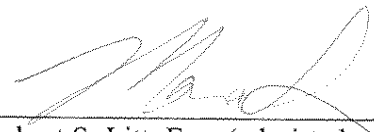
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States **v.** **Donald W. Keyser,** **Defendant.**	**Crim. No. 1:05cr543**

MOTION FOR RECONSIDERATION OF ORDER APPROVING SUBSTITUTION UNDER SECTION 4 OF THE CLASSIFIED INFORMATION PROCEDURES ACT

On July 30, 2006, upon the government's motion and after an *ex parte* hearing, the Court, pursuant to Section 4 of the Classified Information Procedures Act, 18 U.S.C. App. III § 4, approved a substitution for classified information that the government plans to use against Mr. Keyser to argue he breached his plea agreement. Although Mr. Keyser's counsel has seen the limited substitution approved by the Court, Mr. Keyser has not been permitted to see even the summary. For the reasons set forth in the sealed memorandum of law filed in support of this motion, use of the classified information against Mr. Keyser, without his even being able to review it, and without permitting him and his attorneys to review the full underlying information, would violate Mr. Keyser's Fifth and Sixth Amendment rights and is inconsistent with the provisions of CIPA. Accordingly, Mr. Keyser moves for reconsideration of this Court's approval of the substitution and its ruling that Mr. Keyser was not entitled to see any version of this information to be used against him.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby declare that on the 14th day of July 2006, a true and accurate copy of the foregoing Defendant's Motion For Reconsideration Of Order Approving Substitution Under Section 4 Of The Classified Information Procedures Act was served via hand delivery on:

Patricia M. Haynes, Esq.
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Assistant United States Attorney
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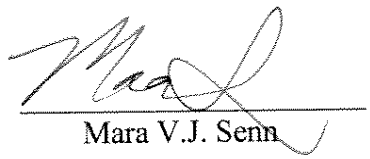

Mara V.J. Senn

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
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United States **v.** **Donald W. Keyser,** **Defendant.**	**Crim. No. 1:05CR543**

[REDACTED] MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER APPROVING SUBSTITUTION UNDER SECTION 4 OF THE CLASSIFIED INFORMATION PROCEDURES ACT

[U] The Government has moved to be relieved of its obligations under the plea agreement it entered into with Mr. Keyser, and has provided classified information to the Court which it has asked the Court to consider in connection with its motion. After an *ex parte* hearing on June 30, 2006, the Court, pursuant to Section 4 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III § 4, approved the disclosure of a classified summary of this information to defense counsel, but prohibited any disclosure at all to the defendant.[1] As provided in the Court's order of June 23, 2006, Mr. Keyser hereby moves for reconsideration of the Court's approval of this substitution. The substitution violates Mr. Keyser's Fifth and Sixth Amendment rights, is inconsistent with CIPA in the particular context

[1] [U] We have been informally notified that the Government is considering an unclassified submission that can be shared with Mr. Keyser, but to date have received nothing. As set forth in this memorandum, we do not believe that Mr. Keyser's rights can be protected unless he receives all of the information provided to the Court.

of this case, and does not permit Mr. Keyser effectively to defend himself against the Government's false accusations.

I. FACTUAL BACKGROUND

[U] The Government's 43-page motion to be relieved of its obligations under the plea agreement is largely irrelevant to Mr. Keyser's present application.[2] Much of the information discussed in the Government's motion was fully known to it before Mr. Keyser's plea. A critical fact that the Government does not mention is that even prior to his arrest, Mr. Keyser voluntarily submitted to extensive questioning by FBI agents over several days, and provided them essentially the same information that he told them in his post-plea debriefings.[3] In other words, the Government knew full well at the time it entered into the plea agreement what Mr. Keyser had to say about these events, and was satisfied under the circumstances that the plea bargain was appropriate. Accordingly, it cannot say that Mr. Keyser's adherence to that truthful version of events – even if it does not accord with the Government's stubborn and erroneous belief that Mr. Keyser was a spy – in any way "deprived [it] of the benefit which [it] reasonably expected." *United States v. Scruggs*, 356 F.3d 539, 543 (4th Cir. 2004). Only new developments,

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[2] [U] Because the Court has delayed Mr. Keyser's obligation to respond to the Government's motion to be relieved of the plea agreement until after matters relating to classified information have been resolved, we will address issues raised in that motion only to the extent necessary for the Court to decide this motion for reconsideration.

[3] [U] By letters dated June 16, 2006, and July 11, 2006, we have requested that the Government provide us memoranda of these interviews of Mr. Keyser, as well as other written or recorded statements of Mr. Keyser. Fed. R. Crim. P. 16(a)(1)(B). Apart from providing us a transcript of Mr. Keyser's March 28, 2006, debriefing, the Government has provided no response to our letter, even though the Government has provided cherry-picked and out-of-context statements of Mr. Keyser to the Court in its motion.

subsequent to the plea, can properly serve as a basis for the Government's motion. *See United States v. Palladino*, 347 F.3d 29 (2d Cir. 2003).

[U] In this regard, the Government points to two events occurring after Mr. Keyser's plea that it claims demonstrate that he has not been truthful. The first is that Mr. Keyser has failed two polygraph examinations administered by the FBI. While it is true that Mr. Keyser's plea agreement stipulated to the admissibility of the results of a polygraph examination in a proceeding to determine his compliance with the plea agreement, admissibility and weight are two very different matters, *cf. e.g.. Ellis v. Playtex, Inc.*, 743 F.2d 292, 303 (4th Cir. 1984), and we intend to argue at the appropriate time that the Court should accord no weight to the results of a procedure that the Supreme Court, lower federal courts, and the Department of Justice itself have all found to be inherently unreliable.[4]

[U] The second matter that the Government points to is the classified information at issue in this motion, which the Government claims it did not learn until after Mr. Keyser's plea. Of course, we do not know what the actual classified information is, or what the Court has been provided and asked by the Government to consider. [CLASSIFIED MATERIAL REDACTED]

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[4] [U] *See, e.g., United States v. Scheffer*, 523 U.S. 303, 309-312 (1998) ("[T]here is simply no consensus that polygraph evidence is reliable . . . . [T]here is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams"); U.S. Attorney's Manual § 9-13.300 ("The Department opposes all attempts by defense counsel to admit polygraph evidence . . . . Though certain physiological reactions such as a fast heart beat, muscle contraction, and sweaty palms are believed to be associated with deception attempts, they do not, by themselves, indicate deceit. Anger, fear, anxiety, surprise, shame, embarrassment, and resentment can also produce these same physiological reactions."). Cases in which a defendant has agreed that failing a polygraph examination would have particular consequences (*e.g.*, that failing a polygraph examination itself breaches the plea agreement), such as those cited at pp. 23-24 of the Government's memorandum in support of its motion, are not relevant to the different issue of whether polygraph results are sufficiently reliable to be accorded any evidentiary weight.

[U] [CLASSIFIED MATERIAL REDACTED] As we have set forth at some length in our sentencing memorandum, Mr. Keyser disclosed no classified information to Ms. Cheng or her superior, Mr. Huang, and his communications were all in furtherance of U.S. Government interests, even if he was answering questions that Ms. Cheng asked him. Even today, the Government makes no allegation that any of the information that Mr. Keyser disclosed was classified.

[U] [CLASSIFIED MATERIAL REDACTED] At an appropriate time, we will respond to them more fully. However, for purposes of considering the adequacy of the substitution, the Court should assume that Mr. Keyser denies [CLASSIFIED MATERIAL REDACTED] and will dispute them at the hearing on the Government's motion. The Government's motion therefore comes down to a one-on-one question of credibility: Mr. Keyser's denial versus [CLASSIFIED MATERIAL REDACTED] In this context, the bowdlerized summary that defense counsel has received, and counsel's inability even to ask Mr. Keyser about it, prevents the defendant and his counsel from establishing the falsity of these allegations.

II. CIPA WAS NOT INTENDED TO LIMIT A DEFENDANT'S RIGHTS.

[U] The fundamental purpose of CIPA was to protect a defendant's rights while avoiding the unnecessary disclosure of national security information. The basic premise of CIPA is that "the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without this Act." S. Rep. No. 96-823, at 8 (1980); *see also* H.R. Rep. No. 96-831, pt. 2, at 3 (1980) (CIPA "is not intended to infringe on a defendant's right to a fair trial or to change the existing rules of evidence and criminal procedure.") As the Court of Appeals has "stress[ed]," even the Government's interest in protecting classified

information "cannot override the defendant's right to a fair trial." *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990).

[U] What the Government has done in this case is unlike anything that has been done in any other reported decision we have been able to find. This case does *not* involve a defense request for discovery of classified information, but the Government's affirmative presentation of secret classified information to the Court for its consideration on the merits. Thus, cases in which the classified information was never presented by the Government to the trier of fact but the defendant nonetheless requested discovery of classified evidence, or cases in which the defense itself sought to interject classified information, are not dispositive.

[U] Nor does this case does involve a suppression hearing, at which the rules of evidence do not apply. *See* Fed. R. Evid. 104(a) (rules of evidence do not apply to "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence"). Because such hearings only determine the question of whether relevant and material evidence will be considered by the trier of fact, "the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself." *United States v. Marzook*, __ F. Supp.2d __, 2006 WL 1648416, at *37 (N.D. Ill. June 8, 2006); *see United States v. Raddatz*, 447 U.S. 667, 677-81 (1980); *compare United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986) (hearsay inadmissible at hearing to determine whether defendant breached plea agreement). In this case the Government has asked the Court to consider secret evidence that bears on the merits of a substantive determination of the rights and liabilities of the parties – a determination that is obviously of critical importance to Mr. Keyser.

[U] This case differs from the typical CIPA case in another respect. CIPA exists because of the problem of reconciling a defendant's rights with important national security interests. When a defendant seeks discovery of classified material or tries to introduce it at trial, the court must intervene to ensure that classified information is not disclosed unless disclosure is necessary to avoid compromising the defendant's rights. This intervention is necessary because the law and the Constitution mandate that a defendant has certain rights of discovery and to present evidence, and those mandates may require the disclosure of classified information. But there is no such mandate in this case. The Government has it completely within its own power to protect classified information: it can simply decline to use it. It is the Government's own choice, not the defendant's, to bring classified information into this case. *See Jencks v. United States*, 353 U.S. 657, 671 (1957) ("[I]t is unconscionable to allow [the Government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."). The Government's dilemma is entirely of its own making. Forgoing this evidence might limit the Government's ability to prove its allegations; but just as defendants are often required to make difficult choices, such as whether to plead guilty and waive constitutional rights, so is the Government. "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow." *McGautha v. California*, 402 U.S. 183, 213 (1971) (quoting *McMann v. Richardson*, 397 U.S. 759, 769 (1970)).

[U] In this case, however, the Government has tried to eat its cake and have it too. It wants to use classified evidence to avoid obligations it undertook, but to invoke CIPA so as to keep this information secret from the defendant and, in part, from his counsel. "[T]he very foundation of the adversary process assumes that the use of undisclosed information will violate

due process because of the risk of error." *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995); *see also Kiareldeen v. Reno*, 71 F.Supp.2d 402, 413 (D.N.J. 1999) ("Use of secret evidence creates a one-sided process by which the protections of our adversarial system are rendered impotent."). As this Court has written:

> The use of secret evidence against a party, evidence that is given to, and relied on, by the [factfinder] but kept entirely concealed from the party and the party's counsel, is an obnoxious practice, so unfair that in any ordinary litigation context, its unconstitutionality is manifest.

Haddam v. Reno, 54 F. Supp. 2d 588, 598 (E.D. Va 1999). The unfairness is compounded because, although Mr. Keyser's counsel has a summary of the evidence, it has been withheld from Mr. Keyser in its entirety. *American-Arab Anti-Discrimination Comm.*, *supra*, 70 F.3d at 1069 ("[T]he evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.") Requiring Mr. Keyser to "rebut the undisclosed evidence against him" imposes an impossible burden; "[i]t is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden." *Rafeedie v. INS*, 880 F.2d 506, 516 (D.C. Cir. 1989).

[U] The cases cited in the previous paragraph involved immigration. The stakes in this case are far higher: the Government seeks to avoid a bargain it entered into knowing that Mr. Keyser disagreed with its view of the facts, and as a result to subject him to additional criminal prosecution, potential lengthy incarceration, and forfeiture of the pension he has earned as the result of over 30 years of dedicated service to our country. If it is "obnoxious" to use secret evidence against a defendant in connection with his immigration status, it is surely far more "obnoxious" to use secret evidence to break a plea bargain and seek to deprive him of his liberty.

III. THE SUBSTITUTION VIOLATES MR. KEYSER'S CONSTITUTIONAL RIGHTS.

[U] In two prior motions filed with this Court, Mr. Keyser has articulated the differences between this case and the typical CIPA case. *See* Motion of Donald Keyser to Bar *Ex Parte* Submissions Related to Sentencing (filed April 26, 2006 and withdrawn May 3, 2006); Emergency Motion For Conference Regarding the Use of Classified Material at Sentencing (filed June 15, 2006). Typically, the defendant seeks discovery of classified information, or the Government needs to use it at trial. The Government provides the classified information and a proposed substitution to the court. If the court approves the substitution pursuant to section 4 of CIPA, the jury, the defense and the prosecution all deal with the same information. The trier of fact has no more access to the classified information than the defendant. Here, however, the Court is the trier of fact. Thus, the Court and the prosecution have secret evidence – evidence that the prosecution believes is material to the Court's determination – that the defense does not have and cannot rebut. By itself, this procedure violates Mr. Keyser's constitutional rights to counsel, to confront the witnesses against him, and to due process of law.

A. The Right To Counsel

[U] "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 684 (1984) (quotation omitted). Thus, the Sixth Amendment is violated whenever "counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n. 25. "Critical stages are those links in the prosecutorial chain of events in which the potential for incrimination occurs or at which the opportunity for effective defense must be seized or forgone." *United States v. Rhynes*, 196 F.3d

207, 217 (4th Cir. 1999) (quoting *Yohn v. Love*, 76 F.3d 508, 522 (3d Cir. 1996)), *unrelated portion of opinion vacated en banc*, 218 F.3d 310 (4th Cir. 2000).

[U] No one could reasonably contend that a hearing to decide whether or not the Government may avoid a plea bargain is not a "critical stage," or that it could be conducted in the absence of the defendant's counsel. *Cf. United States v. Sanchez-Barreto*, 93 F.3d 17, 22 (1st Cir. 1996) (plea withdrawal hearing is a critical stage); *United States v. Crowley*, 529 F.2d 1066, 1069 (3d Cir. 1976) (same). And it is equally clear that the reception of evidence going to the merits of that, or any other, contested motion is a "critical stage" at which the defendant needs the assistance of counsel for his defense. *See Yohn v. Love*, 76 F.3d at 522 (right to counsel denied by *ex parte* conversation with judge about admissibility of evidence); *cf. United States v. Rhynes*, 196 F.3d 207 at 217-18 (4th Cir. 1999) (distinguishing *Yohn* on the grounds that the *ex parte* communications in *Rhynes* "did not concern the presentation of, or the admissibility of, evidence from the Government's point of view during an ongoing trial"). By presenting secret evidence *ex parte* to the Court bearing on the merits of its motion to void the plea agreement, the Government seeks to deprive Mr. Keyser of his right to counsel at a critical stage of the proceedings.

2. The Right of Confrontation

[U] The purpose of the Confrontation Clause is to "'augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence.'" *United States v. Shaw*, 69 F.3d 1249, 1253 (4th Cir. 1995) (quoting *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004)). Thus, the Confrontation Clause guarantees not only the defendant's right to have witnesses testify in open court subject to cross-examination, *Crawford v. Washington, supra*, but also his right to be

present at all stages of the proceeding. *United States v. Camacho*, 955 F.2d 950, 952-53 (4th Cir. 1992). The Government's use of secret evidence to try to void Mr. Keyser's plea bargain violates both of these rights.

[U] First, of course, because this information is withheld from Mr. Keyser in its entirety, he has, in effect, been excluded from a portion of the hearing. The effect is no different than if the Court swore in a witness and took testimony while Mr. Keyser was excluded from the courtroom, which would plainly violate the Confrontation Clause. *United States v. Rolle*, 204 F.3d 133, 136 (4th Cir. 2000) (defendant has "'right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings'") (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). The defendant has a right to be present in person not only at the actual trial but at all proceedings in which "substantial issues of fact are in dispute" if he could "contribute[] to the . . . opportunity to defend himself against the charges." *Terry v. Cross*, 112 F.Supp. 2d 543, 551 (E.D. Va. 2000) (citation and quotation omitted).

[U] Second, because the defense does not even know what evidence the Government has presented to the Court, it is precluded from effectively "test[ing]" that "adverse evidence." "The main and essential purpose of confrontation is to secure for the [defendant] the opportunity of cross-examination. . . . Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (citation and quotation omitted). It is true that cross-examination can be limited, so long as a defendant is nonetheless able to mount an effective overall attack on the Government's evidence. *See, e.g. United States v. Marzook*, 2006 WL 1648416, at *36-*40 (defendant and his counsel heard all of Government's evidence and cross-examined witnesses extensively; classified evidence heard *ex parte* dealt only with additional impeachment and was not considered by

court). But a defendant cannot be said to have an opportunity to test the accuracy of evidence that is provided to the trier of fact in secret; you cannot impeach what you do not know.

3. Due Process of Law

[U] Finally, denying defense counsel and Mr. Keyser the right to know the information upon which the Court is being asked to decide whether to permit the Government to avoid its obligations under the plea agreement violates Mr. Keyser's right to due process of law. The primary safeguard to protect due process rights is the adversarial process, which ensures that judicial determinations are based on reliable and accurate information. "[T]he Supreme Court has recognized that '[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.'" *United States v. Libby*, 429 F. Supp.2d 18, 24 (D.D.C. 2006) (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993)), *modified in part on other grounds*, 429 F. Supp. 2d 46 (D.D.C. 2006). Indeed, accuracy in fact-finding is hampered, rather than advanced, by *ex parte* submissions. "Even where the government acts in good faith and diligently attempts to present information fairly during an *ex parte* proceeding, the government's information is likely to be less reliable and the court's ultimate findings less accurate than if the defendant had been permitted to participate." *United States v. Napue*, 834 F.2d 1311, 1319 (7th Cir. 1988). Because of the inherent unreliability of *ex parte* proceedings, it is a violation of due process "for the prosecutor to convey information or to discuss any matters related to the merits of the case or sentence with the judge in the absence of counsel." *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969); *cf. United States v. Rhynes*, 196 F.3d at 207 (distinguishing *Haller* on the grounds that the *ex parte* communications in *Rhynes* "did not concern the presentation of, or the admissibility of, evidence from the Government's point of view during an ongoing trial"). Asking the Court to use secret information to permit the

Government to avoid its obligations under a plea agreement without allowing the defendant to see that evidence violates Mr. Keyser's right to due process of law.

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[U] The Government's answer to these legal arguments (which were set forth in our prior motions) in its Unclassified Submission filed on July 3, 2006, is extraordinarily weak and borders on disingenuous. The Government does not even address Mr. Keyser's right to counsel. It begins by erroneously asserting that "[t]he Supreme Court has stated that 'the right to confrontation is a *trial* right.' *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987)." Unclassified Submission at 1. But the portion of *Ritchie* that the Govenment quotes was not the opinion of the Court, but an opinion of only four justices. Three justices would have held – contrary to the Government's position here – that the constitutional right to confrontation *does* apply to discovery as well as at trial; two did not reach the issue. *Pennsylvania v. Ritchie*, 480 U.S. 39, 61-78 (1987) (opinions of Justices Blackmun, Brennan and Stevens). *Ritchie* thus did not hold that the right to confrontation applies only at a trial.[5] Similarly, contrary to the Government's contention, the unpublished decision of the Court of Appeals in *United States v. Young*, No. 00-6378, 2000 WL 1726585 (4th Cir. Nov. 21, 2000), appears actually to affirm that the right of confrontation applies at a suppression hearing; the court noted that the right "does not apply *to the same extent*" in that context, such that it was not error to consider an affidavit – but an affidavit that was disclosed to the defense. *Id.* at *1 (emphasis supplied); *accord United States v.*

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[5] [U] Moreover, *Ritchie* is crucially different from this case: it involves a defendant's attempts to get access to information that was *not* provided to the trier of fact, not to get access to information that *was* provided to the trier of fact. The question in *Ritchie* was whether the Confrontation Clause requires that the defendant be given certain discovery, not which contested evidentiary proceedings implicate the Clause.

Boyce, 797 F.2d 691, 693 (8th Cir. 1986); *see also United States v. Verrusio, supra. United States v. Mejia*, No. 02-3067, 2006 WL 1506853 (D.C.Cir. June 2, 2006) involved defense attempts to obtain discovery of information that neither the trier of fact or the prosecution itself had; and in *United States v. Marzook, supra*, the defendant apparently injected the classified information into the case himself. 2006 WL 1648416, at *37 ("[T]he Court gave Defendant the opportunity to explain the pertinence and relevance of the line of questioning pursued on cross examination that evoked classified responses from the witnesses.").[6] To say that these cases support the denial of defense access to secret information proffered by the Government to the trier of fact is to torture their holdings beyond recognition.

[U] Indeed, the violation of Mr. Keyser's constitutional rights is exacerbated by counsel's inability to share this information with him. Mr. Keyser stands accused by the Government of lying in debriefing sessions, yet he cannot even be told what he allegedly lied about or what the Government thinks proves that he did. Counsel cannot possibly mount a fully effective defense to these charges without being able to ask Mr. Keyser about them.

[U] As we have noted, we are unaware of precedent for the Government's efforts to use CIPA to withhold entirely from the defendant, and merely to summarize for his counsel, evidence that the Government affirmatively asks the trier of fact to rely upon in a proceeding of this nature. For the Government to ask the Court to decide, based upon secret evidence, that the defendant has been untruthful, and therefore is not entitled to hold the Government to its bargain, is reminiscent more of the Star Chamber than of courts of law in this country. The Fifth and

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[6] [U] In any event the Court in *Marzook* did not allow the Government to use the classified evidence to support its burden of proof, and indeed drew adverse inferences against the Government because it had withheld the information. 2006 WL 1648416, at *40.

Sixth Amendment require that Mr. Keyser and his counsel know, and have a full opportunity to rebut, the Government's evidence.

IV. THE PROPOSED SUBSTITUTION PREVENTS MR. KEYSER FROM PRESENTING AN EFFECTIVE DEFENSE AND IS INCONSISTENT WITH CIPA.

[U] In addition to the constitutional violations outlined above, the substitution of evidence prevents Mr. Keyser from being able to defend himself fully against the Government's charge that he was lying about his relationship with the NSB, and is thus inconsistent with CIPA. CIPA requires a court, in deciding how much classified information must be disclosed to a defendant, to balance "'the public interest in nondisclosure against the defendant's right to prepare a defense.'" *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) (quoting *United States v. Smith*, 780 F.2d 1102, 1107 (4th Cir. 1985)).[7] The Fourth Circuit has adopted the standard set forth in *Roviaro v. United States*, 353 U.S. 53 (1957), which requires that a government claim of privilege give way when the information the defendant seek to introduce is "relevant and helpful to the defense . . . or is essential to a fair determination of a cause." *Smith*, 780 F.2d at 1107 (quoting *Roviaro*, 353 U.S. at 88). In evaluating materiality, "*Smith* makes clear that a finding that particular classified information is necessary to the defense is enough to defeat the contrary interest in protecting national security." *Fernandez*, 913 F.2d at 157; *see also United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985). In addition, materiality can be shown

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[7] [U] Because there is almost no law as to "how the Court should proceed when the government makes an *ex parte* filing" under Section 4 of CIPA, *United States v. Libby*, 429 F. Supp. 2d at 23, we make reference to cases discussing procedures under Sections 5 and 6 of CIPA. The Court should bear in mind at all times, however, that this case involves the unique factual situation of the Government's effort to withhold information from the defendant that it has, in effect, introduced into evidence, rather than a defendant's efforts to obtain discovery of or introduce classified information.

"whether or not [the evidence] might ultimately be persuasive to a jury." *Juan*, 776 F.2d at 258 (11th Cir. 1985).

[U] CIPA also permits the Government to provide the defendant a substitute for classified information, provided that the court finds that the substitute is adequate to protect the defendant's rights. "[T]he fundamental purpose of a substitution [is] to place the defendant, as nearly as possible, in the position he would be in if the classified information . . . were available to him." *United States v. Moussaoui*, 382 F.3d 453, 477 (4th Cir. 2004). In order to be adequate, a substitution under Section 4 must be "as helpful to the defense as the original [information] would have been." *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998); *see also Libby*, 429 F. Supp. 2d at 26 (Section 4 substitute must be "sufficient to provide the defendant with what he needs to pursue his defense."); *Moussaoui*, 382 F.3d at 477 ("'[n]o information was omitted from the substitutions that might have been helpful to [the] defense . . .'") (quoting *Rezaq*, 134 F.3d at 1143).

[U] It cannot be disputed that Mr. Keyser is disadvantaged by his inability to know at all, and his counsel's inability to know in full, the secret evidence that the Government has asked the Court to consider, and that this summary is not "as helpful to the defense" as the actual information that has been provided to the Court. We are, of course, limited in our ability to discuss this issue because we do not even know what the Court has been given. But we ask the Court to evaluate the adequacy of the substitution based upon the assumption that the Government's charge is wrong – that Mr. Keyser has been truthful in his debriefings on the relevant points – and ask how he can establish his innocence when he does not know the evidence against him.

[U] Moreover, the Court should be mindful of the inherent differences between intelligence information and evidence received in open court. Intelligence often consists of judgments drawn from fragmentary, elliptical and ambiguous sources, or of statements from persons with motivation to fabricate or embellish. Our legal system deals with such issues through the adversary process, but intelligence analysis is not an adversary process. Thus, when a person's liberty is at stake, intelligence information must be viewed with caution.[8] Our Nation has recently seen the perils of basing policy upon intelligence information that has not been adequately confronted and tested. Perhaps we would not have relied upon the informant Curveball, who fabricated information regarding Iraqi weapons of mass destruction, or the conclusion that the government of Iraq was purchasing aluminum tubes for nuclear centrifuges when they were in fact intended for conventional missiles, if that information had been subject to cross-examination and attack by a party motivated and equipped to establish its falsity, or if opposing views had not actually been suppressed. *See, e.g.*, "Panel Seeks Intelligence Culpability," *Washington Post*, at A08 (April 2, 2005), *available at* http://www.washingtonpost.com/wp-dyn/articles/A19831-2005Apr.html. [CLASSIFIED MATERIAL REDACTED]

[U] Even without full knowledge, however, we are able to identify many specific defects in the substitution. [CLASSIFIED MATERIAL REDACTED]

[U] By withholding this information from Mr. Keyser's counsel – and withholding *all* of the information from Mr. Keyser himself – the Government has stacked the deck in this proceeding. It has whispered in the Court's ear that Mr. Keyser is lying, providing information

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[8] [U] We have submitted to the Court with this motion a declaration from a former senior intelligence official, describing the critical importance of knowing the facts surrounding intelligence information in order to evaluate its reliability. *See* Declaration of Kent Harrington (Exhibit A). It is precisely these facts that have been withheld from the defense.

that it claims supports that charge. Yet it has put Mr. Keyser in a position where all he can do is enter a general denial – say that he did not do what the Government thinks he did. He has no ability to engage in the kind of detailed dissection of the Government's evidence that is necessary to prove, rather than merely to assert, its falsity.

[U] We would ask the Court to engage in a thought experiment. Assume that someone has (falsely) accused an innocent judge of corruption in connection with a case he decided in favor of a particular corporation, and that an inquiry is being conducted to determine the truth of that allegation. Assume further that the judicial inquiry board is presented secret evidence purportedly supporting this charge, that this information is not disclosed to the defendant judge at all, and that his counsel receives only a summary that says that:

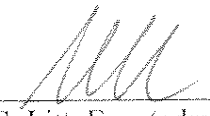
[CLASSIFIED MATERIAL REDACTED]

[U] We ask the Court to consider: How could this judge, who does not himself know any of this information, defend himself? How could his counsel, given the vagueness and lack of specificity of this information, attack it and prove its falsity? If the judge is innocent, how can he rebut this information under these circumstances? What can he do other than say "I didn't do it?" [CLASSIFIED MATERIAL REDACTED] And how can his counsel respond adequately without being able to discuss the information with the judge himself? Surely, the judge would not – and should not – be satisfied with an answer that says that he should simply trust the prosecution and the judicial inquiry board to get it right.

[U] Mr. Keyser stands in the same position. The Government has asked the Court to find that he lied and to be relieved of its obligations under the plea agreement, based upon information that the Court has but that defense counsel and the defendant do not. This procedure hamstrings his ability to establish his innocence for the Court, and should not be tolerated. If the

Government wants to use this evidence, it must disclose to the defendant and his counsel everything that it wants the trier of fact to rely upon, and permit that evidence to be tested effectively as our legal system requires.

Respectfully submitted,



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[9] [U] Ms. Senn is admitted to the Bar of this Court. However, pursuant to the Court's order she has not had access to the classified information or to any classified portions of this pleading.

CERTIFICATE OF SERVICE

I hereby declare that on the 14th day of July 2006, a true and accurate copy of the foregoing [Redacted] Memorandum in Support of Defendant's Motion for Reconsideration of Order Approving Substitution Under Section 4 of the Classified Information Procedures Act was served via hand delivery on:

Patricia M. Haynes, Esq.
David Laufman, Esq.
Assistant United States Attorney
United States Attorney's Office
Eastern District of Virginia
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Alexandria, VA 22314

Robert S. Litt

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States v. Donald W. Keyser, Defendant.	Crim. No. 1:05CR543

DECLARATION OF KENT HARRINGTON
IN SUPPORT OF DEFENDANT'S MOTION FOR
RECONSIDERATION OF CIPA SECTION 4 SUBSTITUTE

1. I am a retired Central Intelligence Agency officer who spent his career as an intelligence analyst in Washington, D.C. and in intelligence operations overseas. At CIA, I served in senior management positions involved with East Asia – including serving under four Directors of Central Intelligence as the National Intelligence Officer for East Asia, the senior intelligence post for the region – during which I provided intelligence support to the Cabinet and other policymaking levels of government, directed CIA's office of public affairs, and served as chief of station in a major intelligence post overseas. My experience includes management of intelligence collection and counterintelligence abroad and liaison with foreign government officials around the world. I have worked extensively with State Department officials, particularly in Asia. A copy of my CV is attached.

2. I have been asked to provide information about what is necessary to evaluate the reliability and accuracy of intelligence information. I have not been provided any classified information in connection with this matter, nor do I have any access to classified information today. I understand that this declaration is in connection with a classified summary of

underlying classified information which the government has provided to Mr. Keyser's legal counsel. I further understand that the government is relying on this information in its case against Mr. Keyser.

3. Intelligence information can take many forms – from raw reporting from technical collection such as intercepted communications, to information from human sources that are recruited and controlled by an intelligence service. It also can refer to intelligence analysis, which is the finished product of substantive intelligence specialists who review raw reporting from all sources to provide their assessments on developments or issues abroad. During my time at the CIA, I was involved in both the collection and the analysis of intelligence.

4. In the case of intelligence reports from the field, the raw information collected is typically forwarded in a document that often includes background data on the source. The analyst's job is to interpret this raw reporting in light of what he or she knows from other unclassified as well as intelligence sources about the issue at hand, applying his or her knowledge of the nature of the source and the source's previous reporting on this or similar subjects. To perform this task, an analyst typically seeks whatever information is available not only about the substance of the raw report – that is, its subject matter – but also the nature of the source or the collection methods used.

5. No competent intelligence analyst would take an individual intelligence report, much less a summary of a report, at face value. It is essential to ask a variety of questions about raw intelligence reports before reaching conclusions about their accuracy and relevance as well as about the reliability of the sources that provide them. Therefore, if the substance of an intelligence report is summarized without this information, the information should be looked at with great skepticism.

6. What are the key questions involved in evaluation of a raw intelligence report? Typically, in order to undertake a reliability analysis, it is necessary to know information about a report's acquisition, the way in which the report of the information was prepared, and the track record and reliability of the source of the information. It is necessary to know whether the source was in a position to know what was reported; if the source acquired the information first-, second- or third-hand; and, the degree of the source's familiarity with the subject matter itself (i.e., does the source know what he's talking about). As important, intelligence analysts will seek to understand the source's personal, political and institutional motivations. Such questions arise no matter where the information comes from - whether from raw intelligence or from intelligence analysis from another US government agency or a cooperative intelligence service of a foreign government, and such source-related information is vital. Needless to say, if the intelligence in question is finished analysis based on raw reporting the same issues concerning sourcing and acquisition apply as well, whether that analysis is received from another government agency or a foreign intelligence service.

7. The question of motivation is particularly important in evaluating human source reporting. A source's personal motives obviously deserve close scrutiny. The decision to provide intelligence to another government turns on calculations that are, at the end of the day, often opaque. Personal motives – from the desire to curry favor or receive a quid pro quo to hidden animus or antagonisms toward others who might be affected by the report – all can have their role, as can bureaucratic and political motivations. For example, there have been numerous instances where intelligence officers have claimed that their reporting reflects a clandestine relationship with an individual who in fact has never been or considered himself to be a recruited intelligence asset. In many of these cases, the intelligence officer's motivations have been self-

promotional; in others, simply an effort to portray in a more important fashion what could be viewed as relatively mundane information. In other cases, both intelligence collectors and their sources have literally misrepresented the facts. I know of a number of instances where analysts discounted a source and his or her reporting because the analysts knew about personal, professional or institutional motivations which caused the source to distort his or her reporting, or to provide erroneous information. What is important to highlight is that without information on the source of an intelligence report the analyst's ability to assess the reliability and accuracy of the information it contains is in serious doubt.

8. US-Taiwan relations are a case in point. Notwithstanding our historically close relations with the government in Taipei, the profound changes that have occurred on Taiwan since the late 1980s have created a complex political environment, producing an array of contending interests and political actors whose objectives conflict frequently on issues related to the United States. The consequences often can call into question the accuracy of intelligence on Taiwan-related issues of all sorts. Tensions with Washington, and Taiwan's own internal disputes, have prompted officials on Taiwan often publicly to mischaracterize private as well as official remarks by US officials to serve their own purposes. Such episodes are examples of why analysts need to take particular care in dealing with reporting from all sources on Taiwan-related issues. Information is not infrequently fabricated or exaggerated in order to advantage or disadvantage an organization within the Taiwan political structure. Any US official - especially those in senior policy roles such as those held by Don Keyser - is vulnerable to such actions.

9. There is also another dimension to analysis of intelligence reporting on Taiwan-related issues: the role of Beijing. For more than half a century both Taipei and Beijing have regularly displayed their successes in discovering each other's hostile espionage efforts. The

announcement of arrests by the security services in both capitals, the flight of spies to safe haven on the eve of their discovery by counter-espionage investigators, and the defection of senior government officials from one country to another to avoid their unmasking as agents of the other side have been news staples for years in both China and Taiwan.

10. Based on the public record, it would be safe to assume that vigorous offensive intelligence programs are underway in both countries and that undiscovered operations continue in both capitals today. The Chinese and other intelligence services have long used misinformation and the distortion of intelligence to mislead and to cloak other sensitive activities. Therefore, all intelligence information relating to issues involving Taiwan, China and the United States include the very real possibility of manipulation of information by China or Taiwan.

11. Intercepted communications – including written communications – also require rigorous examination regarding their acquisition and preparation. Translating intelligence from a foreign language like Chinese can undermine the accuracy of the information because of the cultural context and the use of technical vocabulary or slang. In addition, intercepted intelligence is as prone to purposeful misrepresentation as human source reporting. For example, when we acquire the communications of any foreign government agency, whether a foreign ministry or intelligence service, there is a tendency to assume that the contents are unvarnished facts, but experience tells us otherwise. Such communications are just as prone as other forms of intelligence to manipulation and can also contain false or exaggerated statements designed to advance the career or the bureaucratic position of the author. As another example, the military history of World War II includes several intelligence successes created by the transmission of

bogus information that Allied officials knew would be intercepted by their German adversaries, leading them to take actions that served our goals.

12. Finally, in my experience a single intelligence report has rarely, if ever, stood alone to establish the facts on a critical issue or to provide the basis for a policy choice. Our system of intelligence analysis implicitly makes that point. Our intelligence experience has put a premium on the development of "all source" analysis – the capability to bring together information from multiple sources in order to create an understanding on which policy or command decisions can be made. The failure to recognize that need has been apparent repeatedly in the past - from the intelligence missteps prior to Pearl Harbor to years and months preceding 9/11. It is relevant in any consideration of intelligence from a single source today.

13. In sum, any raw intelligence report requires a full analysis. In its preparation, as intelligence information is passed from person to person, and translated and summarized, both spoken and written narratives inevitably become prone to potential errors and distortions. A report's details as well as its sources, therefore, are critical to its understanding and its correct interpretation. Because it is impossible to evaluate intelligence without such details of this information, summaries simply do not suffice and fall far short of meeting the minimum threshold for analysis.

I declare under penalty of perjury that the foregoing is true and correct.

Dated July 13, 2006.

Kent Harrington

HARRINGTON GROUP, LLC

Kent M. Harrington
President and Managing Director

Kent Harrington brings to Harrington Group, LLC 30 years of experience on trade, economic, defense, and foreign policy issues, senior management responsibility in public affairs, and wide recognition in the United States and abroad as a specialist on intelligence analysis and Asia.

Mr. Harrington's practice areas include information collection and analysis, government relations in East Asia and Washington, and assessments of international political, economic and strategic issues affecting business development and foreign markets. He has worked with leading companies in the United States, Europe, and Asia in finance, investment, insurance, telecommunications, aerospace, defense, consumer products, transportation, and research and development.

At the Central Intelligence Agency, Mr. Harrington led the intelligence community's collection and research on international economic issues, foreign policy and national security concerns. At the CIA, he pioneered interdisciplinary analysis that supported US negotiators, including groundbreaking integrated economic, political and military assessments on East Asia. Mr. Harrington has authored numerous classified studies as well as led the community's estimates and forecasting.

Mr. Harrington served four Directors of Central Intelligence as the National Intelligence Officer for East Asia, the senior intelligence post for the region. He represented the intelligence community at the White House, the Special Trade Representative's Office, and the State, Defense, Commerce and Treasury Departments. Mr. Harrington has worked with foreign leaders in several assignments, including as chief of the CIA's leading intelligence post in Asia.

Mr. Harrington has extensive experience in public affairs. Appointed by the Director of Central Intelligence in 1993 as the CIA's Director of Public Affairs, he played a major role in providing greater public access to intelligence and in crisis management.

Mr. Harrington has spoken at leading universities, including Harvard, Columbia, Johns Hopkins, New York University, Oxford, the National War College and the Naval War College. He served as an Air Force officer, worked for Citibank's international division, and served as a consultant to the Japanese government.

Mr. Harrington has a BA from Duke University and an MA in international relations from Johns Hopkins University School of Advanced International Studies. His commentary and analysis has appeared in the *Washington Post, Los Angeles Times, Asian Wall Street Journal, Washington Times* and leading Japanese newspapers. He has published two novels: The Gift of a Falcon (McGraw Hill, 1988); A Brother to Dragons (Donald I. Fine/Penguin, 1993).

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