

112TH CONGRESS
1ST SESSION

S. 354

To amend the Classified Information Procedures Act to improve the protection of classified information and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 15, 2011

Mr. CARDIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Classified Information Procedures Act to improve the protection of classified information and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; DEFINITIONS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Classified Information Procedures Reform and Improve-
6 ment Act of 2011”.

7 (b) IN GENERAL.—Section 1 of the Classified Infor-
8 mation Procedures Act (18 U.S.C. App.) is amended—

9 (1) by redesignating subsection (b) as sub-
10 section (c); and

1 (2) by inserting after subsection (a) the fol-
2 lowing:

3 “(b) ‘Disclosure’, as used in this Act, includes the re-
4 lease, transmittal, or making available of, or providing ac-
5 cess to, classified information to any person (including a
6 defendant or counsel for a defendant) during discovery,
7 or to a participant or member of the public at any pro-
8 ceeding.”.

9 (c) **TECHNICAL AND CONFORMING AMENDMENT.**—
10 Section 501(3) of the Immigration and Nationality Act (8
11 U.S.C. 1531(3)) is amended by striking “section 1(b)”
12 and inserting “section 1”.

13 **SEC. 2. PRETRIAL CONFERENCE.**

14 Section 2 of the Classified Information Procedures
15 Act (18 U.S.C. App.) is amended—

16 (1) by inserting “(a) **IN GENERAL.**—” before
17 “At any time”;

18 (2) by adding at the end the following:

19 “(b) **EX PARTE.**—If the United States or the defend-
20 ant certifies that the presence of both parties at a pretrial
21 conference reasonably could be expected to cause damage
22 to the national security of the United States or the defend-
23 ant’s ability to make a defense, then upon request by ei-
24 ther party, the court shall hold such pretrial conference
25 ex parte, and shall seal and preserve the record of that

1 ex parte conference in the records of the court for use
2 in the event of an appeal.”.

3 **SEC. 3. PROTECTIVE ORDERS.**

4 Section 3 of the Classified Information Procedures
5 Act (18 U.S.C. App) is amended—

6 (1) by inserting “(a) IN GENERAL.—” before
7 “Upon motion”;

8 (2) by inserting “use or” before “disclosure”;

9 (3) by inserting “, or access to,” after “dislo-
10 sure of”;

11 (4) by inserting “, or any classified information
12 derived therefrom, that will be” after “classified in-
13 formation”;

14 (5) by inserting “or made available” after “dis-
15 closed”; and

16 (6) by adding at the end the following:

17 “(b) NOTICE.—In the event the defendant is con-
18 victed and files a notice of appeal, the United States shall
19 provide the defendant and the appellate court with a writ-
20 ten notice setting forth each date that the United States
21 obtained a protective order under this Act.”.

22 **SEC. 4. DISCOVERY OF AND ACCESS TO CLASSIFIED INFOR-**
23 **MATION BY DEFENDANTS.**

24 Section 4 of the Classified Information Procedures
25 Act (18 U.S.C. App.) is amended—

1 (1) in the section heading, by inserting “AND
2 ACCESS TO” after “DISCOVERY OF”;

3 (2) by inserting “(a) IN GENERAL.—” before
4 “The court, upon”;

5 (3) in the first sentence—

6 (A) by inserting “to restrict the defend-
7 ant’s access to or” before “to delete”;

8 (B) by striking “from documents”;

9 (C) by striking “classified documents, or”
10 and inserting “classified information,”; and

11 (D) by striking the period at the end and
12 inserting “, or to provide other relief to the
13 United States.”;

14 (4) in the second sentence, by striking “alone.”
15 inserting “alone, and may permit ex parte pro-
16 ceedings with the United States to discuss that re-
17 quest.”;

18 (5) in the third sentence—

19 (A) by striking “If the court enters an
20 order granting relief following such an ex parte
21 showing, the” and inserting “The”; and

22 (B) by inserting “, and the transcript of
23 any argument and any summary of the classi-
24 fied information the defendant seeks to obtain

1 discovery of or access to,” after “text of the
2 statement of the United States”; and

3 (6) by adding at the end the following:

4 “(b) ACCESS TO OTHER CLASSIFIED INFORMA-
5 TION.—If the defendant seeks access to nondocumentary
6 information from a potential witness or other person
7 through deposition under the Federal Rules of Criminal
8 Procedure, or otherwise, which the defendant knows or
9 reasonably believes is classified, the defendant shall notify
10 the attorney for the United States and the court in writ-
11 ing. Such notice shall specify with particularity the non-
12 documentary information sought by the defendant and the
13 legal basis for such access.

14 “(c) SHOWING BY THE UNITED STATES.—In any
15 prosecution in which the United States seeks to restrict,
16 delete, withhold, or otherwise obtain relief with respect to
17 the defendant’s discovery of or access to any specific clas-
18 sified information, the attorney for the United States shall
19 file with the court a declaration made by the Attorney
20 General invoking the United States classified information
21 privilege, which shall be supported by a declaration made
22 by a knowledgeable United States official possessing the
23 authority to classify information that sets forth the identi-
24 fiable damage to the national security that the discovery

1 of, or access to, such information reasonably could be ex-
 2 pected to cause.

3 “(d) STANDARD FOR DISCOVERY OF OR ACCESS TO
 4 CLASSIFIED INFORMATION.—Upon the submission of a
 5 declaration of the Attorney General under subsection (c),
 6 the court may not authorize the defendant’s discovery of,
 7 or access to, classified information, or to the substitution
 8 submitted by the United States, which the United States
 9 seeks to restrict, delete, or withhold, or otherwise obtain
 10 relief with respect to, unless the court first determines
 11 that such classified information or such substitution would
 12 be—

13 “(1) noncumulative, relevant, and helpful to—

14 “(A) a legally cognizable defense;

15 “(B) rebuttal of the prosecution’s case; or

16 “(C) sentencing; or

17 “(2) noncumulative and essential to a fair de-
 18 termination of a pretrial proceeding.

19 “(e) SECURITY CLEARANCE.—Whenever a court de-
 20 termines that the standard for discovery of or access to
 21 classified information by the defendant has been met
 22 under subsection (d), such discovery or access may only
 23 take place after the person to whom discovery or access
 24 will be granted has received the necessary security clear-
 25 ances to receive the classified information, and if the clas-

1 sified information has been designated as sensitive com-
2 partmented information or special access program infor-
3 mation, any additional required authorizations to receive
4 the classified information.”.

5 **SEC. 5. NOTICE OF DEFENDANT’S INTENTION TO DISCLOSE**
6 **CLASSIFIED INFORMATION.**

7 Section 5 of the Classified Information Procedures
8 Act (18 U.S.C. App.) is amended—

9 (1) in the section heading, by inserting “USE
10 OR” before “DISCLOSE”;

11 (2) in subsection (a)—

12 (A) in the first sentence—

13 (i) by inserting “use or” before “dis-
14 close”; and

15 (ii) by striking “thirty days prior to
16 trial” and inserting “45 days prior to such
17 proceeding”;

18 (B) in the second sentence by striking
19 “brief” and inserting “specific”;

20 (C) in the third sentence—

21 (i) by inserting “use or” before “dis-
22 close”; and

23 (ii) by striking “brief” and inserting
24 “specific”; and

25 (D) in the fourth sentence—

1 (i) by inserting “use or” before “dis-
2 close”; and

3 (ii) by inserting “reasonably” before
4 “believed”; and

5 (3) in subsection (b), by inserting “the use or”
6 before “disclosure”.

7 **SEC. 6. PROCEDURE FOR CASES INVOLVING CLASSIFIED**
8 **INFORMATION.**

9 Section 6 of the Classified Information Procedures
10 Act (18 U.S.C. App.) is amended—

11 (1) in subsection (a)—

12 (A) in the second sentence, by striking
13 “such a hearing.” and inserting “a hearing and
14 shall make all such determinations prior to pro-
15 ceeding under any alternative procedure set out
16 in subsection (d).”; and

17 (B) in the third sentence, by striking “pe-
18 tition” and inserting “request”;

19 (2) in subsection (b)(2) by striking “trial” and
20 inserting “the trial or pretrial proceeding”;

21 (3) by redesignating subsections (c), (d), (e),
22 and (f), as subsections (d), (e), (f), and (g), respec-
23 tively;

24 (4) by inserting after subsection (b) the fol-
25 lowing:

1 “(c) STANDARD FOR ADMISSIBILITY, USE, AND DIS-
2 CLOSURE AT TRIAL.—(1) Classified information which is
3 the subject of a notice by the United States pursuant to
4 subsection (b) is not admissible at trial and subject to the
5 alternative procedures set out in subsection (d), unless a
6 court first determines that such information is noncumu-
7 lative and relevant to an element of the offense or a legally
8 cognizable defense, and is otherwise admissible in evi-
9 dence.

10 “(2) Nothing in this subsection may be construed to
11 prohibit the exclusion from evidence of relevant, classified
12 information in accordance with the Federal Rules of Evi-
13 dence.”;

14 (5) in subsection (d), as so redesignated—

15 (A) in the subsection heading, by inserting
16 “USE OR” before “DISCLOSURE”;

17 (B) in paragraph (1), by inserting “use
18 or” before “disclosure” both places that term
19 appears;

20 (C) in the flush paragraph following para-
21 graph (1)(B), by inserting “use or” before “dis-
22 closure”; and

23 (D) in paragraph (2)—

24 (i) by striking “an affidavit of” and
25 inserting “a declaration by”;

1 (ii) by striking “such affidavit” and
2 inserting “such declaration”; and

3 (iii) by inserting “the use or” before
4 “disclosure”;

5 (6) in subsection (e), as so redesignated, in the
6 first sentence, by striking “disclosed or elicited” and
7 inserting “used or disclosed”;

8 (7) in subsection (f), as so redesignated—

9 (A) in the subsection heading, by inserting
10 “USE OR” before “DISCLOSURE” both places
11 that term appears;

12 (B) in paragraph (1)—

13 (i) by striking “(c)” and inserting
14 “(d)”;

15 (ii) by striking “an affidavit of” and
16 inserting “a declaration by”;

17 (iii) by inserting “the use or” before
18 “disclosure”; and

19 (iv) by striking “disclose” and insert-
20 ing “use, disclose,”; and

21 (C) in paragraph (2), by striking “dis-
22 closing” and inserting “using, disclosing,”; and

23 (8) in the first sentence of subsection (g), as so
24 redesignated—

1 (A) by inserting “used or” before “dis-
2 closed”; and

3 (B) by inserting “or disclose” before “to
4 rebut the”.

5 **SEC. 7. INTERLOCUTORY APPEAL.**

6 Section 7(a) of the Classified Information Procedures
7 Act (18 U.S.C. App.) is amended—

8 (1) by striking “disclosure of” both times that
9 places that term appears and inserting “use, disclo-
10 sure, discovery of, or access to”; and

11 (2) by adding at the end the following: “The
12 right of the United States to appeal pursuant to this
13 Act applies without regard to whether the order or
14 ruling appealed from was entered under this Act,
15 another provision of law, a rule, or otherwise. Any
16 such appeal may embrace any preceding order, rul-
17 ing, or reasoning constituting the basis of the order
18 or ruling that would authorize such use, disclosure,
19 or access. Whenever practicable, appeals pursuant to
20 this section shall be consolidated to expedite the pro-
21 ceedings.”.

22 **SEC. 8. INTRODUCTION OF CLASSIFIED INFORMATION.**

23 Section 8 of the Classified Information Procedures
24 Act (18 U.S.C. App.) is amended—

1 (1) in subsection (b), by adding at the end
2 “‘The court may fashion alternative procedures in
3 order to prevent such unnecessary disclosure, pro-
4 vided that such alternative procedures do not deprive
5 the defendant of a fair trial or violate the defend-
6 ant’s due process rights.’”; and

7 (2) by adding at the end the following:

8 “(d) ADMISSION OF EVIDENCE.—(1) No classified in-
9 formation offered by the United States and admitted into
10 evidence shall be presented to the jury unless such evi-
11 dence is provided to the defendant.

12 “(2) Any classified information admitted into evi-
13 dence shall be sealed and preserved in the records of the
14 court to be made available to the appellate court in the
15 event of an appeal.”.

16 **SEC. 9. APPLICATION TO PROCEEDINGS.**

17 The amendments made by this Act shall take effect
18 on the date of the enactment of this Act but shall not
19 apply to any prosecution in which an indictment or infor-
20 mation was filed prior to such date.

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