

1 DAVID C. WEISS
 Special Counsel
 2 LEO J. WISE
 Principal Senior Assistant Special Counsel
 3 DEREK E. HINES
 Senior Assistant Special Counsel
 4 SEAN F. MULRYNE
 CHRISTOPHER M. RIGALI
 5 Assistant Special Counsels

6 950 Pennsylvania Avenue NW, Room B-200
 Washington, D.C. 20530
 7 Telephone: (771) 217-6091
 E-mail: christopher.rigali2@usdoj.gov
 8 Attorneys for the United States

9 Attorneys for Plaintiff
 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 ALEXANDER SMIRNOV,

16 Defendant.

No. 2:24-cr-00091-ODW

GOVERNMENT'S 18 U.S.C. App. 3, § 2
NOTICE AND REQUEST TO DESIGNATE A
CLASSIFIED INFORMATION SECURITY
OFFICER; MEMORANDUM OF POINTS AND
AUTHORITIES

PROPOSED ORDER FILED SEPARATELY

17
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 19
 20 Plaintiff, United States of America, by and through its counsel
 21 of record, the Office of Special Counsel David C. Weiss, hereby notifies
 22 the Court that the United States will invoke the Classified Information
 23 Procedures Act ("CIPA"), 18 U.S.C. App. 3, in this case. The United
 24 States provides this notice pursuant to 18 U.S.C. App. 3, § 2, and
 25 submits the following memorandum of law summarizing the procedures
 26 mandated by CIPA for protecting classified information and further
 27 requests that the Court enter an order appointing a Classified
 28 Information Security Officer ("CISO").

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Dated: March 1, 2024

Respectfully submitted,

DAVID C. WEISS
Special Counsel

LEO J. WISE
Principal Senior Assistant Special
Counsel

DEREK E. HINES
Senior Assistant Special Counsel

SEAN F. MULRYNE
Assistant Special Counsel



CHRISTOPHER M. RIGALI
Assistant Special Counsel

Attorneys for Plaintiff
UNITED STATES OF AMERICA

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Alexander Smirnov is charged in a two-count indictment
4 with making a false statement to law enforcement, in violation of 18
5 U.S.C. § 1001, and causing the creation of a false and fictitious
6 record in a federal investigation, in violation of 18 U.S.C. §§ 1519 &
7 2. (Dkt. 1). Trial is scheduled to begin on April 23, 2024. (Dkt. 40).

8 The United States anticipates that it may need to bring to the
9 Court's attention certain discovery issues or other matters relating
10 to classified material, and to do so, it will need to proceed under
11 the Classified Information Procedures Act, 18 U.S.C. App. 3 ("CIPA").
12 Section 2 of CIPA authorizes a party to move for a pretrial conference
13 any time after the filing of an indictment to consider matters relating
14 to classified information. The United States expects that, in the
15 coming weeks and following its further assessment of the nature and
16 scope of classified material at issue, it will request that the Court
17 hold a CIPA Section 2 hearing. For now, however, the United States
18 respectfully requests that the Court designate a Classified Information
19 Security Officer ("CISO"), as detailed below.

20 **II. CIPA PROCEDURAL FRAMEWORK**

21 CIPA mandates several protocols for protecting all forms of
22 classified information in criminal proceedings. Essentially, CIPA is
23 "a procedural tool for a court to address the relevance of classified
24 information before it may be introduced." United States v. Marzook,
25 412 F. Supp. 2d 913, 917-18 (N.D. Ill. 2006) (citing United States v.
26 Dumeisi, 424 F.3d 566, 578 (7th Cir. 2005)); see also United States v.
27 Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988) ("CIPA creates a pre-
28 trial procedure for ruling upon the admissibility of classified

1 information.”). CIPA’s fundamental purpose is to “protect[] and
2 restrict[] the discovery of classified information in a way that does
3 not impair the defendant’s right to a fair trial.” United States v.
4 O’Hara, 301 F.3d 563, 569 (7th Cir. 2002).

5 **A. Section 1 - Definitions**

6 Section 1 of CIPA defines “classified information” as “any
7 information or material that has been determined by the United States
8 Government pursuant to an Executive order, statute, or regulation, to
9 require protection against unauthorized disclosure for reasons of
10 national security.” 18 U.S.C. App. 3, § 1(a). “National security,”
11 in turn, is defined as “the national defense and foreign relations of
12 the United States.” Id. at § 1(b). It is important to bear in mind
13 that CIPA applies equally to classified testimony and classified
14 documents. United States v. North, 708 F. Supp. 399, 399-400 (D.D.C.
15 1988).

16 The Supreme Court has acknowledged the importance of protecting
17 the nation’s secrets from disclosure, noting that “[t]he Government
18 has a compelling interest in protecting both the secrecy of information
19 important to our national security and the appearance of
20 confidentiality so essential to the effective operation of our foreign
21 intelligence service.” C.I.A. v. Sims, 471 U.S. 159, 175 (1985)
22 (internal punctuation omitted). Accordingly, federal courts have long
23 recognized that “[i]t is not in the national interest for revelation
24 of either the existence or the product of [foreign intelligence
25 operations and information] to extend beyond the narrowest limits
26 compatible with the assurance that no injustice is done to the criminal
27 defendant” United States v. Lemonakis, 485 F.2d 941, 963 (D.C.
28 Cir. 1973).

1 **B. The Executive Branch Decides Whether to Disclose Classified**
2 **Information**

3 The decision whether to disclose classified information to anyone
4 is committed to the Executive Branch. Dep't of the Navy v. Egan, 484
5 U.S. 518, 528-29 (1988). In enacting CIPA, Congress made this clear
6 by giving the government the statutory right to seek an expedited
7 appeal from a "district court order in a criminal case authorizing the
8 disclosure of classified information, imposing sanctions for non-
9 disclosure of classified information, or refusing a protective order."
10 18 U.S.C. App. 3, § 7. Thus, although district courts have the power
11 to order, after conducting the appropriate analysis under CIPA,
12 disclosure of certain information in discovery to a defendant, district
13 courts are not authorized to disclose unilaterally any classified
14 information to a defendant or his counsel.

15 At present, the government does not anticipate relying on or
16 introducing classified information in its case-in-chief, and the
17 government does not anticipate that classified information will be
18 admissible in a defense case. The government is in the process,
19 however, of assessing whether any classified information needs to be
20 provided to the defense in furtherance of the government's discovery
21 obligations.

22 Regarding the (potential) provision of classified information to
23 defense counsel, the government notes that the decision whether to
24 grant a security clearance to anyone, including defense counsel, is
25 committed to the Executive Branch agencies responsible for protecting
26 the classified information. Egan, 484 U.S. at 528-29. Moreover, a
27 security clearance at a given level is insufficient by itself to entitle
28 any individual to access or receive national security information

1 classified at that level. Rather, in addition to receiving a security
2 clearance after a favorable determination of eligibility and execution
3 of a non-disclosure agreement, an individual must have a "need to know"
4 the classified information at issue. See Exec. Order 13526 § 4.1(a)(3).
5 "Need to know" is defined as "a determination within the executive
6 branch . . . that a prospective recipient requires access to specific
7 classified information in order to perform or assist in a lawful and
8 authorized governmental function." Id. § 6.1(dd).

9 **C. Section 2 - Pretrial Conference**

10 Section 2 of CIPA provides that "[a]t any time after the filing
11 of the indictment or information, any party may move for a pretrial
12 conference to consider matters relating to classified information that
13 may arise in connection with the prosecution." 18 U.S.C. App. 3, § 2.
14 After such a motion is filed, Section 2 mandates that the district
15 court "shall promptly hold a pretrial conference to establish the
16 timing of requests for discovery, the provision of notice required by
17 Section 5 of [CIPA], and the initiation of the procedure established
18 by Section 6 of [CIPA]." Id. The Section 2 pretrial conference is
19 not a conference to address or resolve substantive issues concerning
20 the use of classified information. See S. Rep. No 96-823, at 5-6
21 (1980), 1980 U.S.C.C.A.N. 4294, 4298-99.¹

22 As noted above, the government expects requesting the Court to
23 hold a Section 2 hearing in the coming weeks and following its further
24 assessment of the nature and scope of classified material at issue;
25 this will enable the government to better apprise the Court regarding

26
27 ¹ Indeed, to foster open discussions at the pretrial conference,
28 § 2 provides that no admission made by the defendant or his or her
attorney at the pretrial conference may be used against the defendant
unless the admission is in writing and signed by both the defendant
and his or her attorney. 18 U.S.C. App. 3, § 2.

1 its expectations for CIPA litigation in this matter.²

2 **D. Section 3 - Protective Orders**

3 Section 3 of CIPA requires the Court, upon the request of the
4 United States, to issue an order "to protect against the disclosure of
5 any classified information disclosed by the United States to any
6 defendant in any criminal case. . . ." 18 U.S.C. App. 3, § 2. In
7 addition to prohibiting such disclosure, protective orders issued under
8 CIPA generally set forth rules for all parties governing the use and
9 storage of classified information and provide for the appointment of a
10 CISO, who will assist the Court and the parties with the logistics and
11 processes for producing, storing, filing, and handling classified
12 information. In other words, the CISO is a resource for the Court and
13 both parties regarding the handling and use of classified information
14 in this litigation.

15 **E. Section 4 - Protection of Classified Information During
16 Discovery**

17 Section 4 of CIPA provides a procedural mechanism to protect
18 classified information, sources, and methods, while simultaneously
19 ensuring that the government is able to satisfy its discovery
20 obligations.

21 CIPA does not create any new right of discovery or expand the
22 rules governing the admissibility of evidence. Dumeisi, 424 F.3d at
23 578 ("CIPA does not create any discovery rights for the defendant.");
24 United States v. Johnson, 139 F.3d 1359, 1365 (11th Cir. 1998) ("CIPA
25

26 ² Section 2 hearings are typically public, and as such, the
27 hearings do not involve a discussion about the nature or scope of
28 classified information. Should the Court require additional
information about the nature and scope of the classified information
at issue, the government can make itself available for an ex parte
Section 2 hearing in a classified setting.

1 has no substantive impact on the admissibility or relevance of
2 probative evidence."). Rather, CIPA applies preexisting general
3 discovery law in criminal cases to classified information and restricts
4 discovery of such information to protect the government's national
5 security interests. United States v. Klimavicius-Viloria, 144 F.3d
6 1249, 1261 (9th Cir. 1998); United States v. Baptista-Rodriguez, 17
7 F.3d 1354, 1363-64 (11th Cir. 1994); United States v. Yunis, 867 F.2d
8 617, 621 (D.C. Cir. 1989).

9 CIPA thus does not, and was not intended to, "expand the
10 traditional rules of discovery under which the government is not
11 required to provide criminal defendants with information that is
12 neither exculpatory nor, in some way, helpful to the defense." United
13 States v. Varca, 896 F.2d 900, 905 (5th Cir. 1990); see United States
14 v. McVeigh, 923 F. Supp. 1310, 1314 (D. Colo. 1996) ("CIPA does not
15 enlarge the scope of discovery or of Brady"); see also United States
16 v. Abu Ali, 528 F.3d 210, 247 (4th Cir. 2008). Nor does CIPA provide
17 that the admissibility of classified information be governed by
18 anything other than the "well-established standards set forth in the
19 Federal Rules of Evidence." Baptista-Rodriguez, 17 F.3d at 1364
20 (citations omitted).

21 Accordingly, pursuant to CIPA Section 4, district courts have the
22 opportunity to assess whether, and the extent to which, specified items
23 of classified information should be disclosed. Specifically, Section
24 4 provides that "[t]he court, upon a sufficient showing, may authorize
25 the United States to delete specified items of classified information
26 from documents to be made available to the defendant through discovery
27 under the Federal Rules of Criminal Procedure, to substitute a summary
28 of the information for such classified documents, or to substitute a

1 statement admitting the relevant facts that classified information
2 would tend to prove.” 18 U.S.C. App. 3, § 4; see also United States
3 v. Sedaghaty, 728 F.3d 885, 904 (9th Cir. 2013); United States v.
4 Rezaq, 134 F.3d 1121, 1142 (D.C. Cir. 1998).

5 Similar to Federal Rule of Criminal Procedure 16(d)(1), which
6 gives the district court the authority to “deny, restrict, or defer
7 discovery or inspection, or grant other appropriate relief” for “good
8 cause,” CIPA Section 4 authorizes the district court “upon a sufficient
9 showing” to deny, or otherwise restrict, discovery by the defendant of
10 classified documents and information belonging to the United States.
11 18 U.S.C. App. 3, § 4; see, e.g., United States v. Asgari, 940 F.3d
12 188, 191 (6th Cir. 2019); Rezaq, 134 F.3d at 1142; Yunis, 867 F.2d at
13 619-25. The legislative history of CIPA makes clear that Section 4
14 was intended to simply clarify the district court’s power under Rule
15 16(d)(1) to deny or restrict discovery in order to protect national
16 security. See S. Rep. No. 96-823, at 6, 1980 U.S.C.C.A.N. at 4299-
17 4300; see also United States v. Aref, 533 F.3d 72, 78-79 (2d Cir.
18 2008).

19 Thus, a district court has the authority to withhold disclosure
20 of classified information if it determines that the information is not
21 “relevant and helpful to the defense of an accused.” Klimavicius-
22 Viloria, 144 F.3d at 1261 (internal quotation and citation omitted);
23 see also United States v. Shih, 73 F.4th 1077, 1102 (9th Cir. 2023)
24 (quoting Sedaghaty, 728 F.3d at 904)); Asgari, 940 F.3d at 191; United
25 States v. Amawi, 695 F.3d 457, 469-70 (6th Cir. 2012); see also Yunis,
26 867 F.2d at 623 (“[A] defendant seeking classified information . . .
27 is entitled only to information that is at least ‘helpful to the defense
28 of [the] accused.’” (quoting Roviaro v. United States, 353 U.S. 53,

1 60-61 (1957))). "Under this [relevant and helpful] test, information
2 meets the standard for disclosure 'only if there is a reasonable
3 probability that, had the evidence been disclosed to the defense, the
4 result of the proceeding would have been different.'" Klimavicius-
5 Viloria, 144 F.3d at 1261 (quoting United States v. Bagley, 473 U.S.
6 667, 682 (1985)).

7 CIPA Section 4 also provides, similar to Rule 16(d)(1), that the
8 government may demonstrate that the use of an alternative discovery
9 procedure—such as deletion or substitution—is warranted. CIPA further
10 specifically provides that the government may make this showing in
11 camera and ex parte. 18 U.S.C. App. 3, § 4; see Amawi, 695 F.3d at
12 472 ("[E]very court that has considered this issue has held that CIPA
13 permits ex parte hearings."); United States v. Hanna, 661 F.3d 271,
14 295 (6th Cir. 2011) ("This court has already stated that CIPA 'permits
15 the government to have the trial court examine classified information
16 in camera and ex parte and determine whether it is necessary for the
17 defense.'" (quoting United States v. Smith, 899 F.2d 564, 565 n.1 (6th
18 Cir. 1990))); see also Shih, 73 F.4th at 1102; United States v. Abu-
19 Jihaad, 630 F.3d 102, 140 (2d Cir. 2010); Aref, 533 F.3d at 81; Yunis,
20 867 F.2d at 622-23; Sarkissian, 841 F.2d at 965.

21 As noted above, a security clearance at a given level is not
22 sufficient to entitle any individual to access or receive national
23 security information classified at that level. Rather, in addition to
24 receiving a clearance after a favorable determination of eligibility
25 and execution of a non-disclosure agreement, an individual must have a
26 "need to know" the classified information at issue. See Exec. Order
27 13526 § 4.1(a)(3).

28

1 Likewise, while the defendant may be entitled to notice when the
2 government initiates CIPA proceedings under Section 4 or 6, there is
3 "no due process right to receive a description of materials in the
4 government's possession that are not discoverable." Sedaghaty, 728
5 F.3d at 909 (citing United States v. Mejia, 448 F.3d 436, 458 (D.C.
6 Cir. 2006) (noting that, in the context of CIPA, as in other discovery
7 in criminal cases, defendant is "'not entitled to access to any of the
8 evidence reviewed by the court . . . to assist in his argument' that
9 it should be disclosed" (citation omitted))). Indeed, a district court
10 considering a motion to withhold classified information "must first
11 determine whether the material in dispute is discoverable." Hanna,
12 661 F.3d at 295; see Sedaghaty, 728 F.3d at 904 ("[A] district court
13 must first determine whether . . . the information at issue is
14 discoverable at all."). Only if the information is discoverable must
15 the court then examine whether it is also relevant and helpful to the
16 defense. Sedaghaty, 728 F.3d at 904. A defendant, however, may be
17 permitted to file his own ex parte submission outlining his theory of
18 the defense to aid the court in the review of any classified materials.
19 See id. at 906 n.10; see also United States v. Abdul-Latif, CR11-
20 0228JLR, Dkt. 87 (Order Granting Government's In Camera, Ex Parte
21 Motion) (W.D. Wash. 2012).

22 **F. Section 5 - Procedures for Cases Involving Classified**
23 **Information Possessed by a Defendant**

24 If a defendant reasonably expects to disclose or cause the
25 disclosure of classified information, Sections 5 and 6 of CIPA apply.
26 See, e.g., Baptista-Rodriguez, 17 F.3d at 1363; Sarkissian, 841 F.2d
27 at 965-66; United States v. Collins, 720 F.2d 1195, 1199-1200 (11th
28 Cir. 1983).

1 Section 5 requires the defendant to provide timely written notice
2 to the Court and the government describing any classified information
3 that he reasonably expects to disclose. See 18 U.S.C. App. 3, § 5(a).
4 Pursuant to Section 5, notification must take place "within the time
5 specified by the court, or where no time is specified, within thirty
6 days prior to trial." Id. at § 5. Although the description of the
7 classified information may be brief, it must inform "[t]he government
8 . . . exactly to which documents [the defendant] was referring, and
9 [to] what information was contained in them" that the defendant
10 reasonably believes to be necessary to his defense. United States v.
11 Rewald, 889 F.2d at 855, amended, 902 F.2d 18 (9th Cir. 1990) (quoting
12 United States v. Miller, 874 F.2d 1255, 1276 (9th Cir. 1989)); see also
13 Collins, 720 F.2d at 1199. The defendant must provide formal notice
14 under Section 5 even if the government believes or knows that the
15 defendant may assert a defense involving classified information. See
16 United States v. Badia, 827 F.2d 1458, 1465-66 (11th Cir. 1987).

17 Section 5 specifically prohibits a defendant from disclosing any
18 classified information until such notice has been given, the government
19 has had the opportunity to seek a determination pursuant to Section 6,
20 and any appeal by the government under Section 7 has been decided or
21 the time for filing an appeal has expired. 18 U.S.C. App. 3, § 5(a).
22 If the defendant fails to provide the requisite notice, then the Court
23 may preclude disclosure of any classified information not made the
24 subject of notification, and may prohibit the defendant from examining
25 any witness with respect to such information. Id. at § 5(b).

26 **G. Section 6 - Pretrial Procedures Regarding the Admission of**
27 **Classified Information**
28

1 Section 6 describes the procedures by which the Court shall, upon
2 request by the United States, conduct a hearing to make determinations
3 of use, relevance, or admissibility of classified information. 18
4 U.S.C. App. 3, § 6(a). Following such a hearing and formal findings
5 of admissibility, the United States may move to substitute an admission
6 of relevant facts or summaries for the classified information the Court
7 rules to be admissible. 18 U.S.C. App. 3 § 6(c). See, e.g., Baptista-
8 Rodriguez, 17 F.3d at 1363; Collins, 720 F.2d at 1197-99.

9 1. Section 6(a) and (b) - Pretrial Hearing on Disclosure
10 and Notice

11 CIPA Section 6 sets forth the steps that a court must take
12 concerning specific classified information that may be subject to
13 disclosure by either party at trial or in pretrial proceedings.

14 If either the government or the defense seeks to introduce or
15 cause the disclosure of classified information, the government may move
16 to protect that information. First, Section 6(a) provides that, upon
17 motion of the government, the Court must hold a hearing "to make all
18 determinations concerning the use, relevance, or admissibility of
19 classified information that would otherwise be made during the trial
20 or pretrial proceeding." 18 U.S.C. App. 3 § 6(a). The hearing is to
21 be held in camera if the Attorney General certifies that a public
22 proceeding may result in the disclosure of classified information. Id.
23 If the government's Section 6(a) motion is filed before trial or a
24 pretrial proceeding, "the court shall rule [on the use, relevance, or
25 admissibility of the classified information at issue] prior to the
26 commencement of the relevant proceeding." Id.

27 Section 6(b) requires that before any hearing is conducted under
28 Section 6(a), the government must notify the defendant of the hearing

1 and identify the classified information at issue. If the information
2 was not previously made available to the defendant, the government may,
3 with the court's approval, provide a generic description of the
4 material to the defendant. Thus, as Congress recognized in enacting
5 CIPA, "the government would not have to disclose the identity of an
6 undercover intelligence agent not previously disclosed to the
7 defendant; instead, the government would describe the information as
8 'the identity of an undercover intelligence agent' if this meets with
9 court approval." S. Rep. No. 96-823, at 8, 1980 U.S.C.C.A.N. at 4301.

10 If the defense has indicated that it intends to seek to introduce
11 into evidence classified information and the government seeks to
12 protect that information from disclosure, a court at the Section 6(a)
13 hearing hears the defense proffer and the arguments of counsel, then
14 rules whether the classified information identified by the defense is
15 relevant under Rule 401 of the Federal Rules of Evidence.³ See Yunis,
16 867 F.2d at 622; United States v. Smith, 780 F.2d 1102, 1105-06 (4th
17 Cir. 1985). A court's inquiry does not end there, however, because
18 under the Federal Rules of Evidence, "[n]ot all relevant evidence is
19 admissible at trial." Smith, 780 F.2d at 1106. A court must analyze
20 and apply other pertinent rules of evidence to assess whether the
21 information meets the standards for admissibility. At the conclusion
22 of the Section 6(a) hearing, a court must state in writing the reasons
23 for its determination as to each item of classified information. 18
24 U.S.C. App. 3 § 6(a).

25
26 ³ CIPA does not change the "generally applicable evidentiary rules
27 of admissibility." United States v. Wilson, 750 F.2d 7, 9 (2d Cir.
28 1984); accord Yunis, 867 F.2d at 623. Rather, CIPA alters the timing
of rulings concerning "use, relevance or admissibility" so as to
require them to be made before trial. United States v. Poindexter,
698 F. Supp. 316, 318 (D.D.C. 1988); see also United States v. Smith,
780 F.2d 1102, 1106 (4th Cir. 1985).

1 2. Section 6(c) and (d) - Alternative Procedure for
2 Disclosure of Classified Information

3 If a court rules that one or more items of classified information
4 that either party seeks to introduce as evidence are admissible, the
5 government may propose a "substitution" for the classified information
6 at issue.⁴ 18 U.S.C. App. 3 § 6(c)(1). Specifically, if disclosure
7 of the information is necessary, the United States may move the court
8 to substitute for specific classified information a statement admitting
9 relevant facts that the classified information would tend to prove, or
10 to substitute for specific classified information a summary of that
11 information. Section 6 authorizes substitutions for classified
12 material in the form of "redactions and substitutions so long as these
13 alternatives do not deprive the defendant of a fair trial." 18 U.S.C.
14 App. 3 § 6(c)(1)(A), (B); see Abu Ali, 528 F.3d at 255; see also United
15 States v. Giffen, 473 F.3d 30, 33 (2d Cir. 2006); Smith, 780 F.2d at
16 1105. A court must grant the motion for substitution if it finds that
17 the admission or summary "will provide the defendant with substantially
18 the same ability to make his defense as would disclosure of the specific
19 classified information." 18 U.S.C. App. 3 § 6(c)(1).

20 Any hearing under Section 6(c) shall be held in camera at the
21 request of the Attorney General. 18 U.S.C. App. 3 § 6(c)(1). In
22 connection with a hearing, the government may submit to the court an
23 affidavit of the Attorney General certifying that disclosure of
24 classified information would cause identifiable damage to national
25

26 ⁴ Substitutions and summaries are not the only means by which the
27 government may seek judicial approval to protect classified information
28 from public disclosure. Additional measures, such as the "Silent
Witness Rule," may be proposed to protect classified information from
unauthorized public disclosure. See, e.g., United States v. Mallory,
40 F.4th 166, 174-78 (4th Cir. 2022).

1 security and explaining the basis for the classification of that
2 information. A court must review that affidavit in camera and ex parte
3 if requested by the government. 18 U.S.C. App. 3 § 6(c)(2). The court
4 shall seal and preserve the record of any in camera hearing at the
5 close of which the court determines that classified information may
6 not be disclosed or elicited at trial or a pretrial proceeding. 18
7 U.S.C. App. 3 § 6(d).

8 3. Section 6(e) - Prohibition on Disclosure and Relief
9 for Defense

10 If the court determines that an item of classified information is
11 relevant and admissible, and denies the government's motion for
12 substitution under Section 6(c), the government may object to
13 disclosure of the classified information. In such cases, the court
14 "shall order that the defendant not disclose or cause the disclosure
15 of such information." 18 U.S.C. App. 3 § 6(e)(1). Section 6(e)(2)
16 sets forth a sliding scale of remedies that the court may impose in
17 such a case, to include dismissal of specific counts, finding against
18 the government on an issue to which the classified information related,
19 striking or precluding testimony of a witness, or dismissing the
20 indictment. See 18 U.S.C. App. 3 § 6(e)(2); S. Rep. No. 96-823, at 9,
21 1980 U.S.C.C.A.N. at 4302-03. An order imposing any such sanctions
22 shall not take effect until the government has had the opportunity to
23 appeal the order under CIPA Section 7, and thereafter withdraw its
24 objection to disclosure.⁵ 18 U.S.C. App. 3 § 7.

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26
27 ⁵ As noted above, if the court determines after an in-camera
28 hearing that the classified information at issue may not be disclosed
or elicited during the proceeding, the record of the hearing must be
sealed and preserved for use in the event of an appeal. 18 U.S.C. App.
3 § 6(d).

1 4. Section 6(f) - Reciprocity

2 If the court determines under Section 6(a) that the defense may
3 disclose classified information in connection with a trial or pretrial
4 proceeding, the court shall order the government to provide the defense
5 with information it expects to use to rebut the classified information,
6 unless the interests of fairness do not so require. 18 U.S.C. App. 3
7 § 6(f). The court may place the government under a continuing duty to
8 disclose rebuttal information, and if the government fails to comply,
9 exclude the rebuttal evidence and prohibit the government from
10 examining any witness with respect to such information. Id.

11 **H. Section 7 - CIPA's Interlocutory Appeal Framework**

12 Section 7 sets forth the United States' exclusive right to seek
13 an interlocutory appeal of a "decision or order authorizing the
14 disclosure of classified information, imposing sanctions for
15 nondisclosure of classified information, or refusing a protective order
16 sought by the United States to prevent the disclosure of classified
17 information." 18 U.S.C. App. 3, § 7(a). The term "disclosure" relates
18 both to information which the court orders the government to divulge
19 to the defendant as well as to information already possessed by the
20 defendant which he or she intends to make public. The appeal can be
21 taken before or during trial. Id. at § 7(b). "Prior to trial, an
22 appeal shall be taken within fourteen days after the decision or order
23 appealed from and the trial shall not commence until the appeal is
24 resolved." Id. The trial must be adjourned until an appeal is resolved
25 if the appeal is taken during trial. Id.

26 **I. Section 8 - Procedures Governing the Introduction of**
27 **Classified Information at Pretrial Proceedings or Trial**

28

1 Section 8 prescribes additional protections and procedures
2 governing the introduction of classified information into evidence.
3 Section 8(a) provides that classified documents may be admitted into
4 evidence without changing their classification status. To prevent
5 "unnecessary disclosure" of classified information, Section 8(b)
6 permits the court to order admission into evidence of only a part of a
7 writing, recording, or photograph, or the entirety of said items with
8 all or part of the classified information contained therein excised,
9 unless fairness requires that the entirety of the relevant item be
10 considered. Lastly, Section 8(c) provides a procedure to address
11 issues presented by any question or line of inquiry that would require
12 a witness to disclose classified information not previously deemed
13 admissible. If the government poses an objection to the examination,
14 the court "shall take suitable action to determine whether the response
15 is admissible as will safeguard against the compromise of any
16 classified information," to include requiring a proffer from the
17 government of the anticipated response and a proffer from the defendant
18 of the information sought to be elicited. 18 U.S.C. App. 3, § 8(c).
19 In effect, this procedure supplements the notice provision under
20 Section 5 and the hearing provision in Section 6(a) to cope with
21 situations that cannot be handled effectively by those sections, such
22 as where defense counsel does not realize that the answer to a given
23 question will reveal classified information. See S. Rep. No. 96-823,
24 at 11, reprinted in 1980 U.S.C.C.A.N. at 4304-05.

25 **J. Section 9 - Security Procedures and Designation of a CISO**

26 Federal law explicitly provides that federal courts must have
27 security procedures for the handling of classified information. See
28 18 U.S.C. App. 3, § 9. Pursuant to Paragraph 2 of the Revised Security

1 Procedures Established Pursuant to Pub L. 96-456, 94 Stat. 2025, by
2 the Chief Justice of the United States for the Protection of Classified
3 Information, courts may appoint a qualified individual to be the
4 Classified Information Security Officer, or CISO, in a case. The
5 United States anticipates that it may need to bring to the Court's
6 attention certain discovery issues or other matters relating to
7 classified material, and the CISO will assist the Court, Court
8 personnel, and the parties in the handling of any proceedings under
9 CIPA and implementing any related orders. As such, the United States
10 requests that the Court designate W. Scooter Slade as the CISO for this
11 case, to perform the duties and responsibilities prescribed for CISOs
12 in the Security Procedures. The United States further requests that
13 the Court designate the following persons as Alternate CISOs, to serve
14 in the event Mr. Slade is unavailable: Jennifer H. Campbell, Daniel O.
15 Hartenstine, Daniella M. Medel, Matthew W. Mullery, and Harry J.
16 Rucker.

17 **III. CONCLUSION**

18 Through this Notice, the government hereby provides the Court and
19 the defendant notice that it is invoking CIPA in the instant case. The
20 government requests that this Court issue the proposed order filed
21 concurrently with this motion designating a Classified Information
22 Security Officer in this case. As noted, the government anticipates
23 making a request for a CIPA Section 2 hearing in the coming weeks.

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