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Note

**\*427 GOVERNMENT SECRETS, FAIR TRIALS, AND THE CLASSIFIED INFORMATION PROCEDURES ACT**

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One of the most astounding characteristics of the pretrial stage of the Iran-Contra prosecution [\[FN1\]](#) was the enormous amount of classified information involved. [\[FN2\]](#) Both Oliver North and John Poindexter were intimately familiar with the most secret aspects of the covert operations conducted by the United States Government. [\[FN3\]](#) According to Independent Counsel Lawrence E. Walsh, lives depend on maintaining the secrecy of some of the information, [\[FN4\]](#) yet there was much concern that it would be necessary to disclose various sensitive classified documents in order to conduct a fair trial. [\[FN5\]](#) District Court Judge Gerhard A. Gesell threatened to dismiss the case if the government did not produce all the relevant materials, regardless of the sensitivity of the documents. [\[FN6\]](#)

At the heart of the controversy was the Classified Information Procedures Act (CIPA). [\[FN7\]](#) Passed by Congress in 1980, CIPA addresses the growing problem of graymail in criminal prosecutions. Graymail, the tactic of a defendant who threatens to disclose classified information in the course of a prosecution, poses a dilemma for the government: The prosecutor must either allow the disclosure of classified information or dismiss the charges against the defendant. [\[FN8\]](#) The Ninety-sixth Congress sought to **\*428** alleviate some of the risk of prosecuting charges involving classified information by providing for pretrial procedures to resolve issues of discovery and admissibility.

The Act has two primary provisions. First, under [section 5](#), defendants must notify the government if they intend to use classified information in their defense. [\[FN9\]](#) Second, CIPA provides for pretrial hearings on discovery and admissibility concerns. [Section 4](#) allows *in camera* and *ex parte* resolution of discovery issues. [\[FN10\]](#) [Section 6](#) provides for pretrial hearings on admissibility. In one hearing, under [section 6\(a\)](#), the trial judge determines the relevance of the classified information, [\[FN11\]](#) and in another hearing, under [section 6\(c\)](#), the judge rules on the adequacy of substitutions offered by the government to be admitted in lieu of the classified documents. [\[FN12\]](#)

Much of the Iran-Contra pretrial proceedings focused on CIPA. Some commentators warned that application of CIPA in the case would have many pitfalls, including the possibility that the Act would prevent the case from ever reaching trial. [\[FN13\]](#) CIPA was at the center of the turmoil, given the substantial risk of graymail in the case. [\[FN14\]](#)

Previous case law, although sparse, has highlighted problems in interpreting the Act that may further complicate the task of judges managing criminal cases involving classified information. The extent to which the statute affects the discretion of judges in determining the relevance and admissibility of classified materials is unclear. Some courts have balanced the needs of the defendant against the interests of the government, [\[FN15\]](#) while others have used common relevancy standards. [\[FN16\]](#)

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I. DISCLOSE OR DISMISS: THE COSTS OF GRAYMAIL

The successful use of graymail in national security cases is particularly harmful to the criminal justice process. As an Assistant Attorney General noted:

[Graymail] foster[s] the perception that government officials and private persons with access to military or technological secrets have a broad *de facto* immunity from prosecution for a variety of crimes. This perception not only undermines the public's confidence in the fair administration of criminal justice but it also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies. [FN19]

Testifying before Congress, a Justice Department official estimated that the desire of a defendant to discover or admit classified information at \*430 trial affects between five and ten prosecutions each year. [FN20] Even though cases involving graymail are few, the Iran-Contra case illustrates that the prosecutions are often significant. [FN21] Crimes that have posed graymail problems include espionage, [FN22] drug offenses, [FN23] gunrunning, [FN24] and even tax evasion [FN25] and mail fraud. [FN26]

Notwithstanding these risks, graymail does not necessarily imply wrongdoing. In certain situations, such as espionage prosecutions, [FN27] graymail may result legitimately and unavoidably from the preparation of a criminal defense. [FN28] Some practitioners contend that the main source of the disclose-or-dismiss dilemma is not the unscrupulous defense attorney, [FN29] but the government's own unwillingness to prosecute and its overclassification of information. [FN30] Thus, they regard the dilemma as largely \*431 illusory. [FN31] According to the government, the graymail problem results primarily from the prosecutor's uncertainty as to whether the defendant will seek to disclose classified material and how the judge will deal with such information. [FN32] Even though there is controversy as to the true cause of the dilemma, those in charge of protecting national security information [FN33] and those generally associated with civil liberty causes [FN34] view the graymail problem as serious and worthy of attention. [FN35]

## II. CIPA AND THE AMBIGUITY OF THE EVIDENTIARY STANDARD FOR ADMISSIBILITY AND DISCOVERY

### A. CIPA

Congress designed CIPA as a procedural tool to reduce the effectiveness of the graymail tactic. The Act was to provide the prosecution with the opportunity to balance the harm to national security from prosecution and disclosure of classified documents against the harm from abandonment of prosecution. [FN36] The House Report on an early and substantially similar version of CIPA stated that the legislation 'is not intended to infringe on a defendant's right to a fair trial or to change the existing rules of evidence and criminal procedure.' [FN37] In the language of the Eleventh Circuit, the procedures simply aid in informing the government of 'the 'price' the defendant asserts the government will have to pay if the prosecution continues.' [FN38]

[Section 4](#) of CIPA provides for defense discovery of classified information. The provision is an elaboration of a court's power under \*432 [Federal Rule of Criminal Procedure 16\(d\)\(1\)](#) to determine issues of discovery. [FN39] [Section 4](#) explicitly permits the court to grant, *ex parte* and *in camera*, government requests to delete specific data from classified materials, or substitute summaries or stipulations of facts. [FN40] When [section 4](#) is invoked, a judge will determine the relevance of the information in light of the asserted need for the information and any claimed government privilege. [FN41] Under [section 3](#) of CIPA, the court may issue a protective order forbidding the defendant from revealing discovered classified information. [FN42]

[Section 5](#) of CIPA requires that defendants notify the court and the government when they expect to disclose classified information. [FN43] The notice must briefly describe in writing the information expected to be revealed. Should the defendant fail to comply with [section 5](#), the court may issue sanctions, including suppressing the evi-

dence that was subject to the notice requirement. [FN44]

After the defense has given notice, the government can request an *in camera* hearing under [section 6\(a\)](#) to determine the relevance of evidence that the defendant seeks to disclose at trial. [FN45] Should the court conclude that such evidence is relevant, the government can invoke [section 6\(c\)](#) of CIPA and request the admission of a stipulation of facts or a summary of the information in lieu of the specific classified information. The substitutions, however, must provide the defendant with ‘substantially the same ability to make his defense’ as would the specific materials. [FN46] With its \*433 request for alternative disclosures, the government may submit an affidavit both certifying that disclosure would damage the national security and explaining the basis for classification of the materials. [FN47] If the government requests, the court shall review the affidavit *in camera* and *ex parte*. [FN48] Thus far, CIPA has withstood constitutional attack, [FN49] including challenges in the Iran-Contra prosecution. [FN50]

### B. Case Articulation of the Evidentiary Standard for Discovery and Admissibility

It is often repeated that Congress did not intend CIPA to change any substantive rules of evidence. [FN51] The legislative history of the Act confirms that the drafters sought to avoid altering the standards for admissibility of evidence at trial. [FN52] Although clearly not created to change the standard for the admissibility of evidence, CIPA did not articulate the preexisting standard either. After grappling at great length with the issue of the evidentiary standard during hearings, Congress concluded only that the current standard, whatever that might be, should remain in force. [FN53]

Because Congress did not expressly define the current evidentiary standards\*434 and seemingly left the task to the courts, [FN54] it is instructive to take a brief look at the competing discovery and trial admissibility rules.

#### 1. Discovery: Common Law ‘Government Privilege’

In cases involving the discovery of classified, or unclassified but sensitive, government information, courts have relied on *Roviaro v. United States* [FN55] in developing a doctrine of governmental privilege. In *Roviaro*, the defendant sought disclosure of the identity of a government informer who witnessed and participated in the illegal activities with which the defendant was charged. The information was not classified. The Supreme Court allowed the discovery, but only after recognizing a governmental privilege ‘to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.’ [FN56] Although allowing for defense discovery of the information, the Court’s language suggested that the defendant’s need for the information should be balanced against the potential damage done by disclosure, and that the evidence must be more than simply relevant to be discovered and admitted at trial:

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer’s testimony, and other relevant factors. [FN57]

The Court in *Roviaro* placed limits on the privilege. Under *Roviaro*, the government cannot prosecute a defendant without disclosing information ‘relevant and helpful’ to the defendant, regardless of whether or not the government has a weighty interest in maintaining the secrecy of that information. [FN58] *Roviaro* has been extended beyond cases involving the identity of informants. The government privilege has been used to deny discovery\*435 of sensitive surveillance techniques and equipment [FN59] and classified documents. [FN60]

#### 2. Trial Admissibility: Federal Rules of Evidence and Common Law ‘Government Privilege’

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**\*436** *C. The Congressional Intention as to Evidentiary Standards for Admissibility*

Congress did not attempt to codify any single evidentiary standards for trial admissibility. Nevertheless, an analysis of the testimony given before Congress during the debate on the different versions of CIPA and an examination of the statute itself may give clues as to the intent of the legislature.

After several years of examining the graymail problem, [FN69] Congress began considering different versions of CIPA, two in the House, [FN70] and one in the Senate. [FN71] The administration proposed a version of CIPA that differed from the Murphy House bill and the Biden Senate bill in major ways. Because much of the testimony relevant to admissibility standards for classified information was provoked by the administration's bill, it is instructive to concentrate on that version of CIPA.

*1. The Higher Relevance Standard for Admissibility*

Unlike the Murphy House bill and the Biden Senate bill, the administration's bill called for a 'relevant and material' standard for resolving relevancy and admissibility issues in the [section 6\(a\)](#) hearing. Referring to the administration standard as 'a touch, a half-step more than mere relevance,' [FN72] then-Assistant Attorney General Philip Heymann testified that the addition of the word 'material' requires 'more than that the evidence in question bears some abstract logical relationship to the issues in the case. It requires that the evidence be of significance to the defendant's case.' [FN73]

Although drawing from the 'relevant and helpful' test of *Roviaro*, the **\*437** administration disavowed any intent to provide for balancing of the parties' interests in determining the admissibility of classified evidence. Heymann testified that '[t]he administration bill does not require or permit the value of evidence to the defendant to be weighed against the harm of disclosure to the national security.' [FN74] Its adoption of *Roviaro* extended only to the requirement that classified material meet the heightened relevance test. [FN75]

Congress was aware that the extension of *Roviaro* was not universally applauded. At the hearings, the administration's use of the case provoked several strong criticisms from witnesses who argued that *Roviaro* did not consider admissibility issues and is limited to the informant context. [FN76] Yet courts have generally disagreed with critics' assessments of *Roviaro* and have extended its holding to allow a limited government privilege in cases dealing with sensitive information. [FN77] The enacted version of CIPA does not contain the administration's proposed 'relevant and material' language. In fact, CIPA does not refer to any standard at all, providing only that the judge determine all the issues regarding 'use, relevance, or admissibility' of classified information. [FN78]

Even in the wake of the criticism of the higher test proposed by the administration, it was not clear what standard was the current standard. Both proponents and opponents of the *Roviaro* higher relevancy test noted the confusion surrounding the standards courts use to determine admissibility. [FN79] Congress knew that rejecting the administration's language would not necessarily preclude courts from using the *Roviaro* standard. [FN80] Congress simply left it up to the judicial branch to develop the appropriate evidentiary test, and stated only that the current standard was not changed by CIPA. [FN81]

**\*438** *2. The Classification Affidavit*

The administration's bill also differed from the Biden Senate bill in that it required the government to submit an affidavit explaining why the material was classified. [FN82] Under the administration's scheme, the affidavit would be submitted to the court prior to the court's determination of the admissibility of the classified materials.

The administration argued that its version would allow the judge to make a more informed decision and determine if the material was properly classified. [FN83] Morton Halperin of the ACLU disagreed, arguing that the affidavit would be prejudicial because it would ‘permit the decision on relevance to be colored by the claims of national security, exaggerated or real, made by the government.’ [FN84] Furthermore, opponents contended, the judge does not need to know why the information is classified in order to rule on admissibility. The sole purpose of the affidavit, one opponent testified, ‘is to scare the hell out of the district judge and to make him or her think that the information is so important that if she or he makes a misstep on the defendant's side as opposed to the prosecution's side irreparable damage will be caused to the country.’ [FN85] The government contended that without knowing the reasons for the classification of the materials, the judge would be unable to determine relevance issues or to create fair substitutions and stipulations to the sensitive information. [FN86]

Congress rejected the administration's proposal with regard to the stage at which the classification affidavit may be filed with the court. The enacted bill provides for such an affidavit only in the [section 6\(c\)](#) hearing on alternative disclosures. [FN87] The legislative history of the Act explicitly rules out balancing the parties' interests in disclosure. The Senate Report states, ‘it should be emphasized, however, that the court should not balance the national security interests of the government against the rights of the defendant to obtain the information.’ [FN88] Congress agreed with the administration that the judge should not operate ignorant of the reasons behind the government's desire to submit alternatives to the classified material. [FN89] \*439 Congress thus provided that the government may submit a damage assessment *after* the court has determined that the evidence is relevant.

### III. CIPA AND THE JUDICIARY

#### A. Discovery Under CIPA [Section 4](#) and Balancing

Circuit courts have applied *Roviaro* balancing when resolving issues of discovery of classified information. For example, the First Circuit in *United States v. Pringle* [FN90] affirmed the lower court's holding that the classified materials the defendant sought in discovery should not be made available. While ruling that the information was not relevant to the defense, the lower court also applied the *Roviaro* balancing test and ‘concluded that the national security would be damaged if the information and materials sought were disclosed to the defendants or the public.’ [FN91] The Ninth Circuit has engaged in similar balancing. [FN92]

Although most of the controversy surrounding the use of *Roviaro* balancing arises from its application in admissibility rulings, many of the same concerns are pertinent to the discovery process. Those issues are identified below.

#### B. Trial Admissibility Under CIPA [Section 6](#) and Balancing

The Fourth Circuit, in *United States v. Smith*, ruled that, in [section 6\(a\)](#) ‘use, relevance, and admissibility’ hearings, the trial judge should balance the defendant's need to disclose classified information at trial \*440 against the government's interest in keeping the materials out of the public domain. [FN93] Accused of selling details of Army double agent operations to a Soviet agent, Richard Smith was indicted on five counts of violating the Espionage Act. [FN94] As part of his trial defense, Smith sought to establish that he reasonably believed he had acquired legal authority to sell the information. [FN95] Smith invoked CIPA by notifying the government of his intent to disclose classified information at trial to establish his defense. [FN96] In a [section 6\(a\)](#) hearing, the district court ruled that certain classified information could be introduced at trial. [FN97]

Initially, on an interlocutory appeal, a panel on the Court of Appeals affirmed the decision of the trial court that the classified information Smith sought to disclose was admissible. [FN98] Judge Butzner, writing for the panel, noted that the Act did not alter the substantive rules of evidence regarding trial admissibility [FN99] and that ‘if Congress had intended the district court to balance national security against relevancy in the [section 6\(a\)](#) hearing, provision would have been made for transmission of information necessary for balancing during the [section 6\(a\)](#)

hearing and not after relevancy and admissibility have been determined.’ [FN100] The original panel rejected the government’s argument that the privilege of *Roviaro* applied. The court distinguished *Roviaro* by noting that the *Roviaro* court had the information necessary to balance and that it placed limits on the privilege when the information is relevant and helpful. [FN101]

The panel decision was subsequently vacated, and an *en banc* review was granted. [FN102] The *en banc* court vacated the trial court’s findings as to admissibility and remanded for *Roviaro* balancing. The court majority attempted to reconcile its holding with the explicit legislative history forbidding the balancing of competing interests by arguing in a footnote that ‘we do not read into the Senate Report a necessary inconsistency, and construe it as we do the House Report to mean any balancing not already required by existing law.’ [FN103] Arguing next that the ‘trial court is required to balance the public interest in nondisclosure against the defendant’s right to prepare a defense,’ the court cited *Roviaro* as authority, \*441 claiming that it was not extending that holding. [FN104] The dissent, written by Judge Butzner, essentially restated the original panel decision, [FN105] arguing in addition that the rejection of the administration’s bill illustrated the legislative intent to prevent judicial balancing of party interests. [FN106] The dissent also argued that *Roviaro* is limited to discovery requests and does not cover information possessed by the defendant. [FN107]

Recently, in *United States v. Zettl*, [FN108] the Fourth Circuit again ruled that *Roviaro* balancing should have been applied in the [section 6\(a\)](#) hearing. Relying on *Smith*, the court held that the trial judge need not postpone considerations of national security until after the relevancy determination. [FN109]

Courts have thus applied *Roviaro* reasoning to both discovery and admissibility of classified information. [FN110] Assuming Congress understood the current state of evidence law, the *Smith* and *Zettl* court probably violated the intent of Congress when they allowed trial courts to balance the defendant’s need for disclosure against the interests of national security in [section 6\(a\)](#) relevancy hearings.

In addition to the conflict with legislative will, balancing should not occur in the [section 6\(a\)](#) hearing for procedural reasons. In that hearing, the judge is directed to determine the relevance of the classified information listed in the defendant’s notice. The government does not submit the classification affidavit until the [section 6\(c\)](#) alternative disclosure hearing. CIPA does not even provide for a [section 6\(c\)](#) hearing until the trial judge \*442 has ruled the classified information admissible in the [section 6\(a\)](#) proceeding. [FN111] Given that the court does not even have the necessary information to balance until the [section 6\(c\)](#) alternative evidence hearing, the judge certainly should not weigh competing interests in the antecedent [section 6\(a\)](#) relevancy hearing.

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[FN1]. The defendants included former National Security Advisor John M. Poindexter, former White House Aide Lt. Colonel Oliver L. North, retired Air Force Major General Richard V. Secord, and Secord’s business associate Albert A. Hakim.

[FN2]. Groner, *Iran-Contra Trial Snagged on Classified Documents*, Legal Times, Apr. 18, 1988, at 3, col. 2. More than 300,000 classified documents have been collected by the Independent Counsel. *See id.* at 3, col. 1.

[FN3]. *See Engelberg, When the Case for the Defense is Top Secret*, N.Y. Times, Apr. 24, 1988, at 8E, col. 2.

[FN4]. Walsh declared that disclosure of some of the secret information could expose agents and operatives to ‘torture and death.’ TIME, May 9, 1988, at 45. Walsh told Judge Gesell that the CIA would never release many of the requested classified documents. *See North Trial Put Off Until After Election*, L.A. Daily J., Aug. 8, 1988, at 3, col. 5.

[FN5]. Judge Gesell ruled that the government must allow the defense to review the materials. *See North Trial Put Off Until After Election*, *supra* note 4, at 3, col. 3.

[FN6]. Judge Gesell warned that '[u]nless [the disclosure] issue can be reconciled by various stipulations or agreements . . . it's clear to me . . . that the conspiracy counts will have to be dismissed.' *No More Documents, No More Charges, Says Iran-Contra Judge*, L.A. Daily J., July 28, 1988, at 3, col. 1; *see North Trial Put Off Until After Election*, *supra* note 4, at 3, col. 5; *see Coyle, A Logical Choice*, Nat'l L.J., May 30, 1988, at 27, col. 1.

[FN7]. 18 U.S.C. app. §§ 1-16 (1982).

[FN8]. *See Note, Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 CASE W. RES. L. REV. 84 (1980).

[FN9]. 18 U.S.C. app. § 5.

[FN10]. 18 U.S.C. app. § 4.

[FN11]. 18 U.S.C. app. § 6(a).

[FN12]. 18 U.S.C. app. § 6(c).

[FN13]. *See, e.g., Groner, supra* note 2, at 4, col. 2 (CIPA 'may be too cumbersome in a case that involves hundreds of thousands of pages'). Even Judge Gesell expressed doubt about CIPA in this extraordinary case. *Id.* at 4, col. 1. The sheer volume of the documents caused the trials to be delayed. *See North Trial Put Off Until After Election*, *supra* note 4, at 3, col. 3.

[FN14]. *See No More Documents, No More Charges, Says Iran-Contra Judge, supra* note 6, at 3, cols. 1-2; Coyle, *supra* note 6, at 27, col. 1.

[FN15]. *E.g., United States v. Zettl*, 835 F.2d 1059 (4th Cir. 1987) (balancing parties' interests when ruling on relevance and trial admissibility of classified information); *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (en banc) (same); *see infra* notes 93-107 and accompanying text.

[FN16]. *E.g., United States v. Juan*, 776 F.2d 256 (11th Cir. 1985) (balancing improper when ruling on relevance; court should rely on Federal Rules of Evidence); *see the cases involving Edwin Wilson: United States v. Wilson*, 732 F.2d 404 (5th Cir.), *cert. denied*, 469 U.S. 1099 (1984); *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983); *United States v. Wilson*, 586 F. Supp. 1011 (S.D.N.Y. 1983), *aff'd*, 750 F.2d 7 (2d Cir. 1984), *cert. denied*, 479 U.S. 839 (1986); *infra* notes 61-68 and accompanying text.

[FN19]. S. REP. NO. 823, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4294, 4297 [hereinafter S. REP. NO. 823] (statement of Philip Heymann, Assistant Attorney General, Criminal Division, U.S. Department of Justice).

[FN20]. *Use of Classified Information in Federal Criminal Cases: Hearings on H.R. 4736 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 3 (1980) [hereinafter *Use of Classified Information*] (statement of Philip Heymann). It is difficult to discover when a prosecution has been discontinued because of the threatened disclosure of classified information. The Justice Department has taken steps to keep secret cases that have been dismissed because of the graymail threat. *See, e.g., Sylvester, Break in CIA-U.S. Attorney Bond*, Nat'l L.J., Apr. 19, 1982, at 3, col. 1 (U.S. Attorney fired for disclosing that CIA had prevented

prosecution from continuing for national security reasons).

[FN21]. See, e.g., [United States v. Walker, 796 F.2d 43 \(4th Cir. 1986\)](#) (espionage); *United States v. LaRouche Campaign*, No. 86-323-K (D. Mass. Aug. 10, 1988) (LEXIS, Genfed library, Dist file) (obstruction of justice), *supra* note 16 (the *Wilson* cases); *infra* note 33. For examples of successful graymail tactics, see Alpern & Shannon, *Cases of 'Graymail'*, NEWSWEEK, Nov. 13, 1978, at 64.

[FN22]. The risk of disclosure of classified material is highest in espionage prosecutions because the 'standard of proof under . . . espionage statutes often requires the disclosure of the contents of the classified document at issue.' Note, *supra* note 8, at 92 n.49. The number of espionage cases has risen dramatically in recent years, and indications are that the prosecutions will continue. See *Record Year Puts Spy-Catchers in Spotlight*, Washington Post, Nov. 30, 1985, at A24, col. 4 (between 1966 and 1975 no federal espionage prosecutions, between 1975 and 1985 49 prosecutions).

[FN23]. [United States v. Porter, 701 F.2d 1158 \(6th Cir.\)](#) (defendants convicted of drug offenses sought discovery and examination of classified surveillance equipment), *cert. denied*, [464 U.S. 1007 \(1983\)](#).

[FN24]. [United States v. Clegg, 740 F.2d 16 \(9th Cir. 1984\)](#) (defendant convicted of exporting firearms sought discovery of classified CIA materials).

[FN25]. [United States v. Diaz-Munoz, 632 F.2d 1330 \(5th Cir. 1980\)](#) (defendants convicted of tax evasion sought discovery of classified information regarding CIA's 'Bay of Pigs' operation).

[FN26]. [United States v. Jolliff, 548 F. Supp. 229 \(D. Md. 1981\)](#) (defendant charged with mail fraud and impersonating CIA officer sought to have classified information disclosed at trial).

[FN27]. *Graymail Legislation, 1979: Hearings on H. 4736 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 106 (1979) [hereinafter *Graymail Legislation, 1979*] (prepared statement of Philip Lacovara) ('As long as the basic elements of the [espionage] offense . . . include the element of injury to national security, the government must place evidence before the jury to establish that element. In addition, the defendant is entitled to place rebuttal evidence before the jury.').

[FN28]. *Id.* at 4 (prepared statement of Philip Heymann) ('[W]holly proper defense attempts to obtain or disclose classified information may present the government with the same 'disclose or dismiss' dilemma.').

[FN29]. *But see Graymail, S. 1482: Hearing Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 31 (1980) [hereinafter *Graymail, S. 1482*] (statement of Daniel Schwartz, former General Counsel, National Security Agency) (defendants routinely seek sensitive information, regardless of relevancy, to force abandonment of prosecution).

[FN30]. *Graymail Legislation, 1979, supra* note 27, at 75 (statement of Michael Scheininger, Assistant U.S. Attorney); see A.B.A. COMM. ON LAW AND NAT'L SEC., LITIGATING NATIONAL SECURITY ISSUES 7 (Aug. 9, 1982) (statement of attorney Earl Silbert) (before CIPA, intelligence agencies reluctant to recommend prosecutions involving classified information).

[FN31]. *Graymail Legislation, 1979, supra* note 27, at 106-07 (prepared statement of Philip Lacovara) (dilemma often false because most classified information is over-classified).

[FN32]. See *Graymail Legislation, 1979, supra* note 27, at 156 (statement of General Counsel for Central Intelli-

gence Agency, Anthony Lapham); *Use of Classified Information*, *supra* note 20, at 4 (statement of Philip Heymann).

[FN33]. *Graymail Legislation, 1979*, *supra* note 27, at 93 (prepared statement of Philip Lacovara) ('[W]hile [graymail] affects a relatively small number of cases, they tend to be cases of unusual public importance.').

[FN34]. For executive officials who perform or are even tangentially connected with the performance of intelligence functions, 'graymail' can mean a virtual immunity from Federal criminal investigation or prosecution 'in the interests of national security'-even where criminal acts performed under color of office deprive others of their constitutional rights.

From a civil liberties point of view, the rights of individuals cannot be fully and effectively protected if such criminal conduct by Government officials cannot be investigated and prosecuted to the full extent of the law.

*Graymail, S. 1482*, *supra* note 29, at 49 (statement of Morton Halperin of ACLU).

[FN35]. *See id.* at 1-2 (statement of Senator Biden) (consensus among parties with diverse interests regarding seriousness of graymail).

[FN36]. *See* S. REP. NO. 823, *supra* note 19, at 4-5, H.R. REP. NO. 831, 96th Cong., 2d Sess., pt. 1, at 11 (1980) [hereinafter H.R. REP. NO. 831 pt. 1]; H.R. CONF. REP. NO. 1436, 96th Cong., 2d Sess. 12 (1980) [hereinafter H.R. CONF. REP. NO. 1436].

[FN37]. H.R. REP. NO. 831, 96th Cong., 2d Sess., pt. 2, at 3 (1980) [hereinafter H.R. REP. NO. 831 pt. 2]; *see also* H.R. REP. NO. 831 pt. 1, *supra* note 36, at 11 (similar language).

[FN38]. [United States v. Collins](#), 720 F.2d 1195, 1197 (11th Cir. 1983).

[FN39]. S. REP. NO. 823, *supra* note 19, at 6; *see* [United States v. Pringle](#), 751 F.2d 419, 427 (1st Cir. 1984).

[FN40]. *See, e.g.,* [United States v. Sarkissian](#), 841 F.2d 959, 965 (9th Cir. 1988); [United States v. Pringle](#), 751 F.2d 419, 425-28 (1st Cir. 1984); [United States v. Clegg](#), 740 F.2d 16, 17-18 (9th Cir. 1984); [United States v. Porter](#), 701 F.2d 1158, 1162 (6th Cir.), *cert. denied*, 464 U.S. 1007 (1983). The § 5 discovery provision has been characterized by intelligence agency attorneys as 'perhaps the most important section of CIPA.' Office of General Counsel, Central Intelligence Agency, Experiences Under the Classified Information Procedures Act 4 (May 2, 1984) (internal memorandum) (on file at Yale Law Journal).

[FN41]. In this regard, courts tend to act in much the same manner as they would have had CIPA not been enacted. Compare [United States v. Panas](#), 738 F.2d 278 (8th Cir. 1984) (non-CIPA discovery) with [United States v. Pringle](#), 751 F.2d 419 (1st Cir. 1984) (CIPA discovery).

[FN42]. 18 U.S.C. app. § 3.

[FN43]. *See* [United States v. Collins](#), 720 F.2d 1195, 1200 (11th Cir. 1983). The Federal Rules of Evidence and the Federal Rules of Criminal Procedure specify similar notice requirements. [FED. R. EVID. 412\(c\)\(1\)](#) (notice required if defendant charged with rape intends to offer any evidence of specific instances of alleged victim's prior sexual behavior); [FED. R. CRIM. P. 12.1](#) (notice required for use of alibi defense).

[FN44]. [United States v. Badia](#), 827 F.2d 1458 (11th Cir. 1987) (defendant prohibited from asserting defense of CIA involvement because did not comply with § 5 notice requirement and demonstrated no reasonable excuse), *cert. denied*, 108 S. Ct. 1115 (1988). The sanction of forbidding defense testimony when a defendant violates a notice requirement recently survived constitutional challenge before the Supreme Court. [Taylor v. Illinois](#), 108 S. Ct. 646

(defendant's deliberate and blatant failure to provide list of alibi witnesses justified sanction of excluding witnesses' testimony), *reh'g denied*, [108 S. Ct. 1283 \(1988\)](#). The CIPA notice provision has thus far survived constitutional scrutiny. *See infra* notes 49-50 and accompanying text; *see also* [United States v. Collins](#), [720 F.2d 1195, 1199-1200 \(11th Cir. 1983\)](#) (articulating need for notice requirement of § 5).

[FN45]. *See, e.g.*, [United States v. Wilson](#), [732 F.2d 404, 412 \(5th Cir.\)](#), *cert. denied*, [469 U.S. 1099 \(1984\)](#).

[FN46]. 18 U.S.C. app. § 6(c)(1).

[FN47]. 18 U.S.C. app. § 6(c)(2).

[FN48]. 18 U.S.C. app. § 6(c)(2).

[FN49]. *See, e.g.*, [United States v. Wilson](#), [750 F.2d 7, 9 \(2d Cir. 1984\)](#) (§ 5 notice requirements), *cert. denied*, [479 U.S. 839 \(1986\)](#); [United States v. Wilson](#), [721 F.2d 967, 976 \(4th Cir. 1983\)](#) (Fifth Amendment guarantee against compulsory self-incrimination and Sixth Amendment right to confront witnesses); [United States v. Porter](#), [701 F.2d 1158, 1162-63 \(6th Cir.\)](#) (§ 4 discovery provisions violate neither Fifth Amendment right to fair trial nor Sixth Amendment right to confront witnesses), *cert. denied*, [464 U.S. 1007 \(1983\)](#); [United States v. Collins](#), [603 F. Supp. 301 \(S.D. Fla. 1985\)](#) (§ 6(c) alternative disclosure provision not violative of Sixth Amendment compulsory process, due process, or equal protection); [United States v. Wilson](#), [571 F. Supp. 1422, 1426-27 \(S.D.N.Y. 1983\)](#) (CIPA definitions for national security and classified information not void for vagueness); [United States v. Jolliff](#), [548 F. Supp. 229, 231 \(D. Md. 1981\)](#) (§ 5 notice requirements not violative of Fifth Amendment guarantee against compulsory self-incrimination).

[FN50]. *See* Coyle, *Full Speed Ahead for D.C. Probes*, Nat'l L.J., July 11, 1988, at 10, col. 2 (§ 5 notice requirements).

[FN51]. *See, e.g.*, [United States v. Smith](#), [780 F.2d 1102, 1106 \(4th Cir. 1985\)](#) (en banc); [Collins](#), [720 F.2d at 1199](#); Note, *United States v. Smith: Construing the Classified Information Procedures Act as Restricting the Admissibility of Evidence*, 44 WASH. & LEE L. REV., 720, 721 & n.10 (1987); *supra* note 37 and accompanying text. By providing a framework in which the rules of evidence are to operate, however, CIPA inevitably affects the application of the rules (for example, the timing of the invocation of the rules). *See infra* text accompanying note 118; *infra* note 134 and accompanying text.

[FN52]. *See, e.g.*, S. REP. NO. 823, *supra* note 19, at 8 ('A defendant should not be denied the use of information that he would otherwise use simply because of the procedures of this bill. . . . [T]he committee intends to retain [the] current [standard for admissibility], regardless of the sensitivity of the information.');

H.R. REP. NO. 831 pt. 1, *supra* note 36, at 14-15 (similar language); H.R. REP. NO. 831 pt. 2, *supra* note 37, at 3 (similar language); H.R. CONF. REP. NO. 1436, *supra* note 36, at 12 (similar language).

[FN53]. *See* GRAYMAIL, S. 1482, *supra* note 29, at 4. A House Intelligence Committee report on CIPA, however, did address the issue of a state secrets privilege, and specifically rejected the notion for criminal trials. In a footnote the report said: '[I]t is well-settled that the common law state secrets privilege is not applicable in the criminal arena. To require, as some have suggested, that a criminal defendant meet a higher standard of admissibility when classified information is at issue might well offend against this principle.' H.R. REP. NO. 831 pt. 1, *supra* note 36, at 15 n.12; *see* Tamanaha, *supra* note 18, at 367 n.272.

[FN54]. *See infra* notes 80, 121-23 and accompanying text. *But see* Note, *supra* note 51, at 732 (arguing that CIPA prohibits courts from modifying evidence discovery and admissibility standards).

[FN55]. [353 U.S. 53 \(1957\)](#).

[FN56]. [Id. at 59](#).

[FN57]. [Id. at 60](#).

[FN58]. [Id. at 60-61](#) (footnotes omitted).

[FN59]. *E.g.*, [United States v. Van Horn](#), 789 F.2d 1492, 1507 (11th Cir.) (information concerning placement of hidden microphone privileged), *cert. denied*, 479 U.S. 854 (1986); [United States v. Green](#), 670 F.2d 1148, 1156 (D.C. Cir. 1981) (location of police officer's observation post privileged); *see* [United States v. Morison](#), 844 F.2d 1057, 1078 (4th Cir. 1988) (balancing parties' interests and denying discovery).

[FN60]. *E.g.*, [United States v. Pringle](#), 751 F.2d 419, 428 (1st Cir. 1984) (*Roviaro* applied to CIPA § 4 discovery proceedings concerning classified surveillance information); *see also* [United States v. Sarkissian](#), 841 F.2d 959, 965 (9th Cir. 1988) (balance permitted in CIPA § 4 discovery proceedings); [United States v. Badia](#), 827 F.2d 1458, 1461, 1464 (11th Cir. 1987) (balance used in applying Foreign Intelligence Surveillance Act in discovery request), *cert. denied*, 108 S. Ct. 1115 (1988); Government's Preliminary Statement at 17, 19-24, *United States v. Clegg*, No. CR83-51R (W.D. Wash.), *aff'd*, 740 F.2d 16 (9th Cir. 1984) (government requests court to balance in CIPA § 4 discovery proceedings).

[FN69]. Debate in Congress on the problems of graymail and potential solutions began as early as 1978. *See* NATIONAL SECURITY SECRETS AND THE ADMINISTRATION OF JUSTICE, REPORT OF THE SENATE SELECT COMM. ON INTELLIGENCE, SUBCOMM. ON SECRECY AND DISCLOSURE, 94th Cong., 2d Sess. 32 (1978).

[FN70]. Congressman Murphy introduced the first bill, on July 11, 1979. H.R. 4736, 96th Cong., 1st Sess. (1979). On February 12, 1980, the House Intelligence Committee unanimously reported the bill, as amended, to the House. *Use of Classified Information*, *supra* note 20, at 1. Ultimately, it was the Murphy bill that was largely adopted. Congressman Rodino introduced the second bill, prepared by the administration. H.R. 4745, 96th Cong., 1st Sess. (1979).

[FN71]. Senator Biden introduced a version of CIPA on July 11, 1979. S. 1482, 96th Cong., 1st Sess. (1979). On May 20, 1980, the Judiciary Committee passed the bill by a unanimous vote. S. REP. NO. 823, *supra* note 19, at 3.

[FN72]. *Graymail Legislation, 1979*, *supra* note 27, at 22 (statement of Philip Heymann); *see also id.* at 39 ('All we are asking for is that there be a touch more than marginal relevance, that it be something more than an argument that . . . a law school professor could make that perhaps it was relevant.').

[FN73]. *Id.* at 8-9. The administration justified this higher standard by arguing that '[s]ince the public interest in protecting the confidentiality of classified information is at least as substantial as the interest in protecting the identities of law enforcement informants, the *Roviaro* decision demonstrates that a more demanding standard than relevance should be employed to govern the disclosure of classified information.' *Id.* at 11.

[FN74]. *Id.* at 9.

[FN75]. The distinction between higher relevance and balancing is often overlooked by the courts and commentators. *See, e.g.*, Note, *supra* note 51, at 733 & n.112; *infra* note 91.

[FN76]. *Graymail Legislation, 1979*, *supra* note 27, at 69 (statement of attorney Michael Tigar); *id.* at 133-34 (statement of Georgetown Law Center Professor William Greenhalgh).

[FN77]. *E.g.*, [United States v. Smith, 780 F.2d 1102 \(4th Cir. 1985\)](#) (en banc) (*Roviaro* balancing applied in § 6(a) relevancy hearing); [United States v. Juan, 776 F.2d 256 \(11th Cir. 1985\)](#) (*Roviaro* balancing applied in § 6(c) alternative disclosure hearing); *see supra* notes 59-60 and accompanying text (*Roviaro* balancing applied in discovery decisions).

[FN78]. 18 U.S.C. app. § 6(a).

[FN79]. *Compare Graymail, S. 1482*, *supra* note 29, at 10 (statement of Philip Heymann) ('To be frank, I don't think that either of us can say that the standard of relevant and material is the present law or relevant is the present law.') *with id.* at 44 (statement of Morton Halperin) ('It is obviously very confused as to what the standard is, both for discoverability of material and admissibility.').

[FN80]. *Use of Classified Information*, *supra* note 20, at 7 (statement of Philip Heymann) (suggesting that rejection of administration language meant that Congress had concluded 'it was sensible to leave [alteration of evidentiary standards] simply for judicial determination.');

*see Graymail Legislation, 1979*, *supra* note 27, at 35 (statement of Philip Heymann) (inclusion of administration's language helpful but not necessary to argue that *Roviaro* applies). Some argue that CIPA does not prohibit *Roviaro* balancing because *Roviaro* was good law at the enactment of CIPA and Congress did not amend any law of evidence. *E.g.*, [United States v. Smith, 780 F.2d 1102, 1106 & n.8 \(4th Cir. 1985\)](#) (en banc). *But see* Note, *supra* note 51, at 733.

[FN81]. *See supra* notes 51-53 and accompanying text.

[FN82]. H.R. 4745, 96th Cong., 1st Sess. § 6(b) (1979). The Murphy House bill also contained an analogous provision allowing the government to show the basis for the classification before a judge rules on relevancy. H.R. 4736, 96th Cong., 1st Sess. § 103(b) (1979).

[FN83]. *Graymail Legislation, 1979*, *supra* note 27, at 20-21 (statement of Philip Heymann).

[FN84]. *Id.* at 43.

[FN85]. *Id.* at 71 (statement of Michael Tigar).

[FN86]. S. REP. NO. 823, *supra* note 19, at 7. Apparently, the basis for the administration's support of the affidavit provision was not the affidavit's value as an informational tool in balancing party interests. The administration did not propose the adoption of a balancing test at all. *See supra* notes 72-75 and accompanying text.

[FN87]. 18 U.S.C. app. § 6(c)(2).

[FN88]. S. REP. NO. 823, *supra* note 19, at 9.

[FN89]. The House Committee on Intelligence report on the first version of CIPA presented to the House noted that the *ex parte* submission of a classification affidavit 'is not intended to sway the judge's deliberations as to the adequacy of the proposed statement or summary; rather it is intended as a predicate for requesting such substitutes and as an aid to the court in understanding the language chosen for the summary statement.' The report reiterated the intent that 'the admissibility rulings required by section 102 [comparable to CIPA § 6(a)] be prior to and distinct from the ruling on a section 103 [comparable to CIPA § 6(c)] motion<sup>9</sup>' H.R. REP. NO. 831 pt. 1, *supra* note 36, at

20.

[FN90]. [751 F.2d 419 \(1st Cir. 1984\)](#).

[FN91]. *Id.* at 426. Although the Court of Appeals did not explicitly approve the balancing in the lower court's analysis, and instead addressed, with approval, the use of the *Roviaro* 'relevant and helpful' test, it is probable that the court also approved balancing. *See* [United States v. Sarkissian](#), 841 F.2d 959, 965 (9th Cir. 1988) (interpreting *Pringle* as approving balancing); [Smith](#), 780 F.2d at 1109-10 (same).

[FN92]. [United States v. Clegg](#), 740 F.2d 16 (9th Cir. 1984). Clegg was charged with various offenses based on the sale of arms to Pakistan. He alleged that the weapons were intended to aid Afghanistan 'freedom fighters.' Brief of Appellant at 12, 23 n.3, [United States v. Clegg](#), 740 F.2d 16 (9th Cir. 1984) (No. 83-3126); *see* [United States v. Clegg](#), 846 F.2d 1221 (9th Cir. 1988). Clegg sought discovery of classified material to establish approval of the transfer. In a § 4 statement, submitted to the court *in camera* and *ex parte*, the prosecution urged the judge 'to consider the sensitivity of the classified material in relation to the speculative nature of the assertions made by the defense.' Government's Preliminary Statement at 17, [United States v. Clegg](#), No. CR83-51R (W.D. Wash.), *aff'd*, 740 F.2d 16 (9th Cir. 1984). According to the Central Intelligence Agency, the information specified in the defense discovery request 'struck a tangential matter that the government must protect.' Office of General Counsel, Central Intelligence Agency, Experiences Under the Classified Information Procedures Act 10 (May 2, 1984) (internal memorandum) (on file at Yale Law Journal). Thus, although not expressly balancing the interests of the parties, the court had before it the necessary information to compare the potential damage of discovery with the defendant's need for the materials. [Clegg](#), 740 F.2d at 17. The Court of Appeals affirmed the lower court's finding that the materials sought were discoverable. *Id.* at 18; *see also* [United States v. Clegg](#), 846 F.2d 1221 (upholding finding that materials should be admitted at trial).

[FN93]. [780 F.2d 1102, 1110 \(4th Cir. 1985\)](#) (en banc).

[FN94]. [United States v. Smith](#), 592 F. Supp. 424, 427 (E.D. Va.), *aff'd*, [750 F.2d 1215 \(4th Cir. 1984\)](#), *rev'd*, [780 F.2d 1102 \(4th Cir. 1985\)](#) (en banc).

[FN95]. *Id.* at 428.

[FN96]. [Smith](#), 780 F.2d at 1103.

[FN97]. The trial court found the classified information relevant to Smith's defense under the principles of [Federal Rule of Evidence 401](#). *Id.* at 1104.

[FN98]. [United States v. Smith](#), 750 F.2d 1215 (1984), *rev'd*, [780 F.2d 1102 \(4th Cir. 1985\)](#) (en banc).

[FN99]. *Id.* at 1217.

[FN100]. *Id.* at 1218.

[FN101]. *Id.* at 1219.

[FN102]. [United States v. Smith](#), 780 F.2d 1102 (4th Cir. 1985) (en banc).

[FN103]. *Id.* at 1106 n.8.

[FN104]. [Id. at 1107.](#)

[FN105]. See [id. at 1111](#) (Butzner, J., dissenting); see also Note, *supra* note 51, at 729-35 (expounding Judge Butzner's dissent).

[FN106]. [Smith, 780 F.2d at 1112](#) (Butzner, J., dissenting). During the drafting of CIPA, even the administration claimed it was not introducing a balancing standard in its bill. See *supra* notes 74-75 and accompanying text. The administration's bill enunciated a test like that in *Roviaro* only to the extent that *Roviaro* raised the relevancy standard; it did not suggest an evaluation of the harm of disclosure. Congress never had the opportunity to reject any *Roviaro* balancing proposals.

[FN107]. [Smith, 780 F.2d at 1113](#) (Butzner, J., dissenting). Even Judge Butzner presumably would allow *Roviaro* balancing under CIPA *discovery* requests. As he argued in his dissent: 'This is clearly explained in *United States v. Pringle*, on which the majority relies. There the court pointed out that none of the defendants 'possessed classified information which they threatened to disclose. Quite to the contrary, they were seeking classified information which the government sought to protect.'" *Id.* (quoting [United States v. Pringle, 751 F.2d 419, 427 \(1st Cir. 1984\)](#)) (footnote omitted).

[FN108]. [835 F.2d 1059 \(4th Cir. 1987\).](#)

[FN109]. The case is astounding because the government interpreted the *en banc Smith* decision to *forbid* balancing in the § 6(a) hearing and to permit privilege claims only in the § 6(c) hearing, [Zettl, 835 F.2d at 1062-67](#). Despite the efforts of the trial judge, the government insisted on this misreading of *Smith* throughout the § 6(a) hearings. [Id. at 1062](#). The trial court judge eventually acquiesced and ruled that the material was relevant without considering possible government privileges. In the § 6(c) alternative disclosure hearing, the trial judge held that the government provided inadequate substitutes, [id. at 1063](#), and ruled the material admissible. On appeal, the case was remanded for further § 6(a) proceedings with the application of the same type of balancing allowed in the *en banc Smith* decision. [Id. at 1066](#). The charges against Zettl's co-defendants were subsequently dropped to minimize the public disclosure of classified material. See *U.S. Drops All Charges Against 2 in GTE Case*, N.Y. Times, Mar. 19, 1988, § 1, at 36, col. 5.

[FN110]. The courts are split on the issue of *Roviaro* balancing in § 6(a) relevancy hearings. Compare [United States v. Zettl, 835 F.2d 1059 \(4th Cir. 1987\)](#) (balancing appropriate) and [United States v. Smith, 780 F.2d 1102 \(4th Cir. 1985\)](#) (en banc) (same) with [United States v. Juan, 776 F.2d 256 \(11th Cir. 1985\)](#) (balancing inappropriate).

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