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Note

***1941 NATIONAL SECURITY VERSUS DEFENSE COUNSEL'S "NEED TO KNOW": AN OBJECTIVE STANDARD FOR RESOLVING THE TENSION**

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"Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens." [FN1]

"[W]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion." [FN2]

Introduction

Legal developments since the devastating events of September 11, 2001, highlight a tension between the government's interest in national security and a defendant's right to access relevant classified *1942 information. [FN3] Consider three hypothetical criminal defendants at different stages of the adjudicatory process: one serving his fifteenth year of a life sentence; one charged with (but not yet convicted of) a capital crime; and one beginning an eight-year sentence of imprisonment. All three individuals are seeking access to classified information pertinent to their cases, yet the government objects to access on the grounds that the defendants lack a need to know the information. [FN4]

The "need to know" element, the only bar to access because the defendants' attorneys have fulfilled the other prerequisites to gaining access to the information, [FN5] remains elusive and problematic. Unless and until there is an established standard for what constitutes a "need to know," defendants such as these three remain subject to the discretion of the court, unfettered by any objective government or judicial standards; even more troubling, the courts might simply defer to partisan and self-serving assertions of government agents and prosecutors whose representations judges often accept without scrutiny in making access determinations. [FN6]

In the interests of national security, information [FN7] held by the United States Government may be classified [FN8] in accordance with the provisions of an executive order issued by the president. [FN9] However, classification raises two major types of problems: those stemming *1943 from its philosophical, and those arising from its practical, consequences. Philosophically, concealing information related to government affairs impairs important constitutional goals. [FN10] As Justice William O. Douglas once remarked, "[s]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors." [FN11] This Note, however, does not endeavor to address such theoretical issues. Instead, the analysis focuses on the most important practical consequence of classifying information: that a criminal defendant does not have ready access to information that is relevant, and perhaps crucial, to his or her case. [FN12]

The executive order governing classified materials implicitly recognizes the constitutional quandary inherent in classifying information and allows for access upon an individual showing of need. [FN13] Although the defendant has the burden of showing such need, currently no objective test exists by which to determine whether the defendant has met the need to know requirement. Defense attorneys are disadvantaged by this undefined term when the government raises the specter of breach to national security, [FN14] a conclusory assertion that is difficult--if not im-

possible--for the defense to challenge, [\[FN15\]](#) especially without access to the very documents at issue.

***1944** Under a claim of danger to national security, the government can argue that counsel has no need to know as mandated, yet left undefined, by the executive order. Because there is no standard to which courts must adhere in determining the “need to know,” the prosecution benefits from the court's general willingness to defer to the government in the realm of national security, [\[FN16\]](#) often ensuring that the court will deny defense counsel-- even security-cleared counsel--access to critical classified information.

Part I of this Note discusses the government's process for classifying information, its implications for criminal defendants, and how defendants and their attorneys may gain access to such information. Part I also presents the background of the Classified Information Procedures Act (“CIPA”) and discusses the lack of an objective need to know standard for defense counsel seeking access to classified information. Part II analyzes the conflict between national security interests and defendants' rights, illustrating the need for a universally applicable need to know test.

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I. A History of Secrets and National Security

The President of the United States protects sensitive information from unauthorized disclosure through the executive order on classification, which consists of a complex set of rules and procedures to be followed by designated agency heads seeking to classify information in their possession. [\[FN18\]](#) Consequently, persons accused of crimes may be denied access to information necessary to defending their cases or to securing post-conviction remedies, [\[FN19\]](#) a dilemma compounded by the enactment of CIPA, which gave prosecutors more control over criminal proceedings. [\[FN20\]](#) For defense attorneys to gain access to classified materials, they must meet certain criteria, the most difficult of which is proving a need to know the information. [\[FN21\]](#) This part details the background of the predicament faced by defense attorneys attempting to gain access to classified information.

A. The Executive Order: Procedures for Classification and Access

The United States Constitution clearly foresaw the need for government secrecy, [\[FN22\]](#) yet no official system for classification of ***1946** government information existed until 1940. [\[FN23\]](#) President Franklin D. Roosevelt first enacted a classification system by issuing an executive order instructing defense agencies to protect from disclosure sensitive information related to “military installations and equipment.” [\[FN24\]](#) Roosevelt did not, however, provide in his order for any access to such information. [\[FN25\]](#) Years later, the perceived communist threat prompted Harry S. Truman to extend the classification system to any information, not only military, whose secrecy was necessary “to protect the national security of the United States.” [\[FN26\]](#) Truman's order, which authorized any and all federal agencies to classify information, directed agency heads to establish a system controlling dissemination of classified materials “adequate to the needs of [their] agenc[ies].” [\[FN27\]](#) Access by individuals outside of the executive branch was therefore at the sole discretion of the respective agency heads. [\[FN28\]](#)

Several subsequent presidents revised the procedures and requirements for classification, each increasing public access. [\[FN29\]](#) The trend toward more open access was later reversed, however, when the Reagan administration broadened the discretion of agency heads in ***1947** assigning classification status. [\[FN30\]](#) The Reagan order also accomplished increased secrecy by eliminating the requirements that the classifying government official consider the interest in public disclosure and show “identifiable damage” [\[FN31\]](#) resulting from release before permitting a document to be classified. [\[FN32\]](#) Thereafter, President Bill Clinton loosened control of government information, emphasizing his stated commitment to open government. [\[FN33\]](#) However, more recently President George W. Bush expanded the number of classifying agency heads to include, for example, the Secretary of Health and Human Services [\[FN34\]](#) as well as the Environmental Protection Agency Administrator. [\[FN35\]](#) The effect of such expan-

sion was to restrict access to a greater range of information than had previously been off-limits to the general public.

One common feature of the executive orders is that weapons plans, troop locations, and treaty negotiating strategies are classifiable. [FN36] The current executive order on classification, issued by President Clinton and amended by President George W. Bush, also includes information related to foreign governments [FN37] and intelligence activities, [FN38] among other things. [FN39] In addition, the order provides limitations on classification, which include prohibiting use of the system to prevent the release of information that does not threaten national security. [FN40]

Enumerated in the order are the three basic levels at which information may be classified: [FN41] top secret, secret, or confidential. [FN42] *1948 Government officials with appropriate clearance are eligible for access to classified information, as are other individuals seeking access under certain conditions. [FN43] Misclassifying or mishandling information or other violations of the order's provisions may subject certain individuals to sanctions. [FN44]

Originating agencies may attempt to determine the time period for which their respective materials may be classified. [FN45] An agency head makes a decision as to the time period based on the expected duration of its national security sensitivity; [FN46] generally, this period is not to exceed ten years. [FN47] The original classifying authority may benefit, however, from exceptions to this ten-year presumption, [FN48] which include information that at the time of original classification "could reasonably be expected" to cause damage to national security for a period greater than ten years, and the release of which "could reasonably be expected" to pose certain risks to national security. [FN49] These risks include, for example, revealing United States military plans, national security emergency preparedness plans, or foreign government information. [FN50]

If the agency fails to designate a time for declassification, then the materials are to be declassified after ten years. [FN51] However, if an *1949 agency chooses to designate a time period, then certain information may be marked for automatic declassification after twenty-five years. [FN52] As there are only limited exceptions to this rule, [FN53] the implication is that the president intended to prevent unnecessarily prolonged restrictions on access.

The carefully crafted scheme set forth in the executive order demonstrates the importance of protecting certain information from gratuitous disclosure. [FN54] Publication of classified information might lead to a chain of events that years later endangers the nation's security or jeopardizes the government's foreign policy goals. [FN55] Yet despite the potential risks to national security, executive orders have made allowances for access to classified information upon a showing of need. [FN56] The inclusion of such a provision underscores the importance of disclosure upon showing a need for access to the information. Undoubtedly, the most compelling cases in which such a need would be present are those involving persons who stand accused or convicted of a crime and thereby face deprivations of life or liberty.

B. Practical Implications for Criminal Defendants

The lack of access to pertinent information potentially impairs the rights of criminal defendants. The United States' vigorous constitutional and statutory protections give criminal defendants numerous rights. [FN57] Prior to conviction, a defendant is entitled to due *1950 process of law [FN58]--a central component of the American legal system [FN59]--and to effective assistance of counsel. [FN60] In addition, state criminal laws shield pre-conviction defendants from unjust convictions through detailed requirements for prosecutors, such as demonstrating specific criminal acts and mens rea. [FN61] In an ongoing case, the defendant must be able to prepare an effective defense, yet this may be impossible without access to classified information.

*1951 Similarly, the post-conviction defendant may need to gain access to classified materials in order to prepare, for example, an effective appeal, [FN62] post-conviction motion, [FN63] parole application, [FN64] or clem-

ency application. [FN65] Rights retained by persons convicted of crimes [FN66] depend upon circumstances but can include due process, [FN67] access to courts, [FN68] *1952 and the right to counsel. [FN69] Even in clemency proceedings, an individual is entitled to some procedural due process. [FN70] The U.S. Supreme Court has emphasized that “a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.” [FN71] Indeed, although a prisoner does not enjoy a particular freedom due to incarceration, such deprivation does not deny the person a protected interest in securing and maintaining his constitutionally protected liberties. [FN72] As “[t]here is no iron curtain drawn between the Constitution and the prisons of this country,” [FN73] post-conviction defendants must be afforded the opportunity to pursue whatever legal means are available.

To effectively prepare a defense or to pursue legal avenues of relief, both pre- and post-conviction defendants may require access to classified information. Yet there are several barriers to obtaining information that may be critical to a defendant's case. The state secrets privilege, for example, is a common law evidentiary rule that permits the government to withhold information from discovery when *1953 disclosure would be detrimental to national security. [FN74] In addition, under the Freedom of Information Act (“FOIA”), [FN75] a government agency is required to make available to the public information regarding its methods, [FN76] rules of procedure, [FN77] and statements of general policy, [FN78] among other things. [FN79] However, FOIA also provides for exceptions in situations when the investigation or proceeding involves a possible violation of criminal law [FN80] and when disclosure of the existence of the records “could reasonably be expected to interfere with enforcement proceedings” and the subject of the investigation is unaware of its pendency. [FN81] The most comprehensive regulations relating to cases involving classified information are found in CIPA, which governs certain pretrial, trial, and appellate procedures for criminal cases requiring access to classified information. [FN82]

C. The Classified Information Procedures Act: The Solution to “Graymail”

The “vigorous and fearless” performance of the prosecutor's duty is critical for the proper functioning of our criminal justice system. [FN83] *1954 Before the enactment of CIPA, [FN84] prosecutors in cases involving classified information faced added difficulty fulfilling their special role [FN85] of both zealously representing the government's interests and ensuring that justice is done. [FN86] By threatening to expose classified information at trial, defendants managed to place prosecutors in a predicament: either allow sensitive government information to be exposed in open court and potentially harm national security, or drop the charges. [FN87] Termed “graymail,” this defense practice prevented the government from prosecuting legitimate cases involving classified *1955 information. [FN88] With no opportunity to obtain an advance ruling on the admissibility of classified information, [FN89] prosecutors often chose to abandon criminal proceedings rather than risk disclosure of such information at trial. [FN90]

The effects of this dilemma were not limited to individual defendants escaping the consequences of their crimes. [FN91] Graymail also affected the integrity of the entire criminal justice system, as it fostered the perception that government officials and private persons who had access to government secrets had “broad de facto immunity from prosecution for a variety of crimes.” [FN92] As it is also more efficient to prevent the release of classified information in advance than to attempt to negate the damage caused by such disclosure after the fact, [FN93] it became necessary to develop formal procedures which would govern cases involving the disclosure of classified information.

Designed to both safeguard classified information and protect a defendant's rights, [FN94] CIPA provides procedures which would permit the trial judge to decide questions of admissibility involving classified information before the evidence is exposed irreversibly in open *1956 court. [FN95] CIPA effectively minimizes the risk of graymail [FN96] without modifying the existing law relating to admissibility of evidence. [FN97] The sixteen sections of CIPA lay out detailed procedures for cases involving classified information as well as how Congress must regulate the Act's application and effectiveness. [FN98]

CIPA governs cases when the government asserts a classified information privilege, and that assertion is “at least a colorable one.” [FN99] In CIPA proceedings, courts have applied a three-step analysis to determine whether

a defendant may utilize the classified information at issue. [FN100] The court first decides if the evidence is relevant, [FN101] which is determined solely by the well-established criteria set forth in the Federal Rules of Evidence. [FN102] If the court deems information relevant, then the court considers whether it is material. [FN103] Once the *1957 evidence is determined to be both relevant and material, then the court balances the government's need to protect the information in the interest of national security against the defendant's need for access to the information in mounting his defense. [FN104]

Initially, once classified information is deemed pertinent and appropriate for disclosure, [FN105] the executive order requires defense counsel to fulfill three conditions in order to gain access to such evidence. [FN106] First, an agency head or the agency head's designee must make a favorable determination of eligibility for access, which is the security clearance corresponding with the level of the information's classification. [FN107] Second, the person seeking access to the classified information must sign an approved nondisclosure agreement. [FN108] Finally, the individual requesting access must demonstrate a need to know the information. [FN109]

CIPA manifests a congressional intent to protect classified information from disclosure associated with court proceedings at any stage. [FN110] Thus, even after information is initially accessed by defense counsel, the Act provides that a court shall issue a protective order to *1958 prevent unauthorized disclosure of any classified materials revealed to the defense. [FN111] One such protective order alludes to the need to know requirement by stating that the Department of Justice shall seek to obtain security clearance, at the request of defense counsel, for individuals not specifically named in the order “[i]f preparation of the defense requires that classified information be disclosed.” [FN112] Thus, as CIPA restricts the defendant's access to classified information during discovery absent a “clear showing of need,” [FN113] a court must evaluate whether counsel has demonstrated such a need before it will grant permission for access.

D. The Need to Know

Despite the emphasis on an individual's need to know the classified information, no clear standard exists by which to assess a claim of need. When used by various branches of government, occasionally the phrase is preceded by an adjective, such as a “valid need to know” [FN114] or an “actual need-to-know,” [FN115] however, there are no guidelines as to how to establish the need. [FN116] Courts, therefore, as well as defendants, are left with little direction in determining compliance with this requirement. [FN117]

*1959 Even those orders and regulations which provide explanations fail to define specifically what constitutes such a need; the definitions provided are amorphous and are therefore of little value to one seeking to prove that the need to know requirement is fulfilled. Representative of this problem is the relevant passage in the executive order on classified information: [FN118] “‘Need-to-know’ means a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.” [FN119] The order does not further define what constitutes performance of or assistance in a lawful and authorized governmental function. [FN120]

Clearly the definition of need to know is not only limited to government employees, for courts may allow access by defense counsel upon demonstrating a need to know the information. [FN121] Although there is no explicit allowance in the order for disclosure to such individuals, courts may be relying on the “lawful and authorized governmental function” [FN122] of assisting defendants in criminal cases and pursuing post-conviction relief. [FN123] However, the order itself fails to elaborate on who is permitted to access the information. [FN124]

*1960 Courts' interpretations of the requisite need to know are similarly unenlightening, [FN125] although one court attempted to flesh out the requirement in *United States v. Lewis*. [FN126] In upholding the lower court's ruling denying defendant's counsel access to a pre-sentence report, [FN127] the circuit court based its reasoning on the following three criteria. [FN128] First, defendant's counsel did not allege any facts to show *1961 that the sentence

was a flagrant abuse of discretion. [FN129] Second, lack of access did not prevent defendant from independently presenting the information in the report, which consisted of defendant's background and record. [FN130] And third, the defendant himself had already read the report, which he and his prior counsel commented upon at sentencing, and there were no allegations that original counsel was unavailable or incompetent or that the defendant did not recall the contents of the report. [FN131] Based on these three factors, the court denied access to the materials sought. [FN132]

However, Lewis did not involve classified information. [FN133] The court's reasoning, therefore, is not directly apposite in cases which implicate the conflicting needs of protecting national security and preserving defendants' rights. Thus, despite the government's ability to classify information at its sole discretion, and although the executive order explicitly permits access upon a showing of a "need to know," it remains unclear how a defendant can demonstrate such a need.

Criminal defendants may argue to the court that their attorneys require access to certain classified information in order to effectively represent them. Yet with no objective need to know test available, a court might reject such an argument without the defendant or his counsel understanding exactly why the request was denied or how to prove such a need, even if one actually exists. Part II details this conflict between a defendant's rights and the government's concerns for preserving national security. Part III then proposes a test that fleshes out the skeletal need to know requirement mandated by the executive order.

*1962 II. The Tension Between Concerns for National Security and Defendants' Rights

There is an inherent conflict in maintaining an effective system of government secrecy in a free and open society. [FN134] In the aftermath of September 11, 2001, apprehension has been mounting that unwarranted state secrecy may infringe upon democratic freedoms and liberties in the government's efforts to prevent future terrorist attacks. [FN135] Moreover, given complete discretion to determine what constitutes classifiable information relating to the nation's security, the government tends to err on the side of caution, overclassifying information. [FN136] From the public's perspective, however, a democratic government should account for its national security decisions when *1963 those decisions adversely affect the lives of the same citizens that the government is attempting to protect. [FN137]

A. National Security Concerns

One of the nation's highest priorities is--and must be--protecting those who provide critical sensitive information to the U.S. government, as well as residents of the United States who trust that the government will shield them from threats to their lives or liberties. [FN138] Consequently, when confronted with requests for access to classified information, the government often attempts to block access by arguing that such disclosure would cause a breach of national security. [FN139] The government has utilized this approach in criminal cases as well as in civil cases ranging from wrongful death actions against manufacturers of missile systems [FN140] to suits brought by CIA employees for gender discrimination. [FN141]

For example, in *Zuckerbraun v. General Dynamics Corp.*, [FN142] the Secretary of the Navy submitted an affidavit establishing that disclosure of secret data and tactics related to the weapons systems of the most technically advanced United States' war ships could be inimical to national security. [FN143] The court agreed, holding that the government properly asserted the state secrets privilege. [FN144] Plaintiff's wrongful death claim was therefore dismissed because there was insufficient evidence with which to establish a prima facie case. [FN145]

Similarly, in *Tilden v. Tenet*, [FN146] the government successfully argued that disclosure of the evidence requested by plaintiff would harm national security. [FN147] In that case, the plaintiff brought a gender discrimination claim against the C.I.A. and requested information related to her claim. [FN148] The court held that the Director of

Central Intelligence properly invoked the state secrets privilege. [\[FN149\]](#) The court also denied plaintiff's counsel's request to participate in the court's in *1964 camera review of the documents at issue, citing other cases in which courts had refused to grant counsel's request to participate, even when the attorney had the appropriate security clearance. [\[FN150\]](#)

Another case involved a criminal defendant whose newly retained counsel sought disclosure of classified information contained in the defendant's record for the purpose of a clemency application. [\[FN151\]](#) In *United States v. Pollard*, the court stated that "in light of the current security threats faced by our nation since September 11, 2001," the attorneys would not be allowed to access their client's classified record, despite their high-level security clearance. [\[FN152\]](#) The court simply declared that they did not have a need to know the information without further elaboration. [\[FN153\]](#)

However, in contrast, claims of First Amendment freedom of the press have triumphed over the government's argument of breach to national security. [\[FN154\]](#) The government has an "almost insurmountable burden" [\[FN155\]](#) in proving that the publication which the government seeks to restrain poses a "direct[] and immediate[]" [\[FN156\]](#) threat of harm. [\[FN157\]](#) Prior restraints on speech and publication are, as the Supreme Court has stated, "the most serious and the least tolerable infringement on First Amendment rights." [\[FN158\]](#)

In *New York Times Co. v. United States*, [\[FN159\]](#) the Court held that the government had not justified its restraint on the publication of a classified study on Vietnam policy. [\[FN160\]](#) Justice Douglas stated that the information at issue, which he personally reviewed, is "all history, not future events. None of it is [less than three years old]." [\[FN161\]](#) Furthermore, Justice Black noted that "[i]n seeking injunctions against these newspapers and in its presentation to the Court, the *1965 Executive Branch seems to have forgotten the essential purpose and history of the First Amendment," [\[FN162\]](#) explaining that "[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." [\[FN163\]](#)

The Supreme Court, in another case involving prior restraints on the media in a criminal trial, noted that "[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." [\[FN164\]](#) The United States continues to learn from what is viewed as "the unhappy experiences of other nations" [\[FN165\]](#) where governments have been permitted to interfere in the internal editorial affairs of newspapers. Moreover, with respect to national security interests in First Amendment cases, Justice Brennan has stated the following:

Military (or national) security is a weighty interest, not least of all because national survival is an indispensable condition of national liberties. But the concept of military necessity is seductively broad, and has a dangerous plasticity. Because they invariably have the visage of overriding importance, there is always a temptation to invoke security "necessities" to justify an encroachment upon civil liberties. For that reason, the military-security argument must be approached with a healthy skepticism: its very gravity counsels that courts be cautious when military necessity is invoked by the Government to justify a trespass on First Amendment rights. [\[FN166\]](#)

Indeed, courts have concluded that regardless of how seemingly benign the goals of controlling the press might be, it is prudent to remain skeptical of those actions that would allow the government "to insinuate itself into the editorial rooms of this Nation's press." [\[FN167\]](#)

*1966 The unique nature of the press's virtually unbridged freedom in this context likely accounts for the First Amendment trumping national security concerns. The government's ability to censor the media was eliminated so that the press would remain free to censure the government and, in fact, "[t]he press was protected so that it could bare the secrets of government and inform the people." [\[FN168\]](#) In stark contrast, litigants who pit claims of other rights against government secrecy overwhelmingly are on the losing side. [\[FN169\]](#) Perhaps this failure on the part of parties seeking access to classified information is that the courts, and certainly the government, view the rights as-

serted as less vital than the “extraordinary protection against prior restraints enjoyed by the press under our constitutional system,” [\[FN170\]](#) which has been zealously guarded by the Supreme Court. [\[FN171\]](#)

When challenged in court, the government's overall success in keeping classified information secret may be attributed to several factors. In criminal proceedings, although CIPA was not originally intended to favor prosecutors or defendants in any way, [\[FN172\]](#) the government has gained substantial control over proceedings involving classified information since its enactment. [\[FN173\]](#) CIPA entitles the government to an interlocutory appeal from the court's decision authorizing disclosure, imposing sanctions for nondisclosure, or denying a protective order proposed by the government to prevent *1967 disclosure. [\[FN174\]](#) The government also has the right to move for a pretrial conference on matters relating to the time of discovery, the defendant's duty to provide notice of intent to disclose classified information, and the initiation of hearings on which materials may be admissible. [\[FN175\]](#)

Furthermore, the government may ask for a ruling that a portion or all of the classified information is not material and therefore not necessary to preserve the defendant's rights. [\[FN176\]](#) If the court finds the information necessary, then upon a sufficient showing by the prosecution, CIPA gives the court several options from which to choose in protecting classified information. [\[FN177\]](#) The court may authorize the government to delete certain pieces of classified information from materials which the defendant will access through the Federal Rules of Criminal Procedure. [\[FN178\]](#) Alternatively, the court may allow the prosecution to substitute a summary of the information for the classified documents or to submit a statement admitting facts that the documents would tend to prove. [\[FN179\]](#) Defendants are left at a disadvantage due to the implementation of such measures which are in place to protect national security.

An even more potent weapon in the government's arsenal is that agency heads with authority to classify information are the sole censors of the materials in their possession. [\[FN180\]](#) Courts are not required to conduct in camera reviews of documents in evaluating the government's assertion of the state secrets privilege. [\[FN181\]](#) Hence, information may be gratuitously classified, [\[FN182\]](#) and the government may be unjustifiably invoking the argument of breach to national security. In such a situation, a party seeking access to classified materials is at a severe disadvantage, especially considering the high incidence of judicial deference to governmental claims of threats to national security. [\[FN183\]](#)

***1968 B. Defendants' Rights**

Before CIPA, the graymail dilemma precluded the prosecution of many defendants. [\[FN184\]](#) Under CIPA, however, the prosecution has gained substantial control over the proceedings. [\[FN185\]](#) For instance, defendants must alert the prosecution to their strategy early on in order to comply with the requirements of CIPA. [\[FN186\]](#) Such drastic changes in procedure are particularly detrimental to the defendant seeking to gain access to information that may be crucial to his or her defense, as the government controls the defendant's access to documents by claiming that he or she has no need to know the information sought. [\[FN187\]](#) Indeed, as one court noted, “[i]t is difficult to imagine how even someone innocent of all wrongdoing could meet” the burden of rebutting the undisclosed evidence against him. [\[FN188\]](#)

In cases involving classified information, a court must consider both the government's need to maintain national security and the defendant's need to gain access to materials that common sense would dictate to be relevant, [\[FN189\]](#) for instance, to a parole or clemency application. However, there is currently no test to guide the courts in deciding these complex and fundamental issues. [\[FN190\]](#) Although specific circumstances may warrant the government protecting classified information even from security-cleared counsel, [\[FN191\]](#) nondisclosure in *1969 criminal cases where a defendant's liberty is at stake must not be taken lightly. [\[FN192\]](#)

The government enjoys wide latitude when operating under the premise of national security. For instance, in keeping with the trend favoring stated national security interests over claims of individuals, [\[FN193\]](#) the Supreme

Court has ruled that the President has authority to revoke a person's passport on the ground that the passport holder's activities in foreign countries are likely to cause damage to U.S. national security. [FN194] Although courts have acknowledged a "compelling interest" in protecting the nation's security, [FN195] courts have also stressed that the government's goals, legitimate as they may be, do not override the rights of a criminal defendant. [FN196]

When considering the government's interest in national security, courts "must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim to innocence." [FN197] The Constitution guarantees all criminal defendants a "meaningful opportunity to present a complete defense," [FN198] which is a *1970 "fundamental element of due process of law." [FN199] These rights include effective assistance of counsel, due process, and pursuit of post-conviction remedies. [FN200] In fact, under CIPA, a court does not initially consider the government's national security concerns when making a relevancy determination. [FN201] Only after a court decides that information is relevant and material [FN202] does CIPA require the court to consider equally the government's national security interests and the defendant's right to prepare an effective defense when ruling on whether to grant the defense's request for classified information. [FN203]

* * *

[FN1]. J.D. Candidate, 2005, Fordham University School of Law. I would like to thank Aton and our daughters for their love and unconditional support, especially throughout the process of writing this Note. Many thanks to my parents, Sam and Ruthie Salamon, for their constant encouragement in all my endeavors; to my in-laws for their assistance in our hectic lives; to Jamie Titus for her ongoing guidance; and to my best friend's father, Martin Paul Solomon, of blessed memory, for his enthusiasm for the legal profession.

[FN1]. United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950). The court further stated that:

All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are [sic] galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.

Id.

[FN2]. N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971) (discussing the "awesome responsibility" of the executive to preserve national security, but holding nevertheless that the government had not met its burden of showing justification for imposing prior restraints on publication of a classified historical study on Vietnam policy).

[FN3]. See, e.g., Vanessa Blum, A Critical Closing Argument, *Miami Daily Bus. Rev.*, June 12, 2003, at 9 ("While friction between national security interests and the rights of criminal defendants is not a new dilemma, the issue has taken on increased urgency in the aftermath of the terrorist attacks."); see also Samantha A. Pitts-Kiefer, Note, Jose Padilla: Enemy Combatant or Common Criminal?, 48 *Vill. L. Rev.* 875 (2003) (analyzing arguments regarding the legality of continued detention of a particular suspected terrorist post-September 11th); Siobhan Roth, Judge and U.S. Reach Standoff in "Moussaoui," *N.Y. L.J.*, July 28, 2003, at 1 (addressing national security concerns due to the ongoing war on terror as in conflict with a defendant's constitutional rights).

[FN4]. See *infra* Part III for further discussion of the predicament faced by these hypothetical defendants and a proposed resolution of the conflict between national security and the defendants' rights.

[FN5]. See *infra* notes 107-09 and accompanying text for the requirements for gaining access to classified information.

[FN6]. See *infra* note 16 and accompanying text.

[FN7]. “Information” as used and defined by [Executive Order No. 13,292](#) means “any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.” [Exec. Order No. 13,292, 3](#) C.F.R. 196, 216 (2003). “‘Control’ means the authority of the agency that originates information, or its successor in function, to regulate access to the information.” *Id.*

[FN8]. “Classified information” as used and defined by [Executive Order No. 13,292](#) is “information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.” *Id.* at 215.

[FN9]. The current order by President George W. Bush amended President Bill Clinton’s [Executive Order No. 12,958](#), 3 C.F.R. 333 (1995). See [Exec. Order No. 13,292, 3](#) C.F.R. 196, 196 (2003).

[FN10]. For example, the First Amendment fosters vital constitutional values potentially impaired by government secrecy. See Bruce E. Fein, [Access to Classified Information: Constitutional and Statutory Dimensions](#), 26 *Wm. & Mary L. Rev.* 805, 812-13 (1985) (exploring both statutory and constitutional powers of the president to prevent disclosure of classified information to the public, to litigants, and to Congress). “The first amendment supports the protection and encouragement of informed public colloquy ‘to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.’” *Id.* at 813 (quoting [De Jonge v. State of Oregon](#), 299 U.S. 353, 365 (1937)). In addition, denying the public access to classified information hinders “trenchant appraisal by the electorate of the nation’s defense and foreign policies.” *Id.*

[FN11]. [N.Y. Times Co. v. United States](#), 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

[FN12]. This situation presents an archetypal Kafkaesque predicament:

[I]n no other Court was legal assistance so necessary. For the proceedings were not only kept secret from the general public, but from the accused as well. Of course only so far as this was possible, but it had proved possible to a very great extent. For even the accused had no access to the Court records, and to guess from the course of an interrogation what documents the Court had up its sleeve was very difficult, particularly for an accused person, who was himself implicated and had all sorts of worries to distract him.

Franz Kafka, *The Trial* 127 (Alfred A. Knopf 1992) (1925) (emphasis added).

[FN13]. See [Exec. Order No. 13,292, 3](#) C.F.R. 196, 207 (2003). The individual seeking access must also have the appropriate security clearance and sign an approved nondisclosure agreement. *Id.* For further discussion of these requirements, see *infra* text accompanying notes 106-09.

[FN14]. “National security” as used and defined by [Executive Order No. 13,292](#) means “the national defense or foreign relations of the United States.” [Exec. Order No. 13,292, 3](#) C.F.R. 196, 216 (2003).

[FN15]. See James T. O’Reilly, *Federal Information Disclosure* 11-14 to 11-15, 11-33 (2d ed. 1990) (stating that courts usually defer to government agencies in national security cases); see, e.g., [Snepp v. United States](#), 444 U.S. 507, 516 (1980) (holding that the CIA’s interest in protecting national security superseded the CIA agent’s First Amendment rights); [Brown v. Glines](#), 444 U.S. 348, 353 (1980) (holding that Air Force regulations restraining speech were constitutional as they were necessary to protect the substantial governmental interest in military effectiveness).

[FN16]. See O’Reilly, *supra* note 15; Michael D. Fricklas, [Executive Order 12,356: The First Amendment Rights of Government Grantees](#), 64 *B.U. L. Rev.* 447, 501 (1984) (stating that judges often defer to Executive Branch deter-

minations of the need to classify information); Molly McDonough, *Detainees Remain Nameless*, A.B.A. J. E-Report, June 20, 2003, at 24 (discussing judicial deference to government claims of national security risks); John Cary Sims, [Triangulating the Boundaries of Pentagon Papers](#), 2 *Wm. & Mary Bill Rts. J.* 341, 377 n.143 (1993) (noting that in *New York Times Co. v. United States* the government actually asserted that judges are obligated to defer almost completely to the Executive Branch's assessment of the national security risks which the documents might raise); see also [Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice](#), 331 F.3d 918, 928 (D.C. Cir. 2003) (stating that courts should defer to the executive, particularly now since "America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore"); [United States v. Ahmad](#), 499 F.2d 851, 854 (3d Cir. 1974) (noting that the district court "took no position on the justification for the government's desire for secrecy but accepted the Attorney General's affidavit at face value"); Kathryn Lohmeyer, Note, [The Pitfall of Plenary Power: A Call for Meaningful Review of NSEERS "Special Registration."](#) 25 *Whittier L. Rev.* 139, 153 (2003) (stating that "the Immigration Service has invoked the Plenary Power doctrine to support many post-September 11 changes in immigration law and policy"); Gabriel S. Oberfield, Note, [Press Rights in Peril: The Department of Justice Infringes Upon Press Liberties by Conducting "Special Interest" Removal Proceedings](#), 13 *Fordham Intell. Prop. Media & Ent. L.J.* 1209 (2003) (asserting that immigration judges are compelled to defer to the government's contentions that the information it seals is potentially injurious to national security).

[FN18]. See, e.g., [Exec. Order No. 13,292, 3](#) C.F.R. 196 (2003); see also *infra* Part I.A.

[FN19]. See *infra* Part I.B.

[FN20]. See *infra* Part I.C.

[FN21]. See *infra* Part I.D.

[FN22]. One provision explicitly directs Congress to publish a journal of each house, excluding "such Parts as may in [Congress's] Judgment require Secrecy." [U.S. Const. art. I, § 5, cl. 3](#) (emphasis added). A second provision states that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." [U.S. Const. art. I, § 9, cl. 7](#). At least one court has acknowledged that "from time to time" indicates an intention to authorize secret expenses for military or foreign policy endeavors. See [Halperin v. CIA](#), 629 F.2d 144, 154-60 (D.C. Cir. 1980); see also Fein, *supra* note 10, at 806. Furthermore, although the Constitution safeguards individual rights and freedoms, "it is not a suicide pact"; it provides the necessary powers to defend and preserve itself. [Haig v. Agee](#), 453 U.S. 280, 309-10 (1981) (citation omitted); see also [Kennedy v. Mendoza-Martinez](#), 372 U.S. 144, 159-60 (1963) (stating that the Constitution "protects against invasion of individual rights" while simultaneously conferring upon Congress "broad power" to regulate foreign affairs "to ensure effectuation of this indispensable function of government").

[FN23]. See [Exec. Order No. 8381, 3](#) C.F.R. 634 (1938-1943).

[FN24]. *Id.*; see also James A. Goldston et al., [A Nation Less Secure: Diminished Public Access to Information](#), 21 *Harv. C.R.-C.L. L. Rev.* 409, 474 n.324 (1986) (discussing the history and evolution of executive orders relating to procedures for classifying information).

[FN25]. See [Exec. Order No. 8,381, 3](#) C.F.R. 634 (1938-1943).

[FN26]. [Exec. Order No. 10,290, 3](#) C.F.R. 789 (1949-1953); see also Goldston et al., *supra* note 24, at 474 n.324.

[FN27]. [Exec. Order No. 10,290, 3](#) C.F.R. 789, at 29(c) (1949-1953).

[FN28]. See *id.*

[FN29]. See Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971, 975 (1975); see also Fricklas, *supra* note 16. Richard Nixon's classification order limited both the number of people with original classification authority and the scope of the materials to be classified. [Exec. Order No. 11,652, 3](#) C.F.R. 678 (1971-1975). "Original classification authority" as defined in the current executive order means "an individual authorized in writing, either by the President, the Vice President in the performance of executive duties, or by agency heads or other officials designated by the President, to classify information in the first instance." [Exec. Order No. 13,292, 3](#) C.F.R. 196, 217 (2003). President Jimmy Carter later increased the review of the classification status of the materials. See [Exec. Order No. 12,065, 3](#) C.F.R. 190 (1978).

[FN30]. See [Exec. Order No. 12,356, 3](#) C.F.R. 166 (1983).

[FN31]. The "identifiable damage" requirement was found in Carter's order. [Exec. Order No. 12,065, 3](#) C.F.R. 190 (1978).

[FN32]. See [Exec. Order No. 12,356, 3](#) C.F.R. 166 (1983); see also Goldston et al., *supra* note 24, at 410 n.6 (citation omitted).

[FN33]. See [Exec. Order No. 12,958, 3](#) C.F.R. 333 (1995).

[FN34]. [Designation Under Executive Order 12,958, 3](#) C.F.R. 925 (2002).

[FN35]. [Designation Under Executive Order 12,958, 3](#) C.F.R. 295-96 (2003).

[FN36]. See Goldston et al., *supra* note 24, at 474-75.

[FN37]. See [Exec. Order No. 12,958, 3](#) C.F.R. 333, 337 (1995).

[FN38]. See *id.*

[FN39]. The remaining categories involve information regarding foreign relations or foreign activities of the United States; scientific, technological, or economic matters relating to the national security; United States Government programs for safeguarding nuclear materials or facilities; and vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security. See *id.*

[FN40]. *Id.* at 339.

[FN41]. *Id.* at 335-36. In addition to these main levels of classification, another designation known as "sensitive compartmented information" includes information which has been classified at one of the main levels and is also subject to special access and handling requirements because it involves or is derived from especially sensitive intelligence sources and methods. [28 C.F.R. § 17.18\(a\) \(2003\)](#).

[FN42]. [Exec. Order No. 12,958, 3](#) C.F.R. 333, 335-36 (1995). The highest level, top secret, is information that "reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe"; the next level, secret, may be used for information whose unauthorized disclosure "reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe"; and the lowest level, confidential, applies to information whose unauthorized disclosure "reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe." *Id.* (emphases added).

[FN43]. See *id.* at 348. Special consideration is given to historical researchers and certain former government personnel under the Executive Order. See *id.* at 350. For an analysis of the need to know prerequisite to accessing classified information, see *infra* Parts I.C, I.D.

[FN44]. The individuals potentially subject to sanctions are officers and employees of the government and its contractors, licensees, certificate holders, and grantees. [Exec. Order No. 12,958, 3](#) C.F.R. 333, 355 (1995).

[FN45]. *Id.* at 337.

[FN46]. *Id.*

[FN47]. *Id.*

[FN48]. *Id.*

[FN49]. *Id.*

[FN50]. *Id.* at 338. Other exceptions relate to information which “could reasonably be expected” to cause damage to national security for a period greater than ten years, and the release of which “could reasonably be expected” to: reveal an intelligence source; disclose information that would assist in the development or use of weapons of mass destruction; reveal information which would impair development or use of technology within a U.S. weapons system; damage relations between the United States and a foreign government; impair the ability of U.S. government officials to protect the President, the Vice President, and other persons for whom protection services are authorized in the interest of national security; or violate a statute, treaty, or international agreement. *Id.*

[FN51]. See *id.* Ten years seems more than reasonable because, indeed, “[t]he passage of time has a profound effect... and that which is of utmost sensitivity one day may fade into nothing more than interesting history within weeks.” [United States v. Ahmad, 499 F.2d 851, 855 \(3d Cir. 1974\)](#) (emphasis added).

[FN52]. [Exec. Order No. 12,958, 3](#) C.F.R. 333, 343 (1995). This provision applies to information determined to have permanent historical value under Title 44 of the United States Code, and provides that the information must be automatically declassified regardless of whether the records have been reviewed. *Id.*

[FN53]. *Id.* at 343-44. Agency heads may exempt from automatic declassification specific information whose release is expected to violate a statute, treaty, or international agreement or to reveal at least one of the following: the identity of a confidential human source, or information about the use of an intelligence source or method, or reveal the identity of a human intelligence source if the unauthorized disclosure of that source would “clearly and demonstrably” impair the national security interests of the United States; information that would assist in either the development or use of weapons of mass destruction; information that would impair United States cryptologic systems or activities; information that would impair application of state of the art technology within a United States weapons system; actual United States military war plans that remain in effect; information that would “seriously and demonstrably” harm relations between the United States and a foreign government or “seriously and demonstrably” destabilize ongoing diplomatic activities of the United States; information that would “clearly and demonstrably” weaken the current ability of United States Government officials to protect the President, Vice President, and other officials whose protection services are authorized in the interest of national security; or information that would “seriously and demonstrably” damage current national security emergency preparedness plans. *Id.*

[FN54]. See Fein, *supra* note 10, at 810.

[FN55]. See *id.* at 812.

[FN56]. See, e.g., [Exec. Order No. 12,958, 3](#) C.F.R. 333, 348 (1995); see also *infra* Part I.D for further discussion of the need to know requirement.

[FN57]. See *infra* notes 58-73 and accompanying text.

[FN58]. [U.S. Const. amend. V](#) (“No person shall be... deprived of life, liberty, or property, without due process of law....”); see *United States v. Moussaoui*, No. CR. 01-455-A, [2003 WL 21263699, at *4 \(E.D. Va. Mar. 10, 2003\)](#) (“Consistent with established principles of due process, the Government may not suppress evidence favorable to an accused that is ‘material either to guilt or to punishment.’”) (quoting [Brady v. Maryland, 373 U.S. 83, 87 \(1963\)](#)); see also [Jencks v. United States, 353 U.S. 657, 671 \(1957\)](#) (noting that in criminal cases the government, whose duty is to ensure that justice is done while prosecuting the defendant, may invoke its evidentiary privileges to suppress documents only “at the price of letting the defendant go free,” since it is unconscionable to allow the government to commence prosecution “and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense”) (quoting [United States v. Reynolds, 345 U.S. 1, 12 \(1953\)](#)); [Roviaro v. United States, 353 U.S. 53, 60 \(1957\)](#) (“Where the disclosure of an informer’s identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the [government] privilege must give way.” (citations omitted)); Herbert L. Packer, [Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1 \(1964\)](#).

[FN59]. See David Fellman, *The Defendant’s Rights Today* 6-9 (1976). Justice Jackson once stated that “[p]rocedural fairness and regularity are of the indispensable essence of liberty.” [Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 224 \(1953\)](#).

[FN60]. [U.S. Const. amend. VI](#). The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.; see, e.g., [Taylor v. Illinois, 484 U.S. 400, 408 \(1988\)](#) (stating that the accused had the right to compulsory process for favorable witnesses). The constitutional protection against cruel and unusual punishment granted by the Eighth Amendment is also vital to the American system of criminal justice. [U.S. Const. amend. VIII](#); see, e.g., [Trop v. Dulles, 356 U.S. 86, 100 \(1958\)](#) (Warren, C.J., plurality opinion) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”).

[FN61]. See, e.g., [N.Y. Penal Law § 125.27 \(McKinney 1999 & Supp. 2005\)](#) (murder in the first degree); *id.* § 145.12 (criminal mischief in the first degree); *id.* § 150.20 (arson in the first degree); see also Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* 131 (1989); Thomas O. McGarity, [Proposal for Linking Culpability and Causation to Ensure Corporate Accountability for Toxic Risks, 26 Wm. & Mary Env’tl. L. & Pol’y Rev. 1, 63 n.239 \(2001\)](#) (“The requirement of proof beyond a reasonable doubt, the privilege against self-incrimination, and protections against double jeopardy are just a few of the procedural protections that are available to defendants when the state attempts to assign blame through the criminal law.”). Moreover, Justice Brennan once wrote that state constitutions are “a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.” William J. Brennan, Jr., [State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 \(1977\)](#).

[FN62]. See, e.g., [Evitts v. Lucey, 469 U.S. 387, 394 \(1985\)](#) (discussing a defendant’s right to counsel during a first

appeal).

[FN63]. See, e.g., [28 U.S.C. § 2255 \(2000\)](#) (writ of habeas corpus). There is a right to due process in habeas proceedings. See [Bonin v. Vasquez](#), 999 F.2d 425, 428-29 (9th Cir. 1993). As such, applying for a writ of habeas corpus should constitute a valid justification for access to information related to the defendant's case.

[FN64]. That the right to parole is constitutionally protected demonstrates its significance. See, e.g., [Purdie v. Tierney](#), 769 F. Supp. 864, 868 (E.D. Pa. 1991). The court in Purdie stated the following:

A constitutional liberty interest is at stake in the revocation of parole. “[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a ‘grievous loss’ on the parolee.... [This] liberty is valuable and must be seen as within the protections of the Fourteenth Amendment.”

Id. (quoting [Morrissey v. Brewer](#), 408 U.S. 471, 482 (1972)); see also [Beavers v. Saffle](#), 216 F.3d 918, 925 (10th Cir. 2000) (noting “the importance of parole eligibility”). For more information on parole from which one can infer the defendant's rights inherent in the parole process, see United States Parole Commission: Answering Your Questions, at <http://www.usdoj.gov/uspcc/questionstxt.htm> (last visited Jan. 27, 2005). For information on clemency, see United States Department of Justice, Office of the Pardon Attorney, at <http://www.usdoj.gov/pardon> (last visited Jan. 27, 2005).

[FN65]. The frequency with which presidents use their “unlimited” power to pardon illustrates the importance of clemency. See Ex parte [Garland](#), 71 U.S. 333, 380 (1866). During approximately the latter half of the twentieth century, the last ten presidents granted some relief to an average of 23% of all petitioners, nearly twelve individuals per month of office. See U.S. Dep't of Justice, Presidential Clemency Actions by Administration: 1945 to 2001, at http://www.usdoj.gov/pardon/actions_administration.htm (last visited Jan. 20, 2005). These statistics demonstrate that clemency is not unrealistically remote for a convicted person; to the contrary, if counsel is able to perform effectively and has access to all relevant documents, clemency can provide a realistic, achievable avenue of relief in our system of justice. See id.

[FN66]. In contrast to the modern approach, under the antiquated Supreme Court view, the post-conviction defendant had virtually no rights whatsoever, as he was considered “for the time being, a slave of the State.” See [Ruffin v. The Commonwealth](#), 62 Va. (21 Gratt.) 790, 796 (1871) (stating that the estate of a prisoner, if any, was administered as though he were a decedent, since “[h]e has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him”).

[FN67]. See, e.g., [Rogers v. Tennessee](#), 532 U.S. 451 (2001); [United States v. Gaudin](#), 515 U.S. 506 (1995); [Taylor v. Illinois](#), 484 U.S. 400 (1988); [Wolff v. McDonnell](#), 418 U.S. 539, 555-57 (1974); [Haines v. Kerner](#), 404 U.S. 519 (1972); [Wilwording v. Swenson](#), 404 U.S. 249 (1971); [Screws v. United States](#), 325 U.S. 91 (1945). Liberty from physical restraint has always been recognized as the core of the liberty protected by the Due Process Clause. See, e.g., [Ingraham v. Wright](#), 430 U.S. 651, 673-74 (1977); [Bd. of Regents of State College et al. v. Roth](#), 408 U.S. 564, 572 (1972). But see [Ford v. Wainwright](#), 477 U.S. 399, 429 (1986) (O'Connor, J., concurring in part and dissenting in part) (“[O]nce society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly.”).

[FN68]. See, e.g., [Johnson v. Avery](#), 393 U.S. 483, 485 (1969) (“Since the basic purpose of the writ [of habeas corpus] is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.”); Ex parte [Hull](#), 312 U.S. 546, 549 (1941) (stating that the state “may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus”). In addition, failure to maintain a prisoner's physical well-being may result in a civil rights deprivation. See, e.g., [Bishop v. Stoneman](#), 508 F.2d 1224, 1225 (2d Cir. 1974); [Corby v. Conboy](#), 457 F.2d 251, 254 (2d Cir. 1972); [Martinez v. Mancusi](#), 443 F.2d 921, 923 (2d Cir. 1970); see also [Haines v. Kerner](#), 404 U.S. 519, 520-21 (1972) (holding that a prisoner's allegations of mistreatment by prison officials may be actionable).

[FN69]. See, e.g., [Gideon v. Wainwright](#), 372 U.S. 335, 344 (1963) (holding that a prisoner has a right to counsel while pursuing a first appeal).

[FN70]. [Ohio Adult Parole Auth. v. Woodard](#), 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment) (“[S]ome minimal procedural safeguards apply to clemency proceedings.” (emphasis omitted)); see also [Duvall v. Keating](#), 162 F.3d 1058, 1061 (10th Cir. 1998) (holding that some level of procedural due process applies to clemency proceedings). Clemency provides the public with assurance that only those who deserve to be punished are punished, and only as much as they deserve. See Moore, *supra* note 61, at 131. The administration of justice by the judiciary “is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt.” Ex parte [Grossman](#), 267 U.S. 87, 120-21 (1925). It has therefore always been thought fundamental in popular governments, as well as in monarchies, to vest in an authority other than the courts the power to amend or avoid certain criminal judgments. See [id. at 121](#) (referring to clemency as “a check entrusted to the executive for special cases”). Thus, a defendant's request for access to classified information that could maximize the effectiveness of his clemency application should be treated with seriousness though the government's objections may be vehement and superficially persuasive.

[FN71]. [Wolff v. McDonnell](#), 418 U.S. 539, 555 (1974).

[FN72]. See [Greenholtz v. Inmates of Neb. Penal & Corr. Complex](#), 442 U.S. 1, 26 (1979) (adding, however, that a convicted person has no constitutional right to actually be released before the expiration of a valid sentence).

[FN73]. [Wolff](#), 418 U.S. at 555-56.

[FN74]. [Zuckerbraun v. Gen. Dynamics Corp.](#), 935 F.2d 544 (2d Cir. 1991) (upholding dismissal of wrongful death claim against missile defense systems manufacturers, designers, and testers). In [United States v. Reynolds](#), the Supreme Court explained the steps necessary for the Government to invoke the state secrets privilege: There must be a formal claim of privilege, made by the head of the department with control over the matter, after personal consideration by that official. [United States v. Reynolds](#), 345 U.S. 1, 7-8 (1953). The court must determine whether the circumstances are appropriate for the claim of privilege, but without forcing a disclosure of that which the privilege was created to protect. *Id.*

[FN75]. [5 U.S.C. § 552](#) (2000).

[FN76]. See [id. § 552\(a\)\(1\)\(B\)](#).

[FN77]. See [id. § 552\(a\)\(1\)\(C\)](#).

[FN78]. See [id. § 552\(a\)\(1\)\(D\)](#).

[FN79]. See [id. § 552\(a\)](#).

[FN80]. See [id. § 552\(c\)\(1\)\(A\)](#).

[FN81]. [Id. § 552\(c\)\(1\)\(B\)](#); see also [Winterstein v. United States Dep't of Justice, Office of Info. & Privacy](#), 89 F. Supp. 2d 79, 83 (D.D.C. 2000) (denying an individual's FOIA request where the document sought related to ongoing investigations). Similarly, the Federal Bureau of Investigation is exempt from the access requirements of the Privacy Act if disclosure might compromise a “pending sensitive investigation.” [28 C.F.R. § 16.96\(b\)\(2\)](#) (2003); see also [Falwell v. Executive Office of the President](#), 158 F. Supp. 2d 734, 740 & n.4 (W.D. Va. 2001) (stating that the FBI

had no legal obligation to disclose the requested information since it was exempt under [28 C.F.R. § 16.96](#)).

[FN82]. See 18 U.S.C. app 3 (2000); see also [United States v. O'Hara](#), 301 F.3d 563, 568 (7th Cir.) (stating that CIPA was not limited to pretrial proceedings), cert. denied, [537 U.S. 1049 \(2002\)](#); [Armstrong v. Executive Office of the President](#), 830 F. Supp. 19 (D.D.C. 1993) (applying CIPA during post-trial proceedings).

[FN83]. [Imbler v. Pachtman](#), 424 U.S. 409, 427-28 (1976); see also Martin Kasten, Case Note, [Summons at 1600: Clinton v. Jones' Impact on the American Presidency](#), 51 Ark. L. Rev. 551, 557 (1998) (examining the impact of a civil suit brought against President Bill Clinton and investigating the history and precedent that the Supreme Court applied to the lawsuit against the President).

[FN84]. 18 U.S.C. app. 3 §§ 1-16. For an overview of CIPA, see generally Brian Z. Tamanaha, [A Critical Review of the Classified Information Procedures Act](#), 13 Am. J. Crim. L. 277 (1986).

[FN85]. See [Strickler v. Greene](#), 527 U.S. 263, 281 (1999).

[FN86]. See Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2001) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1218 (1958) (noting that the prosecutor is "obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but [is] possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice"); see also [Berger v. United States](#), 295 U.S. 78, 88 (1935) (stating that the prosecutor's interest in a criminal case is not primarily to win the case, but to see to it that justice is done); ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 150 (1936) ("The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict but to see that justice is done."). The Court in [Berger](#) elaborated on the extraordinary role of the prosecutor, explaining that

[H]e is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so.... It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

[Berger](#), 295 U.S. at 88.

[FN87]. See [S. Rep. No. 96-823, at 4 \(1980\)](#), reprinted in 1980 U.S.C.C.A.N. 4294, 4297-98; see also [United States v. Smith](#), 780 F.2d 1102, 1105 (4th Cir. 1985); [United States v. Wilson](#), 721 F.2d 967, 975 (4th Cir. 1983); [United States v. Lonetree](#), 31 M.J. 849, 857 (C.A.A.F. 1990); Saul M. Pilchen & Benjamin B. Klubes, [Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel](#), 31 Am. Crim. L. Rev. 191, 195 (1994) ("CIPA was conceived to reconcile the greymail dilemma, while implicitly acknowledging that appropriate cases might well call for the use of classified information by the prosecution or defense."). One student commentator noted that two types of graymail dilemmas existed in which the government was presented with the disclose or dismiss dilemma: either a defendant would threaten the government with disclosure of classified information in an effort to thwart prosecution, known as express graymail, or the defense would attempt to obtain or disclose such information simply as an exercise of the defendant's right to prepare and conduct a satisfactory defense, called implied graymail. Note, Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions, 31 Case W. Res. L. Rev. 84, 85 n.5 (1980); see also Timothy J. Shea, Note, [CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials](#), 27 Am. Crim. L. Rev. 657, 716 (1990).

[FN88]. [S. Rep. No. 96-823, at 1 \(1980\)](#), reprinted in 1980 U.S.C.C.A.N. 4294 (recommending that the bill providing procedures for criminal cases involving classified information, CIPA, should pass because it will "permit the government to ascertain the potential damage to national security of proceeding with a given prosecution before trial").

[FN89]. See [Smith, 780 F.2d at 1105](#) (holding that prior to admission of classified information, a district court must engage in a balancing test weighing the government's interest in nondisclosure against the defendant's need for disclosure). For an in-depth discussion of the government's need to protect classified materials, see generally Laura A. White, Note, [The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security](#), 43 Va. J. Int'l L. 1071 (2003).

[FN90]. See [Smith, 780 F.2d at 1105](#).

[FN91]. See Shea, *supra* note 87, at 659 (noting that graymail affected the entire criminal justice system, and therefore Congress enacted CIPA “[i]n an effort to allay public concerns over the handling of graymail in criminal cases”).

[FN92]. Graymail Legislation: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 96th Cong. 5 (1979) (statement of Rep. Morgan Murphy, Chairman of the Subcommittee).

[FN93]. See [United States v. Bin Laden, 58 F. Supp. 2d 113, 121 \(S.D.N.Y. 1999\)](#) (quoting [Snepp v. United States, 444 U.S. 507, 512-13 & nn. 7-8 \(1980\)](#)).

[FN94]. See [United States v. Pappas, 94 F.3d 795, 799 \(2d Cir. 1996\)](#) (holding that CIPA authorized an order prohibiting disclosure of information acquired by the defendant prior to criminal proceedings only in connection with trial but not to the extent that it prohibited public disclosure unrelated to court proceedings); [United States v. LaRouche Campaign, 695 F. Supp. 1282, 1285 \(D. Mass. 1988\)](#) (applying section 4 of CIPA in deciding question of discovery of classified information by defendants). For instance, section 5(a) mandates that the defendant give formal notice to the prosecution at least thirty days in advance of the time at which the defense would like to use specific classified information. [18 U.S.C. app. 3 § 5\(a\) \(2000\)](#). Failure to comply with this requirement precludes the defendant's use of the classified information at issue. See, e.g., [United States v. Badia, 827 F.2d 1458, 1465 \(11th Cir. 1987\)](#) (holding that defendant's failure to give formal notice of intent to disclose classified information precluded asserting CIA involvement as a defense).

[FN95]. See [S. Rep. No. 96-823, at 1 \(1980\)](#), reprinted in 1980 U.S.C.C.A.N. 4294; see also [In re Wash. Post Co., 807 F.2d 383, 393 \(4th Cir. 1986\)](#) (discussing the history and applicability of CIPA).

[FN96]. See, e.g., [United States v. Wilson, 721 F.2d 967, 975 \(4th Cir. 1983\)](#) (“[O]ppportunity for ‘greymail’ by defendants... is minimized.”).

[FN97]. H.R. Rep. No. 96-1436, at 12 (1980), reprinted in 1980 U.S.C.C.A.N. 4307, 4310; see also [United States v. Smith, 780 F.2d 1102, 1104-06 \(4th Cir. 1985\)](#) (stating that “Congress did not intend to allow exclusion of evidence relevant to the defense simply because that evidence was classified”); [United States v. Collins, 720 F.2d 1195, 1199 \(11th Cir. 1983\)](#) (noting that CIPA does not “undertake to create new substantive law governing admissibility”); [United States v. Pickard, 236 F. Supp. 2d 1204, 1209 \(D. Kan. 2002\)](#) (noting that CIPA supplements, rather than alters, the discovery process).

[FN98]. See Tamanaha, *supra* note 84, at 284.

[FN99]. [United States v. Yunis, 867 F.2d 617, 623 \(D.C. Cir. 1989\)](#) (“Obviously, the government cannot be permitted to convert any run-of-the-mine criminal case into a CIPA action merely by frivolous claims of privilege.”).

[FN100]. Ralph V. Seep, Annotation, [Validity and Construction of Classified Information Procedures Act \(18 U.S.C.S. Appx. §§ 1-16\)](#), 103 A.L.R. Fed. 219 (1991) (analyzing federal cases which specifically determine, or bear on the determination of, the validity and construction of CIPA); see also [United States v. Rewald, 889 F.2d 836, 847](#)

[\(9th Cir. 1989\)](#) (applying CIPA and discussing its requirements).

[FN101]. See Seep, supra note 100; see also [United States v. Anderson, 872 F.2d 1508, 1519 \(11th Cir. 1989\)](#) (“[I]t is axiomatic that a defendant's right to present a full defense does not entitle him to place before the jury irrelevant or otherwise inadmissible evidence.”).

[FN102]. See [Anderson, 872 F.2d at 1514](#). Under the Federal Rules of Evidence, relevant evidence is defined as information “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” [Fed. R. Evid. 401](#). Information may be deemed irrelevant and therefore inadmissible for a number of reasons, such as considerations of undue delay or the danger of unfair prejudice. [Fed. R. Evid. 402-403](#).

[FN103]. See Seep, supra note 100. A court may find that evidence is material if it implicates “very crucial issues, such as motive, intent, prejudice, credibility, or even the possibility of exposing duress or entrapment.” [Yunis, 867 F.2d at 620](#). Evidence may also be found to be material if, had it been disclosed to the defense, there is a “reasonable probability” that the result of the proceeding would have been different. [Strickland v. Washington, 466 U.S. 668, 694 \(1984\)](#). In [United States v. Bagley, 473 U.S. 667, 682 \(1985\)](#), the Court defined a “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” (quoting [Strickland, 466 U.S. at 694](#)). See also [Kyles v. Whitley, 514 U.S. 419, 433-34 \(1995\)](#) (applying the Bagley “reasonable probability” test).

[FN104]. See Seep, supra note 100.

[FN105]. The prosecution may still block disclosure even if access to classified information is determined to be essential to safeguarding the defendant's rights. [18 U.S.C. app. 3 § 6\(e\) \(2000\)](#) (addressing the prohibition on disclosure of classified information by defendant and relief for defendant upon such prohibition). However, the consequence may be a finding against the government, the barring of the testimony of a crucial government witness, or even dismissal of the indictment. *Id.* As with ordinary criminal prosecutions, see [Fed. R. Crim. P. 7\(c\)](#), the government is required to disclose to the defendant the details of its case in order to ensure fairness in determining the issues, [18 U.S.C. app. 3 § 6\(b\)\(2\)](#).

[FN106]. See [Exec. Order No. 13,292, 3 C.F.R. 196, 207 \(2003\)](#).

[FN107]. *Id.* The constitutionality of imposing a clearance requirement was addressed in [United States v. Bin Laden, 58 F. Supp. 2d 113, 118 \(S.D.N.Y. 1999\)](#). “The text and structure of both CIPA and the Security Procedures... create a presumption that the Court possesses the authority to require Defense counsel to seek security clearance before the Court will provide them with access to classified materials.” *Id.* But see [United States v. Smith, 706 F. Supp. 593, 596 n.1 \(M.D. Tenn. 1989\)](#) (finding “no authority” in [section 5](#) of CIPA “for requiring submission to a security clearance as a prerequisite to representation of a defendant in a case involving classified information”), *rev'd* on other grounds, [899 F.2d 564 \(6th Cir. 1990\)](#); [United States v. Jolliff, 548 F. Supp. 232, 233 \(D. Md. 1981\)](#) (stating that [section 5](#) of CIPA “does not provide the Court with authority to make submission to a security clearance a prerequisite to representation of a defendant in a case involving classified information”).

[FN108]. [Exec. Order No. 13,292, 3 C.F.R. 196, 207 \(2003\)](#).

[FN109]. *Id.* Other definitions of the need to know are discussed *infra* Part I.D.

[FN110]. See [18 U.S.C. app. 3 § 4](#) (discussing procedures to be followed “in the event of an appeal”); see also [United States v. LaRouche Campaign, 695 F. Supp. 1282, 1285 \(D. Mass. 1988\)](#) (“When it is read as a whole, CIPA plainly manifests a congressional intent to protect classified information from any disclosure incident to court proceedings, at whatever stage of trial, other than such disclosures as are provided for in CIPA to give full protection to

the rights of defendants.”).

[FN111]. See [18 U.S.C. app. 3, § 3](#).

[FN112]. [United States v. Rezaq, 156 F.R.D. 514, 524 n.18 \(D.D.C. 1994\)](#) (emphasis added); see also [United States v. Moussaoui, No. CR. 01-455-A, 2002 WL 1987964, at *1 \(E.D. Va. Aug. 23, 2002\)](#) (stating that the “Protective Order prohibits the defendant from accessing classified information unless he first obtains the necessary security clearance from the Department of Justice, or other governmental or Court approval... [and] the Court is satisfied that there is a ‘need to know’ the particular information” (emphasis added)); [Protective Order in United States v. Pollard, Crim. No. 86-0207, at 5 \(filed in the U.S. District Court for the District of Columbia, Oct. 2, 1986\)](#) (providing that any individuals other than those specifically mentioned in the Order can obtain access to classified information and documents “only after having been granted the appropriate security clearances by the Department of Justice through the Court Security Officer and the permission of this Court” (emphasis added)).

[FN113]. [Pilchen & Klubes, supra note 87, at 193-94](#).

[FN114]. [5 C.F.R. § 1312.23 \(2003\)](#) (Office of Management and Budget).

[FN115]. [28 C.F.R. § 17.45 \(2003\)](#) (Department of Justice). Agencies use a plethora of other adjectives as well. See, e.g., [5 C.F.R. § 1312.22 \(2003\)](#) (Office of Management and Budget) (“official need to know”); [32 C.F.R. § 322.5\(d\)\(11\) \(2003\)](#) (Office of the Secretary of Defense) (“appropriate need-to-know.... NSA's determination regarding an affiliate's need-to-know is not subject to appeal under this or any other authority”); [67 Fed. Reg. 48,506 \(July 24, 2002\)](#) (Department of Transportation) (“[B]ona fide need to know.”); [62 Fed. Reg. 52,695 \(Oct. 9, 1997\)](#) (Department of Defense) (“[D]efinite need-to-know.”); [55 Fed. Reg. 37,182 \(Sept. 7, 1990\)](#) (Federal Emergency Management Agency) (“[V]erified need-to-know basis.”).

[FN116]. See [supra notes 109-13](#).

[FN117]. Courts largely have not addressed the term “need to know”, and therefore its meaning remains perplexing. See [infra notes 125-32 and accompanying text](#). In contrast, in [United States v. Jolliff](#), for instance, the court held that the terms “classified information” and “national security” are not unconstitutionally vague, as they “give the defendant ample notice of required conduct.” [United States v. Jolliff, 548 F. Supp. 229, 230 \(D. Md. 1981\)](#); see also [United States v. Wilson, 571 F. Supp. 1422, 1426-27 \(S.D.N.Y. 1983\)](#) (holding that neither term as used by CIPA was void for vagueness). But see [N.Y. Times Co. v. United States, 403 U.S. 713, 718-19 \(1971\)](#) (referring to the word “security” as a “broad, vague generality”).

[FN118]. [Exec. Order No. 13,292, 3 C.F.R. 196, 216 \(2003\)](#).

[FN119]. *Id.* The order further states: “[O]ur Nation's progress depends on the free flow of information. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations.” *Id.* at 196; see also [Exec. Order No. 12,958, 3 C.F.R. 333, 334 \(1995\)](#).

[FN120]. See [Exec. Order No. 13,292, 3 C.F.R. 196, 216 \(2003\)](#).

[FN121]. See, e.g., [United States v. Moussaoui, No. CR. 01-455-A, 2002 WL 1987964, at *1 \(E.D. Va. Aug. 23, 2002\)](#) (holding that the defendant had failed to meet the need to know requirement as mandated by the Protective Order); cf. [United States v. Lewis, 743 F.2d 1127, 1129 \(5th Cir. 1984\)](#) (discussing the defendant's lack of a need to know in a case not involving classified information and describing circumstances which would evince a need to know leading to the disclosure of the information at issue).

[FN122]. See *supra* note 119 and accompanying text.

[FN123]. See U.S. Const. [amend. VI](#).

[FN124]. The use of the phrase “need to know” without definition is not limited to executive orders. Examples include regulations issued by the Department of Energy, which defines the need to know as “[a] determination by persons having responsibility for classified information or matter, that a proposed recipient's access to such classified information or matter is necessary in the performance of official, contractual, or access permit duties of employment under cognizance of the [Department of Energy].” [10 C.F.R. § 1016.3\(p\) \(2003\)](#). The Export-Import Bank of the United States defines the term in the following manner:

In addition to a security clearance, a person must have a need for access to the particular classified information or material sought in connection with the performance of official duties or contractual obligations. The determination of that need shall be made by officials having responsibility for the classified information or material.

[12 C.F.R. § 403.10\(a\)\(2\) \(2003\)](#). The Commodity Futures Trading Commission explains the need to know as follows:

A person is not entitled to receive classified information solely by virtue of having been granted a security clearance. A person must also have a need for access to the particular classified information sought in connection with the performance of official government duties or contractual obligations. The determination of that need shall be made by officials having responsibility for the classified information.

[17 C.F.R. § 140.23\(b\) \(2003\)](#). The Office of the Secretary of the Treasury defines the term in the following way: “Classified information shall be made available to a person only when the possessor of the classified information establishes in each instance, except as provided in section 4.3 of the Order, that access is essential to the accomplishment of official United States Government duties or contractual obligations.” [31 C.F.R. § 2.22\(a\) \(2003\)](#). Thus, with regard to any classified information, courts are left with virtually no guidance as to how to make the need-to-know determination. In contrast to these other definitions of “need to know,” the lack of clarity in the context of the executive order is particularly problematic. The vague definition can preclude security-cleared criminal defense attorneys from assisting in “lawful and authorized governmental function[s],” [Exec. Order No. 13,292, 3 C.F.R. 196, 216 \(2003\)](#), which presumably include tasks such as applying for clemency and parole.

[FN125]. See, e.g., [Stillman v. CIA, 319 F.3d 546\(D.C. Cir.2003\)](#); [Cummock v. Gore, 180 F.3d 282 \(D.C. Cir. 1999\)](#); [United States v. Pollard, 290 F. Supp. 2d 165 \(D.D.C. 2003\)](#). In one case, the plaintiff's attorney questioned a naval officer as to the definition of need to know as the officer used it. See [MDS Assocs. v. United States, 37 Fed. Cl. 611, 629 \(1997\)](#). The witness responded: “The military doesn't just give access to documents unless you have a need to know, as they say, which means you are involved with the process.” *Id.* (emphasis added). Similarly, in the case of convicted spy Jonathan Pollard, his newly retained attorneys repeatedly have been denied access to classified documents which directly relate to his case, as the government has argued that the attorneys have “simply not showed any need to know what is in the documents.” Anne Gearan, Pollard's Lawyers Seek His Early Release, AP Online, Sept. 2, 2003, at <http://www.philly.com/mld/philly/news/politics/6670736.htm>.

[FN126]. [743 F.2d 1127, 1129 \(5th Cir. 1984\)](#).

[FN127]. *Id.* The defendant, convicted of conspiracy to possess marijuana with intent to distribute, had been sentenced to five years in prison, and after retaining new counsel, sought reduction of his sentence due to substantial assistance under [Rule 35\(b\) of the Federal Rules of Criminal Procedure](#). See *id.* at 1128. Counsel argued that he needed to know the contents of defendant's pre-sentence investigation report because “[u]pon information and belief, [appellant's] background and prior record were not fully and fairly conveyed to the Court prior to imposition of sentence.” *Id.* In *United States v. Foss*, the court similarly held that the trial court should have allowed the defendant's new counsel to view the pre-sentence report, which was material to the defendant's motion. [United States v. Foss, 501 F.2d 522, 530 \(1st Cir. 1974\)](#).

[FN128]. [Lewis, 743 F.2d at 1129.](#)

[FN129]. Id.

[FN130]. Id.

[FN131]. Id. The court seems to be implying that had the defendant alleged that previous counsel is unavailable or acted incompetently, the court would have found a need to know and allowed access to the documents at issue. See id.

[FN132]. Id.

[FN133]. See id. One case which did involve classified information failed to mention the need to know; the court did, however, state:

[C]lassified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information... is entitled only to information that is at least "helpful to the defense of [the] accused."

[United States v. Yunis, 867 F.2d 617, 623 \(D.C. Cir. 1989\)](#) (quoting [Roviaro v. United States, 353 U.S. 53, 60-61 \(1957\)](#)).

[FN134]. See Edward Lee, [The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property, 55 Hastings L.J. 91, 129 \(2003\)](#).

[FN135]. See, e.g., White, *supra* note 89, at 1087. One student author stated succinctly that "[t]he events of September 11th... tested the federal government's ability to balance civil liberties with national security concerns. In the end, national security interests overshadowed the constitutional objections of immigrants, who often serve as 'scapegoats during times of crisis.'" Shirley C. Rivadeneira, Note, [The Closure of Removal Proceedings of September 11th Detainees: An Analysis of Detroit Free Press, North Jersey Media Group and the Creppy Directive, 55 Admin. L. Rev. 843, 864 \(2003\)](#) (citation omitted). In addition, courts may be invoking September 11th inappropriately due to security fears which may be irrelevant to the decisions facing them. See, e.g., [United States v. Pollard, 290 F. Supp. 2d 165, 166 \(D.D.C. 2003\)](#) (ruling that "in light of the current security threats faced by our nation since September 11, 2001, the Court finds it even less likely than before that Mr. Pollard's attorneys will require access to classified documents in support of a speculative possibility of executive clemency," when the issue before the court was whether the defendant demonstrated a need to know the information contained in those documents, not whether counsel posed a security threat).

[FN136]. See Lee, *supra* note 134; see also [The Intelligence Community in the 21st Century: Hearings Before the House Permanent Select Comm. on Intelligence, 104th Cong. 204 \(1995\)](#) ("[T]here is no question that we classify too much. It is a bureaucratic tendency that needs to be fought.") (statement of General Brent Scowcroft, former National Security Advisor); Matthew Silverman, Comment, [National Security and the First Amendment: A Judicial Role in Maximizing Pub. Access to Information, 78 Ind. L.J. 1101, 1122 \(2003\)](#) (stating that courts should review classification decisions because the government "will always tend to overclassify documents"). One government official, who had worked for the CIA for over ten years, explained that the censor of the information usually prefers to overclassify than risk underclassifying:

I believe that we do classify too much material, because it is the path of least resistance, and I know that from experience. If I get a piece of paper on my table and I am not sure what to do with it, I put a confidential stamp on it and put it in the confidential box.... Then I will not have to worry about whether I released something that was classified that I should not have. So, the incentive is to do the wrong thing, and that is something we have got to get

at.

Pub. Interest Declassification Act: Hearing on S. 1801 Before the Senate Comm. on Governmental Affairs, 106th Cong. 6-7 (2000) (statement of Rep. Porter J. Goss).

[FN137]. See Lee, *supra* note 134.

[FN138]. See Kelley Brooke Snyder, Note, [A Clash of Values: Classified Information in Immigration Proceedings](#), 88 Va. L. Rev. 447, 447-48 (2002).

[FN139]. See *infra* notes 140-67 and accompanying text.

[FN140]. See [Zuckerbraun v. Gen. Dynamics Corp.](#), 935 F.2d 544 (2d Cir. 1991).

[FN141]. See [Tilden v. Tenet](#), 140 F. Supp. 2d 623 (E.D. Va. 2000).

[FN142]. [935 F.2d at 544](#) (upholding dismissal of wrongful death claim against missile defense systems manufacturers, designers, and testers).

[FN143]. [Id. at 547](#).

[FN144]. *Id.*; see *supra* note 74 and accompanying text.

[FN145]. *Id.* at 548. Plaintiff asserted that the missile defense system used by the Navy failed to repel a missile attack due to the negligence of the manufacturer, and the result was the death of a sailor who was killed when his ship was fired upon. *Id.* at 545-46.

[FN146]. [140 F. Supp. 2d 623 \(E.D. Va. 2000\)](#).

[FN147]. [Id. at 625](#).

[FN148]. *Id.*

[FN149]. *Id.* at 626.

[FN150]. *Id.*

[FN151]. [United States v. Pollard](#), 290 F. Supp. 2d 165 (D.D.C. 2003).

[FN152]. [Id. at 166](#).

[FN153]. *Id.*

[FN154]. See, e.g., [N.Y. Times Co. v. United States](#), 403 U.S. 713, 714 (1971). The Court stated that “only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a [troop] transport already at sea can support even the issuance of an interim restraining order.” [Id. at 726-27](#).

[FN155]. Blake D. Morant, [Electoral Integrity: Media, Democracy, and the Value of Self-Restraint](#), 55 Ala. L. Rev.

[1, 28 \(2003\).](#)

[FN156]. [N.Y. Times, 403 U.S. at 726-27.](#)

[FN157]. See Morant, *supra* note 155.

[FN158]. [Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 \(1976\)](#). The Court further stated: “A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted.” *Id.*

[FN159]. [403 U.S. at 713.](#)

[FN160]. [Id. at 714.](#)

[FN161]. [Id. at 722 n.3.](#) Indeed, the age of the classified materials is significant, as their accuracy and potential for damage diminishes with time. Cf. [United States v. Ahmad, 499 F.2d 851, 855 \(3d Cir. 1974\)](#); see also *supra* notes 45-53 and accompanying text.

[FN162]. [N.Y. Times, 403 U.S. at 715.](#)

[FN163]. [Id. at 717.](#) Justice Black's opinion further stated that:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors.... Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

Id.

[FN164]. [Sheppard v. Maxwell, 384 U.S. 333, 350 \(1966\)](#). “A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field” and that the press has “an impressive record of service over several centuries.” *Id.*

[FN165]. [Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 \(1974\)](#) (White, J., concurring).

[FN166]. [Brown v. Glines, 444 U.S. 348, 369 \(1980\)](#) (Brennan, J., dissenting) (citation omitted).

[FN167]. [Miami Herald, 418 U.S. at 259](#) (White, J., concurring).

[FN168]. [N.Y. Times, 403 U.S. at 717](#) (Black, J., concurring). Justice Black elaborated further:

The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.

Id. at 719.

[FN169]. See, e.g., [Monarch Assurance P.L.C. v. United States, 244 F.3d 1356 \(Fed. Cir. 2001\)](#) (precluding from discovery the relationship between the CIA and a British lender due to state secrets privilege); [Black v. United States, 62 F.3d 1115 \(8th Cir. 1995\)](#) (upholding dismissal of the plaintiff's claim that the government's intelligence agencies violated his Fourth Amendment rights by conducting domestic surveillance); [Bareford v. Gen. Dynamics Corp., 973 F.2d 1138 \(5th Cir. 1992\)](#) (holding that the state secret doctrine barred plaintiff's claim against a defense

contractor); [Zuckerbraun v. Gen. Dynamics Corp.](#), 935 F.2d 544 (2d Cir. 1991) (holding that privilege was properly invoked since release of the government's information sought by plaintiff would lead to a high risk that sensitive information would be disclosed).

[FN170]. [N.Y. Times](#), 403 U.S. at 730-31 (White, J., concurring).

[FN171]. See, e.g., *id.*; [Neb. Press Ass'n v. Stuart](#), 427 U.S. 539, 559 (1976). In *Nebraska Press*, the Supreme Court stated that “the barriers to prior restraint remain high” and concluded that in that case, “the heavy burden imposed as a condition to securing a prior restraint was not met.” *Id.* at 570.

[FN172]. See *Pilchen & Klubes*, *supra* note 87, at 193-94.

[FN173]. The government benefits substantially from CIPA's requirements, since the statute's notice and hearing requirements “force[] defense counsel to tip his or her hand concerning defense strategies at earlier stages in the proceedings than would otherwise be the norm in criminal cases.” *Id.* at 194; see also *infra* notes 176-79 and accompanying text.

[FN174]. The government may exercise this right both before and during trial. See [18 U.S.C. app. 3 § 7 \(2000\)](#); see also *Shea*, *supra* note 87, at 665.

[FN175]. See [18 U.S.C. app. 3 § 2](#); see also *Shea*, *supra* note 87, at 662-63.

[FN176]. See [18 U.S.C. app. 3 § 6\(a\)](#); see also [United States v. Collins](#), 720 F.2d 1195, 1197 (11th Cir. 1983) (summarizing CIPA's functions and applying its rules).

[FN177]. See [18 U.S.C. app. 3 § 4](#) (addressing discovery of classified information by defendants).

[FN178]. See *id.*

[FN179]. See *id.*

[FN180]. See *supra* notes 27-28 and accompanying text.

[FN181]. See [Maxwell v. First Nat'l Bank of Md.](#), 143 F.R.D. 590, 595 n.4 (D. Md. 1992) (granting the United States' motion for a protective order when plaintiff sought to discover classified information related to an alleged covert relationship between the CIA and a particular bank or corporation).

[FN182]. See *supra* note 136 and accompanying text.

[FN183]. See *supra* note 16 and accompanying text; *infra* note 205 and accompanying text.

[FN184]. See *supra* note 87 and accompanying text; see also [United States v. Andolschek](#), 142 F.2d 503, 506 (2d Cir. 1944). The *Andolschek* court, which decided the case decades before the enactment of CIPA, explained the graymail problem by noting that:

So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.

Id.

[FN185]. See *supra* note 173 and accompanying text.

[FN186]. See *supra* note 173 and accompanying text.

[FN187]. *Supra* Part I.D for a discussion of the need to know requirement.

[FN188]. [Rafeedie v. I.N.S., 880 F.2d 506, 516 \(D.C. Cir. 1989\)](#) (comparing the defendant to Joseph K., Kafka's protagonist in *The Trial*, who was denied access to information related to his own criminal case).

[FN189]. See [United States v. North, 708 F. Supp. 389 \(D.D.C. 1988\)](#) (focusing on three competing interests in prosecutions of this kind: the need to protect national security; the defendant's rights to a fair trial and due process of law; and the role of the criminal justice system in balancing these interests); see also [Snepp v. United States, 444 U.S. 507, 509 n.3 \(1980\)](#) (considering the government's interest in protecting national security); Shea, *supra* note 87, at 658. But see [United States v. Rezaq, 899 F. Supp. 697, 708 \(D.D.C. 1995\)](#) (denying the government's motion to modify the protective order to further constrain defendant's use of classified materials).

[FN190]. See *supra* Part I.D.

[FN191]. As when the attorney is being monitored by a party whose interests are adverse to the nation's security, or other such situations.

[FN192]. Moreover, the Supreme Court has explained that “the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.” [N.Y. Times Co. v. United States, 403 U.S. 713, 729 \(1971\)](#) (Stewart, J., concurring).

[FN193]. See *supra* Part II.A.

[FN194]. [Haig v. Agee, 453 U.S. 280 \(1981\)](#).

[FN195]. See [Snepp v. United States, 444 U.S. 507, 509 n.3 \(1980\)](#). “The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.” *Id.*

[FN196]. See, e.g., [United States v. Smith, 780 F.2d 1102, 1107 \(4th Cir. 1985\)](#) (requiring admission of classified information that is “helpful to the defense of an accused, or is essential to a fair determination of a cause” (citations omitted)); see also [N.Y. Times, 403 U.S. at 718-19](#) (electing not to defer to the government even though the case involved national security) (Black, J., concurring); [United States v. Fernandez, 913 F.2d 148, 154 \(4th Cir. 1990\)](#) (applying the Smith standard, noting that while the government's interest in protecting national security must be considered, it “cannot override” the defendant's right to a fair trial); [United States v. Rezaq, 899 F. Supp. 697, 708 \(D.D.C. 1995\)](#) (stating that the government's national security interest “cannot override the defendant's rights”); [United States v. Poindexter, 698 F. Supp. 316, 320 \(D.D.C. 1988\)](#) (“[I]n the end, defendant's constitutional rights must control.”); [Ridge v. Police and Firefighters Ret. & Relief Bd., 511 A.2d 418, 425 n.11 \(D.C. 1986\)](#) (noting that a “Kafkaesque chain of secrecy is not what the Due Process Clause contemplates”). The circuit courts have been split as to whether to grant the government's requests to close certain deportation hearings to the public due to national security concerns. Compare [Detroit Free Press v. Ashcroft, 303 F.3d 681, 685-86 \(6th Cir. 2002\)](#) (holding that the Constitution limits non-substantive immigration laws and does not require special deference to the government), with [North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 \(3d Cir. 2002\)](#) (deferring to a government claim that access to a deportation hearing would threaten national security).

[FN197]. [Fernandez](#), 913 F.2d at 154; see also [Rezaq](#), 899 F. Supp. at 708.

[FN198]. [California v. Trombetta](#), 467 U.S. 479, 485 (1984).

[FN199]. [Washington v. Texas](#), 388 U.S. 14, 19 (1967).

[FN200]. See supra Part I.B for a discussion of the rights of criminal defendants.

[FN201]. See, e.g., [United States v. Baptista-Rodriguez](#), 17 F.3d 1354, 1364 (11th Cir. 1994) (“[T]he district court may not take into account the fact that evidence is classified when determining its ‘use, relevance, or admissibility.’” (quoting [United States v. Collins](#), 720 F.2d 1195, 1198 (11th Cir. 1983))).

[FN202]. For criteria used by courts to determine relevance and materiality, see supra notes 100-04 and accompanying text.

[FN203]. See [United States v. Moussaoui](#), No. CR. 01-455-A, 2003 WL 21263699, at *5 (E.D. Va. Mar. 10, 2003) (citation omitted); see also [United States v. Fernandez](#), 913 F.2d 148, 154 (4th Cir. 1990) (stating that “before admitting classified evidence, the trial court takes cognizance of both the state's interest in protecting national security and the defendant's interest in receiving a fair trial.... Were it otherwise, CIPA would be in tension with the defendant's fundamental constitutional right to present a complete defense”).

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