

**THE SECRECY PROBLEM
IN TERRORISM TRIALS**

SERRIN TURNER & STEPHEN J. SCHULHOFER

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& NATIONAL SECURITY
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We are on strange ground.... But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If...we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their own judging and in their new creation.

Justice Wiley B. Rutledge
dissenting opinion
In re Yamashita, 327 U.S. 1, 43 (1946)

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not only to the protection
of civil liberties, but also
to developing effective and
sustainable strategies
for fighting terrorism.

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ABOUT THIS REPORT

In addition to written sources, this Report draws from over twenty detailed interviews with a range of individuals possessing extensive first-hand experience in terrorism investigations and prosecutions. Those interviewed include lead prosecutors and defense counsel involved in the four most significant terrorism cases of the 1990s: the 1993 World Trade Center bombing trial; the trial of Sheikh Omar Abdel Rahman and others for the so-called “Day of Terror” plot, involving a failed scheme to blow up various New York City landmarks on a single day; the trial of Ramzi Yousef for the “Bojinka” plot, a failed Al Qaida plan to blow up a dozen airliners crossing the Pacific over a twenty-four-hour period; and the trial of four Al Qaida members for the 1998 bombings of the U.S. embassies in Kenya and Tanzania. Current and former officials from the Department of Justice, Federal Bureau of Investigation, and Central Intelligence Agency were also consulted. Some of the individuals interviewed did not wish to be quoted by name; they are cited but not identified individually in the text and endnotes.

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INTRODUCTION

More than three years since the attacks of September 11th, the legal landscape of the nation's fight against terrorism remains unsettled. Remarkably, one question still unanswered is where and how captured terrorism suspects should be brought to trial.

The government presently lacks any clear or consistent policy. Shortly after the September 11th attacks, the President announced the creation of special new "military commissions" to be available to try "certain non-citizens" suspected of terrorism. The establishment of the new commissions was and continues to be contentious, yet to date they have not seen much use. The rollout of the commissions was bogged down for more than two years while the Department of Defense hammered out their rules and procedures behind closed doors. Four suspects held in Guantanamo – all non-U.S. citizens captured abroad – were eventually charged and have been brought before the commissions in initial, pre-trial sessions.¹ But all commission proceedings have since been halted pending the outcome of litigation in the federal courts, after a district court found that the commissions' rules violated military and international law.²

Meanwhile, the government has prosecuted dozens of terrorism cases in the federal courts, although none of the defendants has been a high-ranking Al Qaida planner.³ These federal prosecutions have encompassed both U.S. citizens, such as the Lackawanna Six,⁴ and non-U.S. citizens, such as "shoe-bomber" Richard Reid. The prosecutions in our federal courts likewise have encompassed both suspects arrested within U.S. borders as well as suspects captured abroad – even on a battlefield, as with John Walker Lindh.

Three cases have wobbled controversially between military and civilian categorization. Jose Padilla, a U.S. citizen arrested in May 2002 at Chicago's O'Hare International Airport on suspicion that he intended to launch a "dirty bomb" attack, was initially held within the federal criminal system as a material witness. But within a short time, the Administration changed course and labeled him an "enemy combatant"; Padilla has been held in military custody for nearly three years since. It is unclear whether the Administration will ever charge Padilla with a crime, and if so whether it will prosecute in a federal court or a military commission. (The President's executive order authorizing military commissions currently applies only to non-citizens, but the stroke of a pen could remove this limitation.)

Ali Saleh Kahlah al-Marri, a citizen of Qatar lawfully admitted to the United States to study in Peoria, Illinois, was arrested in 2002 and held for trial on charges of lying to the FBI. But on June 23, 2003, as the trial date approached, he too was declared an "enemy combatant" and transferred to a Navy brig in South Carolina. Relying on undisclosed sources, the President determined that al-Marri associated with Al Qaida and therefore should be held incommunicado indefinitely. He too remains in custody.

The third case in this grey area is that of Zacarias Moussaoui, a French national arrested within the United States shortly before September 11th, often described in the press as the missing “20th hijacker” in the September 11th attacks. The Administration initially chose to prosecute Moussaoui in the federal courts. However, because Moussaoui sought access to Al Qaida members held in secret U.S. detention facilities to provide testimony in his case, many argued that the case would prove impracticable to try in the federal courts. Some, even the editorial page of the *Washington Post*, suggested moving the case to a military forum instead.⁵ But so far, the problems surrounding Moussaoui’s request for access to the classified detainees have been ironed out in the federal courts. At this writing, Moussaoui has pled guilty and a death penalty trial is scheduled for early 2006.

Do we need a special forum – such as the Administration’s new military commissions – for trying terrorism suspects, or are our existing courts up to the task? The question still has not received the careful, democratic deliberation that it deserves. Congress has not yet stepped into the debate. Instead, the President established the military commissions unilaterally, and the Department of Defense unilaterally developed their procedures. Congress continues to sit on the sidelines as legal challenges to the military commission system unfold in the courts.

This Report aims to advance this debate – and, along the way, to identify areas in need of Congressional action – by exploring the central question at stake: how should we reconcile the competing demands of secrecy, fairness, and accurate decision-making in terrorism trials?

Thus far, the debate has oscillated between two poles. The chief objection to prosecuting accused terrorists in federal court has been that the defendant’s rights in that forum – to confront the evidence against him, to obtain evidence in his favor, and to be tried in a public proceeding – jeopardize secret information vital to counterterrorism efforts. The chief objection to the new military commissions, in turn, has been that secret and un-rebutted evidence will play a major part in the process, unfairly depriving the defendant of the means to defend himself and opening the door to error and executive abuse.

Both sides raise legitimate concerns. Protecting classified information in a terrorism prosecution is a serious challenge. Prosecution can hinge on evidence gathered through sensitive intelligence mechanisms, such as classified informants, signal intelligence, and delicate cooperation with the military and intelligence services of other countries. Fifteen U.S. intelligence agencies in the civilian and military establishments, besides the FBI and state and local police, may be involved in building a criminal case. Such agencies have good cause for keeping operations and intelligence-gathering strategies secret. Complicating matters further, the sheer scale of possible harm from a terrorist act means that waiting for such acts to be completed, or even to approach completion, is not an option. Prosecutors therefore must work with less evidence than in a run-of-the-mill criminal case.

Introducing secrecy into trials for terrorism suspects, on the other hand, raises rightful concerns about governmental overreaching. Even where government interests in preserving confidentiality are well-grounded, keeping evidence secret from the defendant can prevent him from responding effectively to the government's charges. Shutting the press out of the proceedings can hinder efforts to keep the public informed and the government accountable. Moreover, we know that over-classification is a constant pitfall and that executive branch officials tend to exaggerate the need to keep information secret. Indeed, 9/11 Commission Chairman Thomas Kean observed that roughly three-quarters of the classified material he reviewed during the Commission's investigation should not have been classified in the first place.⁶

These are not partisan concerns; they do not depend on which party controls the White House. The executive has been given considerable powers to combat terrorism and, quite properly, is under intense pressure to capture and incapacitate those involved in terrorist activities. As the Framers well understood, systemic checks are essential under such circumstances to keep the executive honest. In Justice David Souter's recent formulation:

[D]eciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.⁷

To bring sharper focus to the concerns on both sides of the issue, it helps to examine specific examples. The following situations illustrate the potential for tension between secrecy and accountability in the context of criminal adjudication.

■ THE WELL-PLACED INFORMANT

In late 1991, in the wake of the assassination of Jewish extremist leader Rabbi Meir Kahane in New York City by a man named El Sayyid Nosair, the FBI recruited Emad Salem to penetrate a circle of Nosair's supporters. Salem succeeded in doing so, posing as an Egyptian explosives expert. He informed the FBI that Nosair was organizing a terrorist campaign from his prison cell. The FBI wanted Salem to monitor the plot and eventually testify against Nosair and his confederates. But Salem refused to wear a surveillance wire, out of fear that the Nosair supporters would discover his betrayal. The FBI, unsure of Salem's trustworthiness, broke off contact. Subsequently, the first World Trade Center bombing occurred in February 1993; the network penetrated by Salem was behind it. Afterward, Salem complained that, if he had been permitted to remain undercover, Nosair and his cohorts would have chosen him as their explosives expert,

and he could have prevented the first World Trade Center attack. He was also contrite about his refusal to wear a wire, however, and offered to resume his assistance. He eventually uncovered a second plot by the same network – the so-called “Day of Terror” plot – involving a plan to simultaneously blow up various New York City landmarks, including the Lincoln and Holland Tunnels, the George Washington Bridge, the United Nations, and the New York FBI office in lower Manhattan. With Salem’s assistance, the plot was averted. After entering a witness protection program, Salem later testified against the conspirators at trial.⁸

There were a number of reasons for the parting between Salem and the FBI prior to the first World Trade Center bombing. But perhaps if the FBI had been confident of introducing Salem’s evidence at trial without the wiretap evidence or his in-person testimony, intervention before the attack would have been more likely. The example illustrates a broader dilemma concerning intelligence sources: how can their evidence be used in court without destroying their future intelligence-gathering value? This problem is not limited to human informants. Evidence gathered through an ongoing wiretap or signal intelligence stream can pose similar difficulties. The central challenge in using any intelligence as evidence is finding a way to do so without burning extant intelligence assets.

■ ■ THE RECALCITRANT ALLY

Many terrorism investigations are international in scope, meaning that much of the evidence may be collected by foreign law enforcement, intelligence, or military officials. Yet foreign countries may be willing to share that evidence only for intelligence-gathering purposes, not for a criminal prosecution. Former prosecutor Gil Childers, lead prosecutor in the first World Trade Center bombing case, provides a hypothetical example: Suppose that a foreign intelligence service captures and interrogates a terrorism suspect, and it succeeds in eliciting a valuable confession. Under U.S. case law, if U.S. officials were not involved in an interrogation, any confession yielded by the interrogation is admissible into evidence unless it was elicited through coercive means or in a manner that “shocks the conscience.”⁹ But suppose the suspect is prosecuted in federal court and alleges that his interrogation was abusive. The resulting suppression hearing will entail a sensitive factfinding inquiry into the interrogation conditions. “Are you going to be able to get the foreign interrogator to come testify about the defendant’s interrogation?” Childers asks. The foreign country may be unwilling to make the interrogator available to testify for fear of disclosing his identity in open court. It may even resist disclosing the fact that it has cooperated with the United States, fearing internal political backlash. “There might have been a perfectly good statement taken, but the foreign government may have valid reasons not to want to send someone to testify about it.”¹⁰

U.S. courts have no subpoena power over foreign witnesses, so their production for trial depends upon the cooperation of the foreign country. “[T]he foreign governments we’re talking about,” Childers added, “are generally unsympathetic to

our evidentiary problems. [A government] will say: ‘We handed you this guy. If you can’t use the evidence we gave you in your system, that’s your problem.’”¹¹

■ THE TAINTED WITNESS

While the previous examples illustrate that the government can have legitimate interests in secrecy, it is equally easy to find examples of the tendency for secrecy to yield inaccurate and unjust results. The Immigration and Naturalization Service (“INS”) has in the past relied on secret evidence to place resident aliens in detention pending deportation proceedings or to deny certain relief from deportation, such as asylum. Professor David Cole of Georgetown Law School has documented a number of cases in which the use of secret evidence has led to erroneous outcomes.

In one 1998 case, the INS arrested a 30-year-old Palestinian named Hany Kiardeen, asserted that he was deportable for failing to maintain his student visa status, and detained him as a threat to “national security.” The INS refused to show Kiardeen its evidence that he was a national security threat, however, claiming that it was too sensitive to be disclosed to him or to his lawyer. The agency revealed only that it had received allegations that Kiardeen was associated with unnamed terrorists and had made threats concerning the Attorney General. Ultimately, the INS disclosed additional information, from which Kiardeen correctly deduced that his ex-wife was one of the sources of the secret evidence against him. He then showed that his ex-wife had made numerous false reports to the police about him during a past child custody battle. Based on this and other evidence put forward by Kiardeen, the INS judge assigned to the case reversed his original determination that Kiardeen was a national security threat and ordered him released. By that time, Kiardeen had spent nineteen months in detention based on his ex-wife’s secret allegations.¹²

This example from the immigration context illustrates a point equally applicable to criminal prosecutions: Secret evidence can originate from flawed sources or simply be false – as a defendant may readily be able to show if only the evidence is revealed to him.

■ THE EVIDENCE FROM DIEGO GARCIA

To defend its detention of Jose Padilla as an “enemy combatant,” the government has relied on a brief affidavit signed by a policy official at the Department of Defense – the so-called “Mobbs Affidavit.”¹³ In identifying the sources of its allegations that Padilla had been planning to detonate a “dirty bomb” inside the United States, the Mobbs Affidavit cites “interviews with several confidential sources, two of whom were detained at locations outside of the United States.” Yet the affidavit hides as much as it discloses about the conditions under which the two detained confidential sources were interrogated. It vaguely admits that “these confidential sources have not been completely candid about their

association with Al Qaida and their terrorist activities,” further cautioning that “[s]ome information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials.” It adds, cryptically, that “at the time of being interviewed by U.S. officials, one of the sources was being treated with various types of drugs to treat medical conditions.”¹⁴ While the affidavit does not acknowledge it, one of these two sources clearly is Abu Zubaydah, believed to be detained in secret detention facilities, perhaps on the island of Diego Garcia in the Indian Ocean.¹⁵ According to media accounts, one of the interrogation techniques used on Zubaydah – who had been shot three times in a gun battle during his capture in Pakistan – was to withhold pain medication in order to induce him to talk. As described in one report, “For nearly forty-eight hours, around the clock, Zubaydah’s condition went from complete relief when the [narcotic] drip was on to utter agony when it was off.”¹⁶

The Mobbs Affidavit illustrates a kind of secret evidence to be most feared: information elicited through unknown interrogation tactics and reported through the sanitized form of a government affidavit. Information presented in this one-sided fashion can easily be exaggerated or reshaped to bolster a weak case or even to suit political ends. Indeed, upon Padilla’s transfer to military custody, the Attorney General dramatically announced that “we have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive ‘dirty bomb’” – an allegation that garnered much media attention.¹⁷ This allegation, however, has since withered. The idea of a “dirty bomb” plot, the Department of Justice now states, never developed beyond the initial discussion stage.¹⁸ To be sure, the allegations against Padilla remain serious, but their shifting nature illustrates a larger point: when the government is the only arbiter of the evidence, it is difficult to know precisely where the truth lies.



The tension between secrecy and accountability is unavoidable in the context of terrorism trials. The government inevitably has secrecy concerns related to intelligence activities – both its own intelligence activities and those of other countries. Some secrets cannot be disclosed, or at least not without a cost, as the examples of the well-placed informant and the recalcitrant ally suggest. Yet the same assertions of government secrecy can cloak malfeasance, lies, and even possible torture, as in the examples of the tainted witness and the evidence from Diego Garcia. By stripping the defendant of the ability to probe weaknesses in the government’s evidence, secrecy threatens to turn a criminal trial into an empty ritual drained of the adversarial features that are its very reason for being.

These competing concerns have yielded a standoff in public debate. The Administration and its supporters argue that protecting secrets is imperative, and that this need can only be met by creating a wholly new trial forum to which the President can refer problematic cases. On the other side, opponents of the new military commission system argue that its rules, particularly those dealing with

secrecy, are unfair, but they often do not explain how legitimate secrecy concerns can be adequately addressed in another fashion.

This Report seeks to push debate beyond this impasse. It presents a comprehensive assessment of the comparative procedural attributes of federal courts, courts-martial, and the new military commissions, with special attention to how each deals with problems of secrecy. The analysis makes five points clear:

- **Proponents of military commissions often dramatically overstate the difficulty of prosecuting terrorism suspects in federal court.** Within our judicial system, a variety of mechanisms mitigate the tensions between secrecy and accountability. Particularly if Congress steps in to fine-tune existing procedures, the federal courts will be well-equipped to carry out the overwhelming majority of terrorism prosecutions, perhaps even all of them, without significant loss of national security secrets. Far from being frequent and foreseeable, the terrorism case that cannot be prosecuted without exposing sensitive intelligence is and likely will continue to be exceedingly rare. If and when such a case arises, moreover, the government need not resort to novel military commissions to prevent the dangerous terrorist from escaping. It can accomplish that goal by deploying the many workable safety nets that the court system already makes available to meet legitimate law enforcement needs without blocking judicial oversight – such measures as lesser charges and pre-trial continuances.
- In cases involving foreign nationals captured abroad, logistical considerations may justify the use of courts-martial as a trial forum. But in such circumstances, **court-martial procedures need not and should not deviate significantly from those of the federal courts.** For over half a century, court-martial procedures have mirrored those of the federal courts – the result of a sustained effort to improve the fairness and reputation of the military justice system and to place it under civilian oversight. This healthy trend should surely continue. Courts-martial thus do not need specially designed procedures to prevent damage to national security. Where reasons unrelated to secrecy call for the use of courts-martial, they are capable of managing secrecy problems successfully in parallel fashion to the federal courts.
- **The new military commission system is untenable and should be abandoned.** Though created specifically to protect classified evidence, it is not a carefully drawn means of achieving this objective. Instead, commissions are vested with open-ended discretion to keep evidence secret from the defendant and the public. The result is a system where secrecy is uncabined by appropriate safeguards. The commission rules are so quick to accommodate any possible secrecy concern that they override in altogether unnecessary ways the defendant's interest in obtaining a fair trial and the public's interest in obtaining accurate decisions in an effective adversarial proceeding.

- While the commission system cannot be defended in its present form, a new system of some sort could conceivably be designed. That possibility, however interesting in theory, is in practical terms not a promising option. **Creating acceptable tribunals outside the existing judicial and court-martial systems would be costly, time-consuming, and unlikely to provide significantly better protection for our secrets.** The effort would be difficult, troublesome to our allies, and suspect in the eyes of world opinion. Yet nearly all the tools that new tribunals might use to protect classified information are already available in federal courts and courts-martial or could readily be developed for use *within* those systems. Virtually all significant secrecy protections unavailable in these existing systems are precluded precisely because they are unacceptably damaging to the effective adversarial process that any credible tribunal must preserve.

- New legislation, though not essential, could help federal courts and courts-martial adapt to the distinctive challenges of terrorism trials. **Congress should provide detailed statutory guidance in at least three areas.** Specifically, legislative frameworks should: (1) clarify the standards and procedures for determining when the defendant can be excluded from full personal participation in the discovery process; (2) provide rules for determining when the general public can be excluded from discrete, especially sensitive portions of the trial; and (3) take steps to ensure that defense counsel can obtain sufficient security clearance to serve in terrorism cases, by clarifying the process for approving clearances for counsel and creating within the federal defender service a permanent corps of pre-cleared counsel available for appointment where needed.

PART I: THE FEDERAL COURTS

■ THE STATE OF THE DEBATE

The debate over whether the need to protect classified information justifies the establishment of military commissions in the war on terrorism has been highly polarized. With both sides often talking past one another, the debate has also tended to be superficial.

Proponents of military commissions often portray the federal criminal courts as defenseless or careless when it comes to protecting classified information. Some even claim that prior terrorism prosecutions in federal court resulted in disclosures of classified information that aided Al Qaida in the lead-up to the September 11th attacks. A widely cited opinion piece by Charles Krauthammer, for example, decries “our disastrous experience with open trials” for terrorism suspects in the past, contending that such trials

inevitably have to compromise myriad sources to document [the defendant’s] links to various terror attacks. Bin Laden used to communicate by satellite telephone. In the New York City trial of the bombers of the U.S. embassies in Africa, a January 2000 release of documents revealed that these communications had been intercepted by U.S. intelligence. As soon as that testimony was published, Osama stopped using the satellite system and went silent. We lost him. Until Sept. 11.¹

But the Krauthammer story is a myth. Prosecutors and defense counsel responsible for trying the embassy bombings case agree that the case did not result in disclosure of any sensitive intelligence information.² Indeed, before September 11th, the government won a number of significant terrorism convictions in federal court; yet no credible claim has been made that any of these cases resulted in the disclosure of sensitive intelligence secrets.³ It is true that bin Laden learned of the government’s ability to monitor his satellite phone calls prior to September 11th – but not through the embassy bombings prosecution. The U.S. government’s ability to monitor bin Laden’s satellite phone calls had been widely reported in the press years earlier,⁴ and bin Laden had stopped using that mode of communication long since.⁵

More broadly, misstatements like Krauthammer’s ignore the federal courts’ considerable experience with cases involving classified or similarly sensitive information. That experience has led to the development of tools – most significantly, the Classified Information Procedures Act⁶ – designed to address secrecy concerns. This is not surprising, since the need to protect sensitive evidence is hardly unique to terrorism cases. Espionage indictments, organized crime prosecutions, and drug cases all can raise similar issues. Under the Classified Information Procedures Act, the government has many alternatives to full disclosure of classified information. And the government also retains ultimate authority not to disclose classified information if it believes the national security

costs outweigh the prosecutorial gains. Under the Act's procedures, there is simply no way that prosecutors would reveal information about the government's ability to intercept bin Laden's communications absent a deliberate decision by responsible officials that the information could be prudently disclosed.⁷

On the other hand, while proponents of military commissions tend to ignore the tools that federal courts have at their disposal for dealing with secrecy concerns, opponents of military commissions perhaps too readily assume that those tools are fine just as they are. The Classified Information Procedures Act, in particular, is often touted as a fully satisfactory solution to the problem. The implicit suggestion is that post-9/11 terrorism cases do not pose any secrecy problems that we have not seen before. Yet the efficacy of past practices cannot simply be assumed. Indeed, it seems likely that global terrorism will raise novel problems that we have not addressed in the past. A fresh examination of the threats we face, and the tools available to fight them, is called for.

Part I of this Report provides a review and assessment of the means of protecting classified information in the federal courts. It demonstrates that the federal courts have effective tools for protecting classified evidence without compromising civil liberties or weakening the adversary system. While federal courts may not yet have *all* the answers, they already have many. And working in conjunction with Congress, they are well positioned to forge new ones. Federal judges have decades of relevant experience and case law to draw from. Their institutional insulation from the executive branch helps ensure that the interests of the prosecution, the defense, and the public will all be given due weight. And, most important, the courts have a proven capacity to evolve over time, adapting their procedures to meet new problems as they arise on a case-by-case basis.

To be sure, the flexibility of the federal courts is by no means unbounded. Nor should it be. While the executive has legitimate needs for secrecy in combating terrorism, recent events have not changed the inherent dangers of allowing secrecy to go unchecked. The very point of having a trial is that governmental accusations of wrongdoing cannot be taken on faith. We require them to be thoroughly tested by a neutral fact-finder before the accused may be subjected to criminal punishment. Secrecy inherently undermines this process. The federal courts have no magic capacity to conduct a secretive, one-sided proceeding that can simultaneously qualify as a fair adversarial trial. What the federal courts do have, however, are independent judges capable of effectively *accommodating* the need for secrecy while respecting the basic procedural safeguards we have long considered essential to a trustworthy system of justice.

■ BASIC RIGHTS, BASIC CONFLICTS

The limitations on secrecy in a federal criminal proceeding stem directly from the Constitution itself, principally the provisions of the Fifth and Sixth Amendments. The drafters of the Constitution recognized the potential for executive abuse of

the criminal process. Hence, they incorporated a number of basic rights designed to protect the integrity of criminal proceedings, by ensuring that they are robustly adversarial, transparent, and free from executive control. While these rights attach to the defendant, they have an important public value. Without them, the government would not be forced to test its case, and little would protect the innocent and the guilty alike from conviction. With no assurance of accuracy, the judgments of our courts and the actions of our executive officials would command little public respect.

The most salient of the rights guaranteed by the Constitution include:

- the defendant's right to confront the evidence and to cross-examine the witnesses against him;
- the defendant's right to obtain any material evidence in the government's possession pointing to his innocence;
- the defendant's right to summon witnesses to testify in his favor;
- the right to a public trial;
- the right to a jury trial;
- the requirement that guilt be proven beyond a reasonable doubt;
- the right to an independent, unbiased presiding judge; and
- the right to obtain private counsel, or, if private counsel cannot be afforded, the right to counsel at government expense.⁸

These rights set the basic parameters for what evidence must be disclosed to the defendant, his counsel, the jury, and the public in a federal criminal proceeding. Each right has the potential to collide with the government's interests in keeping sensitive evidence secret. The rights are largely familiar, but a review is a good place to start a comprehensive discussion of the secrecy problem.

■ ■ THE DEFENDANT'S RIGHT TO CONFRONT THE EVIDENCE AND WITNESSES AGAINST HIM

The Framers recognized that fairness and accountability abhor one-sided proceedings. Thus, the Confrontation Clause of the Sixth Amendment secures the right of a criminal defendant to confront the evidence and cross-examine the witnesses marshaled against him. It was the Framers' genius to fashion in a single clause the blueprint for the whole structure of the criminal trial. The confrontation right is the core of a fair adversarial trial, as it ensures that the government's formidable power to amass and present evidence against the

accused is checked at every point by the opportunity of the accused to provide an effective rebuttal.

Elaborating in practical terms the Confrontation Clause's teachings, the Supreme Court has delineated several distinct rights protected by the provision. One of its most basic implications is that no evidence that the prosecution chooses to introduce can be kept secret from the defendant. Indeed, the very starting point of the adversarial process is to inform the defendant of the government's evidence against him; for the defendant cannot meaningfully dispute that evidence without knowing what it is. As the Supreme Court has explained, the principle that "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue" has "remained relatively immutable in our jurisprudence."⁹

A second aspect of the defendant's right to confrontation is his right to be personally present at trial during the presentation of evidence in the case. Personal presence is not a mere formality, but a keystone of fair adjudication "vital to the proper conduct of [a] defense."¹⁰ Without being able to observe the government's witnesses and to view its evidence, the defendant will be hampered in his ability to direct a responsive defense. The defendant often is the most important repository of information needed by defense counsel in order to probe the government's case effectively. Removing the defendant from the proceedings prevents counsel from consulting with his client as the government's case unfolds and deciding how best to respond. Thus, with only slight exaggeration, the Supreme Court has described the right to personal presence as "scarcely less important to the accused than the right of trial itself."¹¹

Third, the Confrontation Clause guarantees the right to an effective cross-examination of the prosecution's witnesses by sharply limiting the government's ability to introduce hearsay – that is, statements made by an absent witness outside of court. While often misconceived as a legal technicality, the rule against hearsay has long been a crucial guarantor of the defendant's right to effective cross-examination; for statements made by a witness outside of court cannot be tested by contemporaneously cross-examining the witness. Indeed, as the Supreme Court has explained, the "principal evil at which the Confrontation Clause was directed" was the use of "*ex parte* affidavits": *i.e.*, written reports of accusations made by a witness outside of court during an examination or interrogation by a government official.¹²

Such written statements are especially problematic: not only can't they be challenged through cross-examination, but they also may be the product of improper governmental influence. Through leading questions or pressure tactics, government interrogators, bent on securing a conviction, can induce testimony implicating the defendant in a crime. Moreover, if allowed to summarize the witness's testimony in writing, the government can use its control over the drafting process to further shade and shape the witness's testimony.

The upshot is that certain types of hearsay – *e.g.*, witness statements given to the police, or statements made to intelligence officials by captured terrorism suspects (as reported in the Mobbs Affidavit) – cannot be used at trial. Instead, the government must produce its witnesses in court and permit them to be cross-examined by counsel for the accused. On the other hand, the Supreme Court has held that out-of-court statements that are “non-testimonial” – such as business records, or statements made by the defendant’s alleged co-conspirators in the course of the conspiracy – may be admitted in criminal cases when they appear to be trustworthy.¹³

■ THE DEFENDANT’S RIGHT TO DISCOVER EVIDENCE IN HIS FAVOR

In the landmark 1963 case of *Brady v. Maryland*, the Supreme Court concluded that an essential component of due process guaranteed by the Fifth Amendment is the right to obtain exculpatory evidence in the government’s possession. Even without explicit language in the constitutional text, the Court concluded, fundamental fairness bars the government from convicting a defendant while at the same time withholding evidence of his innocence.¹⁴ Hence, during the “discovery” period that occurs in a criminal case prior to trial, the government is obliged to disclose all material evidence tending to exculpate the defendant. Evidence casting doubt on the quality of the government’s forensic evidence, for example, or evidence tending to undermine the credibility of a government witness, must be handed over.¹⁵

On top of the disclosure obligations constitutionally required under *Brady*, there are supplemental discovery obligations contained in the Federal Rules of Criminal Procedure, which regulate criminal procedure in all federal cases.¹⁶ These rules require the government to disclose certain evidence upon the defendant’s request, including any relevant records of the defendant’s own statements, and any documents or other tangible objects that are material to the case.¹⁷ These discovery obligations reflect a recognition that the government’s resources – already exercised in the investigation of the case – are far more extensive than those of the defendant. Allowing the defendant access to the government’s files helps to minimize surprises at trial, and otherwise serves to guarantee an effective adversarial challenge and accurate results.¹⁸

■ THE DEFENDANT’S RIGHT TO SUMMON FAVORABLE WITNESSES

Under the Compulsory Process Clause of the Sixth Amendment, an accused has the right to use the powers of the government to compel the attendance of witnesses to testify in his favor. A defendant is entitled to have a witness produced at trial for questioning if he can show that the witness can offer testimony material to his defense, and that it is within the government’s power to produce the witness through serving an appropriate subpoena. The government’s subpoena power reaches anyone within U.S. jurisdiction as well as anyone in the U.S. government’s custody.

■ THE RIGHT TO A PUBLIC TRIAL

Transparent trial proceedings are critical to maintaining accountability and legitimacy in criminal trials. Both the defendant and the general public have a vital interest in preserving transparency. Reflecting its dual rationale, the right to a public trial finds two homes in the Constitution. The Sixth Amendment expressly guarantees the criminal defendant a public trial. Further, in light of the First Amendment's goal of facilitating public scrutiny of governmental affairs, the Supreme Court has read the First Amendment to grant the public itself an independent right of access to trial proceedings. As the Supreme Court has stated:

Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.¹⁹

The Sixth Amendment and First Amendment rights to a public trial give rise to a robust presumption in favor of keeping criminal proceedings fully open to the public. The Supreme Court has made clear, however, that in the face of an extraordinary governmental interest – such as a strong need to protect the privacy of a particular witness – the public's presumptive right of access (though not the defendant's confrontation right) may be restricted.²⁰ But such restrictions on public access may be no broader than necessary to protect that interest.²¹

■ THE RIGHT TO A JURY TRIAL

The defendant's right to a jury trial, like the right to a public trial, also has two constitutional homes. Article III of the Constitution states that “[t]he trial of all Crimes...shall be by Jury,” and the Sixth Amendment reiterates that “[i]n all criminal prosecutions, the accused shall enjoy the right to a [trial] by an impartial jury.” The right to a jury trial was intended to ensure that an accused can plead his case directly to the people rather than having recourse only to a government official. As the Supreme Court has explained:

Those who wrote our [federal and state] constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge....Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official

power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.²²

Except in cases in which the defendant decides to waive the right to jury trial, the jury must decide every fact necessary to prove the crime with which the defendant is charged. Indeed, jury trial is so strongly viewed as the preferable mode of resolving factual questions that the Supreme Court has acknowledged the prosecution's valid interest in securing a jury determination of the facts, even when the defendant prefers to waive that right.²³ Accordingly, all evidence presented at trial must be shown to the jury unless both the prosecution and the defense agree to dispense with a jury trial.

■ ■ THE RIGHT TO A PRESUMPTION OF INNOCENCE

The Supreme Court has recognized that the risk of error in criminal prosecutions requires the government to prove guilt beyond a reasonable doubt. While such a basic protection does not directly affect secrecy, it places pressure on the government to use as much of its evidence as possible, in order to persuade a jury of the defendant's guilt.

■ ■ THE RIGHT TO AN INDEPENDENT, UNBIASED JUDGE

Perhaps the founders' most brilliant insight was the realization that the functions of government could be divided into three broad categories: making new law; enforcing existing law; and adjudicating disputes about law. Each function was delegated to a separate branch of government, resulting in a system of separation of powers in which all three branches must cooperate before an individual may be deprived of life or liberty. In staffing the adjudicatory branch, the founders opted for politically insulated, independent judges capable of checking legislative or executive overreaching. Moreover, the Supreme Court has insisted that fundamental fairness prohibits a judge with a personal interest in the outcome of a criminal case from presiding over the proceedings.²⁴

The requirement of an independent, politically detached presiding judge means that any sensitive evidence in a case (military intelligence, for example) must be revealed to an official completely independent of the executive branch.

■ ■ THE RIGHT TO COUNSEL

The criminal defendant's right to representation by counsel of his own choosing is not completely unrestricted, but defendants are always entitled to a fully independent advocate.²⁵ Consequently, any sensitive evidence disclosed in discovery or used at trial must be revealed to counsel with no allegiance to or affiliation with the executive branch.

■ THE INTERSECTION OF THE DEFENDANT'S RIGHTS WITH NATIONAL SECURITY CONCERNS

Each of these components of a fully transparent and effective adversary system is in potential tension with the government's interest in protecting sensitive intelligence information. Setting aside for a moment the problems posed by possible overreaching and malfeasance, any government genuinely concerned with meeting its national security obligations and honoring a defendant's fundamental rights may face difficult decisions in the prosecution of suspected terrorists.

The defendant's confrontation rights mean that any evidence the government wishes to use as part of its case must be disclosed to the defendant and his counsel, even if it might compromise sensitive intelligence sources and methods. In particular, the constitutional bar on hearsay means that information from confidential sources cannot simply be introduced at trial second-hand; the sources themselves must testify and face cross-examination, putting their cover at risk. The defendant's discovery rights also mean that certain evidence collected in the government's investigation must be handed over to the defense, even if it consists of classified materials – such as intelligence reports from covert agents or foreign countries, ongoing interrogations of captured terrorism suspects, or communications intercepts. Posing similar problems, the defendant's right to compel witnesses to testify on his behalf may in effect entitle the defendant to access to other terrorism suspects currently held by the government, potentially interrupting ongoing interrogation efforts. The dilemma of disclosure is heightened, moreover, since the defendant and his counsel are not the only ones who must be granted access to sensitive evidence. Given the right to public trial by jury, the public and the jurors must to an extent have access to evidence as well.

While it is obvious that the exercise of each of these rights may conflict with the government's secrecy interests, it should be equally obvious that none may be lightly dispensed with. The government's legitimate concerns about secrecy could, of course, easily be met by allowing it to conduct wholly one-sided trials, with its evidence shown only to a hand-picked intelligence officer serving as the judge, without opportunity for scrutiny by the defendant, an independent lawyer, a jury, or the public. But such a "trial" would be no trial at all. The question to which we therefore turn is how the adversarial trial safeguards embodied in the Constitution can be reconciled with legitimate governmental secrecy needs, or at least how outright conflict between the two can be minimized.

■ WAYS TO MANAGE THE NEED FOR SECRECY

At first blush, the divide between the Constitution's requirements for a genuine, adversarial trial and the government's interest in protecting classified evidence seems unbridgeable. Closer attention to the experience of the federal courts,

however, reveals a variety of ways in which the tensions between secrecy and accountability can be eased and managed, or avoided altogether, while respecting the procedural boundaries of the federal court system.

Broadly speaking, the government has five options for dealing with classified evidence potentially relevant to the prosecution of a terrorism suspect:

- **filtering:** During discovery and at trial, the Classified Information Procedures Act allows courts to “filter out” any classified information that is not strictly necessary to the resolution of the disputed issues in the case.
- **restricted disclosure:** Where classified information cannot be filtered out, the courts can restrict its disclosure, in particular by limiting the defendant’s access to classified discovery materials and by excluding the public from portions of the trial.
- **declassification:** Over-classification is a problem in terrorism cases as in other national security contexts; often information initially deemed classified can be declassified and made available for use in a prosecution without any adverse effects.
- **alternate charges:** If a terrorism suspect cannot be prosecuted on particular charges without an unacceptable disclosure of classified evidence, the government often can avoid the problem by bringing alternate charges as to which the classified evidence is irrelevant.
- **delay:** Finally, as a last resort, if there is no way to prosecute a suspect on sufficiently serious charges without an unacceptable disclosure of classified evidence, the government may ask to delay trial until other evidence is developed or until the sensitivity of the classified evidence in question has diminished.

Each of these tools can help to accommodate the practical problems posed by the need to protect classified information in a federal prosecution. To be sure, none eliminates the possibility that secrecy concerns may make it impossible to prosecute a given terrorism suspect in the federal courts. Nonetheless, used carefully, and with appropriate refinements, these tools collectively can make such an eventuality highly unlikely.

■ **FILTERING: THE CLASSIFIED INFORMATION PROCEDURES ACT**

The Classified Information Procedures Act (“CIPA”) is a crucial tool for protecting classified information in a federal prosecution. It provides a mechanism for expunging classified evidence from a case wherever a way can be found to proceed fairly without it.

Enacted in 1980, CIPA builds on a pre-existing body of law addressed to secrecy problems in criminal litigation. Concerns about protecting sensitive information in a criminal proceeding are longstanding. They have arisen in a variety of contexts, in drug and organized crime cases, as well as in espionage and terrorism prosecutions.

Nearly fifty years ago, in *Roviano v. United States*,²⁶ the Supreme Court announced the general approach that courts should take in reconciling secrecy needs with fundamental fairness. The defendant in *Roviano* was charged with selling heroin to a government informant. At trial, the informant did not testify, but the defendant sought to ask government witnesses to the transaction to reveal the informant's name. The judge sustained the objection of the prosecutor, who argued that disclosing the informant's identity would jeopardize his participation in ongoing law enforcement operations.²⁷ On appeal to the Supreme Court, the issue was whether the government's interest in protecting the informant's identity trumped the defendant's right to obtain information potentially relevant to his defense. The Court held that in the face of such conflicts, there is "no fixed rule," but rather a court should "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense." If the sensitive information in question is truly "relevant and helpful" to the defense or "essential to a fair determination of a cause," the Court explained, then the government's interest in confidentiality must give way, and the information must be disclosed. In short, 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.²⁸

Roviano sets forth the framework for protecting sensitive information in a criminal proceeding. Under its balancing rule, the defendant cannot be deprived of information so important that the case cannot be tried fairly without it. But courts *can* require the defendant to make a heightened showing of necessity, to show in a tangible, and not merely theoretical, way that the information is "helpful" or "essential" to his defense. The *Roviano* test thus serves to filter out sensitive evidence that is not genuinely important to the defense.

CIPA extends and refines this filtering mechanism. It creates comprehensive procedures to regulate the disclosure of classified information in a criminal case. Aimed at preventing the government from having to choose between disclosing classified information or not bringing charges against a defendant at all, CIPA works to mitigate – although it does not eliminate – this "disclose or dismiss" dilemma.²⁹ It does so principally by enabling classified evidence to be filtered out from a case whenever it is unnecessary for the defense or when unclassified "substitutions" can be used instead.

■ HISTORY OF CIPA

CIPA's history is especially relevant to today's debate over military commissions. The statute was enacted in 1980 as part of an effort by the Carter Administration

to facilitate the criminal prosecution of Cold War spies. Prior to the statute's enactment, the defense and intelligence establishments generally opposed prosecuting Cold War spies, much as proponents of military commissions currently oppose federal prosecutions of terrorism suspects. The prevalent view was that prosecutions in federal court would inevitably expose intelligence assets and reveal to enemy powers what we did and did not know about them.³⁰ The preferred approach was quietly to declare spies *persona non grata* and ship them to their home country, so as to avoid the loss of secrets through prosecution, as well as to avoid public embarrassment over the admission that the nation's intelligence apparatus had been penetrated.³¹ This orthodoxy went unquestioned until the late 1970s, when Attorney General Griffin Bell pushed to find a way to "prosecute these cases without losing the secret."³² CIPA emerged from Bell's efforts.

CIPA's development and implementation illustrate the capacity of the courts, working in tandem with Congress, to develop solutions to the problem of protecting classified information. CIPA grew out of procedures first tested in two cases brought in federal court. In *United States v. Boyce*,³³ an employee of a defense contractor was charged with selling classified information, which he allegedly stole from a secure vault at his workplace, to the Soviets. Angling to pressure the government into a favorable plea bargain, Boyce's attorney made veiled threats during pre-trial proceedings that he would reveal the content of the classified materials in open court as part of the defense's case – a tactic since dubbed "gray-mail." The government responded by asking the trial judge to review the materials himself in closed proceedings. After that review, the judge determined that these materials were irrelevant to the defense and prohibited the defense from revealing them at trial.³⁴

In a second case, *United States v. Kampiles*,³⁵ a CIA official was accused of selling to the Soviets a top-secret manual for the KH-11 reconnaissance satellite, at that time the most sensitive surveillance technology in operation. At trial, the government faced the challenge of introducing enough evidence about the manual to prove Kampiles guilty of espionage, without disclosing the very secrets the case was about. The prosecution sought and was granted permission to introduce an edited version of the manual, with the classified information redacted out.³⁶

■ ■ WHAT CIPA DOES

CIPA formalizes the basic procedures used in *Boyce* and *Kampiles*, creating an omnibus set of rules applicable in any case involving classified information. Step by step, CIPA's procedures are somewhat complex. (See accompanying text box for a detailed explanation.) But the statute's overall thrust is straightforward. It has two basic features.

First, whenever a defendant seeks to obtain classified information during pre-trial preparation or seeks to use classified material at trial, CIPA allows the judge to review the information in a closed hearing, to determine if it is in fact relevant.

Thus, no classified information can be obtained or used by the defendant without the judge's approval, ensuring that classified information is tightly controlled and eliminating the threat that a defendant may reveal it by surprise at trial.

Second, where the judge finds classified information to be relevant, CIPA permits the information to be replaced with an unclassified "substitution." As in *Kampiles*, one possible substitution is a redacted version of a classified document, with sensitive portions blacked out or otherwise disguised. The statute also allows classified information to be replaced with an unclassified summary, or a statement of the facts that the sensitive material would tend to prove. So, for example, the classified spy satellite manual in *Kampiles* might be replaced by a summary explaining that the manual contains classified information about U.S. reconnaissance systems.

Whatever the form of a substitution, however, it must be fair to the defendant. Specifically, CIPA requires that any substitution must "provide the defendant with substantially the same ability to make his defense" as would disclosure of the underlying classified information.³⁷ This safeguard is obviously critical. In authorizing the government to propose substitutions, CIPA in effect grants the government the power to redraft evidence relevant to the case. Careful judicial scrutiny is required to ensure that the government does not use this power to keep important evidence from the defense.

In short, like *Roviaro*, CIPA provides a method of filtering sensitive information to the extent that fairness allows, but CIPA provides a filter of a finer mesh. Under *Roviaro*, sensitive information can be withheld from the defense if it is not sufficiently important to the defendant's case to warrant disclosure. Under CIPA, even if classified information is important to a case, the information still does not necessarily have to be disclosed. Rather, CIPA substitutions enable the courts to devise ways of providing the defense with the basic information needed, while shielding the classified details.

Importantly, CIPA does *not* allow the jury to see different evidence from that shown to the defendant. If an unclassified substitution is approved for use at trial in lieu of certain classified information, the jury sees only the substitution; it does not see the underlying classified information. In this way, CIPA preserves the defendant's right to know all the evidence presented to the jury at trial.

Of course, the facts of some cases will mean that no fair substitution for classified material can be crafted that protects sensitive details and simultaneously gives the defense all the information it needs. In such circumstances, the government may still choose to withhold the information, but only at a cost. CIPA requires the court to impose an appropriate sanction on the government when it refuses to disclose information needed by the defense – not by way of punishment, but rather to protect the integrity of the trial. For example, if withholding certain classified information means that the defendant will be deprived of a fair opportunity to cross-examine a government witness, the court may prohibit the

IN MORE DETAIL: HOW CIPA WORKS

Substitutions during the Discovery Process. Where classified discovery materials are identified by the prosecution, CIPA § 4 allows the information contained in the materials to be disclosed in some substitute, unclassified form. Specifically, the government can propose to substitute: (1) a redacted version of the materials; (2) an unclassified summary that omits the classified details; or (3) a statement admitting relevant facts that the materials would tend to prove.³⁸ In determining whether and in what form any classified materials must be handed over to the defense, the court has discretion to consider the matter *ex parte* – that is, without hearing from the defense.³⁹

The court must approve a proposed substitution upon finding that it provides the defendant “with substantially the same ability to make his defense as would disclosure” of the underlying classified information itself.⁴⁰ In applying this standard, courts have generally allowed substitutions so long as they do not omit information directly relevant to the defense. As one court has elaborated, “[a] district court may order disclosure [of classified information] only when the information is at least ‘essential to the defense,’ ‘necessary to his defense,’ and neither merely cumulative nor corroborative, nor speculative.”⁴¹

Where no adequate substitution for classified discovery materials can be devised, the materials must be disclosed, but a protective order can be used to prevent improper dissemination of the information. In terrorism cases, courts have issued protective orders requiring classified discovery materials to be given only to security-cleared defense counsel, while prohibiting counsel from sharing the materials with the defendant. (See below at pp. 25-28 for a discussion of such orders.)

Substitutions at Trial. If the defense expects to disclose classified information at trial, or to elicit classified information during cross-examination of witnesses, CIPA requires the defense to notify the government at least thirty days in advance of trial. In response, the government may request a hearing under CIPA § 6 to decide the relevance or admissibility of the information. The prosecution can also request such a hearing to address issues concerning its own use of classified materials at trial.⁴² In contrast to CIPA discovery hearings, a CIPA hearing to consider the use of classified evidence at trial cannot be held *ex parte*. The hearing can be closed to the general public, but the defense team is entitled to be heard. At times, however, courts have excluded the defendant from these proceedings, leaving his interests to be represented solely through counsel.⁴³

In seeking to block the admission of classified information at trial, the prosecution can argue that the information is not sufficiently relevant, or if the information is deemed admissible, the prosecution can propose an unclassified substitution. The prosecution can also seek CIPA substitutions for evidence that it intends to use at trial.⁴⁴ In support of its motion for a substitution, the prosecution may submit an affidavit from the Attorney General, to be reviewed by the court alone, explaining why the information is classified and what harm to national security would result from disclosure.⁴⁵

The court must approve a government-proposed substitution, so long as it provides the defendant with substantially the same ability to make his defense as would the classified information itself.⁴⁶ If the court finds that a proposed substitution will not be adequate, and the government is unable to propose an alternate substitution that meets with the court’s approval, then CIPA puts the prosecution to a choice: it must either permit the disclosure of the information, or object and face a court-

imposed sanction. If the government objects to disclosure, then the court must forbid the use of the information at trial. At the same time, however, the court must remedy the unfairness to the defendant and the resulting damage to the adversary system. If the defendant cannot adequately defend himself without the information, then the entire indictment must be dismissed; otherwise, the court may impose a lesser sanction, such as dismissing the counts of the indictment to which the excluded information relates; making a finding against the prosecution on any issue to which the excluded information relates; or striking all or part of the testimony of a witness.⁴⁷

Regulating the Use of Classified Information during Trial. Finally, CIPA enables the court to guard against the disclosure of classified information during trial. Where the defendant’s questioning of a witness may require the witness to disclose classified information not previously approved, CIPA authorizes the court to take protective action, such as asking the defense what facts it seeks to establish, and asking the government to prepare a response for the witness that provides the needed testimony while avoiding disclosure of classified information.⁴⁸ In this way, carefully scripted testimony can be “substituted” for uncontrolled examination of a witness. ■

prosecution from calling that witness, or take other action to ensure that the secrecy measures do not put the defendant at an unfair disadvantage. If the government refuses to disclose information vital to the defendant's case, then the court may be forced to dismiss the entire prosecution.

■ ■ HOW WELL HAS CIPA WORKED?

Although CIPA limits the use of unclassified substitutions for classified evidence – as it must to protect fairness – the statute has proven highly effective. One measure of its effectiveness is how well it has addressed the problem of prosecuting espionage cases, for which it was principally designed. These cases can pose considerable obstacles to prosecution. They directly implicate national security secrets. In order for the government and defense simply to tell the story of the case, information about the inner workings of the intelligence community must, to a certain extent, be revealed. Further, an espionage case may require testimony from an intelligence officer or other government agent involved in covert activity.

Despite these obstacles, CIPA has demonstrably succeeded in facilitating espionage prosecutions by providing a means of protecting the more sensitive aspects of the events and persons involved in a case while enabling enough information to be revealed for the prosecution to go forward. CIPA's enactment enabled an aggressive campaign of espionage prosecutions throughout the 1980s and 1990s, resulting in the conviction of some of the most notorious spies in the history of the country, such as Aldrich Ames in 1994, Earl Pitts in 1997, and Robert Hanssen in 2001.

A before-and-after comparison is instructive. Between 1966 and 1975, only two espionage prosecutions were brought in federal court.⁴⁹ Since CIPA's enactment at the end of the Carter Administration, there have been dozens – 62 during the 1980s alone.⁵⁰ According to one longtime espionage prosecutor, the conviction rate achieved by the Department of Justice in espionage cases brought under CIPA has been nearly 100%.⁵¹ Of course, that figure might simply reveal that the government chooses its cases carefully; there may be unpublicized cases that the government declined to prosecute for fear that CIPA could not protect the secrets involved. CIPA, however, also requires any prosecutions declined for this reason to be reported to congressional intelligence oversight committees.⁵² While these reports are not made public, it is notable that in the 25 years since CIPA's enactment, Congress has never questioned the statute's effectiveness. To the contrary, the Senate Select Committee on Intelligence acknowledged shortly before September 11th that CIPA “has proven to be a very successful mechanism for enabling prosecutions that involve national security information to proceed in a manner that is both fair to the defendant and protective of the sensitive national security intelligence information.”⁵³

CIPA has proven effective not only in espionage prosecutions but in terrorism prosecutions as well. Its first reported use in this context was in the prosecutions

of two hijacking cases from the late 1980s and early 1990s.⁵⁴ One of the cases – *United States v. Yunis* – illustrates CIPA’s application in practice. The defendant in *Yunis* had been captured overseas with the help of a Lebanese informant recruited by the FBI. In the course of the operation, the government intercepted the informant’s conversations with the defendant through an undisclosed method. When the case came to trial, the defendant sought access to these recordings in discovery. The government objected that the recordings were classified and irrelevant. After the closed discovery hearing required by CIPA, the trial judge found that the recordings were sufficiently relevant, because they would help the defendant to reconstruct the events in dispute and might support possible defenses such as entrapment. The government appealed, taking advantage of a CIPA provision entitling either party to an immediate appeal from adverse rulings regarding classified information. The appeals court reversed. In the ordinary case, the court reasoned, recorded statements in the government’s possession are routinely subject to discovery based on a minimal showing of relevance; but when the records are classified, the court held, more than minimal relevance is required. Finding that the recordings in question were only of “theoretical” benefit to the defendant’s case and that the government had a strong interest in concealing its intelligence-gathering methods, the court ruled that the balance tipped toward secrecy.⁵⁵

Interestingly, in most of the major terrorism cases brought in the 1990s, involving Al Qaida and related jihadist groups, CIPA did not get much of a workout – not because it was ineffectual, but because it was not much needed. In the prosecution of the “Day of Terror” case – involving the foiled plot to blow up various New York City landmarks on a single day – a minor issue arose involving classified information, which CIPA easily solved. The defendants sought classified materials in discovery regarding the United States’ delivery of stinger missiles to Afghan rebels during the Afghan-Soviet conflict. In lieu of providing the classified materials themselves, the government provided a statement stipulating for purposes of trial that the U.S. government provided stinger missiles to Afghan rebels – a fact already in the public domain. This substitution made disclosure of the classified details of the stinger missile operation unnecessary.⁵⁶

In other terrorism prosecutions during the 1990s and through early 2001, few secrecy issues arose.⁵⁷ Yet these years saw the prosecution of those responsible for the 1993 World Trade Center bombing, the prosecution of Ramzi Yousef for the 1994 “Bojinka” Plot (a foiled attempt to blow up twelve airliners over the Pacific during a two-day time span), and the prosecution of Ahmed Rassam for the December 1999 Millennium Plot to detonate a bomb at Los Angeles International Airport. The government uncovered damning physical evidence against the defendants in all of these cases and did not need to rely on any evidence involving classified sources or methods.⁵⁸ Nor were significant amounts of classified evidence implicated in discovery in these cases. These prosecutions are, of course, a small and possibly unrepresentative sample. After September 11th, much more intelligence about terrorism suspects is being generated, and thus in any future prosecution of a significant Al Qaida figure, we can expect that much more

classified information will be potentially subject to discovery. But the ease of avoiding classified information issues in these cases nonetheless casts doubt on the idea that future terrorism prosecutions will inevitably raise intractable problems.

The one 1990s terrorism case in which CIPA was put to the test was the embassy bombings case, brought in the wake of the simultaneous August 1998 attacks carried out on the U.S. embassies in Kenya and Tanzania. The indictment was sweeping, charging that the defendants, as members of the Al Qaida network, were participants in a wide-ranging conspiracy to attack American citizens, encompassing the embassy bombings and numerous other terrorist acts. The broad scope of the alleged conspiracy implicated a vast amount of discoverable material, much of it classified. Yet CIPA (along with supplemental measures, discussed in the next section) prevented *any* improper disclosure of such information.

One example is indicative: The “Black Hawk Down” incident in Somalia, in which an American helicopter was shot down during a special operations mission, was one of the acts alleged to be part of the conspiracy. The indictment charged that Al Qaida was responsible for the attack. In discovery, the defendants sought information related to U.S. military operations in Somalia at the time of the incident. The materials were classified because they would have revealed sensitive details about these operations – the equipment and ordnance used, the rules of engagement followed, the casualties inflicted, and so on. Rather than produce these materials, the prosecution agreed to admit the facts that defense counsel sought to infer from these materials, while omitting classified details.⁵⁹ This substitution served the interests of the defense as well as those of the government, for it enabled defense counsel to obtain a concise admission of facts that would have been very difficult to establish via witness testimony or documents.⁶⁰

Similarly, CIPA was used to prevent defense cross-examination from disclosing classified details concerning cooperation provided by a foreign government. One of the prosecution’s key witnesses, L’Houssaine Kherchtou, was a former Al Qaida member whom the United States had recruited as an informant. Before he began cooperating, he was approached by a foreign intelligence agent and debriefed for five days concerning his knowledge about Al Qaida. That debriefing was taped and later shared with the U.S. government.⁶¹ Kherchtou’s statements during the debriefing were relevant to the defense. The debriefing was sensitive, however, because the foreign intelligence service did not want its involvement disclosed. CIPA effectively resolved the issue: in discovery, a transcript of the debriefing was provided to defense counsel with references to the foreign intelligence service blacked out; at trial, defense counsel’s questioning of Kherchtou on the witness stand was monitored to ensure that the foreign intelligence service was not identified. Thus, an effective adversary system was preserved while the government’s national security interests were protected.⁶² “I used every page of that transcript in preparing for trial,” says Joshua Dratel, counsel for one of the defendants, “with no effect on the integrity of the U.S.’s intelligence relationship with the foreign government.”⁶³

The principal prosecutors in the embassy bombings case agree that no classified evidence was improperly disclosed; such evidence was managed effectively through CIPA. Given the amount of classified information involved, that is no mean feat. Patrick Fitzgerald, a prosecutor in the case, remarks: “When you see how much classified information was involved in that case, and when you see that there weren’t any leaks, you get pretty darn confident that the federal courts are capable of handling these prosecutions. I don’t think people realize how well our system can work in protecting classified information.”⁶⁴

Fitzgerald cautions, however, that we should expect the large amount of classified information involved in the embassy bombings prosecution to be the norm for any major Al Qaida prosecutions going forward. And simply because that case was successfully prosecuted without unacceptable disclosures does not necessarily mean that every terrorism case can be similarly handled; in particular, the government was able to amass sufficient unclassified or declassified evidence to prosecute, which cannot always be guaranteed. Nonetheless, the embassy bombings case illustrates the potency of CIPA’s filtering mechanism. At the least, it thoroughly undercuts the myth that terrorism prosecutions generally cannot go forward in federal court without disclosing classified information.

None of this is to say that working under CIPA is easy. Crafting substitutions that are both fair and effective can be a time-consuming, labor-intensive process, as can be the task of monitoring trial proceedings to ensure that classified information is not released through witness testimony. But with appropriate effort, ways can usually be found to avoid disclosure. “CIPA is awkward and cumbersome,” explains former CIA general counsel Jeffrey Smith, “but it works.”⁶⁵

■ **RESTRICTED DISCLOSURE: PROTECTIVE ORDERS AND CLOSURE OF PROCEEDINGS**

While CIPA provides a procedural mechanism for *avoiding* the use of classified information in discovery or at trial, the federal courts also have means of *facilitating* the safe use of classified information, by restricting its disclosure to specified persons. Most prominently, in discovery, courts can require any classified discovery materials to be provided to cleared counsel only; and at trial, courts can restrict public access to proceedings during the introduction of classified evidence. These procedural tools have not been formalized in statute and are less developed than CIPA. They would benefit from legislative refinement.

■ ■ **RESTRICTING DISCLOSURE AT THE DISCOVERY STAGE: THE “CLEARED COUNSEL” SOLUTION**

Experienced prosecutors and defense counsel tend to agree that discovery, rather than trial, is where most classified information problems arise in a terrorism prosecution. The evidence used at trial is a small fraction of the information collected by intelligence and law enforcement agencies relating to the case. There

WHAT IF THE DEFENDANT REPRESENTS HIMSELF?

The “counsel’s eyes-only” solution can collapse if the defendant is his own lawyer. This wrinkle arose in early pre-trial proceedings in the *Moussaoui* case when the defendant sought to represent himself. The trial court originally found Moussaoui competent to do so but warned that, even if he chose to act as his own counsel, he might not be able to review classified evidence in the case.⁶⁹ When Moussaoui later moved for access to classified discovery materials, the judge denied the request. Moussaoui’s interests, she ruled, could be adequately protected by disclosing classified materials instead to “standby” defense counsel, appointed by the court to provide a second voice representing Moussaoui’s interests.⁷⁰

It is an open question whether such an arrangement can be squared with Supreme Court case law holding that a defendant found competent to represent himself cannot have counsel forced upon him by the court.⁷¹ For the time being, however, the question has been rendered moot. Although the trial court initially decided that Moussaoui was competent to defend himself, it subsequently rescinded that decision fifteen months later, after Moussaoui filed many frivolous and disrespectful pleadings, in violation of court orders.⁷² Moussaoui’s former “standby” counsel has consequently now been designated counsel of record. ■

may be thousands of pages of classified communications intercepts, interrogation transcripts, or reports from covert intelligence sources in the files of government agencies; and many of these materials may contain potentially exculpatory evidence or other information that normally should be disclosed to the defense. Filtering out the classified details from such materials through CIPA provides an important layer of protection. But CIPA requires the judge to make difficult determinations about precisely what information should be disclosed to the defense and what information should be withheld. Deciding what information is “helpful” or “essential” to the defense may be impossible without standing in defense counsel’s shoes. Judges may feel compelled to err on the side of disclosure, and even then defense counsel may justly worry that useful information has been withheld. “The biggest problem [in CIPA cases],” says Frank Dunham, defense counsel for Zacarias Moussaoui and a lawyer with significant experience defending cases under CIPA, “is trying to convince the judge you need to see the [classified] material without knowing what’s in it. Although judges try very hard to envision what the defense needs, I really don’t think they should be the ones to make that decision.”⁶⁶ Where large amounts of potentially discoverable classified materials are involved, the problem is compounded; requiring a judge to sift through all the materials to determine what bits of information must pass through to the defense may be extremely laborious.

In light of these practical difficulties, courts applying CIPA in the terrorism context have sought to facilitate the production of classified discovery materials, by ordering their disclosure only to members of the defense team who have obtained the requisite security clearance. In effect, these protective orders allow cleared counsel to review classified discovery materials, while blocking the defendant or members of his entourage from seeing the materials and possibly passing sensitive information on to confederates. Such a protective order was successfully used in the embassy bombings case, for example; a substantial quantity of classified information was provided to cleared counsel during discovery on a “counsel’s eyes-only” basis.⁶⁷ A similar protective order is currently in place in connection with the prosecution of Zacarias Moussaoui.⁶⁸ (See sidebar.)

Defense counsel in the embassy bombings case challenged the court’s order that they obtain security clearance, arguing that such a requirement in effect gave the government a veto over defendant’s choice of counsel. The court rejected the argument.⁷³ The Sixth Amendment right to counsel does not guarantee a defendant the unqualified right to be represented by any lawyer of his choosing. He is entitled to an effective advocate, but effective lawyers can be disqualified by a conflict of interest, for example, and the indigent defendant must accept the assigned counsel designated by the court. While the court in the embassy bombings case agreed that it would be unconstitutional to give the government the “unfettered ability” to remove defendant’s chosen counsel, it found the need for assurance of counsel’s trustworthiness far removed from that scenario. The government’s clearance process was walled off from the prosecution, and any denial of clearance could be appealed to the court.⁷⁴

CIPA does not specifically authorize the cleared-counsel process and counsel's eyes-only protective orders.⁷⁵ The need for such orders was apparently not foreseen when CIPA was drafted, possibly because CIPA was primarily designed for espionage cases, in which the defendant has often had prior access to the relevant classified materials in any event. Nonetheless, courts have the inherent power to structure the discovery process,⁷⁶ and they have used it to restrict the defendant's access to classified discovery materials in terrorism cases, in effect supplementing CIPA. This judicial improvisation highlights the way in which federal court procedures can evolve to meet new problems: procedures for prosecuting espionage cases were first tested in the courts, then refined by Congress through enactment of CIPA, whose provisions in turn have been supplemented case-by-case, as the courts have applied the statute in new contexts.

It would be useful for Congress to pick up the baton by carefully thinking through and formalizing the cleared-counsel model. In particular, if the model is to be used in terrorism cases routinely, the ready availability of a security-cleared, but independent, defense bar becomes vital. In past terrorism cases, security clearances for defense counsel and related personnel have been issued *ad hoc* in each case. But waiting until a case is brought to determine whether the defendant's counsel can be cleared creates problems. Background investigations required for clearance can take months to complete and can delay a case considerably. Some counsel may not qualify for clearance, at least at a sufficient level to see all relevant classified materials. A permanent, institutional mechanism would provide better assurance that cleared defense personnel are always available quickly for terrorism cases. (See sidebar.) While such pre-cleared counsel should not supplant the defendant's choice of counsel, they could at least provide a supplement, perhaps serving as standby counsel designated to review classified discovery materials where defendant's chosen counsel lacks the requisite clearance.⁷⁷

Congressional attention should also be directed toward defining appropriate limits on the cleared-counsel discovery model, for there are dangers inherent in blocking a defendant from directly reviewing sensitive discovery materials himself. In the ordinary criminal case, a defendant is entitled to review all materials produced by the government during discovery and to consult with counsel about them. Excluding the defendant from this process when classified discovery materials are involved may force defense counsel to operate in the dark. Although to date defense counsel have been able to analyze most discovery materials without the client's assistance, some situations could require the defendant's input. For example, if the government produces intercepts of communications involving events in which the defendant took part, the defendant may be better situated than counsel to decipher the communications and determine how they might fit into his defense.⁷⁸ Without the ability to ask his client about the intercepts – *e.g.*, who the parties to the conversation are, or whether the government's translation of the intercepts is accurate – defense counsel may be deprived of the ammunition essential to an effective adversarial challenge.

LEGISLATING THE CLEARED-COUNSEL MODEL

Were Congress to formalize the use of cleared counsel in CIPA cases, it should devise permanent procedures to ensure that cleared counsel are available promptly and with appropriate safeguards. Specifically:

1. Congress should authorize the Administrative Office of the United States Courts to establish, perhaps within the Federal Defender for the District of Columbia or the federal defender unit of the Legal Aid Society of New York, a permanent corps of counsel, pre-cleared at the Top Secret level or higher, to be on call for appointment in terrorism cases presenting classified information issues.
2. Legislation should outline the terms of such representation, especially with regard to cases in which the defendant already has or later wishes to retain other counsel at his own expense.
3. Legislation should provide procedures to facilitate expeditious processing of background investigations and clearance determinations when a defendant retains counsel not pre-cleared under these procedures.
4. Congress should explore the feasibility of permitting counsel in private practice to apply for pre-clearance prior to being retained by any defendant in a particular case.
5. The legislation must provide mechanisms to assure that clearance determinations are made in a fair and independent manner. ■

THE LYNNE STEWART CASE

Lynne Stewart was convicted of violating SAMs imposed on Sheikh Abdel Rahman, whom she defended in the “Day of Terror” case. After Rahman’s followers issued threats against the United States, the government imposed SAMs barring Rahman from communicating with anyone outside prison. Stewart signed agreements to uphold the SAMs. Yet, in June 2000, she called a Cairo reporter to read a statement by the sheikh rescinding support for a cease-fire his followers had been observing in Egypt. Stewart later testified at her trial that the press release was part of a legal strategy to keep the sheik in the public eye. She contended that the SAMs included an unwritten exception allowing her to do what was necessary to defend her client.

Although Rahman’s followers never cancelled the cease-fire and no terrorist acts were traced to her conduct, Stewart was convicted of providing material support to a terrorist conspiracy, as well as lying to the government in pledging to uphold the SAMs. She faces up to 30 years in prison.⁸¹

Stewart’s violation did not involve disclosure of *classified* information. But her conviction – whatever one thinks of its merits – has clearly sent the message that restrictions on counsel in terrorism cases will be enforced, including those intended to safeguard classified information. Some have worried that the conviction will over-deter and lead to undue restrictions on counsel in future cases.⁸² Where restrictions exceed what legitimate security needs require, however, they may be contested in court – as was done in the first World Trade Center bombing case, in which defense counsel successfully challenged a total ban on press statements.⁸³ ■

Courts recognize the validity of these concerns. Thus, where courts have ordered classified discovery materials to be disclosed to cleared defense counsel only, they have still left the door open for counsel to demonstrate a need to consult with the defendant about specific materials. In essence, courts have created a rebuttable presumption that classified discovery materials may be adequately reviewed by defense counsel alone. To prove otherwise, counsel bears the burden of showing that the defendant’s personal input is necessary in order to evaluate a particular item of information adequately.⁷⁹ However, Congress would do well to examine this standard carefully, for in some circumstances – particularly where discovery materials relate to events about which the defendant has personal knowledge – it seems unrealistic and unfair to expect counsel to bear that burden at a point when he has not been allowed to ascertain what his client could tell him.

What happens if defense counsel *can* demonstrate a need to consult with the defendant about specific classified discovery materials? In terrorism cases to date, the problem has not arisen. But were it to arise in future cases, the defendant’s ability to pass on sensitive information to confederates can be contained. Under Bureau of Prison regulations, special administrative measures, or “SAMs,” may be imposed as conditions of confinement for particularly dangerous inmates. Such measures have been applied in certain terrorism cases to ensure that defendants are unable to communicate with potential co-conspirators. For example, Zacarias Moussaoui is currently imprisoned under highly restrictive SAMs, designed to prevent him from contacting Al Qaida associates. He is kept in solitary confinement, segregated from the rest of the prison population; he may make phone calls only to his counsel, the French consulate, and, to a very limited extent, his immediate family; his phone calls to his family are monitored and translated, subject to immediate termination upon any hint of improper communications; and his outgoing mail is closely reviewed before being released.⁸⁰

SAMs are not complete solutions to the problem. While a defendant confined under such restrictive conditions will find it difficult to pass on classified information, the restrictions are not guaranteed to be airtight. They depend on effective monitoring by prison staff, as well as the cooperation of trustworthy defense counsel. (As the recent prosecution of Lynne Stewart demonstrates, however, violations of a SAM can result in prosecution, even when the source of the violation is the defendant’s lawyer.) Moreover, the impact of SAMs in largely sealing a defendant off from the outside world argues against their use except in the most sensitive settings.⁸⁴ Finally, SAMs cease to restrict the defendant if he is ultimately acquitted and released – although his acquittal would undermine the premise for the SAMs in the first place. In any event, while not perfect, SAMs can substantially mitigate the risk that a defendant will be able to pass classified information to confederates, especially if only isolated items of classified information need to be disclosed to him.

■ ■ RESTRICTING DISCLOSURE AT TRIAL

In terrorism cases to date, neither the prosecution nor the defense has used classified information directly as evidence at trial. Classified information has been declassified by intelligence officials prior to trial and subsequently used as evidence, and classified information has also been replaced with unclassified substitutions under CIPA. In no case, however, has either side needed to rely on evidence that could not be reduced to unclassified form.

Such situations are foreseeable, though. Indeed, in cases requiring the testimony of sensitive witnesses, such as covert sources, the very identity of the witness may be classified, as may be many details of his or her testimony. Similar concerns may surround the testimony of law enforcement or intelligence officials of foreign governments reluctant to reveal their cooperation with the United States.

■ ■ ■ RESTRICTING ACCESS BY THE PRESS AND THE GENERAL PUBLIC

Restricting the public's access to classified information is one way to address these concerns. Where such information must be introduced at trial, courts do have power to impose such restrictions. CIPA itself does not authorize a court to facilitate the use of classified information by excluding the public from trial.⁸⁵ Nevertheless, courts have the inherent authority to restrict public access. As described above, the First and Sixth Amendment rights to a public trial may be restricted in order to accommodate a compelling governmental interest, so long as the restrictions are no broader than necessary.⁸⁶

Thus, in narcotics and organized crime cases, judges have closed their courtrooms to the public during the testimony of undercover police officers to protect their identities.⁸⁷ Some courts have similarly closed the courtroom to protect witnesses from discomfort and humiliation in rape or sexual assault trials.⁸⁸ The justifications underlying such closures apply with even stronger force in the CIPA context, where forcing a CIA agent or intelligence source to testify in public could jeopardize not only the witness's safety but also national security.

Although classified information has not been introduced at trial in past terrorism cases, it has been used in past espionage cases. The courts have not found it necessary to close the courtroom doors entirely in such circumstances, but they have imposed more limited restrictions on public access. For example, courts have applied the "silent witness rule" during testimony about a classified document. Under this approach, the witness is given a copy of the classified document, along with the court, the parties, and the jury; the witness answers questions about the document by pointing the jury to the relevant portions of it, without discussing the contents of the document openly; the document itself is filed under seal. In this way the classified information contained in the document is not made public but it still may be entered into evidence and considered by the jury.⁸⁹ During

REGULATING CLOSURE

Legislative guidance would be helpful to clarify at least three points:

(1) *When is closure permissible?* If evidence is properly classified, then by definition its public dissemination would harm national security and a compelling interest would support closure. The catch, of course, lies in determining whether evidence is *properly* classified. In past cases, courts have insisted on independently assessing the danger to national security claimed by the government.⁹⁵ Otherwise, the government could abuse its classification power to thwart public scrutiny. Clarifying legislation should detail precisely what showing the government must make in such circumstances and require an appropriately high-ranking official to certify the national security interest.

(2) *Procedures.* Legislation should also specify the kind of hearing appropriate for making the national security determination. It would rarely if ever be permissible for the hearing to be *ex parte*. At a minimum, cleared defense counsel should be able to contest the government's claims.

(3) *Compensating the public.* Just as CIPA spells out ways to replace classified evidence with unclassified substitutions, closure legislation should spell out ways to limit public access short of total exclusion. One option would be for witnesses to testify behind a screen or via electronic means, so that the content of their testimony is disclosed while their identity is revealed only to the trial participants. If the courtroom must be closed, a compensating option would be to release unclassified summaries of the trial or to delay release of the transcript pending periodic declassification review. ■

early proceedings in the John Walker Lindh case – never brought to trial, as Lindh pled guilty – the government proposed using this approach at trial if classified documents were entered into evidence.⁹⁰

Similarly, in a 1986 espionage case, the trial court allowed classified tape recordings of telephone calls made by the defendant to be played through headphones only to the court, the parties, and the jury. Redacted transcripts were later made available to the general public. Again, this arrangement allowed classified information to be introduced into evidence without being publicly disseminated.⁹¹

How far courts can go in limiting public access to trial proceedings during the presentation of classified evidence is a somewhat open question. One court has ruled that the extent to which criminal proceedings can be closed depends on a sliding scale comprising several factors, including how long the closure lasts, the importance of the evidence presented during the closed proceedings, and whether the public can learn through some other means (by reading transcripts, for example) what took place in the courtroom during the closure. The broader the closure, the graver the governmental interest required to justify it.⁹²

While the interest in protecting classified information may indeed be grave, past a certain point, the right to a public trial must take precedence if the constitutional guarantees of public accountability are to have real meaning. Even if a case were infused with classified information, the right to a public trial clearly would forbid the case from being heard in total secrecy.⁹³ Indeed, in those CIPA cases where evidence has been kept from the public, courts have stressed the small amount of information withheld.⁹⁴

This is another area that could benefit from legislation. Congress should clarify when and how trial proceedings may be closed in order to protect classified information. Legislation should confirm that courts have the power to exclude the press and the general public during the introduction of classified information and should provide guidance as to how apply this power (see sidebar), informed by hearings at which national security officials and the press could provide essential perspective. Beyond giving guidance to the courts, clarifying legislation would help the government predict when courts would accept restrictions on public access. Greater certainty would enable the government to determine whether the national security risks of prosecuting a particular terrorism case will be adequately contained and will help persuade reluctant witnesses to testify, by assuring them that their testimony will not be publicly disclosed.

With or without legislation, the courts already possess the essential power to restrict public access to trials. Where discrete items of classified information cannot be masked through CIPA substitutions, allowing those items to be introduced in closed session or in an otherwise non-public fashion provides an alternative to full disclosure or dismissal.

■■■PREVENTING IMPROPER DISCLOSURES BY JURORS

There remains, though, the problem of ensuring that classified evidence presented in a closed trial session does not leak out. As to the potential for leaks by prosecutors, defense counsel, and court staff, requiring security clearance pursuant to a thorough background check provides a satisfactory solution.⁹⁶ With respect to the jury, however, the answers are less clear.

Although jurors could conceivably be subjected to background investigations and security clearance procedures, until now those precautions have never been taken. They would be extremely problematic.⁹⁷ Background investigations can entail government interviews of employers, neighbors, and acquaintances, review of the prospective juror's travel history, and scrutiny of his or her tax records. Such intrusion is a lot to ask from ordinary citizens called to jury duty, already asked to sacrifice much by serving in a lengthy trial. In rare cases, limited background investigations would perhaps be justified to provide insurance against improper jury disclosures. This is another issue that might benefit from congressional consideration.

There are other ways, however, to mitigate the risk of jury leaks. Although any disclosure, however restricted, inevitably makes intelligence officers nervous, in espionage trials, simply warning jurors of the threat of criminal prosecution has proven sufficient to prevent improper leaks. According to a longtime espionage prosecutor, thus far in espionage cases there has never been a leak of classified information from the jury; jurors are instructed that if they disclose the information, they will be prosecuted, and that warning alone has sufficed as a deterrent.⁹⁸ The use of anonymous juries – already a well-established practice in cases where jury safety or privacy is an issue – could further mitigate the risk of jury leaks, by reducing the danger that jurors will be approached by the press about evidence presented in closed session.

In contrast to other countries that have encountered difficulty in trying terrorism cases by jury, our government does not face any systemic problem of jury disloyalty. Jury trials did, for example, pose an impediment to successful prosecution during Britain's long struggle against terrorists in Northern Ireland, leading the government eventually to suspend the right to jury trial. Those problems resulted from pervasive local support for IRA terrorists and the practical impossibility of selecting a jury that would not contain a significant number of IRA sympathizers.⁹⁹ There is no such problem, of course, in prosecuting suspected Al Qaida members in the United States today.

■■■RESTRICTING ACCESS BY THE DEFENDANT

Like the general public, the defendant has a right to be present at trial, but the defendant's right is different in character and considerably stronger. As explained earlier, the defendant is entitled to confront his accusers and to know all the evi-

dence against him. As a corollary, the defendant has a virtually unqualified right to be present throughout the presentation of evidence at trial, at least in the absence of unruly behavior.¹⁰⁰ While counsel's eyes-only protective orders limit the defendant's full participation in *pre-trial discovery*, in no case have the courts excluded a defendant from *trial* during the introduction of classified evidence, nor have they otherwise restricted the defendant's right to know any evidence seen by the jury. Indeed, such measures apparently have never even been considered, much less implemented.¹⁰¹

The defendant's right to know all the evidence against him cuts to the core of a fair and effective adversarial proceeding. No matter how exceptional the circumstances, it seems doubtful that constitutionally acceptable procedures could be devised for presenting classified evidence at a criminal trial without fully disclosing it to the defendant.¹⁰²

In any event, there is as yet no significant evidence of any need to depart from this bedrock norm, given the availability of SAMs and similar measures to prevent the defendant from passing classified evidence to the outside world in the rare cases where such evidence must be introduced. The preferable course is to build incrementally upon the courts' past experience. As pointed out, Congress could refine the courts' power to close proceedings in several ways. But, absent a most compelling showing that incremental refinements are insufficient, Congress should avoid radical change.

■ DECLASSIFICATION

The discussion thus far has assumed that information deemed "classified" does in fact merit protection. In practice, however, over-classification is omnipresent in government. Thus, in many instances where a criminal prosecution implicates classified information, the proper response may be not to protect the information but simply to declassify it.

It is no secret that the intelligence community tends to overprotect its information. Indeed, national security cases are often marked by inter-agency disputes between prosecutors and intelligence officials over the need for information to remain classified. The *Kampiles* case mentioned above, involving the sale of the KH-11 spy satellite manual to the Soviets, serves to illustrate. Six weeks before trial of the case, the Justice Department had worked out procedures for trying the case without revealing the sensitive contents of the manual. Nonetheless, the Defense Department objected to proceeding as the prosecution planned, arguing that the mere fact that the United States was conducting satellite reconnaissance of the Soviet Union at all was classified and could not be acknowledged at trial. Pentagon lawyers even proposed that the prosecution misrepresent facts at trial to avoid acknowledging the existence of the reconnaissance program, for example, by suggesting falsely that the KH-11 satellite system had been proposed but never implemented. Yet, the existence of the government's satellite reconnaissance

program was by that time (the late 1970s) no secret. The press regularly reported that the government was using satellite reconnaissance to collect intelligence, and the Soviets, with the KH-11 satellite manual in their hands, knew that it was an operational system. Ultimately, the Defense Department's objections were overcome, the prosecution went forward, and the existence of the United States' satellite reconnaissance capability was not distorted at trial.¹⁰³

Indeed, many would argue that over-classification accounts for the only reported CIPA case where an entire indictment was dismissed as a sanction for the government's refusal to disclose classified information needed by the defense. This highly political case was brought in connection with the Iran-Contra affair. The defendant, a former CIA station chief in Costa Rica, was charged by Independent Counsel Lawrence Walsh with making false statements and obstructing justice during the investigation. After the defendant sought to introduce classified documents, and the trial judge found some of those documents to be admissible, the Attorney General filed an affidavit objecting to disclosure. The judge found that the defense would be "eviscerated" without the ability to use the documents and so ordered dismissal.¹⁰⁴ The Attorney General's objection to disclosure, however, was opposed by the Independent Counsel, who claimed that the information was already largely in the public domain, and that the Attorney General's objection was motivated more by the government's desire to avoid politically embarrassing revelations than by national security concerns.¹⁰⁵

In terrorism cases too, over-classification has been a persistent problem. Experienced prosecutors and defense counsel agree that in the embassy bombings case much information that remained classified at the start of the case posed no continuing national security concern. Originally classified to protect the secrecy of the government's investigation into the Al Qaida network in Kenya, the information could safely be disclosed once the indictment was issued. A good deal of this information was eventually declassified, but it often took some pushing by defense counsel and the trial judge. According to defense counsel Sam Schmidt: "On almost every occasion when we challenged the classified status of an important piece of information, it was declassified – sometimes because the judge would indicate that, unless it were declassified, the government would have to suffer a sanction."¹⁰⁶ Prosecutors exerted pressure as well. "No one got more material declassified than we [*i.e.*, the prosecutors] did," says Patrick Fitzgerald. "Declassifying information made our lives a lot easier. Behind the scenes, we pushed where appropriate to declassify to make it easier for everyone."¹⁰⁷ There is no indication that these declassification decisions harmed national security in any way.

Similar over-classification problems arose more recently in the prosecution of Sami Omar Al-Hussayen, a Saudi citizen studying computer science in Boise, Idaho, who was accused (and later acquitted) of designing websites used to support terrorists. During discovery, the government produced 30,000 intercepts of Hussayen's phone calls and emails. All of them were deemed classified and provided only to cleared defense counsel. The intercepts were in Arabic,

INDEPENDENT OVERSIGHT OF CLASSIFICATION DECISIONS

The 9/11 Commission's struggle throughout its investigation to get information declassified has led Senators Lott and Wyden to propose bipartisan legislation creating an independent declassification review board. One of the board's duties would be to review classification decisions upon the request of Inspectors General and certain congressional committees. While the board would not have the power to overturn classification decisions made by executive officials, it could recommend that information be partially or wholly declassified, and the President would have the duty to respond in writing if he disagreed with the commission's recommendations.¹⁰⁹ Were such a board created, providing it authority to review classification decisions relevant to CIPA cases could provide further pressure on the government to avoid overclassification. ■

however. Unable to consult their client about them, defense counsel waited for months to obtain security clearance for an interpreter, to no avail. After the government selectively declassified a handful of intercepts that *it* wished to use at trial, defense counsel pointed out the blatant resulting unfairness and continued to pressure the government to conduct a declassification review of the remaining intercepts. Three days before trial, the government abruptly declassified all 30,000 intercepts.¹⁰⁸

These cases illustrate the need for systemic pressure on the government to declassify information wherever possible. Officials responsible for classification decisions must be made aware that secrecy has its drawbacks even for the government, and they must be forced to take into account its societal costs along with its obvious advantages. CIPA exerts such pressure, by requiring the government to suffer a sanction if it uses its power over classified information to deprive the defense of needed evidence. The gears of this incentive mechanism could be greased by supplemental measures, however. For example, the government could be required to undertake an automatic internal declassification review once a CIPA case is initiated, in order to help minimize the amount of information subject to restricted disclosure. Where such review results in controversial decisions to keep material classified, those decisions could possibly be made appealable to an independent classification oversight board, currently under congressional consideration. (See sidebar.)

Significantly, declassification may be appropriate even when information has not been classified arbitrarily. If disclosing certain information would create an identifiable national security risk, declassification may still be worth that risk, all things considered. Outside the context of criminal prosecutions, the government regularly makes such tradeoffs. The 9/11 Commission Report, for example, discloses significant, previously classified intelligence information. It is full of specifics revealing what we know about Al Qaida and the way it operates, including information elicited through interrogations of high-level Al Qaida detainees. The report discusses past U.S. intelligence and military operations in detail and analyzes why they failed to prevent the September 11th attacks; it reveals the clues to the September 11th attacks that our intelligence agencies were able to detect, and the ones they missed; and it outlines continuing vulnerabilities in our immigration and homeland security policies. All of this information surely is of potential benefit to Al Qaida, and indeed, the Administration was reluctant to declassify much of it. But the benefits of disclosing that information – educating the public about the threat we face and spurring governmental reform – were ultimately judged to outweigh the potential national security costs.

Along the same lines, prosecuting terrorism may in some cases require the disclosure of information despite residual security risks. Just as the need for secrecy can be outweighed by the value of informing the public and stimulating vital debate, so it can also be outweighed by the value of trying terrorism suspects in a way that is fair and legitimate, both in actuality and appearance.

■ ALTERNATE CHARGES

This Report has focused thus far on ways to deal with classified information during discovery and trial. But prosecutors can also safeguard classified information at the outset of a case, by carefully selecting the charges. The prosecution's ability to determine the scope of an indictment gives the government broad power to define the relevant evidence – and thereby to avoid the need to disclose classified information.

Assume that a confidential informant reveals that a terrorist in the United States is planning an attack. The information is classified, however, disclosing it necessarily would reveal the informant's identity, and the government lacks sufficient unclassified evidence to assure a conviction for the plot. While the government thus might refrain from prosecuting the suspect for attempt or conspiracy to commit an act of terrorism, it would remain free to use unclassified evidence to convict the target of more readily provable offenses, still carrying substantial penalties. For example, a lawful search might reveal false identification documents, or illegal firearms or explosives. The suspect may lie during questioning by a federal officer – by itself a federal offense.¹¹⁰

If the suspect truly is a terrorist, chances are that a carefully conducted investigation will reveal illegal activity of some kind, permitting prosecution and incarceration without jeopardizing sensitive intelligence information. Indeed, recalling strategies famously used to combat organized crime in the past, the Department of Justice has made clear that part of its post-9/11 strategy is to intercept potential terrorist activity as soon as possible by charging suspects with “spitting on the sidewalk” if necessary to remove them from the streets.¹¹¹ This strategy becomes worrisome when trivial charges of that sort are used as a pretext to detain or imprison a suspected terrorist for extended periods far out of proportion to the seriousness of the misconduct actually proved. But so long as alternate charges are used responsibly and punishments remain proportionate to the offense of conviction, this can be a legitimate approach with the potential to avoid any need to bring classified information into evidence.

The “material support” statute – allowing the government to prosecute individuals for knowingly providing support or resources to a foreign terrorist organization¹¹² – provides an example. In the case of the so-called Lackawanna Six, the FBI monitored suspected Al Qaida trainees in suburban Buffalo, New York, after receiving information that they had traveled to Afghanistan to attend an Al Qaida camp. Pressured to cut short its investigation, the FBI arrested the six despite having no proof that they were planning any specific attack. However, based on their admissions that they had attended an Al Qaida training camp, received firearms training, and attended speeches by bin Laden, the defendants pled guilty to providing material support – *i.e.*, themselves – to a foreign terrorist organization.¹¹³ There is no indication that the government possessed classified evidence that the six were guilty of any graver offense, and news reports suggest

that the precise nature of their activities remains controversial.¹¹⁴ The case nonetheless illustrates how prosecutions for lesser offenses can narrow the factual showing required – and thus in turn eliminate the need to rely on classified evidence.

To be sure, the breadth of the “material support” concept poses a risk that the statute will be used indiscriminately. Unwary individuals could be swept into a terrorist prosecution who merely intended to support the political aims of organizations deemed to be engaged in terrorist activities. Indeed, there has already been considerable litigation over the material support statute’s vagueness and problematic boundaries.¹¹⁵ Amendments enacted as part of the Intelligence Reform Act of 2004 narrow the statute to some degree.¹¹⁶ However, with the obvious but essential caveats that such statutes must be clearly drafted, must leave breathing room for constitutionally protected activity, and must not authorize disproportionately severe punishments, they can provide prosecutors useful and justifiable flexibility.

The case of Jose Padilla provides another concrete example of how alternate charges could be used to prosecute a terrorism suspect without disclosing classified information. As described earlier, Padilla was arrested in May 2002 upon arriving at Chicago’s O’Hare International Airport and was initially held as a material witness¹¹⁷ in a grand jury investigation sited in the Southern District of New York. A month later, however, President Bush declared Padilla an “enemy combatant” and transferred him to military custody at a naval base in South Carolina. The Department of Justice subsequently has contended that categorizing Padilla as an enemy combatant was necessary because he could not be prosecuted in the courts without disclosing classified intelligence sources.¹¹⁸

The government’s initial information about Padilla appears to have come mainly from interrogations of captured Al Qaida planners, most notably Abu Zubaydah.¹¹⁹ But since Padilla’s arrest, the government claims to have uncovered additional evidence, including an application form for an Al Qaida training camp, which the Department of Justice claims the FBI recovered from a box of such forms found in Pakistan.¹²⁰ Padilla’s form allegedly indicates that he had traveled to Afghanistan – a fact that Padilla allegedly denied in interviews with FBI agents upon his arrival in Chicago.¹²¹ Based on this evidence alone, it would seem that Padilla could be charged with at least two offenses: (1) making a materially false statement to a federal officer (for allegedly misrepresenting that he had not traveled to Afghanistan), an offense punishable by up to eight years’ imprisonment where the offense involves terrorism;¹²² and (2) attempting to provide material support (for allegedly attending an Al Qaida training camp), an offense punishable by up to 15 years in prison.¹²³

In short, in most cases, the government will have more than one way to bring a terrorist to book. Even if it cannot prove all of its suspicions without using classified information, its unclassified evidence may be sufficient to convict on

alternate charges serious enough to support a significant period of incapacitation and punishment.

Further, a choice to prosecute on alternate charges now does not bar the government from prosecuting on more substantial terrorism charges later. There is no statute of limitations with respect to crimes of terrorism.¹²⁴ While the Constitution's Due Process Clause forbids the government from delaying a prosecution in bad faith, this is an exceptionally high bar – one that does not forbid prosecutors from delaying a prosecution until “they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.”¹²⁵

■ DELAY AND PRE-TRIAL DETENTION

In the rare case where filtering, restricted disclosure, declassification, and prosecution on alternate charges all fail to resolve problems raised by classified evidence, a final – but potentially troublesome – means of protecting classified evidence is to delay trial. From the point of initial arrest, the Speedy Trial Act of 1974¹²⁶ controls the timing of a criminal trial in the federal courts, setting maximum time periods for the intervals from arrest to indictment and from indictment to trial. But the Act provides many grounds for granting continuances that stop the running of the speedy trial clock. Thus, prosecutors conceivably could ask the court to delay trial while they seek to develop unclassified evidence, or until classified evidence may be used without undue cost.

When a defendant can safely be released on bail or other supervised conditions, reasonable delay usually will not pose insuperable problems. Speedy trial rules generally will be waived by a defendant who remains free while awaiting trial. Moreover, modern technology provides monitoring techniques that lower the risk that a defendant could flee or engage in criminal activity.

But in most significant terrorism prosecutions, pre-trial release will not be an option, because the defendant presumably will be considered dangerous and an unacceptable flight risk. For such cases, federal law already provides a tightly regulated system of detention. Incarceration before trial, without any chance to make bail, is obviously troublesome and was once widely viewed as antithetical to Anglo-American tradition. Yet in the Bail Reform Act of 1984, Congress expressly authorized pre-trial detention on grounds of dangerousness,¹²⁷ and on review the Supreme Court upheld the statute's constitutionality.¹²⁸ Since then, detention until trial has become commonplace not only in terrorism and violent crime cases but in nearly half of all federal prosecutions for drug and immigration offenses.¹²⁹ Thus, by combining two tools now routinely available – postponement of trial under the Speedy Trial Act and detention until trial under the Bail Reform Act – prosecutors already have considerable power to incapacitate a dangerous terrorist suspect while they seek evidence they can safely disclose in court.

THE MATERIAL WITNESS LAW

After September 11th, the Attorney General announced a policy of “aggressive detention” of material witnesses. At least 70 people have since been detained.¹³¹ While courts have long had statutory power to detain witnesses in order to ensure their availability to testify,¹³² in these cases the material witness law apparently is being used to detain not reluctant witnesses, but rather criminal suspects.¹³³

The statute is not well designed for this purpose. To be sure, it contains protections for detainees – e.g., bail procedures, supervision of detention conditions, and required release of a witness willing to testify.¹³⁴ But the threshold for detention is fundamentally misplaced: the government need only show that the person has testimony “material” to a criminal proceeding, and that securing the testimony through a subpoena is “impracticable.” The statutory triggers are not tied to factors relevant to pre-trial detention, e.g., whether there is sufficient evidence that the person is guilty of a crime and a danger to the community.

From the government’s vantage as well, the statute is a poor tool. If a witness’s testimony can be secured by deposition, the government must take the deposition and let the witness go – except where further detention is “necessary to prevent a failure of justice.”¹³⁵ Unless this exception is so expanded as to swallow the rule, the statute cannot serve as an effective means of holding a dangerous suspect pending further investigation and trial.

Given the risks and limitations of using the material witness statute, as a pre-trial detention mechanism, congressional consideration of a better solution is overdue. ■

For obvious reasons, such an expedient must be viewed as a last resort, and in any event its potential is – quite properly – limited. But these existing powers are far preferable to the unbridled detention authority claimed by the Administration.

The Padilla case again serves to illustrate. As discussed, the government initially held Padilla on the basis of slender information that was deemed classified. But with the passage of time, it claims to have discovered evidence, apparently unclassified, that could be sufficient to sustain a criminal prosecution. And in the meantime, Padilla’s alleged plans to carry out an attack inside the United States have been interrupted through his incapacitation.

The problem with the Administration’s handling of the Padilla case is not the mere fact that Padilla has been detained but that his detention has occurred outside of any process affording even the most minimal safeguards of transparency and accountability.

The government initially held Padilla using the “material witness” statute – which it has likewise used to detain at least 70 other terrorism suspects without charges since September 11th.¹³⁰ That statute, however, was not intended to authorize detention for the sake of incapacitating criminal suspects. Rather, it was designed to enable the government to secure the testimony of potential witnesses, by holding them until their statements can be presented at trial or taken in a deposition. Accordingly, the statute does not provide forms of judicial oversight that fit the end to which it is being put. (See sidebar.)

Much more worrisome than the government’s use of the material witness statute, however, is the next step it took – the decision to classify Padilla as an “enemy combatant” and transfer him to military custody. The government has held Padilla in this condition for nearly three years, while claiming that the grounds for his detention are subject to virtually no judicial review whatsoever.

Clearly, if something as dangerous as pre-trial detention is to be used to hold a suspect pending further investigation, a better tailored, more accountable mechanism is needed. And in fact, the basic elements of such a mechanism already exist in the 1984 Bail Reform Act. Its procedures are worth considering in some detail, as a measure of the flexibility already available under federal law and the potential room for enhancements that might meet government needs fairly and without loss of accountability.

In any federal criminal case, an arrest can be based on evidence shown only to a magistrate, without an adversarial hearing.¹³⁶ Thereafter, the Bail Reform Act allows the defendant to be held in pre-trial detention if the court finds there is no reasonable way to assure that he will not pose a danger to the public if released.¹³⁷ Significant safeguards surround this determination. The defendant is entitled to counsel and an adversarial hearing, at which the government bears the burden of proving dangerousness by clear and convincing evidence.¹³⁸ At the hearing, the

defendant is entitled not only to present evidence and summon witnesses to testify on his behalf, but he also is generally entitled to see and challenge any evidence the government offers to prove his dangerousness, and likewise to cross-examine any witnesses called by the government.¹³⁹

Nonetheless, the defendant does not have the same confrontation rights at a pre-trial detention hearing that he has at trial. Accordingly, the government has greater leeway to use evidence from classified sources. For example, there is no rule against using hearsay at a pre-trial detention hearing.¹⁴⁰ Thus, if the government's evidence derives from a confidential informant, the informant need not appear in court. Instead, an FBI agent could testify about the information received and why it is considered reliable, without revealing who the source is.¹⁴¹ More controversially, several courts have allowed the government to provide certain evidence of the defendant's dangerousness only to the judge, without showing it to the defense team, in unusual circumstances where "strong special reasons warrant confidentiality."¹⁴² In sanctioning this extraordinary step, courts have stressed that such *ex parte* presentations are permissible only where there is "a most compelling need and no alternative means of meeting that need," and only if the defendant is given a summary apprising him of "the gist of the evidence" presented.¹⁴³ Such presentations are rare,¹⁴⁴ and perhaps inadvisable, but they illustrate the considerable detention powers already available in the federal courts.

Under current law, detention, once ordered, can continue up through the defendant's trial, the date of which depends on the time limits set by the Speedy Trial Act.¹⁴⁵ Several provisions of the Act offer at least arguable grounds for postponements designed to delay the disclosure of classified evidence. One applies where an essential witness is unavailable.¹⁴⁶ This exception has been invoked, for example, for witnesses too ill or frightened to testify, as well as for witnesses outside the government's control.¹⁴⁷ To date, however, no case has used this exception for a witness within the government's control who is "unavailable" for policy reasons (such as national security). And as currently written, the statute could not easily be stretched to encompass such a situation, because a witness cannot be considered unavailable unless "his presence cannot be obtained by due diligence or he resists appearing."¹⁴⁸

More promising, perhaps, the Speedy Trial Act permits delay of trial when failure to grant a postponement would result in a "miscarriage of justice," or when a case "is so unusual or so complex, due to...the nature of the prosecution, ...that it is unreasonable to expect adequate preparation for pre-trial proceedings or for the trial itself" within the regular time limits.¹⁴⁹ These provisions might provide a basis for stopping the speedy trial clock where the government can demonstrate a legitimate need to avoid a damaging disclosure of national security secrets. Indeed, these exceptions have been used in similar circumstances in organized crime cases, where courts have allowed delay of trial in order to protect an ongoing investigation – although the delays granted have only been for several months.¹⁵⁰

Needless to say, extended pre-trial detention, as a tactic to buy the government more time to develop its case, is very dangerous medicine. Confinement, whatever its label, can become the functional equivalent of criminal punishment. As a result, a judicial hearing, no matter how fair, ordinarily is not sufficient to authorize lengthy detention, unless it respects all the procedural safeguards of a criminal trial, including the requirement of proof beyond a reasonable doubt. Although civil commitment of the mentally ill is a long-standing exception to this principle, the Supreme Court has insisted that in the absence of mental disorder, dangerousness alone cannot suffice to justify indefinite incarceration.¹⁵¹ Reaffirming that commitment, the Supreme Court emphasized, in upholding detention under the Bail Reform Act, that “the maximum length of pre-trial detention is limited by the *stringent time limitations* of the Speedy Trial Act,” and cautioned that at some point “detention in a particular case might become excessively prolonged, and therefore punitive.”¹⁵²

Against the background of these principles, an acceptable and constitutionally sustainable system for detaining terror suspects clearly requires both scrupulous procedural fairness and stringent limits on the permissible length of confinement. *De facto* pre-trial detention, achieved by placing putative defendants in unregulated military custody, cannot be countenanced.

Professors Philip Heymann and Juliette Kayyem have proposed that Congress enact a statute permitting detention of dangerous terrorism suspects for up to two years when proceeding promptly to trial would be impossible without a severe loss of national security secrets.¹⁵³ Their proposal would allow parts of the detention hearing to be held outside the defendant’s presence, provided that cleared counsel representing the defendant was afforded the opportunity to review and contest any classified evidence.¹⁵⁴

Any expansion of existing pre-trial detention laws would – and should – be controversial. The point relevant here, however, is that any such measures – if they are indeed justifiable and are crafted to meet constitutional requirements – can readily be incorporated into the federal court system. The courts are already equipped with considerable pre-trial detention hardware. If special measures are needed for terrorism suspects, then this existing hardware can be upgraded. Such a step should not be taken without careful congressional consideration, and perhaps should not be taken at all. But if expanded detention is determined to be acceptable, adjusting the machinery already available within the federal court system is infinitely preferable to the government’s current use of military detention to hold terrorism suspects indefinitely, beyond the reach of any judicial review.

■ ASSESSMENT

We are left, then, with a far more nuanced picture of the federal courts and their capacity to handle cases involving classified information than the caricature

drawn by some proponents of military commissions. As we have seen, there are a number of ways the government can manage classified information problems within the confines of the federal criminal system:

- using CIPA, the government can ask a court to filter out classified evidence from a case wherever unclassified substitutions can be used instead;
- the government can seek to restrict access to classified evidence that must be disclosed, through protective orders requiring classified discovery materials to be produced to cleared counsel only, and through closure of trial proceedings to the public during the introduction of classified information into evidence;
- the government can choose to declassify information where the benefits of using it in court are substantial and the national security risks are acceptable;
- the government can avoid bringing charges implicating classified information by bringing alternate charges that can be proved without it; and
- as a last resort, under careful judicial supervision, the government can seek to hold the defendant in time-limited, pre-trial detention while it develops unclassified evidence or the sensitivity of its classified evidence fades.

These approaches cannot eliminate all conceivable secrecy problems. But each progressively narrows these problems, so that, at the end of the day, only a manageable sliver of problematic cases remains. It requires an improbable series of wrong turns on a flow chart in order for a terrorism suspect to be in no way prosecutable or detainable in federal court: only if classified evidence is so central to the case that it cannot be filtered out through CIPA; only if counsel's eyes-only discovery orders and limited public access to trial cannot adequately deal with any classified information that cannot be filtered out; only if declassification is not an option; only if no alternate charges against the defendant can be brought; only if pre-trial detention offers no solution; only if *all* of these conditions are met does the classified information problem become truly intractable. Particularly if the available tools are refined along the lines outlined here, courts confronting terrorism cases will be well-equipped to resolve novel secrecy problems within the bounds of the Constitution, preserving the American commitment to transparency and accountability through an effective adversary system.

■ ■ A CASE STUDY: UNITED STATES V. MOUSSAOUI

A case study illustrating precisely these points is the ongoing prosecution of Zacarias Moussaoui – the only terrorism prosecution brought since September 11th that has generated an open conflict between the defendant's fair trial rights and the government's secrecy interests. Moussaoui, often called the "20th hijacker," is charged with conspiracy to commit international terrorism and related crimes. The indictment alleges that Moussaoui received training at an Al

Qaida camp in Afghanistan and that he was preparing to participate in a hijacking attack against American targets. It further alleges that he engaged in conduct similar to that of the September 11th attackers and that he and they were part of a common conspiracy that “result[ed] in the deaths of thousands of persons on September 11.” For his part, Moussaoui admits to being a member of Al Qaida, but claims he was not involved in the September 11th attacks. Rather, he claims that he was to be used in a separate, follow-up attack – an uncompleted conspiracy that is criminally punishable, to be sure, but not by the death penalty, which the government seeks.¹⁵⁵

The case has involved the production of classified materials in discovery, which have been handled under CIPA and, where produced to the defense, have been made available to cleared defense counsel only.¹⁵⁶ The novel problem concerns the defendant’s right to call witnesses. Several major Al Qaida figures currently in U.S. custody apparently have provided information during interrogation corroborating Moussaoui’s story that he was not involved in the September 11th attacks. Moussaoui has sought to call these witnesses to testify in his favor. The trial judge, Leonie Brinkema, ruled that the detainees’ testimony would in fact be important to Moussaoui’s defense: at a minimum, the testimony could support an argument that Moussaoui should not receive the death penalty.¹⁵⁷

Recognizing that the detainees were important national security assets, and deferring to the government’s contention that producing the detainees to testify at a trial was not practically possible, Judge Brinkema attempted to craft a compromise. She ordered that the detainees’ testimony be taken in a pre-trial deposition, via remote video, with the witnesses sitting in an undisclosed location and the parties propounding questions through a secure video link in the presence of the judge.¹⁵⁸ Judge Brinkema further ordered that the deposition be conducted with a time-delay mechanism, so that intelligence officials could interrupt the transmission at any point to block information too sensitive to release.¹⁵⁹ The arrangement would have resembled an approach followed in a previous CIPA case, the prosecution of John Poindexter in the Iran-Contra affair. In that case, Poindexter sought to call former President Reagan to testify as a defense witness. Recognizing that President Reagan’s testimony would be infused with classified information, and that it was impossible to anticipate in advance the extent to which any line of questioning might yield answers containing classified information, the *Poindexter* court ordered that President Reagan’s testimony be taken in a videotaped deposition prior to trial, in a closed proceeding. Afterwards, the sensitive portions of the deposition were edited out and the cleansed version was made available to be played at trial.¹⁶⁰

Judge Brinkema’s order would seem an effective solution to the problem of protecting classified information potentially contained in the detainees’ testimony. The prosecution argued, however, that an essential tool in the struggle against terrorism is the government’s ability to interrogate captured enemies without judicial interference, and that producing the detainees to testify, even in a closed

deposition, would impair that ability irreparably.¹⁶¹ As a result, the government refused to make the detainees available for a deposition, despite the judge's order. In response, following CIPA as a model, Judge Brinkema imposed sanctions on the government to compensate for Moussaoui's inability to question the detainees. Given that the witnesses allegedly could help to corroborate Moussaoui's claims that he had no role in the September 11th attacks, she precluded the government from arguing that Moussaoui was involved and, correspondingly, barred the government from seeking the death penalty.¹⁶²

On appeal, however, the government won a more generous compromise. The appeals court deferred to the government's argument that interrupting the interrogation of the detainees at issue would have "devastating" effects on its ability to continue gathering information from them.¹⁶³ (The government argued that producing the witnesses at a deposition would entail removing them from a carefully structured interrogation environment and could require providing them with counsel, which, it suggested, would end the possibility of further effective interrogation.¹⁶⁴) At the same time, the court recognized the central role of the defendant's right to call witnesses in our adversarial system of justice, and that the witnesses in question could offer testimony "essential to Moussaoui's defense."¹⁶⁵

The compromise reached by the appeals court was to allow written summaries to be used as "substitutions" for the detainees' testimony. The appeals court directed Judge Brinkema to work with counsel on both sides to compose unclassified summaries of any statements the detainees have made during interrogation tending to exculpate Moussaoui from the September 11th attacks.¹⁶⁶ These summaries would then be read to the jury at trial, and the jury would be instructed that the statements were made under conditions that provide circumstantial guarantees of their reliability.¹⁶⁷ The Supreme Court denied Moussaoui's petition for review, and he subsequently pled guilty to planning an eventual hijacking, while maintaining his claim that he had no role in the September 11th attacks. But since the government continues to seek the death penalty, and since its argument for that punishment depends on showing Moussaoui's involvement in the September 11th plot, the key factual issue remains unresolved and access to the detainees or to their statements remains as important as before. Thus, the penalty phase of the trial apparently will go forward under the arrangement crafted by the court of appeals.¹⁶⁸

Moussaoui provides a useful case study in two respects. The first point to note is the multiplicity of options available to avert the harm to national security that allegedly would result from the interruption of ongoing interrogations of high-level detainees.

One option would be, in essence, to pursue alternate charges. Under Judge Brinkema's ruling, the government could deny Moussaoui access to the detainees entirely if it simply drops its effort to obtain the death penalty and avoids any argument that Moussaoui was involved specifically in the September 11th attacks.

This option would not come without cost: beyond being a political setback for the Administration, a failure to obtain the death penalty might generate public disappointment and frustration for some of the September 11th families. But the national security costs of failing to obtain the death penalty are nil: Moussaoui could still be imprisoned for life for conspiring to commit terrorist attacks using a hijacked airliner.¹⁶⁹

Another option for the government would be to seek delay, *i.e.*, to seek to postpone the deposition of the detainees until the government's interrogation of them has wound down. Indeed, the litigation over Moussaoui's right to question the detainees has achieved much the same effect already. The detainees have now been in custody for two to three years.¹⁷⁰ It is difficult to believe that their interrogation is still yielding fresh intelligence, or that interrupting their continued incommunicado detention would actually damage national security. By point of comparison, in Israel – which has far more experience interrogating terrorism suspects than we do – the longest a suspect can be held for interrogation without access to counsel is 34 *days*.¹⁷¹ Thus, even before the compromise crafted by the appeals court is inserted into the mix, the government's other options – giving up the death penalty, or allowing a limited interruption of years-old interrogations – hardly seem untenable. The government is far from facing a disclose-or-dismiss dilemma.

The second point to take away from the *Moussaoui* case is the flexibility demonstrated by both the trial and appeals courts in attempting to accommodate the government's national security interests within the bounds of an effective adversary system that permits the defendant to call witnesses in his favor. The appeals court decision allowing written summaries to substitute for actual deposition testimony is certainly subject to criticism, and the compromise it endorsed should not necessarily be considered acceptable. 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 summaries will instead have been made in response to questions asked by interrogators for intelligence-gathering purposes.¹⁷² Another substantial difference is that, without seeing the detainees testify, the jury will have no way to assess their credibility – although this difference might help Moussaoui more than the government.

In any event, both the appeals court and trial court decisions underscore the courts' ability to adapt existing rights and procedures to fit novel problems. Neither decision treated the defendant's constitutional right to call witnesses as fixed or static; rather, both recognized the need to effectuate that right in a way that accommodated competing societal concerns. And both sought to do so by extending CIPA's “substitution” concept into a new context. The case well illustrates that, where a workable balance between fairness and secrecy can be struck, the courts have the wherewithal to strike it.

■ ■ LOOKING AHEAD

Future terrorism cases will likewise require courts to explore how far the requirements of an effective adversary system should bend in response to national security concerns. For example, one issue the courts may increasingly confront, especially as our human intelligence capabilities increase, is the question of how much protection can fairly be provided to intelligence sources whose testimony is needed by the government. There is already some precedent for allowing witnesses to testify anonymously in order to protect their safety.¹⁷³ Indeed, if the true name of a witness is classified, as that of covert intelligence agents often are, then under CIPA it is treated like any other classified information: it can be withheld from the defendant, and a pseudonym “substituted,” so long as the defense is not deprived of a meaningful opportunity to test the witness’s credibility.¹⁷⁴ Some courts have permitted a witness’s true name to be disclosed to defense counsel only, so that counsel could fully investigate the witness’s background, while forbidding counsel from disclosing the witness’s identity to the defendant.¹⁷⁵ Less clear, however, is what additional steps can be taken to protect a witness’s identity.

The courts likewise may be pushed to consider whether hearsay may be used as a witness protection measure. For example, if a foreign intelligence service has supplied evidence the government wishes to use in the case, but it is not willing to provide a witness who can explain how it was recovered, could a sworn statement be accepted in place of the witness’s testimony? Could cross-examination of the witness be done through written questions and answers? The Supreme Court’s most recent decision regarding hearsay would seem to bar such a practice.¹⁷⁶ On the other hand, the same opinion appears to hold out the prospect that credible hearsay may be admitted under some circumstances as long as the statements were not made to law enforcement officials.¹⁷⁷

Another possible solution that courts may explore is the use of depositions conducted under a foreign court’s rules in lieu of live trial testimony. One former prosecutor puts the problem of obtaining foreign witness testimony at the top of his list of problems with prosecuting terrorism cases in the federal courts. A principal reason for the problem, he explained, was that some foreign countries are distrustful of American court procedures and fear that their agents and officials will not be adequately protected in a U.S. trial. Lacking any power of subpoena, the only way for the U.S. government to obtain needed testimony in such circumstances is to coax cooperation from the reluctant foreign government.¹⁷⁸ One possible means of doing so is to obtain the witness’s testimony in a deposition conducted within the foreign country, under the foreign country’s own rules. Such depositions are expressly authorized by federal statute,¹⁷⁹ and they have been used to secure foreign witness testimony in international criminal cases in the past – even where the foreign country’s deposition rules differed considerably from our own.¹⁸⁰ This is not to suggest that anything goes in a deposition so long as it is conducted abroad. But many foreign deposition procedures will be found compatible with fundamental fairness, and if not,

compromise procedures can be worked out, such that the deposition testimony can be admitted at trial in federal court.

In any event, as the *Moussaoui* case illustrates, the flexibility of the federal courts should not be underestimated. Although satisfactory answers to secrecy problems in terrorism prosecutions are not already settled for every conceivable situation, there is every reason to expect that the courts and Congress will be able to find them.

PART II: MILITARY TRIBUNALS

The federal courts have well-developed mechanisms for protecting classified information. The current Administration, however, seeks to address that concern by establishing an entirely new system of tribunals – “military commissions” – specifically designed with secrecy concerns in mind. To understand this dramatic step and assess whether it is an advisable solution to the secrecy problem, we first lay out the legal and historical background: What are military commissions? How do they differ from “courts-martial” – the military’s ordinary courts? Who may be tried before them, and what procedures must they follow? We then examine the new military commissions created for use in combating terrorism, focusing on their rules for guarding classified information. Can these commissions protect sensitive information in ways not available to ordinary federal courts and traditional courts-martial? Are their rules and procedures compatible with basic fairness? If not, can they be improved without defeating their basic purpose of providing greater secrecy than is possible in the federal court system?

■ THE LEGAL AND HISTORICAL BACKGROUND

Military tribunals serve important and legitimate needs. Both in war and peace, they function to maintain troop discipline and to punish criminal conduct by U.S. soldiers. They are also essential for administering justice in occupied territories and zones of combat, where U.S. federal courts do not operate.

Two types of criminal tribunals are recognized within the military system of justice – courts-martial and military commissions. Courts-martial make up the military’s permanent system of courts. They are primarily used to try U.S. soldiers for criminal and disciplinary offenses, but they can also try enemy prisoners and those charged with spying, sabotage, or other violations of the laws of war.¹ Military commissions, in contrast, are not standing courts. Rather, they have been established on an *ad hoc* basis for special purposes during times of war. They have been used mainly to fill gaps that arose in situations where courts-martial had not been given the authority to try certain categories of persons or crimes.²

■ TRADITIONAL LIMITS ON MILITARY JURISDICTION

At times throughout our history, the government has sought to use military tribunals for the trial of U.S. civilians, but the Supreme Court has made clear that this is rarely permissible, even in wartime. The Constitution acknowledges a legitimate role for military tribunals; it provides explicitly that the right to a grand jury indictment (and by implication the right to a civilian jury at trial) are not available in “cases arising in the land or naval forces.” But the Supreme Court has ruled that this exception cannot be stretched to include cases involving U.S. citizens not serving in the military. For example, when a civilian citizen was accused of murdering her husband while he was on active duty with the Army overseas, the Supreme Court held that her case did not “aris[e] in the land or naval forces,”

THE MILLIGAN CASE

Lambdin P. Milligan was accused of plotting to seize federal munitions and free Confederate prisoners. Union officers arrested him at his Indiana home on charges of aiding the enemy and violating “the laws of war.”⁵ Convicted by a military commission and sentenced to death, Milligan argued that as a Union citizen he was entitled to a civilian trial.

When the case reached the Supreme Court after the war’s end, the Court voided his military trial. The Court acknowledged that if civil authorities are “overthrown,” military courts can serve to establish order until ordinary courts can return. But, if military government continues “after the courts are reinstated, it is a gross usurpation of power,”⁶ for “where the courts are open and their process unobstructed...no usage of war could sanction a military trial...for any offense whatever of a citizen in civil life, in nowise connected with the military service.”⁷ The Court explained:

“[O]ur ancestors...foresaw that troublous times would arise, when rulers and people would become restive under restraint and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril unless established by irrevocable law.... No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that [constitutional] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers...necessary to preserve its existence.”⁸ ■

and as a result she was entitled to a civilian jury trial and all the other protections of the Bill of Rights.³ As long as civilian courts are open and functioning, military tribunals can be used only in cases involving our own troops, enemy soldiers, and foreign nationals under military occupation abroad.

The Supreme Court has emphatically enforced this principle even when fighting has reached our own shores. During the Civil War, President Lincoln established military commissions to try citizens suspected of aiding the Confederate cause. The military need was acute. Southern sympathizers, especially in the border states, posed a threat to military recruiting and logistics. Maryland was a particular hotbed of Confederate supporters, and its strategic location enabled them to disrupt the rail lines into Washington. Rioters in Baltimore blocked the movement of Union troops needed to protect the capital. Civil authorities were often unable to maintain order, and border-state juries sympathetic to the troublemakers made prospects for conviction uncertain. In this environment, security concerns were by no means speculative or imaginary.⁴

Nonetheless, in the Civil War case of *Ex Parte Milligan* (see sidebar), the Supreme Court held that even these military exigencies could not displace the safeguards of the Bill of Rights. In passages that have become justly famous, the Court declared: “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances....”⁹ The right to be tried in a civilian court, in a manner consistent with the Bill of Rights, the Court declared, “is the birthright of every American citizen when charged with crime.”¹⁰

World War II put that principle to the test again. Immediately after Pearl Harbor, President Roosevelt, with Congressional authorization, declared a state of “martial law” in Hawaii. Particularly in the early months, the situation was grave. Until the Battle of Midway in June 1942, enemy forces held considerable power to continue striking eastward, threatening the Hawaiian Islands with further bombardment or invasion. Even after Midway, the Japanese successfully seized islands in the Aleutian chain off the coast of Alaska, and for many months, enemy strength and intentions remained largely unknown. As late as April 1944, the Japanese fleet remained capable of launching another surprise attack on Pearl Harbor, and smaller raids and sabotage remained dangers in Hawaii throughout the war.¹¹

In this atmosphere, Roosevelt transferred to the area’s commanding general all powers normally exercised by the governor and judicial officers of the Hawaiian Territory. For all the commanding general knew, enemy forces were poised to launch an all-out invasion of the islands. The possible presence of enemy agents, lurking among the many loyal Japanese-Americans (citizens of Japanese descent accounted for a third of the population), added to the sense of insecurity. The military feared that the islands’ “heterogeneous population” afforded “ideal cover

for the activities of the saboteur and the spy.”¹² Officers worried that “the mere assembling of juries and the carrying on of protracted criminal trials might well constitute an...interference with the vital business of the moment.”¹³

Upon assuming control, military authorities immediately issued orders suspending the operation of the civilian courts. To take their place, the army quickly established military tribunals, not restricted by ordinary rules of evidence and procedure, to try local residents for violations of federal statutes, territorial law, and the regulations and orders of the new military government.¹⁴

Once again, however, in the case of *Duncan v. Kahanamoku* (see sidebar), the Supreme Court refused to countenance the trial of civilians in military courts. Duncan, a civilian employed at the Honolulu Navy Yard, had been brought before a military court on charges of assaulting two Marine sentries. Despite the military security concern and the defendant’s status as a Navy employee, the Supreme Court held that Duncan could not be denied a civilian trial, with a jury and all the other safeguards of the Bill of Rights. Tracing the history of resistance to military rule in England and America, the Court noted that “military trials of civilians charged with crime, especially when not made subject to judicial review, are...obviously contrary to our political traditions and our institution of jury trials in courts of law.”¹⁸ Against that background, the Court held, civilians living in U.S. territory where courts remained open could not be brought to trial before military tribunals, even during a grave military emergency.

In sum, while military tribunals play an important role in administering justice in cases involving U.S. soldiers, enemy armed forces, and foreign nationals under military occupation, military trials of U.S. civilians – even in wartime – have long been viewed with disfavor. As the Supreme Court has recognized, given the “dangers lurking in military trials...[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential.”¹⁹

■ TRIAL PROCEDURE IN COURTS-MARTIAL AND MILITARY COMMISSIONS

In those cases that can be appropriately tried in a military forum, what procedures do those courts follow?

Courts-martial are America’s regular military courts, and their procedures are comprehensively regulated by statute. As previously mentioned, courts-martial have historically served the military’s need to enforce strict discipline among U.S. troops in conditions of war as well as peace. Further, the modern court-martial system has been given authority to try both our own soldiers and enemy prisoners of war for ordinary criminal offenses and violations of the laws of war.²⁰

Yet, the requirements of a system suitable for use in wartime have not prevented courts-martial from assuming characteristics similar to those of the civilian

MARTIAL LAW AFTER PEARL HARBOR

In the *Duncan* case, the Court refused to interpret Congress’s express approval of “martial law” as authority for displacing civilian courts. Noting that military trial of civilians was one of the grievances prominently mentioned in the Declaration of Independence, the Court insisted that Congress could not have wished “to exceed the boundaries between military and civilian power in which our people have always believed.”¹⁵ The Court added: “Legislatures and courts are not merely cherished American institutions; they are indispensable to our government. Military tribunals have no such standing.”¹⁶

Justice Murphy’s emphatic concurrence still resonates today. Referring to the *Milligan* rule against military trials for civilians when civilian courts are open, Murphy declared: “The argument is made that however adequate the ‘open court’ rule may have been in 1628 or 1864 it is distinctly unsuited to modern warfare conditions where all of the territories of a warring nation may be in combat zones or imminently threatened with long-range attack.... The argument thus advanced is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. It is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war.... From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised.”¹⁷ ■

criminal justice system. For much of their history, this was not so. Courts-martial were viewed as instruments of military commanders and often functioned simply to rubber-stamp commanders' disciplinary judgments. During World War II, however, the military justice system came under scrutiny as millions of American conscripts were subjected to its harsh procedures. In the wake of widespread complaints of unfairness, Congress completely overhauled the court-martial system in 1950 by enacting the Uniform Code of Military Justice ("UCMJ").²¹ The UCMJ sought to bring military justice into line with civilian standards of due process. As one military judge has put it, the UCMJ is based on the "precept that military effectiveness depends on justice and that, by and large, civilian forms and principles are necessary to ensure justice" in military trials.²²

Through these reforms, and additional waves of reform in the 1960s and 1980s, court-martial procedures have come to resemble those found in a civilian criminal trial. The military judge exercises functions like those of the judge in a civilian court, and there are at least five court-martial "members," who serve the same function as jurors, deciding the facts of the case and determining the defendant's guilt or innocence.²³ Though military judges and jurors have less independence than their civilian counterparts,²⁴ a court-martial defendant can appeal his case to a *civilian* appeals court – the Court of Appeals for the Armed Forces. This court, wholly outside the military chain of command, consists of five civilian judges who, while not given life tenure, are still well insulated from political pressures by virtue of being appointed to fifteen-year terms.²⁵ And decisions of the Court of Appeals for the Armed Forces may be further appealed to the U.S. Supreme Court.²⁶

The defendant in a court-martial proceeding has many of the same fair trial rights recognized in the federal criminal courts. The Court of Appeals for the Armed Forces has held that all of the protections afforded to criminal defendants by the Bill of Rights apply to soldiers tried within the court-martial system, save for the right to indictment by a grand jury and trial by a jury of twelve civilians. Accordingly, court-martial procedure generally tracks Supreme Court case law interpreting these rights.²⁷ Thus, a defendant in the court-martial system is entitled to receive a speedy public trial,²⁸ to be personally present throughout the trial,²⁹ and to confront the evidence and witnesses against him.³⁰ As in the civilian courts, the defendant's right to confrontation restricts the government's ability to rely on hearsay evidence.³¹ The defendant also has the rights to be given access to exculpatory evidence in the government's possession³² and to subpoena witnesses to testify in his favor.³³ Some of these rights are longstanding. During the Civil War, the Army's Judge Advocate General, enforcing a tradition that was already considered well settled, set aside convictions where the record failed to show that the tribunal had met "in the presence of the accused" or that the accused had been afforded the "opportunity of challenge."³⁴

Like federal criminal courts, courts-martial follow special procedures in cases involving classified information.³⁵ In fact, the procedures are largely identical to

those followed in federal court under the Classified Information Procedures Act (CIPA): Military Rule of Evidence 505 provides that before the defense may obtain access to classified information, the military judge must review it to determine if the evidence is necessary to the defendant's case.³⁶ If so, the government may propose a declassified substitution for the evidence.³⁷ But if no adequate substitution can be crafted, then – just as in a federal criminal trial under CIPA – the evidence must be disclosed or else an appropriate sanction must be imposed on the government.³⁸

As in federal court, proceedings can be closed to the public when classified information is introduced, so long as the closure lasts no longer than necessary. For this option to be used, prosecutors, defense counsel, the judge, and all court-martial members must have appropriate security clearances, and they, like the defendant, retain the unrestricted right to be present throughout a closed session of this sort. Only the public is barred.³⁹ Closed proceedings can protect classified information somewhat more readily in the court-martial system than in the federal courts, because court-martial members, unlike a civilian jury, can easily be drawn from military officers with appropriate security clearances. Nonetheless, when the requirements for holding a closed session cannot be met and when no other satisfactory remedy is available, military law, like the law applicable in federal court, requires the prosecution to choose between disclosure or a sanction such as dismissal of any charges affected by the evidence in question.

In short, in a number of relevant respects, court-martial procedures parallel those of the federal criminal courts. How do military commissions compare?

Unlike courts-martial, military commissions are not permanent courts, but rather they have been established as needed in times of war. In instances when they have been established, however, military commissions usually have borrowed the contemporaneous procedures of courts-martial. The first military commissions were established during the Mexican War to try U.S. soldiers for crimes committed against the local population in occupied Mexican territory. At the time, military law did not grant courts-martial the authority to punish service members for crimes against civilians. U.S. Army commander General Winfield Scott created special military commissions as a way of quickly patching this statutory gap. General Scott established procedures for the commissions that closely resembled the court-martial procedures of the time.⁴⁰

Throughout their history, military commissions generally have followed this precedent. Tracking court-martial procedures, they have typically granted the same rights to the accused, utilized the same rules of evidence, and accorded the same rights to appellate review.⁴¹ Indeed, as early as the Civil War, the Army's Judge Advocate General set aside convictions by military commission when proceedings had failed to follow fundamental court-martial rules; in regard to the defendant's rights to presence and confrontation, he wrote, "it has always been held that the proceedings of a Military Commission should be assimilated to

those of a Court-martial. And [defects that] would be fatal in the latter case. . . must be held to be so in the [former].”⁴²

There are two significant exceptions to this pattern. First, in World War II, allied forces used military commissions to establish order in occupied territory and later to try Nazi and Japanese war criminals. These commissions were not modeled after courts-martial, nor were they modeled after Anglo-American courts in general. Instead, they drew heavily from the continental style of justice prevalent in Europe and throughout most of the world. In this way, the commissions reflected the international character of the Allied commands, and they followed customary procedures already familiar to the populations of the occupied nations themselves.⁴³

The second exception is *Ex Parte Quirin*, the famous World War II case involving eight would-be Nazi saboteurs caught inside United States territory in 1942. The Roosevelt Administration convened a special military commission to try the saboteurs, with looser procedures than those followed in courts-martial at the time. In this instance, a military commission was invoked for the specific purpose of escaping the rules applicable in federal courts and courts-martial, in order to lower the bar for conviction and sentence. The current Administration has relied heavily on the *Quirin* case as precedent for the military commissions established since the September 11th attacks, and thus it is worth examining the case in some detail.

■ ■ THE SABOTEURS' CASE

The conspirators traveled by German submarine to beaches in the United States, with plans to carry out acts of sabotage after their arrival. However, one of them quickly turned himself in to the FBI, leading to a roundup of the remaining seven soon thereafter. President Roosevelt responded by ordering a trial by military commission, composed of members he selected personally.

The option of a civilian trial was rejected for two reasons. One was a desire for absolute secrecy. The public was under the impression that the FBI had discovered the saboteurs through brilliant police work, and the Administration wanted to avoid disclosing that they had been able to enter the country undetected. This objective was not entirely political: the Administration sought to deter future sabotage attempts by projecting an image of impenetrability.⁴⁴ Nonetheless, complete secrecy was clearly unnecessary. A federal court could have held an open trial, save for testimony on this one point, or an appropriately redacted transcript could have been released to the public.

The second reason for by-passing the civilian courts was the fear that, because the men had been caught in the early stages of planning, it would be impossible to convict them of a substantial civilian crime – let alone sentence them to death, as much of the public was demanding.⁴⁵ A military tribunal, it was thought, could be used to obtain the desired convictions swiftly, along with the ultimate penalty.⁴⁶

These concerns, however, do not suffice to explain the Roosevelt Administration's preference for a military commission. Secrecy and more stringent punishments could have been achieved in a court-martial proceeding, but the Administration rejected that approach as well. It believed that by opting for a military commission, it would give itself a freer hand in crafting *ad hoc* procedures of its choosing.⁴⁷ It used that freedom to by-pass many procedural safeguards required in courts-martial at the time. The commission's proceedings were entirely closed to the public.⁴⁸ Released from court-martial evidentiary rules, it was free to consider any evidence deemed to "have probative value to a reasonable man."⁴⁹ The commission was authorized to impose the death sentence by just a two-thirds vote,⁵⁰ and ordinary appellate review of court-martial judgments was displaced by Roosevelt's order that the record of the proceedings be transmitted "directly to me for my action thereon."⁵¹

The saboteurs' military trial was held in secrecy at the Justice Department, although the defendants and their counsel were present throughout.⁵² While the trial was ongoing, the defendants challenged its legality, arguing that the President had no authority to prosecute them outside of the civilian criminal justice system. After the Supreme Court upheld the legality of the commission, all eight defendants were found guilty and sentenced to death. Six were executed; President Roosevelt commuted the sentences of the remaining two to prison terms based on their assistance in apprehending the others.⁵³

The Supreme Court's opinion in the case, *Ex parte Quirin*,⁵⁴ was limited and in some respects ambiguous. (See sidebar.) The most important issues were whether the saboteurs were properly subject to military trial at all, and if so, whether the particular procedures established for their case were lawful. Because they had been seized within the United States at a time when the courts were open and functioning, the *Milligan* rule offered at least superficial support for their claim that they were entitled to a civilian jury trial. The *Quirin* Court noted the sensitivity of issues touching the power of military courts, but denied the saboteurs' jury trial claim on narrow grounds: "We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals.... It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries.... [They were] admitted enemy invaders."⁵⁵ Unlike *Milligan*, who claimed to be a civilian and denied aiding the Confederacy, the *Quirin* defendants acknowledged that they were serving on active duty with the German armed forces. Thus, they fell within the longstanding rule: Enemy soldiers, like our own, are subject to trial in military courts even when the civilian courts are open.

The second question in *Quirin* was whether the military commission's procedures were unlawful, because they permitted a secret trial and disregarded safeguards applicable to courts-martial under the congressionally approved Articles of War, the precursor to today's UCMJ. From today's vantage point, of course, this issue is especially important, because the present Administration points to *Quirin* as

THE QUIRIN DECISION

In *Ex parte Quirin*, the Supreme Court held that enemy combatants may be tried by military commission for violations of the laws of war – including those "who without uniform come secretly through the lines" to "wag[e] war by destruction of life or property."⁵⁵ Notably, the Court found it irrelevant that one of the defendants claimed to be a U.S. citizen. As an "admitted enemy invader" accused of violating the laws of war, he was still subject to military trial.⁵⁶

In this respect, the decision stands in marked contrast to *Ex parte Milligan*.⁵⁷ The *Quirin* Court made some perfunctory attempts to distinguish *Milligan*, stating that *Milligan* was "not an enemy combatant" and that his conduct was "not recognized by our courts as [a] violation[] of the law of war."⁵⁸ But these distinctions do not easily withstand scrutiny. Indeed, several justices had misgivings about the opinion.

Under pressure to decide the case quickly, the Court announced its judgment only one day after hearing argument, deferring its written opinion in a rare departure from custom. Over the summer, Chief Justice Stone wrote his opinion for the Court, which was finally issued three months later. In contemporaneous memos, Stone worried about the lack of authority for its conclusions, doubting in particular that the commission's departure from court-martial procedures was proper.⁵⁹ But the executions had occurred soon after the Court's initial pronouncement; the Court could hardly change its mind. As to the commission's procedures, the opinion simply stated a bare-bones conclusion and noted divided views within the Court. Justice Frankfurter, who enthusiastically supported the commission at the time, would later remark that *Quirin* "was not a happy precedent."⁶⁰ ■

support for the President's authority to by-pass court-martial norms and prescribe special, less protective procedures for military commissions. What did the *Quirin* Court decide on this crucial point?

The short answer (misleading, as we shall see) is that *Quirin* upholds the saboteurs' commission and President Roosevelt's authority to establish its procedures. To that extent, the decision seems to support the current Administration's actions taken since the September 11th attacks. But again, the Court's ruling is extremely narrow. In fact, the Justices were obliged to note that on the crucial issue of the commission's procedures, "a majority of the full Court are not agreed on the appropriate grounds for decision."⁶² Some members of the Court thought that the military commission was indeed bound by the Articles of War but that "the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President."⁶³ Other Justices were "of the opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders."⁶⁴

Because *Quirin's* approval of the commission's procedures expressly turns on these two points, that holding is largely inapplicable to present circumstances. Regardless of whether the World War II Articles of War permitted the procedures President Roosevelt prescribed in 1942, the UCMJ, enacted in 1950, provides much more comprehensive safeguards; the import of the statutory provisions now in force must be examined on their own terms. Similarly, nothing in *Quirin* suggests that the Justices who accepted limited safeguards for "admitted enemy invaders" would necessarily endorse the same approach when, as is true today, the defendants brought before a military commission deny the charges against them and seek a reliable procedure for determining the decisive facts.

Moreover, there are other questions relevant to the lawfulness of today's military commissions that *Quirin* fails to answer. One is whether the commissions' procedures must accord not merely with the UCMJ, but also with the Constitution. At the time that *Quirin* was decided, the Supreme Court did not review military trials to determine whether their procedures met the Constitution's guarantee of due process. Rather, the only constitutional question the Court would consider was whether the military tribunal had authority under the Constitution to try the case at all.⁶⁵ Since then, however, the Supreme Court has made clear that federal courts can review military trial proceedings to ensure that a defendant's constitutional rights have been respected.⁶⁶ Thus, in judging the lawfulness of today's military commissions, the Supreme Court would have to decide what constitutional rights are owed to a defendant in the military commission system, and whether the commissions' procedures violate those rights.

Another question is whether the commissions accord with international law. Since *Quirin* was decided, there have been significant developments in international law regarding the fair trial rights owed to a captured combatant charged

with a crime. Most significantly, Common Article 3 of the 1949 Geneva Conventions forbids sentences from being carried out “without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁶⁷ These guarantees are fleshed out in the “fundamental guarantees” enumerated in Article 75 of the 1977 Geneva Protocol I, which include the right of the defendant “to be tried in his presence,” “to examine, or have examined, the witnesses against him,” and “to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”⁶⁸ Thus, a key question in assessing the lawfulness of today’s military commissions is whether these rights under international law are judicially enforceable and what precisely they entail.

In sum, military commissions have a recognized pedigree and a long history. But Supreme Court decisions have tended to limit their use to try civilians, even in wartime, and military tradition has constrained their freedom to depart from ordinary court-martial procedures. *Quirin* is a rare instance where the military commission form was used to evade civilian or court-martial fair-trial standards in order to facilitate conviction. Whether today’s military commissions can lawfully depart from these standards depends on complex questions which *Quirin* simply does not answer.

■ **MILITARY COMMISSIONS IN THE WAKE OF THE SEPTEMBER 11TH ATTACKS**

Approximately two months after the Al Qaida attacks on the Pentagon and the World Trade Center, President Bush issued an executive order authorizing the use of military commissions in the war on terrorism.⁶⁹ The order does not apply to U.S. citizens; but it gives the President unfettered discretion to require anyone else to face trial by military commission (including any of the 30 million foreign nationals living in the United States), whenever the President finds a “reason to believe” that the individual has connections to terrorism.⁷⁰ The order declares that, given the nature of international terrorism, “it is not practicable” for these military commissions to apply the rules of law generally recognized in federal criminal trials.⁷¹ The order does not specify the new procedures the commissions will use, but rather authorizes the Secretary of Defense to do so through regulation.

Beginning in March 2002, the Defense Department began promulgating regulations to establish the commissions’ procedural rules. These rules, for the most part, have been drafted behind closed doors, without any hearings or other input from scholars, legal organizations, human rights groups, or others with relevant expertise or points of view. Unlike the procedures that govern courts-martial, the military commission procedures have not been enacted by Congress, and have been adopted with no congressional input.

Together, the President’s order and the Defense Department regulations create a system in which the tribunal, its procedures, and the provisions for appeal all

depart sharply from the corresponding features of the court-martial system already in place to try our own service members, enemy prisoners, and those accused of violating the laws of war.⁷²

The Tribunal. Each military commission under the new system is composed of three to seven “members,” all commissioned officers of the U.S. military appointed directly by the Secretary of Defense or his special designee, called the “Appointing Authority.”⁷³ Unlike a court-martial, the commissions have no separate, independently assigned judge to decide issues of law. (A military judge in the court-martial system is randomly assigned by and reports directly to the semi-independent Judge Advocate General’s office.)⁷⁴ Indeed, the military commission rules require only one member, the Presiding Officer, to be a lawyer.⁷⁵ Yet the military commission members as a group decide not only the facts of the case, but also the legal questions that arise during the proceedings.⁷⁶ Thus, even though cases coming before the military commissions are sure to raise novel questions of law, the issues will be resolved by panel members who largely possess no legal training. Compounding that problem, the commission rules require any legal questions that could require a judgment for the defendant to be referred to the person designated as the “Appointing Authority.”⁷⁷ The Appointing Authority likewise need not be a judge or a lawyer, and as an appointee of the Secretary of Defense, he or she has no insulation from political influence.

Trial Procedures. At first blush, the military commission rules appear to provide many of the procedural safeguards available in a civilian criminal trial or court-martial. The defendant is entitled to notice of the charges and sufficient time to prepare a defense.⁷⁸ He has the right to counsel⁷⁹ and the right to be provided any exculpatory evidence known to the prosecution.⁸⁰ He has the right to have his counsel present evidence on his behalf and cross-examine prosecution witnesses.⁸¹ He can choose not to testify and his silence may not be used against him.⁸² He is presumed innocent and may be convicted only on proof beyond a reasonable doubt.⁸³

In crucial respects, however, these safeguards are watered down by other provisions of the military commission rules. In the name of secrecy and providing greater protection for witnesses, the rules place significant, and in some ways dramatic, restrictions on the defendant’s rights to confront the witnesses against him, to discover favorable evidence, to present witnesses in his favor, and to have a public trial. These restrictions are discussed in depth below.

Other departures from customary civilian and military procedures have no apparent relation to secrecy and witness-protection problems. A commission may consist of as few as three members, and a two-thirds vote is normally sufficient for conviction and sentence.⁸⁴ Where a capital sentence is at stake, there must be seven members and a unanimous vote.⁸⁵ By comparison, a court-martial must consist of at least five members, and in serious cases a three-fourths vote is required for conviction and sentence.⁸⁶ In capital cases, there must be twelve

members and a unanimous vote.⁸⁷ In a federal court, of course, a jury of twelve and a unanimous vote are required in all criminal cases.

Provisions for Appeal. Unlike the court-martial system, where a defendant may appeal to the civilian Court of Appeals for the Armed Forces and ultimately to the U.S. Supreme Court, a defendant in the military commission system has no right of appeal to any independent civilian court. Rather, the new commission system is wholly contained within the military command structure. Commission decisions are reviewable only by panels appointed by the Secretary of Defense, and decisions of these panels in turn are reviewable only by the Secretary and the President.⁸⁸ Review-panel members, like commission members, have little insulation from political influence: they report directly to the Secretary of Defense, who decides their term of appointment.⁸⁹ Only one member on each review panel is required to have judicial experience.⁹⁰

Lack of Enforceable Rights. Finally, as if selling a used car, the military commission rules expressly disclaim any guarantee that even the limited rights described above will be enforced. The rules end with the caveat that they are “not intended to and do[] not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States.”⁹¹



In creating a new trial system that departs sharply from the established practices of all existing American courts, civilian and military, the Administration has cited extraordinary needs to maintain secrecy and to protect the physical safety of trial participants. Few would question the importance of these concerns in the context of our efforts to combat global terrorism. Terrorism unquestionably poses distinctive challenges. Yet, the Administration’s military commissions are a cumbersome and gravely flawed response. The newly created procedures stretch far beyond any legitimate concern for safety or secrecy. They needlessly override traditional trial safeguards that are essential not only to assure fair treatment of the accused, but also to guarantee accurate determinations of guilt and to confer legitimacy on the tribunal’s verdicts in the eyes of America and the world. With little apparent justification beyond the predictable desire of military and executive officials to escape accountability to independent courts, the new commissions promise to hinder our counter-terrorism effort far more than they will advance it.

Below, we assess the new military commissions against the primary rationale the Administration has put forward to justify them – the need for greater secrecy in terrorism trials. We begin by noting that a number of the commissions’ features bear no relationship to legitimate secrecy concerns. We then turn to the genuinely difficult problem of protecting sensitive information, focusing in depth on each of the commission procedures ostensibly designed for that purpose. In each case, the new procedures confer indiscriminate powers that prove to be unnecessary, contrary to long-standing concepts of fairness in both civilian and military courts,

PROTECTING TRIAL PARTICIPANTS

The need to ensure the physical safety of the judges, jurors, prosecutors, and other participants in a terrorism trial might seem a plausible justification for military commissions until we put that problem in perspective. Safety concerns are by no means imaginary, as recent events have made all too clear.⁹⁴ But there is no reason to think that revenge attacks on trial participants are more likely in terrorism cases than in drug or organized crime prosecutions. Safety concerns, though often substantial in those contexts, are addressed through the use of anonymous juries, witness protection programs, and security details for judges and prosecutors. In fact, protective measures of these sorts may well need to be strengthened in conventional domestic trials. But given that global terrorist groups typically aspire to cause mass casualties, the danger that they might seek to disrupt trial proceedings or seek vengeance on participants is speculative and remote – far less than the documented desire of some drug gangs, organized crime figures, mentally disturbed defendants, and domestic political extremists to carry out such attacks. If safety problems of that sort can suffice to move prosecutions from civilian to military tribunals, the constitutional right to trial in the independent federal courts is fragile indeed. ■

and, most important, damaging to our prospects for success in the struggle against terrorism.

Many of the procedural details are complex and technical, but the overall picture is not. By granting military officers who lack independence the unchecked discretion to keep evidence secret from the defendant and from the public, the new commission system cannot be expected to win public trust or to craft narrowly tailored devices that simultaneously guarantee secrecy, fairness, and factually reliable decisions. The military commissions are a counterproductive diversion urgently in need of reconsideration.

■ WHAT PROTECTION DO ACCUSED TERRORISTS DESERVE?

On announcing the President’s order creating the commission system, the Administration explained that extraordinary measures are needed to guard classified information in terrorism trials and to protect the physical safety of everyone involved.⁹² As stated in a Defense Department press release: “The commissions share characteristics with both federal and military courts [*i.e.*, courts-martial], but provide heightened protection for trial participants and safeguards for classified information.”⁹³

The differences between the new military commissions and our existing civilian and military courts are not, however, limited to the addition of “heightened safeguards for protection for trial participants and safeguards for classified information.” The commissions depart from ordinary civilian and military standards of justice in ways that have little to do with either safety or secrecy.

First, while the military commission rules require proof of guilt beyond a reasonable doubt, this ostensibly high standard of proof is undermined by a low voting threshold required for conviction and sentence. Because a commission can consist of as few as three members and can decide on conviction and sentence by only a two-thirds vote, the government need only be able to persuade two persons hand-picked by the Secretary of Defense in order to prevail. Second, the commissions lack any independently assigned, legally trained judge with the authority to decide questions of law. Third, the rules preclude appellate review by a civilian court, allowing decisions to be appealed only to review panels appointed by the Secretary of Defense.

These differences lack any apparent connection to legitimate concerns about guarding classified information or protecting trial participants. (See sidebar.) Instead, their function seems simply to be to insulate the commission system from any independent check on its decisions, eliminating even the partially independent mechanisms of accountability that we have long accepted in courts-martial. In effect, the commission rules are throwbacks to military justice procedures as they existed more than fifty years ago, before the reforms of the UCMJ and

subsequent legislation brought the military legal system in line with modern standards of fairness. As a retired Navy Commander has put it, reversion to these practices in the newly fashioned military commission system “marks a half-century leap backward in military legal norms.”⁹⁵

That “leap backward,” moreover, is the result of rules developed behind closed doors, without any opportunity for public input or deliberation – another anomalous feature of the commission system with no link to its stated rationale. In areas where the UCMJ allows the executive branch to develop specific court-martial procedures, standard Defense Department policy is to develop those procedures through an open process in which persons and organizations with interests or expertise – including military justice experts and the defense bar – have the opportunity to participate.⁹⁶ And whatever the need for secrecy in terrorism trials, that need cannot be extrapolated into a need to keep secret the process for developing trial procedures themselves. Yet no open process was followed in developing the new commission procedures. Legislation from Congress was never sought or considered;⁹⁷ the Defense Department did not even follow its usual process for adopting administrative rules, with the customary opportunity for public comment.⁹⁸

Given the dramatic implications of creating an entirely new system of courts and its potential impact on the quality of justice in counter-terrorism prosecutions, the need for careful decision-making with public input should have been obvious. At stake is whether we should append to the American system of justice a secretive trial forum, lacking conventional guarantees of independence, which presumably will be with us for as long as the threat of terrorism lasts. Yet the new courts and their rules have simply been announced by executive fiat. The resulting system, adopted without adequate deliberation, lacks both the imprimatur of democratic legitimacy and the careful analysis necessary to assure its workability and effectiveness, even from the perspective of the military planners it was presumably meant to serve.

In light of its various features in no way related to needs for secrecy or safety, the commission system seems intended, at least in these respects, simply to provide a convenient, streamlined alternative to conventional civil and military courts. In effect, it is designed to dispense a lesser brand of justice, just as streamlined procedures enable us to administer speedy justice in traffic court and other forums concerned with petty offenses. Yet terrorism charges, obviously, are no minor matters. Much of the public nonetheless seems to believe that in terrorism cases we should relax our ordinary commitment to independent tribunals that resolve factual disputes with scrupulous attention to detail. Indeed, some Administration officials openly endorse that perspective, though not, of course, on the ground that terrorism is a petty offense.

The rationale for a lesser system of justice is quite different. In public remarks shortly after the announcement of the President’s order establishing military

MISDIRECTED SUSPICIONS

Public pressure for aggressive executive action against terrorism is appropriate but bound to generate overreaching and exaggeration. We have seen this dynamic at work in several contexts since September 11th:

The Guantanamo Detainees. Cabinet-level officials initially described detainees transferred to Guantanamo Bay as “the worst of the worst,”¹⁰² “among the most dangerous, best trained, vicious killers on the face of the earth.”¹⁰³ Yet more than three years later, the public has been given little reason to believe these claims. To date, only four detainees have been charged with any offense.¹⁰⁴ More than 200 detainees have been released, and the deputy commander of the base has described most of the 550 remaining as of “low intelligence value and low threat status.”¹⁰⁵ Another military official explained that few turned out to be hardened terrorists: “It became obvious to us as we reviewed the evidence that, in many cases, we had simply gotten the slowest guys on the battlefield. We literally found guys who had been shot in the butt.”¹⁰⁶

Immigration Sweeps. In the weeks after September 11th, the government detained over 1,200 Muslim and Arab immigrants in immigration sweeps. At the time, the Attorney General claimed the sweeps were “carefully drawn to target a narrow class of individuals – terrorists.”¹⁰⁷ Yet, an investigation by the Justice Department’s Inspector General found that the sweeps were conducted in an “indiscriminate and haphazard manner,” and that, rather than being focused on “suspected terrorists,” the detention policy was “applied much more
(continued)

commissions, Vice President Cheney defended the military commission system on the ground that “terrorists” do not “deserve” normal due process protections:

The basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation, killing thousands of innocent Americans – men, women and children – is not a lawful combatant. They don’t deserve to be treated as a prisoner of war. They don’t deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process. They will have a fair trial, but it will be under the procedures of a military tribunal, under rules and regulations to be established in connection with that. We think it’s the appropriate way to go. We think it guarantees that we’ll have the kind of treatment of these individuals that we believe they deserve.⁹⁹

This reasoning reflects a short-sighted and dangerous mistake. When one thinks of admitted terrorists such as Osama bin Laden, or September 11th mastermind Khalid Sheikh Mohammed, this impulse toward “rough justice” is perhaps understandable. Likewise, in the World War II case of the Nazi saboteurs, the Supreme Court’s willingness to tolerate the streamlined procedures of President Roosevelt’s military commission is perhaps understandable on the ground the Court itself stressed – that the accused were “admitted enemy invaders.”¹⁰⁰ But that instinct cannot be applied to those who face military commissions today – *suspects* who deny the government’s charges – unless there is no difference between an admitted terrorist and an accused terrorist. To conflate the two is to disregard the whole point of a trial, which is to determine the truth when the defendant disputes the accusations against him. By treating the defendant’s involvement in terrorism as a known fact we assume away the reason for having a trial in the first place. Accusations must be thoroughly tested in a neutral forum before a defendant may be deemed guilty as charged.

The need for such a check is greater, not less, in the context of the struggle against terrorism. The government is under enormous pressure to show progress. Yet the shadowy character of our efforts and our enemy make victories difficult to demonstrate. The temptation – conscious or subconscious – to cut corners and produce results can be powerful.¹⁰¹ Indeed, since September 11th, government claims of success in capturing “terrorists” have ultimately proven dubious or untrue on a number of occasions. (See sidebar.) Time-tested trial safeguards exist precisely to protect the accused and the public against loose accusations of this sort. Both to preserve fairness to the accused and to maintain the integrity of the law enforcement effort itself, any needed adjustments to these safeguards must be made carefully – with a scalpel, not an ax.

The sections below consider whether the military commission system passes this critical test in its efforts to solve the classified information problem.

■ SECRECY WITHOUT SAFEGUARDS

Four features of the military commission system are centrally concerned with protecting classified information. Commission rules permit:

- **closed trial sessions**, in which evidence may be kept secret not only from the public but also from the accused himself;
- **hearsay evidence and anonymous witnesses**, both of which can be used to protect confidential intelligence sources;
- **limits on the defense's discovery rights**, which thus insulate classified information from disclosure; and
- **limits on the defendant's opportunity to subpoena witnesses and documents in his favor**, ostensibly to prevent the defense from gaining access to sensitive intelligence information.

These features, like the military commission system as a whole, are troubling over-reactions to a legitimate but narrow problem. Rather than providing carefully tailored mechanisms to protect classified information, they simply grant the government broad discretion to keep secret the evidence on which convictions and punishments will be based. Existing civilian and military courts use a familiar set of discriminating tools to preserve confidentiality without compromising their ability to render respected and reliable verdicts. In contrast, the new military commissions operate with virtually no safeguards to insure that efforts to protect secrecy do not needlessly override the defendant's opportunity to challenge the accusations and the public's need for confidence in the accuracy of the results.

■ ■ CLOSED TRIAL SESSIONS

Under the new military commission rules, the Presiding Officer enjoys essentially unfettered discretion to exclude the press, the general public, the defendant's civilian counsel, and even the defendant himself whenever the prosecution seeks to introduce into evidence any "Protected Information." This newly minted category of information is only loosely defined, but it clearly sweeps more broadly than *classified* information. It includes, among other things, information that is "classified or classifiable," information "concerning intelligence and law enforcement sources, methods, or activities," and, broadest yet, any information "concerning" national security interests.¹¹⁴ While the rules caution that "[p]roceedings should be open to the maximum extent practicable," they contain no restraint on the Presiding Officer's authority to order closure as he or she sees fit.¹¹⁵

This broad discretion to close the proceedings raises several separate concerns. Most obviously, the power to exclude the defendant and his civilian counsel threatens the defense team's ability to challenge accusations that may, after all, be mistaken. The power to exclude the media and others impairs the distinct interests protected by freedom of speech and the press. Even when a defendant is willing to plead guilty and seeks to maintain confidentiality, judicial proceedings and courts-martial ordinarily must be kept open, in order to preserve the public's right to know – and in turn to criticize – the actions of its government.¹¹⁶

broadly to many detainees for whom there was no affirmative evidence of a connection to terrorism."¹⁰⁸ Indeed, none of the detainees have been successfully convicted of terrorist crimes.¹⁰⁹

Overzealous Prosecution. Public demand for visible "victories" and the government's perceived need to demonstrate results can produce dramatic instances of prosecutorial overreaching, such as the so-called Detroit "Sleeper Cell" case. Of the hundreds of individuals detained in the post-September 11th immigration sweeps, only four were ever charged with a terrorist-related crime. That prosecution, the Department of Justice ultimately acknowledged, was brought in error. Prosecutors in Detroit initially stated that those charged constituted a "sleeper operational combat cell" of radical Muslims that was helping to plot attacks in the United States, Turkey, and Jordan.¹¹⁰ The Attorney General added that the defendants were "suspected of having knowledge of the Sept. 11 attacks."¹¹¹

Two of the defendants were convicted of terrorism-related charges in June 2003, a result that the Attorney General described as sending a "clear message" that the government was "work[ing] diligently to detect, disrupt and dismantle the activities of terrorist cells in the United States and abroad."¹¹² A year later, however, that message turned out to be less than clear. After it was revealed that government agencies held considerable amounts of exculpatory evidence never provided to the defense (see sidebar on pp.70-71), the Justice Department asked the court to throw out the terrorism charges, acknowledging that an overzealous prosecution had built a case on questionable evidence.¹¹³ ■

The public's right to attend court proceedings, though crucially important in a democracy, is not unlimited. Federal courts and courts-martial restrict public access to trials when classified evidence is presented, but they do so only when the government can show a compelling interest in closing the proceedings.¹¹⁷ Moreover, even when a compelling need can be shown, civilian courts and courts-martial impose strict limits on the scope of the closure – for example, by releasing redacted transcripts of the closed proceedings or by providing another limited form of public access. Nothing in the military commission rules requires such limits or insures that secrecy concerns will not needlessly impair the public's right to know. In fact, when the new military commissions held closed pre-trial sessions in late 2004, to hear challenges to the impartiality of the commission members, no redacted transcripts were released afterwards.

Of course, proceedings can be closed to the public when unusual circumstances require without excluding the defendant himself. The defense team's ability to mount a vigorous defense thus can be preserved in full, even when it is important to maintain some degree of confidentiality. Exclusion of the defendant or his counsel raises far more serious concerns. Indeed, if the prosecutor can introduce evidence that is kept secret from the accused, the trial loses its primary check against error: the defendant's ability to identify gaps and inaccuracies in the prosecution's case.

For that reason, neither the federal courts nor courts-martial ever allow a defendant to be shut out from his own trial, except for unruly behavior. (And even where a defendant is forcibly removed from trial due to misconduct, he remains free to consult with his counsel afterwards about the evidence presented in his absence and how to respond.)¹¹⁸ To protect classified information, federal courts and courts-martial do occasionally limit a defendant's access to classified information in *pre-trial* proceedings. As described in Part I, when classified information must be turned over to the defense as part of discovery proceedings, the Classified Information Procedures Act allows the court to impose a counsel-only protective order, requiring the classified material to be provided exclusively to defense counsel holding a security clearance and not to the defendant himself. But accepting this restriction in the discovery process is a far cry from excluding the defendant at the trial itself. Discovery is merely preparatory; it enables the defense to investigate the case and devise litigation strategy. And discovery can involve thousands of documents, too sensitive to show the defendant, that neither side would ever expect to use. At trial, the government makes its case by selecting the central pieces of evidence with which it hopes to establish the defendant's guilt. In the American legal tradition, it has been considered unthinkable, as well as unconstitutional, to deny the defendant an opportunity to know what that evidence is.

The new military commission rules authorizing closed trial sessions represent a stark departure from these norms. In order to safeguard so-called Protected Information, Presiding Officers may exclude the defendant either on their own initiative or in response to a prosecution request. And compounding the risk of

unfairness, the prosecutor's request for closure can itself be made outside the presence of the defendant or his counsel.¹¹⁹ Trial proceedings also can be closed to any civilian counsel hired by the defendant – even though civilian counsel must obtain a high-level security clearance before they may practice in the military commissions in the first place.¹²⁰

True, the commissions' closed sessions are not entirely one-sided. The defendant's military counsel cannot be excluded from any trial proceedings, and counsel accordingly has at least some opportunity to confront the government's evidence and to cross-examine its witnesses.

But the presence of military defense counsel cannot fully compensate for the absence of the defendant himself. The defendant, not counsel, is on trial. The defendant, not counsel, knows first-hand whether the government's allegations against him are accurate. Counsel's role requires consulting with the defendant about where the government's side of the story goes wrong. In the Supreme Court's words: "[The defendant's] life or liberty may depend upon the aid which, *by his personal presence*, he may give to counsel.... The necessities of the defense may not be met by the presence of his counsel only."¹²¹ Yet the commission rules bar military counsel from discussing with their clients (or anyone else) any information presented in closed session.¹²² Lieutenant Commander Charles Swift, who represents Salim Ahmed Hamdan, one of four defendants charged in the military commission system to date, provides an insider's view of the problems posed by closed sessions:

[The rule providing for closed sessions] comes from the school of thought that defense counsel simply makes it all up anyway, so what's the difference if the defendant doesn't get to see the evidence? But as any defense lawyer knows, the way you get your cross-examination material is by consulting with your client. Whenever I meet with a defendant for the first time, the first thing that I say to him is: "The government has lots of advantages. Compared to me, they have unlimited time and unlimited investigative resources. But the one advantage I have is you. You're the one person who knows whether the government's accusations are true."¹²³

The prosecution in the *Hamdan* case has stated that at least two days (of a projected ten-day trial) will take place in closed session. These closed sessions have yet to take place, but the problems faced by Commander Swift and his client are readily imagined. In closed session, the government presumably intends to have a witness testify to the allegations made in its charging papers – for example, that Hamdan trained at an Al Qaeda camp.¹²⁴ To cross-examine such a witness effectively, Hamdan's counsel must be able to turn to his client and ask: "Who is this witness? Did you do what he says? What explains his testimony?" Without that ability, defense counsel can only make use of the outer forms of cross-examination, not its substance.

In fact, closed sessions have already been used in the "Combatant Status Review Tribunals" established at Guantanamo to determine whether detainees there are,

in the Administration's terminology, "enemy combatants."¹²⁵ The records of these tribunal proceedings contain vivid lessons about the dangers of closed sessions, lessons that carry over to the military commission context. Consider the following colloquy from an open tribunal session in which the detainee was asked to respond to classified evidence previously presented in closed session:

Tribunal Recorder [reading unclassified summary of the evidence presented in closed session]: "While living in Bosnia, the Detainee associated with a known Al Qaida operative."

Detainee: Give me his name.

Tribunal President: I do not know.

Detainee: How can I respond to this?

Tribunal President: Did you know of anybody that was a member of Al Qaida?

Detainee: No, no.

Tribunal President: I'm sorry, what was your response?

Detainee: No.

Tribunal President: No?

Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.¹²⁶

A military commission, unlike a Combatant Status Review Tribunal, would allow the defendant's military counsel to learn the name of the "known Al Qaida operative." But that information would be of little help to defense counsel so long as he could not share it with the defendant himself. Restricting counsel's ability to probe the defendant's knowledge is likely to propel the attorney and the client into the same sort of awkward conversation set forth above, with counsel unable to uncover the details needed to challenge the government's claims. To be sure, defense counsel can question some types of prosecution evidence without needing to consult with their clients. Certain types of forensic evidence, for example, might fall into this category. In the main, however, most of the important evidence in a criminal case is likely to concern the defendant's conduct and intentions. Without the ability to consult with the defendant about such evidence, counsel will be severely and unfairly handicapped in responding to it, and the

public itself will be deprived of an effective mechanism for ensuring that the government's accusations are true.

Given the enormous risks associated with the use of secret evidence, there is a clear need for compensating safeguards. Yet safeguards are glaringly absent from the military commission rules.

First, the commission rules take no account of how severely counsel's ability to mount a defense will suffer if the defendant is excluded. There is no requirement, for example, that the Presiding Officer find prior to closure that the defendant lacks personal knowledge relevant to the secret evidence, or that his counsel can adequately respond to the evidence without his client's assistance. The rules simply state that commission proceedings are to be open to the maximum extent "practicable"¹³² – and the term "practicable," unclear at best, seems to focus attention on the government's asserted security interests. Thus, testimony central to the prosecution's case, concerning events with which the defendant is intimately familiar, apparently can be admitted in secret, with no effective opportunity for rebuttal, so long as the Presiding Officer deems open proceedings "impracticable."

Second, where commission proceedings are closed to the defendant, the rules require no effort to offset any resulting handicap to the defense. Even when classified information is too sensitive to risk disclosing it to the defendant (for example, the identity of an informant still working undercover), a detailed summary of the evidence presented in closed session can go far toward enabling the defendant to respond. Yet the rules of the new commission system do not require that the defendant receive any summary at all. To the contrary, defense counsel cannot disclose any information presented in closed session – "or part thereof" – except with the prior authorization of the Presiding Officer.¹³³

Third, the rules allow the defendant to be excluded from the proceedings without requiring the government to make any showing that the defendant's presence would harm national security. Rather, the rules authorize closure to protect the almost limitless class of "Protected Information," which includes information that is classified or "classifiable," along with information that "concerns other national security interests."¹³⁴ By those terms, virtually any evidence in a terrorism prosecution will qualify. Yet, even when evidence is officially "classified," it does not necessarily warrant protection. To the contrary, it has been well documented that the government habitually over-classifies information; indeed, courts addressing CIPA matters often discover that information was improperly classified, not only due to mistake or excessive caution but on occasion simply to shield officials from accountability.¹³⁵ To check against abuse, a case-specific finding of a real national security risk is essential – and well within the competence of ordinary courts. Where federal courts and courts-martial have considered limiting public access to trials involving classified information, they have independently assessed whether its release would pose a *bona fide* national security risk.¹³⁶ At least this much scrutiny is called for where the defendant himself is to be excluded.

THE ALIEN TERRORIST REMOVAL COURT

With open-ended discretion to keep evidence secret, military commissions enjoy unchecked power that exceeds even the broad prerogatives conferred on the Alien Terrorist Removal Court ("ATRC").¹²⁷ Congress created the ATRC in 1996 to enable deportation of alien terrorism suspects based on classified evidence.¹²⁸ Even though such an alien faces only removal from the country, not a prison or death sentence, Congress nonetheless built greater safeguards into the ATRC than the Defense Department has considered necessary for military commissions.

An ATRC proceeding is held before a specially designated federal judge. If the government wants to rely on classified evidence, it must first submit a summary to the judge that is "sufficient to enable the alien to prepare a defense."¹²⁹ If the judge finds the summary insufficient, and the government fails to cure the deficiencies, then the judge must determine whether failing to remove the alien would cause "irreparable harm" to national security, and if so, whether providing the alien a sufficient summary of the classified evidence would also cause "irreparable harm."¹³⁰ When both determinations are made, then – but only then – can the ATRC hearing proceed in closed sessions, with classified evidence shown only to specially cleared counsel.¹³¹

If the mere deportation of an alien suspected of terrorism calls for this level of care, then clearly the criminal trial of someone suspected of terrorism calls for at least as much. That the commission rules omit even the ATRC's safeguards underscores how far they veer from basic standards of fairness and reliability. ■

In short, the military commission system's closure rules permit the defendant to be excluded from his own trial without requiring any well-focused judgment that the government's national security interests are significant, or that they cannot be fully protected in some less drastic way. Instead, a Presiding Officer who lacks the independence now customary even in courts-martial holds unchecked discretion to close proceedings – regardless of how great the resulting harm to the defendant, or how tenuous the asserted threat to national security. A tribunal structured in that fashion cannot be expected to reach reliable results or to command the public trust that is essential for long-run success in the struggle against global terrorism.

■ ■ HEARSAY AND ANONYMOUS WITNESSES

The military commission rules condone secrecy in another way by authorizing the use of hearsay and anonymous witnesses.¹³⁷ Both mechanisms allow prosecutors to introduce evidence against the defendant while limiting the defense's ability to challenge it effectively. If, for example, an intelligence agent cannot be called as a witness without jeopardizing his cover, hearsay testimony offers one means to get his information into evidence: a government officer could simply testify as to what the agent told him. Another way to protect the agent would be to have him testify anonymously.

Hearsay and anonymous witnesses are not objectionable *per se*. They are allowed under limited circumstances in federal court, and they are more liberally permitted in European criminal trials. Again, however, what is worrisome about the military commission rules is the open-ended discretion they confer on military officers who lack both independence and legal training. The rules establish no safeguards to protect against the dangers associated with hearsay and anonymous witnesses.

The pre-trial proceedings held so far in the *Hamdan* case (before all military commission proceedings were halted pursuant to federal court order) foreshadow the risks of allowing unregulated hearsay. In these pre-trial proceedings, the prosecution gave notice of its intent to introduce at trial over fifty reports of interrogations conducted by military and law enforcement personnel at Guantanamo and at Bagram Air Base in Afghanistan.¹³⁸

If – as current rules permit – *Hamdan's* commission were to consider these reports without affording him the opportunity to cross-examine the detainees quoted in them, enormous problems of fairness and indeed accuracy would arise. Consider first the possibility of translation error. The interrogators asked questions in English, with translators reproducing the questions in the detainee's language and then translating the detainee's answers back into English. The interrogation reports, however, provide nothing comparable to a full transcript of the questions and answers in their original and translated forms.¹³⁹ Rather, the reports contain only a paraphrased summary provided by the agent who was present during the interrogation. There is thus no way to check whether any

statement purportedly made by a detainee was the result of an error in translating either the interrogator's questions or the detainee's answers. As one recent terrorism case in federal court has already made dramatically clear, translation error is an omnipresent risk and can have serious consequences. (See sidebar.)

More fundamentally, the interrogation reports provide no detail about the circumstances under which the detainees' statements were made and whether coercive methods were used to elicit them. Yet as official government reports now establish, abusive interrogation has occurred both in Guantanamo and in Afghanistan. Detainees have, for example, been threatened with dogs, deprived of sleep, shackled in uncomfortable positions for sustained periods, and subjected to extreme temperature changes; they have had bright lights flashed in their eyes and loud music played next to their ears for hours.¹⁴² Given these circumstances, any statements that detainees reportedly made under interrogation are presumptively suspect; yet the device of hearsay testimony can insulate those statements from any scrutiny of the conditions under which they were made.

Indeed, the Sixth Amendment's ban on the use of testimonial hearsay in criminal cases rests precisely on these sorts of dangers. In England's notorious political trials of the 16th and 17th centuries, defendants were convicted of crimes against the state on the basis of sworn statements by witnesses whom the government refused to make available for cross-examination.¹⁴³ As the Framers recognized, these "*ex parte* affidavits" are rife with potential for unfair exploitation. Allowing the government to introduce into evidence an accuser's out-of-court allegations, in the form of a written statement prepared by a government officer, gives the prosecution a free hand to shape the accuser's statements and sanitize them to suit its purposes. The risk of such abuse is a concern in any context. But it applies with special force in terrorism prosecutions, where cases attract considerable political attention and the government faces considerable pressure to obtain convictions.

Nor can the government's efforts to use interrogation reports as evidence in the *Hamdan* case be rationalized by any need to protect sensitive intelligence sources. The statements at issue are not those of C.I.A. informants or the agents of a foreign clandestine service, whose testimony arguably could put intelligence sources at risk. Rather, the statements are those of captured individuals, many of whom remain in U.S. custody.¹⁴⁴ There is no apparent reason why they cannot testify in person, so that their allegations can be tested through cross-examination.

Proponents of military commissions attempt to justify the use of hearsay by pointing out that this sort of evidence is allowed in the criminal justice systems of continental Europe and in international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia. The bar on hearsay in the Anglo-American tradition is, from a global perspective, unusual. Thus, they argue, there is nothing fundamentally unfair about allowing hearsay in a military commission.

LOST IN TRANSLATION

In early August 2004, the FBI arrested two leaders of a mosque in Albany, New York, charging them with conspiring to launder money given to them by an FBI informant. The informant allegedly told the men that the funds derived from selling a shoulder-fired missile to Islamic militants.¹⁴⁰ Following their arrest, the two defendants were placed in pre-trial detention, on the basis of a court's finding that they were a danger to the community. That finding, in turn, rested on a notebook recovered at a suspected terrorist camp in Iraq, in which one of the defendants was referred to by a term that Defense Department experts translated as "commander." While the defendants remained in detention, however, the FBI determined the crucial word was in Kurdish, not Arabic, and that it was properly translated as "brother" or "mister." After learning of the error, the court now found that the defendants were *not* dangerous and that there was no evidence they had ties to any terrorist organization. Though the charges against the two men are still pending, both are now free pending trial.¹⁴¹ ■

HEARSAY IN THE GERMAN COURTS

German courts offer one example of a system in which hearsay can be used as a witness-protection measure, but only under carefully guarded conditions. Using a procedure that combines oral and written hearsay, German judges can allow confidential informants to testify without having to appear in court: the informant submits a written statement, which is admitted in conjunction with the oral testimony of the government officer to whom the information was reported. If the court has questions about the informant's statements, his background, his credibility, or the conditions under which his statements were made, the officer attempts to answer those questions. If the court needs additional information, it can formulate written questions, to be answered by the informant in writing.

The Federal Constitutional Court of Germany has imposed several safeguards, however, to ensure that this exceptional procedure is not used lightly and that hearsay evidence from an informant is not given undue weight. Specifically, for a conviction to be upheld in a case where this procedure has been employed: (a) officials at the highest executive level must certify that the informant cannot testify in person; (b) that certification must be explained in writing so that the court can make an independent assessment; (c) the hearsay evidence must be corroborated by other evidence; and (d) the trial court must, in weighing the evidence, take account of the fact that hearsay is less reliable than evidence heard in court.¹⁴⁸ ■

This argument, however, overlooks crucial safeguards built into these other systems of justice but typically missing from judicial proceedings in the United States. American courts regulate hearsay at the front end – the fact-finder is insulated from it from the outset. By contrast, in continental-style systems, hearsay is carefully regulated at the back end – the fact-finder can consider hearsay, but a number of checks ensure that such evidence is properly weighed and treated with suitable caution.¹⁴⁵ The military commission system, however, fails to regulate hearsay in either fashion. At the same time that the commission rules eliminate the hearsay restrictions found in ordinary American courts, they omit the compensatory safeguards found in continental-style systems.

For example, in continental systems, a judge, a panel of judges, or a mixed panel of judges and lay jurors decides the facts of a case. By virtue of their professional training, judges are presumed familiar with the weaknesses of hearsay evidence and capable of assessing its significance appropriately. By contrast, in the military commission system, the facts are decided by panels of military officers; most of them lack any legal training, but all of them see all the evidence presented.¹⁴⁶

Furthermore, in a continental criminal trial, judges must justify their verdicts in a detailed written opinion that is subject to careful review on appeal. Judges relying on hearsay must explain why they found it reliable despite its second-hand character, and they must explain the extent to which it determined the disposition of the case. Again, no such requirement is found in the military commission system. Verdicts and sentences are decided by secret vote, and the commission's underlying reasons are never made known. Thus, if hearsay is admitted at trial, there is no way a reviewing authority can determine the role, if any, the hearsay played in the tribunal's ultimate decision.

Finally, although continental-style systems do not bar hearsay evidence altogether, they do restrict its uses. Developing case law in the European Court of Human Rights forbids relying “to a decisive extent” on hearsay evidence and in effect requires hearsay to be corroborated by non-hearsay evidence if it is to form the basis for a conviction.¹⁴⁷ Not only do these rules help ensure that hearsay evidence is properly discounted, but they also provide an important incentive for the prosecution to avoid hearsay evidence when live witnesses are available. The military commission system includes no such corroboration rule or any analog to it; at present a commission may find a defendant guilty and pass sentence based “to a decisive extent” – or even entirely – on uncorroborated hearsay evidence. In short, by leaving hearsay unregulated, the military commission rules raise sharp concerns about the potential for abuse.

The provisions of the commission rules relating to anonymous witnesses are subject to the same criticisms. Again, the problem is not that the use of anonymous witnesses is inherently unfair; rather, the problem lies in the need for limits on the practice. As discussed earlier, the federal courts already have rules, developed through case law, that permit the withholding of witnesses' names and other steps

to protect their identities where their safety or intelligence cover is at risk.¹⁴⁹ Courts-martial have developed such rules as well.¹⁵⁰ In both systems, witness protection requirements are achieved through carefully tailored measures designed to minimize any impact on the defendant's rights to confrontation and cross-examination. Thus, if the defendant himself (not simply defense counsel) truly needs to know a witness's identity in order to cross-examine the witness effectively, then the witness's identity must be disclosed. The *Roviano* rule sets the ultimate boundaries: information that is directly helpful or essential to the defendant's case cannot be withheld.

Likewise, continental systems of justice do not leave the use of anonymous witnesses unregulated. As with hearsay evidence, checks are in place to ensure that such witnesses are only used where necessary, and that the weight of their testimony is properly discounted to compensate for any limitation placed on the ability of the defendant or the court to cross-examine them.¹⁵¹

In sum, hearsay and anonymous witnesses can be appropriate tools for protecting sensitive witnesses, but the dangers of these devices call for constraints and safeguards – as is recognized in continental systems of justice as well as our own. The military commission rules inspire little confidence that the use of hearsay and anonymous witnesses will be properly cabined in the ways that courts throughout the world recognize to be necessary.

■ ■ LIMITS ON THE DEFENDANT'S DISCOVERY RIGHTS

The military commission rules place two substantial limitations on the defendant's right to be alerted to exculpatory evidence and other relevant documents held by the government. Both limitations insulate classified information from discovery by the defense. Both fail to serve this legitimate need in a carefully tailored manner that avoids unnecessary damage to the adversary process.

First, the defendant is given the right to obtain only exculpatory evidence that is *known to the prosecution* – an obligation that crucially omits exculpatory evidence known solely to law enforcement and intelligence agencies like the FBI or CIA. Thus, even though these agencies may hold evidence that could prove the defendant's innocence, that evidence need not be turned over to the defense so long as prosecutors themselves are not informed about it.

The problem with this rule is not that limits on the government's duty to search for exculpatory evidence are categorically objectionable; the problem is the indiscriminate manner in which the limits are drawn. In ordinary criminal cases, the basic rule is that prosecutors must hand over exculpatory evidence in their own files, and they also have a duty to uncover any exculpatory evidence known to any investigative agencies involved in the case.¹⁵² This rule ensures the disclosure of all exculpatory evidence uncovered during the government's investigation. Some argue, however, that in the context of a terrorism case, this rule should not

THE DETROIT SLEEPER CELL CASE

In a September 17, 2001, search of a Detroit apartment, FBI agents found three men with suspicious items in their possession, including video of several American landmarks and drawings in a day planner labeled “The American Air Base in Turkey” and “Queen Alia, Jordan.”¹⁵⁴ The government subsequently charged that the three were part of an Al Qaida sleeper cell and had been studying sites for possible attack. The case hinged on the videotape and drawings, described by the prosecution as “casing” materials; this evidence was bolstered by a felon-turned-informant who testified that the defendants were Islamic extremists whom he had observed planning attacks.

Two of the defendants were convicted of providing material support to terrorism. But soon after, the trial judge found indications that exculpatory evidence had been withheld from the defense; it ordered the Department of Justice to investigate. The Department’s review concluded that prosecutors had failed to collect and disclose significant exculpatory evidence. For example, prior to trial, several Air Force officers reviewed the supposed sketch of an American air base and concluded it was simply a map of the Middle East.¹⁵⁵ A CIA officer similarly found that the sketch did not appear to contain information useful to terrorists.¹⁵⁶ The second sketch in the day planner, supposedly of a hospital in Jordan, did not match hospital photos obtained by the State Department at the prosecution’s request.¹⁵⁷ An FBI field office likewise determined that the video footage did not consist of terrorist surveillance.¹⁵⁸ The prosecution also failed to disclose

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require a prosecutor to search every corner of the intelligence community for potentially exculpatory evidence; rather, the search duty should be limited in order to prevent intrusion on ongoing intelligence-gathering activities.¹⁵³ If such limitations are sensibly drawn, there is little doubt that the Supreme Court would uphold them.

Any acceptable limitations, however, clearly cannot be broader than national security needs require, and they would have to be crafted to minimize the inevitable risk of masking important evidence of innocence. The discovery rules of the military commission system, in contrast, contain no such safeguards. Beyond the prosecution’s obvious obligation to examine its own files for exculpatory evidence, they impose no duty to search for exculpatory evidence at all. This broadside omission creates a grave danger that relevant facts known to other agencies within the government will be overlooked or suppressed – even if the information is not sensitive, and even if it had been collected specifically to help prepare the criminal prosecution. Inadvertently or deliberately, investigators may fail to give prosecutors information that suggests possible innocence, and prosecutors, whether intentionally or neglectfully, may not ask for it. In one recent terrorism prosecution – the “Detroit Sleeper Cell case” – the government’s failure to disclose exculpatory evidence gathered by investigators outside the immediate prosecution team resulted in erroneous convictions and a major miscarriage of justice. Only after the trial judge ordered the government to comply fully with the discovery obligations that govern in federal court were these mistakes revealed and the defendants’ convictions reversed. (See sidebar.) In the military commission system, where these disclosure obligations are eliminated, there is no safeguard against such a fiasco.

Besides failing to require the prosecution to look beyond its own files for exculpatory evidence, the commission rules restrict the defendant’s discovery rights in a second way. Even when facts suggesting innocence are *known* to the prosecution, they need not be disclosed if they fall within the domain of so-called “Protected Information.” As previously discussed, this open-ended category includes everything “concerning national security” and accordingly can encompass virtually any evidence related to a terrorism prosecution.

In a nod to practices under CIPA, the rules authorize the Presiding Officer to take a step toward preserving the adversary process if he or she chooses, by giving the defense a substitution for the Protected Information, that is, a version with the sensitive material blacked out or summarized. Unlike CIPA, however, the commission rules do not *require* efforts to craft these substitutions or insist that the substitutions leave the defendant in substantially the same position as full disclosure would. Indeed, the rules do not require the Presiding Officer to consider defendant’s interests *at all*. Instead, they authorize the Presiding Officer to provide substitutions for Protected Information “as necessary to protect the interests of the United States.”¹⁶² In effect, exculpatory materials deemed “Protected” can be withheld in part or in full, regardless of their importance for the defendant’s case.

■ LIMITS ON THE DEFENDANT'S OPPORTUNITY TO OBTAIN WITNESSES AND DOCUMENTS

Finally, the commission rules limit the defendant's right to obtain witnesses and documents supporting his defense, even when he already knows about them. The defendant has such a right only to the extent that the Presiding Officer considers the evidence "necessary and reasonably available." The Presiding Officer thus has broad discretion to restrict defense access to witnesses and evidence – a restriction that does not apply to the prosecution. This unique disadvantage collides with a foundational requirement of a fair and effective adversary system. In the court-martial system, for example, the Uniform Code of Military Justice requires that the prosecution and defense "shall have equal opportunity to obtain witnesses and other evidence."¹⁶³

The "necessary and reasonably available" provision was presumably intended to prevent defendants from seeking access to sensitive witnesses or documents – to short-circuit, in other words, the problem presented in the *Moussaoui* case. But its sweep is far broader. It does not require the Presiding Officer to assess the extent to which defense access would pose genuine national security problems; nor does it require a substitution to be provided if there are such problems. A more discriminating approach, patterned after CIPA, would instead require narrowly tailored protections for sensitive information, together with well crafted substitute measures to preserve the essence of the challenge that a defendant seeks to present. That approach, CIPA experience demonstrates, serves to accommodate national security concerns without striking at the very essence of the adversary system – the defendant's ability to offer evidence disputing the charges against him. Indeed, the protective measures devised by the district and appeals courts in the *Moussaoui* case show concretely how the most difficult of these problems can be managed successfully within the framework of independent federal courts.

■ SUMMARY

In summary, the military commission system provides virtually no safeguards to ensure that measures ostensibly serving secrecy needs are crafted to avoid unnecessary restrictions on defense efforts to respond to the government's accusations. To the contrary, the commissions have essentially unfettered discretion to limit the defendant's ability to challenge the government's case. Allegedly incriminating evidence can be kept secret from the defendant without significant limitation. Prosecutors can rely on hearsay and anonymous testimony, largely without restriction. Major loopholes in the government's disclosure obligations make it easy for evidence suggestive of innocence to be overlooked or deliberately suppressed. And the commissions have broad authority to restrict the defendant's access to potentially exculpatory witnesses and evidence already known to the defense team.

evidence calling into question the credibility of its informant.¹⁵⁹ During the Justice Department's internal review, the lead prosecutor claimed that he never knew of this exculpatory evidence – a claim that others dispute.¹⁶⁰ But the Department acknowledged that the prosecutor's possible lack of knowledge was irrelevant: "[T]hese matters were clearly within the purview of the prosecution, could have been ascertained with minimal diligence, and should have been either disclosed to the defense or discussed with the Court."¹⁶¹ Once aware of this substantial body of exculpatory evidence, the Department of Justice asked that the terrorism charges be dropped.

The Detroit case stands as a dramatic reminder of how an overzealous prosecutor can damage lives and waste precious counter-terrorism resources when checks and balances are allowed to weaken. The episode demonstrates how quickly a seemingly strong case can fall apart if subjected to scrutiny. And it vividly documents how that process of scrutiny can critically depend on the prosecutor's duty to disclose exculpatory evidence – including evidence that lies outside the immediate files of the prosecution team itself. ■

ARE THE NEW COMMISSIONS LEGAL?

Two legal challenges against the new military commission system are currently pending in the federal courts: *Hamdan v. Rumsfeld*, brought by a Yemeni citizen captured in Afghanistan, charged with serving as Osama bin Laden's body-guard; and *Hicks v. Bush*, brought by an Australian citizen also captured in Afghanistan, charged with fighting with Al Qaida against coalition forces. In challenging the commissions, the plaintiffs have been joined by retired generals and admirals, military law scholars, European and British Parliament members, international law scholars, and human rights advocates.¹⁶⁵

The two cases present several issues:

Constitutional law: One issue is whether the commissions violate the Constitution's guarantees of due process and equal treatment, by omitting key trial safeguards and subjecting non-citizens to a lower standard of justice. The government claims that plaintiffs, as aliens captured abroad with no connections to the United States, have no rights under the Constitution. Also at issue is whether the President can establish military commissions in the absence of a congressional declaration of war or specific statutory authorization.

Military law: Another issue is whether the minimum procedural safeguards established by the UCMJ apply only to courts-martial or to military commissions as well.

International law: The last major issue is whether plaintiffs can invoke the protections of international law – including Geneva Conventions provisions affording anyone detained in armed conflict the right
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In the end, the military commission system is simply built on the “trust us” principle. In lieu of procedural safeguards whose importance has been understood for centuries, the government asks us to have faith that the commissions will exercise their expansive discretion with appropriate restraint and with little need for formal mechanisms to guard against hasty or ill-considered judgments. Yet the commissions are staffed largely by officers with military rather than legal training, appointed directly by the Secretary of Defense or a designated subordinate. And the commissions' decisions are not subject to review by independent civilian courts. At every turn they lack the carefully crafted procedures and structural elements of independence that our nation has come to consider indispensable even for military courts-martial – a judgment that has stood, largely without question, through more than half a century of peacetime and wartime experience. We should be reluctant to trust any trial forum where secrecy is not cabined by carefully drawn rules. But we should be especially reluctant to trust such a forum when it operates under the deep shadow of direct political influence, in a setting divorced from safeguards that are taken for granted in all other American civilian and military courts.

■ SPURIOUS PRECEDENT AND BAD POLICY

Administration efforts to defend the military commission system only reinforce these concerns about its unfairness and lack of genuine national security justification. The system has been challenged in federal court on the ground that it violates the fair trial standards embodied in the U.S. Constitution, the Uniform Code of Military Justice, and international law. In responding to these challenges, the Administration has not even tried to argue that the system complies with these fair trial standards. Rather, it contends that it is free to ignore them.

The Administration offers two principal arguments for this absolutist position. First, relying principally on *Ex parte Quirin*,¹⁶⁴ the World War II case of the Nazi saboteurs, the Administration argues that there is precedent for the President to establish military commissions during wartime and to prescribe for them whatever procedures he deems fit. Second, the Administration argues that non-U.S. citizens captured and held abroad have no rights enforceable in federal court.

Whether these arguments will prevail as a legal matter remains an open question. Challenges brought against the military commission system continue to work their way through the federal courts. (See sidebar.) This Report, however, focuses not on whether the Administration's actions are technically permissible as a legal matter, but rather on whether those actions are wise. And as a policy matter, the military commission system is gravely flawed.

Legal precedent plays a role in shaping this policy debate, as the Administration has astutely recognized, because precedents establish the benchmark of practices that define American values and traditions. The Administration for that reason has prominently embraced the *Quirin* precedent and referred to it frequently in

presentations to broad public audiences. Thus, in a speech to the U.S. Chamber of Commerce, Vice President Cheney cited the Nazi saboteurs episode and described the commission established by President Roosevelt, claiming that “that procedure was upheld by the Supreme Court when it was challenged later on. So there’s ample precedent for it.”¹⁶⁷

Yet, it is simply not true that the *Quirin* case provides precedent for the wartime use of a military commission with relaxed safeguards to resolve disputes about the guilt or innocence of suspected enemy agents. *Quirin* presented two important questions. The first was whether U.S. citizens and others seized within the United States could be tried before a military court at all. The second question was whether, assuming a military tribunal was permissible (as it ordinarily would be, for example, in the case of a foreign national seized abroad), the particular procedures followed by the saboteurs’ commission were legally and constitutionally acceptable. As explained above, the Supreme Court upheld the Roosevelt commission, but on both of the central questions it announced an extremely narrow decision expressly limited to cases against “admitted enemy invaders.”

Despite the Administration’s effort to portray *Quirin* as an endorsement of the new commission system’s procedures, the decision itself does nothing of the kind. Indeed, the Justices indicated they were troubled by military trials that deviated from court-martial procedures, and the Court explicitly took care to *avoid* giving its approval for the momentous step the Administration seeks to take now – the use of such tribunals to resolve cases in which factual reliability is essential because the basic accusations are disputed.

In any event, however one reads the *Quirin* case as a legal precedent, it is precisely the wrong historical example to follow in our present circumstances. The *Quirin* military commission was established in order to stage a one-time proceeding whose outcome was all but announced in advance.¹⁶⁸ The problem of terrorism, whether characterized as one of war or crime, will be with us for decades, even generations, to come. It calls for fair, sustainable solutions, not show trials. We need a trial forum we can trust over the long term to accurately sift the guilty from the innocent, keep the government accountable, and preserve American values and the American image overseas.

The Administration’s second technical argument for the new commission system – that non-U.S. citizens captured and held abroad have no enforceable rights – sheds little light on this core problem. It is an interesting, important, and unsettled legal question whether non-U.S. citizens captured and held abroad have enforceable rights under the U.S. Constitution or international law.¹⁶⁹ But even if the legal escape hatch sought by the Administration exists, it does not provide a path to sound policy. The proper course is to find ways of trying terrorism suspects that respect our fundamental judicial norms, not to search out zones where these norms do not apply.

to be tried in accord with fundamental safeguards. The government argues the Conventions do not apply to Al Qaida and that, in any event, they do not create judicially enforceable rights.

In November 2004, the district judge in the *Hamdan* case, himself a former naval officer, ruled against the government. The decision relied chiefly on military law, finding the military commission rules to be fatally contrary to the UCMJ insofar as they allow the defendant to be excluded from closed trial sessions.¹⁶⁶ All military commission proceedings were halted in the wake of the *Hamdan* ruling, which is presently on appeal. The *Hicks* challenge has yet to be ruled upon. ■

We should not be content to subject any category of persons – whether U.S. citizen or alien, whether captured here or abroad – to trials that cannot satisfy the demands of fundamental fairness. It sends a self-defeating message to the rest of the world if we fail to treat their citizens fairly in accordance with well established procedures. Such hypocrisy breeds resentment and undercuts our ability to work with allies and obtain their cooperation in terrorism investigations. As former U.S. Attorney Mary Jo White explains, given how often evidence in terrorism cases will come from foreign countries, “you have to be so careful to maintain an international coalition. And if we are perceived to be acting arbitrarily and unfairly with respect to the citizens of other countries while treating our own citizens with kid gloves, that hurts us.”¹⁷⁰

Furthermore, a military commission system available only to try foreign nationals provides a fundamentally incomplete solution to the problem such commissions were supposed to solve – protecting classified information. If the commission system can only be used for terrorism suspects who, on the Administration’s view, do not have judicially cognizable rights, what about those suspects who do? Sensitive intelligence sources can be implicated in terrorism cases brought against a U.S. citizen (such as Jose Padilla) or against a non-citizen arrested within the United States (such as Zacarias Moussaoui). Military commissions available only for trying foreigners captured abroad thus fail to address a substantial portion of the cases the classified information problem infects.

Indeed, as a practical matter, the military commission system cannot even be depended on to try non-U.S. citizens captured and held abroad, regardless of whether they have rights enforceable in U.S. courts. For other countries have a say in the matter. Several European allies have made clear already that they will not extradite suspects to the United States for prosecution in a military commission.¹⁷¹ Likewise, allies may refuse to share information needed for cases brought before a military commission. Or foreign countries may simply exert diplomatic pressure in a way that constrains the executive’s hand. An example is seen in the concessions made in the prosecution of Australian citizen David Hicks, one of the four defendants brought before the military commission system to date. At the behest of his government, the U.S. government has agreed, among other things, that Hicks will not be excluded from any closed sessions – a concession that cedes the very advantage that trial by military commission is supposed to confer.¹⁷²

In short, if the military commission system can only be housed in a rights-free zone, it is necessarily of limited utility. For there will be numerous terrorism cases where, whether as a legal or practical matter, the defendant’s rights cannot simply be ignored. As to those cases, the military commission offers no real solution to the classified information problem.

■ SHOULD THE COMMISSION SYSTEM BE “FIXED”?

Because the military commission system as it now stands is deeply flawed, we are left with the question whether it should be salvaged or simply discarded. The question must be considered against the backdrop of *both* of our existing court systems – federal courts and courts-martial. It is important to note that the alternative to using military commissions is not necessarily to prosecute *all* terrorism cases in federal court: some cases may appropriately be tried before a court-martial. Military operations abroad are obviously an important part of the nation’s counterterrorism strategy, and logistical considerations may warrant trying suspects captured in those operations in a military proceeding held abroad, where the federal courts do not operate. Certainly in past military conflicts, we have not normally transported persons captured in a battle zone abroad to face trial here in the United States. But in those circumstances, *courts-martial* supply a readily workable forum with many of the safeguards necessary to achieve reliability and legitimacy, while preventing waste and abuse.¹⁷³

The question, then, becomes more precise: should the new military commission system be retained specifically to provide greater protection for classified information than is available in either federal courts or courts-martial?

In theory, many of the commission system’s defects could be corrected, so that potentially it could evolve into a trustworthy system that handles classified information safely without departing gratuitously from modern procedural safeguards. But that logical and seemingly moderate solution makes virtually no sense as a practical matter. The more such improvements were made, the more the commissions would converge with our existing institutions. Any of the commission’s distinctive protective measures that are genuinely necessary, but not currently available in ordinary courts, could simply be grafted onto CIPA procedures and other protective devices already used in federal courts and courts-martial. Likewise, most of the restrictions on the government’s ability to protect classified information in a federal or court-martial proceeding would have to be incorporated to make a military commission system fair. In the end, the bounds of fairness, not the bounds of a particular forum, are what constrain the amount of secrecy that can properly be introduced into a criminal trial.

The margin of difference between a truly fair military commission system and our existing institutions – if indeed there is any – is simply not significant enough to outweigh the costs of creating an entirely new system. First, as long as trial by military commission is considered a kind of failsafe option to be used when prosecuting in our regular courts is problematic, the commission system will necessarily have a second-class status. There will be an ever-present temptation for the executive to use it to prosecute weak cases, and there will be considerable institutional pressure for the commission system to generate convictions. Thus, even if the military commission system could be made fair in theory, it would be difficult to make it fair in practice.

Second, even if a commission system could be constructed that was fair in practice, in all likelihood it would still be *perceived* as a second-class system, especially outside the United States. Its procedures and decisions would not be as readily accepted as legitimate in comparison to those of our regular courts. This lack of perceived legitimacy would not only be problematic by itself; it would also reduce the commission system's flexibility in dealing with classified information. The federal courts' established reputation for independence and fairness, and to a lesser extent that of courts-martial, means that these tribunals have a reservoir of good will to draw from in crafting compromises between secrecy and a fully adversarial process. Compromises like the ones struck by the courts in the *Moussaoui* case are not perfect by any means, but the federal judiciary's endorsement gives them an immediate presumption of fairness and good sense. Compromises of that sort would be greeted with far more skepticism were they to come from a military commission. In one former prosecutor's words: "In a federal court, there is no issue of public legitimacy and appearance. If you do end up having to do some creative things in a federal court, they're much less likely to be perceived as being questionable than if they were done in a military commission."¹⁷⁴

Third, there are inevitably large start-up costs in creating a special trial system. Latent within new institutions and new procedures is a vast array of unforeseen problems. Working out these hitches will require considerable time and energy. It took nearly three years of rule-drafting before the current military commission system even attempted its first hearing. And subsequent proceedings have been beset by considerable confusion, with even the Presiding Officer at times appearing flummoxed over basic procedural questions, such as whether the defendant had the right to represent himself, without a lawyer.¹⁷⁵ By contrast, existing courts are known quantities, their rules and procedures familiar. They have evolved slowly over many decades of experience. Adapting them to the new realities of a complex global struggle against terrorism will entail far less upheaval than building a new system from scratch.

Finally, there remains the problem that however thoroughly they may be refashioned, military commissions by themselves can never completely solve the classified information problem. They cannot be used domestically without undermining the rule of law. Democratic freedoms depend on civilian control over the levers of government – most certainly including the levers of criminal punishment. The security of those freedoms would be gravely undermined by permanent military courts to which the President could send any U.S. citizen or others within the United States to stand trial on terrorism charges. Moreover, many allies will decline to extradite suspects to the United States for trial before *any* military tribunal, whether military commission or court-martial. For these persons as well, a non-military solution to the secrecy problem is needed. As one Department of Justice official has remarked, describing the views of Deputy Attorney General James Comey:

[W]e have to have a criminal-justice response to terrorism.... Because let's say the next terrorist is caught in Hamburg. The Germans are not sending him to an American military tribunal. They're not even sending him to a death-penalty proceeding. They will only send him to a civilian-justice proceeding. What do we do then if we haven't resolved these issues and balanced a defendant's rights to discovery with the country's need to protect classified information? Do you dismiss the indictment? Do you let the guy go?¹⁷⁶

In sum, military commissions unavoidably raise far more problems than they solve. They are not fair as presently constituted. Even if made fair they would still entail considerable costs. And important classes of suspects cannot be tried before them in any event. Not only would we do better by attempting to find solutions to the classified information problem within our existing institutions; we *have to* do so.

CONCLUSION

The shock of the September 11th attacks still lingers. We have quickly had to adjust to the new reality that a small group of individuals, exploiting the implements of modern technology, can acquire a destructive force previously monopolized by nations and armies. Indeed, more Americans died on September 11th than in any single day of military combat in American history, save the Civil War battle of Antietam.

We cannot allow the images of that day to fade, lest we forget the magnitude of the threat posed by terrorism. Nor, however, can we let those images overpower sound judgment concerning our response to the threat.

Protecting national secrets in terrorism trials presents a genuinely difficult problem. But however enticing it may be to shunt that problem out of sight – by creating a special military system to deal with it – that quick-fix approach is dangerously short-sighted. Allowing the executive to escape independent oversight and to dispense with well-established procedural safeguards is counter-productive and unsustainable over the long term. Attention should be directed instead toward finding ways to conduct terrorism trials in accordance with our best traditions and best interests.

That task will require American citizens and leaders to keep four considerations in focus. One, to be sure, is the need to protect classified information. The other three are equally important, yet too often forgotten:

- the need for reliable procedures that resolve complex factual disputes with consistent accuracy;
- the need for a process that will be accepted as fair by Americans, by our allies, and by people around the world; and
- the need for built-in structural safeguards to minimize the risk of carelessness, deliberate malfeasance, and other abuses – abuses which not only injure individuals, but also engender a false sense of progress among the public and damage the counter-terrorism effort itself.

In pursuing these goals, the wise course is a conservative one – in the classical sense of the term. We should strive as much as possible to conserve and work within existing traditions and institutions. Our forms of justice, based on checks and balances, are built upon centuries of experience, are widely recognized as legitimate, and should not lightly be discarded.

As this Report shows, prosecutors already have a broad array of tools for addressing classified information problems in the federal courts and in courts-martial, which tend to track federal court procedures. To the extent that these existing

tools are inadequate, the proper response is to expand and improve them within the bounds of constitutional principle and sound policy. As CIPA's development and subsequent application demonstrates, our courts are flexible and know how to experiment with care in the face of new problems. Through case-by-case adjudication and multiple layers of review, the courts are well-positioned to flesh out ways of dealing with these problems that respect our constitutional values. Meanwhile, Congress can insert itself into the debate at any point and enact legislative solutions, drawing upon both the courts' experience and input from the executive. Several issues already are ripe for consideration and possible legislation from Congress:

- **formalizing the cleared-counsel model.** Congress should establish an independent security clearance process for defense counsel, build a corps of pre-cleared counsel available to serve in terrorism cases, and set a fair standard for courts to apply in adjudicating requests by cleared counsel to share classified discovery materials with the defendant.
- **establishing rules to regulate public access, in order to facilitate the use of classified evidence at trial.** Congress should delineate the specific showing necessary to justify restricting public access, one that requires the government to demonstrate a *bona fide* risk to national security before proceedings are closed. Legislation should also enumerate alternative forms of public access, short of total exclusion, that must be considered in such circumstances, to guarantee the nearest possible equivalent of complete transparency.
- **increasing systemic pressure on the government to declassify classified evidence wherever possible.** Congress should require a declassification review to be automatically initiated in CIPA cases and completed in a timely fashion. Executive determinations rendered in the course of such review could potentially be made appealable to an independent declassification review board.

Our nation has gone about solving hard problems in the past by following this basic process: new powers must be sought and justified by the executive, publicly debated and approved by the Congress, and subjected to interpretation and review by independent courts. It is through the same process that reasonable compromises between the government's legitimate secrecy interests and the demands of fair criminal adjudication are likely to emerge. This is, after all, the *democratic* process. We must not give up on it as we face the threat of terrorism; we stand to lose far more than we gain by vesting unchecked power in a hermetically sealed executive branch.

It is worth recalling that prior to CIPA's enactment in 1980, the conventional wisdom was that espionage cases could not be prosecuted in federal court without jeopardizing national secrets. Had that conventional wisdom not been questioned, Congress might have attempted to address the problem of

prosecuting spies by establishing a special military or other executive tribunal, in which evidence could freely be kept secret from the public and the defendant. We were in a war, albeit a cold one, with the Soviet Union at the time. But Congress respected the separation of powers and the crucial role played by the federal courts in our system of government. Through experimentation in the courts, followed by carefully tailored legislation, a more measured solution was devised, and it has proven both effective and fair.

There is every reason for optimism that we will be able to find similar solutions for effectively prosecuting terrorism cases. Those solutions will not always be easy. There *are* limits on how far the courts can go in accommodating governmental interests in secrecy. But those limits mark the safe path forward. They reflect a time-tested commitment to fairness, built on the recognition that we must have reliable findings of guilt, reached through an effective adversarial process, before we deprive individuals of their life or liberty. That is a commitment we need not and should not abandon in the fight against terrorism.

ENDNOTES

■ INTRODUCTION

¹ The four are: Salim Ahmed Hamdan, a Yemeni alleged to be Osama bin Laden's bodyguard; Ali Hamza Ahmad Sulayman al Bahlul, another Yemeni, alleged to be a key Al Qaida propagandist; Ibrahim Ahmed Mahmoud al Qosi of Sudan, alleged to be an Al Qaida accountant; and David Hicks, an Australian citizen charged with attending an Al Qaida training camp and fighting with Al Qaida against coalition forces in Afghanistan. See U.S. Dep't of Defense, Military Commissions, Charge Sheets, *available at* http://www.defenselink.mil/news/Nov2004/charge_sheets.html. (Note: All internet pages cited in the endnotes were last visited Apr. 27, 2005.)

² See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

³ For compilations of post-9/11 terrorism prosecutions, see Center on Law & Security at NYU School of Law, *Terrorist Trials: A Report Card* (Feb. 2005), *available at* <http://www.law.nyu.edu/centers/lawsecurity/publications/terroristtrialreportcard.pdf>; Nancy Chang & Alan Kabat, Center for Constitutional Rights, *Summary of Recent Court Rulings on Terrorism-Related Matters Having Civil Liberties Implications* (Mar. 8, 2004), *available at* http://www.ccr-ny.org/v2/legal/september_11th/docs/summaryofcases2-4-04.pdf; FindLaw, Civil and Criminal Terror Cases Home Page, <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html>.

⁴ See *infra*, Pt. I, pp.35-36 & nn.113-14 for the facts of the Lackawanna Six case.

⁵ See Editorial, *The Moussaoui Experiment*, WASH. POST, Jan. 27, 2003, at A18.

⁶ Op-ed, Senators Trent Lott & Ron Wyden, *Hiding the Truth in a Cloud of Black Ink*, N.Y. TIMES, at A27, Aug. 26, 2004.

⁷ *Hamdi v. Rumsfeld*, 542 U.S. ___, 124 S. Ct. 2633, 2655 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

⁸ See Jim Dwyer & David Kocieniewski, Deidre Murphy, Peg Tyre, TWO SECONDS UNDER THE WORLD 177-96 (1994); Chitra Ragavan, Nancy L. Bentrup, Ann M. Wakefield, Sheila Thalhimier, & Monica M. Ekman, *How the First World Trade Center Plot Sowed the Seeds for 9/11*, U.S. NEWS & WORLD REPORT, Feb. 24, 2003, at 28.

⁹ See, e.g., *United States v. Yousef*, 327 F.3d 56, 146 (2nd Cir. 2003); *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980).

¹⁰ Consultation with J. Gilmore Childers (Nov. 10, 2004).

¹¹ *Id.*

¹² See David Cole, ENEMY ALIENS 170-73 (2003).

¹³ Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, dated Aug. 27, 2002, *available at* [http://www.cnss.org/Mobbs Declaration.pdf](http://www.cnss.org/Mobbs%20Declaration.pdf) (hereinafter "Mobbs Affidavit").

¹⁴ *Id.* at 2 & n.1.

¹⁵ See, e.g., Abraham McLaughlin, *For U.S., Captured Al Qaida Leader Serves Two Ends*, CHRISTIAN SCIENCE MONITOR, Jun. 14, 2002, at 3.

¹⁶ See Gerald Posner, WHY AMERICA SLEPT 185-87 (2003) (describing reward-and-punishment technique used in the interrogation).

¹⁷ Transcript, *Ashcroft Statement on 'Dirty Bomb' Suspect*, CNN.com, Jun. 10, 2002, *available at* <http://archives.cnn.com/2002/US/06/10/ashcroft.announcement/>.

¹⁸ See U.S. Dep't of Justice, *Summary of Jose Padilla's Activities with Al Qaida*, May 28, 2004 (transmitted to Congress Jun. 1, 2004), at 3-6, available at <http://www.fas.org/irp/news/2004/06/padilla060104.pdf>. The Justice Department now claims instead that Padilla's plan upon arriving in the United States was to blow up several apartment buildings using natural gas explosions. *Id.* at 6.

■ ■ PART I

¹ See Charles Krauthammer, *In Defense of Secret Tribunals*, TIME, Nov. 26, 2001, at 104, available at <http://www.cnn.com/ALLPOLITICS/time/2001/11/26/tribunals.html>. Krauthammer's claim regarding the embassy bombing trial has been cited as fact in, among other places, an *amicus* brief filed in support of the government in *Hamdan v. Rumsfeld*, a case challenging the lawfulness of military commissions currently pending before the U.S. Court of Appeals for the District of Columbia. See Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Respondents-Appellants Urging Reversal, *Hamdan v. Rumsfeld*, No. 04-5392 (D.C. Cir. filed Dec. 8, 2004).

² See Consultations with Mary Jo White, former U.S. Attorney for the Southern District of New York (Sep. 17, 2004); Patrick Fitzgerald, former Assistant U.S. Attorney for the Southern District of New York (presently U.S. Attorney for the Northern District of Illinois) (Nov. 10, 2004); Hon. Kenneth Karas, former Assistant U.S. Attorney for the Southern District of New York (presently a federal district court judge) (Oct. 12, 2004); Joshua Dratel, defense counsel for Wadiah el-Hage (Sep. 9, 2004); and Sam Schmidt, defense counsel for Wadiah el-Hage (Sep. 7, 2004). Krauthammer's claim is doubly mistaken: not only was there no classified information revealed in "a January 2000 release of documents" in the embassy bombings trial, there was simply no such release of documents. The trial did not even start until 2001. Moreover, all of the court filings in the case were reviewed by the government, and redacted, before being made available in the public record.

³ See *Statement of Mary Jo White, Former United States Attorney for the Southern District of New York, before the Joint Intelligence Committees*, 107th Cong. 15 (Oct. 8, 2002) (on file with the authors) (stating that in the major terrorism cases prosecuted in the 1990s in the Southern District of New York, the need to safeguard intelligence sources and methods was "successfully achieved," even though emphasizing that this is "an ever-present and very difficult issue and risk").

⁴ The embassy bombings trial took place during the first half of 2001. Stories disclosing the U.S. government's ability to monitor terrorists' – and, specifically, bin Laden's – satellite phone calls appear in the press as early as 1998. *E.g.*, James Bamford, *Our Best Spies Are In Space*, N.Y. TIMES, Aug. 20, 1998, at A23; Jack Kelly, *Arrests, New Information Shake bin Laden's Empire*, USA TODAY, Oct. 1, 1998, at 2A ("A Joint Terrorism Task Force, formed after the bombings, ... has been monitoring bin Laden's cellular phone calls and money transfers by using a satellite positioned over his headquarters in Jalalabad, Afghanistan.").

⁵ See Jake Tapper, *The Weak Case for Military Tribunals*, Salon, Dec. 5, 2001, available at <http://dir.salon.com/politics/feature/2001/12/05/tribunals/index.html>. Another myth that has circulated in news circles is that the September 11th hijackers were aided by a disclosure made in the trial of the 1993 World Trade Center bombing case that the buildings could withstand a hit by a Boeing 707, leading the September 11th hijackers to employ larger 767 planes. But the information was not classified. In fact, it was widely available, in a Popular Mechanics magazine article, for example, published around the time of the 1993 World Trade Center bombing. See *id.*

⁶ 18 U.S.C. app. 3.

⁷ See *id.* § 9A (requiring Department of Justice officials to consult regularly with intelligence officials with respect to any case involving classified information).

⁸ See U.S. Const. Amends. V & VI. The right of the defendant to obtain exculpatory evidence in the government's possession is not explicitly found in the Constitution, but the Supreme Court has held the right to be implicit in the Constitution's guarantee of due process. See *infra* p.13.

⁹ *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959).

¹⁰ *Schwab v. Berggren*, 143 U.S. 442, 448 (1892); *see also Hopt v. Utah*, 110 U.S. 574, 578 (1884).

¹¹ *Diaz v. United States*, 223 U.S. 442, 455 (1912); *see also Illinois v. Allen*, 397 U.S. 337, 338 (1970) (right to presence is “one of the most basic” rights guaranteed an accused); *United States v. Gregorio*, 497 F.2d 1253, 1258-59 (4th Cir. 1974) (right to presence not only “prevent[s] the loss of confidence in courts as instruments of justice which secret trials would engender,” but also “protect[s] the integrity and reliability of the trial mechanism by guaranteeing the defendant the opportunity to aid in his defense”). While the defendant is generally entitled to be personally present at all stages of a trial, the right to personal presence is at its zenith during the introduction of evidence. *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (“A defendant in a criminal case must be present at a trial when evidence is offered.”); *cf.* Fed. R. Crim. P. 43 & advisory committee notes (codifying common law right of defendant to be present at all trial proceedings except those involving only questions of law). The right to presence is not, however, absolute. If a criminal defendant waives his right to presence, either voluntarily or through persistent misconduct, the trial may continue in his absence. *See, e.g., Allen*, 397 U.S. at 342-43; *Snyder*, 291 U.S. at 106.

¹² *See Crawford v. Washington*, 541 U.S. 36, 50 (2004).

¹³ *See id.* at 55-56, 68. Professor Ruth Wedgwood, a proponent of military commissions, thus exaggerates the scope of the hearsay bar in criticizing it as misplaced in terrorism prosecutions. Wedgwood attempts the following *reductio ad absurdum*: “It has been widely reported that Osama bin Laden telephoned his mother in Syria shortly before September 11 to warn her that a major event was imminent, and that he would be out of touch for some time. If the mother confided to a close friend about her son’s warning, still one could not call the friend to give testimony [if bin Laden were prosecuted in federal court], for technically it would be hearsay.” Ruth Wedgwood, *Al Qaida, Terrorism and Military Commissions*, 96 AM. J. INT’L L. 328, 331 (2002). Since the mother’s statement to her friend would not be made to a government official, it might not qualify as *testimonial* hearsay, and thus it is by no means clear that there would be a constitutional bar to its admission in federal court. Under the Federal Rules of Evidence, the statement could be admitted if shown to fall within one of the many exceptions to the hearsay rule. *See* Fed. R. Evid. 803-804, 807.

¹⁴ 373 U.S. 83, 87-88 (1963).

¹⁵ *See id.*; *see also Giglio v. United States*, 405 U.S. 105 (1972).

¹⁶ The Federal Rules of Criminal Procedure are promulgated through a drafting process involving selected federal judges and members of the bar. The rules are subject to approval and change by Congress.

¹⁷ *See* Fed. R. Crim. P. 16. The defendant further has the right, after a government witness has testified on direct examination, to discover any records of statements made by the witness prior to trial that are in the government’s possession and that relate to the witness’ testimony. *See* Fed. R. Crim. P. 26.2.

¹⁸ *See* Fed. R. Crim. P. 16, advisory note (“[B]road discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence.”).

¹⁹ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *see also In re Oliver*, 333 U.S. 257, 270-271 (1948) (“The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.... ‘Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.’”) (quoting 1 Bentham, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

²⁰ *See, e.g., Globe Newspaper*, 457 U.S. at 608-09 (safeguarding welfare of child-witnesses in sex offense cases constitutes a compelling interest). *Cf. Coy v. Iowa*, 487 U.S. 1012 (1988) (holding that a similar concern cannot justify impairment of confrontation by interposing a screen between the defendant and a child-witness in a sex offense case); *but cf. Maryland v. Craig*, 497 U.S. 836 (1990)

(permitting a child witness to testify by remote video connection, a procedure that allowed the defendant to see his accuser but protected the accuser from having to make eye contact with the defendant).

²¹ See *Globe Newspaper*, 457 U.S. at 608-09; *Waller v. Georgia*, 467 U.S. 39, 45 (1984).

²² *Duncan v. Louisiana*, 391 U.S. 145, 155-156 (1968).

²³ See *Singer v. United States*, 380 U.S. 24 (1965).

²⁴ See *Tumey v. Ohio*, 273 U.S. 510 (1927).

²⁵ See *Wheat v. United States*, 486 U.S. 153, 160 (1988); *United States v. bin Laden*, 58 F. Supp. 2d 113, 119 (1999).

²⁶ 353 U.S. 53 (1957).

²⁷ See *id.* at 59-60 & n.5.

²⁸ See *id.* at 60-61. In the specific circumstances of the case before it, the Supreme Court held that the informant's identity had to be disclosed. The defendant sought to learn the informant's name so that he might call him as a witness. The Court found that, given that the informant was the only other party to the drug transaction, his testimony was potentially "highly relevant" and could help to corroborate the defendant's theory of the case. See *id.* at 63-64.

²⁹ See S. Rep. No. 96-823, at 1-6 (1980), 1980 U.S.C.C.A.N. 4294, 4294-99.

³⁰ See Katherine L. Herbig & Martin F. Wiskoff, Defense Personnel Security Research Center, *Espionage Against the United States by American Citizens 1947-2001*, at 8 (2002), available at <http://www.fas.org/sgp/library/spies.pdf> (hereinafter "Espionage Report").

³¹ See Griffin B. Bell & Ronald J. Ostrow, *TAKING CARE OF THE LAW* 104 (1982).

³² See Espionage Report, *supra* n.30, at 9-11.

³³ 594 F.2d 1246 (9th Cir. 1979).

³⁴ See Espionage Report, *supra* n.30, at 11; Michael S. Serrill, *The Perilous Game of Trying Spies; Balancing the Claims of Justice and Secrecy*, *TIME MAGAZINE*, Nov. 19, 1984, at 115.

³⁵ See 609 F.2d 1233 (7th Cir. 1979).

³⁶ See Stephen Engelberg, *Secrecy Is Sought in Analyst's Trial*, *N.Y. TIMES*, Sep. 15, 1985, at 35 (citing government motion filed in later espionage case explaining that edited version of manual was introduced in *Kampiles* case); see also Bell, *supra* n.31, at 123 (explaining that manual was kept out of public record of proceedings and provided only to expert witnesses, attorneys, and jury in the case).

³⁷ 18 U.S.C. app. 3 (hereinafter "CIPA"), at § 6(c).

³⁸ See CIPA § 4.

³⁹ See *id.*; see also H.R. Rep. No. 96-831 (1980), at 27 n.22 (explaining that, "since the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose" of the government's request). *Ex parte* hearings are not unknown in criminal discovery. Where there is a close call whether certain materials in the government's possession are exculpatory, the government can ask for the judge to review the materials *ex parte* in order to determine if they are sufficiently exculpatory to warrant handing over to the defense. CIPA allows courts to follow the same approach with respect to classified materials. See *United States v. Joliff*, 548 F. Supp. 232, 232 (D. Md. 1981) (finding *ex parte* review of discovery motions to be "particularly appropriate prior to the disclosure of classified information"). Nonetheless, some courts have allowed security-cleared defense counsel to participate in CIPA discovery hearings and to review and contest the government's requests to limit disclosure of classified materials. See, e.g., *United States v. Rezaq*, 156 F.R.D. 514, 527 (D.D.C. 1994).

⁴⁰ CIPA explicitly mandates this standard in its provisions dealing with substitutions used at trial, see CIPA § 6(c), but courts have assumed Congress intended the same standard to apply to substitutions approved for discovery.

⁴¹ *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985); see also *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (“[C]lassified information is not discoverable on a mere showing of theoretical relevance in the face of the government’s classified information privilege, but...the threshold for discovery in this context further requires that a defendant seeking classified information, like a defendant seeking the informant’s identity in *Roviaro*, is entitled only to information that is at least ‘helpful to the defense of [the] accused.’”) (citations omitted); *United States v. Collins*, 603 F. Supp. 301, 304 (S.D. Fla. 1985) (“Simply put, [CIPA’s substitution standard] does not preclude presentation of the defendant’s story to the jury, it merely allows some restriction on the manner in which the story will be told.”).

⁴² See CIPA § 5.

⁴³ See *United States v. bin Laden*, 2001 WL 66393, at *6-*7 (S.D.N.Y. Jan. 25, 2001) (collecting cases).

⁴⁴ See CIPA §§ 6(a)-(c).

⁴⁵ See CIPA § 6(c)(2).

⁴⁶ See CIPA § 6(c)(1).

⁴⁷ See CIPA § 6(e).

⁴⁸ See CIPA § 8(c).

⁴⁹ See Bell, *supra* n.31, at 106.

⁵⁰ See Espionage Report, *supra* n.30, at 11.

⁵¹ Consultation (Nov. 30, 2004).

⁵² See CIPA § 12 (requiring that, whenever the Department of Justice decides not to prosecute a violation of federal law due to the possibility of revealing classified information, written findings must be made detailing the basis for the decision and those findings must be reported to appropriate congressional oversight committees).

⁵³ S. Rep. 107-51 (2001), at 34.

⁵⁴ See *United States v. Yunis*, 867 F.2d 617, 619-25 (D.C. Cir. 1989); *United States v. Rezaq*, 156 F.R.D. 514, 524-28 (D.D.C. 1994).

⁵⁵ See *Yunis*, 867 F.2d at 624.

⁵⁶ The case included allegations against the defendants that they had conducted weapons training inside the United States; and the defendants sought to show that they intended to use such training to fight in Afghanistan, where they were allied with the United States, not at war with it. Consultations with Andrew Patel, defense counsel for El Sayyid Nosair in *United States v. Rahman* (Aug. 23, 2004) and Andrew McCarthy, former Assistant U.S. Attorney (Oct. 12, 2004).

⁵⁷ Consultations with Patrick Fitzgerald (Nov. 10, 2004) and Dietrich Snell, former Assistant U.S. Attorney for the Southern District of New York (Oct. 28, 2004).

⁵⁸ The government’s case in the first World Trade Center bombing case was built primarily on forensic evidence obtained from the scene of the crime. After the attack, the FBI was able to recover a piece of the Ryder truck used to deliver the bomb that contained the vehicle’s identification number. Using that information, the FBI traced the van back to its renter. A search of the renter’s apartment and a series of further searches revealed clear physical evidence of bomb-building activities. See Domestic Terrorism: Hearing Before the Subcomm. on Technology, Terrorism, and Gov’t Information, 105th Cong. (Feb. 24, 1998) (testimony of former prosecutors J. Gilmore Childers and Henry DePippo); Transcript, *Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium*, 21 MICH. J. INT’L LAW 655, 744 (2000) (discussion with prosecutor J. Gilmore Childers).

The Bojinka plot was discovered when a fire broke out in Ramzi Yousef’s apartment in Manila while Yousef and a co-conspirator were burning chemicals that they had obtained to construct the aircraft bombs. Yousef fled the scene and was later apprehended. In the meantime, the police

conducted a thorough search of the apartment, which yielded an abundance of incriminating evidence – including bombmaking materials and instructions, as well as a computer on which Yousef had laid out his plans for the bombing and also composed a letter claiming responsibility for future attacks against American targets. *See United States v. Yousef*, 327 F.2d 56, 78-82 (2nd Cir. 2003).

The Millennium Plot was foiled when a customs inspection revealed explosives and timing devices concealed in the spare tire well of Ahmed Ressam's car upon his entry into the United States by ferry from Canada. *See 9/11 Commission Report* § 6.1.

⁵⁹ *See* 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*, 48 N.Y.L. SCH. L. REV. 69, 88 (2003/04).

⁶⁰ *Id.* at 86.

⁶¹ *See* Transcript of Trial Proceedings, *United States v. bin Laden*, No. S(7)-98-Cr.-1023, at 1309-10 (Feb. 22, 2001), available at <http://www.ict.org.il/documents/documentdet.cfm?docid=50>.

⁶² Consultations with Patrick Fitzgerald (Nov. 29, 2004) and Joshua Dratel (Sep. 9, 2004).

⁶³ Consultation with Joshua Dratel (Sep. 9, 2004).

⁶⁴ Consultation with Patrick Fitzgerald (Nov. 29, 2004).

⁶⁵ Consultation (Sep. 21, 2004); *see also* Fred Strasser, *It Didn't Start with Ollie North; CIPA Litigation*, NAT'L LAW J., Jan. 30, 1989, at p.1 (describing practical and logistical burdens of litigating under CIPA).

⁶⁶ Consultation (Oct. 5, 2004); *see also Yunis*, 867 F.2d at 624 (“[T]he defendant and his counsel in CIPA cases are hampered by the fact that the information they seek is not available to them until [a showing that the information is “helpful” or “essential” under *Roviano*] is made. Thus, it might be said, they cannot show the helpfulness of contents, because they do not know their nature.”).

⁶⁷ *See United States v. bin Laden*, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001) (upholding constitutionality of protective order). A protective order was also issued in the embassy bombings case for unclassified materials still deemed “particularly sensitive” by the government. The order allowed the defense team to share such materials with the defendants but not with others, such as witnesses, absent approval by the court or agreement between the parties. *See* Schmidt & Dratel, *supra* n.59, at 76-77 & n.17.

⁶⁸ *See United States v. Moussaoui*, 2002 WL 1987964 (E.D. Va. Aug. 23, 2002); *see also Rezaq*, 156 F.R.D. 514, 524-25 (D.D.C. 1994) (imposing similar order).

⁶⁹ *See* Philip Shenon, *Judge Lets Man Accused in Sept. 11 Plot Defend Himself*, N.Y. TIMES, Jun. 14, 2002, at A27.

⁷⁰ *See United States v. Moussaoui*, 2002 WL 1987964, at *1 (E.D. Va. Aug. 23, 2002).

⁷¹ *See Faretta v. California*, 422 U.S. 806, 833-36 (1975).

⁷² *See United States v. Moussaoui*, Crim. No. 01-455-A (E.D. Va. Nov. 13, 2003).

⁷³ *See United States v. bin Laden*, 58 F. Supp. 2d 113, 119 (1999) (citing *Wheat v. United States*, 486 U.S. 153, 160 (1988)).

⁷⁴ *See id.* at 119-21.

⁷⁵ CIPA § 3 authorizes the court to issue a protective order to prevent the further disclosure of classified information “disclosed by the United States to any defendant” in the course of a case. It does not, however, explicitly authorize a court to issue a protective order allowing classified information to be disclosed to cleared defense counsel while blocking the information from being disclosed to the defendant himself.

⁷⁶ *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.”).

⁷⁷ Equally important is developing a corps of cleared paralegals, translators, and other personnel whose assistance defense counsel may need. The lack of availability of cleared translators is an especially acute problem, according to defense counsel and prosecutors whom we consulted. *See also infra* pp.33-34 (discussing delay in obtaining cleared counsel in *Al-Hussayen* case).

⁷⁸ Moreover, not only can counsel not discuss the evidence with the defendant, but counsel cannot discuss it with anyone else without clearance, such as witnesses and consultants, adding another significant impairment to counsel's ability to construct a defense.

⁷⁹ *See bin Laden*, 2001 WL 66393, at *4; *Rezaq*, 156 F.R.D. at 524. Courts in terrorism cases have also excluded the defendant from being personally present in any CIPA proceedings (*i.e.*, proceedings regarding whether and in what form classified information may be obtained in discovery or used at trial). While such exclusion has been challenged by defense counsel, again on the grounds that the defendant's personal input is necessary to evaluate the relevance of classified information to the case, courts have held that CIPA proceedings concern matters of law rather than fact and can be adequately argued by defense counsel, without the defendant's personal presence. *See, e.g., bin Laden*, 2001 WL 66393, at *6-*7; *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261-62 (9th Cir. 1998).

⁸⁰ *See* Memorandum re: Origination of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal pre-Trial Detainee Zacarias Moussaoui, available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss41702gsam.pdf>.

⁸¹ *See* Julia Preston, *Lawyer Is Guilty of Aiding Terror*, N.Y. TIMES, Feb. 11, 2005, at A1. A paralegal and a translator who worked with Stewart on the case were convicted on similar charges as well. *Id.* The original indictment against Stewart was invalidated on constitutional grounds by the trial court, but revised charges brought in a superseding indictment were subsequently upheld. *See United States v. Sattar*, 314 F. Supp. 2d 279 (S.D.N.Y. 2004) (upholding validity of material support and other charges brought in superseding indictment).

⁸² *See* William Glaberson, *Verdict in Stewart Case: Impact; Lawyers Take Uneasy Look At The Future*, N.Y. TIMES, Feb. 11, 2005, at B8.

⁸³ *See United States v. Salameh*, 992 F.2d 445 (2nd Cir. 1993); David Margolick, *Ban on Press Statements in Trade Center Bombing Case Is Overturned*, N.Y. TIMES, May 1, 1993, at A27.

⁸⁴ *See* Schmidt & Dratel, *supra* n.59, at 71-76 (discussing deleterious effects of SAMs on prisoner's mental state); Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. LAW, POLICY & ETHICS J. 81, 83-92 (2003) (same).

⁸⁵ The only provision included in CIPA addressing the introduction of classified evidence at trial (as opposed to substitutions) is CIPA § 8(a), which allows classified information to be introduced directly at trial without any change in the information's classified status. As CIPA's legislative history explains, § 8(a) "simply recognizes that classification is an executive, not a judicial function. The subsection allows the classifying agency to decide whether the information has been so compromised during trial that it could no longer be regarded as classified." S. Rep. 96-823 (1980), at 10, 1980 U.S.C.C.A.N. 4294, 4304. By contrast, an alternative bill proposed at the time CIPA was enacted did include a provision authorizing trial proceedings to be closed during the introduction of classified evidence. *See* H.R. 4745, 96th Cong., 2d Sess. (1979), at § 8. This provision was later incorporated into military rules of evidence governing the use of classified information in a court-martial proceeding. *See infra*, Pt. II, p.51 & n.39.

⁸⁶ *See supra* p.14.

⁸⁷ *See Brown v. Artuz*, 283 F.3d 492, 501-02 (2nd Cir. 2002) (finding that safety of undercover police officer "surely constitutes an overriding interest" justifying closure); *Bowden v. Keane*, 237 F.3d 125, 130 (2nd Cir. 2001) (same); *see generally* Randolph N. Jonakait, *Secret Testimony and Public Trials in New York*, 42 N.Y.L. SCH. L. REV. 407, 430-40 (1998) (explaining that New York federal and state courts have led the country in allowing courtroom closure to protect undercover agents; reviewing cases). *Cf. United States v. George*, Crim. Nos. 91-0521 & 91-0215, 1992 WL 200027 (D.D.C. Jul. 29,

1992) (ordering various measures, short of totally excluding the public from the courtroom, in order to protect identities of undercover CIA officers needed to testify in Iran-Contra case, including allowing the witnesses to testify from behind a screen).

⁸⁸ See, e.g., *Bell v. Jarvis*, 236 F.3d 149, 167-68 & n.11 (4th Cir. 2000) (finding it “settled that the state’s interest in protecting minor rape victims is a compelling one,” sufficient to justify well-tailored closure).

⁸⁹ See *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987).

⁹⁰ See Government’s Designation of Classified Documents in *United States v. Lindh*, Crim. No. 02-37A (E.D. Va. May 17, 2002), at 2 & n.4.

⁹¹ See *United States v. Pelton*, 696 F. Supp. 156, 159 (D. Md. 1986).

⁹² See *Bowden*, 237 F.3d at 129-30.

⁹³ Such a trial would be exceptional in the extreme. As the Supreme Court noted in *In re Oliver*, 333 U.S. 257 (1948): “[W]e have been unable to find a single instance of a criminal trial conducted *in camera* in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute.” *Id.* at 266.

⁹⁴ E.g., *Pelton*, 696 F. Supp. at 159 (“It is also important to the court that only a very small amount of evidence is being withheld. The tapes in question are estimated to have a combined length of less than five minutes, and the trial in this case is expected to last for five to eight days....”).

⁹⁵ See *id.* (“While the court would not find a mere assertion of ‘national security’ sufficient to overcome the important first amendment values at issue, in this case the court has conducted its own analysis of the classified affidavit and the unredacted transcripts, and finds that there are serious national security concerns that would be affected if Abell/NBC’s motion were granted.”). Courts-martial have followed a similar approach in determining when proceedings can be closed in order to protect classified information. See *United States v. Grunden*, 2 M.J. 116, 122 (1977) (“Although the actual classification of materials and the policy determinations involved therein are not normal judicial functions, immunization from judicial review cannot be countenanced in situations where strong countervailing constitutional interests exist which merit judicial protection. Before a trial judge can order the exclusion of the public on this basis, he must be satisfied from all the evidence and circumstances that there is a reasonable danger that presentation of these materials before the public will expose military matters which in the interest of national security should not be divulged.”).

⁹⁶ Subjecting judges themselves to background checks by the executive would raise separation of powers problems and is not done in CIPA cases. Cf. *United States v. Smith*, 899 F.2d 564, 570 (1990) (approving background checks in CIPA cases for law clerks, secretaries, and other court staff because “these individuals do not and should not decide cases” and thus background checks on such personnel “only mildly intrudes into the manner in which federal judges conduct business”). In any event, the possibility of judicial leaks is exceedingly remote. Griffin Bell recounts that, in pushing for prosecutions of espionage cases, one reason for the resistance he encountered from intelligence agencies was “especially galling”: “That was their belief that federal judges could not be trusted to handle sensitive national security information.... There is no record of judges leaking information given them. Yet the intelligence community has a deep-seated distrust of the judiciary.” Bell, *supra* n.31, at 104-05. Indeed, we would venture that federal judges are just as trustworthy as the military officials who would oversee the newly formed military commission system, if not more so. Many spies have come from the ranks of the military. By comparison, even though federal judges are routinely entrusted to see highly sensitive information, not only in CIPA cases but in approving search and surveillance warrants, Freedom of Information Act cases, and various other contexts, we know of no Benedict Arnold who has ever sat on the federal bench.

⁹⁷ Indeed, rules established by the Chief Justice pursuant to CIPA § 9, detailing security protocols for federal courts to follow in cases involving classified information, caution: “Nothing

contained in these procedures shall be construed to require an investigation or security clearance of the members of the jury or interfere with the functions of a jury, including access to classified information introduced as evidence in the trial of a case.” See 18 U.S.C. app. 3, Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, § 6.

⁹⁸ Consultation (Sep. 23, 2004).

⁹⁹ See, e.g., John D. Jackson, Katie Quinn, & Tom O’Malley, *The Jury System in Contemporary Ireland: In The Shadow of a Troubled Past*, 62 LAW & CONTEMP. PROBS. 203, 221 (1999).

¹⁰⁰ As a constitutional matter, the Supreme Court has held that the defendant has the right to be present at trial at any point where his exclusion would “interfere[] with his opportunity for effective cross-examination,” *Kentucky v. Stincer*, 482 U.S. 730, 740 (1987), or where his presence otherwise “has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge,” *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934). The Federal Rules of Criminal Procedure are more categorical, as they give the defendant the right to be present at every stage of trial save for proceedings involving only questions of law. See Fed. R. Crim. P. 43(a) & (b)(3). In contrast to the defendant’s constitutional rights, however, the Federal Rules of Criminal Procedure are subject to change by Congress.

¹⁰¹ In some espionage cases, the courts have allowed classified documents to be submitted to the jury under seal, with copies being shared only among the judge, the jury, defense and government counsel, and the witness testifying about the document – with the defendant himself apparently not being shown the documents. See, e.g., *Zettl*, 835 F.2d at 1063 (explaining “silent witness” procedure where witness would testify about a classified document and “[t]he court, counsel and the jury would also have copies”); Bell, *supra* n.31, at 123 (stating that in *Kampiles* “only the attorneys, jury and expert witnesses could see the [KH-11 spy satellite] manual”). However, these cases involved situations in which the defendant had had prior access to the documents in question and so was already familiar with their contents; for this reason, there was likely no need to share the documents with the defendant and the issue does not appear to have been raised at the time. The point of the restrictive measures was to keep the documents secret from the public, not from the defendant.

¹⁰² See *Coy v. Iowa*, 487 U.S. 1012 (1988).

¹⁰³ See Bell, *supra* n.31, at 121-22.

¹⁰⁴ See *United States v. Fernandez*, 913 F.2d 148, 164 (4th Cir. 1990).

¹⁰⁵ See, e.g., David Johnston, *Iran-Contra Prosecutor Says Secrecy Issue Blocks Justice*, N.Y. TIMES, Dec. 2, 1989, at A12; Joe Pichirallo & Walter Pincus, *Probe of CIA Role Hampered, Walsh Says; Iran-Contra Prosecutor Faults White House Policy on Release of Classified Data*, WASH. POST, Dec. 1, 1989, at A4.

¹⁰⁶ Consultation (Sep. 13, 2004).

¹⁰⁷ Consultation (May 3, 2005).

¹⁰⁸ See Betsy Z. Russell, *Key Evidence Released on Eve of Terrorism Trial*, SPOKANE SPOKESMAN-REVIEW, Apr. 13, 2004, at A1; Consultation with Joshua Dratel (Sep. 9, 2004); see also Dratel, *supra* n.84, at 104.

¹⁰⁹ See S. 2672, 108th Cong., 2nd Sess. (introduced July 15, 2004).

¹¹⁰ See 18 U.S.C. § 1001 (prohibiting the knowing and willful making of “any materially false, fictitious, or fraudulent statement or representation” “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States”). A violation of the statute is punishable by a sentence of up to 5 years’ imprisonment – or up to 8 years if the violation occurs in connection with a terrorism investigation. See *id.* § 1001(a); see also Kelly Thornton, *Ruling in Immigration Case Sides with National Security*, SAN DIEGO UNION-TRIBUNE, Jan. 27, 2005, at B1 (discussing case in which defendant was charged with nine counts of lying in naturalization

interview about associations with charities tied to terrorist fund-raising; the defendant claimed the prosecution was motivated by the erroneous belief that he was engaged in terrorist activities, but the judge ruled with the government that classified information from the terrorism investigation, sought by the defendant, was not relevant to the case).

¹¹¹ See *Ashcroft Details Justice Reorganization To U.S. Attorneys*, THE WHITE HOUSE BULLETIN, Nov. 13, 2001. As Deputy Attorney General James Comey has recently elaborated: “Proactive prosecution of terrorism-related targets on less serious charges is often an effective method of deterring and disrupting potential terrorist planning and support activities. Moreover, guilty pleas to these less serious charges often lead defendants to cooperate and provide information to the Government – information that can lead to the detection of other terrorism-related activity.” *Patriot Act Reauthorization: Hearing Before the House Select Comm. on Intelligence*, 109th Cong. (May 11, 2005) (Opening Statement by James B. Comey, Deputy Attorney General, Department of Justice).

¹¹² 18 U.S.C. § 2339B. “Material support or resources” are defined as “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.” *Id.* § 2339A(b) (cross-referenced by 18 U.S.C. § 2339B(g)(4)). A “foreign terrorist organization” is an organization so designated by the Secretary of State. See 8 U.S.C. § 1189(a)(1).

¹¹³ See Note, Brian P. Comerford, *Preventing Terrorism by Prosecuting Material Support*, 80 NOTRE DAME L. REV. 723, 726-31 (2005).

¹¹⁴ See Matthew Purdy & Lowell Bergman, *Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at A1.

¹¹⁵ Compare *United States v. Goba*, 220 F. Supp. 2d 182, 193 (W.D.N.Y. 2002) (upholding use of statute in Lackawanna Six case); *United States v. Lindh*, 212 F. Supp. 2d 541, 546 (E.D. Va. 2002) (upholding use of statute in prosecution of Lindh for joining ranks of the Taliban) *with Humanitarian Law Project v. U.S. Dep’t of Justice*, 352 F.3d 382, 385 (9th Cir. 2003) (holding § 2339B impermissibly vague insofar as it could be construed to reach innocent political advocacy); *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1343 (M.D. Fla. 2004) (upholding use of statute but only after construing it to require the defendant to have known both that the organization he assisted was a terrorist organization and that his assistance would further its illegal activities).

¹¹⁶ Intelligence Reform and Terrorism Prevention Act of 2004, § 6003, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

¹¹⁷ See *infra* p.38 for a discussion of the material witness statute.

¹¹⁸ See U.S. Dep’t of Justice, Remarks of Deputy Attorney General James Comey Regarding Jose Padilla, Jun. 1, 2004, available at <http://www.usdoj.gov/dag/speech/2004/dag6104.htm> (stating that “to make a case against Jose Padilla through our criminal justice system” was “something that I as the United States Attorney in New York could not do at that time without jeopardizing intelligence sources”). The Department has also argued that removing Padilla from the criminal system was necessary in order to allow him to be interrogated effectively, outside the presence of counsel. This Report does not address the issue of whether detention for this purpose is appropriate, but we note that such detention is not necessarily incompatible with the criminal process. Other countries, such as England and Israel, have allowed for limited periods of incommunicado detention for interrogation of terrorism suspects (measured in terms of days, not the months or years that Padilla has been held in detention). See Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1919-23 (2004). We further note, however, that providing a defendant with counsel can often be highly *useful* in helping the government to elicit information. Counsel, as a trusted intermediary between the defendant and the prosecution, can play a crucial role in convincing the defendant to cooperate with the government in exchange for leniency. Both before and after September 11th, the government has been able to turn a number of terrorism defendants into cooperating informers within the confines of the criminal process. See, e.g., Lisa Anderson & Stephen J. Hedges, *Terror Web Pulled into Daylight; Ex-Aide Tells of bin Laden’s*

Anti-U.S. Effort, CHICAGO TRIBUNE, Feb. 11, 2001, at C1 (describing cooperation supplied in return for guilty plea by key witness in embassy bombings trial); Daniel Eisenberg, *The Triple Life of a Qaida Man; Inside the Secret Operation to Turn a Truck-Driving bin Laden Follower into an Agent for the U.S.*, TIME, Jun. 30, 2003 (“[Attorney General] Ashcroft recently told members of Congress that the Justice Department has 15 or more plea deals with alleged terrorists who are singing to the feds.”).

119 See *supra*, Introduction, pp. 5-6 & n.15. In the prosecution of Zacarias Moussaoui, the government has claimed that these detainees cannot be made available to testify as witnesses in a trial proceeding (even by remote video) for national security reasons, for fear of interrupting ongoing interrogation efforts. The difficulty with using these detainees as witnesses, however, may have less to do with national security concerns than other reasons, not the least of which is the possibility that the information they provided regarding Padilla was extracted through coercive methods. See *id.*

120 See *Summary of Jose Padilla’s Activities with Al Qaida*, *supra*, Introduction, n.18, at 2.

121 *Id.* at 6.

122 See 18 U.S.C. § 1001. The Department further claims that “Padilla also lied about the source of the money he was carrying, and the purpose of his return to the United States.” See *Summary of Jose Padilla’s Activities with Al Qaida*, *supra*, Introduction, n.18, at 6. If provable, these false statements could lay the predicates for additional counts brought under § 1001.

123 See 18 U.S.C. § 2339B.

124 See 18 U.S.C. § 3286.

125 *U.S. v. Lovasco*, 431 U.S. 783, 791 (1977).

126 18 U.S.C. §§ 3161-64.

127 See 18 U.S.C. § 3142(e) (authorizing detention of a defendant if, pursuant to a hearing, a “judicial officer finds that no condition or combination of conditions will reasonably assure...the safety of any other person and the community”).

128 *United States v. Salerno*, 481 U.S. 739 (1987).

129 See John Scalia, U.S. Dep’t of Justice, Bureau of Justice Statistics, Special Report, *Federal Pre-trial Release and Detention – 1996* (Feb. 1999).

130 See Anjana Malhotra, International Civil Liberties Report, *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims without Charges*, at 1-2, available at <http://www.aclu.org/iclr/malhotra.pdf>.

131 See Cam Simpson, *Roundup Unnerves Oklahoma Muslims*, CHICAGO TRIBUNE, Apr. 21, 2002, at 1.

132 Since 1789, federal courts have had the power to compel witnesses who have material evidence to give testimony in criminal proceedings, and to imprison witnesses who refuse to do so. See Act of Sept. 24, 1789, ch. 20, §33, 1 Stat. 73, 91. The present material witness statute was enacted in 1984. See Pub. L. 98-473, § 203(a) (codified at 18 U.S.C. § 3144).

133 Perhaps the best known case involves Oregon lawyer Brandon Mayfield, who was arrested as a material witness in May 2004 based on FBI assertions that his fingerprints had been found on a bag of detonators used in the March 11, 2004, Madrid bombings. The government clearly viewed Mayfield not as a witness, but as the prime suspect in the case at the time. He was later cleared of any wrongdoing. The *Washington Post* has reported that, of the forty-four individuals held on material witness warrants in 2002, twenty were never even brought before a grand jury to testify. See Steve Farinau & Margot Williams, *Material Witness Law Has Many in Limbo: Nearly Half Held in War on Terror Haven’t Testified*, WASH. POST, Nov. 24, 2002, at A1.

134 See *United States v. Awadallah*, 349 F. 3d 42, 55-64 (2nd Cir. 2003).

135 See 18 U.S.C. § 3144.

136 See *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975).

¹³⁷ See 18 U.S.C. § 3142(e).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See *id.* § 3142(f) (stating that the rules of evidence applicable in a criminal trial do not apply in a pre-trial detention hearing).

¹⁴¹ See, e.g., *United States v. Accetturo*, 783 F.2d 382, 391 (3rd Cir. 1986); *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985). There is a further feature of the pre-trial detention statute that limits the government's need to disclose its evidence. The statute identifies certain categories of offenses – including terrorism – as to which a presumption of dangerousness attaches. See 18 U.S.C. § 3142(e). Where a judge finds probable cause to believe that the defendant has committed such an offense (as must be found to warrant the defendant's arrest in the first place), the judge is to give weight to this presumption among other factors in determining whether pre-trial detention is appropriate. See *United States v. Jessup*, 757 F.2d 378 (1st Cir. 1985) (Breyer, J.) (explaining nature of presumption), *abrogated on other grounds*, *United States v. O'Brien*, 895 F.2d 810 (1st Cir. 1990).

¹⁴² *United States v. Acevedo-Ramos*, 755 F.2d 203, 209 (1st Cir. 1985); *accord Accetturo*, 783 F.2d at 390; *United States v. Terrones*, 712 F. Supp. 786, 792 (S.D. Cal. 1989); *United States v. Stanford*, 551 F. Supp. 209, 211 (D. Md. 1982). *But see United States v. Abuhamra*, 389 F.3d 309, 326 (2nd Cir. 2004) (holding that *ex parte* submission cannot form the sole basis for the government's opposition to release of defendant on bail).

¹⁴³ *Accetturo*, 783 F.2d at 391. As noted by the Third Circuit in *Accetturo*: “Precisely because the Bail Act permits hearsay testimony, the government will usually not need to present its case [*ex parte*] in order to protect potential witnesses.” *Id.*

¹⁴⁴ See *Terrones*, *supra*; *Stanford*, *supra*.

¹⁴⁵ See 18 U.S.C. §§ 3161-64.

¹⁴⁶ See *id.* § 3161(h)(3)(A).

¹⁴⁷ See, e.g., *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994) (medical reasons); *United States v. Garcia*, 995 F.2d 556 (5th Cir. 1993) (threats made against the witness); *United States v. Vasser*, 916 F.2d 624 (11th Cir. 1990) (co-conspirators imprisoned in Bahamas deemed unavailable until they could be produced).

¹⁴⁸ 18 U.S.C. § 3161(h)(3)(B).

¹⁴⁹ *Id.* §§ 3161(h)(8)(B)(i)&(ii).

¹⁵⁰ See *United States v. Napolitano*, 552 F. Supp. 465, 472 (S.D.N.Y. 1982) (granting continuance under § 3161(h)(8)(B) in organized crime case upon finding that denial of continuance “would mandate disclosure of materials which would impede an ongoing significant investigation”); *United States v. Mannino*, 480 F. Supp. 1182, 1188 (S.D.N.Y. 1979) (same).

¹⁵¹ *Foucha v. Louisiana*, 504 U.S. 71 (1992); see also *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding indefinite confinement of “sexually violent predator,” in part on the ground that this condition represented a recognized mental disorder).

¹⁵² *Salerno v. United States*, 481 U.S. 739, 747 & n.4 (1987) (emphasis added).

¹⁵³ See Philip B. Heymann & Juliette N. Kayyem, *Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism*, at 33-50, available at <http://www.ksg.harvard.edu/bcsia/longtermlegalstrategy>.

¹⁵⁴ See *id.* at 36-38. Detention would initially be available only for 90 days. After that, the government could seek detention for additional 90-day periods, for a total length of up to two years. If, after the two-year maximum period has expired, the government declines to bring the case to trial, the suspect would be entitled to financial compensation. *Id.*

155 See 18 U.S.C. § 3591(a)(2)(C) (requiring as condition for death penalty that defendant “intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act”) (emphasis added); see also *United States v. Moussaoui*, 282 F. Supp. 2d 480, 485-86 (E.D. Va. 2003) (hereinafter “*Moussaoui I*”).

156 See *United States v. Moussaoui*, 2002 WL 1987964 (E.D. Va. Aug. 23, 2002).

157 See *Moussaoui I*, 282 F. Supp. 2d at 482, 486.

158 See *United States v. Moussaoui*, 382 F.3d 453, 458 (4th Cir. 2004) (hereinafter “*Moussaoui II*”).

159 See Siobhan Roth, *Terror Case Could Redraw Lines of Power: Role of Branches at Stake in Turf War between Judge, U.S.*, LEGAL TIMES, Jul. 21, 2003, at Court Watch Section, p.1.

160 See *United States v. Poindexter*, 732 F. Supp. 165 (D.D.C. 1990).

161 See *Moussaoui I*, 282 F. Supp. 2d at 481; see also *United States v. Moussaoui*, Crim. No. 01-455-A, slip. op. at 10 (E.D. Va. Mar. 10, 2003).

162 See *Moussaoui I*, 282 F. Supp. 2d at 483-87.

163 *Moussaoui II*, 382 F.3d at 470.

164 See Redacted Brief for Appellant United States, *Moussaoui II* (filed Oct. 31, 2003) at 24-33, available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss102403gbrf.pdf> (hereinafter “Government’s Appeal Brief in *Moussaoui II*”).

165 *Moussaoui II*, 382 F.3d at 476.

166 See *id.* at 480-81. In addition, the summaries must include any inculpatory portions of the witnesses’ statements so as to ensure that they are complete. See *id.* at 482.

167 See *id.* at 480-81. The court reasoned that the statements could be presumed reliable because they would be composed from interrogation reports distributed to the intelligence community, whom the government had “a profound interest” in supplying with accurate information for use in counter-terrorism operations. *Id.* at 478.

168 The Supreme Court’s denial of review does not, of course, preclude it from reviewing the constitutionality of this arrangement at a later date, on appeal post-trial.

169 See 18 U.S.C. § 2332b(a)(2) & (c)(1)(F). In its appeal of the district court’s order, the government contended that the order would unduly hamper its ability to prosecute the case. By effectively prohibiting the prosecution from presenting any evidence about the September 11th attacks “at all,” the government argued, the district court’s order would prevent the prosecution from demonstrating to the jury “the full horrifying scope” of the conspiracy in which the defendant was a part, “[g]iven that the defendant’s preparation for his involvement in a hijacking attack mirrors the preparatory acts of the 19 hijackers who executed the attacks of September 11.” See Government’s Appeal Brief in *Moussaoui II*, *supra* n.164, at 18, 75-76. This argument rests on conjecture, however. The district court’s order would have excluded evidence that Moussaoui had involvement in or knowledge of the September 11th attacks; but there is no reason to assume that the district court’s order would have prevented the government from introducing any evidence about the attacks *at all*. See *Moussaoui I*, 282 F. Supp. 2d at 487 n.22 (barring the introduction of any cockpit voice recordings, video footage, and photographs of the victims of the September 11th attacks on the ground that such evidence would be unduly prejudicial to the defense, but otherwise not restricting the government’s ability to introduce evidence of the September 11th attacks if offered to prove matters other than the defendant’s knowledge of or involvement in attacks).

170 While officially the names of the detainees in question have remained classified in the case, the detainees are widely believed to be Ramzi Binalshibh, Khalid Sheikh Mohammed, and Mustafa Ahmed Hawsawi. See Jerry Markon, *Court Clears Way for Moussaoui Trial*, WASH. POST, Sep. 14, 2004, at A5. Binalshibh was captured in September 2002; Mohammed and Hawsawi were captured in March 2003.

¹⁷¹ See Schulhofer, *supra* n.118, at 1919-23. Notably, in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), the plurality decision emphatically rejected the government's contention that Hamdi could be detained indefinitely for purposes of interrogation. See *id.* at 2641 ("Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized [under the Authorization for Use of Military Force enacted by Congress in response to the September 11th attacks]").

¹⁷² *Moussaoui II*, 382 F.3d at 483-89 (Gregory, J., concurring in part and dissenting in part).

¹⁷³ As one court has stated, disclosure of a witness's name

has a core purpose: to prevent a criminal conviction based on the testimony of a witness who remains "a mere shadow" in the defendant's mind. When that core purpose is not implicated, we see no reason for reflexively excluding otherwise admissible testimony....

Against this backdrop, it is readily apparent that all pseudonyms are not equal in the eyes of the Confrontation Clause.... Sometimes, ... a witness's use of a fictitious name will transform him into a wraith and thereby thwart the efficacy of cross-examination. Other times, the use of a fictitious name will be no more than a mere curiosity, possessing no constitutional significance.

Siegfried v. Fair, 982 F.2d 14, 17 (1st Cir. 1992) (citations omitted); *accord Smith v. Illinois*, 390 U.S. 129, 134-35 (1968) (White, Marshall, JJ., concurring) (recognizing safety of witness as proper ground for withholding witness's identity); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (recognizing right to full confrontation must occasionally give way to competing governmental interests, including danger to witnesses); *United States v. Persico*, 425 F.2d 1375, 1384 (2nd Cir. 1970) (permitting withholding of witness's name from defense).

¹⁷⁴ See Department of Justice, U.S. Attorney's Manual, Title 9, Criminal Resource Manual, § 2054, pt. III.D (explaining procedures for protecting the true name of intelligence officers needed to testify in a CIPA case), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm.

¹⁷⁵ Consultation with espionage prosecutor (Sep. 23, 2004); see also Veronica T. Jennings, *Identity of Witness Is Shielded; Fear of Retaliation Cited in Murder Trial*, WASH. POST, Mar. 14, 1994, at B1 (describing use of such measure in state murder trial).

¹⁷⁶ See *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

¹⁷⁷ See *id.* at 55-56, 68.

¹⁷⁸ Consultation with J. Gilmore Childers (Nov. 10, 2004).

¹⁷⁹ See 18 U.S.C. § 3292.

¹⁸⁰ See generally Michael J. Burke, Note, *United States v. Salim: A Harbinger for Federal Prosecutions Using Depositions Taken Abroad*, 39 CATH. U. L. REV. 895 (1990).

■ ■ PART II

¹ See 10 U.S.C. § 818; Kevin J. Barry, *Military Commissions: Trying American Justice*, 2003-NOV ARMY LAW. 1, 2 (2003).

² For comprehensive accounts of the history of military tribunals and the legal limits of their powers, see generally David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002).

³ *Reid v. Covert*, 354 U.S. 1 (1957). *Accord U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

⁴ See William H. Rehnquist, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 18-25 (1998).

⁵ *Ex Parte Milligan*, 71 U.S. 2, 6 (1866).

⁶ *Id.* at 127 (emphasis in original).

⁷ *Id.* at 121-22.

⁸ *Id.* at 118-127 (paragraph structure omitted).

⁹ *Id.* at 120-21.

¹⁰ *Id.* at 119.

¹¹ *See Duncan v. Kahanamoku*, 327 U.S. 304, 329 (1946) (Murphy, J., concurring); *id.* at 339 n.1 (Burton, J., dissenting).

¹² *Id.* at 333 (Murphy, J., concurring) (internal quotation marks omitted).

¹³ *Id.* (internal quotation marks omitted).

¹⁴ *See id.* at 307-09.

¹⁵ *Id.* at 315-16.

¹⁶ *Id.* at 322.

¹⁷ *Id.* at 329-30 (Murphy, J., concurring).

¹⁸ *Id.* at 317.

¹⁹ *Quarles*, 350 U.S. at 22.

²⁰ *See* 10 U.S.C. § 818 (court-martial may “try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war”). Note, however, that there are both advantages and disadvantages of treating crimes of terrorism as war crimes. *See generally* Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence between International Humanitarian Law and International Criminal Law?*, 7 ILSA J. INT’L & COMP. L. 391 (2001).

²¹ *See* 10 U.S.C. §§ 801 *et seq.*

²² Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 8-9 (1998).

²³ *See* 10 U.S.C. § 851.

²⁴ Court-martial members are hand-picked by the “convening officer,” the same commander who decides to bring the charges in the first place. *See* 10 U.S.C. § 825(d)(2). (The defendant does, however, have the right to challenge the convening officer’s selections in a similar fashion as a criminal defendant can challenge potential jurors. *See id.* § 841.) In contrast, the convening officer does not have the power to select the military judge. Rather, military judges are assigned to cases by, and are directly responsible to, the Judge Advocate General offices of their respective branches. *See id.* § 826(a)&(c).

²⁵ *See* 10 U.S.C. §§ 941-46. Court-martial defendants have an automatic right of appeal to intermediate appellate courts staffed by military judges. The Court of Appeals for the Armed Forces is required to grant further review in any case involving a death sentence or any case in which review is requested by the prosecution. Review at the request of the defense is granted only at the court’s discretion.

²⁶ *See id.* § 867a.

²⁷ *See United States v. Crawford*, 35 C.M.R. 3 (1964) (all constitutional protections apply to soldiers tried in court-martial system, except rights to indictment by grand jury and trial by petit jury); *see also United States v. Jacoby*, 29 C.M.R. 244, 246 (1960) (all Bill of Rights protections apply “unless excluded directly or by necessary implication”). *But see United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994); *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). In both *Taylor* and *Lopez*, the court noted that

the Supreme Court has never expressly applied the Bill of Rights to the military justice system, but rather has assumed that it applies in determining the implications of its guarantees in the military context.

²⁸ See *United States v. Grunden*, 2 M.J. 116, 120 n.3 (C.M.A. 1977) (stating that “the right to a public trial is indeed required in a court-martial” and rejecting any implication to the contrary emerging from *Ex parte Quirin*, 317 U.S. 1 (1942)).

²⁹ See 10 U.S.C. § 839(b).

³⁰ *Jacoby*, 29 C.M.R. at 246-47.

³¹ *Id.*

³² *E.g.*, *United States v. Kern*, 22 M.J. 49, 51 (1986).

³³ *E.g.*, *United States v. Daniels*, 48 C.M.R. 655, 656 (1974).

³⁴ See Mark E. Neely, *THE FATE OF LIBERTY* 162-63 (1991) (quoting decisions of Judge Advocate General Holt).

³⁵ Like federal courts, courts-martial have experience dealing with classified information problems in the context of espionage cases. See, e.g., *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992); *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

³⁶ Mil. R. Evid. 505(i)(4)(B).

³⁷ Mil. R. Evid. 505(i)(4)(C)&(D).

³⁸ Mil. R. Evid. 505(i)(4)(E).

³⁹ See Mil. R. Evid. 505(j)(5). The Court of Appeals for the Armed Forces has limited the use of this rule, however. Before closing proceedings, the military judge must determine that the government has not classified the information at issue in an arbitrary and capricious manner; see *Grunden*, 2 M.J. at 123 n.14, and proceedings can be closed only for those portions of witness testimony involving classified information. *Id.* at 121.

⁴⁰ See Glazier, *supra* n.2, at 2027-34.

⁴¹ See Frederick Bernays Wiener, *A PRACTICAL MANUAL OF MARTIAL LAW* 123 (1940) (stating that, “even in the absence of statute...the general court-martial is a proper guide for the constitution, commission, and procedure of military commissions”); S. Rep. No. 64-130, at 40 (1916) (explaining that military commissions and courts-martial “have the same procedure”); *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* 248 (1894) (“[M]ilitary commissions [should] be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.”).

⁴² Neely, *supra* n.34, at 162-63 (quoting Judge Advocate General Holt).

⁴³ See Glazier, *supra* n.2, at 2061-73, 2085.

⁴⁴ See Louis Fisher, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL & AMERICAN LAW* 46 (2003).

⁴⁵ See Glazier, *supra* n.2, at 2053.

⁴⁶ Fisher, *supra* n.44, at 46-47.

⁴⁷ *Id.* at 48-49, 51.

⁴⁸ By contrast, court-martial trials at the time could be closed only for “good reasons.” See Maj. Christopher M. Maher, *The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information*, 120 MIL. L. REV. 83, 126-27 & n.329 (1988).

⁴⁹ See Glazier, *supra* n.2, at 2056-58; Exec. Order No. 9185, 7 Fed. Reg. 5101, 5103 (July 7, 1942).

⁵⁰ See Fisher, *supra* n.44, at 53. Then, as now, a unanimous vote was required to impose a death sentence in a court-martial proceeding.

⁵¹ See *id.* At the time, although review of court-martial proceedings was limited, review by a three-officer panel in the Army Judge Advocate General's Office was required for any death sentences.

⁵² See *id.* at 53-56.

⁵³ See *id.* at 77-80.

⁵⁴ 317 U.S. 1 (1942).

⁵⁵ *Id.* at 31.

⁵⁶ *Id.* at 37.

⁵⁷ See *supra* p. 48 for discussion of the *Milligan* case.

⁵⁸ *Quirin*, 317 U.S. at 29, 45-46.

⁵⁹ Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 87 (1980).

⁶⁰ David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 80 (1996).

⁶¹ *Quirin*, 317 U.S. at 19-20.

⁶² *Id.* at 20.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *Hiatt v. Brown*, 339 U.S. 103, 111 (1950) (rejecting due process inquiry: "The single inquiry, the test, is jurisdiction.") (quoting *United States v. Grimley*, 137 U.S. 147, 150 (1890)); *In re Yamashita*, 327 U.S. 1, 8 (1946) ("[T]he military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court.").

⁶⁶ See *Burns v. Wilson*, 346 U.S. 137, 142 (1953) ("[T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts."); see also *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 996-97 (D.C. Cir. 1969) (explaining implications of *Burns*).

⁶⁷ Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135, art. 3.

⁶⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 75. Although the United States has not ratified Protocol I, it is generally accepted, and has been accepted in the past by the United States, that Article 75 accurately reflects customary international law. See Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L. Q. 1, 5 (2004).

⁶⁹ Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism, Nov. 13, 2001, 66 Fed. Reg. 57,833 (hereinafter "President's Military Order").

⁷⁰ See *id.* § 2(a). Specifically, the President's order states that it applies to:

any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

- (i) is or was a member of the organization known as Al Qaida;
- (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

⁷¹ *Id.* § 1(f).

⁷² For a helpful and detailed review of the military commission system, beyond that provided below, see *Trials Under Military Order: A Guide to the Final Rules for Military Commissions*, Human Rights First (updated and revised Oct. 2004), available at http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf.

⁷³ See 32 C.F.R. §§ 9.2, 9.4.

⁷⁴ 10 U.S.C. § 826 (providing that a military judge “shall be designated by the Judge Advocate General” and can serve in this role only “when he is assigned and directly responsible to the Judge Advocate General”).

⁷⁵ See 32 C.F.R. §§ 9.4(a)(3)&(4).

⁷⁶ See President’s Military Order, *supra* n.69, at § 4(c)(2) (prescribing that the military commission as a whole shall sit “as the triers of both fact and law”).

⁷⁷ See 32 C.F.R. § 9.4(a)(5)(iv). The Presiding Officer, if he so chooses, may also refer any other questions of law for decision by the Appointing Authority. See *id.*

⁷⁸ 32 C.F.R. § 9.5(a).

⁷⁹ Specifically, the defendant has the right to have military counsel appointed for him, whom he may choose to replace with another military officer if reasonably available; and he further has the right to retain a civilian attorney at his own expense. See *id.* § 9.4(c)(2)(iii).

⁸⁰ *Id.* § 9.5(e).

⁸¹ *Id.* § 9.5(i).

⁸² *Id.* § 9.5(f).

⁸³ *Id.* § 9.5(c).

⁸⁴ See *id.* § 9.4(a)(2).

⁸⁵ See *id.* § 9.6(g).

⁸⁶ 10 U.S.C. §§ 816(1)(A), 852(a)(1), (b)(1)-(2).

⁸⁷ *Id.* § 825a.

⁸⁸ 32 C.F.R. § 9.6(h).

⁸⁹ *Id.* §§ 9.6(h)(4), 15.3(a)(7); see also Dep’t of Defense, Military Commission Instruction No. 9, § 4(A) (“The Secretary of Defense will prescribe the term of each Review Panel member...”), available at <http://www.defenselink.mil/news/Jan2004/d20040108milcominstno9.pdf>.

⁹⁰ *Id.* § 9.6(h)(4). To date, the Secretary of Defense has appointed four civilians, temporarily commissioned as major generals, to serve two-year terms as review panel members. See “Announcements of Key Personnel for Military Commissions; Issuance of Military Commission Instruction No. 9 on Military Commissions Review Panel,” Department of Defense News Transcript, Dec. 30, 2003, available at <http://www.defenselink.mil/transcripts/2003/tr20031230-1081.html>. These four individuals have considerable legal experience; but, as Eugene

Fidell, head of the National Institute for Military Justice, has remarked: “Putting first-rate people on these panels...doesn’t cure the problem.... In our society we look to institutions, not individuals.” Vanessa Blum, *Pentagon Considers Tapping Civilians for Tribunal Board*, LEGAL TIMES, Vol. 26, No. 51, Dec. 22, 2003, at 3.

⁹¹ 32 C.F.R. § 9.10.

⁹² See Kathy A. Gambrell, *Bush Sets Up Terrorist Military Court*, U.P.I., Nov. 13, 2001; see also *Review of Military Terrorism Tribunals: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Nov. 28, 2001) (Opening Statement by Michael Chertoff, Asst. Attorney General, Criminal Division, Department of Justice), available at 2001 WL 1506626.

⁹³ News Release, U.S. Dep’t of Defense, *Secretary Rumsfeld Announces Military Commission Rules* (Mar. 21, 2002), available at http://www.defenselink.mil/releases/2002/b03212002_bt140-02.html.

⁹⁴ Deborah Sontag, *In Courts, Threats Become Alarming Fact of Life*, N.Y. TIMES, Mar. 20, 2005, at A1.

⁹⁵ Glazier, *supra* n.2, at 2019.

⁹⁶ See DOD Directive 5500.17, *Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice*, May 3, 2003, §§ E2.2-E2.4 (establishing notice and comment procedures for proposed changes to the Manual for Courts-Martial).

⁹⁷ Senators Arlen Specter and Patrick Leahy each proposed legislation authorizing and setting certain requirements for military commissions, but no action was taken on the bills. See S. 22, 108th Cong., §§ 1301 *et seq.* (2003) (sponsored by Sen. Leahy); S. 1937, 107th Cong., §§ 1-9 (2002) (sponsored by Sen. Specter).

⁹⁸ See Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 GREEN BAG 379 (2003). The one exception is the drafting of the “Crimes and Elements Instruction,” which lays out the substantive crimes that may be tried within the military commission system. This instruction was the only portion of the new commission rules that was circulated in draft form for public comment before it was released. It is unclear why only this instruction was circulated in draft. See National Institute of Military Justice, *Military Commission Instructions Sourcebook* (2nd ed. 2004), at Preface p.1.

⁹⁹ *Remarks by Vice President Dick Cheney to the U.S. Chamber of Commerce*, FEDERAL NEWS SERVICE, Nov. 14, 2001.

¹⁰⁰ See *Ex Parte Quirin*, 317 U.S. at 47; *supra* pp. 52-55.

¹⁰¹ See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 L. & CONTEMP. PROB. 125 (1998) (documenting a similar dynamic that leads police to make premature and often inaccurate accusations when they face strong public pressure to solve unusually brutal crimes).

¹⁰² Sue Anne Pressley, *Preparing for Role in War on Terror; Navy Base in Cuba to House Taliban, Al Qaida Detainees*, WASH. POST, Jan. 10, 2002, at A12.

¹⁰³ Transcript, U.S. Dep’t of Defense, *Secretary Rumsfeld Media Availability en route to Guantanamo Bay, Cuba*, Jan. 27, 2002, available at http://www.defenselink.mil/transcripts/2002/t01282002_t0127enr.html.

¹⁰⁴ See U.S. Dep’t of Defense, *Military Commissions Charge Sheets*, available at http://www.defenselink.mil/news/Nov2004/charge_sheets.html.

¹⁰⁵ Mark Hubbard, *General Predicts Release of Terror Suspects*, FINANCIAL TIMES, Oct. 5, 2004, at 12. Although a subsequent press statement issued by the U.S. military stated that the officer’s words had been “misquoted or taken out of context,” the reporter insisted that the quote was accurate. See John Mintz, *Army Denies Detainee-Release Remark*, WASH.POST, Oct. 7, 2004, at A29.

¹⁰⁶ Tim Golden & Don Van Natta, Jr., *Threats and Responses: Tough Justice, Administration Officials Split over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1.

¹⁰⁷ *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate*

Committee on the Judiciary, 107th Cong. (Dec. 6, 2001) (testimony of Attorney General Ashcroft). The Attorney General described the detainees as “suspected terrorists” and further stated that “[w]e believe we have Al Qaida membership in custody.” *Press Release: Attorney General Ashcroft Provides Total Number of Federal Criminal Charges and INS Detainees*, Nov. 27, 2001, available at <http://www.fas.org/irp/news/2001/11/ag-112701.html>.

¹⁰⁸ Office of the Inspector General, U.S. Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11th Attacks* (Apr. 2003), at 70, available at <http://www.usdoj.gov/oig/special/0306/index.htm>.

¹⁰⁹ See David Cole, *Taking Liberties; Ashcroft: 0 for 5,000*, THE NATION, Oct. 4, 2004, at 20.

¹¹⁰ Douglas Farah & Tom Jackman, *6 Accused of Conspiracy To Aid in Terror Attacks*, WASH. POST, Aug. 29, 2002, at A1.

¹¹¹ Philip Shenon & Don Van Natta, Jr., *U.S. Says 3 Detainees May Be Tied to Hijackings*, N.Y. TIMES, Nov. 1, 2001, at A1.

¹¹² Robert E. Pierre & R. Jeffrey Smith, *Jury Splits Verdict in Terror Trial; Two Men Convicted in Alleged ‘Sleeper Cell’ Plot; One Is Acquitted*, WASH. POST, Jun. 4, 2003, at A10.

¹¹³ Danny Hakim & Eric Lichtblau, *After Convictions, the Undoing of a U.S. Terror Prosecution*, N.Y. TIMES, Oct. 7, 2004, at A1.

¹¹⁴ See 32 C.F.R. § 9.6(d)(5).

¹¹⁵ See *id.*

¹¹⁶ See *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985).

¹¹⁷ See *supra*, Pt. I, p.14 & nn.19-20.

¹¹⁸ The Supreme Court has permitted trial proceedings to occur outside the defendant’s presence where the defendant voluntarily waives his right to presence or gives up that right by virtue of persistent misconduct. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934). Such a situation is, however, far removed from the exclusion of the defendant from closed sessions in the military commission system. Where such closed sessions are held, not only is the defendant denied the right to be physically present at trial, but he is further deprived of the right to know the evidence introduced in his absence. Even in the *Quirin* case – where the Roosevelt Administration considered it vital to national security to keep the facts of the defendants’ capture secret – the defendants themselves were allowed to be present throughout trial. Only the public was ever excluded.

¹¹⁹ See 32 C.F.R. § 9.6(b)(3).

¹²⁰ The military commission rules automatically detail military counsel to the defendant, but they also permit the defendant to retain civilian counsel at his own expense. However, any civilian counsel is required to have security clearance at the SECRET level or higher. See 32 C.F.R. § 9.4(c)(1)(iii)(B).

¹²¹ *Lewis v. United States*, 146 U.S. 370, 373-74 (1892) (emphasis added); cf. *Faretta v. California*, 422 U.S. 806, 819 (“It is the accused, not counsel, who must be ‘informed of the nature and cause of the accusation,’ . . .”) (quoting U.S. Const., Amend. VI).

¹²² See 32 C.F.R. § 9.6(b)(3).

¹²³ Consultation (Dec. 8, 2004).

¹²⁴ See *United States v. Hamdan*, Charge Sheet, at 3, available at <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>.

125 Combatant Status Review Tribunals were established by the Department of Defense in the wake of the Supreme Court's ruling in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), which held that detainees imprisoned at Guantanamo were entitled to challenge their detention in federal court. The Tribunals were intended to provide administrative hearings to detainees in anticipation of such litigation. They review only whether an individual is validly detained as a wartime prisoner, or "enemy combatant"; they do not adjudicate criminal charges or dispense criminal punishment. See Christopher Marquis, *Pentagon Will Permit Captives at Cuba Base to Appeal Status*, N.Y. TIMES, Jul. 8, 2004, at A1. Two district courts have considered the legal validity of the Tribunals and have reached opposite conclusions. Compare *Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C. 2005) (upholding validity of the Tribunals) with *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005) (finding the Tribunals to violate the Constitution and international law).

126 *In re Guantanamo Detainee Cases*, 355 F.Supp.2d at 469.

127 See 8 U.S.C. § 1534.

128 See *id.* § 1534(e)(1). The ATRC has never been used since its creation; thus there are no case studies regarding its function in practice.

129 *Id.* § 1534(e)(3)(C).

130 *Id.* § 1534(e)(3)(D)(iii).

131 *Id.* § 1534(e)(3)(E)&(F).

132 32 C.F.R. § 9.6(b)(3).

133 *Id.*

134 *Id.* § 9.6(d)(5)(i).

135 See *supra*, Pt. I, pp.32-34.

136 See *United States v. Pelton*, 696 F.Supp. 156, 159 (D. Md. 1986); *United States v. Grunden*, 2 M.J. 116, 122 (1977).

137 See 32 C.F.R. 9.6(d)(2)(iv).

138 See *United States v. Hamdan*, Motion to Pre-Admit Evidence, Oct. 1, 2004, available at <http://www.defenselink.mil/news/Oct2004/d20041006motion.pdf>; *United States v. Hamdan*, Defense Response to Government's Motion to Pre-Admit Evidence, Oct. 18, 2004, available at <http://www.defense.gov/news/Oct2004/d20041022admit.pdf>.

139 See Defense Response to Government's Motion to Pre-Admit Evidence, *supra* n. 138, at 4.

140 See Anna Badkhen, *Leaders of Albany, N.Y., Mosque Held in Sting*, SAN FRANCISCO CHRON., Aug. 6, 2004, at A1.

141 See Brendan Lyons, *Judge Sets Bail, Citing "Serious Questions"*, ALBANY TIMES UNION, Aug. 25, 2004, at A1.

142 See, e.g., Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan. 1, 2005, at A11.

143 See *United States v. Crawford*, 541 U.S. 36, 124 S. Ct. 1354, 1359-1364 (2004).

144 See Defense Response to Government's Motion to Pre-Admit Evidence, *supra* n.138, at 3.

145 See generally Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477 (1998); Mirjan Damaska, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425 (1992); Dale A. Nance, *Understanding Responses to Hearsay: An Extension of the Comparative Analysis*, 76 MINN. L. REV. 459 (1992).

¹⁴⁶ This is true even though the military commission rules assign the Presiding Officer primary responsibility for determining what evidence is admissible. Even if evidence is ruled inadmissible at trial, all the commission members see it anyway because the Presiding Officer does not screen the evidence as does the judge in a federal court or court-martial.

¹⁴⁷ See Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 QLR 777, 796-98 (2003) (discussing *Verdam v. Netherlands*, No. 35253/97, Eur. Ct. H.R. (1999) (unpublished, available on the European Court of Human Rights website) and *Luca v. Italy*, 2001-II Eur. Ct. H.R. 167, 36 Eur. H.R. Rep. 807 (2001)).

¹⁴⁸ See Australian Law Reform Commission, *Background Paper, Keeping Secrets: The Protection of Classified and Security Sensitive Information*, §§ 8.60-61 (2004), available at http://www.austlii.edu.au/other/alrc/publications/reports/98/Ch_08.html.

¹⁴⁹ See *supra*, Pt. I, pp. 29, 45.

¹⁵⁰ See *United States v. Lonetree*, 31 M.J. 849 (N.M.C.M.R. 1990), *aff'd* 35 M.J. 396 (C.M.A. 1992).

¹⁵¹ Compare *Kok v. The Netherlands*, 2000-VI Eur. Ct. H.R. 597, 624-25 (2000) (upholding conviction where witness's testimony was taken in separate room with voice distortion to protect his identity, given that "considerable alternate evidence" corroborated the testimony and procedure approximated testimony in open court as closely as possible under the circumstances) with *Birutis v. Lithuania*, Nos. 47698/99 and 48115/99, Eur. Ct. H.R. (2002), at § 31 available at <http://www.worldlii.org/eu/cases/ECHR/2002/350.html> (finding violation of the European Convention on Human Rights where defendant was convicted "solely on the basis of anonymous evidence").

¹⁵² See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

¹⁵³ See, e.g., Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1529-32 (2003).

¹⁵⁴ See *United States v. Koubriti et al.*, Crim. No. 01-80778 (D. Mich.), Government's Consolidated Response Concurring in the Defendants' Motions for a New Trial and Government's Motion to Dismiss Count One Without Prejudice and Memorandum of Law in Support Thereof, available at <http://www.freep.com/pdf/2004/09/01/Motion.pdf>.

¹⁵⁵ See *id.* at 29-34.

¹⁵⁶ See *id.* at 34-36.

¹⁵⁷ See *id.* at 20-25.

¹⁵⁸ See *id.* at 39-40.

¹⁵⁹ See *id.* at 43-49.

¹⁶⁰ See *id.* at 20-25, 30-33, 35-36, 46.

¹⁶¹ *Id.* at 36.

¹⁶² 32 C.F.R. § 9.6(d)(5)(ii).

¹⁶³ 10 U.S.C. § 846.

¹⁶⁴ 317 U.S. 1 (1942).

¹⁶⁵ The briefs submitted by all the parties in the case, including plaintiffs, the government, and *amici* on both sides, are available at <http://www.law.georgetown.edu/faculty/nkk/publications.html#h>.

¹⁶⁶ See *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 166-72 (D.D.C. 2004).

¹⁶⁷ Remarks by Vice President Dick Cheney to the U.S. Chamber of Commerce, FEDERAL NEWS SERVICE, Nov. 14, 2001.

¹⁶⁸ In a note sent from President Roosevelt to Attorney General Francis Biddle in advance of the *Quirin* commission proceedings, Roosevelt stated that he thought the death penalty was “almost obligatory” for the saboteurs, commenting that, “without splitting hairs,” he saw no difference between the saboteurs’ case and the hanging of British spy Major John André in the Revolutionary War. Leaving no room for misunderstanding, Roosevelt added: “*i.e.*, don’t split hairs, Mr. Attorney General.” See Fisher, *supra* n.44, at 49.

¹⁶⁹ On the constitutional question: *Compare United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (extraterritorial application of the Fifth Amendment has been “emphatic[ally]” rejected) *with Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686, 2698 n.15 (suggesting that indefinite, incommunicado detention of innocents at Guantanamo Bay would contravene Constitution). On the international law question: See generally Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004).

¹⁷⁰ Consultation (Sep. 17, 2004).

¹⁷¹ See Toni Locy, *Moussaoui Prosecutors Wary of Tribunal*, USA TODAY, May 14, 2003, at A4; Matthew Purdy, *Bush’s New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at A1 (reporting resistance by Spanish officials); Mark Landler, *Germany: Delay in Extradition Ruling*, N.Y. TIMES, July 26, 2003, at A2 (discussing German court’s refusal to extradite Al Qaida suspects who could face a military tribunal); Stewart Tendler, *Extradition Proceedings Halted*, THE TIMES (LONDON), Mar. 4, 2005, Home section p.8 (extradition of British terrorism suspect halted due to concern that he would face a military commission).

¹⁷² See Tim Dornin, *Lawyer for Hicks Welcomes No Death Penalty*, AUSTRALIAN ASSOCIATED PRESS, Jul. 24, 2003. U.S. officials further agreed that Hicks would not be subject to the death penalty and that he could have an Australian lawyer of his choosing as a member of his defense team. See *id.*

¹⁷³ Whether and to what extent military trials should be available for terrorism suspects captured abroad but *not* on a traditional battle zone is subject to debate, and merits more attention than can be supplied here. For a thoughtful discussion of the issue, see Heymann & Kayyem, *supra*, Pt. I, n.153, at 51-57 (arguing that: (1) any “U.S. person” (*i.e.*, any U.S. citizen or resident alien), as well as any non-U.S. person apprehended within U.S. borders, should be entitled to a civilian trial in federal court, based on the need to protect democratic freedoms and avoid military usurpation of roles traditionally filled by civilian courts; (2) any non-U.S. person captured abroad in a zone of active combat may be appropriately tried in a military court; and (3) any non-U.S. person captured abroad but outside a zone of active combat may also appropriately be tried in a military court, but the country in which they are captured or any other country with jurisdiction over the person should be given priority to try the person if they are willing and able to do so).

¹⁷⁴ Consultation (Nov. 9, 2004).

¹⁷⁵ See Vanessa Blum, *Hearings Raise New Questions About Fairness*, LEGAL TIMES, Vol. 27, No. 35, Aug. 30, 2004, at 1.

¹⁷⁶ Chris Smith, *Mr. Comey Goes to Washington*, NEW YORK MAGAZINE, Oct. 20, 2003 (no page number available), available at http://newyorkmetro.com/nymetro/news/politics/n_9353/index.html.

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