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# Secrets Behind Secrets: Disclosure of Classified Information Before and During Trial and Why CIPA Should Be Revamped

Melanie M. Reid, *Lincoln Memorial University - Duncan School of Law*

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By: Melanie Reid\*

I. Introduction

In 1979, United States Assistant Attorney General Philip Heymann expressed frustration at what many federal prosecutors felt at the time — whether to proceed in a criminal case knowing classified information might be disclosed at trial.<sup>1</sup> In various cases, including “espionage, murder, perjury, narcotics distribution, burglary, and civil rights violations, among others,”<sup>2</sup> defendants and/or prosecutors wanted to disclose “classified information”<sup>3</sup> as evidence at trial when there was no mechanism in place to litigate pre-trial classified-information issues.

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\* J.D., University of Notre Dame, 2001; M.A., Middlebury College, 1998; B.A., University of Notre Dame, 1996. The author is an assistant professor of law at Lincoln Memorial University, Duncan School of Law, and worked as a trial attorney for the Department of Justice, Narcotics and Dangerous Drug Section until July 2010 and as an Assistant United States Attorney for Southern District of Florida from 2002 to 2006. The views expressed in the article are the author’s, and do not reflect the views of the Department of Justice or anyone else. The author would like to thank Robert Reid, Pat Laflin, Akram Faizer, Dave Dalton, Wayne Raabe, and David Walker for their invaluable comments and assistance. A special thank you to Ken Blanco for providing the author with the opportunity to be in the position to write this article.

<sup>1</sup> *Graymail Legislation: Hearings Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 96th Cong. 4-5 (1979) (statement of Philip Heymann, Assistant Att’y Gen. ).

<sup>2</sup> H.R. REP. NO. 96-831, pt. 1, at 6-7 (1980).

<sup>3</sup> Most intelligence collected by intelligence agencies is classified and can’t be disclosed as is. Each piece of information collected is assigned a particular level of classification — the level of classification coincides with the amount of damage the disclosure to the public (and/or the defendant) would cause to national security. Thus, classified information can be labeled as: (1) confidential (where the unauthorized disclosure of that type of information “could be expected to cause damage to the national security”); (2) secret (where the unauthorized disclosure of that type of information “could be expected to cause serious damage to the national security”); or (3) top secret (where the unauthorized disclosure of that type of information “could be expected to cause exceptionally grave damage to the national security”). *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). The information can also be described as “sensitive compartmented information,” which “not only is classified for national security reasons as Top Secret, Secret, or Confidential, but also is subject to special access and handling requirements because it involves or derives from particularly sensitive intelligence sources and methods.” 28 C.F.R. § 17.18(a) (2010).

In some instances, a prosecutor may dismiss a case rather than risk disclosure. In response, Congress passed the Classified Information Procedures Act (hereinafter “CIPA”)<sup>4</sup> in 1980 to provide procedures for any criminal case where classified information was at issue. These procedures would protect against the disclosure of classified information while at the same time ensuring to the defendant a right to a fair trial. Specifically, section 4 of CIPA was designed to govern the handling of classified information issues during pre-trial discovery,<sup>5</sup> and CIPA’s section 6 was designed to govern whether classified information would be admissible at trial and if so, what would be introduced at trial.<sup>6</sup>

During the thirty years since its passage, CIPA has been utilized in hundreds (if not thousands) of criminal cases and is used more frequently now than ever imagined in 1980. Yet, few prosecutors and defense counsel are familiar with CIPA and how to handle classified information when it is presented during the prosecution of a criminal case. CIPA has been misunderstood and misapplied by some judges because these rules only provide a framework for procedures on how to handle classified information when it is introduced during a criminal case. CIPA was not designed to establish a clear guideline on how judges should rule on issues of fairness, legality, or whether classified information is even relevant to the specific criminal proceeding. In fact, Congress specifically stated that CIPA was meant only as a procedural tool “that will permit the trial judge to rule on questions of admissibility involving classified information before introduction of the evidence in open court.”<sup>7</sup> CIPA was not meant to alter the

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<sup>4</sup> Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (codified as amended at 18 U.S.C. app. 3 §§ 1-16).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> S. REP. NO. 96-823, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294; *see* H.R. REP. NO. 96-831, pt. 1, at 10 (1980) (“The procedures are designed to give the government advance notice of what classified information will be admissible during trial; they are not designed to effect the admissibility determination itself.”).

<sup>8</sup> H.R. REP. NO. 96-1436, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4307, 4310 (“[N]othing in the conference substitute is intended to change the existing standards for determining relevance and admissibility.”); H.R. REP. NO.

Federal Rules of Evidence for determining the relevancy and admissibility of evidence.<sup>8</sup> This left judges with a pre-trial procedure with no further congressional guidance on use, relevance, discoverability, or admissibility, other than to “follow the [F]ederal [R]ules of [E]vidence.”<sup>9</sup>

Part II of this article examines the Intelligence Community (hereinafter “IC”) in the present day, the IC’s impact on federal criminal cases today, and why CIPA is extremely important in the national security and criminal law context. Part III explores CIPA’s progression from a relatively innocuous bill in the Senate to its major role in terrorism and espionage cases today, and revisions that should be made, including providing a concrete guideline that judges should follow in determining the discoverability and admissibility of classified information at trial. Part IV discusses why such revisions should be made; a straightforward set of CIPA procedures and guidelines would eliminate ambiguous and arbitrary decisions, as well as diffuse any concerns from defense counsel about transparency during *ex parte*, pre-trial proceedings. Lastly, Part V addresses a prosecutor’s exigent duty to search IC files and the framework needed within CIPA to clarify a prosecutor’s discovery obligations.

## II. The Evolution of Intelligence Collection and its Expanding Impact in Federal Courts

United States intelligence agencies are tasked with gathering and analyzing reliable intelligence information on threats to the United States’ security and providing this classified

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96-831, pt. 1, at 11 (1980) (“The bill does not alter the existing rules or standards for making the substantive determination of whether the particular information is admissible in a criminal trial.”); H.R. REP. NO. 96-831, pt. 2, at 3 (1980) (“It is not intended to infringe on a defendant’s right to a fair trial or to change the existing rules of evidence and criminal procedure. Rather it is intended to provide uniformity, rationality and consistency to the present system.”).

<sup>9</sup> H.R. REP. NO. 96-1436, (1980), *reprinted in* 1980 U.S.C.C.A.N.4310.

information to various “users.”<sup>10</sup> These users of intelligence information, in turn, are hopefully able to make more informed decisions on national security and foreign policy matters.

Intelligence agencies within the IC<sup>11</sup> are governed by a variety of statutes, such as the National Security Act of 1947, the Foreign Intelligence Surveillance Act of 1978, the Counterintelligence and Security Enhancements Act of 1994, the Department of Defense Title 10 Authorities, as amended, the Intelligence Reform and Terrorism Prevention Act of 2004,<sup>12</sup> the USA PATRIOT Improvement and Reauthorization Act of 2005, the Protect America Act of 2007, the Implementing Recommendations of the 9/11 Commission Act of 2007, the Attorney General guidelines, Presidential and IC Directives, Executive Orders, and individual agency policy guidelines. Some intelligence gathered by these agencies would never be considered admissible evidence in a United States court; other intelligence could be introduced, but the evidence would likely never be disclosed in its original form in order to protect the agencies’ sensitive sources

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<sup>10</sup> According to the Office of the Director of National Intelligence, the IC has four goals: (1) to “enable wise national security policies by continuously monitoring and assessing the international security environment to warn policymakers of threats and inform them of opportunities;” (2) to “support effective national security action” by “deliver[ing] actionable intelligence to support diplomats, military units, interagency organizations in the field, and domestic law enforcement organizations at all levels;” (3) to “deliver balanced and improving capabilities that leverage the diversity of the Community’s unique competencies and evolve to support new missions and operating concepts;” and (4) to “operate as a single integrated team, employing collaborative teams that leverage the full range of IC capabilities to meet the requirements of our users, from the President to deployed military units.” OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, NATIONAL INTELLIGENCE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2009), *available at* [www.dni.gov/reports/2009\\_NIS.pdf](http://www.dni.gov/reports/2009_NIS.pdf) [hereinafter NATIONAL INTELLIGENCE STRATEGY]. Users of intelligence include the “President, the National Security Council, the Secretaries of State and Defense, and other Executive Branch officials for the performance of their duties and responsibilities.” OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, NATIONAL INTELLIGENCE: A CONSUMER’S GUIDE 7 (2009), *available at* [www.dni.gov/reports.htm](http://www.dni.gov/reports.htm) [hereinafter NATIONAL INTELLIGENCE: A CONSUMER’S GUIDE].

<sup>11</sup> “The Intelligence Community (IC) is a group of executive branch agencies and organizations that work separately and together to engage in intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States.” NATIONAL INTELLIGENCE: A CONSUMER’S GUIDE, *supra* note 10, at 7. Sixteen United States intelligence agencies comprise the IC and are under the Office of the Director of the National Intelligence: the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, the National Reconnaissance Office, the National Geospatial-Intelligence Agency, the Federal Bureau of Investigation (FBI) National Security Branch, the Drug Enforcement Administration (DEA) Office of National Security Intelligence, Department of Treasury Office of Intelligence and Analysis, Department of Energy Office of Intelligence and Counter-intelligence, State Bureau of Intelligence and Research, Department of Homeland Security Office of Intelligence and Analysis, and Army, Air Force, Coast Guard, Marine Corps, and Naval Intelligence. *Id.* at 9.

<sup>12</sup> 6 U.S.C. § 485 (2010).

and/or methods. Thus, intelligence agencies focus on the collection and dissemination of information as opposed to generating evidence that could be admissible at trial.<sup>13</sup>

Law enforcement agencies, on the other hand, are tasked with enforcing the laws of the United States and investigating violations of U.S. laws. These investigations may lead to federal prosecutions, and therefore, law enforcement agents must gather information that would be admissible in a court of law. Law enforcement agencies, which are governed by a different set of statutes and directives than the IC, collect evidence to admit at trial.<sup>14</sup>

Prior to the passage of the U.S.A PATRIOT Act on October 25, 2001, intelligence personnel were unable to share information with law enforcement personnel about mutual targets of interest whom were being investigated by their respective agencies but for different reasons, i.e., national security concerns versus prosecution of criminal offenders. Now, the wall no longer exists between these two different communities.<sup>15</sup> Intelligence agencies have been asked to share their information with law enforcement to assist in their pre- and post-indictment

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<sup>13</sup> NATIONAL INTELLIGENCE STRATEGY, *supra* note 10, at 6 (“The IC’s mission is to identify and assess violent extremist groups; warn of impending attacks; and develop precise intelligence to cut off these groups’ financial support and to disrupt, dismantle, or defeat their operations.”).

<sup>14</sup> For example, in August 2007, Congress passed the Protect America Act which allowed the intelligence community to conduct surveillance directed at foreign intelligence targets located in foreign countries *without* a court order. Protect America Act, Pub. L. No. 110-55, 121 Stat. 552 (2007). Whereas, law enforcement agencies must work within the confines of the U.S. Constitution and criminal statutes, such as the federal wiretap procedures set forth in 18 U.S.C. § 2510-22, which require a court order and lengthy affidavit and application in order to receive authorization for the interception of wire, oral, or electronic communications. 18 U.S.C. § 2510 (2006).

<sup>15</sup> 50 U.S.C. § 403-5d (2006) (allowing the disclosure of “foreign intelligence information obtained as part of a criminal investigation” to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist in the performance of official duties); 50 U.S.C. § 1806(k)(1) (2010) (“Federal officers who conduct electronic surveillance to acquire foreign intelligence information under [Title 50] may consult with Federal law enforcement officers . . .”); DEP’T OF DEF., DIRECTIVE NO. 5240.01 § 4.5 (2007), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/524001p.pdf> (discussing the Defense Intelligence and Counterintelligence components’ “affirmative responsibility to share collected and stored information, data, and resulting analysis with . . . civilian law enforcement officials, as appropriate.”); NAT’L SEC. DIV., DEP’T OF JUSTICE, NATIONAL SECURITY DIVISION PROGRESS REPORT 1 (2008) [hereinafter PROGRESS REPORT], *available at* [www.justice.gov/nsd/docs/2008/nsd-progress-rpt-2008.pdf](http://www.justice.gov/nsd/docs/2008/nsd-progress-rpt-2008.pdf) (stating that the passage of the USA Patriot Act [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001] on October 25, 2001 “lower[ed] the ‘wall’ that had prevented intelligence personnel and law enforcement personnel from coordinating and sharing information about the terrorists and other national security targets they had in common.”).

investigations.<sup>16</sup> Since September 11, 2001, and the introduction thereafter of the USA PATRIOT Act, more intelligence information is being generated on common targets of both intelligence and law enforcement agencies (whether or not law enforcement is aware of the parallel investigation).<sup>17</sup> This increase in single and dual collection of intelligence material has created a plethora of material that may be relevant to a criminal defendant's case. In most instances, the intent behind the intelligence collection effort was not for the purpose of developing evidence for trial but rather to provide actionable and relevant information on terrorists and national security targets to the IC.

The government has greatly increased the number of terrorism and espionage cases being presented for trial in federal courts.<sup>18</sup> As more terrorists and espionage subjects are tried in criminal courts, there has been a corresponding increase in the use of intelligence agencies' classified files being introduced as evidence in criminal proceedings.<sup>19</sup> However, disclosure of classified information to unauthorized personnel could result in the exposure and loss of valuable

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<sup>16</sup> The Department of Justice's National Security Division was established on September 28, 2006, which led to a significant increase in the amount of terrorism and espionage prosecutions across the country in various United States Attorneys' Offices.

Unlike in the pre-PATRIOT Act era, prosecutors can now play central roles in the investigations of our national security targets. This operational role in threat investigations is a tremendous advantage over the days when the 'wall' kept prosecutors in the dark. It gives investigators access to real-time legal advice on criminal matters as they conduct an intelligence investigation; at the same time it gives prosecutors insight into the investigation that allows them to develop evidence for criminal charges that may become necessary to incapacitate a suspect before he undertakes a terrorist attack.

PROGRESS REPORT, *supra* note 15, at 6.

<sup>17</sup> See Barton Gellman, *The FBI's Secret Scrutiny*, WASH. POST, Nov. 6, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/05/AR2005110501366.html>.

<sup>18</sup> See Daphne Eviatar, *New Report Reaffirms Federal Courts Can Handle Most Terrorism Cases*, WASH. INDEP., (July 23, 2009), <http://washingtonindependent.com/52434/new-report-reaffirms-federal-courts-can-handle-most-terrorism-cases>.

<sup>19</sup> With the passage of the USA Patriot Act, criminal investigators now have access to foreign intelligence information. CHARLES DOYLE, CONG. RESEARCH SERV., RL31377, *THE USA PATRIOT ACT: A LEGAL ANALYSIS* 8-10 (2002), available at [www.fas.org/irp/crs/RL31377.pdf](http://www.fas.org/irp/crs/RL31377.pdf). See also USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). Intelligence and criminal investigations now are coordinated – the “wall” has been eliminated. I can say, on a personal note, the amount of discovery requests sent by prosecutors to agencies dealing in foreign intelligence has skyrocketed since the passage of the Patriot Act in 2001.

sources and methods which are vital to national security. Intelligence material which may be relevant to a criminal prosecution may be too sensitive and valuable to the IC, and its use in a criminal case could jeopardize its value to the IC. Prosecutors may learn, quite unexpectedly, about the existence of intelligence material that was never contemplated as having evidentiary significance prior to trial. Once a prosecutor becomes aware that intelligence material exists which may or may not be discoverable, other considerations such as discovery become a concern. The dilemma in all cases is the same: what disclosure is required to fulfill discovery obligations<sup>20</sup> and when and in what form to disclose such information.

The answer to these questions should lie in CIPA. However, many of CIPA's provisions have provided a skeletal infrastructure but relatively little substantive guidance to courts, leaving judges to set forth differing standards on classified information's use, relevance, and admissibility at trial. Several courts choose language and analysis from earlier CIPA court decisions to support their own particular analysis (which is certainly expected based upon our common law roots). CIPA case-law is filled with a variety of language evaluating whether the classified information at issue is: "relevant and helpful to the defense,"<sup>21</sup> "essential to a fair determination of a cause,"<sup>22</sup> useful "to counter the government's case or to bolster a defense,"<sup>23</sup> "material to the preparation of the defense,"<sup>24</sup> or "favorable to the defense that meets the appropriate standard of materiality."<sup>25</sup>

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<sup>20</sup> The discovery obligations of federal prosecutors are generally established by several sources. Jencks Act, 18 U.S.C. § 3500 (2006); *see* *Brady v. Maryland*, 373 U.S. 83 (1963); *see also* FED. R. CRIM. P. 16; FED. R. CRIM. P. 26.2; *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>21</sup> *United States v. Garey*, No. 5:03-CR-83, 2004 U.S. Dist. LEXIS 23477, at \*5 (M.D. Ga. Nov. 15, 2004).

<sup>22</sup> *United States v. Abu-jihad*, No. 3:07-CR-57 (MRK), 2008 U.S. Dist. LEXIS 7653, at \*11 (D. Conn. Feb. 4, 2008) (quoting *United States v. Moussaoui*, 382 F.3d 453, 472 (4th Cir. 2004)).

<sup>23</sup> *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008) (quoting *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993)).

<sup>24</sup> *United States v. Libby*, 429 F. Supp. 2d 1, 16 & n.25 (D.D.C. 2006).

<sup>25</sup> *United States v. Mohamed*, 410 F. Supp. 2d 913, 917 (S.D. Cal. 2005) (quoting *United States v. Gardner*, 611 F.2d 770, 774-75 (9th Cir. 1980)).

The Military Commissions Act of 2009, signed into law on October 28, 2009, uses CIPA only as a starting point to act as a guideline for military judges when deciding on the use, relevance, and admissibility of classified information during a military trial.<sup>26</sup> The Military Commissions Act, section 1802, followed most of CIPA's provisions while adding greater detail for judges to consider.<sup>27</sup> The revisions to CIPA, which are being used by military courts, provide further example of the need to update these provisions, resolve the issues that have arisen since its enactment, and provide more concrete guidance to the courts.

### III. From 1980 to 2010: Suggested Revisions to CIPA

Congress made clear that CIPA was meant as a procedural tool so that the defendant would be made aware *before* trial of any classified information that may be used during trial.<sup>28</sup> Congress divided the handling of classified information matters into two stages — (1) use during

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<sup>26</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190, 2574-2614 (2009).

<sup>27</sup> *Id.* According to the Military Commissions Act of 2009,

the military judge may not authorize the discovery of or access to such classified information unless the military judge determines that such classified information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing, in accordance with standards generally applicable to discovery of or access to classified information in Federal criminal cases.

*Id.* §1802, 123 Stat. at 2592 (similar to CIPA section 4 hearings). Under the provision of the Act similar to CIPA section 6(a) hearings, “[c]lassified information is not subject to disclosure under this section unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence.” *Id.* § 1802, 123 Stat. at 2594. Under another provision,

the military judge shall permit trial counsel to introduce the evidence, including a substituted evidentiary foundation pursuant to the procedures described in subsection (d), while protecting from disclosure information identifying those sources, methods, or activities, if - (A) the evidence is otherwise admissible; and (B) the military judge finds that (i) the evidence is reliable; and (ii) the redaction is consistent with affording the accused a fair trial.

*Id.* § 1802, 123 Stat. at 2594-95. The “statement, summary, or other procedure or redaction” must “provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information.” *Id.* § 1802, 123 Stat. at 2595. No military commission has prosecuted a detainee as of yet, so the new rules as to the admissibility of classified material have not begun to be tested.

<sup>28</sup> Classified Information Procedures Act, Pub. L. No. 96-456, § 10, 94 Stat. 2025, 2029 (codified as amended at 18 U.S.C. app. 3 §§ 1-16).

discovery (section 4) and (2) use at trial (section 6). CIPA should include guidelines which judges can follow in either context.

(A) Current Procedure under CIPA Section 4 and Subsequent Case Law

Section 4 of CIPA's applies when a defendant is unaware of the classified information, and the prosecutor does not want to disclose such information during discovery (and is requesting a protective order) or wants to disclose the information in a substituted form.<sup>29</sup> Federal Rule of Criminal Procedure 16(d)(1), which governs discovery in general, and CIPA section 4 are interrelated and together essentially state that the government may submit this classified information, *ex parte* and *in camera*, to the court for a pre-trial ruling on its discoverability.<sup>30</sup> CIPA section 4 authorizes the government to file a written motion requesting either a protective order prohibiting disclosure of the classified information or the granting of a partial redaction/substitution/summary of the classified materials at issue.<sup>31</sup> The language in CIPA section 4 is straightforward, simply stating 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."<sup>32</sup>

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<sup>29</sup> *Id.* § 4.

<sup>30</sup> FED. R. CRIM. P. 16 (d)(1). Rule 16(d)(1) authorizes the court to issue orders that "deny, restrict, or defer discovery or inspection." *Id.* Rule 16 also permits a party's written motion on the matter be inspected *ex parte*. *Id.*

<sup>31</sup> Substitution is permitted under CIPA section 4:

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove.

Classified Information Procedures Act § 4.

<sup>32</sup> *Id.*

Congress provided no guidance as to how judges should decide whether the classified information at issue should be protected, whether it should be substituted, or whether it should be disclosed in its original form. In fact, Congress, in many of its legislative documents, stated that judges should follow the current rules of evidence when making these determinations and should not alter the existing rules.<sup>33</sup> This led judges to create their own guidelines.

Prior to issuing a protective order or ordering a substitution, many courts have considered whether the classified material is “relevant”<sup>34</sup> and “helpful or material to the defense.”<sup>35</sup> The D.C. Circuit in *United States v. Mejia*, created its own three-part analysis in determining whether classified information should be disclosed to the defense.<sup>36</sup> First, the reviewing court must find that the information “crosses the low hurdle of relevance”; second, “the assertion of privilege by the government [must be] a colorable one”; and third, the “classified information is not discoverable on a mere showing of theoretical relevance . . . the threshold for discovery in this context further requires that [the information be] . . . at least ‘helpful to the defense of [the] accused.’”<sup>37</sup> Other courts have stated that the classified information to be disclosed must be

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<sup>33</sup> H.R. REP. NO. 96-1436, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4310; H.R. REP. NO. 96-831, pt. 1, at 11 (1980); H.R. REP. NO. 96-831, pt. 2, at 3 (1980).

<sup>34</sup> *See United States v. Anderson*, 872 F.2d 1508, 1514 (11th Cir. 1989) (noting that when the court reviews CIPA issues, it must use existing standards for determining relevancy).

<sup>35</sup> A definition of “helpful to the defense” is found in: *United States v. Yunis*, 867 F.2d 617, 623-24 (D.C. Cir. 1989). In *Yunis*, an informant had gained the confidence of defendant Yunis, who was later charged with air piracy, and overseas conversations between the informant and defendant relating to his eventual criminal charges were intercepted through classified methods. *Id.* at 618. The government moved to protect these conversations from disclosure; the district court ordered that the materials be produced in a redacted version. *Id.* On appeal, the D.C. Circuit held that the government’s interest in nondisclosure was great, and that the taped conversations were not “helpful to the defense”: “[n]othing in the classified documents in fact goes to the innocence of the defendant *vel non*, impeaches any evidence of guilt, or makes more or less probable any fact at issue in establishing any defense to the charges.” *Id.* at 624.

<sup>36</sup> *United States v. Mejia*, 448 F.3d 436, 455-56 (D.C. Cir. 2006).

<sup>37</sup> *Id.* In *Mejia*, a government filter team, without the knowledge of the prosecution team, sought and received a protective order precluding discovery to the defense of certain classified matters that were arguably within the scope of discovery. *Id.* at 454. The D.C. Circuit concluded that after examining the classified material at issue, it fell short of the “helpful or beneficial character” necessary to meet the threshold showing for overcoming the privilege.” *Id.* at 456 (citing *Yunis*, 867 F.2d at 624).

“‘relevant and helpful to the defense’ or ‘essential to a fair determination of a cause,’”<sup>38</sup> should be “both material and favorable to [the] defense,”<sup>39</sup> and should not be “merely cumulative nor corroborative . . . nor speculative.”<sup>40</sup>

Not only have courts asked whether the material is relevant and “helpful to the defense” in determining its discoverability, but various courts have also applied a balancing test to the analysis by weighing a defendant’s right to obtain certain classified information against the government’s claim of privilege regarding non-disclosure based upon national security concerns and its need to prevent the compromise of intelligence sources and methods.<sup>41</sup> The courts borrowed this balancing test from the government’s informant privilege set forth in *Roviaro v. United States*.<sup>42</sup> In *Roviaro*, the United States Supreme Court considered the application of the informant’s privilege to the general discovery rules, pursuant to which the government may withhold the identity of its informants from disclosure.<sup>43</sup> The Court noted that the privilege implicates two fundamental competing interests: (1) the interest of the defendant in mounting a

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<sup>38</sup> *United States v. Rosen*, 520 F. Supp. 2d 786, 801 (E.D. Va. 2007).

<sup>39</sup> *United States v. Paracha*, No. 03 CR. 1197, 2006 WL 12768, at \*10 (S.D.N.Y. Jan. 3, 2006).

<sup>40</sup> *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985) (internal citations omitted).

<sup>41</sup> See *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (finding that “[o]n issues of discovery [of classified information], the court can engage in balancing.”).

<sup>42</sup> *Roviaro v. United States*, 353 U.S. 53, 62 (1957). See also *United States v. Aref*, 533 F.3d 72, 79-80 (2d Cir. 2008) (adopting the “*Roviaro* standard for determining when the Government’s privilege must give way in a CIPA case”); *United States v. Van Horn*, 789 F.2d 1492, 1507-08 (11th Cir. 1986) (holding that the *Roviaro* principle applied and that disclosure of both the nature and location of electronic surveillance equipment would merely serve to educate criminals on how to protect themselves from detection); *Smith*, 780 F.2d at 1108-10 (although this case was decided under CIPA section 6, it relied upon CIPA section 4 case-law and held that the principles espoused in *Roviaro* were applicable to the assessment of the government’s need to maintain the secrecy of the sources and methods of foreign intelligence gathering for national security purposes. “Law enforcement domestic informers generally know who their enemies are; intelligence agents oftentimes do not. To give the domestic informer of the police more protection than the foreign informer of the CIA seems to us to place the security of the nation from foreign danger on a lower plane than the security of the nation from the danger from domestic criminals.”); see also *United States v. Moussaoui*, 365 F.3d 292, 307-08 (finding that the standard set forth in *Roviaro* must be applied in determining whether the government’s privilege in protecting classified information should prevail, and this determination takes into consideration whether the information is “relevant and helpful to the defense . . . or is essential to a fair determination of a cause” ).

<sup>43</sup> *Roviaro*, 353 U.S. at 55.

defense; and (2) the public interest in enabling the government to protect its sources.<sup>44</sup> The Court relied on two basic principles to resolve the competing interests.<sup>45</sup> First, it noted that the defendant's interest was triggered only when information in the government's possession was "relevant and helpful."<sup>46</sup> Second, when the evidence is deemed relevant and helpful, the Court held that resolving the interests "calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."<sup>47</sup>

While Congress never specifically stated whether a balancing test should be applied in determining the disclosure of classified information, Congress did comment that "the protection of information vital to the national security" should be taken into account by the court in deciding on whether to permit discovery to be "denied, restricted or deferred."<sup>48</sup> Thus, several courts have held that even if a defendant is able to show that information is both relevant and helpful to the defense, overriding national security concern may, on balance, trump the defendant's need for the information.<sup>49</sup>

#### (B) Current Procedure under CIPA Section 6 and Subsequent Case Law

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<sup>44</sup> *Id.* at 62.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 60-2.

<sup>47</sup> *Id.* at 62.

<sup>48</sup> S. REP. NO. 96-823, at 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4300.

<sup>49</sup> *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988); *United States v. Pringle*, 751 F.2d 419, 426-27 (1st Cir. 1984); *United States v. Rahman*, 870 F. Supp. 47, 52-53 (S.D.N.Y. 1994); *cf. United States v. Yousef*, 327 F.3d 56, 168 (2d Cir. 2003) (finding no error in preventing disclosure of statements of the defendant where the materials contained no exculpatory information in order to protect, in part, "the need for secrecy about how [the government] investigates and responds to terrorist threats."); *United States v. Pelton*, 578 F.2d 701, 706 (8th Cir. 1978) (affirming protective order to deny disclosure of voice recordings to protect cooperating witnesses and because "the tapes contained no exculpatory evidence and the fact that the Government made no direct or derivative use of the tapes...").

CIPA section 6 applies when a defendant or the government wants to utilize classified information at trial.<sup>50</sup> In such cases, a pre-trial hearing is held during which a determination is first made whether the classified information is admissible,<sup>51</sup> and later, in what form it may be introduced.<sup>52</sup> A CIPA section 6 hearing, usually involving both the defendant and the prosecution,<sup>53</sup> can be held *in camera* when the government certifies in its motion requesting a hearing that a public proceeding might result in the compromise of classified information.<sup>54</sup> CIPA section 6(b) explains that the government must give notice of the classified information at issue to the defendant prior to the hearing either by providing the defendant with the specific material, or generically categorizing the materials (if the defendant has not had access to them).<sup>55</sup> Under section 6(a), judges are to “make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pre-trial proceeding.”<sup>56</sup> If the judge determines the classified material is admissible, the government can then request under section 6(c) that the classified material be substituted and entered into evidence in the form of a “statement” or “summary.”<sup>57</sup> This substitution must place the defendant in “substantially the same ability to make his defense as would disclosure of the specific classified information.”<sup>58</sup> Along with its request for substitution, the government can attach an affidavit “certifying that disclosure of classified information would cause identifiable

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<sup>50</sup> Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (codified as amended at 18 U.S.C. app. 3 §§ 1-16).

<sup>51</sup> *Id.* § 6(a).

<sup>52</sup> *Id.* § 6(c).

<sup>53</sup> The defendant can be excluded during a section 6 hearing during which questions of law are resolved. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261-62 (9th Cir. 1998).

<sup>54</sup> Classified Information Procedures Act § 6(b).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* § 6(a).

<sup>57</sup> *Id.* § 6(c)(1).

<sup>58</sup> *Id.*

damage to the national security of the United States and explaining the basis for the classification of such information.”<sup>59</sup>

As stated previously when discussing the procedures set forth under section 4, Congress did not address which standard the courts should use at a section 6 hearing to determine all the issues regarding the “use, relevancy, or admissibility” of classified information at pretrial or trial proceedings.<sup>60</sup> Most courts’ determinations on use, relevance, and admissibility are made according to Federal Rules of Evidence 401, 402, and 403.<sup>61</sup> However, the Fourth Circuit has conducted the same *Roviaro* balancing of interests test used in section 4 hearings to determine the admissibility of classified information at trial during a section 6 hearing.<sup>62</sup> Once courts determine the classified material’s relevancy and admissibility, they have then used their own discretion, taking into account the government’s reasons for substitution, on a case-by-case basis as to whether the government’s proposed substitution is appropriate.<sup>63</sup>

Congress has made it clear that courts should not evaluate substitutions so as to require “precise, concrete equivalence.”<sup>64</sup> Instead, according to the Fourth Circuit, the courts should consider whether receiving the summary rather than the specific classified information will “materially disadvantage the defendant.”<sup>65</sup> Thus, “the fact that insignificant tactical advantages could accrue to the defendant by the use of the specific classified information should not

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<sup>59</sup> *Id.* at § 6(c)(2).

<sup>60</sup> Classified Information Procedures Act § 6(a).

<sup>61</sup> *See* United States v. Wilson, 750 F.2d 7, 9 (2d Cir. 1984) (where the court first determined relevancy under Fed. R. Evid. 401, then determining whether the evidence was “prejudicial, confusing, or misleading” so that it should be excluded under Fed. R. Evid. 403); *see also* United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985) (where the court applied a materiality standard); United States v. Wilson, 732 F.2d 404, 412 (5th Cir. 1984) (concluding that “the district court correctly found this evidence inadmissible under the ordinary rules of evidence separate and apart from any CIPA consideration...”); *see also* United States v. Libby, 453 F. Supp. 2d 35, 39, 44 (D.D.C. 2006) (applying the Federal Rules of Evidence for relevance, admissibility, and general use).

<sup>62</sup> *See* U.S. v. Zettl, 835 F.2d 1059, 1065-66 (4th Cir. 1987) (remanding to allow government assertion of *Roviaro* privilege in CIPA section 6(a) relevance hearing); United States v. Smith, 780 F.2d 1102, 1106-08 (4th Cir. 1985).

<sup>63</sup> *See* United States v. Dumeisi, 424 F.3d 566, 574 (7th Cir. 2005) (applying an abuse of discretion standard to lower court’s ruling on one such substitution).

<sup>64</sup> H.R. REP. NO. 96-1436, at 12-13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4310.

<sup>65</sup> United States v. Moussaoui, 382 F.3d 453, 477 (4th Cir. 2004).

preclude the court from” authorizing disclosure of the information in the form of a substitution.<sup>66</sup> The D.C. Circuit has stated that a summary should not be rejected simply because the defense could argue that it lacks the “evidentiary richness” or “narrative integrity” of the classified information in its original form.<sup>67</sup> The contextual information behind the classified material at issue is precisely the type of information that the government most wishes to protect; frequently, “the government’s security interest . . . lies not so much in the contents of [a] conversation[], as in the time, place, and nature of the government’s ability to intercept the conversation[] at all.”<sup>68</sup>

Courts have been creative in devising and approving substitutions; they have allowed the government to hide the classified nature of a document by placing the content into another document that is discoverable, or creating a document, such as an agent’s report, that contains the content but not the context of the classified document.<sup>69</sup> Substitutions also come in the form of agreed-upon stipulations; instead of a classified document being introduced as evidence, the content of the document is read to the jury in the form of a stipulation with an accompanying jury instruction explaining why.<sup>70</sup> Courts also admit classified documents into evidence in a redacted form.<sup>71</sup> In order to avoid witness testimony of classified information at trial, a witness’ testimony can be prepared in a question-and-answer format which can then be read into the record at trial.<sup>72</sup> When defense counsel wants to impeach a witness based upon their prior

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<sup>66</sup> H.R. REP. NO. 96-1436, at 12-13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4310.

<sup>67</sup> *United States v. Rezaq*, 134 F.3d 1121, 1142-43 (D.C. Cir. 1998) (citing *Old Chief v. United States*, 117 S. Ct. 644, 651 (1997)).

<sup>68</sup> *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989).

<sup>69</sup> *See United States v. North*, 713 F. Supp. 1442 (D.D.C. 1989) (holding that substitutions in the form of government admissions contained in a forty-four page document were sufficient in lieu of specified classified information).

<sup>70</sup> *United States v. Salah*, 462 F. Supp. 2d 915, 917-24 (N.D. Ill. 2006) (allowing substitutions/government admissions to be read to the jury that neither the government nor the witness could contradict); *United States v. Marzook*, 435 F. Supp. 2d 708, 749 (N.D. Ill. 2006) (approving such stipulations).

<sup>71</sup> *United States v. Passaro*, 577 F.3d 207, 220 (4th Cir. 2009).

<sup>72</sup> CIPA section 8 (c) permits “the United States to provide the court with a proffer of the witness’ response to the question or line of inquiry” and require “the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.” Classified Information Procedures Act, Pub. L. No. 96-456, § 8(c), 94 Stat. 2025,

statements (which are classified), a summary of the prior statements rather than original statements themselves can be read to the jury.<sup>73</sup> In *United States v. Abu Marzook*, foreign agents had requested that their identities not be disclosed based upon their nation's security interest; the court closed the courtroom but provided live video to a separate courtroom where the witnesses were heard but not seen, and were permitted to testify under pseudonyms.<sup>74</sup> Another interesting method of substitution is what is known as the "silent witness rule":

[T]he 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 the 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.<sup>75</sup>

Generally, as long as the substitution places the defendant in "substantially the same ability to make his defense," the trial will go on.<sup>76</sup> What the judge determines to be an adequate substitution is another story.<sup>77</sup>

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2029 (codified as amended at 18 U.S.C. app. 3 §§ 1-16). In *United States v. Mohamed*, 410 F. Supp. 2d 913, 918 (S.D. Cal. 2003), the court considered defendant's proffered cross-examination questions of a classified matter which would be asked of a witness verbatim during trial.

<sup>73</sup> *United States v. Dumeisi*, 424 F.3d 566, 577-78 (7th Cir. 2005).

<sup>74</sup> *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 923, 925-28 (N.D. Ill. 2006).

<sup>75</sup> *U.S. v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987). However, the *Rosen* court stated that a silent witness ought to be used only when the government establishes that: (1) there is "an overriding reason for closing the trial"; (2) "the closure is no broader than necessary to protect that interest"; (3) "no reasonable alternatives exist"; and (4) the defendant is provided with "substantially the same ability" to make his defense as he would had there been a full disclosure of the classified information. *United States v. Rosen*, 520 F. Supp. 2d 786, 799 (E.D. Va. 2007) (citing *Press Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984)).

<sup>76</sup> Classified Information Procedures Act § 6(c)(1).

<sup>77</sup> *See United States v. North*, 713 F. Supp. 1442, 1443 (D.D.C. 1989) (finding that a substitution containing admissions of fact by the United States provided the defendant with substantially the same ability to make his defense as afforded by the disclosure of the specified classified information); *see also United States v. Salah*, 462 F. Supp. 2d 915, 918-20 (N.D. Ill. 2006) (finding substitutions provided the defendant with facts he could argue to the jury in the same vein as if he had been provided use of the classified information); *United States v. Poindexter*, 732 F. Supp. 165, 170 (D.D.C. 1990) (ordering videotape edited to exclude the portions which contained sensitive information be made available to the press and public). *But see also United States v. Clegg*, 846 F.2d 1221, 1224 (9th Cir. 1988) (holding that the government's proposed substitution would "decrease the reasonableness of the [defendant's] belief that the government approved his activities," where the defendant attempted to argue that he

(C) A Proposed Guideline to be Followed in Section 4 and 6 Hearings

Congress set procedures in place in 1980 so that defendants and prosecutors must notify each other prior to trial that they intended to utilize classified material during trial, similar to the requirement that the defendant give notice of an alibi, insanity, or public authority defense.<sup>78</sup> Congress set up the procedures to be followed in the section 4 and section 6 context, but failed to take into consideration what standards should be used. While aware that the discovery phase is different from the admissibility phase,<sup>79</sup> I believe one set of guidelines could be followed in either situation.<sup>80</sup> These guidelines would do away with the court's use of the balancing test in both the section 4 and 6 context<sup>81</sup> and replace it with one straightforward set of principles.

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transported firearms to Afghan rebels in reliance upon United States officials' statements that led him to believe he was lawfully transporting guns).

<sup>78</sup>See Classified Information Procedures Act § 5; FED. R. CRIM. P. 12.1 (Notice of Alibi Defense); FED. R. CRIM. P. 12.2 (Notice of an Insanity Defense); FED. R. CRIM. P. 12.3 (Notice of a Public Authority Defense); see also H.R. REP. NO. 96-831, pt. 1, at 22 (1980) (The Permanent Select Committee on Intelligence discussed "the issue of reciprocity, i.e., what advance disclosures the government should make to the defendant because of the advance notice the defendant is required to provide the government.").

<sup>79</sup> Criminal discovery is essentially governed by the Federal Rules of Criminal Procedure (Rule 16), while the admissibility of evidence at trial is governed by the Federal Rules of Evidence.

<sup>80</sup> Some critics may argue that there should be two different guidelines applicable to CIPA section 4 (discovery) and CIPA section 6 (admissibility) hearings because different federal rules apply at the discovery and admissibility stages. I believe one guideline can be utilized in section 4 and section 6 (use, relevance, admissibility) hearings, and substitutions can be considered at either of these hearings. At their core, the federal rules on discovery and evidentiary federal rules evaluate the classified information at issue in the same light: is the particular item "relevant" to the case. The Federal Rules of Evidence take items turned over in discovery one step further: is this item admissible at trial/have the necessary evidentiary foundations been met? CIPA allows for a perversion of the Federal Rules of Evidence in the sense that it permits substitutions: where an item may have been discoverable but not admissible, the item can now become admissible in its substituted form. This can benefit either the government or the defense — depending upon which party is now able to introduce evidence (inculpatory, exculpatory, impeaching, etc.) that might not have been admissible in its original form. This places the discovery and admissibility phases on an equal playing field — at both stages the court is interested in "relevancy" rather than whether an evidentiary foundation exists to admit the item as evidence. Thus, utilizing the same set of guidelines for discoverability and admissibility in the classified information context is acceptable as the substitution crafted during a CIPA section 4 or CIPA section 6 hearing is outside the norm of the regular rules of evidence, and the rules regarding discoverability and admissibility both rely on the same standards of "relevancy."

<sup>81</sup> This guideline would have judges evaluate the reasons why the government believes a national security interest exists to protect the information only *after* establishing the material's relevance to the criminal case. Therefore, the judge would determine whether the material falls under the discovery rules and then evaluate the government's

First, the court must decide whether the information at issue is “relevant” within Federal Rules of Evidence 401-403 and Federal Rule of Criminal Procedure 16.<sup>82</sup> Within this determination, the court should evaluate whether the information is exculpatory,<sup>83</sup> usable for impeachment,<sup>84</sup> “material to the defense,”<sup>85</sup> or a pretrial statement made by a government witness related to the subject matter of the witness’s testimony.<sup>86</sup> Second, the court must

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national security reasons before issuing a protective order, permitting a substitution, or ordering the material be presented in its original form. In the admissibility context, the judge would follow the same methodology — determining whether the material is relevant utilizing the Federal Rules of Evidence and then evaluating the government’s reasons as to why disclosure would cause damage to national security before issuing a protective order, permitting a substitution, or ordering the material be presented in its original form. This guideline clarifies Congress’ intent that judges, in the CIPA section 6 context, should first determine the material’s relevance and then determine the government’s national security interest when determining whether an adequate substitution for the classified information exists. *See* S. REP. NO. 96-823, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4303 (where the Committee on the Judiciary stated: “It should be emphasized, however, that the court should not balance the national security interests of the Government against the rights of the defendant to obtain the information.”). This guideline does not suggest courts should continue with the established *Roviaro* balancing test used in CIPA section 4, and sometimes CIPA section 6, hearings. Judges should take the government’s reasons for classification into consideration in both sets of hearings after determining whether the material falls under discovery and evidentiary rules. Whether the judge then subconsciously “balances” the material’s relevance and materiality against the government’s reasons for classification — the fact remains that both prongs should be taken into consideration prior to the judge arriving at his final decision.

<sup>82</sup> The idea of amending section 4 and section 6 so that judges determine relevance first without taking into account an item’s classified status is nothing new. In 1988, Richard Salgado suggested that classified information should first determine relevancy in both section 4 and section 6 situations and then utilize a balancing test to determine whether a defendant had a compelling need to view the classified material in its original form (rather than its substituted form). Richard Salgado, Note, *Government Secrets, Fair Trials, and CIPA*, 98 YALE L.J. 427, 442-46 (1988). While I agree courts should determine relevancy first, I disagree with the suggestion that judges should continue to use a balancing test under *Roviaro*.

<sup>83</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Brady*, the Supreme Court held that the government must provide to the defense any evidence favorable to the accused and material to guilt or punishment. *Id.* A violation of this duty is a denial of due process, and a due process violation may occur irrespective of the good faith of the prosecutor. *Id.*

<sup>84</sup> *Giglio v. United States*, 405 U.S. 150, 153-55 (1972). In *Giglio*, the Supreme Court held that *Brady* principles extended to evidence affecting government witnesses’ credibility. *Id.*

<sup>85</sup> “Material to the defense” has been described as a “reasonable probability” that the result of the proceeding would have been different had it been disclosed to the defense. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The Supreme Court defined “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682 (1985) (quoting *Strickland*, 466 U.S. at 694). The district court in *Yunis* found that evidence is “material” if it touches upon “very crucial issues, such as motive, intent, prejudice, credibility, or even the possibility of exposing duress or entrapment.” *United States v. Yunis*, 867 F.2d 617, 620 (D.C. Cir. 1989).

<sup>86</sup> *Jencks Act*, 18 U.S.C. § 3500 (2006). In *Jencks v. United States*, 353 U.S. 657, 668-69 (1957), the Supreme Court held that a criminal defendant was entitled to the production of pre-trial oral or written statements of government witnesses if the contents were relevant to the subject matter of their direct testimony at trial. The Court noted that “only the defense is adequately equipped to determine the effective use [of such statements] for [the] purpose of discrediting the Government’s witness[es].” *Id.* at 668-69. In the *Jencks Act*, Congress codified and reaffirmed the holding of the *Jencks* decision. Federal Rule of Criminal Procedure 26.2 incorporates the *Jencks Act*, which entitles defendants to discover pretrial statements of government witnesses after the witness has testified on direct examination if the statements are in the government’s possession and relate to the subject matter of the witness’s

determine whether the information has been deemed classified<sup>87</sup> *and* whether a national security interest exists to protect the information from disclosure.<sup>88</sup>

If both prongs are met, and the classified information is relevant, but does not fall under *Brady*, *Giglio*, or *Jencks* (cases and statute outlining discovery obligations of federal prosecutors), and is not “material to the defense” (meaning the information is inculpatory, discoverable evidence that neither party wants to use at trial and does not constitute a pretrial statement of a government witness),<sup>89</sup> then the court should issue a protective order against disclosure and/or admissibility. But if the classified material is relevant and either falls under (1) *Brady*, *Giglio*, *Jencks*, or is “material to the defense,” or (2) the government or defendant wants to use the evidence at trial, then the court should either (a) create a substitution to be used in discovery and trial, or (b) if no adequate substitution exists, dismiss the indictment, dismiss the counts pertaining to the classified information, find against the United States on any issue to

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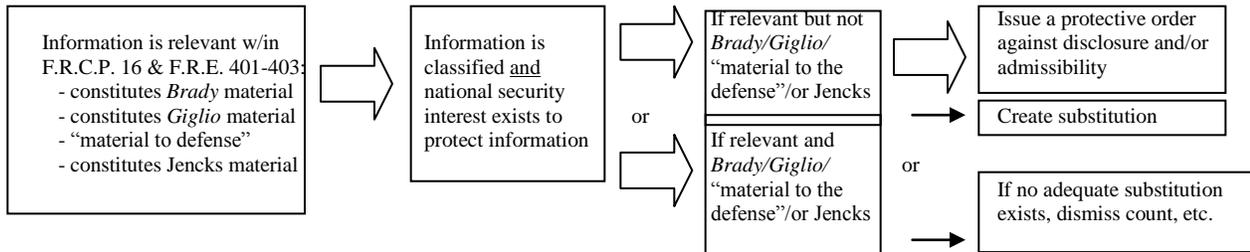
testimony. *See* 18 U.S.C. § 3500(b); FED. R. CRIM. P. 26.2(a). In cases in which classified information is at issue, the pretrial statements (possibly in substituted form) would be turned over in discovery and not after the witness testifies on direct examination. Witness statements that are subject to discovery include: (1) written statements that are signed or otherwise adopted or approved by a witness; (2) substantially verbatim recordings or transcriptions of oral statements; and (3) grand jury testimony. 18 U.S.C. § 3500(e)(1)-(3).

<sup>87</sup> Classified information is designated by the Executive Branch to prevent it from being improperly disclosed to the public. It is an executive function to classify information, and the President, various agency heads, and government officials have been granted the power under Executive Orders to classify information. Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). CIPA section 1(a) defines classified information as “any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in...the Atomic Energy Act of 1954...” Classified Information Procedures Act, Pub. L. No. 96-456, § 1(a), 94 Stat. 2025, 2025 (codified as amended at 18 U.S.C. app. 3 §§ 1-16).

<sup>88</sup> Information may be classified, but a national security interest may not exist to protect the information from disclosure. For example, in *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), the government filed a motion to keep the *New York Times* from publishing portions of the Pentagon Papers, a classified historical study on the Vietnam War. While the Pentagon Papers may have been classified by the government at a “secret” level, the government failed to show how the disclosure of this report would cause damage to national security. *Id.* Although this was a civil case involving the state secrets privilege, the analysis in determining whether a national security privilege exists is the similar.

<sup>89</sup> “[I]nculpatory material which the government does not intend to offer at trial need not be disclosed. Such information cannot conceivably help a defendant, and therefore is both unnecessary and useless to him.” *United States v. Rahman*, 870 F. Supp. 47, 52 (S.D.N.Y. 1994).

which the classified information relates, or strike or preclude certain testimony (as expressed in CIPA section 6(e)(2)).



This guideline takes into account the various scenarios that may arise in criminal cases concerning classified information. If the prosecution learns of recordings collected by an intelligence agency, and the recordings are relevant but inculpatory and cumulative to other evidence already disclosed to the defense, then the judge should issue a protective order against disclosure and admissibility of the recordings in an *ex parte* section 4 hearing. If parts of those recordings are exculpatory, and the methods by which the recordings were made should be protected, then the judge should approve the government’s substitution (perhaps placing the recordings among non-classified recordings or summarizing the contents of the recordings in an agent’s report).

If the defendant worked for the CIA and requests the use of some classified documents to prove he was working with the CIA at the time of the alleged illegal conduct in question, and wants to use this material as part of his public authority defense, the judge should determine the relevancy of the information and its classified status. If the judge determines the information to be relevant and classified, he can order the government to either redact the documents or create a stipulation to be read at trial.

If the government learns of an intelligence agency source that may have impeachment material on another government witness who will testify at trial, the judge must be provided with the pertinent facts that may bear on the government witness' credibility. The judge can determine the veracity of the impeachment material and its classified status, and order the government to turn over a summary of the impeachment material. This will allow the defense to utilize that information in the cross examination of the government witness at issue. The government will not be permitted to dispute the veracity of the impeachment material at trial.

If the defendant requests evidence that may be classified but is not relevant to the case and will not be used at trial, i.e. a Guantanamo Bay detainee requesting the names of CIA operatives and the locations of secret safe houses,<sup>90</sup> and if the information is not *Brady, Giglio*, or "material" to his defense, then the judge should issue a protective order against disclosure.

#### IV. CIPA's Achilles Heel: Secrecy and Substitutions

A review of various CIPA litigation cases between 1981 and 2009 revealed that defendants (and their defense counsel) had two main concerns (other than questioning CIPA's constitutionality): (1) the overall secrecy surrounding the *ex parte* process under section 4 leading to the discoverability (or non-discoverability) of classified material, and (2) the

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<sup>90</sup> For example, Khalid Sheikh Mohammed, currently awaiting trial in the Southern District of New York, may request the names of operatives and his interrogators, and the locations of secret safe houses where he was kept prior to being sent to Guantanamo Bay. Terry Frieden and Chris Kokenes, *Accused 9/11 Plotter Khalid Sheikh Mohammed Faces New York Trial*, CNN (Nov. 13, 2009), [www.edition.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed](http://www.edition.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed). If the government does not intend on using any of Mohammed's statements made after his capture in 2003 (which would be wise considering Mohammed was waterboarded 183 times during interrogations in March 2003 and the statements were clearly involuntary), then the evidence would not be relevant and would merely serve to embarrass the government as to its covert terrorist rendition techniques or create a mini-trial within the trial itself. *Id.*

defendant's lack of access to classified material in its original form that may relate to his criminal case.<sup>91</sup>

Creating a straightforward set of guidelines that judges should follow in determining discoverability and admissibility of classified information at trial would help alleviate a defendant's concerns. The overall "secrecy" surrounding this process of discoverability (or non-discoverability) and admissibility (or non-admissibility) of classified material as it pertains to criminal cases appears unfavorable to the defense.<sup>92</sup> The biggest concern regarding CIPA is that section 4 allows for an *ex parte* hearing between the judge and prosecutor during which the judge decides whether the classified information should be disclosed to the defendant and if so, in what form.<sup>93</sup> Critics argue that the defense counsel should be granted a security clearance and be permitted to attend and argue as his client's sole advocate at such a hearing.<sup>94</sup> However, demanding that defense counsel receive a briefing on all classified information that arises in every criminal case defeats the government's purpose in classifying certain material; limiting the

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<sup>91</sup> See generally *United States v. Libby*, 429 F. Supp. 2d 1 (D.D.C. 2006); Ellen Yaroshefsky, *Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1066-69 (2006). I would also note from my review of many CIPA-related cases that the greatest complaint by defendants was that they were not given access to the original form of classified information, that they were not permitted to disclose their own evidence of a classified nature in its original form to the jury, or that they did not approve of the government's proposed substitution.

<sup>92</sup> See Yaroshefsky, *supra* note 91, 1068-69 (2006) (criticizing the secrecy surrounding pre-trial *ex parte* hearings under CIPA section 4 and the government's ability to create substitutions without the defendant's knowledge).

<sup>93</sup> Classified Information Procedures Act, Pub. L. No. 96-456, § 4, 94 Stat. 2025, 2025-26 (codified as amended at 18 U.S.C. app. 3 §§ 1-16).

<sup>94</sup> See Yaroshefsky, *supra* note 92, at 1086; see also *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 122 (2d Cir. 2008) (holding that the district court did not abuse its discretion when it restricted access to classified information to defense who qualified for security clearances but denied access to the defendants who did not possess security clearances); *United States v. Abdi*, 498 F. Supp. 2d 1048, 1087 (S.D. Ohio 2007) (stating that any infirmities were cured by the requirement that the government provide discovery to cleared counsel where the defendant objected to the government's ability to file CIPA motions *ex parte*); *United States v. Chalmers*, No. S5 05 Cr. 59(DC), 2007 WL 591948, at \*1-2 (S.D.N.Y. 2007) (prohibiting cleared defense counsel from disclosing classified information to their clients); cf. *United States v. Amawi*, No. 3:06CR719, 2009 WL 961143, at \*1-2 (N.D. Ohio 2009) (holding that a security clearance without a "need to know," "does not . . . entitle counsel to see anything and everything that the government has stamped classified even if it has something to do with a client" where defense counsel obtained security clearances and moved to obtain copies of CIPA materials).

number of people aware of both the sensitive sources and methods the government utilizes.<sup>95</sup> The few people who “need to know” are those who require this information in order to effectively carry out their job function.<sup>96</sup> A defense counsel can effectively represent his client without knowing the sensitive sources and/or methods used by the government to collect a particular piece of evidence. Substitutions can be created by the judge so that defense counsel can have access to the content and be excluded only from the context. Since substitutions are admitted into evidence without the necessary evidentiary foundations,<sup>97</sup> the context should be irrelevant. As more classified information touches upon criminal cases including those not directly linked to terrorism or espionage, more and more defendants will demand disclosure. If strict guidelines, as discussed above, are incorporated into CIPA sections 4 and 6, then defendants can be assured that appropriate procedures are followed.

In some instances, such as at the discovery phase during section 4 *ex parte* hearings, defense counsel will not be aware of the evidence generated by sensitive sources or methods.<sup>98</sup> It is in these instances that the judge should function not only as a neutral arbiter as he does during trial, but also serve as the defendant’s advocate at such a hearing. In these *ex parte* hearings, judges should act as defense counsel and thoroughly evaluate the relevancy of the classified material, the government’s need to protect its sources and methods, and the defendant’s need for access to this information. Judges should also scrutinize proposed substitutions to ensure they

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<sup>95</sup> “National security” is defined in CIPA as “the national defense and foreign relations of the United States.” Classified Information Procedures Act § 1(b).

<sup>96</sup> A person requesting access to classified information must have an appropriate security clearance, sign an approved nondisclosure agreement, and have “a need-to-know the information.” Exec. Order No. 13,526, 75 Fed. Reg. 707, 720 (Dec. 29, 2009).

<sup>97</sup> 26 Charles Alan Wright & Kenneth W. Graham, Jr., Fed. Prac. & Proc. Evid. § 5672. Substitutions are just that, substitutions in an unclassified and modified form, so they alter the best evidence rule normally required for admissibility during trial. Whereas the evidence in its original form would have been entered using the normal evidentiary foundations, now the judge is permitting admission of the substitutions without the need for usual necessary evidentiary foundations in its original form.

<sup>98</sup> Classified Information Procedures Act § 6.

accurately summarize the classified information's content. The judge's role in this process is critical as the government has been criticized in the past for over-classifying documents that do not require protection.<sup>99</sup> Some classified documents can be revealed without compromising sensitive methods or sources or causing harm to national security. Some classified information may merely cause embarrassment to the government if disclosed to the public. Once defendants and their counsel place greater confidence in the judge's role as their advocate in *ex parte* situations and become more familiar with the strict guidelines a judge must follow in these matters, they will begin to experience less frustration with the overall secrecy of the process.<sup>100</sup>

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<sup>99</sup> See Yaroshesky, *supra* note 92, at 1081 (citing the New York Times and arguing that the executive branch is "notorious for over-classification" of documents and that the Bush administration doubled the number of documents that were labeled as classified). In response to the either actual or perceived amount of over-classification of documents, President Obama signed a new Executive Order 13,526 on December 29, 2009, § 1.9(a) of which requires agencies to perform "a comprehensive review" of its internal classification guides and "identify classified information that no longer requires protection and can be declassified." Exec. Order No. 13,526, § 1.9(a), 75 Fed. Reg. 707, 712 (Dec. 29, 2009). The new Executive Order also includes the establishment of a National Declassification Center to coordinate and streamline the declassification process (§ 3.7 (a)) and clearly states in § 1.5(d) that "[n]o information may remain classified indefinitely." The Order also states that the executive branch wanted to establish a "uniform system" to classify and declassify national security information in order to "protect[] information critical to our Nation's security and demonstrate[] our commitment to open Government through accurate and accountable application of classification standards and routine, secure, and effective declassification." *Id.* Moreover, the House passed a bill on February 3, 2009. H.R. 553, 111th Cong. (as passed by House on Feb. 3, 2009). The new law "require[s] the Secretary of Homeland Security to develop a strategy to prevent the over-classification of homeland security and other information and to promote the sharing of unclassified homeland security and other information." Reducing Over-Classification Act, Pub. L. No. 111-258, 124 Stat. 2648 (2010).

<sup>100</sup> Currently, there is no requirement under CIPA section 4 to notify the defendant that a section 4 hearing took place. Rather, the pleadings, the court's protective order, and the record of the hearing are made available to the appellate court for review if an appeal is later filed. However, U.S. Senator Benjamin L. Cardin (D-Maryland), former Chairman of the Senate Judiciary Terrorism and Homeland Security Subcommittee, reintroduced legislation, S. 354, in the Senate on February 15, 2011, proposing that CIPA section 4 be changed to require that the United States "provide the defendant and the appellate court with a written notice setting forth each date that the United States obtained a protective order under [CIPA]" once the defendant is convicted and files a notice of appeal. S. 354, 112th Cong. § 3 (2011). Senator Cardin stated that he wanted to "ensure that the statute [referring to the presumably new and improved CIPA statute] maintains the proper balance between the protection of classified sources, methods and information, and a defendant's constitutional rights." 157 Cong. Rec. S753 (daily ed. Feb. 15, 2011) (statement of Sen. Benjamin L. Cardin). If CIPA section 4 is changed so that all parties are notified that a CIPA section 4 *ex parte* hearing took place, this will create a slippery slope — defendants and prosecutors (in some cases) will demand to not only know of the existence of the hearing but will also demand to review all classified materials involved in the hearing. This will result in a flood of litigation in matters that have no bearing on the defendant's case. At the point the defendant will be notified, the district court judge will have already reviewed the information and made a determination under section 4 that the material was not relevant to the defendant's case and issued a protective order. Most classified information reviewed at CIPA section 4 *ex parte* hearings is inculpatory and not intended to be used at trial. Thus, defendants would have no reason to be notified. If the classified information reviewed is *Brady*, *Giglio*, *Jencks*, or material to the defense, then judges should be trusted to make the

Another potential concern for defendants is access to classified information only in its substituted form, rather than in its original form. Defendants may argue that a substitution will only put a defendant in a substantially similar position if the defendant and defense counsel are able to evaluate the material in its original form. This argument only applies in section 4 hearings and shows little faith in the judges who have evaluated the content in its original context and determined the content in the substituted format to be substantially similar. The underlying issue for defendants is the fact that they cannot use the original format (witness, document, recording, or otherwise) at trial before the jury (a summary/stipulation/ prepared question-and-answer format versus live testimony, surprise cross examination, or asking questions into the government's controversial sources and methods behind the evidence at issue). Substitutions do have advantages — the defense has no doubt that the evidence will be admitted at trial, and if the substitution is a stipulation, it can have a powerful effect on juries as joint stipulations are seen as facts “beyond a reasonable doubt.”<sup>101</sup> Little can be gained by the defense attempting to identify the original source of the classified information to be admitted at trial other than, perhaps, keeping the focus of the jury away from the true purpose of the trial — determining whether the

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appropriate substitutions/disclosures. Moreover, if defendants and defense counsel were permitted to review all classified materials involved in Section 4 hearings, this could create serious repercussions within the IC who cooperate with federal prosecutors on discovery issues knowing that the classified material in its original form will be protected (and only reviewed by judges and prosecutors). The IC would be asked to disclose all classified information in federal criminal cases even when the prosecution does not intend on using the classified information against the defendant. In a sense, every defendant who has had contact with the IC in whatever shape or form would know of intelligence information collected on him/her if he/she is ever prosecuted in a federal criminal court in a wholly different matter. This proposed change could negatively impact the fragile relationship between the IC and law enforcement/federal prosecutors.

<sup>101</sup> See *Should You Stipulate?*, TRIAL THEATER (Aug. 26, 2007), [www.trialtheater.com/wordpress/general-trial-strategies/should-you-stipulate](http://www.trialtheater.com/wordpress/general-trial-strategies/should-you-stipulate). Stipulating to evidentiary foundations in order to eliminate the need to disclose classified sources or methods, or allowing a witness to provide a narrative response to direct and cross examination questions previously crafted at a section 6 hearing should not negatively affect a defendant's case. In fact, by stipulating to these issues, defense attorneys can streamline their case and focus on the important issues in dispute. *Id.*

prosecution has proven all elements of the offense beyond a reasonable doubt.<sup>102</sup> Accompanying jury instructions are also critical to the success of substitutions used at trial.<sup>103</sup> In situations where a witness' testimony must be given in the form of a proffered statement, rather than in question-and-answer format for reasons of national security, the judge must make clear that the jury should not infer from this form of testimony that the defendant is a threat to national security. Rather, they should infer that the government is attempting to protect its sources and methods by crafting a statement for the witness which highlights all pertinent facts but avoids an inadvertent disclosure of classified information. The judge must ensure that the defendant is placed in a similar position as if he had the information in its original form. A stipulation or prepared witness statement read at trial may cause jurors to pay more attention to the information as it is evidence admitted without any of the usual evidentiary foundations. This practice may also bring the focus back onto the important disputed issues at trial.

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<sup>102</sup> For example, Khalid Sheikh Mohammed's request for the names of CIA operatives and his interrogators, the locations of secret safe houses where he was kept, and the names of Guantanamo Bay detainees who will testify to his confessions while detained would, if the government did not intend on utilizing any statements of his once in custody, result in keeping the focus away from the evidence intended to be used at trial and cause the trial to be about government embarrassment, CIA interrogation techniques, torture, kidnapping, etc. Frieden & Kokenes, *supra* note 90.

<sup>103</sup> It may be necessary for the court to deliver an instruction to the jury during trial explaining why portions of a document admitted into evidence were redacted, why only a part of a document was admitted, or why a witness curtailed his/her response to a question during direct or cross-examination. *United States v. Salah* provides the following example:

This case involves certain classified information. Classified information is information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure. In lieu of disclosing specific classified information, I anticipate that you will hear certain substitutions for the classified information during this trial. These substitutions are admissions of relevant facts by the United States for purposes of this trial. The witnesses in this case as well as attorneys are prohibited from disclosing classified information and, in the case of the attorneys, are prohibited from asking questions to any witness which if answered would disclose classified information. Defendants may not cross examine a particular witness regarding the underlying classified matters set forth in these admissions. You must decide what weight, if any, to give to these admissions.

*United States v. Salah*, 462 F. Supp. 2d 915, 924 (N.D. Ill. 2006).

V. A Suggested Supplement to CIPA: The prosecutor’s duty to search IC’s files and subsequent discovery obligations.

As intelligence collection has increased over the last decade, prosecutors should worry about what is hiding in IC’s files, and whether they now have an additional duty to search intelligence agencies’ files for discovery materials. Discovery obligations of federal prosecutors are governed by Federal Rules of Criminal Procedure 16 and 26.2, the Jencks Act,<sup>104</sup> *Brady v. Maryland*,<sup>105</sup> and *Giglio v. United States*.<sup>106</sup> In *Kyles v. Whitley*, the Supreme Court held that “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”<sup>107</sup> The decision in *Kyles* implies that prosecutors should search for discoverable material in every file of an agency “acting on the government’s behalf,” regardless of whether the material is classified or otherwise protected.<sup>108</sup> There are certain instances where prosecutors should clearly be able to anticipate these discovery obligations to search intelligence agencies’ files. That obligation to search should exist if: (1) the intelligence agency is part of the investigation team or is otherwise “aligned with” the prosecution,<sup>109</sup> (2) there is a possibility the IC may have information due to the type of crime

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<sup>104</sup> Jencks Act, 18 U.S.C. § 3500 (2006).

<sup>105</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>106</sup> *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>107</sup> *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

<sup>108</sup> *Id.*

<sup>109</sup> If an intelligence agency was involved in prosecution decisions, if law enforcement and an intelligence agency conducted complementary efforts and coordinated efforts, or if the intelligence agency provided information which directly supported the prosecution’s investigation, then it is more likely the intelligence agency is “acting on the government’s behalf in the case,” and the prosecutor should search the agency’s files for discoverable material. *Id.* Members of a prosecution team have included federal, state, and local law enforcement officers; other government officials participating in the investigation and prosecution of the criminal case against the defendant; and those over whom the prosecution exercises control. *See Smith v. Sec’y of New Mexico Dep’t of Corr.*, 50 F.3d 801, 825 n.36 (10th Cir. 1995) (finding that the obligation to search another county’s files was triggered when a prosecutor had actual knowledge of an investigation by another county into the same homicide); *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (finding a prosecutor’s duty to disclose extended to material maintained by branches of government “closely aligned with the prosecution”); *United States v. Perdomo*, 929 F.2d 967, 970-71 (3rd Cir.

charged (i.e., terrorism or espionage) and the IC generally conducts investigations on similar subject matter, (3) the defendant has a good faith basis to request a search of the IC file (i.e., to support his public authority defense), or (4) the prosecutor knows either through the defendant, a witness, a law enforcement agent, or otherwise, that an intelligence agency may have some classified information that may be *Brady*, *Giglio*, or Jencks material concerning a potential government witness.<sup>110</sup>

A gray area begins to emerge in situations where the prosecutor has no knowledge of *Brady*, *Giglio*, or Jencks material (concerning potential government witnesses) contained within intelligence agencies' files, but there is always the possibility that the IC may have some intelligence information on the defendant. Does the prosecutor have a duty to search when the four scenarios discussed above do not apply? In the aftermath of the *Stevens* case,<sup>111</sup> where prosecutors are paranoid they could be found to have failed in their discovery obligations, Congress should set clear discovery guidelines to direct (and protect) prosecutors as to when they must search IC's files. What prosecutors should not be required to do is conduct a "prudential search"<sup>112</sup> in the pre-indictment stage of the case to determine whether any intelligence

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1991) ("declin[g] to excuse non-disclosure in instances where the prosecution has not sought out information readily available to it" when the government failed to run a search of Virgin Island criminal records on prosecution witnesses in a St. Thomas trial); *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979).

<sup>110</sup> These four categories are similar to those found in the U.S. Attorney's Manual. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL, TITLE 9: CRIMINAL RESOURCE MANUAL § 2052, *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm02052.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02052.htm) [hereinafter CRIMINAL RESOURCE MANUAL]. According to the Criminal Resource Manual, prosecutors must request that the IC search its files for material to make available for review when the prosecutor has direct or reliable knowledge of potential *Brady*, *Giglio*, Jencks Act, Fed. R. Crim. Pro. 16, and/or other discovery material in the possession of the IC, or there exists a reliable indication suggesting that the IC might possess evidence that is discoverable, including but not limited to the fact that an agency has become an "active participant" in, aligned with, or participated jointly in the investigation or prosecution of a case. *Id.*

<sup>111</sup> In the case against former Senator Ted Stevens of Alaska, a federal judge in the District of Columbia dismissed Stevens' conviction on April 7, 2009, and named a special prosecutor to investigate the prosecutors on the case to determine whether they should be prosecuted criminally for withholding impeachment evidence in the case. Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, April 8, 2009, [www.nytimes.com/2009/04/08/us/politics/08stevens.html](http://www.nytimes.com/2009/04/08/us/politics/08stevens.html).

<sup>112</sup> A "prudential search" is defined as

information will fall within the prosecutor’s discovery obligations to the defendant.<sup>113</sup> Similarly, mandatory searches conducted merely to determine whether an intelligence agency has any classified information on a particular target would be unduly burdensome on both intelligence agencies and prosecutors alike. Intelligence agencies are not equipped to handle an inordinate amount of discovery requests from prosecutors and are not set up to allow for quick searches for exculpatory and impeachment evidence on particular individuals. The intelligence agencies’ task is not to develop evidence on a particular target, but rather to collect a large amount of information in a short period of time — some intelligence will be analyzed, some stored, and other intelligence quickly discarded.<sup>114</sup> This information is not stored as a resource to be used one day as evidence at trial, but is meant to serve its own purpose, i.e., to inform United States

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[a] search of Intelligence Community (IC) files, usually prior to indictment, for pre-existing intelligence information undertaken because the prosecutor and the Department have objective articulable facts justifying the conclusion that the files in question probably contain classified information that may have an impact upon the government’s decision whether to seek an indictment and, if so, what crimes and defendants should be charged in that indictment.

CRIMINAL RESOURCE MANUAL, *supra* note 110, at § 2052.

<sup>113</sup> This requirement would not preclude a prosecutor from conducting a prudential search — in some cases, it may be helpful. For example, a narcotics prosecutor may not want to charge a defendant with a hefty 21 U.S.C. § 960(a) narco-terrorism violation (which carries a statutory minimum of “not less than twice the minimum punishment” of 21 U.S.C. § 841, the most commonly charged drug trafficking statute) if they learn intelligence information exists which would limit the defendant’s potential future cooperation. *See* 21 U.S.C. § 841 (2010); 21 U.S.C. § 960(a) (2010). The defendant may be precluded from testifying against other defendants or future targets because the intelligence information concerning the defendant would constitute Jencks material and an adequate substitution may not exist. Thus, a defendant facing a stiff penalty under § 960(a) may have no other option than to proceed to trial if cooperation with the government under U.S.S.G. § 5K1.1 (Substantial Assistance to Authorities) cannot even be offered as a possibility. Pre-indictment, prosecutors can take the intelligence information found into consideration and charge him under 21 U.S.C. § 841 with no possibility of cooperation.

<sup>114</sup> The Intelligence Community gathers the raw data used to produce finished intelligence products. Collection can be from open sources, such as newspapers, or from clandestine sources, such as other people or technical means . . . . [T]he Intelligence Community converts the information that is collected into a usable format such as by language translation or decryption. . . Intelligence officers analyze processed information to turn it into finished intelligence.

NATIONAL INTELLIGENCE: A CONSUMER’S GUIDE, *supra* note 10, at 17-18. As stated in the National Intelligence Strategy,

[t]he Intelligence Community faces an explosive growth in type and volume of data, along with an exponential increase in the speed and power of processing capabilities. Threats to our networks and integrity of our information have proliferated. Our partners and users increasingly expect us to discover, access, analyze, and disseminate intelligence information in compressed time frames. We have the responsibility to share information, while protecting sources and methods and respecting the privacy and rights of U.S. citizens.

NATIONAL INTELLIGENCE STRATEGY, *supra* note 10, at 14.

officials of national security threats,<sup>115</sup> and possibly be discarded in its original form and a summary or report kept in its stead. Therefore, unless the four scenarios described above are applicable, a prosecutor should not have an affirmative duty to search IC files. CIPA should be amended to reflect prosecutors' discovery obligations in national security-related investigations or prosecutions.

## VI. Conclusion

The United States government maintains certain sources and methods at a classified level and withholds information from the public at large in order to protect its security. What seems to concern most people is that this entails a great deal of trust on our part that our government is not abusing this right. The IC must continue to collect intelligence in a new and ever-changing world where foreign and domestic-based spies and terrorists pose increasing threats to national security. While law enforcement agencies continue to capture alleged criminals and gather evidence admissible that will be in court, so too must intelligence agencies continue to collect raw intelligence on certain targets which enhance our ability to address all criminal and national security threats. In order to be more successful in both disciplines, a determination must be made as to how to mix the two entities together — in the courtroom. CIPA has been the best procedural guide so far on how to introduce classified information into a criminal court, but the 1980 CIPA needs to be revised to ensure that judges consistently follow guidelines in both section 4 and section 6 hearings. Revisions should take into consideration both the defendant's

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<sup>115</sup> “The U.S. Government uses intelligence to improve and understand the consequences of its national security decisions. Intelligence assists policy decisions, military actions, international negotiations, and interactions with working-level contacts in foreign countries. In some circumstances, it can also aid homeland security providers and first responders.” NATIONAL INTELLIGENCE: A CONSUMER’S GUIDE, *supra* note 10, at 6.

right to a fair trial and the government's need to protect national security. On another note, prosecutors and intelligence collectors are occasionally at odds with one another. Tension can develop when information deemed too sensitive to be released by the IC is requested by a prosecution team for trial purposes. The IC is tasked with collecting this intelligence and is fiercely protective of their sources and methods; the prosecution is constrained by a different obligation, to search government agencies' files and possibly disclose that evidence to the defense in an original or substituted form. If the CIPA statute was expanded to include prosecutorial obligations and options which address such issues as when to search IC files and the consequences of these actions, these amendments might represent an acceptable compromise to all parties involved in the process.