp. 2d at 38. Judge Walton rejected the government's proposed balancing test for several reasons that apply with equal force in this case.

First, after reviewing CIPA's legislative history, the Court noted that the government was advocating a standard of relevance and admissibility that had been rejected by Congress. Id. at 40. During congressional hearings preceding CIPA's enactment, the Department of Justice "requested that the CIPA include a heightened standard for the admissibility of classified information." Id. This standard was rejected by Congress, which "stated unambiguously" that CIPA was not intended to change the existing standards for determining relevance and admissibility." Id. (discussing House Conference Report No. 96-1436, 96th Cong., (1980), p. 12).

Second, the Court noted that while CIPA's provisions regarding discovery of classified information (i.e., CIPA section four) had been interpreted to "allow[] for the Court to balance the assertion of a classified information privilege against a criminal defendant's interest during the discovery process," there was no basis to mechanically apply the same standard to CIPA's separate provisions regarding use and admissibility (CIPA section 6(a)). Id. at 40-42 (emphasis added). As the Court explained, conflating these separate provisions "is flawed because it fails to recognize that there is an important difference between the discovery of information and its

ultimate use during trial." Id. at 42. "While there is no general constitutional right to discovery in a criminal case, the Constitution mandates that a defendant be accorded the opportunity to present a defense." Id. at 42 (internal quotations and citations omitted). The Court thus concluded that it would be improper to apply any balancing test employed at the discovery stage to deprive the defendant of his right to introduce evidence at trial, "especially against Congress' clear declaration that the standard rules of evidence should apply." Id. at 42-43.

Third, the Court also explained that its rejection of the government's proposed balancing test did not mean that "the government's interests in protecting classified information are diminished at the admissibility stage." Id. at 43. To the contrary, the Court pointed out that "CIPA continues to provide the government substantial safeguards to protect classified information at this stage in the proceeding," including the ability "[to] seek to substitute or redact" otherwise admissible documents and "the power to preclude entirely the introduction at trial of the classified information" by filing a motion under section 6(c)(2). Id. "Thus, the government is not without recourse to protect national security interests if the Court concludes that the defendant must be permitted to reveal classified information as part of his defense." Id.

In its motion, the government attempts to overcome Libby's rejection of its proposed balancing test by criticizing several aspects of that decision. See Mot. at 26-31. The government does so, however, by fundamentally misconstruing Judge Walton's opinion. The government claims that Libby "declined to recognize the classified information privilege" in CIPA section 6(a) proceedings and accuses the Court of failing to "explain why it had chosen to treat the classified information privilege – along among privileges – as the only one that applied only for discovery and never at trial." Mot. at 26-27. But that is simply not an accurate description of Libby.

To the contrary, Libby expressly held that "there can be no question that the government has a legitimate privilege in protecting documents and information concerning national security." 453 F. Supp. 2d at 40. But Libby held that "extent of [the privilege] in the context of a criminal prosecution is embodied in the procedures set forth in the CIPA," which contains "separate provisions that govern discovery and admissibility." Id. at 40, 42. Rather than adopting the balancing standard urged by the government at both the CIPA section four and section 6(a) stages, Libby held that the government's privilege is adequately protected during section six proceedings by permitting the government to contest the use, relevance, and admissibility of the information under the Federal Rules of Evidence and to propose substitutions for any classified information deemed relevant and admissible. Id. at 42-43. To be sure, Libby rejected the "balancing mandate" urged by the government. Id. at 42. But Libby most certainly did not "decline to recognize" the classified information privilege or suggest that the privilege applied only during discovery and not trial, as the government misleadingly suggests.[14]

The government also criticizes Libby's discussion of legislative history, claiming that Judge Walton "misread[] CIPA" and mistakenly relied on "a fragment of CIPA's legislative history" to conclude that Congress rejected a standard of admissibility similar to the balancing test espoused by the government. See Mot. at 28-29. Yet the government does not deny the central fact relied on by Libby, namely that Congress considered -- and decided not to adopt – the

[14] For the same reason, the government's argument that Libby's "discovery-only rule" fails to adequately protect its interests must also fail. See Mot. at 29-30. Libby outlines a series of procedural protections provided by CIPA section six that serve to protect the government's interests, including the ability to propose substitutions and to preclude the defendant from disclosing otherwise admissible evidence at trial. See 453 F. Supp. 2d at 43. As noted above, Libby simply did not adopt a "discovery-only rule." Moreover, the government's complaints regarding a lack of "guidance" during the discovery process cannot be taken seriously, as the government has repeatedly taken advantage of the protections afforded by CIPA section four to withhold otherwise discoverable information from discovery.

type of balancing test now urged by the government. See Mot. at 28-29 (acknowledging DOJ proffered a standard similar to the government's balancing test). Nor can the government deny the fact that the legislative history is replete with references to congressional disapproval of any balancing of the government's privilege against the defendant's interest. See, e.g., S. Rep. No. 823, 96th Cong., 2d Sess., at 9 ("[I]t should be emphasized, however, that the court should not balance the national security interests of the government against the rights of the defendant to obtain the information."); H.R. Rep. No. 831, 96th Cong., 2d Sess., pt. 1, at 15 n.12 ("It is well-settled that the common law state secrets privilege is not applicable in the criminal arena. To require, as some have suggested, that a criminal defendant meet a higher standard of admissibility when classified information is at issue might well offend this principle."); Richard P. Salgado, Government Secrets, Fair Trials, and CIPA, 98 Yale L.J. 427 (1988) (discussing CIPA's legislative history).

Instead, the government argues that "[i]t is more accurate to say that Congress abandoned any attempt to define admissibility" and instead "left the common law as it was." Mot. at 28-29. Yet if that was the case, the government glosses over the fact that at the time of CIPA's enactment, the courts did not universally apply a balancing test to address questions of privilege, particularly at the admissibility stage.[15] To the contrary, during congressional debate over CIPA's provisions, "it was not clear what standard was the current standard," and the

[15] The government fails to cite any authority for its assertion that "the common law applies a classified information privilege to trial admissibility determinations" and "consideration of the classified information privilege requires a balancing of the government's interests against the defendant's trial rights." See Mot. at 29. The government similarly fails to support its assertion that "the Roviaro standard ... has universally come to define the classified information privilege at common law." Id. at 28. Both of these assertions are directly contradicted by the line of Eleventh Circuit cases discussed infra, which expressly reject any such considerations when assessing the use, relevance, and admissibility of classified information. This split in authority existed at the time of CIPA's enactment and persists to this day. See generally Salgado, Government Secrets, 98 Yale L.J. at 428, 435-41.

administration "disavowed any intent to provide for balancing of the parties' interests in determining the admissibility of classified evidence." Salgado, Government Secrets, 98 Yale L.J. at 437. Thus, as one commentator has concluded, "[a]ssuming Congress understood the current state of evidence law" when it enacted CIPA, "the [Fourth Circuit] probably violated the intent of Congress when they allowed trial courts to balance the defendant's need for disclosure against the interests of national security in section 6(a) relevancy hearings." Id. at 441.

Indeed, the government's central argument in support of its proposed balancing test is based on a selective reading of the case law. The government fails to cite any authority for its assertion that "the common law applies a classified information privilege to trial admissibility determinations" and "consideration of the classified information privilege requires a balancing of the government's interests against the defendant's trial rights." See Mot. at 29. The government similarly fails to support its assertion that "the Roviaro standard ... has universally come to define the classified information privilege at common law." Id. at 28.

Both of these assertions are directly contradicted by a line of Eleventh Circuit cases which expressly reject any such considerations when assessing the use, relevance, and admissibility of classified information.[16] The Eleventh Circuit has consistently held that "the district court may not take into account the fact that evidence is classified when determining its 'use, relevance, or admissibility,'" as "the relevance of classified information in a given case is governed solely by the well-established standards set forth in the Federal Rules of Evidence." Baptista-Rodriguez, 17 F.3d at 1364 (emphasis added); see also United States v. Noriega, 117 F.3d 1206, 1215 (11th Cir. 1997); United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985). The classified nature of the material only comes into play under section 6(c), when the

[16] This split in authority existed at the time of CIPA's enactment and persists to this day. See, generally, Salgado, Government Secrets, 98 Yale L.J. at 428, 435-41.

government is tasked with "propos[ing] an alternative way of conveying the information to the jury that is less damaging to national security." Baptista-Rodriguez, 17 F.3d at 1364; Noriega, 117 F.3d at 1215; Juan, 776 F.2d at 258-59. These rulings are all based on the Eleventh Circuit's conclusion that "CIPA does not create new law governing admissibility of evidence," but instead "simply ensures that questions of admissibility will be resolved under controlled circumstances calculated to protect against premature and unnecessary disclosure of classified information." Baptista-Rodriguez, 17 F.3d at 1364.

The same principles have been applied by several other courts as well. In United States v. Wilson, 586 F. Supp. 1011 (S.D.N.Y. 1983), for example, the Court held that, "[u]nder CIPA, in making its rulings on admissibility, the Court is to disregard the fact that certain material may be classified. The Act does not alter the existing standards for determining relevance or admissibility. Both documentary and testimonial evidence containing classified matter may be admitted if in conformity with the Federal Rules of Evidence." Id. at 1013. The Second Circuit affirmed the district court's ruling, holding that "the district court did not err in rejecting the material under generally applicable evidentiary rules of admissibility."[17] Wilson v. United States, 750 F.2d 7, 9 (2d Cir. 1984). Similarly, in the prosecution of Wen Ho Lee, a district court in New Mexico explained that "[w]hen determining the use, relevance, and admissibility of the proposed evidence, the court may not take into account that the evidence is classified; relevance of classified information in a given case is governed solely by the standards set forth in the Federal Rules of Evidence." United States v. Lee, 90 F. Supp. 2d 1324, 1325 n.2 (D.N.M. 2000). All of these decisions are consistent with Libby's holding that, at the section 6(a) stage, "the

[17] Wilson's holding is in fact cited in the section of the United States Attorneys' Manual describing the standards applicable under CIPA section 6(a). See U.S. Attorneys' Manual, Title 9, Criminal Resource Manual, § 2054 (Item II.B). The Manual states, "CIPA does not change the 'generally applicable rules of admissibility.'" (quoting Wilson). Id.

Federal Rules of Evidence and the restrictions they impose control whether information subject to CIPA proceedings is admissible during a trial." Libby, 453 F. Supp. 2d at 37.

Libby is therefore not alone in rejecting the balancing test proposed by the government in this case. Several other courts have similarly held that the government's privilege is adequately protected by the procedures mandated by CIPA sections 6(a) and 6(c), without an express balancing of interests. Moreover, as the government is forced to admit, see Mot. at 24-25, the Fourth Circuit itself has retreated from the type of express balancing espoused by the government. In Fernandez, the Fourth Circuit clarified that "Smith does not ... set forth a mechanical balancing rule. Rather, it simply ensures that before admitting classified evidence, the trial court takes cognizance of both the state's interest in protecting national security and the defendant's interest in receiving a fair trial." Fernandez, 913 F.2d at 154. In Moussaoui, the Fourth Circuit went even further, explaining that the "balancing" test does not actually call for a balancing of interests at all. See 382 F.3d at 476. After reviewing developments in the case law since Smith, the Moussaoui Court explained:

> In view of these authorities, it is clear that when an evidentiary privilege – even one that involves national security—is asserted by the Government in the context of its prosecution of a criminal offense, the 'balancing' we must conduct is primarily, if not solely, an examination of whether the district court correctly determined that the information the Government seeks to withhold is material to the defense.

Id. The government attempts to dismiss this holding by claiming that the Fourth Circuit "continues to require that trial courts [engage in balancing]." See Mot. at 25. But, as Judge Walton recognized, see Libby, 453 F. Supp. 2d at 42-43, the meaning of Moussaoui is clear: even in the Fourth Circuit, when the government asserts a privilege against the use of classified information by a defendant in a criminal case, the government's purported "interest" – "even one

that involves national security" – plays little to no role in determining whether that information can be used at trial. Moussaoui, 382 F.3d at 476.

In sum, this Court should follow the approach adopted in Libby, under which the use, relevance, and admissibility of classified information at the section 6(a) stage is determined by applying the normal rules of evidence. See Libby, 453 F. Supp. 2d at 37. Libby's approach is consistent with both the text and legislative history of CIPA, as well as a number of decisions from other circuits holding that the government's interests can be adequately protected by the procedures afforded under CIPA section 6(c). The Court should reject the government's effort to graft an additional balancing step onto the straight-forward use, relevance, and admissibility determinations mandated by CIPA section 6(a).

C. The Government's Assertions Regarding Its Purported Interests Are Procedurally Improper

In support of its "balancing" approach, the government has filed two declarations from the intelligence community, as well as an ex parte submission. Based upon CIPA's text and legislative history, these submissions are procedurally improper at this stage of the proceedings.

First, the government relies in part on an ex parte submission in support of its section 6(a) motion. See Mot. at 6. The purpose of the government's ex parte submission is unclear, as the government states that it "concerns classified information that is plainly irrelevant to this prosecution." Id. If that is the true, then it would appear the only possible reason to file such an addendum would be to attempt to influence the Court by discussing prejudicial issues that are not raised in defendant's first CIPA section five notice.[18] In any event, CIPA by its plain terms does

[18] The government's ex parte submission apparently addresses [redacted] which the parties have repeatedly stated is not at issue in this case. See Mot. at 40 n.20. Despite an agreement by the parties that neither side would raise [redacted] in this case, the government persists in asserting that it "has evidence inculpating the

not authorize ex parte submissions at the section 6(a) stage. Compare 18 U.S.C. App. 3 §§ 4, 6(c)(2) (expressly authorizing ex parte, in camera submissions by the government during CIPA's discovery and substitution phases) with 18 U.S.C. App. 3 §§ 6(a), (b) (permitting the government to seek an in camera hearing and requiring the government to notify the defense of the specific classified information at issue at that hearing). The defense will be filing a motion to strike the government's improper ex parte submission separately.

Second, in support of its purported interests, the government relies on declarations submitted by [redacted] regarding the classified nature of the information at issue. See Mot. at 6 & Tabs C(1), C(2). The government's submission of these declarations is procedurally improper at this stage of the proceedings.

CIPA section 6(c)(2) permits the government to file an affidavit at the 6(c) stage describing any "identifiable damage to the national security of the United States" that would be caused by disclosure of the information and "explaining the basis for the classification of such information." 18 U.S.C. App. 3 § 6(c)(2). CIPA section 6(a) contains no such provision. Congress' decision to permit the government to submit such information at the section 6(c) stage, but not at the section 6(a) stage, was intentional. During congressional debate on CIPA's admissibility and disclosure provisions, experts raised concerns that permitting the government to submit such affidavits during section 6(a) proceedings would be unfairly prejudicial, as it would "permit the decision on relevance to be colored by claims of national security, exaggerated or real, made the government." Salgado, Government Secrets, 98 Yale L.J. at 438. For that reason, Congress decided to permit the government to submit such an affidavit only

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defendant" as to [redacted] Id. at 41 n.21. These assertions are inconsistent with the agreement reached by the parties and are therefore improper.

"after the court has determined that the evidence is relevant." Id. at 438-39 (emphasis added). The Court should therefore wait to consider the government's declaration at the section 6(c) stage, but should not rely on those declarations under section 6(a).

Moreover, even a cursory review of the declarations submitted by the government demonstrates that the declarants rely on and refer to information that the defense has repeatedly requested during classified discovery but the government has refused to produce, such as additional information about the [redacted] at issue in the intelligence report. It is fundamentally unfair for the government to use this information against the defendant while at the same time denying the defendant access to the same material. See Fernandez, 913 F.2d at 154. Now that the government has raised these issues in its declarations, the defense again requests the production of additional information about the [redacted] cited in the intelligence report, the [redacted], and any damage that may have been caused by the alleged disclosure. If the government remains unwilling to disclose these materials, the Court should not permit the government to rely on the declarations submitted in support of its motion. If the Court accepts the government's declarations, due process requires affording the defense an opportunity to cross-examine the government's declarants. Cf. Abu Ali, 528 F.3d at 251 (permitting defense counsel to question government witnesses at in camera hearing).[19]

[19] The defense notes that that government's submissions on their face are also insufficient to support its claims. Although the government asserts vague interests in "protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service," see Mot. at 19, 61-62, these types of generalized interests are insufficient to warrant protection under Roviaro. To the contrary, Roviaro calls for an examination of "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significances of the informer's testimony, and other relevant factors." 353 U.S. at 62. In Roviaro itself, for example, the government's generalized interests in law enforcement and investigative techniques were

III. THE SPECIFIC CLASSIFIED INFORMATION DESIGNATED BY THE GOVERNMENT IN ITS CIPA SECTION SIX MOTION

As noted in Section I.A. above, the government misconstrues the defendant's obligations at the CIPA section five stage. Section five does not require the defendant to set forth his arguments in support of the use, relevance, and admissibility of the documents identified in the notice itself. Rewald, 889 F.2d at 855. Instead, relevance arguments are properly addressed during CIPA section 6(a) hearings, which are required once the government has identified the particular classified evidence to which it is objecting. Id.

The government further misconstrues CIPA when it asserts that it will "have to await the defendant's brief" to ascertain the evidentiary theories on which the defendant will offer the evidence noticed in his CIPA section five notice. See Mot. at 34. Again, neither CIPA section five nor six requires the defendant to file a "brief" outlining his evidentiary theories prior to the section 6(a) hearing. CIPA section six requires the government to identify the specific classified information that will be at issue, and directs the Court to conduct a hearing on the challenged evidence. The defendant will follow the procedural steps mandated by CIPA rather than those invented by the government.

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insufficient to warrant protection in light of the limited scope of the privilege, which the Court defined quite narrowly. The Court noted "several intimations" in the record that the identity of the informant was already known to the defendant, and that the informant was already deceased. Id. at 60 n.8. The Court held that, "[i]n either situation, whatever privilege the Government might have had would have ceased to exist," despite the government's more general interest "in protecting the flow of information." Id. at 60 n.8, 62.

Similarly, in this case, generalized assertions regarding [redacted] methods and its means of protecting classified information are insufficient to justify the asserted privilege, absent a more specific showing of the potential harm caused by disclosure in this particular case. The defense will be prepared to address these issues in further detail during hearings under CIPA section 6(c), when the government's basis for classifying the information and any purported damage caused by disclosure will properly be at issue.

In its motion, the government addresses the categories of documents identified by the defendant in his first CIPA section five notice. In some instances, the government states that, upon further review, the noticed document does not contain classified information and therefore is exempt from CIPA. For the convenience of the Court, the remaining categories are addressed below:

A. The "Trial Ready" Documents

As discussed above, the government has conceded that the documents contained in its "trial ready" set satisfy the CIPA section 6(a) standard. See supra, Section I.B.4; see also Mot. at 34. The noticed documents will be declassified for use at trial, see id., and the only remaining issue is whether the Court will permit the substitutions and redactions proposed by the government. Despite conceding that these documents will be declassified for use at trial, the government attempts to cast the adequacy of its substitutions as a section 6(a) issue, contending that the Court should hold a hearing on the classified information underlying the "additional substitutions and redactions." Mot. at 35-36. As explained above, however, the government cannot simultaneously concede that these documents will be declassified for use at trial and require the Court to conduct a section 6(a) hearing on the same documents. The question of whether the substitutions and redactions are permissible is squarely a section 6(c) issue.

1. The [redacted] report and its predecessor documents

The government has conceded that these documents, which will be declassified and used at trial, satisfy the section 6(a) standard. Accordingly, these documents should pass to the CIPA section 6(c) stage for the Court to evaluate the substitutions and redactions proposed by the government. The government's arguments concerning its proposed substitutions and redactions are premature, and will be addressed at that stage of the proceedings. To the extent that the

Court concludes that there are remaining use, relevance, and admissibility issues concerning these documents at the CIPA section 6(a) stage, the defense will be prepared to address them at the section 6(a) hearing.[20]

2. The June 11, 2009, Fox News article written by James Rosen

The government has conceded that this document, which will be declassified and used at trial, satisfies the section 6(a) standard. Accordingly, this document should pass to the CIPA section 6(c) stage for the Court to evaluate any substitutions and redactions proposed by the government. To that end, the government has conceded that the version of the article to be used at trial will not contain classification markings, and thus the issue of after-the-fact classification markings on this document need not be resolved by the Court. The exhibit provided by the government as the version without classification markings, however, is not the same document noticed by the defense. As the Court will observe, the redacted version provided in discovery and noticed by the defendant [redacted] See Mot., Ex. A, Tab 2. The unredacted version, however, [redacted] See id. The version before the Court at this stage is the version noticed by the defendant, [redacted]

To the extent that the Court concludes that there are remaining use, relevance, and admissibility issues concerning this document at the CIPA section 6(a) stage, the defense will be prepared to address them at the section 6(a) hearing.

[20] In its motion, the government presumes that the defense would offer these documents in furtherance of a "third-party perpetrator" defense. See Mot. at 38. The defense does not agree that these documents would only be relevant and admissible in furtherance of such a defense, nor does the defendant agree that that is the purpose for which these documents will be offered at trial.

3. The FBI 302s relating to the interviews of the defendant, along with agent's notes of those interviews and the defendant's investigative questionnaire

The government has conceded that these documents, which will be declassified and used at trial, satisfy the section 6(a) standard. Accordingly, these documents should pass to the CIPA section 6(c) stage for the Court to evaluate the substitutions and redactions proposed by the government. The government's arguments concerning its proposed substitutions and redactions are premature, and will be addressed at that stage of the proceedings. To the extent that the Court concludes that there are remaining use, relevance, and admissibility issues concerning these documents at the CIPA section 6(a) stage, the defense will be prepared to address them at the section 6(a) hearing.

4. Photographs taken during the warrantless entries by law enforcement of the defendant's State Department office

The defendant's first CIPA section five notice advised the Court that the parties have been discussing how these photographs will be handled at trial, and whether further classification review of visible writings on the photographs will be needed. See Defendant's First CIPA Section 5 Notice at 4 n.3. Those discussions have not been concluded, and the defense respectfully submits that it would be efficient for the Court to defer ruling on these items until closer to trial.

In any event, the government has conceded that these documents, which will be declassified and used at trial, satisfy the section 6(a) standard. Accordingly, if the Court elects to address these documents at the present time, they should pass to the CIPA section 6(c) stage for the Court to evaluate the substitutions and redactions proposed by the government. The government's arguments concerning its proposed substitutions and redactions are premature, and will be addressed at that stage of the proceedings. To the extent that the Court concludes that

there are remaining use, relevance, and admissibility issues concerning these documents at the CIPA section 6(a) stage, the defense will be prepared to address them at the section 6(a) hearing.

5. Electronic Audit Materials reflecting the defendant's [redacted] activity on June 11, 2009

The government has conceded that these documents, which will be declassified and used at trial, satisfy the section 6(a) standard. Accordingly, these documents should pass to the CIPA section 6(c) stage for the Court to evaluate the substitutions and redactions proposed by the government. The government's arguments concerning its proposed substitutions and redactions are premature, and will be addressed at that stage of the proceedings. To the extent that the Court concludes that there are remaining use, relevance, and admissibility issues concerning these documents at the CIPA section 6(a) stage, the defense will be prepared to address them at the section 6(a) hearing.

6. Audit materials reflecting the defendant's access to the [redacted] report on June 11, 2009

The government has conceded that these documents, which will be declassified and used at trial, satisfy the section 6(a) standard. Accordingly, these documents should pass to the CIPA section 6(c) stage for the Court to evaluate the substitutions and redactions proposed by the government. The government's arguments concerning its proposed substitutions and redactions are premature, and will be addressed at that stage of the proceedings. To the extent that the Court concludes that there are remaining use, relevance, and admissibility issues concerning these documents at the CIPA section 6(a) stage, the defense will be prepared to address them at the section 6(a) hearing.

7. Charts and letters identifying the individuals who accessed the intelligence report, their agency affiliation, time of first electronic access, and facility badge records

The government has not yet produced the final version of the Access List or Time of First Access chart to the defense. See Mot. at 48. Despite this, the government suggests that the Court need not wait for the final documents to be created in order to rule on the defendant's notice. Id. The defense submits that the government's suggestion is unwarranted, as the Court cannot rule on issues raised by a document that does not yet exist, and would also likely prove inefficient, as the Court may have to revisit the document once it is in final form.

To the extent that the Court elects to take up the access list at this time, the government has conceded that the access list will be declassified and used at trial, satisfying the section 6(a) standard. Accordingly, these documents should pass to the CIPA section 6(c) stage for the Court to evaluate the substitutions and redactions proposed by the government. The government's arguments concerning its proposed substitutions and redactions are premature, and will be addressed at that stage of the proceedings. To the extent that the Court concludes that there are remaining use, relevance, and admissibility issues concerning these documents at the CIPA section 6(a) stage, the defense will be prepared to address them at the section 6(a) hearing.

8. June 15, 2009, emails among the defendant, John Swegle, and Theodore McCarthy

The government has asserted in its motion that there are no classified equities in these emails that need to be resolved in the CIPA section six proceedings. These emails are therefore no longer at issue.

9. The screenshot of the June 11, 2009, email from John Mattey

The government has asserted in its motion that there are no classified equities in this document that need to be resolved in the CIPA section six proceedings. This item is therefore no longer at issue.

B. The First Set of "Treat as Classified" Documents

1.-3. Investigative questionnaires, badge records, and phone records for individuals who accessed the intelligence report at issue

The government has identified particular classified information in these categories for which it has requested a hearing under CIPA section 6(a). The defense will be prepared to address the use, relevance, and admissibility of that information at the section 6(a) hearing.

4. The FBI 302 for a February 25, 2010, interview with Eric Richardson

Subsequent to the filing of the defendant's first CIPA section five notice, the government determined that this document should be unclassified. Accordingly, there are no classified equities that need to be resolved in the CIPA section six proceedings.

5. Documents related to [redacted] policies

The government's motion states that these materials should be have been treated as part of the "trial ready" set of documents, for which the government is only proposing substitutions. See Mot. at 56. The government has therefore conceded that these documents, which will be declassified and used at trial, satisfy the section 6(a) standard. Accordingly, these documents should pass to the CIPA section 6(c) stage for the Court to evaluate the substitutions and redactions proposed by the government. The government's arguments concerning its proposed substitutions and redactions are premature, and will be addressed at that stage of the proceedings. To the extent that the Court concludes that there are remaining use, relevance, and admissibility

issues concerning these documents at the CIPA section 6(a) stage, the defense will be prepared to address them at the section 6(a) hearing.

6. List of SCI compartments and access privileges for VCI personnel

The government's motion asserts that a stipulation reached by the parties during classified discovery resolves the defendant's need for this document at trial. Mot. at 57. The defense does not agree that such a stipulation would resolve its need for this document. The proposed stipulation, which has not even been finalized, related to a separate discovery request by the defense, not the list of SCI compartments noticed by the defendant. Given that the terms of such a stipulation have not yet been formalized, it is also premature for the government to make this assertion. The defense will be prepared to address the relevance, use, and admissibility of this document at the section 6(a) hearing.

7. Non-disclosure agreement signed by Jeffrey Eberhardt

The government has asserted in its motion that there are no classified equities in this document that need to be resolved in the CIPA section six proceedings. This item is therefore no longer at issue.

8.-9. Other articles written by James Rosen

The government states in its motion that it will provide versions of these articles without any classification headers that can be used at trial. Accordingly, these items do not need to be addressed in the CIPA process.

The government's motion states, however, that the government will not confirm whether the two articles noticed by the defendant in fact contain classified information. For present purposes the government's production of the articles in unclassified form resolves the need for these copies of the articles to be taken up during the CIPA section 6(a) hearing. If the defendant

intends to elicit testimony at trial concerning whether, in fact, these articles contain classified information, such testimony will be noticed separately in a subsequent CIPA section five notice.[21]

10. Email regarding the charged article sent by [redacted]

The government has identified particular classified information in this item for which it has requested a hearing under CIPA section 6(a). The defense will be prepared to address the use, relevance, and admissibility of that information at the section 6(a) hearing.[22]

11. Email sent by Melanie Higgins on June 11, 2009

The government has indicated that this document will be declassified for use at trial. Accordingly, it need not be addressed during the CIPA process.

12. FBI 302 and agent's notes from a September 20, 2010 interview with [redacted]

The government has proposed that this item can be removed from the CIPA process if the defendant agrees to (a) refer to [redacted] and another [redacted] and (b) forego the disclosure at trial of [redacted] The defense is reviewing this proposal and will advise the government and the Court if these proposed substitutions are acceptable. At present, however, the government's arguments concerning its proposed substitutions and redactions are premature, and will be addressed at the section 6(c) stage of the proceedings. To the extent that the Court concludes that there are

[21] The defense also reserves its rights, pursuant to the Protective Order, to request a determination as to whether these articles contain classified information.

[22] In its motion, the government proposes that this document need not be addressed during the CIPA process if the defendant agrees to a substitution for [redacted] and a redacted version of the June 11, 2009, Fox News article that it attaches. See Mot. at 59. The defense is reviewing the government's proposal. At the present time, however, the defense intends to offer the document as noticed in its first CIPA section five notice.

remaining use, relevance, and admissibility issues concerning these documents at the CIPA section 6(a) stage, the defense will be prepared to address them at the section 6(a) hearing.

Respectfully submitted,

DATED: October 7, 2013

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EXHIBIT 5

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/06/2012

From 11/30/2011 to 01/18/2012, GREGORY CEFUS, DIRECTOR OF THE NATIONAL SECURITY SECTION and DEPUTY DIRECTOR OF THE FIELD INTELLIGENCE ELEMENT (FIE) at the DEPARTMENT OF ENERGY's (DoE) SAVANNAH RIVER SITE (hereafter SRS), DOB: [redacted], SSN: [redacted] office telephone number [redacted] and cellular telephone number [redacted], emailed FEDERAL BUREAU OF INVESTIGATION (FBI) SPECIAL AGENT (SA) Michael J. Condon, using Gregory.Cefus@srnl.doe.gov. The content of the email included attachments of computer log-on records from 06/11/2009 on computers within the Sensitive Compartmented Information Facility (SCIF) located at SRS that contained the telephone line (803)725-1012. CEFUS indicated in email that the computer log-on records from 06/11/2009 were too large a file to send in one email and therefore, CEFUS sent several emails with the 6/11/2009 computer records split into multiple attached files.

On 02/06/2012, SA Condon conducted a telephonic interview of GREGORY CEFUS, who was reached by SA Condon on his office telephone number. After being advised of the identity of the interviewing agent and the purpose of the interview, CEFUS voluntarily provided the following information:

CEFUS stated that the aforementioned computer records displayed a user's activity throughout the day and not just a user's initial log-on and final log-off their computer terminal. Regarding the computer records, CEFUS explained that when a user's computer terminal accessed the server, a record was logged of their action. CEFUS was asked by the interviewing agent to identify the individual for each user name in the computer records provided. CEFUS provided the following:

User Name	Individual
dohatdj	David Hathcock
svgouap	Tony Gouge
domalra	Bob Malstrom
svpricl	Claresa Price
svdenpd	Paul D'entremont
svbucrl	Bob Buckley

Investigation on 02/06/2012 at Washington, DC

File # [redacted] Date dictated NOT DICTATED

by SA Michael J. Condon 2/7/12

mjc12037.302

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FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 05/02/2012

On 03/02/2012, GREGORY CEFUS, DIRECTOR OF THE NATIONAL SECURITY SECTION and DEPUTY DIRECTOR OF THE FIELD INTELLIGENCE ELEMENT (FIE) at the DEPARTMENT OF ENERGY's (DoE) SAVANNAH RIVER NATIONAL LABORATORY(hereafter SRNL)/SAVANNAH RIVER SITE (hereafter SRS), DOB: [redacted] SSN: [redacted], office telephone number [redacted] and cellular telephone number [redacted] was contacted by FEDERAL BUREAU OF INVESTIGATION (FBI) SPECIAL AGENT (SA) Michael J. Condon, on CEFUS' office telephone number. SA Condon advised CEFUS that the computer log-on records from 06/11/2009 for computers within the Sensitive Compartmented Information Facility (SCIF) located at SRS, that were sent to SA Condon by CEFUS via email, did not appear to have entries from the complete business day on 06/11/2009. After reviewing the aforementioned computer log-on records, CEFUS agreed that they were incomplete and stated that he would send SA Condon complete records. [Agent Note: CEFUS sent SA Condon the aforementioned incomplete computer log-on records via email attachments over several weeks. This transaction is documented in a FBI FD-302 dated 02/06/2012].

On 03/21/2012, FBI SA Condon accepted custody of printed out records sent by CEFUS. The records were a hard copy print out of computer log-on information from 06/11/2009 on computers within the Sensitive Compartmented Information Facility (SCIF) at SRS.

On 04/16/2012, SA Condon conducted a telephonic interview of CEFUS, who was reached by SA Condon on his office telephone number. CEFUS stated that the SRS SCIF hard copy computer log-on records, received by SA Condon on 03/21/2012, were the complete SRS SCIF computer log-on records from the day of 06/11/2009. SA Condon inquired about the seven character user names on the hard copy SRS SCIF computer log-on records and the DOE SRS employees they correspond with. CEFUS provided the following information:

User Name	Employee
dohatdj	David Hathcock
svgouap	Tony Gouge

Investigation on 05/01/2012 at Washington, DC

File # [redacted] Date dictated NOT DICTATED

by SA Michael J. Condon:mjc5/4/12

mjc12123.302

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FD-302a (Rev. 10-6-95)

[redacted]

Continuation of FD-302 of GREGORY CEFUS , On 05/01/2012 , Page 2

User Name	Employee
domalra	Bob Malstrom
svpricl	Claresa Price
svdenpd	Paul D'entremont
svbucrl	Bob Buckley
svostbl	Lance Osteen
svmctrc	Rodney McTeer
dovisae	Ann Visser
svpreda	David Pretorius
svcoldh	Dave Coleman
svlarws	Steve Large
svsweja	John Swegle
svbrotb	Tim Brown
llguylg	Lloyd Guyman
svmccth	Theodore McCarthy
svbolja	Jim Bollinger

SA Condon also inquired about the line items within the SRS SCIF computer log-on records that did not appear to be a record of an account assigned to an employee or individual user, but that of the SRNL/SRS network. CEFUS could not explain these line items within the log-on records. SA Condon asked if CEFUS could inquire about these line items to the information technology (IT) employees at SRNL/SRS and CEFUS agreed.

On 05/01/2012, SA Condon received an email from CEFUS using [redacted]. The content of the email included an explanation of line items within the SRS SCIF computer log-on records where there is activity other than that of an account assigned to an employee or individual user.

The hard copy SRS SCIF computer log-on records from 06/11/2009, as well as the aforementioned email including an explanation of line items within the SRS SCIF computer log-on records, will be maintained in a FD340 envelope and filed with the captioned investigation.