

MILITARY COMMISSIONS AND THE CONUNDRUM OF CLASSIFIED EVIDENCE: A SEMI-PANGLOSSIAN SOLUTION*

Christopher W. Behan**

*This inquiry is a difficult one, for it pits the judiciary's search for truth against the Executive's duty to maintain the nation's security.*¹

I. INTRODUCTION

Trying terrorists for their crimes presents unique information access and management problems. Simply put, the sources and methods used to gather information in a terrorist trial are different from those used in a standard criminal trial. In addition to law enforcement assets, a nation may well employ all or part of its entire national security apparatus—intelligence agencies, counterintelligence, and the military—to apprehend, interrogate, and detain terrorist suspects.² Furthermore, the process often requires cooperation with other governments and *their*

* The term “Panglossian” refers to the fictional philosopher Pangloss in Voltaire’s *Candide*. His philosophy that all things are for the best is summed up in the first chapter of the book:

“It is demonstrable,” said he, “that things cannot be otherwise than as they are; for as all things have been created for some end, they must necessarily be created for the best end. Observe, for instance, the nose is formed for spectacles, therefore we wear spectacles. The legs are visibly designed for stockings, accordingly we wear stockings. . . . [A]nd they, who assert that everything is right, do not express themselves correctly; they should say that everything is best.”

VOLTAIRE, *CANDIDE* ch. 1 (Peter Gay ed., 1st ed. 1963).

** Associate Professor of Law, Southern Illinois University School of Law. I thank my research assistants, Matthew Swearingen and Kelli Greenwood Anderson, for their assistance in preparing this Article. This Article is based on a presentation by the same title given as part of the *Guantanamo Bay: What Next?* symposium sponsored by the *Southern Illinois University Law Journal*.

1. *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007).
2. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, *COMBATING TERRORISM: INTERAGENCY FRAMEWORK AND AGENCY PROGRAMS TO ADDRESS THE OVERSEAS THREAT* 60-65 (2003) (outlining and explaining interagency process for combating both domestic and international terrorism); *Database Will Unite Agencies*, USA TODAY, Sept. 17, 2003, at 05A (detailing database sharing between American agencies of suspected terrorists in order to make apprehension and detention of suspects more efficient). Cf. John P. McLoughlin, Gregory P. Noone & Diana C. Noone, *Security Detention, Terrorism and the Prevention Imperative*, 40 CASE W. RES. J. INT’L L. 463, 464-66 (2009) (explaining how multiple governmental agencies use varying legal grounds for detaining suspected terrorists).

national security and law enforcement organs.³ Non-governmental actors, such as private contractors, may also play a role in finding, capturing, or interrogating terrorist suspects.⁴

Information gathered using national security assets is frequently classified in order to protect sources, methods, relationships, and operations.⁵ Releasing such information to the public, or even the alleged terrorist defendant at trial, is potentially dangerous to national security.⁶

The danger to national security from improper disclosure of classified information exists regardless of whether the trial occurs in federal court, a military court-martial, or a military commission. Federal courts and military courts-martial have dealt with classified evidence for years; both systems have well-developed rules governing the pretrial disclosure of classified information and its evidentiary use at trial.⁷

-
3. Amy Waldman & Eric Lipton, *Rounding Up Qaeda Suspects: New Cooperation, New Tensions, New Questions*, N.Y. TIMES, Aug. 17, 2004, at 12 (discussing the cooperation between Pakistan, Britain, and the United States in apprehending terror suspects).
 4. Cf. Naomi Wolf, *Obama Fails on Promise to Shut Down Guantanamo*, GULF TIMES, Apr. 2, 2013, at 1 (criticizing the role of intelligence contractors at Guantanamo Bay); Griff Witte & Renae Werle, *Contractors are Cited in Abuses at Guantanamo; Reports Indicate Interrogation Role*, WASH. POST, Jan. 4, 2007, at D01 (explaining the role of contractors in interacting with detainees).
 5. According to the executive order on classified national security information, “[T]he national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations.” Exec. Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010). To classify information is to give it a protected status and label that generally prevents public access to the information and grants access only to those who have obtained the appropriate security clearance from the classification authority. *See generally id.*
 6. The danger exists because of the sophisticated nature of intelligence analysis, in which a seemingly insignificant piece of information may take on great importance when placed in context with other information already known to an intelligence agency. *See United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (“What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.”). Furthermore, disclosure of information to a litigant, in order to help determine the validity of a claim or defense, may require revealing information about the organization, personnel, means, or methods employed in gathering intelligence. The Fourth Circuit explained some of the problems pertaining to disclosure in *El-Masri*:

Any of those three showings would require disclosure of information regarding the means and methods by which the CIA gathers intelligence. If, for example, the truth is that El-Masri was detained by the CIA but his description of his treatment is inaccurate, that fact could be established only by disclosure of the actual circumstances of his detention, and its proof would require testimony by the personnel involved. Or, if El-Masri was in fact detained as he describes, but the operation was conducted by some governmental entity other than the CIA, or another government entirely, that information would be privileged.

479 F.3d at 309.
 7. The federal courts use the Classified Information Procedures Act (CIPA), 18 U.S.C. app. III. Courts-martial use a rule of evidence, Military Rule of Evidence 505, that is based on, and similar to, CIPA.

In contrast, the Executive and Legislative Branches have struggled to find a workable system for classified evidence in trials by military commission.⁸ Classified evidence rules in military commissions have evolved in character over the years from the draconian to the enlightened. The original Military Commissions Order No. 1 (MCO 1), for example, had a controversial rule that authorized excluding the accused from the courtroom during the introduction of classified information into evidence.⁹ Another rule prohibited military defense counsel from discussing classified evidence with their clients.¹⁰ The next iteration of military commissions, authorized by the Military Commissions Act of 2006 (MCA 2006), used classified evidence rules very similar to those used in military courts-martial and federal district courts.¹¹

The Military Commissions Act of 2009 (MCA 2009)¹²—the latest authorizing statute for the military commissions—adopts the best practices from both the federal and courts-martial systems. Along with its ancillary trial manual,¹³ regulations,¹⁴ and court rules,¹⁵ the MCA 2009 contains a comprehensive set of procedures and resources pertaining to the discovery, disclosure, and admissibility of classified evidence at trial. Combined with a state-of-the-art courtroom that is itself a Sensitive Compartmented Information Facility (SCIF),¹⁶ the system for handling classified information at Guantanamo Bay is superior—at least on paper—to those available in federal district courts or courts-martial.¹⁷

And yet, as with nearly everything else that occurs in the military commissions at Guantanamo Bay, the disclosure and use of classified evidence remains problematic. At this stage of the MCA 2009 military

-
8. For a more thorough explanation of the evolution and development of the rules for classified information in the military commissions system, see generally *infra* Part III.
 9. See U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 ¶ 6.B(3) (Mar. 21, 2002).
 10. See *id.* ¶ 6.D(5).
 11. See MIL. COMM'N R. EVID. 505. The Military Commission Rules of Evidence are contained in the Manual for Military Commissions. MANUAL FOR MILITARY COMMISSIONS pt. III (2012). The Manual for Military Commissions was authorized by § 949a(a) of the Military Commissions Act of 2006 (MCA 2006), Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (codified at 10 U.S.C. §§ 948a-950w).
 12. The Military Commissions Act of 2009, Pub. Law No. 111-84, 123 Stat. 2190 (Oct. 28, 2009) (codified at 10 U.S.C. §§ 948a-950w).
 13. See generally MIL. COMM'N R. EVID. 505.
 14. See generally U.S. DEP'T OF DEFENSE, REGULATION FOR TRIAL BY MILITARY COMMISSION ch. 18 (2011 ed.).
 15. See generally MILITARY COMMISSIONS TRIAL JUDICIARY RULES OF COURT r. 11 (Dec. 8, 2011).
 16. See Josh White, *Detainees May Be Denied Evidence for the Defense*, WASH. POST, June 15, 2008, at A03 (“The entire courtroom complex at Guantanamo is considered a SCIF . . .”). See generally U.S. DEP'T OF DEFENSE, MANUAL 5105.21, SENSITIVE COMPARTMENTED INFORMATION (SCI) ADMINISTRATIVE SECURITY MANUAL: ADMINISTRATION OF PHYSICAL SECURITY, VISITOR CONTROL, AND TECHNICAL SECURITY (Oct. 19, 2012).
 17. For a more thorough comparative discussion of the classified evidence rules in district courts, courts-martial, and military commissions, see generally *infra* Part III.B.

commission system, it remains to be seen whether the commissions' classified evidence procedures will gain the credibility and legitimacy to which, as written, they should be entitled. Well-publicized incidents in the recent past have cast doubt on the fairness and integrity of the classified information security systems at Guantanamo Bay and in the commissions' ability to hold fair trials using classified evidence.¹⁸

In this Article, I argue that the MCA 2009 classified information procedures are a semi-Panglossian solution: theoretically legitimate, perhaps even the best of all possible worlds, but forever flawed because of three irreparable defects in the current military commission system. First, the detainees are still monitored and treated as active sources of intelligence in the War on Terror.¹⁹ Second, many detainees cannot adequately defend themselves without disclosing classified information pertaining to their own interrogations or those of other witnesses.²⁰ Third, serious separation-of-powers issues exist because all parties involved with decisions to declassify, disclose, or admit classified information are part of the Executive Branch: the prosecution, intelligence agencies and other original classification authorities, and the military commissions judiciary.²¹

Section II of this Article provides an overview of classified information, the national security privilege, and specialized rules pertaining to criminal trials. Section III traces the evolution of classified information rules for military commissions authorized under the MCA 2009 and compares the MCA 2009 classified evidence procedures to those used in federal courts and U.S. military courts-martial. The Section concludes that the MCA 2009 system, as written, is a superior system for handling classified information. Section IV analyzes the three irreparable defects with the military commissions system that undermine the effectiveness of the MCA 2009 classified evidence procedures: continued treatment of detainees as intelligence assets, classification of interrogation methods, and separation-of-powers issues. Section V concludes the Article.

II. CLASSIFIED INFORMATION AND THE NATIONAL SECURITY PRIVILEGE: AN OVERVIEW

A. An Introduction to Classified Evidence

Classified information is “any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized

18. See generally *infra* Part IV.A.

19. See *infra* Part IV.A.

20. See *infra* Part IV.B.

21. See *infra* Part IV.C.

disclosure for reasons of national security.”²² The term “national security” has reference to the “national defense and foreign relations of the United States.”²³ Because national defense and foreign relations are inextricably intertwined with the duties of the Executive Branch under the United States Constitution,²⁴ the classification, declassification, and release of classified information are governed by presidential executive order.²⁵ According to the current executive order, information is classified in order “to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations.”²⁶

In an open and democratic society, there is an inevitable clash between free information flow and the national security concerns inherent in the public release of sensitive information.²⁷ Nowhere is this clash more apparent than in American civil and criminal trials, in which the default rule is that the public is entitled to “every man’s evidence,”²⁸ and where relevant evidence is presumptively admissible.²⁹

Like any other form of evidence, classified information becomes relevant at trial when it could help make a fact of consequence to the proceedings more or less probable than it would be without the information.³⁰ This can occur in a wide variety of contexts and at any stage of trial, from discovery to appeal. For example, in a civil case, the plaintiff might seek discovery of, or attempt to introduce into evidence, facts about a government agency, program, or piece of equipment in order to help make a

22. 18 U.S.C. app. III § 1(a). The definition also includes restricted data pertaining to atomic energy under the Atomic Energy Act of 1954. *See id.*

23. *Id.* § 1(b).

24. *See* U.S. CONST. art. II, § 2. *See also* Hamdi v. Rumsfeld, 296 F.3d 278, 281 (4th Cir. 2002), *vacated and remanded by* 542 U.S. 507 (2004) (“[I]n the context of foreign relations and national security . . . [i]t is the President who wields ‘delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress.’” (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936))).

25. Exec. Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010).

26. *Id.*

27. *Cf. id.*

28. Of this rule, the great evidence scholar John Henry Wigmore wrote:

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2191 (3d ed. 1940), *quoted in* *United States v. Bryan*, 339 U.S. 323, 331 (U.S. 1950).

29. FED. R. EVID. 402 (“Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court.”).

30. “Relevant evidence” is defined as evidence which “has any tendency to make a fact more or less probable than it would be without the evidence.” FED. R. EVID. 401(a).

prima facie case.³¹ In a criminal case, the basis of the charges themselves might include classified evidence, such as when a defendant is charged with espionage or improperly disclosing classified evidence.³² In addition, the defendant might wish to confront witnesses whose identities or actions are classified,³³ introduce evidence involving classified activities, including the defendant's own participation in a classified military operation;³⁴ or disclose the nature and extent of interrogation techniques employed by or against the defendant.³⁵ Depending on the facts and circumstances of a case, there is, of course, a myriad of other possible rationales for introducing classified information into evidence at trial.

Because of the sensitive nature of classified information, neither litigants nor judges are entitled to introduce it at trial without permission of the original classification authority,³⁶ a member of the Executive Branch

-
31. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 309 (4th Cir. 2007) (to establish a prima facie case in his claim under the Alien Tort Statute that the CIA illegally detained him and tortured him under its extraordinary rendition program, the defendant would have to produce evidence of being detained and interrogated in a manner to make the defendants personally liable to him, which could be done “only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations”); *United States v. Reynolds*, 345 U.S. 1 (1953) (upholding a government claim of privilege for the production of documents related to the death of civilians in a military aircraft accident where disclosing the documents could have revealed information about sensitive electronic equipment that might jeopardize national security).
 32. See, e.g., *United States v. Campa*, 529 F.3d 980 (11th Cir. 2008) (affirming conviction of defendants, Cuban nationals, for espionage against the United States); *United States v. Libby*, 467 F. Supp. 2d 20 (D.D.C. 2006) (approving the prosecution's use of substitutes for classified evidence in a case where the accused was charged with improperly releasing classified evidence to news media in a manner that compromised national security).
 33. See, e.g., *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992) (affirming trial judge's decision to shield identity and background of “John Doe” intelligence agent during appellant's trial for conspiracy to commit espionage, disobeying Navy security regulations, disclosing the identities of covert agents, willfully communicating information in violation of the Federal Espionage Act, and committing espionage).
 34. For example, in *United States v. Duncan*, the accused supervised an Army covert intelligence group operating as a private security company. The Army audited the company's accounts and found significant irregularities. The accused faced charges under both federal criminal law and the Uniform Code of Military Justice (UCMJ). Trial was delayed considerably in order for the federal prosecutors to sort out issues pertaining to classified evidence about the covert operation and its role in the case. See generally *United States v. Duncan*, 34 M.J. 1232 (A.C.M.R. 1992).
 35. See, e.g., *United States v. Marzook*, 435 F. Supp. 2d 708, 744-48 (N.D. Ill. 2006) (addressing classification issues pertaining to interrogations of the accused performed in Israel by the Israeli Security Agency). Cf. *United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010) (holding, without addressing any issues pertaining to the classification of information, that a military judge did not abuse discretion in refusing to order disclosure of documents pertaining to interrogation techniques used in Iraq in accused's trial for maltreating and abusing detainees at Abu Ghraib prison).
 36. A judge might decide the evidence is relevant and necessary, but the original classification authority still controls the information and can decide not to release it at all. Should that occur, the judge can apply a sanction for nonproduction of the evidence, including dismissal of charges. Cf. *United States v. Moussaoui*, 382 F.3d 453, 474 (4th Cir. 2004) (“Ultimately, as these cases make clear, the appropriate procedure is for the district court to order production of the evidence or witness and leave to the Government the choice of whether to comply with that order. If the

who has control of, and responsibility for, the information.³⁷ The reason for requiring permission is that “the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information.”³⁸ On the other hand, the executive cannot decide issues pertaining to the relevance or necessity of evidence at trial; as the Supreme Court has written, “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”³⁹

Thus, a certain tension exists at trials involving classified information, which “pit[] the judiciary’s search for truth against the Executive’s duty to maintain the nation’s security.”⁴⁰ This tension is embodied in the legal doctrines governing the admissibility of classified evidence at trial.

B. The National Security Privilege and Classified Evidence in Criminal Trials

This Subsection introduces the national security privilege, which forms the foundation for the classified evidence rules in federal court, military courts-martial, and trials by military commission. The Subsection then examines the issues raised by the use of classified evidence in criminal trials. Finally, the Subsection briefly analyzes whether the classified information rules for federal criminal trials (and, by extension, courts-martial, in which nearly identical procedures govern use of classified information) adequately balance the interests of the government and the defendant.

1. National Security Privilege

The national security privilege is a common-law testimonial privilege that allows the Executive Branch to refuse to disclose classified national security information in civil trials. The Supreme Court laid the foundation for the privilege in a Civil-War-era case, *Totten v. United States*,⁴¹ in which the claimant’s intestate, William Lloyd, filed a claim for payment on a contract with President Lincoln, under which Lloyd had conducted espionage in the Confederacy and sent information back to the President

government refuses to produce the information at issue—as it may properly do—the result is ordinarily dismissal.”).

37. The term “original classification authority” applies to the President, Vice President, agency heads and officials designated by the President, and other government officials to whom agency heads have delegated authority. Exec. Order No. 13,526 §1.3, 75 Fed. Reg. 707 (Jan. 5, 2010).

38. *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007).

39. *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953).

40. *El-Masri*, 479 F.3d at 304.

41. 92 U.S. 105 (1876).

during the war.⁴² The Court of Claims found that Lloyd did in fact conduct the espionage according to the terms of his agreement with the President, but the court dismissed the claim because its members were divided concerning the authority of the President to enter into such a contract.⁴³ The Supreme Court affirmed the dismissal, holding that “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.”⁴⁴

With reference to the actual agreement between Lloyd and the President, the Court commented,

This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent.⁴⁵

This language set the stage for eventual recognition of a formal testimonial privilege regarding sensitive national security information.

The Court formally recognized a national security privilege in a 1953 case, *United States v. Reynolds*.⁴⁶ *Reynolds* was a suit brought under the Federal Tort Claims Act for the deaths of three civilian observers when a B-29 aircraft crashed during a flight to test secret electronic equipment.⁴⁷ During pretrial discovery, the plaintiffs sought production of the official Air Force accident investigation, as well as the statements of the surviving aircraft crew members.⁴⁸ The government moved to quash, claiming privilege under Air Force regulations. During a rehearing on the motion to quash, the Secretary of the Air Force filed a formal “claim of privilege” with the court, and the Judge Advocate General of the Air Force submitted an affidavit asserting that the information could not be provided without seriously damaging the national security.⁴⁹ The district court ordered production of the documents so the court could determine whether they contained privileged matter. When the government refused, the court

42. *Id.* at 105.

43. *Id.*

44. *Id.* at 107.

45. *Id.* at 106.

46. 345 U.S. 1 (1953).

47. *Id.* at 2-3.

48. *Id.* at 3.

49. *Id.* at 4-5.

entered an order establishing the facts on negligence in the plaintiff's favor. The court of appeals affirmed.⁵⁰

In reversing and remanding, the Supreme Court formally recognized a national security privilege, asserting that the principles governing the application of the privilege were well-established by both American and English precedent.⁵¹ According to the Court, the privilege should never "be lightly invoked."⁵² In furtherance of that principle, the Court identified strict requirements for the privilege: (1) it must be invoked by the head of the Executive Department with control over the matter; (2) the officer must personally consider the matter before asserting the privilege; (3) a court must determine whether the circumstances are appropriate for the exercise of the privilege, but do so without being able to force disclosure of the privileged material; and (4) a court must find a "reasonable danger" that national security could in fact be damaged by disclosure of the information.⁵³ Noting the difficulty of balancing evidentiary necessity against a claim of privilege, the Court came down firmly on the side of national security: "Even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori*, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail."⁵⁴

The national security privilege applies in civil cases in federal district courts. When the privilege is properly invoked, the case must be litigated without the privileged information.⁵⁵ Although the judge must determine whether the privilege was properly invoked, she must do so without even an in-camera review of the information itself.⁵⁶ If the privileged information is central to the case, such that the case cannot proceed without it, the remedy is dismissal of the case.⁵⁷

There is some question as to whether the national security privilege applies by its own force to criminal trials.⁵⁸ Congress has created a

50. *Id.* at 5.

51. *Id.* at 7 (citing, among other cases, *Totten v. United States*, 92 U.S. 105 (1876)).

52. *Id.*

53. *See id.* at 7-10.

54. *Id.* at 11.

55. *See, e.g.,* *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007).

56. *Id.*

57. *Id.* at 306-07 (citing numerous cases from several federal jurisdictions in support of this proposition).

58. *See* Miiko Kumar, *Protecting State Secrets: Jurisdictional Differences and Current Developments*, 82 *Miss. L.J.* 853, 854 (2013) (noting the existence of a national security privilege in federal civil cases, but observing that a legislative model applies to criminal cases). *Compare* *United States v. Aref*, 533 F.3d 72, 79 (2d Cir. 2008) ("We are not unaware that the House of Representatives Select Committee on Intelligence stated categorically in its report on CIPA that 'the common law state secrets privilege is not applicable in the criminal arena.' . . . That statement simply sweeps too broadly.") *with* *Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh*, 552 F.3d 93, 116 (2d Cir. 2008) (citing *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d

statutory scheme, the Classified Information Procedures Act (CIPA), for handling issues pertaining to classified information in criminal trials.⁵⁹ In courts-martial, the President created Military Rule of Evidence 505,⁶⁰ a rule of privilege that also contains many procedural provisions derived from CIPA.⁶¹ The MCA 2009 contains a statutory rule of privilege for classified information,⁶² but it also incorporates some procedural rules that are based on CIPA.⁶³ What is certain is that the values, interests, and constitutional rights at stake in a criminal trial differ considerably from those in a civil trial; accordingly, the invocation of a national security privilege in a criminal trial cannot be given the same deference, nor can it have the same effect, as in a civil case.

The stakes at trial are much higher for a criminal defendant than for a civil litigant: unlike a civil plaintiff or defendant, the criminal defendant faces the loss of his liberty and perhaps his life. Accordingly, as a general rule, the criminal defendant is accorded more protections at trial than a civil litigant. In the United States, many of these protections are constitutionally based, enshrined in the Fifth and Sixth Amendments to the U.S. Constitution.⁶⁴ When classified information is relevant or necessary to the defendant's case, there is a palpable tension between the defendant's rights at trial and the Executive Branch's duty to protect sensitive national security information from disclosure.⁶⁵ The rights potentially implicated by

Cir. 1991) *and Aref* for the proposition that the government's ability to withhold classified information most likely derives from the common-law privilege against disclosure of state secrets and comparing the national security privilege to the informant's privilege in criminal cases; also noting that in criminal cases there are times when the government's privilege "must give way . . . to a criminal defendant's right to present a meaningful defense").

59. *See generally* 18 U.S.C. app. III.

60. Under the UCMJ, the President is authorized to create procedural and evidentiary rules, including privileges, for courts-martial. *See* UCMJ art. 36, codified at 10 U.S.C. § 836.

61. *See* MIL. R. EVID. 505. Military Rules of Evidence are contained in the Manual for Courts-Martial. MANUAL FOR COURTS-MARTIAL pt. III (2012 ed.). *See also id.* at A22-41 (explaining that the military rule is a privilege based on *United States v. Reynolds* and *United States v. Nixon* and also citing provisions of CIPA upon which the procedural aspects of the rule are based).

62. *See* 10 U.S.C. § 949p-1(a) ("Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.").

63. *See id.* §§ 949p-2 to -7; 18 U.S.C. app. III §§ 1-6.

64. *See generally* U.S. CONST. amends. V-VI.

65. These concerns are not merely theoretical. For the criminal defendant, they are immediately at hand. At the end of the trial, after all, he may be sentenced to imprisonment or death. The danger to national security may be less readily apparent, but is no less real. For example, Charles Dunlap recounts an incident in which disclosure of sensitive information in order to accommodate the trial rights of a terrorism defendant posed a risk to U.S. intelligence operations:

Too aggressive risk taking in this regard may present serious problems. In his memoir, *Known and Unknown* [sic], former Secretary of Defense Donald Rumsfeld contends that during the trial of Omar Abdel Rahman, the "Blind Sheikh," who was convicted of seditious conspiracy in a scheme to blow up the World Trade Center in 1993, prosecutors were obliged to turn over a list of 200 possible coconspirators.

According to Rumsfeld,

the nondisclosure or suppression of classified information at trial include the following: the privilege against self-incrimination,⁶⁶ the right to due process,⁶⁷ the right to a speedy trial,⁶⁸ the right to a public trial,⁶⁹ the right to be informed of the nature and cause of the accusation,⁷⁰ the right to confront witnesses,⁷¹ the right to have compulsory process of witnesses and evidence,⁷² and even the right to the assistance of counsel of choice.⁷³

This told al-Qaida which of its members had been compromised and indicated where U.S. intelligence had gleaned its information. Bin Laden reportedly was reading the list several weeks later in Sudan. He must have been shaking his head in contemptuous wonder at how effectively the United States was assisting him in his deadly jihad.

Thus, while the procedures are generally workable, there will always be a tension between what should—or must—be disclosed, and the potential consequences for doing so. As frustrating as it may be at times, this is the price one must pay in a democratic society that honors the rule of law.

Charles J. Dunlap, Jr., *Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. 5150, 5172-73 (2011) (quoting DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR 587 (2011)).

66. U.S. CONST. amend. V. *See, e.g.*, *United States v. Lee*, 90 F. Supp. 2d 1324, 1326-27 (D.N.M. 2000) (holding that the disclosure requirements of CIPA §§ 5-6 do not violate the Fifth Amendment privilege against self-incrimination); *United States v. Jolliff*, 548 F. Supp. 229, 231 (D. Md. 1981) (court determined the privilege against self-incrimination was not violated when the defendant was compelled to disclose classified information to the judge and his defense counsel).
67. U.S. CONST. amend. V. *See, e.g.*, *United States v. El-Mezain*, 664 F.3d 467, 567 (5th Cir. 2011), as revised (Dec. 27, 2011) (finding no violation of defendant's 5th Amendment due process rights when defense counsel was not allowed to review documents used to establish probable cause for a warrant), *cert. denied*, 133 S. Ct. 525 (2012).
68. U.S. CONST. amend. VI. *See, e.g.*, *United States v. Duncan*, 34 M.J. 1232 (A.C.M.R. 1992) (holding that delays incurred in coordinating classified evidence case between military and Department of Justice violated accused's speedy trial right).
69. U.S. CONST. amend. VI. *See, e.g.*, *United States v. Abu Ali*, 528 F.3d 210, 250 (4th Cir. 2008) (holding that the "silent witness" rule, in which witnesses use an in-court code to which the judges, jurors, and defendant have a key, does not violate the public trial right); *United States v. Lonetree*, 31 M.J. 849 (N-M.C.M.R. 1990) (affirming military judge's closure to the public of certain classified portions of the trial), *aff'd in part, set aside in part on other grounds*, 35 M.J. 396 (C.M.A. 1992), *cert. denied*, 507 U.S. 1017 (1993).
70. U.S. CONST. amend. VI. *See, e.g.*, *United States v. Mejia*, 448 F.3d 436, 445 (D.C. Cir. 2006) (holding the government was not required to provide the defendant with a Bill of Particulars despite the original Indictment's lack of allegations of any particular act).
71. U.S. CONST. amend. VI. *See, e.g.*, *United States v. El-Mezain*, 664 F.3d 467, 492 (5th Cir. 2011), as revised (Dec. 27, 2011), *cert. denied*, 133 S. Ct. 525, (2012) (holding that the government could present both fact and expert witnesses under pseudonyms without violating the defendant's right to independently investigate the knowledge and background of the witness for purposes of cross-examination).
72. U.S. CONST. amend. VI. *See, e.g.*, *United States v. Moussaoui*, 382 F.3d 453, 463-66 (4th Cir. 2004) (affirming the district court's decision to use a testimonial writ to order the production of witnesses being held in U.S. custody as enemy combatants for the purpose of deposing them).
73. U.S. CONST. amend. VI. *See, e.g.*, *Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh*, 552 F.3d 93, 128 (2d Cir. 2008) (holding no violation of the right to counsel of choice when classified documents were only provided to counsel with a security clearance); *United States v. Jolliff*, 548 F. Supp. 229, 231 (D. Md. 1981) (holding that the right to counsel was not violated when defendant's counsel refused to apply for a security clearance, making it impossible to fully discuss the case with his client).

2. *Graymail, CIPA, and Military Rule of Evidence 505*

As a result of the aforementioned tension between the rights afforded to criminal defendants at trial and the interests of national security, criminal defendants engaged in a practice called “graymail.” Graymail typically occurred in cases involving U.S. intelligence personnel.⁷⁴ These defendants already possessed security clearances and access to classified information because of their involvement with the country’s intelligence or national security apparatus.⁷⁵ They would threaten to disclose classified information as part of their case—hence the name “graymail,” a practice falling somewhere between blackmail and the legitimate needs of mounting a defense to criminal charges. Regardless of whether their motives were corrupt or pure,⁷⁶ the dangers posed to national security by graymail conferred a species of de facto immunity on members of the intelligence community for serious crimes.⁷⁷

These cases, which often occurred in conjunction with classified intelligence operations, involved a variety of offenses. Some directly involved espionage or the misuse of classified information,⁷⁸ whereas others included “murder, perjury, narcotics, burglary, and civil rights violations.”⁷⁹ The defendant could not present a complete defense, confront the witnesses against him, or place his actions in context without revealing sensitive information about the intelligence organizations and operations

74. James Nicholas Boeving, *The Right to be Present Before Military Commissions and Federal Courts: Protecting National Security in an Age of Classified Information*, 30 HARV. J.L. & PUB. POL’Y 463, 544 (2007).

75. See Joshua L. Dratel, *Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process*, 53 WAYNE L. REV. 1041, 1045 n.24 (2007) (in the espionage-type cases, “defendants—such as I. Lewis “Scooter” Libby or Wen Ho Lee—already possessed security clearances as of the time their alleged offenses were committed, and as a result had access to much of the classified information at issue in the case even before the prosecution commenced.”).

76. The legislative history for CIPA identifies various motives for graymail, including the “unscrupulous defendant who threatens to publicly reveal all kinds of sensitive information, even if it has no possible bearing on the issues of the case” and “wholly proper defense attempts to obtain or disclose classified information.” See Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (CIPA)*, 32 CARDOZO L. REV. 437, 447 n.42 (2010) (quoting and citing CIPA legislative history).

77. The legislative history of CIPA demonstrates a concern that the disclose-or-dismiss dilemma granted immunity to people with access to classified information. According to Phillip Heyman, an Assistant Attorney General, this “foster[ed] the perception that *government officials and private persons with access to military or technological secrets* have a broad de facto immunity from prosecution for a variety of crimes. This perception . . . promotes concern that there is no effective check against *improper conduct by members of our intelligence agencies*.” S. REP. NO. 96-823, at 4 (remarks of Assistant Att’y Gen. Philip Heymann) (emphasis added); see also H. REP. NO. 96-831, pt. 1, at 8 (remarks of Assistant Att’y Gen. Philip Heymann), quoted in Boeving, *supra* note 74, at 547.

78. Boeving, *supra* note 74, at 547.

79. *Id.* at 544 (quoting CIPA’s legislative history).

with which he was involved when the alleged offenses occurred. Graymail placed the government in the position of choosing between disclosing sensitive information in order to comply with the defendant's discovery and trial rights, or dismissing the case in order to protect national security interests.⁸⁰

Congress responded to the graymail problem by enacting CIPA, which applies in federal criminal prosecutions.⁸¹ The Act seeks to balance the rights of the accused and the national security needs of the government in such a way as to permit criminal trials to go forward unhindered by graymail. CIPA was specifically designed to combat espionage cases and those in which the defendant already had legitimate prior access to classified information.⁸²

CIPA is organized into six primary sections that govern all phases of a criminal proceeding in federal court.⁸³ CIPA provides for pretrial conferences regarding classified information;⁸⁴ protective orders that bind both the prosecution and defense;⁸⁵ ex parte prosecution requests to modify discovery requirements by deleting classified information from discovery, providing unclassified summaries of classified information, or creating substitute statements admitting the substance of what the classified evidence would prove;⁸⁶ in-camera review of evidence by the judge;⁸⁷ mandatory pretrial notice by the defense of intent to disclose classified information;⁸⁸ alternative forms of evidence at trial that avoid the disclosure of classified information, including substitutes, summaries, and admissions;⁸⁹ interlocutory appeals of decisions regarding discovery or trial

80. United States v. Bin Laden, No. S(7) 98 CR. 1023 LBS, 2001 U.S. Dist. LEXIS 719, *3 (S.D.N.Y. Jan. 25, 2001) ("A defendant is said to 'graymail' the government when he threatens to disclose classified information during a trial and the government is forced to choose between tolerating such disclosure or dismissing the prosecution altogether.").

81. Codified at 18 U.S.C. app. III.

82. Cf. Radsan, *supra* note 76, at 447 ("CIPA was designed for espionage cases, not terrorism cases.").

83. See generally CIPA, 18 U.S.C. app. III. The titles of the six primary sections are as follows: § 1-Definitions; § 2-Pretrial Conference; § 3-Protective Orders; § 4-Discovery of Classified Information by Defendants; § 5-Notice of Defendant's Intention to Disclose Classified Information; and § 6-Procedure for Cases Involving Classified Information. *Id.* For excellent discussions of how CIPA's sections are designed and work in practice, see Benjamin V. Madison, III, *The Military Commissions Act of 2006: An Unnecessary Scheme for Second-Class Justice or an Essential Means to Prosecute Persons Who Otherwise Would Escape Accountability?*, 55 NAVAL L. REV. 213, 228-43 (2008) and Joshua A. Kastenberg, *Analyzing the Constitutional Tensions and Applicability of Military Rule of Evidence 505 in Courts-Martial Over United States Service Members: Secrecy in the Shadow of Lonetree*, 55 A.F. L. REV. 233, 237-42 (2004).

84. 18 U.S.C. app. III § 2.

85. *Id.* § 3.

86. *Id.* § 4.

87. *Id.*

88. *Id.* § 5.

89. *Id.* § 6.

disclosure of classified evidence,⁹⁰ and controls on the manner in which evidence may be presented at trial.⁹¹

Military Rule of Evidence 505 applies in courts-martial. It is a hybrid rule that incorporates the national security and executive privileges recognized by the Supreme Court in *United States v. Reynolds* and *United States v. Nixon*,⁹² along with a procedural framework borrowed from CIPA.⁹³ In addition, Military Rule of Evidence 505(j)(5) allows closed trial sessions in which classified evidence can be introduced with the public excluded.⁹⁴ This provision is, however, rarely invoked and, when used, is significantly limited by military case law.⁹⁵ For most purposes, Rule 505 serves as the functional equivalent of CIPA; as one scholar has put it, “[c]ourts-martial—with Military Rule of Evidence 505 serving effectively as the equivalent of CIPA—present many of the same problems as prosecuting in Article III courts.”⁹⁶ Unless otherwise indicated, the discussion of CIPA issues in this Article also applies to Military Rule of Evidence 505 in courts-martial.

3. *CIPA and the Terrorism Paradigm*

Although it was designed for the espionage paradigm discussed in the previous Section, CIPA has been pressed into service for terrorism cases. The terrorism paradigm is much different from the espionage paradigm. In terrorism cases, the nation employs its national security assets to find, arrest, interrogate, and detain alleged terrorists. The means, methods, sources of information, and international relationships required to accomplish these actions constitute highly sensitive information, often entirely unknown to the alleged terrorist. The disclosure of this information could endanger not only the collective national security, but also the individual lives of the personnel involved.

Unlike defendants under the espionage paradigm, terrorism defendants do not have security clearances or legitimate prior access to the classified information in their cases. The government has no interest in providing a terrorism defendant, who may still be able to communicate with the outside

90. *Id.* § 7.

91. *Id.* § 8.

92. See *United States v. Reynolds*, 345 U.S. 1 (1953) (recognizing a national security privilege); *United States v. Nixon*, 418 U.S. 683 (1974) (recognizing executive privilege).

93. See *MANUAL FOR COURTS-MARTIAL*, *supra* note 61, at A22-41 (explaining that Military Rule of Evidence 505 is a rule of privilege based on *United States v. Reynolds* and *United States v. Nixon* and also citing provisions of CIPA upon which the procedural aspects of the rule are based).

94. MIL. R. EVID. 505(j)(5).

95. Madison, III, *supra* note 83, at 243-48 (discussing procedures for closing trials in courts-martial under Military Rule of Evidence 505).

96. *Id.* at 248.

world pending trial and who might be acquitted at trial, with sensitive information about the organizations and operations that contributed to his capture. Thus, the government in a terrorism case has two primary objectives: (1) to prevent the public disclosure of classified information at trial, as in the espionage paradigm; and (2) to protect sensitive national security information from falling into the hands of terrorism defendants and their henchmen, a concern that is foreign to the espionage paradigm. As one scholar describes the issue:

[D]efendants in terrorism cases are not likely to know state secrets. If secrets are revealed to suspected terrorists in discovery or at trial, these secrets will inevitably make their way to other terrorists. Protective orders or other instructions from the court will not take care of all problems. A defendant who plotted to fly airplanes into buildings is not easily deterred.⁹⁷

CIPA is an uneasy fit for terrorism cases for two primary reasons. First, it was designed for an entirely different set of information-management problems, the espionage paradigm.⁹⁸ Second, its discovery and disclosure provisions are inadequate for terrorism cases. On the one hand, the provisions may not sufficiently protect against the improper or unauthorized disclosure of sensitive national security information, thereby jeopardizing sources, methods, relationships, and personnel.⁹⁹ On the other hand, as discussed in more detail below, the provisions may not adequately provide the defense counsel with the information needed to mount a proper defense.

4. CIPA at Trial and Calls for Reform

Despite CIPA's procedural controls over the discovery, disclosure, and presentation of classified information (and unclassified substitutes therefor) at trial, the ineluctable fact remains that the Executive Branch, not

97. Radsan, *supra* note 76, at 452.

98. *See id.* at 442. *See also* Boeving, *supra* note 74, at 546 (“[N]ot only is reliance on CIPA in terrorism trials generally inconsistent with the legislative history of the Act, but also that applying CIPA in terrorism trials results in inadequate protection of U.S. national security interests.”).

99. Both Radsan and Boeving criticize CIPA's discovery provisions for potentially providing too much information to the defense and not sufficiently protecting intelligence agencies and classified national security information. *See generally* Radsan, *supra* note 76, at 448-52; Boeving, *supra* note 74, at 550-51. Radsan claims that CIPA, in conjunction with federal criminal procedure rules governing discovery, suggests unrealistic and improper alignments between law enforcement agencies and intelligence agencies. One result of this is that prosecutors may over-disclose information to the defense under § 4 of CIPA, hoping that the judge will adequately shield the information from public disclosure under § 6. But in disclosing the information to the defense, argues Radsan, the damage has already been done. *See* Radsan, *supra* note 76, at 449-51.

the judiciary, maintains ultimate control over classified information. A judge may well decide that pretrial disclosure or admission into evidence of classified information is necessary to preserve the defendant's constitutional rights at trial, but such a decision does not bind the Executive Branch. The Executive Branch can always refuse to provide information that is exclusively in its control, and it can always prevent the defense from disclosing classified information already known to the accused. In such cases, the prosecution pays the price and must do without the information, in some cases even having to dismiss the affected charges.

Dismissal of charges is, however, a rare remedy. Keeping in mind CIPA's purpose to eliminate dismissing charges because of graymail, federal courts have aggressively construed CIPA in favor of the prosecution in a manner that significantly alters the ability of criminal defendants to employ traditional strategies and methods of presenting a defense.¹⁰⁰ Discovery, confrontation, and due process rights are most affected by the application of CIPA at trial.¹⁰¹ To a lesser extent, the right to a public trial is also implicated.¹⁰²

CIPA eliminated graymail but replaced it with a system in which executive claims involving national security trump the constitutional and procedural rights traditionally afforded to defendants. The law requires a defendant to trust the judge—without meaningful input from a defense

-
100. *See, e.g.*, *Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh*, 552 F.3d 93, 147 (2d Cir. 2008) (circuit court upholding the district court decision allowing entry of summary of telephone conversations involving the defendant over defense counsel's argument that the actual tapes would contain exculpatory material and the evidence should be excluded due to the prosecution's misplacing the transcripts); *United States v. Rezaq*, 134 F.3d 1121, 1143 (D.C. Cir. 1998) (affirming that the district court's use of statement summaries rather than classified documents was not an abuse of discretion); *United States v. Yunis*, 867 F.2d 617, 625 (D.C. Cir. 1989) (reversing the district court's determination that the defendant be provided with copies of his statement, after the circuit court reviewed the statements and found them to be only theoretically relevant); *United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987) (holding that the defendant must provide a formal notice of intention to disclose classified information in order to meet CIPA requirements); *United States v. Libby*, 467 F. Supp. 2d 20, 28 (D.D.C. 2006) (affirming the district court's admission of summaries of the defendant's statements rather than the actual statements, despite the defendant's impaired memory); *United States v. Lee*, 90 F. Supp. 2d 1324, 1329 (D.N.M. 2000) (holding that the requirements of disclosure did not violate the defendant's right to due process).
101. *See, e.g.*, *Terrorist Bombings*, 552 F.3d at 127 (holding that the court did not violate the rights of the defendant by ordering that discovery documents only be released to persons holding a security clearance); *United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (holding that the summary of a witness's testimony, rather than the complete transcript, did not raise *Brady* issues); *United States v. Moussaoui*, 382 F.3d 453, 479 (4th Cir. 2004) (holding that substitutions for access to witnesses who could potentially provide exculpatory testimony would be sufficient to protect the rights of the defendant); *United States v. Jolliff*, 548 F. Supp. 229, 232 (D. Md. 1981) (holding that the defendant's rights were not violated when, following an in-camera, ex parte proceeding, his discovery rights were reduced).
102. *See, e.g.*, *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (affirming use of silent witness procedure).

attorney—to have the good will, common sense, and ability to examine classified information and decide what is and is not necessary for an effective and constitutionally sound defense. The defendant is thrust into a complex, even Kafkaesque, system of *ex parte* communications between prosecutors and judges,¹⁰³ in-camera reviews of evidence,¹⁰⁴ and sealed records containing information neither he nor his attorney will ever be able to see.¹⁰⁵ He cannot divulge what he personally knows about his own case if the same Executive Branch that is prosecuting him decides that his knowledge involves sensitive national security information.¹⁰⁶ He might be forced to cross-examine witnesses while being deprived of their names, background information, and occupations.¹⁰⁷ Witnesses might appear in disguise,¹⁰⁸ or be permitted to testify from behind screens.¹⁰⁹ Locations and individuals might be referred to in the courtroom using code words incomprehensible to listeners.¹¹⁰

Not surprisingly, some scholars assert that the paradigm of criminal due process is significantly undermined by CIPA in trials involving classified information.¹¹¹ Recommendations for reforming CIPA to better

103. *See* CIPA, 18 U.S.C. app. III § 4 (providing for *ex parte* communications between prosecution and judge on defense discovery requests).

104. *See id.* § 6(d).

105. *Id.*

106. *See, e.g.,* United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989) (reversing, on interlocutory appeal by the prosecution under CIPA § 7, the district court's decision to order discovery of transcripts of intercepted conversations in which the defendant had participated and finding that the government had a security interest in the time, place, and nature of its ability to intercept the conversations).

107. United States v. Lonetree, 35 M.J. 396 (C.M.A. 1992) (affirming trial judge's decision to shield identity and background of "John Doe" intelligence agent during appellant's trial).

108. *See* Radsan, *supra* note 76, at 477-78 (recounting how a CIA officer was permitted to testify in a disguise of glasses and a beard during the Jose Padilla trial).

109. *Cf. id.* (noting that courts have considered permitting witnesses to testify behind screens to protect their identities).

110. This is known as the "silent witness" process. Everyone in the courtroom—judge, jury, prosecution, and defense—has a key to the code words, but the public and the audience are not provided the key. *See id.* at 477.

111. *See generally* Dana Carver Boehm, *Guantanamo Bay and the Conflict of Ethical Lawyering*, 117 PENN ST. L. REV. 283, 339-40 (2012) (explaining the difficulty of ethically defending a detainee when dealing with CIA classification and oversight of classified information); Ellen C. Yaroshefsky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 203, 211-12 (2006) (detailing the limitations of the court to compel the production of classified documents to defense counsel); Ellen Yaroshefsky, *Secret Evidence Is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1070-71 (2006) [hereinafter Yaroshefsky, *Secret Evidence*] (advocating for full disclosure to the defense counsel rather than review by the judge); James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts 2009 Update and Recent Developments*, 42 CASE W. RES. J. INT'L L. 267, 270-71 (2009) (explaining that the federal court systems are capable of fairly dealing with terrorism trials without causing a release of sensitive information to the public). *See also* Walter Pincus, *It's Time to Get Things Right at Guantanamo Bay*, WASH. POST, July 16, 2013, at A11 (noting the difficulties facing defense attorneys, including invasive searches of their client's bodies and the

protect the rights of criminal defendants include the following: providing clear statutory guidelines for discovery, disclosure, and admissibility of classified information and substitutes that specifically comport with the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the prosecution's constitutional criminal discovery obligations;¹¹² eliminating ex parte hearings and permitting defense counsel participation and advocacy in discovery and disclosure decisions;¹¹³ requiring the judge to serve as a defense advocate during ex parte hearings regarding discovery of classified information or substitutes for classified information;¹¹⁴ improving jury instructions when substitutions are used to make clear that the jury should not infer from the format of the evidence that the accused is a national security threat;¹¹⁵ providing statutory guidelines for when prosecutors are required to actively search intelligence community files for constitutionally required discovery;¹¹⁶ and even reformulating CIPA so it matches the classified information provisions of the MCA 2009.¹¹⁷

Alongside recommendations to reform CIPA in favor of criminal defendants lie arguments that CIPA should be tightened up to better protect the intelligence community and national security interests from improper disclosure of classified information. John Radsan argues that CIPA and classified information practices have tilted too much towards criminal

classification of all in-person communication with clients); Peter Finn, *Hearings Open for 9/11 Suspects*, WASH. POST, June 18, 2013, at A03 (detailing the difficulties of dealing with classified materials during trial from both the CIA and the ICRC); Miami Herald, *Case in Guantanamo Oozes Secrecy*, PITTSBURGH TRIB. REV., June 11, 2013 (detailing the release of a once classified document regarding the use of torture during the trials); Richard A. Serrano, *9/11 Judge Lashes Out at Censors; He Considers Halting the Case to Investigate Lawyers' Claims that They and Their Clients have been Spied on*, LOS ANGELES TIMES, Feb. 1, 2013, at A9 (discussing the interference by the CIA both with the trial through a kill switch and installing listening devices in rooms where attorneys meet with their clients).

112. See Melanie Reid, *Secrets Behind Secrets: Disclosure of Classified Information Before and During Trial and Why CIPA Should Be Revamped*, 35 SETON HALL LEGIS. J. 272, 289-91 (2011).

113. Yaroshefsky, *Secret Evidence*, *supra* note 111, at 1066-69.

114. Reid, *supra* note 112, at 294.

115. *Id.* at 296-97.

116. *Id.* at 298-300. Reid notes four circumstances under which prosecutors should have to search intelligence community files:

(1) the intelligence agency is part of the investigation team or is otherwise "aligned with" the prosecution, (2) there is a possibility the IC may have information due to the type of crime charged (i.e., terrorism or espionage) and the IC generally conducts investigations on similar subject matter, (3) the defendant has a good faith basis to request a search of the IC file (i.e., to support his public authority defense), or (4) the prosecutor knows either through the defendant, a witness, a law enforcement agent, or otherwise, that an intelligence agency may have some classified information that may be Brady, Giglio, or Jencks material concerning a potential government witness.

Id. at 298 (internal citations omitted).

117. See Dunlap, Jr., *supra* note 65, at 5171 (citing the Classified Information Procedures Reform and Improvement Act of 2010, S. 4050, 111th Cong. (2010) and characterizing it as modeled "much after the updated provisions found in the Military Commissions Act of 2009").

defendants at the expense of sensitive national security information.¹¹⁸ He proposes the following statutory revisions to CIPA: reducing prosecutorial discovery obligations with respect to intelligence files absent clear alignment between the intelligence and law enforcement communities when investigating a case; permitting the sensitivity of classified information to affect its admissibility at trial (the more sensitive, the less likely to be admissible); and allowing portions of trials involving classified information to be closed to the public.¹¹⁹ Another scholar, James Boeving, goes even further, suggesting that CIPA should be amended to exclude the terrorist defendant from some proceedings.¹²⁰

What is certain is that there are no easy solutions involving discovery, disclosure, and use of classified information in criminal trials. To quote Radsan, “CIPA . . . is not really a magic wand” and does not solve all the problems posed by classified information in public trials.¹²¹ There is an inherent tension between the demands of due process, the dictates of national security, and the desire for public trials and the free flow of information.

III. CLASSIFIED EVIDENCE IN MILITARY COMMISSIONS

This Section traces the evolution of the rules for handling classified information in military commissions. The rules were initially created out of whole cloth but were gradually modified to more closely resemble the classified information procedures used in federal district courts and military courts-martial. Eventually, in the MCA 2009, Congress established a system for handling classified information that, as written, is superior to those available in federal district courts or military courts-martial.

A. Evolution of Classified Evidence Rules in Military Commissions

President George W. Bush established the precursor to today’s military commissions in a military order dated November 13, 2001.¹²² That order authorized the Secretary of Defense to establish procedures for trial by military commission, including “the handling of, admission into evidence of, and access to [classified] materials and information.”¹²³

118. See Radsan, *supra* note 76, at 442.

119. See *id.* at 482-83.

120. Boeving, *supra* note 74, at 552 (“the second, more substantive amendment is to add a provision that expressly allows for the exclusion of a defendant from trial proceedings in limited circumstances”).

121. Radsan, *supra* note 78, at 442.

122. Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57833 (Nov. 16, 2001).

123. *Id.* § 4(c)(4), 66 Fed. Reg. at 57835.

Subsequently, Secretary Donald Rumsfeld promulgated the now-infamous MCO 1.¹²⁴

MCO 1 allowed the presiding officer of a military commission to issue protective orders to safeguard classified and other security-related information from unauthorized disclosure: both sides in the trial were required to notify the presiding officer of any intent to use information subject to protective order at trial.¹²⁵ While the protective order provision was not particularly noteworthy,¹²⁶ MCO 1 contained a controversial provision that permitted the presiding officer of a military commission to conduct closed proceedings involving classified information from which the accused and his civilian defense counsel could be excluded.¹²⁷

The Supreme Court invalidated the military commissions established by President Bush's military order, as well as the procedures of MCO 1, in the 2006 case *Hamdan v. Rumsfeld*.¹²⁸ In its opinion, the Court specifically criticized the MCO 1 procedures permitting the introduction into evidence of sensitive or classified information in the absence of the accused.¹²⁹

Congress responded to the *Hamdan* opinion by passing the MCA 2006.¹³⁰ The MCA 2006 eliminated the controversial provisions from the MCO 1 that permitted excluding the accused from the courtroom during the introduction of classified evidence.¹³¹ It contained a strong statutory mandate to protect classified information: "Classified evidence shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security."¹³² In 2007, as authorized by the MCA

124. U.S. DEP'T OF DEFENSE, *supra* note 9.

125. *Id.* ¶ 6.D(5).

126. Similar provisions already existed in CIPA and its military counterpart, Military Rule of Evidence 505. *See* 18 U.S.C. app. III § 3 (providing for protective orders) and MIL. R. EVID. 505(g)(1) (providing for protective orders).

127. U.S. DEP'T OF DEFENSE, *supra* note 9, ¶ 6.B(3).

128. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

129. *Id.* at 613-14 ("These rights are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to 'close.'"), 634-35 ("[V]arious provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. . . . That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. . . . But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.") (internal citations omitted).

130. MCA 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (codified at 10 U.S.C. § 47A).

131. *See id.* § 949a(b)(B) ("The accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title."). Section 949d permits excluding the accused from trial "to ensure the physical safety of individuals" or "to prevent disruption of the proceedings." *Id.* § 949d(e).

132. *See id.* § 949d(f). These protections included alternatives to disclosure such as deletion of classified evidence, substitution of unclassified portions of, or substitutes for, classified evidence, and substitution of statements of fact that the classified evidence would tend to prove. *See id.*

2006,¹³³ the Secretary of Defense issued the Manual for Military Commissions, which contained Military Commissions Rule of Evidence 505, governing the disclosure and use of classified information at trials by military commission. Rule 505 was procedurally and substantively similar to both CIPA used in federal district courts and Military Rule of Evidence 505 used in courts-martial.¹³⁴

Congress replaced the MCA 2006 with the MCA 2009. The MCA 2009 provisions for classified information are considerably more detailed than their counterparts in the MCA 2006.

B. MCA 2009 Classified Information Provisions: A Comparative Analysis

The MCA 2009 continues the MCA 2006's requirement for military judges to protect classified information from disclosure to unauthorized persons.¹³⁵ It generally maintains the MCA 2006-era's CIPA-based procedural framework for handling classified information;¹³⁶ in many respects, it is simply a more thorough version of CIPA with more detailed guidance for counsel and judges.¹³⁷ But the MCA 2009 also contains significant enhancements and guarantees pertaining to classified information that distinguish it from both prior military commission rules and CIPA. This Section identifies the MCA 2009's innovative procedures and conducts a comparative analysis of them in light of CIPA and Military Rule of Evidence 505.

1. Formal Statutory Recognition of Classified Information Privilege

As previously mentioned in this Article, there has been some doubt as to whether the national security/classified information privilege applies of

133. See *id.* § 949a(a) (authorizing the Secretary of Defense to prescribe rules for trial, in consultation with the Attorney General).

134. Compare MIL. COMM'N R. EVID. 505 with CIPA, 18 U.S.C. app. III and MIL. R. EVID. 505.

135. MCA 2009, 10 U.S.C. § 949p-1.

136. Compare *id.* §§ 949p-1 to -7 (providing a procedural framework for handling classified information) with CIPA, 18 U.S.C. app. III §§ 1-9 (providing a procedural framework for handling classified information) and MIL. COMM'N R. EVID. 505 (similar procedural framework to CIPA and Military Rule of Evidence 505).

137. See, e.g., Reid, *supra* note 112, at 278-79. According to Reid:

The Military Commissions Act of 2009, signed into law on October 28, 2009, uses CIPA only as a starting point to act as a guideline for military judges when deciding on the use, relevance, and admissibility of classified information during a military trial. The Military Commissions Act, section 1802, followed most of CIPA's provisions while adding greater detail for judges to consider. The revisions to CIPA, which are being used by military courts, provide further example of the need to update these provisions, resolve the issues that have arisen since its enactment, and provide more concrete guidance to the courts.

Id.

its own force in criminal trials.¹³⁸ The MCA 2006 did not statutorily treat classified information as privileged. Instead, the Manual for Military Commissions, promulgated by the Secretary of Defense under authority of the MCA 2006, adopted Military Commissions Rule of Evidence 505.¹³⁹ This rule, modeled on Military Rule of Evidence Rule 505, treated classified evidence as privileged.¹⁴⁰

In contrast, the MCA 2009 formally recognizes a classified information privilege.¹⁴¹ This is significant because it is the first time Congress has recognized a classified information privilege in a criminal trial. The formal recognition of the privilege sends a strong message that the means, methods, sources, and relationships used to bring terrorists to justice are worthy of congressional recognition and protection. A formal privilege also draws a clear line that helps sort issues out at trial: no matter how relevant, necessary, or probative evidence might be, it cannot be admitted into evidence if it is privileged. In addition, the party claiming the privilege must be prepared to pay the price for doing so, which could include dismissal of the charges or the case. Furthermore, a statutory privilege—as opposed to a rule-based privilege such as those found in the military rules of evidence or the MCA 2006-era military commissions rules of evidence—definitively eliminates any potential claims that the privilege exceeds its drafter’s statutory authority.

The MCA 2009 requires the prosecutor to submit a formal written declaration invoking the classified information privilege.¹⁴² The declaration must be signed by a “knowledgeable United States official possessing authority to classify information.”¹⁴³ The requirement of a formal declaration is similar to the procedure recognized by the Supreme Court in *United States v. Reynolds* for claiming the national security privilege in civil cases: the head of the Executive Branch agency in control of the information must formally claim the privilege in a written document, after personal consideration of the matter.¹⁴⁴ Furthermore, the declaration must set forth the damage to the national security that the discovery of, or access to, such information could reasonably be expected to cause.¹⁴⁵

The formal declaration requirement is a positive development. It should be noted that Military Rule of Evidence 505 contains substantially

138. See *infra* note 60 and accompanying text.

139. MIL. COMM’N R. EVID. 505.

140. Compare *id.* with MIL. R. EVID. 505.

141. MCA 2009, 10 U.S.C. § 949p-1(a) (“Classified information shall be protected and is privileged from disclosure.”).

142. See *id.* § 949p-4(a)(1).

143. *Id.*

144. See *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (delineating requirements for claiming the privilege at trial).

145. See *id.*

similar requirements that are already familiar to prosecutors and military judges. Identifying specific harm to the national security ensures clarity of analysis and assists both trial and appellate judges in deciding whether the privilege was properly invoked.

2. *Statutory Standards Authorizing Discovery of, or Access to, Classified Information*

The MCA 2009 requires a defendant seeking discovery of, or access to, classified information to demonstrate that the evidence would be “noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution’s case, or to sentencing.”¹⁴⁶ Although CIPA does not contain similar statutory standards, six of the federal circuit courts of appeal have adopted a “relevant and helpful” standard for deciding whether the defense is entitled to discovery of classified information.¹⁴⁷

This provision prevents fishing expeditions for classified information. More importantly, given the lack of uniformity in the federal circuits regarding discovery standards under CIPA, it provides certainty at trial and prevents unnecessary litigation on the proper standard to apply when regulating discovery.

3. *Guaranteed Presence of the Accused in Proceedings Involving Classified Information*

The MCA 2009 almost entirely eliminates the possibility of classified information being admitted into evidence in the absence of the accused.¹⁴⁸ The only exception to this rule is a defendant who is banned from the courtroom for disruptive behavior or presenting a threat to others.¹⁴⁹ This unequivocally puts to rest the MCO 1 rule that allowed the president of a military commission to exclude the accused and his civilian defense counsel from sessions admitting classified evidence.

This provision of the MCA 2009 creates a risk that a defendant who is acquitted at trial could, upon release, share classified evidence with others, “including . . . potential terrorists.”¹⁵⁰ Rather than excluding a defendant

146. MCA 2009, § 949p-4(a)(2).

147. *See* *United States v. Amawi*, 695 F.3d 457, 469-70 (6th Cir. 2012) (analyzing discovery provisions of CIPA and listing the other circuits that use the relevant and helpful standard: the D.C. Circuit, Second Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, and Ninth Circuit).

148. *See* MCA 2009, 10 U.S.C. § 949p-1(b) (“Any information admitted into evidence pursuant to any rule, procedure, or order by the military judge shall be provided to the accused.”).

149. *See id.* § 949d(d).

150. *Cf.* *Boeving*, *supra* note 74, at 511 (noting the danger of disclosing classified information to terrorist defendants and recommending exclusion of the defendant from some proceedings involving classified information).

from the classified portions of his own trial, Congress chose instead to empower military judges, upon motion of the prosecution, to impose protective orders forbidding the disclosure of any classified information that was “disclosed . . . or that has otherwise been provided to, or obtained by, any such accused in any such military commission.”¹⁵¹

Guaranteeing the presence of the defendant in classified proceedings strongly encourages declassification procedures and minimizes the necessity for classified information in a case.

4. *Mandatory Declassification Reviews*

The MCA 2009 requires prosecutors to work with original classification authorities to seek declassification of evidence that could be used at trial, to the “maximum extent possible consistent with the requirements of national security.”¹⁵² Regulations for the military commissions establish Security Classification/Declassification Review Teams for all classified information controlled by Department of Defense components and commands.¹⁵³ The regulations also require prosecutors to conduct liaison with non-Department of Defense original classification authorities.¹⁵⁴

The declassification mandate of the MCA 2009 is a significant development. All information that is classified must be eventually declassified,¹⁵⁵ but declassification is a slow process that can take years, even decades, on its own.¹⁵⁶ In addition, through the phenomenon of over-classification, significant amounts of information are improperly classified by government officials who err on the side of caution, not wanting to jeopardize national security.¹⁵⁷ In the interests of justice, the MCA 2009 hastens declassification and helps correct over-classification. If information can safely be declassified without damaging national security, the MCA 2009 provides a mechanism (and through its implementing regulations, the

151. See MCA 2009, § 949p-3.

152. See *id.* § 949p-1(c).

153. U.S. DEP’T OF DEFENSE, *supra* note 14, ¶ 18-1b (discussing the Security Classification/Declassification Review Teams).

154. See *id.*

155. Exec. Order No. 13,526 § 1.5(d), 75 Fed. Reg. 707, 709 (Jan. 5, 2010) (“No information can remain classified indefinitely.”).

156. See *id.* § 1.5(b)-(d) (setting a presumptive declassification date of ten years for most information, unless original classification determines the information’s sensitivity requires a twenty-five-year classification period; also providing for a twenty-five-year extension on classification).

157. See, e.g., David E. Sanger, *A Washington Riddle: What Is ‘Top Secret’?*, N.Y. TIMES, Aug. 3, 2013, at SR 4, <http://www.nytimes.com/2013/08/04/sunday-review/a-washington-riddle-what-is-top-secret.html> (asserting that the government classifies far too much information, including open-source information readily obtainable on the internet or newspaper articles, noting the problem has existed for many years, and citing Daniel Patrick Moynihan’s book, *Secrecy*, regarding the corrosive effects of over-classification).

personnel and resources) to accomplish it. A further benefit of the declassification mandate is that it helps focus governmental exercise of the national security privilege in trials by military commission: the government can confidently assert that it has considered declassification but rejected it in the interests of national security. Of course, exclusive Executive Branch control of classified information prevents true verification of such assertions, but the declassification mandate at least discourages casual, misguided, or malicious claims of privilege. Neither CIPA nor Military Rule of Evidence 505 contains a similar mandate.¹⁵⁸

5. CIPA Case Law as Authoritative Precedent

The MCA 2009 provides that CIPA case law is authoritative precedent for interpreting classified information issues under the MCA 2009, except where it is inconsistent with the MCA's specific requirements.¹⁵⁹ The federal courts have developed an extensive jurisprudence interpreting CIPA in the more than thirty years since it was enacted.¹⁶⁰ In contrast, relatively few cases have construed Military Rule of Evidence 505, the court-martial equivalent of CIPA.¹⁶¹ Moreover, federal courts have extensive experience trying terrorism cases involving the use of information obtained through intelligence agencies and other national security assets and have successfully resolved many of the pressing issues regarding the discovery, disclosure, and admissibility of evidence derived from these sources.¹⁶² Incorporating CIPA case law as precedent potentially saves military commissions from extensive interlocutory appeals in order to answer issues that have already been resolved by the Article III courts.¹⁶³

158. See generally 18 U.S.C. app. III; MIL. R. EVID. 505.

159. See MCA 2009, 10 U.S.C. § 949p-1(d).

160. Cf. Reid, *supra* note 112, at nn.21-25 and accompanying text (noting that CIPA's provisions provided an infrastructure but relatively little substantive guidance, leading judges to develop standards on use, relevance, and admissibility at trial). Cf. generally Reggie Walton, *Prosecuting International Terrorism Cases in Federal Court*, 39 GEO. L.J. ANN. REV. CRIM. PROC. iii, nn.50-126 and accompanying text (2010) (reviewing CIPA appellate case law on a variety of discovery and trial issues and recounting the author's experiences trying cases in federal courts using CIPA procedures).

161. STEPHEN A. SALZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, 2 MILITARY RULES OF EVIDENCE MANUAL § 505.02 (7th ed., Matthew Bender & Co. 2011) ("As a practical matter, classified information or evidence is only rarely used, and the fact that there are few reported decisions on these Rules bears this out.").

162. See Walton, *supra* note 160, at viii (noting that many terrorism cases are built upon information gained through both domestic and foreign intelligence operations, and further observing that CIPA has generally been used effectively in terrorism prosecutions). *But see* Boevig, *supra* note 74, at 550 ("There is no coherent body of applicable law describing the way that CIPA is applied in terrorism cases, because only a few cases have dealt with CIPA in the context of terrorism. In the cases that have arisen, there is little support for retaining CIPA as it is.").

163. Cf. MCA 2009, § 950d (outlining procedures for interlocutory appeals by the United States).

To the extent that federal courts have already construed CIPA provisions in light of constitutional criminal due process standards, the use of CIPA precedent provides guidance to trial judges and the U.S. Court of Military Commission Review, aligning military commissions with the best practices of Article III courts. On paper, at least, this ensures that the accused in a military commission is no worse off in matters concerning classified evidence than if tried in federal district court by an Article III judge with all the constitutional guarantees afforded to domestic criminal defendants. As already suggested in this Article, this may come as scant comfort to the accused; Article III courts tend to aggressively interpret CIPA to preserve national security at the expense of trial rights and strategies traditionally accorded to criminal defendants.

6. Relaxed Authentication and Foundational Requirements to Protect Sources, Methods, and Activities Used to Gather Otherwise Unclassified Evidence

The MCA 2009 provides for relaxed evidentiary foundations in order to protect “sources, methods, and activities” by which the evidence was acquired.¹⁶⁴ After conducting an in-camera review of the evidence, the military judge can permit the prosecutor to introduce the evidence with a substituted evidentiary foundation, provided that the evidence is otherwise admissible, is reliable, and its introduction with a redacted foundation is consistent with affording the accused a fair trial.¹⁶⁵

A plain reading of this section suggests the existence of information that is not itself classified, but was obtained using means and methods that classification authorities would like to keep confidential. *United States v. Yunis*, a federal district court case using CIPA procedures, is a good example. During discovery, the defendant in *Yunis* sought to obtain transcripts of intercepted conversations between himself and an FBI informant. The district court ordered production of the transcripts, and the government filed an interlocutory appeal under CIPA.¹⁶⁶ In reversing, the D.C. Circuit Court of Appeals noted that “much of the government’s security interest in the conversation lies not so much in the contents of the conversations, as in the time, place, and nature of the government’s ability to intercept the conversations at all.”¹⁶⁷ Had something similar to the MCA 2009 provision permitting a substituted or redacted evidentiary foundation been in effect, *Yunis* might have been able to receive the intercept

164. *Id.* § 949p-6(c).

165. *Id.*

166. *United States v. Yunis*, 867 F.2d 617, 622 (D.C. Cir. 1989).

167. *Id.* at 623.

transcripts without jeopardizing the government's interest in protecting the methods used in obtaining the intercepts.

From an evidentiary perspective, this provision of the MCA 2009 is not inconsistent with principles that are already used in both federal district courts and courts-martial. The Federal Rules of Evidence, upon which the Military Rules of Evidence are based, contemplate a pragmatic and flexible approach to authenticating evidence.¹⁶⁸ Rule 901 states that the requirements of authentication are satisfied when the proponent produces evidence "sufficient to support a finding that the item is what the proponent claims it is."¹⁶⁹ Military Rule of Evidence 901 is nearly identical.¹⁷⁰ Both rules provide a nonexclusive list of examples of evidence that satisfies the requirement of authentication, including "any method of authentication or authentication allowed by a federal statute or a rule prescribed by the Supreme Court."¹⁷¹

And yet, the authentication rules for military commissions are, by statute, even broader in scope than the federal and military authentication rules. This represents a deliberate policy choice by Congress to make exceptions to normal rules of evidence and procedure in recognition of "the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with this chapter."¹⁷² With respect to non-classified evidence, section 949a(b)(3) states that evidence is authenticated when the military judge "determines there is sufficient evidence that the evidence is what it is claimed to be"; the judge is also required to instruct the members "that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence."¹⁷³ With respect to classified evidence, the MCA 2009 rule permitting a substituted or redacted evidentiary foundation is consistent with the idea that evidence in a military commission should not be dependent on technical evidentiary doctrines.

The ability to substitute or redact the classified evidentiary foundations of otherwise unclassified evidence represents an expansion of the CIPA framework permitting substitutions for, and summaries of, classified evidence at trial.¹⁷⁴ Relaxing authentication and foundational

168. *Cf.* 5 WEINSTEIN'S FEDERAL EVIDENCE § 901.02 (citing numerous cases in support of the judge's broad discretion in authenticating evidence under Rule 901).

169. FED. R. EVID. 901(a). MIL. COMM'N R. EVID. 901(a) (evidence is authentic if the military judge finds sufficient evidence that the item of evidence is what it purports to be).

170. MIL. R. EVID. 901(a) (requirement of authentication satisfied by evidence sufficient to support a finding that the evidence is what it purports to be).

171. *Compare* FED. R. EVID. 901(a)(10) *with* MIL. R. EVID. 901(a) (adding regulations to the statutes and rules mentioned in FED. R. EVID. 901(a)(10)).

172. MCA 2009, 10 U.S.C. § 949a(b)(1).

173. *Id.* § 949a(b)(3)(C)(i)-(ii).

174. *Compare id.* § 949p-6(c) *with* CIPA, 18 U.S.C. app. III § 6(c).

requirements relieves both the military judge and the prosecutor of the burden to craft evidentiary summaries and substitutes for the evidence itself,¹⁷⁵ while allowing for greater discovery and information flow to the accused.

7. *Limited Closure to the Public of Classified Proceedings*

The MCA 2009 provides authority to the military judge to close military commission proceedings to the public.¹⁷⁶ In order to do so, the military judge must specifically find that closure is necessary to protect information, “the disclosure of which could cause damage to national security, including intelligence or law enforcement sources, methods, or activities.”¹⁷⁷ The MCA also allows the admission of classified information into evidence without a change in its classification status.¹⁷⁸ This is possible for two non-statutory reasons: first, the Regulation for Trial by Military Commission requires all participants in the commissions, including counsel, the judge, and panel (jury) members, to have appropriate security clearances;¹⁷⁹ and second, as mentioned in the introduction to this Article, the entire military commission courtroom complex at Guantanamo Bay is a SCIF.¹⁸⁰

Thus, military commissions under the MCA 2009 may include sessions closed to the public in which classified evidence is freely admitted in the presence of the judge, counsel, accused, and panel members without having to create or provide special information security arrangements or procedures. The CIPA contains no such provisions,¹⁸¹ although Military Rule of Evidence 505 does provide for closed sessions in which classified evidence can be admitted.¹⁸²

The ability to introduce classified evidence while excluding the public elevates national security interests and the defendant’s confrontation rights above the interests both of the public and of the defendant in open trials that feature the free flow of “every man’s evidence.” In this respect, trial by military commission much more closely resembles courts-martial practice than CIPA procedures in federal district court. Closed trials are a long-

175. This can be a significant burden at trial, as recounted by The Honorable Reggie B. Walton, a United States district court judge experienced in presiding over CIPA cases. *See* Walton, *supra* note 160, at xvii (noting the tremendous burden to prosecutors and judges imposed by CIPA’s substitution and summary procedures).

176. *See* MCA 2009, § 949d(c)(1).

177. *Id.* § 949d(c)(2)(A).

178. *See id.* § 949p-7(a).

179. U.S. DEP’T OF DEFENSE, *supra* note 14, ¶ 7-1, ch. 18.

180. *See* White, *supra* note 16. *See generally* U.S. DEP’T OF DEFENSE, *supra* note 16.

181. *See generally* CIPA, 18 U.S.C. app. III.

182. MIL. R. EVID. 505(j)(5).

standing—albeit limited and carefully controlled—practice in military courts-martial, the procedures for which are familiar to military judges, prosecutors, and defense counsel.

The seminal military case is *United States v. Grunden*, a 1977 case in which the accused was tried by court-martial for espionage. To protect against the unauthorized disclosure of national security information, the military judge closed nearly the entire trial to the public, despite the fact that only a very small percentage of the evidence admitted at trial was actually classified.¹⁸³ The Court of Military Appeals reversed, holding that the judge had committed an error of constitutional magnitude in employing “an ax in place of the constitutionally required scalpel” when excluding the public from the trial.¹⁸⁴ The court adopted a test in which the military judge is required to balance national security interests in classified information against the Sixth Amendment guarantee of public trials, narrowly tailoring the remedy so as to exclude the public from trial as little as possible.¹⁸⁵ The *Grunden* framework continues to be used in courts-martial to this day.¹⁸⁶

While it may seem antithetical to American values to close portions of trials in order to admit classified evidence, it is important to remember that public disclosure of sensitive national security information could actually endanger lives, compromise ongoing operations, and jeopardize critical diplomatic and security arrangements with other states; these concerns lie at the heart of the national security evidentiary privilege. With its mandatory declassification reviews, relaxed authentication requirements for classified evidentiary foundations, and the full substitution and summary mechanisms drawn from CIPA, the MCA 2009 goes to considerable lengths to avoid the problems associated with introducing classified information into evidence. And yet, the MCA 2009 implicitly recognizes the possibility that the government cannot fully prove its case, nor can the defendant have a fair trial, without admitting classified information into evidence. The standard remedy of going forward without the evidence or dismissing the affected charges may be insufficient for either or both sides.

In this respect, military commissions are much more flexible than trials in federal district court. From the standpoint of protecting national security assets and information, John Rasdan has criticized CIPA’s inflexibility: “[I]f a court rejects the government’s substitution or if an

183. *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

184. *Id.* at 120.

185. *See id.* at 122-24.

186. *See* Kastenbergh, *supra* note 83, at 266-67 (analyzing the *Grunden* test); Katherine Flanagan-Hyde, *The Public’s Right of Access to the Military Tribunals and Trials of Enemy Combatants*, 48 ARIZ. L. REV. 585, 601-02 (2006) (discussing the *Grunden* test and its continued validity in courts-martial); Jessica Zarella, *Why the Traditional First Amendment Right to a Public Trial Cannot Be Applied to Military Tribunals*, 14 COMM. LAW CONSPECTUS 243, 255 (2005) (discussing continued validity and subsequent development of *Grunden* in courts-martial).

approved substitution does not do enough to protect sensitive information, the government must decide between prosecuting with some disclosure and dismissing the case to avoid any more disclosure.¹⁸⁷ He believes judges have sufficient flexibility under CIPA to close portions of trial, but he suggests that Congress might amend CIPA “so that closed portions are more explicitly contemplated” with control mechanisms, such as a requirement for Attorney General approval to ensure closed proceedings are not abused.¹⁸⁸

Given the fact that CIPA does not explicitly permit closing a trial to admit classified evidence, it is likely that the U.S. Court of Military Commissions Review would rely on the principles of *Grunden* and its progeny when interpreting issues pertaining to closed trials rather than CIPA case law. This means that the military judge would be required to employ a scalpel approach when closing portions of the trial, excluding the public only when absolutely necessary and for the most limited possible periods of time.

C. Conclusions Regarding the MCA 2009 and Classified Evidence

There can be little doubt that classified information presents enormous complexities and risks in an American terrorism trial, whether in federal criminal court, a court-martial, or a military commission. The discovery and trial rights of the defendant, national security concerns, and the American public’s traditional right to “every man’s evidence” create enormous tensions at trial. The classified information provisions of CIPA, Military Rule of Evidence 505, and the MCA 2009 provisions are all designed to help judges manage the complex task of balancing risks, rights, and interests at trial.

Of the three systems discussed in this Article, the MCA 2009 is the most complete. It draws on best practices both from CIPA and Military Rule of Evidence 505 to create a system that, on paper at least, does a superior job of handling discovery, disclosure, and use of classified information at trial.

The greatest impact of the MCA 2009 is its clarifying effect on classified information issues at trial. Unlike either CIPA or Military Rule of Evidence 505, it is specifically designed for use in terrorism trials. It expressly recognizes a classified information privilege at trial, yet provides strong incentives to ensure its infrequent use: presumptive presence of the accused at all proceedings involving classified evidence, mandatory declassification reviews, a system of substitutions for, and summaries of,

187. Radsan, *supra* note 76, at 451.

188. *Id.* at 476.

classified evidence, relaxed authentication requirements for the classified foundational elements of otherwise unclassified evidence, and the ability to close proceedings to introduce classified evidence while preventing public disclosure of it. It recognizes that the defense has pretrial discovery rights to classified information, but requires a demonstration that requested classified discovery is noncumulative, relevant, and helpful to a cognizable defense, to counter the prosecution's case or to use at sentencing. It honors the government's legitimate interest in protecting national security information by requiring all parties to abide by sweeping protective orders before, during, and after trial, yet it also forbids the government from making blanket, unfocused claims of privilege. In fact, it requires a formal, written declaration of the harm that could be caused by disclosure of the information; this declaration becomes a part of the record for later review by appellate courts.

In short, the MCA 2009 does a superior job to either the CIPA or Military Rule of Evidence 505 of balancing the rights, risks, and interests involved in the discovery and disclosure of classified evidence in terrorism trials. It provides clear, focused guidance to judges and practitioners alike. It expresses a preference for public trials involving the free flow of "every man's evidence," even as it permits limited closure of trials to the public in subordination to the accused's trial rights and the government's national security interests. And in the end, it recognizes, as it must, that the government is still entitled in some circumstances, provided it is willing to pay the price, to claim its privilege and withhold certain national security information at trial.

Despite all this, the MCA 2009 cannot succeed in its task of regulating classified evidence in military commissions. On paper, it is the best of all worlds for the tremendously difficult task of handling classified information issues at trial. But a combination of unfortunate policy choices and structural separation-of-powers defects in the military commissions dooms these rules to be legally stillborn: well-formed but lacking vitality. Those shortcomings are the focus of the next Section.

IV. THREE DEFECTS IN THE MILITARY COMMISSIONS SYSTEM THAT DOOM THE MCA 2009 CLASSIFIED EVIDENCE PROVISIONS TO FAILURE

As written, the MCA 2009 classified evidence rules and procedures form the most effective integrated system yet devised for handling classified information during terrorism trials in American courts. But they cannot compensate for three critical defects in the current military commissions system pertaining to classified information: (1) the Executive Branch continues to use the Guantanamo Bay detainees, detention facilities,

and court complex as an active intelligence-gathering operation; (2) the detainees are not allowed to introduce evidence about the classified interrogation methods used against them; and (3) the military commissions judge and the original classification authorities are both instrumentalities of the Executive Branch, creating an irreparable breach in the separation-of-powers principles required for the effective and fair adjudication of classified information issues that arise before, during, and after trial.

A. Implications of Executive Branch Exploitation of the Guantanamo Bay Detainees, Detention Facilities, and Military Commissions Courtroom Complex for Active Intelligence Gathering

1. *The Schizophrenic Dual Nature of Military Commissions Criminal Adjudication and National Security Intelligence-Gathering Functions*

Like most armed conflicts, the War on Terror is heavily dependent on intelligence activities and counterintelligence measures.¹⁸⁹ What may be unprecedented in this conflict, however, is the extent to which detainees—many of whom have been imprisoned for more than a decade—are treated as active intelligence assets to be exploited by Executive Branch intelligence agencies.¹⁹⁰ This creates a legally schizophrenic situation in which the detainees are prosecuted as unprivileged belligerents for crimes allegedly committed during the conflict, even as their captors continue trying to obtain information from them to use in prosecuting an armed conflict against their alleged confederates—all the while employing the same interrogations and information-gathering methods for both purposes.

In a traditional armed conflict, a prisoner of war is *hors d' combat* and is entitled to a high level of protection under the Geneva Conventions. The detaining power is permitted to question a prisoner of war, but the prisoner is required to give no information other than his name, rank, and serial

189. See generally JOHN KEEGAN, *INTELLIGENCE IN WAR: KNOWLEDGE OF THE ENEMY FROM NAPOLEON TO AL-QAEDA* (Alfred A. Knopf ed., 1st ed. 2003).

190. For example, in the aftermath of the operation to kill Osama Bin Laden, Obama Administration officials revealed that current detainees at Guantanamo Bay had provided intelligence that helped American forces find Bin Laden's hiding place in Pakistan. See Cully Stimson, *Detainee Interrogations: Key to Killing Osama Bin Laden*, *FOUNDRY* (May 2, 2011, 1:46 PM), <http://blog.heritage.org/2011/05/02/detainee-interrogations-key-to-killing-osama-bin-laden/> (recounting the role of Guantanamo Bay intelligence in finding Bin Laden and concluding that "strategic interrogation" of detainees "has enabled the U.S., under the leadership of both Presidents Bush and Obama, to stay on the offensive while remaining vigilant to the very real threats that confront the nation every day"); Tom Lasseter, *Tip to Bin Laden May Have Come from Guantanamo*, *MIAMI HERALD*, May 2, 2011, <http://www.miamiherald.com/2011/05/02/2197802/tip-that-led-to-bin-laden-may.html>.

number.¹⁹¹ The detaining power may not inflict “physical or mental torture, nor any other form of coercion . . . to secure from [prisoners of war] information of any kind whatsoever.”¹⁹² The traditional purpose for questioning prisoners of war is not to build criminal cases against them, but to gather information and intelligence to assist military commanders in carrying out their war-fighting responsibilities.¹⁹³

The detaining power may try a prisoner of war for violations of international law or the detaining power’s own law that existed at the time the alleged act was committed,¹⁹⁴ but “[n]o moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.”¹⁹⁵ To be valid, the sentence of a prisoner of war must be “pronounced by the same courts according to the same procedure” used in trials of the detaining power’s own service members.¹⁹⁶

Shortly after the 9/11 attacks, American policymakers determined that the detainees were unlawful combatants not entitled to the protections of the Geneva Convention Relative to Treatment of Prisoners of War.¹⁹⁷ The

191. See Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW] (“Every prisoner of war, when questioned on the subject, is bound to give only his surname, first name and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”).

192. *Id.*

193. See, e.g., U.S. DEP’T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION 1-1 (Sept. 28, 1992) (noting that the intelligence cycle is oriented to a commander’s mission). See also U.S. DEP’T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS ¶ 4-58, at 4-24 to -25 (Sept. 2006) (“The goals of HUMINT collection and those of the MPs (particularly CID) are different. CID and PMO are concerned with identification and apprehension of criminal elements. . . . HUMINT collectors are not trained to conduct criminal investigations and must not be used for this purpose.”).

194. U.S. DEP’T OF ARMY, FIELD MANUAL 2-22.3, *supra* note 193, at art. 99 (“No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.”). It is beyond the scope of this Article to discuss whether the offenses for which the Guantanamo Bay detainees face trial either (1) fall under the scope of Article 99, or (2) actually existed at the time the detainees allegedly committed them. Whether some of the offenses listed in the MCA 2009 actually existed at the time of their commission is a matter under active consideration by federal courts at the time of this Article’s preparation. See *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238 (D.C. Cir. 2012) (holding that the international law of war did not proscribe material support of terrorism at the time Hamdan committed the conduct in question, reversing the judgment of the Court of Military Commission Review, and vacating Hamdan’s conviction for material support of terrorism). *Hamdan II* was a decision by a single panel of the D.C. Circuit Court of Appeals (Judges Sentelle, Kavanaugh, and Ginsburg). The D.C. Circuit Court of Appeals has granted an en banc rehearing of a related case, *Ali Hamza Ahmad Suliman al Bahlul v. United States*, 2013 U.S. App. LEXIS 8120 (D.C. Cir. Apr. 23, 2013), which vacated the respondent’s convictions at a military commission based on the panel holding in *Hamdan II*.

195. GPW, *supra* note 191, at art. 99.

196. *Id.* at art. 102.

197. See, e.g., Memorandum from George W. Bush, President of the U.S., on Humane Treatment of Taliban and Al Qaeda Detainees to the Vice President, Sec’y of State, Sec’y of Def., Attorney Gen., Chief of Staff to the President, Dir. of Cent. Intelligence, Assistant to the President for Nat’l

MCA 2009 recognizes as much when it declares that its purpose is to establish “procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission.”¹⁹⁸ Nonetheless, the considerable protections given to prisoners of war in matters pertaining to interrogation and judicial proceedings provide a normative standard by which detainee operations at Guantanamo Bay can be evaluated.

From the beginning, interrogation operations at Guantanamo Bay were conducted with two purposes in mind: the gathering of intelligence to be used in the ongoing War Against Terror¹⁹⁹ and the perfection of criminal terrorism cases against the detainees.²⁰⁰ This created a nearly impossible duality of character for the military commissions because the values and interests at the root of an intelligence interrogation differ markedly from those in a criminal interrogation. The intelligence interrogation is designed to obtain actionable intelligence from an interrogation subject without regard to whether it will later be admissible in a court of law; the overall goal of national security trumps the rights of the interrogation subject. In contrast, the police interrogation is designed to gather admissible evidence that will withstand judicial scrutiny and can be used to convict the interrogation subject in a court of law; the constitutional and statutory rights of the subject trump the interests of public safety, judicial economy, and efficiency.

It is a matter of well-established public record that U.S. interrogators—at least in the early days of interrogation operations at Guantanamo Bay and other locations—used coercive interrogation techniques that could not legally have been used against American citizens and whose products would not have been admissible in standard domestic

Sec. Affairs, and Chairman of the Joint Chiefs of Staff (Feb. 7, 2002) (declaring that the Geneva Convention Relative to the Treatment of Prisoners of War did not apply to Al Qaeda or Taliban detainees), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

198. MCA 2009, 10 U.S.C. § 949b(a).

199. For example, not long after the initial military commissions were established by executive order, then-Secretary of Defense Donald Rumsfeld stated that the purpose of the military commissions “is not to punish people as it is in a court of law. It is to gain information and try to prevent an additional terrorist act.” *Pentagon: Guantanamo Detainees are Being Treated Properly*, VOICE OF AM. (Feb. 5, 2003), available at <http://www.voafanti.com/gate/big5/www.voanews.com/content/a-13-a-2003-02-05-24-pentagon-67453622/385211.html>.

200. Also, early in the life of the military commissions, Secretary Rumsfeld announced that the intelligence-gathering phase of the military commissions was nearly finished, and the law-enforcement phase of the disposition of their cases was beginning. Michael Kilain, *Rumsfeld Closes Office on Influence; He Says He Never Approved Using Misinformation*, CHI. TRIB., Feb. 27, 2002, at N-3. See also Neal A. Richardson & Spencer J. Crona, *Let Military Panels Punish Terrorists*, LOS ANGELES TIMES, Sept. 23, 2001, at M-7 (“Another advantage of the military system would be the opportunity for a proper military interrogation of the suspects. Do we want to give an arrested terrorist suspect, who could have the information to save the next 5,000 innocent lives, the Miranda warning to clam up and lawyer up?”).

criminal trials.²⁰¹ Furthermore, the information gained from these interrogations would also have been inadmissible in a trial by court-martial against any defendant—foreign or domestic, alien or citizen—for two primary reasons. First, the detainees were not given rights warnings under Article 31 of the Uniform Code of Military Justice.²⁰² Second, Article 31 prohibits the admission of any statement “obtained from any person [without proper rights warnings], or through the use of coercion, unlawful influence, or unlawful influence” in a court-martial.²⁰³

And yet, the early military commissions, both those established by executive order and those governed by the MCA 2006, would have permitted the use of coercively obtained information or evidence obtained without rights warnings.²⁰⁴ Even the relatively enlightened MCA 2009 requires no rights warnings and contains no exclusionary rule for evidence obtained in the absence of such warnings.²⁰⁵ Thus, sentences imposed by military commissions could not meet the Geneva Conventions standard of being “pronounced by the same courts according to the same procedure” used for members of the detaining power’s armed forces.²⁰⁶

Coercive interrogations are a relic of the past in the detention facilities at Guantanamo Bay, but detainees are still treated as active intelligence assets by civilian and military intelligence agencies.²⁰⁷ Guantanamo Bay

201. See generally Christopher W. Behan, *Everybody Talks: Evaluating the Admissibility of Coercively Obtained Evidence in Trials by Military Commission*, 48 WASHBURN L.J. 563, 574-75, 592-97 (2008) (discussing coercive interrogation techniques and the possibility of their use in military commissions).

202. In interrogations conducted by, or with, the assistance of U.S. military personnel subject to the UCMJ, Article 31 requires a warning that the suspect does not have to give a statement regarding the suspected offense and that any statement made by him could be used in a trial by court-martial. See UCMJ, 10 U.S.C. 47, § 831(b).

203. *Id.* § 831(d).

204. See Behan, *supra* note 201, at 595-96.

205. Compare UCMJ, 10 U.S.C. 47, § 831 (UCMJ rights warning statute) with MCA 2009, 10 U.S.C. 47A, § 948b(d) (specifically holding UCMJ Article 31 inapplicable to military commissions).

206. GPW, *supra* note 191, at art. 102.

207. See, e.g., Joseph I. Lieberman & Kelly Ayotte, *Why We Still Need Guantanamo*, WASH. POST, July 22, 2011, at A17 (explaining that the primary purpose of detention of suspected terrorists at Guantanamo is for the purpose of intelligence gathering rather than for prosecution of war crimes); Peter Finn, *A New Revelation on Al-Qaeda’s 9/11 Movements*, WASH. POST, Apr. 25, 2011, at A01 (detailing the information gained from detainees at Guantanamo Bay regarding past terroristic acts and plans for future attacks). See also Press Release, Senators John McCain, Lindsey Graham & Kelley Ayotte, McCain, Graham, Ayotte Statement on Sulaiman Abu Ghayth (Mar. 8, 2013), http://www.ayotte.senate.gov/?p=press_release&id=861 (condemning the Obama administration for bypassing Guantanamo Bay and bringing Abu Ghayth to trial in federal district court). In their statement, the Senators touted the interrogation and intelligence-gathering function that still exists at Guantanamo Bay:

Military detention for enemy combatants has been the rule, not the exception. By processing terrorists like Sulaiman Abu Ghayth through civilian courts, the Administration risks missing important opportunities to gather intelligence to prevent future attacks and save lives.

has been designated as a “strategic intelligence gathering center” by the Department of Defense.²⁰⁸ Monica Eppinger has conceptualized an “interrogative detention” model to help explain continuing the intelligence-gathering activities at Guantanamo Bay and other detention sites.²⁰⁹

The schizophrenic dual nature of the commissions continues to exist: they are partly a national security intelligence operation, partly a court of law.²¹⁰ It is one thing to bring a detainee in for questioning or interrogation; when that occurs, he is alert to the hazards of interrogation and has the opportunity to be an active participant in the process. But it is something else altogether surreptitiously to exploit the legal system in order to gather information about a detainee, using security regulations and procedures to gain access to privileged attorney-client information and conducting surveillance of the detainee and his legal team with sensitive electronic equipment. Such activities would undermine the integrity of the legal system; no legitimate civilian court or military court-martial would tolerate such behavior from police or prosecutors.²¹¹

A foreign member of al Qaeda should never be treated like a common criminal and should never hear the words “you have a right to remain silent.”

Abu Ghayth's capture and decision to try him in civilian court raises several questions. For example, did U.S. officials properly interrogate Abu Ghayth before he was read his Miranda rights? If so, for how long? Given the fact that the U.S. required repeated interrogations of detainees in law of war custody over many years in order to find bin Laden, why would the Administration believe that a few hours or days of interrogation of someone so close to bin Laden would be sufficient?

Id.

208. Monica Eppinger, *Reality Check: Detention in the War on Terror*, 62 CATH. U. L. REV. 325, 354 (2013), *citing* Memorandum from Office of Assistant Sec'y of Def. for Special Operations/Low Intensity Conflict (ASDSO/LIC), Criteria and Guidelines for Screening and Processing Persons Detained by the Department of Defense in Connection with the War on Terror (Aug. 22, 2003), at 3, *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/04-F-0269%20Criteria%20and%20Guidelines%20for%20Screening%20and%20Processing%20Persons%20Detained%20by%20the%20DoD%20in%20Connection%20with%20the%20War%20on%20Terrorism.pdf.
209. *See generally* Eppinger, *supra* note 208, at 346-61 (distinguishing interrogative detention from criminal detention and preventive detention).
210. *Cf. id.* at 360 (“Distinguishing between modes of detention provides conceptual clarity, but one should recognize that, in practice, Executive Branch authorities do not always keep these modes distinct from one another. Authorities may take a detainee into custody for one purpose but continue detention for a different purpose, or they may leverage the different modes of detention to coerce detainee cooperation.”).
211. *See, e.g.,* Henderson v. Campbell, No. C 98-4837 CW (PR), 2007 WL 781966 (N.D. Cal. Mar. 13, 2007) *aff'd sub nom.* Henderson v. Newland, 322 F. App'x 551 (9th Cir. 2009) (reviewing the defendant's claims that the district attorney violated the attorney-client privilege and his Sixth Amendment rights by gaining access to the public defender's computer files); United States v. Danielson, 325 F.3d 1054, 1073-74 (9th Cir. 2003) (discussing the failure of the district attorney to produce tapes, made intentionally by investigators, of recorded conversations between an informant and the defendant regarding trial strategy); Morrow v. Superior Court, 36 Cal. Rptr. 2d 210, 213 (Cal. Ct. App. 1994) (indictment dismissed on grounds of prosecutorial misconduct in the form of eavesdropping on attorney-client communications).

The past year has seen a string of allegations and revelations about intelligence-gathering efforts in connection with detainees and their counsel. These include the following: hidden microphones in ostensibly secure attorney-client consultation trailers;²¹² mail from detainees to their attorneys being opened in order to search for contraband and find useful intelligence information;²¹³ the alleged placement of extraordinarily sensitive microphones at counsel tables in the courtrooms, facilitating the electronic monitoring of privileged attorney-client communications;²¹⁴ the seizure and inspection of privileged legal communications during inspections of detainee cells;²¹⁵ and the mishandling and improper release of defense e-mails to the prosecution.²¹⁶

Adding fuel to the fire is perhaps the most notorious incident of all, in which an external monitoring authority—whose identity and existence were apparently unknown to the military commissions trial judge—hit the “kill switch” and cut off the audio feed from the courtroom to the observation gallery during a hearing.²¹⁷ The “kill switch incident” lends credence to claims that the detainees and their lawyers are the subject of an active intelligence-gathering effort by Executive Branch agencies.

-
212. See Carol Rosenberg, *FBI Hid Microphones in Guantanamo, But No One Listened, Prison Commander Testifies*, MIAMI HERALD, Feb. 13, 2013, <http://www.miamiherald.com/2013/02/13/3232992/fbi-hid-microphones-in-guantanamo.html> (defense attorneys learned that microphones capable of listening in on conversations were located in areas used for client consultation); Charlie Savage, *9/11 Case Is Delayed as Defense Voices Fears of Eavesdropping*, N.Y. TIMES, Feb. 12, 2013 (details attorneys for the defendants at Guantanamo Bay requesting extensions after revelations that microphones were located both in the courtrooms and in the areas where attorneys counsel their clients).
 213. See Peter Finn, *Guantanamo Attorneys to Stop Writing to Clients*, WASH. POST, Jan. 12, 2012, at A03 (attorneys for detainees were ordered by leadership to stop sending privileged communications to clients at Guantanamo after an order by the base commander that all mail, including mail from attorneys, be read to search the material for contraband and to gain information for military intelligence).
 214. See Peter Finn, *9/11 Lawyer Says U.S. is Listening in on Clients*, WASH. POST, Feb. 12, 2013, at A04 (explaining how all communications in court rooms of Guantanamo Bay are recorded unless microphones in the courtrooms are muted; attorneys fear that their privileged communications with clients in the courtroom are being monitored); Savage, *supra* note 212 (details attorneys for the defendants at Guantanamo Bay requesting extensions after revelations that microphones were located both in the courtrooms and in the areas where attorneys counsel their clients).
 215. See Charlie Savage, *Legal Clashes at Hearing for Defendants in 9/11 Case*, N.Y. TIMES, Feb. 15, 2013, at 17 (detailing an incident where guards seized and inspected items in detainee’s cells, including items which had been cleared as privileged, legal communication).
 216. See Peter Finn, *Guantanamo Dogged by New Controversy After Mishandling of Emails*, WASH. POST, http://www.washingtonpost.com/national/guantanamo-dogged-by-new-controversy-after-mishandling-of-e-mails/2013/04/11/1973bf9a-a2dd-11e2-82bc-511538ae90a4_story.html (last visited Oct. 7, 2013) (discussing how thousands of defense e-mails were inappropriately released to the prosecution, leading to defense attorneys being ordered to no longer use the defense e-mail system to transmit privileged communication).
 217. Peter Finn, *Mikes Hidden in Guantanamo Lawyer-Client Rooms*, WASH. POST, Feb. 13, 2013, at A02 (detailing an incident where a kill-switch was turned off by someone other than the judge or his security personnel during a hearing).

2. *Classified Information Implications of Continued Intelligence Gathering in the Military Commissions*

a. Incompatibility with MCA 2009's Statutory Purpose for Military Commissions

There are multiple conceptual and practical problems posed by using the military commission detention facilities, courtroom complex, defense communications, and defense personnel as targets of an active intelligence-gathering effort. First and foremost, continued intelligence gathering of detainees facing trial—particularly surreptitious electronic surveillance of defendants and their legal teams, as well as the monitoring of privileged attorney-client communications—is incompatible with the statutory purpose for the military commissions, which is “to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission.”²¹⁸ The MCA 2009 does not list intelligence gathering as either a primary or secondary purpose of the military commissions.

b. Violation of Traditional Norms of Criminal Investigation and Prosecution in Civilian Trials and Military Courts-Martial

Second, continued intelligence gathering violates the traditional norms of criminal investigation and procedure used in criminal courts and military courts-martial. In American criminal trials, a defendant under confinement pending trial enjoys considerable protection from government efforts to obtain information directly from him.²¹⁹ In a custodial environment, he cannot be interrogated without a rights warning.²²⁰ Once his Sixth Amendment right to counsel has been triggered, the government's options for interrogating him are even more limited;²²¹ government agents cannot even rely on planted confederates to elicit information from defendants.²²² In the words of an influential criminal procedure treatise, “[T]he Sixth Amendment [functions] as a shield, enabling the defendant to frustrate the

218. MCA 2009, 10 U.S.C. § 948b(a).

219. It is outside the scope of this Article to exhaustively review and discuss these rights. Accordingly, the reader will be referred generally to secondary sources discussing them.

220. *See* U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself.”). *See generally* WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE §§ 6.5-6.10, at 337-379 (4th ed. 2004) (explaining the privilege against self-incrimination and the development and application of interpretative doctrines related thereto).

221. *See* U.S. CONST. amend VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”). *See generally* LAFAYE, *supra* note 220, § 6.4, at 325-37 (explaining the Sixth Amendment right to counsel and its implications for interrogation of criminal defendants).

222. LAFAYE, *supra* note 220, § 6.5, at 334-36.

state's efforts to obtain evidence directly from him."²²³ Nearly identical standards apply in military courts-martial,²²⁴ except that the military justice system tends to construe its rules even more strictly than civilian courts in order to provide maximum protection to defendants.

c. Creation of Discovery and Due Process Issues

Third, continued intelligence gathering creates nightmarish discovery and due process issues, particularly when combined with the classification issues that inevitably arise from intelligence operations. In 2012, a defense attorney in the military commissions provided a relatively innocuous example of the complexity that classification matters inject into the criminal discovery process. At a motions hearing, he introduced a note that his client had written to the civilian defense attorney in the case. The entire content of the note—"LeBron James is a very bad man. He should apologize to the city of Cleveland."²²⁵—was classified because the detainee had once been held in captivity by the CIA. It took more than two months before the note was cleared and deemed safe for the civilian defense attorney, and the public at large, to see.²²⁵

It is not difficult to imagine the classification and discovery issues that could arise from either an open or clandestine intelligence operation being conducted against detainees or their legal counsel. First, the very existence of such programs would likely be classified. Second, the sources and methods used to conduct the operation would also be classified, and the government might be extremely reluctant to provide such evidence to either the defense or the public at large. Third, the information derived from such a program would likely—if the LeBron James example above is any indication—be presumptively classified, regardless of how innocuous or damning it might be. Continuing intelligence operations create more information to be fed through the declassification, discovery, and privilege determination pipeline, in turn creating additional potential delays, as well as discovery fights and potential due process violations.

223. LAFAVE, *supra* note 220, § 6.4(h), at 335.

224. *See generally* MIL. R. EVID. 304 (prohibiting the introduction into evidence of involuntary statements or derivative evidence therefrom, based on the Self-Incrimination Clause and Due Process Clause of the Fifth Amendment, as well as UCMJ Article 31); MIL. R. EVID. 305 (defining as involuntary statements obtained without proper rights warnings).

225. Carol Rosenberg, *LeBron James Makes Terror Suspect's 'Bad Man' List*, MIAMI HERALD, Oct. 16, 2012, <http://www.miamiherald.com/2012/10/16/3052753/lebron-james-makes-terror-suspects.html>. LeBron James is an American professional basketball player who plays in the National Basketball Association, and, near the time the note was written, had just spurned an offer from his hometown Cleveland Cavaliers to join the Miami Heat. The matter created considerable controversy among basketball fans throughout the world but had no recognizable national security implications.

Third, the dual nature of the military commissions could easily lend itself to a situation (and perhaps already has) in which Executive Branch intelligence agencies conduct intelligence operations based on agendas that are (1) unknown to military commissions prosecutors; (2) inimical to the interests of justice, fairness, and due process; and (3) in violation of prevailing mores and professional conduct standards pertaining to American criminal prosecutors.

As we have already seen in this Article, federal courts already experience “alignment issues” and discovery problems that inevitably occur when national security interests come into conflict with the demands of a criminal justice system.²²⁶ These problems occur when intelligence agencies pursue and obtain information for national security purposes that might be of interest to the defense or would trigger disclosure obligations by the prosecution under the Federal Rules of Criminal Procedure and governing Supreme Court case law.

The military commissions system is no different. The rules, as written, may actually be stricter in their disclosure requirements than criminal trials in federal district courts. On request of the defense, prosecutors in the military commissions system are required to permit examination of all items of real evidence, medical and scientific tests, and relevant statements (whether written, oral, or recorded) of the accused

which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.²²⁷

Furthermore, the prosecution is required to disclose to the defense the existence of evidence known to the trial counsel that could negate the guilt of the accused to the charged offense, or reduce the degree of guilt or punishment; Military Commissions Manual Rule 701 notes that this requirement is equivalent to the duty imposed on the prosecution in courts-martial.²²⁸ In turn, the discovery and disclosure duties imposed on prosecutors in courts-martial derive from Supreme Court jurisprudence on discovery in criminal cases, as well as American Bar Association standards governing the prosecution function.²²⁹ Court-martial discovery rules “provide[] for broader discovery than is required in Federal practice” and

226. See *supra* Part II.B.4.

227. See MANUAL FOR MILITARY COMMISSIONS, *supra* note 11, at II-41.

228. *Id.* at r. 701(e).

229. See MANUAL FOR COURTS-MARTIAL, *supra* note 61, at A21-34 (2012) (citing the American Bar Association standards and Supreme Court cases, including *Agurs* and *Brady*, upon which Rule 701 and its requirements are based).

are intended to “promote full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure.”²³⁰

The possibility exists that ongoing intelligence gathering involving detainees could produce information that the prosecution would be required to disclose under the traditionally liberal discovery mandate of military trial practice. This information could be inculpatory, or, more critically for due process purposes, exculpatory. Suppose, for example, that electronic surveillance of conversations between one of the five 9/11 co-conspirators and his defense team proved inculpatory of that defendant but exculpatory to one or more of the co-conspirators. This type of information might be valuable for national security purposes, but absolutely invaluable for criminal defense purposes. Its existence in the files of an Executive Branch agency might well trigger discovery obligations on the part of the prosecution. And yet, because of the inherent secrecy of the intelligence-gathering operations and a perceived lack of alignment between intelligence agencies and prosecutors, the prosecution might blindly fail to comply with its obligations. The result would be a manifest miscarriage of justice.

Continued intelligence operations against detainees create a toxic stew of discovery and disclosure obligations, alignment problems between the prosecution and Executive Branch intelligence agencies, and issues pertaining to the overclassification and declassification of information. In addition, continued operations create a constant flow of information that strains the processing capacity of an already busy system.

No matter how sound the MCA 2009 framework is for handling classified evidence, it cannot possibly perform its function in a system that continues to pursue an active intelligence-gathering agenda against the criminal defendants. This performance failure is particularly so when ongoing intelligence operations, as well as the information obtained from them, are likely to be classified. Continued intelligence operations—particularly surveillance of interactions between detainees and their counsel—make it impossible for the MCA 2009 classified evidence rules to properly balance the interests of national security and due process to the defendant.

B. The Classification of Interrogation Methods Experienced by Detainees

At this stage in the history of the Guantanamo Bay military commissions, it is a matter of record that many of the detainees facing trial by military commission were subject to “enhanced interrogation

230. *Id.* at A21-33.

techniques.”²³¹ There exists an active and unresolved dispute as to whether enhanced interrogation techniques constitute torture under domestic and international law and, if so, whether information obtained using these techniques is or should be admissible at trial. The MCA 2009 unequivocally declares that evidence obtained by the use of torture or cruel, inhuman, or degrading treatment is inadmissible in a trial by military commission.²³² And yet, the MCA 2009 also protects classified information from disclosure if disclosure “would be detrimental to the national security.”²³³ If there is a balance to be struck between national security and the needs of the defendant, the MCA 2009 requires it to be struck in favor of national security.²³⁴

If the original classification authority—an instrumentality of the Executive Branch—decides to claim the national security privilege, a detainee might be forever precluded from publicly litigating issues pertaining to information derived from enhanced interrogation techniques. This preclusion could include the detainee’s own experiences with such techniques. Such information could be critical at trial. The scholar David Frakt has identified two primary reasons why information about enhanced interrogation techniques is relevant at trial: (1) the coercive nature of the interrogation program is relevant to determine the voluntariness and admissibility of statements derived from such methods; and (2) if detainees were in fact tortured, the government might be compelled to forfeit its right to try them at all.²³⁵

The locations where these interrogations occurred, the identities and nationalities of the interrogators, the agency or contractual affiliations of the interrogators, the particular techniques and combinations of techniques employed in the interrogations, and the information derived from these interrogations are considered by the Executive Branch to be classified. The prosecution in the military commissions has claimed as much in filings made to the military commissions judge in the trial of Khalid Sheikh Mohammed and his co-conspirators.²³⁶ In furtherance of the national

231. See, e.g., Mark Danner, *The Sixteenth Annual Frankel Lecture: Commentary: The Twilight of Responsibility: Torture and the Higher Deniability*, 49 HOUS. L. REV. 71, 73-78 (2012) (recounting numerous instances of enhanced interrogation techniques and classifying them as torture); Behan, *supra* note 201 and accompanying text.

232. MCA 2009, 10 U.S.C. § 948r.

233. *Id.* § 949p-1(a).

234. See Boehm, *supra* note 111, at 298-99 (comparing classified evidence rules in Article III courts, courts-martial, and military commissions and concluding that the MCA 2009 rules require the judge to keep national security information classified).

235. See Benjamin Witte, *David Frakt on “How to Salvage the Military Commissions,”* LAWFARE (Aug. 5, 2013, 9:43 AM), <http://www.lawfareblog.com/2013/08/david-frakt-on-how-to-salvage-the-military-commissions/>.

236. See Government Motion to Protect Against Disclosure of National Security Information ¶¶ 5.c., 5.e, 5.g, 5.j, *United States v. Khalid Sheikh Mohammed*, AE013 (Apr. 26, 2012) (listing

security privilege, the military commissions judge has in fact entered a protective order prohibiting any party, including the defense, from disclosing information pertaining to the locations and techniques involved in these interrogations in court.²³⁷ This protective order precludes detainees from testifying about their own personal experiences while being interrogated in order to prevent them from revealing information pertaining to sources, methods, and activities of Executive Branch intelligence agencies.

As the ACLU points out in its petition for a writ of mandamus to the U.S. Court of Military Commissions Review, nearly all of the information pertaining to these interrogations is already available in the public domain, having been disclosed through open-source methods including news articles and reports by non-governmental organizations.²³⁸ The interrogation techniques at issue were “abandoned by the Bush Administration and formally disavowed by President Obama.”²³⁹ And yet, the techniques themselves, not to mention the detainees’ ability to testify about what actually happened to them while they were being interrogated, remain classified.

The chief prosecutor for the military commissions has publicly declared the information must remain classified so as to avoid harm to U.S. intelligence operations and personnel, asserting that the “government’s sources and methods are not an open book.”²⁴⁰ This is a classic invocation of the national security privilege, containing at its core an assertion not subject to judicial review.²⁴¹

In contrast, defense attorneys claim that the government is using the classification system to hide wrongdoing by the government itself.²⁴² If

information pertaining to locations, personnel, interrogation techniques, and so forth considered classified by the government), *available at* <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

237. *See* Protective Order #1: To Protect Against Disclosure of National Security Information ¶¶ 2.g, 9, *United States v. Khalid Sheikh Mohammed*, AE013P (Dec. 6, 2012), *available at* <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

238. Petition for a Writ of Mandamus at 27-32, *Am. Civ. Liberties Union v. United States* (Feb. 21, 2013), *available at* https://www.aclu.org/files/assets/gitmo_public_access_appeal.pdf.

239. Witte, *supra* note 235.

240. *See Sept. 11 Trial Rules Under Scrutiny at Guantanamo as Pretrial Hearing Begins*, FOX NEWS (Oct. 15, 2012), *available at* <http://www.foxnews.com/world/2012/10/15/sept-11-trial-rules-under-scrutiny-at-guantanamo-as-pretrial-hearing-set-to/#ixzz2e0KPHg8i> (quoting Brigadier General Mark Martins, chief prosecutor for the military commissions).

241. Frakt points out that the intelligence community may fear “that some mU.Sinor details of the defendants’ testimony could be combined with other open source information to create a ‘mosaic’ of information that might assist a determined observer to identify a protected source or compromise a method of information gathering.” Witte, *supra* note 235. There is no way, of course, for a judge to determine whether such a claim has any validity; the Executive Branch is solely and uniquely vested with that responsibility.

242. Witte, *supra* note 235 (quoting Army Captain Jason Wright).

true, this action violates the executive order on classified information, which provides that information may not be classified, continue to remain classified, or fail to be declassified “in order to: (1) conceal violations of law, inefficiency, or administrative error; [or] (2) prevent embarrassment to a person, organization, or agency.”²⁴³ The ability to litigate these issues in a public forum is central to the defense strategy for the 9/11 co-conspirators.²⁴⁴

The conflict between the government and defense positions is intractable. It encapsulates the fundamental flaw at the heart of any criminal case involving classified information. The original classification authority and the prosecutor are both entities of the Executive Branch. The nature of the privilege is such that when national security and prosecutorial interests align, the Executive Branch can effectively prevent both the defendant and the public from ever hearing or seeing critical evidence in the case.²⁴⁵ This is true even where the original classification authority improperly classifies information or improperly employs the national security privilege to shield the government from the consequences of its misconduct.

In this respect, the MCA 2009 is no better than the CIPA or Military Rule of Evidence 505. As yet, American law contains no mechanism for independent review of the propriety of a claim of privilege or an Executive Branch refusal to disclose classified national security information. A judge cannot force disclosure of classified evidence, even in a proceeding closed to the public. This prohibition is so regardless of whether any conceivable unclassified substitute, stipulation, or summary could vindicate the defendant’s rights or satisfy the public’s need for information. The most effective remedy available is dismissal of charges. It is virtually inconceivable that such a remedy would be employed in a high-profile case such as the trial by military commission of the 9/11 co-conspirators.²⁴⁶

243. Exec. Order No. 13,526 § 1.7(a), 75 Fed. Reg. 707 (Jan. 5, 2010).

244. Dina Temple-Raston, *Sept. 11 Defendants Focus on Torture During Hearing*, NAT’L PUB. RADIO (May 7, 2012, 4:16AM), available at <http://www.npr.org/2012/05/07/152171198/sept-11-defendants-make-torture-focus-of-hearing>.

245. See Boehm, *supra* note 111, at 299 (“[T]he unique message the 2009 MCA sends to military judges, prosecutors, and defense counsel is that, in the commission forum, the government determines what evidence is classified (and therefore determines what evidence must be produced), and all other parties must defer to that determination.”).

246. Cf. David D. Cole, *Military Commissions and the Paradigm of Prevention*, in GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE AND POLICY PERSPECTIVES (2013), Georgetown Public Law and Legal Theory Research Paper No. 12-154, at 11 (“The United States cannot responsibly leave unprosecuted those who attacked it on September 11 and killed three thousand innocent civilians. But how, for example, does the United States try Khalid Sheikh Mohammed after he has been disappeared into a secret prison for years, and waterboarded 183 times?”).

C. Separation of Powers and Classified Information in the Military Commissions

The classified evidence procedures in the MCA 2009 are comprehensive and well-written, but they cannot function properly in a system in which the original classification authorities, the prosecution, and the military commissions judiciary are all entities of the Executive Branch. Without genuine separation of powers between these entities, there is no check on the worst tendencies of the modern national security state: intrusive surveillance, paranoia, excessive secrecy, over-classification of information, reluctance to declassify information, improper use of the classification system to mask embarrassing information or criminal behavior by government agents, and refusal to disclose information relevant and necessary to the defense. As we have seen throughout this Article, all of these aberrations are present in the detention operations and military commissions system at Guantanamo Bay.

There is no entity at Guantanamo Bay empowered with the power, ability, or inclination to stop Executive Branch misuse or abuse of classified information. Without an independent and impartial broker to referee the system, the prosecution has no motive to place justice above winning by probing questionable claims made by intelligence agencies or original classification authorities of the necessity either to withhold classified information or prevent its disclosure by the defense. Intelligence agencies have no reason to curtail active intelligence-gathering efforts against detainees and their defense teams. Original classification authorities have no incentive to declassify or permit the disclosure of information such as interrogation techniques, and the defense has no recourse.

To be sure, the military commissions are presided over by a highly trained and culturally independent military judiciary drawn from the court-martial system. These judges are as intelligent and competent as any other judges in the state or federal systems. They have honed their judicial skills in a court-martial system that shows extreme deference to the rights of criminal defendants, the demands of due process, and the spirit, if not entirely the letter, of the Bill of Rights. Their effectiveness in matters pertaining to classified information is, however, limited by three factors: (1) the MCA 2009's mandate to protect classified national security information from public disclosure; (2) the preeminent position of the original classification authority in deciding whether to disclose classified information; and (3) structurally inevitable disregard of—and even contempt for—the position and function of the military commissions trial judiciary shown by Executive Branch intelligence agencies.

This Article has already discussed the first two factors. They are both formidable obstacles to the disclosure and presentation of classified

national security information at trial. The military commission trial judge is in a far worse position than an Article III judge in overcoming these obstacles because the military commissions trial judiciary does not have the security of life tenure and protection from salary diminution enjoyed by the Article III judiciary.²⁴⁷ There is no constitutional or statutory impediment to the substitution or replacement of a military commissions judge at any time, or at any phase of trial.

The current chief judge of the military commissions, who has assigned himself to preside over three high-profile cases including the 9/11 co-conspirator case, is a military retiree who currently serves on a year-to-year renewable contract.²⁴⁸ He has denied a defense motion to recuse himself from the case, ruling that he is fully capable of independence and impartiality,²⁴⁹ but it seems difficult to imagine true independence for a judge serving on a one-year contract that is renewed at the good pleasure of the Department of Defense, an Executive Branch agency.

The lack of structural independence is significant in matters pertaining to classified national security information. As the Fourth Circuit observed in *El-Masri v. United States*, a claim of privilege regarding classified national security information creates a tremendous tension between the Executive and Judicial Branches: “This inquiry is a difficult one, for it pits the judiciary’s search for truth against the Executive’s duty to maintain the nation’s security.”²⁵⁰ In the seminal case of *United States v. Reynolds*, the Supreme Court also noted the tension between the Executive and Legislative Branches in matters of national security, commenting that “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”²⁵¹

Thus far in the pretrial motions hearings in the 9/11 co-conspiracy cases, the military commission judge appears to have in fact abdicated control over classified national security information to the prosecution and the original classification authorities,²⁵² at least on the issue of interrogation techniques used against the detainees. There is perfect alignment between the interests of the prosecution and the original classification authorities: the prosecution wants to win, and the classification authorities want very much to silence any sort of judicial inquiry into the interrogations. Both

247. See U.S. CONST. art. III, § 1.

248. Warren Richey, *Guantanamo Judge Refuses to Step Aside*, CHRISTIAN SCI. MONITOR (Jul. 27, 2012), available at <http://www.csmonitor.com/USA/2012/0717/Guantanamo-judge-refuses-to-step-aside>.

249. See *id.*

250. 479 F.3d 296, 304 (4th Cir. 2007).

251. 345 U.S. 1, at 9-10 (1953).

252. See *supra* Part IV.B (discussing the centrality of the interrogation evidence to the defense case and the protective order preventing the defense from discussing or disclosing it).

interests are served by the government's claim of privilege and the military commission judge's pretrial protective order.

On the one hand, the judge may well be applying a defensible interpretation of the government's claim of privilege in light of the MCA 2009 requirements to safeguard classified national security information. On the other hand, the situation presents a nearly unprecedented situation in a criminal trial: the claim of privilege prevents the defendants from disclosing *things they personally experienced* at the hands of Executive Branch agents, employees, and contractors in litigating the voluntariness and reliability of their statements. Furthermore, the claim of privilege prevents a searching inquiry into whether the interrogation techniques (individually or in combination with each other) constituted torture in violation of domestic and international law.

A judge with structural—constitutional—independence could more easily challenge the Executive Branch's assertions about the national security implications of the information by refusing to grant the protective order on the grounds that doing so would jeopardize the defense's ability to present a full and complete defense. This refusal, in turn, would incentivize the prosecution to question whether its own interests, particularly those related to its justice function, professional responsibility requirements, and discovery obligations, were truly in alignment with those of the Executive Branch intelligence agencies and original classification authorities. At the very least, a refusal to grant a protective order would trigger government interlocutory appeals that could be of invaluable assistance in obtaining authoritative guidance on these matters.²⁵³

Unlike the military commissions judiciary, a member of the Article III judiciary could make such rulings without concern about removal from the case, reassignment to less prestigious duty, a negative performance evaluation, or, as in the case of a retiree on a renewable annual contract, loss of a job and the income that goes with it.²⁵⁴ An Article III judge would be much less likely than an Article I judge to worry about the impact on the prosecution, the efficiency of government intelligence operations, or claims about the impact on national security.²⁵⁵ By ruling for the defendant and

253. See, e.g., MCA 2009, 10 U.S.C. § 949p-6(f)(3) (interlocutory appeal provision).

254. It may well be true that the chief judge of the military commissions trial judiciary in reality fears none of these things. Nonetheless, every one of them is a real consequence for a ruling that angers Executive Branch officials, and members of the military commissions judiciary have no structural protection from any of them.

255. An excellent example of this principle in action is the case of *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), in which the Fourth Circuit affirmed a district court's decision regarding the necessity for the defendant to obtain information from enemy combatants being held by U.S. forces outside the country. The government refused to comply with the district court's order to permit Moussaoui to depose the witnesses, citing national security considerations. The district court ordered sanctions from which the government appealed. Trying to balance Moussaoui's constitutional rights against the government's national security interests, the Fourth Circuit

against the government, an independent judge could force Executive Branch officials to make difficult decisions, rather than facile and virtually unchallenged claims, about the critical impact of disclosure on national security.

But the military commissions trial judiciary cannot really do any of these things. The statute might technically permit them to do so, but that is not their role, and all players on the military commissions stage know it. The military commissions judiciary does not have the power, and to this point has shown little inclination, to challenge Executive Branch intelligence agencies. In fact, available evidence in the public domain indicates that Executive Branch national security and intelligence agencies hold the military commissions process and the military commissions judiciary in a contempt that would be unimaginable in an Article III court.

This Article has already discussed allegations that Executive Branch intelligence agencies have used detention facilities, the military commissions courtroom, and supposedly secure attorney-client consultation areas to conduct electronic surveillance and other intelligence-gathering operations against detainees and their defense teams.²⁵⁶ One cannot conceive of similar activities being carried out or tolerated in Article III courtrooms or in detention facilities under the supervision of Article III judges.

The infamous “kill switch” incident is a telling symbol of the entire problem. As previously mentioned, the military commissions courtroom is a secure facility in which classified information can be freely discussed. A soundproof glass wall separates the courtroom from the observation gallery. Unclassified portions of hearings or trials are transmitted by a delayed audio feed from the courtroom to the observation gallery. In order to prevent the unauthorized public disclosure of classified information, the military judge and a court security officer have access to a “kill switch” that can cut the audio feed altogether. When the switch is activated, a red light goes on in the courtroom to alert participants that the audio feed has been cut.²⁵⁷

During a hearing in January 2013, the red light flashed and approximately three minutes of the hearing were cut off from the audio feed. The problem was that neither the military commissions judge nor the court security officer had activated the switch. This angered the judge, who

ordered the district court, government, and defense to craft adequate substitutes for the necessary testimony of the enemy combatant witnesses that would preserve Moussaoui’s right to a fair trial. *Id.* at 476-82.

256. *See supra* Part IV.A.

257. *See* Amy Davidson, *A Red Light at Guantanamo*, *NEW YORKER* (Jan. 30, 2013), available at <http://www.newyorker.com/online/blogs/comment/2013/01/secretcy-around-ksm-guantanamo-hearings.html>.

“called ‘a little meeting about who turns that light on or off’” and made it clear that, in his view, only he had the authority to order the courtroom closed.²⁵⁸ He also stated that there had been no necessity to activate the switch because no classified information was under discussion.²⁵⁹

The rest of the world learned for the first time that an external authority is monitoring the courtroom proceedings at Guantanamo Bay and has the authority to cut off outside observation of the proceedings. A prosecutor in the proceedings reminded the judge that the “OCA”—original classification authority—has the power to review the audio feeds from the courtroom to the observation gallery and outside world.²⁶⁰ Apparently, those authorities feel no compunction about interrupting a judicial proceeding and cutting it off without first consulting the military judge who is ostensibly in charge. Again, it is inconceivable that any Executive Branch agency or official would do something similar in an Article III courtroom.

The “kill switch” incident shows the contempt with which Executive Branch intelligence agencies and original classification authorities view the military commissions. These agencies are properly concerned with national security, but their actions indicate a basic unfamiliarity with the demands of due process and an unhealthy disregard for the position and authority of the military commissions judiciary. Without a structural separation of powers between them and the judiciary, their actions and decisions cannot be reviewed, reproached, or rebutted. Their caprice, rather than a proper judicial process, takes over the evidentiary aspects of classified national security evidence.

Thus, the MCA 2009’s thoughtful, comprehensive statutory scheme for handling classified information will ultimately matter very little. Executive Branch intelligence agencies have made a mockery of the military commissions process by exploiting it to conduct continuing intelligence operations against the detainees who will be tried by it. They have prevented a full and fair judicial inquiry into the interrogation methods their agents used to extract information from detainees by claiming that disclosure of the information would harm national security. And the absence of true separation of powers between the military commissions judiciary and Executive Branch intelligence agencies means that the MCA 2009 classified information procedures are, like the commissions themselves, likely dead on arrival.

258. See Carol Rosenberg, *Guantanamo Judge Says ‘External Body’ Was Wrong to Censor War Court*, MIAMI HERALD, Jan. 29, 2013, <http://www.miamiherald.com/2013/01/29/3206764/guantanamo-judge-says-external.html>.

259. *Id.*

260. *Id.*

V. CONCLUSION

In any criminal forum involving classified information, the tension between national security and justice creates difficult issues for prosecutors, defense attorneys, and judges. The CIPA-based system used in federal criminal courts and military courts-martial is based on an espionage paradigm, designed to prevent criminal defendants from disclosing classified information at trial to which they already had authorized access. This paradigm is inadequate in trying terrorism defendants who are located, apprehended, and brought to justice using the nation's military and national security assets; the danger is that these defendants and their supporters will become privy to classified national security information during trial that could endanger ongoing military or intelligence operations or jeopardize means and methods of obtaining intelligence.

The MCA 2009 was specifically designed for trials of terrorists and unprivileged belligerents. It builds on lessons learned from CIPA and courts-martial, and it uses the existing body of interpretive CIPA case law when not inconsistent with the MCA 2009's statutory terms. The classified information procedures of the MCA 2009 are superior to those used in federal courts under CIPA or courts-martial under the Military Rules of Evidence.

Despite being the "best of all possible worlds" on paper, the MCA 2009 classified information procedures are doomed to failure. There are several reasons these procedures will fail. First, Executive Branch agencies have co-opted the detention facilities and military commissions court complex to conduct continuing intelligence-gathering operations against detainees and their legal defense teams. This produces a constant flow of potentially discoverable information—much of it obtained in violation of existing norms for criminal prosecution and prosecutorial ethics—that overloads an already-stressed system. Second, original classification authorities refuse to disclose or declassify information pertaining to abusive interrogation techniques used on detainees. These interrogation techniques are central to the defense and, without them, some detainees face the very real possibility of being condemned to death based on evidence tainted by coercion and even torture. Third, the intelligence agencies, original classification authorities, prosecution, and military commissions judiciary are all entities of the Executive Branch. Without a true separation of powers between the judiciary and the other Executive Branch entities, there is no independent and impartial broker to properly incentivize the prosecution to put justice above winning, or to force Executive Branch agencies to disclose classified information or dismiss charges.

Furthermore, the continuing intelligence operations against detainees and external monitoring and control of audio feeds from the military commissions courtroom indicate that the Executive Branch agencies view the military commissions process with contempt and have little respect for the role of the military commissions judiciary.

Thus, the MCA 2009 classified evidence procedures are a semi-Panglossian solution to the problems posed by classified information at trial. On paper, they are superior to the classified evidence rules currently used in federal district courts and military courts-martial; they may well be the “best of all possible rules” for balancing the interests of justice and the demands of national security in the courtroom. But Guantanamo Bay is a harsh environment in which the rule of law is often overruled by the will of the Executive Branch’s intelligence and security organs. The classified evidence rules of the MCA 2009 stand no better a chance of survival at Guantanamo Bay than did Voltaire’s Anabaptist in the fatal depths of the Bay of Lisbon.²⁶¹

261. In *Candide* a violent storm overtakes the party’s ship in the Bay of Lisbon:

The sheets were rent, the masts broken, the vessel gaped. Work who would, no one heard, no one commanded. The Anabaptist being upon deck bore a hand; when a brutish sailor struck him roughly and laid him sprawling; but with the violence of the blow he himself tumbled head foremost overboard, and stuck upon a piece of the broken mast. Honest James ran to his assistance, hauled him up, and from the effort he made was precipitated into the sea in sight of the sailor, who left him to perish, without deigning to look at him. Candide drew near and saw his benefactor, who rose above the water one moment and was then swallowed up forever. He was just going to jump after him, but was prevented by the philosopher Pangloss, who demonstrated to him that the Bay of Lisbon had been made on purpose for the Anabaptist to be drowned. While he was proving this à priori, the ship foundered[.]

VOLTAIRE, *CANDIDE* 18-19 (Peter Gay ed., 1st ed. 1963).

