No. 19-5345 ORIGINAL

In The
Supreme Court of the United States

MUSTAFA KAMEL MUSTAFA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 5(a) of the Classified Information Procedures Act, 18 U.S.C. App. 3, is unconstitutionally vague or overbroad due to its potential to permit District Courts to prohibit what would otherwise be viewed as a common defense investigation if the case did not involve classified information?

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[1] A Classified Appendix will also be provided to the Classified Information Security Officer for service on the parties and filing with this Court pursuant to the Classified Information Procedures Act, 18 U.S.C. App. 3.

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CASES

STATUTES AND OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mustafa Kamel Mustafa (a/k/a Mostafa Kamel Mostafa a/k/a Abu Hamza) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

DIRECTLY RELATED PROCEEDINGS

This petition is directly related to United States v. Mustafa, 04 Cr. 36 (KFB) (SDNY), and United States v. Mustafa, 15-211 (2d Cir.).

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit in United States v. Mustafa is available in an unpublished opinion at 753 Fed.Appx. 22 (2d Cir. October 23, 2018) (Pet.App.1), the decision denying Petitioner's motion for rehearing and/or rehearing *en banc* is available in an unpublished order dated, February 13, 2019, at Pet.App.39. The opinions of the United States District Court for the Southern District of New York denying the relief requested are available in a Classified Appendix which are being served and filed with this Court by the Classified Information Security Officer pursuant to the requirements of the Classified Information Procedures Act, 18 U.S.C. App. 3 (Cl.App.1).

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on October 23, 2018, and an order denying Petitioner's motion for rehearing and/or rehearing *en banc* was denied on February 13, 2019. This petition is timely filed within the statutory time limitation given that a 45-day extension of time to file the instant petition was applied

for in a timely fashion on May 10, 2019, and granted on May 14, 2019, by the Honorable Ruth Bader Ginsburg. This Court has jurisdiction to review the judgment below on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

The Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall be ... deprived of life, liberty, or property, without due process of law[.]

The Confrontation Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]

The Section 5(a) of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 (Pet.App.40-Pet.App.41):

> If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall .... notify the attorney for the United States and the court in writing.... No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act....

STATEMENT

Petitioner was indicted in the Southern District of New York on numerous counts of terrorism-related activity, specifically: (1) conspiracy to take hostages (18

U.S.C. § 1203); (2) hostage taking (18 U.S.C. § 1203); (3) conspiracy to provide and conceal material support and resources to terrorists (18 U.S.C. §§ 371, 956, 2339A); (4) providing and concealing material support and resources to terrorists (18 U.S.C. §§ 956, 2339A, and 2); (5) conspiracy to provide material support and resources to a foreign terrorist organization (18 U.S.C. § 2339B); (6) providing material support and resources to a foreign terrorist organization (18 U.S.C. §§ 2339B and 2); (7) conspiracy to provide and conceal material support and resources to terrorists (18 U.S.C. §§ 956, 2339A); (8) providing and concealing material support and resources to terrorists (18 U.S.C. §§ 956, 2339A, and 2); (9) conspiracy to provide material support and resources to a foreign terrorist organization (18 U.S.C. § 2339B); (10) providing material support and resources to a foreign terrorist organization (18 U.S.C. §§ 2339B and 2); and (11) conspiracy to supply goods and services to the Taliban (18 U.S.C. § 371; 50 U.S.C. § 1705 [1996 ed.]; 31 C.F.R. §§ 545.204, 545.206 [1999 ed.]).

Following a jury verdict, Petitioner was sentenced to a term of life imprisonment by the Honorable Kathleen B. Forrest, United States District Court Judge for the Southern District of New York., which he is serving at ADX Florence in arguable violation of the extradition order that resulted in his transfer to the United States for trial. Petitioner's trial followed a lengthy extradition battle that lasted over eight years and was ultimately resolved by the European Court of Human Rights, and only upon the assurance that Petitioner would not serve an extended sentence at ADX Florence, which is now the case.

Petitioner is a Muslim imam who had been based in London, England, and who, without question, is the highest profile alleged terrorist ever extradited from Europe to the United States for criminal prosecution. His trial and sentencing were watched world-wide and his appeal and cert. petition continue to be closely monitored by international and domestic media, the United States State Department, the United Kingdom Foreign Ministry, as well as the United Nations. Petitioner's offenses, prosecuted in the Southern District of New York, spanned the globe and were alleged to include a hostage taking in Yemen, support for the Taliban in Afghanistan, militant fundamentalist propaganda in England, and the creation of terrorist training camps within the United States.

The prosecution of Petitioner's offenses was extensive, including *unclassified* discovery so voluminous that it fills an entire conference room with banker's boxes stacked to the ceiling. Petitioner's trial (and appeal) also involved substantial *classified* material subject and controlled by the strict requirements of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, which requires the storage of such material only in a separate, secure, facility authorized to maintain "SECRET" level national security documents.

At trial, the Government called Evan Kohlmann as an expert witness. The defense objected based upon, as relevant herein, classified information that called Kohlmann's credibility into question. Upon the disclosure of the classified information in question to security-cleared defense counsel, and then again post-trial, the defense sought the District Court's authorization to discuss the classified

information with security-cleared Government prosecutors assigned to other cases. The defense was required under the Classified Information Procedures Act, 18 U.S.C. App. 3 §§ 6(c), 6(e), to receive authorization from the court before conducting an investigation into the implications of the classified information, because such investigation would require disclosure and/or discussion of the classified information to and/or with others not already cleared to review and discuss the material *in relation to this case.*

Security-cleared defense counsel's application for authorization was initially made to aid cross-examination into Kohlmann's credibility and was revisited post-trial in an effort to determine whether Kohlmann perjured himself at trial, since his trial testimony was inconsistent with the classified information.

Kohlmann testified as an expert witness for the prosecution. In doing so, the following testimony highlights where the issue came to its head at trial:

> Q. You testified in a case called United States v. Mehanna?
> A. Yes.
> Q. That was in 2011?
> A. Yes.
> Q. In that case, in preparing for that case, or at any time during that case, did you inform the prosecutors in that case of your precise relationship with the FBI?
>
> [PROSECUTOR]: Objection to form, your Honor.
>
> THE COURT: Did you inform them of your relationship with the FBI?
>
> THE WITNESS: Yes, your Honor.
>
> Q. Precise relationship with the FBI?

A. I don't know what you mean by "precise," but the prosecutors in that case I had worked with on a previous case, and they were fully aware of the nature of my work with the FBI.

X X X

Q. You testified in United States v. Kaziu, correct?
A. Yes, that is correct.
Q. Also in 2011, correct?
A. I believe so, yes.
Q. Did you inform the prosecutors in that case of the precise nature of your relationship with the FBI?

X X X

THE COURT: Let me ask a question, did you inform the prosecutor in every case in which you have testified on behalf of the government of the nature of your relationship with the FBI if you were asked?

THE WITNESS: Definitely, your Honor.

THE COURT: Did you withhold any information in response to any direct questions?

THE WITNESS: Certainly not.

X X X

Q. You have done more than consulting for the FBI, correct?
A. Correct.
Q. You have done more than act as an expert for the government, correct?
A. That's correct, yes.
Q. Did you inform the prosecutors in those cases of that relationship beyond those two things I just said?

X X X

A. It is the same answer. Every single case I am involved in, I have no reason to hide my relationship with the FBI.

X X X

Q. Isn't it a fact that the first time you disclosed the precise nature of the relationship with the government to prosecutors was in the case before this one a month ago [United States v. Abu Ghayth, Docket No. 98 Cr. 1023 (S-14) (LAK) (SDNY)]?

A. That is incorrect.

(Tr. 1377-1380).

In United States v. Mehanna, 09 Cr. 10017 (GAO) (D.Mass.), and United States v. Kaziu, 09 Cr. 660 (JG) (EDNY), the classified information had not been disclosed to defense in any form, not as Giglio material nor for any other purpose, and as such the precise nature of Kohlmann's relationship with the FBI – which went beyond the manner described by Kohlmann during any of these trials – was unknown to counsel at the time. Present security-cleared defense counsel know that defense counsel on those prior cases were unaware of "the precise nature of" Kohlmann's "relationship with the government," because one of the security-cleared defense counsel in those two cases was also one of the security-cleared defense counsel at Petitioner's trial. Present security-cleared defense counsel are also aware of numerous additional cases where the information was likewise not previously disclosed – which we know to be the case either because one of us were security-cleared defense counsel in those cases or because no security-cleared defense counsel had been appointed at all.

As such, only two possibilities exist to explain the inconsistency between the Government's disclosures and Kohlmann's testimony: (1) his testimony was false; or (2) a Giglio violation occurred implicating at least 20 other Federal cases in which Kohlmann had previously testified. Particularly since the first of these two possibilities is more likely to have been the case, Petitioner had a Due Process right to interview the security-cleared prosecutors from those prior cases to ascertain whether Kohlmann perjured himself, as was the most likely explanation for what occurred, and then a Sixth Amendment right to confront him with the product of that investigation.

In a series of opinions, the District Court denied Petitioner's objections to Kohlmann's testimony and likewise denied his applications for authorization to conduct the investigation necessitated by the disclosure of the classified information. The Second Circuit Court of Appeals thereafter denied Petitioner's claims related to the classified information.

Without specifically revealing the content of the classified information, the Second Circuit wrote in its judgment that "even if it were appropriate to view Kohlmann as the equivalent of a law enforcement witness ... the district court's instructions, together with the inherently distinct nature and subject matter of Kohlmann's expert and fact testimony, satisfactorily safeguarded against juror confusion and, thus, no relief from judgment is warranted." Mustafa, 753 Fed.Appx. at 34 [Slip. Op. at 17]. We respectfully disagree. A witness's "status" *is* the determinative factor of the jury's consideration of bias. See, e.g., Sand, Modern

Federal Jury Instructions, Instruction 7-16, Comment, at 7-61 (2018 ed.) ("the defense is entitled to an instruction to the effect that a witness's status as a law enforcement official employed by the government does not entitle his testimony to be given special consideration by the jury"), citing, United States v. Bethancourt, 65 F.3d 1074, 1080 n.3 (3d Cir. 1995); see also United States v. Dukagjini, 326 F.3d 45, 53 (2d Cir. 2003) ("While expert testimony aimed at revealing the significance of coded communications can aid a jury in evaluating the evidence, particular difficulties, warranting vigilance by the trial court, arise when an expert, who is also the case agent, goes beyond interpreting code words and summarizes his beliefs about the defendant's conduct based upon his knowledge of the case."). As such, a denial of cross-examination into a witness's specific status is a denial of a defendant's Sixth Amendment right to confrontation, and a denial of defense counsel's ability to investigate the veracity of the witness's testimony related to that status is a denial of both the Sixth Amendment right to confrontation and the Fifth Amendment right to Due Process.

Here, the jury was never presented with the "precise nature" of Kohlmann's "relationship with the government" since the District Court precluded defense counsel from confronting Kohlmann on cross with the classified information and thereafter prohibited the defense from investigating Kohlmann's potential perjury in relation to his claims of prior openness.

Had the classified facts revealed to defense counsel by the Government *not* been classified, then the District Court would not have been permitted to interfere

with Petitioner's attempt to investigate whether Kohlmann had committed perjury, which, if born out as expected, the Government would have likewise then been required to concede to the jury – or post-trial to the court – pursuant to this Court's longstanding precedent in Napue v. Illinois, 360 U.S. 264, 269 (1959).[2]

Instead, because the Government was able to shield the information behind an unreviewable Executive Branch decision to classify the information in question, the District Court was in the position to rely upon that classification to prohibit investigation related to an area of impeachment of far greater magnitude than the ineffectual unclassified paths that remained. The ability of the District Court to rely upon the Classified Information Procedures Act to interfere with what would ordinarily be a common and straightforward investigation, violated Petitioner's Fifth Amendment right to Due Process and Sixth Amendment right to confrontation, and exposed a significant flaw in the Constitutionality of the Classified Information Procedures Act.

Petitioner does not dispute that the Executive Branch must be permitted to classify information when necessary to preserve the interests of national security.

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[2] To be clear, the classified information disclosed in this case was specifically disclosed pursuant to the Government's obligations under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). As such, if this witness was not committing perjury when he testified that he had informed the prosecutors in his prior cases of the classified fact at issue, then that could only mean that Government prosecutors in at least at least 20 cases suppressed impeachment material relevant to this witness in clear violation of the Government's responsibilities under Giglio, since it cannot be said that the information was favorable to the defense due to its impeachment value in Petitioner's case but not in those other cases.

The issue here is not that the information was classified. The issue is the Constitutional conflict that results when, as here, the fact that the information was classified required Petitioner's security-cleared defense counsel to seek authorization from the District Court to investigate the scope and implications of that information *even when speaking to Government prosecutors who already possessed the requisite security clearance.* In no other situation can a court interfere with a defendant's ability to investigate the truthfulness of a witness's testimony or rely upon the results of that investigation to impeach the witness thereafter.

REASONS FOR GRANTING THE PETITION

> The proceeding involved a question of exceptional importance: whether Section 5(a) of the Classified Information Procedures Act, 18 U.S.C. App. 3, is unconstitutionally vague or overbroad due to its potential to permit District Courts to prohibit what would otherwise be viewed as a common defense investigation if the case did not involve classified information.

The Classified Information Procedures Act governs the introduction of classified material at a pretrial proceeding, at trial, and on appeal. The determination whether classified material and/or information will be admitted pursuant to CIPA involves four principle steps:

(1) The defense must file a notice briefly describing the classified information that it "reasonably expects to disclose or to cause the disclosure of" at trial or "in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant." 18 U.S.C. App. 3 § 5(a) (emphasis added);

(2) At the Government's request, the District Court must conduct a hearing at which the court determines prior to trial the "use, relevance, or admissibility" of classified information listed in the defendant's CIPA § 5 notice. 18 U.S.C. App. 3 § 6(a). At the request of the Attorney General, the

hearing must be held *in camera*. Following the hearing, the District Court must "set forth in writing" the basis for its ruling as to each item of classified information at issue in the hearing. Id.;

(3) Regarding any classified information that the District Court orders disclosed, the Government may move to replace the information with a statement admitting relevant facts that the information would tend to prove, or to substitute a summary of the information. See 18 U.S.C. App. 3 § 6(c)(1). The District Court shall grant the Government's motion if it finds that the statement or summary would "provide the defendant with substantially the same ability to make his defense as would disclosure" of the classified information. Id.; and

(4) If the District Court denies the Government's motion for a statement or substitution, the court shall, upon objection by the Attorney General, prohibit the defendant from disclosing the classified information and impose sanctions on the Government, including (in appropriate situations) dismissal of the indictment or specified counts thereof, or preclusion of the witness upon which the classified material relates. See 18 U.S.C. App. 3 § 6(e).

Here, the defense provided notice pursuant to 18 U.S.C. App. 3 § 5(a), but, in relevant part, was not seeking to disclose the classified information at trial but rather to Assistant United States Attorneys assigned to other cases who already possessed the requisite security clearance to learn of and discuss the information in question.

Court have long held that the Classified Information Procedures Act is "meant to protect and restrict the discovery of classified information *in a way that does not impair the defendant's right to a fair trial*," United States v. Stewart, 590 F.3d 93, 130 (2d Cir. 2009) (emphasis added and alterations and internal quotation marks omitted), citing, United States v. Aref, 533 F.3d 72, 78 (2d Cir. 2008); see also Aref, 553 F.3d at 80 (the Government's privilege under CIPA "must give way" when classified information is helpful or material to the defense); United States v. Dumeisi, 424 F.3d 566, 578 (7th Cir. 2005) ("CIPA's fundamental purpose is to 'protect [] and

restrict[] the discovery of classified information in a way that does not impair a defendant's right to a fair trial.' It is essentially a procedural tool that requires a court to rule on the relevance of classified information before it may be introduced."), quoting, United States v. O'Hara, 301 F.3d 563, 569 (7th Cir. 2002), and citing, United States v. Wilson, 901 F.2d 378, 379 (4th Cir. 1990); United States v. Libby, 429 F.Supp.2d 1, 7 (D.D.C. 2006) ("[CIPA] creates no new rights or limits on discovery of a specific area of classified information ... it contemplates an application of the general law of discovery in criminal cases to the classified information based on the sensitive nature of the classified information"), quoting, United States v. Yunis, 867 F.2d 617, 621 (D.C. Cir. 1989).

At the same time, the Sixth Amendment guarantees that a criminal defendant "shall enjoy the right ... to be confronted with the witnesses against him." Sixth Amend., U.S. Const. A criminal defendant's right to confrontation includes the "fundamental right" to cross-examine witnesses for the prosecution. Pointer v. Texas, 380 U.S. 400, 404-05 (1965); see Chambers v. Mississippi, 410 U.S. 284, 294-95 (1973).

Cross-examination is essential to the fairness and accuracy of a criminal trial; it is critical for ensuring the integrity of the fact-finding process and is the principal means by which the believability of a witness and the truth of his testimony are tested." United States v. Begay, 937 F.2d 515, 520 (10th Cir. 1991) (quotation marks omitted); see, e.g., United States v. Esparsen, 930 F.2d 1461, 1469 (10th Cir. 1991)

("[r]eaching the truth is a fundamental goal of trials, and cross examination is critical to the process").

In this regard, "[a] more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." Davis v. Alaska, 415 U.S. 308, 316 (1974). Such cross-examination must not be hindered or prevented because "[t]he partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' " Davis, 415 U.S. at 316, quoting, 3A J. Wigmore, Evidence § 940 at p. 775 (Chadbourn rev. 1970). Similarly, this Court has also "recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Davis, 415 U.S. at 316-17, citing, Greene v. McElroy, 360 U.S. 474, 496 (1959) ("the evidence used to prove the Government's case must be disclosed ... where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers").

Here, defense counsel had already been granted access to the material in question and was merely seeking a manner in which to investigate whether prior attorneys had as well. Particularly to the extent the request related to conversations with attorneys still employed by the Department of Justice as Government prosecutions, the Government's privilege under CIPA was unlikely to be impacted, and even if it might be impacted the privilege should still have given way since the

information in question was material and helpful to the defense. See United States v. Abu-Jihaad, 630 F.3d 102, 141 n.33 (2d Cir. 2010) ("Information that is helpful or material to the defense 'need not [even] rise to the level that would trigger the Government's obligation under Brady v. Maryland, 373 U.S. 83 [] (1963), to disclose exculpatory information.' "), quoting, Aref, 533 F.3d at 80; see also United States v. Mejia, 448 F.3d 436, 457 (D.C. Cir. 2006) (observing that, for purposes of CIPA, "information can be helpful without being 'favorable' in the Brady sense").

The Classified Information Procedures Act states that "[i]f a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant," 18 U.S.C. App. 3 § 5(a) (emphasis added), the Government may object, id., and "the court shall set forth in writing the basis for its determination," 18 U.S.C. App. 3 § 6(a). However, explicit in CIPA's legislative history is the admonition that "the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without this Act." Senate Report No. 96-823, 96th Cong.2d Sess. (1980), 1980 U.S. Code Cong. and Adm. News 4302; see also United States v. Lopez-Lima, 738 F.Supp. 1404, 1407 (S.D.Fla. 1990); United States v. Poindexter, 698 F.Supp. 316, 320 (D.D.C. 1988). Yet that is exactly what occurred. Based solely upon the fact that the information was classified, security-cleared defense counsel was prohibited from discussing the information with prior attorneys who would have been in a position to confirm

whether the Government's witness had perjured himself in Petitioner's trial or any of the prior trials where he testified similarly.

As a result, CIPA § 5(a)'s use of the phase "in any manner" while clear at first glance, becomes opaque – vague and overbroad – when the question, as here, is not whether the classified information should be disclosed to the public (i.e., those without the requisite security clearance), but merely to Government prosecutors who already possess the security clearance required to learn of and discuss the information in question.

This Court has long held that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citations omitted). Additionally, "Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, [this Court has] recognized ... that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimum guidelines to govern law enforcement.' Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Kolender, 461 at 357-58, quoting, Smith v. Goguen, 415 U.S. 556, 574, 575 (1974); see also United States v. Davis, Docket No. 18-431, --- S.Ct. ---, 2019 WL 2570623 (June 24, 2019) (holding that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally

vague after determining that language of statute as written had the potential to criminalize conduct that is broader than Congress intended).

During all criminal trials defense counsel should be permitted to investigate whether a prosecution witness has lied during his testimony in that case or in prior cases in which the witness testified, particularly if the only alternative to the testimony being false would be that a Giglio violation had occurred in each prior case. If the former was the case, then relief under Rule 33 of the Federal Rules of Criminal Procedure would have been warranted, whereas if the latter was the case then a much more unsettling and broader investigation would have been justified.

Here, over 20 cases are impacted by the witness's likely perjury, yet it is not merely the impact on these 20+ cases that alone justifies certiorari. It is the fact that the vagueness and overbreadth of 18 U.S.C. App. 3 § 5(a) permits a court to outright prohibit a defense investigation that could never be interfered with if the fact under investigation was not classified. The vagueness and overbreadth of 18 U.S.C. App. 3 § 5(a) thereby creates a conflict of constitutional magnitude between the Classified Information Procedures Act and a defendant's rights to Due Process and confrontation *in any case* involving Giglio material that has been determined to be classified by the Executive Branch.

With more and more cases involving classified material being brought in this post-911 and post-Wikileaks age, the procedures surrounding classified information are of exceptional importance, particularly when they conflict with a defendant's Fifth and Sixth Amendment rights. Certiorari should therefore be granted to address

whether the Section 5(a) of the Classified Information Procedures Act, 18 U.S.C. App. 3, is unconstitutionally vague or overbroad due to its potential to permit District Courts to prohibit what would otherwise be viewed as a common defense investigation if the case did not involve classified information.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
June 28, 2019

Respectfully submitted,

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