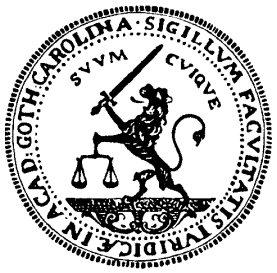

FACULTY OF LAW
Lund University

Anna Maria Martignetti

The Classified Information Procedures Act (CIPA) and Suspected Terrorists in Federal Civilian Courts: *Subject to the Most Exacting Demands of Justice?*

Master thesis
30 credits (30 ECTS)

Supervisor: Dr. Nina-Louisa Arold

Master´s Programme in International Human Rights Law

Spring 2010

Contents

Summary

The condemnation of the specialized procedures of the faulty military commission system, particularly *ex parte* and *in camera* hearings to determine the closure of confidential information, has resulted in the contention that terror cases may be properly adjudicated in regularly constituted Article III courts. Proponents of prosecution of terror suspects in federal civilian courts assert that the conflict between adversarial trial and protecting classified information has been adequately resolved through the Classified Information Procedures Act (CIPA). However, CIPA, a procedural discovery statute enacted by Congress in 1980 to counter graymail attempts in espionage cases, authorizes *ex-parte* and *in camera* proceedings and the use of secret classified information similar to the procedures condemned by the Supreme Court in *Hamdan*. Notably, while CIPA has passed constitutional muster in lower federal courts, the Supreme Court has not yet rendered an opinion on the constitutionality of CIPA. The Obama administration, in an attempt to shed its image as a pariah of human rights protection among the international community, has pledged to prosecute suspected terrorists in federal civilian courts. Can CIPA and Article III courts provide terror suspects with a fair trial as mandated by the Constitution and defined by the binding provision of the International Covenant of Civil and Political Rights (ICCPR)? The answer is a confounding *maybe*.

The Obama administration has reinstated the ill-defined and unremitting national emergency in regards to the threat of terrorism, a declaration contentiously alluding to the ability to derogate from fair trial principles embodied in Article 14 of the ICCPR. However, despite its conspicuous absence from the enumerated list of non-derogable rights, the right to a fair trial contains certain non-derogable components, even during times of public emergency. Similarly, the transference of terror cases from the military commissions to the federal civilian courts implied the abandonment of illegitimate and summary justice in favor of the adoption of the full spectrum of fundamental rights available in adversarial proceedings. However, the application of CIPA in terror cases has resulted in the dilution of non-negotiable Constitutional rights and fails to meet the *de minimus* protections required under international law. Alarmingly, the watered down constitutional doctrines seep into precedent, undermining the adversarial system and narrowing the protection of fundamental rights applicable in 'ordinary' criminal proceedings.

The imposed application of CIPA in the terror context without aforethought amounts to a superficial and disingenuous approach to the reinstatement of the rule of law. Indeed, the military commissions system remains a viable option for terror suspects, to the detriment of the United States. Virtually untouched since its enactment, CIPA may address the discovery and use of classified information during criminal proceedings in

federal court, however, it fails to protect constitutional rights in situations where the defendant lacks security clearance. CIPA allows the prosecutor and the judge to operate under a veil of secrecy with minimal safeguards. CIPA from the judicial perspective seemingly places substantial burdens on judges to accommodate the rights of a defendant against the ill-fitting statute in the context of terrorism. Yet the controversial nature of CIPA in terror cases and its effects on constitutional rights engenders fear of public discussion and threats of recusal, preventing authentic discourse on the statute. Out of fifty federal judges solicited to participate in an anonymous interview on CIPA in the terror context for this study, only three agreed. The disconnect between human rights policy and fair trial practice must be addressed. However, the skeletal framework of CIPA and its objectives should not be wholly discarded. Rather, CIPA should be revised and refined to address the novel and complex issues arising in terror prosecutions while protecting the right to a fair trial.

Oftentimes have I heard you speak of one who commits a
wrong as though he were not one of you, but a stranger unto
you and an intruder upon your world.
But I say that even as the holy and the righteous cannot rise
beyond the highest which is in each one of you,
So the wicked and the weak cannot fall lower than
the lowest which is in you also.
~Kahlil Gibran[1]

[1] The Prophet, Kahlil Gibran

Abbreviations

AG	Attorney General
CIA	Central Intelligence Agency
CIPA	Classified Information Procedures Act
CSO	Clearance Security Officer
DOD	Department of Defense
DOJ	Department of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
FRE	Federal Rules of Evidence
FRCP	Federal Rules of Criminal Procedure
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
RUDs	Reservations, Understandings, and Declarations
SAMs	Special Administrative Measures
UDHR	Universal Declaration of Human Rights
UN	United Nations

1 Introduction

Here in this court we deal with individuals as individuals, and care for individuals as individuals, as human beings we reach out for justice. You are not an enemy combatant. You are a terrorist. You are not a soldier in any war…To call you a soldier gives you far too much stature. And we do not negotiate with terrorists…We hunt them down one by one and bring them to justice. ~Judge William Young[2]

In May of 2009, President Barack Obama publicly pledged to prosecute suspected terrorists in federal civilian courts *whenever feasible*, maintaining the flailing military commission system for specific 'war' crimes cases.[3] The following November, Attorney General (AG) Eric Holder fleshed out President Obama's skeletal promise that accused terrorists "will be subject to the most exacting demands of justice."[4] AG Holder announced that high value Guantanamo Bay detainee, Khalid Sheikh Mohammed, referred to as the mastermind of 9/11, would be transferred to New York to stand trial in a federal civilian court.[5] Other controversial detainees, including Omar Khadr, captured and detained in 2002 at the age of 15 for the murder of a U.S. military officer in Afghanistan, will face a military commission.[6] Notably, the executive decision has resulted in a separation of the accused Guantanamo detainees, allocating some terror suspects to federal civilian courts equipped with due process guarantees and banishing others to the stripped and barren military commission system.[7]

Apprehensive critics of the prosecution of terror suspects in civilian courts fear that terror cases will become entangled in the complex technicalities of federal courts, leading to non-guilty verdicts of perpetrators of heinous crimes or jeopardizing classified information that could provoke further terror attacks.[8] On the other hand, proponents of human rights and civil liberties have lobbied for civilian trials of terror suspects since the inception of the military commission system as the method to restore the

---

[2] CNN.Com, Law Center, Partial Transcript, "Reid: I am at War With Your Country," January 31, 2003, available at http://edition.cnn.com/2003/LAW/01/31/reid.transcript/

[3] S. G. Stolberg, 'Obama Would Move Some Detainees to the U.S.,' 21 May 2009, *New York Times*, available at <www.nytimes.com/2009/05/22/us/politics/22obama.html?pagewanted=all> accessed 2 January 2010.

[4] CNN, Accused 9/11 Plotter Khalid Sheikh Mohammed Faces New York Trial, November 13, 2009, available at http://edition.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html

[5] *Id.*

[6] *Id*.

[7] J. Gerstein, 'New York Terrorist Trial Raises Stakes,' 11/13/09, *Politico*, available at <www.politico.com/news/stories/1109/29486.html>, last accessed 2 January 2010.

[8] S. J. Schulhofer, 'Prosecuting Suspected Terrorists: The Role of Civilian Courts,' *The Journal of the ACS Issues Group*, 63—71, at 63, available at <www.acslaw.org/files/Prosecuting-Suspected-Terrorists.pdf>, last accessed 3 January 2010.

rule of law, due process, and international alliances, without aforethought.[9] However, which argument deserves merit? *Both.*

Opponents of federal civilian prosecutions of terror suspects 'rightfully' *fear* that federal rules of procedure and evidence will grant suspected terrorist broader rights in adversarial trial that may jeopardize classified national security information, particularly the right to confront evidence, obtain exculpatory evidence and to be tried in a public proceeding.[10] But, civil libertarians argue that the conflict between due process and protecting classified information raised in terror cases has been already adequately reconciled through the Classified Information Procedures Act (CIPA), the procedure applied in Article III courts to restrict access to classified information to select persons with a national security clearance. The contention: "Federal courts are already equipped to protect classified information and to handle all the other supposed complexities of terrorism trials."[11]

While opponents of prosecuting terror suspects in civilian courts fear abuse of rights by defendants, the military commission system and initial deprivation of fundamental principles of the right to fair trial created an anomaly of *brutally* victimizing terrorists accused of *brutality*, generating evidence through torture and depriving defendants of fundamental due process.[12] On 29 June 2006, Justice Stevens delivered the opinion of the Supreme Court of the United States in *Hamdan v. Rumsfeld*, holding that the first military commission issued by President George W. Bush lacked power to proceed because its structure and procedures violated the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949.[13] Justice Stevens invalidated the former military commission by pointing to its inadequate procedures, specifically, that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during any part of a proceeding that was closed by an official.[14] Judge James Robertson of the federal district court in Washington, D.C. had initially condemned the military commissions, writing that "it is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court."[15]

Despite strong denunciation from Justice Stevens and Judge Robertson, American courts *have* sanctioned the dilution of the right to a fair trial through the application of CIPA in terror cases. Congress enacted CIPA in 1980 in response to the growing concern of 'gray mail' attempts by government officials or intelligence agents threatening to disclose

[9] *Ibid*.
[10] *Ibid*.
[11] Schulhofer *supra* note 3, at 63.
[12] *Ibid*.
[13] *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), pp. 49—72, available at <www.law.cornell.edu/supct/html/05-184.ZO.html>, accessed 9 January 2010.
[14] *Ibid*., pp. 49—52.
[15] *Hamdan v. Rumsfeld,* 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

confidential national security information if prosecuted for misconduct. CIPA facilitated the prosecution of notorious characters with high security clearances or "insiders", such as Oliver North and John Poindexter, implicated in the infamous Iran-Contra scandal during the Reagan administration. The statute provides for the release of classified information at issue in a trial only to persons with security clearances. In the early espionage or intelligence cases, CIPA's mechanisms did not interfere with the defendants' due process rights because the defendant himself could not only access and review the information at issue, he also had prior knowledge of its existence. In terror cases, however, defendants never had nor will ever have access to classified material.[16] Applied in the terror context, CIPA provides for *ex-parte* and *in camera* examination of classified evidence, similar to the former unfit military commission rules. While military commissions have been found legally and practically incompetent, can CIPA, as applied in federal civilian courts, guarantee fair adversarial proceedings in terror cases? *Maybe.*

Military commissions deviate from the long established rules and procedures of federal civilian courts, creating a separate and calculatedly unequal system for prosecuting *civilians* suspected of terrorist related conduct. Although the Obama administration has abandoned the nonsensical and fictional term "unlawful enemy combatants," the underlying definition justifying military detention remains the same. According to the Department of Justice (DOJ), the government may detain individuals charged with providing substantial support to al-Qaeda, the Taliban or associated enemy forces.[17] Interestingly, the Geneva Conventions of 1949, the codified expression of customary international humanitarian law (IHL), occupy the field of any variation of armed conflict, leaving no category of person undefined. The Geneva Conventions similarly provide a definition for all persons who have engaged in hostile or belligerent conduct but who are not entitled to the protection of prisoner of war of status. They are called civilians. Terrorists are undoubtedly heinous criminals, but civilian criminals nonetheless. Senator Joe Lieberman, in opposing the civilian trial of Khalid Sheikh Mohammed, continues the discussion of nonsensical fiction, claiming that trying terrorists "as common criminals, giving them constitutional rights of American citizens in our courts, is justice according to 'Alice in Wonderland'."[18] In the words of Lewis Carroll's precocious Alice, "that's not a regular rule: you invented it just now."[19] Indeed, fair trial rights implicated by the constitutionalized adversarial process in the Fifth and Sixth Amendments apply to 'persons'

[16] Ellen C. Yaroshefsky, The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas, 5 Cardozo Pub. L. Pol'y & Ethics J. 203, at 209 (Fall 2006).

[17] Obama abandons term 'enemy combatant,' MSNBC, March 13, 2009, available at http://www.msnbc.msn.com/id/29681819/

[18] Suzanne Malveaux, White House Considers Military Trial for Khalid Sheikh Mohammed, CNN, March 5, 2010, available at http://edition.cnn.com/2010/POLITICS/03/05/911.trial/index.html

[19] Lewis Carroll, Alice's Adventures in Wonderland, (Penguin Ltd, United Kingdom 1994), at 141.

facing federal criminal prosecutions, unrestricted by national origin or any other, *apparent* or *perceived* distinction.

Although the Obama administration has adopted a different forum, the rhetoric remains the same, as terror suspects are placed outside the protections of the Constitution, albeit in ordinarily constituted civilian courts. The abandonment of the military commissions for some, but not all, terror cases fails to restore the upright posture of the United States within the international community. Indeed, President Obama recently renewed the continuous state of national emergency that has existed since 2001 in regards to the terrorist threat. What is the effect of this declaration of national emergency on the United States' obligations to ensure the right to a fair trial under the International Covenant for Civil and Political Rights (ICCPR)? The effects of CIPA in terror cases, as an expression of the undefined and seemingly permanent emergency, conflicts with the minimal standards of the right to a fair trial under the ICCPR in times of public emergency.

CIPA as applied in terror cases, threatens to undermine fundamental constitutional doctrines by balancing away the interests of the defendant to a fair trial against the interests of the government to protect national security. Fundamental constitutional rights become negotiable. Notably, a shift in constitutional doctrine in terror cases in federal courts changes the entire landscape of criminal adjudication, as 'bad law' seeps into the entire body of precedent. As a result, the dilution of rights for *others* threatens to diminish the rights of *all* American citizens. Moreover, the "intruder" paradigm, painting terrorists as foreign nationals outside of the protections of the Constitution, is imploding, as the Obama administration recognized as part of its national security strategy in May 2010, for the first time, the increasing threat of 'homegrown' terrorists.[20] Undoubtedly, traditional criminal law methods, including the federal courts, may be the only legitimate response to the next generation of terrorism. CIPA requires Congressional revision to prevent constitutional bargaining and the victimization of American fair trial principles.

[20] Pam Benson, Homegrown terrorist threat to be part of National Security Strategy, CNN, May 27, 2010, available at <http://edition.cnn.com/2010/POLITICS/05/27/homegrown.terror/>.

2 Structure and Methodology

The purpose of this Thesis is to discover whether it is possible to provide a fair trial to accused terror suspects in federal civilian courts under the auspices of CIPA. The study is guided by the intention of understanding whether the United States has mechanisms currently in place to provide a fair trial to terror suspects and how it can revise the system to prevent the degradation of the right to a fair trial while combating terrorism. Fairness of CIPA proceedings in terror cases will be examined under both international standards, as defined in the International Covenant of Civil and Political Rights and interpreted in the case law and general comments of the Human Rights Committee, and also under the Constitution of the United States, illustrated through federal case law.

Chapter Three discusses the historical background and legislative history of CIPA, examining the legislative intent of Congress in enacting the statute. Can CIPA, originally enacted to combat gray mail and facilitate prosecutions of persons with access to classified information, be interpreted to apply in the terror context in the first place? While CIPA may be applicable to several types of criminal proceedings in a nonsensical manner, it is debatable whether it makes sense to apply CIPA in cases where defendants lack security clearance. Chapter Four presents an overview of the "procedure" of CIPA, outlining the procedural scheme, from the definition of classified information to the discovery and pre-trial procedures authorized under the statute. This Section shall introduce the contentious issues arising under CIPA, such as the exclusion of defense during initial discovery hearings and protective orders precluding the defendant from personally inspecting evidence against him. Chapter Five discovers the right to a fair trial under the ICCPR, examining the United States' obligation under international law during times of peace and public emergency to deduce *de minimus* fair trial standards. Chapter Six provides an overview of the right to adversarial process in the United States and its implications on CIPA. A comprehensive discussion of the component rights under the Sixth and Fifth Amendments is undertaken in Chapter Seven, analyzing the current application of CIPA in terror cases and its distortion of fundamental guarantees. Chapter Eight provides summary findings of field research gathered from personal interviews with federal judges. This chapter analyzes CIPA from a judicial perspective in order to determine challenges in preserving fairness in CIPA terror cases and its potential abuses. Finally, Chapter Nine undertakes legislative reform, advocating revision of CIPA to ensure fairness. CIPA aims to reconcile the government's privilege in protecting classified information from unauthorized disclosure and a defendant's right to a fair trial. However, its purpose is defeated in the terror context. Still, prosecutions of terror suspects in federal civilian courts should not be abandoned in favor of a return to the murky and stagnant proceedings of military commissions. Rather, CIPA's underlying purpose

must be preserved and its mechanisms updated to attenuate the novel and diverse challenges and gaps in protection of the right to a fair trial.

3 Historical Background and Legislative Intent of CIPA

3.1 Disclose or Dismiss Dilemma

The leading feature of our Constitution is the independence of the Legislative, Executive, and Judiciary of each other; and none are more jealous of this than the Judiciary.[21]

Congress enacted CIPA in 1980 with the legislative intent to neutralize 'graymail,' or threats by defendants to disclose classified information during trial as a defense tactic in order to pressure the government to discontinue proceedings.[22] During the aftermath of the Cold War, the prosecution of espionage cases became a substantial and contentious issue, leading to numerous legislative hearings and studies on the problem of unauthorized disclosure of classified information.[23] In 1978, the Subcommittee on Secrecy and Disclosure of the Senate Select Committee on Intelligence issued a report and made recommendations to the Executive branch addressing the pervasive "disclose or dismiss" conflict.[24] The Subcommittee addressed the intersection of intelligence and criminal investigations, advocating disciplinary sanctions for intelligence employees that violate security or other laws, the responsibility of the intelligence community to report crimes, and binding guidelines for intelligence agencies to provide the Department of Justice with classified information for criminal proceedings.[25] Most notably, the Subcommittee recommended the enactment of a special omnibus pre-trial procedural law to regulate issues of the disclosure of classified information in criminal trials.[26]

Following legislative hearings, three bills were proposed on the issue of the unauthorized disclosure of classified information: The House Intelligence Committee Bill, H.R. 4736, the Administration Bill, H.R. 4745, and the Senate Judiciary Committee bill, S.1482. With the addition of

---

[21] Quote of Thomas Jefferson, See Doug Linder, The Treason Trial of Aaron Burr, 2001, located at <http://www.law.umkc.edu/faculty/projects/ftrials/burr/burrtrial.html>. President Jefferson's quote exemplifies the long-standing tension between the roles and duties of the Executive and Judiciary branches.

[22] Harvard Law Review Association, 'Secret Evidence in the War on Terror,' *Harvard Law Review*, Vol. 118, No. 6 (Apr. 2005), pp. 1962-1984, at p. 1964, available at <http:///www.jstor.org/stable/4093289, last accessed 10 January 2010.

[23] Larry M. Eig, Classified Information Procedures Act: An Overview, CRS Report for Congress, March 2, 1989, p. 5, located at: <http://www.fas.org/sgp/crs/secrecy/89-172.pdf>.

[24] Larry M. Eig, Classified Information Procedures Act: An Overview, CRS Report for Congress, March 2, 1989, p. 7, located at: <http://www.fas.org/sgp/crs/secrecy/89-172.pdf>.

[25] *Ibid.*

[26] *Ibid.*

minor amendments, a classified information procedures bill using S.1482 as its vehicle was passed by voice vote in the Senate and House on June 26, 1980 and September 22, 1980 respectively.[27] The Senate Report No. 96-823 revealed that the Administration favored the passing of a classified information procedures bill and released the following general statement by the Administration elucidating the intent of S.1482:

> The purpose of this bill is to help ensure that the intelligence agencies are subject to the rule of law and to help strengthen the enforcement of laws designed to protect both national security and civil liberties. Too often the duty of the government to protect legitimate national security secrets and to prosecute law breakers have been in conflict. Insofar as possible, S.1482 resolves that conflict…In the past, the government has foregone prosecution of conduct it believed to violate criminal laws in order to avoid compromising national security information. The costs of such decisions go 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 bill attempts to deal with the 'graymail' problem by requiring a defendant who reasonably expects to disclose or to cause a disclosure of classified information in connection with any trial or pretrial proceeding to notify the government prior to trial, when possible.[28]

While the intent of the bill was to prevent any unauthorized disclosure of classified information during criminal prosecutions implicating national security, the bill concededly arose from concerns of 'insider' cases against government officials or intelligence operatives with access to classified information.[29] CIPA primarily facilitated the prosecutions of spies and government officials threatening to undermine national security by disclosing state secrets in order to coerce the prosecutor into withdrawing charges.[30] Still, the Administration noted in its General Statement that the scope of the bill went beyond the threat of disclosure of classified information as a defense tool of manipulation:

> The government's understandable reluctance to compromise national security information invites defendants and their counsel to press for the release of sensitive classified information the threatened disclosure of which might force the government to drop the prosecution. 'Graymail' is the label that has been applied to

[27] Larry M. Eig, Classified Information Procedures Act: An Overview, CRS Report for Congress, March 2, 1989, p. 8, located at: <http://www.fas.org/sgp/crs/secrecy/89-172.pdf>.
[28] S. Rep. No. 823, 96TH Cong., 2ND Sess. (1980), at 4296—4298.
[29] Ellen Yaroshefsky, Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts,' 34 HOFSTRA L. Rev. 1063, at 1067 (6/11/2006).
[30] William Snyder, Lecture, "Prosecuting Terrorists in Article III Courts," Syracuse University College of Law, Lesson 21, Fall 2009.

> describe this tactic. It would be a mistake, however to view the 'graymail' problem as limited to instances of unscrupulous or questionable conduct by defendants *since wholly proper defense attempts to obtain or disclose classified information may present the government with the same 'disclose or dismiss' dilemma* (emphasis added).[31]

The Administration refused to confine CIPA to graymail situations.[32] Moreover, the Senate Report explicitly indicated that CIPA could apply "to any particular area of alleged illegal activity: the crimes involved have included espionage, murder, perjury, narcotics distribution, burglary, and civil rights violations among others." The current United States code does not define 'terrorism' as a substantive offense, but rather seeks to penalize several acts of illegal conduct.[33] Still, the majority of federal 'terror' prosecutions in fact interrupt terrorism through substantive laws outside of the terror offenses, including conspiracy, immigration and financial offenses.[34] Because CIPA is not prescribed to any one particular scenario, it seemingly could apply in a common-sensical manner to a multitude of cases, including those involving terror related conduct. However, the House and Senate reports are silent as to whether the act does indeed 'make sense' in cases where the defendant lacks the power to access classified information personally. Despite shifting tides in illicit conduct implicating

---

[31] S. Rep. No. 823, 96TH Cong., 2ND Sess. (1980), at 4297.

[32] *Id.* S. Rep. No. 823, 96TH Cong., 2ND Sess. (1980), at 4297

[33] 18 U.S.C. § 2331 (2000). This section of the United States code defines terrorism as follows:

(1) the term 'international terrorism' means activities that –
  (A) involve violent acts or acts dangerous to human life that are a violation of the criminal law of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
  (B) Appear to be intended –
    i) to intimidate or coerce a civilian population;
    ii) to influence the policy of a government by intimidation or coercion; or
    iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
  (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;
  …
(5) the term 'domestic terrorism' means activities that –
  (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
  (B) appear to be intended –
    (i) to intimidate or coerce a civilian population;
    (ii) to influence the policy of a government by intimidation or coercion; or
    (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
  (C) occur primarily within the territorial jurisdiction of the United States.

[34] William Snyder, Lecture 1.

national security since the 1970's, CIPA has remained untouched since its inception.[35]

3.2 Historical Background

During the legislative hearings, the House and Senate addressed the underlying tension, suspicion, and disparity between intelligence investigations, seeking to prevent crimes, and criminal investigations, seeking to punish crimes. [36] Still, while the hearings highlight the debate on *how* classified information should be withheld during a trial, no one ever questioned *why* this right was reserved exclusively to the government.

The modern statutory protection of classified information likely grew out of the common law privilege against disclosure of 'state secrets.[37]' A creature of American legal precedent, the 'state secrets privilege' was formally enunciated in the landmark civil case, *United States v. Reynolds* in 1953.[38] A well established evidentiary precedent,[39] the state secrets privilege "allows the government to withhold information from discovery when disclosure would be inimical to national security."[40] The court in *Reynolds* discussed how the states secret privilege was imported from British common law[41] but ascribed it an American character by associating the privilege with the doctrine of the separation of powers:

---

[35] Joshua L. Dratel, "Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process," 53 Wayne L. Rev. 1041, 1042, Fall, 2007.

[36] H. R. Conf. Rep. 96-1436, 96TH Cong., 2ND Sess. (1980). Among other things, the House and Senate agreed on a provision requiring that any decision not to prosecute be accompanied by written findings by the Attorney General conveying "the importance or sensitivity of the information involved." In addition, the bill required the Attorney General to report annually to the two intelligence committees and the House and Senate Judiciary Committees on the operation and effectiveness of the act, including summaries of cases in which a decision not to prosecute was made for reason of national security.

[37] *United States v. Aref*, 533 F.3d 72, 78 (2d Cir. 2008), (citing Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991).

[38] Stuart Taylor Jr., Reforming the State Secrets Privilege, National Journal, 03604217, 4/17/2008, Vol. 40, Issue 15.

[39] Totten v. United States, 92 U.S. 105 (1875). Although *Reynolds* was the first official recognition of the state secrets privilege in legal precedent, the *Totten* case is likely the earliest case where the Supreme Court implicitly recognized a 'state secrets privilege': (Justice Fields) "It may be stated as a general principle that public policy forbids the maintenance of any suit in a court of justice the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated." 92 U.S. 105, at 107. See also S. M. Barnash, 'What We Owe the World Are Thoughtful War-Crimes Trials that Do Justice Without Unduly Jeopardizing Innocent Lives by Compromising Vital Intelligence," *Saint Mary's Law Journal*, (2007), 39 St. Mary's L.J. 231, at p. 248 , at 247: "[The] government's privilege against revealing state secrets is a common law rule that traces back to 1875."

[40] *Aref*, at 78—9.

[41] United States v. Reynolds, 345 U.S. 1, 7 (1953).

> Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. Indeed, in the earlier stages of judicial experience with the problem, both extremes were advocated, some saying that the bare assertion by the witness must be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification. Neither extreme prevailed, and a sound formula of compromise was developed. This formula received authoritative expression in this country as early as the Burr trial.[42]

However, the common law governmental state secrets privilege and the correlative 'disclose or dismiss' dilemma were recognized in criminal cases pre-dating *Reynolds*. For example, in *United States v. Coplon* of 1951, the Second Circuit discussed a common law privilege against disclosing 'state secrets' in the context of criminal prosecutions but held that it was not an unfettered privilege:

> We agree that there may be evidence-'state secrets'- to divulge which will imperil 'national security'; and which the Government cannot, and should not, be required to divulge. *Salus rei publicae suprema lex*…This privilege will often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions of power to assert their rights or to defend themselves…In *United States v. Andolschek* we held that, when the Government chose to prosecute an individual for crime, it was not

---

[42] United States v. Reynolds, 345 U.S. 1, 8—9, (1953). For a discussion of the Aaron Burr trial, see also, Doug Linder, The Treason Trial of Aaron Burr, 2001, located at <http://www.law.umkc.edu/faculty/projects/ftrials/burr/burrtrial.html>. During the United States' expansion over the North American continent, European imperialist powers grew wary of the simultaneous symbolic erosion of their sovereignty. In the early 1800's, Aaron Burr scornfully stepped down as Vice President to Thomas Jefferson after a fatal duel with Alexander Hamilton and rants of disloyalty. After suffering a debilitating character assassination, Burr looked to the Western frontier to regain his stature as a leading American political figure. Whether patriotic or treasonous, Burr set off on an expedition to explore the West, creating suspicion that he was devising a plot to form a separate nation from Several Western states. Burr's activities, although unclear, alarmed the Jefferson administration and ultimately led to his indictment of treason and his trial in 1807. President Jefferson, armed with letters detailing the plot from Burr's alleged co-conspirator, General Wilkinson, declared to Congress that Burr's guilt was "beyond question." However, when Chief Justice John Marshall issued a subpoena duces tecum against President Jefferson, requiring him to turn over the letters to assist Burr in his defense, the President cited the independent nature of the branches of government in his refusal to comply:

> > The leading feature of our Constitution is the independence of the Legislative, Executive, and Judiciary of each other; and none are more jealous of this than the Judiciary. But would the Executive be independent of the Judiciary if he were subject to the *commands* of the latter, and to imprisonment for disobedience; if the smaller courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his executive duties?

> free to deny him the right to meet the case made against him by introducing relevant documents, otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defence. To that we adhere.[43]

In *Coplon*, the Second Circuit held that the government possessed a states secret privilege in the criminal arena but that it could not override the defendant's right to evidence which might be material to his defense.[44] Indeed, legislative history indicates that CIPA presupposes a common law governmental privilege against disclosing classified information since it is a procedural law and does not itself create a privilege.[45] However, the historical importance that the Executive and Judicial branches remain superior in their respective fields of expertise also appears in CIPA, as the Judiciary may not compel the government to expose state secrets, and the governmental privilege must yield to overriding constitutional rights.[46]

---

[43] United States v. Coplon, 185 F.2d 629, 638 (C.A.2 1951), 185 F.2d 629, 28 A.L.R.2d 1041.

[44] United States v. Aref, 533 F.3d 72, 79(2d Cir. 2008). In the Aref case, the Second Circuit addressed the conclusion reached by the House of Representative Select Committee on Intelligence in its report on CIPA, H.R. Rep. 96-831, that the common law privilege is not applicable in criminal prosecutions. The Committee relied on three cases in making this sweeping statement: *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), *United States v. Coplon*, 185 F.2d 629 (2d Cir.1950), and *United States v. Andolschek*, 142 F.2d 503 (2d Cir.1944). The Second Circuit distinguished these cases from categorically denying the application of the states secret privilege in criminal cases by noting that while the government failed to meet the burden of applying the privilege in these particular cases, a privilege was specifically recognized:

> In *Reynolds*, the Supreme Court held that a court in a civil case may deny evidence to plaintiffs if "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." 345 U.S. at 10, 73 S.Ct. 528. In contrast, the Court explained that in criminal cases such as *Andolschek*, the Government was not permitted to "undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Id.* at 12 & n. 27, 73 S.Ct. 528. Similarly, we acknowledged in *Coplon* that the Government possesses a privilege against disclosing "state secrets," but held that the privilege could not prevent the defendant from receiving evidence to which he has a constitutional right. *See* 185 F.2d at 638. *These cases, therefore, do not hold that the Government cannot claim the state-secrets privilege in criminal cases. Instead, they recognize the privilege, but conclude that it must give way under some circumstances to a criminal defendant's right to present a meaningful defense."*

[45] United States v. Mejia, 448 F.3d 436, 455 & n. 15 (D.C.Cir.2006).

[46] William Snyder, Prosecuting Terrorists in Article III Courts, Lectures, Syracuse University School of Law, Fall 2009, Lesson 21.

4 The "Procedure" of CIPA

To what extent must we harm the national security in order to protect the national security?[47]

CIPA operates within the application of the general law of discovery in criminal cases[48], however, it expressly authorizes the court to exercise its inherent discretionary powers to impose limitations on disclosure of sensitive national security information.[49] CIPA regulates disclosure of classified evidence occurring during pre-trial stages, the prosecutor's case in chief and the affirmative defense of the accused.[50] A framework applied in federal civilian Article III courts, CIPA grapples with the arduous task of reconciling the government's interest in protecting classified information with the defendant's right to conduct discovery and to adequately prepare a defense.[51] CIPA alters the procedural scheme to provide early rulings on the relevance and admissibility of classified information at issue and the adequacy of evidentiary substitutions for evidence that is at once classified and admissible.[52] Enacted by Congress as a procedural statute, CIPA does not create or remove any substantive rights to the discovery of classified information.[53] Rather, it is a sifting tool that pours classified information into the general law of discovery, seizing coarsely sensitive information from leaks and permitting a diluted version to drain to the defendant and the public. Under CIPA, parties submit requests for discovery under the ordinary procedural rule, Federal Rule of Criminal Procedure (FRCP) 16.[54]

---

[47] Senate Report No. 96-823, June 18 1980, S. Rep. 96-823, 96th Cong., 2nd Sess. 1980, 1980 U.S.C.C.A.N. 4294, at 4295. Statement by Department of Justice official testifying before the Subcommittee on Secrecy and Disclosureof the Sentae Intelligence Committee.

[48] CIPA is a procedural statute that applies only to criminal cases. However, in civil cases, similar procedures are followed by the government and the court. See Robert Timothy Reagan, "Keeping Government Secrets: A Pocket Guide for Judges on the States-Secrets Privilege, the Classified Information Procedures Act, and Court Security Offers." Federal Judicial Center 2007, at p. 8.

[49] Harvard Law Review Association, 'Secret Evidence in the War on Terror,' *Harvard Law Review*, Vol. 118, No. 6 (Apr. 2005), pp. 1962-1984, at p. 1964, available at <http:///www.jstor.org/stable/4093289, last accessed 10 January 2010.

[50] S. M. Barnash, 'What We Owe the World Are Thoughtful War-Crimes Trials that Do Justice Without Unduly Jeopardizing Innocent Lives by Compromising Vital Intelligence," *Saint Mary's Law Journal*, (2007), 39 St. Mary's L.J. 231, at p. 248.

[51] Harvard Law Review Association, *supra* note 3, at p. 1964.

[52] Larry M. Eig, Classified Information Procedures Act: An Overview, CRS Report for Congress, March 2, 1989, p. 5, located at: <http://www.fas.org/sgp/crs/secrecy/89-172.pdf>.

[53] Harvard Law Review Association, 'Secret Evidence in the War on Terror,' *Harvard Law Review*, Vol. 118, No. 6 (Apr. 2005), pp. 1962-1984, at p. 1964, available at <http:///www.jstor.org/stable/4093289, last accessed 10 January 2010.

[54] Harvard Law Review Association, 'Secret Evidence in the War on Terror,' *Harvard Law Review*, Vol. 118, No. 6 (Apr. 2005), pp. 1962-1984, at p. 1965. available at <http:///www.jstor.org/stable/4093289, last accessed 10 January 2010.

If either party seeks to introduce *classified* information, CIPA framework applies.

4.1 Classification

The term 'classified' is defined broadly as any information or material that the United States government determines, whether by executive order, statute or regulation, must be protected from unauthorized disclosure in the interest of national defense and foreign relations.[55] Classification authority may be exercised only by the Executive branch.[56] Importantly, sensitive but unclassified information is not safeguarded by CIPA, however, district courts maintain some discretion to protect sensitive information.[57] While the definition in CIPA§ 1 appears general in order to capture all potential classified information or material, its non-particularity still fails to protect particular types of classified information. District courts have fashioned CIPA type procedures in cases where CIPA was inapplicable by its terms to a type of evidence, such as a witness whose identity and location were

[55] CIPA, 18 U.S.C. app. §§1—16 (2000). Section 1(a)—(b). See also, Barack Obama, Executive Order 13526-Classified National Security Information, December 29, 2009, located at http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information. In December of 2009, President Obama established a system of classification of national security information, including information relating to defense against transnational terrorism, in Executive Order 13526. President Obama noted that while democratic principles require disclosure of government activities and information to American citizens, 'nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations." In the Order, President Obama indicated that information would not be classified unless "its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security." Additionally, Section 1.4 of the Order provides a non-exhaustive list of information that may be considered for classification by the government, including information that pertains to:

(a) military plans, weapons systems, or operations;
(b) foreign government information;
(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
(d) foreign relations or foreign activities of the United States, including confidential sources;
(e) scientific, technological, or economic matters relating to the national security;
(f) United States Government programs for safeguarding nuclear material or facilities;
(g) Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
(h) The development, production, or use of weapons of mass destruction.

56 Section 1.3, Executive Order 13526-Classified National Security Information, December 29, 2009, located at http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information.

[57] Article III courts have discretionary authority to protect sensitive information under Federal Rule of Criminal Procedure 16(d)(1). See Fed. R. Crim. Pro. 16(d)(1) ("[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal"). CIPA itself does not protect sensitive information.

considered 'classified' or 'sensitive.'[58] In addition, CIPA applies only after the initiation of criminal proceedings and is inapplicable to habeas challenges and civil cases.[59] However, CIPA procedures have been applied by analogy to habeas proceedings in order to protect classified and sensitive information.[60] Notably, the classification status of information or material does not render it less discoverable or admissible.[61]

4.2 Scheduling and Case-Management

CIPA § 2 imposes a unique scheduling requirement on the parties, shifting evidentiary admissibility determinations well in advance of trial rather than during the trial phase.[62] After the filing of an indictment or information, any party to the case or the court, *sua sponte*, may move for a pre-trial conference.[63] The court shall then *promptly* hold a pretrial conference to address critical timing issues, including the timing of requests for discovery, the provision of notice of intent by the defendant to disclose classified information, and the initiation of procedure to determine what classified information may be presented during trial.[64] Additionally, the court may address other matters relating to classified information or which promote a fair and expeditious trial during this initial pre-trial conference. Notably, Section 2 of CIPA mandates that an admission made by the defense during the pre-trial hearing may not be used against the defendant unless it is written and signed by the defendant and by the attorney for the defendant. Indeed, Section 2 of CIPA explicitly illustrates the inherent case-management powers of federal courts.[65]

4.3 Discovery

Initially, CIPA §§ 5 and 6 constituted the "heart" of the Act, as the unauthorized disclosure of classified material already in the possession of

---

[58] United States v. Moussaoui, No. CR. 01-455-A, 2003 WL 21263699, *2—3 (E.D. Va. Mar. 10, 2003)

[59] American Bar Association Standing Committee on Law and National Security, "Trying Terrorists in Article III Courts, page 12., July 2009, <http://www.abanet.org/natsecurity/trying_terrorists_artIII_report_final.pdf>.

[60] Al Odah v. United States, 559 F.3d 539, 547 (D.C. Cir. 2009).

[61] S. Schmidt & J. Dratel, 'Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the client in Terrorism Prosecutions,' *48 N.Y.L. SCH. L. REV. 69, 76 n.14 (2003), p. 90.*

[62] William Snyder, Lecture 1, Syracuse University Law School. Prosecuting Terrorists in Article III Courts, Fall 2009.

[63] 18 U.S.C. App. III, Section 2.

[64] 18 U.S.C. App. III, Section 2.

[65] Article III courts have inherent power to structure discovery process . See Fed. R. Crim. P. 16(d)(1) ("At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.").

the defendant was the main issue the statute intended to remedy.[66] However, terror prosecutions usually present issues under CIPA § 4, whereby the government alone possesses the classified information to which the defendant seeks access.[67] In the case of an outsider defendant seeking 'inside' information, the government has the discretion to petition the court for an *in camera, ex-parte* hearing to restrict discovery of classified information to the defendant, to which the court must make a timely ruling.[68] CIPA § 4 empowers district courts to authorize the government to redact classified information from materials subject to disclosure before they reach the defendant's hands.

4.4 Overview of Discovery Procedure Under CIPA

Ultimately, district courts regard CIPA § 4 as a non-provocative clarification of their inherent powers under Federal Rule of Criminal Procedure 16(d)(1)."[69] CIPA does not alter or diminish the defendant's discovery rights nor does it modify the government's discovery obligations.[70] The defense proceeds under the normal process of FRCP 16, requesting that the prosecution turn over any of the defendant's statements, physical and documentary evidence, examinations, tests, and all other items material to preparing the defense.[71] Prosecutors must sort through classified information at issue and identify materials subject to the government's ordinary disclosure obligations.[72] Despite the mandatory duty imposed by FRCP 16 on prosecutors to produce "items material to preparing the defense," the rule preserves a correlative discretion to the court to restrict discovery for "good cause."[73] According to case law, "good cause includes the protection of information vital to the national security."[74] CIPA § 4 complements this basic rule.

---

[66] Richard B. Zabel, James J. Benjamin, In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (A White Paper), May 2008, Human Rights First, at p. 106.
[67] Richard B. Zabel, James J. Benjamin, In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (A White Paper), May 2008, Human Rights First, at p. 106. See Also, *United States v. Pringle*, 751 F.2d 419, at 426—7 (noting that while the legislative intent of CIPA was to counter the threat of graymail, Section 4 is the governing provision when a defendant seeks classified information that the government intends to protect).
[68] Barnash, , *supra* note 39, at p. 250.
[69] United States v. *Aref*, 533 F.3d 72, at 78 (2d Cir. 2008).
[70] United States v. Yunis, 867 F.2d 617, 621—2.
[71] Saul M. Pilchen; Benjamin B. Klubes, 'Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel." American Criminal Law Review, Winter 1994, 31 Am. Crim. L. Rev. 191, at 197.
[72] US Attorney, USAM, Title 9, Criminal Resource Manual 2054, Synopsis of the Classified Information Procedures Act, located at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm
[73] United States v. Moussaoui, No. 06-4494, 2010 WL 9953, at *29 (4th Cir. Jan. 10, 2010).
[74] United States v. Aref, 533 F.3d 72, 78 (2d Cir. 2008).

During the discovery phase under CIPA § 4, defense counsel and defendant are excluded from initial proceedings to inspect classified information and to determine what information shall be withheld from the defendant.[75] The government may present the classified information to the court alone in an *ex-parte* proceeding, requesting written relief to withhold certain classified information from the defendant during discovery.[76] Upon a sufficient showing, the district court may authorize the government to withhold discovery by deleting specific items of classified information from documents to be made available to the defendant, by substituting an unclassified summary of information of classified documents in lieu of the classified documents, or by substituting an unclassified statement admitting relevant facts that the classified information tends to prove.[77] If the court grants the government relief, the entire text of the court's *ex-parte* examination of the government's showing is recorded and preserved for review by an appellate court.[78] Seemingly alarming in the context of adversarial process, *ex-parte* CIPA § 4 proceedings complement Rule 16(d)(1) of the Federal Rules of Criminal Procedure permitting *in camera, ex-parte* submissions in rare cases.[79] In addition, *ex-parte* proceedings in the context of national security proceedings have been upheld by various courts.[80]

4.5 Absentee Defendant: The Judge's Role in Discovery

"A trial judge can "balance" the competing demands of secrecy and fairness, but only up to a point. The basic requirements of an effective adversary system cannot be balanced away."[81]

---

[75]Ellen C. Yaroshefsky, Slow Erosion of Adversary System, 5 Cardozo Pub. L. Pol'y & Ethics J. 203
at 213.

[76] CIPA, 18 U.S.C. App. III § 4.

[77] CIPA, 18 U.S.C. App. III § 4.

[78] CIPA, 18 U.S.C. App. III § 4.

[79] Federal Rule of Criminal Procedure 16(d)(1): At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

[80] "It is settled that in camera, ex parte proceedings to evaluate bona fide Government claims regarding national security information are proper" United States v. Pringle, 751 F.2d 419, 426-7 (1st Cir. 1984). United States v. Klimavisius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998) (an *ex parte*, *in camera* hearing not a violation of the Sixth Amendment).

[81] Serrin Turner & Stephen J. Schulhofer, Brennan Ctr. For Justice at N.Y.U. Sch. Of L., The Secrecy Problems in Terrorism Trials 18 (2005), available at http://brennan.3cdn.net/6a0e5de414927df95e_lbm6iy66c.pdf

The lack of a zealous and partial advocate representing the defendant in pre-trial discovery hearings mandates the strict impartiality of the judge to take these silenced interests into account. When the government seeks to restrict the defendant's access to information during discovery, the district court must determine the defendant's interest in the information, without input from defense.[82] Although Congress considered but rejected imposing a heightened standard of relevancy beyond FRCP 16 for discovery requests made under CIPA § 4, district courts have adopted a "relevancy plus" standard in practice.[83] Courts have looked to the *Rovario* balancing test for guidance on an approach to reconcile the competing governmental privilege of secrecy and the defendant's right to fair proceedings encountered in *ex-parte* CIPA § 4 hearings. In *Rovario*, the Supreme Court recognized a qualified governmental privilege in withholding the identity of an informant, noting that the privilege must give way when the sensitive information is not only relevant, but helpful to the defense of the accused or essential to a fair trial.[84] The balancing in CIPA discovery hearings mirror *Rovario*.

However, terror suspects not only lack access to classified material, they also traditionally lack knowledge of the information completely.[85] This factor creates a nonsensical hurdle for defense counsel to overcome: "without even knowing what the information is, a defendant must somehow show that it will be "helpful to his defense.'"[86] As a result, the judge alone is charged with the solemn task of preserving fairness without the benefit of the ordinary adversarial process in *ex-parte* CIPA § 4 discovery determinations. Indeed, these early *ex-parte*, discovery determinations made by the judge in CIPA cases bear heavily upon the outcome of the proceedings.[87] Importantly, the court cannot weigh the risk of harm of disclosure to the government against the risk of harm of nondisclosure to the

---

[82] Terrorism (Confidential Information), International Law Update; Dec 2008, Vol. 14, p204-206, at 205.

[83] Alexandra A.E. Shapiro & Nathan H. Seltzer, "Litigating Under the Classified Information Procedures Act," Criminal Law Bulletin Winter 2009, 45 No. 6 Crim. Law Bulletin ART 1, at 3.

[84] Rovario v. United States, 353 U.S. 53, at 62 (1957). In determining the scope of the government's privilege to withhold an informant's identity, Justice Burton wrote: "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

[85] Alexandra A.E. Shapiro & Nathan H. Seltzer, "Litigating Under the Classified Information Procedures Act," Criminal Law Bulletin Winter 2009, 45 No. 6 Crim. Law Bulletin ART 1, at 3.

[86] Alexandra A.E. Shapiro & Nathan H. Seltzer, "Litigating Under the Classified Information Procedures Act," Criminal Law Bulletin Winter 2009, 45 No. 6 Crim. Law Bulletin ART 1, at 3.

[87] American Bar Association Standing Committee on Law and National Security, Due Process and Terrorism Series, National Strategy Foundation, McCormick Foundation, Trying Terrorists in Article III Courts, at 15, July 2009, available at: http://www.abanet.org/natsecurity/trying_terrorists_artIII_report_final.pdf

defendant's right to a fair trial. Rather, the court must solely examine whether the information the government seeks to withhold is material to the defense.[88] The court lacks the authority to review classification decisions made by the executive branch and must accept the contention that a privilege applies when raised by the government.[89] Therefore, the fundamental role of the judge is to review whether or not the defendant can receive a fair trial.

In determining whether classified information is material to a defense, and therefore necessary for a fair trial, the judge typically subjects the information at issue to a two-prong analysis: First, the court must decide whether the classified information is 'discoverable' by the defendant under FRCP 16(d)(1);[90] Second, the court must consider whether the information is sufficiently 'material' and required to present a meaningful defense, overriding the government's privilege.[91] If information is both classified and material to a defense, the government's privilege must give way to the criminal defendant's right to present a meaningful defense and discovery must be ordered. If the court determines that classified information is discoverable, the burden shifts to the government to demonstrate that the state secrets privilege is warranted, exempting the relevant information from discovery by the accused and permitting the use of alternate evidence by the government.[92] However, the burden to overcome the defendant's interest is a mere 'sufficient showing' that substitution of the information is necessary.[93] On the other hand, the failure by the government to meet the sufficient showing standard triggers severe consequences, as the government must then release the alleged classified information or face sanctions by the court. The court may be authorized to sanction the government to drop certain charges, seek lesser penalties, or in extreme cases, dismiss the prosecution.[94]

The permissive language of CIPA § 4, similar to FRCP 16(d)(1), provides the judge with the sole discretion to determine defense access to classified information and the judge may order the government to produce unclassified evidentiary substitutes that preserve the essence of the classified material and safeguards the defendant's rights. The discretion conferred on the judge under CIPA and FRCP has been interpreted to include the ability to "withhold altogether classified information that might have otherwise been discoverable," provided that the information is not material.[95] However, the language of CIPA § 4 does not authorize the government to "withhold entirely information that is otherwise discoverable

[88] Moussaoui, 382 F.3d 453, 476 (4th Cir. 2004).
[89] United States v. Rosen, No. 05-cr-00225, 2007 WL 3243919, at *10 (E.D. Va. Nov. 1, 2007).
[90] *In Re Terrorist Bombings of U.S. Embassies in East Africa, United States v. Odeh*, No. 01-1535-cr (L) (2d Cir. November 24, 2008), pp. 204—206, at 204.
[91] *Ibid.*
[92] *Ibid*., at 205.
[93] *Ibid.*
[94] *Ibid.*
[95] United States v. Aref, 533 F.3d 72, at 76 (2d Cir. 2008).

under Rule 16 without providing a summary or substitution."[96] Moreover, the framers did not intend to modify discovery rights. Still, the heightened threshold determinations of relevancy and the ability of the government to outright withhold otherwise relevant and discoverable information require pause as noted discrepancies between the *prima-facie* text of CIPA and its practical application.

CIPA ultimately contemplates that the defendant is precluded from ever learning of the full evidence presented by the government;[97] Indeed, even where confidential information is deemed discoverable and unfit for substitution, the classified information may only be released to counsel holding a security clearance and may never be shared with the defendant. A defense attorney is even prohibited from basic questioning of his client in regards to the information, a simple but valuable tool in preparing an effective adversarial defense. Moreover, the heightened standard of relevance developed in practice coupled with the fact that accused terrorists lack access to classified information and are therefore unaware of the information in the government's possession, create significant challenges for the defense. The sole recourse lies in the appellate process, as the government's underlying support substantiating an assertion of the state secrets privilege must be sealed and included in the record and made available for potential review.[98] Still, CIPA substantially interferes with the relatively uninhibited and flexible discovery process enjoyed in ordinary criminal trials.

4.6 Protective Orders

The district court may be compelled by the government to issue a protective order before providing the defense with discovery materials when the government is producing 'particularly sensitive' or classified information.[99] CIPA § 3 requires district courts to enter, "upon motion of the United States, a protective order prohibiting the disclosure of any classified information disclosed by the United States to a criminal defendant." Protective orders provide stringent rules against the dissemination of sensitive information without government authorization and require court submissions and exhibits to be redacted before public filing.[100] In addition, the issuance of a protective order in a terror prosecution presumptively seals all submissions to the court for a short

[96] Alexandra A.E. Shapiro & Nathan H. Seltzer, "Litigating Under the Classified Information Procedures Act," Criminal Law Bulletin Winter 2009, 45 No. 6 Crim. Law Bulletin ART 1, at 3.
[97] Barnash, supra note 39, at p. 253.
[98] *Ibid.* at 252.
[99] Saul M. Pilchen; Benjamin B. Klubes, 'Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel." American Criminal Law Review, Winter 1994, 31 Am. Crim. L. Rev. 191, at 197.
[100] Sam A. Schmidt & Joshua L. Dratel, "Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions," Center for Professional Values and

period to allow other parties to object to a public filing of the material.[101] Undoubtedly, a CIPA protective order in the terror context will require that defense counsel obtain a security clearance before receiving classified information through discovery, preventing the defense counsel from discussing classified materials with non-cleared persons, such as an accused 'terrorist' defendant.[102] Therefore, protective orders effectively seal classified materials until further order of the court or agreement between the parties.[103] Moreover, protective orders strain the attorney-client relationship in terror cases. A foreign national accused of terrorism may view suspiciously and question the allegiance of his defense counsel that has been 'cleared' by the government and is withholding information from him.[104] Historically, security clearance requirements have been upheld. In the landmark case, *United States v. Moussaoui*, the appellate court upheld the Protective Order granted to the government by the district court under Section 3 of CIPA, restricting access to persons with security clearances, including defense counsel. The protective order prohibited defense counsel from disclosing the classified evidence personally to the defendant, absent government consent or a court determined necessity.[105]

On February 12, 1981, Chief Justice Warren Burger promulgated Security Procedures for the Protection of Classified Information as dictated by Section 9 of CIPA.[106] The Security Procedures empowers the court to obtain background information on Defense counsel from an investigation

---

[101] Sam A. Schmidt & Joshua L. Dratel, "Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions," Center for Professional Values and and Practice Symposium, page 80.

[102] United States v. Osama Bin Laden, See Also In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93, at 116, n. 21 (2d Cir. 2008): "Eligibility for access to classified information is limited to United States citizens for whom an appropriate investigation of their personal and professional history affirmatively indicated loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulatios governing the use, handling, and protection of classified information…any doubt shall be resolved in favor of the national security."
(Holding that "the text and structure of CIPA and the Security Procedures create a presumption that the Court possesses the authority to require defense counsel to seek security cleranace befre the Court will provide access to classified materials").

[103] Sam A. Schmidt & Joshua L. Dratel, "Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions," Center for Professional Values and Practice Symposium, Criminal Defense In the Age of Terrorism, New York Law School Review, 2003/2004, 48 N.Y.L .Sch. L. Rev. 69, at 76.

[104] Sam A. Schmidt & Joshua L. Dratel, "Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions," Center for Professional Values and , page 75.

[105] United States v. Moussaoui, No. 06-4494, January 4, 2010, at 5 available at http://www.ca4.uscourts.gov/moussaoui4494/pdf/OPINION01042010.pdf

[106] 18 U.S.C. App. III, §9, stating "Within one hundred and twenty days of the date of the enactment of this Act, the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court."

conducted by the government and consider that information in framing a protective order.[107] Because the Department of Justice is considered supreme in the field of protecting classified information, defense counsel and court personnel would likely be required to submit to a DOJ initiated clearance procedure. In *United States v. Osama Bin Laden*, the court required defense counsel to obtain security clearance under DOJ regulations, supervised by an appointed Court Security Officer.[108] The district court noted that the Clearance Security Officer (CSO) is not a member of the prosecution team but rather is an officer of the court charged with determining who receives a clearance.[109] However, the district court held that it remained the ultimate arbitrator on this decision and any *unlikely* decision to deny clearance to counsel could be appealed to the court in an *ex-parte*, confidential hearing to ensure that the denial was justified.[110] While background investigations are notably intrusive, the assertion of the right to privacy by a defense counsel has been historically trumped by national security interests.[111]

Protective orders not only dictate to whom classified information may be released, but also where such information shall be reviewed. Protective orders sought by the government require that the defense review and discuss classified information at a "Sensitive Compartmented Information Facility" (SCIF), a guarded, enclosed area within a building, maintained and established by the Department of Justice.[112] The protective order is an important feature of CIPA in preventing the unauthorized disclosure of classified information by curtailing the First Amendment right of access to court documents of both the defendant and the public, in light of the compelling governmental interest of 'national security.'[113] As illustrated by protective orders, CIPA and the accompanying Security Procedures create a flexible system by which a district court can impose restrictions on access to classified evidence because "it is practically impossible to remedy the damage of an unauthorized disclosure *ex post*."[114]

4.7 Pre-trial Procedures

4.7.1 Overview of Pre-Trial Procedures: CIPA §§

[107] United States v. Osama bin Laden, 58 F. Supp. 2d 113, at 117 (S.D.N.Y. Jun. 30, 1999).
[108] United States v. Osama bin Laden, 58 F. Supp. 2d 113, at 120.
[109] United States v. Osama bin Laden, 58 F. Supp. 2d 113, at 120.
[110] United States v. Osama bin Laden, 58 F. Supp. 2d 113, at 120.
[111] See, e.g., *United States v. Abdi*, 498 F. Supp. 2d 1048;
[112] Saul M. Pilchen; Benjamin B. Klubes, 'Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel." American Criminal Law Review, Winter 1994, 31 Am. Crim. L. Rev. 191, at 197.
[113] U.S. v. Al-Marri, Not Reported in F. Supp. 2d, 2009 WL 2949495.
[114] United States v. Osama bin Laden, 58 F. Supp. 2d 113, at 121.

5 and 6

CIPA §§ 5 and 6 establish a pretrial procedure governing the presentation of classified information at trial, allowing the government to ascertain the effect of the disclosure of classified information on national security before public disclosure at trial.[115]

Since CIPA sprung from concerns of graymail, CIPA § 5 defeats the element of surprise by requiring the defendant to provide the court and the government with written notice if he "reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding."[116] The notice must describe the classified information sufficiently to provide the government with informed notice, allowing it to decide whether to acquiesce to the disclosure, claim a competing privilege, or abandon the prosecution.[117] CIPA § 5 imposes a continuing duty on the defense to provide notice of any intention to disclose classified information.[118] Failure to provide adequate notice triggers severe consequences, as the defendant may be prohibited from presenting classified information or examining any witness in relation to classified information.[119] CIPA imposes a reciprocal notice requirement on the government.[120] If the court authorizes the defendant to disclose classified information, the court shall direct the government to provide the accused with any rebuttal information.[121]

Additionally, the CIPA hearing procedure under § 6 operates outside of trial at an early stage to allow the court to make two important separate rulings: "(1) whether classified information at issue is admissible and therefore should be disclosed; and (2) if disclosure of particular information is authorized, in what form may it be introduced."[122] At a CIPA § 6 hearing, "the court may authorize the presentation of classified information

---

[115] United States v. Collins, 720 F.2d 1195 (11th Cir.1983).
[116] 18 U.S.C. app. 3 § 5(a).
[117] Major Christopher M. Maher, "The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information," 120 Mil. L. Rev. 83, at 103, Military Law Review, Spring 1988.
[118] Major Christopher M. Maher, "The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information," 120 Mil. L. Rev. 83, at 105, Military Law Review, Spring 1988.
[119] Major Christopher M. Maher, "The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information," 120 Mil. L. Rev. 83, at 105, Military Law Review, Spring 1988.
[120] Major Christopher M. Maher, "The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information," 120 Mil. L. Rev. 83, at 106, Military Law Review, Spring 1988.
[121] Major Christopher M. Maher, "The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information," 120 Mil. L. Rev. 83, at 106, Military Law Review, Spring 1988.
[122] Congressional Report 1989,

at trial by summary or authorize admissions that would render the presentation of classified information unnecessary."[123]

If the government is notified of the defendant's intent to disclose classified information or alternatively seeks to use classified information at trial, the government may request a hearing to determine the "use, relevance, or admissibility of classified information that would otherwise be made during trial proceedings."[124] Although the court must hold this hearing *in camera* if the Attorney General certifies against a public proceeding to prevent disclosure of classified information, the defense may not be excluded.[125] Unlike CIPA § 4, which permits *ex-parte* hearings to determine whether information is material to preparing a defense, CIPA § 6 hearings preclude *ex-parte* hearings to determine whether information is material to presenting a defense. However, defendants may be *personally* excluded from CIPA § 6 hearings. In the opinion *In Re Terrorist Bombings,* the court held that the absence of the defendant did not thwart a fair and just CIPA hearing since, among additional security reasons, the defense counsel could adequately participate on his behalf and that the hearing did not concern matters of guilt or innocence, but rather questions of law to which the defendant could provide no insight.[126] The government must notify the defendant as to which material is to be considered at the hearing, however, it may describe classified material by generic category if the material has not previously been made available to the defendant.[127]

4.7.2 The Presentation of Classified Information At Trial

Under CIPA § 6, most courts have rejected imposing a higher threshold for admissibility when the government pleads a classified information privilege, as seen in discovery determinations in CIPA § 4. The language of CIPA § 6 requires courts to ignore the fact that evidence is classified when determining its use, relevance, or admissibility.[128] Courts generally interpret CIPA § 6 strictly as a procedural tool that does not alter the admissibility of probative evidence at trial. Therefore, ordinary federal evidentiary rules govern the admissibility of classified evidence. Only after the court determines the admissibility of the classified information may it consider the government's interest in protecting classified information from

[123] See Robert Timothy Reagan, "Keeping Government Secrets: A Pocket Guide for Judges on the States-Secrets Privilege, the Classified Information Procedures Act, and Court Security Offers." Federal Judicial Center 2007, at p. 14.
[124] 18 U.S.C. app. 3 § 6(a).
[125] In Pursuit of Justice 2008, p. 99.
[126] In Re Terrorist Bombings, 552 F.3d 93, 126 (2d Cir. 2008).
[127] Congressional Report 1989.page 13.
[128] United States v. Baptista-Rodriguez, 17 F.3d 1354, 1363—4 (11th Cir. 1994).

disclosure.[129] However, some district courts have implemented an additional test similar to *Rovario* during admissibility hearings, balancing national security interests against the right to present a defense.[130] As a result, the defendant must demonstrate that classified information is "necessary to the defense" or "essential," pleading relevance beyond normal evidentiary rules.[131] Under this formulation, the government may plead that disclosure of classified information may harm national security and withhold relevant classified information altogether, wrongfully morphing the procedures of CIPA into a substantive law that alters the right to a defense.[132] The separation of powers illustrated in the procedural scheme of CIPA does not sanction the subordination of constitutional rights to the governmental privilege of classified information.[133]

If the court determines that the classified information is admissible, the burden shifts to the government to offer an evidentiary substitution for the classified information that offers the defendant "substantially the same ability to make his defense as would disclosure of the specific classified information."[134] The court *must* authorize substitutions in the form of "a statement admitting relevant facts that the specific classified information would tend to prove," or "a summary of the specific classified information" *when* the proposed substitution is adequate to protect the defendant's right to present a defense. However, if the substitution offered by the government is found lacking by the court and a suitable alternative cannot be crafted, the government confronts a critical junction: disclose the classified information or file an affidavit from the Attorney General (AG) precluding disclosure and face court imposed sanctions.[135] In the event that the court denies relief to the government by finding a substitution unfit and the AG files a motion to retain its privilege, the court is compelled to issue a protective order preventing the defense from disclosing classified information.[136] However, the court retains its priority in preserving fairness of the proceeding and may order various sanctions against the government, such as the dismissal of specified counts, finding against the government on an issue to which the excluded classified information relates, striking testimony of a witness, and in extreme cases, dismissal of the indictment.[137]

---

[129] Alexandra A.E. Shapiro & Nathan H. Seltzer, "Litigating Under the Classified Information Procedures Act," Criminal Law Bulletin Winter 2009, 45 No. 6 Crim. Law Bulletin ART 1, at 2.
[130] Congressional report 14; See also, United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985).
[131] Congressional Report 14.
[132] Congressional Report 14.
[133] United States v. North, 698 F. Supp. 323, 319, 320, 321 (D.D.C. 1988).
[134] 18 U.S.C. app. 3 § 6(c)(1) (2000).
[135] United States v. Baptista-Rodriguez, 17 F.3d 1354, 1363 (11th Cir. 1994).
[136] 18 U.S.C. app. 3 § 6(e).
[137] 18 U.S.C. app. 3 § 6(e).

4.8 Declassification

In order to allow defense counsel authentic opportunity to assess evidence in CIPA cases, the prosecutor may work with the government to declassify the information if the court determines that classified evidence must be admitted to ensure the defendant receives a fair trial.[138] The declassification process, however, presents challenges and may be time consuming. Given the broad scope of classification authority and the potential for abuse, the Executive branch has been charged with participating in overclassification of evidence to gain tactical advantages over accused terrorists.[139] In fact, critics claim that "since 2001, [the government] has doubled the number of documents that are classified to 15 million a year and has authorized additional government offices to classify information."[140] However, determining whether information has improperly been deemed classified is difficult to assess in relation to the CIPA statute and the plenary authority of the Executive branch to order classification.

4.9 Interlocutory Appeal

Under CIPA, the government alone holds a unique right to interlocutory appeal to challenge a decision by a district court authorizing the disclosure of classified information, the imposition of sanctions in relation to withholding classified information, and the refusal of a protective order to prevent disclosure of classified information.[141] An interlocutory appeal must be expedited by the Court of Appeals, requiring a hearing within 10 days after the lower court's decision.[142] The defendant, on the other hand, may only obtain relief from evidentiary nondisclosure during the appellate process concluding trial.

4.10 Conclusion

The procedural scheme of CIPA contemplates a strict division of labor between the executive and the judicial branches. The judiciary, charged with safeguarding the right to a fair trial, may not be compelled by the executive to continue proceedings if it becomes apparent that the defendant's right are adversely affected by CIPA. On the other hand, the executive branch may not be compelled to disclose classified information in order to make the defendant whole.

---

[138] See Robert Timothy Reagan, "Keeping Government Secrets: A Pocket Guide for Judges on the States-Secrets Privilege, the Classified Information Procedures Act, and Court Security Offers." Federal Judicial Center 2007, at p. 15.
[139] In pursuit of justice 2008, at 116.
[140] Slow Erosion, 224.
[141] 18 U.S.C. app. 3 § 7.
[142] 18 U.S.C. app. 3 § 7.

5 The Right to A Fair Trial Under International Law

The right to a fair trial is central to the protection and prevention from abuse of *all* other human rights.[143] In 1948, the Universal Declaration of Human Rights (UDHR) affirmed the right to a fair trial as a basic human right.[144] As a normative compass, provisions of the UDHR have arguably passed into the corpus of customary international law and have inspired subsequent binding instruments that protect the right to a fair trial, such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), .[145]

5.1 Fair Trial and the ICCPR

The ICCPR codified the right to a fair trial in 1966 in Article 14 of its provisions, affirming its status as a binding human right norm. The United States approached the ICCPR with caution, despite its status as an international bill of rights, finally acceding to its obligations on June 8, 1992.[146] However, the United States attached broad RUDs (reservations, understandings and declarations) to its consent.[147] Paragraph 3 of Article 14 of the ICCPR applies specifically to criminal proceedings, providing minimal fundamental procedural rights to individuals.[148] In some circumstances, however, the Committee acknowledges that the protections under paragraph 3 alone may not suffice to ensure "a fair and public hearing" required by paragraph 1 of Article 14, requiring a case by case determination of due process.[149]

---

[143] I. Langford, 'Fair Trial: History of an Idea,' *Journal of Human Rights*, 8: 1 37-52, at p. 37, available at <http://dx.doi.org/10.1080/14754830902765857>, last accessed 5 January 2010.

[144] D. Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Rights,' *The International and Comparative Law Quarterly*, Vol. 16, No. 2 (Apr. 1967), pp. 352—378, at 352.

[145] *Ibid*.

[146] Case Study: Report of the USA to the ICCPR Committee, July 2006, Henry J. Steiner, Philip Alston and Ryan Goodman, International Human Rights In Context: Law Politics Morals, 3rd Ed. 2007, at page855.

[147] Case Study: Report of the USA to the ICCPR Committee, July 206, Henry J. Steiner, Philip Alston and Ryan Goodman, International Human Rights In Context: Law Politics Morals, 3rd Ed. 2007, at page855.

[148] UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32. , at paragraph 3.

[149] UN Human Rights Committee (HRC), CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984 at para. 5—6.

5.2 The Terrorist Threat: A National State of Emergency

As tragedy reverberated throughout the United States, former President George W. Bush declared a national state of emergency immediately following the terrorist attacks, forewarning imminent threats.[150] This executive authorization extended through August 28, 2008. Significantly, Present Barack Obama renewed the continuous State of Emergency on September 10, 2009, noting:

> The terrorist threat that led to the declaration on September 14, 2001, of a national emergency continues. For this reason, I have determined that it is necessary to continue in effect after September 14, 2009, the national emergency with respect to the terrorist threat.[151]

President Obama implicitly renewed Bush's initial ominous expansion of executive authority and ability to suspend civil liberties 'with respect to the terrorist threat.' In the notable advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice (ICJ) observed that the protection of the ICCPR, as a human rights treaty, "does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[152] Significantly, the right to a fair trial was not included in the derogation regime of Article 4 of the ICCPR, although, the United States delegation had, notably, advocated the inclusion of the entire provision during the drafting of the covenant.[153] However, despite the fact that the right to a fair trial is not specifically identified as a non-derogable right under the ICCPR, aspects of the Article 14 protection of the right to a fair trial may not be dispensed with in times of emergency, irrespective of an armed conflict or status of the individual under international law.[154] Still, what *is* the effect of President Obama's reinstatement of a 'national emergency' on the obligations of the United States pursuant to Article 14 of the ICCPR?

---

[150] Lewis Seiler and Dan Hamburg, Obama Renews Bush's 9/11 State of Emergency, commondreams.org, http://www.commondreams.org/view/2009/10/16-2, October 16, 2009.
[151] Lewis Seiler and Dan Hamburg, Obama Renews Bush's 9/11 State of Emergency, commondreams.org, http://www.commondreams.org/view/2009/10/16-2, October 16, 2009.
[152] Legality or Threat of Nuclear Weapons, International Court of Justice, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 226—267, at p. 240, at para. 25.
[153] E. Schmid, 'The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights," *Gottingen Journal of International Law* 1 (2009) 1, 29—44, at p. 36.
[154] *Ibid*., at p. 30.

5.3 The Impact of CIPA on Non-Derogable Rights

Importantly, "the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights."[155] Moreover, RUDs attached to a State party's signature similarly bind contracting parties in determining valid derogations. For example, despite the fact that the United States reserved the right, contrary to Article 6, to impose capital punishment "subject to its Constitutional constraints,"[156] any trial resulting in the death penalty must conform not only to the provisions of Article 14, but also to traditional Constitutional rights afforded criminal defendants.[157] CIPA, in the terror context, may distort the protections of Article 14 and vitiate fundamental constitutional rights, resulting in an "arbitrary deprivation"[158] of the non-derogable right to life shielded by Article 6. Similarly, statements, confessions, or other evidence obtained in violation of Article 7 prohibiting torture and cruel and inhumane treatment must be excluded in order to comply with Article 14.[159] Because the United States has submitted in reservation that it "considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the…treatment or punishment prohibited by the Fifth, Eight, and/or Fourteenth Amendments,"[160] evidence obtained even after the use of coercion was lifted may be excluded according to the landmark Fifth Amendment case, *Oregon v. Elstad*.[161] However, in CIPA terror cases, a judge may find difficulty in evaluating the reliability of evidence or whether coercion has dissipated or "in the defendant's mind sealed his fate"[162] during Section 4 hearings without the benefit of the adversary process. On the other hand, problems may arise in CIPA cases where an accused terrorist seeks to introduce exculpatory evidence or

[155] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 6.
[156] ICCPR, Declarations and Reservations of the United States of America, located at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec
[157] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 6.
[158] International Covenant on Civil and Political Rights, 16 December 1966, Art. 6(1), 999 U.N.T.S. 171 (ICCPR).
[159] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 6.
[160] ICCPR, Declarations and Reservations of the United States of America, located at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec
[161] Phillip Carter, Tainted by Torture: How Evidence Obtained Through Coercion is Undermining the Legal War on Terrorism," Slate Magazine, May 14, 2004, located at <http://www.slate.com/id/2100543> last accessed May 16, 2010.
[162] State v. Elstad, 61 Ore. App. 673, 677, 658 P.2d, at 554 (Or. App. 1983).

exercise his right to compulsory process but the declarants or witnesses, generally other accused terrorists, were tortured.[163]

5.4 "National Emergency" as "Public Emergency" Under the ICCPR?

The drafters of the Covenant adopted a derogation standard which is at once broad and restricted. The ICCPR fails to include an exhaustive list of possible circumstances that amount to a "public emergency," rather its unspecified nature "could embrace several situations."[164] On the other hand, the "emergency" must 'threaten the life of the nation,' applying strictly to exceptional circumstances actually or imminently affecting the entire population of a State.[165] Preemptive declarations of emergency and permanent states of emergency are unlawful under international law.[166] Therefore, the validity of the declaration of national emergency in regards to terrorism requires the existence of a real threat to the physical integrity of American citizens, territorial integrity, or the functioning of the government. While attempted acts of terror continue on U.S soil, it is questionable whether the magnitude of the risk does indeed affect the whole nation. Implicit in the standard, the declaration of a public emergency must be an option of last resort, lasting no longer than necessary.[167] A national emergency renewed without defined temporal limitations, such as one that has continued for eight years, raises concerns. Several circumstances may qualify as a public emergency under Article 4, including war, subversion, natural disasters and economic crises.[168] Notably, while a declaration of emergency was appropriate following the orchestrated, large scale, and devastating terror attacks of 9/11, it is questionable whether a national emergency may be sustained eight years later.

Importantly, Paragraph 3 of Article 4 imposes a duty of notification on States "availing itself of the right of derogation," requiring contracting members to inform other member States of the specific provisions it seeks to deviate from and substantiate the underlying factual and legal purposes.[169] However, the United States has failed to notify the UN or other member States of its specific intent to derogate from its obligations under

[163] Phillip Carter, Tainted by Torture: How Evidence Obtained Through Coercion is Undermining the Legal War on Terrorism," Slate Magazine, May 14, 2004, located at <http://www.slate.com/id/2100543> last accessed May 16, 2010.
[164] Oraa, Jaime, Human Rights in States of Emergency in International Law. Oxford [England]; New York: Clarendon Press; Oxford University Press, 1992.
[165] Oraa, at 13.
[166] Oraa, at 27.
[167] Oraa, at 33.
[168] Oraa, 30—31.
[169] International Covenant on Civil and Political Rights, 16 December 1966, Art. 4(3), 999 U.N.T.S. 171 (ICCPR).

Article 14 of the ICCPR.[170] However, lack of notice is irrelevant to whether a *de facto* public emergency exists in a State. Moreover, it remains unclear whether the failure to notify invalidates the legality of a derogation due to inconsistent practice of Member States.[171]

Given the above analysis, the validity of President Obama's renewal of a state of emergency seems dubious. However, the purpose of this Thesis is not to determine the validity of the war on terror but to discover whether CIPA corresponds with U.S. obligations under not only national, but also international law. In the most basic understanding of the impact of custom domestically, "international law is part of our law, and must be ascertained and administered by the courts of justice."[172] As a result, this section shall proceed in analyzing the application of CIPA against non-derogable Article 14 obligations in times of national emergency.

5.5 The ICCPR and Minimum Guarantees of Due Process in Times of Public Emergency

Arguably, the right to a fair trial reflects customary international law, crystallized through the general and consistent practice of states to ensure this right as a matter of legal obligation and not of comity.[173] Indeed, the right of an accused to a fair trial during periods other than a time of public emergency may occupy peremptory norm status since explicit denial of fairness in criminal proceedings would be "shocking to the civilized mind."[174] Moreover, the comprehensive study of international humanitarian law (IHL) conducted by the International Committee of the Red Cross (ICRC) confirmed the status of the right to a fair trial as non-derogable customary law in an armed conflict.[175] Because war represents the "gravest" public emergency, the derogation regime of Article 4 of the ICCPR would apply in times of armed conflict.[176] "In light of the (due process) standards applicable to armed conflicts of an international and non-international character contained in the Laws of War, the International

[170] Evelyn Schmid, 'The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights," *Gottingen Journal of International Law* 1 (2009) 1, 29—44, at p. 33.
[171] Oraa, at 78—80.
[172] The Paquete Habana, 175 U.S. 677, 700 (1900).
[173] Judge Patrick Robinson, The Right to A Fair Trial in International Law, Berkeley Journal of International Law, pp. 5—6, 2009 <http://bjil.typepad.com/Robinson_macro.pdf>.
[174] Jean Pictet et al, The Geneva Conventions of 12 August 1949: Commentary (Geneva: International Committee of the Red Cross, 1994), pp. 36—9.
[175] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross.Customary International Humanitarian Law. Volume I, Rules (Cambridge: Cambridge University Press,2007).
[176] Oraa, at 12.

Commission of Jurists has proposed that some of these rights should be considered *non-derogable*" (emphasis added).[177] Indeed, during the drafting of the Covenant, delegates declined to include the right to a fair trial as a non-derogable right under Article 4 because the Geneva Conventions of 1949, governing armed conflicts, contained due process obligations.[178] Logically, due process guarantees which prohibit derogation in times of war similarly bind states during less severe public emergencies.[179] Concededly, only certain aspects of the right to a fair trial can be accepted as minimum 'essential guarantees' which *shall* apply during times of war or other national emergency. The International Commission of Jurists has extrapolated twelve minimum due process guarantees applicable in public emergencies based on Article 75 of Additional Protocol I (API) and Article 6 of Additional Protocol II (APII) to the 1949 Geneva Conventions.[180] The ICRC, in evaluating consistent state practice based on *opinio juris*, has confirmed these *de minimus* standards as customary IHL.

5.6 Minimum Rights of Due Process in a Public Emergency

The United States remains bound to baseline standards of due process during times of national emergency. This section seeks to determine whether the application of CIPA complies with the ICCPR protecting the right to a fair trial during a declared national emergency. Only those specific components of the right to a fair trial implicated by CIPA shall be analyzed: the right to adversarial proceedings; the right to equality of arms; the right to communicate with counsel; the right to self representation; and the right to examine witnesses and secure the attendance and examination of witnesses favorable to the accused. The practice of the Human Rights Committee, the International Commission of Jurists, and the ICRC shall

[177] Oraa, at 114.
[178] Oraa, at 115.
[179] Oraa, at 114.
[180] See Oraa, at 115. (The International Commission of Jurists, the ILA Paris Minimum Standards, the 'Siracusa Principles,' and the 'Declaration on Internal Strife,'…have established the following 'minimum rights' based on article 75 (Protocol I) and on article 6 (Protocol II):

1. The right to be informed promptly and in detail of the charges.
2. The right to 'all the rights and means of defence necessary.'
3. The right to be present at one's trial.
4. The presumption of innocence.
5. The right not to be forced to give incriminatory evidence or to confess.
6. The right to a tribunal 'which offers the essential guarantees of independence and impartiality.'
7. The right to appeal.
8. The principle of non-retroactivity of penal laws.'
9. The right to obtain the attendance and examination of defense witnesses.
10. The right not to be retried after a final judgment.
11. The right to a lawyer of one's choice.
12. The right to free legal assistance if necessary.)

serve as analytical tools to determine the non-derogable parameters of the right to a fair trial under the ICCPR during times of peace and national emergency. Importantly this section seeks to discover whether CIPA as applied in terror cases conflicts with the minimum standards binding the United States.

5.7 Adversarial Proceedings

Notably, the 'adversarial principle,' or the "opportunity for parties to a criminal trial…to have knowledge of and comment on all evidence adduced or observations filed…with a view to influencing the court's decision" shall be distinguished from the adversarial system adopted in several common law countries.[181] The right to adversarial proceedings is encompassed within paragraph 3(b) of Article 14 of the ICCPR, specifically providing that, "in the determination of any criminal charge against him, everyone shall be entitled …to have adequate time and facilities for the preparation of his defense."[182] While the scope of the concept of 'adequate time' remains ambiguous, it has been well established in international and domestic practice that 'facilities' shall include access to documents or similar evidence which the defense reasonably needs to prepare its case.[183] CIPA regulates 'facilities' and determines what is 'adequate.' Notably, the International Commission of Jurists identified the guarantee to "all the rights and means of defense necessary" as a non-derogable aspect of the right to a fair trial in public emergencies to prevent fallible outcomes.[184] The adversarial process ensures that the defendant does not fall victim to summary justice.

Paragraph 1 of Article 14 of the ICCPR further requires the fundamental guarantee of adversarial proceedings by requiring the "independence and impartiality of a tribunal"…as an absolute right…not subject to any exception."[185] Specifically, the appearance of impropriety or the substantial participation of a judge in violation of domestic standards may result in unfair and partial proceedings.[186] The customary rule applicable in times of armed conflict coincides with the protections of the ICCPR, requiring the absolute subjective and objective impartiality of courts with "sufficient

[181] S. Negri, 'The Principle of Equality of Arms and the Evolving Law of International Criminal Procedure,' *International Criminal Law Review 5*: 513—571, at 517, (2005).
[182] International Covenant on Civil and Political Rights, 16 December 1966, Art. 14(3)(b), 999 U.N.T.S. 171 (ICCPR).
[183] Harris, *supra* note 33, at p. 363.
[184] Oraa, at 115.
[185] CCPR General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 19.
[186] CCPR General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 21.

guarantees to exclude any legitimate doubt about its impartiality."[187] While CIPA explicitly authorizes judges to hold *ex-parte* and *in camera* reviews of classified evidence, judges must occupy a neutral position. The limits of permissible judicial involvement in CIPA cases remains uncertain, as "few guidelines direct judicial behavior in ex-parte communications under federal law."[188] Judge Gerald Rosen arguably engaged in national security investigative work by personally going to CIA headquarters to review classified information and to interview government witnesses while presiding over the infamous Detroit Sleeper Cell case.[189] Although the judge's efforts cured the government's prior misconduct, resulting in the discovery of exculpatory evidence and dismissal of the terrorism charge against the defendants, CIPA's exceptions authorizing otherwise prohibited judicial activity create potential for judicial entanglement and abuse.

The constellation of the right to an impartial and independent tribunal and the right to all necessary rights and means of defense in the ICCPR lends itself to configuration as a right to the adversarial process. This right is non-derogable times of public emergency, binding the United States during the declared national crisis on the threat of terrorism.

5.8 Right to a Fair Trial and Equality of Arms

The right to a fair trial includes within it a wide multitude of penumbral rights, including specifically the right to 'equality of arms,' a principal uniquely and elusively tied to adversarial proceedings. Equality of arms implicates procedural and substantive due process, requiring that each party in a proceeding is provided with a reasonable opportunity to prepare and present its case (particularly the weaker accused), including evidence, under conditions that do not place it at a substantial disadvantage in relation to its opponent.[190] Disparate procedural protections must not "entail actual disadvantage or other unfairness to the defendant."[191] The Committee found a violation of the right to equality of arms, specifically the right to equality before the court, when a complainant was denied the ability to appeal an adverse decision but the prosecutor "could, and did, appeal an

[187] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross. Customary International Humanitarian Law, Volume 1, Rules (Cambridge: Cambridge University Press, 2007), at pp. 355—356.
[188] Kathleen Kerr, Ex Parte Communications in a Time of Terror, The Georgetown Journal of Legal Ethics; Spring 2005; 18,2; ABI/INFORM Global, pg. 551—556, at 556.
[189] Kathleen Kerr, Ex Parte Communications in a Time of Terror, The Georgetown Journal of Legal Ethics; Spring 2005; 18,2; ABI/INFORM Global, pg. 551—556, at 551.
[190] Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, paras. 30, 37.
[191] Human Rights Committee General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 13.

earlier judgment" effecting his extradition.[192] Notably, CIPA provides the government the opportunity to appeal a judicial decision requiring the disclosure of classified information under Section 6, but does not grant the defendant a similar right to contest disclosure decisions.[193] Although the American judiciary system rejects the principle of equality of arms, the failure of CIPA to coincide with international standards mandating equality before a court perhaps provides insight into the overall *procedural* fairness of the scheme. Importantly, the principle of equality of arms does not require equalizing material and practical circumstances of the parties.[194] This means that the defense does not have an absolute right to discovery, to seize evidence or to compel testimony under the ICCPR, similar to the practice of the United States. Therefore, the 'particularly weaker accused' remains *particularly weak*, most significantly when the prosecution requests the closure of 'confidential,' yet *relevant*, evidence.

Significantly, the glaring absence of the right to equality of arms in the 1949 Geneva Conventions and ICRC study on customary IHL indicates that the right does not apply in times of armed conflict Therefore, the irregular procedural scheme of CIPA providing the government alone the right to interlocutory appeal may survive scrutiny under the ICCPR during a public emergency.

5.9 Right to Communicate with Counsel

According to the Human Rights Committee, "the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way."[195] Paragraph 3(b) of Article 14 provides that a criminal defendant must "have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing."[196] The consequential juxtaposition of the right to access counsel and the right to prepare a defense within the same sub-provision illustrates the mutually dependent relationship of these important fair trial concepts. General Comment 32 of the Human Rights Committee stresses that the right to communicate with counsel requires that lawyers be permitted to conduct confidential consultations with clients in private and "advise and represent persons charged with a criminal offense in accordance with generally recognized professional ethics without restrictions, influence, pressure or

[192] *Sholam Weiss v. Austria*, CCPR/C/77/D/1086/2002, UN Human Rights Committee (HRC), 8 May 2003, at para 9.6.
[193] 18 U.S.C. App. III § 6.
[194] *Ibid*.
[195] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 10.
[196] International Covenant on Civil and Political Rights, 16 December 1966, Art. 14(3)(b), 999 U.N.T.S. 171 (ICCPR).

undue interference."[197] Moreover, a lawyer must "act diligently and fearlessly in pursuing all available defenses."[198] Customary IHL protects the right to free communication between an accused and his lawyer, requiring that "interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within hearing, of a law enforcement official."[199] However, the ICRC study does not mention whether "free communication" encompasses the right to *full disclosure* between counsel and the accused, creating a gap that may permit restrictions in times of armed conflict. Seemingly, during the gravest state of emergency, armed conflict, limitations on the free communication with counsel could be imposed to "avert imminent danger to life, limb or freedom of persons."[200]

Certainly, CIPA restricts the ability of a lawyer to consult with an accused terror defendant lacking security clearance on classified information at issue and inhibits the proper functioning of defense counsel in determining relevancy of classified information without client input. In 1998, the Committee found a violation of the right to communicate with counsel when a Peruvian national terrorist was tried in a special tribunal that severely restricted his right to communicate with legal representation and to prepare a defense because he was being held *in communicado*.[201] While CIPA itself does not require holding defendants *in communicado*, the nature of terror cases may involve such confinement. In CIPA terror cases, not only are lawyers prohibited from consulting with clients on classified evidence, but also, many high value detainees are subject to Special Administrative Measures (SAMs), restrictions preventing the defendant from contacting co-conspirators through solitary confinement and prohibiting unmonitored communication with counsel.[202] Multiple restrictions operating in tandem restricting the ability to consult with counsel confidentially and freely breeds distrust of the proceedings and can severely hamper the right to present a meaningful defense.

In addition, customary IHL provides the accused the right to be assisted by a lawyer of one's own choice even during times of armed conflict, mirroring the protection of the ICCPR.[203] "Human rights case law

---

[197] CCPR General Comment No. 13, Article 14: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14): 04/13/1984, at paragraph 9.
[198] CCPR General Comment No. 13, Article 14: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14): 04/13/1984, at paragraph 11.
[199] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross. Customary International Humanitarian Law, Volume 1, Rules (Cambridge: Cambridge University Press, 2007), at p. 363.
[200] Jaime Oraa, Human Rights in States of Emergency in International Law, p. 117. (Oxford; New York: Clarendon Press; Oxford University Press, 1992), p. 117.
[201] Communication No. 577/1994, Polay Campos v. Peru, para. 8.8.
[202] American Bar Association Standing Committee on Law and National Security, "Trying Terrorists in Article III Courts, page 30—31.
[203] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross. Customary International Humanitarian Law, Volume 1, Rules (Cambridge: Cambridge University Press, 2007), at p. 361.

has held that this requirement means that an accused cannot be forced to accept a government's choice of lawyer."[204] CIPA requires that defense counsel obtain security clearance through the Department of Justice (DOJ). While this screening requirement does not *per se* "give the government unfettered ability to remove defendant's counsel,"[205] it may interfere with the right to select counsel under both international human rights and humanitarian law. Still, this restriction may be permissible, as defendants retain the right to select counsel and have them submit to a screening process with the possibility of a court review in the event of a rejection.[206] The right to a lawyer of one's choice during a public emergency remains a contentious issue, particularly given the severe consequences for the potential abuse of the role as a lawyer in cases dealing with terrorism, classified information, and national security. As a result, the International Commission of Jurists sanctions the limitation of the right during public emergencies, such as offering a defendant the right to choose an attorney from a list of security cleared counsel.[207] Seemingly, the right to communicate with a lawyer and the right to a lawyer of one's choice may be subject to limitations during a public emergency.

5.10 Right to Self Representation

The ICCPR guarantees the right "to two types of defense" in Article 14(3)(d). The right to legal counsel includes not only the right of assistance by a lawyer, but also the right to reject representation by *any* counsel.[208] The protections of customary IHL replicate that of the ICCPR. As applied in terror cases, CIPA undermines the right to self representation by precluding defendants lacking security clearance from accessing classified evidence at issue and attending closed proceedings reviewing classified information. However, the Committee notes that the right to self representation is 'not absolute,' compelling defendants to accept the assignment of an attorney "in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation."[209] However, it remains unclear whether the forced imposition of counsel is proper in cases where defendants attempt to exercise their right to self representation properly, particularly where proceedings generate uneasiness or appear

[204] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross. Customary International Humanitarian Law, Volume 1, Rules (Cambridge: Cambridge University Press, 2007), at p. 361.

[205] United States v. Osama bin Laden, 58 F. Supp. 2d 113, at 121.

[206] United States v. Osama bin Laden, 58 F. Supp. 2d 113, at 121.

[207] Oraa, at 118.

[208] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 37.

[209] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 37.

partial, and where the State creates a situation which renders the defendant "unable to act their own interest."

5.11 The Right to Adequate Facilities

Similarly, the requirement under Article 14(3)(b) of the ICCPR that proceedings afford "adequate facilities" to the defendant "must include access to documents and other evidence" which the "prosecution plans to offer in court against the accused or that are exculpatory."[210] Importantly, the right to examine evidence and documents ensures the right to adversarial proceedings as an accused must be "given a chance to question the authenticity or probative value of evidence against him or her."[211] Moreover, the scope of exculpatory material under international standards includes not only material establishing innocence but also material which could assist the defense.[212] The customary protections during an armed conflict compiled in the ICRC study reflect general human rights law, indicating the "right to sufficient time and facilities to prepare the defense can *never* be dispensed with (emphasis added)." [213] Evidentiary substitutions offered under CIPA may circumvent the requirement that defendants receive "access" to materials offered against the accused in court. Furthermore, the blanket secrecy of Section 4 proceedings reviewing evidence subject to the government's disclosure obligations, including exculpatory evidence, may contentiously raise the concern "that CIPA is being used as a backdoor for the government to withhold information otherwise subject to discovery," which would violate the ICCPR in both times of peace and public emergency.[214]

5.12 Right to be Present

[210] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 33.
[211] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross. Customary International Humanitarian Law. Volume I, Rules (Cambridge: Cambridge University Press,
2007). And Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law. Vol. 2, Part 2 Practice. (Cambridge: Cambridge University Press, 2003).
[212] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 33.
[213] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross. Customary International Humanitarian Law, Volume 1, Rules (Cambridge: Cambridge University Press, 2007), at p. 362.
[214] Ellen C. Yaroshefsky, "The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas," 5 Cardozo Pub. L. Pol'y & Ethics Journal, Fall 2006, at 214.

Paragraph 3(d) of Article 14 of the ICCPR provides, among other things, the right of an accused "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."[215] Importantly, this provision entitles accused persons to be present during their trial, however, "proceedings in absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice."[216] The Committee found a violation of Article 14(3) where the trial and conviction of first instance was conducted in writing, denying the complainant the right to be tried in his presence.[217] CIPA Section 4 and Section 6 hearings prevent an accused terrorist lacking clearance from attending "in the interest of the proper administration of justice," however, decisions regarding discovery and the relevance, admissibility and use of evidence at trial must be written, sealed, and preserved as part of the classified record for appellate use only. Seemingly inconsistent with the standards of the ICCPR, courts conduct CIPA Section 4 and 6 hearings in writing, rather than publicly and with the attendance of the accused. Still, courts in the United States classify Section 4 and Section 6 hearings as 'pre-trial proceedings' rather than a trial establishing guilt or innocence. The case law of the Committee remains silent regarding the right to be present during 'pre-trial' hearings, however, CIPA evidentiary hearings may fall into the limited exception permitting the exclusion of an accused from general "proceedings" in the "interests of justice."[218]

Significantly, the right to be present at all stages of proceedings is not specifically mentioned in the right to a fair trial embodied in the ICCPR or at customary law. Certainly, the right to be present at one's *trial* remains a non-derogable aspect of due process in public emergencies. And customary IHL requires the presence of the accused at *trial* during an armed conflict, however, in exceptional circumstances, such as if the defendant impedes the progress of the proceeding, the judge retains the discretion to exclude the accused.[219] However, neither standards dictate presence during proceedings outside of the trial. Seemingly, even where an accused terrorist attempts to exercise his right in good faith, 'exceptional circumstances' such as a risk to national security interests, may justify his exclusion at a pre-trial hearing in times of a public emergency.

However, Article 14(3)(d) provides the accused the right to defend themselves in person or through legal counsel.[220] According to the black

---

[215] International Covenant on Civil and Political Rights, 16 December 1966, Art. 14(3)(d), 999 U.N.T.S. 171 (ICCPR).
[216] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 36.
[217] Communication No. 28/1978, Weinberger v. Uruguay, para. 16.
[218] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 36.
[219] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross. Customary International Humanitarian Law, Volume 1, Rules (Cambridge: Cambridge University Press, 2007), at p. 366.
[220] International Covenant on Civil and Political Rights, 16 December 1966, Art. 14(3)(d), 999 U.N.T.S. 171 (ICCPR).

letter text of the ICCPR, the right to defend can be adequately exercised either personally or delegated effectively to a legal representative.[221] "Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify o their own behalf."[222] Importantly, CIPA Section 4 hearings in terror cases exclude not only the accused, but also the defense counsel. Disclosure restrictions similarly deprive the defendant of the right to instruct defense counsel on the conduct of their case since full disclosure is prohibited, preventing the defendant from effectively participating in the development of defense theory and strategy. As a result, CIPA Section 4 may run afoul of the right to defend against a criminal charge under the ICCPR. Still, courts distinguish CIPA Section 4 hearings from other 'critical' proceedings triggering the right to defend on the basis that such a hearing does not concern matters of guilt or innocence, but rather questions of law.[223] Customary IHL similarly distinguishes between the main subject matter of proceedings, requiring the presence of the accused in appellate proceedings involving both questions of law and fact.[224] Therefore, *ex-parte* hearings to determine the government's discovery obligations under Section 4 and Section 6 may coincide with minimum guarantees of due process in a public emergency if viewed *strictly* as a proceeding on questions of law. Still, many defense lawyers argue that the defendant's input at Section 6 hearings is integral to fleshing out the materiality of evidence and ultimately in preparing a defense. Moreover, exclusion of the defense counsel from Section 4 hearings is antithetical to the right to defend under the ICCPR and customary IHL as "outcomes of many terrorism cases in the Article III courts are decided during pretrial discovery because of the early CIPA (and *Brady*) determinations."[225]

5.13 Right to Call and to Examine Witnesses

The international standards promulgated by the Committee guarantees the right of criminal defendants to examine and secure the attendance of witnesses against them and conversely, to examine and secure the attendance of witnesses on their behalf *under the same conditions*.[226] As a

[221] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 37.
[222] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 37.
[223] In Re Terrorist Bombings, 552 F.3d 93, 126 (2d Cir. 2008).
[224] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross. Customary International Humanitarian Law, Volume 1, Rules (Cambridge: Cambridge University Press, 2007), at p. 366.
[225] American Bar Association Standing Committee on Law and National Security, "Trying Terrorists in Article III Courts, page 15.
[226] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 39.

component of the principle of equality of arms, the right of an accused to call and examine witnesses to provide favorable testimony prevents unfair disadvantage to the defendant in presenting a defense or irregularities in the proceedings.[227] Therefore, this right "guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."[228] The ICRC study on customary IHL confirms this right as indispensible in times of armed conflict, noting that the denial of the right to examine and have examined witnesses for the prosecution violated the right to a fair trial in war crimes trials after the Second World War.[229] However, the right to examine the prosecution's witnesses may be limited during a public emergency. The right to obtain the appearance and examine prosecution witnesses may be derogated from in order to protect the identity and safety of witnesses.[230] As a caveat, the International Commission of Jurists recommends that the defense be provided the right to, at the very least, the right to "test the veracity of the evidence" given by prosecution witnesses.[231] Even given the limitation of the right to examine prosecution witnesses during times of public emergency, CIPA prevents an accused 'testing the veracity' of the evidence. As noted above, summary evidence sanctioned by CIPA deprives the defendant of the right of confrontation and the correlative right to effective cross examination.[232] Moreover, CIPA may prohibit the application of the right to secure the attendance and testimony of witnesses in the favor of the defendant when the accused seeks access to co-conspirators whose identity, location, and testimony have been classified and subject to closure.

5.14 Conclusion

The *de minimus* level of protection of the right to a fair trial reflected in the practice of the Human Rights Committee, ICRC, and International Commission of Jurists grants an accused several fundamental due process guarantees in ensuring the right to a fair trial. Under both standards of peace and public emergency, an accused is granted: the right to adversarial proceedings before an independent and impartial court, guaranteeing all necessary rights and means of defense including sufficient time and facilities to prepare the defense; access to documents and other evidence to

[227] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 39.
[228] General Comment No. 32[90], Article 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial, adopted 24 July 2007, at paragraph 39.
[229] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross. Customary International Humanitarian Law, Volume 1, Rules (Cambridge: Cambridge University Press, 2007), at p. 365.
[230] Oraa, at 117.
[231] Oraa, at 117.
[232] Ellen C. Yaroshefsky, "The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas," 5 Cardozo Pub. L. Pol'y & Ethics Journal, Fall 2006, at 217.

be used at trial, including exculpatory evidence; an opportunity to confront and examine witnesses against and in favor of the defense; the right to be present at proceedings, except in exceptional circumstances; and the right to counsel and the correlative right to communicate freely with counsel. Notably, during times of armed conflict, the right to equality of arms is not granted to the accused. In addition, the right to self representation or the right to counsel of one's own choice may be limited under both standards. CIPA as applied in terror cases challenges the fluid operation of fair trial standards under international law, regardless of the declaration of emergency. CIPA falls outside of the parameters of the right to a fair trial outlined above in certain circumstances.

6 The Adversarial Process and the Right to a Fair Trial in the United States

6.1 Introduction

[We] Americans are all about freedom. Because we all know that the way we treat you, Mr. Reid, is the measure of our own liberties. Make no mistake though. It is yet true that we will bare any burden; pay any price, to preserve our freedoms…Here in this courtroom and courtrooms all across America, the American people will gather to see that justice, individual justice, justice, not war, individual justice is in fact being done. ~Judge Young, *Reid* case[233]

[I] would not have put these cases in Article III courts if I did not think our chances of success were not good…What I told the prosecutors and what I will tell you and what I spoke to them about is that failure is not an option. Failure is not an option. This--these are cases that have to be won. I don't expect that we will have a contrary result (emphasis added). ~Attorney General Holder, testifying before Senate Judiciary Committee[234]

Although the Supreme Court has yet to pronounce its position regarding the constitutionality of CIPA, the procedural scheme regulating the use of classified information in criminal proceedings has been systematically upheld by every court that has considered it.[235] Admittedly, CIPA facilitated early "insider" prosecutions against former government officials or intelligence operatives possessing security clearances, and therefore, possessing knowledge of and the ability to personally access exculpatory and incriminating classified evidence used against them.[236] As a result, in the early espionage cases prompting the passage of CIPA, the statute adequately preserved the defendant's Fifth and Sixth Amendment rights while safeguarding classified information from unauthorized access.[237]

---

[233] Judge William Young, Transcript Reid case (Shoe Bomber), from G. Morgan, 'Why Terrorism Continues,' http://www.gwennethmorgan.com/terrorism.htm>, last accessed May 1, 2010.

[234] Attorney General Holder, quoted by James Taranto, Failure is not an Option: Obama and Holder's Assault on Due Process," November 20, 2009, available at, http://online.wsj.com/article/SB10001424052748704888404574547933018090304.html

[235] United States v. Abdi 498 F. Supp. 2d 1048; United States v. Wilson, 750 F.2d 7, 9 (2d Cir. 1984); United States v. Collins, 720 F.2d 1195, 1200 (11th Cir. 1983).

[236] Ellen C. Yaroshefsky, "The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas," 5 Cardozo Pub. L. Pol'y & Ethics Journal, Fall 2006, at 209—210

[237] Ellen C. Yaroshefsky, "The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas," 5 Cardozo Pub. L. Pol'y & Ethics Journal, Fall 2006, at 210.

However, applied in the terror context, CIPA impedes the functioning of the adversary process and creates unintended hurdles for the defendant in the realization of a fair trial.[238]

6.2 Fundamental Principles of the Adversary System in the United States

The modern adversary system is grounded on the medieval principle of trial by battle in which the truth was believed to materialize from legal combat between two equally armed and aggressive advocates asserting conflicting positions under the same restrictions before a neutral and impartial arbiter.[239] The term, 'adversarial proceeding,' is both linguistically simple yet procedurally significant: on the one hand, it is nothing more than a legal proceeding involving opposing parties;[240] on the other hand, is it nothing less than the sole means for ensuring a fair trial in the United States.[241]

The Constitution of the United States assembled the basic principles of the adversary system with a glaring implicitness that the explicit mention of the term would prove an exercise in circular logic.[242] Rooted in the inauguration of the republic, the adversary system found intimate support in the writings and speeches of early American leaders schooled in the natural law *philosophie* that abandoned the tyranny of traditional authority.[243] Indeed, the philosophical predecessor of the American revolution, John Locke, illustrated the underpinnings of the adversary system in his *Second Treatise of Government* (1690): individuals, and not the government, have, by virtue of natural law, the power to preserve and advocate against the injury of their own life, liberty, and estate and equally had the right to judge and punish others for the breaches of such law.[244] At the core of the adversary system lies the purpose of preserving inalienable and unalterable individual human rights that guarantee man's "long-lost liberty" regained by the Founding Fathers in violent revolution.[245] For two centuries, the

[238] United State v. Lopez-Lima, 738 F. Supp. 1404, 1407 (S.D. Fla. 1990): "The defendant should not stand in a worse position because of the fact that classified information is involved, than he would without this Act."
[239] Robert K. Flowers, "An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor," 79 Neb. L. Rev. 251, at 252 (2000).
[240] Gilbert Law Summaries, Pocket Size Law Dictionary, (Harcourt Brace Legal and Professional Publications 1997), at p. 9.
[241] Monroe H. Freedman, "Our Constitutionalized Adversary System," Chapman Law Review, Spring 1998, 1 Chap. L. Rev. 57, at 57.
[242] Robert K. Flowers, "An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor," 79 Neb. L. Rev. 251, at 254—5, (2000).
[243] Robert K. Flowers, "An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor," 79 Neb. L. Rev. 251, at 252 (2000).
[244] John Locke, *Two Treatises of Government* (New York: Hafner Library of Classics, 1947 ed.), pp. 124, 128, 163.
[245] Thomas Jefferson, First Inaugural Address, Marcy 4, 1801, Washington, D.C., located at <http://www.bartleby.com/124/pres16.html>, last visited April 22, 2010.

Supreme Court has further "constitutionalized" the right to adversarial proceedings, formalizing the implicit structure established by the Framers.[246] Indeed, the Supreme Court has stated that "the Constitution recognizes an adversary system as *the proper method* of determining guilt (emphasis added)."

6.3 CIPA and The Constitutionalized Adversary Process

The body of the general right to adversarial proceedings consists of multiple appendages functioning to achieve organic *fairness*. The core penumbral rights of the adversarial process particularly implicated in CIPA "terror" jurisprudence include the right to effective assistance of counsel; the right to confront evidence and the interrelated right to compulsory process; the right to be present at a critical stage of the proceedings; the right to present a defense; and the right against self incrimination.[247] The jurisprudence developed under the Fifth and Sixth Amendments have crystallized these basic elements of our adversarial system.[248] These rights work in tandem to prevent the deprivation of life, liberty, or property from any person without due process of law, an obscure and seemingly mystical principle underlying the adversary system.[249]

In addressing the constitutionality of CIPA in terror cases, federal courts reflexively defer to the government's asserted privilege and sanction the limitation of fundamental guarantees as well established carve outs of Fifth and Sixth amendment rights.[250] However, while Article III courts subject CIPA challenges to scrutiny under specific fifth and sixth amendment jurisprudence, federal courts also consider that CIPA procedures must generally provide the defendant with "substantially the same ability to make their defense." This fluid threshold, similar to the principle of due process of law, refers to the vague expression of the general fairness of the proceedings.[251] The underlying ill-defined *fairness* in the American

[246] Monroe H. Freedman, "Our Constitutionalized Adversary System," Chapman Law Review, Spring 1998, 1 Chap. L. Rev. 57, at 57.
[247] Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions, New York School Law Review, 48 N.Y.L. Sch. L. Rev. 69, at p. 82.
[248] Jay Sterling Silver, "Equality of Arms and the Adversarial Process: A New Constitutional Right," Wisconsin Law Review, Wis. L. Rev. 1007, at 1008—9, (1990).
[249] Monroe H. Freedman, "Our Constitutionalized Adversary System," Chapman Law Review, Spring 1998, 1 Chap. L. Rev. 57, at 57.
[250] Joshua L. Dratel, "Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process," Wayne Law Review, 53 Wayne L. Rev. 1041, at 1056, Fall 2007.
[251] Jay Sterling Silver, "Equality of Arms and the Adversarial Process: A New Constitutional Right," Wisconsin Law Review, Wis. L. Rev. 1007, at 1037 (1990).

adversarial system can find expression in the international principle of the right to equality of arms.[252]

6.4 Equality of Arms as a Tool for Scrutinizing CIPA?

Federal courts have refuted the applicability of the principle of equality of arms in American jurisprudence as an international principle inconsistent with a system of established constitutional rights.[253] However, the rejection of the principle as incongruent with the American adversarial system results from a fundamentally flawed interpretation of equality of arms.[254] Notably, federal courts have understood the principle of equality of arms as requiring symmetry in proceedings, providing the defendant and the prosecution with similar resources, powers, and privileges that eviscerate the inherent differences in roles between parties in a criminal proceeding.[255] The end result threatens the basic tenets of the adversarial system, as the primary actors, two unlike opposing parties, become two congruently 'like' parties. By refusing to acknowledge the differences in the position of the prosecution and the defendant, the truth is unlikely to emerge. The federal judiciary has confused the concept of 'equality' with that of 'equivalence:'[256]

> Fairness in our system…is the result of an overall balance between the superior resources of the prosecution and the constitutional protections of the defense. To seek a balance between the defense and prosecution with respect to each procedural right, the argument goes, is neither feasible nor desirable. This argument, while superficially appealing, is simplistic.[257]

Despite the reluctance of the judiciary to formally recognize the right to equality of arms in criminal proceedings, the principle is essentially exercised by courts when reviewing whether substitutions in CIPA cases provide the defendant with *substantially the same ability to present a defense* and whether a defendant is afforded *due process*. The concepts

---

[252] Jay Sterling Silver, "Equality of Arms and the Adversarial Process: A New Constitutional Right," Wisconsin Law Review, Wis. L. Rev. 1007, at 1008—9, (1990).
[253] United States v. Tucker, 249 F.R.D. 58, at 63, S.D.N.Y. 2008. Judge Scheindlin stated that: [T]he principle of equality of arms may apply in certain international criminal law contexts, but it has no place in our constitutional jurisprudence. For better or worse, due process demands only that a criminal defendant receive a constitutionally "adequate" defense, not that the parties to a criminal prosecution be equally matched.
[254] Jay Sterling Silver, "Equality of Arms and the Adversarial Process: A New Constitutional Right," Wisconsin Law Review, Wis. L. Rev. 1007, at 1039 (1990).
[255] Jay Sterling Silver, "Equality of Arms and the Adversarial Process: A New Constitutional Right," Wisconsin Law Review, Wis. L. Rev. 1007, at 1039, (1990).
[256] The former refers to possessing similar opportunities and the latter refers to interchangeability.
[257] Jay Sterling Silver, "Equality of Arms and the Adversarial Process: A New Constitutional Right," Wisconsin Law Review, Wis. L. Rev. 1007, at 1039, (1990).

captured by these commonplace and vague principles in the American adversarial system ultimately describe the underlying fairness of a proceeding: better known internationally as "the principle of equality of arms."[258] Equality of arms is "a procedural right of each advocate to formulate and present her case."[259] The principle mandates that the defendant not be placed in "a worse position" than the prosecution because of a *lack of equivalence* in terms of time and facilities to prepare its case and access information material to the case, the same standard utilized in CIPA cases.[260] As noted by Professor Jay Sterling Silver, equality of arms existed in the origins of the adversarial process as "it would not have been fair to give one contestant in a trial by battle a lance and a shield and the other only a knife."[261] Similarly, it would be nonsensical to interpret the principle of equality of arms as implying interchangeability of the parties, as it would be inappropriate to grant the government personal constitutional rights and undesirable to grant each defendant uninhibited access to investigative resources.[262] What the concept does indeed require is that whatever the arms, each opposing party is given "ample opportunity" to fight.[263] CIPA diminishes the defendant's fighting opportunities and degrades his weapons of defense. The principle of equality of arms may help guide Congress in revising CIPA.

6.5 Conclusion

The current interpretation of CIPA in terror cases impedes the functioning of the basic core rights comprising the adversarial process available in federal civilian courts. Indeed, the adversarial process available in federal civilian courts prompted the presumption that criminal proceedings against accused terror suspects would be fair. But CIPA deprives terror suspects of the fundamental principles embodied in the Fifth and the Sixth Amendment, placing the defendant at a disadvantage, contrary to the purpose of CIPA. The application of CIPA in its current archaic form in terror cases strips American courts of its essential characteristics: fair and adversarial proceedings.

---

[258] Eugene Cerruti, "Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process," Kentucky Law Journal, 94 Ky. L.J. 211, at 268—9, (2005-2006).

[259] Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 Wis. L.Rev. 1007, 1039

260 Geert-Jan Alexander Knoops, The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials, 28 Fordham Int'l L.J. 1566, 1567 (2005)

[261] Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 Wis. L.Rev. 1007, 1037.

[262] Jay Sterling Silver, "Equality of Arms and the Adversarial Process: A New Constitutional Right," Wisconsin Law Review, Wis. L. Rev. 1007, at 1039, (1990).

[263] United States v. Strickland, 466 U.S. 668, 685 (1984).

7 CIPA in Terror Cases: Diluting the Constitution

7.1 Introduction

A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.[264]

"The legal front of the war on terrorism is a battle that must be fought and won in the courts, but it must be won in accordance with the rule of law. Those of us in the justice system, including those prosecuting terror suspects, must be ever vigilant to insure that neither the heinousness of the terrorists' mission nor the intense public emotion, fear and revulsion that their grizzly work produces, diminishes in the least the core protections provided criminal defendants by our Constitution."-Judge Rosen,U.S. District Court for the Eastern District of Michigan[265]

Ordinary criminal proceedings in Article III courts presuppose the applicability of the full spectrum of fundamental rights to the defendant.[266] This supposition remains true in the context of prosecutions of foreign or U.S. nationals accused of conduct related to terrorism in federal civilian courts. *In all criminal prosecutions* pursued in Article III courts, as noted by the text of the Sixth Amendment, the defendant enjoys, among other extrapolated rights, the right to the effective assistance of counsel, the right to confront evidence against him and the right to compulsory process to obtain witnesses in his favor. Furthermore, the Fifth Amendment states that *no person* shall be denied the right to due process, recognizing no restrictions based on the defendant's citizenship, nationality, or status under international law.[267] CIPA, as applied in terror cases, particularly strains the fluid operation of the Sixth Amendment, as this constitutional provision "defines the basic elements of a fair trial" and formalized the traditional components of the adversarial system.[268] The transference of terror cases from the military commissions to Article III courts noted a shift in paradigm in combating terrorism from the illicit and condemnable extension of belligerent authority to the employment of the legitimate rule of law. However, the constitutional protections applicable in ordinary civilian courts are impeded by the application of CIPA to accused terrorists, threatening to create exceptions to traditional constitutional protections in the name of security.

---

[264] United States v. Strickland, at 685.
[265] Judge Rosen, United States v. Koubriti, 336 F. Supp. 2d 676, at 680 (E.D. Mich. 2004).
[266] Ellen Yaroshefsky, "Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts," Hofstra Law Review, Vol. 34: 1063, at 1066, June, 11, 2006.
[267] See Amendment VI:
[268] United States v. Strickland, 466 U.S. 668, 684—5. (1984).

7.2 Sixth Amendment Right to Counsel

The Sixth Amendment right to counsel protects broader interests, including not only the right to a fair trial but also to life and liberty.[269] The importance of the right to counsel corresponds directly to the integrity of the adversarial process, as the defendant, through the assistance and expertise of counsel, has "ample opportunity to meet the case of the prosecution," which leads to just results.[270] The right to counsel during criminal proceedings has attained a virtually inalienable status, as the right attaches automatically after the initiation of adversary proceedings, even without the defendant's formal request.[271] As noted by the Supreme Court in the landmark case, *United States v. Cronic (1984)*, "of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[272]

7.2.1 Right to *Effective Assistance* of Counsel

The Supreme Court has recognized that the Sixth Amendment right to counsel cannot be satisfied by the mere presence of an attorney "alongside the accused," but requires the "effective assistance of counsel."[273] The constitutional guarantee of effective assistance of counsel may be violated not only through counsel's failure to provide adequate legal assistance, but also through government action that "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[274] A defendant claiming ineffective assistance of counsel must demonstrate that counsel's conduct rose to a level of deficiency that distorted the adversarial process in a manner that prejudiced the defendant and produced unreliable results.[275] The standard for attorney performance "is that of reasonably effective assistance," a well established

[269] Johnston v. Zerbst, 304 U.S. 458, at 462—3 (1938): ("The right to counsel embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty.").
[270] Powell v. Alabama, 287 U.S. 45, 68—9, (1932).
[271] Brewer v. Williams, 430 U.S. 387, 404 (1977). ("Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him -- "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Citing *Kirby v. Illinois, supra* at 689.).
[272] 466 U.S. 684, 654 (1984).
[273] United States v. Strickland, 466 U.S. 668, 685—6 (1984).
[274] Strickland v. Washington, 466 U.S. 668, at 686; see also Geders v. United States, 425 U.S. 80 (1976).
[275] Strickland v. Washington, 466 U.S. 668, at 686—7 (1984).

principle.[276] Because the Sixth Amendment lacks specific guidelines in assessing "reasonably effective assistance" of counsel, courts look to the prevailing professional norms, such as model standards published by the American Bar Association.[277] According to the American Bar Association, in criminal proceedings, a defense lawyer "has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable…but it is for the client to decide what plea should be entered."[278] Moreover, the lawyer "should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."[279] Under CIPA, protective orders preclude counsel from discussing classified evidence at issue with the defendant. Therefore, CIPA may constructively or effectively deny a defendant the effective assistance of counsel since counsel cannot *fully* inform a defendant of evidence being used against him prior to deciding whether to testify or enter a plea.

7.2.2 The Sixth Amendment Right to Communicate with Counsel

The restriction on the ability of counsel to communicate with a non-cleared defendant in CIPA cases in the terror context has been challenged as unconstitutional. In the Embassy Bombings case[280], counsel for the defendant, Wadih El-Hage, zealously disputed the constitutional viability of the protective orders which ultimately placed defendants in "a worse position," contrary to the purpose of CIPA:

> It was Mr. El-Hage's lack of access to the remainder of the classified material, which was voluminous, and from which counsel could not discern relevance, but perhaps Mr. El-Hage could, that forms the basis of the constitutional violation. Such information could have been relevant either as affirmative substantive evidence to be offered

[276] Strickland v. Washington, 466 U.S. 668, at 687.
[277] Strickland v. Washington, 466 U.S. 668, at 688.
[278] American Bar Association, ABA Model Code of Professional Responsibility, Ethical Consideration 7-7, p. 49 (1992), located at <http://www.abanet.org/cpr/mrpc/mcpr.pdf>, last accessed 29 April 2010.
[279] American Bar Association, ABA Model Code of Professional Responsibility, Ethical Consideration 7-8, p. 49 (1992), located at <http://www.abanet.org/cpr/mrpc/mcpr.pdf>, last accessed 29 April 2010.
[280] See Sam A. Schmidt & Joshua L. Dratel, "Turning the Tables: Using the Government's Secrecy And Security Aresnal for the Benefit of the Client in Terrorism Prosecutions." 48 N.Y.L. Sch. L. Rev. 69, at 69—70. (2003/2004). On August 7, 1998, simultaneous attacks were coordinated at the United States' Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, using explosives in vehicles. The blasts in Kenya killed 211 people while the explosion in Tanzania killed 11 people. The United States discovered that Al Qaeda, led by Osama bin Laden, had planned and orchestrated the attacks. The defendant, Wadih El-Hage, was not charged with direct involvement in the Embassy bombings, rather he was charged with conspiring with Al Qaeda to target the United States, its nationals and its interests through terror attacks. Wadih El-Hage is a united States citizen born in Lebanon and is a self proclaimed member of Al Qaeda. The Embassy bombings trial ended in the conviction of all four defendants on 302 counts related to the bombings.

> in Mr. El-Hage's defense, or rebut government evidence, or impeach government witnesses during cross-examination.
>
> The embargo on Mr. El-Hage's access to a substantial trove of discovery put his counsel in a position of attempting to navigate that evidence blindly, in terms of first recognizing its relevant and material quality, and then articulating that relevance and materiality to the District Court in the context of proceedings pursuant to CIPA §§5 & 6.[281]

In a criminal proceeding, the opportunity of the defendant to be heard is "among the immutable principles of justice which inhere in the very idea of free government."[282] The right to be heard, however, "would be of little worth," if a defendant is not given a reasonable opportunity to consult with counsel on material evidence.[283] As noted by Justice Sutherland in the controversial *Powell v. Alabama* decision[284], limitations on communication may unfairly prejudice the defendant:

> He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[285]

CIPA restrictions on the ability of counsel to discuss classified evidence at issue with the defendant prevent both counsel and defendant from 'knowing how to establish' the defendant's innocence. CIPA cases typically involve significant amounts of classified information, and without input of the client, counsel lacks insight into the relevance of material and cannot properly scrutinize evidence according to the adversarial process. Moreover, the imposed secrecy on counsel strains the attorney-client

---

[281] United States v. Mohamed Sadeek Odeh, Mohamen Rashed Daoud Al-'Owhali, and Wadih El-Hage, Petition for Rehearing or Rehearing En Banc, January 7, 2009, 2009 WL 3480611, p. 22-3.

[282] Powell v. Alabama, 287 U.S. 45, 68 (1932), citing Holden v. Hardy, 169 U.S. 366, 389, 18 S.Ct. 383, 387, 42 L.Ed. 780.

[283] See Chandler v. Fretag, 348 U.S. 3, 10 (1954).

[284] Powell v. Alabama, 287 U.S. 45 (1932). Powell v. Alabama was decided in the wake of the Jim Crow era of the 1930's. Segregation was deeply embedded in the South. The case arose from complaints of rape filed by two white women against nine black youths following a quarrel between the accused youths and a group of white males. Alabama officials held summary proceedings, holding three trials in one day and sentencing all nine youths to death. During the proceedings, one counsel agreed to represent all nine defendants but did not consult with any of the accused, nor undertook sufficient investigation efforts. Alabama law required the appointment of counsel in capital cases, and as a result, the nine men appealed their convictions, eventually reaching the Supreme Court. The Supreme Court with Justice Sutherland writing the majority opinion, overturned the convictions, holding that, under the Due Process Clause of the Fourteenth Amendment, a defendant is guaranteed the right of access to counsel in capital cases.

[285] Powell v. Alabama, 287 U.S. 45, 69 (1932).

relationship and runs afoul to the "conventional full disclosure requirements."[286]

Federal courts remain unmoved by genuine concerns of defense counsel opposing the inherently dangerous barricades on the communication between attorney and client in a criminal proceeding. In the embassy bombings case, the court held that important countervailing interests may justify "carefully tailored" and "limited" restrictions on the constitutional right of a defendant to consult with his attorney in certain contexts.[287] However, the Supreme Court has not crafted a bright line test for ascertaining the permissibility or reasonableness of a restriction. Rather, courts must undertake a case-by-case, context-intense analysis, in which "[t]he types of restrictions that are justifiable will depend on the interests that the restrictions are aiming to protect."[288]

In the embassy bombings case, the district court upheld the protective order and its restrictions on the ability of defense counsel to disclose material evidence to the defendant, concluding that "not only were the restrictions carefully tailored to the problem at hand, but also that the evil they intended to prevent was *far more troubling* than the possibility of witness coaching involved in *Geders* and *Perry*."[289] However, the court's reasoning is superficial. While the district court rightfully asserted a fear that unauthorized access of classified evidence "might place lives in danger,"[290] the court failed to recognize that a restriction of access to a defendant's counsel certainly places the defendant's life and liberty at risk in a criminal proceeding.[291] The district court neglected to evaluate the nature of the restriction in the embassy bombings case in addition to the countervailing interest, an analysis undertaken by the Supreme Court in *Perry*. The Supreme Court distinguished *Perry* from *Geders*, noting that the ban on communication during an overnight recess in *Geders* was unconstitutional because an overnight recess "was of a different character" than a restriction during a brief interruption in cross examination at issue in *Perry*.[292] "It is the defendant's right to *unrestricted access* to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a *long* recess (emphasis added)."[293] Importantly, the Supreme Court noted that during an overnight recess, several important defense strategies

[286] Sam A. Schmidt, Joshua L. Dratel, "Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions," New York Law School Law Review, 48 N.Y.L. Sch. L. Rev. 69, at 83 (2004).
[287] In Re Terrorist Bombings, 552 F.3d 93, at 127 (C.A.2. NY 2008).
[288] *Perry v. Leeke*, 488 U.S. 272, (1989).
[289] *In Re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, at 128 (2d Cir. 2008).
[290] *In Re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, at 128 (2d Cir. 2008).
[291] *Perry v. Leeke*, 488 U.S. 272, at 278, holding that a communication ban which violated a defendant's Sixth Amendment right to the assistance of counsel constituted reversible error and no showing of prejudice was necessary given the fundamental importance of the right to counsel.
[292] *Perry v. Leeke*, 488 U.S. 272, at 284 (1989).
[293] *Perry v. Leeke*, 488 U.S. 272, at 284 (1989).

would be discussed, such as calling upon other witnesses, plea negotiations, preparation for cross examination and other unexplored defense tactics.[294] A near permanent restriction on communication between a defendant and his attorney in CIPA terror cases is of yet another different character not readily reconcilable with the constitution because he is denied the "guiding hand of counsel at *every step* in the proceedings against him (emphasis added)."[295]

Moreover, in *Geders*, the Supreme Court looked to the practice of lower courts in holding that a restriction banning a defendant from consulting with his attorney during an overnight recess infringed upon his *substantial* right.[296] In the embassy bombings case, as in other CIPA terror cases, the defendant was denied unrestricted access to consult his lawyer on classified material evidence during the *entirety* of the proceedings, or at least for as long as the material remains classified. Although the Supreme Court has recognized the right of a defendant to consult with counsel on important defense related topics which arise daily in criminal proceedings as going to the core of the right to counsel,[297] this concern is ignored in CIPA terror cases not only briefly, but entirely.

The clear presumption that a defendant is entitled to receive and discuss all evidence used against him in an ordinary criminal trial is normally outweighed by the government's interests in non-disclosure to protect national security in CIPA cases.[298] However, some courts have crafted a "rebuttable presumption" that review of classified material evidence by defense counsel alone satisfies the constitutional threshold of effective assistance by counsel.[299] In order for the defense to counter the government's interest in nondisclosure, defense must show that personal review and consultation with the defendant is "necessary."[300] Still, it is precisely this difficulty for the defense counsel to determine why certain evidence is necessary without the ability to consult with the defendant that renders counsel's assistance *ineffective* and the rebuttable presumption an impossible hurdle. Because defense counsel cannot 'guess' the client's reaction to or explanation of the material, "few harms" can be "specifically identified by defense counsel"[301] when petitioning the court to permit conventional disclosure of evidence with a client, and therefore, the

[294] Jay Sterling Silver, Equality of Arms and the Adversarial Process: A New Constitutional Right, Wisconsin Law Review, 1990 Wis. L. Rev. 1007, at 1013 (1990).
[295] Geders v. United States, 425 U.S. 80, at 89 (1976), citing Powell v. Alabama, 287 U.S. 45, 68-69 (1932).
[296] Geders v. United States, 425 U.S. 80, at 89 (1976).
[297] Geders v. United States, 425 U.S. 80, at 88 (1976).
[298] Stephen J. Schulhofer, "Prosecuting Suspected Terrorists: The Role of the Civilian Courts," *Advance: The Journal of the ACS Issues Group,* p. 66.
[299] Stephen J. Schulhofer, "Prosecuting Suspected Terrorists: The Role of the Civilian Courts," p. 66.
[300] United States v. Moussaoui, No. 06-4494, p. 33.
[301] United States v. Bin Laden, Not Reported in F. Supp. 2d , 2001 WL 66393 (S.D.N.Y.2001).

government always wins. As a result, terror suspects in CIPA cases become the "exception" to the constitutional rule of the right to counsel.

7.3 Sixth Amendment and the Confrontation Clause

'It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'[302]

The use of CIPA in terror cases similarly undermines the protections of the Confrontation Clause of the Sixth Amendment. The Confrontation Clause includes not only the explicit right to confront witnesses and evidence against a defendant, but also the implicit right to cross examination.[303] "The irreducible meaning of the Clause"[304] grants a *personal* right: "a right to meet face to face all those who appear and give evidence at trial."[305] By its nature, the constitutional mandate of the Confrontation Clause cannot be delegated to counsel or adequately exercised by counsel alone.[306] Indeed, the right of a defendant to examine witnesses against him, in addition to the right to be represented by counsel and the right to offer testimony, comprise the *de minimus* elements of a fair trial.[307]

In terror cases, the constitutional assailment by CIPA on the Confrontation Clause is two-fold: the exclusion of the defendant at Section 5 and 6 hearings and the use of evidentiary summaries deprive the defendant of the right of confrontation and the interrelated right to cross examination.[308] The right of a defendant to confront and cross examine witnesses and documentary evidence offered at trial ensures the proper functioning of the adversary system, preserving "both the appearance and reality of fairness."[309] The prohibition against courts determining the merits of a case and convicting a defendant based on *ex-parte, in camera* submissions is a well established principle.[310]

---

[302] *Coy v. Iowa*, 487 U.S. 1012, 1019-20, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)
[303] Coy v. Iowa, 487 U.S. 1012, 1020 (1988).
[304] Coy v. Iowa, 487 U.S. 1012, 1021 (1988).
[305] Coy v. Iowa, 487 U.S. 1012, 1021 (1988), citing Justice Harlan, concurring, California v. Green, 399 U.S. 149, at 175 (1970).
[306] Sam A. Schmidt, Joshua L. Dratel, "Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions," New York Law School Law Review, 48 N.Y.L. Sch. L. Rev. 69, at 82 (2004).
[307] Chambers v. Mississippi, 410 U.S. 284, 294—5 (1973).
[308] Ellen C. Yaroshefsky, The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas, Cardozo Public Law, Policy, and Ethics Journal, 5 Cardozo Pub. L. Pol'y & Ethics Journal, at 217, Fall 2006.
[309] United States v. Abu Ali, 528 F.3d 210, at 245 (4th Cir. 2008), citing Abourezk v. Reagan, 785 F.2d 1043, 1060 (D.C. Cir. 1986).
[310] Abourezk v. Reagan, 785 F.2d 1043, 1060 (D.C. Cir. 1986).

However, initial CIPA proceedings to review evidence to support an eventual conviction of the defendant occur *ex-parte* and *in camera*.[311] Both the defendant and counsel, even with a security clearance, are excluded from initial hearings to see any documentary evidence offered against the defendant. Similarly, in Section 6 hearings, CIPA permits the defense counsel alone to view and challenge evidence tendered against the defendant in an *in camera* hearing, an *exceptional* rule not readily reconcilable with the Constitution in ordinary criminal proceedings. However, the Confrontation Clause of the Sixth Amendment guarantees more than mere physical confrontation of witnesses and evidence by the defendant.[312] Beyond the defendant's exclusion in CIPA proceedings, the defendant and his counsel are provided with summary evidence, "or substituted statements with relevant facts in lieu of the actual information in the classified documents."[313] The defendant and in some circumstances, defense counsel, do not have access to the original documents or witnesses. As a result, CIPA "authorizes restrictions upon the questioning of the witnesses to ensure that classified information remains classified."[314] Evidentiary substitutions deprive the defendant and his counsel of the ability to conduct a thorough investigation; redacted documents prevent the defendant and counsel from determining relevancy or developing exculpatory information.[315]

In addressing the adequacy of substitutions, the Second Circuit quoted Old Chief in noting that "[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it."[316] Even if counsel alone could adequately exercise a defendant's personal right to confrontation, CIPA's initial exclusion of defense counsel from participating in crafting 'adequate' evidentiary substitutions for use in discovery vitiate the opportunity to cross examine all together. As a result, "believability of a witness and the truth of his testimony" are never tested according to the adversary process.[317] CIPA was enacted to protect, not limit, a defendant's constitutional rights in cases involving classified information.[318] The government's interest in protecting classified information "cannot override the defendant's right to a fair trial."[319] Indeed, secret proceedings undermine the *appearance* and *reality*

[311] 18 U.S.C. App. III § 4.
[312] United States v. Abu Ali, 528 F.3d 210, at 245, citing Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986).
[313] Ellen C. Yaroshefsky, The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas, Cardozo Public Law, Policy, and Ethics Journal, 5 Cardozo Pub. L. Pol'y & Ethics Journal, at 217, Fall 2006.
[314] Abu Ali, 528 F.3d 210, at 255.
[315] Ellen C. Yaroshefsky, The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas, Cardozo Public Law, Policy, and Ethics Journal, 5 Cardozo Pub. L. Pol'y & Ethics Journal, at 217, Fall 2006.
[316] United States v. Rezaq, 134 F.3d 1121, at 1142 (D.C. Cir. 1998).
[317] Ellen C. Yaroshefsky, The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas, Cardozo Public Law, Policy, and Ethics Journal, 5 Cardozo Pub. L. Pol'y & Ethics Journal, at 217, Fall 2006.
[318] S. Rep. No. 96-823, at 8 (1980).
[319] United States v. Fernandez, 913 F.2d 148, at 154 (4th Cir. 1990).

of fairness when otherwise compulsory fundamental rights become dispensable in a criminal proceeding.

The absence of the defendant at CIPA Section 5 and 6 hearings, which determine the ability to use classified evidence during trial, both inculpatory and exculpatory, implicates the right to be present at critical proceedings or stages of the trial guaranteed by the Confrontation Clause of the Sixth Amendment. The Supreme Court has noted that a defendant's absence from a pretrial proceeding may violate the mandate of the Confrontation Clause of the Sixth Amendment if the exclusion "interferes with his opportunity for effective cross examination."[320] Specifically, the privilege to be present at a pretrial proceeding turns on whether the defendant's presence bears a substantial relationship to his "opportunity to defend against the charge."[321] In addition, Federal Rule of Criminal Procedure 43 mandates the presence of the defendant at "every stage of the trial," except at a conference or argument upon a question of law. Federal courts have categorically denied the defendant the right to be present during *in camera* CIPA Sections 5 and 6 proceedings, sanctioning the exclusion of the defendant since these hearings do not deal with "factual questions that are relevant to the determination of guilt or innocence."[322] Rather, courts classify matters discussed at CIPA Sections 5 and 6 as questions of law, raising issues of relevancy and admissibility of classified information, to which the defendant cannot contribute or provide any insight to their resolution.[323]

In the embassy bombings case, the Court of Appeals of the Second Circuit affirmed the constitutionality of the exclusion of the defendant, El-Hage. The court cited earlier precedent, *United States v. Bell*, which upheld the exclusion of the defendant from an *in camera* preliminary proceeding at which a witness testified on anti-hijacking procedures as constitutional based on four critical factors: the testimony was sensitive; the defendant's character did not inspire confidence; the proceeding dealt with legal questions and not questions of fact related to guilt or innocence; and finally, the restriction was carefully limited by permitting defendant's attorney to participate. At first glance, the factual circumstances in the embassy bombings case readily absorbed the court's reasoning in *Bell.* However, "the exclusion of a defendant from a trial proceeding should be considered in light of the whole record."[324] Unlike the embassy bombings case, counsel in *Bell* had the opportunity to cross examine the witness during the *in camera* proceeding. In the embassy bombings case, like all CIPA terror cases, defense counsel is reflexively excluded from initial Section 4 hearings, determining the production of discovery materials. Furthermore, the witness in *Bell* provided information regarding a general hijacker profile

[320] Kentucky v. Stincer, 482 U.S. 730, at 740 (1987).
[321] Snyder v. Massachusetts, 291 U.S. 97, 105—106 (1934).
[322] Bin Laden, at 7. See also Fed. R. Crim. P. 43(c)(3), "A defendant need not be present…when the proceeding involves only a conference or hearing upon a question of law."
[323] Bin Laden at 7.
[324] In Re Terrorist Bombings, at 128, citing United States v. Gagnon, 470 U.S. 522, 526—7 (1985).

and not specific facts relating to the defendant.[325] Counsel in *Bell* was enjoined solely from disclosing the criteria of the hijacking profile but could consult his client regarding the testimony.[326] In CIPA cases, as applied in the terror context, defendants are categorically excluded from learning the contents of the proceedings, regardless of whether or not defense counsel is attempting to argue the relevancy and admissibility of evidence which may directly relate to the defendant and to which the defendant may provide insight. Without input from client, it is difficult for counsel to discover relevant evidence from a pool of isolated materials provided during discovery by the government and to further articulate its materiality and admissibility at CIPA 6 hearings. *In light of the whole record*, the exclusion of cleared defense counsel from Section 4 hearings in addition to the restriction of the defendant from Section 6 hearings *interferes with the defendant's opportunity for effective cross examination.*

CIPA intended to resolve the issue of unauthorized disclosure of classified information in criminal proceedings by limiting access to "United States citizens for whom an appropriate investigation of their personal and professional history affirmatively indicated loyalty to the United States."[327] Applied in terror cases, security clearance requirements ensured that counsel alone would have access to classified information and that the defendant, "whose curriculum vitae hardly inspired confidence in his selection as a safe repository"[328] of classified information, could not. However, the counsel only solution proposed by CIPA fails when the defendant decides to exercise his right to proceed *pro se*.[329]

7.4 Sixth Amendment Right to Self Representation

The constitutional right to self representation in criminal proceedings was carved out of the Sixth Amendment, "as well as in the English and Colonial jurisprudence from which the Amendment emerged,"[330] by the Supreme Court in *Faretta* (1975). While the constellation of rights embodied in the Sixth Amendment seek to cure the risk of unfairness in a criminal proceeding, the liberty to receive the assistance of counsel cannot be interpreted as a constraint on a defendant to accept imposed counsel.[331] As noted by Justice Stewart in *Faretta*, the forced imposition of counsel on an

[325] United States v. Bell, 464 F.2d 667, at 671 (2d Cir. 1972).
[326] United States v. Bell, 464 F.2d 667, at 671 (2d Cir. 1972).
[327] In Re Terrorist Bombings, 552 F.3d 93, at 117, footnote 21, citing U.S. Department of Justice Guidelines for obtaining security clearance.
[328] United States v. Bell, 464 F.2d 667, at 672 (2d Cir. 1972).
[329] The Secrecy Problem in Terrorism Trials, page 26 (Brennan Center).
[330] Faretta v. California, 422 U.S. 806, at 818 (1975).
[331] Faretta v. California, 422 U.S. 806, at 833 (1975)

unwilling defendant undermines, rather than assures, fairness in a proceeding:

> [W]here the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him.[332]

The adversary system is distorted when defense counsel is imposed on a defendant by the court. The right to self representation, like other Sixth Amendment rights, is a personal right. "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[333] The Supreme Court in *Faretta* not only rebukes the forced imposition of counsel as antithetical to the client-attorney relationship, but goes as far as declaring it unconstitutional:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant-not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. *To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment*. In such a case, counsel is not an assistance, but a master, and the right to make a defense is stripped of the personal character upon which the Amendment insists (emphasis added).[334]

However, in the highly publicized *Moussaoui* case, referred to as the missing "twentieth hijacker"[335] related to the 9/11 terrorist attacks, the presiding judge permitted the defendant to invoke his right to self representation, providing warnings on its disadvantages, but imposed 'stand-by' counsel against the defendant's wishes.[336] Although the court had determined that the defendant was competent and had validly waived his right to counsel, "given the complex nature of the case and the existence of classified discovery information, the district court determined that 'standby" counsel would be required to assist Moussaoui."[337] The fears echoed in *Faretta* decades prior reverberated in Moussaoui's reaction to the judge's statement that the court had the right to appoint and impose stand-by counsel:

> "[You], I'm sure, fully understand, that the position now to have these people as stand-by lawyer, it's not feasible, practical, because capital death need a very close relationship with the, with the lawyer

[332] Faretta v. California, 422 U.S. 806, at 834 (1975).
[333] Faretta v. California, 422 U.S. 806, at 819 (1975).
[334] Faretta v. California, 422 U.S. 806, at 820 (1975).
[335] Hon. Shira A. Scheindlin, With All Due Deference, at 835.
[336] United States v. Moussaoui, at 268.
[337] United States v. Moussaoui, at 268.

> in order that he know the information that the defendant have and have many information, and I will never share any information, because in fact, *I believe that they are working against me"* (emphasis added).[338]

Although Moussaoui was a foreign national, his fear and distrust of imposed representation against his will was a familiar lamentation shared by early American colonists.[339] In objection, Moussaoui filed a pro se "Motion in Opposition to the Classification of this Case as Complex anf for the Convening of Hearing to Determine How this Joint Motion Between Prosecution and Government Appointed Lawyer will in Effect Ensure my Conviction."[340] Because Moussaoui was not complicit or cooperative with court-appointed standby counsel, the district court dismissed and appointed various counsel over the defendant's objections. Moussaoui, on the other hand, requested the assistance of Charles Freeman, a Muslim attorney, to provide legal consultation on certain matters, but "would never, under any circumstance, use him or appoint him as a standby lawyer."[341] Freeman, however, had not entered a timely appearance and was not licensed to practice law in the Commonwealth of Virginia or before the district court.[342] The district court refused Moussaoui's requests to appoint Freeman as a 'legal consultant,' and renewed their prior warning that once a defendant has invoked his right to self representation, he is not entitled to an intermediate accommodation, such as advisory counsel of his choice, particularly where counsel refuses to formally appear or be bound by the rules of the court.[343] However, the district court could properly appoint standby counsel over the defendant's objections "to aid the defendant *if* and *when* the accused requests help." The protective orders under CIPA, however, meant that *even if* Moussaoui never requested assistance from standby counsel, it would be forced upon him and his personal right to defend would be effectively stripped in violation of the Sixth Amendment.

In *Faretta*, the Supreme Court summarily raised and dismissed the potential for the abuse of the right of self representation as a manner to disrupt trial.[344] At that time, the risk of deliberate exploitation of the right was a

---

[338] Zacarias Moussaoui, Hearing, June 13, 2002, Transcript of Motion Hearing, available at http://www.washingtonpost.com/wp-srv/nation/transcripts/moussaoui061302.htm.

[339] See Faretta v. California, 422 U.S. 806, at 826, Justice Stewart opinion, "The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of law years."

[340] United States v. Zacarias Moussaoui, Trial motion, July 1, 2002, available at Findlaw, <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html>, last accessed May 15, 2010.

[341] Moussaoui, 591 F.3d 263, at 269.

[342] Moussaoui, 591 F.3d 263, at 269.

[343] Moussaoui, 591, F.3d 263, at 270, citing United States v. Singleton, 107 F.3d 1091, 1100—3, (4th Cir. 1997).

[344] Faretta v. California, 422 U.S. 806, at 834 FN46, (1975): Opinion by Justice Stewart, "We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred."

theoretical, rather than a genuine, concern. However, in *Moussaoui*, the defendant realized this potential risk by abusing the right to self-representation in order to disrupt the trial and disseminate his extremist views.[345] In November 2003, Judge Brinkema revoked Moussaoui's right to proceed pro se after having received several improper filings, including "veiled, and in some cases, overt, threats to public officials, attacks on foreign governments, attempts to communicate with persons overseas, and efforts to obtain materials unrelated to this case."[346] Decades earlier, *Faretta* had recognized the ability of the court to terminate self-representation when used to obstruct justice, noting that "the right of self representation is not a license to abuse the dignity of the courtroom."[347] Because Moussaoui pled guilty, his claim that CIPA obstructed his right to effectively proceed *pro se* was not cognizable on appeal.[348]

However, CIPA, in preventing a defendant that lacks security clearance from accessing evidence and participating in the proceedings, squarely conflicts with the right to self representation and the personal right to present a defense. While Moussaoui abused the right, wholly proper and constitutionally consistent attempts by a defendant lacking security clearance wishing to exercise the right to self representation in a criminal trial would be impossible under CIPA and CIPA's intended protections would likewise fail.

7.5 Sixth Amendment Right to Compulsory Process

The Sixth Amendment textually guarantees all criminal defendants the right to compulsory process for obtaining witnesses in his favor and implicitly provides a privilege to discover exculpatory evidence from the

[345] Unite States v. Moussaoui, 591 F.3d 263, at 271, "Moussaoui would later testify that his writings were intentionally designed to promote his agenda of disseminating propaganda about al Qaeda's war against the United States."

[346] Moussaoui, 591 F.3d 263, at 271, FN5. Among the improper pleadings filed by Moussaoui, were two writings directed at Judge Brinkema, "20th Hijacker: Leonie You Bitch, but ZM must get the Wicked Tyran Congress 9/11 Report!; and 20th Hijacker: Real Bitch of Leonie Brinkema Position on Uncle Sam." Also, Moussaoui had submitted writings, such as Death to Satan Democracy, in it writing, "September 11 is much more than simply collapse of World Trade Center it is the death of WTC, World Tyrant Constitution…the greatest Jihad in Islam is to speak the truth in front of tyrant and to be executed for it" Located at: http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/defense/ZM005.pdf

[347] Faretta, 422 U.S. 806, at 834 (1975).

[348] Moussaoui, 591 F.3d 263, at 278. citing Blackledge v. Perry, 417 U.S. 21, 29—30 (1974)("When a criminal defendant enters a guilty plea, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. Rather, a person complaining of such antecedent constitutional violations is limited…to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not within the range of competence demanded of attorneys in criminal cases.").

government.[349] As an affirmative evidentiary tool, the right to compulsory process empowers the defendant to present a defense upon his own initiative.[350] In contrast to the negative rights language formulating the majority of the Bill of Rights as a shield against government encroachment, the compulsory clause gained an early jurisprudential reputation as the lunging weapon in the defense arsenal.[351] Indeed, since the Aaron Burr treason trial of 1807, the compulsory process clause has historically thwarted claims of executive privilege.[352]

The Framers of the Constitution incorporated the compulsory process clause in reaction to the common law restrictions to prevent perjured testimony, thus admitting "to the witness stand only those presumably honest, appreciating the sanctity of the oath, unaffected as a party by the result, and free from any of the temptations of interest."[353] As a result, several categories of witnesses were disqualified from providing testimony, including the defendant and co-defendants, and ultimately obstructed the right to present a defense.[354] However, "just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense."[355] In the formative case, *Washington v. Texas* (1967), the Supreme Court recognized the right to compulsory process as "a fundamental element of due process of law."[356] Indeed, the Supreme Court explicitly characterized the right to compulsory process as consistent with the adversarial system, "taking note of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons

---

[349] U.S. Const. amend. VI. See also, Megan A. Healy, Note: Compulsory Process and the War on Terror: A Proposed Framework, 90 Minn. L. Rev. 1821, at 1822 (2006).

[350] Martin A. Hewett, "A More Reliable Right to Present a Defense: The Compulsory Process Clause After Crawford v. Washington," Note, Georgetown Law Journal, page 275, located at http://www.georgetownlawjournal.org/issues/pdf/96-1/Hewett.PDF

[351] See Megan A. Healy, Note: Compulsory Process and the War on Terror: A Proposed Framework, at 1826—7. In the Aaron Burr trial of 1807, Chief Justice Marshall made a "sweeping construction of compulsory process,"…holding that "no witness, even the President, could claim an exemption form the provisiosn of the sixth amendment," and could be compelled to produce documents.

[352] Martin A. Hewett, "A More Reliable Right to Present a Defense: The Compulsory Process Clause After Crawford v. Washington," Note, Georgetown Law Journal, page 275, located at http://www.georgetownlawjournal.org/issues/pdf/96-1/Hewett.PDF

[353] Washington v. Texas, 388 U.S. 14, 21 FN18 (1967).

[354] Washington v. Texas, 388 U.S. 14, 20 (1967).

[355] Washington v. Texas, 388 U.S. 14, at 19 (1967).

[356] Washington v. Texas, 388 U.S. 14, at 19 (1967). In this landmark case, the defendant, Jackie Washington, had been convicted of murder. Washington claimed that he did not shoot the victim but that he had tried unsuccessfully to dissuade his co-defendant, Fuller, who was intoxicated, from shooting and killing the victim. Washington offered Fuller's testimony in his defense and the court record indicated that Fuller would have testified that Washington had tried to persuade him to leave and that the petitioner had fled before Fuller shot the victim. However, Texas law prohibited co-defendants from testifying, preventing the defendant from using this evidence and he was subsequently convicted. The Supreme Court reversed the judgment, holding that Washington was denied the right to compulsory process by prohibiting the defendant from presenting testimony of a witness who was "physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."

of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court."[357]

The right to compulsory process stands on equal footing with other indispensible Sixth Amendment rights,[358] however, it is similarly not absolute.[359] Compulsory process rests upon the underlying premise, which in turn defines its scope in a criminal proceeding, "that relevant evidence should generally be admissible in the absence of strong reasons for its exclusion."[360] The Supreme Court has identified compulsory process as a fundamental element of due process, requiring not only the right to secure the attendance of witnesses, but also the right to have testimony of these witnesses heard by the jury "so it may decide where the truth lies."[361]

However, the compulsory process clause does not guarantee the right to secure the attendance and testimony of *any* and *all* witnesses.[362] Rather, a materiality standard limits the scope of the right to compulsory process. In order to prove a violation of the right, testimony and information sought through compulsory process must be "favorable to the accused" and "material" and the defendant must show "that a reasonable probability exists that a different outcome would have resulted from its disclosure."[363]

Furthermore, "the compulsory process right is circumscribed…by the ability of the district court to obtain the presence of a witness through service of process."[364] The court's process power effectuates the right to compulsory process by securing the presence of a witness through a subpoena, or where the witness is in custody, through the issuance of a writ of habeas corpus *ad testificandum*.[365] However, the court's process power faces jurisdictional limitations, as it does not reach foreign nationals in a foreign country or aliens held in custody outside the sovereign territory of the United States.[366] Importantly, the defendant's fundamental right to compulsory process cannot abrogate the fundamental right of a witness under the Fifth Amendment, as the court cannot compel a witness to testify

---

[357] Washington v. Texas, 388 U.S. 14, at 22 (1967), citing Rosen v. United States, 245 U.S. 467, 471 (1918).
[358] Washington v. Texas, 388 U.S. 14, at 18 (1967).
[359] Megan A. Healy, Note: Compulsory Process and the War on Terror: A Proposed Framework, at 1829.
[360] Martin A. Hewett, "A More Reliable Right to Present a Defense: The Compulsory Process Clause After Crawford v. Washington," Note, Georgetown Law Journal, page 276, located at http://www.georgetownlawjournal.org/issues/pdf/96-1/Hewett.PDF
[361] Taylor v. Illinois, 484 U.S. 400, 409 (1988).
[362] United States v. Ricardo Valenzuela-Bernal, 458 U.S. 858, 867 (1982).
[363] [363] Megan A. Healy, Note: Compulsory Process and the War on Terror: A Proposed Framework, at 1830.
[364] United States v. Moussaoui, 382 F.3d 453, 464 (2004), citing United States v. Greco, 298 F.2d 247, 251 (2d Cir. 1962).
[365] Roberto Iraola, "Compulsory Process, Separation of Powers, and the Prosecution of Zacarias Moussaoui," 35 U. Mem. L. Rev. 15, at 36 (2004).
[366] Roberto Iraola, "Compulsory Process, Separation of Powers, and the Prosecution of Zacarias Moussaoui," 35 U. Mem. L. Rev. 15, at 36 (2004).

when the witness asserts his or her privilege against self incrimination.[367] Even where a State makes a witness unavailable, the government action may not *per se* violate the Compulsory Process Clause absent "a plausible showing" that the "evidence lost would be both material and favorable to the defense."[368] However, the willful suppression by the government of evidence material to guilt or punishment violates due process.[369]

The FBI had initially arrested Zacarias Moussaoui in August 2001 for overstaying his visa after he provoked the suspicion of a flight instructor while receiving pilot training on a jet simulator.[370] However, Moussaoui subsequently faced a far more serious indictment charging him with conspiracies related to the 9/11 terror attacks, attaching with it the danger of the death penalty.[371] Moussaoui categorically and consistently refuted any participation in the 9/11 attacks and rejected the government's labeling as the twentieth hijacker.[372] Rather, Moussaoui, acknowledging membership in al-Qaeda and allegiance to Osama bin Laden, insisted that al Qaeda had intended for him to participate in a different operation following 9/11.[373] In order to disprove the government's theory and avoid the death penalty, Moussaoui sought access to high ranking al-Qaeda operatives responsible for designing the 9/11 attacks held in U.S. custody.[374] During the course of the proceedings, Moussaoui sought access to leading coordinator, Ramzi bin al-Shibh upon his capture because he had made statements to interrogators indicating that Moussaoui had not been assigned to participate in the 9/11 plot. The government vehemently objected to Moussaui's request to depose bin-al-Shibh, however the district court granted access to Moussaoui, concluding that the witness could offer "material testimony in Moussaoui's defense."[375] In a highly redacted Memorandum Opinion, Judge Brinkema dealt with an issue of first instance not encompassed by CIPA where a witness' identity, location, and testimony, rather than a document, were considered 'classified.' Judge Brinkema looked to the "multi-step analysis mandated by CIPA" for guidance[376], determining that the defendant's right to compulsory process outweighed the government's national security interest and ordering the government to produce a videotaped deposition of al-Shibh pursuant to Rule 15 of the Federal Rules of Criminal Procedure.[377] The government invoked its right to interlocutory appeal under CIPA to the Fourth Circuit, postponing proceedings.[378] However, during this time, the mastermind of 9/11, Khalid

[367] United States v. Bowling, 239 F.3d 973, 976 (8th Cir. 2001).
[368] United States v. Ricardo Valenzuela-Bernal, 458 U.S. 858, 873 (1982).
[369] United States v. Ricardo Valenzuela-Bernal, 458 U.S. 858, 868 (1982), citing Brady v. Maryland, 373 U.S. 83, at 87 (1963).
[370] United States v. Moussaoui, 591 F.3d 263, 266 (2010).
[371] United States v. Moussaoui, 591 F.3d 263, 266 (2010).
[372] United States v. Moussaoui, 2003 WL 21263699, at 1.
[373] United States v. Moussaoui, 2003, WL 21263699, at 1.
[374] United States v. Moussaoui, 2003, WL 21263699, at 1.
[375] Moussaoui, 382 F.3d 453, at 458.
[376] United States v. Moussaoui, No. Cr. 01-455-A, 2003 WL 21263699, at 4.
[377] See Megan A. Healy, Note: Compulsory Process and the War on Terror: A Proposed Framework, at 1836.
[378] Moussaoui, 382 F.3d 453, 458 (4th Cir. 2004).

Sheikh Mohammed was captured with another al-Qaeda operative, making similar statements to interrogators that Moussaoui was not involved in 9/11.[379] Moussaoui sought to depose Mohammed and another al-Qaeda detainee in addition to al-Shibh.[380]

The Fourth Circuit held that enemy combatant witnesses held in military custody outside the territorial boundaries of the United States were subject to the district court's process power under the Sixth Amendment Compulsory Process Clause.[381] The Fourth Circuit held that because the custodian, Donald Rumsfeld, "was indisputably within the process power of the district court,"[382] the testimonial writ of habeas corpus *ad testificandum* reached foreign nationals being held in military custody outside of the United States.[383]

Importantly, the Fourth Circuit noted that compelling the government immunize enemy combatant witnesses who are willing and available to testify did not violate the principle of separation of powers where the government engages in misconduct by refusing to produce material witnesses favorable to the defense and ultimately impairing the defendant's right to a fair trial.[384] However, the Fourth Circuit employed a balancing test to determine whether the judicial act of compelling the production of witnesses placed an impermissible burden on the government, placing Moussaoui's interest in the testimony of the witnesses against the government's national security interest.[385]

Notably, the Fourth Circuit held that, despite the conflicting national security burdens alleged by the government, the governmental privilege must give way to the defendant's right to a fair trial under the Fifth and Sixth Amendments[386]:

> Ultimately…the appropriate procedure is for the district court to order production of the evidence or witness and leave to the Government the choice of whether to comply with that order. If the government refuses to produce the information at issue-as it may properly do-the result is ordinarily dismissal.[387]

However, the Fourth Circuit rejected outright dismissal of the indictment in favor of a "more measured approach," refusing to impose a punitive

---

[379] Megan A. Healy, Note: Compulsory Process and the War on Terror: A Proposed Framework, at 1836.
[380] Megan A. Healy, Note: Compulsory Process and the War on Terror: A Proposed Framework, at 1836.
[381] Moussaoui, 383 F.3d 453, 464—5 (4th Cir. 2004).
[382] Moussaoui, 383 F.3d 453, 464—5 (4th Cir. 2004).
[383] Moussaoui, 383 F.3d 453, 464—6 (4th Cir. 2004).
[384] Moussaoui, 383 F.3d 453, 468 (4th Cir. 2004).
[385] Moussaoui, 383 F.3d 453, 469 (4th Cir. 2004).
[386] Moussaoui, 383 F.3d 453, 474 (4th Cir. 2004).
[387] Moussaoui, 383 F.3d 453, 474 (4th Cir. 2004).

sanction on the government "because the Government has rightfully exercised its prerogative to protect national security interests by refusing to produce the witnesses.[388] Instead, the court looked to CIPA for guidance in determining the appropriate "balanced" remedy for the government's refusal to produce the witnesses, seeking "a solution that neither disadvantages the defendant nor penalizes the government."[389] The Fourth Circuit utilized CIPA as a compass, ordering the production of an evidentiary substitute for the witness' deposition testimony that "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."[390] Rather than permitting Moussaoui and his defense team from deposing the enemy combatants directly, the defense and prosecution would collaborate to create summaries of classified information favorable to the defendant collected from various government interrogations of the enemy combatant witnesses occurring over a period of several months.[391] However, "it must be remembered that the substitution process we here order is a *replacement* for the testimony of the enemy combatant witnesses."[392] As a result, Moussaoui's right to compulsory process was circumscribed by evidentiary substitutions in lieu of testimony taken from the witnesses for the purpose of trial, further encroaching upon, "in plain terms, the right to present a defense."[393]

7.6 The Fifth Amendment, Due Process, and the Government's Disclosure Obligations

The challenges encountered in *Moussaoui* similarly implicate the government's obligations under the *Brady* rule, a due process doctrine. An iconic case of the Warren court, *Brady* v. *Maryland* (1963) established that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[394] The Supreme Court extended the scope of the *Brady* doctrine to include evidence used to impeach the credibility of government witnesses in *Giglio* in 1972.[395] Notably, a defendant need not request *Brady* material in order for the prosecutor's duty to attach.[396] Rather, a prosecutor

[388] Moussaoui, 383 F.3d 453, 476 (4th Cir. 2004).
[389] Moussaoui, 383 F.3d 453, 477 (4th Cir. 2004).
[390] Moussaoui, 383 F.3d 453, 477 (4th Cir. 2004).
[391] Moussaoui, 383 F.3d 453, 479—81 (4th Cir. 2004).
[392] "Moussaoui, 383 F.3d 453, 482 (4th Cir. 2004).
[393] Moussaoui, 383 F.3d 453, 471 (4th Cir. 2004).
[394] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[395] Giglio v. United States, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule" announced in *Brady v. Maryland*) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).
[396] United States v. Coppa, 267 F.3d 132, 144 (2d Cir. 2001).

must produce *Brady* evidence "in time for its effective use" in order to properly discharge its duty.[397]

In determining what evidence constitutes *Brady* material, the Supreme Court in *United States v. Bagley* articulated a comprehensive materiality standard to determine prosecutorial misconduct in nondisclosure, regardless of whether the defendant made a general request, a specific request, or no request at all for evidence favorable to the accused.[398] In *Bagley*, the Supreme Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[399] The Brady doctrine stems from the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment.

The right to due process, "the least specific and most comprehensive protection of liberties,"[400] protects against unlawful invasions of constitutional rights. The concept of due process remains fluid, however, "due process thus conceived is not to be derided as resort to a revival of 'natural law:'"[401]

> "In each case, 'due process of law' requires an evaluation based on disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society."[402]

Due process refers to "a sense of justice" that "in dealing not with the machinery of government but with *human rights*, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions (emphasis added)."[403] In ensuring a fair *procedure*, and ultimately a fair *trial*, "the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty…whose interest…in a criminal prosecution is not that it shall win a case, but that justice shall be done."[404]

CIPA permits the prosecutor to operate under a veil of secrecy that undermines the disclosure obligations required by due process. The potential for prosecutorial abuse materialized in the highly publicized Detroit Terror Case, *United States v. Koubriti*. Following the trial and conviction of four defendants on charges fraud and of conspiracy to provide

---

[397] United States v. Coppa, 267 F.3d 132, 144 (2d Cir. 2001).
[398] United States v. Bagley, 473 U.S. 667, 682 (1985).
[399] United States v. Bagley, 473 U.S. 667, 682 (1985).
[400] Rochin v. California, 342 U.S. 165, at 170(1952).
[401] Rochin v. California, 342 U.S. 165, at 171(1952).
[402] Rochin v. California, 342 U.S. 165, at 172 (1952).
[403] Rochin v. California, 342 U.S. 165, at 169(1952).
[404] United States v. Bagley, 473 U.S. 667, 675 (1985) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

material support and resources to terrorists, allegations of prosecutorial error and a pattern of willful misconduct were brought to the attention of defense counsel and the court by the U.S. Attorney's Office in Detroit:[405]

> "The prosecution failed to in its obligation to turn over to the defense, or to the Court, many documents and other information, both classified and non-classified, which were clearly and materially exculpatory of the Defendants as to the charges against them. Further…the prosecution materially misled the Court, the jury and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecutions case."[406]

The *Koubriti* case had suffered from intense public scrutiny, as the defendants had been apprehended within a week of the terror attacks and the case itself was "the first prosecuted and tried in the aftermath of September 11th."[407] Political and public pressure raised *Koubriti* to symbolic status of the Bush administration's "pre-emptive approach to fighting terrorists,"[408] pushing prosecutors to pursue the case, even though "senior Justice Department officials had doubts about the strength of the case"[409] and "the evidence was somewhat weak."[410] Among its misconduct, the government offered a videotape of Tunisian tourists at Disneyland as *proof* of a 'terror plot' and terrorist surveillance of highly populated American attractions.[411] As noted by President Bush, the *Koubriti* case had "thwarted terrorists," indeed.[412] Given the large amount of *Brady* material withheld by the prosecution, the court granted the motion filed by the Department of Justice requesting dismissal of the terrorism charges and acquiescing to the defendant's request for a new trial on other matters.[413]

On appeal, Judge Rosen echoed the concerns of defense lawyers as he noted that, "no one…could have anticipated the nature and scope of the issues-not to mention the sheer number of documents-that would ultimately be involved in this investigation," pointing specifically to the complexities raised by classified documents.[414] CIPA's secretive discovery process encourages prosecutorial nondisclosure of material classified evidence, both willful and inadvertent, given the high volume of documents and the absence of defense counsel advocating on behalf of the defendant with a

[405] United States v. Koubriti, 336 F. Supp. 2d 676, 679 n.3 (E.D. Mich. 2004).
[406] United States v. Koubriti, 336 F. Supp. 2d 676, 681 (E.D. Mich. 2004).
[407] United States v. Koubriti, 336 F. Supp. 2d 676, 677 (E.D. Mich. 2004).
[408] Danny Hakim & Eric Lichtbau, After Convictions, the Undoing of a US Terror Prosecution, N.Y. Times, Oct. 6, 2004, at A3.
[409] Danny Hakim & Eric Lichtbau, After Convictions, the Undoing of a US Terror Prosecution, N.Y. Times, Oct. 6, 2004, at A3.
[410] Danny Hakim & Eric Lichtbau, After Convictions, the Undoing of a US Terror Prosecution, N.Y. Times, Oct. 6, 2004, at A3.
[411] In Pursuit of Justice, 2008, at page 111.
[412] Danny Hakim & Eric Lichtbau, After Convictions, the Undoing of a US Terror Prosecution, N.Y. Times, Oct. 6, 2004, A3.
[413] Koubriti, 336 F. Supp. 2d 676, at 681.
[414] United States v. Koubriti, 336 F. Supp. 2d 676, 678 (E.D. Mich. 2004).

particular defense strategy. In *Koubriti*, Judge Rosen spearheaded an effort by both government and defense counsel to review all pertinent documents and investigate the credibility of the information in order to review whether the defendants had been provided a fair trial, a process lacking in the initial CIPA Section 4 hearings.[415] As warned by Judge Rosen, "to allow our constitutional standards to be tailored to the moment-would be to give the terrorists an important victory in their campaign to bring us down because they will have caused us to become something less than what we are-a nation of laws based upon constitutional foundations developed over more than two centuries of jurisprudential evolution."[416] CIPA, as applied in terror cases, provides defendants with "something less" than core constitutional protections.

7.7 Conclusion

The proper functioning of the adversary system depends upon meaningful separation of powers, preserving the impartiality of the judiciary and its commitment to the Constitution. Courts must not abdicate their responsibility to review executive actions.[417] The War on Terror, regardless of whether it is factual or ideological, presents a time of crisis for the nation. Complete deference to political branches in "wartime" "create precedents that are unacceptable once the threat of war has receded."[418] CIPA, initially intended to reconcile the conflict between national security and a criminal defendant's fundamental rights, represents a highly deferential procedural scheme that diminishes an accused terrorist's rights in Article III courts that would otherwise, be untenable. CIPA as applied in the terror context simply creates 'bad law.'

[415] Kathleen Kerr, Ex-Parte Communications in a Time of Terror, The Georgetown Journal of Legal Ethics; Spring 2005; 18, 2; AB/INFORM Global, pg. 551—556, at 556.
[416] United States v. Koubriti, 336 F. Supp. 2d 676, 680 (E.D. Mich. 2004
[417] Honorable Shira A. Scheindlin & Matthew L. Schwartz, "With All Due Deference: Judicial Responsibility in a Time of Crisis," 32 Hofstra L. Rev. 795, at 815.
[418] Honorable Shira A. Scheindlin & Matthew L. Schwartz, "With All Due Deference: Judicial Responsibility in a Time of Crisis," 32 Hofstra L. Rev. 795, at 796.

8 Field Research: CIPA from the Judicial Perspective

8.1 Introduction

"This wise discovery of Portia's, that it was flesh and not blood that was named in the bond, saved the life of Antonio; and all admiring the wonderful sagacity of the young counsellor, who had so happily thought of this expedient, plaudits resounded from every part of the senate-house; and Gratiano exclaimed, in the words which Shylock had used, "O wise and upright judge!"[419]

CIPA defers to the judge as the Master in his or her sphere, the zealous guardian of *fairness*. CIPA confers considerable discretion on federal judges in managing cases dealing with classified information. Indeed, "CIPA and the accompanying Security Procedures [promulgated by Chief Justice Burger] create a system by which the trial court has wide latitude to impose reasonable restrictions likely to prevent the unauthorized disclosure of classified information."[420] Under CIPA, the judge actively ensures the integrity of proceedings, as a "[a] trial is not a mere lutte between counsel, in which the judge sits merely as an umpire to decide disputes which may arise between them."[421] The judge sanctions proceedings whose fairness remains intact under CIPA and discontinues those rendered unfair by CIPA. Consequentially, the judge plays a significant role in CIPA cases, charged with a solemn task of protecting the fundamental rights of a controversial and contemptuous defendant: the accused terrorist.

8.2 The Research Pool Controversy

What oppressed me so much
Was a bit shameful.
Talking of it aloud
Would show neither tact nor prudence.
It might even seem an outrage
Against the health of mankind.[422]

[419] The Merchant of Venice, William Shakespeare, Tales from Shakespeare (Ed. Charles and Mary Lamb) at p. 106
[420] In re Terrorist Bombings, 552 F.3d 93, at 117 (2d Cir. 2008).
[421] State v. Crittenden, 38 La. Ann. 448, at 450 (1886).
[422] Czeslaw Milosz, A Poem for the End of a Century

Given the important function of federal judges in safeguarding adversarial proceedings under CIPA, this Thesis intended to incorporate the views of judges on the application and operation of the procedural scheme. Because CIPA is applied and interpreted by judges, the judicial perspective was critical for understanding both the apparent and invisible weaknesses of the statute. During the course of this study, fifty federal judges were solicited to participate in an anonymous interview, providing strict confidentiality to protect the identity of the judges. Of the fifty judges contacted, only three agreed to participate. Indeed, the majority of judges conceded to the importance of the study, but declined participation based on the controversial nature of the subject and fears of possible recusal in current and forthcoming CIPA cases. A small percentage declined based on lack of practical experience of CIPA. The high rejection rate reflects the current contentious debate, as the administration itself has resigned its former endorsement of terror trials in federal courts to assume a diffident stance in pursing the most controversial case: the prosecution of the 9/11 'master-mind', Khalid Sheikh Mohammed.[423] The 'secretive' nature of CIPA ascribes to it a mysterious character requiring suspicious vigilance of its effects on fundamental rights.

CIPA would benefit from the critical opinions, reflections and suggestions of federal judges familiar with the nuances of the statute. As a result, an independent and confidential study undertaken by Congress may be the only manner to concretize the defaults of CIPA. Concededly, generalizations may not be derived from research interviews with less than a one percent response rate. However, for the purposes of this Thesis, the views and opinions shared by three courageous and candid federal judges may still provide insight into the complexities of applying CIPA and preserving fundamental rights in terror cases.

8.3 Main Objective and Structure of the Interview

The main objective of the Research Interview study was to determine how Article III judges function to ensure adversarial proceedings while protecting the security of classified information in the application of CIPA in criminal prosecutions of terror suspects. Research interviews were conducted over the course of two months. One research interview was held in person in the United States while the other two were conducted *via* telephone. Interviews lasted approximately one hour. Interview questions targeted due process issues concerning CIPA. Specifically, the discussion centered around: the issue of ex-parte and in camera proceedings; the right to counsel, including the right to effective assistance of counsel and the right

[423] Suzanne Malveaux, White House Considers Military Trial for Khalid Sheikh Mohammed, CNN, March 5, 2010, located at <http://edition.cnn.com/2010/POLITICS/03/05/911.trial/index.html>.

to self representation; security clearance requirements; the right to compulsory process; divergent standards in determining the breadth of discovery; the balancing of a defendant's rights against the government's privilege; the risk to the credibility and voluntariness of evidence in terror prosecutions; and the scope of permissible judicial conduct under CIPA. The selection process and respondents' identities shall remain strictly confidential.

8.4 Summary of Research Interview Findings

8.4.1 General Opinion of CIPA

"The judge is the gatekeeper to CIPA and ensuring that a fair adversarial process is maintained."[424]

Notably, each respondent described CIPA as a time consuming and fact specific procedural law. As applied in terror cases, CIPA readily becomes cumbersome and clumsy, given the high volume of classified information at issue. However, each respondent supported the application of CIPA as the solution for prosecuting terror suspects in federal civilian courts and advocated an urgent departure from the military commission system. When asked whether federal civilian courts were the proper venue for terror trials, one respondent counter replied: "Well, I think the more appropriate question is, 'why can't this case be tried in civilian courts?" The respondents conceded that there was a risk that CIPA could create 'bad law' in cases where torture or other executive misconduct taints evidence. Augmenting to this concern, a respondent highlighted the necessity for transparency and candor in order for CIPA to guarantee fairness. However, the respondents generally affirmed the flexibility of CIPA as a beneficial characteristic for adjudicating challenging and novel cases. Importantly, each judge demonstrated a fervent commitment to the rule of law and the preservation of fundamental rights. Indeed, one respondent characterized the role of the impartial and independent arbiter under CIPA as the "gatekeeper" to fair adversarial proceedings.

[424] Respondent, Research Interview with Federal Civilian Judge on CIPA and the Right to Adversarial Proceedings, conducted by Anna Maria Martignetti.

8.4.2 Challenges of Ex-Parte Hearings: Protecting the Interests of the Absent Defendant

The interview began with the most controversial aspect of CIPA, or the *ex-parte* and *in camera* hearings under Section 4. Under CIPA, the trial judge may conduct *ex-parte* hearings to determine which items of classified information are subject to the government's discovery obligations. The respondents were asked what challenges they faced in conducting *ex-parte* hearings under CIPA, particularly in the terror context. The respondents generally agreed the *ex-parte* proceeding under CIPA was not unlike other authorized *ex-parte* proceeding held during preliminary stages of a trial, such as grand jury matters or determining an informant's privilege under *Romero*. Still, one respondent did express concern of ex-parte proceedings under CIPA in that the judge faced a substantial burden in filtering out materials which must be provided to the defense from large amounts of classified information. Importantly, without the defense counsel present to argue for disclosure of a specific item, the judge alone must sift through an *unspecific* amount of classified information. However, the respondents agreed that federal judges were the most appropriate party and had the greatest capability of safeguarding the defendant's rights in the process as an independent party, however laborious. When asked whether the defendant's counsel should be present during Section 4 proceedings, the respondents provided split opinions. One respondent feared the inclusion of defense counsel would provide unnecessary exposure of national security information (NSI), particularly since not all classified information will be subject to disclosure. Moreover, *ex-parte* hearings alone do not determine the judge's final decision, as the judge must remain impartial at all times. The judges unanimously agreed that the government's duty to disclose Brady and other obligatory discovery to defense also safeguarded the defendant's rights. However, a respondent added that while presence of defense counsel would provide some opportunity for the defense, the benefits of inclusion were speculative.

8.4.3 Exclusion of Defendants from Section 4 and Section 6 Hearings

The respondents were then asked to consider the constitutionality of excluding defendants from Section 4 and Section 6 hearings and both the benefit and drawback of inclusion. Although the responses varied, the three federal judges characterized this issue as a contentious and fact-specific problem lacking a bright-line rule. One respondent cautioned that focusing on the issue of exclusion of the defendant at Section 6 hearings abandoned the important issues of determining relevancy and admissibility of classified evidence at trial. However, the respondents agreed that if the defendant's

presence would help, a compromise would have to be reached. Still, the judges unanimously described the hearing as a proceeding on a matter of law, and not of fact, indicating that it would be unlikely that a defendant would ever be able to prove that his presence would be necessary for his defense. A fact specific inquiry must be done in each case. On the issue of transparency, a respondent indicated that although both the public and defendant are provided with notice of an *in-camera* hearing, the determinations and deliberations of the hearing are preserved on the record but kept under seal for review by an appellate court.

8.4.4 The Right to Counsel

On the issue of counsel, the respondents were asked whether the imposition of counsel could be reconciled with the Sixth Amendment, particularly in a case where the defendant has filed a motion to proceed *pro-se*. Interestingly, one respondent noted that despite precedent prohibiting the forced imposition of counsel on a defendant, it is 'equally' a violation to fail to provide effective assistance of counsel to a defendant where it is apparent that self representation will place the defendant at a severe disadvantage. The respondents generally agreed that the right to counsel is not absolute and a flexible standard must be maintained in terror cases under CIPA. The respondents did not consider imposing counsel on an accused lacking security clearance in CIPA cases amounted to a violation of the right to counsel.

8.4.5 Communication Restrictions and the Right to Prepare a Defense

The respondents also discussed protective orders restricting communication between defense counsel and a defendant on issues pertaining to classified information and its effects on the right to prepare an adequate defense. When asked if communication bans were violative of the Sixth Amendment, one respondent indicated that they 'may' be, however, each determination must be made on a case by case basis. Generally, the respondents felt that the restrictions imposed by protective orders did not rise to a level of unreasonable interference that prevented counsel from adequately performing his or her duties. However, one respondent indicated that if a protective order prevented the effective assistance of counsel, then the terms would have to be adjusted or the prosecution would have to be discontinued. Another respondent demonstrated an open acceptance of protective orders as a common tool in federal prosecutions and felt that it was inappropriate to distinguish use of protective orders under CIPA from other instances where a protective order would be appropriate. Notably, protective orders do not prevent a defendant from *ever* learning of the evidence or information as the material will eventually become declassified.

8.4.6 Defense Counsel and Security Clearance Requirements

An area of disagreement arose on the topic of whether a pool of readily available defense attorneys with security clearance to prevent delay in CIPA cases should be created. One respondent urged caution, noting a danger in having pre-selected defense approved by the Department of Justice (DOJ). Importantly, the respondent warned that defense attorneys hand picked by the DOJ may be exposed to the defense strategy of the government. Additionally, the affiliation with the DOJ, regardless of the underlying fairness, may engender distrust between the attorney and client as the attorney is seen as working for the opposing party. On the other hand, a respondent indicated that an affiliation of pre-cleared counsel would not be unlike any other public defender program and would prevent delay in often complicated and lengthy terror prosecutions.

8.4.7 Gaps in CIPA: Compulsory Process and the Moussaoui Example

The respondents were asked to consider the restricted scope of CIPA to documentary or other items of classified information, failing to include potential witnesses with classified identities. Specifically, the respondents were asked if they believed Congress should amend the statute to include procedures accounting for compulsory process. Significantly, all three respondents indicated that ad-hoc trial solutions fashioned by judges on issues of constitutionality were most appropriate and should not be legislated by Congress. Interestingly, one judge believed that if CIPA became more detailed, rather than providing more concise guidelines, it would instead prove to be more clumsier and difficult to implement.

8.4.8 Discovery and Evidentiary Standards: Divergence

Congress considered but rejected a heightened relevance standard when adopting CIPA in 1980, therefore excluding the adoption of the common law classified information privilege which requires a stricter standard of relevance than Rule 401. In the landmark cases, *Yunis* and *Moussaoui*, the courts claimed that the defendants were not entitled to receive classified information on a mere showing of theoretical relevance but would be

entitled only to information that is at least helpful to the defense of the accused or is a essential to a fair determination of a cause, an arguably heightened standard. The respondents were asked if they believed CIPA required the defendant to demonstrate a "relevancy Plus" showing when seeking discovery. Divergence was noted among the three respondents. One respondent felt it was inappropriate to implement a higher standard of relevance if Congress did not intend to change evidentiary standards under CIPA, as this would essentially be creating 'bad law.' Notably, the respondent believed that the application of a separate set of rules for terror cases in federal courts would be an affront to the Constitution. Furthermore, the respondent indicated that if terror prosecutions presented different facts, Congress alone should decide whether or not to establish a separate threshold. However, a separate opinion was also expressed by a respondent. Specifically, the respondent raised the *Rovario* example, claiming that federal judges had the inherent power to limit materials received during discovery and ultimately could limit access to classified materials by implementing a slightly higher threshold of relevance.

8.4.9 Fundamental Rights: Balancing Against National Security?

The judges were directed to consider the minority view that permits the court to balance a defendant's rights against the government's interest in protecting national security in Section 6 determinations of the use and admissibility of classified information. Specifically, the judges were asked whether it was proper to engage in such balancing of interests. Notably, all three judges disagreed with the minority view, holding that a court is not balancing the risk of harm to a defendant's right to a fair trial but rather is examining whether the information the government seeks to withhold is material to the defense. As a result, the fundamental concern is that the defendant's right to a fair trial is observed. One respondent praised CIPA as a useful tool for preserving the defendant's right to a fair trial when the government claims a privilege. Still, another respondent claimed that the government itself engaged in balancing the defendant's rights against the government's privilege and therefore, the judge's sole role is to ensure that the proposed solution is fair.

8.4.10 Evidentiary Issues

Given the international character of terrorism, the respondents were asked whether the Federal Rules of Evidence (FRE) provide enough flexibility to accommodate terror prosecutions. Significantly, the respondents characterized terror cases in different terms. Two respondents felt that evidentiary challenges were not unique to terror cases, as organized crime present similar issues. The third respondent felt that the FRE

accommodated the specific challenges of terror cases to some extent, but that some rules were an ill-fit. Importantly, all respondents felt that fundamental rights should not be compromised to allow otherwise excludable evidence into terror prosecutions. Notably, a respondent utilized the example of the informant's privilege, which provides the government with the privilege to maintain the confidentiality of an informant's identity. In terror cases, the government may similarly plead a privilege over a witness' identity, such as confederate terror suspects. However, the judge maintains the ultimate discretion in protecting the defendant's rights to deny or uphold the privilege.

Similarly, the respondents were asked whether the *Miranda* rule posed any significant challenges in prosecutions of terror suspects. One respondent felt that although imposing *Miranda* in 'battlefield' situations would be impracticable in some circumstances, the government and intelligence community must follow standard guidelines in order to facilitate federal prosecutions. Significantly, the federal judges felt that *Miranda*-type protections could be administered in a common sense manner that would respect fundamental rights. However, a respondent noted the competing goals of the intelligence community, in attempting to gather information to prevent crimes, and the judicial or criminal prosecution community, dealing with punishing crimes after the fact. Still, a standardization would facilitate terror prosecutions in federal courts. Finally, respondents were asked to consider whether Miranda violations could adequately be cured after long periods of long military detention or inhumane and degrading treatment. Importantly, all three judges agreed that evidence derived from torture, inhumane or degrading treatment could never be cured. However, fact intensive analysis would have to be applied to determine whether voluntariness has been restored following the abatement of such treatment.

8.4.11 The Scope of Permissible Judicial Conduct Under CIPA

In the Detroit Sleeper Cell case, after allegations of prosecutorial misconduct, the judge interviewed witnesses *in camera* and *ex parte* and visited CIA headquarters to sift through classified information in order to determine whether or not to overturn a conviction. Arguably, the judge participated in investigatory work during the case. The respondents were asked whether they believed CIPA permits this type of behavior for a federal judge. The respondents unanimously upheld the judge's conduct in the Detroit Sleeper Cell Case as wholly proper, citing that CIPA does permit the judge to conduct such *ex-parte* and *in camera* hearings in order to protect classified information. However, the respondents stressed that the judge remains a third, independent party and does not form part of the prosecution nor the defense. One respondent distinguished the prosecutorial misconduct from that of the judge's conduct, noting that the improper behavior of the prosecutor should not affect the *bona fides* of the prosecution in general. Judges approach CIPA cases with an understanding

of the importance of preserving his role as the impartial party charged with ensuring that justice is served.

8.5 Conclusion

Generally, the respondents viewed CIPA as a positive statute that facilitated the prosecution of terror suspects in federal civilian courts. The respondents felt that the lack of detailed procedures under CIPA provided a flexibility that could accommodate complex and novel issues certain to arise during terror prosecutions. Importantly, each respondent demonstrated a solidarity to the rule of law and the protection of fundamental rights. As a result, concerns over the absence of a zealous advocate on behalf of the defendant at each proceeding were minimized from the judicial perspective. Significantly, the judges agreed that a standardization or harmonization among investigators and intelligence agents could ensure that accused terrorists could receive a fair trial in federal civilian courts.

9 Reforming CIPA: From *Just* 'Trust Me'[425] to 'Trustworthy'

9.1 Introduction

It is too often forgotten in these times that the American federal system is itself constitutionally ordained, that it embodies values profoundly making for lasting liberties in this country, and that its legitimate requirements demand continuing solid recognition in all phases of the work of this Court.
~Justice Harlan[426]

The transference of terror cases from the untenable military commissions to Article III courts has failed to mitigate risks to due process in cases involving classified information, as the operation of CIPA in terrorism prosecutions undermines basic constitutional and human rights protections. CIPA as applied in the terror context threatens to establish erroneous precedent, encroaching upon not only the rights of the perceived 'foreign terrorist undeserving of constitutional protections' but also of the average American citizen. Significantly, the term 'terrorism' remains vague under U.S. law and several criminal statutes have been invoked in alleged 'terror-related prosecutions,' that in fact, "were nothing of the sort."[427] Terror prosecutions rarely involve what the general public considers 'terror violence.' As a result, several types of criminal conduct can fall into the scope of terror related activity, including fraud and theft, to which CIPA, and its consequential rulings, may apply.[428]

Although justified, national security concerns should not reflexively and aggressively trump due process and human rights without aforethought to the damaging effects on the American adversarial trial, the aspiration of civilization. AG Holder ominously stated that 'failure is not an option,' guaranteeing convictions at the expense of the adversarial system. Indeed, CIPA has resulted in nearly a perfect conviction rate. However, the

[425] "Prosecuting Terrorism: The Legal Challenge, The NYU Review of Law and Security, Issue No. 7/April 2006, at page 9 <http://www.lawandsecurity.org/publications/no.7ProsecutingTerrorismtheLegalChallenge.pdf>,(Donna Newman, counsel to Jose Padilla, describes her experience as counsel infamous Padilla case: You have no right to information. We will give you an affidavit based on hearsay, based on informants we agree are not particularly reliable, but we know better. This is a matter of national security. And you, despite the fact that you are counsel, despite the fact that you now have security clearance, trust me, you don't need to know anything." Our country is not based on "trust me." The Founding Fathers, in fact, did not trust King George, the *other* King George. They set up separation of powers – checks and balances – for the very reason that they did not trust the imperial leader").
[426] Pointer v. Texas, 380 U.S. 400, 409 (concurring opinion).
[427] Ellen Yaroshefsky, 5 Cardozo Pub. L. Pol'y & Ethics J. 203, at 225.
[428] Ellen Yaroshefsky, 5 Cardozo Pub. L. Pol'y & Ethics J. 203, at 225

objective of the adversarial system is not to ensure that the prosecution will win, but that the outcome is truthful and reliable. Article III courts and CIPA have been offered as extenuating, and not absolute solutions, to defeating the threat of terror. Thus, while the idea of creating a separate system of rules for terror suspect, such as military commissions, lack legitimacy under the rule of law, the notion that CIPA is adequate as enacted thirty years ago is dangerously inaccurate. Importantly, both sides of the spectrum must pragmatically acknowledge that "trial in federal court will not be possible for every suspected terrorist." In some cases unsuitable for prosecution, evidence remains unripe to sustain charges; in others, unfortunately, the government binds its own hands through the sanctioning of harsh interrogation and detention techniques that taint evidence. And in others, the government must contend with the 'disclose or dismiss' dilemma. *So be it.* Terror prosecutions should be pursued in federal courts within the constraints of the Constitution, and not at the cost of it. While the threat of terrorism against international security is real, the threat of self destruction through the obliteration of our defining characteristic, *our delicate, Constitutionally ordained adversarial system,* is intolerable.

Despite its current distortion in terror cases, CIPA should not be thrown out completely. Importantly, because the majority of the response to terrorism has not been through military, but investigative and intelligence efforts, the federal courts remain an important, and in some cases, the only lawful tool available to punish terrorists.[429] Alarmist responses to CIPA present onerous consequences, as extreme deviations from CIPA may undermine both due process and security: on the one hand, it would be unfathomable to permit uninhibited access to classified information to al Qaeda operatives; on the other hand, the complete abandonment of terror prosecutions in federal civilian courts will undoubtedly lead to the reinvigoration of the faulty military commissions and a paradigm of interminable detention. Congress should employ hindsight in revising the untouched CIPA statute to attenuate the complex and novel legal challenges presented in terror prosecutions outside of its intended competencies. Specific areas of CIPA require revision in order to protect due process and prevent the abuse of executive power while safeguarding national security interests: the de-facto and habitual exclusion of defense counsel from Section 4 hearings; standards governing the closure of evidence and the prohibition of communication between defense counsel and a defendant lacking security clearance; concrete standards governing security clearance procedures for defense counsel; and the expansion of the scope and application of CIPA beyond documents and materials to include witnesses whose identity is classified. Importantly, these modest recommendations cannot possibly incorporate invisible shortcomings in CIPA, such as statistics regarding abandoned prosecutions unavailable to the general public and lack of oversight in the classification process. Congressional hearings, following intensive independent reporting and scrutiny of CIPA, as well as

[429] Amos N. Guiora & John T. Parry, Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists, 156 U. Pa. L. Rev. PENNumbra 356, at 367—8 (2008).

recommendations from both the judiciary and executive branches, are recommended to revise the statute.

9.2 Suggested Reforms

9.2.1 De-Facto Exclusion of Defense Counsel from Section 4 Hearings

CIPA Section 4 regulating initial review of classified discovery materials grants judges with the discretion to hold the hearing *in camera*, excluding the defendant and defense counsel.[430] Despite the permissive language of Section 4, the majority of requests by defense counsel to participate in these hearings are denied.[431] While exclusion of a defendant lacking security clearance to review classified information may be legitimate, the exclusion of defense counsel granted clearance is disproportionate. Importantly, defense counsel must be given the opportunity to advocate on behalf of the defendant, contesting national security claims. Currently, CIPA operates under the assumption that defense counsel can 'intuitively' argue for the disclosure of evidence that they have no knowledge of and have never seen. Despite the fact that the court occupies a neutral role in the hearing and intends to safeguard the defendant's rights, the judge is not in the best position to determine what is relevant and material to a defense.[432] Moreover, neither the prosecutor nor the court can know the defense theory or strategy in determining which materials require disclosure. Secondly, when the district court authorizes the use of evidentiary substitutions to protect classified information, defense counsel should participate in the drafting of summary evidence to protect the defendant's interests. Moreover, evidentiary substitutions are at risk of improper governmental abuse: witness testimony may be a product of intense interrogation and leading questions by government officials; summaries of a witness's testimony may be adapted or drafted to conform with the government's position.[433] Most alarmingly, evidentiary substitutions drafted by the government to protect classified information cannot be subject to cross examination.[434] Indeed, the initial hearing under CIPA Section 4 determines what 'arms' the defendant shall receive to mount a defense, often sealing his fate. CIPA Section 4 should be revised to prohibit *ex-parte* hearings and to

[430] 18 U.S.C. App. III. § 4
[431] Ellen Yaroshefsky, 5 Cardozo Pub. L. Pol'y & Ethics J. 203, at 213.
[432] Ellen Yaroshefsky, 5 Cardozo Pub. L. Pol'y & Ethics J. 203, at 213
[433] "Prosecuting Terrorism: The Legal Challenge, The NYU Review of Law and Security, Issue No. 7/April 2006, at p. 12.
[434] Prosecuting Terrorism: The Legal Challenge, The NYU Review of Law and Security, Issue No. 7/April 2006, at p. 12.

include defense counsel in determining 'adequate' evidentiary substitutions to preserve the rights of defense.

9.2.2 Standard on the Right to Communicate with Counsel on Classified Information

Defense counsel is prohibited, under the threat of prosecution, from discussing classified information at issue with the defendant. Defense counsel must agree to "never divulge, publish, or reveal either by word, conduct or any other means, such classified documents and information."[435] While unauthorized access to classified information is a serious threat, CIPA fails to take into consideration the serious ethical and legal consequences that restricted access to counsel has on the right to the effective assistance of counsel, the right to communicate with counsel, and the right to present a defense, particularly in complex cases charging grave offenses. Where defense counsel recognizes a piece of classified information as crucial to preparing a defense, a rebuttable presumption should be available to contest complete bans on communication. However, given the controversial nature of broadening access to classified information, counsel should be allowed, when able to rebut a complete ban on communication, to question his client on classified information under close monitoring. Importantly, counsel can articulate why he believes the classified document is important to preparing a defense or developing exculpatory information, providing the court with notice of specific questions he intends to raise to his client. The communication can be monitored to prevent unnecessary exposure of classified information. Also, given the availability of restrictive SAMs, a defendant can be particularly observed and supervised to prevent passing on classified information to potential confederates. CIPA should include an articulated standard for rebutting absolute communication bans "when appropriate" to provide transparency and fairness to a proceeding.

9.2.3 Security Clearance of Defense Counsel

[435] United States v. Moussaoui, Memorandum of Understanding Regarding Receipt of Classified Information, Crim. No. 01-455-A, available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/moussaoui/usmouss060302mou.pdf >

As discussed in our analysis of international practice under the ICCPR, a defendant must not be forced to accept a government's choice of lawyer.[436] In addition, federal courts have recognized as unconstitutional the unfettered ability of the government to remove Defendant's counsel.[437] Although CIPA does not explicitly authorize requiring defense counsel to obtain security clearance, streamlined and transparent procedures must be established in the framework in light of the *de facto* requirement of clearance. In addition, experts suggest establishing a pre-cleared counsel bar as part of a federal defender service to provide immediate assistance for defendants, ensuring independence from prosecution. However, by revising CIPA to provide concise procedures for efficient security clearance determinations, the defendant retains his right to choose counsel either procured on his own initiative or among the federal defenders without prejudice to his case.

9.2.4 "Classified" Witnesses and Compulsory Process

The right to compulsory process is indispensable for ensuring a fair trial. Despite CIPA's broad definition of 'classified information,' it fails to account for access to witnesses whose identity and testimony may be considered classified. The *Moussaoui* prosecution illustrated this novel and complex issue. Notably, Judge Brinkema fashioned a CIPA-like procedure to reconcile the defendant's right to compulsory process and the government's interest in protecting national security by permitting the government to compile redacted summaries of interrogations of material witnesses in lieu of allowing Moussaoui to depose them. However, the compromise effectively eviscerated the right to compulsory process as understood under the Constitution. The balancing test implemented by the Fourth Circuit was inappropriate. Permitting the court to balance away the government's obligation to provide access to exculpatory information represents the *prima facie* objection to the Fourth Circuits approach to compulsory process and classified information. The evidentiary substitutions themselves offend the principle of adversarial proceedings in its entirety:

> It is something of a stretch to say that mere summaries will provide Moussaoui with "substantially the same ability to make his defense" as would allowing him to call the detainees to testify, either at trial or in a deposition. Summaries will not allow Moussaoui's counsel to ask questions of their own choosing; the statements included in the

[436] Henraecks, Customary Law, page 360.
[437] United States v. Osama bin Laden, 58 F. Supp. 2d 113, at 119.

> summaries will instead have been made in response to questions asked by interrogators for intelligence-gathering purposes.[438]

The scope of CIPA should be expanded beyond 'documentary' evidence to include witnesses. Specifically, CIPA should enable a judge to require the government to provide access to 'classified' material witnesses using secured videotaped depositions pursuant to Rule 15 of the Federal Rules of Criminal Procedure, as suggested by the district court in *Moussaoui*. "Despite the serious implications of dismissing the indictment in terrorism cases, the government must accept the consequences of its refusal to provide access to exculpatory evidence as demanded by the Constitution."[439] Broadening CIPA to acknowledge that terror suspect likely call on their confederates, other terrorists, to provide testimony will ensure that the government does not circumscribe the Constitution. In addition, the government is on notice and may predetermine whether prosecution in an Article III court is *proper* pre-indictment rather than seeking an *improper* exception to the Sixth Amendment right during trial.

9.2.5 Admissibility of Classified Evidence and Trial: Addressing Inconsistent Practice

Although most courts have rejected imposing a higher threshold for admissibility when the government pleads a classified information privilege, divergence exists among the federal circuits on the appropriate admissibility standard. As noted above, the language of CIPA § 6 requires courts to ignore the fact that evidence is classified when determining its use, relevance, or admissibility.[440] Because CIPA does not alter substantive law, courts generally interpret CIPA § 6 strictly as a procedural tool, utilizing ordinary evidentiary standards. However, some district courts have implemented an additional test similar to *Rovario* during admissibility hearings, balancing national security interests against the right to present a defense.[441] Congress rejected imposing a heightened relevancy standard for determining admissibility of classified information. As a result, "the court should not balance the national security interests of the Government against the rights of the defendant to obtain the information" since "the sanctions against the Government are designed to make the defendant whole again."[442] Importantly, *Roviaro* governed disclosure under discovery requests and not determinations of admissibility of evidence. The

[438] "Prosecuting Terrorism: The Legal Challenge, The NYU Review of Law and Security, Issue No. 7/April 2006, at p. 44.
[439] Megan A. Healy, Compulsory Process, page 1855.
[440] United States v. Baptista-Rodriguez, 17 F.3d 1354, 1363—4 (11th Cir. 1994).
[441] Congressional report 14; See also, United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985).
[442] United States v. Smith, 780 F.2d 1102, 1112 (4th Cir. 1985) (en banc).

government alone is authorized with the competency to determine how the disclosure of classified evidence effects national security. The proper task of the court is to ensure that the proceeding is fair and that the defendant is not placed in a worse position than he would be absent the presence of classified information. The classified nature of the evidence bears no relevance to whether or not a certain piece of evidence is essential for making a defense, and therefore admissible. A court, by considering how the disclosure of classified information may damage national security, is overstepping its discretion. Moreover, balancing requires the defendant to overcome an impossible hurdle by forcing him to demonstrate not only how evidence is material to his defense but also how the evidence will likely effect national security. Indeed, CIPA should explicitly prohibit such balancing during Section 6 hearings.

9.3 Conclusion:

"The laws and the Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." —Justice Kennedy[443]

In cases involving classified information, courts "must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim to innocence."[444] CIPA was enacted to allow the government to ascertain the effect of the disclosure of classified information on national security before trial; it was not enacted to allow the government to pursue a trial on lesser judicial guarantees. Concededly, not all terror prosecutions may be appropriate for adjudication under CIPA. However, the fact that a case is deemed improper for prosecution may have less to do with the ability of the federal courts and more to do with the conduct of intelligence and investigative authorities. Enacted three decades ago, CIPA currently fails to address the full contours of terror prosecutions. As a result, CIPA should be revised by Congress, utilizing input from the judicial and executive branches and experience post 9/11. Importantly, we cannot permit the threat of terrorism to *terrorize* our courts, Constitution, and international standing as a human rights leader. Indeed, "the kind of permanent emergency presupposed by an open-ended war on terror risks 'the end of the rule of law itself.'"[445]

[443] Boumediene et al. v. Bush, 553 U.S. 723, 128 S.Ct. 2229, at 2277 (2008).
[444] United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990).
[445] Amos N. Guiora & John T. Parry, Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists, 156 U. Pa. L. Rev. PENNumbra 356, at 368 (2008).

10 Conclusion

During Congressional hearings leading to the enactment of CIPA, a Justice Department official posed the question, 'to what extent must we harm the national security to protect the national security?' Of course, he was referring to the 'disclose or dismiss' dilemma, requiring the government to perform a cost/benefit analysis of prosecuting a case involving national security information. This inquiry has acquired a novel significance in the context of terror cases. Indeed, federal civilian courts can be an effective, and perhaps the only legitimate, tool for disrupting and incarcerating terrorists. However, the adjudication of terror cases under a separate and diluted category of rights harms the adversary system and the constitutional guarantees of the right to a fair trial.

CIPA, as Congressional legislation ordering the procedure of discovery, may rightfully protect the right to adversarial examination and traditional adversarial trial for detainees possessing security clearances in cases concerning "confidential" information. However, in the terror context, CIPA requires reconsideration, refinement and revision in order to prevent abuse and safeguard the right to a fair trial under the American adversarial system. Despite the reinstatement of an undefined public emergency in regards to the threat of terrorism, the United States must not apply ad-hoc and temporary solutions that harm overall security, such as indefinite detention in military commissions. Indeed, the military commission system has been erected to the detriment, rather than the benefit, of the United States, failing to prosecute high value detainees while characterizing the government as a pariah of human rights protection. Rather, the government should provide authentic responses to the threat of terrorism, consistent with the rule of law. The aforementioned revisions of CIPA may provide certainty and clarity to the procedural scheme and augment the right to a fair trial for suspected terrorists, supplanting the faulty military commission system with a system in accordance with the Constitution and international human rights law.

Acknowledgments

I am eternally indebted to my family, particularly my parents, for the several sacrifices offered in my benefit throughout my lifetime. Their enduring support has guided me through various stages of my life, including the arduous and exciting period spent researching and writing this Thesis. To my father: I received my unending thirst for knowledge and education from you and your encouragement to accomplish any feat through discipline and faith will continue to inspire me. To my mother: your selflessness and strength in crisis motivated me to dedicate myself to larger issues and to recognize temporary sufferings as a chance to develop character rather than self pity. Finally, to my brother: you have been a confidant, companion, and a cheering fan throughout my life. Your dedication to your own dreams reminds me to never give up, despite the odds.

I must also recognize my mentors and friends that have nurtured me and imparted their wisdom during joyful and distressing periods, particularly the Honorable Lee G. Johnson and Sharon Ferrari at Malden District Court. You both inspire me to continue to strive for excellence and to recognize the practice of law as a tool for improving the community. I hope to implement your lessons. In addition, I would like to thank Special Agent Victor Melendez of the Naval Criminal Investigative Service for his guidance and his ability to motivate me to see beyond boundaries and obstacles, whether apparent or real.

I cannot fail to mention my friends. To my best friend, Cristen, your abiding support and concern has sustained me through any distance and through the several years that I have had the privilege to know you. You are an extension of my family. To my friends in Lund: I am humbled to have studied and spent time with you all. As I am leaving Lund, I must recall the words of Kahlil Gibran, as "it is not a garment I cast off this day, but a skin that I tear with my own hands."[446] You have all become a part of me. I am particularly grateful to Alessandra for her constant encouragement, honesty, and insight.

I would like to thank the individuals that responded to my inquiries and devoted time to assisting me in my research, however unfavourable or complex the issue.

Finally, I would like to thank the well accomplished scholar, Dr. Nina-Louisa Arold for her support and guidance throughout my time in Lund. I am grateful for her mentorship throughout the writing process.

[446] Kahlil Gibran, "The Prophet," (Penguin Group, London: 1923).

Bibliography

Articles and Periodicals:

Ass'n of the Bar of the City of N.Y., Comm. On Fed. Courts, 'The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Secrity in the Context of the War on Terror" 143 (Feb. 6. 2004).

S. M. Barnash, 'What We Owe the World Are Thoughtful War-Crimes Trials that Do Justice Without Unduly Jeopardizing Innocent Lives by Compromising Vital Intelligence," *Saint Mary's Law Journal* 39 (2007): 231.

J. Boeving, 'The Right to Be Present Before Military Commissions and Federal Courts: Protection National Security in the Age of Classified Information," *Harvard Journal of Law and Public Policy* 30 (2007): 463.

E. Cerruti, "Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process," Kentucky Law Journal, Kentucky Law Journal 94 (2005-2006): 211.

M. Dennis, "Applying Human Rights Law and Humanitarian Law in the Extraterritorial War Against Terrorism: Too Little, Too Much, Or just Rights?: Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking all Around?" 2006 ILSA Journal of International & Comparative Law ILSA Journal of International & Comparative Law (Spring, 2006).

J. Dratel, "Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process," *Wayne Law Review* 53 (2007): 1041.

R. Flowers, "An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor," *Nebraska Law Review* 79 251 (2000): 251.

M. H. Freedman, "Our Constitutionalized Adversary System," *Chapman Law Review* 1 (1998): 57.

A. Guiora & J. Parry, "Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists," University of Pennsylvania Law Review 156 (2008): 356.

D. Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Rights,' *The International and Comparative Law Quarterly,* Vol. 16, No. 2 (Apr. 1967): 352—378.

M. A. Healy, 'Note: Compulsory Process and the War on Terror: A Proposed Framework,' *Minnesota Law Review* 90 (2006): 1821.

M. Hewett, "A More Reliable Right to Present a Defense: The Compulsory Process Clause After Crawford v. Washington," Note, *The Georgetown Law Journal* VOL 96, Issue 1 (2007): 273.

R. Iraola, "Compulsory Process, Separation of Powers, and the Prosecution of Zacarias Moussaoui," *University of Memphis Law Review* (2004): 15.

K. Kerr, 'Ex Parte Communications in a Time of Terror,' *The Georgetown Journal of Legal Ethics* 18 (2005): 551.

G. Knoops, "The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials," *Fordham International Law Journal* 28 (2005): 1566.

I. Langford, 'Fair Trial: History of an Idea,' *Journal of Human Rights,* 8: 1 37-52 <http://dx.doi.org/10.1080/14754830902765857>.

Major C. Maher, "The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information," *Military Law Review* 120 (Spring 1988): 83.

S. Negri, 'The Principle of Equality of Arms and the Evolving Law of International Criminal Procedure,' *International Criminal Law Review 5* (2005): 513—571.

S. Pilchen & B. Klubes, 'Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel." *American Criminal Law Review* 31 (1994): 191.

Hon. P. Robinson, 'The Right to A Fair Trial in International Law, *Berkeley Journal of International Law, Publicist,* Volume 3 (2009) <http://bjil.typepad.com/Robinson_macro.pdf>.

A. Shapiro & N. Seltzer, "Litigating Under the Classified Information Procedures Act," Criminal Law Bulletin 45, No. 6 (2009): ART 1, 3.

E. Schmid, 'The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights," *Gottingen Journal of International Law* 1 (2009): 29—44.

S. Schmidt & J. Dratel, 'Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the client in Terrorism Prosecutions,' *New York Law School Law Review* 48 (2003): 69.

S. J. Schulhofer, *Prosecuting Suspected Terrorists: The Role of the Civilian Courts, Advance: The Journal of the ACS Issue Groups* 63-64 (2008).

J. Sterling-Silver, "Equality of Arms and the Adversarial Process: A New Constitutional Right," Wisconsin Law Review (1990): 1007.

S. Taylor Jr., 'Reforming the State Secrets Privilege, National Journal 40, Issue 15, (03604217).

U.S. Dep't of Justice, Counterterrorism Section, 'Counterterrorism White Paper' 49 (2006), <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

E. C. Yaroshefsky, 'The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas,' *Cardozo Public Law, Policy & Ethics Journal* 5 (2006): 203.

E. C. Yaroshefsky, 'Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts,' *Hofstra Law Review* 34 (2006): 203.

Statutes and Congressional Reports

18 U.S.C. § 2331 (2000).

CIPA, Pub. L. No. 96-456, 94 Stat. 2025, 2025-31 (1980) (codified at 18 U.S.C. app. 3).

Exec. Order No. 13526, 75 Fed. Reg. 707, (Jan. 5, 2010).

Fed. R. Crim. P. 16(d)(1) (2010).

Fed. R. Crim. P. 43(c)(3) (2010).

H. R. Conf. Rep. 96-1436, 96TH Cong., 2ND Sess. (1980).

S. Rep. No. 823, 96TH Cong., 2ND Sess. (1980) 1980 U.S.C.C.A.N. 4294.

U.S. Const. amend. IV.

U.S. Const. amend. V.

U.S. Const. amend. VI.

U.S. Const. amend. XIV.

Books and Reports:

T. Buergenthal, "To Respect and to Ensure: State Obligations and Permissible
Derogations." In The International Bill of Rights: The Covenant on Civil and Political Rights, edited by Louis Henkin. New York: Columbia University Press, 1981.

Gilbert Law Summaries, *Pocket Size Law Dictionary*, (Harcourt Brace Legal and Professional Publications Inc., September 1998).

J. Henckaerts & L. Doswald-Beck, and International Committee of the Red Cross. Customary International Humanitarian Law. Volume I, Rules. Cambridge: Cambridge University Press, 2007.

J. Henckaerts & L. Doswald-Beck. Customary International Humanitarian Law. Vol. 2, Part 2 Practice.,. Cambridge: Cambridge University Press, 2003.

International Commission of Jurists, '*States of Emergency: Their Impact on Human Rights: A Study.'* Geneva, Switzerland: The Commission, 1983.

D. McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights. Oxford; New York: Clarendon; Oxford University Press, 1991.

J. Oraa, Human Rights in States of Emergency in International Law. Oxford (England); New York: Clarendon Press; Oxford University Press, 1992.

J. Locke, *Two Treatises of Government* (New York: Hafner Library of Classics, 1947 ed.).

Pictet, Jean, Frédéric Siordet, M. W. Mouton, Jean de Preux, Oscar M. Uhler, and International Committee of the Red Cross. The Geneva Conventions of 12 August 1949 : Commentary. Geneva: International Committee of the Red Cross, 1994.

Henry J. Steiner, et al, '*International Human Rights In Context: Law Politics Morals,'* 3rd Ed. (New York: Oxford University Press, 2007).

R. Zabel & J. Benjamin, 'In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts' (A White Paper), May 2008, Human Rights First.

R. Zabel & J. Benjamin, 'In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts' (A White Paper), 2009 Update and Recent Developments, Human Rights First, <http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf>.

Internet Periodicals, Manuals, and Reports :

American Bar Association Standing Committee on Law and National Security, Due Process and Terrorism Series, National Strategy Foundation, McCormick Foundation, 'Trying Terrorists in Article III Courts,' at 15, July 2009, <http://www.abanet.org/natsecurity/trying_terrorists_artIII_report_final.pdf >.

American Bar Association, ABA Model Code of Professional Responsibility, Ethical Consideration 7-7, p. 49 (1992) <http://www.abanet.org/cpr/mrpc/mcpr.pdf>.

P. Benson, 'Homegrown terrorist threat to be part of National Security Strategy,' CNN, May 27, 2010, <http://edition.cnn.com/2010/POLITICS/05/27/homegrown.terror>.

P. Carter, "Tainted by Torture: How Evidence Obtained Through Coercion is Undermining the Legal War on Terrorism," Slate Magazine, May 14, 2004, <http://www.slate.com/id/2100543>.

CNN.Com, Law Center, Partial Transcript, "Reid: I am at War With Your Country," January 31, 2003, <http://edition.cnn.com/2003/LAW/01/31/reid.transcript>.

CNN, Accused 9/11 Plotter Khalid Sheikh Mohammed Faces New York Trial, November 13, 2009, available at <http://edition.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html>.

L. M. Eig, 'Classified Information Procedures Act: An Overview, CRS Report for Congress,' March 2, 1989, <http://www.fas.org/sgp/crs/secrecy/89-172.pdf>.

J. Gerstein, 'New York Terrorist Trial Raises Stakes,' 11/13/09, *Politico*, available at <www.politico.com/news/stories/1109/29486.html>, last accessed 2 January 2010.

K. Greenberg (Ed.), "Prosecuting Terrorism: The Legal Challenge," NYU Review of Law And Security, a Publication of the Center on Law and Security at NYU School of Law, Issue No. 7/April 2006, <http://www.lawandsecurity.org/publications/no.7ProsecutingTerrorismtheLegalChallenge.pdf>.

D. Hakim & Eric Lichtbau, "After Convictions, the Undoing of a US Terror Prosecution," N.Y. Times, Oct. 6, 2004, at A3.

Harvard Law Review Association, 'Secret Evidence in the War on Terror,' *Harvard Law Review*, Vol. 118, No. 6 (Apr. 2005), pp. 1962-1984, <http:///www.jstor.org/stable/4093289>.

S. Malveaux, 'White House Considers Military Trial for Khalid Sheikh Mohammed,' CNN, March 5, 2010, <http://edition.cnn.com/2010/POLITICS/03/05/911.trial/index.html>.

MSNBC, 'Obama abandons term 'enemy combatant,' March 13, 2009, <http://www.msnbc.msn.com/id/29681819/>.

Hon. S. Scheindlin & M. Schwartz, "With All Due Deference: Judicial Responsibility in a Time of Crisis," 32 Hofstra Law Review 32 (2004) 795.
L. Seiler & D. Hamburg, Obama Renews Bush's 9/11 State of Emergency, October 16, 2009, <http://www.commondreams.org/view/2009/10/16-2>.

S. J. Schulhofer, 'Prosecuting Suspected Terrorists: The Role of Civilian Courts,' *The Journal of the ACS Issues Group*, 63—71, at 63, <www.acslaw.org/files/Prosecuting-Suspected-Terrorists.pdf>.

S. G. Stolberg, 'Obama Would Move Some Detainees to the U.S.,' 21 May 2009, *New York Times*, <www.nytimes.com/2009/05/22/us/politics/22obama.html?pagewanted=all>.

J. Taranto, Failure is not an Option: Obama and Holder's Assault on Due Process," November 20, 2009, <http://online.wsj.com/article/SB10001424052748704888404574547933018090304.html>.

S. Turner & S. Schulhofer, Brennan Ctr. For Justice at N.Y.U. Sch. Of L., 'The Secrecy Problems in Terrorism Trials' 18 (2005), <http://brennan.3cdn.net/6a0e5de414927df95e_lbm6iy66c.pdf>.

Terrorism (Confidential Information), International Law Update; Dec 2008, Vol. 14.

G. Morgan, 'Why Terrorism Continues,' <http://www.gwennethmorgan.com/terrorism.htm>.

Treaty and Treaty Body Resources

A/HRC/6/17/Add.3. "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Mr. Martin Scheinin) Mission to the United States of America." (2007).

American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

Concluding Observations of the Human Rights Committee: Israel. CPR/C/79/Add.93. 18 August 1998.

E/CN.4/Sub.2/1982/5. Questiaux Report, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency.

E/CN.4/1985/4, Annex (1985). United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights."

E/CN.4/Sub.2/1990/34. The Administration of Justice and the Human Rights of Detainees: The Right to a Fair Trial: Brief Report / Prepared by Stanislav Chernichenko and William Treat in Accordance with Resolution 1989/27 of the Sub-Commission, 1990.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1953).

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Entered into Force Mar. 23, 1976.

International Covenant on Civil and Political Rights, Declarations and Reservations of the United States of America, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec>.

Human Rights Committee, General Comment 13, Article 14 (Twenty-First Session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994).

Human Rights Committee. General Comment 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), Reprinted in Compilation of General Comments andGeneral Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc.
HRI/GEN/1/Rev.6 at 186 (2003).

UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32.

Universal Declaration of Human Rights, U.N. Doc A/810 (1948).

Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf 39/28, 1155 U.N.T.S. 331.

Court Pleadings, Documents, and Hearing Transcripts

United States v. Mohamed Sadeek Odeh, Mohamen Rashed Daoud Al-'Owhali, and Wadih El-Hage, Petition for Rehearing or Rehearing En Banc, January 7, 2009, 2009 WL 3480611.

United States v. Zacarias Moussaoui, Criminal No. 01-455-A, Defense Trial Exhibits, <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/defense/ZM005.pdf>.

United States v. Zacarias Moussaoui, Hearing, Criminal No. 01-455-A, June 13, 2002, Transcript of Motion Hearing, <http://www.washingtonpost.com/wp-srv/nation/transcripts/moussaoui061302.htm>.

United States v. Zacarias Moussaoui, Criminal No. 01-455-A, Trial Motion, July 1, 2002, Motion in Opposition to the Classification of the Case as Complex and for the Convening of Hearing to Determine How this Joint Motion Between Prosecution and Government Appointed Lawyer will in Effect Ensure My Conviction, Findlaw, <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html>.

United States v. Zacarias Moussaoui, Memorandum of Understanding Regarding Receipt of Classified Information, Crim. No. 01-455-A, available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/moussaoui/usmouss060302mou.pdf>.

Manuals and Lectures:

R. Reagan, "Keeping Government Secrets: A Pocket Guide for Judges on the States-Secrets Privilege, the Classified Information Procedures Act, and Court Security Offers," Federal Judicial Center 2007.

W. Snyder, Lecture, "Prosecuting Terrorists in Article III Courts," Syracuse University College of Law, Lesson 21, Fall 2009.

US Attorney, USAM, Title 9, Criminal Resource Manual 2054, Synopsis of the Classified Information Procedures Act, <http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm>.

Miscellaneous:

L. Carroll, 'Alice's Adventures in Wonderland,' (Penguin Ltd, United Kingdom 1994).

T. Jefferson, ‘First Inaugural Address,’ Marcy 4, 1801, Washington, D.C., <http://www.bartleby.com/124/pres16.html>.

D. Linder, ‘The Treason Trial of Aaron Burr,’ 2001, <http://www.law.umkc.edu/faculty/projects/ftrials/burr/burrtrial.html>.

The Merchant of Venice, by William Shakespeare, from *Tales from Shakespeare* (Ed. Charles and Mary Lamb), (J.M. Dent & Co. 1909, London).

Czeslaw Milosz, “A Poem for the End of a Century,” Internet Poetry Archive, <http://www.ibiblio.org/ipa/poems/milosz/a_poem_for_the_end_of_the_century.php>.

Table of Cases

National Cases

22. *Rovario v. United States*, 353 U.S. 53, (1957).

23. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

24. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

25. *State v. Crittenden*, 38 La. Ann. 448 (1886).

26. *State v. Elstad*, 61 Ore. App. 673, 677, 658 P.2d, at 554 (Or. App. 1983).

27. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988).

28. *Totten v. United States*, 92 U.S. 105 (1875).

29. *United States v. Odeh*, No. 01-1535-cr (L) (2d Cir. November 24, 2008).

30. *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).

31. *United States v. Abdi*, 498 F. Supp. 2d 1048 (S.D. Ohio 2007).

32. *U.S. v. Al-Marri*, Not Reported in F. Supp. 2d, 2009 WL 2949495.

33. *United States v. Aref*, 533 F.3d 72, (2d Cir. 2008).

34. *United States v. Bagley*, 473 U.S. 667 (1985).

35. *United States v. Baptista-Rodriguez*, 17 F.3d 1354 (11th Cir. 1994).

36. *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972).

37. *United States v. Bowling*, 239 F.3d 973 (8th Cir. 2001).

38. *United States v. Collins*, 720 F.2d 1195 (11th Cir.1983).

39. *United States v. Coplon*, 185 F.2d 629 (C.A.2 1951).

40. *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001).

41. *United States v. Cronic*, 466 U.S. 684 (1984).

42. *United States v. el-Hage*, No. 1:98-cr-01023-KTD (S.D.N.Y. Sept. 21, 1998) (the "Embassy Bombings" case).

43. *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990).

44. *United States v. Holy Land Found. For Relief and Dev.*, No. 04-cr-00240, 2007 WL 628059 (N.D. Tex. Feb. 27, 2007).

45. *United States v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich. 2004).

46. *United State v. Lopez-Lima,* 738 F. Supp. 1404 (S.D. Fla. 1990).

47. *United States v. Mejia,* 448 F.3d 436 (D.C.Cir.2006).

48. *United States v. Moussaoui,* 382 F.3d 453 (4th Cir. 2004).

49. *United States v. Moussaoui,* No. CR. 01-455-A, 2003 WL 21263699, (E.D. Va. Mar. 10, 2003).

50. *United States v. Moussaoui,* No. 06-4494, 2010 WL 9953, (4th Cir. Jan. 10, 2010).

51. *Unite States v. Moussaoui,* 591 F.3d 263 (4th Cir. 2010).

52. *United States v. North,* 698 F. Supp. 323 (D.D.C. 1988).

53. *United States v. Osama bin Laden,* 58 F. Supp. 2d 113 (S.D.N.Y. Jun. 30, 1999).

54. *United States v. Pringle,* 751 F.2d 419, (1st Cir. 1984).

55. *United States v. Reynolds,* 345 U.S. 1, 7 (1953).

56. *United States v. Rezaq,* 134 F.3d 1121 (D.C. Cir. 1998).

57. *United States v. Ricardo Valenzuela-Bernal,* 458 U.S. 858 (1982).

58. *United States v. Rosen,* No. 05-cr-00225, 2007 WL 3243919, (E.D. Va. Nov. 1, 2007).

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

60. *United States v. Strickland,* 466 U.S. 668 (1984).

61. *United States v. Tucker,* 249 F.R.D. 58 (S.D.N.Y. 2008).

62. *United States v. Klimavisius-Viloria,* 144 F.3d 1249, (9th Cir. 1998).

63. *United States v. Wilson,* 750 F.2d 7 (2d Cir. 1984).

64. *United States v. Yunis,* 867 F.2d 617, (D.C. Cir. 1989).

65. *Washington v. Texas,* 388 U.S. 14 (1967).

International Cases:

1. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America). Vol. 1986 I.C.J. 14,

General List No. 70, International Court of Justice, Judgment of 27 June 1986.

1. Legality of the Threat Or use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226.

2. Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, 15 July 1999.

3. *Sholam Weiss v. Austria*, CCPR/C/77/D/1086/2002, UN Human Rights Committee (HRC), 8 May 2003.

4. *Perterer v. Austria*, Communication No. 1015/2001, CCPR/C/81/D/1015/2001, UN Human Rights Committee (HRC), 20 August 2004.

5. Polay Campos v. Peru, Communication No. 577/1994, CCPR/C/61/D/577/1994, UN Human Rights Committee (HRC), 6 November 1997.