The Silent Witness Rule: A Secret Safeguard to the First and Sixth Amendments

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Introduction

Suppose you are a judge and a case involving matters of grave national security comes across your desk.[1] After reading the allegations, you learn that the government has charged two United States employees with conspiracy to communicate classified information concerning national defense to unauthorized persons in violation of a federal criminal statute. Because the evidence for both parties contains highly sensitive documents, the government has proposed utilizing a procedure at trial that would disclose certain classified information to the court, the jury, and the parties, but not the public.[2]

This procedure is known as the "silent witness rule."[3] The silent witness rule stems from the government's ability under the Classified Information Procedures Act (CIPA)[4] to substitute classified material with a summary of the documents or a statement admitting relevant

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1 The following fact pattern is based on the District Court for the Eastern District of Virginia's decision in United States v. Rosen, 520 F. Supp. 2d 786 (E.D. Va. 2007).

2 *Rosen*, 520 F. Supp. 2d at 789-90. *See also* United States v. Rosen, 487 F. Supp. 2d 703, 719-21 (E.D. Va. 2007). In this earlier decision, the government filed its first motion to apply the silent witness rule. The Court struck the motion, finding that the government's proposed use of the silent witness rule was too extensive and effectively closed the trial to the public without adequately justifying the need for closure under the applicable standard in Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984).

3 *See* United States v. Zettl, 835 F.2d 1059, 1063 (4th Cir. 1987) (coining the term "silent witness rule," and describing it as follows: "Under such a rule, the witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel, and jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury.").

4 18 U.S.C. app. 3 §§ 1-16 (1980).

facts the classified material would tend to prove.[5] While considering the government's proposal, you recall that the silent witness rule has a controversial history among the courts. Because it is your job to balance the government's interest in keeping classified information from public disclosure with the defendant's interest in the right to a public trial, you research whether the silent witness rule violates constitutional public trial rights and how courts have treated the silent witness rule.[6]

First, you must determine whether the silent witness rule violates the constitutional right to a public trial. The Sixth Amendment provides criminal defendants the right to a fair and public trial and the First Amendment guarantees the public access to trials.[7] Traditionally, the presumption of openness in criminal trials has been overcome only if the government can show that: (1) closure is essential to a compelling government interest, (2) the closure is narrowly tailored to serve that interest, and (3) no reasonable alternatives to trial closure exist.[8]

In enacting CIPA, Congress incorporated this traditional trial closure practice by allowing the government to use narrowly tailored alternatives to classified information instead of refusing to pursue the prosecution, or closing the trial completely.[9] In the case before you, the government initiated the trial as a CIPA proceeding and demonstrated that there was a compelling interest in keeping classified information shielded from the general public. Because the government has met its burden, you decide that applying the silent witness rule as a narrowly tailored alternative does not violate the defendants' right to a public trial.

After determining that the silent witness rule is consistent with the Constitution, you must now research how prior courts have

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5 *See id.* § 6(c)(1).

6 *See* Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice after Iran-Contra*, 91 COLUM. L. REV. 1651, 1651 n.2-3 (1991) (noting that the government's interest in keeping classified information from the public derives from the government's duty to protect the nation's secrets from disclosure under Article II of the Constitution, and that the defendant's interest in a public trial derives from his "right to a speedy and public trial" under the Sixth Amendment).

7 *See* U.S. Const. amends. I, VI.

8 Press-Enter. Co. v. Superior Court, 464 U.S. 501, 509-10 (1984) (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982)).

9 *See* S. REP. NO. 96-823 (1980); H.R. REP. NO. 96-1436 (1980). *See also* 18 U.S.C. app. 3 §§ 1-16 (1980).

treated the silent witness rule. Your research ultimately yields only three published cases where courts have addressed the use of the silent witness rule.[10] In only one of those three cases did the court explicitly approve the use of the silent witness rule.[11] However, upon deeper probing, you learn that several other courts, although not using the term "silent witness rule," have approved very similar techniques.[12] You decide these implicit approvals of the silent witness rule demonstrate that courts have supported Congress's express intent in enacting CIPA. Courts apply creative and fair solutions to the problems raised by the use of classified information at trial.[13]

Based on your research, you decide that the silent witness rule is an appropriate trial technique for this case. Not only will applying the silent witness rule to the current case preserve the defendants' First and Sixth Amendment rights to a public trial, but it will also conform with prior courts' treatment of the silent witness rule in CIPA proceedings.

Although the situation described above illustrates how one court applied the silent witness rule, it is unclear whether the silent witness rule is merely an extension of CIPA or whether it is a separate doctrine that could potentially violate the Constitution's public trial guarantee. This Comment maintains that the silent witness rule is consistent with the First and Sixth Amendments and should be

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[10] *See* United States v. Rosen, 520 F. Supp. 2d 786, 794 n.11 (E.D. Va. 2007) (determining that the silent witness rule only appears in the following three published cases: United States v. Fernandez, 913 F.2d 148, 161-62 (4th Cir. 1990); United States v. Zettl, 835 F.2d 1059 (4th Cir. 1987); and United States v. North, CRIM. No. 88-0080-02, 1988 WL 148481 at *3 (D.D.C. Dec. 12, 1988)). *See also* United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008). Although *Abu Ali* was not published when the *Rosen* court determined that only three cases have discussed the silent witness rule, it now serves as a fourth example.

[11] *See Zettl*, 835 F.2d 1059. *See also Abu Ali*, 528 F.3d 210 (explicitly approving the silent witness rule, but holding that its use was unconstitutional because the government provided the jury with an unredacted version of the classified documents while only providing the defendant with a redacted version, thereby violating his Sixth Amendment right to confront the evidence used against him).

[12] *See* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004); United States v. Marzook, 435 F. Supp. 2d 708 (N.D. Ill. 2006); United States v. Pelton, 696 F. Supp. 156 (D. Md. 1986); United States v. George, No. 912-0521(RCL), 1992 WL 200027, at *1 (D.D.C. July 29, 1992). Each of these cases approved techniques similar to the silent witness rule by allowing the presentation of evidence in one form to the jury and in another form to the public.

[13] *Rosen*, 520 F. Supp. 2d at 796 (quoting S. REP. 96-823 (1980)) (internal citations omitted); Jonathan M. Lamb, Comment, *The Muted Rise of the Silent Witness Rule in National Security Litigation: The Eastern District of Virginia's Answer to the Fight over Classified Information at Trial*, 36 PEPP. L. REV. 213, 248 n.190 (2008).

applied by courts as a substitution under CIPA only if the government satisfies traditional trial closure practices and a fairness analysis. Part I of this Comment discusses the constitutional origins of public trial rights in the First and Sixth Amendments and the development of trial closure practices in the courts. Part I also explains the need for CIPA and explores each of its relevant provisions and its effect on public trial rights. Finally, Part I describes the silent witness rule and discusses its prior treatment by the courts. Part II analyzes the court's application of the silent witness rule as constitutional only if the government satisfies traditional trial closure criteria as well as a fairness analysis inherent to CIPA. Part II concludes with a description of the constitutional limits of CIPA and the silent witness rule.

I. BACKGROUND

Before determining whether the silent witness rule is a part of CIPA or its own separate doctrine, it is essential to first explore the historical significance of public trial rights to develop the relationship between the silent witness rule and CIPA. First, Section A of this Part explores the origins of public trial rights established by the First and Sixth Amendments. The First Amendment[14] gives the public the right to access criminal trials.[15] Historically, the language of the First Amendment has been construed to provide the general public and the press the right to attend criminal trials to "enhance public confidence" in the constitutionality of the criminal trial process.[16] The Sixth Amendment sets forth a criminal defendant's trial rights, including the right to a fair and public trial.[17] This Amendment has been used as the foundation for a defendant's personal right to a trial held in an open forum.[18] Section A also describes the development of trial closure practices throughout case law. Next, Section B introduces CIPA and explains its separate provisions. Finally, Section C describes the silent witness rule, its role within a CIPA proceeding, and its treatment by prior courts.

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[14] U.S. CONST. amend I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

[15] *Id.*

[16] Press-Enter. Co. v. Superior Court, 464 U.S. 501, 507-08 (1984).

[17] U.S. CONST. amend. VI.

[18] *See, e.g.*, Gannett Co. v. DePasquale, 443 U.S. 386, 391 (1979).

A. *The Origins and Development of Public Trial Rights and Trial Closure Practices*

Courts have developed public trial rights through case law while attempting to apply the First and Sixth Amendments as the Framers of the Constitution intended. Over time, courts have approved trial closure for certain reasons that the courts have determined do not violate the Constitution. The development of public trial rights and typical trial closure practices can be traced through forty-one years of judicial proceedings, beginning in 1966.

In *Sheppard v. Maxwell*, the Supreme Court ruled that the right to a public trial is not absolute.[19] In that case, the Court examined the right to freedom of the press under the First Amendment in light of the defendant's Sixth Amendment right to a fair, unbiased trial.[20] The Court decided that, although the press has historically enjoyed extremely broad freedom to access the courtroom, the press must not be given such great breadth so as to divert the trial from its primary purpose of adjudicating controversies in the "calmness and solemnity of the courtroom."[21] If the public's First Amendment right significantly interferes with that purpose, the judge should either postpone the proceedings or transfer the case to a different venue.[22]

Thirteen years later, the Supreme Court addressed a legal question that had been overlooked in *Sheppard*: whether the Sixth Amendment creates a public trial right for the criminal defendant as well as for the public.[23] The Court decided in *Gannett Co. v. DePasquale* that the Sixth Amendment right to a public trial is personal to the defendant and does not confer upon the public a right to attend trials.[24] The *Gannett* Court limited its holding to finding that there was no right to attend pretrial hearings under the Sixth Amendment and ultimately left open the question of whether the public had any constitutional right to attend criminal trials at all.[25]

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19 384 U.S. 333, 350-51 (1966).

20 *Id.* The Court held that the defendant was denied a fair trial for the second-degree murder of his wife, of which he was convicted, because the trial judge failed to protect the defendant from the pervasive and widely biased publicity of his prosecution. *Id.* at 357-63.

21 *Id.* at 350-51.

22 *Id.* at 352-53, 363.

23 *Gannett Co.*, 443 U.S. at 391.

24 *Id. See also* Craig H. Lubben, Note, *First Amendment – Constitutional Right of Access to Criminal Trials*, 71 J. CRIM. L. & CRIMINOLOGY 547, 547 (1980).

25 *Gannett Co.*, 443 U.S. at 391; Lubben, *supra* note 24, at 547 n.3.

The Supreme Court later answered that question in the affirmative, holding that the press and the public do have a right of access to criminal trials under the First Amendment.[26] Accordingly, there is a presumption of openness inherent in all criminal proceedings, which may be overcome only when the government demonstrates by a compelling government interest that closure is required and is narrowly tailored to serve that interest.[27]

In *Press-Enterprise v. Superior Court*, the Supreme Court incorporated the presumption of openness into its own three-prong test for determining whether trial closure violates the First Amendment.[28] The Court held that a criminal trial may be closed if the government successfully satisfies the three-prong test developed in *Press-Enterprise*.[29] Under the *Press-Enterprise* test, the public enjoys a presumably unlimited extent of access to criminal trials, limited only if the government fulfills the three trial closure criteria of establishing that: (1) closure is essential to a compelling government interest, (2) the closure is narrowly tailored to serve that interest, and (3) no reasonable alternatives to trial closure exist.[30] *Press-Enterprise* established that closed proceedings, although not completely precluded, must be extremely rare.[31]

The trial closure process developed in *Press-Enterprise* to protect the public's First Amendment right of access is identical to the trial closure process used for the defendant's Sixth Amendment right to a public trial.[32] Today, before closure of any criminal trial, the government must meet the three trial closure criteria established in *Press-Enterprise*, which *United States v. Rosen* subsequently affirmed.[33]

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[26] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580, 587-88 (1980) (Brennan, J., concurring) (finding that the right of access is implicit in the First Amendment and is necessary for a republican form of government to survive); Lubben, *supra* note 24, at 547.

[27] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-07 (1982); James M. Kennedy, *Clarifying the First Amendment Right of Access to Criminal Trials:* Globe Newspaper Co. v. Superior Court, 24 B.C. L. REV. 809, 809 (1983).

[28] 464 U.S. 501, 509 (1984).

[29] *Id.* at 509-10.

[30] *Id.*

[31] *Id.* at 509.

[32] United States v. Rosen, 520 F. Supp. 2d 786, 799 (E.D. Va. 2007).

[33] *Id.*; *Press-Enter. Co.*, 464 U.S. at 509-10.

B. *CIPA: A General Overview*

CIPA is a procedural statute that allows the government to protect classified information that would otherwise be used as evidence in a criminal defendant's case.[34] To understand the need for CIPA, Section 1 explores the concept of "graymail" and the problems it poses to a government prosecution. After recognizing the possible dangers of graymail, Section 2 then offers the solution to these problems by describing CIPA, including a detailed discussion of Sections 2, 4, 5, and 6 of the Act. Finally, Section 3 explains current public trial rights and typical trial closure practices during a CIPA proceeding.

1. The Problem: "Graymail"

"Graymail" occurs when a criminal defendant threatens to reveal classified information during the course of litigation, forcing the government to either dismiss the case altogether or proceed and face the risk of disclosure of sensitive information.[35] If the threat of disclosure is "real," the government may demand the prosecution to cease.[36] A real threat of disclosure arises when the defendant either has access to the classified materials or has shown that the information would be at least relevant and helpful to his defense.[37] In both of these situations, the real threat of public disclosure may lead the government to drop the prosecution and allow the court to dismiss the case.

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[34] *See* United States v. Anderson, 872 F.2d 1508, 1514 (11th Cir. 1989) ("CIPA established a procedural framework for ruling on questions of admissibility involving classified information before introduction of the evidence in open court."); Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (CIPA)*, 32 CARDOZO L. REV. 437, 447 (2010) ("[CIPA] is a procedural statute that allows the government, before the court impanels a jury, to make an informed decision about the effects a particular prosecution will have on national security.").

[35] Lamb, *supra* note 13, at 236; Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 277 (1986). *See also* United States v. Pappas, 94 F.3d 795, 799 (2d Cir. 1996) (defining graymail as "a threat by the defendant to disclose classified information in the course of trial," and providing various circumstances in which the risk of graymail arise); United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985) (defining graymail as "a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the criminal charge against him").

[36] Tamanaha, *supra* note 35, at 277.

[37] *See* United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir. 1998); *Rosen*, 520 F. Supp. 2d at 789-90. *Cf.* Brady v. Maryland, 373 U.S. 83 (1963) (holding that the government has an obligation to provide the defendant with any evidence that is material to either guilt or punishment).

Graymail has a negative impact on both parties. Often, graymail forces the government to abandon pursuing a case.[38] This has an immediate effect on the government's power to prosecute a case and to protect national security. For example, in *United States v. Smith*, the government was forced to drop an espionage case after the district court and the court of appeals both ordered disclosure of classified information, even though the defendant was a threat to national security.[39] Graymail ultimately allows the criminal defendant to control the prosecution and to coerce the government into dropping charges.

Conversely, once the government drops a case, an individual's ability to maintain litigation against the government is greatly diminished. For example, in *El-Masri v. United States*, a torture victim was unable to charge the government with violations of his Fifth Amendment right to due process because the Court dismissed the allegations when the government refused to reveal classified information.[40] In that case, a German citizen, Khaled El-Masri, alleged he had been held against his will by CIA operatives in Afghanistan.[41] During his detention, El-Masri contended that he had been mistreated in a number of ways, including being beaten, drugged, bound, blindfolded, interrogated, and consistently prevented from communicating with anyone outside the detention facility.[42] El-Masri also alleged that CIA officials determined early into his detention that they had detained the wrong person, but refused to release him.[43] Because El-Masri's goal in pursuing the lawsuit was to prove the existence of certain state secrets that the government denied, the district court decided and the Fourth Circuit affirmed that continuing with the case would reveal considerable detail about the CIA's highly classified operations.[44]

In each of these situations, there is a "conflict of values" between the government's interest in protecting national security and the crim-

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38 Lamb, *supra* note 13, at 236; Tamanaha, *supra* note 35, at 277.

39 United States v. Smith, 750 F.2d 1215 (4th Cir. 1984), *vacated*, 780 F.2d 1102 (concluding that the District Court applied an incorrect legal standard in its ruling upon the introduction of the classified information).

40 El-Masri v. United States, 479 F.3d 296, 299-300 (4th Cir. 2007).

41 *Id.* at 300.

42 *Id.*

43 *Id.*

44 Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1261-63 (2007).

inal defendant's right to a fair trial.[45] To ease this tension, Congress enacted CIPA.[46]

2. The Solution: CIPA

In 1980, Congress enacted CIPA to "harmonize a defendant's right to obtain and present exculpatory material upon his trial and the government's right to protect classified material in the national interest."[47] CIPA is a procedural statute consisting of sixteen separate sections that allow the government, in a pre-trial environment, to contemplate the national security risks associated with a particular prosecution.[48] Every trial involving CIPA proceeds through four basic steps: (1) the pre-trial conference and discovery of classified information, (2) the defendant's notice of his intent to use classified information at trial, (3) the admissibility of classified information, and (4) the introduction of classified information at trial.[49] Although this Comment will primarily focus on the third step in this process—the admissibility of classified information under CIPA Section 6—an overview of the other relevant CIPA sections will provide necessary background information to show how the steps interact with each other.

a. Sections 2, 4, and 5: The Pre-Trial Conference, the Discovery Process, and the Defendant's Duty to Notify

Under CIPA Section 2, either party or the court may move for a pre-trial conference to consider any matters relating to classified information that may arise during the prosecution.[50] At this conference, the court will establish the timing of discovery, the defendant's obligation to notify the court and the government if he intends to disclose classified information, and the hearing to determine whether the classified information may be submitted as evidence at trial.[51] The

45 *See id.* at 1265; Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1964 (2005).

46 Lamb, *supra* note 13, at 236; Tamanaha, *supra* note 35, at 277.

47 United States v. Pappas, 94 F.3d 795, 799 (2d Cir. 1996) (quoting United States v. Wilson, 571 F. Supp. 1422, 1426 (S.D.N.Y. 1983)). *See also* Note, *supra* note 45, at 1964.

48 Radsan, *supra* note 34, at 447. *See also* United States v. Anderson, 872 F.2d 1508, 1514 (11th Cir. 1989) ("CIPA established a procedural framework for ruling on questions of admissibility involving classified information before introduction of the evidence in open court.").

49 *See* 18 U.S.C. app. 3 §§ 2-8 (1980); Jordan, *supra* note 6, at 1658.

50 18 U.S.C. app. 3 § 2.

51 *Id.*

court may also consider any other matters that would promote a fair and expeditious trial.[52] However, the court will not yet decide any substantive issues concerning the proper use or admissibility of evidence or admit any statements made by the defendant.[53] This step encourages both parties to resolve questions concerning classified information before trial and allows the government to educate the court on the specific requirements of a CIPA proceeding.[54]

CIPA Section 4 explains the discovery process that the parties must follow.[55] Under this section, the parties request any classified and unclassified information pursuant to the ordinary rules of discovery under Federal Rule of Criminal Procedure 16.[56] Upon the government's request, the court, outside the courtroom and without the defendant's attorney present, will inspect any classified information the parties seek to discover.[57] If the government makes a sufficient showing that the requested materials could damage national security if disclosed,[58] the court may permit the government to substitute certain classified information either with (1) a redacted version of the classified document, (2) a summary of the information contained in the document, or (3) a statement admitting relevant facts that the document would tend to prove.[59] However, if the government fails to make a sufficient showing, the court may instead authorize discovery of the unaltered classified document.[60] This step ensures that the government will comply with its discovery obligations to provide the

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52 *Id.*

53 *See id.*; Lamb, *supra* note 13, at 239; Tamanaha, *supra* note 35, at 286 n.47.

54 *See* Lamb, *supra* note 13, at 239; Tamanaha, *supra* note 35, at 286.

55 18 U.S.C. app. 3 § 4.

56 FED. R. CRIM. P. 16 (detailing the ordinary discovery process in a criminal trial, regardless of whether or not classified information is going to be used as evidence).

57 18 U.S.C. app. 3 § 6.

58 *See* Lamb, *supra* note 13, at 240 n.155; Tamanaha, *supra* note 35, at 290. CIPA permits the government to rebuff the defendant's discovery requests for classified information by declaring that the requested materials could damage national security if disclosed. The court views the government's declaration as sufficient showing for portions of the classified information to be deleted, redacted, modified, or substituted before being given to the defendant. Tamanaha, *supra* note 35, at 291.

59 18 U.S.C. app. 3 § 4. *See also* Lamb, *supra* note 13, at 240-41 (noting that of the three substitution options, the summary, and the admitting statement are the most beneficial to the defendant because redaction may include deleting large portions of the document, limiting the defendant's access to the document or denying the defendant's access to the document entirely).

60 *See* Lamb, *supra* note 13, at 241.

defendant with any exculpatory evidence that would be "material either to guilt or punishment" for the defendant.[61]

Under CIPA Section 5, the defendant must notify the court and the government prior to trial that he expects to use classified information for his defense.[62] Also, the defendant's obligation continues during the trial proceedings.[63] The defendant's notification must be in writing and include a brief description of the classified information the defendant seeks to disclose.[64] If the defendant fails to notify the court or the government, the court may prohibit the defendant from using that information at trial.[65] If at any time during the trial the defendant learns of additional classified information he reasonably expects to disclose, he must immediately notify the court and the government.[66]

b. Section 6: Relevance and Admissibility of Classified Information

After the defendant has filed his notification, the government may move the court for a "relevance hearing" under CIPA Section 6(a).[67] During this hearing, the court will determine the use, relevance, and admissibility of the requested classified materials.[68] If the court decides that disclosure of the classified information is necessary to the defendant's case, the government may request to submit a substitution of the classified information in lieu of disclosure.[69]

Under Section 6(c), the government may substitute the requested classified information with either (1) a statement admitting relevant facts that the materials would tend to prove, or (2) a summary of the classified information.[70] If proposing a substitution, the government bears the burden of showing that the classified information should not be disclosed, or at least that it should be modified.[71] The government

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61 Brady v. Maryland, 373 U.S. 83, 87 (1963).

62 18 U.S.C. app. 3 § 5.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* § 6(a). *See also* Lamb, *supra* note 13, at 242 (2008).

68 18 U.S.C. app. 3 § 6(a) (1980) (noting that the relevance hearing may be held *in camera* if the Attorney General certifies to the court that a public hearing may result in the disclosure of classified information, but may not be held *ex parte*).

69 *Id.* § 6(c). *See also* Brady v. Maryland, 373 U.S. 83 (1963).

70 18 U.S.C. app. 3 § 6(c).

71 Jordan, *supra* note 6, at 1661.

successfully meets its burden only if the court finds that the proposed substitution provides the defendant with substantially the same ability to make his defense.[72]

If the government fails to provide an adequate substitution, the court may order the government to disclose the classified information.[73] At that point, the Attorney General may submit an affidavit on behalf of the government certifying that disclosure of the classified information would harm national security.[74] If the Attorney General files the affidavit objecting to disclosure, the court must order that the classified materials not be disclosed.[75]

Although Section 6 ultimately gives the government control over disclosure of the classified information, it also provides the defendant with relief if the government refuses to comply with the court's disclosure order.[76] Under Section 6(e)(2), the court may dismiss the indictment, unless the court believes dismissal would undermine the interests of justice.[77] If so, the court may issue an alternative remedy that equally protects the defendant's ability to prepare and present his defense.[78] The alternative remedial actions include: (1) dismissing specified counts of the indictment or information, (2) finding against the government on any issue as to which the classified information relates, and (3) striking or precluding all or part of the testimony of a government witness.[79]

In addition to the court's remedial orders, the defendant also benefits from the reciprocity requirement under Section 6(f).[80] Similar to the defendant's duty to notify under Section 5, if the court finds that disclosure of classified information is appropriate, the government must likewise notify the defendant of any information it will use

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72 18 U.S.C. app. 3 § 6(c).

73 Jordan, *supra* note 6, at 1661.

74 18 U.S.C. app. 3 § 6(c)(2).

75 *Id.* § 6(e)(1).

76 *See* S. REP. NO. 96-823, at 9 (1980) ("The sanctions against the government are designed to make the defendant whole again."); Lamb, *supra* note 13, at 243; Tamanaha, *supra* note 35, at 298-99.

77 18 U.S.C. app. 3 § 6(e)(2). *See also* Tamanaha, *supra* note 35, at 298 n.116 (noting that CIPA does not elaborate on what is included in the "interests of justice," but asserts that the phrase refers to "the administration of justice, and the protection of our laws and society within the context of the criminal justice system," not to "national security, which has already been taken into account in earlier sections").

78 Tamanaha, *supra* note 35, at 299.

79 18 U.S.C. app. 3 § 6(e)(2)(A)-(C).

80 *Id.* § 6(f).

to rebut the classified information.[81] Like the defendant, the government has a continuing duty to notify the defendant of any additional disclosure during the trial proceedings.[82] If the government fails to comply with this obligation, the court may exclude any rebuttal evidence the government attempts to submit.[83]

3. Public Trial Rights and Trial Closure Practices under CIPA

When enacting CIPA, Congress intended to protect the public trial rights found in the Constitution and follow trial closure techniques developed by the courts.[84] The rights of witnesses in criminal trials play a large role in the judicial process and in American society as a whole.[85] Public access to criminal trials is an essential component of the government's structure because it "permits the public to participate in and serve as a check upon the judicial process . . . ."[86] However, the enacting Congress understood that there are times when the public's right to attend a trial and the defendant's right to have a public trial must be mitigated.[87]

At those times, Congress intended the courts to conduct trials as openly as possible, including discussing classified information that is not harmful to national security.[88] If, however, the government demonstrates strong national security interests, Congress intended courts to use discretion in a way that best complies with ordinary trial closure practices.[89] Congress specifically noted that at no point during a CIPA prosecution should a criminal defendant's constitutional rights be violated, including his Sixth Amendment right to a public trial.[90] However, Congress left room for the court to determine that "public" may include partially closed trials or trials that use substitutions instead of the original classified documents.[91]

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81 *Id.*

82 *Id.*

83 *Id.*

84 *See* S. REP. NO. 96-823, at 7 (1980).

85 Cameron Stracher, *Eyes Tied Shut: Litigating for Access under CIPA in the Government's "War on Terror*," 48 N.Y.L. SCH. L. REV. 173, 174 (2004) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)).

86 *Id.* (quoting *Globe Newspaper Co.*, 457 U.S. 596).

87 Radsan, *supra* note 34, at 475.

88 S. REP. NO. 96-823, at 9 (1980).

89 *Id.* at 4.

90 *Id.* at 8-9.

91 *Id.* at 4-5.

In each instance, Congress intended CIPA to be a flexible procedure that is applied to the specific facts of each individual prosecution.[92] Because CIPA is flexible, it can adequately take into account several alternatives instead of either disclosing classified information to the public or having to close the trial from the public completely.[93] In this way, Congress has provided a safeguard to the defendant's and the public's right to a public trial.[94] Instead of automatically closing a trial that involves any classified information, the court may now explore other options to preserve the trial rights under the First and Sixth Amendments.[95] In effect, Congress has created a system that accommodates the interests of the defendant, the government, and the public.

C. *The Silent Witness Rule and Its Treatment by Prior Courts*

The term "silent witness rule" was first used in the case *United States v. Zettl* to describe a substitution method that uses code words and a key card to refer to classified information without disclosing private details to the general public.[96] Under the silent witness rule, the witness does not discuss classified information on the stand, but instead refers to specific places within the classified document by referencing the corresponding key card.[97] As a result, either party is free to call witnesses at trial without fear of publicly disclosing classified information. For the silent witness rule to be effective, the judge, jury, and counsel must have access to the same classified document and the same corresponding key card.[98] Although the public can still

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92 *Id.* at 9.

93 *Id.*

94 S. REP. NO. 96-823, at 9 (1980).

95 *Id.*

96 United States v. Zettl, 835 F.2d 1059, 1063 (4th Cir. 1987) ("Under such a rule, the witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel, and jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury.").

97 *Id.*; United States v. Rosen, 520 F. Supp. 2d 786, 793 (E.D. Va. 2007).

98 *See Zettl*, 835 F.2d at 1063. *See also* United States v. Abu Ali, 528 F.3d 210, 253 (4th Cir. 2008) (holding that the government's use of the silent witness rule was unconstitutional because the defendant was presented with different evidence than the judge and jury).

observe the trial, the use of the key card prohibits disclosure of the classified information.[99]

Until recently, among the few courts that have actually discussed the silent witness rule, no court included in their published final decision any explicit approval of using the rule in criminal trials.[100] However, no court clearly rejected its use either.[101] In *Zettl*, the first case to allude to the silent witness rule, the Court approved the technique, but was not able to implement it in trial because the government took an interlocutory appeal.[102] In *United States v. Fernandez* and *United States v. North*, both Courts denied the government's proposal to use the silent witness rule, but noted that its denial was based solely on the specific facts of those cases.[103]

However, in *Rosen*, the Court explicitly approved the silent witness rule and finally applied the technique successfully during a CIPA trial.[104] This case also marked the first time that the government proposed use of the silent witness rule as a substitution under CIPA Section 6.[105] During the pre-trial admissibility hearing,[106] the Court struck down the government's initial motion to use the silent witness rule as a substitution because the Court found that the "proposed extensive use of the [silent witness rule] effectively closed the trial to the public and . . . the government had not adequately justified this trial closure" under *Press-Enterprise*.[107] In a second motion, the government drastically reduced the amount of classified information that it sought to substitute with the silent witness rule.[108] The Court approved the government's proposal, finding that the motion was "now ripe for resolution" because the government limited its use at trial.[109]

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99 *See Rosen*, 520 F. Supp. 2d at 793-94.

100 *Id.* at 794.

101 *See* Lamb, *supra* note 13, at 248-49 (discussing *Zettl*, 835 F.2d 1059).

102 *Id.* at 249-53.

103 *Id.* at 253-59 (discussing United States v. Fernandez, 913 F.2d 148 (4th Cir. 1990) and United States v. North, CRIM. No. 88-0080-02, 1988 WL 148481 (D.D.C. Dec. 12, 1988)).

104 *See Rosen*, 520 F. Supp. 2d at 797 n.20 (noting the court's approval of the use of the silent witness rule for four minutes and six seconds of recorded conversation). *See also* Lamb, *supra* note 13, at 259 (noting that *Rosen* was the first real approval of the silent witness rule in criminal trials).

105 *See* Lamb, *supra* note 13, at 260, 265.

106 *See* 18 U.S.C. app. 3 § 6(a) (1980).

107 Lamb, *supra* note 13, at 262 (quoting *Rosen*, 520 F. Supp. 2d at 790).

108 *Rosen*, 520 F. Supp. 2d at 790.

109 *Id.*

Although the *Rosen* Court approved the silent witness rule, it found that the technique was not merely another type of CIPA Section 6 substitution as the government suggested.[110] The Court determined that CIPA substitutions, unlike the silent witness rule, do not close parts of the trial to the public.[111] Indeed, the Court found that CIPA "plainly envisions that substitutions and redactions will be made available in the same form to the public as to the trial participants."[112] Under this approach, the Court adopted a broad "fairness" test, stating that, although the silent witness rule is separate from CIPA, the technique must be consistent with CIPA's overall fairness objective because it is used during CIPA proceedings.[113] According to the fairness test, a court must determine whether the silent witness rule impairs the defendant's ability to fairly present evidence, cross-examine, and argue to the jury. The court must also determine whether an ordinary juror will be able to follow the evidence and argument, and whether the prejudice from the rule's use is curable by instructions or otherwise.[114]

The *Rosen* Court's holding established that approval of the silent witness rule is only appropriate if the government has satisfied not only traditional trial closure criteria under *Press-Enterprise*, but also a fairness analysis inherent to CIPA.[115] Both tests are satisfied only when the government establishes: (1) an overriding reason for closing the trial, (2) that the closure is narrowly tailored to protect that interest, (3) that no reasonable alternatives to closure exist, and (4) that the use of the silent witness rule provides defendants with substantially the same ability to make their defense as would disclosure of the classified information.[116] The holding from this case provides a constitutional standard for courts to follow when the government proposes use of the silent witness rule at trial.

However, if the courts reject this approach, the silent witness rule may be applied unconstitutionally. For example, in *United States v. Abu Ali*, the District Court initially approved the government's proposal to use the silent witness rule, which ultimately excluded the

110 *See id.* at 797 ("The [silent witness rule] is not part of CIPA.").
111 *Id.*
112 *Id.*
113 *Id.* at 798.
114 United States v. Rosen, 520 F. Supp. 2d 786, 799 (E.D. Va. 2007).
115 *Id.*
116 *Id.*

defendant from the classified information.[117] On review, the Fourth Circuit held the use of the silent witness rule was unconstitutional in this case because it effectively deprived the defendant of his Sixth Amendment right to confront the evidence without the government first providing a compelling interest for closure.[118] The Fourth Circuit further held that the District Court had taken CIPA "one step too far" because it failed to follow the approach described in *Rosen*.[119]

II. ANALYSIS

As the silent witness rule could lead to unconstitutional results, the courts should apply it during a criminal trial only if the government satisfies traditional trial closure criteria and a fairness analysis. Based on this assessment, the silent witness rule should be viewed as a substitution under CIPA Section 6, not as a distinct doctrine. Section A of this Part further explores why the silent witness rule should be construed as a CIPA Section 6 substitution. Section A also explains why the government must satisfy traditional trial closure criteria as well as a fairness analysis. Finally, Section B of this Part provides the constitutional limits of both CIPA and the silent witness rule.

A. *Courts Should Apply the Silent Witness Rule as a CIPA Section 6 Alternative if the Government Satisfies the* Press-Enterprise *Trial Closure Test and the* Rosen *Fairness Test*

The silent witness rule is a trial technique that may be used by the government as a CIPA Section 6 substitution, eliminating the risk of graymail. However, the courts have improperly applied the silent witness rule in the past, a practice that could continue if judges do not adopt a consistent application. The courts should only apply the silent witness rule if the government has satisfied traditional trial closure criteria as well as a fairness analysis. This approach prevents the government from either invoking the silent witness rule as a separate doctrine without having to satisfy the fairness requirement inherent in

117 United States v. Abu Ali, 528 F.3d 210, 250 (4th Cir. 2008). The government's proposal permitted the judge and jury to see the original classified documents, but only allowed the defendant and his counsel to see redacted versions of the same materials. *Id.* The district court approved the government's proposal and the silent witness rule was used to exclude the defendant from the classified information. *Id.*

118 *Id.* at 253.

119 *Id.* at 254.

CIPA, or using the silent witness rule as a way to close a trial without having to satisfy the traditional trial closure practices. First, the government must show that its proposed use of the silent witness rule is consistent with traditional trial closure practices established by the Supreme Court in *Press-Enterprise*. Second, the court must determine that the government's proposed use of the silent witness rule complies with the fairness test inherent to CIPA and established by the district court in *Rosen*.

1. The Silent Witness Rule as a CIPA Section 6 Alternative to Disclosure

The silent witness rule was crafted from the language of CIPA Section 6 and is embedded in the procedural method of CIPA used during trial.[120] Although not explicitly authorized by CIPA, the language of Section 6 provides "the backbone of the silent witness rule and allows substitutions to be admitted as evidence so long as the trial remains fair to both parties."[121] Under CIPA Section 6(c), after the court determines that the classified information needs to be disclosed, the government can move that, in lieu of disclosure of the classified information, the court should order a substitution.[122] As discussed above, a substitution can be in the form of either a summary or a statement admitting relevant facts.[123] The silent witness rule should be construed as a summary emanating from Section 6(c) providing classified information only to the judge, jury, and parties involved.[124]

Although the *Rosen* Court held that the silent witness rule and CIPA are distinct,[125] the silent witness rule should be viewed as a doctrine that emerged from the language of CIPA Section 6. The only reason the *Rosen* Court separated the silent witness rule from CIPA is because the other substitutions do not close parts of the trial.[126] However, the substitutions described in CIPA Section 6 consist of either a

120 18 U.S.C. app. 3 § 6(c) (1980).

121 Lamb, *supra* note 13, at 246. *See also* Government's Memorandum of Law, United States v. Rosen, 520 F. Supp. 786 (E.D. Va. 2007) No. 1:05-CR-225, 2007 WL 3352462 (addressing the use of the silent witness rule under CIPA and arguing that it is a permissible substitute under CIPA section 6(c)).

122 18 U.S.C. app. 3 § 6(c).

123 *Id.*

124 *See* Lamb, *supra* note 13, at 235-36.

125 United States v. Rosen, 520 F. Supp. 2d 786, 797 (E.D. Va. 2007).

126 *Id.*

summary or a statement of the classified information, both of which effectively close the public's ability to access the classified information.[127] Because the silent witness rule and the other two substitutions both block the public's ability to view the original documents, they each close the trial to an equal degree. Indeed, depending on the subject matter of the classified information involved, a summary or statement of the facts could potentially cause greater trial closure than would the silent witness rule. Therefore, the silent witness rule should be viewed as a trial technique embedded within CIPA Section 6, not as a separate or distinct doctrine.

Finally, by recognizing the silent witness rule as a mechanism within CIPA, the court should be able to conduct the fairness test more efficiently and consistently. In *Rosen*, the Court took great pains to distinguish the silent witness rule from CIPA, but ultimately arrived at the same result it would have if it had analyzed the two procedures as one doctrine.[128] The *Rosen* Court also failed to acknowledge that, according to CIPA, the court must explicitly approve any CIPA Section 6 substitution before the government is able to submit it at trial.[129] Therefore, any use of the silent witness rule during trial should presumably satisfy the fairness test because the court would have already assessed whether the technique is fair during the pre-trial relevance hearing.[130] By viewing the silent witness rule as a doctrine embedded within CIPA Section 6, the court's fairness assessment of the government's proposed use of the silent witness rule will protect the rights of the government, the criminal defendant, and the public.

2. The Government Must Satisfy Traditional Trial Closure Criteria and a Fairness Analysis

There is a presumption of openness in every criminal trial.[131] This presumption of openness has historically played an important role in the administration of justice.[132] Openness serves a reassuring role so that individuals not able to attend a trial can have confidence that the

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127 18 U.S.C. app. 3 § 6(c).

128 *Rosen*, 520 F. Supp. 2d at 797-98.

129 *See* 18 U.S.C. app. 3 § 6(a).

130 *See id.*

131 Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982)).

132 *See id.* at 508-10.

courts and respective parties will observe standards of fairness.[133] The understanding that anyone is allowed to attend a trial forces the court to follow constitutional procedures because, otherwise, witnesses will notice a violation of the Constitution.[134] Openness therefore "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[135]

Some criminal acts, especially violent crimes, often provoke public outrage and hostility, which incite a communal urge to retaliate against the criminal defendant.[136] When the public is able to witness the law being enforced and the criminal justice system functioning properly, this provides an outlet for the public's volatile reactions and emotions.[137] In contrast, when the public is denied access to these proceedings, the outlet is destroyed and the public's interest is frustrated.[138] Public proceedings soothe the apprehension of victims and the community as a whole in knowing that offenders must account for their criminal conduct before a fairly and openly selected jury of their peers.[139]

Because of the benefits of an open trial system, courts have historically opposed closing a trial for any reason.[140] However, there are certain circumstances where closure becomes necessary, such as when the public's outrage is so fierce or the media coverage so inflammatory that the criminal defendant is deprived of his right to a fair trial.[141] The court may also choose to close a trial if classified information is used that would compromise national security.[142] In both situations, the court should only allow closure if the government has satisfied traditional trial closure procedures, as defined in *Press-Enterprise* and affirmed in *Rosen*.

As the *Rosen* Court correctly held, the silent witness rule should only be applied if the government has met the traditional trial closure

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133 *Id.* at 508.

134 *Id.*

135 *Id.* (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569-71 (1980)).

136 *Id.* at 508-09.

137 Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508-09 (1984).

138 *Id.* at 509.

139 *Id.*

140 *See id.* at 508-10.

141 *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966) (determining that the defendant was denied a fair trial for the second-degree murder of his wife because the trial judge failed to protect the defendant from the pervasive and widely biased publicity of his prosecution).

142 *See, e.g.*, United States v. Rosen, 520 F. Supp. 2d 786 (E.D. Va. 2007).

criteria necessary for closing any criminal proceeding.[143] The test that the *Rosen* Court used is the three-prong test found in *Press-Enterprise*.[144] Under the *Press-Enterprise* test, if the government seeks to close a criminal trial from the public, it must show: (1) the closure is essential to a compelling government interest, (2) the closure is narrowly tailored to serve that interest, and (3) no reasonable alternatives to closure exist.[145] Typically, these criteria are satisfied in CIPA proceedings if the government demonstrates that an open trial would pose a threat to national security.[146]

As the Court in *Rosen* noted, the silent witness rule does effectively close a portion of the trial from the public.[147] Although it has never been used to completely close the trial, the silent witness rule involves partial closure of the trial because it does not allow the public to access the original classified documents.[148] However, the courts have never distinguished between the government's responsibilities when it seeks complete closure and when it seeks only partial closure.[149] As such, it is not only appropriate, but also necessary that the court require the government to satisfy traditional trial closure criteria established in *Press-Enterprise* anytime the government proposes use of the silent witness rule. Satisfying traditional trial closure criteria provides a clear standard for courts to apply during a CIPA proceeding and ensures that the presumption of openness remains a high priority in the criminal trial system.

In addition to traditional trial closure criteria, the government must also satisfy a fairness analysis to use the silent witness rule during a CIPA proceeding. CIPA does not alter any existing law or policy that Congress has enacted concerning the relevance and admissibility of evidence in court.[150] Therefore, under CIPA, the government must still abide by its normal discovery obligations that Congress estab-

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143 *Id.* at 797-98.

144 *Id.*

145 *Id.* at 797.

146 *See supra* note 58 and accompanying text.

147 *See Rosen*, 520 F. Supp. 2d at 796.

148 *Id.* at 767.

149 *See id.* at 797 (making no distinction between partial trial closure by the silent witness rule and complete trial closure by the silent witness rule for purposes of trial closure practice).

150 Melanie Reid, *Secrets Behind Secrets: Disclosure of Classified Information Before and During Trial and Why CIPA Should Be Revamped*, 35 SETON HALL LEGIS. J. 272, 274 (2011); Timothy J. Shea, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials*, 27 AM. CRIM. L. REV. 657, 662 (1990).

lished in prior legislative acts and that the courts developed. For example, according to the government's normal discovery obligations, the government must disclose any information that would be "material either to guilt or punishment" for the defendant.[151] However, although no part of CIPA, including Section 6, alters the government's normal discovery obligations, CIPA does require a heightened level of fairness to provide the defendant with substantially the same ability to proceed with his defense.[152]

B. *Constitutional Limits of CIPA and the Silent Witness Rule*

There is a clear distinction between the courts' approval of the silent witness rule in *Rosen* and in *Abu Ali*.[153] In *Rosen*, the Court approved the government's proposal of the silent witness rule only because the government satisfied traditional trial closure procedures and a fairness analysis.[154] In contrast, the District Court in *Abu Ali* failed to require the government to satisfy either of those two tests applied in *Rosen*.[155] Instead, the government was able to use the silent witness rule without first demonstrating that closure would further a compelling government interest.[156] This conduct both violated traditional trial closure practices and was unfair to the defendant and the public under CIPA procedures.[157] Consequently, the Fourth Circuit held unconstitutional the district court's approval and application of the silent witness rule in *Abu Ali*.[158]

The distinction between *Rosen* and *Abu Ali* demonstrates that there are constitutional limits to CIPA and the silent witness rule that the courts should not ignore. Although CIPA and the silent witness rule were carefully developed to stay within the constitution's framework, courts require the government to satisfy trial closure criteria and the fairness test to pass constitutional muster. The flaw in *Abu Ali* was not that CIPA or the silent witness rule failed as procedural measures, but instead that the District Court failed to apply CIPA and

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151 Brady v. Maryland, 373 U.S. 83, 87 (1963).

152 18 U.S.C. app. 3 § 6(c) (1980). *See also* Lamb, *supra* note 13, at 268 (describing that CIPA requires an additional "fairness" analysis).

153 *See supra* Part I.C.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

the silent witness rule appropriately.[159] The silent witness rule provides a permissible substitution under CIPA, but only if the courts apply it within its constitutional limits.[160]

Opponents of this approach claim that "the [silent witness rule] is not a part of CIPA" and, therefore, is not always a constitutional trial technique when other substitutions under CIPA are available.[161] As noted above, opponents point out that the other CIPA substitutions do not close the trial to the public, but instead are "made available in the same form to the public as to the trial participants."[162] According to this rationale, the silent witness rule is "not per se impermissible because it closes the trial, but use of the procedure is permissible only after a searching analysis."[163] This "searching analysis" refers to both traditional trial closure criteria and a fairness analysis.[164] As the opposing view ultimately requires the government to satisfy the same two tests described above, it would be more efficient and more consistent to view the silent witness rule as a part of CIPA Section 6 and conduct analysis for both techniques simultaneously. If the courts adopt this method of application in the future, both CIPA and the silent witness rule will be used well within their constitutional limits.

CONCLUSION

By properly applying the silent witness rule in criminal cases involving classified information, courts can preserve the defendant's Sixth Amendment right to a fair and public trial, maintain the public's First Amendment right to witness trial proceedings, and protect the government's interest in keeping classified information classified. To properly apply the silent witness rule, the court should only approve its use if the government satisfies the traditional trial criteria established by *Press-Enterprise* and the fairness test suggested in *Rosen*. Both tests are satisfied only if the government demonstrates (1) an overriding reason for closing the trial, (2) the closure is narrowly tai-

159 Stephen I. Vladeck, *Terrorism Trials and the Article III Courts after Abu Ali*, 88 TEX. L. REV. 1501, 1531 (2010).

160 *See id.* at 1532 ("[CIPA] is set up properly to resolve the tension between the government's interests and the defendant's rights; it is just that the judges get it wrong.").

161 United States v. Rosen, 520 F. Supp. 2d 786, 797 (E.D. Va. 2007).

162 *Id.*

163 *Id.*

164 *Id.* at 797-99.

lored to protect that interest, (3) no reasonable alternatives to closure exist, and (4) that the use of the silent witness rule provides defendants with substantially the same ability to make their defense as would disclosure of the classified information.[165] If the court fails to require the government's satisfaction of both tests, it risks depriving the criminal defendant of his right to a public trial, denying the public its right to access criminal proceedings, and compromising the safety of the American people.

[165] *Id.*