IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No.12-cr-00033-JLK

UNITED STATES OF AMERICA,
Plaintiff,
v.

1. JAMSHID MUHTOROV,

Defendant.

DEFENDANT MUHTOROV'S MOTION FOR ORDER REQUIRING GOVERNMENT TO DISCLOSE OR PROVIDE HIS COUNSEL ACCESS TO ITS CLASSIFIED PLEADINGS AND OBJECTION TO EX PARTE PROCEEDINGS

> "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

The Federalist No. 51 (James Madison)

This Court has the power to control the government's due process-killing obsession with secrecy and security by ordering disclosure to the defense of the classified material the government has hidden; specifically that which was redacted from its response filed May 5, 2014, Doc. 559, and which was included in its classified memorandum filed May 22, 2014, Doc. 569.

Jamshid Muhtorov, asks the Court to exercise this power to order disclosure to the defense subject to appropriate protections. He does so because the statute, 50 U.S.C. § 1806(f), and Due Process require it.

50 U.S.C. § 1806(f)

50 U.S.C. § 1806(f) says that when a motion to suppress is filed under subsection (e); or a motion is made to discover "applications or orders or other materials relating to electronic surveillance;" or a motion is made "to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter;" and the Attorney General files an affidavit alleging that disclosure or an adversary hearing would harm the national security, the district court must – *in camera and ex parte* – "review the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted."

§ 1806(f) also says that "[i]n making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance," but should do so "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance."

Mr. Muhtorov asks that the Court make a finding, following its review of his motion to suppress, the government's responses (secret and not secret), and his reply (due July 3, 2014), that disclosure to the defense *is* necessary to make an accurate determination of the legality of the surveillance.

Due process

50 U.S.C. § 1825(g) also permits disclosure if a district court's *ex parte, in camera* review discloses that due process requires discovery or disclosure. While the question "is not how to optimize the legal review of the surveillance and search," if the district judge concludes "disclosure is 'necessary' in order to make that determination," it should be ordered. *U.S. v. Mubayyid,* 521 F.Supp.2d 125, 130 (D.Mass.2007).

Timing of disclosures

Mr. Muhtorov asks that the disclosures he seeks be made before the Court conducts a hearing on the legal issues raised in his Motion to Suppress (Doc. 520); and there be an evidentiary hearing on that motion at which the defendant and his counsel are present.

Alternative requests

If disclosure is not ordered, without waiving his motion for disclosure or his request for a full due process hearing, Mr. Muhtorov moves to strike the Classified Memorandum in its entirety, so whatever its hidden contents are, they may not be considered by the Court in deciding the legal issues raised in the Motion to Suppress.

Again, without waiving the requests made here, if the Court, *ex parte* or otherwise, determines that the surveillance was illegal, Mr. Muhtorov moves it conduct a "taint hearing," at which the Court would decide whether evidence the government proposes to introduce "has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the

primary taint." *Alderman v. United States* 394 U.S. 165, 180-181, 89 S.Ct. 961, 971 (1969). He asks that he and his attorneys be present at this hearing. As the *Alderman* Court observed, "the task (of determining taint) is too complex, and the margin of error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case." *Id.*, 394 U.S. 182, 89 S.Ct. 971.

Procedural Background

The government asks this Court to decide Mr. Muhtorov's Motion to Suppress in secret, without disclosing the facts and basis that form its opposition. This request comes at the end of a long history – highlighted by recent discovery – demonstrating the government operates under a veil of secrecy regarding wiretapping and surveillance to gather "foreign intelligence."

In 1952 President Harry Truman, in a secret letter, established the National Security Agency. 1952 was also the year Joseph McCarthy assumed chairmanship of the Senate Committee on Government Operations and its Permanent Subcommittee on Investigations. The existence of the NSA remained secret until the 1970s when a Senate Select Committee report disclosed that it had been keeping a watch list of people involved in civil rights and anti-war demonstrations.[1]

The report was by the Church Committee, charged with investigating domestic spying by the U.S. intelligence community. Senator Frank Church, its chairman, warned against the "tremendous potential for abuse" should the NSA

[1] S.Rep.No. 94-755, bk.III, at 735. (1976).

"turn its awesome technology against domestic communications."[2] Senator Church also said:

> I don't want to see this country go across the bridge. I know the capacity that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return.[3]

The revelations of the Church Committee led to the passage of the Foreign Intelligence Surveillance Act, or FISA, in 1978. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801 et seq. (2006)). [4] The first statute enacted to regulate the use of electronic surveillance within the United States for foreign intelligence, *United States v. Megahey,* 553 F.Supp. 1180, 1184 (D.C.N.Y., 1982), FISA's "principal purpose . . . was to prohibit the government from monitoring Americans' electronic communications without a

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[2] *Intelligence Activities—The National Security and Fourth Amendment Rights*, 94th Cong. (1975) (statement of Se. Church, Chairman, Select Committee to Study Governmental Operations with Respect to Intelligence Activities).
[3] James A. Bamford, *The Puzzle Palace*, 379 (1983 ed.)
[4] *See, e.g., Warrantless Wiretapping and Electronic Surveillance*, J. Hearings Before the Subcomm. on Administrative Practice and Procedure and the Subcomm. on Constitutional Rights of the Senate Comm. on *the Judiciary and the Subcomm. on Surveillance of the Senate Committee on Foreign Relations*, 93rd Cong. part I(a), part I(b) & part II(a), part II(b), part II(c). (April 3, 8, 1974 & May 8, 9, 10, and 23, 1974). The United States Supreme Court also reviewed some of those abuses and declared that warrantless wiretaps of domestic groups for national security reasons violated the Fourth Amendment. *United States v. United States District Court* (Keith), 407 U.S. 297 (1972)

judicially granted warrant." *National Security and Double Government,* 5 Harvard National Security Journal at 77 (2014), see note 435.

FISA was later amended, including in 1994 by the Patriot Act and by the 2008 FISA Amendments Act. Between these dates, and in reaction to the attacks of September 11, 2001, then-President George W. Bush authorized the NSA – by secret order effective October 4, 2001 – to significantly broaden data collection, a process that continued through 2004, when Attorney General Ashcroft refused to reauthorize it. *Id.* at 78. Four months later, in an *ex parte* proceeding, the chief judge of the Foreign Intelligence Surveillance Court, or FISC, entered an order permitting bulk collection of internet data without a warrant. *Id*. at 78-79.

In 2008 Congress passed the FISA Amendments Acts (FAA), partly in response to court rulings the secret program was unconstitutional. *See, e.g., ACLU v. NSA,* 438 F. Supp. 2d 754 (E.D. Mich. 2006), rev'd at 493 F.3d 644 (6th Cir. 2007). The FAA allowed the government to secretly eavesdrop on millions of Americans – exactly what the Church Committee sought to prevent with the enactment of the original FISA legislation.

Since the passage of the FAA in 2008, the government has conducted its secret surveillance with few checks or balances. "[N]either Congress nor the public had any knowledge that surveillance of this magnitude was permitted or whether any checks were working," as Senator Chris Coons put it. "The problem

is: we here in the Senate and the citizens we represent don't know how well any of these safeguards actually work."[5]

Recent revelations demonstrate that top executive branch officials have made false statements and misrepresented information to the United States Senate and Supreme Court. Opinions by FISC judges clarify that misrepresentations have been made by the government to the FISC, as well.[6]

As the public, Congress, and other officials learned of the widespread domestic wiretapping and surveillance conducted by the government, the Department of Justice changed part of its secrecy policy. One result was that over two years after he was indicted, Mr. Muhtorov was notified the government intended to use against him evidence obtained under the FAA – or derived from evidence so obtained. The "notice" made by the government was less than a page in length and included no details or specifics. Doc. 457 (Oct. 25, 2013).

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[5] Glenn Greenwalk, *NSA taps in to use data of Facebook, Google and others, secret files reveal,* The Guardian, June 7, 2013, http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data, *cited in* Glennon, Michael, *National Security and Double Government,* 5 HARV. NAT'L SEC. J. 1 (2014).

[6] In *In re Production of Tangible Things From* [REDACTED], Dkt. BR 08-13, March 2, 2009 FISC Judge Reggie B. Walton of the United States District Court for the District of Columbia documented statutory violations of the NSA's electronic surveillance programs. Judge Walton rejected the government's explanations for the violations and criticized its repeated misrepresentations and non-compliance with FISC orders. In a declassified FISC opinion dated October 3, 2011, Judge John D. Bates of the United States District Court for the District of Columbia found the NSA's surveillance under the FAA to be "deficient on statutory and constitutional grounds," particularly with respect to the mas collection of emails of American citizens that were entirely domestic and not to or from a foreign intelligence target. 2011 WL 10945618.

On January 29, 2014, Mr. Muhtorov filed his Motion to Suppress the fruits of the FAA surveillance because the government's monitoring of his communications violated the Fourth Amendment to the U.S. Constitution and Article III. Doc. 520.

Continuing to operate under the veil of secrecy, the government filed its Memorandum in Opposition to the Motion to Suppress on May 9, 2014. Doc. 559. The Unclassified version – and only version Mr. Muhtorov received – was like a piece of Swiss cheese, full of holes justified by the government as containing classified information.[7] Under the heading, "Overview of the FAA Collection at Issue," all seven sections are redacted. Doc. 559 at 2. Likewise, under the heading, "Targeting Procedures," two sections are redacted (*Id. at 3),* and under the heading, "The Section 702 Information was Lawfully Acquired and Conducted in Conformity with an Order of Authorization or Approval / Relevant Facts," all 15 sections are redacted. Altogether, 32 sections and 15 footnotes are redacted from the government's opposition brief.

With the government's redacted Memorandum in Opposition, Attorney General Eric Holder has provided this Court with a Declaration and Claim of Privilege. It asks*,* in the name of national security, that Mr. Muhtorov be denied access to the redacted sections of the response, a request that ignores his constitutionally protected rights under the Fifth and Sixth Amendments, his rights under Rule 16, and under *Brady v. Maryland* and its progeny. The Attorney

[7] These portions of the brief are identified as CLASSIFIED MATERIAL REDACTED

General does not explain in his Declaration and Claim of Privilege why the statutory remedies created by Congress to protect sensitive information are not adequate to address security concerns. Nor does he explain why defense counsel cannot be given security clearance (a process followed in many national security cases, including the Abel Daoud case in Chicago and the Mohamed Osman Mohamud case in Portland, Oregon) so they may have access to classified information.

Instead, the Court is asked to determine "In Camera, Ex Parte" (Doc. 569) the issues that Mr. Muhtorov raised in his Motion (Doc. 520). [8] The government argues that Mr. Muhtorov should not (a) know the facts it relies on in opposing his motion; (b) be afforded a full and fair hearing; (c) have his own lawyer advocate on his behalf; or (d) know the basis on which it asserts this wide-reaching privilege.

Ex Parte, In Camera Hearings Violate Fundamental Constitutional Principles

An *ex parte, in camera* hearing where discovery and a complete copy of the government's arguments and facts in opposition are not provided to the defense is unconstitutional, violates FISA provisions, and offends the fundamental principles of our criminal justice system.

[8] This sort of declaration always gets filed in these cases. *See, e.g., United States v. Daoud*, 2014 WL 321384, *2 (N.D.Ill. Jan. 29, 2014). In the one filed here, the Attorney General says he will submit a Declaration of Stephanie O'Sullivan, Acting Director of National Intelligence in support of his claim of privilege. This Declaration is TOP SECRET and will not be provided to Mr. Muhtorov or counsel.

The Bill of Rights forms the backbone of our American system of justice. The first ten amendments to the United States Constitution are the "fundamental safeguards of liberty immune from federal abridgement." *Gideon v. Wainwright,* 372 U.S. 335 (1963). Rights embodied in the Fifth and Sixth Amendments protect both individuals and these fundamental principles of liberty and justice. "The Sixth Amendment stands as a constant admonition that if constitutional safeguards [are] lost, justice will not be done." *Johnson v. Zerbst,* 304 U.S. 458, 462). "To protect the interests of criminal defendants enmeshed in the midst of our adversarial system of justice, the Sixth Amendment of the United States Constitution guarantees each defendant the 'assistance of counsel for his defense.' This guarantee 'contemplates that such assistance be untrammeled and unimpaired.'" *United States v. Dolan,* 570 F.2d 1177, 1180 (3rd Cir.1978), *quoting Glasser v. United States,* 315 U.S. 60, 70 (1942).

The adversarial process is the bedrock of effective assistance of counsel protected by the Sixth Amendment. *Anders v. California,* 386 U.S. 738, 743 (1967). The adversarial process is integral to safeguarding the rights of all citizens, including those charged with a crime. "The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic,* 466 U.S. 648, 656 (1984).[9]

[9] This principle was the basis for U.S. District Judge Coleman's recent decision ordering disclosure in *United States v. Daoud,* 2014 WL 321384, *3 (N.D.Ill.2014)("The Court finds . . . that an accurate determination of the legality of the surveillance is best made in this case as part of an adversarial proceeding.") This ruling, appealed by the government, was recently re-argued in

The Fifth Amendment also entitles Mr. Muhtorov to an adversarial hearing with the assistance of counsel. The Due Process Clause requires any person accused of a crime be present at all critical stages against him and be present and have hearings on critical issues. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976). "A defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer,* 482 U.S. 730 (1987).

The Supreme Court has declared that "'[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" *United States v. James Daniel Good Real Property,* 510 U.S. 43, 55 (1993) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 170-72 (1951). The Court made the same point in *Franks v. Delaware,* 438 U.S. 154 (1978). *Franks* held that a defendant must be permitted to attack the veracity of the affidavit underlying a search warrant, upon a preliminary showing of an intentional or reckless material falsehood. The Court rested its decision on the *ex parte* nature of the procedure for issuing a search warrant and the value of adversarial proceedings: The usual reliance of our legal system on adversary

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the Seventh Circuit following disclosure there was no recording of the first "public" arguments. http://www.politico.com/blogs/under-the-radar/2014/06/court-orders-rare-redo-in-surveillance-case-189926.html (visited June 9, 2014)

proceedings itself should indicate that an *ex parte* inquiry is likely to be less vigorous. 438 U.S. at 169

The same considerations that the Court found compelling in *Franks* and *James Daniel Good* militate against uniformly *ex parte* procedures in the FISA context. As early as 2002, the FISC acknowledged (in an rare published opinion) that without adversarial proceedings, systematic executive branch misconduct – including submission of dozens of FISA applications with "erroneous statements" and "omissions of material facts" – went undetected by the courts until the DOJ revealed it. *See In re All Matters,* 218 F. Supp. 2d 611, 620-21 (Foreign Intelligence surveillance Court) *rev'd*, 310 F.3d 717 (Foreign Intelligence Surveillance Court of Review 2002).

Ex Parte, In Camera Hearings are Not Required by 50 U.S.C. § 1806(f)

When a defendant (and "aggrieved person") moves to suppress fruits of FISA surveillance or a FISA search, the Attorney General may file an affidavit that "disclosure or an adversary hearing would harm the national security of the United States."[10] Once an Attorney General files such an affidavit, as Attorney General Holder has done here, the court must review the FISA application, order, and related materials ex parte and in camera, unless "disclosure [to the defendant] is necessary to make an accurate determination of the legality of the

[10] 50 U.S.C. § 1806(f).

surveillance."[11] Under 50 U.S.C. § 1806(f), any such disclosure must occur "under appropriate security procedures and protective orders."

As touched upon above, one District Court Judge has, for the first time, ordered FISA materials be disclosed to the defense in a so-called terrorism case. *United States v. Adel Daoud,* (12-cr-723 N.Dist.Ill. Doc. 92). [12] In *Daoud*, the defendant "filed a motion for disclosure of Foreign Intelligence Surveillance Act of 1978 ("FISA") related material; . . . to suppress the fruits or derivatives of electronic surveillance and any other means of collection conducted under FISA or other foreign intelligence gathering; [and] raised an issue about the legality of the government's surveillance." *Id*., *1. The district court found disclosure was an essential component of an adversarial proceeding; a proceeding for the court to make "an accurate determination of the legality of the surveillance."

In enacting FISA Congress anticipated that sometimes disclosure would be ordered; specifically, when doing so would promote an accurate determination of a FISA order's legality. *See* S. Rep. No. 701, 95th Cong., 1st Sess. at 64, reprinted 1978 U.S.Code & Cong. Admin. News 403.

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[11] *Id.; see also id.* § 1806(g) (if court determines surveillance or search was "lawfully authorized," it shall deny motion to suppress "except to the extent due process requires discovery or disclosure").

[12] Defense counsel in the *Daoud* case previously had security clearance. Hundreds of lawyers were given security clearance to represent detainees at Guantanamo and "there does not appear to be on record a single, reliable reported incident in which a detainee or his counsel mishandled classified information in a way that could compromise national security." Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas,* 95 Iowa L. Rev. 445, 537 (2010).

Provisions of FISA, itself, 50 U.S.C. §§ 1806(f) and 1825(g), require a case-by-case analysis about the need for disclosure; there is no automatic rule against it.

The Attorney General filed an affidavit in this case that disclosure would harm national security. The Attorney General has always done so where a criminal accused has sought suppression or disclosure of FISA material. David S. Kris & Douglas Wilson, 1 *National Security Investigations and Prosecutions,* § 30:7 (2nd ed. 2012). That the Attorney General has adopted a robotic approach does not mean courts must follow suit (although they did until *Daoud)*.

Here, as in *Daoud*, disclosure focuses on the definition of "necessary" in 50 U.S.C. § 1806(f). The district court in *Daoud* defined "necessary" as meaning to "substantially promote an accurate determination of legality." This follows the legislative history of FISA and its purpose to balance national security and civil liberties.

The government asserts that "necessary" in 50 U.S.C. § 1806(f) means "essential" or "required," an assertion at odds with the legislative history of FISA. Two Senate Reports – one from the Senate Judiciary Committee and the other from the Senate Intelligence Committee – discuss the provision that became §1806. The Reports provide:

> The extent to which the government should be required to surrender to the parties in a criminal trial the underlying documentation used to justify electronic surveillance raises delicate problems and competing interests. On the one hand, broad rights of access to the documentation and

> subsequent intelligence information can threaten the secrecy necessary to effective intelligence practices. However, the defendant's constitutional guarantee of a fair trial could seriously be undercut if he is denied the materials needed to present a proper defense. The Committee believes that a just, effective balance has been struck in this section.

S. Rep. 604(I), 95th Cong., 1st Sess. 53, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3954; *see* S. Rep. 701, 95th Cong., 1st Sess. 59 (similar passage in Senate Intelligence Committee Report), *reprinted in* 1978 U.S.C.C.A.N. 3973, 4028.

Turning to § 1806(f), the Committees, in discussing the disclosure provision, observed:

> The decision whether it is necessary to order disclosure to a person is for the Court to make after reviewing the underlying documentation and determining its volume, scope and complexity. The committee has noted the reasoned discussion of these matters in the opinion of the Court in *United States v. Butenko,* [494 F.2d 593 (3d. Cir. 1974) (en banc)]. There, the Court, faced with the difficult problem of determining what standard to follow when balancing national security interests with the right to a fair trial stated:
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> "The distinguished district court judge reviewed in camera the records of the wiretaps at issue here before holding the surveillances to be legal . . . [I]n some cases, the Court will likely be able to determine the legality of the surveillance without any disclosure to the defendant. In other cases, however, the question may be more complex because of, for example,

> indications of possible misrepresentation of fact, vague identification of the persons to be surveilled or surveillance records which includes [sic] a significant amount of nonforeign intelligence information, calling into question compliance with the minimization standards contained in the order. In such cases, the committee contemplates that the court will likely decide to order disclosure to the defendant, in whole or in part since such disclosure "is necessary to make an accurate determination of the legality of the surveillance."

S. Rep. 604(I), 95th Cong., 1st Sess. 58-59, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3959-60; *see* S. Rep. 701, 95th Cong., 1st Sess. 64-65 (identical language in Senate Intelligence Committee Report), *reprinted in* 1978 U.S.C.C.A.N. 3973, 4033-44.

This reflects the balanced approach the Senate Judiciary and Intelligence Committee meant for courts to take when deciding whether disclosure was warranted.

> Striking a sound balance between the need for such surveillance and the protection of civil liberties lies at the heart of [the Act].... [It] is designed to permit the Government to gather necessary foreign intelligence information by means of electronic surveillance but under limitations and according to procedural guidelines which will better safeguard the rights of individuals.

United States v. Megahey 553 F.Supp. 1180, 1184 (D.C.N.Y., 1982).

The citation to *Butenko*, a pre-FISA decision, reflects a congressional intent to give district judges broad discretion when deciding when disclosure is "necessary to make an accurate determination of the legality of the surveillance." This suggests the "necessary" standard is met when the district court determines that "adversary presentation would substantially promote a more accurate decision."

The Committees also noted the district court's "broad discretionary power to excise certain sensitive portions" from the FISA materials before disclosure. This discretionary power has a statutory basis in CIPA and substantially ameliorates the government's professed national security concerns.

CIPA Procedures Can apply to Review of Classified Pleadings

Congress enacted the Classified Information Procedures Act ("CIPA") in 1980 that outlines the procedures and conditions already in place for defense counsel to review classified discovery. Presumably, the redacted classified portions of the government's pleadings are relevant and came from discovery not disclosed. CIPA procedures can be used for defense counsel to access the classified pleadings and information contained therein.

First, CIPA provides for entry of a protective order.[13] The CIPA protective order requires defense counsel and other members of the defense team to obtain security clearances before receiving access to classified discovery. The protective order also requires the defense to maintain all classified information in a Sensitive Compartmented Information Facility or SCIF – usually in the federal

[13] 18 U.S.C. App. 3 § 3.

courthouse and protected by locks and other security devices. The SCIF contains safes to hold classified documents, secure computers on which to prepare classified pleadings and other approved equipment.

Once the protective order is in place, defense counsel has clearance, and the SCIF is ready, the parties begin the classified discovery process. CIPA § 4 governs this process. It allows the court to authorize the government, "upon a sufficient show," to delete classified information from the discovery it provides or to furnish substitutions for the classified information in summaries or admissions. The statute adds that "[t]he court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone." 18 U.S.C. App. 3 § 4. CIPA contains additional procedures governing the use of classified information at trial and in hearings and giving the government a right of interlocutory appeal. *See* 18 U.S.C. App. 3 §§ 5, 6, 7, 8. In Mr. Muhtorov's case, he government has already invoked the CIPA § 4 procedures. *See e.g. Doc. 124.*

For over 30 years, classified information has been disclosed under CIPA in federal criminal cases – without, as far as counsel are aware, a serious security violation by the defense. *See, e.g., United States v. Lee,* 99-cr-1417 JAP (U.S. District Court, New Mexico- Albuquerque), Doc. 15, CIPA protective order, 12-15-1999. In *Lee,* CIPA procedures were employed in a case involving classified national security information, nuclear weapon codes; codes capable of "changing the strategic global balance" that "represented the gravest possible security risk to the United States." *United States v. Lee*, 2000WL228263, at *2

(10th Cir. Feb. 29, 2000). *See* Richard B. Zabel & James J. Benjamin, Jr., *Human Rights First, In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Courts* at 85 (May 2008) (concluding, after studying eighteen terrorism cases involving CIPA, that "CIPA has provided a flexible, practical mechanism for problems posed by classified evidence").[14]

Conclusion

The Fifth and Sixth Amendments to the United States Constitution, 50 U.S.C. §§1806(f),1825(g), and CIPA, support Mr. Muhtorov's request that this Court order the government to disclose to defense counsel its Classified Memorandum (Doc. 569).

Mr. Muhtorov asks the Court to find under 50 U.S.C. 1806(f) that disclosure and subsequent adversarial proceedings will substantially promote the accuracy of the district court's determination of the legal issues raised in the motion to suppress. He also asks that his lawyers be given security clearances and that the process of disclosure be accomplished under CIPA and appropriate protective orders.

[14] The 2009 update to this article concluded that "[t]he Classified Information Procedures Act (CIPA), although subject to being improved, is working as it should: we were unable to identify a single instance in which CIPA was invoked and there was a substantial leak of sensitive information as a result of a terrorism prosecution in federal court." *Human Rights First, In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Courts,* Preface and at p. 25 (May 2009 Update and Recent Developments). http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf(visited June 12, 2014)

Without waiving these requests, Mr. Muhtorov asks:

If there is no disclosure, the government's classified memorandum in response be stricken; and

If the Court finds – after *ex parte* review *in camera* – that some or all of the evidence the government proposes to use was gathered illegally, it conduct a taint hearing in which he and his lawyers are full participants.

Respectfully submitted this 12th day of June, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participant via U.S. Mail: Mr. Jamshid Muhtorov.

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