

111TH CONGRESS  
2D SESSION

# S. 4050

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

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## IN THE SENATE OF THE UNITED STATES

DECEMBER 20, 2010

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

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## 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 2010”.

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 would harm the national security of the United  
22                 States or the defendant’s ability to make a defense, then  
23                 upon request by either party, the court shall hold such  
24                 pretrial conference ex parte, and shall seal and preserve

1 the record of that ex parte conference in the records of  
2 the court for use 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, the United States shall provide the defendant and  
19 the appellate court with a written notice setting forth each  
20 date that the United States obtained a protective order.”.

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

23 Section 4 of the Classified Information Procedures  
24 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.—Classified information which is the  
3 subject of a notice by the United States pursuant to sub-  
4 section (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, relevant, and necessary to an element of the offense  
8 or a legally cognizable defense, and is otherwise admissible  
9 in evidence. Classified information may not be used or dis-  
10 closed at trial by the defendant unless a court first deter-  
11 mines that exclusion of the classified information from  
12 such use or disclosure would deprive the defendant of a  
13 fair trial or violate the defendant’s right to due process.”;

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 the striking “such affidavit”  
2 and 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 and shall apply  
19          to any prosecution pending in any United States district  
20          court.

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