

Volume 31 | Issue 1

1980

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Recommended Citation

Karen H. Greve, *Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 Case W. Res. L. Rev. 84 (1980)

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NOTES

GRAYMAIL: THE DISCLOSE OR DISMISS DILEMMA IN CRIMINAL PROSECUTIONS

A defendant's request for classified information in a criminal prosecution often places the Government in a "disclose or dismiss" dilemma: it must choose between disclosing the information or dismissing the prosecution. This Note examines recent prosecutions which brought the use of this "graymail" tactic into public view. After weighing the Government's and defendant's interests in graymail-type prosecutions, the Note analyzes the advantages and disadvantages of the mechanisms presently available to resolve the dilemma. The author also examines the proposed congressional reforms which seek to create a uniform system of rules for the disclosure of classified information during the course of criminal prosecutions. The Note concludes, however, that such a codification would prove to be cumbersome and inefficient. As an alternative it proposes a resolution of the dilemma which incorporates the congressional goals into the existing rules of evidence and criminal procedure.*

INTRODUCTION

THE PRIMARY GOAL of criminal procedure is to secure a just adjudication before the court by carefully balancing the government's interests in deterrence and retribution against the defendant's interests in life and liberty.¹ Submitting classified information² regarding national security³ matters as evidence in a criminal prosecution, however, generates additional concerns which must be factored into this traditional balancing.

In light of these concerns, the court must balance the Govern-

* For a discussion of the legislation enacted by Congress while this Note was in the final stages of publication, see Author's Note following the Conclusion.

1. See generally Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1149-50 (1960).

2. "'Classified information' means information or material . . . that is owned by, produced for or by, or under the control of, the United States Government, and that has been determined pursuant to this Order or prior Orders to require protection against unauthorized disclosure, and that is so designated." Exec. Order No. 12,065, 43 Fed. Reg. 28,949, 28,961 (1978).

Information may be classified as "top secret," "secret," or "confidential," depending on the expected degree of harm which its unauthorized disclosure would cause to national security: the disclosure of top secret information would cause "exceptionally grave damage," disclosure of secret information would cause "serious damage," and disclosure of confidential information would cause "identifiable damage." *Id.* at 28,950.

3. "'National Security' means the defense and foreign relations of the United States." *Id.* at 28,961.

ment's claim of a state secrets privilege against the defendant's request for disclosure. Consequently, the use of classified information in criminal litigation creates a "disclose or dismiss" dilemma for the Government: either disclose the information in open court, possibly compromising the national security interests at stake, or dismiss the charges against the defendant.⁴ This disclose or dismiss dilemma, frequently used as a defense tactic to force the Government to abandon its proceedings, is actually a subtle form of blackmail and, as such, has been labeled "graymail."⁵

Graymail creates a perplexing situation across a spectrum of criminal offenses.⁶ Often, enforcement of the laws designed to

4. See 125 CONG. REC. H5763 (daily ed. July 11, 1979) (remarks of Rep. Murphy); *Graymail Legislation: Hearings on H.R. 4736 & H.R. 4745 Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 2-4 (1979) (statement of Phillip B. Heymann) [hereinafter cited as *Hearings on H.R. 4736 & H.R. 4745*].

5. The graymail threat in criminal prosecution may be either express or implied. An express graymail threat occurs when the defendant pressures for the release of classified information as a means of forcing the Government to drop the prosecution or when the defense threatens the Government with the disclosure of classified information in the hope of thwarting the prosecution. Implied graymail describes those attempts by the defense to obtain or disclose classified information which are simply the exercise of the defendant's legitimate right to prepare and conduct an adequate defense. In both situations, the Government may be presented with a disclose or dismiss dilemma.

Although this Note focuses only on graymail in the criminal context, the dilemma also arises in civil litigation. For instance, civil litigation with regard to classified information has arisen where former governmental employees have published books and articles concerning their experiences in government service. See, e.g., *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) (action by United States against former Central Intelligence Agency (CIA) employee to enjoin him from publishing a proposed book about his experience in government service); *United States v. Snepp*, 456 F. Supp. 176 (E.D. Va. 1978), aff'd in part, rev'd in part, 595 F.2d 926 (4th Cir. 1979), rev'd, 444 U.S. 507, rehearing denied, 445 U.S. 972 (1980) (United States brought a breach of contract suit against former CIA agent who had written and published a book without first submitting it to the CIA for prepublication review).

Civil litigation concerning the unauthorized disclosure of classified information also arises where government officials "leak" information to the press for subsequent publication. See *Espionage Laws and Leaks: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 69-87, 164-72 (1979) (statements of Mark Lynch and Thomas I. Emerson) [hereinafter cited as *Espionage Laws and Leaks*]; *The Use of Classified Information in Litigation: Hearings Before the Subcomm. on Secrecy and Disclosure of the Senate Select Comm. on Intelligence*, 95th Cong., 2d Sess. 89-93, 116-24 (1978) (statements of William Colby and Morton H. Halperin) [hereinafter cited as *The Use of Classified Information in Litigation*].

6. Graymail problems can arise in espionage cases, see, e.g., *United States v. Lee*, 589 F.2d 980 (9th Cir. 1979), as well as in cases involving bribery, perjury, obstruction of justice, narcotics trafficking, and murder, see, e.g., *United States v. Berrellez*, Crim. No. 78-120 (D.D.C. Feb. 8, 1979), *mandamus denied sub nom. In re United States of America*, No. 78-2158 (D.C. Cir. Jan. 26, 1979) (defendant was charged with multiple counts of

protect national security information may create the problem, since these statutes often require the disclosure of the very information which they seek to protect.⁷ Another major factor generating this vexing situation is the intelligence agencies' general reluctance to acquiesce in compromises regarding the disclosure of classified information, even when the Justice Department requests declassification of the data for use in a prosecution.⁸ This unyielding position has immobilized otherwise important investigations and prosecutions.⁹

The recent *Helms*¹⁰ and *Berrellez*¹¹ prosecutions, among others, have forced public attention on the graymail dilemma and have prompted congressional investigations.¹² These investiga-

perjury and conspiracy). For a discussion of notable graymail cases, see notes 35-70 *infra* and accompanying text.

7. For example, section 798 of title 18, which establishes a "strict liability" for the knowing and willful disclosure of classified information, 18 U.S.C. § 798 (1976), does not specify whether the prosecution has the burden of establishing the substantive validity of the classification of the material in order to prosecute under the statute. If the Government must prove the validity of the classification, it would probably be forced to disclose publicly the very information which the statute is designed to protect. In a comprehensive article on the espionage statutes, Professors Harold Edgar and Benno Schmidt argue that requiring the Government to prove proper classification could so compromise national security interests that imposing sanctions for improper classification would subordinate Government secrecy interests. See Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 930, 1066 (1973). For additional discussion of this problem, see SENATE SUBCOMM. ON SECRECY AND DISCLOSURE, SELECT COMM. ON INTELLIGENCE, 95TH CONG., 2D SESS., NATIONAL SECURITY SECRETS AND THE ADMINISTRATION OF JUSTICE 5, 23 (Comm. Print. 1978) [hereinafter cited as NATIONAL SECURITY SECRETS].

Although a consensus is lacking as to whether courts require the prosecution to establish the propriety of the classification, it is undisputed that the Government in criminal cases must prove beyond a reasonable doubt that the classified information disclosed actually caused damage to the national security. See Note, *United States v. Marchetti and Alfred Knopf, Inc. v. Colby: Secrecy 2, First Amendment O*, 3 HASTINGS CONST. L.Q. 1073, 1101 (1976).

8. See NATIONAL SECURITY SECRETS, *supra* note 7, at 3-4; *The Use of Classified Information in Litigation*, *supra* note 5, at 48-51 (statement of Robert Keuch). *But see id.* at 16-23 (statement of Admiral Stansfield Turner).

9. See NATIONAL SECURITY SECRETS, *supra* note 7, at 6-8. For an example of a prosecution thwarted by the CIA, see notes 35-38 *infra* and accompanying text.

10. *United States v. Helms*, Crim. No. 77-650 (D.D.C. Nov. 4, 1977) (the Justice Department bypassed a possible perjury prosecution against the former CIA director and instead entered into a plea bargain for a misdemeanor charge of contempt of Congress). See generally Lacovara, *Resolving the 'Disclose or Dismiss' Dilemma*, Nat'l L.J. May 14, 1979, at 19, col. 1.

11. *United States v. Berrellez*, Crim. No. 78-120 (D.D.C. Feb. 8, 1979), *mandamus denied sub nom. In re United States of America*, No. 78-2158 (D.C. Cir. Jan. 16, 1979).

12. See NATIONAL SECURITY SECRETS, *supra* note 7, at 1-4; *The Use of Classified Information in Litigation*, *supra* note 5, at 1-9.

tions have produced various proposals for solution of the dilemma,¹³ including new statutes, new rules of criminal procedure, and a revival of a state secrets privilege.¹⁴

A solution to the graymail dilemma, consistent with constitutional principles, does not appear to be obtainable through the enactment of a blanket rule.¹⁵ The precepts of criminal procedure strongly suggest that elimination of the graymail problem will be achieved only through a neutral arbiter's balancing of the interests involved. In light of these concerns, this Note weighs the competing interests of the prosecution and the defendant within the graymail context through an examination of various remedies which are presently available¹⁶ and proposed congressional reforms.¹⁷ These reforms, initiated by both Houses of Congress, are designed to create a uniform system of rules¹⁸ for the disclosure of classified information in pretrial, trial, and appellate proceedings.¹⁹ The Note explores the advantages and disadvantages of the present and future graymail solutions and concludes that the proposed congressional legislation may not present the best means of correcting the inefficiencies and ambiguities of the present remedies.²⁰ Finally, the Note proposes an alternative to the apparent congressional intent to codify a distinct set of procedural rules governing the use of classified information in criminal trials.²¹

13. See NATIONAL SECURITY SECRETS, *supra* note 7, at 30-32; *The Use of Classified Information in Litigation*, *supra* note 5, at 2-5.

14. See generally NATIONAL SECURITY SECRETS, *supra* note 7, at 30-32; *The Use of Classified Information in Litigation*, *supra* note 5, at 56-59.

15. Under the British Official Secrets Act, 1920, 10 & 11 Geo. 5, c. 75, sched. 1, at 492, if the prosecution declares that the evidence contains information relevant to the security and protection of the Crown, it is neither required to prove the validity of the classification nor to disclose the contents of the materials to the defendant. The prosecution does not risk disclosure because it is permitted to inform the judge *in camera* (and most likely *ex parte* as well) that the information is classified without revealing the contents of the information.

Under the British statute, all information relating to government affairs belongs to the Crown. Under American jurisprudence, however, all information belongs to the people. The first and sixth amendment guarantees, in particular, would probably render the enactment of a statute comparable to the British Official Secrets Act unconstitutional. U.S. CONST., amends. I, VI. See also *The Use of Classified Information in Litigation*, *supra* note 5, at 107 (statement of Lawrence Houston).

16. See notes 71-184 *infra* and accompanying text.

17. See notes 185-247 *infra* and accompanying text.

18. The tools which are presently available for resolving the graymail dilemma are applied only on an ad hoc basis. See, e.g., *Hearings on H.R. 4736 & H.R. 4745*, *supra* note 4, at 2-5 (statement of Phillip B. Heymann).

19. See notes 185-247 *infra* and accompanying text.

20. *Id.*

21. See notes 248-64 *infra* and accompanying text.

The proposal incorporates the congressional goals into the existing rules of evidence and criminal procedure through a series of amendments as this approach promises a more efficient resolution of the graymail dilemma.²²

I. GRAYMAIL CASES: GRAYMAIL 4, JUSTICE 1

The ordinary criminal prosecution frequently presents a number of evidentiary difficulties.²³ These difficulties, however, are magnified when the evidence to be revealed at trial is classified information.²⁴ If there is a possibility that prosecution of a defendant will reveal sensitive, classified information during the course of the trial, the defendant possesses an effective weapon with which to thwart the prosecution.²⁵ This graymail weaponry, while appearing to be novel, has been sporadically used to thwart government prosecutions since the early days of the nation.²⁶ Only recently has extensive press coverage of several criminal prosecutions focused public attention on the graymail problem.²⁷

One reason for delayed press coverage of graymail is the nature of the problem. Because unsuccessful graymail prosecutions are rarely publicized by the Government, information relating to the facts of the incident and the Government's reasons for aborting the prosecution have not been readily available.²⁸ Furthermore, it is not uncommon for a government department to use the graymail tactic to prevent the Justice Department from even initi-

22. *Id.*

23. *See, e.g.*, *State v. Holbert*, 416 S.W.2d 129, 133 (Mo. 1967), where the defendant's conviction for carrying a concealed weapon was reversed because two additional pistols belonging to the defendant, other than the one charged in the indictment, were introduced into evidence, and were referred to extensively by the prosecutor, who also passed them to the jury for examination.

24. *See The Use of Classified Information in Litigation*, *supra* note 5, at 33 (statement of Robert Keuch).

25. *See NATIONAL SECURITY SECRETS*, *supra* note 7, at 11 n.6.

26. The first criminal defendant to employ the graymail tactic was Aaron Burr, who sought to serve a subpoena upon the President; Chief Justice Marshall upheld his claim. *See United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807).

27. Lacovara, *supra* note 10, at 19, col. 1-2.

28. In light of this problem, S. 1482 and H.R. 4736, two of the three bills comprising the proposed Classified Information Criminal Trial Procedures Act which is presently under congressional consideration, contain reporting provisions which require the Justice Department to state its reasons for abandoning a classified information prosecution in a written report to Congress. *See Congressional Record*, S. 1482, 96th Cong., 1st Sess. § 12, 125 CONG. REC. S9185 (daily ed. July 11, 1979); *id.* H.R. 4736, 96th Cong., 1st Sess. § 202, 125 CONG. REC. H5764 (daily ed. July 11, 1979).

ating a criminal investigation into alleged criminal activity.²⁹

Frequently, the primary obstacle to criminal prosecutions in the classified information context is the Central Intelligence Agency (CIA).³⁰ For example, in an unauthorized disclosure investigation, the Justice Department routinely poses eleven questions³¹ to the CIA,³² including one which inquires into the possibility of declassifying the information for prosecutorial purposes.³³ The CIA often refuses to declassify the information, causing the Justice Department to abandon its investigation.³⁴

This uncooperative attitude is exemplified by the dismissal of an indictment against a CIA operative, Puttahnorn Khramkhruan,

29. A 1978 report by the Senate Subcommittee on Secrecy and Disclosure states that an intelligence agency reported the details of an intensive Korean government lobbying effort on Capitol Hill to the Justice Department in 1971. Attempts by the Federal Bureau of Investigation (FBI) to investigate the reports were thwarted, however, since the information regarding the matter was classified and would not be disclosed to the Bureau. No further action was taken regarding the Korean affair until 1975. See NATIONAL SECURITY SECRETS, *supra* note 7, at 13.

This scenario raises the issue of who should decide whether the national security risk substantially outweighs the duty of the Justice Department to prosecute. The power to prosecute and the reciprocal power not to prosecute are vested solely in the Executive branch of the government, U.S. CONST., art. II, § 3, and in all but the most unusual circumstances, this Executive power is exercised by the Attorney General through the Department of Justice. See, e.g., 28 U.S.C. §§ 515-516 (1976); *accord* United States v. Nixon, 418 U.S. 683, 694 (1974) (pursuant to 28 U.S.C. §§ 509, 510, 515, 533, the Attorney General delegated authority to represent the United States in the Watergate investigation to a Special Prosecutor with "unique authority and tenure").

Congress has specifically provided the Attorney General with the authority to investigate violations of the federal criminal code by government employees. 28 U.S.C. § 535(a) (1976). Because agency directors are required to report "expeditiously" to the Attorney General any information concerning criminal misconduct by government employees, *id.* § 535(b), they are usually not free to decide whether their subordinates should be prosecuted for apparent violations of the law. Congress, however, has given the Director of Central Intelligence the statutory authority to protect intelligence sources and methods from unauthorized disclosure. 50 U.S.C. § 403(g) (1976). This responsibility may conflict with the Attorney General's authority to investigate and prosecute criminal violations if the prosecution could disclose intelligence sources and methods. NATIONAL SECURITY SECRETS, *supra* note 7, at 25. In a 1954 understanding between the Justice Department and the CIA, the CIA was given the authority to investigate misconduct by its own employees. *Id.* at 19-20. The CIA has used this authority to effectively block prosecutions by the Justice Department of both government and nongovernment employees by simply "stonewalling" and refusing to allow the Justice Department access to relevant information. *Id.*

30. *The Use of Classified Information in Litigation*, *supra* note 5, at 2-3.

31. For a listing of the questions posed by the Justice Department, see *The Use of Classified Information in Litigation*, *supra* note 5, at 216.

32. These questions are not posed solely to the CIA; any governmental agency which possesses the desired information is subject to this inquiry. *Id.* at 44-45, 50-51.

33. *Id.* at 216; NATIONAL SECURITY SECRETS, *supra* note 7, at 7-8.

34. For a more detailed discussion of this problem, see *The Use of Classified Information in Litigation*, *supra* note 5, at 44-46, 50-51.

who was under investigation by the Justice Department for narcotics trafficking.³⁵ Khrankhruan had threatened that his defense would include evidence showing that the CIA knew about his opium smuggling.³⁶ Because of this graymail tactic, the CIA informed the Justice Department shortly before trial that it would neither produce documents necessary for discovery nor provide a rebuttal witness on the defendant's charge of advance knowledge.³⁷ CIA officials later testified before the House Subcommittee on Government Information and Individual Rights that the Agency based its subsequent request for dismissal of the indictment on national security grounds.³⁸

The reluctance of the CIA to declassify information for Justice Department use in criminal prosecutions has often created conflicts between the two governmental bodies.³⁹ Solutions to this type of graymail dilemma lie outside the scope of procedural and evidentiary rules as these cases do not usually result in criminal prosecutions.⁴⁰ It has been suggested, however, that stricter administrative standards controlling government employees and the activities of the intelligence agencies should be promulgated to obviate this facet of the graymail threat.⁴¹ In addition, since the prosecution of a federal employee may pose conflict of interest problems for the Justice Department, Congress may want to create a special office to conduct all classified information prosecutions of such employees.⁴² Such remedies may, however, seem

35. NATIONAL SECURITY SECRETS, *supra* note 7, at 14-15.

36. Jenkins, *Graymail*, *Student Law.*, Dec. 1979, at 16, 19.

37. *Id.*; NATIONAL SECURITY SECRETS, *supra* note 7, at 14.

38. NATIONAL SECURITY SECRETS, *supra* note 7, at 14. According to the testimony of CIA officials, the CIA had requested the Justice Department to dismiss the indictment because of its belief that the criminal prosecution would lead to the revelation of sources and methods of ongoing CIA clandestine operations in Southeast Asia. The witnesses left unsaid, however, that the CIA would have found it embarrassing to have one of its operatives convicted of narcotics trafficking. *Id.*

39. See NATIONAL SECURITY SECRETS, *supra* note 7, at 3, 6, 7-8; *The Use of Classified Information in Litigation*, *supra* note 5, at 64 (statement of Phillip Lacovara). *Contra, id.* at 11 (where Admiral Stansfield Turner states that relations between the CIA and Justice are neither strained nor hostile).

40. See notes 34-48 *supra* and accompanying text.

41. *The Use of Classified Information in Litigation*, *supra* note 5, at 64, 65-68, 79-80 (statement of Phillip Lacovara).

42. The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified at 28 U.S.C.A. §§ 591-598 (West Supp. 1979)), was designed to "preserve and promote the accountability and integrity of public officials and the institutions of the Federal Government and to invigorate the Constitutional separation of powers between the three branches of Government." S. REP. No. 95-170, 95th Cong., 2d Sess. 1, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4216, 4217. Included within this Act is a provision creating a Special

extreme in light of the Government's successful prosecution of a former CIA employee in *United States v. Kampiles*.⁴³

During the recent espionage prosecution of William Kampiles, a former CIA watch officer, the CIA made no effort to thwart the Justice Department's investigatory efforts.⁴⁴ The defendant in *Kampiles* had obtained a copy of the top secret KH-11 System Technical Manual for the KH-11 reconnaissance satellite while at work at CIA headquarters.⁴⁵ During a 1978 trip to Athens, Kampiles contacted a Russian agent to whom he sold the KH-11 manual for \$3000.⁴⁶ Returning to the United States, Kampiles approached a senior CIA official with the details of his alleged counterintelligence mission, asserting that he had received \$3000 "for general expenses."⁴⁷ Disbelieving his boast of "something for nothing," the Government indicted Kampiles on a total of six counts, including espionage.⁴⁸

Although espionage prosecutions routinely raise the problem of graymail,⁴⁹ the prosecution, with the cooperation of the trial

Prosecutor's Office to prosecute criminal suits involving high government officials. 28 U.S.C.A. § 533 (West Supp. 1979). A Special Prosecutor was deemed necessary to avoid the serious conflict of interests which would develop if the Department of Justice were to conduct the investigation and the subsequent prosecution. S. REP. NO. 95-170, 95th Cong., 2d Sess. 53, reprinted in [1978] U.S. CODE CONG. & AD. NEWS at 4269.

Notably, the American Civil Liberties Union supported the appointment of a Special Prosecutor in cases alleging abuses of power by the intelligence agencies and other government officials because, in these instances, it was possible that the Justice Department could not conduct a prosecutorial investigation in an impartial manner. *Special Prosecutor Legislation: Hearings on H.R. 2835 and Related Bills Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 48-49 (1978) (statement of Jerry Berman).

43. *United States v. Kampiles*, Crim. No. HCR 78-77 (N.D. Ind. Nov. 17, 1978), *aff'd*, No. 78-2646, slip op. (7th Cir. Nov. 15, 1979), *petition for rehearing denied*, No. 78-2646 (7th Cir. Jan. 24, 1980).

44. *United States v. Kampiles*, No. 78-2646, slip op. at 7 (7th Cir. Nov. 15, 1979).

45. *Id.* at 3-8. As a CIA employee, Kampiles monitored secret cables and spy satellite photographs. In evaluating these photographs, he used the top secret KH-11 System Technical Manual for the KH-11 reconnaissance satellite. *Id.* at 7.

The KH-11 satellite is designed to monitor foreign troops and military equipment movements by photographing them from outer space; the KH-11 manual reveals the limitations on the satellite's geographic coverage and also contains examples of the quality of the satellite's photographs. If the information contained within the manual were given to the Soviet Union, arguably they could develop effective camouflage to avoid the satellite's surveillance, thus reducing the effectiveness of this reconnaissance equipment. Wash. Post, Nov. 14, 1978, § A, at 6, col. 3.

46. *United States v. Kampiles*, No. 78-2646, slip op. at 4-6 (7th Cir. Nov. 15, 1979).

47. *Id.* at 5.

48. *Id.* at 1-3.

49. According to a United States intelligence source, "[O]ne of the problems [with an espionage prosecution] is that in order to prosecute we might just have to release classified

judge, successfully proved its case against Kampiles by introducing edited versions of the KH-11 manual at trial.⁵⁰ Kampiles was subsequently found guilty on all six counts and received a forty year sentence.⁵¹

*United States v. Kampiles*⁵² is one instance where judicial cooperation avoided the graymail dilemma. The prosecution of Kampiles, however, seems to represent the exception rather than the rule. In light of the unsuccessful prosecution of former CIA director Richard Helms,⁵³ *Kampiles* suggests that graymail undermines criminal prosecution only when high level officials are involved.

Richard Helms, like William Kampiles, was a CIA employee, but their similarity ends there. Purportedly, Helms used his position as a former director of the agency to graymail the Justice Department into dropping the prosecution against him on several perjury counts by threatening to introduce into evidence classified information and details of CIA practices.⁵⁴ The Justice Department delayed prosecuting Helms for almost two years. Finally, in 1977, it dropped the perjury counts, each with a maximum penalty of a five year sentence and a \$2000 fine, and allowed Helms to plead *nolo contendere* to a two-count misdemeanor, because he "did refuse and fail to answer questions" before the Senate Foreign Relations Committee on two occasions.⁵⁵ Through his plea, Helms managed to avoid the stigma of an admission of guilt and he received only a \$2000 fine and one year of unsupervised probation.⁵⁶

The *Helms* case produced a flagrant miscarriage of justice when viewed in light of the elements necessary to prove perjury. The only classified information required to be disclosed at trial would be evidence tending to show that perjury was committed.⁵⁷

information, and we just can't do that." Wash. Post, Aug. 20, 1978, § A, at 1, col. 3. See generally 18 U.S.C. §§ 794, 798 (1976) (standard of proof under these espionage statutes often requires the disclosure of the contents of the classified document at issue).

50. *Espionage Laws and Leaks*, *supra* note 5, at 18-19.

51. *United States v. Kampiles*, No. 78-2646, slip op. at 3 (7th Cir. Nov. 15, 1979); Wash. Post, Nov. 18, 1978, § A, at 10, col. 5.

52. *United States v. Kampiles*, No. 78-2646 (7th Cir. Nov. 15, 1979), *petition for rehearing denied*, No. 78-2646 (7th Cir. Jan. 24, 1980).

53. *United States v. Helms*, Crim. No. 77-650 (D.D.C. Nov. 4, 1977).

54. Jenkins, *supra* note 36, at 18.

55. Lacovara, *supra* note 10, at 19, col. 1.

56. Jenkins, *supra* note 36, at 18.

57. *The Use of Classified Information in Litigation*, *supra* note 5, at 118 (statement of Morton H. Halperin).

Any classified information not relevant to this element of the offense is irrelevant to the other aspects of the prosecution's case-in-chief, and probably to any part of the defense as well. Accordingly, since the alleged perjury committed by Helms had already been made public,⁵⁸ his prosecution should not have forced the revelation of substantial amounts of national security information. A result such as this leads to criticism that the Government uses graymail as a convenient excuse to avoid prosecuting one of its own, and thereby conceal embarrassing details of misconduct by government officials.⁵⁹

The recent International Telegraph and Telephone (ITT) cases⁶⁰ also raise this concern and illustrate the need for a uniform approach to the graymail problems. In connection with testimony given before a Senate subcommittee in 1973 regarding ITT's role in the 1970 Chilean presidential election, the Justice Department indicted two ITT officials, Robert Berrellez and Edward J. Gerrity, Jr., on counts of perjury and conspiracy.⁶¹ As a result of the corporation's relationship with the CIA's activities in Chile, criminal prosecutions of the ITT officials threatened to reveal sensitive information during trial.⁶² Consequently, the Justice Department sought to obtain a protective order from the district court judge as it had done in *Kampiles*.⁶³ Although it obtained an order restraining the defense from making unauthorized disclosures of CIA documents provided to them through pretrial discovery,⁶⁴ the trial judge refused to issue a protective order establishing a pre-trial framework for advance rulings on classified information issues.⁶⁵

Attempting to overturn the judge's ruling, the Justice Depart-

58. *Id.*

59. Jenkins, *supra* note 36, at 43.

60. The two ITT cases are *United States v. Berrellez*, Crim. No. 78-120 (D.D.C. Feb. 8, 1978), *mandamus denied sub nom. In re United States of America*, No. 78-2158 (D.C. Cir. Jan. 26, 1979), and *United States v. Gerrity*, Crim. No. 78-121 (D.D.C. Mar. 20, 1978). See Jenkins, *supra* note 36, at 19; Lacovara, *supra* note 10, at 19, col. 1.

61. Berrellez and Gerrity were charged with giving false testimony before the Senate Foreign Relations Committee's Subcommittee on Multinational Corporations. Lacovara, *supra* note 10, at 19, col. 1; Wash. Post, Aug. 19, 1978, § A, at 1, col. 4-5. The ITT officials were alleged to have falsely testified that ITT neither offered financial aid to the political opponents of socialist Salvadore Allende nor collaborated with the CIA in attempting to prevent Allende's election as president. *Id.* col. 5.

62. Lacovara, *supra* note 10, at 19, col. 1.

63. *Id.*

64. *Id.*

65. *Id.* Judge Robinson described the Government's request as "an unusual, extraordinary, unprecedented procedure to make an ordinary judgment about the relevance

ment sought a writ of mandamus from the United States Court of Appeals for the District of Columbia, arguing that the appellate court should use its supervisory powers to establish the desired pretrial procedures for cases like *Berrellez*, in which national security was likely to be compromised by the disclosure of certain secret information.⁶⁶ The court of appeals, however, denied the petition for mandamus.⁶⁷ Subsequently, the Justice Department dismissed the charges against both Berrellez and Gerrity because the threatened disclosure of national security information prevented further prosecution.⁶⁸

Not only do the ITT cases support the demand for new classified information procedures, they also create the image of the Justice Department as a willing victim in the graymail ploy: the classified information which prevented the prosecution was actually irrelevant to both the prosecution and the defense.⁶⁹ Moreover, since the perjury committed by Berrellez and Gerrity was publicly reported, it is questionable whether additional classified information would have been revealed as a result of the prosecutions.⁷⁰ Thus, considering the nature of the evidence necessary to prove perjury, it is possible that public trials of Berrellez and Gerrity could have followed the *Kampiles* pattern.

In *Kampiles*, the redaction procedure and the rules of evidence formed a successful means for counteracting the graymail ploy. These identical procedures, however, were insufficient to achieve the same results in the ITT cases when corporate officials were involved. It is possible that public trials of the ITT officials would have revealed highly classified information concerning CIA operations in Chile. It must be noted, however, that the ITT result adds to the evolving pattern of prosecutorial immunity for high level officials and prosecution of those in positions of less power and authority.

of proffered testimony; [and for which he possessed not] one iota of authority for any of the propositions that have been proposed by the Government." Jenkins, *supra* note 36, at 19.

66. *Id.*

67. United States v. Berrellez, Crim. No. 78-120 (D.D.C. 1978), *mandamus denied sub nom.* In re United States of America, No. 78-2158 (D.C. Cir. 1979). The appellate court explained that "the extraordinary remedy of mandamus is rarely available to the government to obtain review of pretrial orders in criminal cases," and thus, held that the district judge had not exceeded his authority in rejecting the novel procedures pressed upon him by the prosecutors. Lacovara, *supra* note 10, at 19, col. 1.

68. Lacovara, *supra* note 10, at 19, col. 1; Jenkins, *supra* note 36, at 19.

69. See *The Use of Classified Information in Litigation*, *supra* note 5, at 118 (statement of Morton H. Halperin).

70. *Id.*

The prosecutions of Kampiles, Helms, Berrellez, and Gerrity demonstrate the need for a more effective application of presently available substantive and procedural devices to handle the litigation problems presented by classified information. The erratic success record of the Justice Department in this context, however, indicates that present mechanisms create a legal vacuum more often than they successfully eliminate the graymail dilemma. Accordingly, this Note next examines the advantages and disadvantages of several substantive and procedural devices which are presently available to solve the graymail dilemma.

II. SOLVING THE GRAYMAIL DILEMMA WITH PRESENTLY AVAILABLE REMEDIES

Successful use of the graymail tactic not only forces the Government to abandon criminal prosecutions, but it also undermines the integrity of the criminal justice system⁷¹ and reinforces public opinion that those individuals with access to sensitive information enjoy a broad de facto immunity from prosecution.⁷² Therefore, much attention has been focused on finding a solution to the graymail dilemma. One suggestion is that a formal mechanism is needed to weigh the risks of disclosure against the benefits of prosecution and to avoid the creation of frustrating impasses which often lead to the abandonment of prosecutions.⁷³ A uniform approach would also be more likely to ensure a consistent application of those statutes and rules already designed to solve the graymail dilemma. Congressional codification of uniform, unambiguous provisions is thus imperative. The issue to be resolved, however, is how comprehensive the mechanism must be in order to enable the Justice Department to prosecute those individuals with access to classified information who break the law while preserving the defendant's constitutional rights to a public and fair

71. Testifying before the House Subcommittee on Legislation of the Permanent Select Committee on Intelligence on January 25, 1979, Senator Joseph Biden remarked:

The "graymail" phenomenon also tears at the fabric of our system of justice by creating an atmosphere of contempt for that system among those in contact with it. Try explaining to a man doing twenty years to life for an economic crime why another man or woman who compromised the freedom and security of the entire Nation and its citizenry is not prosecuted or is allowed to enter a plea bargain with knowledge that his sentence, if any at all, will be suspended. [N]one of us comprehend [unequal justice] nearly as well as the man doing twenty years to life.

Espionage Laws and Leaks, *supra* note 5, at 90 (statement of Senator Joseph Biden).

72. *Hearings on H.R. 4736 & H.R. 4745*, *supra* note 4, at 3-5 (statement of Phillip B. Heymann).

73. *Id.*

trial as guaranteed by the sixth amendment. Before discussing this issue, however, it is necessary to examine the mechanisms presently available to combat the "disclose or dismiss" dilemma.

A. *The Espionage Laws*

Placing one's means of access to defense or other national security secrets at the disposal of foreign governments or factions constitutes the offense of espionage.⁷⁴ Since the purpose of espionage statutes is to prevent disclosure of certain information, it is possible that they could be used to defuse the graymail threat. Drafting statutes to prevent espionage and its product—the unauthorized disclosure of information pertaining to military affairs, foreign policy, and national security—is a difficult task. The statute must encompass the classic case of spying, while balancing several competing interests. For example, a comprehensive espionage statute must balance the need to disclose relevant information so that the public may exercise its franchise⁷⁵ against the need to withhold information which, if disclosed, could be harmful to national security.⁷⁶

The language of the current espionage statutes⁷⁷ creates problems of interpretation regarding the specific conduct prohib-

74. *Espionage Laws and Leaks*, *supra* note 5, at 112 (statement of Harold Edgar and Benno C. Schmidt, Jr.).

75. The democratic form of government inherently conflicts with the need for secrecy. Without an independent source of information, Congress must either rely on those with access to the secrets or exercise its power blindly. Consequently, as the scope of privileged information increases, the ability of the public, through its elected representatives, to make and express a meaningful opinion decreases. Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 878-79 (1966).

76. *Espionage Laws and Leaks*, *supra* note 5, at 108. In addition, such a comprehensive statute must attempt to resolve the problems associated with governmental employee infidelity, executive rights and duties regarding top secret information and the rights and duties of a free press. *Id.*

77. The current espionage statutes are scattered throughout titles 18 and 50 of the United States Code; however, the primary provisions are contained in sections 793 through 798 of title 18. Subsections 793(a), 793(b), and 794(a) of title 18 together make the gathering and communication of information relating to the national defense a crime if such acts are done with either an "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation. . . ." 18 U.S.C. § 793(a) (1976).

Similarly, subsection 794(b) prohibits publishing or otherwise communicating national security information during wartime with an intent to make such information available to the enemy, 18 U.S.C. § 794(b) (1976), and subsections 793(d) and 793(e) prohibit both the "willful" communication of national security information and documents to persons "not entitled to receive it" and the unlawful retention of this information by those same persons. 18 U.S.C. §§ 793(d)-793(e) (1976). For a comprehensive study of the espionage laws, see Edgar & Schmidt, *supra* note 7.

ited, the precise limits on the scope of the statutes, and the standards of culpability and intent. For example, 18 U.S.C. § 793(a) prohibits the gathering of national security information if the act is done with the "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation."⁷⁸ This section seems to be applicable to a reporter who gathers national security information for publication in the interests of informed national debate. Moreover, the publication of such information by the reporter's newspaper may be an offense under subsection 793(e)⁷⁹ if done with "reason to believe" that a foreign government will benefit.⁸⁰

The possibility that newspaper publication is included within the definition of the crime is strengthened by the absence of an intent requirement in subsection 793(e).⁸¹ Unlike the other subsections of the statute, this provision does not expressly require that an actor be motivated by an intent to injure the United States or benefit a foreign country; it requires only an awareness of the significance of the information.⁸² Therefore, a newspaper which published classified information would be culpable under this subsection if it was merely aware of the classified nature of the

78. 18 U.S.C. § 793(a) (1976).

79. Section 793(e) provides in pertinent part:

Whoever having unauthorized possession of, access to, or control over any document, . . . relating to the national defense . . . which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated . . . or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . [s]hall be fined not more than \$10,000 or imprisoned not more than 10 years, or both.

18 U.S.C. § 793(e) (1976).

80. *Id.*

81. *Id.* The statutory language indicates that any "communicating" of national security information to unauthorized personnel constitutes a criminal offense. If this interpretation is correct, "[t]he source who leaks defense information to the press commits an offense; the reporter who holds onto defense materials commits an offense; and the retired official who uses defense material in his memoirs commits an offense." Edgar & Schmidt, *supra* note 7, at 1000. Thus, "public speech in this country since World War II has been rife with criminality." *Id.*

82. *See, e.g.,* United States v. Coplon, 88 F. Supp. 910, 911-12 (S.D.N.Y. 1949), where the trial court construed subsection 793(d) to require a lesser intent than subsection 793(b); thereby making a violation of both subsections separate and distinct offenses. According to the court, subsection 793(d) required merely that the defendant had obtained possession of the documents and had attempted to transmit them to another who was not entitled to receive them. *Id.* Section 793(d) is virtually identical to section 793(e): the former covers those actors with lawful possession of national security documents and the latter covers those with unauthorized possession.

information. The legislative history of these provisions, however, indicates that Congress did not intend to include newspaper publication within the definition of the crime.⁸³ It is unclear precisely how the broad implication inherent in these provisions is to be narrowed in order to effectuate this congressional intent.⁸⁴

Subsection 793(c) is another example of espionage legislation which, if interpreted literally, would subject a considerable range of conduct relating to public debate to criminal sanctions.⁸⁵ Liability under this subsection depends upon the interpretation of the phrase "for the purpose aforesaid."⁸⁶ It may mean that simply obtaining national security information, irrespective of the actor's intent, constitutes the criminal offense, or, alternatively, it may mean that the actor must obtain the information with an "intent or reason to believe that the information will be used to the injury of the United States, or to the advantage of any foreign nation."⁸⁷ The absence of any language which would constitute an intent requirement indicates that the purpose of obtaining national security information constitutes the crime.⁸⁸ This construction would permit a conviction regardless of the actor's intent to harm the United States.⁸⁹

Although support for this interpretation of subsection (c) is provided by the statute's structure, some congressional drafters apparently did not intend such a construction.⁹⁰ Both law enforcement authorities and Congress have assumed that the identical culpability standard required for a violation of subsections 793(a) and (b), which specify an intent requirement, is also required for a

83. Edgar & Schmidt, *supra* note 7, at 1000, 1030.

84. *Id.* at 998-99, 1032.

85. 18 U.S.C. § 793(c) (1976). This subsection provides in part:

Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

Id.

86. This phrase refers to the purpose prohibited by subsection 793(a), that is, obtaining classified information.

87. 18 U.S.C. § 793(a) (1976).

88. Edgar & Schmidt, *supra* note 7, at 1059.

89. *Id.*

90. See 54 CONG. REC. 2820 (1917); 55 CONG. REC. 778 (1917).

violation of subsection (c).⁹¹

In addition to the classic espionage provisions, Congress also enacted other statutes which prohibit the disclosure of certain categories of classified information⁹² as well as the disclosure of such information between particular classes of persons.⁹³ Because these statutes are narrower in their scope, they may represent more precise congressional drafting. For example, 18 U.S.C. § 798, which prohibits the disclosure of cryptographic information, specifically states that a violation occurs upon participation in the proscribed conduct, regardless of the actor's motivation.⁹⁴

One significant problem which section 798 does not cover is whether improper classification constitutes a defense.⁹⁵ The Senate and House Judiciary Committees reported that "[t]he bill specifies that the classification must in fact be in the interests of national security,"⁹⁶ indicating that appropriateness of classification is a question of fact.⁹⁷

Section 798 presents a difficult problem: it appears to require the disclosure during a criminal trial of cryptographic documents which the Government is trying to keep secret. In addition, the

91. Edgar & Schmidt, *supra* note 7, at 1059, 1076-77. Ironically, in light of this confusion regarding the culpability standards, Justice Reed unequivocally asserted in *Gorin v. United States*, 312 U.S. 19 (1940), that the vagueness of this statutory language was irrelevant because scienter was required. Justice Reed stated:

We find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. The obvious delimiting words in the statute . . . requiring "intent or reason to believe that the information to be obtained is to be used to the injury of the United States or to the advantage of any foreign government" . . . requires those prosecuted to have acted in bad faith. The sanctions only apply when *scienter* is established.

Id. at 27-28 (emphasis in original).

92. *See, e.g.*, 18 U.S.C. § 798 (1976) (prohibiting the revelation of communications intelligence and cryptographic information).

93. *See, e.g.*, 18 U.S.C. § 952 (1976) (prohibiting the disclosure of diplomatic codes and correspondence in this country); 50 U.S.C. § 783(b) (1976) (prohibiting federal employees from divulging classified information to an agent of a foreign government or a member of a designated Communist organization).

94. 18 U.S.C. § 798 (1976).

95. *See* note 2 *supra* for a definition of "classified information" pursuant to Executive Order No. 12,065, 43 Fed. Reg. 28,949 (1978). *See also* 18 U.S.C. § 798(b) (1976).

96. S. REP. NO. 111, 81st Cong., 1st Sess. 3 (1949); H. REP. NO. 1895, 81st Cong., 2d Sess. 3 (1950).

97. *But see* *Scarbeck v. United States*, 317 F.2d 546 (D.C. Cir. 1962), *cert. denied*, 374 U.S. 856 (1963) (refusing to allow a defense of improper classification under 50 U.S.C. § 783(b) (1976), a statute which bars government employees from communicating classified information to an agent or representative of a foreign government). A principal argument against allowing the improper classification defense is that it requires the Government to disclose an enormous amount of information to prove its case-in-chief.

statute provides an exception for the disclosure of classified information other than that classified expressly for intelligence communication purposes.⁹⁸ Conceivably, therefore, disclosure of classified information which is outside the purview of section 798 would not invoke that section's penalties.⁹⁹

The current espionage laws attempt to treat a wide variety of problems: classic spying, government employee breaches of official secrecy orders, and newspaper publication. The resulting morass demonstrates the difficulty of prohibiting all forms of classified information disclosure in a single statutory provision. For example, sections 793 and 794 encompass the disclosure of all national security information by anyone, while distinguishing between actual spying and well intentioned publication through cumbersome and opaque descriptions of the actor's mental state.¹⁰⁰ Prohibitions thus result which either leave publication without restraint, or subject it to sweeping prohibitions which may be appropriate to spying, but inappropriate to informed debate regarding national policy. It appears, therefore, that espionage statutes are ill-suited to control graymail threats.

B. *Relevance to the Defense: Excluding Classified Information Evidence from the Trial*

Although the graymail dilemma is most commonly found in espionage prosecutions, it may also occur in criminal prosecutions involving narcotics, extortion, obstruction of justice, perjury, and even murder—crimes which are generally not associated with national security risks.¹⁰¹ Criminal statutes applicable to these nonespionage prosecutions, therefore, do not specifically provide for the disclosure of classified information during the course of the litigation. Absent such specific statutory provisions, the prosecution can, in some instances, rely on the general principles of the rules of evidence to counterbalance the graymail threat. For example, one possible key to averting the "disclose or dismiss" dilemma is the irrelevance of the classified information to the issues in the case.

98. 18 U.S.C. § 798 (1976).

99. See *The Use of Classified Information in Litigation*, *supra* note 5, at 77-78 (statement of Phillip Lacovara). A violation of section 798 is subject to a maximum prison term of ten years, a \$10,000 fine, or both.

100. *Espionage Laws and Leaks*, *supra* note 5, at 111 (statement of Harold Edgar & Benno C. Schmidt, Jr.).

101. See NATIONAL SECURITY SECRETS, *supra* note 7, at 12.

1. *Rules of Relevance*

Where the classified information is irrelevant to the material issues in the case, disclosure of the sensitive information can be avoided.¹⁰² Therefore, unless the classified information which a defendant hopes to introduce at trial is relevant to his or her defense, it is not admissible and the prosecution cannot be compelled to disclose the classified data.¹⁰³ If the prosecution insists upon this precise interpretation of relevance, it can successfully quash the defendant's graymail threat, as demonstrated by *United States v. Ehrlichman*.¹⁰⁴

Before the return of the indictment in *Ehrlichman*, defense counsel warned the prosecution that it would force the most highly classified information regarding national security into the public record.¹⁰⁵ The Watergate Special Prosecutor, however, refused to dismiss the proceedings. Rather than concede to defense threats, he sought ways to neutralize the defense strategy.¹⁰⁶ Eventually, an indictment against the defendants was returned.

Subsequently, the defendants attempted to make good their threat and demanded the production of highly classified data, including nuclear missile targeting plans.¹⁰⁷ The defendants sought

102. The Federal Rules of Evidence define "relevant evidence" as "evidence 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.

Relevance, however, is not an inherent characteristic of any item of evidence. Rather, it exists only as a relation between a piece of evidence and a matter properly provable in the case. Whether this relationship exists, depends upon the tenets evolved by science or experience which are applied logically to the instant matter. *Advisory Committee's Explanatory Statement Concerning the Federal Rules of Evidence*, 56 F.R.D. 183, 216-18 (1973) [hereinafter cited as *Advisory Committee's Notes*].

The Federal Rules of Evidence state: "Evidence which is not relevant is not admissible." FED. R. EVID. 402. This provision, as well as the provision that all relevant evidence, with certain exceptions, is admissible, is "a presupposition involved in the very conception of a rational system of evidence." *Advisory Committee's Notes, supra*, at 216-17 (citing J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 264 (1898)). Similar provisions are found in CAL. EVID. CODE §§ 350-351 (West 1977). See also UNIFORM RULE OF EVIDENCE 7(f); KAN. STAT. ANN. § 60-407(f) (Weeks 1965); N.J. R. EVID. 7(f). These rules provide that all relevant evidence is admissible, and thus leave to implication the exclusion of irrelevant evidence.

103. See FED. R. EVID. 401, 402; *Advisory Committee's Notes, supra* note 102, at 215-17.

104. 376 F. Supp. 29 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977) (prosecution resulting from the break-in at the office of Daniel Ellsberg's psychiatrist).

105. See *The Use of Classified Information in Litigation, supra* note 5, at 55.

106. *Id.*

107. *Id.* See also *United States v. Ehrlichman*, 546 F.2d at 930-32.

to obtain national security information to support the defense that they believed the break-in at the office of Daniel Ellsberg's psychiatrist was fully justified by national security concerns.¹⁰⁸ The Special Prosecutor argued, however, that such information was irrelevant to the charge of conspiracy to violate fourth amendment rights because "good faith" motivation was not a valid defense to this crime.¹⁰⁹ Both the district court and the court of appeals agreed with the Special Prosecutor.¹¹⁰ Consequently, the difficult choice between disclosing classified information vital to national security needs and forfeiting an important prosecution was avoided.

The Ellsberg break-in case represents one incident where the rules of relevance successfully thwarted the defendant's attempt to graymail the prosecution. The recent cases in which the Justice Department attempted to prosecute two ITT officials for perjury and conspiracy¹¹¹ and the attempted prosecution of former CIA director Richard Helms¹¹² represent examples of other situations which presented the risk of disclosing classified information at public trial. Unlike *Ehrlichman*, however, these prosecutions were subverted by the defendants' successful use of the graymail tactic.¹¹³

Whether the rules of relevance could have actually prevented graymail in these cases is pure speculation. The procedure employed by the Special Prosecutor in *Ehrlichman*, however, should work well in perjury or conspiracy cases, particularly where the defendant seeks to introduce classified information to show good faith motivation, since motive is irrelevant to the material issue in these crimes.¹¹⁴ In these cases, the classified information is relevant only to the extent it proves that the crime indeed was committed.¹¹⁵ Beyond this purpose, the classified information is

108. 546 F.2d at 917-18.

109. *Id.* at 918-19.

110. *See The Use of Classified Information in Litigation*, *supra* note 5, at 55.

111. *See* notes 60-70 *supra* and accompanying text.

112. *See* notes 53-59 *supra* and accompanying text.

113. The exact relation of the classified information to the defense in these cases is unknown. Sources simply indicate that the Government feared the public disclosure of highly classified information if these cases went to trial. *See generally* Jenkins, *supra* note 36, at 18-19; Wash. Post, Aug. 19, 1978, § A, at 1, col. 3; *id.* at 12, col. 2.

114. *See* notes 65-70 *supra* and accompanying text.

115. Testifying before the House Subcommittee on Legislation, former general counsel to the Special Prosecutor, Phillip Lacovara postulated:

[I]n a perjury case, it is highly doubtful that the defendant is entitled to introduce background information of a highly classified nature designed to show what his

irrelevant to both the defense and the proof of the case. Therefore, the defendant should be unable to compromise national security by threatening to introduce the information as evidence at trial.

Although the rules of relevance may help to undercut the graymail threat in certain cases, the rules may also be advantageous to the defendant if the classified information in question is determined to be relevant and admissible as evidence at trial.¹¹⁶ A principal drawback to relying on the rules of relevance, however, is that the rules normally become operative when the opposing party offers the classified evidence at trial. Because of the sensitive nature of some classified information, the prosecution often prefers to avoid the possibility of disclosure at trial by litigating the issue of relevance *in camera*, or even before the trial begins.

2. *The In Camera Hearing*

The *in camera* hearing provides for judicial determination of the admissibility of evidence outside the public courtroom, and presents an opportunity for the prosecution to prevent public dissemination of classified materials. Greater use of the *in camera* proceeding would enable the court to determine the relevance of the classified information in question to the issues without risking the disclosure of sensitive information in open court.¹¹⁷

Conceptually, however, the *in camera* proceeding directly con-

false answers were designed to conceal. Motive is simply not a material issue in the case, and the classified information is not relevant at the trial.

See *The Use of Classified Information in Litigation*, *supra* note 5, at 55.

The proposed federal Criminal Code expressly recognizes this proposition. Subsection 1345(d) precludes a defense in a false statements prosecution that, in a closed congressional session, a false answer was necessary "to prevent the disclosure of classified information or to protect the national defense." S. 1437, 95th Cong., 1st Sess., § 1345(d) (1978).

Notably, specific intent crimes, such as perjury or conspiracy, do not acknowledge the good faith defense of motive. See, e.g., *United States v. Ehrlichman*, 546 F.2d at 918-19.

116. Not all relevant evidence is admissible at trial. Under the Federal Rules of Evidence, relevant evidence is excluded where the probative value of such evidence is "substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

117. An *in camera* adversary proceeding enables both parties to present their arguments to the presiding judge. During the proceeding, the parties are subject to judicial controls, such as the threat of contempt, to prevent them from disclosing the classified information to the public. The *in camera* adversary hearing thus protects both the secrecy of the materials and the defendant's right to prepare an adequate defense. See *The Use of Classified Information in Litigation*, *supra* note 5, at 99-100, 102-03.

flicts with the sixth amendment's express guarantee of a public trial for the accused,¹¹⁸ although courts have long recognized that a defendant's right to a public trial and his or her right to be present at all hearings are not absolute.¹¹⁹ In recognition of the competing interests at stake, the Supreme Court has indicated that a court may properly determine in an *in camera*, *ex parte* proceeding whether electronic surveillance conducted for national security purposes was lawful.¹²⁰ The *in camera*, *ex parte* proceeding has also been held to be a permissible means of determining whether the defendant has standing to challenge the constitutionality of the electronic surveillance¹²¹ and whether the electronic surveillance material sought by the defendant during discovery is relevant.¹²²

Using the *in camera* proceeding in cases involving classified information allows the courts to protect both the national security interests and the defendant's interest in a fair trial.¹²³ Acting *in camera*, judges can decide preliminary issues, such as discovery requests and the relevance of evidence, without risking general public dissemination of the classified information.¹²⁴ The *in cam-*

118. U.S. CONST. amend. VI. On its face, the *in camera* hearing appears to contradict the right to a public hearing, since the *in camera* hearing is actually a secret hearing.

119. See, e.g., *Illinois v. Allen*, 397 U.S. 337 (1970) (trial judge may exclude defendant from courtroom if defendant's behavior is disruptive); *United States v. Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973) (protection of the government's secret "hijacker's profile" justifies exclusion of defendant and public from the courtroom); *Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969) (exclusion of public justified to preserve truthful testimony of witness); *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965) (exclusion of public justified where its presence disrupted the trial). See generally Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U.L. REV. 1138 (1966); Note, *The Accused's Right to a Public Trial*, 42 NOTRE DAME LAW. 499 (1967).

120. See, e.g., *Giordano v. United States*, 394 U.S. 310, 314 (1969) (Stewart, J., concurring).

121. See, e.g., *Taglianetti v. United States*, 394 U.S. 316, 317-18 (1969) (per curiam).

122. See, e.g., *United States ex rel. Williams v. Dutton*, 431 F.2d 70, 71 (5th Cir. 1970). But see *Dennis v. United States*, 384 U.S. 855, 875 (1966) (trial judge's function is limited to protective orders where national security is concerned); *Jencks v. United States*, 353 U.S. 657, 669 (1957) (practice of producing government documents to the trial judge for a determination of their relevancy and materiality without a hearing by the accused is disapproved).

123. *In camera* examinations in which the court sought to balance the Government's interest in secrecy against the defendant's interest in disclosure have been upheld by the Supreme Court in various contexts. See, e.g., *United States v. Nixon*, 418 U.S. 683, 714-15 (1974) (disclosure of tapes allegedly containing confidential Presidential communications); *Dennis v. United States*, 384 U.S. 855 (1966) (disclosure of grand jury minutes subject to *in camera* deletions of extraneous material); *Roviaro v. United States*, 353 U.S. 53 (1957) (disclosure of informant's identity).

124. The United States Court of Appeals for the Eighth Circuit upheld this approach in *United States v. Bass*, 472 F.2d 207 (8th Cir.), cert. denied, 412 U.S. 928 (1973), a criminal

era hearing combined with the issuance of a protective order further undercuts the graymail threat in these cases, since the judge determines the admissibility of the information prior to trial and without its disclosure to the jury and the public.¹²⁵

The *in camera* hearing, however, does present some significant disadvantages.¹²⁶ Extensive use of this special courtroom technique could be costly, and constant retreat to the judge's chambers could disrupt the trial.¹²⁷ Furthermore, use of the *in camera* procedure may surprise the prosecution as it does not provide it with advance notice of the defendant's intent to raise the classified information issue. The *in camera* hearing also raises issues regarding the proper role of the court. In determining the admissibility of classified information, the judge essentially decides the appropriateness of the classification. Consequently, a substantial controversy has arisen between officials of the executive branch and the judiciary¹²⁸ regarding the deference which a court should give

prosecution in which a subcontractor was charged with making fraudulent statements regarding parts he supplied to an Air Force contractor. The appeals court approved the trial court's *in camera* inspection of the contract to determine whether confidential military information in the contract, which the Government had deleted, was exculpatory or otherwise relevant to trial. 472 F.2d at 211. *Contra*, Zagel, *supra* note 75 (where the author argues that the use of the *in camera* hearing increases the risk of disclosure).

125. *See, e.g.*, United States v. Gray, Crim. No. 78-00179 (D.D.C. Dec. 22, 1978) (protective order provided for the redaction of documents by the Government prior to discovery by the defendants).

126. Zagel, *supra* note 75, at 886-87.

127. *Id.*

128. A determination of the propriety of the classification must be made by either the Executive or the courts. The Executive initially decides the validity of the privilege underlying the classification designation when he or she orders the materials to remain undisclosed in accordance with Executive Order No. 12,065. *See* notes 2-3 *supra*. Due to this initial involvement with the classification, it is argued that the Executive should not determine the appropriateness of the classification.

A better approach would be to allow the judiciary to determine the validity of the requested privilege, although it is argued that there are some national secrets that even a judge should not see. Many intimate operations of the nation, however, are disclosed regularly to Congress in executive sessions. Allowing a judge in the privacy of his or her chambers to examine classified information certainly appears to present less danger of disclosure. *See* Zagel, *supra* note 75, at 886. In light of the apparent overclassification of much government information, the objectivity of a third party, such as that of a judge, is greatly needed. *See The Use of Classified Information in Litigation, supra* note 5, at 54-55.

Courts have held that the disclosure of "evidence relevant to the issues in [the case] involves a justiciable question, traditionally within the competence of the [judiciary]." *Reynolds v. United States*, 192 F.2d 187, 197 (3d Cir.), *rev'd on other grounds*, 345 U.S. 1 (1953). Recently, in *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court indicated that the trial judge should make the initial determination of relevance regarding the classified materials. *Id.* at 714-15.

One possible judicial solution to this controversy was outlined by the majority of the United States Court of Military Appeals in *United States v. Grunden*, 2 M.J. 116 (1977),

to the Executive classification scheme.¹²⁹ In light of the disadvantages and the uncertainty which surround the judiciary's role in this area, employing the *in camera* proceeding *in limine* may present a preferable means of confronting the "disclose or dismiss" dilemma.

3. *The Pretrial Motion to Exclude: The Motion In Limine*

Traditional Anglo-American evidentiary principles permit objections to evidence only at trial.¹³⁰ Adhering to this tradition, some courts have refused to recognize the legitimacy of a pretrial motion to exclude, holding that "there is no occasion, prior to trial, to seek test rulings . . . upon questions of admissibility."¹³¹

Determining the admissibility of evidence in open court, however, allows the jury to become aware that potentially damaging evidence may exist. While a limiting instruction to the jury concerning the inadmissible evidence may preclude any legal error, it probably cannot reverse the psychological impact of the evidence on the jury.¹³² Thus, the motion *in limine*, a pretrial motion to exclude, has been employed to minimize the impact of prejudicial evidence upon the jury.¹³³

In essence, the motion *in limine* is a pretrial request for an order directing the opposing party and counsel, as well as witnesses, to refrain from introducing certain prejudicial evidence, either directly or indirectly, without a prior determination of its admissibility outside the presence of the jury.¹³⁴ A motion *in limine*

reprinted in *The Use of Classified Information in Litigation*, *supra* note 5, at 196-219. Under *Grunden*, whenever the disclosure of classified information is protested by the Government, the judge's initial task is to determine whether the material at issue has been classified by the proper authorities in accordance with the appropriate regulations. 2 M.J. at 122-23.

129. For a summary of the Executive classification scheme, see note 2 *supra*.

130. Comment, *Motion in Limine*, 29 ARK. L. REV. 215, 217 (1975). See also Note, *Pretrial Exclusionary Evidence Rulings*, 1967 WIS. L. REV. 738, 745-46.

131. Note, *supra* note 130, at 746. See, e.g., *Bradford v. Birmingham Elec. Co.*, 227 Ala. 285, 149 So. 729 (1933) (holding that a pretrial motion to exclude violates all precedent and such a motion has no authorization under Alabama law). An increasing number of courts, however, have recognized the legitimacy of pretrial exclusionary rulings. See Davis, *Motions in Limine*, 15 CLEV.-MAR. L. REV. 255, 257 (1966).

132. Comment, *Motions in Limine in Washington*, 9 GONZ. L. REV. 780 (1975).

133. Comment, *supra* note 130, at 133. Black's Law Dictionary defines "in limine" as: "On or at the threshold; at the very beginning; preliminarily." BLACK'S LAW DICTIONARY 896 (5th ed. rev. 1979).

134. Comment, *supra* note 130, at 217. The motion *in limine* can be used by either the defendant or the prosecution. *Id.* See also Rothblatt & Leroy, *The Motion in Limine in Criminal Trials*, 60 KY. L.J. 611 (1972).

should be distinguished from hearings on preliminary questions of fact¹³⁵ and from pretrial motions seeking to exclude illegally obtained evidence.¹³⁶ A true motion *in limine* seeks a judicial ruling that the potentially prejudicial character of a specific item of evidence outweighs any materiality the evidence could have at trial.¹³⁷

Generally, the decision of whether to make an advance ruling is left to the trial judge's discretion.¹³⁸ The trial judge's authority to render pretrial exclusionary rulings on the basis of a motion *in limine* is derived from the duty to ensure a fair trial to all parties.¹³⁹ Most judges, however, are reluctant to make pretrial rulings, especially when the motion *in limine* is sanctioned by neither statute nor law.¹⁴⁰

There are two types of motions *in limine*. The first, an absolute motion *in limine*, completely prohibits the opposing party from offering or mentioning the offending evidence at the trial. This absolute order is issued before trial and remains in effect throughout the entire proceeding.¹⁴¹

The second type of motion *in limine*, the preliminary order, finds greater acceptance in the American legal system.¹⁴² The preliminary order is preferred by many trial judges because it does not obstruct the "natural course of the trial."¹⁴³ The preliminary order requires the submission of prejudicial evidence to the trial judge outside of the jury's presence before it is introduced at trial. The admissibility of the proffered evidence is determined while the trial is in progress, but before the evidence is presented to the

135. E. CLEARY, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 53 (2d ed. 1972).

136. The motion *in limine* is distinguishable from the motion to suppress in that the former is discretionary, balancing the relevance of the evidence against the prejudice it creates, while the latter is grounded in fourth and fifth amendment guarantees. *Id.* § 180.

137. Rothblatt & Leroy, *supra* note 134, at 613-14.

138. *See, e.g.*, United States v. Palumbo, 401 F.2d 270, 273-74 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969).

139. 401 F.2d at 272-73.

140. Rothblatt & Leroy, *supra* note 134, at 616.

141. Due to this definitive characteristic, many trial judges are reluctant to issue the absolute motion *in limine*. Opponents of this order argue that a trial judge needs a large degree of flexibility in making determinations of admissibility because the trial itself lacks a predictable outcome. The absolute motion *in limine* deprives the judge of flexibility, since he or she is bound by pretrial rulings. *See* Comment, *supra* note 130, at 217. *See also* Rothblatt & Leroy, *supra* note 134, at 616.

142. Rothblatt & Leroy, *supra* note 134, at 616.

143. Comment, *supra* note 130, at 223.

jury.¹⁴⁴ Thus, "[w]hen the offering party nears the point in the trial when he feels the evidence should be introduced, the jury is excused, and the court determines the admissibility of the evidence."¹⁴⁵

Generally, both types of motion *in limine* require the party raising the motion to show that prejudice will result from the disclosure of the evidence to the jury.¹⁴⁶ Little or no balancing of interests is involved. The moving party requests simply that an advance exclusionary ruling be made to prevent an unfair situation.¹⁴⁷

The motion *in limine* has many advantages: it isolates highly prejudicial evidence from the jury, maximizes pretrial discovery, forces the offering party to evaluate its case and make elections, helps obtain favorable guilty plea offers, and preserves a record for appeal.¹⁴⁸ Additionally, pretrial consideration of prejudicial evidence can simplify, purify, and accelerate the process of obtaining just verdicts by isolating the jury from prejudicial inferences and by preventing extensive delays during trial, thereby allowing the judge and jury to concentrate on substantive issues.¹⁴⁹

The motion has disadvantages as well: it appears to make efficient and just criminal adjudication more difficult, contributes to a piecemeal trial by increasing the number of separate issues, and creates additional opportunities for error.¹⁵⁰ Another drawback to the motion *in limine* is its discretionary nature—the parties are not mandated to request this motion, and the trial judge is not obligated to grant it. Nonetheless, two primary advantages of the motion *in limine* appear to outweigh these disadvantages. The motion *in limine* replaces the frequently ineffective, unrealistic, and psychologically invalid admonitions to the jury to disregard

144. The order may be issued before the trial begins. *Id.*

145. *Id.*

146. Rothblatt & Leroy, *supra* note 134, at 621.

147. *Id.* See Comment, *supra* note 130, at 224. There is a disagreement regarding the applicability of the motion *in limine* to the testimony of the offering party's witnesses. If the motion *in limine* does encompass witnesses, the offering party must counsel his or her witnesses against inadvertently mentioning the excluded evidence. If the motion *in limine* fails to encompass the witnesses, they are free to volunteer the excluded information in response to questioning. Comment, *supra* note 130, at 224.

148. Rothblatt & Leroy, *supra* note 134, at 634.

149. *Id.* at 633-34.

150. *Id.* Rothblatt and Leroy contend that the motion *in limine* can never be completely accurate in balancing the probative and prejudicial values of evidence, which is best evaluated within the total trial context. *Id.*

certain evidence or occurrences at trial,¹⁵¹ and it “provides an effective means of deterring counsel from offering improper evidence because it warns him in advance that the court will not only exclude his offer of evidence at trial, but may also use it as a basis for a new trial or a contempt order.”¹⁵²

The motion *in limine* is a useful pretrial device which could aid in undercutting the graymail threat because the offering party would be compelled to rebut the Government’s showing of prejudice in order to offer the controversial evidence at trial. Moreover, even if the motion is denied by the trial court, both parties have notice of the classified information at issue, thus eliminating surprise at trial. Although the motion *in limine* may not be effective in all proceedings,¹⁵³ its use in prosecutions in which the relevance of classified information is at issue may effectively combat the pervasive graymail threat.

C. *The State Secrets Privilege*

The Government’s privilege not to reveal state secrets pertaining to national security when disclosure would compromise that national security has long been recognized.¹⁵⁴ Consequently, the assertion of a claim of a state secrets privilege may be useful in preventing dismissal of a prosecution because of the nondisclosure of classified information.

As originally proposed by the Supreme Court, the Federal Rules of Evidence contained a rule defining a privilege for state secrets and other official information.¹⁵⁵ Although Congress re-

151. One author notes that “while the use of these ‘curative measures’ can perhaps be justified in terms of judicial economy, its effectiveness in removing the prejudicial impact of an improper question is subject to serious doubt.” Note, *supra* note 130 at 741.

152. *Id.* at 744.

153. See note 150 *supra* and accompanying text.

154. See *United States v. Reynolds*, 345 U.S. 1, 6–7, 11 (1953) (claim of privilege may be invoked when military secrets are involved); 8 J. WIGMORE, EVIDENCE §§ 2378–2379 (rev. ed. McNaughton 1961).

The state secrets privilege should be distinguished from two other privileges for governmental information: (1) the privilege protecting the revelation of an informant’s identity, and (2) the privilege shielding “official information.” See UNIFORM RULES OF EVIDENCE 508–09. Official information has been defined as information concerning the “internal affairs of the state, acquired by public officials in the course of duty or transmitted from one public official to another in the course of duty.” Zagel, *supra* note 75, at 875.

155. Proposed Federal Rule of Evidence 509 provided in part: “The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.” Proposed Fed. R. Evid. 509(b), *reprinted in* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE 509–1 (1977).

jected all the proposed rules concerning privileges,¹⁵⁶ a suggestion has recently been made that Congress enact specific standards narrowly defining the scope of a state secrets privilege to enable the government to control more effectively the disclosure of national security information in criminal litigation.¹⁵⁷

In determining whether information is privileged, a court must balance the requesting party's need for the information against the other party's assertion of confidentiality.¹⁵⁸ In *United States v. Nixon*,¹⁵⁹ however, the Supreme Court suggested that an assertion of a state secrets privilege would perhaps be treated more deferentially than a claim of privilege based on Executive confidentiality.¹⁶⁰ In the *Nixon* case, the Court reaffirmed its earlier pronouncement in *United States v. Reynolds*¹⁶¹ regarding state secrets:

It may be possible to satisfy the Court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence would expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone in his chambers.¹⁶²

This language should not be interpreted as implying that mere assertion of a state secrets privilege perfunctorily places the requested information beyond the province of the courts.¹⁶³ The

156. 2 J. WEINSTEIN & M. BERGER, *supra* note 155. The Supreme Court promulgated Rule 509 contemporaneously with the Nixon Administration's assertion of executive privilege in response to congressional requests for information. This coincidence may help to explain the congressional discomfort with Rule 509 since the Rule, like the Nixon Administration claim, granted the Executive branch wide discretion to withhold information. *Id.* See generally Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 CASE W. RES. L. REV. 747 (1975).

157. *The Use of Classified Information in Litigation*, *supra* note 5, at 56-57 (remarks of Phillip Lacovara).

158. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 204, 207 (1978). Professor Tribe notes that the balancing process could be implemented in several ways. One method would allow the Executive to handle the process, thereby "rendering an assertion of privilege tantamount to a finding that the balance of policy considerations favors it." *Id.* Another method would remit the process to the President only after the judiciary had satisfied itself that an absolute privilege was actually involved. Finally, the courts could declare themselves the final arbiters of the privilege issue or they could request Congress to define the limits of an absolute privilege. *Id.* See also Zagel, *supra* note 75, at 877.

159. 418 U.S. 683 (1974).

160. *Id.* at 706, 710-11.

161. 345 U.S. 1 (1953).

162. *Id.* at 10.

163. Professor Tribe suggests that *Reynolds* is limited to its factual context because the

Nixon decision clearly suggested that even classified materials allegedly protected by a state secrets privilege should be "delivered to the District Judge . . . for *in camera* consideration of the validity of particular excisions. . . ." ¹⁶⁴ Thus, the *Reynolds* decision does not require an abdication of judicial scrutiny in state secrets cases in either the civil or criminal context. ¹⁶⁵

Although the Supreme Court has recognized the validity of an absolute privilege for national security information within the context of a civil case, ¹⁶⁶ the scope of the Government's right to withhold such information in a criminal case is presently undefined. ¹⁶⁷ In criminal prosecutions, perhaps the claimed privilege should be granted only when the evidence pertains indirectly to the material issues in the case. ¹⁶⁸ When the proposed evidence relates directly to the issue of guilt or innocence, the Government, as prosecutor, should not be permitted to both claim its privilege *and* proceed with the prosecution. ¹⁶⁹

Court "reversed a lower court's order forcing the government to produce documents relating to the [design] of a military aircraft which had been engaged in a secret mission pertaining to the testing of electronic equipment." L. TRIBE, *supra* note 158, at 212. Unusually strong evidence of the plane's involvement in a secret mission induced the Court to bypass *in camera* inspection. *Id.* Thus, the implication remains that weaker evidence implicating a state secret would justify *in camera* inspection.

164. 418 U.S. at 715 n.21.

165. L. TRIBE, *supra* note 158, at 212.

166. *See, e.g.*, United States v. Reynolds, 345 U.S. 1 (1953).

167. In criminal cases, the Government, as prosecutor, normally has an obligation to produce all relevant evidence or suffer dismissal. *See, e.g.*, United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944) (Government must choose, in criminal action, between full disclosure of the content of official reports or no prosecution). Accordingly, courts have held that the Government cannot properly invoke a state secrets privilege in criminal prosecutions which involve either official information or informant privileges. *See, e.g.*, Roviario v. United States, 353 U.S. 53 (1957) (failure of trial court to require the disclosure of informant's identity is reversible error); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944) (Government ordered to produce reports defendant made to his superior). *Contra*, McCray v. Illinois, 386 U.S. 300 (1967) (disclosure of informant's identity at pretrial hearing not required). The validity of the state secrets privilege in criminal prosecutions received support in United States v. Nixon, 418 U.S. 683 (1974), where the Supreme Court strongly implied that a claim of absolute privilege could prevail in a criminal case when the claim was based on military or diplomatic secrecy. *Id.* at 710-11.

168. *See* note 167 *supra*.

169. *See, e.g.*, United States v. Coplon, 185 F.2d 629 (2d Cir.), *cert. denied*, 342 U.S. 920 (1950) (defendant's conviction reversed because the Government refused disclosure of wiretap records to the defendant on the grounds of national security).

Chief Justice Vinson's dictum in *Reynolds* demonstrates the increasing acceptance of this position by the courts:

The rationale of the criminal case is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense.

The state secrets privilege is often claimed in espionage prosecutions, since the espionage statutes make the theft or disclosure of national security information a criminal offense. In *Gorin v. United States*,¹⁷⁰ the Supreme Court held that it was the jury's function to determine whether the disputed classified information did pertain to national security.¹⁷¹ The requirement that state secrets be disclosed to the jury in order for it to determine an issue of fact, however, appears to defeat the purpose of preventing the disclosure of that classified information which is subject to the privilege.¹⁷² Consequently, the Government may be forced to drop the prosecution rather than risk the disclosure of national security secrets.

The effect of the assertion of the state secrets privilege on the further progress of a prosecution must also be considered. Under the present Federal Rules of Criminal Procedure, the trial judge has extensive discretion to impose an array of sanctions if either the Government's claim of privilege deprives the defendant of material evidence or the Government fails to comply with a discovery request.¹⁷³ Accordingly, upholding the validity of the privilege claim does not necessarily compel dismissal of the case.¹⁷⁴

345 U.S. at 12.

170. 312 U.S. 19 (1941).

171. *Id.* at 32.

172. In *Gorin*, the Court did not divulge the actual contents of the material to the jury. It merely defined national defense and its application to the charges against the defendant for the jury, instructing it to connect the evidence presented with the national security claim. Thus, the privilege will not be undercut in those cases involving national security where the contents of the information are not disclosed to the jury. *Id.* at 32-33.

173. FED. R. CRIM. P. 16(d). Under Rule 16(d), the trial judge is vested with complete discretion to regulate discovery through the use of protective orders and sanctions. When a party fails to comply with the provisions of this rule, the judge may (1) order the delinquent party to permit the discovery or inspection, (2) grant a continuance, (3) prohibit the party from introducing the undisclosed evidence, or (4) enter another type of order which the judge deems justified under the circumstances. Additionally, the judge has the power to specify the time, place and manner of making the discovery and inspection, prescribing those terms and conditions deemed to be fair. *Id.*

These sanctions could be applied in the graymail cases. Courts have used Rule 16(d) to widen an otherwise narrow scope of discovery in various cases involving national security information. *See, e.g., United States v. Kampiles*, Crim. No. HRC 78-77 (N.D. Ind. Nov. 17, 1978), *aff'd* No. 78-2646, slip op. (7th Cir. Nov. 15, 1979), *petition for rehearing denied*, No. 78-2646 (7th Cir. Jan. 24, 1980) (where the district court judge ordered that edited versions of the top secret KH-11 manual be introduced into evidence at trial). *Contra, United States v. DeMarco*, 407 F. Supp. 107 (D.C. Cal. 1975) (where the court dismissed the prosecution because the Government failed to produce requested exculpatory material).

174. Proposed Federal Rule of Evidence 509 provided that if the privilege deprived the other party of material evidence, the trial judge could make any further orders in the inter-

For example, dismissal would be inappropriate if the defendant does not demonstrate that the information in question would be helpful or necessary to the preparation of a defense.¹⁷⁵

The remedy available to a defendant in the event that the Government's claim of privilege is upheld would vary according to the circumstances of the case. At one extreme, where the utility of classified information to the defense is totally speculative, the case could simply continue without disclosure. At the other extreme, where the classified information is central to the issue of guilt, and no other methods of proof are available, dismissal may be necessary. In the gray area, the judge could instruct the jury to assume that the missing information establishes a given proposition, find against the Government on a given fact, or strike a witness' testimony rather than dismiss the prosecution.¹⁷⁶

Privileges are inherently detrimental to a judicial system, as they exclude potentially useful evidence from the trial;¹⁷⁷ governmental privileges are especially undesirable in, and repugnant to, the fundamental tenets of a democracy.¹⁷⁸ The magnitude of the interests protected by the state secrets privileges, however, necessarily requires a more careful balancing of the competing interests than in cases involving lesser governmental privileges,¹⁷⁹ since "[i]t is one thing to sacrifice governmental efficiency to assure fair litigation; it is another to endanger the nation to preserve the integrity of a litigation system."¹⁸⁰ Nevertheless, in the interest of

est of justice, including (1) striking the testimony of the witness, (2) declaring a mistrial, (3) finding against the Government on the issue to which the evidence is relevant, or (4) dismissing the case. Proposed Fed. R. Evid. 509(e), *reprinted in* 2 J. WEINSTEIN & M. BERGER, *supra* note 155, at 509-2.

175. *See, e.g.*, *United States v. Lee*, 589 F.2d 980 (9th Cir. 1979).

176. Proposed Federal Rule of Evidence 509(e) provided for the use of these sanctions in the event that a state secrets privilege was upheld. *See* note 174 *supra*. The Proposed Classified Information Criminal Procedures legislation provides for similar sanctions. *See* note 238 *infra*.

177. Zagel, *supra* note 75, at 909.

178. The general availability of government information is the fundamental basis upon which popular sovereignty and the consent of the governed rest. "It is reasonable to assert, therefore . . . that only a limited power to withhold government information can be derived from Articles I and II of the Constitution even apart from the Bill of Rights." Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 7 (1950). In the words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy, or, perhaps both. Knowledge will forever govern ignorance: And [a] people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822).

179. *See United States v. Nixon*, 418 U.S. at 705-06, 708 n.18.

180. Zagel, *supra* note 75, at 909-10.

preserving the fairness of the adversary system, the successful assertion of a state secrets privilege should be accompanied by procedural "penalties."¹⁸¹

Congress has the authority to prescribe procedural guidelines and sanctions to govern the effect of a claim of privilege.¹⁸² Congressional action could establish a formal policy directing the courts to dismiss an action only in those situations where an otherwise valid claim of privilege abrogates a defendant's right to a fair trial.¹⁸³ Moreover, congressional classifications for state secrets would better equip the courts to determine the propriety of the asserted privilege because they would have uniform criteria with which to balance the Government's and defendant's interests.¹⁸⁴

The state secrets privilege will not solve the graymail dilemma in every prosecution. It can be used, however, to obviate the "disclose or dismiss" dilemma in those cases implicating real and substantial national security concerns.

The primary disadvantage in relying on the presently available mechanisms to resolve the graymail dilemma is the ad hoc fashion in which they are applied. The ambiguity and complexity of the espionage statutes operate as deterrents to the initiation of espionage prosecutions by the Government, especially when the statutes appear to require the disclosure of the very information they are designed to protect. Absent specific statutes relating to the disclosure of classified information, the prosecution must rely on evidentiary principles. The discretionary application of the rules of relevance and privilege prevents the development of a consistent approach to the diverse graymail dilemmas confronting the Government. Although the *in camera* proceeding affords some protection against the public dissemination of classified information,

181. *Id.* at 910; see note 174 *supra*. The proposed graymail legislation also includes provisions for assessing penalties against the Government in the event of nondisclosure. See note 238 *infra*.

182. *The Use of Classified Information in Litigation*, *supra* note 5, at 57 (statement of Phillip Lacovara).

183. One observer has suggested that Congress reevaluate its position regarding the state secrets privilege, especially now that the Watergate affair has ended. She notes that promulgation of a rule similar to the rejected Federal Rule of Evidence 509 would allow Congress to assert its authority with regard to the disclosure of national security information. Berger, *supra* note 156, at 789-90, 795.

184. Cf. Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166, 179 (1958), where the author notes, "Unfortunately, courts are sometimes persuaded to attach the secrets of state label to unrelated matters, and thus dissipate the value of a clear-cut distinction." See also Zagel, *supra* note 75, at 877.

frequent use of this device is costly and disruptive to the proceedings and also fails to eliminate the element of surprise at trial. Alternatively, the motion *in limine* offers the prosecution the opportunity to obtain advance notice of the defendant's intent to disclose classified information, thereby diminishing the danger of surprise at trial. The judiciary's general reluctance to determine the admissibility of evidence preliminary to trial, however, presents a significant obstacle to pretrial exclusion of classified evidence.

Examination of the presently available methods of combatting graymail highlights the need for the development of a uniform approach to the dilemma. Providing the judiciary with procedural and evidentiary guidelines will help to minimize the defendant's ability to graymail the Justice Department into abandoning a criminal prosecution and will simultaneously afford a consistent handling of the disclosure issue.

III. FINDING A MORE EFFECTIVE SOLUTION TO GRAYMAIL: THE CLASSIFIED INFORMATION CRIMINAL TRIAL PROCEDURES ACT

Congressional concern with the graymail phenomenon resulted in the introduction of three bills before Congress in July 1979.¹⁸⁵ These legislative proposals, entitled the Classified Information Criminal Trial Procedures Act,¹⁸⁶ present a uniform system of rules designed to create a consistent approach to the problem of classified information in criminal trials.¹⁸⁷ In proposing such uniform rules, the drafters sought to reconcile the public interest in legitimate law enforcement with the defendant's right to a fair and public trial through the early, measured, and careful intervention of the trial judge.¹⁸⁸

The proposed legislation seeks to ensure an early screening by

185. See Lacovara, *supra* note 10, at 19, col. 1. The three bills were introduced into both houses of Congress on July 11, 1979. See *Congressional Record*, S. 1482, 96th Cong., 1st Sess., 125 CONG. REC. S9184 (daily ed. July 11, 1979) (remarks of Sen. Biden); *Id.* H.R. 4736, 96th Cong., 1st Sess., 125 CONG. REC. H5763 (daily ed. July 11, 1979) (remarks of Rep. Murphy); H.R. 4745, reprinted in *Hearings on H.R. 4745 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 181-94 (1979) [hereinafter cited as *Hearings on H.R. 4745*].

186. See 125 CONG. REC. H5763 (daily ed. July 11, 1979) (remarks of Rep. Murphy).

187. *Id.*; 125 CONG. REC. S9184 (daily ed. July 11, 1979) (remarks of Sen. Biden).

188. 125 CONG. REC. H5763 (daily ed. July 11, 1979) (remarks of Rep. Murphy); 125 CONG. REC. S9184 (daily ed. July 11, 1979) (remarks of Sen. Biden). See also *Hearings on H.R. 4736 & H.R. 4745, supra* note 4, at 3-4 (statement of Phillip Lacovara).

the trial judge of the classified information which the defendant either proposes to introduce as evidence at trial or wishes to obtain through discovery.¹⁸⁹ Consequently, the relevance of the classified information to the material issues at trial is assured.¹⁹⁰ More generally, however, the proposed bills show congressional intent that federal courts should give these issues careful and methodical treatment in accordance with a clearly defined procedural system.¹⁹¹

A. *A Proposed Amendment to the Jencks Act*

Enactment of the Jencks Act¹⁹² substantially affected the balance of advantages enjoyed by the prosecution and defense,¹⁹³ as the Act allows a defendant to secure prior statements of Government witnesses for impeachment purposes.¹⁹⁴ Yet, the advantage gained by the defendant is not unlimited. Initially, the statements are obtainable only after the witnesses have openly testified in court.¹⁹⁵ Disclosure to the defendant is required only when it will facilitate cross-examination; it is not to be regarded as a general

189. See *Hearings on H.R. 4736 & H.R. 4745*, *supra* note 4, at 3-4 (statement of Phillip Lacovara).

190. The proposed legislation does not alter the existing rules of relevance, but it does require the defendant to notify the Government prior to trial of any intention to disclose classified information at trial. This pretrial notice requirement allows the Government to obtain an *in camera* hearing at which the trial judge may examine the proposed evidence and rule on its admissibility. 125 CONG. REC. H5763 (daily ed. July 11, 1979) (remarks of Rep. Murphy).

191. 125 CONG. REC. S9184 (daily ed. July 11, 1979) (remarks of Sen. Biden).

192. Pub. L. No. 85-269, 71 Stat. 595 (codified at 18 U.S.C. § 3500 (1976)). The Jencks Act represents the action taken by Congress in response to the Supreme Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957). In *Jencks*, the defendant requested the production of FBI undercover reports regarding matters to which certain agents had testified at trial. The Supreme Court held that the defendant was entitled to inspect such documents without determining that the witnesses had used the reports during the trial or that the reports were inconsistent with their trial testimony. 353 U.S. at 666. Congress enacted the Jencks Act in an effort to restrict this decision. S. REP. NO. 981, 85th Cong., 1st Sess. 2-5, reprinted in [1957] U.S. CODE CONG. & AD. NEWS 1861, 1862-64.

193. See generally Goldstein, *supra* note 1, at 1180-92; Pulaski, *Extending the Disclosure Requirement of the Jencks Act to Defendants: Constitutional and Nonconstitutional Considerations*, 64 IOWA L. REV. 1, 8 (1978); Note, *The Jencks Right: Judicial and Legislative Modifications, the States and the Future*, 50 VA. L. REV. 535, 552-53 (1964).

194. 18 U.S.C. § 3500 (1976); Pulaski, *supra* note 193, at 6; Comment, *The Jencks Legislation: Problems in Prospect*, 67 YALE L.J. 674, 675 (1958). The Jencks Act provides for the production of only those statements, in either holographic form or its equivalent, actually attributable to the witness or which are adopted by the witness. Pulaski, *supra* note 193, at 6-7.

195. 18 U.S.C. § 3500(a)-(b) (1976).

discovery tool.¹⁹⁶ Finally, if the prosecution charges that the requested material does not relate to the subject matter of the witness' testimony, the trial judge reviews the disputed statements *in camera*.¹⁹⁷ Irrelevant portions of the requested information are then excised before the judge releases the information to the defendant.¹⁹⁸ The drafters of the Act intended this judicial review to protect the confidentiality of Government files, and the names and identities of Government informants.¹⁹⁹

Two of the three bills which compose the Classified Information Criminal Trial Procedure Act contain an amendment to the Jencks Act.²⁰⁰ The Administration bill²⁰¹ restricts the scope of the Jencks Act by authorizing the trial judge to excise classified information which is consistent with the witness' testimony from the requested materials.²⁰² This amendment, therefore, has the potential to deprive the defendant of information that may be more than marginally relevant to the defense.

In support of the proposed amendment, the Government contends that neither the *Jencks* decision²⁰³ nor the Act expressly provides a sixth amendment right to these materials.²⁰⁴ Rather, it asserts that the *Jencks* ruling and statute are simply evidentiary devices which provide the defendant with access to certain materi-

196. 18 U.S.C. § 3500(a), (e)(1)-(2) (1976); S. REP. NO. 981, *supra* note 192, at 4-5, reprinted in [1957] U.S. CODE CONG. & AD. NEWS at 1863-64; Pulaski, *supra* note 193, at 6.

197. 18 U.S.C. § 3500(c) (1976).

198. *Id.*; Pulaski, *supra* note 193, at 18-19.

199. See S. REP. NO. 981, *supra* note 192, at 2-5, reprinted in [1957] U.S. CODE CONG. & AD. NEWS at 1862-64.

200. *Congressional Record*, S. 1482, § 10, 96th Cong., 1st Sess., 125 CONG. REC. S9184 (daily ed. July 11, 1979); *Hearings on H.R. 4745*, *supra* note 185.

201. H.R. 4745, *Hearings on H.R. 4745*, *supra* note 185.

202. Section 10 of H.R. 4745 provides in part:

If the United States claims that any statement ordered to be produced under this section contains classified information, the United States may deliver such statement for the inspection of the court in camera and provide the court with an affidavit identifying the portions of the statement that are classified and the basis for the classification assigned. If the court finds (1) that disclosure of any portion of the statement identified by the Government as classified could reasonably be expected to cause damage to the national security in the degree required to warrant classification under the applicable Executive order, statute, or regulation, and (2) that such portion of the statement is consistent with the witness' testimony, the court shall excise the portion from the statement. With such material excised, the court shall then direct delivery of such statement to the defendant for his use.

Id. § 10.

203. See note 194 *supra*. Telephone interview with Ronald Stern, Special Assistant to the Assistant Attorney General, Criminal Division (Nov. 1, 1979).

204. See note 203 *supra*.

als.²⁰⁵ Limiting this access, therefore, will not constitute a blanket impingement on the constitutional right to counsel and the concomitant right to prepare a defense.

The Government admits there may be rare circumstances in which denial of access to a Jencks-type statement will be tantamount to the denial of a defendant's sixth amendment rights. The occasional unfairness that could result from the application of the proposed amendment, however, does not render the amendment per se unconstitutional.²⁰⁶ Supreme Court interpretations of the Jencks Act support the Government's contention that the Act is only a limited discovery device for the defendant.²⁰⁷

In further support of the proposed amendment, Government officials contend that the governmental privilege which is normally waived by the initiation of a prosecution²⁰⁸ is not waived as to classified information which is irrelevant to a defense theory.²⁰⁹ If the privilege does not extend to such information, the defendant will be able to obtain much information, some of which may be inadmissible in court as useless to the defense.²¹⁰ Furthermore, if the information contained within the requested materials is consistent with trial testimony, governmental privilege should apply since the information may be inadmissible as cumulative evidence.²¹¹

205. *Id.*

206. *Id.*

207. In *Palermo v. United States*, 360 U.S. 343 (1959), the Supreme Court held that the Jencks Act was concerned primarily with limiting and regulating defense access to those statements which were not actually attributable to the witness or which failed to relate to the witness' testimony at trial. *Id.* at 354. In addition, the Court noted that the Jencks Act was not intended as an authorization for a general "fishing expedition" by the defendant for discoverable material, but was intended to preclude disclosure in those cases where the Act's provisions were inapplicable. *Id.* at 352, 354. *Cf. The Use of Classified Information in Litigation*, *supra* note 5, at 34, where a Justice Department official states: "Clearly we as prosecutors cannot determine precisely how a defendant can present his case, and although he has no license to rummage through the Government files at will, a defendant does have a right to information which may be useful in his defense."

208. *See, e.g.*, *United States v. Grayson*, 166 F.2d 863, 870 (2d Cir. 1948); *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946); *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944).

209. Telephone interview with Ronald Stern, Special Assistant to the Assistant Attorney General, Criminal Division (Nov. 1, 1979).

210. *Id.*

211. *Id.*; *see* FED. R. EVID. 403. The Government's contentions emphasize that material produced under the Jencks Act is nonetheless subject to the rules governing admissibility of evidence at trial. *See, e.g.*, *Campbell v. United States*, 373 U.S. 487, 493 n.12 (1963); *United States v. Berry*, 277 F.2d 826, 830 (7th Cir. 1960). Notably, nothing in the language of the statute indicates that material disclosed to the defense under the statute's provisions

Congressional debate over the Jencks Act supports the Government's position on privilege and further indicates that the trial judge, not defense counsel, should determine whether the requested materials relate to the trial testimony.²¹² In making such a determination, however, the consistency of the prior statement to the testimony of the Government witness should not be the only factor which is considered. Consistency is neither a valid nor a complete test of the material's utility to the defense for the purposes of cross-examination.²¹³ The Jencks Act does not presently require demonstrable inconsistency as the test for the production of Jencks material, and the courts have not read such a test into the Act.²¹⁴

In light of the Jencks Act's present provisions, the proposed amendment appears unnecessary. Not only does it contravene the congressional intent underlying the Act,²¹⁵ but it also simply restates objectives already embodied in the current codification. If a defendant requests the production of classified information which allegedly relates to a Government witness' testimony, the Jencks

will be admitted into evidence in contravention of the governing rules of evidence. *See* 18 U.S.C. § 3500 (1976).

212. S. REP. NO. 981, *supra* note 192, at 4, *reprinted in* [1957] U.S. CODE CONG. & AD. NEWS at 1863. The Supreme Court, however, has repeatedly taken the position that potentially impeaching information should be made available to the defendant for whatever use that party chooses. *See* *United States v. Nobles*, 422 U.S. 225, 230 (1975) (primary responsibility of the adversary system is to develop relevant facts on which a determination of guilt or innocence can be made); *Jencks v. United States*, 353 U.S. 657, 668-69 (1957) (only the defense is adequately equipped to determine the importance of information to the case).

One commentator has stated:

[S]ince the accused is best able to determine the use to be made of the relevant data, the prosecution must turn over directly to him all prior statements of witnesses logically related to the testimony on direct examination. . . . The fact that evidence is not sufficiently inconsistent with, or material or relevant to, the testimony of a prosecution witness to be admissible need not mean that [the information] cannot arm the accused with knowledge essential to neutralization of the challenged testimony and, perhaps, a resulting successful offense.

Comment, *supra* note 194, at 677, 680.

213. *Hearings on H.R. 4736 & H.R. 4745, supra* note 4, at 5-6 (statement of Anthony Lapham). Lapham suggests that the proposed amendment should be softened: prior statements should be withheld only if the court determines that the information contains nothing material to the defense. *Id.*

214. S. REP. NO. 981, *supra* note 192, at 2-5, *reprinted in* [1957] U.S. CODE CONG. & AD. NEWS at 1862-64; *see, e.g., Jencks v. United States*, 353 U.S. 651, 667-68 (1957).

215. The legislative history of the Jencks Act indicates that a defendant in a criminal trial is entitled to all relevant and competent reports and statements in the Government's possession which relate to the direct testimony of its witnesses. Only those materials within operative exclusionary rules are to be withheld from the defense under the Act. *See* S. REP. NO. 981, *supra* note 192, at 3, *reprinted in* [1957] U.S. CODE CONG. & AD. NEWS at 1862.

Act, in its present form, does not require the Government to comply.²¹⁶ Moreover, the Act does not require dismissal of the prosecution in the event of nondisclosure.²¹⁷

Notably, the Jencks Act is the sole source of mandatory discovery for the defendant.²¹⁸ Subsequent to the witness' direct testimony, the defendant may request any prior statements as a matter of right without establishing a preliminary basis of inconsistency or other reasons for requesting the documents.²¹⁹ The proposed amendment eliminates this right by requiring the trial judge to determine the consistency of the materials to the trial testimony. In effect, the judge is required to determine the usefulness of the requested information to the defense before releasing the information. This is clearly a result which the Jencks Act sought to prevent.²²⁰

Furthermore, the Senate version of the proposed amendment also affects a defendant's rights by authorizing the substitution of a summary of the requested classified information for the actual information.²²¹ This provision impinges on the defendant's sixth amendment right to confront witnesses and to be informed of the nature of the prosecution's charge against him or her since a summary is useless for the purposes of cross-examination.²²² Usurping defense counsel's power to cross-examine effectively leaves the defendant with disabled counsel—a result which contravenes the defendant's constitutional right to effective representation.²²³

In sum, the proposed amendment narrows the Jencks Act's coverage and consequently infringes on a defendant's sixth

216. 18 U.S.C. § 3500(d) (1976).

217. *Id.* Subsection (d) provides that the court may strike the witness' testimony from the record and proceed with the trial, or the court may declare a mistrial if such action is necessary to prevent injustice. *Id.* See also *Hearings on H.R. 4736 & H.R. 4745, supra* note 4, at 10–12 (statements of Michael G. Scheininger and Thomas A. Guidoboni).

218. *Hearings on H.R. 4736 & H.R. 4745, supra* note 4, at 3–4 (statement of William Greenhalgh).

219. 18 U.S.C. §§ 3500(a)–(b) (1976).

220. See *Reed v. United States*, 379 A.2d 1181 (D.C. 1977); 18 U.S.C. §§ 3500(d)–(e) (1976).

221. *Congressional Record*, S. 1482, 96th Cong., 1st Sess. § 10(d), 125 CONG. REC. S9184 (daily ed. July 11, 1979).

222. *Hearings on H.R. 4736 & H.R. 4745, supra* note 4, at 4 (statement of William Greenhalgh).

223. *Hearings on H.R. 4736 & H.R. 4745, supra* note 4, at 5–6 (statement of William Greenhalgh); see *Dennis v. United States*, 384 U.S. 855, 874–75 (1966); *Jencks v. United States*, 353 U.S. 657, 667–68 (1957). *Cf.* *Chambers v. Maroney*, 399 U.S. 42, 59 (1970) (effective denial of constitutional right to assistance of counsel occurs if counsel lacks the opportunity to plan a defense) (Harlan, J., dissenting).

amendment right to the effective assistance of counsel. It is also an unnecessary addition to the current statute, as the Act achieves the proposed amendment's goal of safeguarding the disclosure of classified information completely irrelevant to the defendant. The proposed Classified Information Criminal Trial Procedures Act,²²⁴ however, includes a variety of other procedural mechanisms to resolve the "disclose or dismiss" dilemma.²²⁵

B. *Pretrial Notice Provisions*

In light of the existence of substantive and procedural rules which can be used to combat graymail,²²⁶ it seems clear that although congressional action in this area is mandated, the codification of an independent set of statutes and rules is unnecessary. The same uniformity that the proposed legislation offers can be achieved simply by integrating the various proposed procedures with the existing Federal Rules of Criminal Procedure and the Federal Rules of Evidence.²²⁷ Inserting these proposed procedures into the existing rules would subject them to the constant scrutiny of the Supreme Court and the Judicial Conference of the United States.²²⁸ This inclusion would, in turn, provide the judiciary with the opportunity to promulgate necessary modifications with Congress still retaining the right to initiate independent alterations it deemed necessary. Perhaps the most important provision in the proposed legislation is the section relating to the pretrial conference between the parties in the judge's chambers.²²⁹ This provision is modeled upon Rule 17.1 of the Federal Rules of Criminal Procedure²³⁰ which establishes a timetable for pretrial discovery and provides each party with notice concerning certain aspects of the evidence to be offered at the trial.²³¹

224. See note 185 *supra*.

225. 125 CONG. REC. S9184 (daily ed. July 11, 1979) (remarks of Sen. Biden).

226. See notes 71-85 *supra* and accompanying text.

227. See *Hearings on H.R. 4736 & H.R. 4745, supra* note 4, at 2 (statement of Phillip Lacovara); *id.* at 2-3 (statement of William Greenhalgh).

228. See 18 U.S.C. §§ 3771-3772 (1976); 28 U.S.C. § 2076 (1976).

229. Each bill specifies that "any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution." See *Congressional Record*, S.1482, 96th Cong., 1st Sess. § 2, 125 CONG. REC. S9184 (daily ed. July 11, 1979); H.R. 4736, 96th Cong., 1st Sess. § 101, 125 CONG. REC. H5763 (daily ed. July 11, 1979); H.R. 4745, § 3, *Hearings on H.R. 4745, supra* note 185.

230. FED. R. CRIM. P. 17.1.

231. Rule 17.1 provides:

At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the con-

The effectiveness of the existing procedural devices would be greatly enhanced if Congress required a mandatory pretrial notice and hearing at which the proposed disclosure of the classified information would be discussed. The Federal Rules of Criminal Procedure contain similar directives in Rules 12.1²³² and 12.2²³³ which provide that a defendant who intends to rely upon an alibi or insanity defense must, upon demand by the Government, provide pretrial notice of that intent and details of the circumstances and supporting witnesses.²³⁴

This mandatory pretrial notice would reduce the impact and number of graymail threats. The classified information would be viewed *in camera* by the trial judge to determine its relevance to the defense prior to a determination of admissibility. This procedure would identify the precise nature of the classified information that could be disclosed at trial. If the judge rules that the evidence is admissible, the Government still receives an opportunity to balance the risks of disclosure of the particular information

clusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

FED. R. CRIM. P. 17.1.

232. Rule 12.1 provides in part:

Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct upon the attorney for the government a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

FED. R. CRIM. P. 12.1(a).

233. Rule 12.2 provides in part:

If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

FED. R. CRIM. P. 12.2(a).

234. See notes 232-33 *supra*. The Supreme Court upheld the constitutionality of these rules in *Williams v. Florida*, 399 U.S. 78 (1970). In *Williams*, the Court held that a Florida criminal procedure rule requiring pretrial disclosure of an alibi defense by the defendant did not violate the privilege against self-incrimination. *Id.* at 83. The alibi rule was designed to enhance the search for truth in the criminal proceeding by ensuring both the defendant and the prosecution ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. *Id.*

against the objectives of pursuit of the prosecution before the notoriety and additional complications of the trial are thrust upon it.

C. *Reciprocal Discovery Provisions*

Discovery in the criminal context is an attempt to balance the prosecution's extensive information gathering mechanisms against the defendant's need for access to materials with which to prepare an adequate defense.²³⁵ Reciprocal discovery is part of this balance and, as such, was constitutionally mandated by *Wardius v. Oregon*,²³⁶ in which the Supreme Court interpreted the due process clause as requiring that discovery be a "two-way street," absent strong state interests to the contrary.²³⁷ If a defendant obtains classified information, reciprocal discovery obligates the Government to provide the defendant with "the information it expects to use to rebut the particular classified information at issue."²³⁸ One of the three bills proposed by Congress to resolve the graymail dilemma, however, omits any reciprocity provision between defendant and prosecutor.²³⁹ In essence, this omission requires the defendant to disclose the intended role of the classified information in his or her case prior to hearing the prosecution's case.²⁴⁰ This result dictates that other safeguards need to be employed so that classified information is not protected at the expense of a defendant's constitutional rights.

D. *The Government's Right to an Interlocutory Appeal*

The Government's present right to an interlocutory appeal is limited to decisions which set aside or dismiss an indictment or information and decisions which arrest a judgment of convic-

235. See Nakell, *Criminal Discovery for the Defense and the Prosecution—the Developing Constitutional Considerations*, 50 N.C.L. REV. 437, 439–40, 443 (1972). See also Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82 (1963).

236. 412 U.S. 470 (1973).

237. *Id.* at 474–75.

238. *Congressional Record*, H.R. 4736, 96th Cong., 1st Sess. § 107(a)(1), 125 CONG. REC. H5763 (daily ed. July 11, 1979). If the Government fails to comply with such an order, the court "may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information." *Id.* § 107(b).

239. Both H.R. 4736 and S. 1482 contain reciprocity provisions requiring the disclosure of rebuttal evidence by the prosecution. See *id.*; S. 1482, 96th Cong., 1st Sess. § 6(c), 125 CONG. REC. S9184 (daily ed. July 11, 1979).

240. *Hearings on H.R. 4736 & H.R. 4745*, *supra* note 4, at 4–5 (statement of Otto Obermaier). See generally K. DAVIS, *DISCRETIONARY JUSTICE* (1966).

tion.²⁴¹ Traditionally, the prosecution's right to an interlocutory appeal has been limited because the use of this extraordinary device can adversely affect the defendant's constitutional right to a speedy trial.²⁴² The proposed legislation at issue provides the Government with the right to an interlocutory appeal following a trial court's order to disclose classified information, imposition of sanctions for nondisclosure, or refusal to grant a protective order sought by the prosecution to prevent disclosure,²⁴³ if the prosecutor certifies that the appeal is not a dilatory tactic.²⁴⁴ The proposed legislation also provides for special expeditious procedures²⁴⁵ to avoid disruption at trial and to ensure that the defendant's interest in a speedy trial is protected. For example, the legislation provides a stringent timetable for the disposition of the appeal by the appellate court. The court must hear oral argument and render a decision within eight days of the adjournment of the trial.²⁴⁶ To further expedite its decision, the appellate court may dispense with a written opinion.²⁴⁷ While these procedures increase the likelihood that the Government's right to an interlocutory appeal will not disrupt the flow of the criminal proceeding any more than the customary granting of a continuance by the trial judge, they may not be the best solution to the graymail dilemma.

E. *An Alternative Proposal*

A distinct set of codified rules devoted to the resolution of the graymail dilemma appears unnecessary in light of the relatively small number of cases in which the graymail threat occurs.²⁴⁸

241. 18 U.S.C. § 3731 (1976).

242. U.S. CONST., amend. VI; *see, e.g.*, *Will v. United States*, 389 U.S. 90, 96 (1967) (citing *DiBello v. United States*, 369 U.S. 121, 126 (1962)); *Carroll v. United States*, 354 U.S. 394 (1957). The prosecution does, however, enjoy the right to an interlocutory appeal in at least one jurisdiction. *See* D.C. CODE ENCYCL. §§ 11-721(a)(3), 23-104 (West 1973).

243. *E.g.*, *Congressional Record*, H.R. 4736, 96th Cong., 1st Sess. § 108, 125 CONG. REC. H5764 (daily ed. July 11, 1979). This provision eliminates the need to seek a writ of mandamus when the trial judge rules adversely for the Government as was necessary in the *Berrellez* case. *See* notes 61-70 *supra* and accompanying text.

244. The Attorney General, Deputy Attorney General, or a designated Assistant Attorney General must certify that the appeal is not for the purpose of delay. *E.g.*, *Congressional Record*, H.R. 4736, 125 CONG. REC. H5764 (daily ed. July 11, 1979).

245. *See, e.g.*, *Congressional Record*, H.R. 4736, 96th Cong., 1st Sess. § 108, 125 CONG. REC. H5764 (daily ed. July 11, 1979).

246. *Id.*

247. *Id.*

248. *Hearings on H.R. 4736 & H.R. 4745, supra* note 4, at 4 (statement of Phillip B. Heymann).

Amending the existing rules of criminal procedure and the rules of evidence, however, could efficiently control the use of the graymail tactic. The Classified Information Criminal Trial Procedures Act's²⁴⁹ emphasis on pretrial notice heightens the attractiveness of this approach.

An amendment to the Jencks Act appears unnecessary, since all discoverable prior statements, including those obtained under the Act, are subject to the rules of relevance controlling the admissibility of evidence at trial.²⁵⁰ In addition, since the Act does not require dismissal of a prosecution in the event of nondisclosure of requested materials, the defendant's ability to disclose Jencks-type information at trial is further limited.²⁵¹ The combination of the Act's sanctions with the federal evidentiary rules of relevance greatly diminishes the necessity for enacting the proposed Jencks amendment.

Commentary on the proposed graymail legislation demonstrates a concern with the lack of pretrial notice afforded the Government by the present procedural mechanisms.²⁵² The core of the proposed legislation is its provision for a pretrial hearing, at either party's request, at which the classified information issues relevant to the case can be reviewed.²⁵³ This pretrial notice warns the Government in advance of potential graymail situations that could arise at trial, thus providing it with the opportunity to secure a pretrial ruling on the relevance or admissibility of the classified information at issue.²⁵⁴

The proposed legislation's pretrial notice provision is analogous to the pretrial notice requirements in cases in which the defendant intends to raise either an alibi or insanity defense. Under the Federal Rules of Criminal Procedure, the defendant in these instances must provide the prosecution with advance notice.²⁵⁵ The identical procedure in classified information cases would ensure advance notice to the prosecution of the potential graymail threat. Congress need only amend the existing Federal Rules of Criminal Procedure by adding a new rule which would require mandatory pretrial notice if the defendant intends to disclose clas-

249. See note 185 *supra*.

250. See notes 208-12 *supra* and accompanying text.

251. See notes 215-17 *supra* and accompanying text.

252. See notes 185-91 *supra* and accompanying text.

253. 125 CONG. REC. H5763 (daily ed. July 11, 1979) (remarks of Rep. Murphy).

254. See text following note 234 *supra*.

255. See notes 232-34 *supra* and accompanying text.

sified information. This rule could also provide for reciprocal discovery between defendant and prosecution.²⁵⁶

In addition, Congress could amend the Federal Rules of Evidence by adding a rule similar to the rape shield rule.²⁵⁷ Under this rule, the defendant is required to provide the court with advance notice of an intent to offer evidence of specific instances of the alleged victim's past sexual behavior.²⁵⁸ Similarly, the new rule could require written advance notice of the defendant's intent to offer classified information as evidence. Amendment of the existing procedural and evidentiary rules could provide a mandatory, uniform mechanism for securing pretrial notice and bypassing a possible graymail threat at trial. By affording the Government advance warning of the classified information issue, the Government could calculate the risks involved in further prosecutorial proceedings.²⁵⁹

One disturbing aspect of the proposed legislation is the provision for an *in camera*, *ex parte* proceeding.²⁶⁰ The more these procedures are used, the less subject the Government is to the adversary process. The *ex parte* proceeding is often unnecessary and prejudicial to the defendant, since the trial judge decides the relevance of evidence without the benefit of the adversary process.²⁶¹ A better approach, which would force the prosecution to conform to the adversary process, would require the prosecution to submit proof that the national security privilege has been properly invoked. Maintaining the adversarial process in the *in cam-*

256. See notes 235-40 *supra* and accompanying text.

257. FED. R. EVID. 412.

258. *Id.* 412(c).

259. This approach would also work with regard to the proposed Government right of interlocutory appeal. Section 3731 of title 18 could be amended to include a Government right to appeal from any adverse decision of the trial court in classified information cases.

260. Only the Administration bill (H.R. 4745) includes a provision for this type of hearing. Section 6(b) allows the Government to present its reasons for nondisclosure of the classified information in an *in camera*, *ex parte* hearing. H.R. 4745 § 6(b), *Hearings on H.R. 4745*, *supra* note 185.

261. In *Jencks*, the Supreme Court stated: "What is true before the case is opened is equally true as the case unfolds. The trial judge cannot perceive or determine the relevance and materiality of the documents to the defense without hearing defense argument, after inspection, as to its bearing upon the case. *Jencks v. United States*, 353 U.S. 657, 669 n.14 (1957). The court further stated:

Because only the defense is adequately equipped to determine the effective use [of evidence] for the purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

Id. at 668-69.

era hearing would thus allow the court to make a well informed choice regarding the classified information at issue.

The use of protective orders would eliminate the need for *ex parte* proceedings,²⁶² as they afford defendants and defense counsel access to sensitive materials, but restrict their freedom to disseminate further such materials.²⁶³ A standard form protective order should be created²⁶⁴ which could be tailored to the specific circumstances of a particular case.

In sum, provision for mandatory pretrial notice would remove much of the arbitrariness inherent in the present procedural and evidentiary rules applicable to the resolution of the graymail dilemma. Although no mechanism may ever be completely effective in solving the graymail dilemma, mandatory pretrial notice presents a more effective means of confronting the dilemma than any mechanism presently available.

CONCLUSION

Graymail presents a formidable obstacle to upholding the integrity of the criminal justice system. Justice cannot be achieved when some defendants go free simply because their access to classified information permits them to enjoy a prosecutorial immunity. Procedural rules tailored to resolve this problem and the graymail dilemma it creates are needed. The question is not whether new solutions are necessary, but rather, how severe the solutions must be.

The goal of criminal procedure is to secure a just adjudication of the issues before the court. This goal can be achieved only through a careful balancing of the Government's interests in retribution and deterrence against the defendant's interests in a fair trial and his or her ultimate liberty. The Government's concern in

262. Both H.R. 4736 and S. 1482 contain provisions providing for the issuance of protective orders to prevent the compromise of classified information by the defendant. *Congressional Record*, H.R. 4736, 96th Cong., 1st Sess. § 109, 125 CONG. REC. H5763-64 (daily ed. July 11, 1979); *Id.*, S. 1482, 96th Cong., 1st Sess. § 3, 125 CONG. REC. S9184 (daily ed. July 11, 1979). Use of the protective order to prevent the dissemination of classified information has enabled the Government to prosecute successfully several graymail cases. *See, e.g.*, *United States v. Humphrey*, 456 F. Supp. 51 (1978) (classified information remained within the physical custody of the court with strict limitations regarding disclosure and notetaking placed upon the defense).

263. *See, e.g.*, *United States v. Gray*, Crim. No. 78-00179 (D.D.C. Dec. 22, 1978) (protective order provided for the redaction of documents by the Government before the disclosure to the defendants).

264. *See Espionage Laws and Leaks, supra* note 5, at 18-19 (statement of Anthony Lapham).

eliminating graymail cannot be upheld at the expense of the defendant's constitutional rights. The solution to graymail must strike a new balance: a balance in which both national security secrets and defendants' sixth amendment rights are protected.

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AUTHOR'S NOTE

Congressional concern with the graymail phenomenon ultimately resulted in the recent enactment of the Classified Information Procedures Act.²⁶⁵ The Act provides a comprehensive pretrial, trial, and appellate procedural framework for the disclosure of classified information in criminal cases, but it does so without amending the Federal Rules of Evidence and Criminal Procedure. The core of the new legislation is its provision for a pretrial conference pursuant to either party's request. At this conference the classified information issues relevant to the case can be reviewed, and the court may consider any matters which relate to classified information or which promote a fair and expeditious trial.²⁶⁶ Importantly, any admissions made by the defense during the pretrial conference cannot be used against the defendant at trial, unless the admission is reduced to writing and signed by both the defendant and defense counsel.²⁶⁷

The Classified Information Procedures Act contains a mandatory pretrial notice provision analogous to those required in cases where the defendant intends to raise either an alibi or insanity defense. Under the Act, if the defendant intends to disclose classified information in connection with a pretrial or trial proceeding, the Government and the court must be notified in writing.²⁶⁸ Additionally, the Act prohibits the defendant from disclosing the classified information until the Government has had a reasonable opportunity to move for a hearing at which a procedure for the requested disclosure may be established. Moreover, if the defendant fails to comply with the Act's pretrial notice requirement, the court in its discretion may preclude disclosure of

265. Classified Information Procedures Act, Pub. L. No. 96-456, 49 U.S.L.W. 187 (1980).

266. *Id.* § 2.

267. *Id.*

268. *Id.* § 5(a).

the classified information or may prohibit the defense from examining any witness with regard to classified information. These provisions should provide the Government with the advance warning necessary for it to be aware of the possible graymail problems arising during the course of the prosecution. Thus, many of the "disclose or dismiss" dilemmas of the past should be avoided in the future.²⁶⁹

Under the Act's terms, the Government may secure a pretrial ruling regarding the use, relevance or admissibility of the classified information by requesting the district court to conduct an *in camera* hearing.²⁷⁰ Before the court holds the hearing, however, the Government must notify the defendant of the classified information at issue.²⁷¹ The Act requires the Government to describe the information with specificity only if the defendant previously had access to the information; otherwise, the Government need only describe the information generally.²⁷² If the Government succeeds in preventing the disclosure to the defendant of court-ordered classified information, the Act requires the court to dismiss the indictment or information, unless a lesser sanction will better serve the interests of justice.²⁷³ Thus, the new Act requires the Government to make a calculated choice between nondisclosure of the classified information and prosecution of the defendant.

Additionally, the Classified Information Procedures Act includes a reciprocity provision which requires the Government to disclose to the defendant any information which it intends to use to rebut the classified information.²⁷⁴ In fact, the court may place the Government under a continuing duty to disclose all rebuttal information to the defendant as this information becomes available.²⁷⁵ If the Government fails to comply with the reciprocity requirement, the court may subject it to sanctions similar to those imposed upon the defendant for failing to notify the prosecution of an intent to disclose classified information not disclosed.²⁷⁶ It appears, therefore, that discovery, at least with respect to rebuttal information, should be a "two-way street" under the Act.

269. *Id.* § 5(a)-(b).

270. *Id.* § 6(a).

271. *Id.* § 6(b).

272. *Id.*

273. *Id.* § 6(e)(2).

274. *Id.* § 6(f).

275. *Id.*

276. *Id.*

Although the Classified Information Procedures Act provides for the issuance of protective orders to guard against the indiscriminate dissemination of classified information by the defendant, it unfortunately provides for an *in camera*, *ex parte* proceeding.²⁷⁷ This *ex parte* provision enables the Government to bypass the adversarial process, allowing it simply to submit a written statement to the court requesting authorization to delete specified items of classified information from requested documents to substitute a summary of the information for these classified documents, or to substitute a statement admitting the relevant facts that the classified information would tend to prove.²⁷⁸ Upon *ex parte* inspection of this statement, the court may order either the deletion or substitution of the classified information as requested by the Government.²⁷⁹ Thus, the pretrial discovery of these items by the defense will be prohibited without giving the defense the benefit of an adversarial *in camera* hearing.

Even if the court conducts an *in camera* hearing with both parties present and subsequently orders the disclosure of the classified information to the defendant, the Government may still prevent disclosure by requesting the court to order either a proffer of the relevant facts to be proven by the classified information or a summary of the requested classified information.²⁸⁰ If the court determines that the proffer or summary will provide the defendant with substantially the same ability to prepare an adequate defense as would the disclosure of the specific information, it must grant the Government motion.²⁸¹ It thus appears that the Act authorizes the trial court to assume the role of the defense attorney in determining what classified information will be necessary to secure the defendant's sixth amendment right to prepare an adequate defense. Apparently, Congress envisioned no impingement of the defendant's sixth amendment rights by requiring the preparation of a defense and the confrontation of Government witnesses using only a summary or a proffer of the requested classified information.

The Government's concern in eliminating graymail is indeed meritorious and the newly enacted Classified Information Procedures Act seems to be an effective weapon with which to combat

277. *Id.* §§ 4, 6(c)(2).

278. *Id.* § 4.

279. *Id.*

280. *Id.* § 6(c)(1).

281. *Id.*

the “disclose or dismiss” dilemma. Although the Act’s procedural rules present a viable solution to the graymail problem, they appear, unfortunately, to favor the Government’s interests in retribution and deterrence over the defendant’s interests in a fair trial. Thus, this new congressional solution to graymail strikes a new balance: a balance in which national security secrets may indeed be protected at the expense of the defendant’s sixth amendment rights.