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Reconciling Classified Evidence and a Petitioner's Right to a "Meaningful Review" at Guantanamo Bay: A Legislative Solution

Cover Page Footnote

J.D. Candidate, 2010, Fordham University School of Law; B.A., 2005, Haverford College. Thank you to Professors Martha Rayner and Deborah Denno for their invaluable knowledge, energy, and guidance and to my family for being so tremendously supportive.

RECONCILING CLASSIFIED EVIDENCE AND A PETITIONER'S RIGHT TO A "MEANINGFUL REVIEW" AT GUANTÁNAMO BAY: A LEGISLATIVE SOLUTION

Sarah Lorr*

In Boumediene v. Bush, the U.S. Supreme Court determined that the detainees held at Guantánamo Bay have a constitutional right to a writ of habeas corpus and are entitled to a "meaningful review" of their habeas petitions. This Note attempts to reconcile the need for a "meaningful review" with the government's reliance on classified evidence that is completely inaccessible to the detainee-petitioners. After examining three other contexts in which the reliance on classified evidence has been sanctioned—federal criminal courts, immigration cases, and the ongoing military commissions at Guantánamo—this Note concludes that a "meaningful review" of the Guantánamo habeas petitions requires that the detainees be provided with regulated access to the evidence against them. Specifically, this Note recommends that the Classified Information Procedures Act (CIPA) or a CIPA-like statute be adapted to the habeas context so that detainees have, at a minimum, summaries of the key evidence against them.

INTRODUCTION

On January 22, 2009, in a dramatic break with the policies of former President George W. Bush,¹ President Barack Hussein Obama ordered the closure of the detention facilities at Guantánamo Bay, Cuba.² The executive order pledges complete closure within one year³ and creates an

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1. See Jess Bravin & Laura Meckler, *Obama Set to Undo Bush's Gitmo Policies*, WALL ST. J., Jan. 22, 2009, at A3; Scott Shane et al., *Obama Reverses Key Bush Policy, but Questions on Detainees Remain*, N.Y. TIMES, Jan. 23, 2009, at A16 (describing the executive orders as "revers[ing] the most disputed counterterrorism policies of the Bush administration").

2. Exec. Order No. 13,492, § 3, 74 Fed. Reg. 4897, 4898 (Jan. 27, 2009) ("The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order.").

3. *Id.*

interagency panel to review the “status” of detainees currently held.⁴ More generally, the order requires that “the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.”⁵ Although the speed with which the order was issued and its tone show that closing Guantánamo is a top priority for the new administration, the futures of the individual men who remain detained are far from clear.⁶ The ongoing habeas cases remain the principle method for those currently detained to challenge the legality of their detention.⁷

The first of the Guantánamo habeas cases concluded on November 20, 2008, when Judge Richard J. Leon of the U.S. District Court for the District of Columbia ordered the release of five detainees held at Guantánamo.⁸ One of those ordered released was Lakhdar Boumediene, the lead petitioner in the U.S. Supreme Court’s July 2008 decision, *Boumediene v. Bush*.⁹ In *Boumediene*, the Supreme Court held that prisoners in military detention have the right to “invoke the fundamental procedural protections of habeas corpus” and that their petitions must be given a “meaningful review.”¹⁰

4. *Id.* § 4(a). The Attorney General will lead the review while the Secretary of Defense, Secretary of Homeland Security, Director of National Intelligence, Chairman of the Joint Chiefs of Staff, and “other officers or . . . employees” of the United States will participate in the review as necessary. *Id.* § 4(b)(1)–(7). Additionally, the order pledges renewed diplomatic efforts aimed at securing the repatriation of those still held at Guantánamo. *Id.* § 2(d).

5. *Id.* § 2(b), 74 Fed. Reg. at 4897. The order articulated that it is “in the interests of the United States” for the Executive to begin a “prompt and thorough review” of the justification for continued detention of remaining detainees. *Id.* § 2(d), 74 Fed. Reg. at 4898.

6. The executive order contemplates that the review, following the collection and review of information about each detainee, will determine whether detainees can be transferred or prosecuted on a rolling basis. *Id.* § 4(c)(1)–(2), 74 Fed. Reg. at 4898–99. Additionally, the order leaves open the possibility that some men will neither be prosecuted or transferred. *Id.* § 4(c)(3), 74 Fed. Reg. at 4899. With respect to these men, the order directs only that “the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals.” *Id.* § 4(c)(4). The debate over this issue focuses both on the current detainees and the issue of detention of terrorists in general. *See, e.g.*, William Glaberson, *Post-Guantánamo: A New Detention Law?*, N.Y. TIMES, Dec. 15, 2008, at A13 (assessing the possibility of the adoption of a preventive detention law); Michael B. Mukasey, Op-Ed., *Al Qaeda Detainees and Congress’s Duty*, WALL ST. J., Nov. 21 2008, at A23; Michael Ratner & Jules Lobel, *Don’t Repackage Gitmo!*, NATION, Dec. 15, 2008, at 8 (arguing against the creation of a national security court or a preventive detention law); Jack Goldsmith & Benjamin Wittes, *Nuts and Deadbolts: A Blueprint for the Closure of Guantánamo Bay*, SLATE, Dec. 8, 2008, <http://www.slate.com/id/2206229/> (proposing the creation of a national security court).

7. The order itself recognizes the ongoing habeas cases brought by many of the men at Guantánamo. Exec. Order No. 13,492, § 2(c), 74 Fed. Reg. at 4897 (recognizing that the Guantánamo detainees “have the constitutional privilege of the writ of habeas corpus” and that “most” have filed petitions).

8. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008) (ordering the release of five petitioners and denying the writ for a sixth petitioner).

9. 128 S. Ct. 2229 (2008) (holding that foreign national detainees held at Guantánamo have a constitutional right to habeas corpus).

10. *Id.* at 2269, 2277.

The decision guaranteed detainees a legal means to challenge their detention and was heralded as an "immediate" legal solution for the men held at Guantánamo.¹¹ In reality, however, Boumediene is one of a very few petitioners who has been given a hearing.¹² The vast majority of petitions have been slowed by arguments over the required substance and procedures of these habeas hearings.¹³ Even for Boumediene, the solution was far from immediate: his long legal battle began in February of 2002, taking over six and a half years to reach the merits of the case.

As of December 31, 2008, the government had filed documents laying out the purported factual bases for detention in 190 of the pending cases at Guantánamo.¹⁴ While this represents significant progress in some respects, these documents have been either entirely classified or partially classified and partially protected.¹⁵ Where classified evidence is used, it cannot be

11. See Josh White & Del Quentin Wilber, *Detainees Now Have Access to Federal Court*, WASH. POST, June 13, 2008, at A4 (describing *Boumediene* as "immediately giv[ing] the detainees access to a federal court in Washington").

12. As of February 11, 2009, the U.S. District Court for the District of Columbia has heard ten petitions. Including the six petitioners in *Boumediene v. Bush*, the court has granted the writ in six cases and denied issuance in four cases. See *Al Bihani v. Obama*, No. 05-1312, slip op. (D.D.C. Jan. 28, 2009) (order denying writ of habeas corpus); *El Gharani v. Bush*, No. 05-429, 2009 WL 88056 (D.D.C. Jan. 14, 2009) (order granting writ of habeas corpus); *Al Alwi v. Bush*, No. 05-2223, 2008 WL 5412289 (D.D.C. Dec. 30, 2008) (order denying writ of habeas corpus); *Sliti v. Bush*, No. 05-429, slip op. (D.D.C. Dec. 30, 2008) (same).

13. Habeas cases are currently before Judges Thomas F. Hogan, Richard J. Leon, Emmet G. Sullivan, Colleen Kollar-Kotelly, John D. Bates, Reggie B. Walton, Richard W. Roberts, James Robertson, Ellen S. Huvelle, Ricardo M. Urbina, Paul L. Friedman, Royce C. Lamberth, and Henry H. Kennedy. Though cases before Judge Sullivan have also been successful in moving forward, they have not moved to completion. Judge Hogan was selected as coordinating judge to handle uniform procedural issues in the cases so that they could be "addressed as expeditiously as possible as required by the Supreme Court in *Boumediene v. Bush*." Resolution of the Executive Session (D.D.C. July 1, 2008), available at <http://www.dcd.uscourts.gov/public-docs/system/files/Guantanamo-Resolution070108.pdf>. Judges Leon and Sullivan declined to transfer their cases.

14. Respondents' Status Report Regarding the Filing of Factual Returns for December 2008 and Request for Exception from Sequencing, *In re Guantanamo Bay Detainee Litig.*, No. 08-442 (D.D.C. Dec. 31, 2008). This Note uses the term "the government" to refer to the Department of Justice generally. Where there are explicit policy variances between the current administration of Barack Hussein Obama and that of former President George W. Bush, the Note indicates this in the text.

15. Protected information is information that is not classified but is still sensitive and "not suitable for public filing" and also often cannot be shown to petitioners themselves. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 147 (D.D.C. 2008) (outlining procedures for access to classified protected information and procedures for counsel to access detainees). See generally Classified Information Procedures Act, 18 U.S.C. app. III § 3 (2006) (describing the purpose of protective orders). The Federal Rules of Criminal Procedure also provide for the use of protective orders. FED. R. CRIM. P. 16(d)(1) ("At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal."). In the case of the factual returns at Guantánamo, detainees have been allowed to view the protected portions.

accessed by the public or the petitioners themselves.¹⁶ The result is that, even for the ten petitions heard by the District Court for the District of Columbia, none of the petitioners have seen the classified factual returns or been present for the hearings.¹⁷

The significance of the habeas hearings goes beyond that of the rights of the men currently held at Guantánamo. As the Supreme Court articulated most recently in *Boumediene*, the writ is a “time-tested device . . . to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”¹⁸ The writ of habeas corpus is the only individual right included in the main body of the U.S. Constitution, independent of the Bill of Rights.¹⁹ Understanding how habeas corpus, as articulated in the Suspension Clause of the Constitution, is enforced, and the scope of its protection, is a precondition to assuring its continued enforcement and to preserving the liberty and personal freedom the writ was designed to protect. Arguably, the precise mechanics of the writ become especially important when protecting the rights of individuals imprisoned at the behest of the President and on the basis of evidence that has, outside of the habeas context, never been examined in court.

While there is much scholarship on the scope and mechanics of the writ in general, this Note will look specifically at how the use of classified evidence will impact district courts’ “meaningful review” of petitioners’ habeas claims. Part I.A gives a brief history of the government’s use of Guantánamo as a military prison in the wake of the attacks of September 11, 2001. Part I.B provides an overview of the history of the writ of habeas corpus. Part I.C reviews the Supreme Court’s jurisprudence borne of challenges to the government’s use of Guantánamo for indefinite military detention, including the *Boumediene* decision. Part I.D discusses the practical and legal challenges presented by the use of classified information as evidence against an individual. Part I.E looks at how the lower courts have handled the issue of classified evidence in the habeas hearings that have already gone forward. Part II examines three other contexts in which procedures for the use of classified information have been legislated: federal criminal courts, immigration cases, and the ongoing military commissions at Guantánamo. In light of this examination, Part III argues that a “meaningful review” of the Guantánamo habeas petitions requires

16. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 148–51 (outlining procedures for access to classified protected information and procedures for counsel to access detainees); see also Exec. Order No. 12,958, 3 C.F.R. 333, 334, pt. I, § 1.1(c) (1995), reprinted as amended in 50 U.S.C. § 435 note (2000) (“Classified National Security Information”) (defining classified information as “information . . . determined pursuant to this order . . . to require protection against unauthorized disclosure and . . . marked to indicate its classified status when in documentary form”).

17. See, e.g., *Sliti*, No. 05-429, slip op. at 1 (order denying petition for a writ of habeas corpus); *Al Alwi*, 2008 WL 5412289, at *4 (same).

18. *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)).

19. U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”).

that the detainees themselves be given regulated access to the classified information that is used as evidence against them. Specifically, this Note recommends that the Classified Information Procedures Act (CIPA) or a CIPA-like statute be adopted in the habeas context. Such a statute would allow for the uniform regulation of detainee access to the evidence against them, while still safeguarding sensitive national security information.

I. NATIONAL SECURITY, CLASSIFIED INFORMATION, AND THE SPECIAL CASE OF GUANTÁNAMO

Part I of this Note provides background on Guantánamo as a national security prison, as well as the legal and jurisprudential tensions that form a backdrop to this issue. In doing so, Part I aims to create a foundation for the analysis of the three frameworks for controlling access to classified information that are explored in Part II.

A. *A Brief History of Guantánamo as a National Security Prison*

The Bush administration began using Guantánamo Bay, Cuba, as the location for a military prison in January 2002.²⁰ From the outset, the purpose of moving prisoners to the facility at Guantánamo was to detain and interrogate individuals whom the Bush administration believed were a threat to the United States and to isolate them from the outer world.²¹ The captors sought to create an atmosphere of “debility, dependence, and dread” among prisoners.²² In spite of the fact that detainees began arriving as early as 2002, the military prohibited detainee access to counsel until 2004, following the Supreme Court decision of *Rasul v. Bush*, which guaranteed the men a right to habeas.²³ *Boumediene v. Bush* dealt with the claims of only six of the 248 men still detained at Guantánamo.²⁴ The current population totals less than one-third of the total number of men who have

20. Press Release, U.S. Dep’t of Def., Detainee Transfer Announced (Dec. 16, 2008), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=12394> (citing the current, approximate population of the prison).

21. JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 22 (2006).

22. *Id.* at 38–40 (describing the use of isolation, stress positions and other tactics to create this atmosphere).

23. See *Rasul v. Bush*, 542 U.S. 466 (2004); *infra* notes 50–54 (discussing the rights articulated in *Rasul*); see also MOAZZAM BEGG, *ENEMY COMBATANT: MY IMPRISONMENT AT GUANTÁNAMO, BAGRAM, AND KANDAHAR* 267–75 (2006) (describing his visit with Gita Gutierrez, the first habeas lawyer to visit Guantánamo).

24. On December 16, 2008, the Department of Defense announced the transfer of the three of these men to Bosnia and estimated that the prison is holding “approximately 250” detainees. Press Release, U.S. Dept. of Defense, *supra* note 20. At the time of this release, “approximately 60” other detainees had been determined “eligible for transfer or release” but remain detained. *Id.* For a comprehensive report on the number of detainees held at Guantánamo at various points, current through December 18, 2008, see BENJAMIN WITTES ET AL., BROOKINGS INST., *THE CURRENT DETAINEE POPULATION AT GUANTÁNAMO: AN EMPIRICAL STUDY* (2008).

passed through.²⁵ At its peak, the detention centers at Guantánamo held 779 men and juvenile males.²⁶

Under former President George W. Bush, the government asserted that the men were lawfully held, claiming broad authority to detain from the President's inherent authority in Article II of the U.S. Constitution.²⁷ To the extent that petitioners and courts did not accept unilateral presidential authority to detain, the government argued that Authorization for the Use of Military Force (AUMF) represents congressional authorization for the detainment.²⁸

B. *The Writ of Habeas Corpus*

The primary purpose of the writ of habeas corpus, called the Great Writ at common law, is to “test[] the legality of [the] cause” of commitment.²⁹ Indeed, as the Supreme Court recently described it, the writ is a “critical check on the Executive” and guarantees that individuals are only detained in accordance with the law.³⁰ Originally, the King of England used the writ of habeas corpus to review the jurisdiction of lower courts.³¹ A central court could compel the production of prisoners who had been arrested by the lower courts and challenge their detention.³² As the writ evolved, “all persons within the realm who [were] under the protection of the Crown” could take advantage of the writ and challenge their detention.³³ Literally

25. See WITTES ET AL., *supra* note 24, at 3; see also BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* (2005) (documenting the history of Guantánamo as the site of indefinite detention of Haitian refugees throughout the 1990s).

26. WITTES ET AL., *supra* note 24, at 6.

27. The government has filed several different documents arguing its authority to detain. Each contains a variation of these basic propositions. See, e.g., Respondents' Statement of Legal Justification for Detention at 3, *Gherebei v. Bush*, No. 04-1164 (D.D.C. Nov. 13, 2008); Government's Brief Regarding Preliminary and Procedural Framework Issues at 13, *Batarfi v. Bush*, No. 08-00864 (D.D.C. Aug. 12, 2008). In recent briefs from Barack Obama's Department of Justice, the government has shifted its argument to focus more on the Law of War, though still claiming authority to detain. See Respondents' Memorandum Regarding the Government's Detention Authority to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litig.*, No. 08-0442 (D.D.C. Mar. 13, 2009).

28. See, e.g., Respondents' Legal Justification for Detention at 3, *Gherebei*, No. 04-1164 (D.D.C. Nov. 13, 2008). The Authorization for the Use of Military Force (AUMF) authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” in the September 11 terrorist attacks. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C.A. § 1541 note (West 2008)).

29. R. J. SHARPE, *THE LAW OF HABEAS CORPUS* 5 (2d ed. 1989).

30. *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (citing *INS v. St. Cyr*, 553 U.S. 289, 301 (2001)).

31. See SHARPE, *supra* note 29, at 5; Benjamin J. Priester, *Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants*, 37 RUTGERS L.J. 39, 68–69 (2005).

32. See Priester *supra* note 31, at 6869 (describing the original mechanics of the writ).

33. Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2523 (1998) (quoting 11 HALSBURY'S LAW OF ENGLAND 25 (3d ed. 1955)).

meaning "bring the body forward," a prisoner's petition for the writ would lead to his production in court.³⁴ Historically the writ of habeas corpus has been used to challenge almost any kind of detention in an effort to counter the potential for wrongful detention and to guarantee liberty for those "under the protection of the crown."³⁵ This included executive detention in the absence of a charge or conviction.³⁶ In addition to its long history, the importance of the writ is further emphasized by its inclusion in Article I of the U.S. Constitution.³⁷

The precise scope and availability of the writ in a novel situation is traditionally determined by its historical use and purpose.³⁸ Habeas is recognized as a flexible remedy that can be adapted to nearly any form of detention.³⁹ Specifically, the Supreme Court has stated clearly that it is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose."⁴⁰

The rights safeguarded by the writ are fundamentally the same now as at the founding of our nation: freedom from unlawful detention and the government's unlawful exertion of power.⁴¹ Prior to the Guantánamo detentions, modern habeas corpus jurisprudence focused largely on federal court review of state criminal cases sought by prisoners postconviction.⁴²

34. See STEVEN T. WAX, *KAFKA COMES TO AMERICA: FIGHTING FOR JUSTICE IN THE WAR ON TERROR* 24 (2008) (giving a brief history of habeas corpus).

35. Hafetz, *supra* note 33, at 2523 (citing 11 HALSBURY'S LAW OF ENGLAND, *supra* note 33, at 25).

36. See *Brown v. Allen* 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2037 (2007) (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)); see also Hafetz, *supra* note 33, at 2520 (describing habeas at common law in "noncriminal confinement" cases as allowing challenges to jurisdiction, legal error, abuse of discretion, and factual findings).

37. See U.S. CONST., art. I, § 9, cl. 2 ("The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."); see also Hafetz, *supra* note 33, at 2515 (describing the historical evolution of the Suspension Clause); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555 (2002) (analyzing the Suspension Clause as it has evolved historically and how it has been challenged in recent years).

38. See, e.g., *St. Cyr*, 533 U.S. at 301 ("[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996))); Hafetz, *supra* note 33, at 2516 ("It is well established that the common law history of habeas corpus is integral to the Suspension Clause.").

39. *St. Cyr*, 533 U.S. at 302 (finding that, at common law, the writ of habeas allowed challenges to "[e]xecutive and private detention in civil cases as well as criminal" and covered challenges based on errors of law and the wrongful application of statutes whether or not based on constitutional error).

40. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (upholding the use of the writ to challenge parole restrictions that "significantly confine and restrain" freedom and therefore act to keep petitioner in "custody" within the meaning of the writ).

41. See Hafetz, *supra* note 33, at 2525 (citing WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 40-48 (1980)) (describing executive detention as "implicat[ing] the core function" of the writ).

42. See, e.g., *Felker v. Turpin*, 518 U.S. 651 (1996); *Swain v. Pressley*, 430 U.S. 372 (1977); see also Fallon & Meltzer, *supra* note 36, at 2037 ("American lawyers who came of

The Guantánamo petitioners, however, seek to rely on the writ of habeas corpus for its most traditional purpose: challenging executive detention.

The Guantánamo detainees bring their petitions under the codification of the common-law writ at 28 U.S.C. § 2241.⁴³ The petitions allege that the detainees are “in custody in violation of the Constitution or laws or treaties of the United States.”⁴⁴ Under the statute, after the writ is filed, and if the court has jurisdiction, the government must produce a “return” stating the factual and legal basis for the detention of the petitioner.⁴⁵ In recognition of the great injustice done to a petitioner wrongfully imprisoned, the statute contemplates a speedy process: the respondent shall issue their return within three days of the claim.⁴⁶ If the application for the return reveals any issues that cannot be resolved as a matter of law, the court must then set a date for a hearing.⁴⁷ The petitioner is given an opportunity to respond to, or traverse, these allegations.⁴⁸ Again contemplating a rapid legal response, the statute requires that the court should “summarily hear and determine the facts, and dispose of the matter as law and justice require.”⁴⁹ For reasons explored below, however, the rapid process envisioned by Congress in the habeas statute has taken years to be triggered in the Guantánamo cases.

C. *Battle of the Branches: Supreme Court Rulings and Executive and Congressional Response*

Part I.C of this Note explains the novel and complicated legal history of the Guantánamo detainees and their right to habeas corpus. Beginning with the first of the habeas petitions to come out of Guantánamo, *Rasul v. Bush*, Part I.C looks at each Supreme Court decision and any executive, congressional, or military response that followed until the July 2008 decision of *Boumediene v. Bush* guaranteed the constitutional right of habeas corpus.

1. *Rasul*: Extending Habeas to Guantánamo Detainees

The habeas petition brought on behalf of Safiq Rasul, a noncitizen detainee captured in Afghanistan, was the first in the line of Supreme Court cases addressing the scope of detainees’ legal right to challenge their detention in U.S. courts. In *Rasul v. Bush*, the Supreme Court established

age since World War II may associate the writ with federal court relitigation of constitutional issues raised by prisoners convicted in state courts.”); Priester, *supra* note 31, at 69 (describing contemporary habeas corpus law as “concerned almost exclusively with challenges to incarceration pursuant to a judgment issued by a duly constituted court for conviction for a criminal offense”).

43. 28 U.S.C. § 2241 (2000).

44. *Id.* § 2241(c)(3).

45. *Id.* § 2243 (“The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.”).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

that federal district courts have jurisdiction over habeas corpus proceedings brought by Guantánamo detainees.⁵⁰ The Court was explicit that this jurisdiction would allow district courts to hear suits brought under the federal habeas statute, § 2241.⁵¹ While recognizing that habeas had evolved since 1789, the Court explained that, "at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."⁵² The Court found that Guantánamo's location outside of the United States was irrelevant because Guantánamo is under the "complete jurisdiction and control" of the United States.⁵³ Further, because the federal habeas statute "draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship."⁵⁴

Nine days after the Supreme Court decided *Rasul*, then-Deputy Director of Defense Paul Wolfowitz announced the creation of Combatant Status Review Tribunals (CSRTs).⁵⁵ The stated purpose of the tribunals was to determine whether the individual detained at Guantánamo was, as accused, an enemy combatant,⁵⁶ and to provide him with an opportunity to challenge his status.⁵⁷ On December 30, 2005, Congress passed the Detainee

50. *Rasul v. Bush*, 542 U.S. 466, 467–68 (2004) (holding that "the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing" who are held at Guantánamo).

51. *Id.* at 481 ("Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.").

52. *Id.* at 474 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

53. *Id.* at 480–81 (quoting *Lease of Lands for Coaling and Naval Stations, U.S.-Cuba*, Feb. 23, 1903, T.S. No. 418) (internal quotation marks omitted) (describing the "express terms" of Cuba's lease of Guantánamo to the United States as allowing complete jurisdiction and control over the land, at the discretion of the United States).

54. *Id.* at 501 (finding no evidence of congressional intent to distinguish between citizens and noncitizens in the habeas statute and that there is federal court jurisdiction to hear the claim of a citizen held at Guantánamo).

55. See Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Gordon R. England, Sec'y of the Navy (July 7, 2004) [hereinafter DoD Memo], available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; see also BEGG, *supra* note 23, at 277 (describing the Combatant Status Review Tribunal (CSRT) experience from the perspective of a detainee).

56. Each judge at the district court level has handled the definition of "enemy combatant" independently. After briefing by counsel, Judge Leon in the *Boumediene* case adopted the definition of enemy combatant as any "individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008) (order defining enemy combatant). In the CSRT proceedings, an enemy combatant is anyone "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." DoD Memo, *supra* note 55, at 1.

57. See DoD Memo, *supra* note 55, at 1 ("[A]ll detainees shall be notified of the opportunity to contest designation as an enemy combatant in the proceeding described herein . . ."). The CSRT process assigns each detainee a "personal representative" who represents the detainee in front of "three neutral commissioned officers of the U.S. Armed

Treatment Act (DTA), stripping federal courts of habeas jurisdiction over the men at Guantánamo and creating a very narrow form of appellate review for the CSRTs and military commissions.⁵⁸ In practice, the CSRT process has been widely criticized.⁵⁹

2. *Hamdi*: Defining the Terms of Habeas for Enemy Combatants Held Within the United States

While *Rasul* dealt with a detainee's right to challenge his detention, *Hamdi v. Rumsfeld*⁶⁰ focused on the process by which such a challenge should be heard and the substantive standards that govern the government's ability to detain.⁶¹ Yaser Esam Hamdi, a U.S. citizen held in military detention, sought to challenge his imprisonment under the habeas corpus

Forces." *Id.* Detainees are provided with unclassified versions of the basis for their detention. *Id.* at 2. They are not shown any classified evidence. *Id.* They are given the opportunity to call "reasonably available" witnesses and to question witnesses called by the tribunal. *Id.* The memorandum clearly states that it does not "create any right or benefit." *Id.* at 4.

58. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2739 (codified as amended at 10 U.S.C. § 801 note (2006) ("Matters Relating to Detainees")). The Detainee Treatment Act (DTA) established a narrow form of appellate review to take place solely in the U.S. Court of Appeals for the D.C. Circuit. *Id.* at 2742. DTA cases allow review of enemy combatant status based on two narrowly defined questions: (1) Did the military comply with CSRT procedures and is the status determination supported by a preponderance of evidence? (2) To the extent the Constitution and laws of the United States apply, were the procedures and standards of the CSRT applied in a manner consistent with the Constitution? *Id.* The Justice Department has argued that by authorizing habeas petitions, *Boumediene* effectively undid the power of federal courts to hear DTA appeals. See Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/primer-on-boumedienes-week-of-reckoning/> (Nov. 19, 2008, 14:42 EST) (calling *Bismullah et al. v. Gates* a "showdown over the fate of the DTA system"). See generally Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369, 406 (2008) (summarizing recent developments in DTA cases); Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257, 264 (2006) ("The U.S. Court of Appeals for the District of Columbia Circuit has exclusive, but limited, jurisdiction to hear appeals to review the final decisions of the Combatant Status Review Tribunals and final decisions of the Military Commissions.").

59. See, e.g., *In re Guantánamo Detainee Cases*, 355 F. Supp 2d. 443, 468 (D.D.C. 2005) (holding that the CSRTs violate due process); MARGULIES, *supra* note 21, at 159-70 (listing and describing the due process problems inherent in CSRT procedure); Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN. ST. L. REV. 967, 1020-32 (2005) (listing and discussing in detail the reasons for high risk of error in the CSRT process). As Benjamin Wittes described, "[t]he CSRT . . . hearings are not judicial proceedings. Government allegations lack the specificity, detail, and supporting evidence typical of criminal trials. Allegations are often vague and key terms . . . go undefined." WITTES ET AL., *supra* note 24, at 6. Further pointing to the weakness of such hearings, several CSRTs found that detainees were not enemy combatants, only to be reconvened and find the opposite. *Id.* at 6-7.

60. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

61. *Id.* at 510-11 (comparing the government position that Hamdi was an "enemy combatant" with his father's claim that he was in Afghanistan doing "relief work" and that his detention violates at least his Fifth and Fourteenth Amendment rights).

statute, § 2241.⁶² The government argued Hamdi's status, determined by the Executive, should be reviewed only for legal sufficiency and that there should be no review of the specific facts alleged by the government to justify detention.⁶³ The Court rejected this view and called for a fact-focused review that allowed for an assessment of the individual petitioners' case.⁶⁴ In theory, at least, this promised a more searching level of review.

While the government argued that the Court should only review the basis for detention on a "some evidence" standard,⁶⁵ Hamdi argued that individuals held by the Executive are due "recourse to some proceeding before a neutral tribunal to determine . . . the . . . justifications for that detention have basis in fact and warrant in law" and urged process at the level of a traditional criminal trial.⁶⁶ After balancing national security concerns and the petitioner's due process rights, the Court determined that "neither the process proposed by the Government nor" the criminal trial-type proceedings endorsed by the district court "strikes the proper constitutional balance."⁶⁷ The Court relied on the hallmark, three-part *Mathews v. Eldridge*⁶⁸ test to reach this conclusion.⁶⁹ The *Mathews* test, as it will be called throughout this Note, weighs (1) the interest of the individual, (2) the risk that this interest will be erroneously deprived by the procedure in question, and (3) the government's interest at stake in the procedure.⁷⁰ The Court held that a citizen-detainee is due fair "notice of the factual basis" for his detention and "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."⁷¹ Addressing national security concerns, the Court held that, "aside from these core elements, enemy-combatant proceedings may be tailored to

62. *See id.* at 511 (explaining that Hamdi's petition was brought under § 2241 by his father as his "next friend").

63. *See id.* at 527 (rejecting the argument that "further factual exploration is unwarranted and inappropriate" because of separation of powers concerns and the limited role of the court in areas of military concern).

64. *See id.* (characterizing the impact of a strictly legal inquiry as "eliminat[ing] entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme").

65. Under a "some evidence standard," courts focus "exclusively on the factual basis supplied by the Executive to support its own determination." Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 455-457 (1985). There is no "weighing of the evidence" and instead, the Court is called upon to assess only whether there is any information in the record to support the Executive's conclusion. *Id.*

66. *Hamdi*, 542 U.S. at 528 (describing petitioner's argument that without a hearing and an opportunity to present counterevidence he would not receive meaningful judicial review).

67. *Id.* at 532.

68. 424 U.S. 319, 335 (1976).

69. *Hamdi*, 542 U.S. at 534 (citing *Mathews*, 424 U.S. at 335).

70. *Mathews*, 424 U.S. at 335. As measured by the *Mathews v. Eldridge* test, an evaluation of the risk of erroneous deprivation of an individual's right includes the "probable value, if any, of additional or substitute procedural safeguards." *Id.* The government's interest includes "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

71. *Hamdi*, 542 U.S. at 533 (holding that a citizen-detainee in military custody has a statutory right to habeas corpus).

alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”⁷² Though *Hamdi* applies to U.S. citizens, rather than aliens, the decision is significant as the only decision interpreting § 2241 as it should be applied to detainees suspected of terrorism held in military custody.

The decision is also significant because of its reliance on *INS v. St. Cyr*, a case explicitly finding that constitutional habeas rights extend to aliens seeking review of an administrative order of removal and, further, that not allowing full and robust habeas review in this context would be a violation of the Suspension Clause.⁷³ Thus, *St. Cyr* clarified that the constitutional guarantee of habeas applies to noncitizens.⁷⁴

3. *Hamdan*: Articulating Minimum Standards for Military Commissions

Shortly after September 11, 2001, former President George W. Bush signed a military order authorizing the convening of military tribunals to try alleged terrorists.⁷⁵ On the basis of this order, the U.S. Department of Defense then published Military Commission Order Number One, a set of regulations governing the military commissions.⁷⁶ Military proceedings were initiated against Salim Ahmed Hamdan under this military order, but before a trial could commence, the framework for these commissions was

72. *Id.* at 533–34 (suggesting that hearsay and a burden-shifting scheme that rests on a presumption, with a “fair opportunity for rebuttal” in favor of the government’s evidence, might be acceptable alterations to traditional standards). The Court intimated that “[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.” *Id.* at 538. In addition, the Court held that affidavits by government personnel would be accepted as long as there was an opportunity for detainees to present their own evidence in rebuttal. *Id.*

73. *Id.* at 525 (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (holding that the denial of habeas corpus review of an alien’s administrative removal order would be a violation of the Suspension Clause)).

74. *See St. Cyr*, 533 U.S. at 314 (finding that the absence of (1) an alternative forum to review the issues of law presented in *St. Cyr*’s case and (2) proof of Congress’s clear intention to preclude habeas review of the legal question, “strongly counsels against adopting a construction that would raise serious constitutional questions”).

75. *See* Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 3 C.F.R. 918 (2002).

76. *See* U.S. Dep’t of Def., Military Commission Order No. 1 (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>. The legal and ethical standards promulgated in the first military commission order, while not an issue here, have been strongly criticized. The National Association of Criminal Defense Lawyers issued an ethical opinion advising against civilian lawyer participation in the tribunals. *See* Nat’l Ass’n of Crim. Def. Lawyers Ethics Advisory Comm., Op. 03-04 (2003); *see also* Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT’L SECURITY L. & POL’Y 375, 375 (2005) (arguing that National Association of Criminal Defense Lawyers’ refusal to endorse participation in the military commissions was the “wise and preferred” route); David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 MIL. L. REV. 40 (2002); Neal K. Katayl & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE. L.J. 1259 (2002). For scholarship supporting the commissions, see Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249 (2002).

invalidated by the Supreme Court in *Hamdan v. Rumsfeld*.⁷⁷ The *Hamdan* Court also ruled that the DTA, enacted after *Rasul* to strip the district courts of jurisdiction to hear detainee habeas claims, could not be applied retroactively to habeas cases initiated prior to the passage of the DTA.⁷⁸

In direct response, Congress again attempted to divest federal district courts of their ability to hear detainee habeas claims, this time through the enactment of the Military Commissions Act of 2006 (MCA).⁷⁹ In addition to providing new standards for the military commissions, the MCA suspended the writ of habeas corpus for alien detainees by creating another addendum to § 2241.⁸⁰ It was this provision that the Supreme Court found invalid in *Boumediene*.⁸¹

4. *Boumediene*: Guaranteeing Habeas for Guantánamo Detainees and Requiring a "Meaningful Review"

Boumediene found the MCA's addendum to § 2241 to be an unlawful suspension of the writ of habeas corpus.⁸² In striking this provision, the Court reiterated its earlier holding in *Rasul* that the Guantánamo detainees are due "the fundamental procedural protections of habeas corpus."⁸³ The *Boumediene* Court rested its finding on the constitutional provision prohibiting suspension.⁸⁴ The Court explained that the "habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."⁸⁵ While the Court did

77. In *Hamdan v. Rumsfeld*, the Court found that the commissions and procedures authorized by the executive in Military Order No. 1 were not properly constituted under the Uniform Code of Military Justice (UCMJ) and not authorized by Congress. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2791 (2006) ("[W]e conclude that the 'practicability' determination the President has made is insufficient to justify variances from the procedures governing courts-martial [as required by the UCMJ]."); see also 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, 471-78 (2007) (discussing the *Hamdan* holding and its ramifications for further litigation).

78. *Hamdan*, 126 S. Ct. at 2764-69 (assessing and rejecting the government's argument that the DTA acted to strip federal-court jurisdiction over habeas cases filed before its passage).

79. See Military Commissions Act, 10 U.S.C. §§ 948a-950w (2006); see also Boeving, *supra* note 77, at 471-78.

80. See 28 U.S.C.A. § 2241(e)(1) (West 2006), *invalidated by Boumediene v. Bush*, 128 S. Ct. 2229 (2008) ("[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."). Section 2241(e) also stripped all courts of any jurisdiction to hear cases against "the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who was or is detained by the United States." *Id.* The validity of this section is currently being contested.

81. See *infra* Part I.C.4 (discussing *Boumediene*).

82. *Boumediene*, 128 S. Ct. at 2240.

83. *Id.* at 2277.

84. *Id.*

85. *Id.* at 2269.

not specify the procedural protections due to the detainees, the Court did reiterate that habeas is an “adaptable” remedy, the precise scope and nature of which “change depending upon the circumstances.”⁸⁶

The Court concluded that the level of review due in a habeas petition is related to the level of procedural safeguards already conferred upon the detainee at the point of his challenge.⁸⁷ The Court looked at the “sum total of procedural protections afforded to the detainee at all stages, direct and collateral.”⁸⁸ The Court concluded that where individuals seeking review have been given no, or only the most superficial, review, habeas must allow for a more searching review.⁸⁹ Specifically, the Supreme Court found that the court conducting habeas must have “some authority to assess the sufficiency of the Government’s evidence against the detainee”⁹⁰ and to “consider relevant exculpatory evidence that was not introduced during the earlier proceeding.”⁹¹

Looking at the CSRT and appeals process established by the DTA,⁹² the Court determined four specific ways in which the procedures therein were flawed and prevented the CSRT from being an adequate substitute for habeas corpus.⁹³ All four problems show a concern for the petitioner’s ability to rebut the factual basis of his detention:⁹⁴ (1) the petitioner’s limited ability to present evidence at the CSRT, (2) the petitioner’s lack of counsel, (3) the petitioner’s lack of knowledge of the most critical allegations against him, and (4) the use of hearsay and the petitioner’s inability to confront witnesses against him.⁹⁵ Because of the inadequacy of the underlying CSRT procedure, the Court found that detainees have a “constitutionally required” right to supplement the record of review.⁹⁶

The Court identified other aspects of the CSRT process that prevent it from being an adequate habeas substitute. For example, the Court found that the CSRTs were “closed and accusatorial,”⁹⁷ and “lack[ing] . . .

86. *Id.* at 2267.

87. *Id.* at 2268 (“The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context.” (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))).

88. *Id.* at 2269.

89. *Id.* (“Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.”).

90. *Id.* at 2270.

91. *Id.*

92. For a brief background on the DTA, see *supra* note 58 and accompanying text.

93. *Boumediene*, 128 S. Ct. at 2274 (describing the CSRTs as an “inadequate” substitute for habeas corpus review).

94. *See id.* at 2269 (identifying “constraints upon the detainee’s ability to rebut the factual basis for the Government’s assertion” as the “most relevant” concerns about the validity of the CSRT for the purposes of assessing the adequacy of the CSRT as a habeas substitute).

95. *See id.* (listing problems with the CSRT process and calling the right to confront witnesses in CSRTs “more theoretical than real”).

96. *Id.* at 2270 (recognizing that because the CSRT process was not an adversarial one, detainees cannot be held responsible for the information, or lack thereof, on the record).

97. *Id.* (quoting *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008)).

necessary adversarial character."⁹⁸ The CSRTs did not give petitioners notice of the "most critical allegations that the Government relied upon"⁹⁹ in justifying their detention and did not provide detainees with a "means to find or present evidence to challenge the Government's case."¹⁰⁰ The Court also noted that detainees were allowed access only to the unclassified evidence held by the government.¹⁰¹

Alongside these criticisms of the CSRT process, the Court recognized the government's legitimate interest in "protecting sources and methods of intelligence gathering" through the use of classified information.¹⁰² The Court was careful to note that the judge reviewing the petition must be mindful of "the dangers the detention in these cases was intended to prevent."¹⁰³ Indeed, the Court suggested that lower courts consider accommodations that would be made to "reduce the burden" that habeas hearings would inherently place on the military.¹⁰⁴ Moderating this point slightly, the Court was careful to point out that any such accommodations should not "impermissibly dilut[e] the protections of the writ."¹⁰⁵

D. *Balancing Individual Rights and National Security: The Challenge of Classified Evidence*

Classified information is defined by the government as information that "require[s] protection against unauthorized disclosure."¹⁰⁶ Classified information is designated as such unilaterally by the Executive and other branches of the government.¹⁰⁷ Authority to classify information comes through an authorization in writing from the President, agency heads, or other individuals designated by the President to classify information.¹⁰⁸ Information can be classified into three categories: confidential, secret, or top-secret.¹⁰⁹ Once categorized, classified information can only be

98. *Id.* at 2273.

99. *Id.* at 2269.

100. *Id.*

101. *Id.*

102. *Id.* at 2276.

103. *Id.*

104. *Id.*

105. *Id.*

106. Exec. Order No. 12,958, 3 C.F.R. 333, 334, pt. I, § 1.1(c) (1995), *reprinted as amended in* 50 U.S.C. § 435 note (2000) ("Classified National Security Information"); *see also* Classified Information Procedures Act, 18 U.S.C. app. III § 1 (2006) (defining classified information as "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 disclosure for reasons of national security").

107. *See* CIA v. Sims, 471 U.S. 159, 180 (1985) (explaining that courts themselves may not order declassification and disclosure of classified national security information); United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984) ("[T]he Government . . . may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it.").

108. 3 C.F.R. at 335, pt. I, § 1.1(g).

109. *Id.* at 335-36, pt. I, § 1.3(a)(1)-(3).

accessed by individuals who are deemed eligible for access and are found to have a “need to know” the information.¹¹⁰

The executive order allowing classification contains very specific limits on the kind of information that can be classified and the length of time that information can be classified.¹¹¹ While the specificity of the rules surrounding classification seems to suggest a tightly controlled classification process, the overclassification of documents is a widely recognized problem.¹¹² The number of classified documents grows regularly, and in 2005, classification had reached the rate of 125 documents a minute.¹¹³

In a habeas case, the petitioner is necessarily unable to access any classified information relied on by the government. The resulting impact on the petitioner’s ability to defend himself is visible in the now-infamous dialogue that took place at the CSRT of Bosnian-Algerian detainee Mustafa Ait Idir:¹¹⁴

Idir was asked to respond to a charge that he had “associated with a known Al Qaida operative” while living in Bosnia. “Give me his name,” Idir said.

Tribunal President: I do not know.

Idir: How can I respond to this?

110. See *id.*; see also *id.* at 347, pt. IV, § 4.1(c) (defining a “need-to-know” as “requir[ing] access to specific classified information in order to perform or assist in a lawful and authorized governmental function”).

111. See *id.* at 337, pt. I, § 1.5(a)–(g) (listing categories of information that are open to classification, including military plans, weapons systems, foreign government information, intelligence activities, and others); *id.* at 337, § 1.6(a)–(b) (directing that a specific date or event for declassification should be selected at the time of classification, and that where a specific date cannot be set, the document should be marked for declassification in ten years). *But see id.* § 1.6(c) (stating that an original classifying authority can extend the duration of classification for successive periods, not to exceed more than ten years at a time).

112. See, e.g., SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CTR. FOR JUSTICE, *THE SECRECY PROBLEM IN TERRORISM TRIALS* 5, 32–34 (2005) (discussing the problem of over-classification); Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 312–13 (1986) (describing the classification system as having a “well-documented” problem with unnecessary overclassification); Ellen C. Yaroshesky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 203, 224 n.97 (2006) (“It is widely recognized that ‘the Federal Government exhibits a proclivity for over-classification of information.’” (quoting *Ray v. Turner*, 587 F.2d 1187, 1209 (D.C. Cir. 1978) (Wright, J., concurring))).

113. Yaroshesky, *supra* note 112, at 224 & n.98 (citing Editorial, *The Dangerous Comfort of Secrecy*, N.Y. TIMES, July 12, 2005, at A20) (presenting evidence that since 2001, the Executive has doubled the number of documents that are classified to fifteen million a year while simultaneously expanding upon the number of governmental offices empowered to classify them).

114. Ait Idir was one of the five men recently ordered to be released by the District Court in Washington, D.C., in the *Boumediene* habeas decisions. See *Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008).

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

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

Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.¹¹⁵

Later in the same sitting, Idir explained further:

You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. . . . What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.¹¹⁶

As exhibited here, it is very difficult to confront secret information. Based in part on this concern, American courts have prohibited the use of classified information by the government in adversarial contexts in all but the most extreme cases.¹¹⁷ As the Supreme Court has recognized, it is a basic tenet of our jurisprudence "that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."¹¹⁸ In the criminal context, it is a "firmly held main rule" that a court will not decide the merits of a case based on submissions made outside of the presence of defense counsel and the defendant.¹¹⁹ At the same time, the courts have long recognized the need for the government to

115. MARGULIES, *supra* note 21, at 163.

116. *Id.* at 164.

117. See *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) ("It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions."); *id.* at 1060 ("It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment."); *United States v. Libby*, 429 F. Supp. 2d 18, 21 (D.D.C. 2006) ("[C]ourts routinely express their disfavor with ex parte proceedings and permit such proceedings only in the rarest of circumstances.").

118. *Greene v. McElroy*, 360 U.S. 474, 496 (1959) (finding that the Department of Defense was not empowered to use confidential information to deprive an individual of his job without explicit authorization from either the President or Congress because of the lack of opportunities for confrontation and cross-examination afforded to the individual).

119. *Abourezk*, 785 F.2d at 1061 (describing the exceptions to the main rule as "both few and tightly contained").

safeguard information that, if released, might cause harm to the national security.¹²⁰

The Supreme Court has recognized that the level of procedural protections extended to an individual directly relates to his ability to fairly and directly challenge the case against him.¹²¹ This is particularly true when dealing with evidence that possesses an exculpatory value and can be gained through confrontation but that cannot be gained through another reasonably available method.¹²² Indeed, in the criminal context, “state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials,” but such rules cannot be either “‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’”¹²³ An evidentiary exclusion becomes “arbitrary” or “disproportionate” where it “infringe[s] upon a weighty interest of the accused,” for example the right of the defendant to testify.¹²⁴ Such an interest is arguably implicated when a defendant’s lawyer cannot discuss evidence with the accused and, as a result, the defendant cannot directly address the evidence against him.¹²⁵

More generally, classified information presents problems of accuracy and truth. Like all information acquired by investigations and interviews,

120. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008) (“[T]he Government has a legitimate interest in protecting sources and methods of intelligence gathering . . .”); *CIA v. Sims*, 471 U.S. 159, 175 (1985) (“The Government has a compelling interest in protecting . . . the secrecy of information important to our national security . . .” (quoting *Snapp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam))).

121. See *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (citations omitted) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984))).

122. *Trombetta*, 467 U.S. at 489 (finding no constitutional deprivation where defendant was denied evidence that was reasonably available by means other than confrontation and was not exculpatory); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (noting that the right to cross-examine or call a witness “is implicit in the constitutional right of confrontation, and helps assure the ‘accuracy of the truth-determining process’” (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970))).

123. *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)).

124. *Id.*; see also *Rock*, 483 U.S. at 55 (discussing the inability of the court to arbitrarily deny a witness the opportunity to testify or to arbitrarily exclude relevant pieces of testimony); *Chambers*, 410 U.S. at 302 (holding that the exclusion of evidence “critical” to the defendant, coupled with the court’s refusal to allow cross-examination of a key witness, was a denial of due process); *Washington v. Texas*, 388 U.S. 14, 23 (1967) (deciding that an accused has the right to present his own witnesses to establish a defense and that arbitrary denial of this right violates the compulsory process clause).

125. See, e.g., Brief of the National Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, Writ of Certiorari to the 4th Circuit, *United States v. Moussaoui*, No. 06-4494 (4th Cir. Feb. 22, 2008) [hereinafter NACDL Brief] (arguing that Classified Information Procedures Act (CIPA) procedures depriving defendant of his ability to see evidence against him is a denial of his rights under the Fifth and Sixth Amendments); Yaroshesky, *supra* note 112, at 232 (arguing that the pervasive use of CIPA procedures is “eroding fundamental Fifth and Sixth Amendment rights”).

classified information may be flawed or simply false.¹²⁶ The risk of false reporting within the intelligence community was especially high in the months and years following the attacks of September 11, 2001.¹²⁷ There was intense pressure on intelligence agencies to gather useable information but new intelligence networks were not yet in place.¹²⁸ Where petitioners are denied the opportunity to see information alleged against them, they are "stripp[ed] . . . of the ability to probe weaknesses in the Government's evidence."¹²⁹ The process of classification thus threatens to turn a trial or hearing into "an empty ritual drained of the adversarial features that are its very reason for being."¹³⁰

In addition, the use of classified information that is only available for view by the attorney can cause immense stress to the attorney-client relationship.¹³¹ The judicial system of the United States has long recognized that whether and to what extent a lawyer is able to communicate with his client influences the lawyer's ability to craft a strong defense and to engage forcefully in the adversarial system.¹³² The concerns reflected in this recognition are particularly relevant in the context of the detainee

126. See Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23, 28 (1996) ("[T]he risk of error is greater, maybe even much greater, when a person is denied access to the full raw evidence against him, leaving him incapable of testing the integrity of that evidence by cross-examination and rebuttal."); see also Petitioners' Public Traverse to the Government's Return to the Petition for Habeas Corpus at 5, *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008) (No. 04-1166) (citing Declaration of Arthur Brown at 5, *Boumediene*, 579 F. Supp. 2d 191 (No. 04-1166) [hereinafter Brown Declaration] (describing raw intelligence reports relied on by the government as "at best a basis for further inquiry")) (noting that the government has recently acknowledged the unreliability of previously classified evidence).

127. See Brown Declaration, *supra* note 126, at 4 (describing the intelligence system as "flooded with unreliable reports" following September 11, 2001, and citing examples through 2005).

128. See *id.* at 3 ("[T]he failure to provide some quality control to the raw data reported in intelligence reports was always a concern The failure in quality control was most acute with respect to raw data that had any relation (however remote) to possible terrorist activities."); *id.* at 5 (estimating the existence of "tens of thousands—if not hundreds of thousands" of intelligence reports of "little to no credibility").

129. TURNER & SCHULHOFER, *supra* note 112, at 6.

130. *Id.* (discussing the impact of classified documents in federal criminal cases); see Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1979 (2005) ("The use of secret evidence thus 'creates a one-sided process by which the protections of our adversarial system are rendered impotent.'" (quoting *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999))).

131. See David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1994 (2008) ("Not only does the protective order create enormous and obvious practical difficulties in preparing a legal case, it also precludes the lawyers from communicating information that might allow them to establish trust." (citing Martha Rayner, *Roadblocks to Effective Representation of Uncharged, Indefinitely Imprisoned Clients at Guantánamo Bay Military Base*, 30 FORDHAM INT'L L.J. 485, 489–90 (2007))).

132. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel." (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970))); *Chandler v. Fretag*, 348 U.S. 3, 10 (1954) ("[A] defendant must be given a reasonable opportunity to . . . consult with counsel; otherwise, the right to be heard by counsel would be of little worth.").

litigation where there so many external factors influencing the attorney-client relationship. For example, language barriers,¹³³ cultural differences,¹³⁴ the scarcity of attorney-client interaction due to the high administrative and financial costs of visiting Guantánamo,¹³⁵ and the general and pervasive lack of trust in the U.S. government and judicial system,¹³⁶ of which lawyers are seen as representatives,¹³⁷ are all stresses on the attorney-client relationship. Prohibitions on detainee access to information thus challenge trust and strain what is, in many cases, an already weakened attorney-client relationship.¹³⁸

The government and its supporters argue that tight rules regulating use of, and access to, classified information are predicates to protecting the very system in which the U.S. judiciary operates and, indeed, the safety of the nation.¹³⁹ Principally, the government has a strong interest in protecting the identification of its intelligence agents and sources.¹⁴⁰ This interest is based both in a pragmatic desire to maintain undercover channels of information and a need to protect the life and health of agents.¹⁴¹ The government is

133. See generally Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007) (assessing and discussing the difficulties encountered when attorney and client speak different languages). The vast majority of detainees on Guantánamo speak little or no English and require a translator to work with their American, English-speaking lawyers. See Luban, *supra* note 131, at 1992 (discussing the difficulty and slowness imposed by the language difference).

134. See BEGG, *supra* note 23, at 270 (describing the concerns of a female attorney visiting with a detainee); *id.* at 331 (describing the discomfort with Western, secular law felt by some Islamic detainees).

135. See Luban, *supra* note 131, at 1989 (discussing the scarcity of seats on the plane, the high cost of travel, the need to pay for and find interpreters, and other barriers to visiting clients).

136. See *id.* at 1983 n.7 (quoting CLIVE STAFFORD SMITH, EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO BAY 192 (2007) (describing his experience with meeting with clients at Guantánamo)); see also BEGG, *supra* note 23, at 274 ("The stringent military rules made it impossible for anyone to function in any normal client-lawyer terms.").

137. See BEGG, *supra* note 23, at 268–70 (describing anxiety before his first visit with a habeas attorney).

138. See generally Luban, *supra* note 131, at 1992–98 (discussing the various obstacles to the attorney-client relationship at Guantánamo).

139. Stuart Taylor Jr., *The Case for a National Security Court*, NAT'L J., Feb. 24, 2007, at 15 (arguing that terrorism-based "military detentions and trials should be very tightly constrained by congressionally specified rules and done by experts," and that the prosecution of terrorists in criminal courts leads to dangerous disclosures of classified information that cripple intelligence gathering).

140. See Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 321 (2008); see also D. Mark Jackson, *Exposing Secret Evidence: Eliminating a New Hardship of United States Immigration Policy*, 19 BUFF. PUB. INT. L.J. 25, 52 (2001) (describing the government interest as "more concerned with the source of the information rather than with the information itself").

141. See *International Terrorism: Threats and Responses: Hearing on H.R. 896 Before the H. Comm. on the Judiciary*, 104th Cong. 21 (1995) (statement of William O. Studeman, Acting Director, Central Intelligence Agency) ("We must protect those who would provide us with vital information and protect methods critical to us, if we are to continue to keep Americans out of harm's way."); see also Ramji-Nogales, *supra* note 140, at 322 (describing

also rightly concerned about jeopardizing intelligence-based relationships with other nations.¹⁴² As William O. Studeman, acting Director of Intelligence in 1995, explained, "Foreign governments simply will not confide in us if we cannot keep their secrets."¹⁴³ For similar reasons, the government has a legitimate interest in maintaining the "appearance of confidentiality" as well.¹⁴⁴

Where classified evidence is used in a trial, tight control of that information lowers the risk of the accused being exposed to the information and enabling its misuse.¹⁴⁵ If classified information is exposed to an individual during the course of a hearing, there is the potential that the individual will be acquitted, or released in the case of the habeas petitioners, and then be able to distribute the information to other potential terrorists.¹⁴⁶

E. *Judicial Progress Post-Boumediene*

Judge Richard J. Leon of the Washington, D.C. District Court was the first to rule on procedural issues in the Guantánamo cases and, subsequently, the first judge to rule on the merits of a habeas petition brought by a detainee.¹⁴⁷ On November 20, 2008, after a weeklong hearing, Judge Leon issued the first decision in a habeas case and determined that the evidence against five of the six petitioners, "a classified document from an unnamed source," was not enough to justify their detention.¹⁴⁸ Explaining his decision that reliance on this document could not justify further detention of the petitioners, he declared that to "rest [continued detention] on so *thin* a reed would be inconsistent with this Court's obligation . . . to protect petitioners from the risk of erroneous

a government interest in preventing the disclosure of intelligence sources to guard against retaliation to officers, agents, and their families).

142. See *Secret Evidence in the War on Terror*, *supra* note 130, at 1980 (describing how the release of classified evidence to an individual without clearance may undermine relationships with foreign intelligence agencies on whom we rely for evidence).

143. *International Terrorism: Threats and Responses: Hearing on H.R. 896 Before the H. Comm. on the Judiciary*, 104th Cong. 21 (1995) (statement of William O. Studeman, Acting Director, Central Intelligence Agency).

144. See Note, *supra* note 130, at 1980; see also *CIA v. Sims*, 471 U.S. 159, 175 (1985) ("The Government has a compelling interest in protecting both the secrecy of information . . . and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam))).

145. See *Boeing*, *supra* note 77, at 511 (listing risks of accused terrorists being exposed to classified information during a trial and the benefits of preventing disclosure).

146. See *id.* (noting that the risk presented by such a situation is much greater in the context of an ongoing conflict with an unknown end).

147. William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 21, 2008, at A1 (describing Judge Leon's decision to release five of the six men involved in the *Boumediene* petition for habeas corpus).

148. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197 (D.D.C. 2008) (order granting writ as to five petitioners and denying writ as to one, explaining that the court could not "adequately evaluate the credibility and reliability" of the sole, classified source relied upon by the government to justify the detention of the men).

detention.”¹⁴⁹ As an example of the problems with the evidence, Judge Leon explained that he had no way to evaluate the circumstances in which it was obtained.¹⁵⁰ With respect to the sixth petitioner, Belkacem Bensayah, the court found that the government had presented “credible and reliable evidence” showing that Bensayah planned to take up arms against the United States and facilitated the travel plans of “unnamed others” to do the same.¹⁵¹ Because of the classified and closed nature of the proceedings, Judge Leon could not make specific comments about his reasons for evaluating the government’s evidence as he did.¹⁵²

Notably, Judge Leon’s order establishing the procedures for the hearing does not specifically address the treatment of classified information outside of a brief statement that “petitioners are prohibited by law from listening to the classified portions of the hearing.”¹⁵³ Judge Leon required the government to provide unclassified versions of the factual return for the petitioners but has made no other determinations in advance of hearings.¹⁵⁴

The public version of the amended factual returns providing the government’s justification for detention in the habeas case *Boumediene v. Bush* was heavily redacted.¹⁵⁵ The returns took the form of a fifty-three-page narrative report with 134 exhibits.¹⁵⁶ Of the fifty-three pages, approximately forty-eight were entirely redacted and almost all of the remaining pages were partially blacked out.¹⁵⁷ These unclassified versions were the only evidence that Boumediene and the other petitioners saw. Aside from two brief public sessions for opening and closing statements, the petitioners were excluded from the entirety of their habeas hearing.¹⁵⁸

Since Boumediene’s hearing, Judge Leon has ruled on the merits of three other habeas petitions, using the same set of guiding principles. In two of these cases, he found the detention of petitioners to be lawful.¹⁵⁹ In Mohammed el-Gharani’s hearing, the most recent of the three, the court found that the government relied solely on statements by two detainees, the

149. *Id.* at 197 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004)).

150. *Id.*

151. *Id.* at 198.

152. *Id.* at 197 (“Unfortunately, due to the classified nature of the Government’s evidence, I cannot be more specific about the deficiencies of the Government’s case at this time.”).

153. *Boumediene v. Bush*, No. 04-1166, at 3 (D.D.C. Oct. 27, 2008) (order governing procedures).

154. *See id.*

155. *See* Amended Factual Return for Petitioners, *Boumediene*, 579 F. Supp. 2d 191 (No. 04-1166) [hereinafter *Boumediene Amended Return*].

156. *See* Petitioners’ Motion to Compel Signature of Unsigned “Narrative For Petitioners” or, in the Alternative, to Strike the Unsigned Narrative and Exhibits at 2, *Boumediene*, 579 F. Supp. 2d 191 (No. 04-1166) (describing the redactions to the factual return).

157. *See* *Boumediene Amended Return*, *supra* note 155.

158. *Boumediene*, 579 F. Supp. 2d at 193 (explaining that after the opening statements the court convened six days of “closed door sessions” to review classified evidence).

159. *See* *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008) (order denying petitioner’s petition for a writ of habeas); *Al Alwi v. Bush*, 593 F. Supp. 2d 24 (D.D.C. 2008) (same).

reliability of which they did not prove and which Judge Leon could not ascertain.¹⁶⁰ On this basis, Judge Leon granted the writ.¹⁶¹

On December 16, 2008, after much litigation, Judge Thomas F. Hogan issued a procedural order in the consolidated cases.¹⁶² Like Judge Leon's order, the December 16 order requires the government to provide petitioners with an unclassified version of the factual return.¹⁶³ Significantly, the order for the consolidated cases addresses standards for the production of classified information. If compliance with exculpatory or discovery obligations requires disclosing classified information, petitioner's cleared counsel is due a copy of any such information.¹⁶⁴ Notably, there is no requirement that an unclassified version be prepared for the petitioner, and the order contemplates that there may be circumstances where the government may object to the disclosure of classified information, even to cleared counsel.¹⁶⁵ Since Judge Hogan's issuance of this order, the judges assigned to oversee the resolution and merits of individual cases have begun making independent decisions as to case management, adopting and rejecting different parts of Hogan's order and making substantially different rulings on exculpatory information and discovery.¹⁶⁶

160. *El Gharani v. Bush*, No. 05-429, 2009 WL 88056, at *4 (D.D.C. Jan. 14, 2009) (citing "internal inconsistencies" in the witness accounts and granting petitioner's writ).

161. *Id.* at *3.

162. *See In re Guantanamo Bay Detainee Litig.*, No. 08-0442, 2008 WL 5245890 (D.D.C. Dec. 16, 2008) (order amending procedures). This order is a significantly amended version of an earlier order issued on November 6, 2008. Judge Hogan amended the order following a motion to clarify and reconsider by the government. *See id.* (explaining the reasons for the amendments).

163. *See id.* at *1.

164. *See id.* at *2.

165. *See id.* ("If the government objects to providing the petitioner's counsel with the classified information, the government shall move for an exception to disclosure.")

166. *See, e.g., Al Ansi v. Bush*, No. 08-1923, 2008 WL 5412373, at *1 (D.D.C. Dec 29, 2008) (order by Judge Gladys Kessler adopting some changes reflected in Judge Hogan's amended order but otherwise reverting to the his original order); *Hamlily v. Bush*, No. 05-0763, at 1 (D.D.C. Dec. 22, 2008) (order by Judge John D. Bates stating that further changes to the consolidated case management order would have no bearing on cases before him). There has also been substantial variation in the area of discovery, with some judges requiring broader inquiry on behalf of the government and others limiting the government's obligation to what is "reasonably available" or what has been reviewed in preparation of the factual return or hearing. *Compare Zemiri v. Obama*, No. 05-2046 (D.D.C. Feb. 9, 2009) (defining exculpatory information as evidence "that tends to materially undermine" evidence relied on by the Government, and specifically "including evidence that undercuts the reliability and/or credibility of the Government's evidence" and "that indicates a statement is unreliable because it is the product of abuse, torture, or mental, or physical incapacity"), *with Al-Ghizzawi v. Obama*, No. 05-2378 (D.D.C. Dec. 22, 2008) (defining exculpatory evidence as "all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government[s] justification for detaining the petitioner"), *and Boumediene v. Bush*, No. 04-1166 (D.D.C. Aug. 27, 2008) (requiring the government to produce "any evidence contained in the material reviewed in developing the return for the petitioner, and in preparation for the hearing for the petitioner, that tends materially to undermine the Government's theory as to the lawfulness of the petitioner's detention").

On March 6, 2009, the U.S. Court of Appeals for the District of Columbia Circuit issued a ruling outlining and clarifying procedures to be used in evaluating counsel access to classified information.¹⁶⁷ In addition to providing badly needed direction in this otherwise murky area, the decision provides great support to Part III of this Note, which advocates for the adoption of CIPA in the habeas context.¹⁶⁸ The decision, *Al Odah v. Bush*, reviewed a 2005 district court discovery order granting detainee counsel access to classified information that had been redacted from even the classified factual returns.¹⁶⁹ The government's timely appeal of the order was held in abeyance pending *Boumediene* and resulted in this Court of Appeals decision.¹⁷⁰ *Al Odah's* unique procedural posture makes it directly applicable to only a small handful of cases, but, nonetheless, the case "may give lawyers for Guantanamo Bay detainees expanded opportunities to challenge the government's reasons for keeping them confined."¹⁷¹ Indeed, the Court of Appeals clarified that, as in the criminal context, the district court can order disclosure of classified information to detainee counsel if the court "determine[s] that the information is both relevant *and material*—in the sense that it is at least helpful to the petitioner's habeas case."¹⁷² Additionally, the court of appeals clarified that the decision to order access to petitioner's counsel hinges on the court's conclusion that such access "is necessary to facilitate meaningful review" per the mandate of *Boumediene*.¹⁷³ The court of appeals found that "it is the court's responsibility to make the materiality determination itself"¹⁷⁴ but that, if a court determines that the presence of petitioner's counsel would aid in making a decision about materiality, "nothing bars [the court] (assuming no other privilege is at issue) from compelling the government to

167. *Al Odah v. United States*, 05-5117, 2009 WL 564310 (D.C. Cir. Mar. 6, 2009).

168. See *infra* Part III (arguing, in light of the three legal areas explored and the unique issues involved in the Guantánamo habeas cases, for the adoption of CIPA or a CIPA-like statute in the habeas context).

169. *Al Odah*, 2009 WL 564310, at *3 (describing the district court's determination that counsel with security clearance is entitled to see evidence that is related to the merits of the case). The specific order was issued before *Boumediene* and before the issuance of Judge Hogan's case management order, but both parties conceded that the new order would not impact the finality of the appeal. *Id.* at *2.

170. *Id.* at *1.

171. Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/new-lift-for-detainee-challenges> (Mar. 9, 2009, 11:06 AM) (describing the ruling as "spell[ing] out new rules on when the prisoners' lawyers get to see secret information in government files"); cf. *id.* ("It is unclear just how far the new ruling will go to cases that are now going forward in District Court But, Friday's ruling does speak more generally about the duties of the judge . . . on resolving disputes over access to data withheld from detainees' lawyers . . .").

172. *Al Odah*, 2009 WL 564310, at *4.

173. *Id.*

174. *Id.* at *5 (finding that a "naked declaration" by the government that the information sought does not contain exculpatory information is insufficient basis for a court to determine redacted statements are not material).

produce an unclassified substitution that will enable counsel to assist the court.”¹⁷⁵

Using CIPA by “analogy,” the court ruled that the alternatives to disclosure available to the government under CIPA¹⁷⁶ should also be available in the habeas context and that, though a finding of materiality is required for the disclosure of classified information, it is “not a prerequisite to ordering disclosure of an unclassified substitution.”¹⁷⁷ In the habeas context, the court of appeals ruled, an alternative to disclosure is valid as long as the alternatives “would suffice to provide the detainee with ‘a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law.’”¹⁷⁸

Though the habeas cases on Guantánamo are unique, the problem of classified information is not. Congress has provided legislation on the procedures governing the use of classified information in judicial proceedings including federal criminal proceedings, alien removal proceedings where an alien is believed to be a national security threat, and, most recently, the MCA.¹⁷⁹ This legislation and case law is reviewed below, assessing the successes and challenges of balancing individual rights and the protection of national security information in each context.

II. FINDING A BALANCE: JUDICIALLY AND CONGRESSIONALLY ENDORSED SOLUTIONS TO THE CHALLENGE OF CLASSIFIED INFORMATION

Part II.A of this Note focuses on the use of classified evidence in federal criminal trials. CIPA guides federal courts in all criminal cases where such evidence is relied upon by either side. Part II.B of this Note turns to the use of classified evidence in the immigration context. The use of classified information in immigration cases is controlled by a combination of statute, federal regulation, and case law, depending on the specific legal issue involved. Finally, Part II.C of this Note focuses on the use of classified evidence in the military commissions at Guantánamo Bay. Each section within Part II begins by providing background about the regulations and policies that exist in each context, provides a description of the procedures that govern access to the particular information, and concludes with a critique of the policies and regulations in each context.

175. *Id.* at *7.

176. *See infra* Part II.B (outlining the various alternatives to disclosure under CIPA, including summaries or substitutions).

177. *Al Odah*, 2009 WL 564310, at *7.

178. *Id.* (quoting *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008)).

179. *See infra* Part II.C (providing details on the Military Commissions Act).

A. CIPA and Federal Criminal Courts

1. The History of CIPA

Understanding the strengths and weaknesses of CIPA as a procedural mechanism depends first upon understanding the original purpose of the Act. CIPA governs the use of classified evidence in federal criminal trials and was enacted in the 1980s to bring cold war espionage suspects to trial.¹⁸⁰ CIPA was intended to allow the government to evaluate individual cases and ““make an informed decision in determining whether or not the benefits of prosecution . . . outweigh the harm stemming from public disclosure of such [classified] information.””¹⁸¹ Rather than creating new discovery or evidentiary standards, CIPA was intended to ““clarify’ a court’s existing ‘powers under Federal Rule of Criminal Procedure 16(d)(1)’ to protect classified information.””¹⁸² Congress intended CIPA to be a flexible procedure that provided structure and standards for the use of classified evidence without “ossify[ing]” courts and judges with overly restrictive procedure.¹⁸³ More recently, CIPA has been used successfully to prosecute and convict terrorists as well as those charged with material support for terrorism or other related crimes.¹⁸⁴ Though terrorism cases often present very different challenges than traditional espionage trials,¹⁸⁵ and often lead to the inability of defendants to view the evidence against

180. Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. III (2006)). Richard Zabel and James Benjamin provide a comprehensive description of the purposes of CIPA, both as originally envisioned and in more contemporary situations. See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 82 (2008). The original purpose of CIPA was to combat “graymailing” by a defendant charged with a national-security-related crime but who has access to classified documents and threatens to release these documents as part of his defense. *Id.*; see also Timothy J. Shea, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials*, 27 AM. CRIM. L. REV. 657, 662 (1990); Tamanaha, *supra* note 112, at 277–303 (providing a comprehensive legislative history and review of CIPA).

181. Shea, *supra* note 180, at 662 & n.23 (quoting 126 CONG. REC. 26,503 (1980) (statement of Rep. Romano Mazzoli, House floor manager of the bill)).

182. *United States v. Mejia*, 448 F.3d 436, 455 (D.C. Cir. 2006) (quoting S. REP. NO. 96-823, at 6 (1980)) (conducting relevance review of classified evidence under CIPA); see also FED. R. CRIM. P. 16(d)(1).

183. ZABEL & BENJAMIN, *supra* note 180, at 85 (noting congressional interest in judicial creativity to reach fair solutions in cases involving classified evidence).

184. See, e.g., *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989) (using CIPA in a federal criminal case); *United States v. Marzook*, 435 F. Supp. 2d 708, 749 (N.D. Ill. 2006) (upholding the constitutionality of CIPA in a material support of terrorism case involving Hamas); *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004); *United States v. Bin Laden*, No. 98-1023 (S.D.N.Y. May 29, 2001); see also ZABEL & BENJAMIN, *supra* note 180, at 26–27 (presenting sentencing data from terrorism prosecutions in criminal court); *id.* at 31–60 (listing existing criminal statutes that can be used to prosecute terrorists and collecting cases that exemplify the successful application of these statutes).

185. See *supra* note 180.

them, CIPA has repeatedly been upheld as adequately protecting defendants' Fifth and Sixth Amendment rights.¹⁸⁶

2. CIPA-Mandated Procedures

Having provided a brief historical context, Part II.A.2 explains the procedural mandates of CIPA. To begin, either party may move for a pretrial conference to "consider matters relating to classified information" that could come up during the case.¹⁸⁷ The court can also move for such a conference *sua sponte*.¹⁸⁸ During this conference, the government may make a motion for a protective order.¹⁸⁹ Where a protective order has been entered and the defense counsel obtains a security clearance, he can share classified information with a defendant only by "showing that the defendant's personal input is necessary in order to evaluate a particular item of information adequately."¹⁹⁰

When a defendant intends to introduce classified information pretrial or during trial, he must provide thirty days' notice and a brief description of the information.¹⁹¹ If the defendant later learns of additional classified information he seeks to use, he must alert the government as soon as possible.¹⁹² The government is then given reasonable time to seek a hearing to determine the use, relevance, or admissibility of the information.¹⁹³ If the Attorney General certifies that a public proceeding would result in disclosure of national security information, this hearing "shall be held *in camera*."¹⁹⁴ Where the government intends to hold such a hearing, the government must give notice to the defendant and, if the

186. *See, e.g.*, *United States v. Moussaoui*, No.01-455-A, 2002 WL 1987964, at *1 (E.D. Va. Aug. 23, 2002) ("We further conclude that [his] Fifth and Sixth Amendment rights are adequately protected by standby counsel's review of the classified discovery and their participation in any proceedings held pursuant to [CIPA], even though the defendant will be excluded from these proceedings."); *United States v. Bin Laden*, No. 98-1023, 2001 U.S. Dist. LEXIS 719 (S.D.N.Y. Jan. 25, 2001) (assessing numerous constitutional challenges to CIPA and upholding the validity of the Act).

187. Classified Information Procedures Act, 18 U.S.C. app. III § 2 (2006).

188. *Id.*

189. *Id.*

190. TURNER & SCHULHOFER, *supra* note 112, at 28. At the time of writing, Serrin Turner and Stephen Schulhofer had not identified a single case in which defense counsel had successfully demonstrated a need to show classified evidence to which they had access to the defendant. *Id.*

191. 18 U.S.C. app. III § 5 (specifying that the defendant must give notice on his intention to use classified information within thirty days unless another time is specified by the court).

192. *Id.* (requiring that defendants also include a brief description of the classified information).

193. *Id.* (giving the government reasonable time to seek a determination pursuant to CIPA § 6); *id.* § 6 (providing that the government may request a hearing for determinations of relevance, use, or admissibility determinations).

194. *Id.* § 6(a).

defendant already has access to the information, specify the exact information that it seeks to exclude.¹⁹⁵

Where classified information is implicated in discovery, CIPA was not intended to change the government's discovery obligations under the rules of evidence.¹⁹⁶ CIPA "contemplates an application of the general law of discovery . . . with limitations imposed based on the sensitive nature of the classified information."¹⁹⁷ Rule 16 of the Federal Rules of Criminal Procedure remains the relevant governing law and entitles a defendant to "any relevant written or recorded statements made by the defendant."¹⁹⁸ In practice, however, courts have imposed the "limitations" contemplated by CIPA by applying a heightened standard of relevance and some have also conducted a balancing test.¹⁹⁹

Where the government seeks to deny disclosure of a document because of its classified nature, courts first assess whether or not the document sought is relevant and whether or not it is "material," or "helpful to the defense of an accused."²⁰⁰ Some courts have also queried whether access to the information is "essential to a fair determination of a cause."²⁰¹ Courts employing a balancing test then go on to weigh the potential national security risks attending disclosure against the defendant's need to access the documents.²⁰² Whether or not information is ultimately disclosed depends upon "the 'particular circumstances of each case, taking

195. *Id.* § 6(b)(1) (clarifying that when the defendant has not previously had access to the information, "the information may be described by generic category" in a form approved by the court).

196. *See* *United States v. Mejia*, 448 F.3d 436, 455 (D.C. Cir. 2006) (endorsing defendant's argument that CIPA is a procedural statute that does not create a privilege against discovery of classified information); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) ("Congress intended CIPA to clarify the court's power to restrict discovery of classified information." (citing *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988))); *United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989) ("[CIPA] creates no new rights of or limits on discovery of a specific area of classified information.").

197. *Yunis*, 867 F.2d at 621.

198. *Id.* (quoting FED. R. CRIM. P. 16(a)(1)(A)).

199. *See* *Yaroshefsky*, *supra* note 112, at 211 n.32 ("[C]ircuit courts differ as to whether a balancing test is applicable."); *see, e.g., Yunis*, 867 F.2d at 625 (neither adopting nor rejecting a balancing test); *Sarkissian*, 841 F.2d at 965 (adopting a balancing test); *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985) (same).

200. *Shea*, *supra* note 180, at 692; *see also Yunis*, 867 F.2d at 622 (explaining that the requirement that information sought be "helpful to the accused" is derived from the informant's privilege "which permits the government to withhold disclosure of an informant's identity or the contents of the communication which would endanger the secrecy of that information" (citing *Roviaro v. United States*, 353 U.S. 53 (1957))).

201. *Smith*, 780 F.2d at 1107-10 (quoting *Roviaro*, 353 U.S. at 60-61) (applying the *Roviaro* standard to a case where a defendant sought access to classified information).

202. *See Yunis*, 867 F.2d at 625 (describing the balancing test as weighing the defendant's interest in disclosure against the government's need to keep the information secret); *BENJAMIN & ZABEL*, *supra* note 180, at 82 (describing the balancing test as "balanc[ing] relevance with national security interests to decide whether information is discoverable" (citing *Yunis*, 867 F.2d at 623)).

into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."²⁰³

Even when a court determines that a document must be available to a defendant under the Federal Rules of Criminal Procedure, the government may not have to turn over the document. For example, even where defendants show relevance, inculpatory or otherwise significant information that the government does not intend to rely upon need not be turned over to defense.²⁰⁴ Additionally, section four of CIPA authorizes the government to produce various substitutes for the classified evidence "upon a sufficient showing."²⁰⁵ This showing may be made *ex parte*.²⁰⁶ If *ex parte*, the entire request must be sealed and preserved in the records of the court in case of appeal.²⁰⁷

Valid substitutes under CIPA include redacted versions of the documents, a summary of the information included in the documents, or a substitute statement that admits "relevant facts that the classified information would tend to prove."²⁰⁸ Substitutions must be fair to the defendant and provide him with "substantially the same ability to make his defense" as he would have through actual access to the documents.²⁰⁹ In applying this standard, "courts have generally allowed substitutions so long as they do not "omit information directly relevant to the defense."²¹⁰ If the court denies a proposed substitution, the Attorney General may submit a formal objection to the disclosure of the information.²¹¹ This standard is

203. *Smith*, 780 F.2d at 1107 (quoting *Roviaro*, 353 U.S. at 62).

204. *See* *United States v. Rahman*, 870 F. Supp. 47, 52 (S.D.N.Y. 1994) ("[I]nculpatory [classified discovery] material which the government does not intend to offer at trial need not be disclosed. Such information cannot conceivably help a defendant, and therefore is both unnecessary and useless to him.").

205. Classified Information Procedures Act, 18 U.S.C. app. III § 4 (2006); *see also* *United States v. Libby*, 429 F. Supp. 2d 18, 23 (D.D.C. 2006) ("Section four only applies after the threshold question of materiality is made in favor of disclosure or the government agrees to disclosure without making a materiality challenge.").

206. 18 U.S.C. app. III § 4 (allowing for the submission of a "written statement to be inspected by the court alone"); *see also* *United States v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006) (finding that section 4 of CIPA does not require defense counsel participation and should only be used for discovery determinations); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (finding that an *ex parte*, in camera hearing with a government lawyer was an appropriate proceeding by which to determine relevancy under section 4 of CIPA); *United States v. Pringle*, 751 F.2d 419, 427 (1st Cir. 1984) (upholding *ex parte*, in camera review of documents to review for national security implications because sections three and four of CIPA were intended to limit discovery of classified documents).

207. 18 U.S.C. app. III § 4 (providing for the preservations of *ex parte*, section 4 requests to be made available to the appellate court in case of an appeal).

208. *Id.*

209. *Id.* § 6(c)(1); *see also* TURNER & SCHULHOFER, *supra* note 112, at 20 (calling this a "critical" safeguard and noting the need for "[c]areful judicial scrutiny" to maintain this standard and prevent government abuse of the ability to substitute).

210. TURNER & SCHULHOFER, *supra* note 112, at 21 (citing *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985)); *see* *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989); *United States v. Collins*, 603 F. Supp. 301, 304 (S.D. Fla. 1985).

211. *See* 18 U.S.C. app. III § 6(e) (allowing the Attorney General to submit an affidavit objecting to disclosure of specific information the defendant seeks to use at trial).

officially articulated in section six of CIPA as applying to trials, but courts have assumed that Congress intended the same standard to apply to substitutions approved for discovery.²¹² In the event of an adverse ruling on the discovery or admissibility of any classified information, either side may bring an immediate, interlocutory appeal.²¹³

Typically, after making a relevance determination, a judge will determine the adequacy of a proposed substitution *ex parte*.²¹⁴ In the case of *United States v. Moussaoui*,²¹⁵ the U.S. Court of Appeals for the Fourth Circuit clarified that CIPA also authorized a more collaborative approach to determining the adequacy of a substitution. While noting that CIPA allows the government to move for an order allowing substitutions of classified evidence *ex parte*, the court found that “nothing in CIPA expressly or implicitly precludes the involvement of defense counsel or the district court” in assessing the adequacy of a substitution.²¹⁶

Harnessing the flexibility of CIPA, courts have recently held the substitution provisions of CIPA to apply to a defendant’s access to witnesses, in addition to documents.²¹⁷ For example, in the *Moussaoui* case, defense counsel sought access to witnesses held at Guantánamo Bay, but the government insisted that such access would interfere with national security.²¹⁸ The Fourth Circuit developed a plan whereby, in lieu of direct examination, the government would provide redacted summaries of secret evidence containing the information defense counsel sought to obtain from protected witnesses.²¹⁹ As envisioned by the Fourth Circuit, the defense

212. See TURNER & SCHULHOFER, *supra* note 112, at 21 (noting that though the substitution methods available to the Government are the same, requests for substitutions at trial, unlike those made during discovery, cannot be made *ex parte*).

213. 18 U.S.C. app. III § 7(b) (“An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals.”); see also TURNER & SCHULHOFER, *supra* note 112, at 23 (describing section 7 as “entitling either party to an immediate appeal from adverse rulings regarding classified information”).

214. See BENJAMIN & ZABEL, *supra* note 180, at 88 (describing the resulting exclusion of the defense attorney as an aspect of CIPA often attacked by critics but noting that it is no different from discovery and exculpatory determinations in criminal proceedings).

215. 382 F.3d 453 (4th Cir. 2004) (evaluating alleged terrorist’s right to access classified information).

216. *Id.* at 480 n.36.

217. See, e.g., *Moussaoui*, 382 F.3d at 471 n.20 (using CIPA as “a useful framework” in a criminal terrorism prosecution where the defendant sought to depose witnesses of high intelligence value held at Guantánamo Bay); *United States v. Marzook*, 435 F. Supp. 2d 708, 745–46 (N.D. Ill. 2006) (citing *United States v. Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998)) (explaining that CIPA applies to testimony and documents, and therefore interpreting section 4 to allow the hearing of testimony *ex parte* and *in camera*). CIPA itself also makes provisions for taking testimony midtrial. See 18 U.S.C. app. III § 8(c) (“During the examination of a witness . . . the [Government] may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.”).

218. *Moussaoui*, 382 F.3d at 471 n.20.

219. *Id.* at 479 (holding that redacted summaries of redacted intelligence reports are an “adequate basis for the creation of written statements that may be submitted to the jury in lieu of the witnesses’ deposition testimony” where the district court previously found the summaries to accurately reflect the contents of the intelligence reports).

could select relevant sections from these summaries, the government would then review these submissions to determine that they were not misleading, and only then would the court "make rulings as necessary" of the admissibility of the proposed evidence.²²⁰

Where evidence is found necessary for use at trial and cannot be adequately substituted or, for national security reasons, be shown to the defendant, courts can sanction the government.²²¹ Available sanctions include a dismissal of the indictment, a dismissal of the counts to which the excluded information relates, a finding against the prosecution on any issue to which the excluded information relates, or striking all or part of the testimony of a witness.²²²

If the only practicable sanction is dismissal, or the charge itself would require revealing classified information, the government may try to create an "alternate charge."²²³ In other words, the government may bring a charge for which they do not need to rely on classified evidence.²²⁴ In situations where the government cannot bring sufficiently serious charges without disclosing classified information, it can also seek delay until either other evidence is developed or the sensitivity of the information has diminished, or dismiss the case.²²⁵

Importantly, CIPA does not allow a jury to see any information that the defendant himself cannot see.²²⁶ Though there have been some espionage cases where a jury has been given evidence denied to the defendant, these cases all involved defendants who had already had the opportunity to see the classified documents at issue.²²⁷ In contrast, typical terrorism cases are brought against petitioners who have never had access to classified

220. *Id.* at 480 n.35 (allowing government review of the statement selected for admission by the defense for the purposes of cross-designating other portions that might be required under the rule of completeness).

221. 18 U.S.C. app. III § 6(e)(2) (listing sanctions).

222. *Id.* § 6 (e)(2)(A)–(C).

223. TURNER & SCHULHOFER, *supra* note 112, at 35 (describing that where a charge requires disclosure of classified information and "the suspect truly is a terrorist" the government should be able to find evidence of illegal activity of another kind, permitting legal action without implicating classified information).

224. *See id.* (citing the use of the material support statute in the case of the Lackawanna Six, suspected Al Qaeda trainees arrested without evidence of a specific attack plan, as an example of successfully prosecuting under an alternative charge).

225. *See id.* at 33 (citing *United States v. Fernandez*, 913 F.2d 148, 164 (4th Cir. 1990), as the only case to be dismissed as part of a sanction because, without access to classified evidence, any defense would be "eviscerated").

226. *See id.* at 20 ("If an unclassified substitution is approved for use at trial in lieu of certain classified information, the jury sees only the substitution; it does not see the underlying classified information.").

227. *See id.* at 91 n.101 (citing *United States v. Zettle*, 835 F.2d 1059, 1063 (4th Cir. 1987)) (describing that in cases where the jurors, but not the defendant, had access to classified material during the trial, the defendant has always had prior access to documents and been familiar with their contents).

material.²²⁸ Still, while courts have used protective orders to exclude defendants from pretrial discovery, as discussed above, the courts have never excluded a defendant from trial during the introduction of classified evidence.²²⁹

3. Criticisms of CIPA

Despite the widespread and successful use of CIPA in criminal trials, CIPA is hardly immune from criticism. One common criticism of CIPA is that it excludes security-cleared defense counsel from the decision-making process about disclosure.²³⁰ A related complaint is that defense counsel must show the relevance of classified information before it is made available to them and thus “they cannot show [its] helpfulness.”²³¹ In addition, even where defense counsel is allowed to access information, the defendant is not, and discussion between attorney and client is hindered. Classified evidence is often key, and defense counsel’s ability to fact-find and investigate is severely crippled.²³² Critics thus argue that CIPA has “in essence . . . created a rebuttable presumption that classified discovery materials may be adequately reviewed by defense counsel alone” and that a defendant’s input is not required.²³³

The imbalance of information between attorney and client also curtails defense counsel’s ability to cross-examine witnesses and to access all of the evidence against a client.²³⁴ In addition, this presents challenges in preparing a defendant to testify. This not only puts a defendant “at a significant disadvantage” but also “call[s] into question” the “fundamental ethical mandates for counsel.”²³⁵ As one frustrated defense attorney questioned, “How do you prepare your client to testify when you have fifteen months of wiretaps related to your client that are off limits to

228. See generally *United States v. Marzook*, 435 F. Supp. 2d 708 (N.D. Ill. 2006) (using CIPA to prosecute charges of conspiracy and material support of Hamas where defendant had no connection to the United States that would allow access to classified information).

229. TURNER & SCHULHOFER, *supra* note 112, at 32 (noting that no cases were found where exclusion of the defendant from trial was even considered).

230. Yaroshefsky, *supra* note 112, at 213–14 (noting that, though the court is in a “more neutral” position, neither the court nor the government “by role” share the defense perspective on what is material or relevant).

231. *United States v. Yunis*, 867 F.2d 617, 624 (D.C. Cir. 1989) (determining, ultimately, that this “apparent Catch-22 is more apparent than real”).

232. See Yaroshefsky, *supra* note 112, at 216 (“So how do you know what is relevant and what is not relevant? How do you know what is good to introduce into evidence and what is bad to introduce into evidence?” (quoting Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: Stuck in the Middle*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 65, 69 (2003))).

233. TURNER & SCHULHOFER, *supra* note 112, at 28.

234. See Yaroshefsky, *supra* note 112, at 216 (“[C]ounsel often cannot conduct an adequate investigation and prepare a defense.”).

235. *Id.* at 208.

him?"²³⁶ A further result of this inhibited communication is the undermining of trust between attorney and client.²³⁷

Another concern is that the government's use of section 4 ex parte procedures designed for discovery determinations "threatens to swallow" the protections offered by section 6.²³⁸ This is a risk where classified information is raised by the government midtrial, in an ex parte submission to the judge under section 4, rather than pretrial under section 6. Absent certification from the Attorney General, section 6 contemplates the presence of defense counsel and thus offers greater protections to defendants' rights than the section 4 procedure.²³⁹ As noted by Ellen C. Yaroshefsky, professor of Ethics and Criminal Law at Cardozo School of Law, the case of *United States v. Mejia*²⁴⁰ is a good example.²⁴¹ In *Mejia*, the U.S. Department of Justice obtained an ex parte order midtrial to prevent disclosure of classified information without notice to the prosecutor or the defendant.²⁴² The D.C. Circuit found that, though the defense may be disadvantaged by such a procedure, there was "no support for the defendant's claim of the right to participation or access in CIPA or the Federal Rules."²⁴³ Some, like Professor Yaroshefsky, view this as a deliberate abuse of CIPA procedures.²⁴⁴

Another critique of CIPA, which was the subject of litigation in *United States v. Osama Bin Laden*,²⁴⁵ is that CIPA requires defense counsel to undergo thorough and lengthy clearance procedures.²⁴⁶ The process requires disclosure of intimate and personal information, including past history of mental health counseling.²⁴⁷ In addition, defense counsel in *Bin*

236. Dratel, *supra* note 232, at 69.

237. See *supra* notes 131–37 and accompanying text (discussing ethical strains on attorney-client relationship caused by unequal access to information); see also NACDL Brief, *supra* note 125, at 10 ("Without access to all material information, a defendant cannot consult adequately with counsel to assist in the determination of what portions of the classified discovery are relevant and exculpatory, or which might lead to such evidence."); Mark Denbeaux & Christa Boyd-Nafstad, *The Attorney-Client Relationship in Guantanamo Bay*, 30 *FORDHAM INT'L L.J.* 491, 493 (2007) (describing the attorney-client relationship at Guantánamo as "overwhelmed" by paternalism because of the protective order and other external influences).

238. See Tamanaha, *supra* note 112, at 308 (describing the effect of improperly invoking section 4 midtrial).

239. 18 U.S.C. app. III § 6 (2006).

240. 448 F.3d 436 (D.C. Cir. 2006).

241. See Yaroshefsky, *supra* note 112, at 215–16 & n.53 (citing *Mejia* as an example of the government using section 4 midtrial to avoid the presence of defense counsel).

242. *Mejia*, 448 F.3d at 458.

243. *Id.*

244. See Yaroshefsky, *supra* note 112, at 217; see also Tamanaha, *supra* note 112, at 303.

245. 58 F. Supp. 2d 113 (S.D.N.Y. 1999).

246. *Id.* at 115 (seeking confirmation of the constitutionality of requiring defense attorneys to obtain security clearance).

247. See U.S. OFFICE OF PERSONNEL MGMT., STANDARD FORM 86, QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS (2008), available at http://www.opm.gov/Forms/pdf_fill/sf86.pdf; see also *Bin Laden*, 58 F. Supp. 2d at 115–16 (describing the invasive qualities of the clearance process).

Laden alleged that the clearance process gives the government effective “veto power” over defendant’s choice of counsel.²⁴⁸ In spite of these criticisms, the clearance process was upheld as within the court’s authority, constitutional, and desirable in cases involving sensitive national security information.²⁴⁹

Alternatively, many, like former Attorney General Michael B. Mukasey, argue that CIPA fails to adequately protect against the dissemination of national security information. For example, Mukasey claims that terrorists have been made aware of ongoing searches for specific individuals, including Osama Bin Laden, as a result of disclosures made pursuant to CIPA.²⁵⁰ Mukasey has also claimed that the testimony made public as the result of CIPA alerted terrorists to the government’s surveillance, and, as a result, “[their] communication network shut down within days and intelligence was lost to the government forever, intelligence that might have prevented who knows what.”²⁵¹ A final, and related, criticism from this perspective is that Article III courts, even with the protections added by CIPA, are not “well-positioned to address fully our national security and intelligence interests.”²⁵² Mukasey points to a perceived overcrowding of dockets, the use of traditional rules of evidence, and features that emphasize the rights of the individual over the government.²⁵³

B. *Classified Evidence in the Immigration Context*

Part II.A of this Note focused on the procedural adaptations developed under and mandated by CIPA. Part II.B discusses similar adaptations that have developed throughout immigration law, taking note of the innate differences between the two areas of the law.

1. The History and Use of Classified Information in Immigration Proceedings

Immigration law is relevant to the Guantánamo cases both because the petitioners are uniformly noncitizens and because of the long history of habeas corpus in immigrations proceedings.²⁵⁴ This is particularly true

248. *Bin Laden*, 58 F. Supp. 2d at 119.

249. *Id.* at 122–23.

250. See Paul Taylor, *The Historical and Legal Norms Governing the Detention of Suspected Terrorists and the Risks Posed by Recent Efforts to Depart from Them*, 12 TEX. REV. L. & POL. 223, 255 (2008) (citing Taylor, *supra* note 139). But see ZABEL & BENJAMIN, *supra* note 180, at 88 (suggesting that the government made no effort to invoke CIPA with respect to information at issue in the case discussed by Michael Mukasey and reporting that, based on a search of public records, no “important” security breach has been reported as resulting from CIPA).

251. Taylor, *supra* note 139, at 16.

252. Mukasey, *supra* note 6.

253. *Id.*

254. See Hafetz, *supra* note 33, at 2514 (“[H]abeas corpus has always been available to aliens to test the legality of [deportation orders] before an Article III court.” (citing *Heikkila v. Barber*, 345 U.S. 229 (1953))). But see Stephen J. Townley, Note, *The Use and Misuse of*

given the extent to which immigration law has clarified that one's procedural due process rights depend upon citizenship status and physical location, either at the border or within the country.²⁵⁵ In general, aliens within the country, whether legally present or not, are granted higher levels of due process than those outside of the country.²⁵⁶

A broad view of the government organizations that manage immigration law is helpful here. In 2003, the U.S. Department of Homeland Security (DHS) divided immigration policy and enforcement of the Immigration and Nationality Act (INA) among three agencies, Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and Customs and Border Patrol (CBP).²⁵⁷ Like all agency decisions, those of ICE, USCIS, and CBP are subject to varying degrees of judicial review.²⁵⁸

Throughout the 1990s, approximately twenty-five immigration cases involved the use of classified information.²⁵⁹ Prior to September 11, 2001, lawmakers began to work on codifying regulations that would control the use of classified evidence in immigration cases.²⁶⁰ After the attacks of September 11, efforts to pass this type of corrective legislation waned, and the immigration system became "an incredibly important piece of the terrorism response."²⁶¹ Between March 2003, when ICE was founded, and

Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada, and the United Kingdom, 32 YALE J. INT'L L. 219, 230, n.93 (2007) (citing *INS v. St. Cyr*, 533 U.S. 289, 306 (2001)) (noting that, though all noncitizens have a right to file habeas, there is some question as to whether noncitizens will have the right to review issues of fact).

255. "The differing levels of procedural due process applicable to non-citizens at the border and those within the country . . . derive from the constitutional jurisprudence and therefore probably still constrain how the government can treat both non-citizens at the border and those found within the country." Ramji-Nogales, *supra* note 140, at 298 (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

256. *Zadvydas*, 533 U.S. at 694 (citing *Landon v. Plasencia*, 459 U.S. 21, 32–34 (1982)).

257. 6 U.S.C. §§ 251–298 (2006) (ordering the transfer of programs from the Commissioner of Immigration and Naturalization to the Under Secretary of Border and Transportation Security and other divisions of Homeland Security).

258. *See generally* *Rusk v. Cort*, 369 U.S. 367 (1962) (applying the principle of judicial review to agency action in the case of an individual seeking review of a citizenship determination made outside of the United States).

259. Robert M. Chesney, *Panel Report: Beyond Article III Courts: Military Tribunals, Status Review Tribunals, and Immigration Courts*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 27, 31 (2006) (highlighting Professor David Cole's remark that "approximately twenty-five cases in the 1990s involving immigration law proceedings used secret evidence, or ex parte, in camera evidence").

260. *See* Ramji-Nogales, *supra* note 140, at 304 (describing efforts to pass the Secret Evidence Repeal Act which would have allowed removal of classified immigration cases to federal court and the application of CIPA).

261. Mary Beth Sheridan, *Immigration Law as Anti-terrorism Tool: Use of Charges to Detain or Deport Suspects Criticized by Muslim Groups*, WASH. POST, June 13, 2005, at A1 (quoting Michael J. Garcia, head of Immigration and Customs Enforcement). Initially, former President George W. Bush supported the Secret Evidence Repeal Act but it failed to pass six months before 9/11 and, following the attacks, was never reintroduced. Ramji-Nogales, *supra* note 140, at 304–05.

June 2005, more than 500 people were charged with immigration violations that began with national-security-based investigations.²⁶²

2. Article I Courts: Expedited Removal and Discretionary Relief

The Constitution's protections are the lowest for aliens whom the government seeks to exclude before they have even entered.²⁶³ In this context, Congress has authorized the use of *ex parte*, in camera evidentiary procedures for the expedited removal of an inadmissible arriving alien.²⁶⁴ If an immigration official is "satisfied on the basis of confidential information" that the alien is inadmissible for national security reasons, he may order the alien removed pending review by the Attorney General.²⁶⁵ Findings that the alien seeks entry for purposes of participating in espionage, sabotage, overthrow of the government, terrorist activity, or, more generally, because his admission would have "potentially serious adverse foreign policy consequences for the United States"²⁶⁶ are all considered valid bases for inadmissibility.²⁶⁷ Aliens may submit a statement for the Attorney General's review, but excludability can be based solely on confidential documents.²⁶⁸

The use of classified evidence for the exclusion of nonresident aliens seeking entry "generally stands on firm constitutional ground."²⁶⁹ In the

262. Sheridan, *supra* note 261.

263. See *Zadydas v. Davis*, 533 U.S. 678, 693 (2001) (noting that the "entry" distinction runs throughout immigration law, such that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders"); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; [these rights] become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.").

264. See 8 U.S.C. § 1225(c) (2006) (providing regulations governing the expedited removal of aliens inadmissible on security and related grounds). Stephen Townley points out that this provision probably applies equally to aliens already within the country but who entered without inspection because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 "effaced any distinction between those within the United States illegally and those seeking admission at the border." Townley, *supra* note 254, at 229 n.82 (citing 8 U.S.C. § 1101(a)(13)(A)). Two federal courts have also supported the use of classified information to deny unadmitted aliens asylum hearings. See *Azzouka v. Meese*, 820 F.2d 585, 587 (2d Cir. 1987); *Avila v. Rivkind*, 724 F. Supp. 945, 950 (S.D. Fla. 1989).

265. 8 U.S.C. § 1225(c)(2)(B)(i)–(ii) (allowing removal without further review if the Attorney General has consulted with the appropriate security agencies and believes the alien is inadmissible for national security reasons).

266. *Id.* § 1182(a)(3)(c)(i) (2006).

267. *Id.* § 1225(c)(2)(B)(i) (listing bases of inadmissibility).

268. *Id.* § 1225(c)(3) (allowing the alien or his representative to submit additional documents for the consideration of the Attorney General); see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (finding valid exclusion based on confidential documents the disclosure of which would prejudice public interest).

269. Matthew R. Hall, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 CORNELL INT'L L.J. 515, 518 (2002) (citing *Mezei*, 345 U.S. at 213–14; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

case of expedited removal, the statute governing procedures does not establish hearings, create evidentiary procedures, provide notice of allegations to the alien, or demand that government officials reach a standard of proof.²⁷⁰ This distinct lack of process explains why the procedure has been called "summary exclusion."²⁷¹

For permanent residents who have resided in the United States, including those who have gained entry unlawfully, the law is less clear.²⁷² In *Rafeedie v. INS*,²⁷³ the D.C. District Court found that a lawful permanent resident returning to the country after a short trip was denied a constitutional right to due process when the court allowed the use of ex parte, classified evidence.²⁷⁴ The court followed *Mathews v. Eldrige* to weigh the alien's interest in the fair resolution of the proceeding and the risk of error involved in the hearing against the government's interest in using classified evidence.²⁷⁵ The court found that "even a manifest national security interest of the United States" would not be an appropriate basis on which to deny due process to a permanent resident alien.²⁷⁶

Classified information is also used as evidence by immigration judges considering an alien's application for discretionary relief. Discretionary relief includes requests for asylum, adjustment of status, or a redetermination of bail pending the outcome of a deportation proceeding.²⁷⁷ Most forms of discretionary relief are based on the "unfettered discretion" of the Attorney General, rather than a petitioner's right to relief.²⁷⁸ In such

270. See *id.* at 517–18 (discussing the lack of process afforded aliens in expedited removal hearings).

271. See *Rafeedie v. INS*, 880 F.2d 506, 515–16 (D.C. Cir. 1989) (describing the process mandated by 8 U.S.C. § 1225 as "the minimum statutory summary proceeding").

272. See *Rafeedie*, 880 F.2d at 519 (ordering an injunction to bar summary proceedings found to unconstitutionally deny the petitioning permanent resident alien the opportunity to confront classified evidence); see also *Mezei*, 345 U.S. at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." (citations omitted)).

273. 880 F.2d 506.

274. *Id.* at 525 (remanding to the district court for entry of partial summary judgment for petitioner and further proceedings on whether the combination of the procedural protections that have been afforded Yacoub Rafeedie thus far and the limited protections further required by § 1225(c) satisfy the constitutional requirement of due process).

275. See *id.* at 524–25 (laying out the interests at stake in a *Mathews* balancing test).

276. *Rafeedie*, 880 F.2d at 523. But see *infra* Part II.C (discussing the Alien Terrorist Removal Court (ATRC), which allows secret evidence for the removal of a permanent resident with other procedural protections); Townley, *supra* note 254, at 227 (interpreting the ATRC to allow secret evidence for removal of an alien but not for denial of re-entry).

277. See, e.g., *Jay v. Boyd*, 351 U.S. 345 (1956) (denial of application for discretionary suspension of deportation based on secret evidence); *United States ex rel. Barbour v. INS*, 491 F.2d 573, 578 (5th Cir. 1974) ("[R]elease on bail is a form of discretionary relief . . .").

278. See *Jay*, 351 U.S. at 357–58. Significantly, the holding of *Jay v. Boyd* dealt only with a statutory challenge to the use of secret evidence in the discretion context and not a constitutional challenge. See *Secret Evidence Repeal Act of 1999, Part I: Hearing on H.R. 2121 Before the H. Comm. on the Judiciary*, 106th Cong. 41–43 (2000) (statement of David Cole, Professor, Georgetown University Law Center) [hereinafter David Cole Testimony]. David Cole also points out that the cases usually relied on by the government to prove there is no constitutional deprivation where secret evidence is used to deny a suspension of

cases, the government is never required to submit a substitute for the classified information it wishes to proffer, and Congress explicitly denies an alien the right to view national security information proffered by the government in opposition to the alien's motion for discretionary relief from removal.²⁷⁹ In cases where an alien has applied for asylum or withholding of removal, the government can use classified information, and the alien is given an unclassified version only if such a summary is "consistent[] with safeguarding both the classified nature of the information and its sources."²⁸⁰ If a summary is provided, it "should be as detailed as possible" so that the alien will have an opportunity to challenge the evidence.²⁸¹

Where a summary or substitute cannot be provided consistent with national security, the Supreme Court has held that no substitution is required.²⁸² If evidence indicates that the alien has engaged in terrorism or poses a threat to national security, the alien seeking relief from removal must refute this evidence by a preponderance of the evidence.²⁸³ Thus, an alien has the burden of proving that discretionary action is warranted, often without seeing the evidence against him.

Bail redetermination, another kind of discretionary review,²⁸⁴ presents unique issues for permanent residents. Two federal cases have held that lawful aliens who had overstayed their visas were denied their constitutional right to due process and a fundamentally fair hearing when they were denied access to classified information during bail redeterminations.²⁸⁵ "[A]liens, once legally admitted into the United States, are entitled to the shelter of the Constitution."²⁸⁶ In *Al Najjar v. Reno*,²⁸⁷

deportation erroneously rely on *Jay v. Boyd* for a constitutional finding. *Id.*; see also *Suciu v. INS*, 755 F.2d 127, 128 (8th Cir. 1985).

279. See 8 U.S.C. § 1229a(b)(4)(B) (2006).

280. 8 C.F.R. § 1240.11(c)(3)(iv) (2007) (describing procedures for applications of asylum and withholding of removal).

281. *Id.*

282. See, e.g., *Jay*, 351 U.S. 345 (finding that where a resident alien has already been found deportable and is seeking discretionary relief, confidential information can be used to deny discretionary relief if disclosure of the information would be prejudicial to the public safety).

283. 8 C.F.R. § 1240.8(d); see *Hall*, *supra* note 269, at 520; see also *United States ex rel. Barbour v. INS*, 491 F.2d 573, 578 (5th Cir. 1974) (describing alien as bearing "a heavy burden" to show that the Attorney General abused his discretion).

284. See *Barbour*, 491 F.2d at 578 (defining release on bail as a form of discretionary relief).

285. See *Al Najjar v. Reno*, 97 F. Supp. 2d 1329, 1362 (S.D. Fla. 2000) (finding that where alien has overstayed student visa and concedes deportability but seeks discretionary relief, he is denied procedural due process when the evidence for his removability is based on classified information unseen by the alien and his counsel); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 404 (D.N.J. 1999) (finding that a bond determination based on uncorroborated hearsay and secret evidence that petitioner, a student who had overstayed his visa, cannot examine or confront is a violation of petitioner's procedural due process right).

286. *Kiareldeen*, 71 F. Supp. 2d at 409 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Landon v. Plasencia*, 459 U.S. 21, 31 (1982)) (denying the government's argument that because petitioner conceded that he overstayed his visa, he had "forfeited" his due process rights).

287. 97 F. Supp. 2d 1329.

the government even provided the alien with notice of intent to rely on classified information in camera, a summary of the classified information, and an opportunity to rebut the unclassified return.²⁸⁸ Reasoning that a deportable alien who is legally or illegally present is entitled to more due process than an excludable alien at the border but less due process than a permanent resident,²⁸⁹ the district court held that the use of classified information in a bond redetermination hearing "implicates core interests of the Due Process Clause."²⁹⁰

As stated above, a judge adjudicating an application for permanent resident status may inform the alien of the nature of the evidence against him only if this can be done while safeguarding the source of the evidence.²⁹¹ In *American-Arab Anti-Discrimination Committee v. Reno*,²⁹² however, the U.S. Court of Appeals for the Ninth Circuit confronted the use of secret evidence in hearings following applications by two men for adjustment of status.²⁹³ Both aliens were accused of being members of a terrorist organization, the Popular Front for the Liberation of Palestine, and of overstaying their visas.²⁹⁴ Both subsequently applied for legalization and a change of status and were given notice of the government's intent to deny their application based on classified information.²⁹⁵ The men filed suit in district court, challenging the use of undisclosed classified information on several grounds, including a due process violation.²⁹⁶ The district court conducted an ex parte, in camera review of the government's evidence and granted a permanent injunction against the government, preventing the use of undisclosed classified evidence against these men based on due process.²⁹⁷

Applying the *Mathews v. Eldridge* test, the court found that the aliens, who had lived in the United States for ten years and would be deported if their request for a change of status were denied, had a strong interest in

288. *Id.* at 1333–34 (describing steps taken after petitioner was taken into custody).

289. *Id.* at 1344 (citing *Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984) ("[T]hose with the status of deportable aliens are constitutionally entitled to rights in the deportation context that are inapplicable to exclusion proceedings."), *aff'd*, 472 U.S. 846 (1985)).

290. *Id.* at 1353–54 (citations omitted) (listing due process rights implicated: (1) the right to petition the Government and have petition judged fairly, at a meaningful time and manner; (2) notice of the grounds on which the Government seeks detention; and (3) an opportunity to present evidence in opposition to the Government).

291. 8 C.F.R. § 1240.11(a)(3) (2007); *see also supra* note 280 and accompanying text.

292. 70 F.3d 1045 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999) (affirming the district court's grant of a permanent injunction preventing the use of undisclosed classified information against two petitioners in legalization proceedings).

293. *Id.* at 1052.

294. *Id.* at 1052–53 (describing charges under the McCarren-Walters Act of 1952 for membership in an organization that allegedly advocates "world communism" (citing 8 U.S.C. §§ 1251(a)(6)(D), (F)–(H) (1988))).

295. *Id.* at 1054 (the government's intent to deny was based on excludability under a former section of U.S. Code involving a threat to national security).

296. *Id.* (describing the district court's finding of jurisdiction and the issuance of a preliminary injunction).

297. *Id.* (describing the district court's finding that the use of confidential, classified information submitted by the government would constitute a due process violation).

changing their status to avoid deportation.²⁹⁸ Additionally, the court found that the risk of reaching an erroneous decision based on classified information was high: “One would be hard pressed to design a procedure more likely to result in erroneous deprivations.”²⁹⁹ Finally, the court found that the government’s interest in removal based on classified information was weak because there was no evidence showing that the aliens in question were a threat to the country.³⁰⁰ Perhaps most significantly, the court recognized that, though not all rights afforded to criminal defendants translate to the civil context, procedural due process and hearings have “ancient roots” in the rights of confrontation and cross-examination.³⁰¹

3. Immigration Review in Article III Courts: The Alien Terrorist Removal Court

In Part II.B.2 above, this Note explored the use of classified information in administrative hearings. The Alien Terrorist Removal Court (ATRC) system, however, is a statutorily enacted court system designed to work with classified information in immigration cases in Article III courts.³⁰² The ATRC was enacted in 1996³⁰³ in response to the Oklahoma City Bombing.³⁰⁴ Despite its adoption by Congress, it has not yet been used.³⁰⁵ In theory, the ATRC could be used to remove residents currently within the country and also permanent residents entering at a border where the government has secret evidence against them.³⁰⁶

298. *Id.* at 1068–69 (“Aliens who have resided for more than a decade in this country, even those whose status is now unlawful because of technical visa violations, have a strong liberty interest in remaining in their homes.”).

299. *Id.* at 1069 (citing *Goss v. Lopez*, 419 U.S. 565, 580 (1975)) (quoting the lower court opinion in this case and acknowledging that there is no actual evidence in the record showing what percentage of decisions based on classified information result in error).

300. *Id.* (“[T]he Government has offered no evidence to demonstrate that these particular aliens threaten the national security of this country. . . . [and] . . . claims that it need not.”).

301. *Id.* (quoting *Green v. McElroy*, 360 U.S. 474, 496 (1959)) (discussing the disclosure of evidence against an individual to be a “relatively immutable” principal of justice where government action harms an individual and the reasonableness of the action depends on fact finding).

302. Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §§ 1531–1537 (2006).

303. Pub. L. No. 104-132, 101 Stat. 1214 (1996) (codified as amended at 8 U.S.C. §§ 1531–1537 (2006)).

304. See Note, *supra* note 130, at 1971 (describing the ATRC as “created in the aftermath” of the 1995 Oklahoma City bombing).

305. See Carl Tobias, *The Process Due Indefinitely Detained Citizens*, 85 N.C. L. REV. 1687, 1723 (2007) (“[T]he 1996 alien terrorist removal system . . . has yet to be invoked.”); John Dorsett Niles, Note, *Assessing the Constitutionality of the Alien Terrorist Removal Court*, 57 DUKE L.J. 1833, 1834 (2008); *id.* at 1863 (postulating that the ATRC’s use in certain situations might lead to an adverse constitutional ruling). The ATRC’s lack of use can probably be attributed to the fact that there are frequently other means of deporting an alien who the government believes is a terrorist. For example, criminal prosecutions or more traditional removal proceedings.

306. See Niles, *supra* note 305, at 1833 (“In theory, the limited nature of the ATRC protections might implicate resident aliens’ Fifth Amendment rights.”). *But see* Townley, *supra* note 254, at 227 (explaining that the U.S. Supreme Court “has repeatedly hinted that

ATRC proceedings are initiated when the government submits an *ex parte*, in camera request to the removal court and demands a removal hearing.³⁰⁷ The request must include the identity of the alien, facts showing that there is probable cause to believe that the alien is a terrorist, and a demonstration that traditional avenues of removal would pose a risk to the national security of the United States.³⁰⁸ If the judge determines that there is such probable cause, he must grant the application for removal.³⁰⁹ Once this motion is granted, the noncitizen loses all other rights relating to removal and deportation.³¹⁰

Despite the secrecy surrounding the invocation of ATRC hearings, the actual proceedings are open to the public.³¹¹ At the outset, the alien is due "reasonable notice" of the nature of the charges against him, which must include "a general account of the basis for the charges."³¹² The alien has a right to be present for the hearing, to be represented by counsel, to introduce evidence on his own behalf, to examine the evidence against him, and to cross-examine any witnesses.³¹³ Despite the existence of these procedural protections, none of them are "intended to allow an alien to have access to classified information."³¹⁴

The government may make *ex parte*, in camera submissions of any evidence it seeks to use that, if disclosed, might pose a threat to national

permanent residents returning from abroad are entitled to more process at the border than first-time applicants seeking admission").

307. 8 U.S.C. § 1533(a)(2) (requiring that after the government makes a request to convene the request be filed under seal). The removal court is made up of five district judges, each from one of the judicial circuits. *Id.* § 1532(a).

308. *Id.* § 1533(a)(1)(D)(i)–(iii) (requiring that requests to convene the ATRC also include proof that the individual in question is an "alien terrorist" and that they are present in the United States).

309. *Id.* § 1533(c)(2)(A)–(B). A single judge on the removal court has discretion whether or not to grant the government's application for removal. *Id.* § 1533(c)(1)(A)–(B) (allowing a judge to receive *ex parte*, in camera testimony and evidence, specifically including classified information).

310. *See id.* § 1533(d) ("If an order is issued under this section granting an application, the rights of the alien regarding removal and expulsion shall be governed solely by this subchapter, and except as they are specifically referenced in this subchapter, no other provisions of this chapter shall be applicable."); *id.* § 1534(k) (stripping relief based on asylum, withholding of removal, cancellation of removal, voluntary departure, adjustment of status, and registry).

311. *See id.* § 1534(a)(2). Despite application in Article III courts, the Federal Rules of Evidence do not apply in proceedings for the ATRC. *Id.* § 1534(h) (stating explicitly that the Federal Rules of Evidence do not apply in a removal hearing); *see also* Hall, *supra* note 269, at 519–20 ("[T]he statute expressly disclaims the application of the Federal Rules of Evidence in proceedings before the ATRC.").

312. 8 U.S.C. § 1534(b)(1)–(2) (including the time and place of trial in "reasonable notice").

313. *Id.* § 1534(c)(1)–(3) ("The alien shall have a right to be present at such hearing and to be represented by counsel. Any alien financially unable to obtain counsel shall be entitled to have counsel assigned to represent the alien.").

314. *See id.* § 1534(d)(5).

security.³¹⁵ The government must submit a summary of the classified evidence to the removal court.³¹⁶ If the judge finds that the summary is “sufficient to enable the alien to prepare a defense,” he must approve it within fifteen days.³¹⁷ If the judge does not find the document sufficient, the government is afforded another fifteen days to correct deficiencies.³¹⁸ If the summary is deemed sufficient, the hearing will go on and the alien will have use of the substitute.

Where this revised summary is not sufficient, and the government cannot improve it, the Act provides special procedures for lawful permanent residents.³¹⁹ In such situations, the ATRC legislation authorizes the appointment of a “special attorney.”³²⁰ “Special attorneys” have security clearance and are appointed to contest classified evidence on behalf of the aliens.³²¹ As in CIPA, the attorney cannot disclose the classified information to the alien.³²² For aliens without permanent resident status but who are nonetheless inside the United States and therefore subject to the ATRC, the hearing continues without a summary and without a representative.³²³

Though both the alien and the government are “given [a] fair opportunity to present argument[s],” the judge may allow any part of the argument dealing with evidence that was initially received in camera and ex parte to be heard outside the presence of the alien.³²⁴ For aliens without the benefit of a “special attorney,” this means that there is no opportunity to challenge this evidence or the arguments and evidence presented in association with

315. *Id.* § 1534(e)(3)(A) (allowing submission and ex parte, in camera review of any evidence that “would pose a risk to the national security of the United States” or any individual if disclosed).

316. *Id.* § 1534(e)(3)(B) (requiring submission of an unclassified summary of evidence that does not pose a risk to national security).

317. *Id.* § 1534(e)(3)(C) (requiring that if the summary is approved, the government must deliver it to the alien).

318. *Id.* § 1534(e)(3)(D)(i)–(ii) (allowing the government to correct deficiencies and submit a revised, unclassified summary).

319. *Id.* § 1534(e)(3)(F) (providing “[s]pecial procedures” for lawful permanent resident aliens found within the country and subject to ATRC).

320. *Id.* (authorizing the court to designate a special attorney to lawful permanent residents who are otherwise unable to address the evidence against them).

321. *See id.* § 1534(e)(3)(F)(i)(I)–(II) (noting specifically that appointed attorneys can challenge the veracity of the classified evidence in in camera proceedings); *see also* Chesney, *supra* note 259, at 33–34 (describing the “special advocate” provision of the ATRC as “clearly designed to reconcile the competing governmental and individual interests at stake in this context”).

322. 8 U.S.C. § 1534(e)(3)(F)(ii) (listing sanctions for “special attorney[s]” who violate the prohibitions on disclosure).

323. *Id.* § 1534(e)(3)(E)(ii) (“[T]he Department of Justice shall cause to be delivered to the alien a statement that no summary is possible, and the classified information submitted in camera and ex parte may be used pursuant to this paragraph.”).

324. *Id.* § 1534(f).

it. In these proceedings, the government must prove removability on the basis of terrorism by a preponderance of the evidence.³²⁵

4. Critiques of the Use of Secret Evidence in Immigration Settings

In many respects, criticisms of the use of classified evidence in immigration cases follow the same structure as criticisms of classified evidence in the criminal context. For example, there is an argument that secret evidence "short-circuits the adversary process" and is a denial of due process.³²⁶ As in the criminal context, this argument is based on the idea that, for the adversarial process to insure a fair hearing, both sides must be able to examine and respond to the other's evidence.³²⁷ Where the opportunity to do so is denied, so the argument goes, fair process has also been denied.³²⁸

Despite the similar criticisms, the use of secret information in the immigration context creates unique difficulties. Understanding this depends in part on recognizing the wide breadth of potential negative outcomes that accompany an adverse finding in the immigration context. Immigration hearings can lead to deportation, the loss of a home and work, the separation of families,³²⁹ and lengthy periods of detention.³³⁰ Also specific to the immigration setting is the risk that the use of secret evidence will "decrease[] the legitimacy" of our immigration system and cause an increase in terrorism by "alienating immigrant communities."³³¹ Plainly, the potential loss created by the denial of a fair hearing in the immigration setting is similar but distinct from an unfair denial of process in the criminal context.

In addition, the procedures employed in immigration hearings are especially open to abuse. While this is, again, an argument made with respect to the use of classified information in criminal cases, it raises

325. *Id.* § 1534(g) (stating that it is the government's burden to prove the alien's removability).

326. *See* David Cole Testimony, *supra* note 278, at 43 (introducing a catalogue of criticisms of the use of secret evidence in immigration cases).

327. *See id.* ("[W]hat right could be more basic under due process than the right to see the evidence against you?")

328. *See* Ramji-Nogales, *supra* note 140, at 307 (arguing that "[t]he very nature of secret evidence eliminates the adversarial system's traditional test of evidentiary reliability and accuracy: confrontation").

329. *See id.* at 292 (describing the failure to "test" secret evidence with the adversarial process as leading to the wrongful "separation of families"). Much has been written about Ellen Knauff and Ignatz Mezei, aliens coming to this country to live with their spouses. *See, e.g.,* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995).

330. *See* Ramji-Nogales, *supra* note 140, at 290–91 (citing the detention of innocent men pending resolution of claims based on secret evidence as a negative effect of such secret evidence); *see also* David Cole Testimony, *supra* note 278, at 42 (describing several clients who spent years incarcerated pending review only to be released and found not to be a threat to national security).

331. Ramji-Nogales, *supra* note 140, at 292.

significant issues unique to the immigration context. Where evidence has been improperly classified by one agency, no other agency has the independent authority to declassify that specific information.³³² Because immigration authorities frequently use information derived from other agencies, the use and nondisclosure of information that did not need to be classified and therefore did not need to be withheld from the alien is prevalent.³³³ Additionally, because substitutes or summaries of classified evidence are not required, immigration is the only area of the law where absolutely secret evidence is permitted as evidence in an adversarial setting.³³⁴

Reliance on evidence that cannot be challenged can lead to practices like asserting hearsay without producing the original declarant,³³⁵ or simply asserting evidence that is factually inaccurate.³³⁶ In *Arar v. Ashcroft*,³³⁷ for example, an alien traveling through New York City was arrested and detained on the basis of secret evidence.³³⁸ According to the government, Maher Arar was a member of Al Qaeda and for this reason inadmissible.³³⁹ Arar never went before an immigration judge, and neither he nor his attorney were ever allowed to see the erroneous evidence against him.³⁴⁰ While the government contended that Arar was on a terror watch list, he was in fact on a list of possible witnesses, not terrorists, maintained by the

332. See Exec. Order No. 12,958, 3 C.F.R. 333, 341, pt. III, § 3.1(c)(1)–(4) (1995), reprinted as amended in 50 U.S.C. § 435 note (2000) (“Classified National Security Information”) (giving declassification authority to four specific categories of individuals: (1) the official who originally classified the information; (2) the successor of the official who originally classified the information; (3) a supervisory official of either; and (4) officials specifically delegated declassification authority in writing by the agency head or other senior agency official).

333. See Ramji-Nogales, *supra* note 140, at 308 (citing *In re Ahmed*, No. A90-674-238, slip op. at 3 (N.Y. Immigr. Ct. July 30, 1999)) (describing the Nasser Ahmed case and the government’s reliance on misclassified information, a biased source, and a mischaracterized document to make its case and keep Ahmed detained for three and a half years); see also Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 81 (1999) (describing the use of “biased and unreliable sources”).

334. Even in asylum cases or applications for which there is a preference for the production of summaries, such substitutes are only to be produced when the agency “can do so consistently with safeguarding both the classified nature of the information and its sources.” 8 C.F.R. § 1240.11(c)(3)(iv) (2007).

335. See David Cole Testimony, *supra* note 278, at 44 (describing the INS practice of relying on hearsay during in camera, ex parte proceedings).

336. See Akram, *supra* note 333, at 81 (describing the use of “deliberately or mistakenly falsified translations”).

337. 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

338. See *id.* 253–54; see also Ramji-Nogales, *supra* note 140, at 290 (citing *Arar* as “perhaps the best-known recent example of misuse of secret evidence in immigration proceedings”).

339. *Arar*, 414 F. Supp. 2d at 254 (describing the INS finding of temporary inadmissibility based upon an asserted association with Al Qaeda).

340. *Id.* at 253–54 (describing the events of Arar’s incarceration from the time of his arrest to his receipt of his final removal order “without further inquiry before an immigration judge”).

Canadian Government.³⁴¹ All of this came out only after he was rendered to Syria, where he was imprisoned and tortured.³⁴² Similarly, in the case of Hany Kiareldeen, a heavily biased source that could not be challenged was used as the basis of secret evidence against him.³⁴³ Without the ability to confront the evidence, Kiareldeen, an alien, was left with no means to challenge the veracity of the statements or expose any bias inherent to the witness testimony.

The ATRC has come under very specific and focused attack. The majority of critics argue that, under *Mathews v. Eldridge*, the interest of a resident alien to remain in the United States is "weighty."³⁴⁴ Based on this, there is a concern that the use of a special attorney for lawfully admitted permanent residents is insufficient to pass constitutional muster.³⁴⁵ This is compounded by the concern that an appointed attorney would not be able to work with his client without somehow inadvertently informing him of the government's evidence.³⁴⁶ On the other hand, one supporter of the system has argued that an appointed attorney would owe the alien a "fiduciary duty" and would therefore be loyal and able to adequately represent the alien.³⁴⁷ Another potential issue is that unlawful or temporary resident aliens can be denied both summary evidence and a special attorney, leaving the alien with absolutely no way to contest his removal.³⁴⁸

341. See *id.* at 256 n.1 (describing a letter submitted by Arar containing publicly available information that he was included on a list of potential witnesses to terrorism).

342. See *id.* 254–55 (describing Arar's treatment in Syria where he was forced to sleep in a "grave" cell, interrogated, beaten, and tortured).

343. See *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) (relying on information provided by petitioner's ex-wife).

344. See Niles, *supra* note 305, at 1852 (listing and comparing descriptions used by various scholars and commentators in describing an alien's interest in remaining in the United States, and noting the propensity to describe it as "weighty," "great," "substantial," or another like term). John Dorsett Niles also notes that commentators similarly weigh the government's interest, describing it as "tremendously important," "strong," and "heavy." *Id.* (footnotes omitted) (internal quotation marks omitted).

345. See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 136 (noting that even a "tough and demanding" attorney will be impaired by his inability to share information with his client).

346. See *id.* (characterizing this possibility as a theoretical conflict of interest that might exist between attorneys and their clients in ATRC settings).

347. See *id.* at 1859–60 (acknowledging that an interview would be "cumbersome" but arguing that "[a] forward-looking attorney . . . could circumvent any potential problem by comprehensively interviewing the alien before reviewing the government's secret evidence").

348. See Niles, *supra* note 305, at 1860, 1862–63 (suggesting that by treating unlawful and temporary resident aliens the same as lawful, permanent resident aliens and appointing a special attorney in every case, the ATRC would be cured of any constitutional problems).

C. *The Military Commissions Act and Classified Evidence*

1. Background of the Military Commissions Act

Part II.B discussed the various procedures and standards governing reliance on classified evidence in immigration hearings. Part II.C focuses on the most recent congressionally adopted scheme providing for the use of classified evidence in a judicial forum, the Military Commissions Act of 2006 (MCA).³⁴⁹ On his first day in office, Barack Obama ordered an immediate stop to the military commissions process pending a review of the system as it currently operates.³⁵⁰ However, even as the future of the commissions system remains unknown, there is much to be gained from an examination of the evidentiary rules and standards that regulate classified information in this forum.

Enacting the first military commission of any kind in the United States since World War II,³⁵¹ the MCA was passed in response to the Supreme Court's ruling in *Hamdan*, which found the initial executive order establishing military commissions unlawful.³⁵² The MCA was designed specifically to try "alien unlawful enemy combatants" in the wake of September 11, 2001.³⁵³ Even with the MCA in place, however, only twenty-seven detainees have been charged.³⁵⁴

The first detainee to be charged by the military commission was Salim Hamdan in 2004.³⁵⁵ Initially charged under the military commission legislation found unlawful in the Supreme Court case bearing his name, Hamdan was eventually charged under the MCA.³⁵⁶ Ultimately, Hamdan was acquitted of all conspiracy charges and convicted of the separate, arguably lesser, charge of material support for terrorism.³⁵⁷ Hamdan was

349. See Military Commissions Act, 10 U.S.C. §§ 948a–950w (2006).

350. Editorial, *First Steps at Guantánamo*, N.Y. TIMES, Jan. 22, 2009, at A32 ("Before midnight of his first day in office, [Barack Obama] took the obvious and vital step of halting the military tribunals at the prison camp.").

351. William Glaberson, *Judge's Guantánamo Ruling Bodes Ill for System*, N.Y. TIMES, May 11, 2008, at A26.

352. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (finding military commissions established in response to Bush's November 13, 2001, order to have been wrongfully convened without congressional authority). For a history of the legislation, Supreme Court cases, and policy that lead to the creation of the Military Commissions Act (MCA), see *supra* Part I.C.3.

353. 10 U.S.C. §§ 948a (1)(A)(i)–(ii) (2006) (defining an unlawful combatant as anyone who sat through a CSRT proceeding, has "engaged in hostilities," has "purposefully and materially supported hostilities against the United States or its co-belligerents," and "is not a lawful enemy combatant").

354. WITTES ET AL., *supra* note 24, at 5.

355. Hamdan was first charged in July 2004 pursuant to Military Order No. 1, the first executive order establishing commissions. Stephen Ellmann, *The "Rule of Law" and the Military Commission*, 51 N.Y.L. SCH. L. REV. 761, 762 (2007).

356. See William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1.

357. *Id.*

sentenced to five and a half years in prison with credit to be given for the sixty-one months he had already been held.³⁵⁸ David Hicks, an Australian national formerly held at Guantánamo, was also charged and accused of training with Al Qaeda and working with the Taliban.³⁵⁹ Hicks pled guilty and finished his term in Australia.³⁶⁰ He has since been released.³⁶¹

Ali Hamza Ahmad al-Bahlul, the most recent detainee sentenced, did not participate in his trial as a means of protesting the authority of the commission.³⁶² The so-called "propaganda chief" of Al Qaeda, Bahlul's trial took one week and Bahlul was given a life sentence.³⁶³

2. MCA Procedures for the Use and Protection of Classified Information

The MCA contains clear rules as to when and how classified information can be used as evidence. Unlike CIPA, which has specific rules for discovery and trial, the rules regarding the use of classified information in military commissions apply to all stages of the commissions.³⁶⁴ For information to be considered privileged, the "head of the executive or military department or government agency concerned" must make a finding that the information is properly classified and that the disclosure of this information would be "detrimental to the national security."³⁶⁵ Importantly, witnesses and trial counsel for the prosecution are presumed to have the authority of the head of the relevant executive agency to invoke the privilege.³⁶⁶

Like CIPA, the MCA authorizes substitutions of classified evidence. Where government counsel makes a motion to protect classified information and the military judge finds it "is relevant and necessary to an element of the offense or a legally cognizable defense,"³⁶⁷ the military judge "shall authorize" one of three alternatives to disclosure to defense

358. William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1.

359. *Terror Detainee Back in Australia*, N.Y. TIMES, May 20, 2007, at A8.

360. *Id.* As part of his deal for an earlier release, he has forgone all future suits relating to conditions of confinement at Guantánamo and agreed not to speak with the press for one year. *Id.*

361. Raymond Bonner, *Full Freedom for Former Australian Detainee*, N.Y. TIMES, Dec. 21, 2008, at A12.

362. William Glaberson, *Detainee Convicted on Terrorism Charges: A Second Guantánamo Trial Victory for the Bush Administration*, N.Y. TIMES, Nov. 14, 2008, at A19.

363. *Id.*

364. See 10 U.S.C. § 949d(f)(1)(A) (2006) (requiring that rules on the treatment of classified information be applied throughout the stages of military commissions).

365. *Id.* § 949d(f)(1)(B)(ii).

366. *Id.* § 949d(f)(1)(C) (presuming that representatives, witnesses, and trial counsel have authority to claim privilege from disclosure).

367. U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS pt. 3, rule 505(h)(4) (2007) [hereinafter MMC], available at <http://www.defenselink.mil/news/MANUAL%20FOR%20MILITARY%20COMMISSIONS%202007%20signed.pdf> (providing the standard for disclosure of classified information or a substitute or summary of such information).

counsel to the extent that such alternatives are “practicable.”³⁶⁸ The three possible alternatives to disclosure contemplated by the act are (1) redaction of specific classified sections of a document, (2) substitution of a part of the document with unclassified information, and (3) substitution of facts that the classified information tends to prove.³⁶⁹ In determining whether or not a substitution is “practicable,” the judge may consider “any relevant factor.”³⁷⁰ The same methods of substitution apply to any and all exculpatory evidence that must be disclosed.³⁷¹

If the military judge finds that a proposed substitute of otherwise admissible information upon which the government seeks to rely is “inadequate or impracticable” and the government objects to a substitute suggested by the military judge, then the judge may issue a sanction.³⁷² The possible sanctions are similar to those available under CIPA:

- (A) striking or precluding all or part of the testimony of a witness at trial;
- (B) declaring a mistrial;
- (C) finding against the Government on any issue as to which the evidence is probative and material to the defense;
- (D) dismissing the charges, with or without prejudice; or
- (E) dismissing the charges or specifications or both to which the information relates with or without prejudice.³⁷³

In addition to providing for substitutions, the MCA contemplates the admissibility of evidence even where classified sources, methods, and activities by which evidence was acquired are excluded, as long as the evidence is deemed reliable.³⁷⁴ The MCA does not set standards for reliability in this context. In such situations, the military judge may require that an unclassified summary of the excluded information be given to the

368. See 10 U.S.C. § 949d(f)(2)(A) (giving no guidance on what is meant by the term “practicable”).

369. *Id.* § 949d(f)(2)(A)(i)–(iii) (listing deletion alternatives to disclosure of classified information).

370. MMC, *supra* note 367, pt. 2, rule 701(f)(4). Potential factors for evaluating practicability include

the burden that producing the alternatives would impose on the Government, the time it would take to produce the alternative, the degree to which a summary could be provided consistent with national security, whether the evidence is cumulative of or distinct from other evidence available to the defense, the relevance and materiality of the evidence to the preparation of the defense, and the significance of the evidence in comparison with other evidence to which the defense has access.

Id.

371. See 10 U.S.C. § 949j(d) (requiring the government to provide adequate substitutions of all classified exculpatory evidence).

372. MMC, *supra* note 367, pt. 3, rule 505(e)(4)(A)–(E) (listing possible sanctions).

373. *Id.*

374. See 10 U.S.C. § 949d(f)(2)(B) (allowing admission of evidence without sources upon motion by trial counsel and finding by military judge that evidence is reliable and that the sources are classified).

commission and the defense (both the attorney and the defendant), as long as the production of the summary is "consistent with national security."³⁷⁵

An incident in the case of Salim Hamdan provides an example of how problems of access to classified information are adjudicated under the MCA. Defense counsel sought access to the names of three witnesses who could be seen in a videotaped investigation provided by the government. The government willingly identified one witness, the principal investigator, but submitted *ex parte*, in camera, classified documents in an effort to prove that disclosure of the other two witnesses, an interpreter and another individual briefly on the tape, would harm national security. The judge considered the *ex parte* motion in light of the discovery rule requiring that "no party may unreasonably impede . . . access of another party."³⁷⁶ The judge accepted the government's assertion of the national security privilege with respect to one witness but found that their argument with respect to the other was "merely an assertion."³⁷⁷ Rather than granting unfettered access to the defendant and defense counsel, however, the judge made provisions whereby the witness could call the defense at an appointed time and answer questions about the circumstances of the videotape without identifying himself.³⁷⁸

The records from Hamdan's military commission also illustrate the extent to which access to witnesses held in custody by the government complicates the issue of access to classified information. The defense sought access, via written questions, to certain detainees held at Guantánamo.³⁷⁹ The commission granted access via written questions.³⁸⁰ The defense prepared questions and then provided them to a Court Security Officer (CSO) with the authority to redact the questions for national security purposes. The CSO delivered the questions to the detainees, and the detainees' responses were returned in the same manner, again giving the

375. See *id.* § 949d(f)(2)(B). The MCA does not differentiate between the "defense counsel" and the "defendant" in its terminology. Notably, even the military commission may not get to see either the summary or the "sources, methods or activities" by which evidence is obtained if it is determined classified. *Id.* ("The military judge may require trial counsel to present to the military commission and the defense . . . an unclassified summary of the sources . . . by which the United States acquired the evidence.")

376. See *United States v. Hamdan*, No. D018, slip op. at 1 (Military Comm'n Apr. 21, 2008), available at <http://preview.defenselink.mil/news/Apr2008/HAMDAN%20D018%20RULING.pdf> (finding the relevant standard to be that each party must have "adequate opportunity" to prepare their case).

377. *Id.* at 2 (describing the government's assertion of privilege as to the second witness as "merely an assertion by counsel" but failing to explore the substance of either privilege claim in detail).

378. *Id.* (explaining that this procedure would allow a direct defense interview of the witness without necessarily giving away the witness's identity).

379. *United States v. Hamdan*, No. D011, slip op. at 1 (Military Comm'n June 4, 2008), available at <http://www.defenselink.mil/news/D-011-Ruling%20on%20Access%20to%20High%20Value%20Detainees.pdf> (describing the process by which questions were delivered to the detainees).

380. *Id.*

CSO an opportunity to redact the answers.³⁸¹ After receiving the redacted answers of former Al Qaeda operative Khalid Sheik Mohammed, the defense made a motion for the commission to undertake an in camera review of the redacted statements to determine if they should be disclosed to the defendant and counsel.³⁸² The government objected, arguing that the MCA places “the duty to protect classified information on its shoulders.”³⁸³ Accordingly, government counsel argued that they, rather than the court, must be able to inspect the answers to determine whether or not the defense should be allowed to access the document.³⁸⁴ The military judge denied the defense motion for in camera review excluding the government.³⁸⁵ Instead, the court found that “[i]f the defense wants access to those answers” the government counsel must be allowed to review the questions and determine whether or not defense counsel should have access.³⁸⁶

Objections based on disclosure of classified information can be made by the government at any point throughout the trial, including the examination of witnesses.³⁸⁷ The MCA contemplates that trial counsel may not be certain what information is classified without further consultation and therefore allows for a delay in proceedings for the purposes of discussion with agency heads and superiors.³⁸⁸ Additionally, military judges are given the option of conducting in camera and ex parte review of the government’s claim of privilege before making a determination about the admissibility or disclosure of a specific piece of information.³⁸⁹ In spite of its tight regulation of classified sources, the MCA requires that the defendant be present “at all sessions” of the military commission.³⁹⁰

3. Critiques of the MCA

Muneer Ahmad, visiting professor at Georgetown Law Center and former lawyer for Guantánamo detainees in both the civil and military commission context, points out an inconsistency in the MCA that allows the government to use evidence obtained under torture.³⁹¹ The MCA contains explicit provisions prohibiting the use of statements obtained through

381. *Id.* (“[T]he Commission authorized the CSO to redact any portions of the questions or answers that he considered appropriate to redact . . .”).

382. *Id.* (indicating that the desired review would be by the commission alone and not government counsel).

383. *Id.*

384. *Id.* at 1–2 (describing the government argument that it is the job of government trial counsel to control and protect classified information).

385. *Id.*

386. *Id.* at 2.

387. See 10 U.S.C. § 949d(f)(2)(C) (2006) (allowing objection to any question, line of inquiry, or motion to admit evidence).

388. See *id.*

389. *Id.*

390. *Id.* § 949a(b)(B) (providing exceptions for commission deliberation, voting, and when the defendant is behaving in a disruptive manner).

391. See Muneer Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 Nw. U. L. REV. (forthcoming 2009) (manuscript at 58 n.216, on file with author).

torture; however, it also includes the provision discussed above, allowing the government to introduce evidence without revealing classified sources and methods of interrogation as long as the military judge finds that the evidence is "reliable."³⁹² As Professor Ahmad notes,

Because hearsay evidence is generally admissible, the MCA may permit intelligence officers to testify to statements made by the defendant or others, without the defense having a meaningful opportunity to inquire into or challenge the methods of interrogation, thus raising the specter of a laundering of evidence obtained through torture.³⁹³

David Glazier, Loyola Law School professor and scholar of military justice and national security law, notes broader concerns of legitimacy. He raises questions about the validity of the commissions' jurisdiction over detainees, the failure of the commissions to comport with the Third Geneva Convention and International Humanitarian Law, and the commissions' potential lack of subject matter jurisdiction to hear material support charges and other charges that are not war crimes.³⁹⁴ Glazier also notes the potential for the commissions to be a "procedural due-process disaster" because they deny detainee access to much of the evidence against them and present many difficulties for detainees attempting to construct a defense.³⁹⁵

Another concern is the growing number of scandals that have developed surrounding the specific military judges involved in the commissions. Lieutenant Colonel Darrel Vandeveld, the chief prosecutor in the case of Mohammed Jawad, recently left his position within the tribunals, seeking reassignment elsewhere within the military.³⁹⁶ In a declaration submitted to the commission, he explained his decision to resign: "I am highly concerned, to the point that I believe I can no longer serve as a prosecutor at the Commissions, about the slipshod, uncertain 'procedure' for affording defense counsel discovery."³⁹⁷ Further, he detailed the observations upon which his concern was based:

I have observed that a number of defense requests which I considered to be reasonable and in some cases indicated support for were nevertheless rejected by the Convening Authority, presumably on the advice of the Legal Advisor.

....

392. See *id.* (citing 10 U.S.C. §§ 948r(b)–949d(f)(2)).

393. See *id.* (citing 10 U.S.C. § 949a(b)(2)(E)).

394. David W. Glazier, *If I Could Turn Back Time: Re-lawyering the "War on Terror"* 63–65 (Loyola Law Sch. Legal Studies, Paper No. 2008-30, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280391.

395. See *id.* (noting the "fairly substantial body" of war crimes law establishing that denial of a fair trial is a war crime).

396. Josh Meyer, *For Lawyer, Trial Was Tribulation; Guantanamo Prosecutor Who Quit Had 'Grave Misgivings' About Fairness*, L.A. TIMES, Oct. 12, 2008, at A1.

397. Declaration of Lieutenant Colonel Darrel J. Vandeveld at 3, *United States v. Mohammed Jawad* (Military Comm'n Sept. 22, 2008) (on file with author).

. . . [D]iscovery in even the simplest of cases is incomplete or unreliable. To take the Jawad case as only one example—a case where no intelligence agency had any significant involvement—I discovered just yesterday that something as basic as agents’ interrogation notes had been entered into a database, to which I do not have personal access, on or about 11 August 2008. These and other examples too legion to list, are not only appalling, they deprive the accused of basic due process and subject the well-intentioned prosecutor to claims of ethical misconduct.³⁹⁸

Lieutenant Colonel Vandeveld was at least the sixth officer of the Judge Advocate General’s Corp to either resign or request transfer based on concerns about the fairness of the tribunals.³⁹⁹

Lieutenant Colonel Vandeveld is not alone in his concerns about the proceedings. In the second of two motions to dismiss for undue influences, Jawad’s counsel submitted a letter to George W. Bush from the American Bar Association (ABA) expressing concern over the lack of due process afforded in the commissions.⁴⁰⁰ The ABA objected to the fact the commissions do not comport with the Uniform Code of Military Justice or U.S. international treaty obligations.⁴⁰¹ Specifically, the ABA pointed out that detainees cannot select their own counsel, have limited, tightly controlled access to information, and that their counsels have limited access to “fundamental information” relating to the defense of the detainee.⁴⁰² Further, the ABA objected to the military commissions’ willingness to accept hearsay and information obtained through coercion. The ABA raised specific concerns with respect to the fact that a finding of the death penalty could result from such information.⁴⁰³

III. REGULATED ACCESS TO CLASSIFIED INFORMATION: GIVING SUBSTANCE TO A “MEANINGFUL REVIEW”

Part II of this Note explored three different strategies for regulating access to classified evidence in different judicial contexts. Adopted in very different circumstances, each scheme provides an example of judicial or congressional efforts to balance individual rights and national security concerns. Part III of this Note evaluates the appropriate use of classified evidence in the habeas corpus litigation brought by detainees held at Guantánamo Bay, Cuba, in light of the three examples explored in Part II and the mandate of a “meaningful review.” This part recommends that

398. *Id.* at 2–3.

399. Meyer, *supra* note 396.

400. See Defense Motion to Dismiss for Unlawful Influence, Attachment 9, at 1, *Jawad*, No. D004 (Military Comm’n May 20, 2008) (letter from William H. Neukom, President, Am. Bar Ass’n, to President George W. Bush), available at <http://www.defenselink.mil/news/Jawad%20-%20D%20-%200004%20Motion%20to%20Dismiss%20Unlawful%20Influence%202.pdf>.

401. *See id.*

402. *Id.* Attachment 9, at 2.

403. *Id.*

procedural legislation be adopted to control the use of classified evidence and assure basic rights for the detainees.

A. *What Boumediene Requires: Reconciling Classified Evidence and a "Meaningful Review"*

In the long history of habeas corpus jurisprudence, *Boumediene's* mandate of a "meaningful review" was in many respects a rearticulation of a right previously recognized by the Court. As explained in *INS v. St. Cyr* and reasserted in *Rasul v. Bush*, the writ's function is to review the legality of detentions.⁴⁰⁴ Challenges to executive detentions, like the current Guantánamo petitions, traditionally trigger the highest level of procedural protections.⁴⁰⁵ In providing a strong affirmation of the writ, the Supreme Court in *Boumediene* neither created a binding procedural structure for the Guantánamo habeas cases nor posited a potential framework that would allow vindication of detainee rights.⁴⁰⁶ In lieu of fixed rules, the Court emphasized the traditionally adaptable and flexible nature of habeas and articulated broad principles to guide the lower courts.⁴⁰⁷ The guiding admonition continues to be that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."⁴⁰⁸

The Court did, however, identify specific procedural failings of the CSRT and DTA review processes that prevent these forms of review from being adequate habeas substitutes.⁴⁰⁹ This set of objections provides, in essence, procedural minimums for the habeas proceedings in district court and requires at least some detainee access to classified information. In assessing the CSRT process, the Court was most concerned with the petitioners' inability to rebut the evidence against them.⁴¹⁰ To the extent that the government is relying upon classified information to which petitioners are denied access, the habeas hearings replicate one of the flaws that rendered the CSRTs an inadequate substitute for the writ. Of the four specific problems identified within this broader concern, two are even more directly implicated by the use of classified evidence.⁴¹¹

First, the Court objected to the inability of detainees in CSRT hearings to learn of the most critical allegations against them.⁴¹² While all of the CMOs issued thus far have required that an unclassified factual return be made available to detainees, none have required that substitutes for

404. See *supra* note 52 and accompanying text.

405. See *supra* note 52 and accompanying text.

406. See *supra* note 86 and accompanying text.

407. See *supra* note 86 and accompanying text.

408. *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

409. See *supra* note 93 and accompanying text.

410. See *supra* note 93 and accompanying text.

411. See *supra* note 95 and accompanying text (noting four flaws identified by the Supreme Court that prevent the CSRT process from being an adequate habeas substitute).

412. See *supra* note 95 and accompanying text.

classified information be provided to the detainee.⁴¹³ If the unclassified factual returns contained more substantive information, the lack of required substitutes would be of less importance. The unclassified *Boumediene* factual return reveals, however, that there is the potential for an unclassified factual return to communicate very little substantive information.⁴¹⁴ Forty-eight out of fifty-three pages are completely redacted, greatly challenging petitioner's ability to know the substance of the government's allegations against him.⁴¹⁵ Additionally, the idea that more than ninety percent of the information the government has submitted to the court as a demonstration of their authority to detain is noncritical is simply not credible. Without some form of regulated access to classified evidence, this critical failing of the CSRTs will contaminate habeas hearings as well.

Second, the Supreme Court identified the CSRTs' near total reliance on hearsay as a failing.⁴¹⁶ Where, as contemplated by Judge Hogan's CMO,⁴¹⁷ the court can view classified information that is not shown to either the petitioner or his counsel, there is a high risk that the evidence will be hearsay. In spite of the Court's understandable distaste for hearsay, the Court did not indicate that the admissibility of hearsay alone would be a fatal flaw. Where neither the petitioner nor counsel can see the hearsay, however, it runs the risk of going completely unchallenged. To effectively guard against unreliable hearsay and provide petitioners with an opportunity to rebut the allegations against them, courts must adopt regulations that will allow petitioners to know, at minimum, the basic contents of the allegations against them.

The *Boumediene* Court also faulted the CSRTs for their "closed and accusatorial" nature.⁴¹⁸ Thus far, the habeas hearings have been closed to the petitioners and to the public, and as such seem to approach the closed hearings so frowned upon by the Court in *Boumediene*.⁴¹⁹ While the presence of an attorney at these hearings ameliorates the situation and provides a distinctly higher level of process than that which was provided in the CSRTs, it does not erase the risks and dangers inherent in a closed proceeding.⁴²⁰ Petitioners, even in their absence, are encouraged to present evidence through their representative. Because they are unaware of the substance of the government's allegations and are not present for the hearing, the extent to which they are actually able to do so, however, remains unclear. As discussed throughout Part I, where an attorney cannot communicate to his client the substance of specific allegations charged by the government, challenging the allegations is very difficult regardless of

413. See *supra* notes 153, 165 and accompanying text.

414. See *supra* note 157 and accompanying text.

415. See *supra* note 157 and accompanying text.

416. See *supra* note 95 and accompanying text.

417. See *supra* note 165 and accompanying text.

418. See *supra* note 97 and accompanying text.

419. See *supra* note 158 and accompanying text.

420. See *supra* notes 131–37 and accompanying text.

the actual truth.⁴²¹ Additionally, having the benefit of a representative does not preclude the implicit unfairness of being entirely excluded from your own hearing. This inherent unfairness has long been recognized by U.S. courts.⁴²² Where neither the public nor the very individual whose rights are a stake are present for a hearing, classification of the hearing as anything but closed is quite difficult.

An individual's right to see and confront the evidence against him comes out of a tradition of criminal law and constitutional rights,⁴²³ however it is relevant to any context where a fundamentally fair and meaningful review of facts and law has been guaranteed. Moreover, the *Boumediene* decision indicates that at least some level of due process is due to the detainees held on Guantánamo. Both the Court's reliance on the *Mathews* test to evaluate the procedural adequacy of the CSRT process, and its holding that the detainees have a right to habeas corpus guaranteed by the Constitution suggest that the Constitution reaches those held at Guantánamo.⁴²⁴ The Court's articulated concern over the "sum total of procedural protections afforded to the detainee at all stages, direct and collateral," further supports this notion.⁴²⁵

Detainee access to classified evidence relied on by the government to prepare for, and respond during, the hearing is essential to the other procedural protections extended throughout the habeas hearing.⁴²⁶ If a petitioner cannot examine the evidence against him, he cannot help his attorneys prepare a response by offering specific counterproofs to the evidence against him.⁴²⁷ The CSRT record of Mustafa Ait Idir reveals the difficulties of responding to allegations that one cannot see.⁴²⁸ The logic of traditional jurisprudence is consistent, even in this novel area of the law: where the government's action will injure an individual and the assessment of that action is based on a finding of fact, "the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."⁴²⁹ These problems are only intensified in the context of the attorney-client relationship that exists at Guantánamo.⁴³⁰

The use of classified information creates a very high risk that procedural process problems of the type discussed above will be encountered. To avoid this, a clear rule must be adopted to allow petitioners regulated access to classified evidence. This Note supports a legislative, rather than judicial solution. Adoption of a statute to govern the use of classified information in this context would avoid the multiplicity of standards that are already

421. See *supra* note 236 and accompanying text.

422. See *supra* note 119 and accompanying text.

423. See *supra* notes 121–24, 132 and accompanying text.

424. See *supra* note 87 and accompanying text.

425. See *supra* note 88 and accompanying text.

426. See *supra* notes 121–25 and accompanying text.

427. See *supra* notes 234–37 and accompanying text.

428. See *supra* notes 114–21 and accompanying text.

429. See *supra* note 118 and accompanying text.

430. See *supra* notes 133–37 and accompanying text.

developing in the proliferation of numerous case management orders and the varying definitions of exculpatory information that have developed at the district court level.⁴³¹

Part III.A. of this Note argued that regulated access to classified evidence is required to provide a meaningful review of the type ordered in *Boumediene*. This Note now considers the three models previously discussed. Part III.B addresses the reasons that the procedural regimes developed in the immigration context are not appropriate for the habeas context, and Part III.C similarly provides an argument against adopting the procedures from the military commissions. Part III.D argues that, in crafting a procedural mechanism for controlling the use of classified evidence, Congress should look directly to CIPA as a model.

B. Procedures from the Immigration Context Are Not Appropriate for Adoption in the Habeas Cases

The procedures used to regulate classified information in immigration law are neither clear enough in how they should be applied nor protective enough of individual rights for use in this setting. The use of classified information in classified removal proceedings, with essentially zero access for petitioners, would not be sufficient in the Guantánamo setting.⁴³² Though the Guantánamo detainees are noncitizens held outside of the United States, they have been brought within the jurisdiction of U.S. courts by the U.S. government and have been found to have at least some specific constitutional rights.⁴³³ The complete denial of access to classified information in the summary proceedings afforded aliens in expedited removal hearings⁴³⁴ utterly fails to comport with the *Boumediene* meaningful review standard, which unequivocally requires that petitioners be provided with a “meaningful opportunity” to challenge their detention.⁴³⁵

The standards applied in discretionary relief hearings are likewise inappropriate. Summaries of classified evidence are provided to aliens seeking discretionary relief only when “consistent[.]” with national security.⁴³⁶ But, unlike aliens seeking discretionary relief, habeas petitioners do not seek relief that is based on “unfettered discretion.”⁴³⁷ Rather, they seek relief based on rights firmly embedded in the Constitution and that the Supreme Court has recently and explicitly validated as accessible to the petitioners.⁴³⁸

431. See *supra* note 166 and accompanying text.

432. See *supra* note 270 and accompanying text.

433. See *supra* note 84 and accompanying text.

434. See *supra* notes 270–71 and accompanying text.

435. See *supra* note 408 and accompanying text.

436. See *supra* note 280 and accompanying text.

437. See *supra* note 278 and accompanying text.

438. See *supra* notes 83–84 and accompanying text.

If any area of immigration law is applicable or can be analogized to the detainees at Guantánamo, it is the logic of those discretionary relief cases dealing with permanent residents. Both the detainees and permanent residents are within the jurisdiction of the U.S. courts. And, like permanent residents, the Guantánamo detainees have been guaranteed some level of constitutional protection.⁴³⁹ Following the logic of *Al Najjar* and *American-Arab Anti-Discrimination Committee*, a procedural due process violation would surely result from a failure to disclose evidence when the detainees' interests in relief are so pressing and procedures can so easily be changed to better address their interests.⁴⁴⁰ The government has an obvious interest both in detaining those men who truly are a threat to our national security and in preventing the disclosure of sensitive national security information, but the risk that the detainees would be erroneously denied meaningful review through the use of classified information is too great to ignore.⁴⁴¹

The logic of *Al Najjar* and *American-Arab Anti-Discrimination Committee* does not, however, provide an affirmative standard by which to measure the level of process that should be due to detainees. Each case determined only that the aliens involved had been given too little process rather than articulating the appropriate procedures that should govern permanent resident access to classified evidence.⁴⁴² Additionally, although the detainees are due some level of constitutional protection, they are not permanent residents. The weighty interests of the alien and the detainee are distinct: the alien faces deportation and potential separation from his family, friends, life, and work; the detainee faces indefinite detention far away from his family and home. While aliens face the ominous threat of deportation, the Guantánamo detainees face years of solitary detention in a strange land. More obviously, and cutting the other way, the detainees have never actually lived within the United States and therefore are not traditionally due the same level of constitutional protections.⁴⁴³ These distinctions make it difficult and perhaps inappropriate to draw too strong a parallel between the two groups.

Likewise, the ATRC would insufficiently protect detainee rights to satisfy the meaningful review standard. Using the ATRC as a model, the detainee would be provided reasonable notice of the type of charges against him⁴⁴⁴ and would be present for the hearing and represented by counsel.⁴⁴⁵ He would not, however, be guaranteed even qualified access to classified information. For example, if the government could not create an adequate summary of the information, a detainee treated like a permanent resident

439. See *supra* note 433 and accompanying text.

440. See *supra* notes 285–91 and accompanying text.

441. See *supra* notes 234–37 and accompanying text.

442. See *supra* note 290 and accompanying text; see also *supra* note 297 and accompanying text.

443. See *supra* note 263 and accompanying text.

444. See *supra* note 312 and accompanying text.

445. See *supra* note 313 and accompanying text.

under the statute would be appointed a lawyer with access, while a detainee treated like an alien without permanent resident status would be denied even that.⁴⁴⁶ Additionally, despite guaranteeing the presence of the alien, the ATRC explicitly allows for ex parte, in camera presentation of evidence,⁴⁴⁷ exactly the type of “closed and accusatorial” setting prohibited by the *Boumediene* Court.⁴⁴⁸

C. Procedures from the MCA Are Not Appropriate for Adoption in the Habeas Cases

The MCA requires the production of summaries or substitutes of classified evidence for detainees⁴⁴⁹ and provides judges with an array of sanctions where the government is unable to comply with this requirement.⁴⁵⁰ From this perspective, it is quite similar to CIPA. Still, other provisions within the MCA make its treatment of classified information insufficient under the *Boumediene* meaningful review standard.

The generally acknowledged problems with overclassification⁴⁵¹ discussed earlier are exacerbated in this context by the fact that the original classifying authorities and agency heads are not required to assess the legitimate need to have specific documents remain classified.⁴⁵² Rather than assessing the appropriateness of classified information independently, agency heads are presumed to have delegated their authority to witnesses and trial counsel participating in the tribunals.⁴⁵³ This de facto finding of the privilege effectively allows government counsel to wrongfully withhold information and discourages the declassification of documents that might no longer need to be classified. Consider the following hypothetical situation: a military prosecutor seeks to rely on a classified document containing hearsay. After some consideration, he is reasonably sure that the information would no longer cause harm to national security. Knowing that he has the power to invoke classification independently may encourage this hypothetical prosecutor to invoke the privilege when it is not actually called for, simply in an effort to avoid adversarial challenges to the document. The MCA's grant of this power to the counsel working on an adversarial case fosters a level of abuse for which the military commissions are known⁴⁵⁴ and certainly undermines efforts to allow meaningful judicial review. The risk of such abuse is especially great where a significant concentration of evidence remains in the government's control.⁴⁵⁵

446. See *supra* notes 317–23 and accompanying text.

447. See *supra* note 315 and accompanying text.

448. See *supra* note 97 and accompanying text.

449. See *supra* notes 368–69 and accompanying text.

450. See *supra* notes 372–73 and accompanying text.

451. See *supra* notes 112–13 and accompanying text.

452. See *supra* note 366 and accompanying text.

453. *Id.*

454. See *supra* notes 397–99 and accompanying text.

455. See, e.g., *supra* notes 379–86 and accompanying text (describing difficulties of interviewing witnesses held in government custody).

The MCA provides for substitutions but the MCA itself contains a provision that would allow the prosecution to easily avoid being forced to actually produce such substitutions. Section 949d(f)(2)(B) allows the admission of evidence without identifying the sources of the information, the methods of obtaining the information, or the intelligence activities used to generate the information.⁴⁵⁶ As Professor Ahmad points out, this allows the use of evidence obtained under torture,⁴⁵⁷ but it also allows the use of unseen and unchallenged information more generally. By allowing evidence without sources, the sources themselves can remain classified and unknown to the defense. This may deeply undercut both the value of the information to the defense and the defense's ability to challenge the validity of the evidence. It is clear from the cases involving biased sources in the immigration context that the source of information or the methods used to obtain it is often what makes evidence most vulnerable to attack on confrontation.⁴⁵⁸ Additionally, the act of confronting an evidentiary source has long been accepted by our justice system as the best means of assuring its validity.⁴⁵⁹

D. CIPA Should Be Adopted in the Habeas Cases

In adopting legislation for this purpose, Congress should follow the recent decision by the D.C. Circuit, *Al Odah v. United States*,⁴⁶⁰ and look directly to CIPA as a model. Indeed, though the Court applied CIPA "by analogy," it did so directly and used the procedural construct to evaluate a question of access to classified information in the habeas context.⁴⁶¹ Besides this most recent use, CIPA's demonstrated success prosecuting terrorism shows that there is a way to balance national security and individuals' rights without offending the Constitution.⁴⁶² Though CIPA certainly has its detractors,⁴⁶³ and is designed for criminal cases, it could be easily adapted for use in the habeas setting.⁴⁶⁴

CIPA strikes the appropriate balance between individual rights and the government's interest in security. While many critics of CIPA focus on the defendant's lack of access to the evidence, they do not respond to the fact that ultimately, under CIPA, a defendant is guaranteed an "adequate[] substitute" of the information.⁴⁶⁵ In guaranteeing access to the substance of the charges against you, CIPA is the most petitioner-friendly model of any

456. See *supra* note 374 and accompanying text.

457. See *supra* note 391 and accompanying text.

458. See *supra* note 343 and accompanying text.

459. See *supra* note 118 and accompanying text.

460. No. 05-5117, 2009 WL 564310, at *7 (D.C. Cir. Mar. 6, 2009); see also *supra* notes 167-78 and accompanying text.

461. See *supra* notes 177 and accompanying text.

462. See *supra* notes 184-86 and accompanying text.

463. See *supra* notes 230-53 and accompanying text.

464. See *supra* notes 167-78 and accompanying text.

465. See *supra* note 221 and accompanying text.

of those existing in either the criminal or immigration contexts.⁴⁶⁶ Allowing unfettered access to classified information would not show appropriate deference to the Supreme Court's admonition that lower courts must respect the government's interest in source and intelligence protection.⁴⁶⁷ As the court of appeals indicated in *Al Odah*, "alternatives should . . . be available in habeas if the district court determines that a proposed admission or summary" would adequately protect petitioner's right to a meaningful review.⁴⁶⁸ Indeed, the D.C. Circuit considered access to summaries of evidence relied on by the government so reasonable that a court can order substitutes even if the information summarized is not "material" to the case.⁴⁶⁹

Where an adequate substitute cannot be crafted, the government need not, as some critics suggest, immediately drop a case.⁴⁷⁰ Other, more incremental sanctions are available under CIPA and could easily be incorporated in the habeas context.⁴⁷¹ These sanctions, if actively used, would encourage the government to rely only on its best, most reliable information and to craft the best substitutes possible.

Those who, like former Attorney General Michael Mukasey, believe that CIPA will allow widespread disclosure of classified information and interrupt our national security, should be reminded that each counsel with access to classified information must adhere to the rigorous standards of security clearance⁴⁷² and that represented individuals see only summaries or substitutions of national security information.⁴⁷³

The adoption of a flexible statute like CIPA would lead to the application of uniform standards throughout the habeas context without hampering the role of the federal judges in crafting a fair procedure. Uniform standards would also help to prevent the proliferation of various and conflicting standards among the district court judges handling these cases.⁴⁷⁴ Unfortunately, the adoption of differing standards at the district court level

466. In expedited removal situations, classified or otherwise secret evidence can be used ex parte and in camera without disclosure to the alien. See *supra* note 264 and accompanying text. In the discretionary relief context, a substitution or summary of the classified information used to oppose requested relief is required only where it is "consistent with" the classified and sensitive nature of the documents. See *supra* note 280 and accompanying text. While the ATRC requires "sufficient substitutions," it does so only if the government is able to craft such a document. If not, no substitution is required. Without a substitution, all cases go forward and only lawful permanent residents are given a cleared representative who will have access to the information. See *supra* note 323 and accompanying text. The military commissions require substitutions but have other provisions that enable this requirement to be easily evaded. See *supra* note 456 and accompanying text.

467. See *supra* notes 102-03 and accompanying text.

468. *Al Odah v. United States*, No. 05-5117, 2009 WL 564310, at *7 (D.C. Cir. Mar. 6, 2009); see also *supra* note 177 and accompanying text.

469. See *supra* note 177 and accompanying text.

470. See *supra* note 222 and accompanying text.

471. See *supra* note 222 and accompanying text.

472. See *supra* note 247 and accompanying text.

473. See *supra* note 205 and accompanying text.

474. See *supra* note 166 and accompanying text.

has already begun in the form of different case management orders and standards for discovery, creating a risk of contradictory findings.⁴⁷⁵ A firm set of rules governing the admissibility and discoverability of information would help to avoid needless litigation over sources at the district court level. It would also help to eliminate the possibility of bias on the part of individual judges, whether with respect to the race or background of a petitioner or to the specific set of facts that the government alleges justify a given detention. In the context of such highly contested litigation, an overarching structure of this kind would be very beneficial.

The CIPA model would require a few modifications for use in the habeas setting. Under CIPA, the Federal Rules of Criminal Procedure remain the governing standard for discovery.⁴⁷⁶ Whether or not this is the appropriate standard for habeas cases would need to be reviewed by Congress. A rule more explicitly adopting the heightened standards of relevance used by courts in CIPA cases⁴⁷⁷ would probably be appropriate here. Additionally, this Note proposes other minor changes to guarantee that the meaningful review standard is met. For example, legislation governing the use of classified evidence in the habeas hearings should ensure that cleared counsel have a right to contribute to admissibility determinations. At minimum, detainees would then have a representative who could argue in their favor as to the admissibility of specific pieces of evidence. Additionally, following the holding of the *Moussaoui* court,⁴⁷⁸ any statute adopted by Congress should explicitly provide that counsel for the defense shall be allowed to participate in hearings over the adequacy of a proposed substitution.⁴⁷⁹ While the judge should remain the ultimate arbiter of substitution determinations,⁴⁸⁰ a representative for the petitioner should have the opportunity to argue on behalf of detainees. These changes would have the added benefit of addressing the primary concern of CIPA detractors who believe that the defendant and defense counsel are improperly excluded from admissibility and discovery determinations.⁴⁸¹

CONCLUSION

What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.⁴⁸²

This simple plea for evidence from detainee Mustafa Ait Idir during his CSRT sums up the primary challenge of defending against classified

475. See *supra* note 166 and accompanying text.

476. See *supra* note 198 and accompanying text.

477. See *supra* notes 199, 172–75 and accompanying text.

478. See *supra* note 215 and accompanying text.

479. See *supra* note 215 and accompanying text.

480. See *supra* note 214 and accompanying text.

481. See *supra* notes 230–31 and accompanying text.

482. MARGULIES, *supra* note 21, at 164 (quoting Mustafa Ait Idir, Bosnian-Algerian Detainee, Guantánamo Bay, Cuba) (internal quotation marks omitted).

evidence: without knowledge of the facts, there can be no meaningful opportunity to refute them. Recognizing this, as well as the need to protect against the unnecessary and potentially harmful disclosure of classified national security information, this Note advocates for a legislative framework following the CIPA model to regulate legal standards, procedures, and access to classified information in the Guantánamo habeas cases. The *Boumediene* majority stated clearly that the habeas petitioners at Guantánamo are due meaningful review. The Court balanced this forceful requirement by reminding lower courts to be mindful of national security concerns and to be cautious and accommodating while adjudicating the habeas cases. Additionally, the Court was careful not to tread on the turf of the district courts, leaving them space to iron out the exact construct of a habeas hearing that will provide adequate and meaningful review. The Court was nevertheless clear that any accommodations for national security concerns must not undermine the purpose of the writ—to effectively challenge the lawfulness of a petitioner’s detention.

While the D.C. Circuit’s recent adoption of CIPA by analogy in *Al Odah v. United States* is a large step toward clarifying detainee rights to access classified information, the decision does not and cannot go far enough on its own. *Al Odah* connects access to classified information and a meaningful review explicitly, and it requires detainee access to classified evidence, or a summary of such evidence, wherever such access “is necessary to facilitate a meaningful review.”⁴⁸³ By phrasing the issue in this way, and by analogizing to CIPA, the *Al Odah* court correctly requires courts and counsel alike to assess petitioner’s access to classified information on a case-by-case basis while still protecting sensitive information. *Al Odah*, however, is limited in precedential value and deals only with classified information at one specific point of the habeas hearings. In light of the limited effect of the *Al Odah* decision, as well as the lack of clear guiding principles enunciated in *Boumediene*, Congress should enact a statute providing for fair and standard use and access to classified evidence throughout the habeas cases.

The adoption of CIPA or a CIPA-like statute is appropriate in this setting because with controlled and regulated access to classified evidence, or at least summaries of such information, courts can strike the balance between national security and a fair adjudication of detainee rights envisioned by the Supreme Court. In keeping with the long tradition of the writ, habeas corpus must adapt to the needs of the current situation to which it is being applied and must be made to work within the confines of a statute regulating classified evidence. CIPA, a flexible statute designed to promote judicial creativity, is the ideal complement to the writ in this context, allowing both a firm structure and the creativity required to achieve justice while protecting national security. Indeed, without such a statute in place,

483. *Al Odah v. United States*, No. 05-5117, 2009 WL 564310, at *4 (D.C. Cir. Mar. 6, 2009).

the courts risk reaching judgments based on inconsistent standards and—of far graver concern—failing to ensure that each petitioner be given a “meaningful review” as required by the Supreme Court.

Notes & Observations