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Protecting Classified Information and the Rights of Criminal Defendants: The Classified Information Procedures Act

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Summary

A criminal prosecution involving classified information may cause tension between the government's interest in protecting classified information and the criminal defendant's right to a constitutionally valid trial. In some cases, a defendant may threaten to disclose classified information in an effort to gain leverage. Concerns about this practice, referred to as "graymail," led the 96th Congress to enact the Classified Information Procedures Act (CIPA) to provide uniform procedures for prosecutions involving classified information. Examples of recent cases implicating CIPA have arisen in the context of prosecutions against alleged terrorists, as well as prosecutions involving the unauthorized disclosure of classified information by former intelligence officials.

CIPA provides procedures that permit a trial judge to rule on the relevance or admissibility of classified information in a secure setting. The Act requires a defendant to notify the prosecution and the court of any classified information that the defendant may seek to discover or disclose during trial. During the discovery phase, CIPA authorizes courts to issue protective orders limiting disclosure to members of the defense team that have obtained adequate security clearances and to permit the government to use unclassified redactions or summaries of classified information that the defendant would normally be entitled to receive.

If classified information is to be introduced at trial, the court may allow substitutes of classified information to be used, so long as they provide the defendant with substantially the same ability to present a defense and do not otherwise violate his constitutional rights. Among the rights that may be implicated by the application of CIPA in a criminal prosecution are the defendant's right to have a public trial, to be confronted with the witnesses against him, and to have the assistance of counsel. Application of CIPA may also be implicated by the obligation of the prosecution to provide the defendant, under *Brady v. Maryland*, with exculpatory information in its possession and the separate obligation to provide the defendant with government witnesses' prior written statements pursuant to the Jencks Act.

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Criminal prosecutions involving classified information inherently create a tension between the government's legitimate interest in protecting sensitive national security information and a criminal defendant's rights under the United States Constitution and federal law. In many cases, the executive branch may resolve this tension before any charges are formally brought by simply forgoing prosecution in order to safeguard overriding national security concerns.

"Graymail" colloquially refers to situations where a defendant may seek to introduce tangentially related classified information solely to force the prosecution to dismiss the charges against him.[1] However, in other cases, classified information may actually be material to the defense and excluding it would violate the defendant's constitutional rights.

This tension was the primary factor leading to the 1980 enactment of the Classified Information Procedures Act (CIPA),[2] which "provides pretrial procedures that will permit the trial judge to rule on questions of admissibility involving classified information before the introduction of the evidence in open court."[3] These procedures are intended to provide a means for the court to distinguish instances of graymail from cases in which classified information is actually material to the defense.

Background

Courts have generally agreed that CIPA does not create any new privilege against the disclosure of classified information,[4] but merely establishes uniform procedures to determine the materiality of classified information to the defense in a criminal proceeding. The U.S. Court of Appeals for the Second Circuit (Second Circuit) has held that CIPA "presupposes a governmental privilege against disclosing classified information" in criminal matters.[5] Therefore, before discussing the specifics of the Classified Information Procedures Act in criminal prosecutions, this report will first provide a general overview of the government's ability to restrict disclosures in civil litigation by asserting the state secrets privilege. The state secrets privilege is a judicially created evidentiary privilege that allows the government to resist court-ordered disclosure of information during civil litigation if there is a reasonable danger that such disclosure would harm the national security of the United States.[6] Although the common law privilege has a long history, the Supreme Court first described the modern analytical framework of the state secrets privilege in the 1953 case of *United States v. Reynolds*.[7]

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[1] *See* S. REPT. 96-823 at 1-4 (1980) (part of the legislative history of CIPA).

[2] P.L. 96-456, 94 Stat. 2025 (1980), *codified at* 18 U.S.C. app. 3 §§ 1-16.

[3] S.REPT. 96-823, at 1.

[4] United States v. Mejia, 448 F.3d 436, 455 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1137 (2007). *See also* United States v. Yunis, 867 F.2d 617, 621 (D.C. Cir. 1989) (stating that CIPA "creates no new rights of or limits on discovery of a specific area of classified information").

[5] U.S. v. Aref, 533 F.3d 72, 78-79 (2d Cir. 2008) (holding that the state secrets privilege may be asserted in criminal prosecutions, subject to the procedures in CIPA, to bar disclosure of classified evidence that is not relevant and helpful to the defense), *cert. denied* 556 U.S. 1107 (2009). The legislative history of CIPA states that "it is well-settled that the common law state secrets privilege is not applicable in the criminal arena." H.REPT. 96-831 pt. 1, at n.12. *But see Aref*, 533 F.3d at 79 (observing that this statement in the legislative history "sweeps too broadly").

[6] See generally CRS Report R41741, *The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information During Civil Litigation*, by Todd Garvey and Edward C. Liu.

[7] 345 U.S. 1, 12 (1953) (finding that the government was entitled to withhold military secrets in wrongful death suit brought by survivors of service members killed in plane crash).

If the state secrets privilege is appropriately invoked to cover protected information in civil litigation, it is absolute; the disclosure of the underlying information cannot be compelled by the court.[8] Still, a valid invocation of the privilege does not necessarily require dismissal of the lawsuit. In *Reynolds*, for instance, the Supreme Court did not dismiss the plaintiffs' claims, but rather remanded the case to determine whether the claims could proceed absent the privileged evidence.[9] Controversy has arisen with respect to the question of how a case may proceed in light of a successful claim of privilege. Courts have varied greatly in their willingness to either grant government motions to dismiss a claim in its entirety or allow a case to proceed "with no consequences save those resulting from the loss of evidence."[10] Whether the assertion of the state secrets privilege is fatal to a particular suit, or merely excludes privileged evidence from further litigation, is a question that is highly dependent upon the specific facts of the case.[11]

The Classified Information Procedures Act

Prosecutions implicating classified information can vary factually, but an important distinction that may be made among such prosecutions regards whether the defendant already has access to the classified information in question. In cases where the defendant is accused of leaking classified information, she may already be privy to such information, and the government may be seeking to prevent further disclosure to the general public. However, in the case of terrorism prosecutions, the more typical concern is likely to be how classified information can be used as part of the prosecution's case against the defendant. In these cases, protective orders preventing disclosure to the defendant, as well as to the public, may be sought by the government. Constitutional issues related to withholding classified information from a criminal defendant arise during two distinct phases of criminal litigation. First, issues may arise during the discovery phase, when the defendant requests and is entitled to classified information in the possession of the prosecution. Secondly, issues may arise during the trial phase, when classified information is sought to be presented to the trier-of-fact as evidence of the defendant's guilt. The issues implicated during both of these phases are discussed below.

Pretrial Conferences, Required Notice, and Appeals

CIPA contains a number of provisions that are intended to create opportunities to resolve issues related to the use of classified information in advance of trial in a secure setting. For example, at any time after charges have been filed against a defendant, any party may request a pretrial conference to discuss issues related to the potential disclosure of classified information. Among the issues that may be discussed are schedules for discovery requests and hearings to determine the relevance, admissibility, and materiality of classified information.[12]

[8] *Id.*

[9] *Id.*

[10] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1079 (9th Cir. 2010) (holding that there was no feasible way to litigate case alleging unlawful extraordinary rendition without disclosing privileged state secrets), *cert. denied*, 563 U.S. 1002 (2011).

[11] *See* CRS Report R41741, *The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information During Civil Litigation*, by Todd Garvey and Edward C. Liu.

[12] 18 U.S.C. app. 3, § 2.

CIPA also requires a defendant to notify the court and the prosecution of any classified information that he reasonably expects to disclose or cause the disclosure of.[13] If a defendant fails to provide such notice, he may be penalized by being precluded from using such evidence at trial.[14]

In order to ensure that the disclosure of classified information is not premature, the government may also take an interlocutory appeal of any CIPA ruling, rather than waiting until a trial has concluded. In this way, the government does not have to risk disclosure of classified information that would later have been determined by a reviewing court to be protected.[15] Such appeals will be expedited by the court of appeals.[16]

Protective Orders and Security Clearances

In order to safeguard classified information that is disclosed, CIPA authorizes courts to issue protective orders prohibiting or restricting the disclosure of such classified information.[17] In some cases, protective orders may limit disclosure to individuals or attorneys, even from those who have received security clearances from the government. However, some defendants may be ineligible for the necessary security clearances. In these cases, courts may issue protective orders prohibiting cleared counsel from sharing any classified information with the defendant.[18] In the event that the defendant's attorneys are also unable to obtain the necessary security clearances, courts have appointed counsel with the necessary security clearance to represent the defendant in matters where disclosure of classified information may be necessary.[19] However, in some cases, cleared counsel have been prohibited from disclosing the classified information to the uncleared defendant or uncleared defense counsel.[20]

For example, in *In re Terrorist Bombings of United States Embassies in East Africa*, the court entered a protective order limiting disclosure of classified material to certain persons who had obtained sufficient security clearances.[21] The defendant's attorneys were able to obtain security clearances, but the defendant was not.[22] Because of this, the defendant's attorneys were unable to share with their client all the information they learned from the classified documents.[23] Other

[13] *Id.* § 5(a).

[14] *Id.* § 5(b).

[15] *Id.* § 7(a). An appeal may be taken after any ruling under CIPA authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing to issue a protective order sought by the United States.

[16] *Id.* § 7(b). Interlocutory appeals taken during trial shall be argued within four days, and the appellate court will render its decision within four days after argument.

[17] *Id.* § 3.

[18] *See* Brian Z. Tamanaha, *A Critical Review of The Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 290, n.64 & n.65 (1986).

[19] U.S. v. Abu Ali, 528 F.3d 210, 249 (4th Cir. 2008), *cert. denied*, Ali v. United States, 555 U.S. 1170 (2009).

[20] *Id.* at 253-54. If no defense counsel has been cleared to review the classified information, the court may impose appropriate sanctions against the government regarding that evidence or issue (including dismissal of the indictment) if the government insists on its nondisclosure. 18 U.S.C. app. 3, § 6(e)(2).

[21] *In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93, 118 (2d Cir. 2008), *cert. denied* El-Hage v. United States, 558 U.S. 1137 (2010).

[22] In re *Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d at 118.

[23] *Id.*

facts deemed by the court to be relevant to the defendant's case were declassified or stipulated by the government.

The defendant in this case argued that this restriction on communication violated his Sixth Amendment right to have the assistance of counsel. The Second Circuit rejected this claim, noting that the right to the assistance of counsel does not preclude every restriction on communication between defense counsel and the defendant.[24] In this instance, the court believed that the restrictions were justified because the disclosure of the classified information "might constitute a particularly disastrous security breach—one that, perhaps, might place lives in danger."[25] Furthermore, the Second Circuit found that the restrictions were limited and carefully tailored because they permitted cleared defense counsel to discuss the "relevant facts" with the defendant.[26]

Discovery

The mechanics of discovery in federal criminal litigation are governed primarily by the Federal Rules of Criminal Procedure. These rules provide the means by which defendants may request information and evidence in the possession of the prosecution, in many cases prior to trial, including classified information. CIPA authorizes a court to permit the government to propose redactions to classified information provided to the defendant as part of discovery, but "does not give rise to an independent right to discovery" of classified information.[27] Alternatively, a court may permit the government to summarize the classified information, or to admit relevant facts in lieu of providing discovery.[28] In support of such procedures, the government may submit an affidavit written statement explaining why the defendant is not entitled to the redacted information.[29] The statement may be viewed by the court *ex parte* and *in camera*.[30]

Required Disclosures by the Prosecution

Under federal law, there are certain classes of information that the prosecution must provide if requested by the defendant. For example, *Brady* material, named after the seminal Supreme Court case *Brady v. Maryland*,[31] refers to information in the prosecution's possession which is exculpatory or tends to prove the innocence of the defendant. This may encompass statements by witnesses that contradict, or are inconsistent with, the prosecution's theory of the case. Such information must be provided to the defense, even if the prosecution does not intend to call those witnesses.[32] Prosecutors are considered to have possession of information that is in the control of

[24] *Id.* at 127 (citing Perry v. Leeke, 488 U.S. 272 (1989)) (holding that prohibiting communication between defendant and his attorney during 15 minute recess to avoid "coaching" of testimony did not violate defendant's right to assistance of counsel).

[25] In re *Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d at 128 (internal quotation marks and punctuation omitted).

[26] *Id.*

[27] United States v. Lustyik, No. 15-4050, 2016 U.S. App. LEXIS 14933 (10th Cir. Aug. 15, 2016) (holding that district court did not abuse its discretion in denying defendant's request to review classified information based on the determination that such information was irrelevant).

[28] 18 U.S.C. app. 3, § 4.

[29] *Id.*

[30] *Id.*

[31] Brady v. Maryland, 373 U.S. 83 (1963) (holding that the Due Process Clause of the Fourteenth Amendment requires prosecution to turn over exculpatory evidence in its possession).

[32] The related category of *Giglio* material refers to information that may tend to impeach a government witness, such as

agencies that are "closely aligned with the prosecution,"[33] but whether information held exclusively by elements of the intelligence community could fall within this category does not appear to have been addressed by the courts.[34]

Additionally, *Jencks* material refers to written statements made by a prosecution witness, who has testified or may testify.[35] For example, this would include a report made by a witness called to testify against the defendant. In the Supreme Court's opinion in *Jencks v. United States*,[36] the Court noted the high impeachment value a witness's prior statements may have, to show either inconsistency or incompleteness of the in-court testimony.[37] Subsequently, this requirement was codified by the Jencks Act.[38]

Classified information that is also *Jencks* or *Brady* material is still subject to CIPA and may be provided in a redacted or substituted form,[39] but the operation of *Jencks* and *Brady* may differ in this context. For example, under Section 4 of CIPA, which deals with disclosure of discoverable classified information, the prosecution may request to submit either a redacted version or a substitute of the classified information in order to prevent harm to national security.[40] While the court may reject the redacted version or substitute as an insufficient proxy for the original, this decision is made *ex parte* without the defendant's input.

Depositions

In some cases, the issue may not be the disclosure of a document or statement, but whether to grant the defendant pre-trial access to government witnesses. In *United States v. Moussaoui*, one issue raised was the ability of the defendant to depose "enemy combatant" witnesses who were, at the time the deposition was ordered, considered intelligence assets by the United States.[41] Under the Federal Rules of Criminal Procedure, a defendant may request a deposition in order to

promises of leniency, and is also required to be disclosed to the defense. Giglio v. United States, 405 U.S. 150, 155 (1972).

[33] United States v. Brooks, 966 F.2d 1500, 1503 (D.C. Cir.1992).

[34] *But see* United States v. Libby, 429 F. Supp. 2d 1 (D.D.C. 2006) (in a prosecution involving the unauthorized disclosure of classified information, the Central Intelligence Agency (CIA) was closely aligned with the special prosecutor for purposes of *Brady* based on the free flow of other documents between the CIA and the prosecutor).

[35] 18 U.S.C. § 3500.

[36] Jencks v. United States, 353 U.S. 657 (1957) (holding that, in a criminal prosecution, the government may not withhold documents relied upon by government witnesses, even where disclosure of those documents might damage national security interests).

[37] *Jencks*, 353 U.S. at 667.

[38] 18 U.S.C. § 3500. The Jencks Act provides definitions for so-called "Jencks material" and requires disclosure of such material to the defense, but only after the witness has testified.

[39] *See* United States v. O'Hara, 301 F.3d 563, 569 (7th Cir. 2002) (holding that *in camera* examination and redaction of purported *Brady* material by trial court was proper).

[40] 18 U.S.C. app. 3, § 4.

[41] United States v. Moussaoui (*Moussaoui* II), 382 F.3d 453 (4th Cir. 2004), *cert. denied*, Moussaoui v. United States, 544 U.S. 931 (2005). Moussaoui was prosecuted for his involvement in the conspiracy to commit the terrorist attacks of September 11, 2001. While the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) held that CIPA did not apply to the question of whether Moussaoui and his standby counsel would be allowed to depose enemy combatant witnesses, United States v. Moussaoui (*Moussaoui I*), 333 F.3d 509, 514-15 (4th Cir. 2003), both the district court and the Fourth Circuit looked to CIPA for guidance when considering the question, *see* 382 F.3d at 471 n. 20 and accompanying text. Further litigation of these issues was rendered moot when Zacarias Moussaoui subsequently entered a guilty plea.

preserve testimony at trial.[42] In *Moussaoui*, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) had determined that a deposition of the witnesses by the defendant was warranted because the witnesses had information that could have been exculpatory or could have disqualified the defendant for the death penalty.[43] However, the government refused to produce the deponents, citing national security concerns.[44]

In light of this refusal, the Fourth Circuit, noting the conflict between the government's duty to comply with the court's discovery orders and the need to protect national security, considered whether the defendant could be provided with an adequate substitute for the depositions, such as summaries of the witnesses' statements. The court also noted that substitutes would necessarily be different from depositions, and that these differences should not automatically render the substitutes inadequate.[45] Instead, the appropriate standard was whether the substitutes put the defendant in substantially the same position he would have been absent the government's national security concerns.[46] Here, the Fourth Circuit seemed to indicate that government-produced summaries of the witnesses' statements, with some procedural modifications, could be adequate substitutes for depositions.[47]

Admissibility of Classified Information

CIPA provides the government with an opportunity to request a hearing to determine the use, relevance, or admissibility of any classified information that may be disclosed at trial. This hearing may be conducted *in camera* if the Attorney General certifies that a public proceeding might result in disclosure of classified information.[48] Before the hearing, the government may be required to give the defendant notice of the classified information at issue and its relevancy to the charges against the defendant.[49]

If the information in question is held to be material to the defense, but the government still objects to its disclosure, the court is required to accept that assertion without scrutiny and impose nondisclosure orders upon the defendant.[50] However, in such cases the court is also empowered to dismiss the indictment against the defendant or impose other sanctions that are appropriate.[51] Therefore, once classified information has been determined through the procedures under CIPA to be material, it falls to the government to elect between permitting the disclosure of that information or the sanctions the court may impose, including dismissal of charges against the defendant.[52]

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[42] FED. R. CRIM. P. 15(a). The court should permit the deposition if there are "exceptional circumstances" and it is in the interest of justice. *Moussaoui II*, 382 F.3d at 458.

[43] Moussaoui, 382 F.3d at 458, 473-475.

[44] *Id.* at 459.

[45] *Id.* at 477.

[46] *Id.*

[47] *Id.* at 479-483. The precise form of the deposition substitutes is unclear as significant portions of the Fourth Circuit's opinion dealing with the substitute were redacted.

[48] 18 U.S.C. app. 3, § 6(a).

[49] *Id.* § 6(b).

[50] *Id.* § 6(e)(1).

[51] *Id.* § 6(e)(2).

[52] U.S. DEPT. OF JUSTICE, *U.S. Attorney's Manual: Criminal Resource Manual,* § 2054 (June 2015).

Substitutions

If the court concludes that classified information is admissible and authorizes its disclosure at trial, CIPA establishes a framework by which the government may petition the court to permit certain alterations to evidence in order to introduce the relevant information in an alternative form. These substitutions may occur during discovery or at trial. During discovery, a court may, "upon a sufficient showing," permit the government to "delete specified items of classified information," "substitute a summary of the information," or "substitute a statement admitting relevant facts that the classified information would tend to prove."[53] Prior to the introduction of evidence at trial, a court may likewise permit the government to redact, summarize, or substitute classified information, but only so long as the substitution "provide[s] the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."[54]

If the substitute is rejected by the court, disclosure of classified information may still be prohibited if the Attorney General files an affidavit with the court objecting to disclosure.[55] However, if the Attorney General files such an objection, the court may dismiss the indictment; find against the government on any pertinent issue; strike testimony; or take any other action as may be appropriate in the interests of justice.[56]

Two recent CIPA cases, both of which involved federal prosecutions of former intelligence officials for allegedly disclosing classified information,[57] provide insight into the scope of a court's authority to permit evidentiary substitutions. In *United States v. Drake*, a federal district court approved the government's request to submit evidentiary substitutions for *unclassified*, but otherwise protected, information.[58] In *United States v. Sterling*, the court permitted the prosecution to use evidentiary substitutions for evidence introduced in its own case-in-chief, as opposed to merely providing substitutes for evidence introduced by the defendant.[59] Both of these rulings are discussed in more detail in the following sections.

Substitutions for Unclassified Information

Section 6(c) of CIPA specifically provides the government with the authority to make evidentiary substitutions for *classified* information during a criminal prosecution.[60] However, in some cases prosecutors have also sought to submit substitutions for *unclassified* information that the government believes would threaten national security if disclosed as part of the evidentiary record. For example, in *United States v. Drake*, the government sought to make substitutions for evidence that, though not classified, was protected under a separate statutory evidentiary privilege expressly applicable to the National Security Agency (NSA).[61]

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[53] *Id.* § 4.

[54] *Id.* § 6(c)(1).

[55] *Id.* § 6(e)(1).

[56] *Id.* § 6(e)(2).

[57] The Obama Administration has undertaken a number of prosecutions relating to the disclosure of classified information. *See* CRS Report R41404, *Criminal Prohibitions on the Publication of Classified Defense Information*, by Jennifer K. Elsea, Charles Doyle, and Edward C. Liu.

[58] United States v. Drake, No. 10-181, 2011 U.S. Dist. LEXIS 60770 (D. Md. 2011).

[59] United States v. Sterling, No. 10-485 (E.D. Va. 2011).

[60] 18 U.S.C. app 3. §6(c)(1).

[61] *Drake*, 2011 U.S. Dist. LEXIS 60770 at *11 (citing 50 U.S.C. § 3021 note).

The *Drake* case involved an unauthorized disclosure prosecution against a former NSA employee under the Espionage Act. Drake was accused of leaking classified information relating to the NSA Inspector General investigation that found that the agency had inefficiently used resources in developing a specific secret program.[62] After a series of CIPA hearings in which the court determined which classified information sought by the defense was relevant and admissible, the government provided the court with proposed evidentiary substitutions for admissible evidence that included substitutions and redactions for both classified and unclassified evidence.[63] As to the substitutions of unclassified evidence, the government argued that though not classified, the evidence was "protected material" under 50 U.S.C. Section 402—a statutory privilege that protects against the "disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof."[64] In short, the government asserted that admissibility decisions under CIPA, including determinations of the adequacy of a substitution, remained subject to statutory, military, and other traditional common law privileges, as CIPA had never altered "the existing law governing the admissibility of evidence."[65] In addition, the government argued that courts retain "inherent authority outside of CIPA to resolve the legal and evidentiary issues relating to the protected information through the use of substitutions."[66]

The defense objected to the government's proposed use of substitutions for unclassified evidence—arguing that CIPA provided the exclusive basis upon which a court could permit substitutions for evidence in a criminal case.[67] As CIPA, by its terms, applied only to classified information, the court, according to the defendant, had no grounds to permit substitutions, redactions, or summaries with respect to unclassified information.[68] Even if the court had authority to permit substitutions for unclassified information protected by a valid privilege, the defense asserted that the NSA privilege, which had previously only been asserted in civil cases, had no application in a criminal trial.[69]

The federal district court held that the government was permitted to submit substitutions for unclassified information protected under the NSA's statutory privilege, as CIPA does not "foreclose the consideration of substitutions for information based upon an assertion" of an otherwise applicable government privilege.[70] Relying on the Fourth Circuit's decision in *United States v. Moussaoui*, the district court determined that federal courts have the inherent "authority to allow or reject substitutions for unclassified information that is protected by a Government

[62] The prosecution of Thomas Drake was ultimately narrowed as major charges brought under the Espionage Act were dropped and Drake eventually pleaded guilty to a misdemeanor charge of exceeding the authorized use of a government computer. *See* Ellen Nakashima, "Ex-NSA manager accepts plea bargains in Espionage Act case," WASH. POST, June 9, 2011, https://www.washingtonpost.com/national/national-security/ex-nsa-manager-has-reportedly-twice-rejected-plea-bargains-in-espionage-act-case/2011/06/09/AG89ZHNH_story.html.

[63] *Drake*, 2011 U.S. Dist. LEXIS 60770, at *1-2.

[64] 50 U.S.C. § 402 note; National Security Agency Act of 1959, P.L. 86-36, § 6(a) (1959).

[65] Government's Mem. of Law Regarding Appl. of Legal Privilege Under CIPA, United States v. Drake, No. 10 CR 00181 (May 9, 2011) (citing U.S. v. Smith, 750 F.2d 1215, 1106 (4th Cir. 1990)).

[66] *Id*. at 7.

[67] Def.'s Resp. to Government's Mem. of Law Regarding Appl. of Legal Principles Under CIPA, United States v. Drake, No. 10-181 RDB (D. Md. May 10, 2011).

[68] *Id.* at 7-8.

[69] *Id*. at 5-7.

[70] *Drake*, 2011 U.S. Dist. LEXIS 60770 at *8.

privilege."[71] In *Moussaoui*, the defense had requested access to a witness for use at trial.[72] The government objected, noting that the witness in question was an enemy combatant, a national security asset, and, therefore, unavailable. The Fourth Circuit accepted the government's position, holding that although CIPA was inapplicable to the unclassified testimony in question, the statute provided a "useful framework" for considering the appropriateness of substitutions.[73] Thus, rather than providing the defense with unfettered access to the witness, the Fourth Circuit permitted the witness to be deposed with specific precautions.[74] Drawing an analogy to *Moussaoui*, the *Drake* court held that as long as the NSA privilege was applicable, the court was not prohibited from allowing adequate substitutions for protected evidence. Specifically, for the *Drake* court CIPA did not represent the exclusive means by which a court could permit evidentiary substitutions.[75]

The court next turned to whether the NSA privilege was applicable in a criminal prosecution. As no court had yet held that the NSA statutory privilege applied in criminal cases, the district court looked to the analogous state secrets privilege—generally considered a common law evidentiary privilege with application primarily in the civil context—to inform its decision.[76] Citing a case from the U.S. Court of Appeals for the Second Circuit (Second Circuit), in which it was determined that the state secrets privilege was applicable to criminal cases,[77] the district court determined, by analogy, that the NSA privilege would similarly apply in the criminal context.[78] Accordingly, as the NSA had asserted an applicable government privilege, the agency was free to submit substitutions for unclassified evidence protected under 50 U.S.C. § 402.[79]

Substitutions for Prosecution Evidence and Defense Evidence

A second dispute that has arisen in the context of allowing substituted evidence in criminal leak prosecutions has been whether CIPA permits the government to submit substitutions for its own evidence. Typically in CIPA cases, the defense will submit a 5(a) notice, which provides the court and the prosecution with notice of any classified information that the defense reasonably expects to disclose or cause to be disclosed at trial. Following this submission, the court will generally hold CIPA hearings in which the court makes "all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceedings."[80] After the court determines what evidentiary items are relevant and admissible, the government will generally propose any necessary substitutions for that evidence. Thus, substitutions generally are submitted in place of classified information that the defense expects to use in its own case. However, in *United States v. Sterling*, the government gave notice to the court

[71] *Id*. at 11

[72] *Moussaoui*, 333 F.3d at 514.

[73] *Id*. at 513.

[74] *Id*.

[75] *Drake*, 2011 U.S. Dist. LEXIS 60770 at *11 ("[E]ven where CIPA does not apply, this court has authority to allow or reject substitutions for unclassified information that is protected by a Government privilege.").

[76] *Id*. at 14-15 ("[T]his Court looks to the application of the closest evidentiary privilege to [the NSA privilege]—the common law privilege against disclosure of state secrets.").

[77] U.S. v. Aref, 533 F.3d 72 (2d Cir. 2008). Despite the decision in Aref, the application of the state secrets doctrine in the criminal context remains disputed. *See, e.g.*, H.R. REP. NO. 96-831, pt. 1, at 15 n.12 (1980) ("[T]he common law state secrets privilege is not applicable in the criminal arena.").

[78] *Drake*, 2011 U.S. Dist. LEXIS 60770 at *15.

[79] *Id.* at *22.

[80] 18 U.S.C. app 3. §6(a).

that it also sought to submit substitutions for classified information it wished to introduce itself for use in its case-in-chief.[81]

Sterling involves a former Central Intelligence Agency (CIA) officer who was convicted of disclosing classified information to author James Risen.[82] During preliminary hearings in the case, the defense objected to the prosecution's use of substitutions for its own evidence. CIPA, the defense asserted, permitted the court to grant a request to use substituted evidence in only two scenarios: (1) under Section 4, in complying with the prosecution's discovery obligations, and (2) under Section 5 and Section 6, for use "in lieu of classified information that the *defense* intends to use in any pretrial or trial proceeding."[83] "Notably absent," argued the defense, "is any statutory provision allowing for the Government to use substitutions or redactions for information it seeks to introduce into evidence at trial."[84] Although unable to cite to any previous cases that had interpreted CIPA as distinguishing between evidence introduced by the defense and evidence introduced by the prosecution, or any express language within the statute that clearly made such a distinction, the defense relied upon the history and primary purposes of CIPA as the basis for its argument. First, the defense argued, the statute was "intended to implement procedures that allow for the defense to gain access to classified information so as not to impede a defendant's right to a fair trial."[85] Second, the defendant argued that CIPA was enacted to combat the practice of "graymail," where a "criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the charge against him."[86] Neither concern, the defense argued, was triggered where the government is permitted to substitute evidence it seeks to present in its own case-in-chief.[87]

In response, the government argued that nothing in the text of CIPA distinguished between evidence submitted by the prosecution and evidence submitted by the defense.[88] In the view of the government, CIPA authorizes the government to propose substitutions "upon *any* determination by the court authorizing the disclosure of specific classified information."[89] The government relies on the text of CIPA, noting that neither Section 4, 6, nor 8 of CIPA states that the provided substitution authority only applies to defense evidence. Additionally, contrary to the defense's reading of the legislative history, the government argued that while "graymail" was undoubtedly a concern behind CIPA, the legislative history suggests that Congress was also concerned with the disclosure of any classified evidence at trial, regardless of which party

[81] United States v. Sterling, Criminal No. 10-485 (E.D. Va. 2011).

[82] Matt Apuzzo, *C.I.A. Officer Is Found Guilty in Leak Tied to Times Reporter*, N.Y. TIMES (Jan. 26, 2015), http://www.nytimes.com/2015/01/27/us/politics/cia-officer-in-leak-case-jeffrey-sterling-is-convicted-of-espionage.html. The alleged disclosures related to "Operation Merlin," described as an "allegedly failed attempt by the CIA to have a former Russian scientist provide flawed nuclear weapon blueprints to Iran." United States. v. Sterling, 818 F. Supp. 2d 945, 947 (E.D. Va. 2011). Sterling's case is also discussed, *infra*, at "Confrontation Clause and the Silent Witness Rule."

[83] Def.'s Resp. to Government's Mot. for *In Camera* Hr'gs, United States v. Sterling, No. 10-485 (E.D. Va. August 19, 2011) at 2 (emphasis added).

[84] *Id*.

[85] *Id*. at 5.

[86] *Id*. at 6.

[87] *Id*. ("[T]he government cannot graymail itself. It simply must make the election that is the natural consequence of its decision to prosecute: it must either declassify information it wishes to use in its case-in-chief or forego using that information.").

[88] Government's Reply to Defendant's Response to Government's Motion for In Camera Hearings, United States v. Sterling, Criminal No. 1:10CR485 (E.D. Va. August 26, 2011).

[89] 18 U.S.C. app 3. § 6(d) (emphasis added).

introduced the evidence.[90] The government contended that CIPA, when read as a whole, was enacted to establish procedures for use in criminal prosecutions involving classified information that prevents "the disclosure in the course of trial of the very information the laws seek to protect."[91] The substitution provisions of CIPA that exist to protect classified information, would, according to the government, therefore apply to any classified information that arises during trial, not simply classified information that the defense seeks to introduce.

The U.S. District Court for the Eastern District of Virginia rejected the defense's interpretation of CIPA. Instead, based on "reasons stated on the record during a sealed hearing," the court held that the government "will be permitted to use limited substitutions and redactions in exhibits subject to the court's determination that the exhibits are relevant, not cumulative, and not shown by the defense to be unfairly prejudicial."[92] While the sealed nature of the opinion makes it unclear what the basis was for the court's ruling, the fact that it ruled for the government suggests that the court found the government's arguments to be persuasive.

Consequences

Together, the *Drake* and *Sterling* cases reinforce that CIPA does not represent the exclusive means by which a court can prevent disclosure of sensitive or classified information within criminal proceedings. CIPA is not intended to alter the rules of evidence, and therefore does not affect traditional powers of the judiciary to craft certain methods for safeguarding protected information.[93] Thus, rather than imposing procedural limitations on the court, CIPA may be more accurately characterized as supplementing judicial authority to resolve evidentiary disputes in criminal cases involving classified information. Additionally, the statute has not been read by the courts as simply establishing a procedure by which defendants are provided with access to classified information necessary to their defense; rather, the statute also serves the broader purpose of protecting the disclosure of classified information generally by providing the government with procedures for carrying out prosecutions without risking the disclosure of protected information.

Confrontation Clause and the Silent Witness Rule

In some cases, the use of CIPA procedures can also implicate constitutional concerns. As described above, there may be instances where disclosure of classified information to the defendant would be damaging to national security. In these instances, the prosecution may seek to present evidence at trial in a manner that does not result in disclosure to the defendant. One proposed scenario might be the physical exclusion of the defendant from those portions of the trial, while allowing the defendant's counsel to remain present.[94] However, such proceedings

[90] Government's Reply to Defendant's Response to Government's Motion for In Camera Hearings, United States v. Sterling, Criminal No. 1:10CR485 (E.D. Va. August 26, 2011) at 9-10.

[91] *Id.*

[92] Order, United States v. Sterling, Criminal No. 1:10CR485 (E.D. Va. August 30, 2011).

[93] *See* United States v. Smith, 780 F.2d 1102 (4th Cir. 1985) ("The legislative history is clear that Congress did not intend to alter the existing law governing the admissibility of evidence.").

[94] For example, procedures under the military commissions established by Presidential order may have permitted defendants from being excluded from proceedings. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 168 (D.D.C. 2004) (granting writ of habeas corpus and describing potential procedures under military commissions established by Presidential order); *rev'd*, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005); *rev'd and remanded*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that military commissions did not comply with the Uniform Code of Military Justice or the Geneva Conventions).

could be viewed as unconstitutionally infringing upon the defendant's Sixth Amendment right to confrontation.[95]

Similar confrontation issues may be raised by use of the "silent witness rule," a procedure that may be offered by the government as a substitution for classified information that would be otherwise admissible in a criminal defendant's trial.[96] Under this procedure, a witness whose testimony may include classified information will respond to questions by making references to particular portions of a classified document. The classified document may be made available to the parties, the court, and members of the jury. However, it is not made available to members of the public that may be in the gallery of the court. In this way, the witness may testify without disclosing classified information to members of the public at large.

If the defendant is not allowed to personally review classified information in the same manner that it is made available to the jury, the use of the silent witness rule may violate the defendant's right to confront the evidence used against him. For example, in *United States v. Abu Ali*, the trial court permitted the prosecution to use the silent witness rule, while only providing the defendant and uncleared counsel with a redacted version of the document.[97] In contrast, the members of the jury were allowed to hear the testimony using an unredacted version of the same document. The Fourth Circuit subsequently held this procedure to be unconstitutional, stating:

> If the government does not want the defendant to be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether. What the government cannot do is hide the evidence from the defendant, but give it to the jury. Such plainly violates the Confrontation Clause.[98]

The use of the silent witness rule for selected pieces of classified evidence has been approved by courts under CIPA when its use has not raised Confrontation Clause issues.[99] For example, in *Sterling*, the government sought an interlocutory appeal from a district court order permitting government witnesses to testify using pseudonyms from behind physical screens, but allowing the jury and defense to have a key to the witnesses' true names.[100] Specifically, the government sought to preclude the jury and defense from knowing the witnesses' true identities.[101] Sterling had argued that such exclusions would violate his right to have a public trial and to confront witnesses against him.[102] Sterling also argued that, in his particular case, the use of such security measures was "unduly suggestive," as the jury may confuse the purposes of the secrecy measures used in the witnesses' testimony and make inferences about the sensitive nature of the

[95] *See* Hamdan v. Rumsfeld, 548 U.S. at 634 (Stevens, J., plurality opinion) (stating that "an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him").

[96] *See*, *e.g.*, United States v. Abu Ali, 528 F.3d 210, 253 (4th Cir. 2008), *cert. denied*, Ali v. United States, 129 S. Ct. 1312 (2009); United States v. Zettl, 835 F.2d 1059 (4th Cir. 1987), *cert. denied*, Zettl v. United States, 494 U.S. 1080 (1990).

[97] United States v. Abu Ali, 528 F.3d at 253.

[98] *Id.* at 255 (the defendant's conviction was upheld because the violation was considered harmless error). *Id.* at 257.

[99] *See*, *e.g.*, *Zettl*, 835 F.2d at 1063. (implicitly approving of use of the silent witness rule for all classified information except with respect to the information that defendants were charged with unlawfully disclosing). *But see* United States v. Rosen, 487 F. Supp. 2d 703 (E.D. Va. 2007) (use of the silent witness rule for entire mass of classified information without case-by-case justification would effectively close trial).

[100] United States v. Sterling, 724 F.3d 482, 514-15 (4th Cir. 2013).

[101] *Id.* at 515.

[102] *Id.* at 514.

information he had allegedly disclosed. Sterling argued that these inferences would be prejudicial because the actual sensitivity of such information was a contested issue in his trial.[103]

The Fourth Circuit held that the district court had correctly allowed the defense to access the witnesses' true identities, noting that "Sterling knows, or may know, some of the witnesses at issue, and depriving him of the ability to build his defense in this regard could impinge on his Confrontation Clause rights."[104] However, the court reversed that part of the district court's order allowing the jury to know the witnesses' true names, finding the witnesses' identities to be clearly sensitive information that would not provide any benefit to the jury's deliberations.[105] The Fourth Circuit also held that any concerns about the undue influence of the security measures could be cured by instructing the jury that "Sterling's guilt cannot be inferred from the use of security measures in the courtroom."[106]

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[103] *Id.*

[104] *Id.* at 516. The court also noted that "the Government in this case has made no showing that Sterling or his counsel pose an actual threat to the safety of these witnesses." *Id.*

[105] *Id.* at 516-17.

[106] *Id.* at 517.