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"The public needs and wants to know more information; Government wants to protect more information," said Jim Rosen, a journalist for The McClatchy Company at "Lawfare: Terrorism & the Courts," an event hosted by William Mitchell's National Security Forum. Mr. Rosen sat on a panel along with United States District Court Judges Gerald Rosen and John Tunheim. Judges Rosen and Tunheim discussed the challenges that federal judges face in the handling of classified information in criminal trials as controlled by the Classified Information Procedures Act (CIPA).

In Judge Rosen's opinion, there are four main obstacles to hurdle in a case involving classified information under CIPA: (1) case management; (2) procedural issues; (3) substantive constitutional issues; and (4) evidentiary issues. Judge Rosen noted that because of the differences presented by every case and because there is no instruction manual to deal with the problems that variability presents, case management becomes a special concern when a trial will likely involve classified information. Unfortunately, for the judge and the attorneys involved, identifying early on the extent to which classified information will be implicated may not be an easy task. Section 2 of CIPA creates a procedure for relieving some of the concerns this uncertainty presents by providing that "any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution." Judge Rosen emphasized that, under Section 6 of CIPA, if counsel fails to move for a pretrial conference it is the duty of the judge to conduct a hearing to make all determinations concerning the "use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding."

Judge Tunheim pointed out that, relating generally to case management issues, judges have to be cognizant of all the evidence and need to get "behind the information process." More specifically, he pointed out several issues a judge and the parties involved need to address during the pretrial conference. The judge must know whether the government anticipates using classified information in its case

against the accused. Second, the judge must determine what to do with this information during discovery. The judge must also determine whether his own staff and defense counsel must obtain a security clearance. Sometimes the information involved is so secret that the judge may need to secure the information in a Secured Compartmented Information Facility or "SCIF." This may require greater security (i.e. alarms, guards) in the judge's chambers, and occasionally throughout the entire courthouse, before, during, and after review of the classified information. Finally, Judge Tunheim pointed out that judges in these trials must remain mindful of the access they can grant to the media during the proceedings to avoid the unintentional disclosure of any protected information.

"The court needs to establish clear procedures," said Judge Rosen regarding his second major concern. Judge Rosen provided a list of some of the procedures CIPA controls: the prosecution must provide the court with a privilege log of all classified documents; defense counsel will typically see generic descriptions of the privileged classified information, though not the documents themselves; the defense must disclose any and all arguments, documents, and witnesses which may involve classified information that it will use in presenting its case; the government is permitted to propose "substitute evidence" for the classified information. Judge Rosen noted that often this substitute evidence, like evidence produced for the privilege log, is not very helpful to defense counsel because it has been "scrubbed" to a point that erases its utility. Judge Tunheim said that he remains a strong proponent of the substitute evidence solution because of his observation that "[the federal government] drastically over-classif[ies] information."

Judge Rosen also identified the government's challenge in determining when it has redacted sensitive information so that defense counsel may view documents without discovering any operational secrets such as intelligence sources and methods. He identified the government's fear that revealing such information could jeopardize relations with other countries and its own operatives. However, Judge Rosen noted, based on *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), the government must produce and disclose all exculpatory evidence to the defense. In addition to being legally required, the disclosure of exculpatory evidence is also important in building the appropriate courtroom decorum between opposing attorneys and between the lawyers and the judges. Judge Rosen noted that these procedures require time and negotiation to identify and produce classified information in a manner that meets the

approval of the government and the defense, complies with statutory rules, and avoids compromising national security interests.

For his third major concern Judge Rosen noted that it is important to ensure that all parties honor the constitutional promise of due process. At the forefront of these issues is the right of the defense to effectively confront witnesses and put on its case. This means that the defense may need to investigate sources and methods of intelligence. The government rarely discloses these aspects of the intelligence community's operations and such information will almost always qualify for protection under CIPA. As an example, Judge Rosen explained that the defense counsel in the Zacharias Moussaoui trial sought exculpatory statements from detainees held at the Guantanamo Bay facilities. The court denied that request and the government was allowed to produce "substitute evidence." Because of the scrubbing problem he noted earlier, Judge Rosen stated that one is left to question whether "substitute information" violates the accused's constitutional right to a fair, public trial.

Finally, the panelists addressed other evidentiary issues that may arise. Judge Rosen noted that the often mundane presentation of a photograph or document for the purpose of its authentication raises CIPA-related questions: Were these items obtained through circuitous means? What is to be done if important probative information from these items is electronically intercepted? What happens if counsel is unable to lay foundation? As a practical matter, it is not feasible for the judge to grant everyone in the courtroom a security clearance. This practical concern, however, is in tension with the defendant's right to a fair, public trial. It is also necessary for the judge to have procedures in place which allow members of the jury to gain access to classified information. One solution might be to change the forum for these complicated classified information cases: military tribunal, special immigration or procedure court, terror court, or special pre-cleared juries for Article III courts. While Judge Rosen expressed a willingness to have cases involving classified information tried in alternative fora, Judge Tunheim argued that the Article III courts are better equipped to handle cases involving classified information and effectively protect individual rights.

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