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The Classified Information Procedures Act (CIPA)

The Classified Information Procedures Act (CIPA), enacted in 1980, establishes uniform procedures for federal courts to determine the admissibility and manage the admission of classified information as evidence in federal criminal proceedings. This In Focus describes CIPA’s background, key provisions, and potential issues for Congress.

Background

Criminal prosecutions involving classified information create a tension between the government’s interest in protecting national security information and a defendant’s right to exculpatory information possessed by the government under the Fifth Amendment’s Due Process Clause. Inappropriately excluding classified information from a case could violate a defendant’s rights. Conversely, defendants could engage in *graymail*—seeking to acquire or introduce classified information tangentially related to a case to force the government to dismiss charges rather than risk disclosing classified information. Congress intended CIPA to address these concerns by creating a procedural framework for federal courts to prevent unnecessary or inadvertent disclosures of classified information while upholding defendants’ rights. Courts have stated that CIPA only institutes uniform procedures and does not create new substantive privileges for the government or defendants.

Definitions

CIPA defines two key terms critical to its ambit: “classified information” and “national security.” *Classified information* is any material that the U.S. government has determined—pursuant to executive order, statute, or regulation—requires protection from unauthorized disclosure for national security reasons. *National security*, in turn, “means the national defense and foreign relations of the United States.”

Court Security Procedures

CIPA mandates that the Chief Justice of the United States, in consultation with the Attorney General and Director of National Intelligence, issue rules for protecting classified information during criminal proceedings. The rules require a court to appoint a Classified Information Security Officer from the Department of Justice’s Litigation Security Group if a criminal case involves or potentially involves classified information. This officer assists parties and court staff in obtaining security clearances and properly handling classified information. Courts must also provide secure locations for proceedings involving classified information and control access to and handling of such information. The government may obtain information on the trustworthiness of individuals acting for the defense and bring such information to the court’s attention. The security procedures do not require investigation or security clearance of jurors or interfering with a jury’s functions.

Pretrial and Trial Procedures

CIPA creates several uniform procedures that federal courts can use to manage classified information issues.

Pretrial Conference

At any time after an indictment, a party may request a pretrial conference to consider classified information issues that might arise at criminal trial. At the conference, the court must establish timing requirements for, among other things, (1) discovery requests involving classified information, (2) defendants notifying the government that they intend to disclose or cause the disclosure of classified information during proceedings, and (3) the government’s motions for hearings on classified information admissibility and the disclosure of such information if admitted.

Notice

Defendants must notify the court and government, in writing, if they reasonably expect to disclose or cause the disclosure of classified information in connection with pretrial or trial proceedings. The court can set the time in which to provide notice prior to trial, but if no time period is set, notice must be given within 30 days of trial. If defendants later come to reasonably expect disclosure, they must provide notice “as soon as possible.” A notice must contain a “brief description of the classified information,” which courts have interpreted to require a “particularized” account “setting forth specifically the classified information which the defendant reasonably believes to be necessary for his defense” so that “the government [is not] surprised” by a defendant’s disclosure. A defendant may not disclose the information until the government has had a “reasonable opportunity” to seek a court order on the information’s admissibility and proper handling. If a defendant provides inadequate notice, a court may preclude or limit the information’s disclosure or use.

Hearings

Within a time period set by the court, the government can move for a hearing on the admissibility and proper handling of classified information. If the Attorney General certifies that a public hearing risks disclosing classified information, proceedings must be held *in camera* (i.e., privately, without press or public access). Prior to the hearing, the government must notify the defendant of the classified information at issue, either specifically (if the information was previously shared with the defendant) or in generic terms (if the information was not previously shared). The defendant is entitled to any details needed to receive fair notice to prepare for the hearing. The court must issue a ruling prior to commencing pretrial or trial proceedings and must describe the basis for its decision in writing as to each item of classified information. If the court determines that the classified information may not be disclosed, it must seal

and preserve the record of any in camera hearing for potential appeal. A defendant can seek reconsideration of a classified information determination prior to or during trial.

Objections to Testimony

During witness examination, the government may object to questioning that could lead to disclosure of classified information not previously found admissible. The court must then ascertain whether potential responses are admissible and, if so, how they can be introduced.

Protective Measures and Relief

CIPA delineates several mechanisms for courts to protect defendants' rights and avoid unnecessary disclosure when a case involves classified information.

Discovery Limitations

On sufficient showing, a court may permit the government to limit the classified information it supplies to a defendant through discovery. These limitations can entail deleting portions of classified information, providing summaries of classified information, or providing statements admitting relevant facts that the classified information would tend to prove. A court may permit the government to seek such relief *ex parte* (i.e., with the involvement of only one party—in this case, the government) via a written statement reviewed solely by the court. If relief is granted following an *ex parte* showing, the government's statement must be sealed and preserved for a potential appeal.

Protective Orders

On the government's motion, a court must issue orders restricting access to and handling of classified information that the government provides to the defendant. Such orders often require individuals to possess security clearances to access classified information. Thus, defense attorneys must generally obtain security clearances to fully participate in proceedings. When defense attorneys have failed to procure or been denied security clearances, courts have appointed defense counsel who possess required clearances. Judges and jurors are exempt from such requirements. Defendants are generally exempt as well, but courts have concluded that, in some cases, disclosing classified information presents sufficient national security risks to warrant requiring a defendant to obtain a security clearance. In these cases, courts barred defendants who failed to obtain security clearances from accessing classified information, and defense attorneys were unable to share classified information with the defendants.

Modified Admissions

Courts can order partial admission of evidence to prevent unnecessary disclosure of classified information, which can entail admitting only part of a writing, recording, or photograph; admitting a whole work with redactions; or restricting witness questioning and testimony. Courts can also admit government statements accepting facts that the classified information would have proved or summaries of that information. Summaries must provide defendants with "substantially the same" information. Courts have held that summaries "need not be of precise, concrete equivalence" but "must be evenhanded, worded in a neutral fashion and not tilted ... to the government's advantage." Courts must

grant government motions to substitute statements or summaries for classified information if they "will provide the defendant with substantially the same ability to make his defense."

Relief for Defendants

When the court denies a government motion to substitute a statement or summary for classified information, the government can file an Attorney General affidavit objecting to disclosure of the classified information at issue. The court must then order the defendant not to disclose this information. If it issues such an order, the court must also dismiss the indictment unless dismissal would not serve "the interests of justice." If the court makes such a finding, it must afford alternative relief to the defendant, such as dismissing specific counts of the indictment or ruling against the government on issues involving non-disclosable classified information.

If a court determines that classified information that the defendant seeks to introduce is admissible, it must order the government to provide the defendant with information that the government expects to use for rebuttal unless the court finds that fairness does not require such disclosure. If the government does not fulfill this obligation, the court can exclude evidence that was not properly shared or prohibit witness questioning regarding that information.

Appeals

The government can pursue an *interlocutory appeal* (i.e., an appeal prior to the trial court's decision) of a trial court's adverse classified information ruling. Pretrial, such appeals must be made within 14 days of the ruling, and appellate court consideration must be "expedited." The trial cannot commence until the appeal is resolved. For an appeal during trial, the trial court must adjourn proceedings until the appeal is resolved. The appellate court must hear argument within four days of the trial adjourning and reach a decision within four days of argument.

Potential Issues for Congress

Lawmakers have previously introduced legislation meant to amend CIPA. One proposal would have involved the Attorney General in any effort to limit defendant access to classified information by requiring the Attorney General to submit a declaration invoking government privilege to the information. Another proposal would have barred classified information evidence from being presented to a jury unless it was provided to the defendant. Congress may consider previously introduced amendments.

CIPA also does not apply in civil cases. The court-created state secrets privilege controls in these cases, which "allows the government to resist court-ordered disclosure of information ... if there is a reasonable danger that [this] would harm the national security." There are no uniform procedures for determining classified information admissibility or handling such information once admitted, and if the state secret privilege is found, it is "absolute" in terms of barring evidence. Congress may consider whether a CIPA for civil proceedings is appropriate.

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