

# THE GOVERNMENT ASKED TO USE SILENT WITNESS RULE IN THOMAS DRAKE CASE

This document, Judge Richard Bennett's rulings on the admissibility of a number of documents presented in CIPA hearings, is interesting for several reasons, some of which I may return to. But I wanted to highlight that the government is trying to introduce evidence under a silent witness rule, something I hadn't seen mentioned before. [Update: Josh Gerstein covered this back in March. I stand corrected.]

In his ruling on item 14, Volume I, Exhibit 11, Bennett writes,

A ruling on the relevance and admissibility of Classified Statements 1 and 2 should be deferred until the Court rules on the government's request to invoke the silent witness rule. The government agrees that these written statements of its expert witness will be inadmissible if the Court does not invoke the silent witness rule. The defense objects to the use of the silence [sic] witness rule and the introduction of these statements. The parties' arguments relating to these documents are reserved.

In other words, the government has requested, but Bennett is still considering, the use of the silent witness rule for some evidence in this case.

As Steven Aftergood explained back in 2007 when the government won approval for it in the AIPAC leak case, the silent witness rule basically allows the government to present evidence to the jury that the public won't see.

Last week, Judge Ellis approved limited use at trial of the so-called “silent witness rule,” an unconventional tactic that permits prosecutors to withhold evidence from the public and to disclose it only to the parties, the witnesses and the jury. Because this amounts to closing the trial, it runs the risk of infringing on constitutional guarantees that trials will be public.

The silent witness rule “is a novel evidence presentation technique that has received little judicial attention in the context of the use of classified information in trials,” Judge Ellis noted. “No published decision has explicitly approved or endorsed use of the rule in this context.”

This ability to do this—to limit what the public can see at the trial—is a tactic the government uses at Gitmo.

I’m just saying.

It’s impossible to tell what the government is trying to introduce. Elsewhere, references to the government’s expert witness seem always to refer to Catherine Murray, their classification expert, whose review of the charged documents are a central dispute in this trial.

That’s interesting, because in a defense filing submitted yesterday, they made it clear that Drake intends to show that information alleged to be classified in this case was introduced in the public domain, thereby proving that it has not been “closely held.”

Indeed, the evidence shows that the allegedly classified information has been officially released and discussed by numerous agencies and officials of the United States government, including NSA, the Director of National Intelligence, the United States Congress, the Department of Justice, and

the White House.

The very end of that filing focuses on the government's expert (note the reference to a singular expert; the connection between the public domain question and the substitutions at issue here is not entirely clear).

To defend himself against these charges, Mr. Drake must be allowed to cross-examine the government's expert witness and to test her opinion that the documents in Mr. Drake's home are classified. He must be able to elicit and present evidence that the documents he possessed did not contain national defense information, that he did not believe they contained national defense information, that he did not specifically intend to violate the law when he brought them home, and that his statements to federal agents in regard to the documents were not false.

Now these two issues—the two statements from a government expert who may or may not be Catherine Murray that the government wants to introduce into evidence without letting the country's citizens see it, and the defense claim that the government is trying to hide Murray's statements that relate in some way to information in the public domain—may well be entirely unrelated. As I said, Murray's review of the documents will be at the center of the trial for many reasons.

But it is worth noting that in addition to all the other novel, expansive claims about the government's ability to keep stuff—even unclassified stuff—secret in this case, the government is also trying to add yet another layer of secrecy here.