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THE INDEPENDENT COUNSEL VERSUS THE ATTORNEY GENERAL IN A CLASSIFIED INFORMATION PROCEDURES ACT-INDEPENDENT COUNSEL STATUTE CASE†

RONALD K. NOBLE*

INTRODUCTION

This article analyzes the tension that exists between two important federal statutes when they are triggered by sensitive and delicate prosecutions of high-ranking members of the Executive Branch and other officials who, in the course of their legal defense, reveal classified information. The first statute, the Independent Counsel Statute ("IC Statute"), was passed in 1978 in response to the unethical and criminal behavior of high-ranking members of the Nixon administration during the Watergate scandal.¹ The IC Statute removes responsibility for investigation and prosecution of high-ranking members of the Executive Branch from the Department of Justice, and transfers these functions to an Independent Counsel

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* Assistant Professor of Law, New York University School of Law. J.D., 1982, Stanford Law School; B.A., 1979, University of New Hampshire. I am grateful to Professors Anthony Amsterdam, Vicki Been, Graham Hughes, James Jacobs and William Nelson of the New York University School of Law, the Honorable A. Leon Higginbotham, Jr. of the U.S. Court of Appeals for the Third Circuit, and Craig Bleifer, Eric Leon and Michael Lowe, students at the New York University School of Law, for their incisive criticism and enthusiasm through many drafts. This article discusses in part the conflict between the Independent Counsel and the Attorney General concerning classified information in connection with the Iran-Contra cases of Oliver North and Joseph Fernandez. The author, while on leave from the New York University School of Law, represented the Department of Justice on matters of classified information in these cases. Although that experience provoked the author's interest in this topic, all research on and writing of this article occurred after the author's departure from the Department of Justice. The views set forth in this article do not reflect the views of the Department of Justice. The Filomen D'Agostino and Max E. Greenberg research fund at the New York University School of Law provided financial support for this article.

¹ Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867-73 (codified as amended at 28 U.S.C. §§ 49, 529, 591-599 (1988)).

appointed by the Judiciary. The IC Statute thus aims to ensure that high-ranking members of the Executive Branch suspected of criminal wrongdoing do not receive preferential treatment by that branch.²

The second statute, the Classified Information Procedures Act ("CIPA"), was enacted in 1975 to prevent defendants from frustrating otherwise legitimate prosecutions by engaging in a form of "graymail."³ This type of graymail occurs when a defendant threatens to disclose classified information at trial,⁴ and the government, fearing such public disclosure, decides to drop the charges against the defendant. Thus, like the IC Statute, CIPA is designed to bolster public confidence in the administration of criminal justice by ensuring that individuals who work with classified information—often members of the Executive Branch whose jobs require the highest levels of public trust—cannot make themselves immune from criminal prosecution.⁵ CIPA is also designed to safeguard national security by preventing the uncontrolled release of classified information at trial.

At the respective times that the IC Statute and CIPA were passed, no one considered the possibility that serious problems of harmonization would arise if both statutes were triggered in the same case.⁶ Neither statute refers to the other, nor is there any guidance concerning the respective powers of the Independent

² Congress has recognized that "[t]he President and the Attorney General must have policy control to make discretionary enforcement decisions. However, where the alleged criminal conduct of high-level administration officials is involved, this argument must bow to the fundamental principle that no [person] can be a prosecutor or judge in [her] own case." S. REP. NO. 170, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4221.

³ Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. §§ 1-15 (1988)).

⁴ The threatened disclosure may be either the result of "unscrupulous or questionable conduct" by a defense attorney, who seeks to disclose classified information regardless of its relevance, or the legitimate need for exculpatory information. S. REP. NO. 823, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4296-98. The type of defendant in the best position to threaten the release of classified information is the government official who has worked on classified matters.

⁵ Because CIPA gives the government the opportunity to contest relevance and admissibility and propose substitutions prior to trial, the government will consider dismissing only those cases in which the classified information *must* be disclosed. This has the effect of preventing the charges from being dropped against a defendant who really does not need classified information for his defense, and who was merely attempting to graymail the government with unnecessary disclosures.

⁶ I will refer to such a case as a "CIPA-IC Statute" case.

Counsel and the Attorney General where both statutes are operating in the same case.⁷ This omission creates a conflict that first surfaced in the Iran-Contra prosecutions.⁸

In two recent cases, *United States v. North*⁹ and *United States v. Fernandez*,¹⁰ a conflict arose between the Independent Counsel and the Department of Justice concerning the potential public disclosure of classified information. In *North*, the district court ruled that classified information could be disclosed at trial unless the Independent Counsel filed an interlocutory appeal challenging the district court's ruling or the Attorney General filed a CIPA section 6(e) affidavit barring disclosure of the classified information on national security grounds.¹¹

The Independent Counsel, Lawrence Walsh, decided that it was not in the best interest of the case to appeal the district court's ruling. The Attorney General thereafter asked the Independent Counsel to file an immediate interlocutory appeal, in order to protect national security. In both cases, Independent Counsel Walsh refused,¹² taking the position that the IC Statute transferred to the Independent Counsel all of the Department of Justice's investigative and prosecutorial powers except the power to authorize wiretaps. Walsh considered an appeal of the rulings on classified information a prosecutorial function. Therefore, in cases governed by the IC Statute and CIPA, Walsh argued that only the Independent Counsel could appeal such adverse rulings.¹³

⁷ The court in *United States v. Fernandez* stated that "[r]esolution of this controversy requires us to construe both CIPA and the Ethics in Government Act [the IC Statute], neither of which refers to the other." 887 F.2d 465, 468 (4th Cir. 1989). The IC Statute refers to the powers of the "Independent Counsel" while CIPA refers to the powers of the "Attorney General" and "the United States."

⁸ The officials who were prosecuted included Marine Lt. Col. Oliver L. North, CIA Chief of Station Joseph Fernandez, CIA official Thomas Clines and National Security Advisor John Poindexter.

⁹ *United States v. North*, 713 F. Supp. 1441 (D.D.C. 1989).

¹⁰ *United States v. Fernandez*, 887 F.2d 465 (4th Cir. 1989).

¹¹ See *North*, 713 F. Supp. at 1442. Likewise, the *Fernandez* court agreed that the Independent Counsel had the sole right to file an interlocutory appeal. The Attorney General could not file an interlocutory appeal, but had the right to file a CIPA § 6(e) affidavit. See *Fernandez*, 887 F.2d at 470-71.

¹² See *Fernandez*, 887 F.2d at 467; *North*, 713 F. Supp. at 1441. In a non-IC Statute case, this situation would never arise. Any CIPA dispute within the Executive Branch would always be resolved inside the Executive Branch, ultimately by the President. In an IC Statute case, even though the Independent Counsel is technically discharging Executive Branch functions and is an inferior officer of the Executive Branch, he need not follow the directives of the Attorney General or the President.

¹³ See *Fernandez*, 887 F.2d at 467; *North*, 713 F. Supp. at 1441.

Attorney General Richard Thornburgh disagreed, contending that CIPA provides two separate mechanisms to protect classified information from public disclosure.¹⁴ The first involves an interlocutory appeal of any court rulings that would result in public disclosure of classified information.¹⁵ The Attorney General argued that in an IC Statute case, the power to appeal is shared by the Attorney General and the Independent Counsel. The second protective mechanism involves the filing of an affidavit with the trial court, opposing public disclosure on national security grounds.¹⁶ The Attorney General argued that such an affidavit should not be filed until all interlocutory appeals had been exhausted.

Thus, the stage was set for what one news service described as the battle of the "Titans"—the Independent Counsel versus the Attorney General. Indeed, "[i]n a moment fraught with tension, a [Department of Justice lawyer] walked to the bench in the midst of jury selection and handed [the trial judge in *North*] a copy of the stay request filed with the appeals panel."¹⁷ Many saw the Executive Branch's decision to interrupt the North trial as an attempt to use national security as a pretext to prevent both the prosecution of one of its own and the embarrassment of the President.¹⁸ The

¹⁴ See *Fernandez*, 887 F.2d at 467, 469; *North*, 713 F. Supp. at 1441. The Attorney General and the Department of Justice identified the CIPA § 6(c) substitution of classified information power and the CIPA § 7(a) interlocutory appeal power as two separate mechanisms for protecting classified information. The Attorney General believed that he also represented "the United States" for purposes of CIPA. See *infra* section II.C.

¹⁵ See 18 U.S.C. app. § 7 (1988).

¹⁶ See *id.* app. § 6(e). The *Fernandez* court held that the power to file a § 6(e) affidavit is the Attorney General's alone. *Fernandez*, 887 F.2d at 467-68. Although Independent Counsel Walsh never challenged the Attorney General's claimed exclusive right to file a § 6(e) affidavit, this issue might arise in future CIPA-IC Statute cases.

¹⁷ Glen Craney, *Secret Documents at Issue: Justice Department Tries to Delay North Trial*, CONG. Q. WKLY. REP., Feb. 11, 1989, at 273.

¹⁸ One reporter described the interruption of the Oliver North trial by the Justice Department this way:

It was a scene right out of 'Lonesome Dove,' the mega-Western where the good guys always rode up in the nick of time. Just as the jury was about to be sworn in, just as Oliver North was, finally, about to advance to the dock, a posse of Justice Department lawyers came galloping into Judge Gerhard Gesell's courtroom, crying 'Jest a danged minute here.'

The Justice Department, which has had only 11 months or so to study classified documents that are to be used in the trial, had suddenly come to, clapped its hand to its brow and all but fainted at the thought that Oliver North, patriot and hero to two presidents, might go on the stand and tell the public some intelligence secrets that could bring the republic crashing down around our ears.

Mary McGrory, *Thornburgh Comes Late to Ollie's Rescue*, NEWSDAY, Feb. 10, 1989, at 80.

prosecution of a former high-ranking member of the Executive Branch had been interrupted by the very Executive Branch that Congress, in enacting the IC Statute, had disqualified from investigating and prosecuting the case.

In the *North* and *Fernandez* cases, the courts rejected the Attorney General's position that his office retained power under CIPA to appeal court rulings permitting disclosure of classified information. The courts held that the Independent Counsel could prevent disclosure of classified information *only* by successfully appealing adverse court rulings, while the Attorney General could prevent the public disclosure of classified information *only* by filing a CIPA section 6(e) affidavit.¹⁹

The lack of coordination between CIPA and the IC Statute, and the division of CIPA powers between the Independent Counsel and the Attorney General, have produced two results that frustrate the purposes of Congress in enacting these statutes. First, the continued ability of the Executive Branch to protect itself from prosecution by controlling classified information undermines CIPA's goal of eliminating *de facto* immunity for members of the government who handle classified information. Similarly, control of classified information is a tool that can potentially be used to circumvent the entire Independent Counsel process, as it puts the Executive Branch in a position of judging whether or not one of its own is prosecuted.

Second, the courts' prohibition of intervention by the Executive Branch to appeal issues of admissibility and relevance under CIPA forces that branch to act in an arguably suspicious manner; the Executive may potentially, and prematurely, file a CIPA section 6(e) affidavit when the Independent Counsel refuses to appeal adverse

¹⁹ See *United States v. North*, 713 F. Supp. 1441, 1441-42 (D.D.C. 1989). The district court confronted the standing to appeal question in the context of the Attorney General's request to stay the trial of Oliver North, pending resolution of the issue by the United States Court of Appeals for the District of Columbia Circuit. The district court rejected the Attorney General's stay request, concluding that the Attorney General's position on standing to appeal was frivolous. The court held that CIPA and the IC Statute provided the Attorney General only with the standing to file a § 6(e) affidavit. Similarly, in *Fernandez*, the United States Court of Appeals for the Fourth Circuit held that the IC Statute transferred all of the Department of Justice's CIPA powers to the Independent Counsel, save the Attorney General's power to file a § 6(e) affidavit to prevent public disclosure of classified information on national security grounds. 887 F.2d at 470-71. Once filed, the § 6(e) affidavit prevents the public disclosure of the identified classified information.

CIPA rulings. Because the decision to file a section 6(e) affidavit to prevent the release of classified information will appear self-interested, such filing will frustrate the IC Statute's goal of fostering public confidence in decisions made during the prosecution of high-ranking members of the Executive Branch. Alternatively, in order to avoid the appearance of impropriety, the Executive Branch may release classified information that could threaten national security.

This article will demonstrate that a forum is needed wherein the Independent Counsel and the Attorney General can resolve disputes concerning the potential public disclosure of classified information. To that end, this article proposes the creation of an Office of Independent Special Arbiter ("ISA") for classified information that would be a step toward harmonizing the IC Statute and CIPA.

The ISA would be a private attorney qualified to make decisions regarding classified information and national security. The appointment process would be the same as for the Independent Counsel except that, once appointed, the ISA would issue advisory opinions on whether the release of the classified information would threaten national security. These opinions would be made public, but would not bind the Executive Branch; the Attorney General could still file a CIPA section 6(e) affidavit to prevent public disclosure. Nevertheless, the Executive Branch's decision to prevent the public disclosure of classified information in the face of an ISA opinion that such disclosure would not threaten national security could be denounced by the public at the election polls.

To give the background for this proposal, Section I of the article describes the basic structure of the IC Statute and CIPA and the tension between the two statutes that emerged during the Iran-Contra trials. Section II argues that when these two statutes operate simultaneously in criminal proceedings, they bring out each other's weaknesses and actually work to undermine, not ensure, public confidence, as illustrated in *North* and *Fernandez*. Such simultaneous operation also works to endanger, rather than safeguard, national security. Section III explains how the goals of CIPA and the IC Statute are jeopardized in an CIPA-IC Statute case, and concludes by demonstrating that wise policy warrants the rejection of all potential solutions under the current CIPA-IC Statute framework. Section IV develops in detail a proposal for creating an Office of Independent Special Arbiter that would promote harmony in this framework.

I. THE STRUCTURE OF THE INDEPENDENT COUNSEL STATUTE AND THE CLASSIFIED INFORMATION PROCEDURES ACT

A. *The Independent Counsel Statute*

In 1978, Congress created the office of Independent Counsel²⁰ to investigate and prosecute criminal activity by high-ranking members of the Executive Branch.²¹ The so-called Independent Counsel Statute ("IC Statute") is a provision of the Ethics in Government Act, which remedies problems such as those that arose during the investigation and prosecution of high-ranking government officials in the Nixon administration,²² especially President Nixon's firing of the Watergate Special Prosecutor.²³

An Independent Counsel is a private attorney appointed by the court to investigate and, where appropriate, prosecute in the

²⁰ See Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867-73 (1978) (codified as amended at 28 U.S.C. §§ 49, 529, 591-599 (1988)). The Ethics in Government Act 1982 amendments changed the name of the "special prosecutor" of the original 1978 Act to "independent counsel" in order to "remove the Watergate connotation" and to "spare the subject of such investigation adverse public reaction." S. REP. NO. 496, 97th Cong., 2d Sess. 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3537, 3554.

²¹ The original version of the Ethics in Government Act of 1978 ("the Act") covered 120 authorized federal executive positions; this number was reduced to 70 in 1982. The original Act covered such persons as the Director of Staff for the First Lady. The drafters were concerned about excessive triggering of the Act, which causes "extreme expense and stigma" to the subject of Independent Counsel investigations. S. REP. NO. 496, 97th Cong., 2d Sess. 6-7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3537, 3543. The Act covers executive officers including the President, Vice President, Cabinet members, top Department of Justice officials and the heads of the CIA and the IRS. See 28 U.S.C. § 591(b). In addition, the "catch all" § 591(c) authorizes the Attorney General to trigger the statute for persons not specifically enumerated in § 591(b) in situations where an investigation by the Department of Justice would create an actual or perceived conflict of interest. This was the section that led to the appointment of Independent Counsel Lawrence E. Walsh for the Iran-Contra investigation.

²² S. REP. NO. 170, 95th Cong., 2d Sess. 5-8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4221-23.

²³ The so-called "Saturday Night Massacre" occurred when President Nixon directed Attorney General Elliot Richardson to fire Archibald Cox, who had been appointed Special Prosecutor in the Watergate matter. Cox was fired for trying to force President Nixon to turn over tape recordings and notes of presidential conversations relevant to Cox's investigation. Rather than fire Cox, Richardson and his Deputy Attorney General resigned. Cox was finally dismissed by Acting Attorney General Robert Bork. See Constance O'Keefe & Peter Safirstein, Note, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics In Government Act*, 49 BROOK. L. REV. 113, 117-18 (1982). Eventually Leon Jaworski was appointed Special Prosecutor, with assurances of freedom from the Executive Branch set forth in a formal regulation. See S. REP. NO. 170, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4218 (referring to 38 Fed. Reg. 30,739, as amended by 38 Fed. Reg. 32,805 (1974)).

name of the United States alleged violations of federal criminal law.²⁴ Under the IC Statute, an Independent Counsel is technically part of the Executive Branch and is expected to follow Department of Justice policy.²⁵ At the same time, however, the Independent Counsel also remains "independent" of such policy.²⁶ Once appointed,²⁷ an Independent Counsel has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice"²⁸ with respect to all

²⁴ It should be noted that the use of private attorneys to prosecute is not unique to cases involving Executive Branch conflicts. In *Young v. United States ex rel Vuitton et Fils*, 481 U.S. 787, 793-96 (1987), the Court upheld the federal district court's use of private attorneys to prosecute contempt actions.

²⁵ See 28 U.S.C. § 594(f). The drafters of the original bill apparently believed that whether the Independent Counsel follows Department of Justice policy is a matter of the Independent Counsel's own discretion and that the "section should be interpreted more as a goal than as a command." S. REP. NO. 170, 95th Cong., 2d Sess. 69 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4285-86. Furthermore, the committee emphasized that the court will not supervise or judge the discretion of the Independent Counsel. *Id.* at 71, reprinted in 1978 U.S.C.C.A.N. at 4287.

The 1982 Amendments to the Act changed the standard for following Department of Justice policy from "to the extent the special prosecutor deems appropriate" to "except where not possible." This was an attempt to ensure application of the uniform standards of the Department of Justice "unless extenuating circumstances exist." See S. REP. NO. 496, 97th Cong., 2d Sess. 17 (1982), reprinted in 1982 U.S.C.C.A.N. 3537, 3552. The drafters, however, were careful to point out that "[t]his section should not be interpreted to mean that failure of the special prosecutor to follow Departmental policies would constitute grounds for removal of the special prosecutor by the Attorney General. Such an interpretation would seriously compromise the special prosecutor's independence." *Id.* at 16, reprinted in 1982 U.S.C.C.A.N. at 3552; see also 28 U.S.C. § 594(f).

²⁶ 28 U.S.C. § 594(i) states that "[e]ach independent counsel appointed under this chapter, and the persons appointed by that independent counsel under subsection (c), are separate from and independent of the Department of Justice for purposes of sections 202 through 209 of title 18."

²⁷ Under the Act, the Independent Counsel is appointed by a Special Division Court. See 28 U.S.C. § 592(c)(1). The Special Division consists of three judges who serve staggered two-year terms, designated by the Chief Justice of the United States, and who are drawn from a pool including retired U.S. Supreme Court Justices and senior judges on the U.S. Courts of Appeals. See *id.* § 49. The judiciary has the power to appoint executive officers under the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2. The Special Division's proper name is the "Division for the Purpose of Appointing Independent Counsels," and was created by the Ethics in Government Act of 1978, Pub. L. No. 95-521, § 602(a), 92 Stat. 1824, 1867-75 (1978) (codified as amended at 28 U.S.C. §§ 49, 529, 591-99 (1988)).

²⁸ 28 U.S.C. § 594(a). The Independent Counsel's powers include:

- (1) conducting proceedings before grand juries and other investigations . . . (3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity . . . (6) receiving appropriate national security clearances and, if necessary, contesting in court . . . any claim of privilege or attempt to withhold evidence on grounds of national security . . . and (9) initiating and conducting prosecutions in any court of

matters under the Independent Counsel's jurisdiction, as defined by the Special Division Court ("Special Division") that appointed the Independent Counsel.²⁹

The IC Statute attempts to address the fundamental law enforcement problem of how to assure fair handling of investigations and prosecutions of high-ranking members of the Executive Branch.³⁰ The IC Statute aims to ensure public confidence in the investigation and prosecution of possible offenses by high-ranking members of the Executive Branch by eliminating real or apparent conflicts of interest in the investigation and prosecution of such matters.³¹ Until the passage of the IC Statute, no formal statutory mechanism existed for the appointment of an Independent Counsel, although the practice of discretionary appointments of Independent Counsel had been established well before the Watergate scandals.³²

The IC Statute creates a two-step process by which information and allegations against government officials are screened before the

competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States.

Id.

²⁹ See *id.* The Attorney General can request that the Special Division expand the jurisdiction of the Independent Counsel, either on the Attorney General's own initiative, or upon the request of the Independent Counsel, after discovering or receiving information about persons not covered by the original grant of jurisdiction. See *id.* § 593(c). The Independent Counsel may also ask the Attorney General to refer to her other matters related to her jurisdiction. See *id.* § 594(e).

³⁰ The Ethics in Government Act Amendments of 1982 recognized the conflict inherent in circumstances where the Attorney General is called on to investigate the Executive Branch; the Attorney General "is a political appointee of the President, at times a close advisor to the President, and part of an Administration that may aspire to reelection or have other political objectives." *Id.* at 4, reprinted in 1982 U.S.C.C.A.N. 3537, 3540. "The basic purpose of the special prosecutor provisions is to promote public confidence in the impartial investigation of alleged wrongdoing by government officials." *Id.* For a discussion of public confidence and its importance as an impetus for the enactment of the IC Statute, see Carl Levin, *The Independent Counsel State: A Matter of Public Confidence and Constitutional Balance*, 16 *HOFSTRA L. REV.* 11 (1987).

³¹ See *infra* section II.C. The appointment of an Independent Counsel removes the suspicion that would follow any prosecutorial decision by the Attorney General beneficial to a high-ranking member of the Executive Branch. For example,

The use of an [Independent Counsel] . . . would result in public acceptance of a decision not to prosecute that may be entirely justified on the merits; whereas the same decision made by an Attorney General who has a conflict of interest, or the appearance thereof, might breed public distrust of the decision not to prosecute.

S. REP. NO. 170, 95th Cong., 2d Sess. 7 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4223.

³² See *id.* at 2, reprinted in 1978 U.S.C.C.A.N. 4216, 4218; see also O'Keefe & Safirstein, *supra* note 23, at 116 n.16.

appointment of an Independent Counsel. First, the Attorney General is required to conduct a threshold inquiry whenever "the Attorney General receives information sufficient to constitute grounds to investigate whether any person [covered by the Act]³³ may have violated any federal criminal law other than a violation classified as a class B or C misdemeanor or an infraction."³⁴ The purpose of this threshold inquiry is to determine whether a preliminary investigation is necessary. In determining whether to go forward with a preliminary investigation, the Attorney General considers only the specificity of the information received and the credibility of its source.³⁵ If within the fifteen days after the information concerning an alleged criminal violation is received, the Attorney General determines that the specificity or credibility requirement is not met, then the Attorney General must close the matter.³⁶

Second, if within that fifteen day period the Attorney General determines that the information is specific and from a credible source, the Attorney General should commence a preliminary investigation.³⁷ During a preliminary investigation the Attorney General's ordinary investigative powers are limited; the Attorney General has no authority to convene grand juries, plea bargain, grant immunity or issue subpoenas.³⁸ Additionally, the Attorney General is not permitted to conclude that information about a violation of criminal law by a person is not specific and from a credible source merely because that person lacked the state of mind required for the violation of criminal law.³⁹ Finally, the Attorney General shall not base a determination that "there are no reasonable grounds to believe that further investigation is warranted, upon a determination that the person under investigation lacked the state of mind required for the violation of [the specific] criminal law involved,

³³ See *supra* note 21.

³⁴ 28 U.S.C. § 591(a). The Attorney General must also conduct a threshold inquiry in response to requests by Congress to conduct a preliminary investigation. See *id.* § 592(g)(1) (providing that "[t]he committee on the Judiciary of either House of the Congress, or a majority of majority party members or a majority of all non-majority party members of either such committee; may request in writing that the Attorney General apply for the appointment of an independent counsel").

³⁵ *Id.* § 591(d).

³⁶ *Id.* § 591(d)(2).

³⁷ *Id.* Even if the "Attorney General is unable to determine, within that 15 day period, whether the information is specific and from a credible source, the Attorney General shall, at the end of that 15 day period, commence a preliminary investigation with respect to that information." *Id.*

³⁸ *Id.* § 592(a)(2).

³⁹ *Id.* § 592(a)(2)(B)(i).

unless there is clear and convincing evidence that the person lacked such state of mind."⁴⁰

If upon completion of the preliminary investigation the Attorney General determines that no reasonable grounds exist to believe that further investigation is warranted, the Attorney General must promptly notify the Special Division Court, which has no power to appoint an Independent Counsel with respect to the matters involved.⁴¹ The IC Statute also makes clear that decisions by the Attorney General not to apply for appointment of an Independent Counsel are not reviewable.⁴² If the Attorney General determines that further investigation and appointment of an Independent Counsel is not necessary, the Attorney General must report the decision to the Special Division,⁴³ or, if appropriate, Congress.⁴⁴

If, however, the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted⁴⁵ or the applicable time periods during which to make such determination have elapsed,⁴⁶ then the Attorney General can apply to the Special Division for the appointment of an Independent Counsel.⁴⁷ Upon the application of the Attorney General, the Special Division must appoint and define the prosecutorial jurisdiction of an Independent Counsel.⁴⁸ The Department of Justice provides the Special Division with a list of names from which it can

⁴⁰ *Id.* § 592(a)(B)(ii).

⁴¹ *Id.* § 592(b)(1).

⁴² *See id.* § 592(f).

⁴³ *See id.* § 592(b).

⁴⁴ *See id.* § 592(g)(2). Section 592(g)(2) provides:

Not later than 30 days after the receipt of a request [by Congress to conduct a preliminary investigation], the Attorney General shall submit, to the committee making the request, or to the committee on which the persons making the request serve, a report on whether the Attorney General has begun or will begin a preliminary investigation under this chapter of the matters with respect to which the request is made.

Id. Significantly, the Act does not require the Attorney General to give an explanatory report to either the Special Division or Congress if it is determined during the threshold inquiry that an actual preliminary investigation is not required. Obviously, whenever the Attorney General decides not to conduct a preliminary investigation of a covered member of the Executive Branch and the public learns of that decision, public suspicion will be immediately aroused. This loophole in the IC Statute is often criticized as permitting mischief on the part of the Executive Branch.

⁴⁵ 28 U.S.C. § 592(c)(1).

⁴⁶ The Attorney General has 90 days to conduct the preliminary investigation under 28 U.S.C. § 592(a)(1), but may apply to the Special Division for a 60-day extension under § 592(a)(3).

⁴⁷ *See id.* § 592(c)(1)(B).

⁴⁸ *See id.* § 592(b)(1).

select an Independent Counsel. The Special Division, however, is not bound by this list and instead may appoint an Independent Counsel of its own choosing.⁴⁹

Finally, the IC Statute provides that "[n]otwithstanding any other provision of law, an Independent Counsel appointed under this chapter shall have . . . full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."⁵⁰ The Independent Counsel possesses a number of powers: to investigate person(s) within the Independent Counsel's jurisdiction; to convene a grand jury; to litigate criminal or civil cases; to appeal adverse rulings; to apply for grants of immunity for potential witnesses; to seek indictments from the appropriate grand juries; to control the prosecution of defendants; to negotiate plea agreements; to dismiss individual counts or entire indictments; and to hire all appropriate personnel.⁵¹ The IC Statute's language expressly reserves for the Attorney General alone the power to "exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18 [authorization for interception of wire, oral or electronic communication]."⁵²

B. *Classified Information Procedures Act*

Prior to the enactment of the Classified Information Procedures Act ("CIPA"),⁵³ the government had to choose between allowing public disclosure of classified information and dismissing pending criminal charges, without knowing how the court would rule on admissibility, in federal criminal cases touching on national security matters.⁵⁴ CIPA ensures that issues of relevancy and admissibility

⁴⁹ "Any application for the appointment of an Independent Counsel under this chapter shall contain sufficient information to assist the [Special Division] in selecting an Independent Counsel." *Id.* § 592(d). In practice, the Department of Justice provides the Special Division with a list of up to ten individuals, and the Special Division makes its selection and advises the Department of Justice accordingly.

⁵⁰ *Id.*

⁵¹ For a more detailed list of examples of the Independent Counsel's power, see 28 U.S.C. §§ 594(a)(1)-(10)(c).

⁵² *Id.* § 594(a).

⁵³ Classified Information Procedures Act, 18 U.S.C. app. §§ 1-15 (1988).

⁵⁴ Prior to the enactment of CIPA, a criminal defendant could force the government to dismiss the case against her by threatening to disclose classified information at trial. If the classified information was sufficiently sensitive, the government would not take the risk that the court would find the information relevant when the government objected to it at trial.

can be resolved during the pre-trial stage. In addition, CIPA permits the Attorney General, pursuant to section 6(e) of the Act, to file an affidavit to prevent the public disclosure of classified information on national security grounds.

Classified information⁵⁵ is potentially very important in the prosecution of espionage and other crimes committed by members of the Executive Branch, whose daily operations often involve the handling of such information. In these cases, a defendant may claim that the classified information is essential to his or her defense. Either the indictments will charge the defendant with a crime involving classified information, or the defendant will seek to introduce classified information to prove his or her innocence.⁵⁶ The aim of CIPA is to allow for the prosecution of cases that were previously difficult or impossible to pursue because of the threat of disclosure of classified information: cases like the Iran-Contra pros-

Consequently, in such a situation the government would often dismiss the charges against the defendant.

⁵⁵ "Classified information" refers to information or material classified pursuant to Executive Order as "Top Secret," "Secret," or "Confidential." JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 1064 (1990) (citing Exec. Order No. 12,356, 3 C.F.R. 166, 167 (1982), reprinted in 50 U.S.C. § 401 (1982)). "Classified information" is defined as information, the disclosure of which "reasonably could be expected to cause damage to national security." *Id.* Section 1.3 of Executive Order 12,356 lists the kinds of information that are potentially classifiable. See Exec. Order 12,356, 3 C.F.R. 166 (1982), reprinted in 50 U.S.C. § 401 (1982). CIPA § 1(a) specifically defines classified information as:

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

18 U.S.C. app. § 1(a). CIPA § 6 defines national security as "the national defense and the foreign relations of the United States." *Id.* § 1(b); see also Exec. Order 12,356, § 6.1(c), 3 C.F.R. 166, 167, reprinted in 50 U.S.C. § 401 (1982).

⁵⁶ Many of the CIPA cases involve the so-called "CIA defense," or "apparent authority" defense, where the defendant claims that the alleged illegal activity was committed while in service of the United States government. This defense has been asserted in response to a wide variety of charges. See, e.g., *United States v. Rewald*, 889 F.2d 836, 838-39 (9th Cir. 1989) (securities fraud, mail fraud), as amended, 902 F.2d 18, cert. denied, 111 S. Ct. 64 (1990); *United States v. Miller*, 874 F.2d 1255, 1278 (9th Cir. 1989) (espionage); *United States v. Anderson*, 872 F.2d 1508, 1513 (11th Cir. 1989) (removal of firearms from Fort Bragg); *United States v. Clegg*, 846 F.2d 1221, 1223 (9th Cir. 1988) (exporting firearms to Afghan rebels); *United States v. Badia*, 827 F.2d 1458, 1460, 1464 (11th Cir.) (conspiracy to manufacture firearms), cert. denied, 485 U.S. 937 (1987); *United States v. Smith*, 780 F.2d 1102, 1104 (4th Cir. 1985) (disclosure of classified information to Soviet Union); *United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985) (drug charges); *United States v. Wilson*, 721 F.2d 967, 974 (4th Cir. 1983) (conspiracy to export firearms to Libya illegally); *United States v. LaRouche Campaign*, 695 F. Supp. 1265, 1278 (D. Mass. 1988) (conspiracy to obstruct justice).

ecutions of Oliver L. North and Joseph F. Fernandez.⁵⁷ CIPA attempts to accomplish this aim by "permit[ing] the government to ascertain the potential damage to national security of proceeding with a given prosecution *before* trial."⁵⁸

CIPA formalized procedures for the handling of classified information in criminal cases by creating uniform guidelines to prevent unauthorized disclosure. CIPA's pre-trial procedures eliminate the dilemma whereby the government may have to guess whether the defendant will disclose certain classified information, as well as whether such information would be found admissible at trial.⁵⁹ CIPA requires that defendants identify all classified information that they intend to introduce at trial,⁶⁰ and that the court resolve all issues relating to the admissibility of classified information prior to trial.⁶¹

CIPA also regulates the discovery and disclosure of classified information at pre-trial and trial proceedings. It deals with two basic situations that threaten such disclosure in a criminal prosecution. The first situation occurs when a defendant seeks to discover information that is in the government's sole possession. In this situation, the defendant has no alternative source for the information. If the requested information is classified in whole or in part, CIPA provides the government with ways to regulate the review and potential release of such information.

Section 4 of CIPA addresses the situation in which the defendants do not have access to the physical documents that could aid in their defense. Under section 4, the government can request that the court not allow defendants discovery of irrelevant classified

⁵⁷ Because of the large amounts of classified information involved in proving both the prosecution and defense, the Iran-Contra case against Oliver L. North may never have been prosecuted, and the case against Joseph F. Fernandez may never have been attempted, if the CIPA safeguards were not available. Both North and Fernandez handled and created classified information on a daily basis in the course of their duties as members of the Executive Branch. The *North* and *Fernandez* cases were essentially "apparent authority" cases. See *United States v. North*, 713 F. Supp. 1436, 1439 (D.D.C. 1989); *United States v. North*, 698 F. Supp. 322, 324 (D.D.C. 1988); see also David Johnston, *Case Dismissed in Contra Affair, Clearing Agent*, N.Y. TIMES, November 25, 1989, § 1, at 1, 10. North claimed that "his activities were known and authorized and he [sought] material that [would] reinforce this position." *North*, 698 F. Supp. at 324. Fernandez suggested that the performance of his "legitimate duties" as an intelligence officer caused him to be subject to a "politically motivated" prosecution. See David Johnston, *supra*, § 1, at 1, 10.

⁵⁸ S. REP. NO. 823, 96th Cong., 2d Sess. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 4294.

⁵⁹ *Id.* at 4, reprinted in 1980 U.S.C.C.A.N. 4294, 4297.

⁶⁰ See 18 U.S.C. app. § 5.

⁶¹ See *id.* app. § 6(a).

information.⁶² The request may be *in camera* and *ex parte*,⁶³ and the defendant need not be given notice identifying the classified information.⁶⁴ Upon approval, the government may delete selected portions of the requested documents or provide substitutions. This prevents the defendants from discovering classified information that, though irrelevant to her case, could be used to graymail the government.

The second situation in which CIPA issues can arise in a criminal prosecution occurs when defendants already have classified information in their possession. The defendants may have obtained the information from the government during the course of the criminal proceedings or prior to their initiation. Not unusually, the information will have been acquired in the exercise of an official responsibility. CIPA section 3 requires the court to issue a protective order, upon motion of the government, to prevent defendants from disclosing classified information that was revealed to them by the government in the course of the case.⁶⁵ Section 3 thus gives the government an opportunity to launch a preemptive strike to safeguard national security.

CIPA section 5 also prevents the unauthorized disclosure of classified information by requiring defendants to notify the government and the court, prior to trial, of all classified information that defendants reasonably expect to disclose at trial.⁶⁶ No classified

⁶² See *id.* app. § 4.

⁶³ An *in camera* hearing is one that is held in the judge's chambers, or in the courtroom without the jury or public present. An *ex parte* hearing is one where only the moving party is present. Because the adverse party is not aware that an *ex parte* hearing is being held, she does not know what is being discussed and can take no part in addressing the relevant issues. CIPA § 4 provides that "[t]he court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone." 18 U.S.C. app. § 4.

⁶⁴ CIPA section 6(b) provides:

Before any hearing is conducted pursuant to a request by the United States under subsection [6](a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States.

18 U.S.C. app. § 6(b).

⁶⁵ See *id.* app. § 3 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States."). The legislative history is inconclusive as to whether the language of § 3 limits the use of protective orders only to items disclosed to the defendant in discovery, or whether it extends to classified information already in the defendant's possession. See Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 286-87 (1986).

⁶⁶ See 18 U.S.C. app. § 5. The government can also file its own motion if it believes that

information may be disclosed by defendants until the government has had an opportunity to dispute its admissibility, or to file an affidavit under section 6 preventing such disclosure, and to appeal adverse rulings under section 7.⁶⁷ Section 5(b) provides for sanctions by the court, which include forbidding public disclosure and striking testimony, when defendants fail to comply with the section 5(a) notice requirements.⁶⁸ The advance warning provided by the section 5 notice removes the possibility of surprise disclosure by defendants. In addition, it eliminates graymail by informing the government of the information that defendants plan to disclose, thus allowing the government to make rational choices about whether the cost of disclosure is worth the prospect of a conviction.

Once the government is aware that the defendants plan to introduce classified information for their defense, the government can attempt to prevent its disclosure. CIPA section 6 procedures are followed when the classified information has been disclosed to the defendants, or when the defendants already possess the classified information. Section 6 gives a step-by-step process for evaluating the impact of disclosure and rulings on the admissibility of substitute documents before the government must choose between disclosure or dismissal of the charges. Section 6(a) provides for a pre-trial hearing on the relevance and admissibility of the classified information referred to in the section 5 notice. If the court finds the classified material admissible and relevant, the government, under section 6(c), may move to substitute summaries or statements of admissions for classified materials. The court will approve substitutions of classified information only if the substitutions will give the defendant "substantially the same ability to make his defense as would disclosure" of the actual documents.⁶⁹ Section 6(c)(2) permits

the defendant would assert a defense involving classified information at trial. See 18 U.S.C. app. §§ 2, 6. The government may not be prevented from invoking CIPA procedures at any stage of trial. See *United States v. LaRouche Campaign*, 695 F. Supp. 1282, 1285 (D. Mass. 1988).

⁶⁷ See *United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987), cert. denied, 485 U.S. 937 (1988).

⁶⁸ 18 U.S.C. app. § 5(b); see also, e.g., *Badia*, 827 F.2d at 1464-66. In reality, however, the striking of testimony will not do much good, as the classified information that the government sought to protect will have been disclosed in open court.

⁶⁹ 18 U.S.C. app. § 6(c)(1)(B); see also, e.g., *United States v. North*, 713 F. Supp. 1441, 1442 (D.D.C. 1989). In *United States v. Collins*, 603 F. Supp. 301 (S.D. Fla. 1985), the court held that CIPA § 6(c) substitutions do not interfere with a defendant's Sixth Amendment right to compulsory process of witnesses, or the due process rights of the Fifth Amendment. *Id.* at 303. A defendant still retains the right to present his version of the case to the jury. Section 6(c) merely restricts the "manner in which the story will be told." *Id.* at 304.

the government to submit, *in camera* and *ex parte*, a "classification affidavit" in conjunction with substitution proceedings under section 6(c).⁷⁰ The affidavit explains to the court why the information is classified and, if disclosed, why it "would cause identifiable damage to the national security of the United States."⁷¹

If the court denies the substitutions or summaries, the Attorney General may then either disclose the classified information, dismiss the charges involving classified information, or prevent disclosure by filing an affidavit under section 6(e) stating that disclosure would cause identifiable damage to the national security of the United States.⁷² After the filing of the section 6(e) affidavit, the court must order the defendant not to disclose the information.⁷³ A presumption exists that, if the information is admissible under section 6(a), it would be unfair for the government to prevent the defendant from using it by filing a section 6(e) affidavit. Therefore, section 6(e) also provides for dismissal of the indictment or the specific counts related to the classified information, unless the prosecutor can convince the court that some less drastic action is appropriate.⁷⁴

CIPA provides the government with another course of action in the face of an order authorizing disclosure, sanctioning non-disclosure, or refusing a protective order. Section 7 allows the prosecutor to take an interlocutory appeal, before or during trial, on all of these issues. The ability of the prosecutor to appeal is central to CIPA's scheme of giving the government full consideration of all options before reaching the choice between disclosure or dismissal.⁷⁵

⁷⁰ See 18 U.S.C. app. § 6(c)(2).

⁷¹ *Id.* If one assumes that the acceptability of a substitution should not depend on the classified nature of the document, then "this provision appears to invite the government to influence the court with uncontested claims about the serious nature of the information." Tamanaha, *supra* note 65, at 296 n.102.

⁷² 18 U.S.C. app. § 6(e).

⁷³ See *id.* app. § 6(e)(1).

⁷⁴ CIPA § 6(e)(2) provides:

Whenever a defendant is prevented by an order under paragraph [6(e)] (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information, or the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—(A) dismissing specified counts of the indictment or information; (B) finding against the United States on any issue as to which the excluded classified information relates; or (C) striking or precluding all or part of the testimony of a witness.

18 U.S.C. app. § 6(e)(2).

⁷⁵ The legislative history makes this clear:

This section [7] is essential to the statutory scheme . . . Without such a procedure, the district court could issue an order that could have the effect of

Indeed, it is established Department of Justice policy to file a section 6(e) affidavit only after all alternative means of preventing the disclosure of the information have been exhausted, including section 7 appeals.⁷⁶ If no interlocutory appeal is taken, or if the government loses on appeal, then the government can either permit disclosure of the classified information or file a CIPA section 6(e) affidavit preventing disclosure, with the likely result that all or some of the charges against the defendant will be dismissed.

II. THE TENSION BETWEEN THE IC STATUTE AND CIPA

Prior to *United States v. North*⁷⁷ and *United States v. Fernandez*,⁷⁸ no occasion had arisen to determine the effect of the operation of CIPA and the IC Statute in the same case. *North* and *Fernandez* demonstrate that when this occurs, significant disagreement regarding the conduct of the case can arise between the Attorney General and the Independent Counsel. *North* and *Fernandez* delineate the roles of the Independent Counsel and the Attorney General in a CIPA-IC Statute case in such a way that the two of them are left to "slug out" their disagreements, each having substantial power to paralyze the other.

A. *United States v. North*

On March 16, 1988, Lt. Col. Oliver L. North was indicted on fourteen counts of violating federal criminal law, including obstruction of a congressional inquiry, making false statements at a congressional hearing and illegal acceptance of a gratuity.⁷⁹ The investigation of North began when the Attorney General requested that the

making highly sensitive information public. The government would then face a choice of disclosing information or having the case dismissed This section also responds to the need to protect the defendant's interests in a speedy trial. S. REP. NO. 823, 96th Cong., 2d Sess. 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4294, 4303.

⁷⁶ See Letter from Edward S.G. Dennis, Jr., Acting Deputy Attorney General, to Lawrence E. Walsh, Independent Counsel 2 (July 20, 1989) (on file with the author) (discussing the position of the Department of Justice with respect to *United States v. Fernandez*).

⁷⁷ 713 F. Supp. 1436 (D.D.C. 1989).

⁷⁸ 887 F.2d 465 (4th Cir. 1989).

⁷⁹ The original indictment returned against North charged him with violating 18 U.S.C. § 641 (1988); 18 U.S.C. § 1505 (1988) (four counts); 18 U.S.C. § 1001 (1988) (four counts); 18 U.S.C. § 1343 (1988); 18 U.S.C. § 1503 (1988); 18 U.S.C. § 2071(b) (1988); 18 U.S.C. § 201(f), (g) (current version at 18 U.S.C. § 201(c)(1)(B) (1988)); 18 U.S.C. § 654 (1988); 18 U.S.C. § 371 (1988) (two counts). See Indictment, Criminal No. 88-0080 (D.D.C. 1987), captioned *United States v. John M. Poindexter, Oliver L. North, Richard V. Secord, and Albert Hakim*.

Special Division of the court appoint an Independent Counsel to investigate certain members of the Executive Branch. The Attorney General believed that these officials were involved in the shipping of arms to Iran as a *quid pro quo* for Iranian assistance in obtaining the release of American hostages. He based this request on the "catch all" provision of the IC Statute, which permits the Attorney General to request the appointment of an Independent Counsel if the Attorney General believes that investigation or prosecution by the Department of Justice "may result in personal, financial, or political conflict of interest."⁸⁰ Following the Attorney General's request, the Special Division appointed Lawrence E. Walsh, a retired federal judge and former Deputy Attorney General of the United States, to investigate and prosecute North.

North sought to defend himself by claiming that his superiors, including former President Ronald Reagan, knew of and implicitly endorsed his conduct. To prove this "apparent authority" defense,⁸¹ North claimed that he needed a large number of classified documents, thus triggering CIPA. Before the trial began, however, Independent Counsel Walsh dropped two counts from the indictment because the government's disclosure of the information necessary to prove those counts and North's disclosure of information to defend against those counts would compromise national security. Although the Attorney General did not formally file a CIPA section 6(e) affidavit, he would have done so had Independent Counsel Walsh not dropped those two counts.⁸² Both the Independent Counsel and the Attorney General agreed that dropping counts one and two was necessary for classified information reasons.⁸³

⁸⁰ Ethics in Government Act of 1978, 28 U.S.C. § 591(c) (1988); see also JEFFREY TOOBIN, *OPENING ARGUMENTS* 5 (1991) (the author was a lawyer in the office of Independent Counsel Walsh and claims to reveal in this book the inner workings of the Independent Counsel's office in connection with the trial of Oliver North).

⁸¹ The apparent authority defense is used most frequently by government officials who argue that their superiors authorized or ordered the activity that later becomes the subject of criminal prosecution. Defendants thereby hope to convince jurors that they did not intend to commit a crime. See *supra* note 56.

⁸² See *infra* note 88.

⁸³ Jeffrey Toobin, a lawyer on Independent Counsel Walsh's staff, wrote:

A trial without counts one and two would allow us to shear dozens of names from our witness list, an important advantage in a case where many of our witnesses like the defendant far more than they care for us . . . [M]any on the staff had been willing, even anxious, to solve our classified information problems by dropping these counts. It would also, some of us felt, boost the chances for a conviction in the bargain. [Independent Counsel] Walsh met with Attorney General Dick Thornburgh on January 4, 1989, to make the deal. We would

This agreement between the Independent Counsel and the Attorney General dramatically demonstrates that although the Independent Counsel is prosecuting the case, he does not have the authority to order the disclosure of classified information. This power, according to the courts that addressed the issue, is reserved ultimately for the Attorney General.⁸⁴ It is the Independent Counsel, however, who makes the decisions concerning what charges to bring.⁸⁵ Because the Independent Counsel does not have control over the outcome of the court's CIPA rulings in connection with classified information disputes between the government and the defendant, he must necessarily bring charges without knowing whether he will be able to disclose, or to allow the defendant to disclose, the evidence involving classified information.⁸⁶ When the

drop the counts one and two, and, in return, the administration would guarantee that the remaining counts proceed unimpeded to trial. The deal was announced on the following day. As Thornburgh said definitively on the television news program "Nightline" that evening, Walsh's decision to dismiss counts one and two meant that the case "will go to trial on the remaining dozen counts."

TOOBIN, *supra* note 80, at 190-91.

⁸⁴ See *United States v. Fernandez*, 887 F.2d 465, 470-71 (4th Cir. 1989); *United States v. North*, 713 F. Supp. 1436, 1441-42 (D.D.C. 1989). The *North* and *Fernandez* courts concluded that the Attorney General can authorize disclosure by not filing a § 6(e) affidavit. The Independent Counsel was deemed not to have the power to file a § 6(e) affidavit. Because the Attorney General was deemed to have exclusive power to file a § 6(e) affidavit, it is fair to conclude that he alone has the power to authorize disclosure of classified information. Of course, a decision by relevant entities to declassify information would make the Attorney General's § 6(e) power moot.

⁸⁵ CIPA § 6(e), as currently interpreted by the courts, allows the Attorney General essentially to retain the final authority concerning the disclosure of classified information. The courts have interpreted this function as a non-prosecutorial function, a designation that prevents it from being delegated to the Independent Counsel. This distinction between prosecutorial and non-prosecutorial functions seems arbitrary, as the power to dismiss charges would appear to be a prosecutorial function. The need for this distinction does not arise in cases in which the Department of Justice, rather than the Independent Counsel, handles the prosecution.

⁸⁶ One reason that evidence necessary to prove a charge is not disclosed is that the Independent Counsel and the Attorney General might not agree on whether disclosure would jeopardize national security. If the Independent Counsel, in framing the indictment, believes that the evidence required to prove certain counts would not jeopardize national security, then the Independent Counsel is likely to bring those counts. The Attorney General, however, might take a different view and conclude that disclosure of the necessary evidence would compromise national security. Because it is the Attorney General who retains final authority through the § 6(e) affidavit, the Attorney General might choose to prevent disclosure, thereby causing counts of the indictment to be dismissed. The Independent Counsel can always ask for the Attorney General's views before trial about the national security implications of the public disclosure of classified information. Nevertheless, in practice there might be strategic reasons for the Independent Counsel's not doing so, such as concern about news leaks, maintaining her independence and having her case monitored by the Executive Branch.

Attorney General believes that certain evidence cannot be introduced without endangering national security, the Independent Counsel must drop the charges involving such classified information or face a CIPA section 6(e) affidavit to prevent its disclosure. This is what happened in the *North* case.

It is likely that some members of the public suspected that the Attorney General prevented the prosecution of certain counts in the *North* case for reasons other than a sincere concern for the national security.⁸⁷ Thus, CIPA and the IC Statute combined in the *North* case to undermine public confidence that North was being tried without regard to his special relationship with the Reagan-Bush Administration.⁸⁸

CIPA and the IC Statute converged again in the *North* prosecution, this second time because the Attorney General and the

Another reason that the evidence may not be disclosable is that the Attorney General and the Independent Counsel may assume that proposed substitutions or stipulations would be accepted by the court. If the Independent Counsel, in framing the indictment, relied on the assumption that the court would accept certain substitutions or stipulations, and the court later refuses the proposals, then the Attorney General must either permit disclosure of the classified information or file a § 6(e) affidavit.

⁸⁷ This author believes that public confidence can be undermined by the public's failure to realize certain facts. Of course, propositions such as "the evidence necessary to prove a particular charge cannot be disclosed without endangering national security" are not propositions of objective fact that all persons must agree upon. Rather, they are debatable questions of fact and judgment. Thus, even if the public knew that either the Independent Counsel or the Attorney General had decided, ostensibly in good faith, that a particular prosecution was inconsistent with national security interests, the public would still fear that the judgment was being made by someone whose judgment was distorted by politics. When prosecuting government officials, the suspicion that corruption may be perpetually present is difficult to dispel. Under this view, the public will not have confidence in the process if it distrusts the Attorney General.

⁸⁸ The interaction of CIPA and the IC Statute does create situations in which a sequence of events—the Independent Counsel's bringing charges before she knows whether the evidence needed to prove them can be disclosed without, in the Attorney General's judgment, endangering national security—occurs that may appear to the public as a case of politically motivated protectionism by the Attorney General. This problem would be eliminated if either the Attorney General or the Independent Counsel alone made both the charging decision and the judgment as to whether evidence needed to prove the charge could be disclosed without compromising national security. Alternatively, the charging decision could be made by one official after a binding decision about whether the evidence could be disclosed had been made by another person. This would result in fewer high visibility scenarios likely to undermine public confidence than under the present interaction of CIPA and the IC Statute. Because charges would not be brought by the Independent Counsel, and then dropped after the Attorney General's apparent interference, there would be fewer cases where it seems that a corrupt Attorney General has blocked a warranted prosecution. Of course, the question would still remain whether having fewer visible occasions of possible official political protectionism is useful in reducing the actual occurrence of political protectionism or enhancing the public's long range confidence.

Independent Counsel could not agree whether to appeal the trial judge's CIPA rulings that were adverse to the prosecution's case. This scenario unfolded on the morning that North's trial was scheduled to begin. The trial judge had ruled that the government's proposed statement of substitutions and summaries for classified information was inadequate to put North in substantially the same position he would have been in if the actual classified information were admitted. Independent Counsel Walsh did not want to appeal the trial judge's rulings, but Attorney General Thornburgh wanted an appeal to be taken under CIPA.

Because CIPA is silent on the subject, and no court had yet ruled on the issue, there was confusion about exactly who had the power to take CIPA section 7 interlocutory appeals. Independent Counsel Walsh took the position that he alone had the power to take section 7 interlocutory appeals, while the Attorney General believed that both he and the Independent Counsel had the power to take the appeals. The Attorney General believed that District Judge Gesell's rulings did not adequately safeguard national security, while Independent Counsel Walsh preferred to accept Judge Gesell's rulings and move the criminal case forward.

The Attorney General attempted to stay trial proceedings pending a section 7 interlocutory appeal, and Independent Counsel Walsh challenged the Attorney General's standing to appeal. In a two page decision, District Judge Gesell ruled that the Attorney General's "only authority at this stage is his statutory prerogative under Section 6(e) The Attorney General's attempt to appeal is therefore frivolous and at odds with the purposes of the laws establishing the Independent Counsel."⁸⁹ To emphasize his concern for Independent Counsel Walsh's freedom from the Department of Justice, Judge Gesell ordered that "[o]nly Independent Counsel will be recognized as responsible for the day-to-day conduct of this case,"⁹⁰ and that the Independent Counsel "may avail himself of all rights granted to the Attorney General under CIPA except the filing of an affidavit under § 6(e) The Independent Counsel has the exclusive right under Section 7 to initiate an interlocutory appeal."⁹¹

⁸⁹ *United States v. North*, 713 F. Supp. 1441, 1441 (D.D.C. 1989). That same day, the U.S. Court of Appeals for the District of Columbia affirmed Judge Gesell's holding that the Justice Department had no standing to request a stay. See *Craney*, *supra* note 17, at 273.

⁹⁰ *North*, 713 F. Supp. at 1442. Before this order, the Independent Counsel had already been recognized as the sole official responsible for the day-to-day conduct of the *North* case.

⁹¹ *Id.*

The Attorney General and the Independent Counsel subsequently settled their dispute,⁹² and the trial proceeded.

North was eventually convicted on three counts: aiding and abetting the obstruction of Congress, accepting an illegal gratuity, and falsifying and destroying government documents. On appeal, the convictions were remanded to determine whether the witnesses who testified against North had been influenced by hearing North's testimony before Congress prior to the trial. Independent Counsel Walsh sought review of this decision in the Supreme Court, but certiorari was denied.⁹³

B. *United States v. Fernandez*

On April 24, 1989, Joseph F. Fernandez, a former CIA station chief, was indicted by a federal grand jury convened at the request of Independent Counsel Walsh. Fernandez was charged with two counts of obstructing proceedings of Congress and two counts of giving false statements, all counts arising out of the Iran-Contra affair.⁹⁴ Like North, Fernandez sought to introduce classified information in his defense. Following the trial court's rulings permitting disclosure of classified information, the Attorney General asked Independent Counsel Walsh to take a CIPA section 7 interlocutory appeal. Walsh declined to take the appeal. In *Fernandez*, unlike in *North*, the Attorney General and the Independent Counsel could not reconcile their differences.

⁹² After Judge Gesell said that CIPA required the Attorney General personally "to take ultimate responsibility for dismissal of charges caused by the withholding of classified material," Attorney Thornburgh submitted an affidavit stating that "he would have moved to block the disclosure of certain classified information had independent counsel Lawrence E. Walsh continued to press for the use of the documents at trial." *Two Iran-Contra Charges Against North Dismissed*, CONG. Q. WKLY. REP., Jan. 14, 1989, at 99. By submitting this affidavit the Attorney General demonstrated his willingness to assume responsibility for the dismissal of charges on classified information grounds.

⁹³ 111 S. Ct. 2235 (1991). On appeal, North's conviction for falsifying and destroying official documents (under 18 U.S.C. § 2017(b)) was originally overturned outright while the other two convictions were vacated and remanded. Later, however, the United States Court of Appeals for the District of Columbia amended its holding and reinstated the overturned conviction, remanding it with the other two. *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991). On September 16, 1991, after the trial court commenced proceedings on remand regarding the impact of North's immunized testimony on the prosecution's witnesses, Independent Counsel Walsh moved to dismiss the remaining counts against North. Walsh believed that he could not meet his burden of proving that the witnesses had not been influenced by North's immunized testimony. Therefore, he concluded that a dismissal was appropriate.

⁹⁴ Fernandez was charged with violating 18 U.S.C. § 1001 (1988) (two counts) and 18 U.S.C. § 1505 (1988) (two counts).

Walsh suggested to the Department of Justice that it must file a section 6(e) affidavit to block disclosure of the classified information at issue or risk the consequences. The Department of Justice considered the filing of a section 6(e) affidavit to be premature and instead "urged" Independent Counsel Walsh to file an interlocutory appeal.⁹⁵ Independent Counsel Walsh did not request a section 6(e) affidavit from the Attorney General, nor did he attempt to file an interlocutory appeal. Instead, a trial attorney for the Independent Counsel advised the court that the Office of the Independent Counsel was prepared to proceed to trial. This statement was made despite the fact that the trial judge's rulings would have permitted the disclosure of classified information.⁹⁶ By choosing to delay any CIPA section 7 appeal until after the Attorney General filed a section 6(e) affidavit and the court imposed sanctions,⁹⁷ Walsh appeared to leave the Department of Justice with no choice but to file the section 6(e) affidavit.⁹⁸ As in *North*, the Department of Justice instead sought a stay on the morning of trial and filed an appeal with the United States Court of Appeals for the Fourth Circuit.

The circuit court, like the district court in *North*, held that the Attorney General had no standing to appeal because under CIPA section 7 such power is a "prosecutorial function," and therefore belongs to the Independent Counsel under section 594(a) of the IC Statute.⁹⁹ Regarding national security concerns, the court was satisfied that the Attorney General could discharge his duty to protect national security by filing a CIPA section 6(e) affidavit.¹⁰⁰ The court agreed with Independent Counsel Walsh that he could wait for the

⁹⁵ *United States v. Fernandez*, 887 F.2d 465, 467 (4th Cir. 1989).

⁹⁶ The Independent Counsel's decision not to request a § 6(e) affidavit and not to file an interlocutory appeal demonstrates that when an Independent Counsel and the Attorney General disagree about the manner in which classified information ought to be protected, national security may be jeopardized.

⁹⁷ *Id.*

⁹⁸ See Letter from Edward S.G. Dennis, Jr., Acting Deputy Attorney General, to Lawrence E. Walsh, Independent Counsel 2 (July 20, 1989) (on file with the author) (discussing the position of the Department of Justice with respect to *United States v. Fernandez*).

⁹⁹ *Fernandez*, 887 F.2d at 468. The *Fernandez* court found persuasive the fact that the IC Statute, in 28 U.S.C. § 594(a), declares that the Independent Counsel's powers are not to be limited by "any other provision of law." The court concluded that the legislative history of the IC Statute showed that the requirement of obtaining the Attorney General's authorization for wiretaps in § 594(a) is the "one and only" exception in the IC Statute to the Independent Counsel's "total independence." *Fernandez*, 887 F.2d at 468 (citing S. REP. NO. 170, 95th Cong., 2d Sess. 67 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4283)). For some reason, Independent Counsel Walsh never sought to litigate the question of whether the IC Statute transferred the Attorney General's § 6(e) CIPA power to the Independent Counsel.

¹⁰⁰ *Fernandez*, 887 F.2d at 470-71.

Attorney General to file the section 6(e) affidavit, and then appeal any sanctions imposed by the court "when, if ever, he wants."¹⁰¹

C. Division of CIPA Responsibilities Between the Independent Counsel and the Attorney General

North and *Fernandez* demonstrate that the conflict of interest within the Executive Branch, which the IC Statute was designed to eliminate, still exists when the IC Statute and CIPA operate in the same case.¹⁰² In a pure CIPA case not involving an Independent Counsel, the Attorney General controls all decisions concerning classified information. As noted, CIPA provides two ways in which the Attorney General can control the release of classified information. First, under section 7 the Attorney General can appeal adverse court rulings on the proposed substitution of admissions and summaries for classified information offered by the government. Second, under section 6(e) the Attorney General may file an affidavit preventing the use of the classified information at trial. The confluence of these powers in the office of Attorney General permits the Executive Branch to resolve all issues concerning classified information "in house."

Similarly, in a pure IC Statute case the Independent Counsel exercises full prosecutorial authority and discretion in behalf of the United States. Because all of the powers of the Attorney General, save the power to authorize wiretaps, are transferred to the Independent Counsel, she effectively stands in the shoes of the Attorney General. Moreover, because the entire Executive Branch, including the President, is removed from the prosecutorial process when an Independent Counsel is appointed, the Independent Counsel is essentially the CEO for the Executive Branch. She can also resolve,

¹⁰¹ *Id.* at 470.

¹⁰² In *Morrison v. Olson*, Justice Scalia anticipated some of the problems that might arise because the same people who are covered by the Ethics in Government Act, and who must be prosecuted by an Independent Counsel, would be intimately involved with large amounts of classified information. 487 U.S. 654, 707-08 (1988) (Scalia, J., dissenting). Commenting on the ambiguity of the statutory requirement that the Independent Counsel comply with Department of Justice policy "except where not possible," Justice Scalia noted:

[O]ne would be hard put to come up with many investigative or prosecutorial 'policies' . . . that are absolute. Almost all investigative and prosecutorial decisions . . . involve the balancing of innumerable legal and practical considerations [A] preeminently political decision is whether getting a conviction in a particular case is worth the disclosure of national security information that would be necessary.

Id.

in house, all issues and conflicts concerning the prosecution of the case.¹⁰³

Specifically, the Independent Counsel possesses *de jure* prosecutorial powers, such as the power to indict, the power to try the case, the exclusive power to appeal adverse rulings under section 7, and the power to dismiss charges on behalf of the United States. The Attorney General retains the power to file a section 6(e) affidavit. Although this is the Attorney General's only formal power, it provides a potentially powerful veto of a criminal case. The Attorney General can cause counts of the indictment to be dismissed, or even prevent the trial, by threatening to file or by actually filing a section 6(e) affidavit. In a combined CIPA-IC Statute case, the Independent Counsel has no authority to challenge the Attorney General's filing of a section 6(e) affidavit. Similarly, the Attorney General can challenge neither the Independent Counsel's failure to make motions or objections, nor her refusal to take appeals that the Attorney General regards as necessary to protect national security.

From the Attorney General's perspective, it will ordinarily be in the best interest of the Executive Branch to appeal all adverse CIPA rulings prior to filing a section 6(e) affidavit in a CIPA-IC Statute case.¹⁰⁴ An appeal offers the opportunity to reverse lower court rulings unfavorable to the government's position on CIPA issues and thereby avoid the need for the Attorney General to file

¹⁰³ The IC Statute was not designed to eliminate all kinds of "conflict of interest" that may affect prosecutors. Nor was it designed to eliminate choices between competing prosecutorial interests, such as the choice between the benefits of proceeding promptly to trial and of bettering the prosecution's posture at trial by winning an interlocutory appeal from trial court rulings that restrict the prosecution's presentation of evidence, or expand that of the defendant. Further, the IC Statute is not intended to avoid disagreements among the government counsel about how these choices should be made or eliminate the "conflict" between the desirability of securing a conviction and the desirability of protecting national security.

The IC Statute was designed only to eliminate a particular kind of "conflict of interest": the conflict between the Department of Justice's interest in prosecuting federal crimes and its interest in protecting certain high-ranking members of the Executive Branch, and other "favorites" of the Administration. One of the problems presented in a CIPA-IC Statute case is the very kind of conflict of interest that the IC Statute was designed to eliminate. The problem is that the Attorney General can use his unilateral power to file a CIPA § 6(e) affidavit as a device for aborting the prosecution of a politically favored defendant, and thus protect the Administration's "friends."

¹⁰⁴ One might expect the Independent Counsel, as much as the Attorney General, to dislike the prospect that a CIPA § 6(e) affidavit may result in dismissal of charges, or other sanctions that make the prosecution less likely to succeed. The Attorney General, however, has the additional concern that the public may perceive a filing of a § 6(e) affidavit as politically motivated—to protect high-ranking members of the Executive Branch from criminal prosecution.

a section 6(e) affidavit. But from the Independent Counsel's perspective, it may not always be in the best interest of the prosecution to appeal all adverse lower court rulings. Appeals cause delays that can jeopardize the prosecution.¹⁰⁵ Thus, the positions taken by the Attorney General and the Independent Counsel may often conflict in a CIPA-IC Statute case.

III. MOVEMENT TOWARD A POLICY RESOLUTION OF THE CIPA-IC STATUTE DILEMMA

The previous sections have demonstrated the strain that the simultaneous operation of the IC Statute and CIPA places on each statute's goals. *North* and *Fernandez* illustrate how the different perspectives of the Attorney General and the Independent Counsel are likely to produce disagreements about the desirability of protecting classified information. Thus, in moving toward a policy resolution of the dilemma presented by a CIPA-IC Statute case, we must first highlight the competing interests of the Independent Counsel and the Attorney General created by the interaction of these statutes.

A. *Competing Interests of the Independent Counsel and the Attorney General*

An Independent Counsel is appointed solely to investigate and, if appropriate, prosecute a person or persons covered by the IC Statute. In determining whether or not to prosecute, an Independent Counsel is not encumbered by the same concerns that would hamper the Executive Branch. If the Department of Justice were handling the case, it could face budgetary constraints such as the appropriate allocation of resources among its many cases. Unlike ordinary government prosecutors, the Independent Counsel's office

¹⁰⁵ Delays are problematic in any prosecution. They are especially problematic in an IC Statute case because of the high-profile nature of the case. Moreover, as stated earlier, an Independent Counsel is a private attorney. Many of the Independent Counsel's senior staff attorneys, such as John Kecker, the lead prosecutor in the *North* case, have law practices that they cannot pursue while serving in the office of the Independent Counsel. The protracted nature of the appeals process could create severe hardships for them. Many of these attorneys could be forced to leave public service and return to their private practices. Moreover, in a case like *North*, where the Independent Counsel took significant steps to ensure that his trial team be kept separate from the immunized testimony of Oliver North, a change in the trial team could have significant negative consequences for successful prosecution of the case.

has an unlimited budget,¹⁰⁶ enabling her to devote whatever resources are necessary to the prosecution of her case. In addition to an unlimited budget, the high-profile nature of an Independent Counsel prosecution could mean unlimited scrutiny and criticism.

In the Iran-Contra prosecutions,¹⁰⁷ Independent Counsel Walsh persevered despite a great deal of criticism from the trial judge,¹⁰⁸ the media¹⁰⁹ and even the minority leadership of the Senate and the House of Representatives.¹¹⁰ The intensity of the criti-

¹⁰⁶ The Ethics in Government Act of 1978, 28 U.S.C. § 594(d)(2) (1988), guarantees the Independent Counsel an unlimited budget. "The Department of Justice shall pay all costs relating to the establishment and operation of any office of independent counsel." *Id.* To date, Independent Counsel Walsh has spent over \$25 million in investigations and prosecutions relating to the Iran-Contra affair. See *Very Special Prosecutors . . .*, WASH. TIMES, June 5, 1991, at G2. In light of the unlimited budget and the public pressure associated with such a high-profile case that requires the appointment of an independent counsel, one can understand why there is such pressure to prosecute. Obviously, the greater the publicity associated with a particular investigation and the greater the public perception that a crime has been committed, the greater the pressure to prosecute.

¹⁰⁷ As of September 13, 1991, Independent Counsel Walsh gave no signal that his investigation was concluding. Indeed, on July 21 of the same year, Alan D. Fiers, a former Chief of the CIA's Central American Task Force, pleaded guilty to two misdemeanor counts of lying to Congress. Fiers's guilty plea has enabled Independent Counsel Walsh to renew "interest in two men whose involvement in the [Iran-Contra] scandal had been thought laid to rest . . . according to sources close to the investigation." Stephanie Saul, *The Ghost of Investigations Past*, NEWSDAY, July 21, 1991, at 17. To that end, on September 6, 1991, former CIA Operations Chief Clair E. George, was indicted "on 10 counts of perjury, making false statements and obstructing Congressional investigations in connection with testimony he gave on the Iran-Contra affair to three Congressional committees and a Federal grand jury." Michael Wines, *Ex-C.I.A. Official Denies 10 Charges*, N.Y. TIMES, September 13, 1991, at A17.

¹⁰⁸ District Judge Gesell informed Walsh that he "would bear a very heavy burden" and that "[i]t's a pretty big can of worms" to overcome the Kastigar problems raised by Oliver North. Robert L. Jackson, *North Conviction in Doubt, Judge Says*, L.A. TIMES, June 15, 1991, at A19. Kastigar problems involve the tainting of a witness's testimony when the witness has been exposed to immunized testimony.

¹⁰⁹ An editorial in the *Washington Times* characterized Walsh's decision to continue this way:

The Reagan administration is history, the Ayatollah Khomeini is dead and the Contras have been disbanded, but none of these transitions has stayed the sleepless march of Lawrence Walsh, special prosecutor, grand inquisitor and antiquarian-in-chief of the late unpleasantness known as the Iran-Contra scandal. Appointed in December, 1986 to ferret out wrongdoing and its doers in the executive branch, Mr. Walsh and his team of lawyers, investigators, spokespersons and minions have brought the hammer of justice down on the heads of eight whole people, all of two of whom have actually received prison sentences. After two years and six months, his operation has cost \$25.2 million by his own estimate, and still it festers.

Very Special Prosecutors . . ., *supra* note 106, at G2.

¹¹⁰ Senate Minority Leader Bob Dole (R-Kan.) and a group of House Republicans led by Minority Leader Robert H. Mitchell of Illinois asked Attorney General Thornburgh to dismiss Independent Counsel Walsh. *Walsh Vows Quick End to Iran-Contra Inquiry*, L.A. TIMES, June 1, 1991, at A20.

cism leveled against Independent Counsel Walsh shows that the Independent Counsel's autonomy is neither academic nor fragile. An Independent Counsel possesses the resources, and may feel the obligation, to pursue a controversial investigation despite resistance and objections that many professional prosecutors would find daunting.¹¹¹

In the area of national security, however, the mission of the Attorney General is arguably just as sacred. The Attorney General is largely concerned with safeguarding national security, either by prosecuting those who endanger it or by discharging his CIPA duties. In cases that do not involve the interaction of CIPA and the IC Statute, the Attorney General often must decide between the public disclosure of classified information and the dismissal of charges against a defendant.

The Independent Counsel's and Attorney General's interests may compete as they did in *North* and *Fernandez*. The Independent Counsel is appointed to worry more about a successful prosecution than about preventing the disclosure of classified information that may compromise national security. The Independent Counsel, unlike the Attorney General, is not part of the Cabinet. This ensures insulation from political bias, but on the other hand, it may mean narrowness of goals and vision. Finally, the factual information that guides the Attorney General's and the Independent Counsel's respective analyses is likely to be different because their investigative resources and access to relevant information are often unequal. The Independent Counsel may not have access to information that would show how serious a threat to national security the public disclosure of certain classified information could pose while the Attorney General and other cabinet members would. Moreover, the Independent Counsel will ordinarily not be privy to the Executive Branch's foreign policy goals, which may affect the seriousness of a classification.

The Attorney General on the other hand might be overly concerned about the potential threat to national security presented by a CIPA case. This might be the result of the intelligence agencies' tendency to over-classify and the deference that the Attorney General might pay to the experts in the intelligence agencies. In a CIPA-

¹¹¹ See generally RICHARD LEMPERT & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* (1982), where the authors assert that "prosecutors appointed specially for one or a series of related cases may exhibit messianic impulses rarely found among careerists." *Id.* at 104.

IC Statute case, the Executive's loss of exclusive control over these prosecutions might cause it to be more conservative in the positions that it takes relating to classified information. Once it decides that information can be publicly disclosed, the Independent Counsel alone makes the determination on the part of the Executive Branch whether the prosecution ought to continue.

Because the Attorney General and the Independent Counsel ultimately do not have entirely the same goals, some conflict concerning the use of classified information is inevitable. Indeed, even if the interests of the Independent Counsel and Attorney General completely coincided—if, for instance, both were concerned with balancing national security interests against prosecutorial benefits—it would still be very likely that the Independent Counsel and the Attorney General would disagree in many classified information/national security cases. Disagreements are inevitable, if only because balancing the competing considerations in these complex cases is an imprecise science. More than one reasonable analysis or balance is almost always possible, and any two reasonable lawyers are bound to disagree about the judgments that have to be made in difficult cases.

B. *The Goals of CIPA and the IC Statute*

In addition to recognizing the unavoidable conflicts between the Independent Counsel and the Attorney General, we should, in attempting to resolve the dilemma caused by a CIPA-IC Statute case, also consider the harms that the IC Statute and CIPA were designed to avoid. This is necessary to determine whether there is a solution that will maximize the goals of each statute while minimizing the harms caused by the conflict. Thus, the following discussion will examine the principle goals of these statutes in the context of a CIPA-IC Statute case.

1. The Public Confidence Problem¹¹²

The principal goal of the IC Statute is to ensure that high-ranking government officials do not receive special treatment in the

¹¹² The concept of public confidence is intended to be restricted to the general public's trust, or lack thereof, in the prosecutorial decisions of the government. Predicting the effect that different procedures are likely to have on public confidence is a matter of guesswork. A lack of public confidence is a serious problem, because as long as citizens trust the U.S. government and its system of justice, they will allow the rule of law to determine the outcome of disputes with the government. Even this assumption, however, is subject to challenge. For example, one could argue that a lack of public confidence in the government serves to keep

investigation and prosecution of their cases.¹¹³ The conflict created by a CIPA-IC Statute case has demonstrated, however, that even if an Independent Counsel prosecutes high-ranking members of the Executive Branch, public confidence that these prosecutions will be immune from the influence of the Department of Justice may still be undermined. For example, the dismissal of certain charges against North was criticized by Representative Jack Brooks of Texas "as a backdoor way" to give North a pardon.¹¹⁴ The People for the American Way, a civil liberties group, likewise viewed the dismissal of two counts against North prior to trial as a "pocket pardon."¹¹⁵ Similarly, in an editorial concerning the dropping of the charges, one person wrote that "we are skeptical about the manner in which that judgment is being made because the people making it—top Reagan administration officials—stand to lose the most from any revelations."¹¹⁶ Reaction to the dismissal of the two counts against North highlights the public cynicism about the likelihood of high-ranking members of the Executive Branch being treated without favoritism.

Certain segments of the public were equally suspicious of the Executive Branch when it interrupted the *Fernandez* trial. The motivations of the Attorney General were questioned; his actions were again considered a way to protect Joseph Fernandez—an individual closely linked to the Administration—from prosecution. Indeed, when the Attorney General filed, for the first time ever, a section 6(e) affidavit, the public's greatest suspicions and fears were realized. In an editorial in the *New York Times*, one commentator wrote:

We have taken a step toward arbitrary, unaccountable government power. That is the significance of the stym-

the government honest and to keep government from evolving tyrannical powers. Further, the continued existence of moderate levels of public distrust of government serves to avert episodic surges of more acute distrust, which tend to be more distinctly destabilizing.

¹¹³ See *supra* note 2.

¹¹⁴ Glen Craney, *Iran-Contra Case May Drop Two Counts*, CONG. Q. WKLY. REP., Jan. 7, 1989, at 28.

¹¹⁵ Ronald J. Ostrow & Robert L. Jackson, *Walsh Seeks to Drop 2 Key North Charges*, L.A. TIMES, Jan. 6, 1989, at A1.

¹¹⁶ *In North Case, Secrecy Is Winning Out Over Justice*, NEWSDAY, Jan. 8, 1989, at 3. Indeed, when the Department of Justice interrupted the *North* trial over the objections of the Independent Counsel, one reporter wrote that, "[t]he Justice Department's slyly timed effort to jam the controls just as the Oliver North trial enters its painstakingly prepared takeoff roll is aimed at saving George Bush the political embarrassment he deserved, but mostly escaped, in the Iran-Contra scandal." Randolph Ryan, *Saving Bush at North's Expense*, BOSTON GLOBE, Feb. 10, 1989, at 11.

ieing of efforts to prosecute . . . Joseph Fernandez
 If the Fernandez case stands up, then, it means that government officials who operate in secret can commit crimes without fear of punishment. For they can count on the guardians of secrecy to prevent a prosecution.¹¹⁷

In general, these newspaper articles and editorials demonstrate that a certain segment of the public neither understands nor trusts the role of the Executive Branch in a CIPA-IC Statute case.¹¹⁸

Simply stated, on those occasions when the Independent Counsel and the Attorney General agree that charges cannot be brought without compromising national security, the public may view the Independent Counsel as nothing more than a puppet of the Executive Branch. Although it is hard to think of a dismissal of charges on grounds of national security as a "technicality," the invocation of this ground for abandoning a prosecution, especially one against those in positions of power, certainly contributes to the erosion of public confidence in prosecutorial decisions, our criminal justice system and government in general. This is because the public may not know that the problem of compromising national security is a real one, and may believe that it is just something invented by bureaucrats to allow them to cloak their activities. Further, the public may not trust the Attorney General or the President to permit the prosecution of a political colleague or friend. These issues highlight the complex nature of maintaining public confidence in the handling and outcome of a CIPA-IC Statute case.

The public is naturally suspicious when any action by the Executive Branch leads to the dismissal of charges against high-ranking government officials, even when that action is endorsed by the Independent Counsel.¹¹⁹ This suspicion is likely to be compounded when the Attorney General and Independent Counsel disagree about national security. The IC Statute's 1982 amendments recognized the importance of this problem: "when conflicts [between the

¹¹⁷ Anthony Lewis, *Government of Laws?*, N.Y. TIMES, Nov. 30, 1989, at A31.

¹¹⁸ It is possible that this merely demonstrates that political use can be, and often will be, made of anything that can be presented as an attack against a differing political philosophy. It is worth noting, on the other hand, the extent to which the public's suspicion is informed by what it sees reported by the press. See Craney, *supra* note 17, at 273. This serves as a further basis for public suspicion of the Executive Branch in a CIPA-IC Statute case.

¹¹⁹ This is a problem that could be eliminated or reduced simply by better coordination between the Independent Counsel and Attorney General before charges are filed, so that the Independent Counsel knows before drafting the charging document that the Attorney General will oppose disclosure of information needed to support certain charges. Therefore, the Independent Counsel can consider not bringing the charges in the first place.

Executive Branch and the Independent Counsel] exist, or when the public believes there are conflicts, public confidence in prosecutorial decisions is eroded, if not totally lost."¹²⁰

In the situation where a CIPA case is being prosecuted by an Independent Counsel, attempts by the Executive Branch to protect classified information are viewed as impediments to the prosecution of members of its own branch of government.¹²¹ Where such *de facto* immunity is actually enjoyed, it undercuts the criminal law as a deterrent to corruption in high levels of government.¹²² The potential dangers of a withdrawal of criminal sanctions would be extraordinarily magnified with respect to those persons dealing with critical national security matters, such as North and Fernandez.

2. The National Security Problem¹²³

The principal goal of CIPA is to protect national security by preventing defendants from releasing or threatening to release clas-

¹²⁰ S. REP. NO. 496, 97th Cong., 2d Sess. 4-5 (1982), reprinted in 1982 U.S.C.C.A.N. 3537, 3540.

¹²¹ One newspaper reported the conflict in *Fernandez* by declaring that "[t]he case against [Fernandez] was dismissed . . . because the Justice Department blocked the use of classified documents he said he needed for his defense." *Iran-Contra Figures and Their Status*, N.Y. TIMES, Apr. 8, 1990, § 1, at 24.

¹²² S. REP. NO. 823, 96th Cong., 2d Sess. 4 (1980), reprinted in 1980 U.S.C.C.A.N. 4294, 4297. Assistant Attorney General Philip Heymann stated:

Indeed, decisions not to prosecute high level officials in the interest of protecting classified information have implications beyond the failure to redress particular instances of illegal conduct. Such determinations foster the perception that government officials and private persons with access to military or technological secrets have a broad *de facto* immunity from prosecution for a variety of crimes. This perception not only undermines the public's confidence in the fair administration of criminal justice but it also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies.

Id.

¹²³ "'The distinctive meaning of national security is *freedom from foreign dictation*.'" MOORE ET AL., *supra* note 55, at 3 (quoting H. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 51 (1971)). Nevertheless, the problem of defining national security:

is a matter of clarifying perceptions of what is to be made secure from whom and how? What is at stake? How is it threatened? How should it be protected? The answers to these questions are resolved—deliberately or by default—through the political process and are frequently embodied—with varying degrees of clarity and consistency—in law National security is a highly charged political symbol with variable, ambiguous, and frequently contentious content.

Id.

The imprecise nature of national security makes possible a number of alternative ways of defining it. One could argue that the national security of the United States would be damaged seriously if citizens came to an erroneous belief that national leaders are warmon-

sified information¹²⁴ in the course of their defense, thereby forcing the government to drop the prosecution.¹²⁵ Yet disagreements between the Independent Counsel and Attorney General in a CIPA-IC Statute case could jeopardize national security and thereby frustrate the purpose of CIPA. Almost invariably, CIPA-IC Statute cases are high-visibility cases, attended by public interest and media scrutiny. Many of them may produce jury trials. Under these circumstances, even the most sober and conscientious Independent Counsel is likely to feel that she must protect her public image, both to avoid a climate of skepticism within the pool of prospective jurors and to protect her long-range professional standing.

When checked by the Attorney General's filing of a CIPA section 6(e) affidavit, the Independent Counsel has no effective way to protect her public image except to publicly criticize, directly or indirectly,¹²⁶ the Attorney General's decision to take such action.

gers looking for any reason to bomb foreign nations. *See infra* notes 136-39. President Reagan arguably could have caused that kind of damage by non-disclosure of his reasons for bombing Libya following the terrorist bombing of a West Berlin discotheque. Even more essentially, the national security of a democracy is damaged if its President cannot explain to its people why he has bombed an apparently innocent foreign nation. Thus, if President Reagan had said nothing, the United States possibly would have precious little national security left. This article concerns national security in a more classic sense, where it may be jeopardized by the untimely release of classified information. This is possible when the Attorney General in a CIPA-IC Statute case must decide whether to file a CIPA § 6(e) affidavit to prevent the disclosure of classified information without the benefit of a neutral party to evaluate and, if appropriate, endorse the filing as proper.

¹²⁴ This article assumes that the classified information at issue is properly classified. Similarly, it assumes that the Executive Branch is not abusing its power to classify information. If the Executive Branch is abusing these powers, the Independent Counsel should be free to challenge the classification practices in court. In the Iran-Contra cases, however, Independent Counsel Walsh never made any such challenge. It was his position that although the information might be properly classified, its public disclosure would not threaten national security. For a perspective that is highly critical of the government's classification system, and that suggests courts adopt a less deferential standard, see Note, *Keeping Secrets: Congress, the Courts and National Security Information*, 103 HARV. L. REV. 906 (1990).

¹²⁵ *See supra* note 4.

¹²⁶ Independent Counsel Walsh complained that the government was covering up a "fictional secret" because much of the classified information in dispute had already been reported in the press. Letter from Lawrence E. Walsh, Independent Counsel, to Edward S.G. Dennis, Jr., Acting Deputy Attorney General 2 (July 21, 1989) (on file with the author) (discussing the position of the Office of Independent Counsel with respect to *United States v. Fernandez*). Walsh's statement was reported in the media shortly thereafter. *See, e.g.*, David Johnston, *Prosecution of Ex-CIA Agent in Iran-Contra Case: A Slow Dance Around the Issue of Secrecy*, N.Y. TIMES, Aug. 8, 1989, at A14. Theoretically, if an Independent Counsel was wrong, the release of the classified information in dispute could jeopardize national security in several ways. It could damage our foreign relations with the countries involved, lead to the overthrow of governments secretly working with the United States, or endanger undercover U.S. agents connected with the reported activity.

Although she could ask the CIA, the State Department, or the President for support, the Attorney General may have consulted these executive officials *before* filing the affidavit, and the Independent Counsel can realistically expect that these officials will more often back the Attorney General than the Independent Counsel. Moreover, since there is no apparently neutral arbitrator between the Independent Counsel and the Executive Branch, when the Independent Counsel does speak out, the public and the media are likely to believe that the Independent Counsel's case has merit. There is no one who can credibly dispute the Independent Counsel's claims without revealing the classified information in question.

This belief or suspicion will predictably encourage the media to investigate the facts surrounding the dispute, keep the subject alive in the public eye, and attempt to find information to "expose" the situation. The more intense and protracted the media coverage and investigation, the more likely it is that something will eventually come out that directly reveals or indirectly compromises classified information.¹²⁷ Media scrutiny may also invest questionable information with whatever degree of credibility a foreign government may demand before acting on such information.¹²⁸

¹²⁷ Exactly what information must be classified is very complex. It may include the identity of witnesses, the location of people and the very methods used to obtain classified information. See *infra* notes 137-39 and accompanying text.

¹²⁸ The Attorney General and the Executive might permit the public disclosure of classified information, despite its genuine belief that such disclosure would threaten national security. An example of the effect of public pressure on the Executive's decision to permit the disclosure of classified information occurred in the case of the April 14, 1986 bombing of Libya by the United States. Intense public pressure forced President Reagan to disclose publicly the classified information that led to the U.S. bombardment of Libya.

In a television address, President Reagan confirmed the fact that the United States had intercepted and decoded a number of messages that indicated that a Libyan-sponsored terrorist organization perpetrated the bombing of a discotheque in Berlin in which American servicemen were killed. President Reagan disclosed this information in order to justify the bombing of Libya. In reference to this disclosure, George Carver, a former Deputy Director of the CIA, "complained that President Reagan 'was so detailed that it may be a very long time before we get anything like that comparable quality, and as a result, Americans might die.'" *U.S. Lucked Out on Disco Bomb Data, Experts Say*, CHI. TRIB., Apr. 17, 1986, at 2. Another newspaper noted that:

[Intelligence] officials said the information divulged by Mr. Reagan and others about intercepted Libyan messages had raised problems for intelligence agencies because Libya was now likely to alter its communication methods. The officials said this was a calculated risk, taken so that Mr. Reagan could make as convincing a case as possible in justifying the raid on Libya.

U.S. Aides Provide Details on Paris Plot Tied to Libya, N.Y. TIMES, Apr. 16, 1986, at A18. Ultimately, the damage done was summed up this way:

Intelligence could have appropriately been used in Libya for two objectives. One would have been to overthrow Qaddafi and to replace him with a more

If a neutral arbiter, such as an Independent Special Arbiter ("ISA"), were available, the Independent Counsel would be less likely to go to the public in the first place. It would be foolhardy for the Independent Counsel to go to the public *before* or *instead of* going to the ISA. And *after* the ISA has rejected the Independent Counsel's position, the Independent Counsel would be less prone to go to the public because she would likely feel less convinced of either the rightness or the acceptability of her position. If the Independent Counsel does go to the public after her position has been rejected by an ISA, the Independent Counsel's position would be both less credible and more easily rebutted without disclosing classified information; the ISA can state publicly that the Independent Counsel's claim was considered and rejected by the ISA.

Clearly, many reasonable people may believe that the harms of disclosing classified information are exaggerated. In fact, some of these claims are probably exaggerated. The exaggeration of some claims, however, does not discredit them all. It would be as unreasonable to underestimate as to overstate the harms, and the existence of some very serious risks of harm have been soundly documented.¹²⁹

Indeed, the disclosure of intercepted Libyan messages following the United States' bombing of Libya alerted the United States'

reasonable Government. There is some evidence that this was tried. The other objective would have been to use our vast resources for collecting intelligence to provide forewarning of terrorist attacks. We had such forewarning, a little too late, in the case of the Berlin nightclub.

But instead of exploiting our collection capabilities, the administration seriously weakened, if it did not destroy, them when it revealed how good they were. Officials probably thought that they had to do this to establish the credibility of their charge of Libyan sponsorship. But when they said that we were reading Libyan diplomatic messages, they as much told the Libyans to get new codes that we cannot read.

Seymour M. Hersh, *Target Qaddafi*, N.Y. TIMES, Feb. 22, 1987, § 6, at 17, 19.

This may or may not have been a worthwhile price to pay for giving the American people and the world some assurance that the United States was acting responsibly. The release of the information was a political decision that President Reagan made and was required to defend. Its relevance to this article is to demonstrate how pressure by the media and public can be so great as to require the Administration to disclose classified information, even at the risk of jeopardizing national security by "alert[ing] the Libyans to the fact that American intelligence had been reading their messages." Stephen Engelberg, *U.S. Aides Call Libyan Plots Undeterred by Raid*, N.Y. TIMES, May 23, 1986, at A8. The creation of an ISA will help to ensure that a decision to disclose in a CIPA-IC Statute case is not made simply because there is no independent arbiter who can hear the Executive's reasons why disclosure ought not to be permitted. See *infra* section IV.

¹²⁹ See *supra* note 128.

enemies to our intelligence capabilities. In disclosing these capabilities, President Reagan severely damaged a valuable source of intelligence, presumably because he believed that it was in the best interests of the country to do so. If the Executive Branch is willing to disclose national security secrets to justify its actions, then there is reason to be concerned that such disclosure could occur in criminal prosecutions of high-ranking members of the Executive Branch. Although disclosure of classified information may not be in the country's best interests, the public outcry in such prosecutions can be very persuasive. In a criminal prosecution handled by an Independent Counsel, the principal reason why the Executive Branch might be tempted to disclose classified information, despite the belief that disclosure is inimical to the interests of national security, would be to eliminate the public suspicion that arises whenever the Executive Branch interrupts the prosecution of its high-ranking members. In a situation where the Attorney General is forced to file a CIPA section 6(e) affidavit, the public will likely see such a move as a "cover up" simply on the basis of the filing. Thus, if the public outcry is great enough, the Executive Branch might be tempted to release the information and allow the prosecution to continue, even if it would harm national security.

C. *Potential Solutions to CIPA-IC Statute Conflict*

The following procedures have been suggested to help resolve the dilemma caused by a CIPA-IC Statute case, but are not used in current practice. The statutes, properly construed, do not *require* the adoption of these procedures. This section will show that these procedures would be strongly undesirable as a matter of policy because they fail to maximize the objectives of either CIPA or the IC Statute.¹³⁰

1. Assumption by the Independent Counsel of the Attorney General's CIPA Section 6(e) Powers

Transferring all of the Attorney General's CIPA powers to the Independent Counsel would solve problems created by the present distribution of CIPA power between the Attorney General and the Independent Counsel.¹³¹ There are several reasons, however, why

¹³⁰ This article will not discuss whether CIPA and the IC Statute as presently construed would allow the adoption of these procedures.

¹³¹ See *supra* notes 102-05 and accompanying text.

the Independent Counsel ought not to be given the Attorney General's CIPA section 6(e) power. As stated earlier, the Independent Counsel is likely to be particularly interested in vigorously prosecuting the case¹³² and less concerned with protecting national security. Moreover, the Independent Counsel's appointment is based on her qualifications as a lawyer, not on her expertise or responsibility in national security or foreign relations.¹³³

Generally, the Executive Branch is charged with safeguarding the most sensitive information relating to national security and foreign relations. The performance of this responsibility is a delicate task. The authors of a text on national security described the relevant institutional pressures of the Executive Branch as follows:

Indeed, it is the very intensity of individual beliefs about national security—their deep seated, emotional, even visceral quality—that places such a burden on institutions of political decision-making and legal process. Because the balance of values at stake is not always clear, and because in the heat of crisis the pressure for action increases, institutional safeguards and procedures assume special importance in such situations. Without such safeguards, priorities of single individuals and nonrepresentative groups—however patriotic and well-meaning they may be—replace the outcomes derived through accepted exercise of authority and ultimately undercut broad popular support for the policies adopted. Such results, in turn, undermine national security itself.¹³⁴

The Independent Counsel, being a unique, temporary official, is not subject to the same institutional pressures and safeguards as the Executive Branch.

The absence of institutional safeguards is just one of the reasons why the Independent Counsel should not be charged with

¹³² See *supra* section III.A.

¹³³ See 28 U.S.C. § 593(b)(2) (setting forth the qualifications of an Independent Counsel). Section 593(b)(2) states in part that "[t]he division of the court shall appoint as independent counsel an individual who has *appropriate experience* and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner." *Id.* (emphasis added). On the other hand, the Attorney General, although not appointed specifically for expertise in national security or foreign affairs, is evaluated by the President for her ability to safeguard classified information. In addition, the Attorney General, unlike the Independent Counsel, has no institutional barrier preventing her from working closely with experts in the fields of national security and foreign affairs, such as the CIA and State Department, without raising concerns about compromising her independence.

¹³⁴ MOORE ET AL., *supra* note 55, at 24.

single-handedly safeguarding classified information that could affect national security. The Independent Counsel is selected by a Special Division of the court in a secret, unscrutinized fashion, while election to the Office of the President is the most scrutinized of all political procedures. Presidents are chosen by the electorate because they can be trusted to manage important national affairs generally and foreign affairs specifically.¹³⁵ By choosing a President, the electorate declares who ought to have ultimate responsibility for making judgments about national security and foreign relations.

Moreover, the President, unlike the Independent Counsel, is accountable to voters. If the Attorney General acts improperly, or is perceived to have acted improperly, the President and perhaps the President's party will be held politically accountable for the Attorney General's action or inaction.¹³⁶ Thus, the political accountability of the President for the Attorney General's behavior, as contrasted with the lack of accountability of an Independent Counsel, supports the view that, from a policy perspective, transferring all of the Attorney General's CIPA powers to the Independent Counsel would be unwise. For these reasons, permitting the Independent Counsel to assume the CIPA section 6(e) powers of the Attorney General is no answer to the problems that arise in a CIPA-IC Statute case.

2. Authorization of the Independent Counsel to Challenge in Court the Attorney General's Filing of a Section 6(e) Affidavit

Permitting the Independent Counsel to challenge in court the Attorney General's filing of a section 6(e) affidavit is also not a viable solution to the problem created by the simultaneous operation of the IC Statute and CIPA. This power would give the courts authority to decide whether national security would be harmed by the disclosure of certain classified information. If the court were to decide that a threat existed, then the trial would be halted by order of the court, not by order of the Attorney General. This decision would protect national security, and the public would be less inclined to view it with suspicion.

¹³⁵ It is worth noting, however, that many Presidential elections occur in contexts where many other issues and concerns dilute the voters' attention to the capacity of the candidates to manage foreign affairs capably.

¹³⁶ Regarding CIPA § 6(e) affidavits, however, the public will seldom have information available that allows *post hoc* monitoring of the President's performance. If a § 6(e) affidavit is filed, the whole subject is so wrapped in secrecy that it is difficult then for the President to be fairly held accountable by the electorate.

If, however, the court were to decide that no threat existed, it then could reject the Attorney General's section 6(e) affidavit and order the disclosure of the information during the trial. The proponents of this procedure are often those who recall President Richard M. Nixon's attempt to withhold tape recordings and other documents on the basis of executive privilege.¹³⁷ These proponents remember the Supreme Court ordering President Nixon to comply with the Special Prosecutor's subpoena; Nixon did so and justice was served. Thus, because the courts have previously prevented abuses by the Executive, some proponents conclude that the court ought to act as a watchdog in CIPA-IC Statute cases. But, while the role of the judiciary in the Nixon case might lend support to having the courts resolve conflicts between the Independent Counsel and the Attorney General in CIPA cases, the CIPA-IC Statute conflict cannot be properly addressed by the courts.

The decision whether to permit the public disclosure of classified information is a core Executive Branch decision.¹³⁸ The Supreme Court, in *C. & S. Air Lines v. Waterman S.S. Corp.*,¹³⁹ stressed the importance of preserving the Executive Branch's authority over foreign policy, stating that "[t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."¹⁴⁰ Thus, the Supreme Court recognized that "the courts have traditionally shown the utmost deference to Presidential responsibilities"¹⁴¹ regarding the secret military or diplomatic quality of information.¹⁴² The Court further explained the

¹³⁷ For example, Professor Sandra D. Jordan cites *United States v. Nixon*, 418 U.S. 683 (1974), for the proposition that "an absolute, unqualified executive privilege would conflict with the Court's function under Article III." *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice after Iran-Contra*, 91 COLUM. L. REV. 1651, 1677 (1991). Professor Jordan also notes that "[a]lthough the executive branch claim was presumptively privileged, the court [in *Nixon*] nevertheless did not accord it utmost deference since the executive branch claim involved a generalized presidential interest in confidentiality." *Id.* Other proponents of this proposal have suggested it to me orally.

¹³⁸ See *Baker v. Carr*, 369 U.S. 186 (1962).

¹³⁹ 333 U.S. 103 (1948).

¹⁴⁰ *Id.* at 111.

¹⁴¹ *U.S. v. Nixon*, 418 U.S. 683, 710 (1974).

¹⁴² In *United States v. Reynolds*, 345 U.S. 1 (1953), the Court recognized that even a court could be prevented from examining classified information: "under circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents . . ." *Id.* at 11. The *Reynolds* Court also cited with approval *Totten v. United States*, 92 U.S. 105 (1875), for the proposition that circumstances exist where the "very subject matter of the action, [such as] a contract to perform espionage, [is] a matter of state secret The action [can be]

basis for its deference to the Executive on matters involving classified information by stating that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the executive taken on information properly held secret."¹⁴³

Moreover, even if the Court were permitted access to the "secret" information, "the very nature of executive decisions as to foreign policy is political, not judicial."¹⁴⁴ The Court has recognized that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁴⁵ Yet it is emphatically the province and duty of the Executive Branch to safeguard national security. Indeed, the Court has observed that decisions concerning national security

are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.¹⁴⁶

dismissed on the pleadings without ever reaching the question of evidence." *Reynolds*, 345 U.S. at 11.

¹⁴³ *C. & S. Airlines*, 333 U.S. at 111. Professor Sandra D. Jordan believes that the "utmost deference" standard gives too much deference for the Executive Branch in CIPA-IC Statute cases. She argues that "when there is a dispute between the executive branch and an independent prosecutor, the court should probe deeply and ensure legitimacy of the claimed privilege." Jordan, *supra* note 137, at 1680. Moreover, she states that "the Attorney General should bear the burden of persuading the court by a *preponderance of objective evidence* that disclosure of classified information would cause irreparable harm to the United States." *Id.* (emphasis added). I believe that Professor Jordan's standard runs afoul of the Constitution as a violation of the separation of powers doctrine. There is no more sacred and essential Executive Branch function than protecting the national security. To require the Executive Branch to satisfy the Judiciary by a *preponderance of objective evidence* that public disclosure of classified information would cause irreparable harm to the national security is too high a standard. Indeed, imagine if the Executive Branch established that there was a 49% probability that public disclosure would cause a world war; under Professor Jordan's proposed standard the classified information would be released. Clearly, the Executive Branch, not the Judiciary, should decide whether to place the United States in 49% risk of war. Moreover, disputes about classified information rarely involve "objective evidence"—the only evidence that Professor Jordan would permit a reviewing court to consider in resolving a CIPA-IC Statute dispute. See *C. & S. Airlines*, 333 U.S. at 111.

¹⁴⁴ *Id.*

¹⁴⁵ *Nixon*, 418 U.S. at 703 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁴⁶ *C. & S. Airlines*, 333 U.S. at 111.

Because courts are less informed, less qualified, and less accountable than the Executive to make national-security decisions, it would be unwise as a matter of policy for Congress to amend the present CIPA-IC Statute scheme to permit the Independent Counsel to contest in court the Attorney General's filing of a Section 6(e) affidavit. Indeed, legislation of this sort might well infringe upon the constitutional doctrine of separation-of-powers in its "political question" form.

3. Authorization of the Attorney General to Challenge Adverse CIPA Rulings Separately from the Independent Counsel

It could be argued that the Attorney General's interests in safeguarding national security are sufficiently protected if the Attorney General has the power to advocate the Department of Justice's position to a federal judge. There are several procedures that could provide the Attorney General with such jurisdiction. First, Congress could allow both the Independent Counsel and the Attorney General to present their respective, independent positions on CIPA issues to the district judge, and allow both to take interlocutory appeals. Second, it could allow both the Independent Counsel and the Attorney General to present their respective, independent positions on CIPA issues to the district judge, but allow only the Independent Counsel to take interlocutory appeals. Finally, Congress could allow only the Independent Counsel to present her positions on CIPA issues to the district judge, but allow both the Independent Counsel and Attorney General to take interlocutory appeals.¹⁴⁷

All of these possible solutions give the Attorney General standing to contest the merits of a judge's ruling on the proposed substitution of statements of admissions or summaries for classified information. Giving the Attorney General, as well as the Independent Counsel, standing to challenge a trial judge on these CIPA questions in an IC Statute case would add a layer of protection for national security. It would give the Attorney General authority to present and argue CIPA issues to the trial court or appellate court

¹⁴⁷ There are several other possibilities as well. First, the Attorney General could replace the Independent Counsel as the representative of the United States in the presentation of CIPA issues, either in the trial court or on an interlocutory appeal. Also, interlocutory appeals could be abolished entirely. These procedures are inappropriate because an interlocutory appeal by a representative of the prosecution or the government is desirable (as Congress decided in enacting § 7 of the present CIPA statute). See *supra* note 93.

separately from the Independent Counsel. This would reduce the likelihood that sensitive issues of national security and foreign relations would escape judicial scrutiny because of the differing responsibilities and expertise of the Independent Counsel and Attorney General.

Yet there are many problems with giving the Attorney General standing to resort to trial or appellate courts in connection with disputed CIPA matters. First, the IC Statute's primary purpose of ensuring that prosecutions of high-ranking members of the Executive Branch are conducted independently—by an entity other than an agency or division of the Executive Branch—would be frustrated. Second, the Independent Counsel's decision not to challenge certain CIPA rulings might be based on a decision that a swift prosecution of one member of the Executive Branch is critical in order to preserve the possibility of prosecuting other individuals not yet facing charges.¹⁴⁸ Third, many of the Independent Counsel's staff are lawyers who have taken leaves of absence from their primary employers. A delay could force some or all of these lawyers to resign and return to their permanent jobs, and therefore lead to an awkward transition in the middle of a case. Fourth, and perhaps most importantly, if there are counts of the indictment not affected by the adverse court rulings, the Independent Counsel could decide that it is better to convict the defendant on those counts as a "sure thing," rather than extend the proceedings to obtain convictions on every count.¹⁴⁹

Furthermore, giving the Attorney General standing to litigate CIPA matters also diminishes the appearance of power and authority that the Independent Counsel might otherwise have, and undermines her control as the chief prosecutor for the United States in an IC Statute case.¹⁵⁰ Indeed, giving the Attorney General the

¹⁴⁸ It is a common practice for prosecutors not to charge all potential defendants at one time. Prosecutors hope that if they are successful with early prosecutions, these convicted defendants might be inclined to cooperate by providing information about other individuals. The longer the early prosecutions take, however, the greater the risk that future charges may not be brought because of statute of limitations problems.

¹⁴⁹ A severance is not a practicable solution. Although the Independent Counsel might prefer this option because it could give him more than one opportunity to "convict" a defendant, this solution would be overly burdensome to the defendant. Cases involving classified information are very costly and time consuming for both the defendant and the government. The defendant, unlike the Independent Counsel, usually does not have an unlimited budget.

¹⁵⁰ Practically speaking, however, this occurs in every CIPA case under the current system because the Independent Counsel cannot make the decisions about what classified

power to appeal would inevitably result in the Attorney General trumping every decision by the Independent Counsel not to appeal, because "[i]t is the established policy of the Department [of Justice] that the filing of the [CIPA] Section 6(e) affidavit is a matter to be undertaken only in the last resort."¹⁵¹ CIPA's structure recognizes this and encourages it by providing for interlocutory appeals in section 7.¹⁵² The Attorney General therefore would likely appeal every adverse ruling and cause potentially substantial delays.

This solution also does not solve the public perception problem, because whenever the Attorney General files a section 6(e) affidavit, the public would still question his motives. In fact, the public would likely be even more skeptical if the Attorney General exhausted his judicial options first, and only then filed a section 6(e) affidavit. When a high-ranking member of the Executive Branch is under scrutiny, the public may believe that the Attorney General is no more able to make unbiased decisions about national security than he is able to make unbiased decisions about prosecution strategy.¹⁵³

Instead of letting the Attorney General appeal adverse CIPA rulings, Congress could expand the current system. The IC Statute now provides that the Attorney General may appear in court as *amicus curiae* to argue issues that the Department of Justice finds significant.¹⁵⁴ This authority could be broadened to allow the At-

information to release or the contents of substitutions. These are always executive functions, as the *North* and *Fernandez* courts both recognized. See *United States v. Fernandez*, 887 F.2d 465, 470 (4th Cir. 1989); *United States v. North*, 713 F. Supp. 1441, 1442 (D.D.C. 1989).

¹⁵¹ Letter from Edward S.G. Dennis, Jr., Acting Deputy Attorney General, to Lawrence E. Walsh, Independent Counsel I (July 20, 1989) (on file with the author) (discussing the position of the Department of Justice with respect to *United States v. Fernandez*). Thus, if there are any available alternatives to the filing of a CIPA § 6(e) affidavit, such as taking a § 7 interlocutory appeal, Department of Justice policy would favor the alternative.

¹⁵² Allowing only the Independent Counsel to present her positions on CIPA issues to the district judge, but allowing both the Independent Counsel and the Attorney General to take interlocutory appeals has an additional problem. It forces the Attorney General to advocate her position in the court of appeals without having presented it in the district court. Thus, she would not have had the opportunity to make the best record in support of her position in the district court because the Independent Counsel alone controlled the government's submission to the district court on CIPA issues. If the Attorney General is bound by the record established and the positions asserted by the Independent Counsel in the district court, the Attorney General's ability to protect her interests will be seriously handicapped. If the Attorney General is not so bound, inefficient remands will be necessary, and the question who decides for the government on remand will be extremely complicated. The alternative to remand—record supplementation procedures on appeal—is obviously inefficient.

¹⁵³ See *supra* section II.C.

¹⁵⁴ See 28 U.S.C. § 597(b).

torney General to file an *amicus* brief any time he felt his interests were not being protected. This would not solve the problem, however, because an appeal must be taken before the Attorney General can file an *amicus* brief, and the power to appeal would be in the hands of the Independent Counsel. Moreover, this solution once again would not solve the problem of the public perception of the Attorney General's motives.

4. Automatic Appeal of All Adverse CIPA Rulings

Another possible method for addressing the public perception that appeals by the Executive Branch are based on improper motives is to provide for the automatic appeal of all adverse CIPA rulings. That is, any time the court rules against the Independent Counsel on a CIPA issue, the Independent Counsel would be required to take an immediate appeal of the ruling. This would protect public confidence by removing the need for the Attorney General to submit a section 6(e) affidavit, at least until all automatic appeals were exhausted.

This option, however, removes from the Independent Counsel the discretion to make important prosecutorial decisions, and could hamper the effective presentation of the case. For example, if the Independent Counsel has charged a defendant with ten counts of wrongdoing, one count of which involves classified information, the Independent Counsel might choose to accept an adverse ruling by the court on that count because it would have little impact on the overall case.

In this context, the automatic appeal could cause substantial delay. This would be particularly true if the case involved the volume of classified information present in *North* and *Fernandez*. In these cases, automatic appeals could grind the circuit courts' calendars to a halt while they reviewed potentially hundreds of district court rulings. In addition, it is likely that the Attorney General's decision to file a section 6(e) affidavit after failure to win the automatic appeal would be greeted by even greater public skepticism, because two courts would have ruled against earlier efforts by the government to resist disclosure. Finally, all of the solutions discussed in this part fail to address the problem of the subversion of the Independent Counsel's authority.¹⁵⁵

¹⁵⁵ See *supra* section II.C.

5. Judicial Balancing of National Security Interests and the Defendant's Right to a Fair Trial

In *United States v. Smith*,¹⁵⁶ the U.S. Court of Appeals for the Fourth Circuit, sitting *en banc*, held that in a CIPA section 6(a) hearing the court must balance "the public interest in protecting the information against the individual's right to prepare his defense."¹⁵⁷ In propounding such a balancing test in CIPA section 6(a) hearings, the court realized that "[i]ts application results in a more strict rule of admissibility,"¹⁵⁸ which means the exclusion of defense evidence. A stricter rule of admissibility allows the prosecution both to prosecute and to avoid disclosure. In reality, application of a balancing test to determine admissibility results in the exclusion of most, if not all, of the contested information. The district court in *Smith* noted that "[t]he interests of the entire nation, by definition, always 'substantially outweigh' the interest of a single individual in a given item of classified information."¹⁵⁹

A solution such as that presented in *Smith* will most likely lead to the inability of defendants to introduce the classified information into evidence. This has the indirect result of vastly reducing the number of conflicts between the Independent Counsel and the Attorney General because there will be no adverse rulings concerning the proposed substitution of statements of admissions or summaries for classified information.

Application of the *Smith* holding is not, however, a practical solution. The most obvious criticism of this solution is that the judiciary would be making determinations about whether the national security interest outweighs the defendant's interest. Under the separation of powers doctrine, assessment of the potential harm to national security through the public disclosure of classified information should be made only by the Executive Branch.¹⁶⁰

¹⁵⁶ *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985).

¹⁵⁷ *Id.* at 1105. The Court derived this balancing test from the standard promulgated in *Roviaro v. United States*, 353 U.S. 53 (1957).

¹⁵⁸ *Smith*, 780 F.2d at 1105. The *Smith* court thus analyzed issues concerning classified information by focusing on defense evidence.

¹⁵⁹ *United States v. Smith*, 592 F. Supp. 424, 436 (E.D. Va. 1984).

¹⁶⁰ A further problem with the *Smith* decision as a solution is that the *Smith* holding affronts Congress's understanding of the procedure it was creating in § 6(e) of CIPA. Even if Congress's understanding were consistent with *Smith*, however, the problems identified in this article would remain. See *supra* section III.B.

6. Close CIPA Trials to the Public

Professor Sandra D. Jordan has written a thoughtful article on the conflict between the Executive Branch and the Independent Counsel in cases involving classified information.¹⁶¹ Professor Jordan asserts that "[t]hree procedures, taken together, may solve the [public disclosure of classified information or dismissal of charges]¹⁶² dilemma: trial closure, a limited (security cleared) jury pool, and the defendant's prior consent to both of these procedures."¹⁶³ In her view, such a proposal would withstand constitutional scrutiny and would be good policy. I, however, find the constitutional difficulty to be greater than Professor Jordan concedes, and more importantly I believe that her proposal would promote even greater public distrust in our system of criminal justice than the public distrust created by the current CIPA-IC Statute conflict.

Part of her proposal to resolve the dilemma would "[restrict] public access to the trial in some circumstances by . . . closing the trial or portions thereof altogether."¹⁶⁴ Professor Jordan even suggests that "[t]he trial itself could be conducted, partially or entirely, *in camera*."¹⁶⁵ To withstand the public's or press's First Amendment challenge to her three-part proposal, Professor Jordan relies on language from three Supreme Court cases: *Richmond Newspapers, Inc. v. Virginia*,¹⁶⁶ *Waller v. Georgia*,¹⁶⁷ and *Press-Enterprise Co. v. Superior Court*.¹⁶⁸

¹⁶¹ See Jordan, *supra* note 137.

¹⁶² This is the classic "graymail" problem that occurs whenever defendants threaten to disclose classified information in order to defend themselves from charges of criminal wrongdoing. In such situations the government must decide between public disclosure of classified information or dismissal of charges.

¹⁶³ See Jordan, *supra* note 137, at 1684.

¹⁶⁴ See *id.* at 1687.

¹⁶⁵ *Id.* at 1687-88.

¹⁶⁶ 448 U.S. 555 (1980) (holding that a trial judge impermissibly closed a criminal trial where there was no overriding interest to support closure that was articulated in the findings). The Court declined "to define the circumstances in which all or parts of a criminal trial may be closed to the public" while recognizing that the right of public access is not absolute. *Id.* at 581 n.18.

¹⁶⁷ 467 U.S. 39 (1984) (holding that the closure of a seven-day suppression hearing was unjustified). The Court "made clear that the right to an open trial may give way in certain cases to other rights or interests, such as . . . the government's interest in inhibiting disclosure of sensitive information." *Id.* at 45.

¹⁶⁸ 464 U.S. 501 (1984) (holding that the guarantee of open public proceedings in criminal trials extends to *voir dire* of potential witnesses). The Court stated that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510.

Admittedly, each of the above-cited cases has language that recognizes that there is no absolute right of the press or public to attend or have access to all aspects of a trial. Nevertheless, Professor Jordan's movement from that proposition to the proposition that the Constitution or public would accept as legitimate a secret trial of high-ranking government officials accused of criminal misconduct simply cannot be supported. Indeed, as soon as one moves from the dicta of non-CIPA cases to application of her proposal to CIPA-IC Statute cases, the inadequacies presented by such a proposal surface.

For example, in deciding *Richmond Newspapers*, the Court acknowledged "the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."¹⁶⁹ Public trials act as a check against public protest and outrage that would follow a questionable outcome following a closed trial. "A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted."¹⁷⁰

The critical nature of the public's watchdog role arises in a CIPA-IC Statute case. The defendant's special relationship with the Executive Branch fosters a natural suspicion on the part of the public that the defendant will receive favorable treatment as a result of this special relationship. In Professor Jordan's proposal, the Executive Branch and employees with authorized access to classified information will already have entered into an agreement that secret trials could be held should one of the employees be accused of criminal misconduct. This agreement would have occurred at the time employees were given authorized access to classified information. Indeed, these agreements would be mandatory for all security-cleared individuals.¹⁷¹

Because approximately three million employees possess security clearances for access to classified information,¹⁷² there is a real possibility that Professor Jordan's proposal could lead to two systems

¹⁶⁹ *Richmond Newspapers*, 448 U.S. at 569.

¹⁷⁰ *Id.* at 571.

¹⁷¹ See Jordan, *supra* note 137, at 1687.

¹⁷² See *id.* at 1686 (citing Information Security Oversight Office, 1989 Report to the White House, Mar. 26, 1990, at 29).

of justice: one public and subject to public scrutiny for non-security-cleared defendants (employing C.I.P.A. as currently structured) and one private and not subject to public scrutiny for security-cleared defendants. I believe that courts would be unlikely to resolve First Amendment constitutional challenges in favor of the Executive Branch or the defendant under such a scenario.

The defendant's Sixth Amendment right to a public trial also raises constitutional concerns with regard to Professor Jordan's closed trial procedure. The Sixth Amendment operates to protect the defendant by requiring public trials. Public trials serve the defendant by decreasing the possibility of improper conduct by the courts and the Executive Branch and by decreasing the risk that witnesses will testify falsely.¹⁷³ Professor Jordan's proposal anticipates that defendants might challenge closed trials on Sixth Amendment grounds, but she suggests that waivers of this right at the time individuals gain authorized access to classified information would eliminate Sixth Amendment problems.

In my view, the waiver component of Professor Jordan's proposal has two problems. First, it only covers individuals who had authorized access to classified information. Therefore, it does nothing to harmonize CIPA-IC Statute cases involving defendants who never signed a waiver. Conspiracy cases involving non-security-cleared and security-cleared defendants could not be held. Second, with regard to those individuals who executed waivers, there is a serious question whether these waivers would be considered "knowing" and "voluntary."

Professor Jordan compares her proposed Sixth Amendment waiver proposal to non-disclosure agreements that prevent employees from disclosing sensitive information without prior consent of the Executive Branch.¹⁷⁴ Professor Jordan notes that the Executive Branch has required employees with access to classified information to sign non-disclosure agreements.¹⁷⁵ She further notes that "[a]pproximately one-half of all civilian and military personnel—or approximately three million persons—have signed one of these forms."¹⁷⁶ Finally, she cites a case for the proposition that signing these non-disclosure agreements can constitute a waiver of one's

¹⁷³ See *In re Oliver*, 333 U.S. 257-71 (1948).

¹⁷⁴ See Jordan, *supra* note 137, at 1684.

¹⁷⁵ *Id.* at 1686 (citing Information Security Oversight Office, 1989 Report to the White House, Mar. 26, 1990, at 29).

¹⁷⁶ *Id.*

First Amendment right to speak or write publicly about classified information.¹⁷⁷

While I accept that courts will continue to consider non-disclosure agreements to be permissible under the First Amendment, I question whether the courts would interpret the Constitution to treat similarly waiver of one's Sixth Amendment right to a public trial. With regard to a person's waiver of his or her First Amendment right, it is fairly easy for the person waiving this right to predict and understand what a person is waiving and what such a waiver means. With regard to one's Sixth Amendment right to a public trial, however, it is less clear at the time of the waiver what one is waiving. Under Professor Jordan's proposal the waiver would occur at the time the defendant received authorized access to classified information. At this point in time the defendant would be an employee—either of the government or private industry working on government contracts. There would be no particular set of charges or facts against which the employee could evaluate the impact of relinquishing her Sixth Amendment right to a public trial.¹⁷⁸ Moreover, the employee would not have benefit of counsel to advise her about the ways in which such a waiver could affect the employee's ability to get a fair trial.

For example, if an employee agrees to waive her right to a public trial and agrees that the jurors who would constitute the venire panel must be security-cleared, then the employee in effect agrees that only security-cleared individuals may participate in the trial.¹⁷⁹ This means that if the employee (now defendant) has potential witnesses who never had or no longer have security clearance, these witnesses might not be able to participate or might escape being cross-examined with classified information.¹⁸⁰ In addition, if the employee agrees to jury panels of security-cleared individuals, she might not be able to strike people from the jury

¹⁷⁷ See *Alfred Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir. 1975).

¹⁷⁸ Unlike a First Amendment waiver, which is clear at the time one waives it, the significance of a Sixth Amendment waiver does not ripen until a particular set of charges or facts develops.

¹⁷⁹ The whole purpose of a closed trial involving security-cleared jurors, as proposed by Professor Jordan, is to ensure that classified information is protected. Under Professor Jordan's proposal, this classified information would already have been deemed by the Executive Branch and the court to be so sensitive that its disclosure would cause irreparable harm to the national security. Therefore, it would make no sense to permit individuals who do not have the appropriate security clearance to gain access to such classified information.

¹⁸⁰ See *id.*

panel for cause based on their relationship with the intelligence and military communities.¹⁸¹

Professor Jordan's proposal also presents obvious problems with regard to whether the waiver of a public trial by an employee would be considered "voluntary" under the Constitution. First, if a current employee is required to sign such a waiver in order to retain her job, a serious question of coercion arises. It is not hard to imagine a court concluding that waiving one's right to an open and fair trial by a jury of one's peers (including non-security-cleared jurors) in order to keep one's job is an "involuntary" waiver under the Constitution.¹⁸² Jobs are often considered essential by many employees because a family's health and general well-being may turn on the income jobs generate. Any waiver following an employee's being forced to decide between the real costs associated with losing her job and the abstract costs associated with a Sixth Amendment waiver could very often be considered coercive and involuntary under the Constitution. Second, requiring a prospective employee to waive his or her constitutional right to an open and fair trial while presenting less categorical coercion problems could in individual cases be held as not "voluntary" under the Constitution.¹⁸³

From a policy perspective Professor Jordan's three-part proposal presents a more serious problem—the public's lack of confidence in rulings during and verdicts following secret trials. In such a case the public would be informed that defendants would be tried by a jury consisting only of individuals with active security clearances such as members of the intelligence communities. Furthermore, the public would be informed that these trials would be held in secret. Additionally, the public would be informed that at some point in the past the Executive Branch and the defendant agreed that if the defendant were ever charged criminally in a case involving classified information the trial could be held in secret. But, the public would not be informed about the specific facts, circumstances and evidence

¹⁸¹ Certainly, it is not difficult to conceive of situations where the very nature of the criminal charges or potential defense is such that members of the intelligence or military communities who have appropriate security clearance might be biased against certain defendants.

¹⁸² Professor Jordan recognizes that there are currently two to three million government employees who would be required to sign such a waiver under her proposal or risk losing their jobs. If her proposal does not apply to current employees, then it is of little practical value at this time.

¹⁸³ These difficult economic times increase the waiver requirement's coercive impact on prospective employees.

that led to a given ruling or verdict because such information would be classified.

Obviously, if there were a "classified" jury trial, it would require extensive background and security clearance checks of the jurors.¹⁸⁴ This would provide many opportunities for abuse on the part of the Executive Branch when it decided which jurors were "qualified" to sit on the jury. In addition, jurors in closed trials may not be capable of keeping disclosed information secret outside the courtroom. Finally, the public perception problem would be especially acute in a closed trial. If there is any trial that should be held in an open court, it would be the prosecution of high-ranking members of the Executive Branch. The public would have no confidence in the integrity of a closed-door trial in such a case.

IV. A BETTER IDEA: A PROPOSAL FOR THE CREATION OF AN OFFICE OF INDEPENDENT SPECIAL ARBITER

In light of the conflicts that surfaced in the *North* and *Fernandez* cases, and the flaws inherent in the proposed procedures discussed above, another alternative must be found to resolve the dilemma created by a CIPA-IC Statute case. As mentioned earlier, the best solution for this dilemma must address concerns of public confidence in the unbiased administration of criminal justice and concerns for the protection of national security. Indeed, because the problem centers on the public's distrust of the government's actions in a CIPA-IC Statute case, the problem can be solved best by giving the public some credible basis for forming judgments concerning the Attorney General's motives. The creation of an Independent Special Arbitrator for classified information (the "ISA") to resolve CIPA disputes between the Independent Counsel and the Attorney General would accomplish this goal.

¹⁸⁴ Requiring security clearance for jurors would raise serious problems under the jury-trial guarantee of the Sixth Amendment, both because of the potentially intimidating effects of the security investigations involved and because of the dubious justification for narrowing the "cross section" of the community by excluding venirepersons who cannot qualify for clearance. CIPA security procedures simultaneously disavow the need for closed trial proceedings and expose their most obvious deficiencies: "[n]othing contained in these procedures shall be construed to require an investigation or security clearance of the members of the jury or interfere with the functions of a jury, including access to classified information introduced as evidence in the trial of a case." See Security Procedures Established Pursuant to the Classified Information Procedures Act, Oct. 15, 1980, Pub. L. No. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, reprinted in 18 U.S.C. app. § 9 at 708-09 (1988).

Under an ISA procedure, the Attorney General is less likely to file a section 6(e) affidavit under circumstances giving rise to public suspicion, and the Independent Counsel will have an independent entity to hear counterarguments against the need for the filing of a section 6(e) affidavit. By creating the ISA, the competing interests of the Attorney General and the Independent Counsel could be integrated properly, because both officials would be able to safeguard their interests without public misperception of their motives.¹⁸⁵ Moreover, the goals of the IC Statute and CIPA could be maximized in the process.

In order for the public to have confidence in the opinions of the ISA, however, it is essential that the ISA be absolutely free from the influence of either the Attorney General or the Independent Counsel. The ISA must be qualified to make decisions regarding classified information and national security. The only essential qualification is sufficient prior experience with, or knowledge of, issues relating to national security. Other factors should also be considered, including the absence of close ties with both the current administration and the Independent Counsel, past intelligence experience that may result in a biased perspective concerning classified information, and the absence of political connections that might influence or appear to influence the ISA's determinations.¹⁸⁶ It may also be desirable to attach post-employment restrictions to the position, such as barring ISAs from holding any Executive-appointed office for a period of ten years after the expiration of their term as ISA.

The ISA may be removable by the Attorney General for cause.¹⁸⁷ In addition, the ISA should have a limited term of office. An ISA will be appointed after an Independent Counsel has been

¹⁸⁵ This article accepts the proposition that there are certain prosecutions that must be brought by some entity other than the Department of Justice in order to avoid the appearance of impropriety. The author is reluctant to endorse the creation of another "part" of the Executive Branch. Nevertheless, the author believes that the current simultaneous operation of the IC Statute and CIPA proves the proposition that two halves do not necessarily make a whole. The creation of an ISA will combine with the IC Statute and CIPA to make them whole.

¹⁸⁶ It is of paramount importance to find a qualified person to serve as the ISA, but the very factors that make such a person qualified might also be viewed as making her biased in favor of the intelligence communities. That is, if a person is qualified because she worked in the CIA for twenty years, she might be deemed an inappropriate selection because of her ties to the CIA. Therefore, the search could begin in the academic community, where the appearance of bias problem would probably be less serious.

¹⁸⁷ This would help to define the ISA as an "inferior" officer with the meaning of Article II.

named. In order for the ISA to be appointed, the Independent Counsel or the Attorney General must file an affidavit with the Special Division stating that he or she reasonably expects classified information to be disclosed at trial. The ISA would then have jurisdiction over the Independent Counsel's case and the cases of all other subsequent Independent Counsel appointments, as long as either a subsequent Independent Counsel or the Attorney General also petitioned the ISA to review a conflict concerning the disclosure of classified information.

As long as the first Independent Counsel's case is ongoing, it would not be necessary for any succeeding Independent Counsel to file an affidavit with the court.¹⁸⁸ But the succeeding Independent Counsel, or the Attorney General, would have to petition the ISA prior to the resolution of the first Independent Counsel case in order to come within the ISA's jurisdiction. Thus, if a second Independent Counsel or the Attorney General petitions the ISA prior to the termination of the first case, the ISA would also have jurisdiction over the second case. The ISA would retain this jurisdiction over the second case even after the original case ends. While the ISA has jurisdiction over a case, it would not be necessary for the Attorney General or any other Independent Counsel to file an affidavit.

When an Independent Counsel case ends, the ISA's term of office would be complete if there were no other Independent Counsel cases outstanding over which the ISA had jurisdiction. The ISA's term of office would in any event be limited to ten years, with the possibility that it could expire earlier.¹⁸⁹ If the ten year period expires and there are still cases over which the ISA has jurisdiction, a new ISA would be appointed to take over. After the ten year period has expired, or if the ISA's office terminates earlier because of the conclusion of all IC Statute cases over which she acquired jurisdiction, a new ISA would be appointed. This replacement ISA would be appointed in the same fashion as the first one, that is, when an Independent Counsel or the Attorney General files an

¹⁸⁸ By allowing the ISA to have jurisdiction over these cases without requiring the Independent Counsel to file an affidavit, we would conserve judicial resources. There is no reason to involve the court once an ISA properly has jurisdiction over other cases.

¹⁸⁹ These factors would further make the ISA akin to Independent Counsel within the holding of *Morrison v. Olson*, 487 U.S. 654 (1988), so as to enable the ISA also to be called "inferior." See *infra* notes 198-206 and accompanying text. Yet there would be no problem with allowing an ISA to serve more than one term. So long as each individual term is less than ten years, the Office of ISA might still be called "inferior."

affidavit stating that he or she reasonably expects that classified information will be disclosed at trial. The new ISA would have jurisdiction over cases in the same manner as his predecessor. This system would result in the appointment of only one ISA at a time. The ISA's duties would consist of issuing advisory opinions whenever the Attorney General and the Independent Counsel disagree about the disclosure of classified information.¹⁹⁰

The ISA's opinions would be advisory because the Executive Branch must retain control over the information that can and cannot be disclosed due to national security considerations. The Attorney General answers to the President, who in turn answers to the public through the election process. It is proper for the President to retain control over decisions that could threaten national security because the public has declared, by electing her to this office, that the ultimate decision for the safety of our nation ought to rest with her.

Because the ISA's opinions would be strictly advisory, her opinions would only advise the Independent Counsel, the Attorney General and the public that national security either would or would not be threatened by the disclosure of the classified information in question.¹⁹¹ The public is currently quite distrustful of the Attorney General's motives,¹⁹² yet, it has no evidence to support this distrust, only suspicions. If the public were confronted with the advisory opinion of the ISA stating that the disclosure of certain classified information would not compromise national security, the Attorney General's decision to file a CIPA section 6(e) affidavit to prevent disclosure would carry with it a potentially high political cost. The pressure on the Executive Branch could even result in a withdrawal of the section 6(e) affidavit. Thus, even though the opinions are advisory they would carry great weight.

The ISA would have authority to issue opinions only when the Attorney General and the Independent Counsel disagree about whether a section 6(e) affidavit can be supported on the grounds of a threat to national security. The ISA will confront disagreements only where the Attorney General takes the position that a section

¹⁹⁰ Again, this limited duty of the ISA would make the ISA very similar to the Independent Counsel for purposes of the *Morrison* holding. See *infra* notes 198-206 and accompanying text.

¹⁹¹ By giving the ISA advisory power only, the legislative intent behind the Independent Counsel Statute would not be frustrated, because Congress intended to give the Independent Counsel the prosecutorial powers and an advisory opinion would not usurp those powers.

¹⁹² See *supra* notes 112-22 and accompanying text.

6(e) affidavit can be supported on the grounds of irreparable harm to national security, and the Independent Counsel disagrees.¹⁹³ Because the Executive Branch would be the party seeking to withhold information from the Independent Counsel and is deemed to be in a conflict with regard to the handling of the case as evidenced by the appointment of an Independent Counsel, the Executive Branch should bear the burden of persuasion. Nevertheless, the Executive Branch's standard should not be a preponderance of evidence standard as has been suggested by one commentator.¹⁹⁴ Instead, the ISA should determine whether the Executive Branch's assertion that public disclosure of classified information would cause irreparable harm to national security is supported by the evidence, viewing the evidence in the light most favorable to the government. The purpose of the ISA's review function is to ensure that the Executive Branch's CIPA section 6(e) claims are legitimate and to discourage the Executive Branch from making insupportable claims of irreparable harm to national security. Every time the ISA is petitioned, he or she would be required to render an opinion deciding the question and stating publicly whether the Attorney General's or Independent Counsel's position was untenable or even frivolous.¹⁹⁵

The ISA's decision as to whether or not disclosure would compromise national security would aid the public in assessing the Attorney General's motives. Thus, the public would be rightfully suspicious if the Attorney General filed a section 6(e) affidavit after the ISA issued an advisory opinion stating that the disclosure of the information would not be harmful to national security. On the other hand, if the Attorney General filed a section 6(e) affidavit when the ISA agreed that the disclosure of classified information would

¹⁹³ Obviously, if the independent counsel believes that the § 6(e) affidavit can be supported on the grounds of a threat to national security, then the independent counsel would not be in a conflict with the Executive Branch about the public disclosure of the classified information.

¹⁹⁴ See Jordan, *supra* note 137, at 1680 (disputes between the Independent Counsel and the Executive Branch ought to be resolved by the court, and the Executive Branch bears the burden of proving its case by a preponderance of evidence standard).

¹⁹⁵ The ISA would not issue any opinions regarding CIPA § 6(a) hearings. In a § 6(a) hearing, the court is to rule on admissibility alone, without considering the classified nature of the information until the § 6(c) substitution hearings. If information is found admissible in a § 6(a) hearing, it does not necessarily mean that the information will be disclosed, but only that it is relevant. It is possible that the information may still be protected adequately by using substitutions. The ISA cannot issue opinions concerning the relevance and admissibility of evidence, even classified evidence, as this would infringe upon the powers of the court. Determinations of relevance and admissibility are purely judicial functions, over which the ISA is not qualified to issue an opinion.

threaten national security, the public would have less reason to be suspicious of the Attorney General's motives.

The office of ISA must be structured to withstand challenges to its constitutionality. Recently, the Supreme Court upheld the constitutionality of the IC Statute in *Morrison v. Olson*.¹⁹⁶ By modeling the office of the ISA after the office of the Independent Counsel, the office of the ISA would likewise be able to withstand challenges to its constitutional validity.

In *Morrison v. Olson*, the IC Statute withstood three separate challenges to its constitutionality based on the Appointments Clause,¹⁹⁷ Article III,¹⁹⁸ and the separation of powers doctrine.¹⁹⁹ An Article III challenge is unlikely to succeed in the wake of *Morrison*, which upheld the power of the Special Division to appoint the Independent Counsel on a theory that would likewise uphold the power of the Special Division to appoint the ISA.²⁰⁰ Further, the *Morrison* Court sustained the Ethics in Government Act against a separation of powers challenge, concluding that the Act did not represent a usurpation of the Executive Branch's functions by either Congress or the judiciary.²⁰¹ It is likely that the Court would also

¹⁹⁶ *Morrison v. Olson*, 487 U.S. 654 (1988). For an interesting discussion of this problem, see Earl C. Dudley, Jr., *Morrison v. Olson: A Modest Assessment*, 38 Am. U. L. Rev. 255 (1989).

¹⁹⁷ U.S. CONST. art. II, § 2, cl. 2.

¹⁹⁸ U.S. CONST. art. III.

¹⁹⁹ The Supreme Court has explained the significance of separation of powers doctrine: Time and again we have reaffirmed the importance in our constitutional scheme of the separation of government powers into the three coordinate branches . . . [T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."

Morrison, 487 U.S. at 693 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

²⁰⁰ An Article III challenge would focus on whether the judiciary is permitted to intrude on an executive function through the appointment of an Independent Counsel who would be authorized to discharge executive functions. This appointment by the judiciary would in effect prevent the "Executive Branch from accomplishing its constitutionally assigned functions." *Morrison*, 487 U.S. at 695.

²⁰¹ In holding that the Ethics in Government Act (the IC Statute) as a whole does not violate the principle of separation of powers, the *Morrison* Court said that "[w]e observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch." *Morrison*, 487 U.S. at 694. Under the Act, Congress can: request the Attorney General to apply for the appointment of an [I]ndependent [C]ounsel, but the Attorney General has no duty to comply with the request . . . Other than that, Congress' role under the Act is limited to receiving reports or other information and oversight of the independent counsel's activities[,] . . . functions that we have recognized generally as being incidental to the legislative function of Congress.

Id. In holding that "the Act works [no] judicial usurpation of properly Executive functions,"

find that the office of the ISA does not violate the principle of the separation of powers because the ISA would have the power to issue advisory decisions only. Therefore, the primary consideration in structuring the office of the ISA would be to ensure that it does not violate the Appointments Clause.

The Appointments Clause distinguishes between two types of officers, "principal" and "inferior" officers.²⁰² The Appointments Clause provides in part that "the Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."²⁰³ In order for the Special Division to have the power to appoint an ISA, therefore, that person must be deemed an inferior officer. As the *Morrison* Court noted, "the line between 'inferior' and 'principal' officers is one that is far from clear."²⁰⁴ The Court considered several factors in determining that the Independent Counsel was an inferior officer. These factors included recognition that the Independent Counsel is removable by the Attorney General, that the Independent Counsel is "empowered . . . to perform only certain, limited duties," that the Independent Counsel is limited in jurisdiction and that the office of Independent Counsel is temporary.²⁰⁵ The Court stated that "[i]n our view, these factors relating to the 'ideas of tenure, duration . . . and duties' of the [I]ndependent [C]ounsel . . . are sufficient to establish that [the Independent Counsel] is an 'inferior' officer in the constitutional sense."²⁰⁶ Because the ISA would be modeled after the Independent Counsel, the ISA should be considered an inferior officer. Therefore, the Appointments Clause does not represent a constitutional bar to the establishment of an office of the ISA.

The creation of an office of the ISA would hopefully result in fewer conflicts between the Attorney General and the Independent Counsel. Although conflicts are still bound to arise, the ISA's advisory opinions would potentially prompt the Independent Counsel and the Attorney General to resolve their conflicts without having

the Court emphasized that the Special Division can appoint an Independent Counsel only if the Attorney General requests one. *Id.* at 695. It also noted that the Attorney General has the power to remove the Independent Counsel, but only for cause. *Id.* at 695-96.

²⁰² U.S. CONST. art. II, § 2, cl. 2. In *Morrison*, the Supreme Court read "principal" into Article II, Section 2, Clause 2 by implication.

²⁰³ *Id.*

²⁰⁴ 487 U.S. at 671.

²⁰⁵ *Id.* at 671-72.

²⁰⁶ *Id.* at 672.

to resort to filing a section 6(e) affidavit. In those instances where the Attorney General does decide to file a section 6(e) affidavit, the ISA's opinion would allow the public to make a more informed judgment as to the necessity for the affidavit, thereby reestablishing public confidence in the prosecution of high-ranking members of the Executive Branch. Similarly, if the public has confidence in the Attorney General's decisions, there will be less danger that the Attorney General will disclose classified information solely to avoid questions of impropriety.

V. CONCLUSION

This article has demonstrated that the simultaneous operation of CIPA and the IC Statute undermines public confidence in our system of government and endangers national security. Any decision by the Attorney General to interrupt the prosecution of a member of the Executive Branch by filing a CIPA section 6(e) affidavit will arouse public suspicion. To avoid questions of impropriety, the Executive Branch might permit the public disclosure of classified information and the prosecution of these officials, even when doing so would threaten national security. Thus, two statutes that were enacted to ensure public confidence in our system of justice and safeguard national security combine to do just the opposite. This result is antithetical to Congress's intent in enacting CIPA and the IC Statute.

Public confidence can be restored by providing the Independent Counsel and the Attorney General a forum in which to resolve disputes concerning the release of classified information. The creation of the Independent Special Arbiter would provide the Attorney General and the Independent Counsel with an informed, neutral official who would issue an advisory opinion on whether the filing of a section 6(e) affidavit is necessary to protect national security and foreign relations. Thus, creation of the ISA would integrate the dichotomous objectives of the Attorney General and the Independent Counsel by removing from both the ability to make a decision concerning national security without having the legitimacy of that decision subject to review by an independent entity. The creation of an ISA provides a reliable way of ensuring that neither national security nor public confidence in our system of justice suffers as the result of the prosecution of a member of the Executive Branch by an Independent Counsel.