ANNEX D

Classified Information Procedures Act: Statute, Procedures, and Comparison with M.R.E. 505

Classified Information Procedures Act, 18 United States Code Appendix § 1

§ 1. Definitions

(a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

Comparison with M.R.E. 505. CIPA § 1(a) is essentially identical to M.R.E. 505(b)(1), and CIPA § 1(b) is essentially identical to M.R.E. 505(b)(2). Note that CIPA is a PROCEDURAL statute that has, at its foundation, the ability of the United States to assert the State Secrets Privilege. CIPA does not contain the privilege language; it merely provides the mechanism for the United States to proceed in a case where the State Secrets Privilege is waived to the extent needed for a given case. The State Secrets Privilege enables the government to refuse to give evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state. *See, e.g., United States v. Reynolds, 345 U.S. 1, 7-8, (1953)* (privilege to protect military and state secrets belongs to government and must be asserted by it via formal claim of privilege lodged by head of department with actual control over the matter); *Frost v. Perry, 919 F. Supp. 1459, 1464-1465 (D. Nev. 1996)* (military and state secret privilege was properly invoked by Secretary of the Air Force).

In contrast, M.R.E. 505(a) states that the Rule is a "general rule of privilege" to protect information "if disclosure would be detrimental to national security."

§ 2. Pretrial conference

At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any matters which relate to

classified information or which may promote a fair and expeditious trial. No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

Comparison with M.R.E. 505. CIPA § 2 is reflected in M.R.E. 505(e). In conformance with military practice, 505(e) establishes that pre-trial hearings are available after referral of charges and prior to arraignment, when a military judge has control of a case. Since Federal practice has no corollary to pre-referral, there is no counterpart in CIPA to M.R.E. (d) which imposes certain responsibilities upon a convening authority.

§ 3. Protective orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

Comparison with M.R.E. 505. CIPA § 3 addresses protective orders which, in military practice, are set forth in both M.R.E. 505(g)(1) and R.C.M. 405(g)(6). Note that while R.C.M. 405 states that a designated authority "may" issue a protective order, M.R.E. 505(g)(1), like CIPA, states that the military judge "shall" issue such an order upon request of the Government. Protective orders are discussed in Chapter 6.

§ 4. Discovery of classified information by defendant

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Comparison with M.R.E. 505. CIPA § 4 is mirrored in M.R.E. 505(d), which permits a convening authority to order the use of evidentiary substitutes such as substitutes, redactions, deletions, stipulations, etc. during the pre-referral period. This same provision is also contained in M.R.E. 505(g)(2), where this authority is granted to the military judge. However, as discussed more fully in Chapter 9, the military judge may determine that an evidentiary substitute is insufficient and "disclosure of the classified information itself is necessary to enable the accused to prepare for trial."

§ 5. Notice of defendant's intention to disclose classified information

(a) Notice by defendant. If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

(b) Failure to comply. If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

Comparison with M.R.E. 505. The defense notice requirement of CIPA § 5 is found in M.R.E. 505(h). 505(h) provides more detail on the notice requirement and substitutes "prior to arraignment" for the thirty days prior to trial language in CIPA. Both contemplate a judicial order specifying a timeline, however, and this is how it works in practice. 505(h)(3) provides more details on what is required in the written notice. It uses the "brief description" term of CIPA but specifies that this "must be more than a general statement of the areas about which the evidence may be introduced. The accused must state, with particularity, which items of classified information he reasonably expects will be revealed by his defense." 505(h)(2) expands on the continuing duty to notify intent of CIPA, and 505(h)(4) is essentially the same language regarding prohibition against disclosure as in CIPA. 505(h)(5) provides the same sanctions for failure to comply as does CIPA § 5(b).

§ 6. Procedure for cases involving classified information

(a) Motion for hearing. Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the

disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

Comparison with M.R.E. 505. CIPA § 6 is the "engine" that drives CIPA. It provides the procedural framework for the *ex parte* or *ex parte in camera* reviews by a judge for all determinations concerning the use, relevance, or admissibility of classified information. There are some key differences in the M.R.E. analogue, 505(i). For clarity, the differences or notable similarities are set forth following each subsection of CIPA § 6.

CIPA § 6(a):

- *In camera* in the Federal court means outside of the presence of the defendant. In a court-martial the accused has an absolute right to be present at all proceedings, thus *in camera* means the public is excluded from that portion of the court-martial. *Ex parte in camera* is the same for both, either Government counsel and military judge, or military judge alone review the information.
- A Federal judge shall hold an *in camera* review if the Attorney General certifies to the court "that a public proceeding may result in the disclosure of classified information." In military practice the Government must have head of agency invocation of the privilege, per 505(c), and an affidavit regarding the reasonably expected damage to national security for disclosure justifying the classification of the information. M.R.E. 505(i)(3); *See* Chapters 7 and 8.
- The military judge, like the Federal judge, must make a ruling on the information "prior to commencement of the relevant proceeding." 505(i)(4)(B).
- Both CIPA and the M.R.E. require a written determination of the judge's ruling, though on its face M.R.E. 505(i)(4)(C) seems to only require a written order if the judge determines that the information meets the disclosure standards of 505(i)(4)(B). However, in practice a military judge will, in all likelihood, issue a written ruling for any decision under this Rule section.

(b) Notice.

(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a), the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

Comparison with M.R.E. 505. The notice requirement of CIPA § 6(b) is found in M.R.E. 505(i)(4)(A). While this notice provision under CIPA and 505 are similar, including the same "generic category" language, there is no equivalent under 505 for CIPA § 6(b)(2) due to military practice differences.

(c) Alternative procedure for disclosure of classified information.

(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order--

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

Comparison with M.R.E. 505. This section is one that is very different from the comparable M.R.E. 505 section and highlights the primary difference between the Federal and military systems. CIPA does not provide the Government with the ability to close a courtroom to the general public and CIPA therefore is only applicable to pre-trial evidentiary issues.

In Federal court, if a judge rules that the information must be disclosed, all the government can do is try to provide an acceptable substitute and have the judge conduct an *ex parte in camera* review of the information and the proposed substitute. The judge "shall" approve a substitute if the "statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."

In contrast, since a court-martial can be closed to all but cleared and necessary parties under M.R.E. 505(j)(5), the standard for disclosure to an accused is different. 505(i)(4)(B) states that classified information is NOT subject to disclosure "unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence." 505(i)(4)(D) then addresses alternatives to full disclosure, similar to CIPA, with the exception that the military judge can determine that the "use of the information itself is necessary to afford the accused a fair trial." In Federal court this result would likely result in a case or charges being dismissed, but in a court-martial, the possibility of disclosure only in a closed proceeding may ameliorate the possible damage to national security enough to permit the court to proceed.

(d) Sealing of records of in camera hearings. If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

Comparison with M.R.E. 505. The sealing requirement of CIPA § 6(d) is found in M.R.E. 505(i)(4)(C). While this notice provision under CIPA and 505 are very similar, 505 requires the record of any in camera proceeding to be attached to the record, not only those where disclosure is denied. This is perhaps a reflection of the mandatory appellate review in the military system. Attachment of the "entire unaltered text of the relevant documents" to a sealed record of trial is also required by 505(g)(4).

(e) Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure.

(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to--

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

Comparison with M.R.E. 505. The remedies section of CIPA § 6(e) is found in M.R.E. 505(i)(4)(E). While again the provisions under CIPA and 505 are similar, 505 has differences that are related to military practice. One notable omission from 505 is the ability of the Government to seek an interlocutory appeal of a judge's decision and ordered sanction under 505(i)(4)(E) and seek a stay of proceedings pending that appeal. However, as discussed below with respect to CIPA § 7, this is remedied in R.C.M. 908, which specifically addresses the availability of an interlocutory appeal of an "order or ruling that … directs the disclosure of classified information…" and contains provisions for seeking stays of proceedings.

(f) Reciprocity. Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

Comparison with M.R.E. 505. CIPA § 6(f) has no counterpart in M.R.E. 505. The Government has no formal requirement for reciprocal discovery, *i.e.*, to provide the defendant with the information it expects to use to rebut the classified information. While this will likely be the subject of a timely motion by astute defense counsel and generally ordered by a military judge (if not already provided *sua sponte* by the Government), in the event that reciprocal discovery is litigated, counsel should be aware that only CIPA has this requirement.

§ 7. Interlocutory appeal

(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

Comparison with M.R.E. 505. As noted above in the discussion under CIPA § 6(e), there is no specific provision in 505 for the Government to seek an interlocutory appeal of a judge's decision and ordered sanction under 505(i)(4)(E) or to seek a stay of proceedings pending that appeal. However, this is remedied in R.C.M. 908, which specifically addresses the availability of an interlocutory appeal of an "order or ruling that … directs the disclosure of classified information…" and contains provisions for seeking stays of proceedings and expedited reviews by the Courts of Criminal Appeal.

§ 8. Introduction of classified information

(a) Classification status. Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(b) Precautions by court. The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.

(c) Taking of testimony. During the examination of a witness in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the United States to provide the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

Comparison with M.R.E. 505. CIPA § 8 is contained within M.R.E. 505(j), one of two primarily procedural provisions of 505 that do not seem to require the 505 privilege assertion sections to have effect. 505(j)(1) and (2) are identical to CIPA § 8(a) and (b), respectively, while 505(j)(4) is very similar to CIPA § 8(c). CIPA has no direct counterpart to (j)(3), though CIPA § 6(c) is similar. As mentioned earlier, CIPA contains no authority to close a courtroom and therefore there is no analog to 505(j)(5). 505(j)(6) is a military procedural provision regarding record of trial preparation that has no counterpart in CIPA.

§ 9. Security procedures

(a) Within one hundred and twenty days of the date of the enactment of this Act [enacted Oct. 15, 1980], the Chief Justice of the United States, in consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

(b) Until such time as rules under subsection (a) first become effective, the Federal courts shall in each case involving classified information adopt procedures to protect against the unauthorized disclosure of such information.

[The Security Procedures are set forth in the text following the statute in the U.S. Code Annotated. These Procedures are not applicable to a court-martial but may be used as guidance in establishing a security plan. *See also* Chapter 6 of this Guide.]

§ 9A. Coordination requirements relating to the prosecution of cases involving classified information

(a) Briefings required. Appropriate United States attorney, or the designees of such officials, shall provide briefings to the senior agency official, or the designee of such official, with respect to any case involving classified information that originated in the agency of such senior agency official.

(b) Timing of briefings. Briefings under subsection (a) with respect to a case shall occur--
(1) as soon as practicable after the Department of Justice and the United States attorney concerned determine that a prosecution or potential prosecution could result; and
(2) at such other times thereafter as are necessary to keep the senior agency official concerned fully and currently informed of the status of the prosecution.

(c) Senior agency official defined. In this section, the term "senior agency official" has the meaning given that term in section 1.1 of Executive Order No. 12958 [50 USCS § 435 note].

Comparison with M.R.E. 505. No M.R.E. 505 counterpart. *But see* the National Security Case requirements and coordination requirements discussed in Chapters 3, 4, and 7!

§ 10. Identification of information related to the national defense

In any prosecution in which the United States must establish that material relates to the national defense or constitutes classified information, the United States shall notify the defendant, within the time before trial specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense.

Comparison with M.R.E. 505. No M.R.E. 505 or specific military practice counterpart. However, if the Government is charging an accused under Federal statutes that have as elements of an offense that "material relates to the national defense or constitutes classified information" normal court-martial practice would generally include notice of the evidence to be relied upon. If not provided or if unclear, a defense counsel may decide that a motion for a bill of particulars or other motion may be appropriate.

[§§11- 16 Miscellaneous Administrative Provisions. (Omitted from this Annex)]

2054 Synopsis of Classified Information Procedures Act (CIPA)

[From Title 9 U.S. Attorney's Manual Criminal Resource Manual]

I. DEFINITIONS, PRETRIAL CONFERENCE, PROTECTIVE ORDERS AND DISCOVERY

After a criminal indictment becomes public, the prosecutor remains responsible for taking reasonable precautions against the unauthorized disclosure of classified information during the case. This responsibility applies both when the government intends to use classified information in its case-in-chief as well as when the defendant seeks to use classified information in his/her defense. The tool with which the proper protection of classified information may be ensured in indicted cases is the Classified Information Procedures Act (CIPA). *See* Title 18, U.S.C. App III.

CIPA is a procedural statute; it neither adds to nor detracts from the substantive rights of the defendant or the discovery obligations of the government. Rather, the procedure for making these determinations is different in that it balances the right of a criminal defendant with the right of the sovereign to know in advance of a potential threat from a criminal prosecution to its national security. *See, e.g., United States v. Anderson*, 872 F.2d 1508, 1514 (11th Cir.), *cert. denied*, 493 U.S. 1004 (1989); *United States v. Collins*, 720 F.2d 1195, 1197 (11th Cir. 1983); *United States v. Lopez-Lima*, 738 F. Supp. 1404, 1407 (S.D.Fla. 1990). Each of CIPA's provisions is designed to achieve those dual goals: preventing unnecessary or inadvertent disclosures of classified information and advising the government of the national security "cost" of going forward.

A. *Definitions of Terms*

Section 1 of CIPA defines "classified information" and "national security," both of which are terms used throughout the statute. Subsection (a), in pertinent part, defines "classified information" as:

> [A]ny information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.

Subsection (b) defines "national security" to mean the "national defense and foreign relations of the United States."

B. Pretrial Conference

Section 2 provides that "[a]t any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution." Following such a motion, the district court "shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by Section 5 of this Act, and the

initiation of the procedure established by Section 6 (to determine the use, relevance, or admissibility of classified information) of this Act."

C. Protective Orders

Of critical importance in any criminal case, once there exists any likelihood that classified information may be at issue, is the entering of a protective order by the district court. CIPA Section 3 requires the court, upon the request of the government, to issue an order "to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case." The government's motion for a protective order is an excellent opportunity to begin educating the Court, including the judge's staff, about CIPA and related issues. It is essential that the motion include a memorandum of law that provides the court with an overview on national security matters and sets forth the authority by which the government may protect matters of national security, including the general authority of the Intelligence Community (IC) pursuant to the National Security Act of 1947, the Central Intelligence Act of 1949, and various Executive orders issued by the President. For sample motions and protective orders or to discuss any problems you may have with the court on CIPA issues, please contact the ISS. The protective order must be sufficiently comprehensive to ensure that access to classified information is restricted to cleared persons and to provide for adequate procedures and facilities for proper handling and protection of classified information during the pre-trial litigation and trial of the case.

The requirement of security clearances does not extend to the judge or to the defendant (who would likely be ineligible, anyway). Some defense counsel may wish to resist this requirement by seeking an exemption by order of the court. The prosecutor should advise defense counsel that, because of the stringent restrictions imposed by federal regulations, statutes, and Executive Orders upon the disclosure of classified information, such tack may prevent, and will certainly delay, access to classified information. In any case in which this issue arises, the prosecutor should notify the Internal Security Section immediately.

An essential provision of a protective order is the appointment by the court of a Court Security Officer (CSO). The CSO is an employee of the Department's Justice Management Division; however, the court's appointment of a CSO makes that person an officer of the court. In that capacity, the CSO is responsible for assisting both parties and the court staff in obtaining security clearances (not required for the judge); in the proper handling and storage of classified information, and in operating the special communication equipment that must be used in dealing with classified information.

D. Discovery of Classified Information by Defendant

Section 4 provides in pertinent part that "[t]he court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting the relevant facts that classified information would tend to prove." Like Rule 16(d)(1) of the Federal Rules of

Criminal Procedure, section 4 provides that the Government may demonstrate that the use of such alternatives is warranted in an *in camera, ex parte* submission to the court. By the time of the section 4 proceeding, the prosecutor should have completed the government's review of any classified material and have identified any such material that is arguably subject to the government's discovery obligation. Where supported by law, the prosecutor, during the proceeding, should first strive to have the court exclude as much classified information as possible from the government's discovery obligation. Second, to the extent that the court rules that certain classified material is discoverable, the prosecutor should seek the court's approval to utilize the alternative measures described in section 4, i.e., unclassified summaries and/or stipulations. The court's denial of such a request is subject to interlocutory appeal. *See* Section III.A, *infra*.

II. SECTIONS 5 AND 6: NOTICE AND PRETRIAL EVIDENTIARY RULINGS

NOTICE OF INTENT TO USE CLASSIFIED INFORMATION

Following the discovery process under section 4, there are three critical pretrial steps in the handling of classified information under sections 5 and 6 of CIPA. First, the defendant must specify in detail, in a written notice, the precise classified information he reasonably expects to disclose. Second, the Court, upon a motion of the Government, shall hold a hearing pursuant to section 6(a) to determine the use, relevance and admissibility of the proposed evidence. Third, following the 6(a) hearing and formal findings of admissibility by the Court, the Government may move to substitute redacted versions of classified documents from the originals or to prepare an admission of certain relevant facts or summaries for classified information that the Court has ruled admissible.

A. The Section 5(a) Notice Requirement

PRETRIAL EVIDENTIARY HEARING, SUBSTITUTIONS AND STIPULATIONS

The linchpin of CIPA is section 5(a), which requires a defendant who reasonably intends to disclose (or cause the disclosure of) classified information to provide timely pretrial written notice of his intention to the Court and the Government. Section 5(a) expressly requires that such notice "include a brief description of the classified information," and the leading case under section 5(a) holds that such notice

> must be *particularized*, setting forth *specifically* the classified information which the defendant reasonably believes to be necessary to his defense.

United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983) (emphasis added) *See also United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985) (*en banc*). This requirement applies both to documentary exhibits and to oral testimony, whether it is anticipated to be brought out on direct or on cross-examination. *See, e.g., United States v. Collins*, *supra*, (testimony); *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984) (same).

If a defendant fails to provide a sufficiently detailed notice far enough in advance of trial to permit the implementation of CIPA procedures, section 5(b) provides for preclusion. *See United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987). Similarly, if the defendant attempts to disclose at trial classified information which is not described in

his/her section 5(a) notice, preclusion is the appropriate remedy prescribed by section 5(b) of the statute. *SeeUnited States v. Smith*, *supra*, 780 F.2d at 1105 ("A defendant is forbidden from disclosing any such information absent the giving of notice").

B. The Section 6(a) Hearing

The purpose of the hearing pursuant to section 6(a) of CIPA is for the court "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial...." 18 U.S.C. App. III § 6(a). The statute expressly provides that, after a pretrial section 6(a) hearing on the admissibility of evidence, the court shall enter its rulings *prior* to the commencement of trial. If the Attorney General or his/her designee certifies to the court in a petition that a public proceeding may result in the disclosure of classified information, then the hearing will be held *in camera*. CIPA does not change the "generally applicable evidentiary rules of admissibility," *United States v. Wilson*, *supra* 750 F.2d at 9, but rather alters the *timing* of rulings as to admissibility to require them to be made before the trial. *Accord, United States v. Smith*, *supra*, 780 F.2d at 1106.

At the section 6(a) hearing, the court is to hear the defense proffer and the arguments of counsel, and then rule whether the classified information identified by the defense is relevant under the standards of Fed.R.Evid. 401. *United States v. Smith*, *supra*, 780 F.2d at 1106. The court's inquiry does not end there, for under Fed.R.Evid. 402, not all relevant evidence is admissible at trial. The Court therefore must also determine whether the evidence is cumulative, prejudicial, confusing, or misleading," *United States v. Wilson*, *supra*, 750 F.2d at 9, so that it should be excluded under Fed.R.Evid. 403.
At the conclusion of the section 6 (a) hearing, the court must state in writing the reasons for its determination as to each item of classified information. 18 U.S.C. App..III section 6(a).

C. *Substitution Pursuant to Section 6(c)*

If the court rules any classified information to be admissible, section 6(c) of CIPA permits the Government to propose unclassified "substitutes" for that information. Specifically, the Government may move to substitute either (1) a statement admitting relevant facts that the classified information would tend to prove or (2) a summary of the classified information instead of the classified information itself. 18 U.S.C. App. III section 6(c)(1). *See United States v. Smith*, *supra*, 780 F.2d at 1105. In many cases, the government will propose a redacted version of a classified document as a substitution for the original, having deleted only non-relevant classified information. A motion for substitution shall be granted if the "statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." 18 U.S.C. App. III section 6(c).
If the district court will not accept a substitution proposed by the government, an interlocutory appeal may lie to the circuit court under CIPA section 7. If the issue is resolved against the government, and classified information is thereby subject to a disclosure order of the court, the AUSA must immediately notify the ISS. Thereafter, the Attorney General may file an affidavit effectively prohibiting the use of the contested

classified information. If that is done, the court may impose sanctions against the government, which may include striking all or part of a witness' testimony, resolving an issue of fact against the United States, or dismissing part or all of the indictment. *See* CIPA section 6(e). The purpose of the relevance hearings under 6(a) and the substitution practice under 6(c), however, is to avoid the *necessity* for these sanctions.

III. OTHER RELEVANT CIPA PROCEDURES

A. *Interlocutory Appeal*

APPEAL FROM INTERLOCUTORY ORDER

Section 7(a) of the Act provides for an interlocutory appeal by the government from any decision or order of the trial judge authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information. Section 7 appeals must be approved by the Solicitor General. The term "disclosure" within the meaning of section 7 includes both information which the court orders the government to divulge to the defendant or to others as well as information already possessed by the defendant which he or she intends to disclose to unapproved people. Section 7(b) provides that the court of appeals shall give expedited treatment to any interlocutory appeal filed under subsection (a). As a matter of *fairness*, the policy of the Department shall be that the defense be given notice of the government's appeal under section 7.

B. Introduction of Classified Information

Section 8(a) provides that "writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status." This provision simply recognizes that classification is an executive, not a judicial, function. Thus, section 8(a) implicitly allows the classifying agency, upon completion of the trial, to decide whether the information has been so compromised during trial that it could no longer be regarded as classified.

In order to prevent "unnecessary disclosure" of classified information, section 8(b) permits the court to order admission into evidence of only a part of a writing, recording, or photograph. Alternatively, the court may order into evidence the whole writing, recordings, or photograph with excision of all or part of the classified information contained therein. However, the provision does not provide grounds for excluding or excising part of a writing or recorded statement which ought in fairness to be considered contemporaneously with it. Thus, the court may admit into evidence part of a writing, recording, or photograph only when fairness does not require the whole document to be considered.

Section 8(c) provides a procedure to address the problem presented during a pretrial or trial proceeding when the defendant's counsel asks a question or embarks on a line of inquiry that would require the witness to disclose classified information not previously

found by the court to be admissible. If the defendant knew that a question or line of inquiry would result in disclosure of classified information, he/she presumably would have given the government notice under section 5 and the provisions of section 6(a) would have been used. Section 8(c) serves, in effect, as a supplement to the hearing provisions of section 6(a) to cope with situations which cannot be handled effectively under that section, e.g., where the defendant does not realize that the answer to a given question will reveal classified information. Upon the government's objection to such a question, the court is required to take suitable action to avoid the improper disclosure of classified information.

C. Security Procedures

Section 9 required the Chief Justice of the United States to prescribe security procedures for the protection of classified information in the custody of Federal courts. On February 12, 1981, Chief Justice Burger promulgated these procedures. For further information regarding those procedures, please contact the Justice Management Division Office of Security, (202) 514-2094.

D. Public Testimony By Intelligence Officers

> Although the IC is committed to assisting law enforcement where it is legally proper to do so, it must also remain vigilant in protecting classified national security information from unauthorized disclosure. Just as with law enforcement agencies, the successful functioning of the IC turns in significant part upon the ability of its intelligence officers covertly to obtain information from human sources. In carrying out that task, the intelligence officers must, when necessary, be able to operate anonymously, that is, without their connection to an intelligence agency of the United States being known to the persons with whom they come in contact. For that reason, an intelligence agency is authorized under Executive Order 12958 to classify the true name of an intelligence officer.

During the pre-trial progression of an indicted case, as the court enters its CIPA rulings under sections 4 and 6, it may become apparent to the prosecutor that testimony may be required from an intelligence officer or other agency representative engaged in covert activity, either because the Court has ruled under CIPA that certain evidence is relevant and admissible in the defense case, or because such testimony is necessary in the government's rebuttal. Just as the substance of that testimony, to the extent it is classified and is being offered by the defense, must be the subject of CIPA determinations by the court, the prosecutor must also ensure that the same considerations are afforded to the true names of covert intelligence community personnel, if those true names are classified information. That is, the prosecutor must seek the court's approval, under either CIPA section 4 or section 6, of an alternative method to the witness' testimony in true name that will provide the defendant with the same ability that he would have otherwise had to impeach, or bolster, the credibility of that witness.

In any criminal case in which it becomes likely that an intelligence agency employee will testify, the Assistant United States Attorney (AUSA) assigned to the case shall

immediately notify the Internal Security Section (ISS). That office, in consultation with the general counsel at the appropriate intelligence agency, will assist the AUSA during pretrial motion practice and litigation on the issue of whether the witness should testify in true name and other issues related to the testimony of intelligence agency personnel.