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The Case Against Secret Evidence

Victor Hansen* and
Lawrence Friedman**

I. INTRODUCTION

In support of its effort to fight terrorism, the administration of George W. Bush proposed to try individuals detained indefinitely in respect to alleged terrorist activities before military tribunals. The United States Supreme Court subsequently struck down the Bush administration's tribunal system in *Hamdan v. Rumsfeld*.¹ In the wake of that 2006 decision, the administration sought to reach a compromise over a successor system with members of the House of Representatives and the Senate who favored a scheme of military commissions that would provide greater protections to terrorism suspects than the administration preferred. One feature of the system upon which the sides differed was whether these individuals could be tried and convicted on the basis of secret evidence – protected information, whether classified or related to national security, that only the military attorneys and members of the military commissions would be allowed to view in discovery or at trial.²

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1. 126 S. Ct. 2749 (2006).

2. "Secret evidence" has been defined as "information of potential evidentiary value not shared with the defendant, and often not shared with defense counsel." Ellen Yaroshefsky, *Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1064 (2006); see also Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1962 n.7 (2005) (defining "secret evidence" as "evidence – whether classified or unclassified – that is not disclosed to the accused himself"). See also *infra* note 9 (discussing Department of Defense definition of "protected information").

Statutory and procedural standards exist under federal law and military rules for preventing the disclosure of protected information relating to national security. But the Bush administration did not link its proposal to those laws, which effectively compel the government, in cases in which protected information is relevant, to choose between non-disclosure of the information in any form, or prosecution of the case with disclosure to the defendant and defense counsel. The administration claimed that, in the context of trials of terrorism suspects, the government cannot be forced to make that choice because of the practical need to safeguard information that might reflect such highly sensitive matters as operational intelligence.

In the event, the administration did not prevail; the compromise legislation, though it did not provide terrorism suspects detained as enemy combatants the full panoply of individual rights protections enjoyed by criminal defendants in federal courts, did not authorize the use of secret evidence.³ That Congress and the president reached an agreement on this issue in 2006 is of no small moment, but even five years after September 11 national security policymaking could only be viewed as a dynamic enterprise. Administrations and congressional membership change, after all,⁴ and a compromise on such a divisive issue in 2006 is not necessarily a policy point upon which future leaders may be content to rest. And so in this Article we address a central question the administration's proposal raised: can the use of secret evidence ever be justified in the trials of terrorism suspects before military tribunals?

We approach this question assuming that the Bush administration, which lost several times in the United States Supreme Court in cases involving aspects of its national security

3. See generally, Military Comm'ns Act of 2006, S. 3930, 109th Cong. (2003) available at http://www.loc.gov/rr/frd/Military_Law/pdf/S-3930_passed.pdf. This act establishes a process relating to protected information which is similar to the process set forth in the Classified Information Procedures Act.

4. Following the 2006 midterm elections, in which Democrats won back both the House of Representatives and the Senate, President Bush's secretary of defense, Donald Rumsfeld, a leading architect of administration policy regarding terrorism suspects detained as enemy combatants, resigned. See Michael Kranish & Farah Stockman, *Rumsfeld Goes at 'Critical' Time in War*, BOSTON GLOBE, Nov. 9, 2006, at A1.

program, made the best possible case for the use of secret evidence in military tribunals. In determining whether the administration had the better of the argument, we look at the issue from the perspectives of history and of precedent in United States military courts and in Article III courts. That review demonstrates that there is wisdom to be learned from past experience, both in respect to pragmatic policymaking for the nation and the soldiers who defend it, and in respect to the ongoing discussion about the rule of law in times of crisis.

We begin, in Part I, by discussing in detail the case for allowing the use of secret evidence. We rely for the argument in favor of secret evidence upon policy statements issued by Bush administration officials and like-minded commentators indicating that practical considerations about protected information underlie the proposal. We view this argument through the filter of the Court's decision in *Hamdan* and the administration's stated belief that the use of secret evidence would run afoul of no domestic legal prohibition.

In Part II, we focus on the practical implications of the Bush administration's argument in favor of secret evidence, and responses to that argument.⁵ Part II discusses the lessons that may be learned from the military and civilian experiences with protected information. We examine the requirements of the Classified Information Procedures Act (CIPA)⁶ and its counterpart in the Uniform Code of Military Justice (UCMJ),⁷ and how those regulations have been used by military and Article III judges to manage the use of classified information in discovery and at trial. In addition, we review the standards the United States Supreme Court has established for the use of confidential information in proceedings not concerned with national security, as well as the protective measures that trial court judges may take to ensure that such information remains protected throughout the course of

5. Commentators have raised substantive criticisms of secret evidence based upon due process concerns, see Note, *supra* note 2, at 1976-83, and the implications for the ethical obligations of defense counsel, see Yaroshefsky, *supra* note 2, at 1081-85. We do not rehearse those arguments here, as our look at the practical reasons supporting the use of secret evidence and the Bush administration's argument in favor of its use seeks to draw out the reasons for that advocacy and the dangers such reasoning pose.

6. Classified Info. Procedures Act, 18 U.S.C. § App. III (2003).

7. MIL. R. EVID. 505.

criminal proceedings. We conclude that ample precedents exist to provide guidance on how to manage the practical problems posed by the use of protected information in the trials of terrorism suspects.

Given our conclusion that the practical argument in favor of secret evidence in the trials of terrorism suspects is best viewed as a makeweight, in Part III we explore the possible reasons underlying the administration's preference for secret evidence, the legitimacy of those reasons, and the potential consequences of endorsing the use of secret evidence in cases involving our own forces in courts-martial, and ordinary criminal defendants in Article III courts. To ensure that steps are taken to avoid the realization of those consequences, we outline a series of recommendations for Congress to consider that will serve effectively to check the use of secret evidence by future administrations in proceedings designed to operate in moments of national crisis.

II. THE CASE FOR SECRET EVIDENCE

In this Part we address the genesis and substance of the Bush administration's argument that certain information must be withheld from terrorism defendants. We aim here to sketch the argument based upon public documents and the arguments the administration's lawyers made in connection with the *Hamdan* case, before turning in Part II to a review of the ways in which Congress, the military, and the courts have managed the issue of secret evidence in the past.

A. *Pre-Hamdan*

The Bush administration's first attempt to address the use of protected information in the context of the military commissions is found in Department of Defense Military Commission Order Number 1 dated March 21, 2002.⁸ In this order the administration set out a position that placed a preeminence on preventing the disclosure of protected information.⁹ According to

8. Military Comm'n Order No., U.S. Dep't of Def., 1 (Mar. 21, 2002) available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter MCO (Mar. 21, 2002)].

9. Protected information is defined as:

the order, the presiding officer¹⁰ of each commission shall *sua sponte*, or upon motion of the prosecutor, take the steps necessary to protect the interests of the United States with regard to state secrets and protected information.¹¹

Under the order, the presiding officer could take a number of actions to protect the interests of the United States during the proceedings. Most restrictively the presiding officer could delete specified items of protected information from documents to be made available to the accused, the detailed defense counsel or civilian defense counsel.¹² The presiding officer could also direct a portion or a summary of the protected information be provided in lieu of the protected information.¹³ Finally, the presiding officer could substitute the protected information with a statement of the relevant facts that the protected information would tend to prove.¹⁴

In addition to these measures, the presiding officer could direct the closure of the proceedings or a portion of the proceedings in order to prevent the disclosure of protected information.¹⁵ As part of the closure the presiding officer could exclude the accused and the civilian defense counsel from the

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- (i) information classified or classifiable pursuant to [Executive Order 12958]; (ii) information protected by law or rule from unauthorized disclosure; (iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests.

See id. at para. 6D(5)(a).

10. Under the initial order, the presiding officer was a military judge advocate officer who ruled on all issues of admissibility, advised the other members as to the law, and who also was a voting member of the commission. *See id.* para. 4(5)(a)-(d). Under the revised commission order the presiding officer was a non-voting member of the commission, with other duties remaining the same. *See* U.S. Dep't of Def., Military Commission Order No. 1 (Aug. 31, 2005), available at <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>.

11. *See* MCO (Mar. 21, 2002) *supra* note 8, at para. 6D(5)(b). Under the original commission structure, the presiding officer of the commission must be a military officer who is a judge advocate of any military service. *Id.* para. 4A(4).

12. *See id.* at para. 6D(5)(b).

13. *See id.*

14. *See id.*

15. *See id.* at para. 6B(3).

proceedings.¹⁶ Though detailed defense counsel could not be excluded, they would be restricted from disclosing any information presented during the closed sessions to the client or the civilian defense counsel without the prior approval of the presiding officer.¹⁷ Requests for limited disclosure of protected information and the closure of the proceedings to the accused and the civilian defense counsel could be made by the prosecutor *ex parte* and *in camera*.¹⁸ Finally, under the initial order, no protected information could be admitted into evidence for consideration by the commission unless it was presented to the detailed defense counsel.¹⁹

On August 31, 2005, the Secretary of Defense issued a new order on military commissions which superseded the March 2002 order.²⁰ This version of the military commission procedures took a slightly different approach to protected information by placing two additional hurdles that the prosecution must clear before the commission could consider the protected information. The new order kept the same restrictions in place on the use and disclosure of protected information. The presiding officer still has the ability to close the proceedings to the accused and the civilian defense counsel.²¹ Under the new order if the presiding officer denies the accused and the civilian defense counsel access to the protected information, that protected information cannot be introduced as evidence without the approval of the chief prosecutor. In addition, the presiding officer will not admit the protected information into evidence if it would result in the denial of a full and fair trial for the accused.²² It was this order that the Supreme Court reviewed and ultimately struck down in *Hamdan*.²³

16. *See id.*

17. *See id.*

18. *See id.* at paras. 6D(5)(b) and 6B(3).

19. *See id.* at para. 6D(5)(b).

20. *See* Military Comm'n Order No. 1, U.S. Dep't of Def., (August 31, 2005), *available at* <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf> [hereinafter MCO (Aug. 31, 2005)]

21. *See id.* at paras. 6D(5)(b) and 6B(3).

22. *See id.* at para. 6D(5)(b).

23. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

B. *The Bush Administration's Rationale*

The initial military commission order of 2002 and the superseding commission order of 2005 represent a significant departure in the manner in which this evidence is treated by Article III courts and by military courts-martial under the Uniformed Code of Military Justice (UCMJ).²⁴ The administration plainly preferred a process that removed any possibility of disclosure of protected information. Significantly, the two parties that could be denied access to this information were the accused and his civilian defense counsel.

The administration's concern about revealing protected information to an accused is understandable: it is the accused who has been identified and charged with violations of the law of war and terrorist actions directed against the United States. There is a legitimate fear that, once the accused has access to this protected information, he could seek to use it in furtherance of his own criminal conduct as well as to aid the enemies of the United States.²⁵ Some control is accordingly necessary.

It bears remembering, however, that the detainees at Guantanamo are not in an ordinary situation. The United States military would have complete control over them before, during, and after the conduct of the military commissions; they are confined and virtually cut off from any access to the outside world except under terms dictated by the military. Even if the detainees were acquitted by a military commission, the administration made clear it would continue to detain these individuals at least for the duration of the war on terror or until the detainee would no longer be considered a threat.²⁶

The other party that can be denied access to protected information is the civilian defense counsel, if the accused is so represented. It is not immediately clear why the civilian defense counsel poses a greater threat to national security than anyone else in the proceedings. Under the commission order, any civilian

24. A more detailed discussion of the procedures used in Article III courts and under the UCMJ will be discussed in the next section of the paper. *Infra* Part II.

25. See Note, *supra* note 2, at 1963.

26. See Press Briefing, Dep't of Def., (Briefing on Military Comm'ns) (May 22, 2003) available at http://www.defenselink.mil/releases/2003/b05222003_bt355-03.html.

defense counsel who represents a detainee must be a U.S. citizen; admitted to practice law in a state, district, territory or possession of the United States; not subject to professional sanction for relevant misconduct; eligible for access to information classified at the SECRET level or higher; and willing to comply with the regulations and instruction for counsel.²⁷

In light of the controls that the United States already places both on the detainees and their civilian defense counsel, it is important to articulate and understand the administration's rationale for placing such a strong preference on protecting certain information. This is no simple task: the administration has not been a model of clarity or precision in justifying the procedures it sought to impose at the trial of detainees. At a minimum, the rationale for the use of military commissions centers on national security and the protection of sensitive information. In his order on November 13, 2001, President Bush stated that, "[g]iven the danger to the safety of the United States and the nature of international terrorism,"²⁸ non-citizens would be detained, and, when tried, would be tried by military tribunals.²⁹ Subsequent statements by administration and Pentagon officials elaborated on this theme. One administration official stated that the president's principal objective in using military commissions was to "set up a body of rules that will allow us to protect information to achieve additional intelligence gathering purposes that may lead to the capture of more terrorists."³⁰ Other officials noted that the commission order "capitalize[s] on the flexibility needed because of the increased need to protect intelligence information that occurs during an armed conflict."³¹

Often, however, these statements lack any specific

27. MCO (Aug. 31, 2005), *supra* note 20, at para. 4C(3)(b).

28. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), Reprinted in 10 U.S.C. § 801 (Supp. IV 2004) [hereinafter President's Military Order].

29. *See id.*

30. Background Briefing on Military Comm'ns, U.S. Dep't of Def. (July 3, 2003) available at <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2797>.

31. Background Briefing on the Release of Military Comm'n Instructions, U.S. Dep't of Def. (May 2, 2003) available at <http://www.defenselink.mil/transcripts/2003/tr20030502-0144.html>.

articulation defining the necessity of particular rules dealing with protected information. John Altenburg, selected by the Secretary of Defense to serve as the Appointing Authority for the military commissions, articulated the rationale for the military commissions as follows:

[T]he government chose for many different reasons to use a military commission process. It doesn't mean that the others were wrong. It just means that the government chose on balance, given the nature of the allegations that were being made and I think especially national security interests, that they chose to use the commission process, thinking that that would meet the balanced needs.³²

This is hardly a clear and specific explanation of the rationale for military commissions and it certainly leaves one to question the administration's motives.

The government's brief in *Hamdan v. Rumsfeld* likely offers the most specific justification for the military commission's treatment of protected evidence. According to the government, military commissions have a long history under United States and international law.³³ Under United States law, military commissions are the military's "common law courts."³⁴ These commissions are not bound by an established set of rules or procedure. Rather, the commissions and their procedures are created and adapted in each instance to meet the needs of that specific occasion.³⁵ The argument then follows that the attacks on September 11, 2001 represented a new threat by Al Qaeda and other international terrorist organizations. These organizations are able to operate across international borders and within the United States itself. The objective of these organizations is to cause massive death, injuries, and property destruction.³⁶ If members of these terrorist organizations had access to protected information they would use that information to plot and carry out

32. Def. Dep't Briefing on Military Comm'n Hearings, U.S. Dep't of Def. (Aug. 17, 2004) available at <http://www.defenselink.mil/transcripts/2004/tr20040817-1164.html>.

33. Brief for Respondent-Appellee at 21-24, *Hamdan v. Rumsfeld*, 126 S. Ct 2749 (2006) (No. 05-184).

34. *Id.* at 45.

35. *Id.*

36. See President's Military Order, *supra* note 28.

future terrorist attacks; learn of the government's efforts to discover and disrupt terrorist cells and terrorist plots; reveal government plans and efforts to other members of their terrorist organizations; discover members of their organizations who may be cooperating with the government; and use the information in possibly even unknown ways to further their terrorist activities against the United States and its interests. These reasons necessitate the use of the military commissions procedures for protected information, as opposed to the procedures provided in Article III courts or in courts-martial.

In addition, the government contends that in the war on terror the battlefield is not confined to traditional boundaries.³⁷ Because the battlefield is virtually everywhere and the threat can come from any direction, national security concerns are paramount. The procedures set forth under military commissions for protected information, the argument would continue, remain the best way to protect against this ubiquitous threat. Different and more open procedures regarding protected information would be inappropriate and inadequate to defend against this threat.³⁸

C. *Analysis of Hamdan v. Rumsfeld*

The Court considered these arguments in *Hamdan v. Rumsfeld*³⁹ when it ruled on the constitutionality and legality of the administration's military commissions procedures.⁴⁰ In *Hamdan* the Court invalidated the military commissions procedures established by the president.⁴¹ Among the Court's reasons for striking the military commissions was the concern over the procedures related to protected information – the Court

37. See Background Briefing on the Release of Military Comm'n Instructions, U.S. Dep't of Def. (May 2, 2003) available at <http://www.defenselink.mil/transcripts/2003/tr20030502-0144.html>.

38. See Military Comm'n Charges Referred, U.S. Dep't of Def. (Dec. 19, 2005) available at <http://www.defenselink.mil/releases/2005/nr20051219-12183.html>.

39. 126 S. Ct. 2749 (2006).

40. The *Hamdan* opinion raises and addresses a number of issues relevant to the military commissions. *Id.* at 2762. It is not the purpose of this article to discuss all of these issues; rather, the focus here is on the specific provisions relating to protected evidence, which the court struck down. *Id.* at 2798.

41. *Id.*

focused on a process that could prevent the accused and his civilian defense counsel from ever learning what evidence was presented during any proceeding that was "closed."⁴² The Court held that this procedure was both an unjustified departure from the procedures established under the UCMJ, and the procedures violated the requirements of the law of war as set out in common Article 3 of the Geneva Conventions of 1949.⁴³

Article 21 of the UCMJ codified the well established principle that military commissions have concurrent jurisdiction with courts-martial to try offenses and offenders by statute or by the law of war.⁴⁴ Article 36 of the UCMJ sets out in general terms the procedural requirements for military commissions. Under Article 36, to the extent that the president considers practicable, the military commission procedures should apply the principles of law and the rules of evidence generally recognizable in Article III courts.⁴⁵ Additionally, the rules and regulations for military commissions should, again insofar as practicable, match the rules and regulations for courts-martial, and other military tribunals.⁴⁶ The Court held that the president's military commission rules regarding protected evidence ran afoul of both Article 21 and Article 36 of the UCMJ.⁴⁷

The Court noted that Article 36 does not absolutely prevent the military commission from establishing procedures that are different than procedures in Article III courts or the procedures used in courts-martial or other military tribunals.⁴⁸ In order for those differences to comply with Article 36, however, certain conditions must be met.⁴⁹ In order for the procedures to lawfully differ from procedures found in Article III courts, the president must determine that it would be impractical to apply those procedures to military commissions.⁵⁰ The Court found that the president had made that determination and the Court gave him

42. *See id.* at 2786-88.

43. *Id.* at 2762.

44. Uniform Code of Military Justice, 10 U.S.C. § 821 (2003).

45. *Id.* at § 836(a).

46. *Id.* at § 836(b).

47. *Hamdan*, 126 S. Ct. at 2775-87.

48. *Id.* at 2780.

49. *Id.* at 2788-94.

50. 10 U.S.C. § 836(a) (2000).

complete deference as to that decision.⁵¹

The Court ruled that a different determination would be required before the military commission procedures could depart from the procedures used in courts-martial.⁵² Under Article 36(b) the determination of impracticality is not one that the president can make unilaterally.⁵³ According to the Court, the historical reasons for the uniformity of procedures for military commissions and courts-martial are two fold.⁵⁴ First, the difference between military commissions and courts-martial was originally jurisdiction alone, and such a difference would not justify a separate set of procedural rules for each forum.⁵⁵ Second, and more importantly, uniformity was required to “protect against abuse and ensure evenhandedness under the pressures of war.”⁵⁶ The Court held that there is nothing in the record to demonstrate that it would be impractical to apply court-martial rules to military commissions.⁵⁷ The Court further concluded that the absence of any showing why the rules for courts-martial were impractical was particularly disturbing in light of the clear and admitted failure to apply one of the most fundamental protections afforded by the Manual for Courts-Martial and the UCMJ – the right of the accused to be present.⁵⁸ Accordingly, the Court ruled that the military commission procedures violated Article 36 of the UCMJ.⁵⁹

Not only did the military commission procedures established by the president violate Article 36 of the UCMJ, they also violated Article 21 of the UCMJ because the procedures relating to protected information did not comply with the law of war. The Court reasoned that, in order for military commissions under Article 21 to have jurisdiction, they must comply with the law of war.⁶⁰ Common Article 3 of the Geneva Conventions of 1949 is a

51. *Hamdan*, 126 S. Ct. at 2788-94.

52. *Id.*

53. *Id.* at 2790.

54. *Id.*

55. *Id.*

56. *Id.* at 2788.

57. *Id.* at 2792.

58. *Id.*

59. *Id.*

60. *Id.* at 2795-96.

part of the law of war.⁶¹ Common Article 3 requires, among other things, that the accused be tried by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.⁶² The Court did not precisely define what the term "regularly constituted court" means under Common Article 3 other than to indicate that it may likely exclude special tribunals unless those tribunals incorporate recognized principles governing the administration of justice.⁶³ At a minimum the Court held that in order for the military commission procedures established by the president to qualify as regularly constituted courts, any departures from the standards of the military justice system must be justified by some practical need.⁶⁴ Here, the Court said, such a justification was lacking.⁶⁵

In the Court's view, both Article 21 and Article 36 impose a requirement that military commissions should apply the same procedures as the UCMJ.⁶⁶ If these military commission procedures are established unilaterally by the president, and if these procedures depart from the procedures for courts-martial, some determination must be made as to why the courts-martial procedures were impractical. According to the Court, the president failed under both Article 21 and Article 36 of the UCMJ to justify his departure.⁶⁷ The Court seemed particularly troubled when that departure would deny the accused the fundamental right to be present at all of the proceedings against him.⁶⁸ Implicit in the Court's opinion was the concern that the president chose to authorize military commissions, not because of a legitimate national security concern, but as a matter of expedience. Throughout the majority opinion the Court reminds and cautions the president that the military commission was not "born of a desire to dispense a more summary form of justice than is afforded by courts-martial."⁶⁹

61. *Id.* at 2794-97.

62. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 290.

63. *Hamdan*, 126 S. Ct. at 2796.

64. *Id.* at 2796-97.

65. *Id.* at 2797.

66. *Id.* at 2793.

67. *Id.* at 2797.

68. *Id.* at 2798.

69. *Id.* at 2788-93. As noted above, the compromise legislation did not

III. HISTORY AND PRECEDENT: THE USE OF SECRET EVIDENCE IN THE COURTS

At bottom, the Bush administration's argument for denying terrorism suspects and their counsel access to confidential information comes down to practicality—that there is no way, as a practical matter, to prevent the disclosure of information critical to national security. To be sure, the government has a compelling interest in protecting information important to national security,⁷⁰ but it is not as though the practical aspects of achieving this interest have not been explored by Congress, as well as the military and civilian courts. In this Part, we discuss the ways in which the Congress and the courts have approached the practical issues surrounding the use of protected information and constructed procedures to prevent the unwarranted disclosure of protected information.

A. *Under the CIPA and the UCMJ*

There is no question that the Bush administration's proposal for military commission procedures relating to protected information departed significantly from the framework created by the CIPA and the UCMJ. Both the statute and the military regulations set out the specific requirements to which parties must adhere if the government wishes to introduce classified information or if the government wishes to assert a classified evidence privilege. In this section, we discuss how the statute and the military rule resolve the practical problems associated with protected information that is classified, examine the details of the statutory and regulatory requirements, and some illustrative cases.

1. *The CIPA and Protected Information*

Congress enacted the CIPA in 1980 as a means to manage the tension between a criminal defendant's right to discover classified information prior to trial and introduce that information at trial,

approve the use of secret evidence in trying terrorism suspects.

70. *CIA v. Sims*, 471 U.S. 159, 175 (1985); *Haig v. Agee*, 453 U.S. 280, 307 (1981).

and the government's legitimate interest in preventing the disclosure of information related to national security.⁷¹ Legislators designed the law to address a problem with so-called "graymail" cases, in which defendants threatened to disclose classified information at trial to force the government to dismiss the case,⁷² and the statutory procedures govern the conduct of pretrial conferences, the need for protective orders, and the steps that may be taken when a defendant is entitled to the classified information.⁷³

In particular, the CIPA outlines the standards for determining when classified information will be discoverable and admissible at trial. For discovery purposes, the defendant must demonstrate that the information is more than theoretically relevant and material.⁷⁴ If the defendant satisfies that standard, the government may respond by requesting modification or substitution of the information in question.⁷⁵ Assuming the government produces classified information in some form and the defendant seeks to use the information at trial, the CIPA requires a defendant to file a notice describing the information he reasonably expects to be disclosed.⁷⁶ When the government so requests, the court must hold a hearing to determine whether the information is useful, relevant or admissible.⁷⁷ The relevance and admissibility inquiries are distinct from one another, and governed by the standards contained in the Federal Rules of Evidence.⁷⁸

If the court in fact concludes that certain information can be used by the defendant, because it is relevant and admissible, the government may seek simply to admit the relevant facts that the

71. See *United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005); see also *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998).

72. See Note, *supra* note 2, at 1964 (discussing origins of the CIPA).

73. See 18 U.S.C.A. App. III, §§ 2-4 (1980).

74. *United States v. Libby*, 429 F. Supp. 2d 1, 7-8 (D.D.C. 2006); *United States v. Moussaoui*, 382 F.3d 453, 476 (4th Cir. 2004) (district court must determine whether "the information the Government seeks to withhold is material to the defense").

75. See 18 U.S.C.A. App. III, § 4 (1980).

76. *Id.* at § 5(a).

77. *Id.* at § 6(a). The CIPA does not alter the standards by which relevance is determined. See *United States v. Smith*, 780 F.2d 1102, 1106 (4th Cir. 1985) (en banc).

78. *United States v. Libby*, 453 F. Supp. 2d 35, 36 (D.D.C. 2006).

classified information would tend to prove, or substitute a summary of the information.⁷⁹ The court may allow the summary to be used only when it determines the summary will provide the defendant “with substantially the same ability to make his defense as would disclosure of the specified information.”⁸⁰ If, on the other hand, the court denies the government’s request to stipulate or substitute, the government also may seek an interlocutory appeal.⁸¹ In the alternative, the government may object to the disclosure of classified information, which effectively requires dismissal of the case unless the government can prove that the dismissal will not serve the interests of justice.⁸² If the government can show that justice requires that the prosecution go forward, the court may, among other things, dismiss particular counts in the indictment, find against the United States on any issue “to which the classified information relates,” or strike or preclude all or part of any witness’s testimony.⁸³

The CIPA also gives the government significant authority to close the trial proceedings to the public.⁸⁴ This additional precaution gives the parties an additional ability to both protect the legitimate national security interests of the United States while ensuring that the defendant has access to relevant and necessary classified evidence.

In short, the CIPA outlines a framework for addressing two practical issues associated with protected information that is considered classified: the defendant’s need for information relevant to his case, and the government’s concern that classified information related to national security not be casually disclosed. The aim of the law is to ensure that prosecutions move forward consonant with the principle that the government cannot “undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be

79. 18 U.S.C.A. App. III, § 6(c); see *Moussaoui*, 382 F.3d at 476 (discussing procedure once district court determines an item of classified information is relevant and material).

80. 18 U.S.C.A. App. III, § 6(c)(1). See, e.g., *United States v. Juan*, 776 F.2d 256, 259 (11th Cir. 1985) (the court should determine whether the government’s alternative “will provide the defendant with his defense”).

81. 18 U.S.C.A. App. III, § 7.

82. *Id.* at § 6(e).

83. *Id.*

84. *Id.* at § 6(a).

material to his defense.”⁸⁵ Accordingly, the statute ultimately compels the government to choose between disclosing the information in question or forgoing prosecution of the defendant: even when justice requires that the indictment not be dismissed, the government will not be allowed to proceed as if the defendant’s legitimate interest were rendered null.⁸⁶ The constitutionality of forcing this choice upon the government has been upheld in numerous cases.⁸⁷

a. *Illustrative Cases*

The federal courts have addressed the requirements of the CIPA in many cases; here, we discuss a few that illustrate particularly well the way in which the statute’s design serves to protect the government’s interest in limiting the disclosure of protected information. Consider, first, *United States v. Yunis*.⁸⁸ There, the defendant had been indicted for crimes arising out of the hijacking of a Royal Jordanian Airlines flight in 1985, including air piracy, conspiracy, and hostage taking.⁸⁹ The defendant sought discovery of fourteen transcripts of taped conversations between himself and a government informant, Jamal Hamdan.⁹⁰ The United States District Court concluded that the transcripts at issue should be produced, and the government appealed that determination.⁹¹

In reversing the District Court, the Court of Appeals in *Yunis* clarified the requirements of the CIPA in respect to discovery requests that implicate classified information. First, the defendant must demonstrate that the information sought is relevant to his defense.⁹² The court must next determine whether the government’s claim of privilege is at least colorable; as the court observed, “the government cannot be permitted to convert any run-of-the-mine criminal case into a CIPA action merely by

85. *Jencks v. United States*, 353 U.S. 657, 671 (1957).

86. *United States v. Moussaoui*, 382 F.3d 453, 474-76 (4th Cir. 2004).

87. *See Note, supra* note 2, at 1966.

88. 867 F.2d 617 (D.C. Cir. 1989).

89. *See id.* at 619; for a full description of the circumstances of the hijacking, see *United States v. Yunis*, 859 F.2d 953, 954-57 (D.C. Cir. 1988).

90. *See Yunis*, 867 F.2d at 619.

91. *See id.* at 620-21.

92. *Id.* at 623.

frivolous claims of privilege.”⁹³ In making this determination, the court must consider not just the substance of the information at issue – such as the content of conversations – but the tactical value that attaches to the way in which the information was obtained, from which foreign counterintelligence agents might learn a great deal about the nation’s intelligence-gathering capabilities.⁹⁴

Neither the substance nor the tactical value of the information automatically precludes its discovery and disclosure under the CIPA. So long as the defendant can show that the information he seeks is in fact relevant and material, the information should be deemed discoverable consistent with appropriate limitations upon its further disclosure. The *Yunis* court held that relevance and materiality in this context must refer to more than mere theoretical relevance; rather, the district court should rule the protected information discoverable only if it “is at least helpful to the defense of [the] accused.”⁹⁵ On the facts of *Yunis*, and following an *in camera* review of the protected information at issue, the court concluded that because the information did not go “to the innocence of the defendant *vel non*,” and could not serve to impeach “any evidence of guilt, or make[] more or less probable any fact at issue in establishing any defense to the charges,” it arguably could not be considered relevant, much less beneficial to his case.⁹⁶

These discovery standards were applied more recently in *United States v. Libby (Libby I)*.⁹⁷ In that case, the government charged the defendant with obstruction of justice, making false statements and perjury resulting from his statements regarding an intelligence agent’s identity.⁹⁸ The defendant sought all documents provided him in connection with certain intelligence

93. *Id.* The government privilege to withhold classified information has long been recognized. *See, e.g., C. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

94. *Yunis*, 867 F.2d at 623.

95. *Id.* (quotation omitted).

96. *Id.* at 624. Because the court viewed the protected information as neither relevant nor material, it declined to review how the balance should be struck between the defendant’s interest in disclosure and the government’s interest in non-disclosure. *See id.* at 625.

97. 429 F. Supp. 2d 1 (D.D.C. 2006).

98. *Id.* at 4.

briefings, as well as documents relating to inquiries he made in connection with intelligence briefings.⁹⁹ On the question of materiality of the information sought, the court undertook a close examination of the purposes to which the defendant claimed he would put that information as well as the nature of the information itself.¹⁰⁰ The defendant argued that the information was necessary for him to negate the specific intent element of the charged offenses; the court did not dispute that information that would tend to demonstrate a lack of specific intent ought to be considered relevant and material because it would be helpful to the defense.¹⁰¹ But the court also concluded that such information need not be provided in its raw form, because the material portion could be provided him in a form sufficient to be helpful, but which would not disclose more information than necessary to that end.¹⁰²

Just as *Libby I* illustrates the steps a court can take to both assess relevance and materiality and make provisions to limit disclosure to information that satisfies that assessment, another relatively recent case, *United States v. Moussaoui*,¹⁰³ shows the flexibility under the CIPA in circumstances in which a defendant has a genuine need for protected information and the government nonetheless refuses to disclose. In *Moussaoui*, the United States Court of Appeals for the Fourth Circuit addressed the procedures that should be followed when a court has determined that a defendant has shown both relevance and materiality in respect to testimony from witnesses (in *Moussaoui*, enemy combatants) whom the government, for national security reasons, cannot produce.¹⁰⁴

The court concluded that the defendant, charged with conspiracy related to the attacks of September 11, 2001, had made a plausible showing that testimony from certain witnesses was

99. *Id.* at 8.

100. *See id.* at 13-14.

101. *Id.* at 12-13.

102. *See id.* at 15.

103. 382 F.3d 453 (4th Cir. 2004).

104. *See id.* at 471-72. The court discussed the matter in light of CIPA's requirements while acknowledging that CIPA technically did not control. *Id.* at 471 n.20 ("Like the district court ..., we believe that CIPA provides a useful framework for considering the questions raised by Moussaoui's request for access to enemy combatant witnesses.").

material to his defense.¹⁰⁵ The court then observed that, pursuant to the CIPA and the cases decided thereunder,

the appropriate procedure [was] for the district court to order production of the evidence or witness and leave to the Government the choice of whether to comply with that order. If the government refuses to produce the information at issue – as it may properly do – the result is ordinarily dismissal.¹⁰⁶

Having determined that the enemy combatant witnesses could offer material testimony essential to Moussaoui's defense, the district court concluded and the Fourth Circuit affirmed that the choice was the government's whether to comply with the order to afford the defendant access to the witnesses, or to suffer a sanction.¹⁰⁷

Because the government refused to produce the witnesses, the court considered whether an alternative procedure would suffice – one that would “neither disadvantage[] the defendant nor penalize[] the government (and the public) for protecting classified information that may be vital to national security.”¹⁰⁸ In devising an alternative, the court focused on two questions: whether there existed any appropriate substitute for the witnesses' testimony, and whether, absent such a substitute, another remedy would be appropriate.¹⁰⁹ The CIPA requires that any substitute must place the defendant in as close to the position he would have been in had the classified information been made available.¹¹⁰

The *Moussaoui* court concluded that there was no need to consider alternative remedies given that a substitution could be made: the court held specifically that certain summaries of witness testimony would provide “an adequate basis for the creation of written statements that [could] be submitted to the jury in lieu of the witnesses' deposition testimony.”¹¹¹ The court notably held that the creation of the substitution statements

105. *Id.* at 473-74.

106. *Id.* at 474.

107. *Id.* at 476.

108. *Id.* at 477.

109. *Id.*

110. *Id.*

111. *Id.* at 479.

should be an “interactive process among the parties and the district court,” including identification by defense counsel of those portions of the summaries that the defendant would want to admit into evidence at trial.¹¹² As well, the court made clear that the jury would have to be provided with sufficient information regarding the substitutions to understand their origins.¹¹³

Finally, consider the second go-around in the *Libby* case (*Libby II*),¹¹⁴ in which the District Court addressed the CIPA requirements regarding disclosure of protected information at trial. In addressing the question of admissibility, the court noted that Congress did not intend by the enactment of the CIPA to “alter the rules governing the admissibility of evidence during a trial” under the Federal Rules of Evidence.¹¹⁵ The government nonetheless argued that, when evidence involves matters of national security, the court must look beyond relevance to determine whether the information at issue would at least aid the defendant’s case.¹¹⁶ This is nearly identical to the test courts have used to determine materiality at the discovery stage – and, indeed, was the test the court had applied in *Libby I*.¹¹⁷

The court found that the clear language of the statute and the legislative history provided no basis for concluding that any heightened relevance and admissibility standard should apply to classified information at the trial stage.¹¹⁸ As the court observed, “[w]hile there is no doubt a governmental interest in protecting national security and classified information under the CIPA, the . . . balancing of the government’s interests against the defendant’s interest [is] properly employed during the discovery process.”¹¹⁹ Indeed, the CIPA accounts for the continuing vitality of the government’s interest by allowing for the substitution or redaction of documents to protect information from disclosure, and by allowing the government to preclude entirely the introduction of such information.¹²⁰ While the latter option may require the case

112. *Id.* at 480.

113. *Id.*

114. *United States v. Libby*, 453 F. Supp. 2d 35 (D.D.C. 2006).

115. *See id.* at 39.

116. *Id.* at 40.

117. *Id.* at 41.

118. *Id.* at 42.

119. *Id.* at 43.

120. *See* 18 U.S.C.A. App. III, § 6(c).

be dismissed, “ [t]he burden is the Government’s . . . to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government’s possession.”¹²¹

What these cases demonstrate is that the handling of protected information relevant to national security is not beyond the capacity of lawyers and judges. The CIPA sets out rules governing the discovery of such information and its admissibility at trial and provides great flexibility to the government in accommodating the defense’s need for protected information when it is relevant and material. That the government may have to choose in some cases to refuse to disclose any information and thereby forgo the prosecution is one that Congress has deemed appropriate; that the government must make that choice is consistent with the long-standing determination that defendants in fairness must have access to information adequate to mount an appropriate defense to criminal charges, regardless of the provenance of that information, and regardless of its connection to national security.

2. *The UCMJ and Protected Evidence*

Military courts, like Article III courts, have wrestled with the use of secret evidence in the courts-martial context. Like their Article III court counterparts, the military system has struck a balance between protecting national security interests and the protection of individual rights. Before discussing the specific rules and some illustrative cases, we briefly examine the tradition from which the current military system emerged. Interestingly, this tradition is one in which individual rights have often taken precedence over the protection of national security interests – even when the risks caused by a disclosure of secret evidence to national security have been far from speculative. This history is best reflected in three cases that arose in the years following World War II, during the height of the cold war with the Soviet Union.

In the first case, *United States v. Dobr*,¹²² the accused was

121. *Libby*, 453 F. Supp. 2d at 43 (quotations omitted).

122. 21 C.M.R 451 (1956).

tried for desertion and convicted of the lesser offense of absence without official leave (AWOL).¹²³ Prior to his enlistment in the military in 1954, the accused was a member of the Czechoslovakian Army and after escaping into Germany he had served as a civilian employee of the American Intelligence Agency.¹²⁴

Before the trial began, military officials told the accused's defense counsel that he would be restricted from viewing his client's government file for the period in which the client served as an employee of the American Intelligence Agency.¹²⁵ They also told the defense attorney that at trial he could only introduce evidence that his client was employed by the American Intelligence Agency and that he had access to classified information.¹²⁶ They further ordered defense counsel not to make any argument or present any motion at trial that would indicate the availability of information regarding the accused's activities.¹²⁷

On appeal, the defense claimed that these restrictions denied him the effective assistance of counsel and violated fundamental due process requirements.¹²⁸ The Army Board of Review agreed and reversed the conviction.¹²⁹ The court held that the secret evidence contained in the accused's government files might be relevant in two ways: first, to show that the accused performed valuable and loyal service to his country which would counter allegations that he intended to desert the Army;¹³⁰ and second, at sentencing, evidence in the accused's secret file might contain mitigating information such as evidence of bravery, or other good conduct.¹³¹ The court made these relevancy determinations without actually reviewing the accused's confidential file.

The court noted the tension between protecting national security information and ensuring the rights of the accused to a

123. *Id.* at 453.

124. *Id.* at 454.

125. *Id.* at 453.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 455.

130. *Id.* at 454.

131. *Id.*

fair trial.¹³² The court concluded that when testimony or documents involve classified information and are relevant to any issue, either for the prosecution or the defense, the government must elect either to permit the introduction of classified evidence or abandon the prosecution.¹³³ This standard, which favors disclosure, is even more significant when one considers the context of this case. First, though the court assumed that the accused's files contained relevant evidence, it never conducted an *in camera* or other review of the files. Second, since the accused had not been found guilty of desertion, the only issue at trial to which the classified information would have been relevant was determining an appropriate sentence for the relatively minor offense of AWOL. Finally, there is little doubt that the accused's file detailing his work with the American Intelligence Agency likely would have revealed classified operations, classified means and methods used by agents, as well as the identity of other classified agents, counter-agents, and organizations directly affecting U.S. national security interests in relation to the Soviet Union and other Warsaw Pact countries. Nonetheless, the court ruled in favor of disclosure.

The next case, *United States v. Nichols*,¹³⁴ decided in 1957 by the court of military appeals, which at that time was the highest court of review within the military system. In *Nichols*, the accused, who was a member of the Counter Intelligence Corps, was charged with a number of offenses related to improper dealings with subordinates and misuse of government resources.¹³⁵ The investigation file and the charges against the accused were classified.¹³⁶ The accused retained civilian counsel and the government denied that counsel access to the information and precluded him from representing his client during the preliminary hearing.¹³⁷ Prior to trial, the government declassified and made available virtually all of the case file and the charge sheet.¹³⁸ On appeal the defense contended that the accused had

132. *Id.* at 455.

133. *Id.*

134. 23 C.M.R 343 (1957).

135. *Id.* at 346.

136. *Id.*

137. *Id.*

138. *Id.* at 347.

been denied the right to the counsel of his choice at the preliminary hearing and that it was unfair for the government to place the burden on the accused and his defense counsel to obtain the necessary security clearance.¹³⁹ The court agreed with the defense and reversed the conviction.¹⁴⁰

The court held that under the UCMJ the accused has the right to a civilian counsel of his choice.¹⁴¹ Because the UCMJ does not place any limitations on that counsel with respect to the attorney's security clearance, the right to counsel cannot be limited by service-imposed obligations that the counsel obtain a security clearance.¹⁴² In essence, like the court in *Dobr*, the court here struck the balance in favor of the soldier's individual rights over the need to protect national security interests.

The third case from this era, *United States v. Reyes*,¹⁴³ involved an airman who was charged with among other crimes, damaging national defense material with the intent to interfere with the national defense of the United States.¹⁴⁴ Specifically, the accused was charged with and convicted of cutting several electrical wires on a B-52 aircraft he was assigned to guard.¹⁴⁵

In order to prove the accused's intent to interfere with the national security of the United States, the government introduced a witness who testified the aircraft in question was part of the emergency war order, and that the aircraft was in a "cocked" status at the time the accused cut the wires.¹⁴⁶ This status required the aircraft to be ready to deploy in short notice up to the maximum range of the aircraft's capacity.¹⁴⁷ On cross-examination the military defense attorney asked the witness in general terms the nature of the aircraft's mission and the distance the aircraft would be expected to fly.¹⁴⁸ The president of the panel and the law officer precluded the defense attorney from asking

139. *Id.* at 348-49.

140. *Id.* at 350.

141. *Id.* at 349.

142. *Id.*

143. 30 C.M.R. 776 (1960).

144. *Id.* at 780.

145. *Id.* at 781.

146. *Id.* at 784.

147. *Id.*

148. *Id.* at 784-85.

these questions because the aircraft's mission was "top secret."¹⁴⁹

On appeal the Air Force Board of review ruled that it was reversible error to prevent the defense from questioning the witness about evidence which the government had made relevant by its line of questioning.¹⁵⁰ The court held that once the relevancy and admissibility of the evidence has been established, the government must chose between permitting the evidence to be introduced or withdrawing the charges to which the evidence relates.¹⁵¹

In each of these cases, the national security interests were both obvious and tangible. Disclosure of the classified information could have resulted in revealing the identity of secret agents and counter agents, providing information as to the methods and means used to gather intelligence information, exposing secret programs, and disclosing top secret war plans and strategic aircraft capabilities. All three military appeals courts ruled that the interests of the accused to present relevant evidence in mitigation, to be represented by the counsel of his choice in a preliminary hearing, and to effectively cross examine a government witness, outweighed the national security interests at issue. It is from this tradition that the current military rules and case law on secret evidence emerged.

a. *Requirements of the Code*

The military first codified rules on the treatment of classified evidence when the president signed the executive order establishing the military rules of evidence (MRE) in 1980.¹⁵² Contained within the new military rules of evidence is Rule 505,¹⁵³ which sets out the procedures for classified information in the context of a court-martial. MRE 505 is similar to the CIPA enacted by Congress that same year; MRE 505 was based on the version of CIPA sponsored by the administration.¹⁵⁴ The

149. *Id.*

150. *Id.*

151. *Id.* at 787.

152. Executive Order No. 12,198. 45 Fed. Reg. 16, 931 (1980).

153. MIL. R. EVID. 505.

154. Major Christopher Maher, *The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information*, 120 MIL. L. REV. 83, 102 (1988).

balancing of interests between the defendant's right to discover and present classified information and the government's interests in protecting classified information, as well as the problem of "grey mail" were the concerns of MRE 505.

MRE 505 begins by defining classified information in the same way that the term is defined under CIPA.¹⁵⁵ MRE 505 then sets out various procedural rules related to classified evidence. The procedural rules differ depending on where the case is in the court-martial process. The rules also outline the standards for determining when classified information will be discoverable and admissible at trial. This process and the standards differ somewhat from the procedures and standards under CIPA.

At the initial stages before the case has been referred for trial, the government has the maximum ability to restrict or prevent the disclosure of classified evidence. If the defense requests discovery of classified information, the court-martial convening authority can delete specific items of classified information,¹⁵⁶ substitute a portion or summary of the classified information,¹⁵⁷ substitute a statement admitting the relevant facts that the classified evidence would tend to prove,¹⁵⁸ or provide the classified information subject to conditions that will guard against the compromise of the information.¹⁵⁹ If the convening authority believes that none of these actions will prevent identifiable damage to national security, he can also simply withhold disclosure of the requested information.¹⁶⁰

Once the case has been referred to trial, the convening authority no longer has the absolute ability to prevent the

155. MIL. R. EVID. 505(b)(1). Classified information is: any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulations, to require protection against unauthorized disclosure for reasons of national security, and any restricted data as defined in 42 U.S.C. § 2014(y). 42 U.S.C. § 2014(y) defines restricted data as "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title."

156. MIL. R. EVID. 505(d)(1).

157. *Id.* at (d)(2).

158. *Id.* at (d)(3).

159. *Id.* at (d)(4).

160. *Id.* at (d)(5).

disclosure of classified information. In the discovery phase, if the defense requests the disclosure of classified information, they must first demonstrate that the evidence is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial.¹⁶¹ Once the request is made the convening authority has one of four options.

The convening authority can direct the disclosure of the classified information to the defense.¹⁶² If the government elects to disclose the information, they can place certain protective orders on the defense to protect the information from unauthorized disclosure.¹⁶³

The second option for the government is to request limited disclosure.¹⁶⁴ Under this option the government must provide information to the military judge in an *in camera* and *ex parte* proceeding.¹⁶⁵ So long as the classified information itself is not necessary to enable the accused to prepare for trial, the military judge can allow for any of the following limits on disclosure: deletion of specified items of classified information from the information disclosed to the defense; substitution of a portion or summary of the information for the classified documents; or the substitution of relevant facts that the classified information would tend to prove.¹⁶⁶

At trial, if the defense requests production of prior statements made by the witness, and those statements contain classified information, the government can seek to have the military judge excise portions of the prior statement before disclosure to the defense if the prior statement is consistent with the witness's in-court testimony.¹⁶⁷ If the prior statements are inconsistent with the witness's in-court testimony, then the military judge can order the disclosure of the classified portions of the prior statements.¹⁶⁸ In lieu of full disclosure the government can either proffer a

161. *Id.* at (f).

162. *Id.* at (g).

163. *Id.* at (g)(1).

164. *Id.* at (g)(2).

165. *Id.* at (g)(2)(C).

166. *Id.* (g)(2).

167. *Id.* at (g)(3)(B).

168. *Id.* at (i)(4)(B).

statement admitting relevant facts that the witness's prior inconsistent statement would tend to prove or submit a portion or summary to be used in lieu of the classified information.¹⁶⁹ If the military judge determines that providing the classified portion of the prior inconsistent statement to the defense is necessary to afford the accused a fair trial, then no alternatives to full disclosure will suffice.¹⁷⁰

The government's third option to a defense discovery request for classified information is to dismiss the charges against the accused and avoid disclosing the classified information.¹⁷¹ The final option for the government is to dismiss those charges and specifications to which the classified information relates.¹⁷² This option also allows the government to avoid disclosing the classified information at the cost of forgoing a criminal prosecution on the charges to which the classified evidence relates.

If the government does provide classified evidence in some form to the defense at the discovery stage and the defense later seeks to use the information at trial, MRE 505 requires the defense to provide notice to the government of the information it reasonably expects to disclose.¹⁷³ If the government requests, the military judge must hold an *in camera* hearing to determine if the information which the defense seeks to introduce is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence.¹⁷⁴

If the military judge determines that the information which the defense seeks to introduce is relevant and necessary, then the government has three options. First the government can withdraw its objection and allow for the evidence to be disclosed.¹⁷⁵ In order to more fully protect the information the government can also proffer a statement admitting for the purposes of the proceeding any relevant facts such classified information would tend to prove.¹⁷⁶ The government can also submit a portion or summary to be used in lieu of the classified

169. *Id.* at (i)(4)(D).

170. *Id.*

171. *Id.* at (f)(2).

172. *Id.* at (f)(3).

173. *Id.* at (f)(2)-(3).

174. *Id.* at (i)(4)(B).

175. *Id.* at (i)(4)(D).

176. *Id.*

information.¹⁷⁷ If the military judge determines that providing the classified portion of the prior inconsistent statement to the defense is necessary to afford the accused a fair trial, then no alternatives to full disclosure will suffice.¹⁷⁸

The third option for the government is to continue to object to the disclosure of classified information.¹⁷⁹ Faced with continued government refusals to disclose information, the military judge is authorized to impose any order that the interests of justice require.¹⁸⁰ Orders can include, striking or precluding all or part of a witness's testimony;¹⁸¹ declaring a mistrial;¹⁸² finding against the government on any issue to which the classified evidence is relevant and material;¹⁸³ dismissing the charges with or without prejudice;¹⁸⁴ or dismissing the charges or specifications to which the classified information relates.¹⁸⁵

In sum, MRE 505, like the CIPA, outlines a framework for addressing the two practical issues associated with protected information that is considered classified: the defendant's need for information relevant to his case, and the government's concern that classified information related to national security not be casually disclosed. MRE 505, in most aspects, strikes the very same balance Congress struck under the CIPA. One of the few differences in the two provisions is the standard that the defense must meet in order to obtain discovery of classified information. Under the CIPA, the defendant must show that the evidence is relevant and material. Under MRE 505, by contrast, the defense must show that the evidence is relevant and necessary to an element of the offense or a legally cognizable defense and is

177. *Id.*

178. *Id.*

179. *Id.* at (i)(4)(E). MRE 505 does not specifically provide the government with the right to file an interlocutory appeal of a judge's decision ordering disclosure of classified evidence. Rule for courts-martial 908 specifically provides the government the ability to appeal a military judge's order that either directs the disclosure of classified information or imposes sanctions for the nondisclosure of classified information. *See* Rule for Courts-Martial 908(a).

180. MIL. R. EVID. 505(i)(4)(E).

181. *Id.* at (i)(4)(E)(i).

182. *Id.* at (i)(4)(E)(ii).

183. *Id.* at (i)(4)(E)(iii).

184. *Id.* at (i)(4)(E)(iv).

185. Mil. R. Evid. 505(i)(4)(E)(v).

otherwise admissible in evidence. MRE 505's standard is more difficult to meet because even at the discovery stage the defense must demonstrate that the classified information is admissible.

What is important for purposes of this Article is that while the CIPA and MRE 505 strike the balance slightly differently, both provisions recognize that a balance between individual rights and the protection of classified information must be reached – the aim of both laws is to ensure that prosecutions move forward consonant with the principle that the government cannot “undertake prosecution and then invoke its governmental privileges to deprive the accused of anything that might be material to his defense.”¹⁸⁶ Both provisions ultimately compel the government to choose between disclosing the information in question and forgoing prosecution of the defendant.

In addition to these procedures, MRE 505 also gives the military judge significant authority to close the trial proceedings to the public.¹⁸⁷ This additional precaution gives the parties an additional ability to both protect the legitimate national security interests of the United States while ensuring that the accused has access to relevant and necessary classified evidence.

a. Illustrative Cases

Unlike the Article III courts, there have been relatively few reported cases since the adoption of MRE 505 that have required the military courts to interpret or work through the provisions of this rule of evidence. Two cases post-MRE 505 do illustrate some of the workings of this rule in the military context.

The first and most significant case is *United States v. Lonetree*.¹⁸⁸ Sergeant Lonetree was a marine assigned at one time to the U.S. Embassy in Moscow, and later to the U.S. Embassy in Vienna.¹⁸⁹ While on duty at these locations agents of the Soviet Union contacted Lonetree and he eventually passed confidential information to them.¹⁹⁰ He was tried and convicted by a military panel of a number of offenses including espionage and conspiracy

186. *Jencks v. United States*, 353 U.S. 657, 671 (1957).

187. MIL. R. EVID. 505(i)(1)-(4).

188. 35 M.J. 396 (C.M.A. 1992).

189. *Id.* at 399.

190. *Id.*

to commit espionage.¹⁹¹

At his trial the government sought to corroborate certain aspects of the case against Sergeant Lonetree by calling a witness who had knowledge of the identity of Soviet agents.¹⁹² The government moved to allow the witness to testify under a pseudonym.¹⁹³ The government also moved to prevent the defense from discovering the witnesses real name and questioning the witness about his background during cross examination.¹⁹⁴ After an *in camera* and *ex parte* review of the government's motion, the military judge granted the request.¹⁹⁵ On appeal Sergeant Lonetree claimed that the military judge's restriction on his access to evidence and the limits placed on cross examination violated his 6th Amendment right to confrontation.¹⁹⁶

The Court of Military Appeals rejected Sergeant Lonetree's argument based on the court's analysis of applicable Supreme Court decisions and MRE 505.¹⁹⁷ The court recognized that while the accused has a Sixth Amendment right to inquire into the background of the witnesses, the right is not unlimited.¹⁹⁸ Protection of the witness' safety is one legitimate reason for denying the accused access to this information.¹⁹⁹ A denial does not violate the accused's Sixth Amendment right if there is a legitimate basis for the limitation and withholding the information does not prevent the accused from placing the witness in his proper setting.²⁰⁰ Here the court determined that the accused was still able to place the witness in his proper setting.²⁰¹ According to the court "the real world setting and environment of John Doe at the time of this trial and of all events about which he testified is better reflected in his pseudonym and in his identification as an intelligence agent than in anything connected

191. *Id.*

192. *Id.* at 405.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 405-10.

198. *Id.* at 407.

199. *Id.*

200. *Id.*

201. *Id.* at 410.

with his true identity.”²⁰² Accordingly, the excluded evidence lacked the relevant and necessary value under MRE 505 which would have required its disclosure.²⁰³

The second and more recent case, *United States v. Schmidt*,²⁰⁴ concerned the government’s attempt to establish a procedure to screen all classified information which the accused had obtained in his official duties before the information was passed by the accused to his civilian defense counsel.²⁰⁵ The government contended that MRE 505(h)(1) required such a procedure because the rule requires the accused to provide notice to the government if he intends to disclose classified material “in any manner in connection with a court-martial proceeding.”²⁰⁶

The Court of Appeals for the Armed Forces dispensed with that argument in a per curiam opinion. The court noted that the civilian defense counsel had the requisite security clearance.²⁰⁷ MRE 505(h)(1)’s notice requirement is not applicable in this context. According to the court, “the rule does not come into play when the defense is making a preliminary evaluation of the evidence it already possesses to determine what evidence, if any, it may seek to disclose.”²⁰⁸ The court also expressed concern over how the requirements which the government sought to impose would affect the attorney-client relationship.²⁰⁹ The government’s approach would have required the accused without the benefit of his own counsel to engage in adversarial litigation with opposing counsel as a precondition to discussing relevant information with his attorney.

Both of these cases are instructive examples of how military courts have applied MRE 505. The cases demonstrate a military court’s ability to accommodate the interests of the government in protecting classified information while protecting the rights of the accused to a fair trial. The opinions reflect a pragmatic, fact-based resolution of complex issues. In *Lonetree*, for example, the court recognized that the accused may not be entitled to all of the

202. *Id.* (quotation omitted).

203. *Id.*

204. 60 M.J. 1 (2004).

205. *Id.* at 2.

206. MIL. R. EVID. 505(h)(1).

207. *Schmidt*, 60 M.J at 2.

208. *Id.*

209. *Id.* at 2-3.

possible relevant information about the government's witness. That interest is tempered by other legitimate concerns including the government's need to protect classified information. Even here it is important to note that the accused was not banned absolutely from access to information. He was allowed and, in fact, did conduct a thorough cross examination of the "John Doe" witness, and it is equally clear that, had that limited cross-examination not sufficiently placed the witness in his proper setting, or had the excluded evidence been relevant and necessary to the defense, the court would have required the government under MRE 505 to elect between disclosing the information or dismissing the charges.

Likewise, in *Schmidt*, the court did not employ a literal reading of MRE 505(h)(1).²¹⁰ The court recognized that such a reading would be both impractical and unfair.²¹¹ Yet the court did not give the accused a blank check to disclose classified evidence. He was merely permitted to disclose classified evidence he had obtained in the course of his duties to his civilian defense counsel who had the requisite security clearance.²¹² That disclosure was for the limited purpose of allowing the accused and his attorney to make a preliminary evaluation of the evidence and no disclosure outside of the attorney-client relationship was authorized.²¹³ These cases aptly demonstrate that military courts, like their Article III counterparts, are capable of handling protected information relevant to national security.

B. *Outside the National Security Context*

Though it is in the context of trying terrorism suspects that the question of how to limit the unnecessary disclosure of protected information while ensuring that defendants are fairly tried is raised most directly, there are relevant examples of how the practical problems associated with protected information may be addressed outside the national security context. In *Davis v. Alaska*,²¹⁴ for instance, the U.S. Supreme Court concluded that a

210. *Id.* at 2.

211. *Id.*

212. *Id.* at 2-3.

213. *Id.* at 2.

214. 415 U.S. 308 (1974).

statute making a witness's juvenile court record presumptively confidential violated the defendant's right to conduct cross-examination under the Confrontation Clause.²¹⁵ The Court elaborated on this holding in the due process context in *Pennsylvania v. Ritchie*.²¹⁶

In *Ritchie*, the Court addressed the question whether a state's interest in the confidentiality of investigative files concerning child abuse trumped a defendant's constitutional right to discover favorable evidence.²¹⁷ The case involved a defendant's request for records relating to the victim in the possession of Pennsylvania's department of Children and Youth Services.²¹⁸ The legislature had deemed the information contained in the CYS investigative files confidential subject to certain exceptions, including one for disclosure pursuant to a court order.²¹⁹ The Pennsylvania Supreme Court had held, among other things, that the defendant, through his lawyer, had a constitutional right to examine the contents of the records at issue and that the failure to disclose the CYS file violated the Sixth Amendment's guarantee of compulsory process.²²⁰

The Court concluded, first, that this claim was best considered by reference to due process.²²¹ And, under due process, "[i]t is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment."²²² "Materiality," moreover, refers to the "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."²²³

The Commonwealth argued that no inquiry into materiality was required on these facts because of its overriding interest in confidentiality – particularly when the defendant had no more than a belief that the files might contain information relevant to his defense. The Court recognized that the public interest in

215. *Id.* at 318-20.

216. 480 U.S. 39 (1987).

217. *Id.* at 42-43.

218. *Id.* at 43.

219. *See id.* at 43-44.

220. *Id.* at 55.

221. *See id.* at 56.

222. *Id.* at 57.

223. *Id.* (quotation omitted).

ensuring the confidentiality of information related to child abuse is indeed strong;²²⁴ but the Commonwealth had not granted such information absolute immunity from disclosure in criminal cases, and the Court reasoned that, when otherwise confidential records contain information relevant and material to the defendant's case, it must be disclosed.²²⁵

That said, the Court did not ignore the Commonwealth's important interest in limiting the scope of disclosure of cabining its effect. The Court noted that a defendant's right to discover exculpatory evidence does not "include the unsupervised authority to search through the Commonwealth's files."²²⁶ Rather, settled practice – reflecting the government's practical concern in limiting disclosure of confidential information – indicated that the defendant's interest in securing information relevant and material to his defense could be fully protected by the trial court's *in camera* review of the records in question.²²⁷ If a defendant knows of specific information contained within the government's otherwise confidential records, he may request that from the court and argue that such information is relevant and material to his defense.²²⁸

As *Ritchie* demonstrates, the Article III courts have developed procedures for handling protected information in the context of criminal proceedings – procedures developed outside an explicit statutory framework like the CIPA, and which indicate that the courts are competent to manage sensitive information in the context of criminal litigation. The *Ritchie* court in particular recognized the general rule that a defendant must be afforded access to all relevant and material exculpatory information. The importance of that interest does not favor unlimited disclosure, but rather initial review by the trial court *in camera*, with a report to defense counsel and the defendant about potentially exculpatory information that the defense may then argue should be produced because of its relevance and materiality. In this way

224. *See id.* at 60 (noting that it "is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality").

225. *See id.* at 58.

226. *Id.* at 59.

227. *Id.* at 60.

228. *See id.*

the balance is struck between the government's practical concern to control disclosure of the information and the criminal defendant's unquestioned interest in access to information that may prove useful in challenging the government's case against him.

C. There Exist Ample Models Addressing the Practical Concerns Associated with Protected Information

As this discussion shows, there are ample models in both the military and federal systems for managing potential evidence that raises national security concerns. The CIPA and Military Rule 505 reflect the required balancing and correctly place the onus on the government to make a choice in respect to the practicality of keeping protected information from disclosure. These arrangements are not inapposite in the terrorism context; there the government faces precisely the same choices as in other contexts, and likewise maintains control over the information in question. The practical concerns, in short, may be addressed by reference to one of the models we have discussed in this Part. That the Bush administration, in the face of these models, still claimed impracticality suggests that other concerns motivated its secret evidence proposals.

IV. THE LEGITIMACY OF THE ADMINISTRATION'S RATIONALES

If the administration's reasons for placing severe restrictions on the defense's access to protected information in respect to terrorism suspects detained as enemy combatants are not justified in light of the proven ability of the courts to manage such information in criminal trials, the question remains: what was at the heart of the administration's decision to opt for such restrictive measures? As stated earlier, even after *Hamdan* and the passage of the military commissions act, which ultimately reached a fairer compromise on the use of protected information, this remains an important question. In the dynamic enterprise of national security policy making, it is far from clear that today's compromise will hold. In this Part, we explore the possible reasons underlying the administration's preference for secret evidence, the legitimacy of those reasons, and the potential consequences of endorsing the use of secret evidence in cases involving our own forces at courts-martial, and ordinary criminal

defendants in Article III courts. We conclude that the administration's reasons for using secret evidence lack legitimacy and we propose amendments to Article 36 of the UCMJ to better ensure that Congress serves its constitutional role as a check on executive power.

A. *Possible Underlying Rationales*

The administration's underlying rationales for its treatment of protected information in military tribunals fall into three broad categories. First, the use of secret evidence is warranted because the legal status of the unlawful enemy combatants is different from other individuals. Second, because of the terrorist activities in which the unlawful enemy combatants allegedly engaged, they should be treated differently. Finally, unless the rules for using protected evidence in military tribunals are relaxed, the protections typically provided to defendants in a criminal trial or a court-martial will prevent the government from obtaining convictions. These rationales reflect potential policy determinations based not upon national security concerns, but upon the legal and factual identities of the terrorism suspects and upon their alleged actions.²²⁹ Of course, if we were to accept these reasons as legitimate bases for providing them less protection through the use of secret evidence, then we have taken a significant step down a very slippery slope.

The first rationale that might explain the administration's position regarding protected information is the legal status of the terrorism suspects detained as enemy combatants. Initially, the administration's view was that members of Al Qaeda and other enemy combatants did not enjoy the protections of Common Article 3 of the Geneva Conventions.²³⁰ While the

229. See, e.g., Transcript of Interview of Vice President Dick Cheney on "Meet the Press," Sunday September 14, 2003. The Vice President stated: "[I]n a sense, sort of the theme that comes through repeatedly for me is that 9/11 changed everything. It changed the way we think about threats to the United States. It changed about our recognition of our vulnerabilities. It changed in terms of the kind of national security strategy we need to pursue, in terms of guaranteeing the safety and security of the American people." Available at <http://www.msnbc.msn.com/id/3080244/>.

230. Press Release, Office of the White House Press Secretary, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>.

administration's stated policy was to treat these unlawful enemy combatants consistent with the spirit of the Geneva Conventions,²³¹ the administration had the power to decide just how close to the spirit of Geneva that treatment would fall. The Supreme Court rejected this position in *Hamdan*.²³² The Court held that Congress, by statute, had determined that Common Article 3 did, in fact, apply to these enemy combatants brought before military tribunals.²³³ In other words, the Court concluded that, by operation of Article 21 of the UCMJ, the detainees did not have a legal status falling outside the provisions of Common Article 3.

The significant point for this discussion is that, even if the Court had upheld the administration's position in *Hamdan* and found the status of these enemy combatants to be legally unique, the question remains why that different legal status should result in less access to and use of protected information. Assume, for example, that Congress were to amend the UCMJ to exempt these enemy combatants from the protections of Common Article 3. Given the proven ability of judges and lawyers to balance the legitimate interests of national security against the rights of a defendant in a criminal trial, one could reasonably conclude that the judges sitting on military tribunals would be equally capable of striking a similar balance; as a practical matter, the legal status of the defendant is immaterial to the protected evidence inquiry. At a minimum, the government ought to make some showing that the difference in legal status would be meaningful in the context of the determinations the tribunals would have to make. The government has not made that showing, relying instead upon the simple assertion that a difference in legal status is meaningful in the context of a tribunal's determination of a detainee's connection to terrorist activities.

A second potential rationale that might explain the administration's proposal in respect to protected information in military tribunals focuses on the identity of the detainees as alien enemy combatants sworn to support the terrorist cause.²³⁴ The horrific experience of September 11th and the possibility that

231. *Id.*

232. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006).

233. *Id.* at 2798.

234. See President's Military Order, *supra* note 28.

terrorists will strike again with even more deadly means and methods may have driven the administration to conclude that these suspects, as the representatives of Al Qaeda we have in custody, simply do not deserve the protections we afford criminal defendants in cases involving protected information. To give them more access to protected information, in other words, would be to dignify these individuals as somehow worthy of treatment above mere contempt.²³⁵

We do not propose here to defend the actions of the terrorism suspects detained as enemy combatants of their moral worth as individuals. But we would argue that adjusting the level of protection afforded these individuals in criminal and quasi-criminal contexts based upon who that individual is, as a factual matter, based primarily upon the moral assessment of the individual's alleged actions, reflects a policy long abandoned, and rightly so, in Anglo-American jurisprudence.²³⁶ As in any case in which an act condemned by the community has occurred, neither the community nor its governmental representatives has a special moral claim in respect to a particular individual until that person has been determined through fair procedures to be guilty.²³⁷ There is a reason that Americans, as citizens whose government and criminal justice systems deny the efficiencies of the Star Chamber, should not hasten its return.

A third rationale that might explain the administration's position, one reflected in nearly every aspect of the administration's proposed military commissions, is the concern

235. The terrorism suspects detained as unlawful combatants are understandably demonized as the classic "other," who must be vanquished; as the Middle East historian Bernard Lewis observed, "[w]e of the West have often failed catastrophically in respect for those who differ from us. ... But it is something for which we have striven as an ideal and in which we have achieved some success, both in practicing it ourselves and in imparting it to others." BERNARD LEWIS, *CULTURES IN CONFLICT: CHRISTIANS, MUSLIMS, AND JEWS IN THE AGE OF DISCOVERY* 78 (1995).

236. See, e.g., *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (discussing repudiation in Anglo-American jurisprudence of the tactics of the Star Chamber and how, "[u]nder our system society carries the burden of proving its charge against the accused ... not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation").

237. See Robert P. Mosteller, *Popular Justice*, 109 HARV. L. REV. 487, 488-89 & n.10 (1995) (book review).

that if we were to afford enemy combatants more process, we might not be able to convict them in military tribunals. This concern has been expressed in a number of ways. Under the initial order, both the accused and his civilian defense counsel could be excluded from access to protected information before or during trial at the request of the prosecutor and with the agreement of the presiding officer. This restriction applied regardless of the civilian defense counsel's security clearance and regardless of the fact that the accused has virtually no means to make use of this information to further ongoing terrorist operations. Even the accused's military counsel's access to protected information was conditioned on the promise that the military counsel would not reveal information to the accused or civilian defense counsel without the prior approval of the presiding officer.

The subsequent military order provided few significant improvements. The accused and his civilian defense counsel could still be precluded from access to the evidence. While additional procedural requirements were put in place, ultimately the chief prosecutor could decide to offer the evidence and so long as the presiding officer concluded that the accused received a full and fair trial, the evidence could be considered by the commission without the accused or his civilian counsel ever seeing or knowing about the evidence used to support the conviction. Such a system values expediency over individual rights.

Expediency might be relevant if these terrorism suspects posed some ongoing danger to national security. Here, however, this practical concern is arguably less compelling because these individuals are subject to much greater government control – and will continue to be subject to that control regardless of the judgment of the military tribunal. But expediency serves another goal: it provides the government greater assurance that justice will be done in respect to individuals associated with terrorist attacks against the United States and its citizens; that punishment of those individuals will be meted out. The desire to see justice served in these circumstances is entirely appropriate; we are not saying either that many of the detainees are not guilty, or that the government does not have sufficient cases against them.

Yet many of these prosecutions will likely involve protected

information that exists in forms that cannot be reduced to useful evidence that would make sense out of context. Numerous witnesses are likely not to be available – these suspects are in our custody and control, after all, as a result of initial detention on the battlefield. Say, for example, the government’s best information about a particular detainee’s involvement in terrorist activities came from a member of the Northern Alliance. That individual is unlikely to be available to appear before a military tribunal, and what evidence the government would present probably exists as hearsay in an affidavit, report, or similar statement. Protection of the source of the information and means by which the government acquired it can be adequately had under the CIPA and MRE 505.²³⁸ But the government’s fear is that these circumstances nonetheless will prevent the administration of justice because allowing the detainee and his lawyer access to the information will further complicate the tribunal’s determination. Such fears ought not be permitted to trump fairness – expediency at this point is not a sufficiently compelling interest.

It nearly goes without saying that, under a system in which the desire for justice prevails over fairness and secret evidence is the norm, there is a real danger that the accused will be convicted and punished based upon evidence that has not been fully and accurately scrutinized, where the accused was denied the opportunity to assist his counsel in understanding and evaluating the evidence, and where the accused is denied the opportunity to discover and present relevant evidence that may undermine the government’s case against him. However reprehensible we may believe these terrorism suspects to be, and however important for reasons of justice that the truly guilty be found and punished, the use of secret evidence has consequences that extend beyond the cases of these terrorism suspects.

B. *The Consequences of Sanctioning the Use of Secret Evidence*

Much of the public debate and certainly much of the debate in Congress following the *Hamdan* decision centered on concerns about how our service members would be treated when captured by an enemy force if we were to treat our enemies unfairly.

238. See *United States v. Moussaoui*, 382 F.3d 453, 471-72 (4th Cir. 2004); see also *United States v. Lonetree*, 35 M.J. 396, 409-10 (C.M.A. 1992).

Concerns about harsh interrogation techniques and the specter of secret trials were frequently mentioned as reasons why the Military Commissions Act should afford more protections to alien enemy combatants.²³⁹ This concern is born of a long history under the law of war regarding the principle of reciprocity and the notion that, if we want our forces to be treated fairly by the enemy, we must treat our enemies fairly when they come under our control.²⁴⁰ This is certainly a legitimate issue and an important reason why the United States should be concerned any time we plan to use military tribunals to prosecute our enemies.

Reciprocity, however, is not the most important reason why the administration's initial proposals on the use of protected information should not have been adopted. Each of the administration's possible rationales for its attempts to limit an enemy combatant's access to protected information in military tribunals is most troubling for the potential effect it can have on the protections afforded to service members facing courts-martial and citizens facing criminal trials in Article III courts. If the administration can significantly limit a defendant and his attorney's access to relevant and material evidence because of the status of the defendant, because of the crimes charged against the defendant, or because it would be difficult to convict the defendant if he had access to that evidence in military tribunals, then these same steps can be taken to limit a service member's or a citizen's access to this kind of evidence in a future situation where the president believed a similar justification exists.

To answer that constitutional protections would prevent this from ever occurring does not address the issue: constitutional standards, and particularly criminal procedure protections, have almost always been interpreted to mean different things in different contexts. Consider, for example, the special needs exception under the Fourth Amendment, which allows precisely the same searches in a non-criminal context that, in the criminal context, could be justified only by a showing of probable cause.²⁴¹

239. See, e.g., Amicus Cure Brief of Retired Military Officers in Support of Petitioners at 22, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

240. *Id.* at 4-6, 26-27.

241. See, e.g., *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619-630 (1989) (discussing circumstances in which "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause

We accordingly suggest an answer lies elsewhere, in the hallmark of our constitutional democracy: the system of checks and balances established by the Constitution's structural provisions, and upon which the *Hamdan* Court relied.

C. *Amending Article 36(b)*

Without a sufficient check on the executive's authority, the substantive language of the Constitution's criminal procedure protections does little to limit that authority. Our concern here is to promote the structural checks and balances within the Constitution itself to limit unfettered executive power. What we proposes is an amendment to Article 36 of the UCMJ to more formally establish a process which the president must follow before the rules regarding the use of protected information in military commissions can differ from the established procedures under the UCMJ or the CIPA. A more robust process where the president's justifications for any departure must be clearly articulated and vetted by Congress before they can be implemented, will ensure that the president's power, even in time of war, will be appropriately checked.

That Congress has the constitutional authority and obligation to check the executive's power in this area cannot be disputed. While the president's authority as Commander-in-Chief includes the discretion to control military forces in the field and matters related to national defense, he does not have unchecked power. The Constitution expressly authorizes the Congress, among other things, to "provide for the common Defense,"²⁴² "to raise and support Armies,"²⁴³ and to "make rules for the Government and Regulation of the land and naval Forces."²⁴⁴ The president, on the other hand, has the authority to see "that the Laws [are] faithfully executed,"²⁴⁵ and to serve as the Commander-in-Chief.²⁴⁶ Given these textual commitments of authority and responsibility, in no sense can it be maintained that the president has exclusive authority over matters related to foreign affairs and national

requirement [of the Fourth Amendment] impracticable" (quotation omitted)).

242. U.S. CONST., art. I, § 8, cl. 1.

243. U.S. CONST., art. I, § 8, cl. 12.

244. U.S. CONST., art. I, § 8, cl. 14.

245. U.S. CONST., art. II, § 3.

246. U.S. CONST., art. II, § 2, cl. 2.

security.

Congress has consistently exercised its power to raise and support the armed forces through its appropriations authority.²⁴⁷ Congress is constitutionally required to exercise its appropriation authority at least every two years. Congress's authority, however, does not end at the decision to raise an army; it embraces as well the discretionary authority to regulate the size and composition of the armed forces. Alexander Hamilton noted in Federalist No. 69 that the president's constitutional power as Commander-in-Chief relates to the command and direction of military forces; it does not extend to "the . . . regulating of fleets and armies."²⁴⁸ And, as the Supreme Court concluded in *Loving v. United States*,²⁴⁹ while the Executive may regulate military conduct, he may do so only so long as those regulations do not conflict with congressional enactments.²⁵⁰

It is clear that Congress by statute can control the authority of the president to establish rules governing military commissions. As the Court recognized in *Hamdan*, Congress has already done this under Article 36(b) by requiring the rules and regulations for military tribunals and the rules and regulations for courts-martial to be uniform insofar as practical.²⁵¹ The language of Article 36(b), however, is currently unclear as to how that practicality determination should be made and the Court did not resolve that issue in *Hamdan*.²⁵² Significantly, the newly passed Military Commissions Act (MCA) also fails to make any practicality determination for why the procedures under that act differ from the procedures under the CIPA or the UCMJ.

247. U.S. CONST., art. I, § 8, cl. 12.

248. THE FEDERALIST No. 69 (Alexander Hamilton), (J. R. Pole ed., 2005) (original emphasis removed).

249. 517 U.S. 748 (1996).

250. *See id.* at 772.

251. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2791 (2006).

252. In *Hamdan* the Court stated that the president had not made an official determination that it is impractical to apply the rules of courts-martial to military commissions. The Court further stated that even if subsection (b)'s requirements may be satisfied without an official determination, the requirements were not satisfied in this case because there was nothing on the record to demonstrate why it was impractical for the military commissions to apply some of the most fundamental protections found in the rules for courts-martial, including the right of the accused to confront witnesses. *Id.* at 2791-92.

We are not suggesting that such a practicality determination was required before Congress and the president could enact a separate statute governing the procedures for military commissions in the case of terrorism suspects deemed enemy combatants. But the MCA does not render the requirements of Article 36 moot. The MCA's jurisdiction is limited to trials of alien unlawful enemy combatants.²⁵³ The MCA expressly does not alter or limit the president's authority to establish military commissions for areas declared to be under martial law or in occupied territories.²⁵⁴ There may also be other circumstances in the future which call for military commissions or tribunals outside the scope of the MCA.

The requirements of Article 36(b) still apply to military commissions outside of the MCA and for these commissions Article 36 is unclear as to how the practicality determination should be made if those procedures are to depart from the rules and regulations under the UCMJ. The danger still exists that, unless the president is required to fully articulate his reasons for departing from the provisions of the UCMJ, some future military commission could also allow for trials using secret evidence never provided to the accused or his counsel.

To remedy this situation and give Congress an opportunity to fulfill its constitutional responsibility as a check on the executive, Article 36(b) should be amended as follows: *All rules, procedures and regulations made under this article shall be uniform with each other as far as practical. Before the President can adopt any rules, regulations, and procedures for military commissions or other military tribunals that differ from the rules, regulations, and procedures for trial by courts-martial, the President must submit to Congress a justification for these procedures and an explanation of why the rules, regulations, and procedures for trial by courts-martial are not practicable.*

This amended Article 36(b) will accomplish several objectives. First, it will recognize, clarify, and codify the Court's holding in *Hamdan* that Article 36(b) is intended to ensure consistency in procedures among courts-martial, military commissions, and other

253. Military Comm'ns Act of 2006, S. 3930, 109th Cong. (2003) available at http://www.loc.gov/rr/frd/Military_Law/pdf/S-3930_passed.pdf.

254. *Id.*

military tribunals. It will also clarify that the president has the responsibility to make the initial practicality determination if he decides that military commission or tribunal procedures should depart from courts-martial procedures. Since it is the president as Commander-in-Chief who will be the one seeking to establish military commissions and tribunals, it is appropriate that he shoulder the burden of showing impracticality.

This amendment also requires the president to more completely and precisely articulate why he believes a departure from the courts-martial rules and procedures is necessary. The amended Article more fully aligns the use of military commissions and tribunals with their historical precedent. That precedent strongly favors military commission and tribunal procedures that are consistent with the procedures used at courts-martial. If the president wants to depart from that precedent, then he must do more than simply state that it is not practicable to apply the principals of law and rules of procedure recognized in trials by courts-martial. He must fully explain and justify that departure. This will help to ensure that any departures from courts-martial procedures are not motivated by a desire simply to develop a more convenient adjudicatory tool for the government.

Most important, by requiring the president to justify the procedures and explain why the rules, regulations, and procedures for court-martial are not practical, the amended Article 36(b) gives Congress an opportunity to evaluate the president's exercise of his authority. Congress can review the reasons and explanations put forth by the president and make its own determination as to whether the president's decision is justified. If Congress disagrees with the president then it has the responsibility to take action to either seek compromise or otherwise prevent the president from departing from the rules and procedures of courts-martial. The very act of reviewing these changes – the kind of review contemplated by the *Hamdan* court – has benefits: increased transparency and a chance for citizens to understand the implications of the changes.²⁵⁵

This amendment to Article 36(b) also ensures that the president will develop a record, which was lacking in *Hamdan*, explaining why courts-martial procedures are impracticable. The

255. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

courts then have a basis upon which to evaluate the president's determinations to see if they in fact satisfy the requirements of Article 36(b). And so the third branch of the government may provide an additional check upon the Executive, allowing yet one more opportunity to prevent the enactment of procedures, like the proposal for secret evidence, that bear no relation to the purpose for which they are being promoted.

V. CONCLUSION

Placing the check on the president's power by amending Article 36(b) makes legal and practical sense. The use of military commissions is one way in which the president sought to expand his war powers and his authority on issues of national security. It was through the use of military commissions that the president sought to significantly restrict an accused's access to and use of protected information in a criminal trial. Had the president's power gone unchecked by the Court in *Hamdan*, it is through the use of military commissions that the president could have established a precedent that allowed for the government to depart from some of the most fundamental protections of the law because of the legal status of the accused, the type of crimes that the accused is alleged to have been involved in, or as a matter of convenience. Article 36(b) in its current form does not do enough to check the president's exercise of power in this critical area. It is through this proposed amendment to Article 36(b) that Congress can more properly exercise its systemic check on the executive's power.