

REDACTED / CLEARED FOR PUBLIC RELEASE



Filed with the Classified Information Security Officer
CISO M. White
Date 10/24/2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)

v.)

STEPHEN JIN-WOO KIM,)
also known as Stephen Jin Kim,)
also known as Stephen Kim,)
also known as Leo Grace,)

Defendant.)

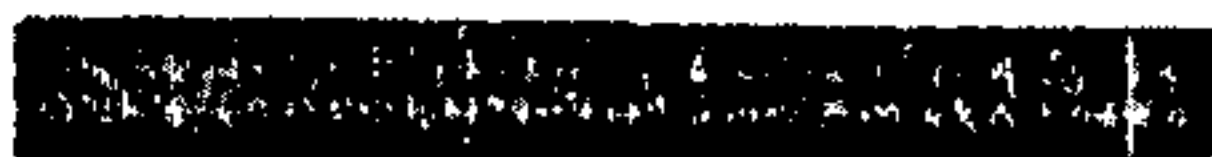
Criminal No.: 10-225 (CKK)

Filed In Camera, and
Under Seal with the Classified
Information Security Officer

GOVERNMENT'S OBJECTIONS TO ADEQUACY OF
DEFENDANT'S SECOND CIPA SECTION 5 NOTICE

G. Michael Harvey
Jonathan M. Malis
Thomas A. Bednar
Assistant United States Attorneys
United States Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20530

Deborah A. Curtis
Julie A. Edelstein
Trial Attorneys
U.S. Department of Justice
600 E Street, N.W.
Washington, D.C. 20530



REDACTED / CLEARED FOR PUBLIC RELEASE

[REDACTED]

(U) The defendant's second notice under the Classified Information Procedures Act, 18 U.S.C. App. 3 ("CIPA") ("Second CIPA Section 5 Notice" or "Notice") contains 49 categories and sub-categories relating to classified information that the defendant seeks to disclose at his trial. While some of the defendant's descriptions of classified information in the Notice are sufficient for CIPA Section 5 purposes,¹ many are not because they lack the specificity required at this stage of CIPA proceedings. Accordingly, for these remaining vague descriptions of classified information, the United States is not in a position to identify, let alone object under CIPA Section 6(a), nor will this Court be in a position to make the required determinations concerning the use, relevance, and admissibility of that classified information that CIPA Section 6(a) requires. Before proceeding to CIPA Section 6, the Court should order the defendant to provide a particularized notice setting forth the specific classified information that he expects to disclose at trial. Alternatively, the Court should preclude the disclosure of any classified information for which the defendant has failed to provide the requisite particularity and specificity. The government's specific objections to the adequacy of the defendant's Second CIPA Section 5 Notice are set forth below.

(U) I. **CIPA Section 5 Requires a Particularized Notice of the Specific Classified Information the Defendant Seeks to Disclose Publicly**

(U) "CIPA was enacted by Congress in an effort to combat the growing problem of graymail, 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." United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985) (en banc). By

¹ (U) The United States does not object to adequacy with respect to the following categories as enumerated in the defendant's Notice: Item Numbers 1, 2, 3, 4, and 6.

[REDACTED]

[REDACTED]

requiring a defendant to “specifically set out the classified information the defendant believes he will rely upon in his defense,” and requiring the court to make pretrial rulings regarding its admissibility, CIPA is designed to eliminate the risk that the United States will be surprised at trial, unable to evaluate disclosure claims, and instead simply “abandon prosecution rather than risk possible disclosure of classified information.” Id.

(U) Thus, CIPA establishes procedures by which courts rule on pretrial matters concerning the discovery, use, relevance, and admissibility of classified information in criminal cases. A defendant’s CIPA Section 5 notice of the classified information that he reasonably expects to disclose is “the central document” in that CIPA process. United States v. Collins, 720 F.2d 1195, 1199-1200 (11th Cir. 1983). Through that notice, CIPA “requires that the defendant be forthcoming, before trial, as to anticipated evidence” and establish “what classified information will actually be – as opposed to vaguely threatened to be – made public if the case proceeds.” Id. at 1999.

(U) CIPA Section 5 sets forth the requirements for the notice. It mandates that defendants provide timely written notice to the Court and the United States, describing any classified information that the defendant reasonably expects to disclose at trial or in any pre-trial proceeding. 18 U.S.C. App. 3 § 5(a). Where no notice is given, the Court may preclude the disclosure of such information. Id., § 5(b). Following the defendant’s notice, the United States may request a hearing under CIPA Section 6(a) on the use, relevance, or admissibility of any classified information in the notice. Id., § 6(a). After such a hearing, the Court must “set forth in writing the basis for its determination” on use, relevance, and admissibility “[a]s to each item of classified information.” Id.

[REDACTED]

[REDACTED]

(U) Courts have consistently held that, although the description of the classified information in the defendant's notice may be brief, it must nonetheless be particularized and set forth the specific classified information that the defendant reasonably believes that he will disclose to the public at his trial. "[T]he objective of CIPA is to provide the government with both notice of the defendant's intent to introduce sensitive information at trial, and a particularized description of the classified information prior to trial." United States v. Badia, 827 F.2d 1458, 1465 (11th Cir. 1987) (emphasis in original). Indeed, "[t]he notice must specifically set out the classified information the defendant believes he will rely upon in his defense. A general statement of the areas the evidence will cover is insufficient." Smith, 780 F.2d at 1105. Where documents produced in discovery are at issue, a CIPA Section 5 notice is adequate if it "informs '[t]he government . . . exactly to which documents [the defendant] was referring, and [to] what information was contained in them.'" United States v. Rewald, 889 F.2d 836, 855 (9th Cir. 1989) (quoting United States v. Miller, 874 F.2d 1255, 1276 (9th Cir. 1989) (upholding district court order requiring defendant "to specify with greater particularity which documents or portions of documents were relevant.")). CIPA Section 6 proceedings cannot proceed without an adequate Section 5 notice because, without it, both the United States and the Court would lack an adequate basis to evaluate the specific classified information at issue and any objections or alternatives to its disclosure. "Obviously, without a sufficient notice that sets forth with specificity the classified information that the defendant reasonably believes necessary to his defense, the government is unable to weigh the costs of, or consider alternatives to, disclosure." Badia, 827 F.2d at 1465.

(U) The Eleventh Circuit considered at length the adequacy of a CIPA Section 5 notice in Collins, a decision which has been followed by other courts. In Collins, the defendant provided

[REDACTED]

[REDACTED]

notice under CIPA Section 5 that at trial he intended to disclose classified information concerning several broadly worded categories. The trial court sought to narrow the issues somewhat, but even at a hearing on the matter, defense counsel would only provide non-exclusive examples of the types of classified information concerning those categories, reserving the right to introduce other specific classified information related to the noticed categories. 720 F.2d at 1198. The United States took an interlocutory appeal, and the Eleventh Circuit reversed and remanded on the ground that the defendant's CIPA Section 5 notice lacked the requisite specificity and particularity. The Eleventh Circuit flatly rejected the defendant's argument that by calling for a "brief description," CIPA Section 5 permits "a mere general statement of the areas about which evidence may be introduced":

[T]his overlooks that the 'brief description' is to be of the classified information expected to be disclosed. 'A brief description' is not to be translated as 'a vague description'; 'of the classified information' may not be interpreted as 'of the areas of activity concerning which classified information may be revealed.'

Id. (emphasis in original). As a result, "[a] Section 5(a) notice must be particularized, setting forth specifically the classified information which the defendant reasonably believes to be necessary to his defense." Id.

(U) The Eleventh Circuit advised that a trial court "must not countenance a Section 5(a) notice which allows a defendant to cloak his intentions and leave the government subject to surprise at what may be revealed in the defense. To do so would merely require the defendant to reduce 'greymail' to writing." Id. at 1199-1200. After all,

the government should not be surprised at any criminal trial when the defense discloses, or causes to be disclosed, any item of classified information. The court, the government and the defendant should be able to repair to the Section 5(a) notice and determine, reliably, whether the evidence consisting of classified information was contained in it.

Id. at 1199.

[REDACTED]

[REDACTED]

(U) The Collins court further held that the trial court should not have proceeded to a CIPA Section 6(a) hearing unless and until the defendant cured the lack of specificity and particularity in his Section 5 notice. Collins, 720 F.2d at 1200 (“[N]o Section 6 hearing should be held until the sufficiency of the 5(a) notice, if questioned, has been determined.”). “[A] sufficient notice is essential to put into motion the other CIPA procedures,” such as the Section 6(a) motion and hearing, id. at 1198, because “the defendant’s ‘asking price,’ in revelation of classified information, should be clearly stated before the government starts to negotiate for a better ‘price’ pursuant to Section 6.” Id. at 1200.

(U) The requirement that a defendant submit a particularized CIPA Section 5 notice before the United States objects under CIPA Section 6 also prevents a defendant from using a vague and overbroad Section 5 notice as a de facto discovery request, calling on the United States to identify specific information that is both classified and objectionable and which may -- or may not -- fall under the defendant’s broad notice. To do otherwise would result in “suddenly shifting the burden . . . to the government to anticipate and state what it fears from ‘greymail’” in the face of an inadequate Section 5 notice. Id. Nor is the government required to sift through its own evidence to identify classified information that conceivably falls within an overbroad Section 5 notice. “It is of no importance that the government can locate specific data about defendant’s knowledge of sensitive information in its own records.” Id. at 1199.

(U) Collins has been followed in two CIPA cases in this district. In the Oliver North prosecution, Judge Gesell required a “precise, highly particularized notice” under CIPA Section 5, “to be limited to classified portions [of documents] that North considered relevant and material to his defense.” United States v. North, 708 F. Supp. 389, 392 (D.D.C. 1988); see also id. at 395 (relying upon Collins and Badia). The trial court required a specific notice because

[REDACTED]

[REDACTED]

“CIPA is designed to let the government know, with some precision, what the costs of prosecution would be” North, 708 F. Supp. at 392. In that case, after the defendant repeatedly failed to provide a particularized notice under CIPA Section 5, the trial court precluded his use of a broad range of noticed material. In the related Poindexter prosecution, Judge Gesell took a consistent approach, adopting “the standard for specificity of notice set forth in Collins,” which “shall cover the documents or other information” the defendant “reasonably expects to disclose in any manner during trial.” United States v. Poindexter, 698 F. Supp. 316, 321 (D.D.C. 1988). See also United States v. Drake, Criminal No. 10-181 (RDB), 2011 WL 2175007, at *1 (D. Md. June 2, 2011) (“A defendant’s Section 5 notice must provide specific detail as to the classified information the defendant anticipates he will rely upon in his defense.”).

(U) **II. The Defendant’s Second Section 5 Notice Lacks The Specificity and Particularity Required By CIPA Section 5**

(U) When evaluated in light of these standards, the defendant’s Second CIPA Section 5 Notice is fatally defective. As explained further below, Item Numbers 7 through 12, 15 and 16 notice broad categories of information that lack sufficient specificity or particularity as to the exact classified information that the defendant intends to disclose at trial. The United States further objects to subcategory Item Numbers 7.c., 7.d., 7.e., 7.f., 7.g., 8.b., 9.b., 10.d., and 10.e. because they are vague or lack sufficient particularity as to the sources of information the defendant is noticing, let alone the specific classified information that the defendant intends to disclose publicly from within those unspecified sources of information. Finally, the United States objects to Item Numbers 5, 7.b., 10.b., 11.g., 11.h., 11.k., 11.m., 13, and 14 because they fail to specify the particular classified information within documents that the defendant expects

[REDACTED]

[REDACTED]

to disclose publicly at trial. Filing with the Court broad categories of information and failing ever to identify the precise classified information that the defendant seeks to disclose publicly at trial, does not constitute sufficiently particularized notice under CIPA Section 5. It is not the Court's or the government's obligation to sift through documents or launch a new investigation to discern precisely what classified information the defendant intends to disclose. Indeed, any attempt to do so would be futile, as both the Court and the United States could only speculate as to what specific classified information the defendant intends to disclose. Nor should the Court permit the defendant to use his Section 5 notice as a means to obtain classified discovery, imposing on the United States the burden of investigating and then detailing for the defendant any classified information that could relate to the broad categories in his Notice. Accordingly, this Court should order that the defendant produce a particularized notice that satisfies the requirements of CIPA Section 5. In the alternative, this Court should, pursuant to CIPA Section 5(b), preclude the disclosure of any of the classified information that may fall within these impermissibly vague categories. See Badia, 827 F.2d at 1466.

(U) A. Impermissibly Vague Categories of Information

[REDACTED] The Second Section 5 Notice identifies two categories of information – Item Numbers 15 and 16 in the defendant's Notice – that are broadly worded and make no attempt to specify the classified information the defendant seeks to disclose within those categories. Item Numbers 15 and 16 assert that the defendant intends to disclose:

15. Information relating to the systems and procedures for the classification and declassification of documents and information in each government agency relevant to this case, [REDACTED].

16. Information relating to the practices and procedures by which an agency of the United States government (such as the State Department) prepares a public or

[REDACTED]

[REDACTED]

media statement that is derived from or relates to classified information, or otherwise communicates or discusses information with the media that is derived from classified information.

Such vague, non-particularized, “general statement[s] of the areas the evidence will cover [are] insufficient.” Smith, 780 F.2d at 1105. Evidence should be precluded in CIPA Section 5(b) if a defendant attempts to elicit classified information at trial that he did not adequately notice under Section 5(a). See 18 U.S.C. App. 3, § 5(a). The defendant cannot seek to evade this penalty by noticing broad and indefinite descriptions of the areas that his evidence may cover at trial. Nor can the defendant shift the burden to the United States of investigating this area of inquiry for the defendant, or force the government to detail for him during the CIPA Section 6 proceedings any classified information that may fall within these broad categories. See Collins, 720 F.2d at 1199-1200. To permit the defendant to do so would “suddenly shift[] the burden . . . to the government to anticipate and state what it fears from ‘greymail’” in the face of an inadequate Section 5 notice, see id., and is a back door attempt to discover additional classified information to which the defendant is not entitled. Moreover, this Court could not adequately make pretrial rulings regarding the use, relevance, and admissibility of these broad categories before trial, as required by CIPA, any more than the Court could make such rulings regarding broad categories of unclassified information (as opposed to discrete, identifiable testimonial or documentary evidence) during trial.

(U) B. Non-Exhaustive Lists within Broad Categories

[REDACTED]) Elsewhere in his Notice, the defendant notices his intent to disclose “[i]nformation relating to” broad categories of unspecified classified information (e.g., “information relating to [REDACTED] on June 11, 2009”) and provides only a non-exhaustive list of the information that the broad

[REDACTED]

[REDACTED]

categories may encompass. That is, for each such category, the defendant indicates that it “include[es] but [is] not limited to” the examples provided. On its face, such notice fails. The United States objects to Item Numbers 7-12 on this basis. For example, in Item Number 7 the defendant states that he intends to elicit “[i]nformation relating to the distribution of copies of the [REDACTED], including but not limited to” fourteen sub-categories. In addition to lacking specificity as to the classified information at issue, these categories lack any definiteness whatsoever because they claim to be “including, but not limited to” the examples provided, and as a result purport to provide notice of wholly unspecified classified information bearing some unarticulated relation to the general subject matters set forth in the Notice.² The defendant’s liberal use of the sweeping term “relating” further compounds the problem. These sorts of non-exhaustive statements are what the Eleventh Circuit condemned in Collins, 720 F.2d at 1198.

(U) C. New Discovery Demands Disguised as a CIPA Section 5 Notice

(U) Many of the non-exhaustive sub-categories for Item Numbers 7-12 are themselves deficient because they further lack specificity and particularity. For each of these items, the defendant notices “information” or “sources of information” related to a sub-category without specifying what those sources of information are, let alone the specific classified information that the defendant intends to disclose publicly from within those sources of information. The United States objects to Item Numbers 7.c., 7.d., 7.e., 7.f., 8.b., 9.b., 10.d., and 10.e. on this basis.³

² (U) Further, as demonstrated in Section II.C. below, many of the non-exhaustive sub-categories provide no help as many of them are similarly non-specific.

³ (U) Another sub-category is objectionable because it is vague. See Second CIPA Section 5 Notice, Item Number 7.g. [REDACTED] (emphasis added).

[REDACTED]

[REDACTED]

Indeed, each of these items reads less like a notice of specific information that the defendant intends to disclose at trial, and more like a new discovery request. The defendant should not be permitted to impose on the United States the burden of investigating and then detailing for him any classified information that could relate to these overly broad categories. Again, CIPA does not countenance such an attempt at “suddenly shifting the burden . . . to the government to anticipate and state what it fears from ‘greymail.’” Collins, 720 F.2d at 1199.

(U) **D. Failure to Specify the Classified Information Within a Document**

(U) The defendant’s Notice also lists many lengthy documents, such as FBI 302s, that contain a variety of classified information on multiple topics, without specifying the particular information in those documents that the defendant reasonably expects to disclose publicly at trial. The United States objects to Item Numbers 5, 7.a., 7.b., 10.b., 11.g., 11.h., 11.k., 11.m, 13, and 14 on this basis. Such notice is inadequate because it does not point the United States to “exactly” what information in these particular documents the defendant seeks to disclose. Rewald, 889 F.2d 855 (quoting Miller, 874 F.2d at 1276). In order for the United States to evaluate meaningfully whether the defendant seeks to elicit information that is classified and objectionable, the United States needs to know what aspect of these documents the defendant seeks to adduce at trial, rather than having to sift through the entire document and object to every single item of classified information.

(U) **III. Conclusion**

(U) For all of the foregoing reasons, prior to proceeding to the CIPA Section 6 stage, the Court should order the defendant to file a new Section 5 Notice setting forth with specificity and particularity the classified information that he reasonably expects to disclose or cause to be disclosed in connection with any trial or pretrial proceeding. Collins, 720 F.2d at 1200 (“[N]o

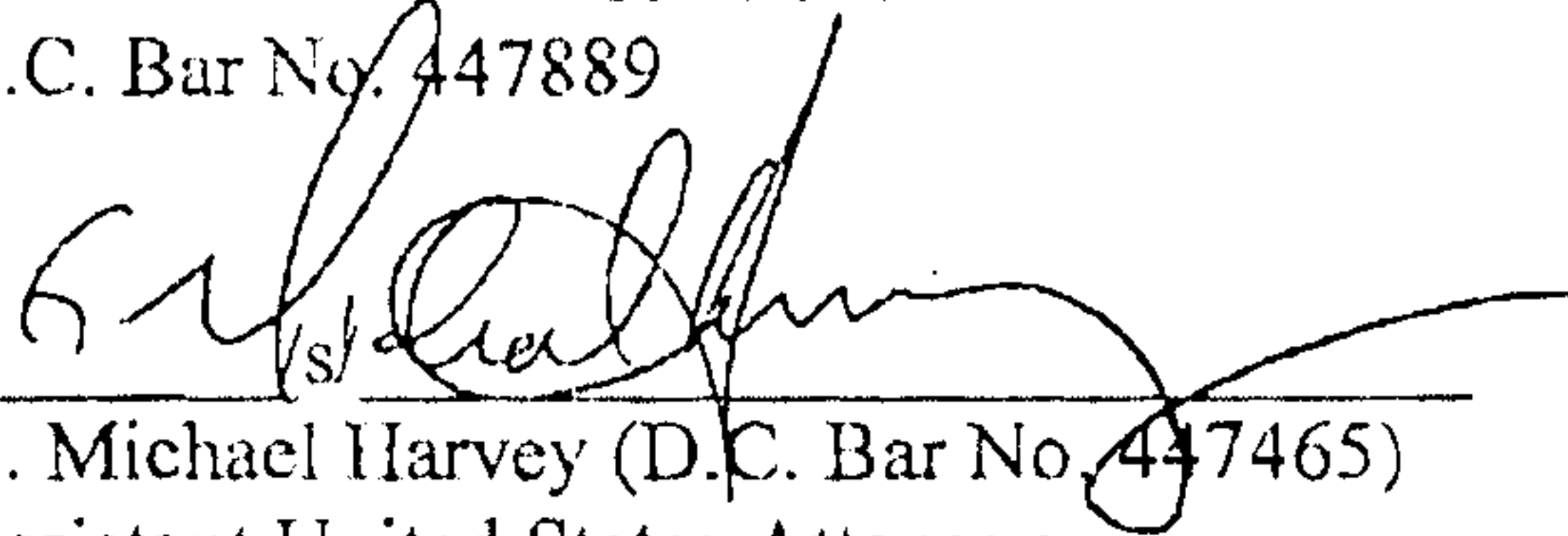
[REDACTED]



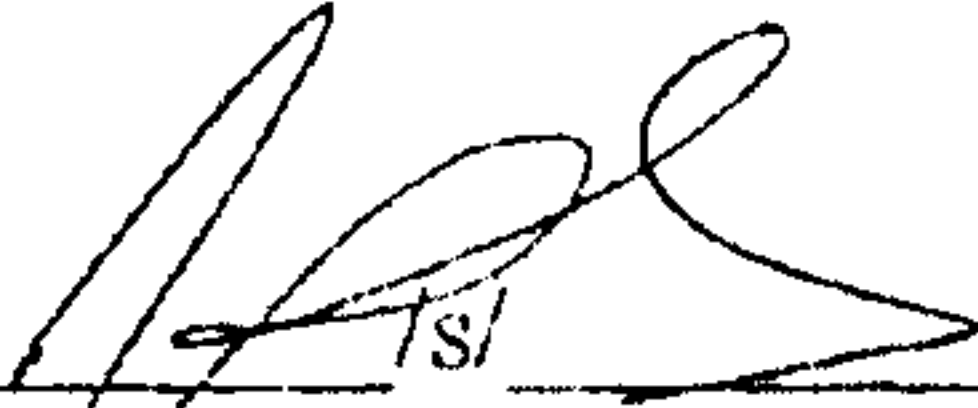
Section 6 hearing should be held until the sufficiency of the 5(a) notice . . . has been determined.”). Alternatively, the Court should preclude the disclosure of any classified information falling into the objectionable categories in the defendant’s Notice.

Respectfully submitted,

RONALD C. MACHEN JR.
UNITED STATES ATTORNEY
D.C. Bar No. 447889


/s/

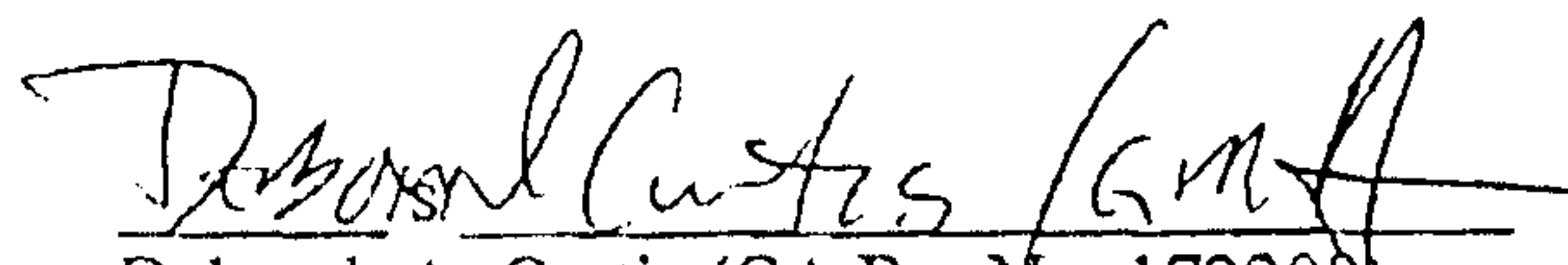
G. Michael Harvey (D.C. Bar No. 447465)
Assistant United States Attorney
United States Attorney’s Office
(202) 252-7810
Michael.Harvey2@usdoj.gov


/s/

Jonathan M. Malis (D.C. Bar No. 454548)
Assistant United States Attorney
United States Attorney’s Office
(202) 252-7806
Jonathan.M.Malis@usdoj.gov


/s/

Thomas A. Bednar (D.C. Bar No. 493640)
Assistant United States Attorney
United States Attorney’s Office
(202) 252-7877
Thomas.Bednar@usdoj.gov


/s/

Deborah A. Curtis (CA Bar No. 172208)
Trial Attorney
Department of Justice
(202) 233-2113
Deborah.Curtis@usdoj.gov





Julie Edelstein/GMA

JULIE A. EDELSTEIN (D.C. Bar No. 976558)
Trial Attorney
Department of Justice
(202) 233-2260
Julie.Edelstein@usdoj.gov

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 24th day of October, 2013, I caused a true and correct copy of the foregoing filing to be served on counsel of record through the Court's Classified Information Security Officer.

G. Michael Harvey

G. Michael Harvey
Assistant United States Attorney

