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NATIONAL SECURITY VERSUS DEFENSE COUNSEL’S “NEED TO KNOW”: AN OBJECTIVE STANDARD FOR RESOLVING THE TENSION

Rachel S. Holzer

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

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

INTRODUCTION

Legal developments since the devastating events of September 11, 2001, highlight a tension between the government’s interest in national security and a defendant’s right to access relevant classified

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

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

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

Id.

2. N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971) (discussing the “awesome responsibility” of the executive to preserve national security, but holding nevertheless that the government had not met its burden of showing justification for imposing prior restraints on publication of a classified historical study on Vietnam policy).
Consider three hypothetical criminal defendants at different stages of the adjudicatory process: one serving his fifteenth year of a life sentence; one charged with (but not yet convicted of) a capital crime; and one beginning an eight-year sentence of imprisonment. All three individuals are seeking access to classified information pertinent to their cases, yet the government objects to access on the grounds that the defendants lack a need to know the information.

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

In the interests of national security, information held by the United States Government may be classified in accordance with the provisions of an executive order issued by the president. However, classification raises two major types of problems: those stemming from the way that the government classifies information.

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

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

5. See infra notes 107-09 and accompanying text for the requirements for gaining access to classified information.

6. See infra note 16 and accompanying text.

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

8. "Classified information" as used and defined by Executive Order No. 13,292 is "information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form." Id. at 215.

from its philosophical, and those arising from its practical, consequences. Philosophically, concealing information related to government affairs impairs important constitutional goals.\(^\text{10}\) As Justice William O. Douglas once remarked, "[s]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors."\(^\text{11}\) This Note, however, does not endeavor to address such theoretical issues. Instead, the analysis focuses on the most important practical consequence of classifying information: that a criminal defendant does not have ready access to information that is relevant, and perhaps crucial, to his or her case.\(^\text{12}\)

The executive order governing classified materials implicitly recognizes the constitutional quandary inherent in classifying information and allows for access upon an individual showing of need.\(^\text{13}\) Although the defendant has the burden of showing such need, currently no objective test exists by which to determine whether the defendant has met the need to know requirement. Defense attorneys are disadvantaged by this undefined term when the government raises the specter of breach to national security,\(^\text{14}\) a conclusory assertion that is difficult—if not impossible—for the defense to challenge, especially without access to the very documents at issue.

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\(^{10}\) For example, the First Amendment fosters vital constitutional values potentially impaired by government secrecy. See Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 Wm. & Mary L. Rev. 805, 812-13 (1985) (exploring both statutory and constitutional powers of the president to prevent disclosure of classified information to the public, to litigants, and to Congress). "The first amendment supports the protection and encouragement of informed public colloquy ‘to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.’" *Id.* at 813 (quoting De Jonge v. State of Oregon, 299 U.S. 353, 365 (1937)). In addition, denying the public access to classified information hinders "trenchant appraisal by the electorate of the nation’s defense and foreign policies." *Id.*


\(^{12}\) This situation presents an archetypal Kafkaesque predicament: ["In no other Court was legal assistance so necessary. For the proceedings were not only kept secret from the general public, but from the accused as well. Of course only so far as this was possible, but it had proved possible to a very great extent. For even the accused had no access to the Court records, and to guess from the course of an interrogation what documents the Court had up its sleeve was very difficult, particularly for an accused person, who was himself implicated and had all sorts of worries to distract him.


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

\(^{14}\) "National security" as used and defined by Executive Order No. 13,292 means "the national defense or foreign relations of the United States." Exec. Order No. 13,292, 3 C.F.R. 196, 216 (2003).

\(^{15}\) *See* James T. O'Reilly, *Federal Information Disclosure* 11-14 to 11-15, 11-33 (2d ed. 1990) (stating that courts usually defer to government agencies in national security cases); *see, e.g.*, Snepp v. United States, 444 U.S. 507, 516 (1980) (holding that
Under a claim of danger to national security, the government can argue that counsel has no need to know as mandated, yet left undefined, by the executive order. Because there is no standard to which courts must adhere in determining the “need to know,” the prosecution benefits from the court’s general willingness to defer to the government in the realm of national security, often ensuring that the court will deny defense counsel—even security-cleared counsel—access to critical classified information.

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

Finally, Part III formulates and elaborates upon an objective, multi-part test to be utilized by courts in determining whether defense counsel has met the need to know prerequisite to access the classified information in the CIA’s interest in protecting national security supersedes the CIA agent’s First Amendment rights; Brown v. Glines, 444 U.S. 348, 353 (1980) (holding that Air Force regulations restraining speech were constitutional as they were necessary to protect the substantial governmental interest in military effectiveness).

16. See O’Reilly, supra note 15; Michael D. Fricklas, Executive Order 12,356: The First Amendment Rights of Government Grantees, 64 B.U. L. Rev. 447, 501 (1984) (stating that judges often defer to Executive Branch determinations of the need to classify information); Molly McDonough, Detainees Remain Nameless, A.B.A. J. E-Report, June 20, 2003, at 24 (discussing judicial deference to government claims of national security risks); John Cary Sims, Triangulating the Boundaries of Pentagon Papers, 2 Wm. & Mary Bill Rts. J. 341, 377 n.143 (1993) (noting that in New York Times Co. v. United States the government actually asserted that judges are obligated to defer almost completely to the Executive Branch’s assessment of the national security risks which the documents might raise); see also Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (stating that courts should defer to the executive, particularly now since “America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore”); United States v. Ahmad, 499 F.2d 851, 854 (3d Cir. 1974) (noting that the district court “took no position on the justification for the government’s desire for secrecy but accepted the Attorney General’s affidavit at face value”); Kathryn Lohmeyer, Note, The Pitfall of Plenary Power: A Call for Meaningful Review of NSEERS “Special Registration,” 25 Whittier L. Rev. 139, 153 (2003) (stating that “the Immigration Service has invoked the Plenary Power doctrine to support many post-September 11 changes in immigration law and policy”); Gabriel S. Oberfield, Note, Press Rights in Peril: The Department of Justice Infringes Upon Press Liberties by Conducting “Special Interest” Removal Proceedings, 13 Fordham Intell. Prop. Media & Ent. L.J. 1209 (2003) (asserting that immigration judges are compelled to defer to the government’s contentions that the information it seals is potentially injurious to national security).
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materials. The proposed test requires courts to consider and balance\(^\text{17}\) nine factors in determining whether the need to know requirement has been fulfilled. The first group of elements directly addresses the government’s need for secrecy: (1) the possibility that access may compromise an ongoing investigation; (2) the government’s stated reasons for denying access; (3) the position and rank of the government official opposing access; and (4) the age and classification level of the materials. The second group involves the defendant’s need for access to the classified information: (1) defendant’s stated reasons for requiring access; and (2) the severity of the defendant’s sentence. The third and final group encompasses both the government’s interest in secrecy and the defendant’s need for the information: (1) leaks of the information; (2) previous access by other individuals; and (3) previous access by defendant or prior counsel. This Note argues that the use of these guidelines would allow courts to make a fair determination as to whether individuals have fulfilled the need to know requirement.

I. A HISTORY OF SECRETS AND NATIONAL SECURITY

The President of the United States protects sensitive information from unauthorized disclosure through the executive order on classification, which consists of a complex set of rules and procedures to be followed by designated agency heads seeking to classify information in their possession.\(^\text{18}\) Consequently, persons accused of crimes may be denied access to information necessary to defending their cases or to securing post-conviction remedies,\(^\text{19}\) a dilemma compounded by the enactment of CIPA, which gave prosecutors more control over criminal proceedings.\(^\text{20}\) For defense attorneys to gain access to classified materials, they must meet certain criteria, the most difficult of which is proving a need to know the information.\(^\text{21}\) This part details the background of the predicament faced by defense attorneys attempting to gain access to classified information.

A. The Executive Order: Procedures for Classification and Access

The United States Constitution clearly foresaw the need for government secrecy,\(^\text{22}\) yet no official system for classification of

\(^{17}\) See United States v. Salerno, 481 U.S. 739, 750 (1987) (similarly balancing the government’s “compelling” interest in preventing crime against “the individual’s strong interest in liberty”).

\(^{18}\) See, e.g., Exec. Order No. 13,292, 3 C.F.R. 196 (2003); see also infra Part I.A.

\(^{19}\) See infra Part I.B.

\(^{20}\) See infra Part I.C.

\(^{21}\) See infra Part I.D.

\(^{22}\) One provision explicitly directs Congress to publish a journal of each house, excluding “such Parts as may in [Congress’s] Judgment require Secrecy.” U.S. Const. art. I, § 5, cl. 3 (emphasis added). A second provision states that “a regular Statement
government information existed until 1940. President Franklin D. Roosevelt first enacted a classification system by issuing an executive order instructing defense agencies to protect from disclosure sensitive information related to “military installations and equipment.” Roosevelt did not, however, provide in his order for any access to such information. Years later, the perceived communist threat prompted Harry S. Truman to extend the classification system to any information, not only military, whose secrecy was necessary “to protect the national security of the United States.” Truman’s order, which authorized any and all federal agencies to classify information, directed agency heads to establish a system controlling dissemination of classified materials “adequate to the needs of [their] agencies.” Access by individuals outside of the executive branch was therefore at the sole discretion of the respective agency heads.

Several subsequent presidents revised the procedures and requirements for classification, each increasing public access. The trend toward more open access was later reversed, however, when the Reagan administration broadened the discretion of agency heads in

and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” U.S. Const. art. I, § 9, cl. 7. At least one court has acknowledged that “from time to time” indicates an intention to authorize secret expenses for military or foreign policy endeavors. See Halperin v. CIA, 629 F.2d 144, 154-60 (D.C. Cir. 1980); see also Fein, supra note 10, at 806. Furthermore, although the Constitution safeguards individual rights and freedoms, “it is not a suicide pact”; it provides the necessary powers to defend and preserve itself. Haig v. Agee, 453 U.S. 280, 309-10 (1981) (citation omitted); see also Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159-60 (1963) (stating that the Constitution “protects against invasion of individual rights” while simultaneously conferring upon Congress “broad power” to regulate foreign affairs “to ensure effectuation of this indispensable function of government”).

28. See id.
assigning classification status. The Reagan order also accomplished increased secrecy by eliminating the requirements that the classifying government official consider the interest in public disclosure and show "identifiable damage" resulting from release before permitting a document to be classified. Thereafter, President Bill Clinton loosened control of government information, emphasizing his stated commitment to open government. However, more recently President George W. Bush expanded the number of classifying agency heads to include, for example, the Secretary of Health and Human Services as well as the Environmental Protection Agency Administrator. The effect of such expansion was to restrict access to a greater range of information than had previously been off-limits to the general public.

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

Enumerated in the order are the three basic levels at which information may be classified: top secret, secret, or confidential.

31. The "identifiable damage" requirement was found in Carter's order. Exec. Order No. 12,065, 3 C.F.R. 190 (1978).
32. See Exec. Order No. 12,356, 3 C.F.R. 166 (1983); see also Goldston et al., supra note 24, at 410 n.6 (citation omitted).
36. See Goldston et al., supra note 24, at 474-75.
38. See id.
39. The remaining categories involve information regarding foreign relations or foreign activities of the United States; scientific, technological, or economic matters relating to the national security; United States Government programs for safeguarding nuclear materials or facilities; and vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security. See id.
40. Id. at 339.
41. Id. at 335-36. In addition to these main levels of classification, another designation known as "sensitive compartmented information" includes information which has been classified at one of the main levels and is also subject to special access and handling requirements because it involves or is derived from especially sensitive intelligence sources and methods. 28 C.F.R. § 17.18(a) (2003).
42. Exec. Order No. 12,958, 3 C.F.R. 333, 335-36 (1995). The highest level, top secret, is information that "reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe"; the next level, secret, may be used for information whose unauthorized disclosure "reasonably could be expected to cause serious damage to the
Government officials with appropriate clearance are eligible for access to classified information, as are other individuals seeking access under certain conditions. Misclassifying or mishandling information or other violations of the order’s provisions may subject certain individuals to sanctions.

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

If the agency fails to designate a time for declassification, then the materials are to be declassified after ten years. However, if an
agency chooses to designate a time period, then certain information may be marked for automatic declassification after twenty-five years.\(^5\) As there are only limited exceptions to this rule,\(^5\) the implication is that the president intended to prevent unnecessarily prolonged restrictions on access.

The carefully crafted scheme set forth in the executive order demonstrates the importance of protecting certain information from gratuitous disclosure.\(^5\) Publication of classified information might lead to a chain of events that years later endangers the nation's security or jeopardizes the government's foreign policy goals.\(^5\) Yet despite the potential risks to national security, executive orders have made allowances for access to classified information upon a showing of need.\(^5\) The inclusion of such a provision underscores the importance of disclosure upon showing a need for access to the information. Undoubtedly, the most compelling cases in which such a need would be present are those involving persons who stand accused or convicted of a crime and thereby face deprivations of life or liberty.

**B. Practical Implications for Criminal Defendants**

The lack of access to pertinent information potentially impairs the rights of criminal defendants. The United States' vigorous constitutional and statutory protections give criminal defendants numerous rights.\(^5\) Prior to conviction, a defendant is entitled to due

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

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

54. See Fein, supra note 10, at 810.

55. See id. at 812.

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

57. See infra notes 58-73 and accompanying text.
process of law—a central component of the American legal system—and to effective assistance of counsel. In addition, state criminal laws shield pre-conviction defendants from unjust convictions through detailed requirements for prosecutors, such as demonstrating specific criminal acts and mens rea. In an ongoing case, the defendant must be able to prepare an effective defense, yet this may be impossible without access to classified information.

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


60. U.S. Const. amend. VI. The Sixth Amendment provides:

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

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

61. See, e.g., N.Y. Penal Law § 125.27 (McKinney 1999 & Supp. 2005) (murder in the first degree); id. § 145.12 (criminal mischief in the first degree); id. § 150.20 (arson in the first degree); see also Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989); Thomas O. McGarity, Proposal for Linking Culpability and Causation to Ensure Corporate Accountability for Toxic Risks, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 1, 63 n.239 (2001) ("The requirement of proof beyond a reasonable doubt, the privilege against self-incrimination, and protections against double jeopardy are just a few of the procedural protections that are available to defendants when the state attempts to assign blame through the criminal law."). Moreover, Justice Brennan once wrote that state constitutions are "a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977).
Similarly, the post-conviction defendant may need to gain access to classified materials in order to prepare, for example, an effective appeal, post-conviction motion, parole application, or clemency application. Rights retained by persons convicted of crimes depend upon circumstances but can include due process, access to courts, 


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

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

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

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

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

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

and the right to counsel.\textsuperscript{69} Even in clemency proceedings, an individual is entitled to some procedural due process.\textsuperscript{70} The U.S. Supreme Court has emphasized that “a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.”\textsuperscript{71} Indeed, although a prisoner does not enjoy a particular freedom due to incarceration, such deprivation does not deny the person a protected interest in securing and maintaining his constitutionally protected liberties.\textsuperscript{72} As “[t]here is no iron curtain drawn between the Constitution and the prisons of this country,”\textsuperscript{73} post-conviction defendants must be afforded the opportunity to pursue whatever legal means are available.

To effectively prepare a defense or to pursue legal avenues of relief, both pre- and post-conviction defendants may require access to classified information. Yet there are several barriers to obtaining information that may be critical to a defendant’s case. The state secrets privilege, for example, is a common law evidentiary rule that permits the government to withhold information from discovery when

\textsuperscript{68} See, e.g., Johnson v. Avery, 393 U.S. 483, 485 (1969) (“Since the basic purpose of the writ [of habeas corpus] is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.”); \textit{Ex parte} Hull, 312 U.S. 546, 549 (1941) (stating that the state “may not abridge or impair petitioner’s right to apply to a federal court for a writ of habeas corpus”). In addition, failure to maintain a prisoner’s physical well-being may result in a civil rights deprivation. See, e.g., Bishop v. Stoneman, 508 F.2d 1224, 1225 (2d Cir. 1974); Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972); Martinez v. Mancusi, 443 F.2d 921, 923 (2d Cir. 1970); see also Haines v. Kern, 404 U.S. 519, 520-21 (1972) (holding that a prisoner’s allegations of mistreatment by prison officials may be actionable).

\textsuperscript{69} See, e.g., Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that a prisoner has a right to counsel while pursuing a first appeal).

\textsuperscript{70} Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring in part and concurring in the judgment) (“[S]ome minimal procedural safeguards apply to clemency proceedings.”) (emphasis omitted); see also Duvall v. Keating, 162 F.3d 1058, 1061 (10th Cir. 1998) (holding that some level of procedural due process applies to clemency proceedings). Clemency provides the public with assurance that only those who deserve to be punished are punished, and only as much as they deserve. See Moore, \textit{supra} note 61, at 131. The administration of justice by the judiciary “is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt.” \textit{Ex parte} Grossman, 267 U.S. 87, 120-21 (1925). It has therefore always been thought fundamental in popular governments, as well as in monarchies, to vest in an authority other than the courts the power to amend or avoid certain criminal judgments. See \textit{id.} at 121 (referring to clemency as “a check entrusted to the executive for special cases”). Thus, a defendant’s request for access to classified information that could maximize the effectiveness of his clemency application should be treated with seriousness though the government’s objections may be vehement and superficially persuasive.


\textsuperscript{72} See Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 26 (1979) (adding, however, that a convicted person has no constitutional right to actually be released before the expiration of a valid sentence).

\textsuperscript{73} Wolff, 418 U.S. at 555-56.
disclosure would be detrimental to national security. In addition, under the Freedom of Information Act ("FOIA"). a government agency is required to make available to the public information regarding its methods, rules of procedure, and statements of general policy, among other things. However, FOIA also provides for exceptions in situations when the investigation or proceeding involves a possible violation of criminal law and when disclosure of the existence of the records "could reasonably be expected to interfere with enforcement proceedings" and the subject of the investigation is unaware of its pendency. The most comprehensive regulations relating to cases involving classified information are found in CIPA, which governs certain pretrial, trial, and appellate procedures for criminal cases requiring access to classified information.

C. The Classified Information Procedures Act: The Solution to "Graymail"

The "vigorous and fearless" performance of the prosecutor's duty is critical for the proper functioning of our criminal justice system.

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74. Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544 (2d Cir. 1991) (upholding dismissal of wrongful death claim against missile defense systems manufacturers, designers, and testers). In United States v. Reynolds, the Supreme Court explained the steps necessary for the Government to invoke the state secrets privilege: There must be a formal claim of privilege, made by the head of the department with control over the matter, after personal consideration by that official. United States v. Reynolds, 345 U.S. 1, 7-8 (1953). The court must determine whether the circumstances are appropriate for the claim of privilege, but without forcing a disclosure of that which the privilege was created to protect. Id.
76. See id. § 552(a)(1)(B).
77. See id. § 552(a)(1)(C).
78. See id. § 552(a)(1)(D).
79. See id. § 552(a).
80. See id. § 552(c)(1)(A).
81. Id. § 552(c)(1)(B); see also Winterstein v. United States Dep't of Justice, Office of Info. & Privacy, 89 F. Supp. 2d 79, 83 (D.D.C. 2000) (denying an individual's FOIA request where the document sought related to ongoing investigations). Similarly, the Federal Bureau of Investigation is exempt from the access requirements of the Privacy Act if disclosure might compromise a "pending sensitive investigation." 28 C.F.R. § 16.96(b)(2) (2003); see also Falwell v. Executive Office of the President, 158 F. Supp. 2d 734, 740 & n.4 (W.D. Va. 2001) (stating that the FBI had no legal obligation to disclose the requested information since it was exempt under 28 C.F.R. § 16.96).
82. See 18 U.S.C. app 3 (2000); see also United States v. O'Hara, 301 F.3d 563, 568 (7th Cir.) (stating that CIPA was not limited to pretrial proceedings), cert. denied, 537 U.S. 1049 (2002); Armstrong v. Executive Office of the President, 830 F. Supp. 19 (D.D.C. 1993) (applying CIPA during post-trial proceedings).
Before the enactment of CIPA, prosecutors in cases involving classified information faced added difficulty fulfilling their special role of both zealously representing the government’s interests and ensuring that justice is done. By threatening to expose classified information at trial, defendants managed to place prosecutors in a predicament: either allow sensitive government information to be exposed in open court and potentially harm national security, or drop the charges. Termed “graymail,” this defense practice prevented the government from prosecuting legitimate cases involving classified information.

President Bill Clinton and investigating the history and precedent that the Supreme Court applied to the lawsuit against the President.


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

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

Berger, 295 U.S. at 88.

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

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

Designed to both safeguard classified information and protect a defendant's rights, CIPA provides procedures which would permit the trial judge to decide questions of admissibility involving classified information before the evidence is exposed irreversibly in open

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

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

90. See Smith, 780 F.2d at 1105.

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


94. See United States v. Pappas, 94 F.3d 795, 799 (2d Cir. 1996) (holding that CIPA authorized an order prohibiting disclosure of information acquired by the defendant prior to criminal proceedings only in connection with trial but not to the extent that it prohibited public disclosure unrelated to court proceedings); United States v. LaRouche Campaign, 695 F. Supp. 1282, 1285 (D. Mass. 1988) (applying section 4 of CIPA in deciding question of discovery of classified information by defendants). For instance, section 5(a) mandates that the defendant give formal notice to the prosecution at least thirty days in advance of the time at which the defense would like to use specific classified information. 18 U.S.C. app. 3 § 5(a) (2000). Failure to comply with this requirement precludes the defendant's use of the classified information at issue. See, e.g., United States v. Badia, 827 F.2d 1458, 1465 (11th Cir. 1987) (holding that defendant's failure to give formal notice of intent to disclose classified information precluded asserting CIA involvement as a defense).
CIPA effectively minimizes the risk of graymail without modifying the existing law relating to admissibility of evidence. The sixteen sections of CIPA lay out detailed procedures for cases involving classified information as well as how Congress must regulate the Act’s application and effectiveness.

CIPA governs cases when the government asserts a classified information privilege, and that assertion is “at least a colorable one.” In CIPA proceedings, courts have applied a three-step analysis to determine whether a defendant may utilize the classified information at issue. The court first decides if the evidence is relevant, which is determined solely by the well-established criteria set forth in the Federal Rules of Evidence. If the court deems information relevant, then the court considers whether it is material. Once the


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


98. See Tamanaha, supra note 84, at 284.

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

100. Ralph V. Seep, Annotation, Validity and Construction of Classified Information Procedures Act (18 U.S.C.S. Appx. §§ 1-16), 103 A.L.R. Fed. 219 (1991) (analyzing federal cases which specifically determine, or bear on the determination of, the validity and construction of CIPA); see also United States v. Rewald, 889 F.2d 836, 847 (9th Cir. 1989) (applying CIPA and discussing its requirements).

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

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

103. See Seep, supra note 100. A court may find that evidence is material if it implicates “very crucial issues, such as motive, intent, prejudice, credibility, or even the possibility of exposing duress or entrapment.” Yunis, 867 F.2d at 620. Evidence may also be found to be material if, had it been disclosed to the defense, there is a “reasonable probability” that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). In United States v. Bagley, 473 U.S. 667, 682 (1985), the Court defined a “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” (quoting Strickland, 466 U.S. at
evidence is determined to be both relevant and material, then the court balances the government's need to protect the information in the interest of national security against the defendant's need for access to the information in mounting his defense. 104

Initially, once classified information is deemed pertinent and appropriate for disclosure, 105 the executive order requires defense counsel to fulfill three conditions in order to gain access to such evidence. 106 First, an agency head or the agency head's designee must make a favorable determination of eligibility for access, which is the security clearance corresponding with the level of the information's classification. 107 Second, the person seeking access to the classified information must sign an approved nondisclosure agreement. 108 Finally, the individual requesting access must demonstrate a need to know the information. 109

CIPA manifests a congressional intent to protect classified information from disclosure associated with court proceedings at any stage. 110 Thus, even after information is initially accessed by defense counsel, the Act provides that a court shall issue a protective order to


104. See Seep, supra note 100.

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


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


109. Id. Other definitions of the need to know are discussed infra Part I.D.

110. See 18 U.S.C. app. 3 § 4 (discussing procedures to be followed "in the event of an appeal"); see also United States v. LaRouche Campaign, 695 F. Supp. 1282, 1285 (D. Mass. 1988) ("When it is read as a whole, CIPA plainly manifests a congressional intent to protect classified information from any disclosure incident to court proceedings, at whatever stage of trial, other than such disclosures as are provided for in CIPA to give full protection to the rights of defendants.").
prevent unauthorized disclosure of any classified materials revealed to the defense. 111 One such protective order alludes to the need to know requirement by stating that the Department of Justice shall seek to obtain security clearance, at the request of defense counsel, for individuals not specifically named in the order “[i]f preparation of the defense requires that classified information be disclosed.” 112 Thus, as CIPA restricts the defendant’s access to classified information during discovery absent a “clear showing of need,” 113 a court must evaluate whether counsel has demonstrated such a need before it will grant permission for access.

D. The Need to Know

Despite the emphasis on an individual’s need to know the classified information, no clear standard exists by which to assess a claim of need. When used by various branches of government, occasionally the phrase is preceded by an adjective, such as a “valid need to know” 114 or an “actual need-to-know,” 115 however, there are no guidelines as to how to establish the need. 116 Courts, therefore, as well as defendants, are left with little direction in determining compliance with this requirement. 117

111. See 18 U.S.C. app. 3, § 3.
112. United States v. Rezaq, 156 F.R.D. 514, 524 n.18 (D.D.C. 1994) (emphasis added); see also United States v. Moussaoui, No. CR. 01-455-A, 2002 WL 1987964, at *1 (E.D. Va., Aug 23, 2002) (stating that the “Protective Order prohibits the defendant from accessing classified information unless he first obtains the necessary security clearance from the Department of Justice, or other governmental or Court approval... [and] the Court is satisfied that there is a ‘need to know’ the particular information” (emphasis added)); Protective Order in United States v. Pollard, Crim. No. 86-0207, at 5 (filed in the U.S. District Court for the District of Columbia, Oct. 2, 1986) (providing that any individuals other than those specifically mentioned in the Order can obtain access to classified information and documents “only after having granted the appropriate security clearances by the Department of Justice through the Court Security Officer and the permission of this Court” (emphasis added)).
113. Pilchen & Klubes, supra note 87, at 193-94.
117. Courts largely have not addressed the term “need to know”, and therefore its meaning remains perplexing. See infra notes 125-32 and accompanying text. In contrast, in United States v. Jolliff, for instance, the court held that the terms “classified information” and “national security” are not unconstitutionally vague, as they “give the defendant ample notice of required conduct.” United States v. Jolliff,
Even those orders and regulations which provide explanations fail to define specifically what constitutes such a need; the definitions provided are amorphous and are therefore of little value to one seeking to prove that the need to know requirement is fulfilled. Representative of this problem is the relevant passage in the executive order on classified information:"

"'Need-to-know' means a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." The order does not further define what constitutes performance of or assistance in a lawful and authorized governmental function.

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


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


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

See supra note 119 and accompanying text.

See U.S. Const. amend. VI.

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

In addition to a security clearance, a person must have a need for access to the particular classified information or material sought in connection with the performance of official duties or contractual obligations. The
Courts' interpretations of the requisite need to know are similarly unenlightening, although one court attempted to flesh out the requirement in *United States v. Lewis*. In upholding the lower court's ruling denying defendant's counsel access to a pre-sentence report, the circuit court based its reasoning on the following three criteria. First, defendant's counsel did not allege any facts to show determination of that need shall be made by officials having responsibility for the classified information or material.

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

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

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

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

126. 743 F.2d 1127, 1129 (5th Cir. 1984).

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

128. Lewis, 743 F.2d at 1129.
that the sentence was a flagrant abuse of discretion.\textsuperscript{129} Second, lack of access did not prevent defendant from independently presenting the information in the report, which consisted of defendant’s background and record.\textsuperscript{130} And third, the defendant himself had already read the report, which he and his prior counsel commented upon at sentencing, and there were no allegations that original counsel was unavailable or incompetent or that the defendant did not recall the contents of the report.\textsuperscript{131} Based on these three factors, the court denied access to the materials sought.\textsuperscript{132}

However, \textit{Lewis} did not involve classified information.\textsuperscript{133} The court’s reasoning, therefore, is not directly apposite in cases which implicate the conflicting needs of protecting national security and preserving defendants’ rights. Thus, despite the government’s ability to classify information at its sole discretion, and although the executive order explicitly permits access upon a showing of a “need to know,” it remains unclear how a defendant can demonstrate such a need.

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

\textsuperscript{129} \textit{Id.} \\
\textsuperscript{130} \textit{Id.} \\
\textsuperscript{131} \textit{Id.} The court seems to be implying that had the defendant alleged that previous counsel is unavailable or acted incompetently, the court would have found a need to know and allowed access to the documents at issue. See \textit{id.} \\
\textsuperscript{132} \textit{Id.} \\
\textsuperscript{133} See \textit{id.} One case which did involve classified information failed to mention the need to know; the court did, however, state: \\
[C]lassified information is not discoverable on a mere showing of theoretical relevance in the face of the government’s classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information... is entitled only to information that is at least “helpful to the defense of [the] accused.” United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989) (quoting \textit{Roviaro v. United States}, 353 U.S. 53, 60-61 (1957)).
II. THE TENSION BETWEEN CONCERNS FOR NATIONAL SECURITY AND DEFENDANTS' RIGHTS

There is an inherent conflict in maintaining an effective system of government secrecy in a free and open society.134 In the aftermath of September 11, 2001, apprehension has been mounting that unwarranted state secrecy may infringe upon democratic freedoms and liberties in the government's efforts to prevent future terrorist attacks.135 Moreover, given complete discretion to determine what constitutes classifiable information relating to the nation's security, the government tends to err on the side of caution, overclassifying information.136 From the public's perspective, however, a democratic government should account for its national security decisions when...
those decisions adversely affect the lives of the same citizens that the
government is attempting to protect.\[137\]

A. National Security Concerns

One of the nation’s highest priorities is—and must be—protecting those who provide critical sensitive information to the U.S. government, as well as residents of the United States who trust that the government will shield them from threats to their lives or liberties.\[138\] Consequently, when confronted with requests for access to classified information, the government often attempts to block access by arguing that such disclosure would cause a breach of national security.\[139\] The government has utilized this approach in criminal cases as well as in civil cases ranging from wrongful death actions against manufacturers of missile systems\[140\] to suits brought by CIA employees for gender discrimination.\[141\]

For example, in Zuckerbraun v. General Dynamics Corp.,\[142\] the Secretary of the Navy submitted an affidavit establishing that disclosure of secret data and tactics related to the weapons systems of the most technically advanced United States’ war ships could be inimical to national security.\[143\] The court agreed, holding that the government properly asserted the state secrets privilege.\[144\] Plaintiff’s wrongful death claim was therefore dismissed because there was insufficient evidence with which to establish a prima facie case.\[145\]

Similarly, in Tilden v. Tenet,\[146\] the government successfully argued that disclosure of the evidence requested by plaintiff would harm national security.\[147\] In that case, the plaintiff brought a gender discrimination claim against the C.I.A. and requested information related to her claim.\[148\] The court held that the Director of Central Intelligence properly invoked the state secrets privilege.\[149\] The court also denied plaintiff’s counsel’s request to participate in the court’s in

\[137\] See Lee, supra note 134.
\[139\] See infra notes 140-67 and accompanying text.
\[142\] 935 F.2d at 544 (upholding dismissal of wrongful death claim against missile defense systems manufacturers, designers, and testers).
\[143\] Id. at 547.
\[144\] Id.; see supra note 74 and accompanying text.
\[145\] Id. at 548. Plaintiff asserted that the missile defense system used by the Navy failed to repel a missile attack due to the negligence of the manufacturer, and the result was the death of a sailor who was killed when his ship was fired upon. Id. at 545-46.
\[147\] Id. at 625.
\[148\] Id.
\[149\] Id. at 626.
camera review of the documents at issue, citing other cases in which courts had refused to grant counsel's request to participate, even when the attorney had the appropriate security clearance.150

Another case involved a criminal defendant whose newly retained counsel sought disclosure of classified information contained in the defendant's record for the purpose of a clemency application.151 In United States v. Pollard, the court stated that "in light of the current security threats faced by our nation since September 11, 2001," the attorneys would not be allowed to access their client's classified record, despite their high-level security clearance.152 The court simply declared that they did not have a need to know the information without further elaboration.153

However, in contrast, claims of First Amendment freedom of the press have triumphed over the government's argument of breach to national security.154 The government has an "almost insurmountable burden"155 in proving that the publication which the government seeks to restrain poses a "direct[] and immediate[]"156 threat of harm.157 Prior restraints on speech and publication are, as the Supreme Court has stated, "the most serious and the least tolerable infringement on First Amendment rights."158

In New York Times Co. v. United States,159 the Court held that the government had not justified its restraint on the publication of a classified study on Vietnam policy.160 Justice Douglas stated that the information at issue, which he personally reviewed, is "all history, not future events. None of it is [less than three years old]."161 Furthermore, Justice Black noted that "[i]n seeking injunctions against these newspapers and in its presentation to the Court, the

150. Id.
152. Id. at 166.
153. Id.
154. See, e.g., N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971). The Court stated that "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a [troop] transport already at sea can support even the issuance of an interim restraining order." Id. at 726-27.
156. N.Y. Times, 403 U.S. at 726-27.
157. See Morant, supra note 155.
158. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). The Court further stated: "A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted." Id.
159. 403 U.S. at 713.
160. Id. at 714.
161. Id. at 722 n.3. Indeed, the age of the classified materials is significant, as their accuracy and potential for damage diminishes with time. Cf. United States v. Ahmad, 499 F.2d 851, 855 (3d Cir. 1974); see also supra notes 45-53 and accompanying text.
Executive Branch seems to have forgotten the essential purpose and history of the First Amendment,162 explaining that “[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.”163

The Supreme Court, in another case involving prior restraints on the media in a criminal trial, noted that “[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”164 The United States continues to learn from what is viewed as “the unhappy experiences of other nations”165 where governments have been permitted to interfere in the internal editorial affairs of newspapers. Moreover, with respect to national security interests in First Amendment cases, Justice Brennan has stated the following:

Military (or national) security is a weighty interest, not least of all because national survival is an indispensable condition of national liberties. But the concept of military necessity is seductively broad, and has a dangerous plasticity. Because they invariably have the visage of overriding importance, there is always a temptation to invoke security “necessities” to justify an encroachment upon civil liberties. For that reason, the military-security argument must be approached with a healthy skepticism: its very gravity counsels that courts be cautious when military necessity is invoked by the Government to justify a trespass on First Amendment rights.166

Indeed, courts have concluded that regardless of how seemingly benign the goals of controlling the press might be, it is prudent to remain skeptical of those actions that would allow the government “to insinuate itself into the editorial rooms of this Nation’s press.”167

162. *N.Y. Times*, 403 U.S. at 715.
163. *Id.* at 717. Justice Black’s opinion further stated that:

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

*Id.*

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

The unique nature of the press's virtually unabridged freedom in this context likely accounts for the First Amendment trumping national security concerns. The government's ability to censor the media was eliminated so that the press would remain free to censure the government and, in fact, "[t]he press was protected so that it could bare the secrets of government and inform the people." In stark contrast, litigants who pit claims of other rights against government secrecy overwhelmingly are on the losing side. Perhaps this failure on the part of parties seeking access to classified information is that the courts, and certainly the government, view the rights asserted as less vital than the "extraordinary protection against prior restraints enjoyed by the press under our constitutional system," which has been zealously guarded by the Supreme Court.

When challenged in court, the government's overall success in keeping classified information secret may be attributed to several factors. In criminal proceedings, although CIPA was not originally intended to favor prosecutors or defendants in any way, the government has gained substantial control over proceedings involving classified information since its enactment. CIPA entitles the government to an interlocutory appeal from the court's decision authorizing disclosure, imposing sanctions for nondisclosure, or denying a protective order proposed by the government to prevent

168. *N.Y. Times*, 403 U.S. at 717 (Black, J., concurring). Justice Black elaborated further:

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

*Id.* at 719.

169. *See, e.g.*, Monarch Assurance P.L.C. v. United States, 244 F.3d 1356 (Fed. Cir. 2001) (precluding from discovery the relationship between the CIA and a British lender due to state secrets privilege); Black v. United States, 62 F.3d 1115 (8th Cir. 1995) (upholding dismissal of the plaintiff's claim that the government's intelligence agencies violated his Fourth Amendment rights by conducting domestic surveillance); Bareford v. Gen. Dynamics Corp., 973 F.2d 1138 (5th Cir. 1992) (holding that the state secret doctrine barred plaintiff's claim against a defense contractor); Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544 (2d Cir. 1991) (holding that privilege was properly invoked since release of the government's information sought by plaintiff would lead to a high risk that sensitive information would be disclosed).


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


173. The government benefits substantially from CIPA's requirements, since the statute's notice and hearing requirements "force[] defense counsel to tip his or her hand concerning defense strategies at earlier stages in the proceedings than would otherwise be the norm in criminal cases." *Id.* at 194; *see also infra* notes 176-79 and accompanying text.
disclosure.\(^{174}\) The government also has the right to move for a pretrial conference on matters relating to the time of discovery, the defendant's duty to provide notice of intent to disclose classified information, and the initiation of hearings on which materials may be admissible.\(^{175}\)

Furthermore, the government may ask for a ruling that a portion or all of the classified information is not material and therefore not necessary to preserve the defendant's rights.\(^{176}\) If the court finds the information necessary, then upon a sufficient showing by the prosecution, CIPA gives the court several options from which to choose in protecting classified information.\(^{177}\) The court may authorize the government to delete certain pieces of classified information from materials which the defendant will access through the Federal Rules of Criminal Procedure.\(^{178}\) Alternatively, the court may allow the prosecution to substitute a summary of the information for the classified documents or to submit a statement admitting facts that the documents would tend to prove.\(^{179}\) Defendants are left at a disadvantage due to the implementation of such measures which are in place to protect national security.

An even more potent weapon in the government's arsenal is that agency heads with authority to classify information are the sole censors of the materials in their possession.\(^{180}\) Courts are not required to conduct in camera reviews of documents in evaluating the government's assertion of the state secrets privilege.\(^{181}\) Hence, information may be gratuitously classified,\(^{182}\) and the government may be unjustifiably invoking the argument of breach to national security. In such a situation, a party seeking access to classified materials is at a severe disadvantage, especially considering the high incidence of judicial deference to governmental claims of threats to national security.\(^{183}\)

\(^{174}\) The government may exercise this right both before and during trial. See 18 U.S.C. app. 3 § 7 (2000); see also Shea, supra note 87, at 665.

\(^{175}\) See 18 U.S.C. app. 3 § 2; see also Shea, supra note 87, at 662-63.

\(^{176}\) See 18 U.S.C. app. 3 § 6(a); see also United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983) (summarizing CIPA's functions and applying its rules).

\(^{177}\) See 18 U.S.C. app. 3 § 4 (addressing discovery of classified information by defendants).

\(^{178}\) See id.

\(^{179}\) See id.

\(^{180}\) See supra notes 27-28 and accompanying text.

\(^{181}\) See Maxwell v. First Nat'l Bank of Md., 143 F.R.D. 590, 595 n.4 (D. Md. 1992) (granting the United States' motion for a protective order when plaintiff sought to discover classified information related to an alleged covert relationship between the CIA and a particular bank or corporation).

\(^{182}\) See supra note 136 and accompanying text.

\(^{183}\) See supra note 16 and accompanying text; infra note 205 and accompanying text.
B. Defendants' Rights

Before CIPA, the graymail dilemma precluded the prosecution of many defendants.184 Under CIPA, however, the prosecution has gained substantial control over the proceedings.185 For instance, defendants must alert the prosecution to their strategy early on in order to comply with the requirements of CIPA.186 Such drastic changes in procedure are particularly detrimental to the defendant seeking to gain access to information that may be crucial to his or her defense, as the government controls the defendant’s access to documents by claiming that he or she has no need to know the information sought.187 Indeed, as one court noted, “[i]t is difficult to imagine how even someone innocent of all wrongdoing could meet” the burden of rebutting the undisclosed evidence against him.188

In cases involving classified information, a court must consider both the government’s need to maintain national security and the defendant’s need to gain access to materials that common sense would dictate to be relevant,189 for instance, to a parole or clemency application. However, there is currently no test to guide the courts in deciding these complex and fundamental issues.190Although specific circumstances may warrant the government protecting classified information even from security-cleared counsel,191 nondisclosure in

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

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

Id.

185. See supra note 173 and accompanying text.

186. See supra note 173 and accompanying text.

187. Supra Part I.D for a discussion of the need to know requirement.

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

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

190. See supra Part I.D.

191. As when the attorney is being monitored by a party whose interests are adverse to the nation’s security, or other such situations.
criminal cases where a defendant's liberty is at stake must not be taken lightly.\(^{192}\)

The government enjoys wide latitude when operating under the premise of national security. For instance, in keeping with the trend favoring stated national security interests over claims of individuals,\(^{193}\) the Supreme Court has ruled that the President has authority to revoke a person's passport on the ground that the passport holder's activities in foreign countries are likely to cause damage to U.S. national security.\(^{194}\) Although courts have acknowledged a "compelling interest" in protecting the nation's security,\(^{195}\) courts have also stressed that the government's goals, legitimate as they may be, do not override the rights of a criminal defendant.\(^{196}\)

When considering the government's interest in national security, courts "must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim to innocence."\(^{197}\) The Constitution guarantees all criminal defendants a "meaningful opportunity to present a complete defense,"\(^{198}\) which is a

\(^{192}\) Moreover, the Supreme Court has explained that "the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained." N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring). \(^{193}\) See supra Part II.A. \(^{194}\) Haig v. Agee, 453 U.S. 280 (1981). \(^{195}\) See Snepp v. United States, 444 U.S. 507, 509 n.3 (1980). "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." \(^{196}\) See, e.g., United States v. Smith, 780 F.2d 1102, 1107 (4th Cir. 1985) (requiring admission of classified information that is "helpful to the defense of an accused, or is essential to a fair determination of a cause" (citations omitted)); see also N.Y. Times, 403 U.S. at 718-19 (electing not to defer to the government even though the case involved national security) (Black, J., concurring); United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990) (applying the Smith standard, noting that while the government's interest in protecting national security must be considered, it "cannot override" the defendant's right to a fair trial); United States v. Rezaq, 899 F. Supp. 697, 708 (D.D.C. 1995) (stating that the government's national security interest "cannot override the defendant's rights"); United States v. Poindexter, 698 F. Supp. 316, 320 (D.D.C. 1988) ("[I]n the end, defendant's constitutional rights must control."); Ridge v. Police and Firefighters Ret. & Relief Bd., 511 A.2d 418, 425 n.11 (D.C. 1986) (noting that a "Kafkaesque chain of secrecy is not what the Due Process Clause contemplates"). The circuit courts have been split as to whether to grant the government's requests to close certain deportation hearings to the public due to national security concerns. Compare Detroit Free Press v. Ashcroft, 303 F.3d 681, 685-86 (6th Cir. 2002) (holding that the Constitution limits non-substantive immigration laws and does not require special deference to the government), with North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (deferring to a government claim that access to a deportation hearing would threaten national security). \(^{197}\) Fernandez, 913 F.2d at 154; see also Rezaq, 899 F. Supp. at 708. \(^{198}\) California v. Trombetta, 467 U.S. 479, 485 (1984).
“fundamental element of due process of law.” These rights include effective assistance of counsel, due process, and pursuit of post-conviction remedies. In fact, under CIPA, a court does not initially consider the government’s national security concerns when making a relevancy determination. Only after a court decides that information is relevant and material does CIPA require the court to consider equally the government’s national security interests and the defendant’s right to prepare an effective defense when ruling on whether to grant the defense’s request for classified information.

Because there is currently no objective test for courts to apply in balancing national security interests against defendants’ rights, Part III suggests a multi-part analysis to be used by courts in determining whether defense counsel has satisfied the need to know requirement in cases involving classified information. The court, when evaluating the attorney’s need for access, should look to the benefit potentially gained by the defendant compared with the probability of a breach to national security using the multi-part test articulated in the next part.

III. AN OBJECTIVE NEED TO KNOW TEST

In this era of increased judicial deference to government claims of national security concerns, it is particularly critical to develop a test that courts can follow in their determinations of need to know. The need to know standard discussed in United States v. Lewis is helpful insofar as it attempts to define the nebulous expression, but it remains gravely insufficient. The Lewis test is inapposite in cases where national security concerns conflict with defendants’ rights because it

201. See, e.g., United States v. Baptista-Rodriguez, 17 F.3d 1354, 1364 (11th Cir. 1994) (“[T]he district court may not take into account the fact that evidence is classified when determining its ‘use, relevance, or admissibility.’” (quoting United States v. Collins, 720 F.2d 1195, 1198 (11th Cir. 1983))).
202. For criteria used by courts to determine relevance and materiality, see supra notes 100-04 and accompanying text.
203. See United States v. Moussaoui, No. CR. 01-455-A, 2003 WL 21263699, at *5 (E.D. Va. Mar. 10, 2003) (citation omitted); see also United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990) (stating that “before admitting classified evidence, the trial court takes cognizance of both the state’s interest in protecting national security and the defendant’s interest in receiving a fair trial.... Were it otherwise, CIPA would be in tension with the defendant’s fundamental constitutional right to present a complete defense”).
204. See supra Part I.
205. See supra note 16 and accompanying text.
206. 743 F.2d 1127, 1129 (5th Cir. 1984) (holding that the lower court did not abuse its discretion in prohibiting defendant’s second attorney from examining a presentence investigation report in connection with a motion to reduce defendant’s sentence and that such refusal did not deprive defendant of his rights to due process and effective assistance of counsel); see supra notes 126-33 and accompanying text.
was developed in a case that did not involve classified information.\textsuperscript{207} Moreover, the court’s three-part analysis in that case failed to define counsel’s need to know in sufficient detail to provide a meaningful standard for determining in any given case whether counsel actually needs to gain access to the classified information.\textsuperscript{208} In the absence of a clear definition of “need to know,” the term remains a factor by which the government can circumvent CIPA, manipulate the courts, and potentially violate the rights of criminal defendants.\textsuperscript{209}

A. An Objective Need to Know Test

A thorough, objective test is needed in order to ensure equitable and concrete reasoning in cases where a defendant’s attorney seeks access to classified information. After counsel has obtained the appropriate level of security clearance and has signed the approved non disclosure documents,\textsuperscript{210} a court should balance\textsuperscript{211} the following three groups of factors: those which impact directly upon the government’s need for secrecy, those relating primarily to the defendant’s need for access to the classified information, and the factors affecting both the need for secrecy and the defendant’s “need to know.” Part III.A expands upon the three-part analysis which, if utilized by courts, would lead to a fair determination of defense counsel’s need to know\textsuperscript{212} while respecting the government’s concerns for protecting national security.\textsuperscript{213}

1. Factors Directly Addressing the Government’s Interest in National Security

   a. The Possibility that Access May Compromise an Ongoing Investigation

The most important element to be considered by a court is the probability that access by security-cleared counsel will compromise an ongoing investigation. The concerns are heightened in any case when the government’s investigation is ongoing, because the accuracy of the classified information “increases the possibility that unauthorized disclosures might place additional lives in danger.”\textsuperscript{214} Although this

\textsuperscript{207} See Lewis, 743 F.2d at 1128-29.
\textsuperscript{208} See id.; supra notes 126-33 and accompanying text.
\textsuperscript{209} See supra notes 15-16 and accompanying text.
\textsuperscript{210} See supra notes 106-09 and accompanying text.
\textsuperscript{211} See supra note 17.
\textsuperscript{213} See supra note 181 and accompanying text.
\textsuperscript{214} See United States v. Bin Laden, 58 F. Supp. 2d 113, 121 (S.D.N.Y. 1999); see also supra note 161.
fact alone is not sufficient to deny access to a security-cleared attorney, the increased risk of danger in an ongoing investigation warrants greater protection of the classified information sought than information which cannot possibly impair such an investigation.

Congress has also acknowledged the significance of protecting information that is presently pertinent to ongoing proceedings. Under FOIA, there are exceptions to the requirements to disclose information relating to the methods and rules of government organizations in order to protect an ongoing investigation. The Central Records System of the Federal Bureau of Investigation is similarly exempt from certain access requirements in cases where disclosure might compromise a "pending sensitive investigation." Thus, a court would be justified in denying a defendant access to classified materials if it determines that an ongoing investigation likely will be compromised as a result of granting access, even if those making the request are security-cleared attorneys.

If the government can show that access would be harmful to an ongoing investigation, then this factor would weigh heavily against granting access to the classified materials at issue. Ordinarily the danger of compromising an investigation would be low, because a court is evaluating access by a security-cleared attorney. The government therefore has the burden of showing that access by this attorney would compromise a current investigation. As the right of access must be balanced against the interest in conducting a criminal investigation, this factor should be accorded significant weight in cases when the government can show that access would be to the detriment of an ongoing investigation.

b. The Government’s Stated Reasons for Denying Access

Next, a court should take into account the government’s stated reasons for denying access to the defendant. These reasons must not be vague and speculative; they must be based on information which tends to prove that there in fact is no need to know. Rather than being permitted to invoke generalized assertions about the theoretical incremental risk of inadvertent disclosure if even one more person is allowed access, the government must show specific, identifiable damage that disclosure to this particular security-cleared attorney would pose to national security.

A court should evaluate very carefully the government’s alleged justification for denying defense counsel access to pertinent information, as the defendant is potentially stripped of life or liberty as a result of a court’s deference to the government. However, this

215. See supra notes 75-81 and accompanying text.
216. 28 C.F.R. § 16.96(b)(2) (2003); see also supra note 81.
217. See supra note 31 and accompanying text.
element of the test would not be sufficiently compelling to tip the scale substantially unless the government's stated reason would defeat the defense attorney's security clearance. Were the government to have a basis for questioning the attorney's trustworthiness despite his or her security clearance, this factor may be weighted heavily on the side of denying access to the classified materials. Absent such a justification, however, the government's stated reason should not be a crucial factor when balancing the elements of the test, because the attorney is presumed trustworthy by the fact of his or her security clearance.

c. The Position and Rank of the Government Official Opposing Access

A court should also consider the position and rank of the official in the government, if any, who is opposing access to the classified information. For instance, the Secretary of State's opposition should be given more weight than that of a lower-ranking bureaucrat or, even worse, an unidentified government employee whose views are communicated to a court by government counsel without specific attribution. It would be unjust for a court to ignore the status of the individual opposing access and to keep anonymous the face of the official who is opposing the defendant's interests.\textsuperscript{218}

For a court to view equally the challenges by any government official regardless of rank would be unfair, as there is a hierarchy in every government agency. Thus, an objection "from a government agency" may mean that opposition to access comes from merely a low-level bureaucrat, perhaps only a case agent. If justified in opposing access, the agent should be able to successfully convince his or her superior—who presumably has access to the same materials as the subordinate—to intervene for the sake of protecting national security.\textsuperscript{219} Thus, if the agent is unsuccessful in convincing an official

\textsuperscript{218} As the stakes are so high for the defendant, the court also should require the government either to identify exactly who objects to access, or to withdraw the objection. \textit{See} United States v. 2323 Charms Rd., 946 F.2d 437, 445 (6th Cir. 1991) (Merritt, C.J., dissenting) (noting the similarities in that case to Kafka's \textit{The Trial}, and asking how the defendant is expected to reply to charges "when the case against him is based on unknown sources, unidentified people and an undescribed investigation"); \textit{see also} Kafka, \textit{supra} note 12, at 12 ("[T]hough I am accused of something, I cannot recall the slightest offense that might be charged against me. But that even is of minor importance, the real question is, who accuses me?" (emphasis added)). The government official opposing access—not government counsel—therefore should be required to submit a detailed affidavit to the court stating in specific terms and on the basis of first-hand knowledge why access should be denied.

\textsuperscript{219} \textit{Cf.} Doe v. Tenet, 329 F.3d 1135, 1151 (9th Cir. 2003) ("To invoke the state secrets privilege, a formal claim of privilege must be lodged by the head of the department which has control over the matter, after actual personal consideration of the evidence by that officer." (quoting United States v. Reynolds, 345 U.S. 1, 7-8 (1953)) (alteration in original)); \textit{see supra} note 74 and accompanying text.
with greater stature and authority to deny access and only submits his or her own opposition to granting access, such a lack of agency support likely indicates that the agent's position is untenable, even if the agent is intimately involved with the details of the case.

However, a court should not give great weight to this particular factor when balancing the elements. Even opposition from a high-level government official should not necessarily preclude access by a security-cleared attorney who is seeking to effectively represent his client. If the government were justified in believing that disclosure to this attorney would pose a risk to national security, then the attorney should never have been granted security clearance to begin with. Yet the official's rank is worth considering nonetheless, as a court should take into account the source of the opposition to access.

d. The Age and Classification of the Materials

The age of the classified materials in question should be considered as well. Information that is current and still poses a direct risk to national security should be protected more vigilantly than older, more obsolete materials which are of virtually no use to those who seek to harm the nation.\textsuperscript{220} A court should evaluate the defendant's request while bearing in mind that the information once deemed potentially harmful to national security may now be completely benign. Any considerations of national security interests must "be viewed in the light of circumstances as they exist at the time the request for disclosure is made—not when the affidavit was prepared or the material filed with the court,"\textsuperscript{221} as older information may be rendered virtually harmless with the mere passage of time.\textsuperscript{222}

Under the applicable executive order, there is a general presumption that certain information should be declassified after ten years.\textsuperscript{223} This provision indicates that, ordinarily, information does not retain its potential for damage beyond that period of time. Where access to such older information would be helpful to the defense, the government should have the burden of persuading a court that the documents are still worthy of protection for national security purposes.

If the information is not older than ten years, then the burden of proving that the information is obsolete should rest on the defendant, and a court should still consider defense counsel's good faith claim of need and earnestly assess the other factors in this test. There is authority for holding that even information which is older than three years and which does not relate to future events is worthy of lesser

\textsuperscript{220} See supra note 51.
\textsuperscript{221} United States v. Ahmad, 499 F.2d 851, 855 (3d Cir. 1974).
\textsuperscript{222} See id.
\textsuperscript{223} See supra notes 46-52 and accompanying text.
protection than information which is newer and therefore remains currently viable.224

A court should also consider the classification level of the materials in determining whether access should be granted.225 Information in the highest classification category—top secret—should receive greater protection than information in the lower categories of secret or confidential. To the extent different portions of the documents at issue contain information in different classification categories, a court should evaluate each portion of the documents separately.

Indeed, the government, which has a legitimate interest in protecting national security, may be justified in attempting to protect the information sought from unnecessary disclosure, even to security-cleared attorneys. The level of classification, therefore, is worth considering, as the greater the sensitivity of the materials, the greater the protection necessary for the materials. However, the fact of security clearance demonstrates that counsel may be trusted with materials which fall under the classification level at issue. Thus, a court should take into account the level of classification but should not accord it significant weight.

2. Factors Directly Relating to Defendant’s Need for Access

a. Defendant’s Stated Reasons for Requiring Access

A court should consider whether the reasons stated by the defense for access constitute a bona fide purpose. As classified information is not discoverable on a showing of purely theoretical relevance where the government asserts a classified information privilege,226 it is both reasonable and necessary for a court to require the defense to state grounds for requiring access to the classified information.

A concrete, plausible reason should suffice, because access to the information may lead the defendant to information which can be of immeasurable value to his or her case. For instance, a plan to prepare a parole or clemency application on behalf of a client,227 or to apply for a writ of habeas corpus228 would constitute a legitimate rationale for requiring access to the classified information, thereby satisfying this element of the test. This fact should substantially impact the balance of the factors. However, if the reason stated is clearly

224. See N.Y. Times Co. v. United States, 403 U.S. 713, 722 n.3 (1971) (Douglas, J., concurring); see also supra text accompanying note 161.

225. See supra notes 41-42 and accompanying text. Counsel must have the appropriate clearance level, of course, in order for the court to continue its analysis. See supra note 107 and accompanying text.

226. See supra note 133.

227. See supra notes 64-65 and accompanying text.

228. See supra note 63 and accompanying text.
conjectural or a fishing expedition, such as an attorney seeking access to materials which are not directly related to a client’s case, then a court could find that this element has not been satisfied and that it would weigh against granting access.

b. The Severity of the Defendant’s Sentence

A court should note the severity of the sentence before proceeding with its analysis of whether defense counsel has demonstrated a “need to know.” A defendant sentenced to life in prison, for instance, has a greater need than one sentenced to probation, because the liberty interest in the first instance is so much greater.

A court should accord substantial weight to this factor—whether or not it is in the defendant’s favor—as it directly affects the degree of urgency required in addressing the request for access. A defendant on death row, therefore, would benefit most from this factor. For an individual facing only a year in prison, this factor could weigh solidly on the side of denying access. In cases where the defendant has a less extreme sentence, a court must look to the totality of the circumstances to determine the role of this factor.

3. Factors Encompassing the Conflicting Needs for Secrecy and Access

a. Leaks of the Information

A court should also consider whether government personnel have leaked any of the information sought by the defendant and whether such leaks have harmed the defendant’s interests. A prosecutor has a duty to refrain from making extrajudicial comments that have a “substantial likelihood of heightening public condemnation of the accused.” Furthermore, the prosecutor must also attempt to

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229. See Pilon v. United States Dep’t of Justice, 796 F. Supp. 7, 8 n.1 (D.D.C. 1992) (“To ‘leak’ is synonymous . . . with divulge, disclose, make public. In Washington parlance, it is usually thought of as the surreptitious disclosure of information to the press for political or bureaucratic advantage.” (citation omitted)).

230. See, e.g., id. at 9 (“[I]n actions reminiscent of Franz Kafka’s novel The Trial, Department of Justice officials leaked confidential information concerning plaintiff with considerable abandon, while at the same time plaintiff was told that he could not be allowed access to the facts underlying the investigation the government had conducted of him.” (internal citations omitted)).

231. Model Rules of Prof’l Conduct R. 3.8(f) (2003) (supplementing Rule 3.6, which prohibits extra-judicial statements which have a “substantial likelihood of prejudicing an adjudicatory proceeding”). Id. cmt. 5. A prosecutor’s extra-judicial statements, in the context of a criminal prosecution, can also create the problem of increasing public condemnation of the defendant. See id. Therefore, prosecutors are expected to “avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.” Id.
prevent others associated with the government in a criminal case from making not only damaging statements, but also statements which have a "substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." As these rules refer to "a criminal case," government officials should be held to this standard not only for pre-conviction defendants, but also for defendants seeking post-conviction relief.

This factor should be accorded substantial weight when a court balances the elements. The potential damage caused by a leak could be devastating to a defendant, as the presumably negative light in which the defendant is portrayed gives an unfair and incomplete picture of the defendant's situation, bolstered by the fact that the information is classified and thus carries imprimatur of legitimacy. The defendant's attorney must be allowed to access the relevant materials in order to combat destructive and incomplete statements, if only to state that he or she has viewed the relevant documents and that they do not say what some claim, thereby attempting to negate the public relations damage incurred by the defendant.

b. Previous Access by Other Individuals

A court should look next at whether the government has allowed other individuals to access the information at issue, and if so, how many others and under what circumstances. Assuming the information is primarily related to the defendant's case, this factor should be given substantial weight if others have accessed the same classified material.

As a practical matter in most cases, the usual reasons for anyone to access a prisoner's court record, for example, would be in connection with some post-conviction remedy that the prisoner is seeking, such as parole, habeas corpus, or clemency. If even one person in the government has a need to know the contents of the prisoner's record in order to oppose a post-conviction remedy, it is unfair to deny defense counsel access to the same record on the ground that counsel has no need to know when the defense attorney wishes to use the information in favor of the prisoner in the very same context.

c. Previous Access by Defendant or Prior Counsel

If the defendant or prior counsel has previously been afforded access to the materials in question, that fact should point in the

232. See id. R. 3.8(f).
233. Id. R. 3.6(a). Exceptions to these rules include requesting assistance in obtaining necessary evidence and information and warning the public of danger concerning the behavior of the individual involved. Id. R. 3.6(b).
234. Id. R. 3.8.
direction of allowing new counsel similar access. The earlier disclosure indicates that the government was not as concerned about the secrecy of the materials as it might be about materials that have never been disclosed to anyone outside of government circles. Thus, the fact of prior access should militate in favor of subsequent access. Moreover, at least one court has implied that there is even more reason to allow new counsel access if previous counsel was less than competent or is now unavailable or if the defendant either no longer remembers the contents of the documents or never understood them.\footnote{235}

**B. Balancing the Factors**

After determining each factor independently, a court should weigh the ten factors against one another.\footnote{236} A court must engage in a “difficult and sensitive balancing process,”\footnote{237} as no single part of the test is dispositive in the analysis.\footnote{238} If, taken together, several of the elements weigh heavily on the side of denying access to the defendant, then a court may decide in favor of the government’s claim that the need to know requirement has not been fulfilled. Conversely, if numerous factors favor granting access, then a court should grant the defendant’s request for access to the classified materials at issue. In each case, a court should consider the elements individually and, under the specific circumstances of the case at hand, evaluate whether some are more important than others.

A court can apply the proposed multi-part test in any case when security-cleared defense counsel seeks access to relevant classified information. The tension between the government’s need to maintain national security and the defendant’s right to gain access to relevant materials is manifested in the introductory hypothetical cases of the three defendants whose security-cleared attorneys are seeking access to classified information related to their respective cases. In each instance, the government would argue that allowing the defendant’s attorney to gain access to this information poses an unnecessary risk to national security. The defendant would maintain that his attorney

\footnote{235. See United States v. Lewis, 743 F.2d 1127, 1129 (5th Cir. 1984); see also supra notes 126-32 and accompanying text.}
\footnote{236. See, e.g., Barker v. Wingo, 407 U.S. 514, 533 (1972) (utilizing a multi-part test to determine whether the defendant had been deprived of due process); see also supra note 17.}
\footnote{237. Barker, 407 U.S. at 533.}
\footnote{238. See id. The Supreme Court stated:

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities . . . .}

\emph{ld.}
poses no threat whatsoever, as evidenced by the attorney’s government-issued security clearance. The following scenarios use these hypothetical defendants to illustrate the types of cases in which a court must evaluate the defense counsel’s need to know and suggest how a court should weigh the government’s interest in national security against a defendant’s rights.

1. Defendant #1

John Allen, \textsuperscript{239} convicted of conspiracy to commit espionage, is currently serving the fifteenth year of his life sentence. Classified portions of Allen’s court record contain unsubstantiated allegations by a high-level government official that Allen had committed “the crime of the century” and consequently cost the United States numerous human lives as well as many millions of dollars in damage control. In addition, a government official declared to the media, “if you only knew what I knew, you would agree that this prisoner should not be granted clemency,” and gave an example from the classified record of the damage that Allen allegedly caused.

Allen’s newly-retained attorney has never viewed the documents containing these allegations, as he did not represent Allen in the underlying criminal case. Both the defendant and his original attorney viewed the materials at issue years ago; however, previous counsel is unavailable, and Allen does not recall the contents of the documents after so many years. Allen’s current counsel requests access to his complete court record in order to prepare a clemency application that properly addresses the entire record. If Allen’s newly-retained counsel were not privy to these classified statements, it would be impossible for him to prepare a complete—or effective—application for executive clemency, because the government official evaluating Allen’s clemency application would presumably have access to his entire court record.\textsuperscript{240} Thus, omitting from the clemency application an argument rebutting the allegations in Allen’s record would make for an unpersuasive application, which would most likely result in a denial of his request for clemency.

The court is faced with the question of whether Allen’s attorney has demonstrated a need to know the information requested. To grant access without considering the potential risks to national security

\textsuperscript{239} The names of all three defendants in this part are a product of the author’s imagination.

\textsuperscript{240} See 28 C.F.R. § 1.6 (2003). The applicable rule states:

\begin{quote}
Upon receipt of a petition for executive clemency, the Attorney General shall cause such investigation to be made of the matter as he or she may deem necessary and appropriate, using the services of, or obtaining reports from, appropriate officials and agencies of the Government, including the Federal Bureau of Investigation.
\end{quote}
would be imprudent, as the government must safeguard the security of the nation. Similarly, to dismiss out of hand Allen's claim of need to know would, as a practical matter, eliminate his right to apply for clemency, because his application would not be effective unless he has access to the classified information from his court record that his adversaries have invoked.

Under the proposed test, a defendant such as John Allen would fare well because many of the elements weigh heavily in his favor. First, access would not compromise an ongoing investigation, as the materials are nearly two decades old. Second, Allen is planning to submit a clemency application, which should constitute a valid purpose for needing access to the information contained in his own court record. Third, he is serving a life sentence, entitling him to greater consideration than a defendant with less at stake. In addition, a government official has leaked portions of the classified materials in a manner detrimental to Allen's interests, numerous other individuals have gained access to the information at issue, and previous counsel had access to the documents.

Other elements which weigh in favor of granting the defendant's request are less central to the court's analysis, but they should be considered as well: the government's generalized assertion that access could theoretically harm national security should be discounted, because the government has not articulated a concrete risk; and the fact that the materials are approximately two decades old indicates a reduced risk that disclosure to a security-cleared attorney would result in damage to national security. All of these factors should weigh in favor of the court's granting access to the classified portions of Allen's court record.

Two factors, however, would not weigh in Allen's favor: opposition by a high-level government official and the top secret classification

241. Such statements are especially damaging to a prisoner seeking clemency, as the prisoner is at the mercy of an executive branch beholden to public opinion. Public relations play a vital role in a president's decision to grant or deny a clemency request, illustrated in one case by the defendant's lawyers "acting principally as lobbyists, working with public relations specialists and individuals—foreign government officials, prominent citizens, and personal friends of the President—who had access to the White House." In re Grand Jury Subpoenas, 179 F. Supp. 2d 270, 274 (S.D.N.Y. 2001) (discussing the strategy of Marc Rich and Pincus Green in their ultimately successful attempt to obtain clemency from then-President Bill Clinton). Therefore, a court should explore this element assiduously and more strongly consider allowing the defendant an adequate response to the harmful publicity. For example, government officials have caused injury to the reputation of the prisoner Jonathan Pollard by stating to the press that the contents of his classified records indicate that Pollard does not deserve any favorable treatment. See, e.g., Angelo M. Codevilla, Israel's Spy Was Right About Saddam, Wall St. J., Aug. 6, 1998, at A14; Letters to the Editor, Justice for the Friendly Spy, Wall St. J., May 14, 1998, at A23; James Gordon Meek, Spy Pleads for Open Secrets, N.Y. Daily News, Sept. 3, 2003, at 26. His attorneys have a need to know what is contained in the record to combat such negative public relations, among other reasons.
level of the materials. The court must balance the factors favorable to the defendant against those which are unfavorable. For Allen, many elements weigh heavily on the side of granting access to the classified materials, while the two on the other side of the scale are less weighty factors. The court, therefore, should decide to grant the defendant’s request in the case of John Allen.

2. Defendant #2

Mohammad Brown, a convert to Islam, is a pre-conviction defendant whose attorney is requesting access to materials that a defendant is ordinarily entitled to access under *Brady v. Maryland*,\(^2\) that is, evidence favorable to the accused. These classified documents remain in the sole possession of the CIA and the FBI, and the materials are not specific to Brown’s case; rather, the materials relate to acts allegedly committed by many individuals charged with a variety of crimes. The government resists on the ground that these materials contain newly classified information, the disclosure of which could compromise an ongoing investigation. Furthermore, the government argues that despite the attorney’s security clearance he is not to be trusted with sensitive information, as the terrorist organization al-Qaeda is currently monitoring closely his activities and conversations.

Brown stands accused of committing several acts of terrorism against the United States and of being an active member of al-Qaeda. In addition, Brown has openly and repeatedly prayed for the destruction of the United States and has pledged allegiance to Osama Bin Laden. The investigation is ongoing, and Brown is awaiting trial. If convicted, he is eligible for the death penalty. Brown’s attorney seeks access to the materials because he suspects that they may contain exculpatory evidence, though counsel has given no reason as to how he reached that conclusion.

The court here must weigh the potential risks to national security posed by disclosure to an alleged terrorist’s counsel against Brown’s rights to due process and effective assistance of counsel. In this case, nearly every factor of the proposed test weighs in favor of denying access to his attorney, and the court should deny the request of Brown’s counsel. The factors that weigh most heavily in favor of denying access are the following: (1) access might compromise the ongoing investigations associated with Brown’s case and other related cases; (2) the defense has not put forward a concrete reason for requiring access, as the rationale is based solely on an unsubstantiated suspicion that the classified materials, which are not exclusively

\(^2\) 373 U.S. 83 (1963) (holding that the prosecution’s failure to turn over evidence favorable to a criminal defendant upon request violates due process if the evidence is material to either guilt or punishment).
related to Brown's case, may contain exculpatory materials; (3) there have been no leaks by government officials; and (4) the defense has never previously viewed the classified materials sought, which demonstrates that the information has greater protection than information which has been disclosed to non-government parties.

A few less weighty factors also do not militate in favor of granting access. The government's reason for denying access is legitimate, as Brown and his attorney are being monitored by groups hostile to America's national security interests. The opposition by numerous high-level government officials must be respected as well, and the fact that the materials consist of new pieces of intelligence and the top secret classification level are further reasons to deny access. In addition, access by other individuals would not weigh in favor of granting access to Brown's attorney because the content of the materials does not relate specifically to Brown. Thus, the fact that others have viewed the documents does not indicate that any action adverse to Brown's case has resulted from such access.

The only factor weighing in favor of granting access is the severity of Brown's potential sentence: the death penalty. As this is a balancing test, this important factor can tip the scale significantly, perhaps even outweighing all the other factors under certain circumstances. In Brown's case, however, one element also weighs quite heavily against granting access—the probability that disclosure would compromise an ongoing investigation—and several other elements also weigh, although only moderately, in favor of denying access. Therefore, the court should deny the request by Brown's counsel for access to the classified materials.

3. Defendant #3

William Cramer was recently convicted of spying for North Korea after the United States government discovered his involvement in selling information related to U.S. nuclear weapons programs. He has been sentenced to eight years in prison, although he was merely an accessory to the crime of espionage and did not directly cause any grave damage to the United States. Cramer's court record contains classified statements by a low-level government official who was intimately involved as a case agent in Cramer's criminal investigation. In the classified portion of the record, labeled only "confidential," the government official proposed that Cramer's detention should be especially long because Cramer will continue to be a threat to national security for many years to come, owing to Cramer's personal knowledge of current government secrets. Thus far, neither the defendant's adversaries nor other individuals have accessed the record at issue, and therefore there have been no leaks of the information. The government's sole justification for denying access is that Cramer and his attorney are long time friends and, as such, the government
believes that the attorney will feel compelled to share the classified information with his client, whom the government does not trust with the sensitive data.

Cramer's attorney is working on a habeas corpus petition and is hopeful that the judge will vacate Cramer's sentence, on the ground that at Cramer's sentencing, the prosecution presented evidence which—in Cramer's attorney's view—the prosecution knew to be untruthful. The attorney requests access to Cramer's entire court record, which his current attorneys have never viewed, in order to file a brief addressing all possible arguments by the government.

This case is somewhat more difficult than those of Allen and Brown, as several elements work in favor of granting access to the classified materials, while others do not favor access, and still others remain in a gray area, leaving the court to render a most difficult decision. The factor which weighs most heavily in favor of granting access is that Cramer has a bona fide reason for requiring access, namely applying for a writ of habeas corpus. Furthermore, the government has not put forward a concrete justification for denying access by merely stating that Cramer and his attorney have a close relationship and that the government fears that counsel will share the information with his client. Also on the side of granting access are the facts that the individual opposing access is only a low-level government official and that the classification level—confidential—is relatively low.

Those factors which do not favor access by Cramer's attorney are as follows: the lack of leaks; the lack of access by other individuals; and the lack of prior access by either defendant or defense counsel. Although these elements do not affirmatively suggest that the court should deny access, the presence of these factors would add to the compelling nature of the defendant's argument for access, while their absence instead indicates that the need to know may not have been demonstrated.

Several elements could cut in either direction in Cramer's case. First, it is uncertain whether access would compromise an ongoing investigation. Cramer's own criminal case evidently has concluded; yet the government may still be involved in an ongoing investigation of his co-conspirators. If so, this factor should militate against granting access; if not, it should weigh in favor of granting access. Second, his eight-year term is certainly not as severe as life imprisonment or a death sentence; however, he is at the beginning of his term and faces an additional seven years of incarceration. The court might find that the remaining term is long enough to weigh, even slightly, in favor of access. Therefore, if all else were equal, this factor would push the balance in favor of access. Finally, the materials sought consist of information which is between five- and ten-years-old. As the materials are still relatively new, Cramer must
prove that the information lacks potency. If he succeeds, then the
court might decide that this factor weighs on the side of granting
access. However, if Cramer does not meet this burden, then this
factor would weigh in favor of denying access. Although this case is
difficult to decide, the court should probably grant the request of
Cramer’s counsel. As illustrated above, the factors weighing in favor
of permitting access outweigh—however slightly—those which do not
favor access.

4. The Ultimate Decision: The Scales Are Balanced Evenly

In a case where the scales are perfectly balanced, a court would be
forced to render an even more difficult decision. Whether a court
decides to deny or grant access, the choice will either potentially
compromise national security by releasing the sensitive data or, on
some level, violate a defendant’s rights. However, as the government
alone controls classified information as well as access to such data,
fairness requires that the government be charged with the burden of
establishing why security-cleared counsel should be denied access.

The presumption must be in favor of the defendant because the
government has vast resources available to mount an argument
against access by security-cleared counsel; where the government fails
to meet its burden, access should be granted. Although the
government’s interest in preserving national security is certainly
legitimate, it is better to err on the side of preserving the rights of the
defendant than to deny access without cause, thereby unjustifiably
violating the defendant’s rights.

CONCLUSION

Constantly permeating our system of criminal justice are two
competing themes: procedural protection of the accused and the
quest for the truth.\textsuperscript{243} In order to address the plight of the criminal
defendant, courts developed a due process model to ensure that
defendants are given fair trials.\textsuperscript{244} This formula recognizes higher
stakes in criminal proceedings, most notably the loss of liberty and the
concomitant social stigma, and requires that the scales of justice be
tilted in favor of the accused.\textsuperscript{245} Thus, if those scales were perfectly
balanced in a case when a court must determine whether defense
counsel has a need to know, a court should decide to grant access.
However, where the risks to national security outweigh the benefits to
the defendant, a court may choose to deny defense counsel’s request.
If applied fairly and objectively in any given case, the proposed test

\textsuperscript{243} See Darren Allen, Note, The Constitutional Floor Doctrine and the Right to a
\textsuperscript{244} See, e.g., Packer, supra note 58.
\textsuperscript{245} See, e.g., Allen, supra note 243.
properly balances a defendant's rights and the government's need to protect national security by preventing unnecessary disclosure of classified information.

Fair criminal justice proceedings are, of course, essential to any system of justice.\textsuperscript{246} Judicial tendencies to defer to government claims of national security risks\textsuperscript{247} undermine the delicate balance between necessary government secrecy and the need to protect the rights of criminal defendants. Moreover, the problem of overclassification threatens to unnecessarily deprive defendants of information which may be essential to their cases.\textsuperscript{248} As a democracy depends on the free flow of information,\textsuperscript{249} it is disturbing that the need to know prerequisite to accessing classified information remains undefined in any meaningful way. A fundamental flaw remains in our system of justice until our courts adopt an objective test in their analyses of the criminal defense attorney's "need to know."

\footnotesize

\begin{itemize}
    \item 246. Clemency and parole are, for most prisoners, the final avenues of relief and should a fortiori be encompassed by such fairness. See supra notes 64-65. Clemency is especially vital to our system of criminal justice because it provides the "fail-safe" for persons to whom gross injustices have been done. See Moore, supra note 61, at 131. Its necessity is manifest in the fact that almost every constitution in the world provides for a pardoning power. See id. at 7.
    \item 247. See supra notes 16, 205 and accompanying text.
    \item 248. See supra note 136 and accompanying text.
    \item 249. Exec. Order No. 13,292, 3 C.F.R. 196, 196 (2003) ("Our democratic principles require that the American people be informed of the activities of their Government.").
\end{itemize}