

THE RIGHT TO BE PRESENT BEFORE MILITARY COMMISSIONS AND FEDERAL COURTS: PROTECTING NATIONAL SECURITY IN AN AGE OF CLASSIFIED INFORMATION

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A defendant's right to be present during trial is a touchstone of the American criminal justice system, and the precise scope of this right has substantial implications for the prosecutions of crimes involving terrorism. This Article explores the contours of the right to be present in the context of both military commissions and federal courts, examining what limitations, if any, might be placed upon it. The denial of this right by military commissions came under fire in *Hamdan v. Rumsfeld*. This Article questions the validity of such attacks by analyzing whether the right to be present in military commissions can be derived from the text of the Uniform Code of Military Justice prior to passage of the Military Commissions Act of 2006 and concludes that a defendant possesses no such right. This Article also ex-

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plores the recent congressional response to *Hamdan* and examines whether the current scheme will adequately safeguard classified information. The Article then pursues a broader, and perhaps more important, inquiry: whether the procedures provided in Military Order No. 1, limiting the presence of the accused, could be adapted for use in trials in federal court. This inquiry begins by examining the precise boundaries of the right to be present under existing Confrontation Clause jurisprudence and concludes that this right could indeed be curtailed in certain, limited circumstances. The Article then proposes the incorporation of amendments into the Classified Information Procedures Act (CIPA) to allow for the removal of a defendant in limited circumstances, and outlines certain procedures that would pass constitutional scrutiny, at least in the first instance. The Article next confronts the problems that would arise in the case of a defendant wishing to proceed pro se and concludes that existing procedures allowing for the appointment of standby counsel are adequate to protect a defendant's right to proceed pro se. The Article concludes by noting that the proposed amendments to CIPA would vastly improve the ability to protect classified information in federal terrorism trials, but it also questions whether it would be more appropriate to allow terrorism prosecutions to proceed in military commissions rather than in federal court.

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INTRODUCTION

The events of September 11th fundamentally altered the way many think about the balance between freedom and security. Numerous areas of domestic and international law have undergone unprecedented change,¹ not the least of which involve the rights of the accused in judicial or quasi-judicial proceed-

1. For instance, in the domestic law enforcement context, September 11th has altered the interaction of government agencies, *see* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, and led to the adoption of the USA Patriot Act, which is intended to safeguard the nation against terrorist threats. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). On the international level, the response to September 11th has drastically altered conceptions of armed conflict and the right of self defense. *See, e.g.,* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004); Ian Johnstone, *The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT’L L. 337 (2005); John Norton Moore, *The Bush Administration Preemption Doctrine and the Future of World Order*, 98 AM. SOC’Y INT’L L. PROC. 325 (2004); Stephen G. Rademaker, *Use of Force After 9/11*, 5 CHI. J. INT’L L. 461 (2005); William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319 (2003).

ings held before military commissions and federal courts.² The Supreme Court entered the fray, issuing opinions about the scope of the writ of habeas corpus,³ the right to detain enemy combatants until the cessation of hostilities,⁴ and the rights of U.S. citizens held as enemy combatants.⁵ Although pronouncements on these larger jurisdictional issues were no doubt necessary, the legal debate involving the rights of accused terrorists and unlawful enemy combatants entered a new, arguably more important, phase: determining the substantive and procedural rights due to the accused.

The substantive rights at issue include, but are not limited to, the right to counsel,⁶ the permissible limitations upon counsel communications,⁷ and the scope of permissible discovery.⁸

2. Judge Moody may have best framed the question this way: "how does this Nation (and its courts) balance an individual's constitutional rights against national security and foreign interests?" *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1297 (M.D. Fla. 2004). While for some, defendants' fundamental rights may seem immutable regardless of September 11th, such a proposition is simply irreconcilable with jurisprudential history and current political realities. More specific issues that might arise in bringing terrorists to trial in a federal court rather than a military commission will be explored *infra* Part II.

3. *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the federal habeas statute conferred jurisdiction on the district court to hear challenges of aliens held at Guantanamo Bay). For a criticism of this holding, see *Hamdan v. Rumsfeld: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *S. Judiciary Comm. Hearing No. 1*] (statement of Hon. Theodore Olson), available at http://judiciary.senate.gov/print_testimony.cfm?id=1986&wit_id=5507.

4. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (holding that members of the Taliban may be detained until the conclusion of hostilities).

5. *See id.* at 533 (holding that due process requires, at a minimum, that a U.S. citizen held in the United States as an enemy combatant must be given a meaningful opportunity to challenge the factual basis for his detention before a neutral decisionmaker); *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004) (holding that the commander of the naval brig where Padilla was detained was the only proper respondent, that the district court did not have jurisdiction over the commander, and that the Court thus did not have jurisdiction to entertain the petition).

6. *See, e.g., Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (holding that detainees have a right to counsel).

7. *Id.* at 15; *United States v. Bin Laden*, No. S(7) 98 CR. 1023 (LBS), 2001 WL 66393, at *4 (S.D.N.Y. Jan. 25, 2001) (holding that, although detainees had a right to counsel, the restrictions placed on communications between the attorney and the client were appropriate in light of the circumstances).

8. *See generally Bin Laden*, 2001 WL 66393 at *4. Other substantive rights and issues that are often implicated in terrorism proceedings include the right to exculpatory evidence, sufficiency of the evidence, protection from vague or ex post facto laws, the right to a speedy trial, the loyalty of counsel, and the impartiality of the court and the finder of fact.

These and other related issues are substantially discussed in legal scholarship⁹ and are actively confronted by lower courts.¹⁰

One right which has received little attention in legal scholarship, however, is the right of an accused to be present during trial. The lack of scholarly discourse stems primarily from the perception that the existence of the right is largely settled, even if its precise contours may not be.¹¹ It is well established that there are certain instances where a defendant must be present, and other instances where his presence is not fundamentally required for the proper administration of justice. A secondary reason for the lack of scholarly discourse is that the right to be present is not textually provided for in the Constitution. Rather, it is entwined with the right of confrontation,¹² and thus is often inadvertently overlooked.¹³ Indeed, when discussing the right of confrontation, the legal literature typically relies

9. See, e.g., Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67 (2004); Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962 (2005) [hereinafter Note: *Secret Evidence*]; Michael R. Hartman, Note, *A Critique of United States v. Bin Laden in Light of Chavez v. Martinez and the International War on Terror*, 43 COLUM. J. TRANSNAT'L L. 269 (2004); Katherine Ruzenski, Note, *Balancing Fundamental Civil Liberties and the Need for Increased Homeland Security: The Attorney-Client Privilege After September 11th*, 19 ST. JOHN'S J. LEGAL COMMENT. 467 (2005).

10. See, e.g., *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd* 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 126 S. Ct. 2749 (2006) (considering the lawfulness of trial of enemy combatant by military commission); *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (considering the defendant's access to enemy combatant witnesses in custody of the United States); *In re Guantanamo Detainee Litigation*, 355 F. Supp. 2d 443 (D.D.C. 2005) (considering the due process rights of enemy combatants held at Guantanamo Bay); *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005), *rev'd* 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006); *Bin Laden*, 2001 WL 66393 (legality of indefinite detention of a U.S. citizen held as enemy combatant).

11. See, e.g., *Lewis v. United States*, 146 U.S. 370, 372 (1892) ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."). See generally FED R. CRIM. P. 43.

12. See Brett H. McGurk, *Prosecutorial Comment on a Defendant's Presence at Trial: Will Griffin Play in a Sixth Amendment Arena?*, 31 UWLA L. REV. 207, 228 (2000) ("Nevertheless, the Supreme Court has held that one of the most basic rights guaranteed by the latter clause—the Confrontation Clause—is the right of the accused to be present in the courtroom at every stage of trial.").

13. See, e.g., Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996). In his description of the rights contained in the Sixth Amendment, Amar does not identify a discrete right to be present. Instead, he explains that it seems subsumed in the right of confrontation. See *id.* at 689 (explaining that the Confrontation Clause is intended to allow the defendant to hear a witness's story, which assumes that the defendant is present to hear).

only on the text of the Sixth Amendment, which provides a defendant the right “to be confronted with witnesses against him,”¹⁴ whereas a textual analysis of the right to be present is usually absent. Finally, the Federal Rules of Criminal Procedure also provide a largely unqualified right to be present,¹⁵ thus adding to the clarity of the right and seemingly reducing the need for scholarly discourse on the topic.

Nevertheless, a defendant’s right to be present during the course of his trial remains fundamental. Given the important values that the right to be present serves for the individual defendant and the larger scheme of constitutional rights, any limitations on that right must be carefully considered. As a general matter, the defendant’s presence helps ensure that the proceedings are, at a minimum, perceived as fair because the defendant is given the opportunity to confront any witnesses. Furthermore, the defendant is placed in the best position to test the veracity of the evidence proffered by the prosecution, increasing the likelihood that the government will take proper care to fully prove its case-in-chief before a conviction is rendered.¹⁶

While the right to be present is a touchstone of the U.S. criminal justice system, it is not without limits. Certain portions of criminal proceedings do not necessitate a defendant’s presence to ensure a fair trial; in some circumstances defense counsel’s presence alone may be sufficient.¹⁷ Additionally, in limited circumstances, public policy interests have been invoked to justify restricting the defendant’s right to be present.¹⁸ The risk of undermining the fairness of the proceedings and the truth-seeking function of our justice system, however, increases proportionally with the amount of time that a defendant is excluded from the proceedings against him, particularly at trial. Cognizant of the proportional risk, the Supreme Court acts cautiously in permitting the exclusion of a defendant from portions of his trial,¹⁹ and rightfully so.

14. U.S. CONST. amend. VI.

15. FED. R. CRIM. P. 43.

16. This objective relates in large part to the central purpose of the Confrontation Clause, for “[t]he essence of the right protected is the right to be shown that the accuser is real and the right to probe the accuser and accusation in front of the trier of fact.” *Coy v. Iowa*, 487 U.S. 1012, 1026 (1988) (Blackmun, J., dissenting).

17. See *infra* Part II.A.

18. See *infra* Part II.A.1.

19. See *id.*

In terrorism trials, the issue of presence manifests itself in the question of whether, and in what circumstances, the government may exclude the defendant from portions of the legal proceedings in order to prevent the disclosure of classified information and safeguard national security. Determining the flexibility of this right could greatly influence future legal decisions and, perhaps more importantly, shape future legislation.

*Hamdan v. Rumsfeld*²⁰ is the most significant ruling on this subject since the beginning of the war on terror.²¹ This Article uses the various opinions rendered in the *Hamdan* litigation as the background for a discussion of the right to be present in military commissions. It then explores the extent to which Congress could, through legislative action, limit the right to be present in federal court during a terrorism trial.

This Article is divided into three Parts. Part I discusses the right to be present before military commissions. Part I.A examines the right to be present under the legislative framework of the Uniform Code of Military Justice (UCMJ) prior to Congress's recent alteration through the passage of the Military Commissions Act of 2006, and to a lesser extent under the Geneva Conventions. It concludes that neither guarantees an individual accused of terrorism the right to be present before a military commission.²² Part I.B then considers the Military Commissions Act of 2006, which was Congress's response to the *Hamdan* decision, as it relates to the right to be present, and it considers whether the route chosen by Congress was appropriate and adequate to safeguard national security information.

Part II explores whether procedures like those promulgated under Military Order No. 1, allowing for the exclusion of the defendant from portions of his trial, would be permissible in federal terrorism trials, and suggests that any such procedures could be easily incorporated into the existing statutory framework of the Classified Information Procedures Act (CIPA). Part

20. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd* 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 126 S. Ct. 2749 (2006).

21. Indeed, a strong claim could be made that this is the most significant ruling on presidential powers in the last fifty years.

22. The Supreme Court decision in *Hamdan v. Rumsfeld* does not deal directly with the right to be present, but rather confronts only the issue of whether the military commissions were properly authorized and lawfully constituted. *Hamdan*, 126 S. Ct. at 2749, 2756.

II.A frames the current understanding of the right to be present in federal court and concludes that although objections would certainly be raised, the federal courts could utilize procedures akin to those permitted by the President's initial order establishing the Military Commissions²³ and outlined in subsequent U.S. regulations.²⁴ Under such a scenario, the constitutionality of any limitations placed on a defendant's right to be present in a terrorism prosecution would be reviewed on a case-by-case basis on appeal following conviction. Part II.B pursues the more limited inquiry of whether provisions of CIPA could be amended to better protect a bona fide national security interest²⁵ while still providing adequate constitutional safeguards for the accused. This Subpart argues that CIPA provides an excellent structural framework in which to incorporate procedures similar to those initially promulgated for the military commissions along with other possible restrictions on the right to be present.

Finally, Part III examines the unique problems that may arise when a defendant seeks to represent himself pro se and what implications, if any, those potential problems have on the proposed CIPA amendments. This Article concludes that the unique problems that pro se representation present can be adequately addressed using the present understanding of the right to be present and the flexibility granted to the trial court to appoint standby counsel. This Article concludes by briefly discussing the possible advantages and disadvantages of prose-

23. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Presidential Order]. Section 4 of this Order authorizes the Secretary of Defense to provide the rules for procedure and evidence in military commissions.

24. See, e.g., Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002) [hereinafter Military Order No. 1], available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>; Military Commission Order No. 3, Special Administrative Measures for Certain Communications Subject to Monitoring (Feb. 5, 2004), available at <http://www.defenselink.mil/news/Feb2004/d20040206ord3.pdf>; Military Commission Order No. 5, Designation of Appointing Authority (Mar. 15, 2004), <http://www.defenselink.mil/news/Mar2004/d20040317ord5.pdf>. Military Orders No. 2 & 4 were revoked and are no longer relevant. See United States Dep't of Def., Rescinded/Superseded Documents, <http://www.defenselink.mil/news/rescinded.html>.

25. A blanket determination by the Executive that particular information relates to national security may allow too much discretion and potential for abuse; the aim is obviously to protect only genuine national security interests. This is clarified *infra* Part II.

cuting terrorists in federal court and questioning whether such prosecutions would be more appropriate in military commissions or similar military justice apparatuses.

I. RECONSIDERING THE RIGHT TO BE PRESENT
BEFORE MILITARY COMMISSIONS

A. *The Hamdan Litigation*

The *Hamdan* litigation concerned the purported conflict between the procedures governing military commissions and those governing courts-martial under the UCMJ as it existed prior to congressional alteration. This Subpart examines the pre-*Hamdan* UCMJ to determine whether the right to be present may be properly derived from the Code.²⁶ The decisions of the district court, the court of appeals, and the Supreme Court offered drastically different opinions on this question, serving as the appropriate background upon which to examine this issue. This Subpart considers the reasoning in each of the opinions and concludes that the right to be present before courts-martial under the UCMJ does *not* guarantee a similar right in trials before military commissions.

The *Hamdan* litigation originated directly out of the war in Afghanistan. Salim Ahmed Hamdan was captured in Afghanistan during a time of armed conflict in 2001 and was subsequently transferred to the military base at Guantanamo Bay, Cuba.²⁷ In July 2003, the President designated him for trial by a military commission.²⁸ After Hamdan was officially charged,²⁹ his attorney filed multiple objections and motions with the military commission³⁰ and sought habeas relief in the Western

26. This inquiry is without prejudice to the later discussion of the congressional response amending the UCMJ. The other central issue in the dispute was the authority of the President to establish such commissions. That issue is only minimally relevant to this Article and will be discussed where appropriate.

27. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

28. *Id.* (citing Press Release, Dep't of Def., President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), <http://www.defenselink.mil/releases/2003/nr20030703-0173.html>).

29. A copy of the charges brought against Hamdan is available at <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>.

30. For the numerous documents filed on behalf of Hamdan before the military commission, see *Hamdan Court Motions*, http://www.defenselink.mil/news/Dec2004/commissions_motions_hamdan.html. Hamdan's counsel alleged, inter alia, that the military commission was improperly constituted in violation of 42 U.S.C. § 1981, that it violated the Equal Protection Clause, that its creation was

District of Washington.³¹ The case was subsequently transferred to the District Court for the District of Columbia pursuant to an earlier court ruling.³²

In granting habeas relief, the district court relied on Article 36(a) of the UCMJ and concluded that the procedures of the military commission are contrary to the UCMJ, rendering the military commissions fatally flawed.³³ The principal criticism of the commission's procedures concerned "the power of the appointing authority or the presiding officer to exclude the accused from hearings and deny him access to evidence presented against him."³⁴ The district court found that the procedures in Military Order No. 1 authorizing the exclusion of the defendant from portions of the trial were at odds with the Confrontation Clause jurisprudence developed under the UCMJ.³⁵ Furthermore, although it acknowledged that such restrictions were presumably drafted to protect the disclosure of classified information, the district court noted that the Mili-

an unconstitutional exercise of legislative power by the President, that it lacked personal jurisdiction, that its procedures violated the right to a speedy trial under U.C.M.J. art. 10, and that the Presidential Order creating it unlawfully discriminated against a suspect class and discriminated in the allocation of fundamental trial rights. *See id.*

31. *See* Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, In the Alternative, Writ of Habeas Corpus, *Hamdan*, 344 F. Supp. 2d 152 (No. 1:04CV01519). His counsel alleged that the denial of Hamdan's speedy trial rights violated article 10 of the UCMJ, that the nature and length of Hamdan's pretrial detention violated the Third Geneva Convention, that the detention violated Common Article 3 of the Geneva Conventions, that the order establishing the Military Commission violated the separation of powers doctrine, that the creation of the Military Commission violated the equal protection guarantees of the Fifth Amendment, that the creation of military commissions violated 42 U.S.C. § 1981, that the authority vested in the Military Commission exceeded the authority permissible under the laws of war, and that the Military Order did not, on its face, apply to Hamdan. *See Hamdan*, 344 F. Supp. 2d at 156.

32. *See* *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004) (determining that all Guantanamo cases should be heard in the United States District Court for the District of Columbia).

33. *Hamdan*, 344 F. Supp. 2d at 166–72; *see also* David Glazier, Note, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2010 (2003) (arguing that "the procedures still fall short of the modern judicial standards implemented in contemporary courts-martial"). The district court also held that that Combatant Status Review Tribunal (CSRT) is not a "competent tribunal" able to determine whether Hamdan was entitled to be treated as a prisoner of war. *Hamdan*, 344 F. Supp. 2d at 162.

34. *Hamdan*, 344 F. Supp. 2d at 166. The court also noted that there are a number of other differences, and cites Glazier, *supra* note 33, at 2015–20.

35. *Hamdan*, 344 F. Supp. 2d at 171.

tary Rules of Evidence already contain an effective system to deal with classified information. Relying on Military Rule of Evidence 505, the district court concluded that “the government has a choice to make . . . [if] the conflict between the government’s need to protect classified information and the defendant’s right to be present becomes irreconcilable,” the government will have to determine whether to disclose the information in question or dismiss the charges.³⁶ Because it determined that the provision of Military Order No. 1 permitting the exclusion of the accused from his trial is “directly contrary to the UCMJ’s right to be present,”³⁷ the court held that Hamdan could not be tried by a military commission “until the rules for Military Commissions are amended so that they are consistent” with the UCMJ.³⁸

The court of appeals, in reversing the district court, determined that the UCMJ did not govern the procedures used in trials before the military commissions.³⁹ It reasoned that the UCMJ was careful to distinguish between courts-martial and military commissions, noting specifically that Article 39(b) only requires the presence of the defendant in courts-martial, without mentioning military commissions. The court buttressed its textual reading of the UCMJ with reference to *Madsen v. Kinsella*,⁴⁰ in which the Supreme Court noted that neither the procedures nor jurisdiction of military commissions had been regulated by statute,⁴¹ even though the UCMJ had been passed only two years earlier.⁴²

36. *Id.* at 171. Indeed, as will become apparent *infra*, MIL. R. EVID. 505 played a central role in the congressional response to the *Hamdan* litigation.

37. *Id.* at 172.

38. *Id.* at 173. The district court used the phrases “contrary to” and “inconsistent with” almost interchangeably without ever discussing what either might mean.

39. *Hamdan v. Rumsfeld*, 415 F.3d 33, 42–43 (D.C. Cir. 2005). In addition to its holding as to the UCMJ, the court of appeals made a number of other critical holdings that should benefit the long-term war on terror, by finding that nothing in the Geneva Conventions allowed an enemy combatant the right to enforce its provisions in federal court, *see id.* at 40, and that even if the Conventions were enforceable in federal court, the trial of an enemy combatant before a military commission would not violate his rights under the Conventions. *Id.* at 40–42.

40. 343 U.S. 341 (1952).

41. *Id.* at 348.

42. *Hamdan*, 415 F.3d at 43 (“[I]t is difficult, if not impossible, to square the Court’s language in *Madsen* with the sweeping effect with which the district court would invest Article 36.”).

The Supreme Court overturned the decision of the court of appeals and invalidated the military commissions established by the President.⁴³ It held that the commissions were authorized by neither the Authorization for the Use of Military Force⁴⁴ nor the Detainee Treatment Act,⁴⁵ and that they were not properly constituted under the uniformity requirement of UCMJ Article 36(b) because the Executive had not made a compelling showing of necessity.⁴⁶ The Court, however, provided that the President may return to Congress to seek authorization for the types of military commissions he envisions.⁴⁷ The Court also implicitly acknowledged that Congress itself could alter the UCMJ to allow for procedures similar or even identical to those found in Military Order No. 1.⁴⁸

Accordingly, the two primary issues involved in *Hamdan* are the extent of the President's authority to establish military commissions and his power to determine the procedures governing such trials.⁴⁹ Article II of the Constitution entrusts the President

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

44. *Id.* at 2775–76.

45. *Id.* The Court stated that, at most, the UCMJ, DTA and AUMF “acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws,’ including the law of war.” *Id.* at 2775.

46. *Id.* at 2756.

47. *Id.* at 2799 (Breyer, J., concurring); see also *infra* Part I.B.

48. This point is implicit in the Court's suggestion that the President return to Congress because Congress could draft a response effectively overturning the Court's decision. This point was indeed a suggestion made in congressional hearings following the Court's decision. See *S. Judiciary Comm. Hearing No. 1, supra* note 3 (statement of Hon. Theodore Olson).

49. Whether the President has the power in the first instance to establish such tribunals is hotly contested. Compare Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 252 (2002) (“A strong argument can be made that President Bush has independent power, as Commander-in-Chief, to establish military commissions to try war crimes violations, even in the absence of affirmative congressional authorization.”), with Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1270 (2002) (arguing that “[t]he moment the President moves beyond detaining enemy combatants as war prisoners to actually adjudicating their guilt and meting out punishment . . . he has moved outside the perimeter of his role as Commander-in-Chief of our armed forces and entered a zone that involves judging and punishing alleged violations of the laws, including the law of nations . . .”), Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 339 (2002) (arguing that Military Order No. 1 violates separation of powers), and Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 5 (2001) (“The President's Commander-in-Chief power to set up military commissions applies only during actual war within

with the nation's war-making authority as the Commander-in-Chief of the armed forces.⁵⁰ The President possesses a number of considerable and largely undefined powers under this provision,⁵¹ the exercise of which often, although not always, presents an unreviewable political question.⁵² Indeed, in matters concerning national security, the President is entitled to "heightened deference."⁵³ Despite the breadth of the Commander-in-Chief power, the Court insists that its exercise remain compatible with "the principles of our institutions,"⁵⁴ because, as the Court recognized in a later case, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."⁵⁵ Thus, while the powers of the President in wartime are broad, they are not unlimited; often the only check on these powers comes from the judiciary.⁵⁶

a war zone or relevant occupied territory and apparently ends when peace is finalized.").

50. U.S. CONST. art. II, §§ 1–2. For competing views on presidential power in the arena of foreign affairs, see LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d ed. 2004) and JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005) [hereinafter YOO, *POWERS OF WAR AND PEACE*]; see also JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 226 (2006) [hereinafter YOO, *INSIDER'S ACCOUNT*] (arguing that the authority to establish military commissions, even absent congressional authorization, is vested in the President's power as Commander-in-Chief under Article II of the Constitution).

51. See JAMES SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* 37 (1953).

52. The political question doctrine is governed by *Baker v. Carr*, 369 U.S. 186, 217 (1962). A prime example of this doctrine as applied during armed conflict is *Hirota v. MacArthur*, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) (concluding that "the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say").

53. See *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001); *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) (observing that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); *CIA v. Sims*, 471 U.S. 159, 179 (1985) (noting that "[t]he decisions of the Director [of the CIA], who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake"); *Haig v. Agee*, 453 U.S. 280, 293–94 (1981) (noting "the generally accepted view that foreign policy was the province and responsibility of the Executive").

54. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866).

55. *United States v. Robel*, 389 U.S. 258, 264 (1967).

56. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ("[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.").

The Supreme Court's opinion in *Hamdan* is such a check on the power of the President in a time of war.⁵⁷ Its conclusion regarding the legality of the military commission's procedures is unpersuasive⁵⁸ and troubling both in terms of its legal implications and its national security repercussions. Before delving into the substantive legal issues raised by the Court regarding the issue of a defendant's right to be present, it is necessary to note that the issue of presence during trial was not truly presented in *Hamdan* since the trial had not yet begun; Hamdan was only excluded from voir dire proceedings.⁵⁹ Justice Kennedy noted as much in his concurrence by stating that "[t]he evidentiary proceedings at Hamdan's trial have yet to commence, and it remains to be seen whether he will suffer any

57. A number of commentators immediately described the Court's decision as a check on Executive power, and some condemned its decision as interfering with the President's authority to properly prosecute the war on terror. See, e.g., Editorial, *After Hamdan*, WALL ST. J., July 3, 2006, at A10; Dennis Byrne, Editorial, *Contorting the Law as a Rebuke*, CHIC. TRIB., July 3, 2006 at CN23; Charles Krauthammer, Editorial, *Emergency Over, Saith the Court*, WASH. POST, July 7, 2006, at A17; Adam Liptak, *The Court Enters the War, Loudly*, N.Y. TIMES, July 2, 2006, § 4, at 1; Jonathan Mahler, Editorial, *A Check Against Fear*, N.Y. TIMES, July 9, 2006, § 6, at 13; David B. Rivkin, Jr. & Lee A. Casey, Editorial, *Hamdan*, WALL ST. J., June 30, 2006, at A12; Scott Shane, *Terror and Power: Bush Takes a Step Back*, N.Y. TIMES, July 11, 2006, at A20; John Yoo, Op-Ed, *5 Wrong Justices; Ruling Mistakes War for Familiarity of Nation's Criminal Justice System*, USA TODAY, June 30, 2006, at A22.

58. See Stephen J. Ellmann, *The "Rule of Law" and the Military Commission*, N.Y.L. SCH. L. REV. (forthcoming 2007) (manuscript at 3–4, available at <http://ssrn.com/abstract=939603>) (commenting that "[t]he Supreme Court's interpretation of these Articles cannot rest solely on an analysis of their text, and instead reflects as well profound judicial commitments being shaped as the Supreme Court decides what role the courts should play in the long war against terrorism"); Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L.Q. 99, 161 (2006) (noting that "the Court expanded Article 21 of the UCMJ beyond its language" in requiring that the commissions follow international law, even though "[n]othing in Article 21's text, structure, enactment record, or ninety-year history supports such a close tie between the statute and international law"); Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 101, 103–20 (forthcoming 2007), available at <http://ssrn.com/abstract=945454> (labeling the *Hamdan* decision a "cascade of errors"); John Yoo, Editorial, *Sending a Message: Congress to Courts: Get Out of the War on Terror*, WALL ST. J., Oct. 19, 2006, at A18 (commenting that "[i]n *Hamdan*, the court moved to sweep aside decades of law and practice so as to force a grand new role for the courts to open their doors to enemy war prisoners").

59. This point was also made during oral argument before the D.C. Circuit. See Transcript of Oral Argument, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393) (on file with Author).

prejudicial exclusion.”⁶⁰ With this procedural posture in mind, the remainder of this Part explores whether, prior to Congressional alteration, the UCMJ gave a defendant an unfettered right to be present during his trial before a military commission.

As an initial matter, the Court in *Hamdan* apparently merged the issue of the Executive’s authority to establish the military commissions on the one hand and its discretion to craft the rules and procedures governing the commissions on the other.⁶¹ Conflating these two distinct issues, the Court concluded that the commissions were invalid because there were improper, or at least unnecessary, procedural departures from the rules typically governing courts-martial. As Justice Alito rightly noted in his dissent, however,

[E]ven if it is assumed for the sake of argument that some of the procedures specified in Military Commission Order No. 1 impermissibly deviate from court-martial procedures, it does not follow that the military commissions created by that order are not ‘regularly constituted’ or that trying petitioner before such a commission would be inconsistent with the law of war. If Congress enacted a statute requiring the federal district courts to follow a procedure that is unconstitutional, the statute would be invalid, but the district courts would not.⁶²

60. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2809 (2006) (Kennedy, J. concurring). Justice Kennedy’s refusal to join the majority on this issue troubles some. Green comments that:

A deep puzzle in Kennedy’s concurrence is the fact that he joined the majority’s general principle of procedural uniformity, including its criticisms concerning confrontation rights . . . yet he *refused* to invalidate Hamdan’s military commission for violating his right to be present. If the uniformity principle requires military commissions to match court-martial evidentiary standards, appellate procedures, and composition standards . . . it seems obvious that identical logic requires parity with respect to a defendant’s right to be present.

Green, *supra* note 58, at 159 n.280 (internal citations omitted).

61. Perhaps this conflation is not terribly surprising given that some of the amici in this matter made the same error. See Brief for the National Inst. of Military Justice and the Bar Ass’n of the Dist. of Columbia as Amici Curiae in Support of Petitioner at 18, *Hamdan*, 126 S. Ct. 2749 (No. 05-184) (arguing that the commissions are invalid because they depart from the rules of procedure and evidence set forth in the Manual for Courts-Martial).

62. *Hamdan*, 126 S. Ct. at 2852–53 (Alito, J., dissenting). Justice Alito’s mention of a “regularly constituted” court is a direct reference to the plurality’s argument concerning the Geneva Convention; this claim is discussed *infra* Part I.A.2. See Ku & Yoo, *supra* note 58, at 113–14.

Accordingly, provisions that allow the defendant's exclusion surely cannot by itself render the commissions invalid. That said, the issue of whether presence is required must be addressed more fully.

1. *The UCMJ and the Right to Be Present
Prior to Congressional Alteration*

The interpretive conflict displayed in *Hamdan* over whether a defendant must be present during his trial hinges primarily upon the meaning of the UCMJ, particularly whether its provisions governing courts-martial also apply to military commissions. An accused's right to be present during courts-martial is set out in UCMJ Article 39(b), which requires that all proceedings, except deliberations and voting on guilt or innocence, be conducted in the presence of the accused.⁶³ The procedures that governed the military commissions at issue in *Hamdan*, however, provided no such right. Although open public hearings are generally required in military commissions, under Military Order No. 1 the appointing authority or the presiding officer could close the proceedings to prevent disclosure of classified or classifiable information in order to safeguard participants in the proceedings, and to protect "other national security interests."⁶⁴ This authority encompassed "a decision to exclude the [a]ccused" and an order preventing defense counsel from disclosing "any information presented during a closed session to individuals excluded"⁶⁵

The UCMJ was promulgated by Congress acting under its constitutional authority "[t]o make rules for the government and regulation of the land and naval forces."⁶⁶ It covers various groups, including United States forces, "[p]ersons in custody of the armed forces serving a sentence imposed by a court-martial,"⁶⁷ and "prisoners of war in custody of the armed forces."⁶⁸ Although the text of the UCMJ does not ex-

63. UCMJ art. 39(b), (codified at 10 U.S.C. § 839 et seq.); see also *United States v. Dean*, 13 M.J. 676, 678 (A.F.C.M.R. 1982) ("The accused must be present at all stages of his trial. The integrity of the military justice system is jeopardized where a hearing is held and witnesses questioned without all parties to the trial being present." (citation omitted)).

64. Military Order No. 1, *supra* note 24, at § 6(B)(3).

65. *Id.*

66. U.S. CONST. art. I, § 8, cl. 14; see also SNEDEKER, *supra* note 51, at 5.

67. U.C.M.J. art. 2(a)(7).

68. *Id.* art. 2(a)(9).

explicitly state that it applies to individuals to be tried before a military commission who are not POWs—unlawful enemy combatants—the language of Article 2(a)(10)–(11)⁶⁹ is sufficiently broad to assume that all persons coming before military commissions are subject to the relevant provisions of the UCMJ.⁷⁰

Although suspected terrorists held at Guantanamo Bay may be covered by the UCMJ, what protections are afforded to them under the Code is not as clear. Indeed, that subject elicited much debate in *Hamdan*. The petitioner complained that the rules governing admission of evidence did not comply with the normal rules of either relevance or admissibility and that he and his civilian counsel could potentially be excluded from portions of his trial, preventing them from hearing certain classified information.⁷¹ Only the issues surrounding the denial of presence will be addressed in this Article.⁷²

Whether an unlawful combatant to be tried before a military commission possesses the right to be present during those proceedings turns on the meaning of Article 36 of the UCMJ. It provides that:

- (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, *so far as he considers practicable*, apply the principles of law and the

69. These provisions provide that “[i]n time of war, persons serving with or accompanying an armed force in the field,” *id.* art. 2(a)(10), and “persons serving with, employed by, or accompanying the armed forces outside the United States,” *id.* art. 2(a)(11), are subject to the provisions of the UCMJ. In all likelihood Article 2(a)(10) provides the best support for the proposition that persons coming before a military commission are subject to the UCMJ, since this provision refers only to “an armed force” rather than “the armed forces” under Article 2(a)(11). The former is broader and likely encompasses foreign forces, whereas the latter seems to only refer to U.S. armed forces.

70. See *Hamdan*, 126 S. Ct. at 2789 n.47. Indeed a contrary position would render the UCMJ’s limited regulation of military commissions nonsensical.

71. *Id.* at 2786–88.

72. As oral arguments before the Supreme Court indicate, evidentiary issues regarding military commissions seem to spark more controversy than the right to be present. Evidentiary questions are particularly salient because the rules governing military commissions have been changed significantly regarding both admissibility and sufficiency of evidence to obtain a conviction. This Article, however, takes no position as to whether the evidentiary rules for the original military commissions were proper.

rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter.*

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.⁷³

Every exercise in statutory interpretation must begin with the statute's text, and every word must be given effect, so as not to render any part of the statute inoperative, superfluous, void, or insignificant.⁷⁴ When Congress includes particular language in one section of a statute yet omits it in another section of the same statute, Congress presumptively acts "intentionally and purposely in the disparate inclusion or exclusion."⁷⁵ Courts interpreting the UCMJ have held to these same principles; they begin with the text of the UCMJ,⁷⁶ and generally regard the plain language and structure of the statute as expressing Congress's intent, absent clear evidence to the contrary.⁷⁷ Utilizing these same principles, this Article concludes that the procedures authorized

73. UCMJ art. 36 (emphasis added); *see also* Glazier, *supra* note 33, at 2013–14 (contending that the only major issue regarding consistency is whether "with this chapter" means that military commission must comply with all of the UCMJ or only those provisions which mention military commissions); *infra* text accompanying notes 113–66.

74. *See, e.g.*, United States v. Menasche, 348 U.S. 528, 538–39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute'" (internal citation omitted)); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy."); Lewis v. Maris, 1 U.S. (1 Dall.) 278, 282 (1788) ("In the construction of statutes, every part must receive effect; for, it cannot be presumed that unnecessary words have been used").

75. *See, e.g.*, Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002).

76. *See, e.g.*, United States v. Inthavong, 48 M.J. 628, 631 (A. Ct. Crim. App. 1998) (observing, in the context of interpreting UCMJ Article. 112(a), that "[w]hen interpreting statutory language our starting point must be the language employed by Congress.") (citations omitted); United States v. Maxwell, 42 M.J. 568, 580 (A.F. Ct. Crim. App. 1995) ("In construing unambiguous statutes, judicial inquiry begins and ends with the plain language of the statute.")

77. *See, e.g.*, United States v. Stuckey, 220 F.3d 976, 984–86 (8th Cir. 2000) (rejecting the Government's urging to not interpret the UCMJ literally, applying the principle *inclusio unius est exclusio alterius*, and concluding that Congress's enumeration of certain statutes is an indication that it intended to exclude unlisted statutes); *Inthavong*, 48 M.J. at 631 ("[A]bsent evidence to the contrary, the ordinary meaning of the words used expresses legislative intent."); *Dukes v. Smith*, 34 M.J. 803, 805 (N.M.C.M.R. 1991) ("Unless an appellate court can discover a clearly expressed legislative intent to the contrary, the language of the statute is ordinarily regarded as conclusive.")

by the President and issued by the Department of Defense were consistent with the text and purpose of the UCMJ.⁷⁸

The most logical starting point for the present inquiry is UCMJ subsection 36(a), which deals directly with the promulgation of procedures for military commissions. Indeed, that subsection was the focal point of the petitioner's presence claim in *Hamdan*⁷⁹ and was a central issue considered by both the district court⁸⁰ and the court of appeals.⁸¹ The Supreme Court, however, did not address the interpretative question under subsection (a),⁸² but instead chose to focus on subsection (b). Therefore, the remainder of this Subpart will proceed in a somewhat reverse fashion, considering first the Supreme Court's holding under subsection (b) and then moving to a fuller consideration of subsection (a).

a. Impracticability Under Article 36, Subsection (b)

The Court determined that subsection (b) required a more substantial showing of impracticability than subsection (a) and that, under subsection (b), military commissions are subject to the rules governing courts-martial unless it is impracticable.⁸³ The Court then concluded that the President had not made the requisite showing of impracticability, stating that "[t]here is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility."⁸⁴ The Court likewise found the possible denial of the right

78. *Contra* LOUIS FISHER, *MILITARY TRIBUNALS & PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 255 (2005). Fisher argues that "[i]t has always been the expectation and statutory policy that the rules and procedures for military tribunals conform, in general, with the rules and procedures for courts-martial." This Article argues that the plain text of the UCMJ, its legislative history, and the UCMJ's predecessor, the Articles of War, all belie Fisher's claim.

79. See Brief for Petitioner, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184); Brief for Appellee, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2004) (No. 04-5393).

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

81. *Hamdan*, 415 F.3d at 42-43.

82. *Hamdan*, 126 S. Ct. at 2791.

83. *Id.*

84. *Id.* at 2792. However, the term "practicable" is nowhere defined "and could plausibly have been read to encompass not just logistical concerns but concerns of national security. Those risks bore most immediately, perhaps, on the risk that defendants would gain access to secret information if they were entitled to be present throughout their trials." Ellmann, *supra* note 58, at 11.

to be present troubling, stating that “the jettisoning of so basic a right cannot lightly be excused as ‘practicable,’”⁸⁵ but it did not make a definitive ruling on this particular issue.

As a matter of statutory interpretation, the Court’s holding renders the President’s discretion to make a determination of practicability provided by subsection (a) nonsensical, for if the showing of impracticability under subsection (b) is greater than that required under subsection (a), then there is no need in the statute for the discretionary grant of authority in subsection (a). The Court’s reading of the statute contradicts the long standing canon of statutory construction that, where possible, courts are to avoid stripping a provision of its meaning or rendering it essentially obsolete.⁸⁶ Indeed, in the hearings that followed the Court’s decision, it was asserted that no one in the military community read subsection (b) in this manner.⁸⁷

To avoid this questionable interpretation of the UCMJ, the Court should have delved a bit further into the purpose of subsection (b).⁸⁸ The Court was right to note that Congress did not include subsection (b) in the UCMJ when it was originally proposed, but rather added it after World War II.⁸⁹ The Court, however, failed to explain the significance, if any, of this later addition. Instead, Justice Thomas accomplishes the task in his dissent, where he notes that “[t]he vision of uniformity that motivated the adoption of the UCMJ, embodied specifically in Article 36(b), is nothing more than uniformity across the separate branches of the armed services.”⁹⁰ He explained that “Article 36(b) is best understood as establishing that, so far as practicable, the rules and regulations governing tribunals convened by the Navy must be uniform with the rules and regulations governing tribunals convened by the Army.”⁹¹ The post-*Hamdan* hearings reveal that Justice Thomas’s interpretation of

85. *Hamdan*, 126 S.Ct. at 2792.

86. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (“The cardinal principle of statutory construction is to save and not to destroy.”).

87. See *Military Commissions in Light of the Supreme Court’s Decision in Hamdan v. Rumsfeld: Hearing Before S. Comm. on Armed Servs.*, 109th Cong. (2006) [hereinafter *S. Armed Servs. Comm. Hearing No. 1*] (remarks of Adm. James McPherson).

88. But see *Hamdan*, 126 S. Ct. at 2791 n.50 (dismissing Justice Thomas’s concern).

89. *Id.* at 2791.

90. *Id.* at 2842 (Thomas, J., dissenting).

91. *Id.*

the statute is indeed the proper one.⁹² For example, Admiral James McPherson commented that, “[p]rior to *Hamdan*, we had *always* interpreted, assumed, that ‘uniform’ meant the rules were the same among the services, not that they were the same for the courts-martial, commission, tribunals, those provost courts.”⁹³

This interpretation of subsection (b) directly tracks the legislative history of the provision. If one looks at the legislative history on Article 36, it becomes clear that the drafters were concerned with uniformity between the branches of the armed services.⁹⁴ Congress meant for Article 36 to govern the drafting of the Manual for Courts-Martial; it was anticipated that “the services w[ould] sit down to write a manual as a joint effort”⁹⁵ and that the manual “would be used by all three services.”⁹⁶

92. Recent scholarship also concludes that Justice Thomas had the better of the argument. See Green, *supra* note 58, at 163 n.296. Green comments that:

On balance, most interpretive tools support Thomas’s view of 36(b), and his dissent may have understated its arguments on this point. Before Congress enacted the “Uniform” Code of Military Justice, law enforcement in the military was governed by the Articles of War, which applied to the Army, and the Articles for Government, which applied to the Navy.

Green also notes that “the majority’s efforts to rebut the Thomas dissent were fairly weak” and “although the Court insisted that Congress might have intended to provide both uniformity among the military services and uniformity between military commissions and courts martial, the Court cited no evidence to substantiate that possibility.” *Id.* at 162 n.295.

93. *S. Armed Servs. Comm. Hearing No. 1, supra* note 87 (remarks of Adm. James McPherson) (emphasis added). In addition, Professor David A. Schlueter commented at the hearings that:

I don’t believe it was ever the intent of Congress to require that all the rules concerning provost courts, which haven’t yet been mentioned, but are in that provision, military commissions and courts martial would all be uniform. The uniformity requirement, in my view, was designed in 1950 to address the uniformity between the various armed forces and not between all of the various military tribunals.

Military Commissions in Light of the Supreme Court’s Decision in Hamdan v. Rumsfeld: Hearing Before S. Comm. on Armed Servs., 109th Cong. (2006) (remarks of Professor David A. Schlueter) [hereinafter *S. Armed Servs. Comm. Hearing No. 2*].

94. See *S. Armed Servs. Comm. Hearing No. 2, supra* note 93 (remarks of Professor David A. Schlueter) (commenting that “[t]he most common reading given to Article 36(b) is that the uniformity requirement was designed to make the practices in the various armed forces uniform, in response to the sometimes disparate practices that existed before the UCMJ was enacted in 1950”).

95. *Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong., 1014 (1949) [hereinafter *UCMJ House Hearings*] (remarks of Robert Smart).

96. *Id.* at 1015; see also *Hearing on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. (1949) [hereinafter *UCMJ Senate Hearings*]. In

During the House hearings on the UCMJ, when discussing whether to require absolute uniformity across the branches of the armed services with regards to courts-martial, Robert Smart, the author of subsection (b), commented, "I doubt that you should tie [the branches of the armed services] with an amendment to where they could not even breathe."⁹⁷ He then offered an amendment to Article 36, which became subsection (b), and explained that it would leave "enough leeway to provide a different provision where it is absolutely necessary" and recognized that "there are some differences in the services."⁹⁸ He went on to note that "there might be some slight differences that would pertain as to the Navy in contrast to the Army, but at least [subsection (b)] is an expression of the congressional intent that we want it to be as uniform as possible."⁹⁹ Nowhere in the legislative history is there any indication that Congress intended for subsection (b) to rein in the President's discretion under subsection (a) to promulgate the rules and procedures for military commissions. At a later Senate hearing on the subject of the drafting of the UCMJ, participants observed sentiments similar to those of Smart, commenting that "[t]here will be the same law and the same procedure governing all personnel in the armed services."¹⁰⁰ The interpretation of subsection (b) evidenced in these hearings makes sense given the Court's precedent, which acknowledges that when Congress enacted the UCMJ, it was codifying the Articles of War, which preserved the President's authority to promulgate rules and procedures governing military commissions.¹⁰¹ Absent explicit

discussing the effort to draft the UCMJ, Harvard Law Professor E.M. Morgan noted that it was intended to "supercede (a) the Articles of War . . . (b) the Articles for the Government of the Navy, and (c) the Disciplinary Laws of the Coast Guard." *Id.* at 34; *see also id.* at 38 (remarks of E.M. Morgan) (noting that it "is a code for the three services, the Army, the Navy, and the Air Force").

97. *UCMJ House Hearings*, *supra* note 95, at 1015 (remarks of Robert Smart).

98. *Id.*

99. *Id.*

100. *UCMJ Senate Hearings*, *supra* note 96, at 34 (statement of E.M. Morgan); *see also id.* at 255 (statement of Maj. Gen. Thomas H. Green). Even those critical of the concept of a uniform code recognized that its purpose was to unify the practice of the armed service; no mention of military commissions is found. *E.g., id.* at 235 (questionnaire submitted by the Judge Advocates Association) (commenting in a response critical of the proposal, that "[i]n my opinion, it is much too early to attempt to work out a uniform code for the three services") (emphasis added).

101. *See, e.g., Madsen v. Kinsella*, 343 U.S. 341, 347-49 (1952); *see also In re Yamashita*, 327 U.S. 1, 20 (1946).

language to the contrary, Congress should not be presumed to have gutted that authority when it added subsection (b) to the UCMJ.

Moreover, nothing in the history of the UCMJ suggests that it ever intended to require uniformity of procedures between courts-martial and military commissions.¹⁰² Looking at the text of the entire UCMJ makes it clear that Congress intended to create different courts with different procedures. The most obvious example is found in Article 16, which sets up different types of courts under the military justice system.¹⁰³ Later articles accord these various courts with different jurisdiction¹⁰⁴ and allow them to utilize different procedures. Given the flexibility normally afforded military commissions and the variances within the practice of courts-martial,¹⁰⁵ the suggestion that the procedures for the former must equate with those of the latter is erroneous. Indeed, “nothing in the structure, enactment record, or judicial history of Article 36(b) confirms the Court’s holding.”¹⁰⁶

The other aspect of the Court’s holding that raises some cause for concern is its determination that the President failed to make a sufficient showing of impracticability. Although this issue is beyond the scope of this Article, it deserves brief discussion given the central role it played in the dispute. It is the President, not the Court, that has been entrusted with the responsibility of safeguarding this nation’s security.¹⁰⁷ History demonstrates the high degree of deference generally given to the Executive in the areas of war and foreign affairs.¹⁰⁸ This pattern of deference makes practical sense because, of the three branches, the Court is the least suited to decide what measures are and are not necessary to safeguard the nation. The Court has, at best, limited access to the vital security information upon which the Executive and, to a lesser extent, Congress rely on to make such important decisions. The Court’s information deficit is illustrated most

102. Ellmann, *supra* note 58, at 10 (noting that “[t]he justices cite no mention of uniformity between military commissions and courts-martial”).

103. Article 16 distinguishes between general courts-martial, special courts-martial, and summary courts-martial.

104. *See* UCMJ arts. 17–21 (describing the different jurisdictions of the various forms of courts-martial).

105. *See infra* notes 147–50 and accompanying text.

106. Green, *supra* note 58, at 163.

107. THE FEDERALIST NO. 70 (Alexander Hamilton).

108. *See generally* YOO, POWERS OF WAR AND PEACE, *supra* note 50, Ku & Yoo, *supra* note 58.

clearly by its own statement that “it is not evident to us why [the danger of international terrorism] should require, in the case of Hamdan’s trial, any variance from the rules that govern courts-martial.”¹⁰⁹ At a minimum, this portion of the decision should give one pause to consider the broader implications of the Court’s intervention into such disputes.

Even assuming that the Court properly interpreted subsection (b), that alone does not foreclose future regulations permitting the exclusion of a defendant in a trial before a military commission.¹¹⁰ The Court made clear that its ruling was entirely dependent on a showing of impracticability under subsection (b).¹¹¹ Thus, a more detailed showing of the need to depart from the procedures governing courts-martial would probably quell the Court’s concerns. Moreover, because the Court noted that “the structural and procedural defects of Hamdan’s commission extend far beyond rules preventing access to classified information,”¹¹² any procedures designed solely to protect classified information would likely be subject to much less criticism than the court subjected the entire procedural framework to in *Hamdan*.

b. “Contrary to or Inconsistent with”
Under Article 36, Subsection (a)

Although the Court left open the question whether the procedures governing Military Order No. 1 were “contrary to or inconsistent with” those governing courts-martial,¹¹³ a fuller exploration of that question is appropriate. Through subsection (a), Congress delegated to the President the authority to promulgate rules of procedure and evidence for the military commissions, which the President lawfully delegated to the Secretary of Defense.¹¹⁴ The UCMJ’s predecessor, the Articles of War, granted a similar power to the President.¹¹⁵ The powers dele-

109. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2792 (2006).

110. As will be discussed *infra* Part I.B, however, Congress may have foreclosed such an option, at least temporarily, by passing the Military Commissions Act of 2006.

111. *Hamdan*, 126 S. Ct. at 2791–92.

112. *Id.* at 2792 n.52.

113. *Id.* at 2792.

114. UCMJ art. 140. (“The President may delegate any authority vested in him under this chapter, and provide for the subdelegation of any such authority.”).

115. Article 38 of the Articles of War provided that:

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before

gated through subsection (a) and under the Articles of War were not seriously questioned before the *Hamdan* litigation.

Article 36(a) granted the President broad discretion to formulate the rules of procedure and evidence for trials before a military commission.¹¹⁶ The legislative history demonstrates that there was much debate over whether and how much discretion should be granted. In the end, Congress gave the President almost unlimited discretion.¹¹⁷ In drafting the UCMJ, Congress made clear that it was “not prescribing rules of procedure for military commissions” but only for courts-martial.¹¹⁸ The only limitation extrinsic to the language of the Act itself is the will of Congress, and prior to the *Hamdan* litigation, Congress had not limited the power of the President to exclude a defendant from portions of the proceedings.

The only textual limit placed upon the President was contained in Article 36(a), which required that the procedures imposed may not be “contrary to or inconsistent with” the provisions of the UCMJ dealing with trial procedure.¹¹⁹ One might be tempted to read Article 36(a) as imposing a limitation upon the extent to which the procedures in the UCMJ may be altered or restricted in trials before military commissions.¹²⁰ The district court in *Hamdan* took that position when it concluded that the UCMJ requires the defendant to be present in all proceedings except court deliberation.¹²¹ Upon a closer review of the structure and language of the UCMJ,

courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided that nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules and regulations made in pursuance of this Article shall be laid before the Congress.

LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 117 (1949). It must be noted, however, that under the Articles of War at least some senior military officers believed that military commissions and courts-martial used “the same procedure.” See, e.g., S. REP. NO. 64-130 (1st Sess.) at 40 (1916) (testimony of Brig. Gen. Enoch H. Crowder).

116. SNEDEKER, *supra* note 51, at 306–07.

117. See UCMJ House Hearings, *supra* note 95, at 993, 1017, 1061, and 1063.

118. *Id.* at 1017.

119. U.C.M.J. art. 36(a).

120. Indeed, this interpretation is the reading suggested by Glazier. See Glazier, *supra* note 33, at 2088–89.

121. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d. 152, 168–69 (D.D.C. 2004).

however, it is apparent that the rules governing courts-martial need not apply to military commissions.¹²² Only nine provisions of the UCMJ specifically mention military commissions, and none of these provisions regulate the rights of or procedures due a defendant in such proceedings.¹²³ The scarcity with which military commissions are mentioned under the UCMJ stands in stark contrast to the lengths to which Congress went to prescribe specific regulations for courts-martial. The most pertinent example is Article 39(b), which provides that “[w]hen the members of a *court-martial* deliberate or vote,

122. Assuming, for the sake of argument, that the Supreme Court’s test of impracticability is met.

123. The nine specific provisions are:

- 1) Article 21, which stipulates that courts-martial jurisdiction is concurrent with that of “military commissions, provost courts, or other military tribunals”;
- 2) Article 28, which requires the convening authorities of either a court-martial or a military commission to appoint “qualified court reporters”;
- 3) Article 36, which grants the President the power and discretion to prescribe procedure for “courts-martial, military commissions and other military tribunals”;
- 4) Article 47, which gives the federal courts the authority to try any person who willfully fails to appear before a court-martial or military tribunal despite being issued a subpoena;
- 5) Article 48, which grants a “court-martial, provost court or military commission” the authority to punish “any person” for contempt, and sets limits on the punishment;
- 6) Article 49, which allows depositions to be “read in evidence or, in the case of audiotape, videotape, or similar material . . . [to be] played in evidence before any military court or commission” in a non-capital case, or in any case where certain criteria are met;
- 7) Article 50, which allows prior testimony to “be read in evidence by any party before a court-martial or military commission if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of such evidence” by the government in noncapital cases only, and by the defense in all types of cases;
- 8) Article 104, which subjects “[a]ny person” who “aids . . . knowingly harbors or protects or gives intelligence to, or communicates or corresponds with . . . the enemy” to the jurisdiction of a court-martial or military commission;
- 9) Article 106, which allows spies to be tried by general court-martial or military commission.

The tenth relevant UCMJ provision is Article 37(a), which prohibits improper influence directed at the members of a court-martial “or any other military tribunal.” Although Article 37(a) does not explicitly mention military commissions, its application to such commissions may be inferred from the “other military tribunal” language.

only the members may be present. All other proceedings . . . shall be in the presence of the accused."¹²⁴ As the text indicates, this provision applies only to courts-martial. Even those critical of the procedures governing military commissions note that if they adhere to this interpretation, the procedures in question "do not contravene the specific treatments of military commissions" in the UCMJ.¹²⁵

The strongest argument for the proposition that the rules for military commissions should be similar to the rules for courts-martial is found in the concept of inconsistency found in Article 36(a), which provides that the rules and regulations promulgated by the President may not be "inconsistent with this chapter," and this language should be interpreted in light of Article 39 and the Preamble to the Manual for Courts-Martial. The notion here is that, though procedures prescribed by the President are not necessarily "contrary to" the UCMJ, they must nonetheless be consistent with its overall structure. This argument looks more at the general pattern of how proceedings are conducted and less at the technical details and the article-by-article regulation of military commissions. The concept of presence under Article 39(b) forms part of that structure; therefore, a rule allowing the denial of this right in military commission proceedings would be "inconsistent with" that framework.

Although this argument has some surface appeal, it is less than compelling upon further consideration. The phrase "inconsistent with" is not defined in the UCMJ, and it is not clear precisely what the drafters meant by the term. What is clear from the text and the legislative history, however, is that the drafters intended to give as much discretion to the President as possible in formulating the procedures to govern military commissions. This impulse to confer the maximum amount of discretion is evident not only from the text of Article 36(a), but also from the Preamble to the Manual for Courts-Martial, which provides that "[s]ubject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and

124. UCMJ, art. 39(b) (emphasis added).

125. *E.g.*, Glazier, *supra* note 33, at 2020. Nonetheless, Glazier also suggests that the UCMJ be interpreted broadly enough to require military commissions to adhere to the same procedural requirements as courts-martial. *Id.* at 2088.

rules of procedures and evidence prescribed for courts-martial.”¹²⁶ Thus, as the text makes clear, the President is free to alter the rules and procedures applicable to military commissions at *his* discretion.¹²⁷ Had the drafters of the original UCMJ sought to limit that discretion or to provide specifically for the right to be present during military commission procedures, they certainly would have said so.¹²⁸ The weight of the evidence, however, leads to the opposite conclusion.

Excusing the procedures of military commissions from the requirement of UCMJ Article 39(b) comports with the general history and purpose of military commissions. Although not always labeled as such,¹²⁹ military commissions have always been recognized as part of the common law of war.¹³⁰ Their use and creation is rooted not only in the Commander-in-Chief Clause of the U.S. Constitution,¹³¹ but also implicitly in the UCMJ,¹³² and their exist-

126. JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES I-1 (2000 ed.), available at <http://www.jag.navy.mil/documents/mcm2000.pdf> (emphasis added).

127. Note that the preamble to the MANUAL FOR COURTS-MARTIAL references international law. See *id.* The issue of what effect, if any, international law has on the President’s ability to order the exclusion of a defendant from certain proceedings will be discussed *infra* Part I.A.2.

128. See Glazier, *supra* note 33, at 2020–22 (suggesting that one plausible reading of “inconsistent” would require consistency only with those provisions that specifically refer to military commissions, and then providing counterarguments against this proposition).

129. Very early in this nation’s history, a military commission was referred to as “the war court.” See WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 275 (1892); see also A. Wigfall Green, *The Military Commission*, 42 AM. J. INT’L L. 832 (1948).

130. The first instance of a “military commission,” as labeled, was in 1847 in General Order No. 287, issued during the U.S.-Mexican War. This Order was issued by General Scott and is reprinted in BIRKHIMER, *supra* note 129, at 466–68, app. I. Indeed, “American generals have used military commissions in virtually every significant war from the Revolutionary War through World War II.” YOO, INSIDER’S ACCOUNT, *supra* note 50, at 221.

131. See BIRKHIMER, *supra* note 129, at 280 (“Military commissions may be appointed either under provisions of law in certain instances, or under that clause of the Constitution vesting the power of Commander-in-Chief in the President, who may exercise it either directly or through subordinate commanders.”). The Supreme Court did not reach this issue, but instead hinged its opinion on statutory grounds.

132. See Glazier, *supra* note 33, at 2013. It is arguable that the commissions are also authorized by the Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224, 224 (2001). See Michael Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 442 (2002); Bradley & Goldsmith, *supra* note 49, at 252. It bears noting, however,

tence has been confirmed and validated repeatedly by the Supreme Court.¹³³ Military commissions were created largely in response to military necessity,¹³⁴ and they have been “adapted in each instance to the need that called [them] forth.”¹³⁵ The flexibility of military commissions in times of armed conflict has historically allowed them to depart from normal trial procedures in an effort to dispense swift justice.¹³⁶

There is no doubt that the rules governing courts-martial “vary somewhat from the rules generally recognized in the trial of criminal cases in the United States district courts.”¹³⁷ One of the most obvious distinctions is that rules of evidence are more lenient in courts-martial.¹³⁸ Furthermore, the full panoply of rights guaranteed by the Constitution does not apply in courts-martial.¹³⁹ The right to a jury trial, for example, is guaranteed in every felony criminal case in civilian court,¹⁴⁰ but is denied in courts-martial.¹⁴¹ Other differences include: the right to compul-

that the Supreme Court rejected this argument. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006).

133. *See, e.g., Madsen v. Kinsella*, 343 U.S. 341, 346 (1952) (noting that “[s]ince our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war”); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that German nationals, confined in custody of the United States Army in Germany following conviction by military commission of having engaged in military activity against the United States in China after Germany surrendered, had no right to writ of habeas corpus to test legality of their detention); *In re Yamashita*, 327 U.S. 1, 7 (1946) (finding that a military commission appointed by military command was an appropriate tribunal for the trial and punishment of offenses against the law of war); *Ex parte Quirin*, 317 U.S. 1 (1942) (upholding the validity of a military commission and denying motion for a writ of habeas corpus).

134. *See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS* 831 (2d ed. 1920).

135. *Madsen*, 343 U.S. at 347–48; *Yamashita*, 327 U.S. at 18–23.

136. *See Yamashita*, 327 U.S. at 1; S. REP. NO. 64-130 (1st Sess.), at 40 (1916) (testimony of Brig. Gen. Enoch H. Crowder).

137. SNEDEKER, *supra* note 51, at 307.

138. Thomas L. Hemingway, *In Defense of Military Commissions*, 35 U. MEM. L. REV. 1, 10 (2004).

139. SNEDEKER, *supra* note 51, at 446.

140. U.S. CONST. amend. VI.

141. *See Ex parte Quirin*, 317 U.S. 1, 40 (1942) (observing that the provisions of the Constitution and the Fifth and Sixth Amendments regarding trial by jury do not extend the right to demand a jury to trials by military commission or to have required that offenses against the law of war not triable by jury at common law be tried only in civil courts); *see also DeWar v. Hunter*, 170 F.2d 993, 997 (10th Cir. 1948) (“The right of trial by jury guaranteed by the 6th Amendment to the Constitution of the United States is not applicable in a trial by military court-martial.”).

sory process,¹⁴² the standards of due process,¹⁴³ and the prohibition against ex post facto laws.¹⁴⁴ Similarly, when compared to the civilian judicial system, military commissions offer a number of advantages,¹⁴⁵ including more flexibility in addressing the national security interests that arise in these sorts of trials.¹⁴⁶

More important than the differences between the military commissions and courts-martial on one hand and civilian trials on the other, is whether it is permissible for the procedures utilized by military commissions to differ from the procedures used in courts-martial. Although courts have not pronounced on this distinction, aside from lower courts in *Hamdan*,¹⁴⁷ it is generally recognized that one of the particular advantages of military commissions over courts-martial is their ability to apply more flexible procedures. Indeed, it has long been recognized that military commissions “will not be rendered illegal by the omission of details required upon by trials by courts-

142. LEE S. TILLOTSON, INDEX-DIGEST AND ANNOTATIONS TO THE UNIFORM CODE OF MILITARY JUSTICE 271 (1956).

143. In *Durant v. Hiatt*, 81 F. Supp. 948, 956 (N.D. Ga. 1948), a district court held that the following alleged irregularities did not constitute deprivation of due process of law and did not deprive the court-martial of jurisdiction: (1) illegal arrest, (2) method of questioning the accused, (3) admission of testimony of a person to whom the accused confessed, (4) failure to allow the accused the benefit of an attorney at the beginning, (5) lengthy confinement, (6) restrictions upon his consultation with his attorney, (7) insufficient facilities to prepare for defense, and (8) method of pretrial investigation.

144. See *United States v. Merritt*, 1 C.M.R. 56, 56–57 (C.M.A. 1951) (asserting that the UCMJ “authorizes the President to deal with the procedure applicable to all trials, regardless of the time of commission”).

145. Obvious advantages of military commissions include the following: (1) commissions better protect classified and secret information, (2) those who deal with armed conflict are better able to try alleged violations of the laws of war, (3) commissions lessen the chance that publicity will inspire attacks by other terrorists seeking a defendant’s release, (4) the risk of jury intimidation is eliminated, (5) courtroom security is easier on a military base, (6) the process is quicker and less expensive, and (7) the death penalty can be used more effectively. Gary D. Solis, *Military Commissions and Terrorists*, in *EVOLVING MILITARY JUSTICE* 195, 203 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

146. See Ruth Wedgwood, *After September 11th*, 36 *NEW ENG. L. REV.* 725, 728–29 (2002) (“A military commission allows two things: some latitude in the admission of reliable evidence, and some ability to close limited portions of a trial to avoid the gaze of the adversary.”); see also Kendall Coffey, *The Case for Military Tribunals*, *WALL ST. J.*, May 19, 2003, at A16.

147. The Supreme Court did not rule directly on this issue but only found the commissions unauthorized and not properly constituted, and suggested the President seek some type of congressional authorization. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

martial.”¹⁴⁸ Even one of the amici in *Hamdan* who argued in support of the petitioner recognized that “[a] military commission is a wartime military trial with less stringent rules of procedure and rules of evidence than found in courts-martial.”¹⁴⁹ To conclude otherwise would seem curious given the text of the UCMJ and the discretion it originally afforded the President to craft military commission procedures.¹⁵⁰

Rather than present historical evidence requiring a defendant’s presence before military commissions, the district court in *Hamdan* opined that military courts-martial provide an adequate method to protect the national security concerns voiced by the government.¹⁵¹ It determined that Military Rule of Evidence 505 would adequately safeguard classified material.¹⁵² This rule is based entirely upon the Classified Information Procedures Act (CIPA), which is discussed in detail below.¹⁵³ Both CIPA and the Military Rules of Evidence were enacted the same year.¹⁵⁴ The court assumed without proof that not only is

148. WINTHROP, *supra* note 134, at 841 (emphasis omitted); see also LEONARD CUTLER, THE RULE OF LAW AND THE LAW OF WAR: MILITARY COMMISSIONS AND ENEMY COMBATANTS POST 9/11, at 61 (2005) (noting that military commissions had the freedom to depart from the Manual of Courts-Martial and the Articles of War); EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL 314 (1907) (noting that “[m]ilitary commissions follow the mode of procedure adopted for general courts-martial, but it is not obligatory”) (emphasis added).

149. Solis, *supra* note 145, at 196. Solis is listed as an amicus on the Brief of Military Law Practitioners and Academicians as Amici Curiae in Support of Petitioner-Appellee Urging Affirmance, *Hamdan v. Rumsfeld*, 334 F. Supp. 2d 152 (D.D.C. 2004) (No. 04-5393).

150. See *supra* note 73 and accompanying text. The Court implicitly recognized this distinction in *Madsen v. Kinsella*, 343 U.S. 341 (1952). The Court noted that in the case of military commissions, Congress had granted the President, or his subordinates, the exclusive power to make the rules of procedure, whereas Congress repeatedly enacted and revised the procedures to govern courts-martial under the Articles of War, the predecessor to the UCMJ. See *id.* at 348–49.

151. Although the Supreme Court did not pass directly on this issue, Justice Kennedy suggests a similar conclusion were the issue to be reached. *Hamdan*, 126 S. Ct. at 2808 (Kennedy, J., concurring).

152. *Hamdan*, 344 F. Supp. 2d at 171. Senator Arlen Specter seems to have reached a similar conclusion, urging courts to use CIPA-like procedures to protect classified information. See 152 CONG. REC. S6796–S6801 (daily ed. June 29, 2006) (statement of Sen. Specter).

153. STEPHEN A. SALTZBURG ET AL., 2 MILITARY RULES OF EVIDENCE MANUAL 5–66 (5th ed. 2003).

154. CIPA was enacted in 1980, see *infra* note 388, and the Military Rules of Evidence were established in 1980. See Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Interpretation*, 130 MIL. L. REV. 5, 5–8 (1990).

Rule 505 adequate in theory, but also that its implementation, or that of its predecessor, has been successful in protecting classified information.¹⁵⁵ Although Rule 505 inevitably will help protect some classified information, its use by military commissions would place the government in a disclose-or-dismiss dilemma similar to what already plagues CIPA cases.¹⁵⁶ Requiring military commissions to utilize this provision of the Military Rules of Evidence would disadvantage the government more than allowing the flexibility traditionally afforded military commissions.¹⁵⁷ Such a requirement should be rejected.¹⁵⁸

Even assuming, however, that Rule 505 could adequately protect national security interests, such a conclusion is wholly irrelevant because the Military Rules of Evidence by their terms are only “applicable in courts-martial, including summary courts-martial, to the extent and with the exceptions stated in Military Rule of Evidence 1101.”¹⁵⁹ They are not intended to apply to military commission proceedings,¹⁶⁰ once again confirming the distinction between congressional regulation of courts-martial and the flexibility given to the President in promulgating rules of procedure and evidence for military commissions.

155. *Hamdan*, 344 F. Supp. 2d at 171.

156. For example, if the military judge rules under Rule 505 that substitution or other alternatives to full disclosure would unduly prejudice the defense, he may, inter alia, order the government to disclose the evidence, proceed without the evidence, or dismiss the indictment altogether. See MIL. R. EVID. 505(i)(4)(E).

157. See Melvin Heard et al., *Military Commissions: A Legal and Appropriate Means of Trying Suspected Terrorists?*, 49 NAVAL L. REV. 71 (2002). The authors note that “although M.R.E. 505 contains elaborate procedures by which the government can move to prevent full disclosure of classified information to an accused service member, the rule does not provide for the exclusion of the Accused when classified evidence is presented at trial,” *id.* at 90, and that the rules under Military Order No. 1 adequately protect classified military information. See *id.* at 91. For a discussion of CIPA’s effectiveness and misuse in the present context, and for proposals for amending CIPA, see *infra* Part II.B.2–3.

158. It appears that at least the portion of MRE 505 allowing dismissal of the charges where classified information is not turned over was rejected by Congress when it passed the Military Commissions Act of 2006. See *infra* notes 236–37 and accompanying text.

159. MIL. R. EVID. 101(a).

160. MANUAL FOR COURTS-MARTIAL, *supra* note 126, at app. A22-1-2 (noting that the Military Rules of Evidence are not applicable to military commissions unless otherwise required by competent authority).

Early in the twentieth century, it was understood that the “safeguards of the Bill of Rights of the Constitution are for the time being set aside” when military commissions were employed.¹⁶¹ Today, the precise scope and application of the Bill of Rights in proceedings before a military commission is almost entirely unknown. It is known, however, that the full protections afforded by the Sixth Amendment are not recognized by courts-martial. Jury trials are not required,¹⁶² and the right of confrontation, to which the district court alluded in *Hamdan*, is more limited in courts-martial than in federal criminal trials.¹⁶³ Perhaps most importantly, the option to exclude the defendant from portions of trial has been contemplated for military commissions. The most notable example is Article 12 of the Nuremberg Charter, which provided that:

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, *for any reason*, finds it necessary, in the interests of justice, to conduct the hearing in his absence.¹⁶⁴

When this provision is considered alongside the historical reality that a military commission is “adapted in each instance to the need that called it forth”¹⁶⁵ and the extraordinary deference usually granted to the Executive in decisions related to national security,¹⁶⁶ it is not unreasonable to believe that the right of confrontation and presence properly may be limited in trials before military commissions.

161. DUDLEY, *supra* note 148, at 312.

162. *See supra* note 141 and accompanying text.

163. *See* SNEDEKER, *supra* note 51, at 452. For example, Snedeker refers to the admission into evidence of depositions where the witness is unavailable and has not been cross-examined by the defense counsel. *Id.*

164. Charter of the International Military Tribunal at Nuremberg art. 12, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 290 [hereinafter IMT Charter] (emphasis added). Indeed, Martin Bormann was convicted in absentia.

165. *Madsen v. Kinsella*, 343 U.S. 341, 347–48 (1952); *see also In re Yamashita*, 327 U.S. 1, 18–23 (1946).

166. *See, e.g.,* *United States v. Nixon*, 418 U.S. 683, 710 (1974); *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953) (holding that the privilege against revealing military secrets is one belonging to and invocable by the Government); *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692) (“If [the letter in question] does contain any matter in which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.”).

2. *The Geneva Convention and the Right to Be Present*

A secondary question that also occupies much of the Court's decision in *Hamdan* is the extent to which international law and more precisely the Geneva Conventions limit the procedures that military commissions can employ.¹⁶⁷ The discussion of the Geneva Conventions in *Hamdan* is somewhat complex, much of it extending beyond the scope of this Article's inquiry. However, to properly frame this Subpart, a brief overview of this question is necessary.

Common Article 3 of the Geneva Conventions provides that, in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities," which includes "members of the armed forces who have laid down their arms" and those held in "detention."¹⁶⁸ The Convention requires covered persons be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."¹⁶⁹

Hamdan alleged that he was protected by Common Article 3 of the Geneva Conventions, at least until a competent tribunal determined whether he was a POW.¹⁷⁰ He further alleged that the protections of the Conventions are directly enforceable by a private individual¹⁷¹ and complained that the procedures of the military commission violate Common Article 3.¹⁷² The government countered that Hamdan was not covered by the Geneva Conventions,¹⁷³ that a private citizen may not enforce its provisions in federal court,¹⁷⁴ and that, regardless, the court should abstain from ruling on this issue.¹⁷⁵

167. *Hamdan v. Rumseld*, 126 S. Ct. 2749, 2793–96 (2006).

168. Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

169. *Id.* at art. 3(1)(d), 6 U.S.T. at 3320.

170. Brief for Petitioner at 36, 48–50, *Hamdan*, 126 S. Ct. 2749 (No. 05-184).

171. *Id.* at 41–44.

172. *Id.* at 49–50.

173. See Brief for Respondents at 37–42, *Hamdan*, 126 S. Ct. 2749 (No. 05-184) [hereinafter Respondents' Brief].

174. *Id.* at 30–37.

175. *Id.* at 12–15.

The district court held that until Hamdan's status was determined by a competent tribunal he must be afforded the protections of the Geneva Conventions¹⁷⁶ and that it was appropriate for the court to abstain on the question of whether the procedures of the military commission violated Common Article 3.¹⁷⁷ The court of appeals, in contrast, held that the Geneva Conventions are not enforceable in a private cause of action,¹⁷⁸ that Hamdan was not entitled to their protection even if they were judicially enforceable,¹⁷⁹ and that, in any event, abstention was appropriate.¹⁸⁰

The Supreme Court avoided the question of direct enforceability by private parties of individual rights conferred by the Geneva Conventions.¹⁸¹ Instead, it held that whatever might be said about the rights conferred on Hamdan, the Conventions are part of the law of war, and thus compliance with them is a precondition for the establishment of military commissions under the UCMJ.¹⁸² The Court went on to conclude that, at a

176. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (D.D.C. 2004). The district court determined that the Combatant Status Review Tribunal established by the President was not a "competent tribunal" within the meaning of Third Geneva Convention Article 5. *Id.* at 162. This holding seems to suggest that the President's determination that Hamdan is an enemy combatant not entitled to POW status is not relevant. See generally Presidential Order, *supra* note 23; Press Release, U.S. Dep't of Def., Presidential Military Order Applied to Nine More Combatants (July 7, 2004), <http://www.defenselink.mil/releases/2004/nr20040707-0987.html>.

177. *Hamdan*, 344 F. Supp. 2d. at 165–66.

178. *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005) ("[T]he 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court.").

179. *Id.* at 40–42.

180. *Id.* at 42.

181. See 152 CONG. REC. S10401 (daily ed. Sept. 28, 2006) (statement of Sen. John Warner). Senator Warner inserted into the record a joint letter from Senators McCain, Warner, and Graham, which commented that "[t]he Supreme Court's decision in *Hamdan* left untouched the widely held view that the Geneva Conventions provide no private rights of action to individuals. And, in fact, the majority in *Hamdan* suggested that the Geneva Conventions do not afford individuals private rights of action . . ." *Id.*

182. *Hamdan*, 126 S. Ct. at 2794. However, "the case for binding application of [Common Article 3] seems weaker than the Court portrayed" and does not follow from the text of the treaty. David W. Glazier, *Full and Fair by What Measure?: International Law Standards Regulating Military Commission Procedure*, 25 BOSTON UNIV. INT'L L. J. (forthcoming 2007) (manuscript at 5, 44, available at <http://ssrn.com/abstract=896643>). Some might read this as conferring a private right to enforce the Conventions, or even more broadly, a private right to enforce other international conventions to which the United States is a party. This would be an overly broad reading of the case because the Geneva Conventions issue is part of

minimum, the protections of Common Article 3 were applicable to Hamdan because he was involved in a conflict “not of an international character.”¹⁸³ Then, the Court proceeded to examine language of Common Article 3. It found that the court-martial was the “regularly constituted court” in the system of military justice¹⁸⁴ and that a military commission could be considered regularly constituted “only if some practical need explains the deviations from court-martial practice.”¹⁸⁵ The Court

the Court’s larger inquiry into whether the tribunals were authorized under the UCMJ.

183. *Hamdan*, 126 S. Ct. at 2795–96. This portion of the Court’s opinion is questionable, at least insofar as it applies the Geneva Conventions to our conflict with al Qaeda. Common Article 3 applies to armed conflicts “occurring in the territory of one of the High Contracting Parties.” *Id.* at 2795. This provision was intended to regulate the conduct of civil war. See INT’L COMM. OF THE RED CROSS, I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, 37–43 (1952). This interpretation is supported by Common Article 2 of the Conventions, which regulates “armed conflict . . . between two or more of the High Contracting Parties.” *Hamdan*, 126 S. Ct. at 2796. The Court, however, found the distinction between these two Articles to turn on whether the conflict was a “clash between nations.” *Id.* This is not completely accurate, for as the text of Common Articles 2 and 3 and the relevant commentary makes clear, the location of the conflict is key: the conflict is solely within one nation, Common Article 3 applies, but if it occurs in more than one nation, Common Article 2 applies. Regardless, even if there happens to be some ambiguity in this provision, the President’s construction and application of the treaty provision is entitled to “‘great weight,’” *United States v. Stuart*, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shoji Amer., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)), and so long as his interpretation is reasonable, it should prevail. Perhaps the best that can be said is that the Geneva Conventions were not designed to cover conflicts like the current one, which involves one nation and a terrorist organization stationed in more than one nation. See Eric Posner, *Apply the Golden Rule to al Qaeda?*, WALL ST. J., July 15, 2006, at A9 (noting that prior to *Hamdan*, Common Article 3 was thought to apply to internal civil wars and insurgencies).

184. *Hamdan*, 126 S. Ct. at 2796–97.

185. *Id.* at 2797 (quoting *id.* at 2804 (Kennedy, J., concurring)). Nothing in the Geneva Convention appears to allow deviation based on necessity, at least as far as what is and is not considered “regularly constituted.” Instead, a particular court should be considered either “regularly constituted” or not. Injecting this kind of uncertainty and opportunity for second-guessing by the Court can only lead to confusion and judicial variance. Whether the military commissions are “regularly constituted” is more appropriately addressed by Justice Alito in his dissent when he noted that “regularly constituted” means properly appointed, set up, or established in accordance with domestic law. See *id.* at 2850 (Alito, J. dissenting). “Tribunals that vary significantly in structure, composition, and procedures may all be ‘regularly’ or ‘properly’ constituted,” and “had [Common Article 3] been meant to require trial before a country’s military courts or court that are similar in structure and composition, the drafters almost certainly would have used language that expresses that thought more directly.” *Id.* at 2851.

also found the question of whether the commissions were regularly constituted to be “intertwined” with the issue of whether the procedures of the commission “afford ‘all the judicial guarantees which are recognized as indispensable by civilized peoples’” under the Convention.¹⁸⁶ Although the Court noted that this latter phrase is not defined by the Convention, it found that the phrase “must be understood to incorporate at least the barest of those trial [protections] that have been recognized by customary international law,”¹⁸⁷ which includes the [protections] listed in Article 75 of [] Protocol I to the Geneva Conventions.¹⁸⁸ Among these rights is the right to be present during criminal proceedings. Here again, the Court noted that this right is subject to a “practical need” exception.¹⁸⁹

The only portion of the Court’s *Hamdan* opinion directly relevant to this Article is its discussion of whether customary international law includes the right to be present. The merits of this question are far from clear. Although Protocol I provides for the right to be present,¹⁹⁰ the United States has not ratified this Protocol. Moreover, it is questionable whether this provision forms part of customary international law¹⁹¹ and whether the United State qualifies as a persistent objector.¹⁹² The most obvious signal is the United States’ refusal to accede to the Protocol.¹⁹³ And although the Court opines that the United States

186. *Id.* at 2797 (majority opinion) (citing Geneva Convention, *supra* note 168, at art. 3(1)(d), 6 U.S.T. at 3320.).

187. *Hamdan*, 126 S. Ct. at 2797.

188. Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 75, Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Geneva Protocol I].

189. *Hamdan*, 126 S. Ct. at 2797–98; *id.* at 2805 (Kennedy, J., concurring).

190. Geneva Protocol I, *supra* note 188, art. 75 ¶4(e).

191. See *Standards of Military Commissions and Tribunals: Hearing Before the H. Comm. on Armed Servs.*, 109th Cong. 3 (2006) [hereinafter *H. Armed Serv. Comm. Hearing No. 2*] (statement of Gerald Gahima). Despite his clear preference for including the right to be present, Gahmina noted that “[t]here is no absolute prohibition on trials in absentia under international law.” *Id.*

192. A state may qualify as a persistent objector if there is clear evidence of its consistent refusal to accept a particular customary rule, in which case it is not bound by the customary rule. See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 538 (1993); see also Ted L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 457 (1985). This principle has long been accepted by the United States. See generally RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987).

193. The United States may have opted not to sign the Protocol for fear that it would “grant[] terrorist groups protection as combatants” and undermine efforts

does not contest Article 75,¹⁹⁴ if the United States did not contest this Article, it could have made that clear by ratifying the Protocol and attaching reservations to the ratification concerning the objectionable parts of the Protocol.

Additionally, the opinion of the Court does not prove that the right to be present is considered “indispensable by civilized peoples.”¹⁹⁵ The assumption underlying the Court’s rationale is that “judicial guarantees which are recognized as indispensable by civilized peoples” include, at a minimum, customary international law.¹⁹⁶ Had the drafters of the Convention intended such a result they could just as easily have provided that persons are to be afforded those guarantees recognized as part of customary international law. More importantly, the Court did not analyze what “civilized peoples” might actually consider “indispensable.” The Court could have, for example, looked to the practice of European or common law nations and ascertained whether an accused in like circumstances might be excluded from portions of his trial in order to safeguard classified or national security information.¹⁹⁷ This type of comparative legal analysis would have been far more persuasive than the conclusory and unsupported statement that the right to be present is part of customary international law.¹⁹⁸

“to encourage fighters to avoid placing civilians in unconscionable jeopardy.” *The Sixth Annual American Red-Cross Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 415, 466–67 (1987) (remarks of Judge Abraham D. Sofaer).

194. *Hamdan*, 126 S. Ct. at 2797; see also Taft, *supra* note 1, at 322.

195. *Hamdan*, 126 S. Ct. at 2797–98. Indeed, Glazier’s statement that the Court “engaged in only rudimentary analysis of the relevant international law issues” is an accurate description of the Court’s opinion in this regard. Glazier, *supra* note 182, at 3.

196. *Hamdan*, 126 S. Ct. at 2797.

197. It is worth mentioning, for example, that Australia appears to have established procedures that allow its courts, under tightly defined circumstances, to withhold evidence from the accused that would otherwise be subject to normal disclosure requirements. *Military Commissions in Light of Supreme Court Decision in Hamdan v. Rumsfeld: Hearing Before S. Comm. on Armed Servs.*, 109th Cong. 1 (2006) [hereinafter *S. Armed Servs. Comm. Hearing No. 3*] (statement of Att’y Gen. Alberto Gonzales).

198. *Contra* Glazier, *supra* note 182, at 65 (arguing that customary international law requires the presence of the accused). As noted elsewhere in this section, this cannot be an absolute right, as all of the international tribunals, both past and present, have allowed at least the limited exclusion of the defendant.

Finally, the Court fails to consider the effect of the Nuremberg precedent on this part of its analysis—although it was quick to reference it in others.¹⁹⁹ As noted earlier, the Nuremberg Tribunal was empowered to exclude the accused from the proceedings at its discretion.²⁰⁰ There is little doubt that the Nuremberg proceedings form part of the corpus of customary international law²⁰¹ and, at a minimum, the Court should have addressed this apparent conflict. The Court's failure to recognize the Nuremberg precedent or explain why it is no longer applicable leaves a gaping hole in the opinion.

Rather than prove that a defendant's presence is indispensable, the Court does just the opposite by suggesting that an adequate showing of necessity might permit exclusion. The Court's line of reasoning implies that it will require adherence to customary international law norms unless circumstances justify deviation from a particular norm.²⁰² As a general matter, however, either the practice is custom or it is not, and if a practice is custom, then it binds all nations. The Court never demonstrates that necessity,²⁰³ standing alone, would permit deviation from customary international law. This line of reasoning is unpersuasive, and it threatens, perhaps unwittingly, to undermine the force of customary international law in the future.

The Court's opinion, far from clarifying whether the right to be present is enshrined in customary international law, raises more questions than it answers. Its newly-minted test for determining whether customary international law applies—that is, the standard of necessity—muddies the waters of what

199. See *Hamdan*, 126 S. Ct. at 2779 n.32 (arguing that Nuremberg does not prove that conspiracy is a chargeable offense under the laws of war).

200. See IMT Charter, *supra* note 164, art. 12. However, some consider this precedent to be without force in today's debate over the issue of presence. See *H. Armed Servs. Comm. Hearing No. 2*, *supra* note 191 (statement of Michael Scharf). Professor Scharf commented that international law requires certain minimum "due process guarantees for any international or domestic war crimes proceedings," including the right to be present during the trial, and that recourse to Nuremberg and Tokyo "cannot today be used to justify departures from these rights." *Id.*

201. See U.N. Int'l Law Comm., *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, ¶ 95, Supp. No. 12, U.N. Doc. A/1316 (July 29, 1950); *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95(I), at 1144, U.N. GAOR, 1st Sess., U.N. Doc. A/236 (Dec. 11, 1946).

202. *Hamdan*, 126 S. Ct. at 2797–98.

203. Note that the Court nowhere defines necessity.

should be a bright-line rule. If a practice qualifies as custom, then the United States is bound by it. Nonetheless, whatever may be said about the merits of this portion of the Court's opinion, its force in future litigation is surely limited because it was decided by a plurality and could not garner a fifth vote from Justice Kennedy.²⁰⁴

B. Congressional Response:
The Military Commissions Act of 2006

Justice Breyer, in his concurring opinion in *Hamdan*, encouraged Congress to authorize military commissions in whatever form it deems appropriate.²⁰⁵ Congressional action could have proceeded in three broad categories, each of which has been discussed in the post-*Hamdan* congressional hearings:²⁰⁶ Congress could have done nothing, thereby placing the future of the military commissions in limbo; it could have ratified the President's military commissions as drafted, leaving in place the procedures openly questioned by the Court; or it could have authorized the use of military commissions to try terrorists, but altered the procedures that govern such trials. Because Congress quickly scheduled hearings on the issues raised in *Hamdan*, inaction was the least likely outcome. Moreover, the political fallout of inaction would have been unbearable for members of Congress facing reelection,²⁰⁷ not to mention the

204. *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring).

205. *Id.* at 2799 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary.").

206. See generally *To Receive Testimony on Standards of Military Commissions and Tribunals: Hearing Before the H. Armed Servs. Comm.*, 109th Cong. (2006) [hereinafter *H. Armed Serv. Comm. Hearing No. 3*]; *The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *S. Judiciary Comm. Hearing No. 2*]; *S. Armed Servs. Comm. Hearing No. 3*, *supra* note 197; *H. Armed Servs. Comm. Hearing No. 2*, *supra* note 190; *S. Armed Servs. Comm. Hearing No. 2*, *supra* note 93; *S. Armed Servs. Comm. Hearing No. 1*, *supra* note 87; *Standards of Military Commissions and Tribunals: Hearing before the H. Armed Serv. Comm.*, 109th Cong. (2006) [hereinafter *H. Armed Serv. Comm. Hearing No. 1*]; *S. Judiciary Comm. Hearing No. 1*, *supra* note 3.

207. Indeed, passage of the MCA was quickly criticized by many Democrats as a political maneuver. See 152 CONG. REC. S10359 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy) ("But now, 6 weeks before a midterm election, as the fundraising letters are running around, the Bush-Cheney administration and its supplicants in Congress deem a complete abolition of the writ the highest priority, a priority so urgent that we are allowed no time to properly review, debate, and amend a bill we first saw in its current [form] less than 72 hours ago. There must be a lot of fundraising letters going out."); 152 CONG. REC. S10400 (daily ed. Sept. 28, 2006)

potential nonpolitical consequences of leaving the nation without effective means by which to try accused terrorists. Likewise, the second option, although advocated by some,²⁰⁸ was generally disfavored by Congress, if for no other reason than Congress's desire to exercise its newfound power to regulate the conduct of armed hostilities, a power traditionally reserved to the President.²⁰⁹ Thus, Congress pursued the third option: it chose to authorize trials by military commissions and significantly alter the procedural apparatus from that originally promulgated by the President in Military Order No. 1. Congressional action culminated in the passage of the Military Commissions Act of 2006 (MCA).²¹⁰

The MCA is a compromise between the Executive and the Legislature,²¹¹ and this Subpart examines the Act as it relates to

(statement of Sen. Kennedy) (“[W]e have continued to see changes in that bill as it has been moved to the floor in a rush to achieve passage before the Senate recesses for the election. This rush to passage to serve a political agenda is no way to produce careful and thoughtful legislation on profound issues of national security and civil liberties.”); 152 CONG. REC. H7556 (daily ed. Sept. 27, 2006) (statement of Rep. Miller) (“Congress should not alter our international obligations in an election-year rush ordered by Karl Rove’s partisan strategy shop.”).

208. See, e.g., *S. Armed Servs. Comm. Hearing No. 2*, *supra* note 93 (statement of Dr. James Jay Carafano) (“Congress ought to ratify the president’s discretion to use military commissions to try these types of unlawful combatants and the offenses charged, and grant the greatest discretion to this and future presidents to establish just rules for such tribunals consistent with national security.”); *H. Armed Servs. Comm. Hearing No. 1*, *supra* note 206 (statement of Hon. Ted Olson); *S. Judiciary Comm. Hearing No. 1*, *supra* note 3 (statement of Hon. Ted Olson). *Contra S. Armed Servs. Comm. Hearing No. 2*, *supra* note 93 (statement of Professor Scott L. Sillman) (“One option is to pass a law which merely gives legislative sanction to the prior system for military commissions—putting everything back in place the way it was there—there is no assurance that such a ‘reblued’ military commissions system would pass judicial muster.”). In this regard, had Congress chose to approve the procedures outlined by Military Order No. 1, a strong argument can be made that, given Justice Kennedy’s position in *Hamdan*, such a result would be likely upheld as constitutional. See also Green, *supra* note 58, at 172.

209. Steven Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, commented that:

[I]t is a historic fact that we are here talking to Congress about legislation to authorize and set up procedures for military commissions; something that has never happened in the history of the country. They have always been set up and handled administratively by the President and the Executive Branch throughout the history of the country.

S. Judiciary Comm. Hearing No. 1, *supra* note 3 (remarks of Steven Bradbury).

210. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

211. See 152 CONG. REC. S10253 (daily ed. Sept. 27, 2006) (statement of Sen. Lindsey Graham) (commenting that “[t]he work product is the result of give and

the issue of presence and the protection of national security information. In order to fully analyze Congress's actions, this Subpart will occasionally compare the MCA to earlier proposals submitted to Congress in an effort to show the evolution of congressional thinking leading up to the passage of the Act.

The MCA is striking not only for what it contains, but also for what it does not contain. The most glaring omission from the Act, and perhaps the portion of the legislation that will have the most long-term consequence, is the lack of any congressional findings. This is in sharp contrast to the earlier proposal of the Administration²¹² and of a draft bill, the Unprivileged Combatants Act, circulated by Senator Specter shortly after the *Hamdan* decision.²¹³ Both the Administration's proposal and the Unprivileged Combatants Act contained particular findings regarding the President's Article II power to convene military commissions,²¹⁴ and the former included additional findings of the necessity to deviate from court-martial procedures in trials before military commissions.²¹⁵ The MCA,

take, is the result of being more than one branch of Government"); Damien McElroy, *Interrogation Bill 'Will Save US Lives'*, DAILY TELEGRAPH (London), Oct. 18, 2006, at 20. *But see* 152 CONG. REC. S10364 (daily ed. Sept. 28, 2006) (statement of Sen. Diane Feinstein) (commenting that she was "disappointed to be voting against this bill. I had hoped a real bipartisan compromise could be reached"); 152 CONG. REC. H7557 (daily ed. Sept. 27, 2006) (statement of Rep. Pete Stark) ("Some call this legislation a 'compromise,' I call it a capitulation."); Ron Hutcheson, *Detainee Law's Fate Uncertain: Bush Signs Measure, But Courts May Get Last Word*, SACRAMENTO BEE, Oct. 18, 2006, at A1 (noting the comments of Professor Jeffrey Adicott, who stated that "[t]he president has gotten everything he wants and more"); Michael Dorf, *Why The Military Commissions Act Is No Moderate Compromise*, WRIT, Oct. 11, 2006, <http://writ.news.findlaw.com/dorf/20061011.html> (commenting that that "[o]n nearly every issue, the MCA gives the White House everything it sought").

212. A Bill to Facilitate Bringing to Justice Terrorists and Other Unlawful Enemy Combatants Through Full and Fair Trials by Military Commissions, and for Other Purposes [hereinafter Administration Proposal], available at <http://www.law.georgetown.edu/faculty/nkk/documents/MilitaryCommissions.pdf>.

213. Unprivileged Combatant Act of 2006, S. 3614, 109th Cong., 2d Sess. (2006).

214. *Id.* § 1(c)(3); Administration Proposal, *supra* note 212, § 2(3).

215. Administration Proposal, *supra* note 212, § 2(7). The enactment of the MCA itself, along with the numerous differences from the courts-martial procedures, however, are strong indications that no finding of specific necessity was needed. *See* 152 CONG. REC. S10392 (daily ed. Sept. 28, 2006) (statement of Sen. Lindsey Graham) (commenting that "[w]hat I am proud of is we have created a new military commission based on the UCMJ and deviations are there because of the practical need"). Indeed, the MCA itself recognizes that the rules governing military commissions were based upon those governing courts-martial, but noted explicitly that the rules governing courts-martial do not "apply to trial by military

however, contained no findings of presidential power to establish the commissions, but based the establishment of military commissions solely on the legislative framework passed by Congress.²¹⁶ While one may speculate on the importance of this omission, it certainly gives some indication about how Congress viewed its role in the process of determining the procedures that govern such commissions and helps paint a broader picture of the issues underlying the controversy over an accused's right to be present.

The protection of national security information was a central focus of the post-*Hamdan* hearings, yet those hearings contained little detailed discussion of the right to be present before military commissions.²¹⁷ Protection of national security information is discussed primarily within a broader discourse on Rule 505 of the Military Rules of Evidence. Therefore, discussion of MRE 505 will be entwined with the discussion of presence and national security in the remainder of this Subpart.

Considerable debate centered on the protection of classified information. Many of those involved in the hearings, particularly senators, voiced concern regarding the protection of such information.²¹⁸ The manner that would eventually be chosen to secure protection of national security information, however, did not become clear until well into the hearings before the House Armed Services Committee and culminated at the final hearing.²¹⁹ During the hearings, two primary positions

commission" except as specifically provided, and that judicial application of those provisions "are not binding on military commissions" established by the MCA. Military Commissions Act § 948b(c).

216. Military Commissions Act § 948b(b), 120 Stat. at 2602.

217. Most discourse on this issue took place during one of the final hearings. See, e.g., *H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206. Other references to the question of presence are sprinkled in the transcripts from other hearings, but are primarily passing references to the issue.

218. See, e.g., *id.* (remarks of Rep. Duncan Hunter) (noting the complications regarding the protection of classified information); *S. Judiciary Comm. Hearing No. 1*, *supra* note 3 (remarks of Sen. Orrin Hatch) (commenting that "I am very concerned that classified information does not fall into the hands of the enemy"); *id.* (remarks of Sen. Jon Kyl) (noting his concerns regarding "damage to intelligence collection and to intelligence protection" if the UCMJ were applied to terrorists); *id.* (remarks of Sen. Charles Schumer) (noting that "in times such as these the balance between liberty and security may have to tip a little bit in the direction of security").

219. Certainly the other post-*Hamdan* hearings provide insight of how Congress would eventually resolve this issue, but the final hearing contains the most thoughtful and detailed discussion of the issue involved.

emerged. On the one hand, the Administration maintained that military commissions needed to possess the “discretion to admit classified evidence not shared with the accused,”²²⁰ which would most easily be accomplished by excluding the accused. In contrast, a number of military personnel and academics voiced concerns about introducing evidence outside the presence of the accused.²²¹

The route chosen by Congress appears to seek a middle ground.²²² Congress flatly rejected the Administration’s request to allow the limited exclusion of the accused from portions of the proceedings. The MCA requires that “[t]he accused shall be

220. *H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206 (remarks of Steven Bradbury); *see also S. Armed Servs. Comm. Hearing No. 3*, *supra* note 197 (remarks of Hon. Alberto Gonzales) (“I think it’s going to be an extraordinary case when we will absolutely need to have classified information to go forward with a prosecution that we cannot share with the accused. But I think it’s something that we really ought to seriously consider to have remaining as an option.”).

221. *See, e.g., H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206 (remarks of Brig. Gen. James Walker). Brigadier General Walker commented that:

I personally remain concerned about any process which would permit the introduction of evidence against an accused outside of his presence. I simply believe the right to see the evidence against you and to be present when evidence is presented are fundamental to a full and fair trial and are also part of those judicial guarantees which are recognized as indispensable by civilized people. This may require in particular cases, I understand, that the government would have to balance the need for prosecution on a particular charge against the need to protect certain classified information.

Id. Major General Black, in commenting on one of the proposals before the committee, stated that:

I am concerned, one, that the package does not contain a provision that would prohibit the admission of evidence outside of the presence of the accused when that evidence is the sole evidence admitted to establish a material fact, if you follow. If it’s the only piece of evidence that’s necessary to convict, then I remain concerned about excluding the accused.

Id. (remarks of Maj. Gen. Scott Black). Major General Black also asserted, at a separate hearing, that he believes presence of the accused is required by Common Article 3. *See S. Armed Servs. Comm. Hearing No. 1*, *supra* note 87 (remarks of Maj. Gen. Scott Black); *see also H. Armed Servs. Comm. Hearing No. 2*, *supra* note 191 (remarks of Michael P. Scharf) (commenting that “international law requires certain minimum due process guarantees for any international or domestic war crimes trial, specifically including the right to be present during the trial”); *S. Armed Servs. Comm. Hearing No. 2*, *supra* note 93 (remarks of Elisa Massimino) (commenting that “defendants must have the right to be present at trial. This means proceedings cannot be conducted in secret, outside the presence of an accused or his lawyers.”).

222. Although some will no doubt contend that this middle ground leans noticeably in favor of the Executive’s position.

present at all sessions of the military commission²²³ and allows exclusion only where the defendant, after being warned, persists in conduct that either endangers individuals or disrupts the proceedings.²²⁴ Rather than permit the exclusion of the accused from trial, Congress chose to protect national security information by incorporating procedures modeled after those in MRE 505.²²⁵ In some other respects, however, the protection afforded by the MCA goes beyond that under MRE 505.²²⁶ The remainder of this Subpart examines the protective procedures established by the MCA and considers whether those procedures will adequately safeguard national security information. The MCA provisions will be considered alongside the procedures authorized by the President's original Military Order No. 1, which allows the defendant to be excluded from certain proceedings.

The MCA contains very detailed provisions that seek to protect classified information from entering the hands of a defendant in circumstances which might threaten national security. The Act endeavors to protect classified information during both discovery and at trial, and provides that “[c]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.”²²⁷ The Act empowers the Government to claim the privilege upon a showing that the information sought to be withheld is “properly classified” and that disclosure “would be detrimental to the national security.”²²⁸ Rather than disclose such information, the trial judge is empowered, “to the extent practicable,” to delete specific items in admitted evidence, substitute a portion or summary of the information contained therein, or substitute a

223. Military Commissions Act, Pub. L. No. 109-366, § 949a(b)(1)(B), 120 Stat. 2600, 2608 (2006).

224. *Id.* § 949d(e)(1)–(2), 120 Stat. at 2611–12.

225. This was the route suggested by many who testified before Congress in the post-*Hamdan* hearings. See *S. Judiciary Comm. Hearing No. 1*, *supra* note 3 (remarks of Lt. Col. Charles Swift); *S. Armed Servs. Comm. Hearing No. 1*, *supra* note 87 (remarks of Adm. James McPherson); *id.* (remarks of John Hutson); *S. Judiciary Comm. Hearing No. 2*, *supra* note 206 (remarks of Adm. Bruce MacDonald); *H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206 (remarks of Maj. Gen. Scott Black).

226. See *infra* notes 232–42 and accompanying text.

227. Military Commissions Act § 949d(f)(1)(A), 120 Stat. at 2612. This provision is a mirror image of MIL. R. EVID. 505(a).

228. *Id.* § 949d(f)(1)(B)(i)–(ii), 120 Stat. at 2612. This provision tracks almost verbatim the procedures set forth in MIL. R. EVID. 505(c).

statement of relevant facts established by the classified information.²²⁹

In addition, during the examination of a witness, the trial counsel may object to any line of questioning or motion to admit evidence that would require the disclosure of classified information.²³⁰ In that circumstance, the judge “shall take suitable action to safeguard such classified information,” which may include an in camera and ex parte review of the prosecutor’s claim.²³¹

The procedures in the MCA differ in four significant respects from those found in MRE 505. First, a claim of privilege under MRE 505 must be made prior to the referral of charges in order for decisions on deletions, substitutions, or summaries to be made.²³² Thus, decisions on deletions, substitutions, or summaries are made prior to charges being brought. If a claim of privilege is filed after the referral of charges, the military judge is authorized to dismiss the charges entirely, dismiss only those charges which depend on the classified information, or take any other action consistent with the interests of justice.²³³ In contrast, the MCA does not give similar authority to the judge in the military commission and seemingly does not restrict when a claim of privilege may be filed.²³⁴

Secondly, the MCA contains a specific provision that allows for the protection of sources and methods. This provision allows trial counsel, upon making an appropriate request, to present evidence to the commission without revealing the sources, methods, and activities of the United States.²³⁵ The MRE contains no similar provision, which is perhaps unsurprising because many of those accused in courts-martial will already have knowledge or information regarding sources, methods, and activities. Nonetheless, it underscores the key difference in

229. *Id.* § 949d(f)(2)(A)(i)–(iii), 120 Stat. at 2612. The language of this section is drawn directly from MIL. R. EVID. 505(d).

230. *Id.* § 949d(f)(2)(C), 120 Stat. at 2612. This provision tracks the language of MIL. R. EVID. 505(j)(4).

231. *Id.*

232. MIL. R. EVID. 505(d).

233. MIL. R. EVID. 505(f).

234. Military Commissions Act § 949d(f)(1)(A), 120 Stat. at 2612 (allowing a claim of privilege at any stage of the proceedings).

235. *Id.* § 949d(f)(2)(B), 120 Stat. at 2612.

prosecuting U.S. servicemembers in courts-martial and prosecuting terrorists in military commissions.

The third key difference between the two statutes is that there is no provision in the MCA that grants the military judge the authority to compel disclosure of classified information. This omission is in stark contrast to both MRE 505 and CIPA (upon which MRE 505 is based), both of which place the prosecutor in a disclose-or-dismiss dilemma.²³⁶ Because Congress based the MCA's classified information provisions on MRE 505, yet chose to omit any provision similar to that in MRE 505 authorizing the judge to force disclosure or dismiss the charges, it appears that a dismissal cannot result from the government's refusal to disclose such evidence.²³⁷ However, there

236. MIL. R. EVID. 505(i)(4)(E) provides that:

If the military judge determines that alternatives to full disclosure may not be used and the Government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice require. Such an order may include an order:

(i) Striking or precluding all or part of the testimony of a witness;

....

(iv) Dismissing the charges, with or without prejudice; or

(v) Dismissing the charges or specifications or both to which the information relates.

Likewise, the Classified Information Procedures Act (CIPA), Pub. L. No. 96-456, § 6(e)(2), 94 Stat. 2025, 2027-28 (1980), provides that:

Whenever a defendant is prevented . . . from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

See also 152 CONG. REC. S10411 (daily ed. Sept. 28, 2006) (statement of Adm. Bruce MacDonald) (acknowledging that under MRE 505 the government might conceivably be prevented from presenting certain classified evidence to the trier of fact); 152 CONG. REC. S10412 (daily ed. Sept. 28, 2006) (statement of Brig. Gen. James Walker) (suggesting adopting MRE 505 as the framework, but recognizing that “[t]his may require the government to balance the need for prosecution on particular charges against the need to protect certain classified information”).

237. Senator Dodd recently introduced a proposed amendment to the MCA dealing with this particular lacunae, which would allow the military judge, upon a determination that substitution is insufficient to protect the defendant's fair trial rights, to “dismiss the charges in their entirety,” “dismiss the charges . . . to which

is considerable ambiguity in this provision when examined in the context of the entire MCA. The significance of this will be explored more fully below.

The fourth, and perhaps most important, difference is that the MCA permits an in camera and ex parte review of trial counsel's claim of privilege.²³⁸ Thus, consideration of privilege claims is conducted outside the presence of the accused.²³⁹ This seems to contrast with the procedures under MRE 505, which provide for an in camera hearing, but not one conducted ex parte or necessarily outside the presence of the accused.²⁴⁰ This distinction is appropriate when one considers the differing goals of each respective rule. Under the MRE, the accused is generally presumed to be in possession of at least some classified information²⁴¹ and the concern is not of the accused being exposed to the details of the classified information but rather from keeping the classified information out of public view. In contrast, the MCA is concerned primarily with preventing the accused from learning the contents of *any* classified documents in the first instance, if disclosure is detrimental to national security.²⁴²

The implications of these provisions are better appreciated once one gains an understanding of the rationale behind the argument for allowing the exclusion of the accused from cer-

the information relates," or "take such other action as may be required in the interests of justice." 109 CONG. REC. S11061 (daily ed. Nov. 16, 2006).

238. Military Commissions Act § 949d(f)(2)(C), 120 Stat. at 2611.

239. *Id.* § 949d(f)(3), 120 Stat. at 2613.

240. MIL. R. EVID. 505(i)(1) (defining in camera proceedings as "a session . . . from which the public is excluded"). One should be careful, however, not to confuse a hearing regarding privilege, where it seems the accused may be present, with the redaction and summary process, where the accused is not likely to be present. See *H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206 (testimony of Maj. Gen. Charles Dunlap, Jr.).

241. See MIL. R. EVID. 505(h)(1) (noting the obligation of the accused to inform the government if he intends to cause the disclosure of classified information which he believes helps disprove the charges against him); see also *S. Armed Servs. Com. Hearing No. 1*, *supra* note 87 (remarks of Adm. James McPherson). Admiral McPherson noted:

[W]e would have to change, though, 505 because normally our experience is it applies to evidence that the accused already is in possession of, already is aware of, where in most of these commission cases it would be classified evidence that the government would want to be using against the detainee.

Id.

242. Military Commissions Act § 949d(f), 120 Stat. at 2611.

tain proceedings and examines that rational in light of the MCA procedures. The purpose behind exclusion is simple: to protect national security by preventing the disclosure of classified information to the accused.²⁴³ If an accused were present and able to hear classified information during trial, he would be able to relay the sensitive information to fellow terrorists and undermine the national security. This fear could be realized in two primary ways. First, the accused could obtain evidence submitted at trial that contained classified information relating to national security. Second, the accused could elicit such information through the examination of witnesses. Critics contend that this concern is overblown and that the risk is minimal.²⁴⁴ Even if the critics are correct, analysis of the risk should not focus solely on the level of risk, but must also consider whether exclusion would prejudice the defense.

If a defendant is allowed to remain present throughout the proceedings, gains access to classified information, and then is acquitted, he will be able to freely distribute that information to outsiders, including other potential terrorists.²⁴⁵ This concern is magnified by the ongoing nature of the current conflict. In the past, military tribunals were convened following the cessation of hostilities; thus, the fear of disclosing classified information, especially following a potential acquittal, was minimal.²⁴⁶ Moreover, the type of the intelligence information utilized in those prior conflicts was often of little use following the conflict.²⁴⁷ In contrast, during trials of alleged terrorists, the use of intelligence is ongoing and ever-changing, and the need to keep sensitive information away from the enemy is heightened. Therefore, there is a greater need for specially-tailored proceedings allowing the exclusion of the accused.

To prevent this latter concern from materializing, an accused who is acquitted by a military commission could be held until the cessation of hostilities. Such a result was clearly contemplated by the Supreme Court in *Hamdi v. Rumsfeld*, where the

243. *Id.*

244. See, e.g., *S. Judiciary Comm. Hearing No. 1*, *supra* note 3 (statement of Lt. Cmdr. Charles Swift).

245. See *S. Judiciary Comm. Hearing No. 1*, *supra* note 3.

246. See *id.*

247. *Hamdi v. Rumsfeld*, 542 U.S. 507, 588 (2004) (Thomas, J., dissenting); see also *Madsen v. Kinsella*, 343 U.S. 341, 360 (1952); *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950).

Court noted that “the power to detain does not end with the cessation of formal hostilities.”²⁴⁸ While this approach is disfavored by some, it remains within the discretion of the President,²⁴⁹ and appears to be contemplated by the provision of the MCA that prevents detainees from filing habeas petitions challenging, *inter alia*, their detention.²⁵⁰ The relevant portion of the MCA provides that

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.²⁵¹

248. *Hamdi*, 542 U.S. at 588; *see also Madsen*, 343 U.S. at 360; *Johnson*, 339 U.S. at 786.

249. *See* 152 CONG. REC. H7539 (daily ed. Sept. 27, 2006) (statement of Rep. Silvestre Reyes) (commenting that “[t]he Bush Administration has determined that we can legally hold all enemy combatants until the end of hostilities in the global war on terror”). Even those critical of such practice noted its availability under the MCA. *See* 152 CONG. REC. S10261 (daily ed. Sept. 27, 2006) (statement of Sen. Jeff Bingaman) (“Most troubling of all, with this legislation Congress is giving its consent to the executive branch to continue to unilaterally designate individuals as enemy combatants and imprison them indefinitely.”).

250. *See* Dorf, *supra* note 211 (commenting that “[u]nder the terms of the MCA, then, the government could declare a permanent resident alien—including someone who has been residing lawfully in the United States for decades—to be an enemy combatant, and lock him up, potentially forever”).

251. Military Commissions Act, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2636 (2006). A hearing was held on this particular subject days before passage of the MCA. *See Examining Proposals to Limit Guantanamo Detainees’ Access to Habeas Corpus Review: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006).

Denying habeas relief to those detained is no doubt a controversial policy, and one disfavored by some. *See, e.g.,* Bruce Fein, *Cripple the Great Writ*, WASH. TIMES, Sept. 19, 2006, at A16; Nat Hentoff, *Habeas Corpus Sellout: Why Did McCain and Company Back Bush Bill?*, WASH. TIMES, Oct. 9, 2006, at A19. Indeed, many commentators have quickly rebuked this provision of the MCA as unconstitutional. *See* Dorf, *supra* note 211 (commenting that “the MCA should be judged unconstitutional as a *de facto* suspension of the writ of habeas corpus”); Ron Hitchenson, *Detainee Law’s Fate Uncertain: Bush Signs Measure, But Courts May Get Last Word*, SACRAMENTO BEE, Oct. 18, 2006, at A1 (noting that “[l]egal scholars on both sides of the issue agreed that the law is most vulnerable to challenge on the issue of denying detainees access to civilian courts unless they’re U.S. citizens”). However, others argue that these detainees have no habeas right in the first instance. *See* Andrew C. McCarthy, *The New Detainee Law Does Not Deny Habeas Corpus*, NAT’L REV. ONLINE, Oct. 3, 2006, <http://article.nationalreview.com/?q=YWNIMjg3YWVRINmNj-MTk0NDc1NzE0ZWl2YzBIOGRINzU=>.

This provision of the MCA was hotly contested, and indeed many senators and congressmen questioned the constitutionality of the measure during the floor de-

Thus, the fears associated with repatriation after an acquittal are misplaced. Accordingly, the analysis must focus on the first risk mentioned above—that is, exposing such information to the accused during the course of trial.

Unfortunately, the congressional hearings contained little detailed discussion about whether the risk of exposing sensitive information to accused terrorists during trial is indeed a real one (although it was assumed to be). There was also very little discussion about precisely how MRE 505 works in practice, what areas of it might need to be altered,²⁵² or whether it compares favorably against the original procedure of simply allowing the exclusion of the accused. Thus, the hearings left Congress with very little beyond blanket statements that provided the contents of MRE 505 and claimed that it would work. Con-

bates. *See, e.g.*, 152 CONG. REC. S10356 (daily ed. Sept. 28, 2006) (statement of Sen. Patrick Leahy) (commenting that the MCA “would not merely suspend the great writ . . . it would eliminate it permanently”); 152 CONG. REC. S10361 (daily ed. Sept. 28, 2006) (statement of Sen. Russ Feingold) (commenting that “it may well be that this provision will be found unconstitutional as an illegal suspension of the writ of habeas corpus”); 152 CONG. REC. H7540 (daily ed. Sept. 27, 2006) (statement of Rep. Robert Andrews) (commenting that “[t]he constitutionality of this [habeas provision] is ambiguous”); 152 CONG. REC. H7546-47 (daily ed. Sept. 27, 2006) (statement of Rep. John Conyers) (citing written testimony of Jonathan Hafetz before the Senate Committee on the Judiciary arguing that the MCA unlawfully suspends the writ of habeas corpus); 152 CONG. REC. H7555 (daily ed. Sept. 27, 2006) (statement of Rep. Jerrold Nadler) (commenting that “[t]his bill is flatly unconstitutional, for it repeals the Great Writ—Habeas Corpus”). Indeed, Senator Specter proposed removing this provision of the MCA via amendment. The vote on his proposal, however, failed. *See* 152 CONG. REC. S103569 (daily ed. Sept. 28, 2006). Many senators and congressmen, however, argued the opposite—that the MCA would pass constitutional muster. *See, e.g.*, 152 CONG. REC. S10354-55 (daily ed. Sept. 28, 2006) (statement of Sen. Jon Kyl) (arguing that the provision would pass constitutional muster); 152 CONG. REC. S10394 (daily ed. Sept. 28, 2006) (statement of Sen. Bill Frist) (“I am also confident that Congress has finally cleared up what has been a huge problem. What role should a judge have in a time of war? Who should make the decision regarding enemy combatant status?”).

Since control of Congress has changed hands, efforts are underway to amend this portion of the MCA and restore habeas corpus. 109 CONG. REC. S 11061 (Nov. 16, 2006 daily ed.). However, it is questionable whether this measure, even if passed by Congress, will become law, since President Bush stands poised to veto the amendments and to allow the law to be tested in court. Indeed, the D.C. Circuit recently held that the MCA stripped the court of jurisdiction to hear claims by plaintiffs held at Guantanamo Bay Naval Base in Cuba, and that the Suspension Clause does not apply to aliens outside the United States. *Boumediene v. Bush*, No. 05-5062, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007).

252. The only mention of alteration regards the notion that MRE 505 contemplates that the accused already has at least some classified information. *See S. Armed Servs. Comm. Hearing No. 1, supra* note 87 (remarks of Adm. James McPherson).

gress assumed the testimony to be accurate and built the MCA around MRE 505.²⁵³

A holistic look at the MCA procedures reveals that they should protect against many of the concerns that underlie the Administration's desire to exclude the defendant during certain portions of the trial. They allow the government to claim privilege and require very little for that privilege to be invoked. Section 949d(f)(1)(B) allows the government to determine that the document a defendant seeks to have disclosed is in fact classified and that disclosure would threaten national security. There is no method built into the MCA that allows the judge to test the validity of the government's claim of national security.²⁵⁴ Thus, even those documents which may only impact national security at the margins are permissibly withheld upon a proper claim of privilege.

Likewise, the four areas of the MCA that go beyond MRE 505 further the goals originally justifying the accused's absence from certain proceedings. It is necessary to allow the government to invoke the privilege at any stage in the litigation because of the ever-changing type of information likely to be available. The explicit protection of sources and methods is likewise a necessary component in the protection of national security, and the congressional decision not to place the government in a disclose-or-dismiss dilemma should allow prosecutions to go forward in a more meaningful and protective manner. Most importantly, although allowing the *in camera* review to be conducted *ex parte* may seem like a small detail, its impact is far greater than perhaps even the drafters were aware. This provision permits the court to review the material without the accused and perhaps without his counsel, thus allowing the protection of national security information to the greatest extent possible.

While the MCA may secure the protection of classified information just as well as excluding the defendant would, the Act's national security provisions lack clarity, which may create obstacles to successful prosecutions. These obstacles would

253. See, e.g., *H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206; *S. Judiciary Comm. Hearing No. 1*, *supra* note 3.

254. The lack of a testing mechanism may raise the question of whether the government possesses too much discretionary authority to determine what is and is not a threat to national security, a question that has thus far been overlooked in the legal commentary on the MCA.

not be present if the accused were to be excluded under Military Order No. 1.²⁵⁵

Section 949d(f)(1) allows redactions, substitutions, and summaries only “to the extent practicable.” Although practicable is not defined in the MCA, the concept of practicability most likely involves the overall fairness of the proceedings. Although this follows logically from the overall goal of the MCA—to provide full and fair trials—the Act provides no guidance about what would happen after a judicial determination that alternatives to disclosure are impracticable.

The absence of guidance on this point has the potential to undermine prosecutorial efforts. Under MRE 505, two basic remedies are available upon a determination that alternatives to disclosure are impracticable. The judge may order disclosure of the classified information subject to conditions that will guard against compromise,²⁵⁶ and where the government refuses to comply with the order the judge has the option to, among other things, dismiss the charges in whole or in part.²⁵⁷ The judge may also “[w]ithhold disclosure if [the alternatives to disclosure] cannot be taken without causing identifiable damage to the national security.”²⁵⁸

Under the MCA, the judge lacks the authority to compel disclosure of such information. The MCA prohibits such information from *ever* being turned over to an accused if the government claims the privilege.²⁵⁹ Likewise, the MCA does not contain any provision authorizing the judge to dismiss for failure to disclose such information. Where, as here, Congress chose to specifically allow this remedy in one statute (the MRE) but withheld it from another statute (the MCA) that was drafted based on the former, normal methods of statutory interpreta-

255. In addition, perhaps ironically, the MCA does not protect the defendant from the unfair use of redacted material as did the initial Military Order. The MCA permits the redaction of evidence prior to its introduction at trial to protect classified evidence from disclosure, but does not condition redaction on a finding that the defendant can challenge or use the redacted material as effectively as he might have if redaction had not been permitted. Indeed, the language of the Military Commission Order that protected the defendant from unfair use of redacted material does not appear in the new statute. *See* Ellmann, *supra* note 58, at 30.

256. MIL. R. EVID. 505(d)(4).

257. *Id.* 505(i)(4)(E).

258. *Id.* 505(d)(5).

259. Military Commissions Act, Pub. L. No. 109-366, § 949d(f)(1), 120 Stat. 2600, 2612 (2006).

tion would indicate that Congress rejected this remedy in the new statute.²⁶⁰ Therefore, one must conclude that the first remedy under the MRE, dismissal, is not available to judges of the military commissions.

While it seems clear that withholding disclosure is a permissible option, it is less than clear what will happen to the classified evidence. A close reading of the statute suggests two possible remedies in this circumstance. On the one hand, the judge could exclude all of the classified information and force the government to proceed to trial without it. This follows from the text of § 949a(b)(1)(A), which provides that “[t]he accused shall be permitted to . . . examine and respond to evidence admitted against him on the issue of guilt or innocence . . . as provided for by this chapter.”²⁶¹ However, an argument may be made that the classified information could be admitted but withheld from the accused. Evidence is admissible so long as a reasonable person would find it probative,²⁶² and the evidence must be probative if the government claims privilege but the judge denies alternative forms of disclosure.²⁶³ And while the accused is generally allowed to “examine and respond” to the evidence against him, this right is limited specifically “as provided for by this chapter.”²⁶⁴ The chapter in question prohibits the accused from reviewing classified information and if that information is relevant, it is presumptively admissible. This creates the possibility that relevant evidence is admitted but not shown to the accused.²⁶⁵ This is certainly a controversial argument and one

260. See, e.g., *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000) (“The incorporation of one statutory provision to the exclusion of another must be presumed intentional under the statutory canon of *expressio unius*.”); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 3, 25 (1997) (“Expression of the one is exclusion of the other.”).

261. Military Commissions Act § 949a(b)(1)(A), 120 Stat. at 2608 (emphasis added).

262. *Id.* § 949a(b)(2)(A), 120 Stat. at 2608.

263. Or else why would the government seek to use it?

264. See, e.g., NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* (6th ed., 2000).

265. In addition, the rules of evidence governing courts-martial apply to military commissions only insofar as the Secretary of Defense determines practicable. See Military Commissions Act § 949a(a), 120 Stat. at 2608. Thus the Secretary of Defense could clear up this ambiguity and allow for the introduction of evidence to the jury without giving it to the accused. Were this done, a jury instruction should also be provided informing the members that the accused has neither seen nor had a chance to rebut the classified information.

which may not withstand close scrutiny.²⁶⁶ Nonetheless, if one considers the overall purpose of the MCA along with the necessity of protecting classified information from disclosure while still allowing presentation of the full panoply of evidence, this option is not one that should be brushed aside lightly.

A third remedy not textually provided for but which might remain available is for the judge to dismiss the charges based on due process or the interests of justice.²⁶⁷ For example, if the information sought to be protected is crucial to proving an element of the charged offense, but redacting portions of the document or compiling a summary of what it tends to prove is impracticable due to the detail required to allow for an adequate defense, the judge might determine that the interests of justice or due process concerns require dismissal of the offense related to the classified information.

In addition, even if the aforementioned problem does not arise and national security information is adequately protected from disclosure, the classified information provisions of the MCA still place the prosecutor in a less advantageous position than did allowing exclusion under Military Order No. 1. Under the former, assuming that classified information cannot be introduced to the trier of fact but withheld from the accused, the redacted documents, summaries, or substitutes can be admitted against the accused.²⁶⁸ Thus, there is a possibility that those deciding guilt or innocence of the accused will not truly have all of the relevant information before them. This is not to say that the information, whatever its form, will not be adequate to determine guilt or innocence, for that conclusion cannot fairly be known at this point. However, when one considers that the full amount of evidence, including fully classified documents

266. *See, e.g.*, 152 CONG. REC. H7534 (daily ed. Sept. 27, 2006) (statement of Rep. Duncan Hunter) (commenting that "[t]he accused is permitted to be present at all phases of the trial, and no evidence is presented to the jury that is not also provided to the accused").

267. Here I should note my disagreement with this interpretation of the statute. Since this particular remedy was provided for in CIPA and MRE 505, but not in the Military Commissions Act, I believe sound methods of statutory interpretation counsel against reading into the statute a remedy which was obvious to the drafters of the Military Commissions Act yet was apparently rejected. This interpretation is also supported by the fact that an amendment has already been offered which would give the trial judge the option to dismiss the charges. *See* 109 CONG. REC. S11061 (daily ed. Nov. 16, 2006).

268. Military Commissions Act § 949d(f)(2), 120 Stat. at 2612-13.

and statements, could be introduced outside the presence of the accused under Military Order No. 1, the inevitable conclusion is that the procedures under the MCA do not allow for such a full review of the evidence.²⁶⁹

Finally, a tangential disadvantage of the MCA when compared to Military Order No. 1 is the speed with which the trial may be conducted as a result of the MCA's classified information provisions. Indeed, Congress recognized that the classified information provisions of the MCA may cause delay. For example, § 949d(f)(2)(C) explicitly allows for delay "to permit trial counsel to consult with the department or agency as to whether the national security privilege should be asserted."²⁷⁰ In contrast, where an accused is excluded from the relevant portions there is no need for extended delays.

Even though the MCA's procedures likely fulfill the goals justifying exclusion of the accused, such a conclusion is not without negative implications. A consistent criticism levied against Military Order No. 1 was that it permitted a trial to go forth without the accused having all of the evidence that was to be used to determine innocence or guilt.²⁷¹ One must wonder if the same criticism cannot be raised against the procedures in the MCA. While the procedures in the MCA do not strike the same nerve as the outright exclusion of the defendant allowed under Military Order No. 1, there may be little meaningful difference between the old system and the new one. Under Military Order No. 1 the accused, but not his counsel, could be excluded from the proceedings.²⁷² Defense counsel would have access to all the information and would be in a position to test its veracity, albeit without the input of his client since counsel could not disclose to the accused what was contained in the classified information. So long as the accused's security-cleared counsel remains present, the risk of prejudice can be controlled and minimized. Under the MCA, the accused will again be de-

269. This feature may not be problematic. It may well be that the complaints of those accused, who are unable to see and confront the evidence, counsel in favor of procedures like those in the MCA. Still, as discussed *infra*, it is questionable whether the MCA actually allows the accused to see all the evidence.

270. Military Commissions Act § 949d(f)(2)(C), 120 Stat. at 2613.

271. See, e.g., *H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206 (remarks of Brig. Gen. James Walker) (stating that "I personally remain concerned about any process which would permit the introduction of evidence against an accused outside of his presence").

272. Military Order No. 1, *supra* note 24, § 5(K).

nied much of the classified evidence, perhaps getting only summaries or redacted versions.²⁷³ Moreover, in some circumstances, the defense may be put in a worse position because the in camera review of the classified information may be conducted ex parte without the input of defense counsel. Indeed, all considerations of materials in support of a claim of privilege and related materials “shall not be disclosed to the accused.”²⁷⁴ Further complicating this process is that, unlike Military Order No. 1, the MCA authorizes the accused to represent himself pro se,²⁷⁵ which may cause further delays and confusion in the process.²⁷⁶ One must question whether it would be better for defense counsel, but not the accused himself, to have virtually all of the relevant material, or for both the accused and the defense counsel to have limited versions of the material. In the end, it may be a distinction without a meaningful difference, making all of this wrangling over presence versus absence much ado about nothing.

These concerns bring us full circle to the concept of presence, and more precisely why exclusion of the accused was not even considered as an option, perhaps coupled with the classified information provisions of the MCA. It appears that there are genuine concerns, and then there are those concerns which are based on public perception and seem to have been the motivat-

273. Military Commissions Act § 949d(f)(2), 120 Stat. at 2612–13.

274. *Id.* § 949d(f)(3), 120 Stat. at 2613.

275. *Id.* § 949a(b)(D), 120 Stat. at 2608. This provision is again modeled after one found in the military justice system. See *MANUAL FOR COURTS-MARTIAL*, R.C.M. 506(d) (2002). In addition, it bears noting here that a defendant is allowed to represent himself pro se and is not required to have counsel. This further supports the argument that the MCA does not contemplate the defendant or his counsel being present during consideration of a claim of privilege by the government. See also Pamela A. MacLean, *Jag Lawyers in a ‘Catch-22’ Trap*, NAT’L L. J., Oct. 2, 2006, at 7. Compare H.R. 6166, 109th Cong. 2d Sess. § 949a(b)(C) (introduced Sept. 25, 2006) (providing that “[t]he accused shall receive the assistance of counsel”).

276. Moreover, there must be some question as to whether this provision would also compromise the classified information provisions. See *S. Judiciary Comm. Hearing No. 1*, *supra* note 3 (remarks of Paul Cobb, Former Deputy Gen. Couns., U.S. Dep’t. of Def.) (noting that “the right [to] self-representation would defeat protections for classified information”). Indeed, the notion of allowing a defendant to represent himself was disfavored by the Administration. See *H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206 (remarks of Steven Bradbury, Acting Assistant Att’y Gen.) (commenting that “we would envision that it would not be appropriate and not a necessary requirement that you allow these accused to represent themselves,” and noting, in response to questioning that “it may be a good idea” to always have the accused represented by counsel).

ing force behind this Act.²⁷⁷ Many of the “real” concerns could be dealt with through careful and thoughtful drafting, such as allowing security-cleared counsel view the classified information in its entirety,²⁷⁸ requiring the prosecutor to make a substantial proffer as to the bona fides of the national security interests claim, and allowing the judge to make a reasoned decision on such issues. Instead, the sweeping provision of Military Order No. 1 invited harsh rebuke, and the public perception of the procedures adopted by the various military orders and subsequent regulations invoked outcry both at home and abroad.²⁷⁹ As a result, the option of excluding an accused was never considered to be a viable option.

Nonetheless, when thinking about presence, perhaps Congress was too dismissive. There is no absolute right of presence under either domestic or international law. Our domestic law routinely allows a defendant to be excluded for disruptive behavior, and confrontation rights are occasionally limited in other contexts.²⁸⁰ The courts-martial system, praised by the Supreme Court, likewise allows such exclusions.²⁸¹ There is also no absolute right to presence under international law.²⁸² A defendant could be excluded from proceedings for any reason at Nuremberg. The ad-hoc tribunals for Yugoslavia and Rwanda also recognize that the right to presence is not absolute by allowing exclusion where the defendant is disruptive.²⁸³ Indeed,

277. See, e.g., Letter from Timothy H. Edgar, ACLU Legislative Couns., to Interested Persons (Apr. 16, 2002), <http://www.aclu.org/natsec/emergpowers/14352leg20020416.html>.

278. Some of those testifying at the post-*Hamdan* hearings rejected such an idea. See, e.g., *S. Judiciary Comm. Hearing No. 2*, *supra* note 206 (remarks of Maj. Gen. Jack Rives) (stating that “it does not comport with my ideas of due process, for . . . a defense counsel to have information he cannot share with his client”).

279. See, e.g., Edgar, *supra* note 277.

280. See *infra* Part II.A.

281. See *H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206 (remarks of Col. Ronald Reed) (noting that under the UCMJ there are instances where “an accused who’s been arraigned voluntarily absents themselves from the proceedings, or if they become disruptive, they can be pulled from the courtroom and not see any of the evidence or have access to the evidence that’s being presented against them”).

282. See *supra* notes 191–201 and accompanying text; see also *H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206 (remarks of Steven Bradbury, Acting Assistant Att’y Gen.) (commenting that “the notion of presence at trial, I don’t think—is clearly not an absolute in international law. If, for example, the safety of witnesses require it, the accused may be excluded from the trial.”).

283. ICTY R. OF PROC. & EVID., RULE 80(B), U.N. DOC. IT32/REV.38 (June 13, 2006); ICTR R. OF PROC. & EVID., RULE 80(B) (May 21, 2005), *available*

the MCA admits as much when it allows for the exclusion of the accused where he is disruptive or endangers individuals.²⁸⁴

While these situations are obviously different from those contemplated under Military Order No. 1, the underlying principle is the same: there is no absolute right to presence under domestic law, military law, or international law. Moreover, in such circumstances evidence may be taken, and indeed has been taken, outside the presence of the accused.²⁸⁵ The primary concern is not the right itself, but rather how to fashion exceptions to it. The debate should have focused not on whether there was a right; clearly there is a right, although it is limited. Instead, the focus should have been on what justifications warranted deviation from that right.

When the focus of the debate shifts from whether or not a defendant may be excluded to the justifications for exclusion, more clarity can be brought to the discussion. Where a compelling interest exists, military commissions must be able to exclude the defendant from portions of the proceedings, and “[i]t is ‘obvious and unarguable’ that no government interest is more compelling than the security of the Nation.”²⁸⁶ As Justice O’Connor noted, “the exigencies of the circumstances may demand that . . . [the] proceedings be tailored to alleviate their

at <http://69.94.11.53/ENGLISH/rules/070605/070605.pdf>. Indeed, it bears noting that in his recent trial, Saddam Hussein was removed from his trial on numerous occasions. See *Timeline: Saddam Hussein Anfal Trial*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/middle_east/5272224.stm (noting that Hussein was removed from his trial three times within the same week).

284. Military Commissions Act, Pub. L. No. 109-366, § 949d(e)(1)–(2), 120 Stat. 2600, 2612 (2006); see also Unprivileged Combatant Act of 2006, S. 3614, 109th Cong. § 10(a)(2) (governing “classification tribunals” and providing that “[a] detainee shall be entitled to be present at the classification tribunal, unless the head of the tribunal has decided to admit classified information”); *id.* § 12(b)(1) (permitting disclosure of classified information to defense counsel but not to the accused); Administration Proposal, *supra* note 212, § 216(c)(3) (permitting the exclusion of an accused where necessary to protect national security).

285. Most obviously, the defendant is excluded based on his own wrongdoing in some cases. However, in the *Tadic* case, the ICTY allowed anonymous witness testimony. The testimony was given outside the presence of the accused where the fact-finder knew the identity of the witness yet the accused did not. See *H. Armed Servs. Comm. Hearing No. 3*, *supra* note 206 (remarks of Acting Assistant Att’y Gen. Steven Bradbury).

286. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)); see also *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (“The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”).

uncommon potential to burden the Executive at a time of [war],”²⁸⁷ and the circumstances now facing the nation require the ability to exclude a defendant from military commission procedures where his presence would raise bona fide national security concerns. Such a procedure, however, should not be the primary remedy. Rather, the exclusion remedy should be available only in circumstances where the judge determines that the alternatives to disclosure are not adequate.²⁸⁸

If a proposal like the one above had been included in the MCA, the military commissions could avoid the problems created by the ambiguity in the current statute without unduly prejudicing the accused. Under this proposal, classified information would only be allowed outside the presence of the accused when alternatives are impracticable and the evidence sought to be admitted is valid, authentic, compelling, and irrefutable. In such circumstances, the prejudice suffered is virtually zero because even when defense counsel has access to such evidence, he likely cannot do anything meaningful with it. He could not challenge or rebut the information contained in the classified document, even if the accused remained present. This situation is similar to how courts treat harmless error; even if the accused had been present he could not rebut the evidence, so his absence is harmless.²⁸⁹ This scenario, albeit limited, could arise in the military commissions and was inadequately dealt with by the MCA. In these limited circumstances, exclusion would not only be easier and more efficient, but would also be harmless. Accordingly, the possibility of exclusion should not have been dismissed as easily as it was.

287. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion of O’Connor, J.).

288. Accordingly, an accused should be excluded from the procedures, while his security-cleared counsel would be allowed to remain present to test the veracity of the proffered evidence or testimony. This of course means that an accused should not be allowed to represent himself pro se, or at least at a minimum he should have detailed defense counsel to act on his behalf in these limited circumstances.

289. Indeed, Justice Kennedy noted in *Hamdan* that “[t]he evidentiary proceedings at Hamdan’s trial have yet to commence, and it remains to be seen whether he will suffer any prejudicial exclusion.” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2809 (2006) (Kennedy, J., concurring).

II. LIMITING THE “RIGHT TO BE PRESENT” IN FEDERAL COURT: AMENDING THE CLASSIFIED INFORMATION PROCEDURES ACT

While much of the *Hamdan* litigation is troubling, it nevertheless raises a number of very important questions that may shape the permissive legal response to the war on terror. While constraining its criticism of the procedures for the military commissions to a comparison with the UCMJ, the district court in *Hamdan* planted a seed of concern about whether similar procedures would be constitutional if they were employed in the federal criminal justice system. Specifically, the court commented that “[i]t is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court, particularly after Justice Scalia’s extensive opinion in his decision this year in *Crawford v. Washington*.”²⁹⁰

The district court’s comment helps frame this Part of the Article, which is broken into two subparts. Subpart II.A explores the contours of the right to be present in federal court and discusses the extent to which a defendant in a terrorism trial might be excluded from portions of his trial in order to protect national security. While such an exclusion would no doubt raise serious objections, this Article concludes that under existing law, exclusion procedures similar to those originally promulgated for use in the military commission would be permissible, at least on a case-by-case basis. With this conclusion in mind, Subpart II.B suggests that the existing structure of CIPA could be used as the framework to incorporate statutory amendments that would increase the protection of classified information in federal court through the limited exclusion of the defendant from portions of trial.

Before proceeding to this inquiry, however, a few caveats and clarifications are required. First, this Article assumes that the Supreme Court’s Confrontation Clause jurisprudence is an accurate statement of the law. Any criticisms of the Confrontation Clause doctrine²⁹¹ are beyond the scope of this Article’s inquiry. Second,

290. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d. 152, 168 (D.D.C. 2004) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

291. There is certainly a case to be made that the existing Confrontation Clause jurisprudence has strayed beyond its intended meaning and certainly beyond the plain text of the Constitution. An excellent but brief discussion of some of the

this Article uses the phrase “bona fide national security interest” to underscore the fact that not all claims of national security by the government will necessarily be valid. This distinction is important because a mere assertion of national security interest by the government, without more, should not be sufficient to justify exclusion. While the government’s determination is due considerable deference, there may be instances where the government may label particular testimony or evidence as in the interest of national security merely for the sake of prosecution. One may hope that this would not happen, but the possibility must be considered. Third, this Article does not offer a precise definition of terrorism, but rather adopts the definition found in 18 U.S.C. § 2331²⁹² and assumes that Congress will act if the definition needs further clarification or alteration. Fourth, this Article is not intended to address or take any position on the other issues regarding the lawfulness of the military commissions or concerns that

tensions may be found in *THE HERITAGE GUIDE TO THE CONSTITUTION* 354–55 (Edwin Meese III et al. eds., 2005).

292. This section offers the following definition of terrorism:

(1) the term “international terrorism” means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal law of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

...

(5) the term “domestic terrorism” means activities that—

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C. § 2331 (2000).

might arise if the United States were to try terrorists in civilian court. These potential concerns include the admissibility of evidence, coerced testimony, and the appropriate standard for conviction. Finally, nothing in this part of the Article should be taken to mean that exclusion of the defendant is necessarily the ideal or only solution for protecting classified information, but rather that those determining how best to safeguard classified information should consider exclusion as an option. The exclusionary remedy proposed herein must be coordinated with other existing or future procedures in terrorism prosecutions. Moreover, there may be other avenues that Congress could pursue to accomplish similar goals,²⁹³ such as increasing the responsibility given to the FISA court to allow it to protect such information and possibly conduct trials where such information is involved.

A. *The Right to Be Present and Federal Criminal Trials*

The right to be present sounds simple enough to define, and yet in practice it is a multifaceted right with parts that often overlap.²⁹⁴ The right may be broken down into three essential parts. First, the right derives its foundations largely from the Sixth Amendment, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”²⁹⁵ Second, the right to be present has been held to exist in the Due Process Clause of the Fifth Amendment.²⁹⁶ Finally, this right has been codified by the Federal Rules of Criminal Procedure.²⁹⁷

293. See Dorf, *supra* note 211 (commenting that “even if one concludes that civilian courts are inappropriate for terrorism cases, it does not follow that one must rely on the sort of special military commissions established by the MCA”).

294. See, e.g., *United States v. Toliver*, 330 F.3d 607 (3d. Cir. 2003) (finding that response to question from the jury outside of defendant’s presence was harmless error); *United States v. Novaton*, 271 F.3d 968 (11th Cir 2001) (holding that continuation of trial during defendant’s involuntary medical absence violated defendant’s constitutional rights).

295. U.S. CONST. amend. VI. Although the text of this amendment does not provide a right to be present, it is necessarily implied in the ability to confront one’s accuser.

296. U.S. CONST. amend. V. This same right has been extended to defendants in state courts through the Fourteenth Amendment. See *Pointer v Texas*, 380 U.S. 400 (1965) (incorporating the Confrontation Clause by making it applicable to the states).

297. FED. R. CRIM. PROC. 43. This Rule provides that “the defendant must be present at: . . . every trial stage, including impanelment and the return of the verdict . . .” *Id.*

The scope, applicability, and flexibility of the right to be present in the context of terrorism trials, particularly whether procedures like those found in Military Commission Order No. 1 can be employed in federal court, may be better understood by individually examining each part of the right. The main question is whether Congress could pass a new law or amend existing law so as to allow a defendant to be excluded from trial upon a judicial determination that exclusion is necessary to protect classified information, other information protected from unauthorized disclosure, the safety of members of the court or witnesses planning to come before it, sources and methods of intelligence, or other national security interests, and when doing so, to forbid the communication between the lawyer and client.²⁹⁸

The inquiry into this question begins with the Federal Rules of Criminal Procedure. Rule 43 provides an unqualified right to be present,²⁹⁹ but it is merely a statutory right that can be amended or removed if Congress determines that the current rule frustrates terrorism prosecutions. Therefore, rather than discuss how the law has developed under this rule, this Article assumes that the rules can be amended to allow for the adequate protection of national security interests where Congress deems necessary. This assumption is, of course, without prejudice to the constitutional inquiry below.

The constitutional underpinnings of the right to be present are more difficult to sidestep than the rights under federal statute, and properly so. There are two distinct aspects of this right that must be considered. First, the right to be present exists under the Due Process Clause of the Fifth Amendment. The core of this right is that a defendant has the right to be present during all aspects of the trial,³⁰⁰ particularly “where his absence might frustrate the fairness of the proceedings.”³⁰¹

298. This language mirrors that found in Military Order No. 1, *supra* note 24, § 6(B)(3), governing the proceedings before a military commission.

299. FED. R. CRIM. PROC. 43.

300. *See* *Kentucky v. Stincer*, 482 U.S. 730 (1987). The Court commented:

The Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right “to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.”

Id. at 745 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934)).

301. *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (citing *Snyder*, 291 U.S. at 97).

Due process, however, “is an inherently flexible concept, and the specific process due in a particular circumstance depends upon the context in which the right is asserted.”³⁰² Resolving a Due Process Clause challenge typically requires consideration of three factors: the private interest of the individual claiming a violation of due process, the risk of erroneous deprivation of that interest through use of existing procedures and the probable value of additional or substitute procedural safeguards, and the competing interests of the government that would be incurred if additional safeguards were provided.³⁰³

If one limits the due process inquiry to instances other than confrontation³⁰⁴ and balances the interests of the parties, taking into account the substantial national security concerns of the government,³⁰⁵ it is not unreasonable to conclude that the government’s interests in nondisclosure of classified national secu-

302. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

303. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

304. This separation of the Fourteenth Amendment and the Sixth Amendment right to be present is far from perfect. Indeed, the Court has been less than clear on where due process ends and confrontation begins. While the separation in this Article is no doubt imprecise in some respects, it is a useful distinction that allows one to better consider the issues involved in the war on terror. Although due process is no doubt implicated when a defendant is excluded from confronting a witness against him, it seems that such due process concerns are all but swallowed up by the Confrontation Clause, which is discussed *infra* notes 309–84 and accompanying text.

305. Intelligence agencies such as the CIA have long maintained that the admission and possible disclosure of certain information could endanger the intelligence-gathering process and negatively impact national security. *See, e.g.*, Exec. Order No. 12,958, 68 Fed. Reg. 15,315 (Mar. 28, 2003). The interest in protecting the confidentiality of certain information has long been recognized by the courts. *See, e.g.*, *CIA v. Sims*, 471 U.S. 159, 175 (1985) (“The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.” (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (*per curiam*))); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (stating that the executive branch “has available intelligence services whose reports are not and ought not to be published to the world”); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 706 (6th Cir. 2002) (“Inasmuch as these agents’ declarations establish that certain information revealed during removal proceedings could impede the ongoing anti-terrorism investigation, we defer to their judgment. These agents are certainly in a better position to understand the contours of the investigation and the intelligence capabilities of terrorist organizations.”); *N.J. Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002) (“[W]e are quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise.”).

rity information may result in a determination that the process due in the context of such a case does not include an unqualified right to be present.³⁰⁶ Indeed, immigration courts have routinely allowed an agency to adjudicate charges against someone without revealing certain implicating information, or the identity of the source of the information, when national security is at stake.³⁰⁷ This Article does not argue that there is no process due,³⁰⁸ but rather that a court, when considering the national security interests at stake, may rightly be inclined to give substantial deference to the interests of the government, even if those interests conflict with the interests of a potential defendant.

Assuming that the courts are able move beyond due process concerns,³⁰⁹ the second aspect of the right to be present arises: the right to be present to confront one's accuser. This right is firmly rooted in the Sixth Amendment, and its denial was among the many "grievances complained of in the Declaration of Independence" that were remedied by the adoption of the Bill of Rights.³¹⁰ The primary purpose of this right

was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the

306. Cf. *Mathews*, 424 U.S. at 334 (noting that due process is "not a technical conception with a fixed content unrelated to time, place and circumstances," but rather "is flexible and calls for such procedural protections as the particular situation demands"). *Contra* Note: *Secret Evidence*, *supra* note 9, at 1977-78 (arguing that existing military commission rules governing the use of secret evidence likely violate procedural due process).

307. See, e.g., *Suciu v. INS*, 755 F.2d 127, 128 (8th Cir. 1985). This practice, however, has been criticized. See Matthew R. Hall, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 CORNELL J. INT'L L.J. 515 (2002).

308. See, e.g., *Rafeedie v. INS*, 880 F.2d 506, 523 (D.C. Cir. 1989) ("[E]ven a manifest national security interest of the United States cannot support an argument that Rafeedie is not entitled, as a threshold matter, to protection under the Due Process Clause. Once across that threshold, the calculus of just how much process is due involves a consideration of the Government's interests in dispensing with procedural safeguards.").

309. This is not to say that the courts will always conclude as such, but only to recognize that it seems possible, given the totality of the circumstances.

310. FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 21 (1969). The right to confront witnesses "was a common law right which had gained recognition as a result of the abuses in the trial of Sir Walter Raleigh." *Id.* at 104.

conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.³¹¹

This right is intended to give the accused “an opportunity equal to his opponent’s”³¹² by ensuring that the defendant is able to cross-examine his accuser³¹³ and to promote a genuinely fair trial.³¹⁴ And unlike other parts of the Bill of Rights, the Sixth Amendment applies to all those “accused” in a criminal trial, without distinction between alien and citizen.³¹⁵ The denial of this right at trial “abridges significantly a defendant’s rights under the Sixth Amendment and thereby casts doubt on the fairness of the proceeding.”³¹⁶

Although the Sixth Amendment right to be present to confront witnesses is a touchstone of American criminal procedure, this right is not unqualified. Thus, hearsay that fits within a traditional exception to the hearsay rule is often admissible in a criminal trial—as with dying declarations³¹⁷ and former trial testimony from witnesses now deceased³¹⁸ or otherwise unavailable,³¹⁹ at least when the defendant had an earlier opportunity to develop his theory on direct or cross-examination.³²⁰

311. *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

312. *HELLER*, *supra* note 310, at 104.

313. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (“[A] primary interest secured by [the Confrontation Clause] is the right of cross-examination”); *see also Kentucky v. Stincer*, 482 U.S. 730, 739 (1986) (asserting that the “functional purpose” of the Confrontation Clause is to ensure that a defendant has the opportunity for cross-examination).

314. ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE I* (1992) (noting that the Sixth Amendment “fosters and promotes the functional and normative purpose of affording a criminal defendant a fair trial”).

315. Compare the language of the Fourth Amendment which protects “the people” from unreasonable searches and seizures. U.S. CONST. amend IV.

316. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

317. *Kirby v. United States*, 174 U.S. 47, 61 (1899).

318. *Mattox v. United States*, 156 U.S. 237, 240, 244 (1895).

319. *California v. Green*, 399 U.S. 149 (1970).

320. Many of these exceptions resemble those contained in the Federal Rules of Evidence for the admissibility of hearsay. Indeed, in the mid-1900s, the Court appeared to equate the Confrontation Clause with the hearsay exceptions. *See Pointer v. Texas*, 380 U.S. 400, 406–07 (1965). It observed that “a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him.” The Court also noted that it “has recognized the admissibility against an accused of dying decla-

Courts have also ruled that the right to confront witnesses can be conditioned on the behavior of the defendant, holding that disruptive defendants may be removed from the courtroom so that the trial may proceed.³²¹

1. *Limiting Presence: The Practice in Sexual Abuse Prosecutions*

The difficulty in applying the Sixth Amendment to the military commission procedures is twofold. First, such procedures have never been employed in federal criminal proceedings.³²² Indeed, the denial of presence is very rare because of its extreme nature. Second, most of the case law deals not with the general right to be present, but with the particular problem of determining when the admission of hearsay declarations intrude on the defendant's ability to confront and cross-examine the out-of-court declarant.³²³ The only area of case law that provides useful analogies is sexual abuse cases,³²⁴ where courts

rations, and of testimony of a deceased witness who has testified at a former trial." The Court, however, has more recently made clear that while "the hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions . . ." *Green*, 399 U.S. at 155. Therefore, one must remain careful not to erroneously conflate the two concepts. For example, the admission of particular evidence may violate a hearsay rule but nonetheless be permissible under the Confrontation Clause. Similar to problems presented by the Federal Rules of Criminal Procedure, any problems presented by the Federal Rules of Evidence can be dealt with by amendment of the rules.

321. *Illinois v. Allen*, 397 U.S. 337 (1970) (holding that a defendant's right to be present could be lost or forfeited by his disruptive behavior).

322. See *Parker v. Levy*, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history."); DAVID A. SCHLUETER, 1 MILITARY JUSTICE: PRACTICE AND PROCEDURE § 1 (2005) (noting that the military justice system is a "unique" system with "separate crimes, procedures, and sanctions").

323. See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004); *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (observing that "[m]ost of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements, or restrictions on the scope of cross-examination" (internal citations omitted)); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Green*, 399 U.S. at 149.

324. There has been criticism of how the law has developed in this area. See, e.g., Robert H. King, *The Molested Child Witness and The Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?*, 53 OHIO ST. L.J. 49 (1992). However, this same line of sexual abuse cases has led some scholars to encourage the expansion of the resulting doctrine to protect other witnesses. See J. Steven Beckett & Steven D. Stennett, *The Elder Witness—The Admissibility of Closed Circuit Television Testimony After Maryland v. Craig*, 7 ELDER L.J. 313 (1999).

often employ protective measures to protect the victim of the alleged crime. In the context of sexual abuse cases, there are two basic issues that arise regarding a defendant's right to be present: (1) whether the defendant may be excluded from pre-trial hearings, and (2) what techniques may be employed to protect the alleged victim during trial.³²⁵ It becomes apparent after even a brief look at some of the seminal cases, however, that any analogy drawn from these cases to justify the exclusion of a defendant must be done with caution.

The first level of exclusion analysis in sexual abuse cases is an inquiry into what circumstances may require that a defendant be excluded from pretrial hearings and *ex parte* communications. The principal case is *Kentucky v. Stincer*,³²⁶ where a defendant charged with first degree sodomy was prevented from being present at the competency hearings of two of the alleged victims.³²⁷ The government sought to justify this exclusion, reasoning that a competency hearing was "not a stage of the trial where evidence or witnesses are being presented to the trier of fact," and was thus not protected by the Confrontation Clause.³²⁸ The Court found this distinction unpersuasive, and instead determined that "it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination."³²⁹ The Court held that the exclusion of the defendant from the competency hearings was not unconstitutional because, following the hearing, the two alleged victims "appeared and testified in open court . . . [and] were subject to full and complete cross-examination."³³⁰

The second level of exclusion analysis in sexual abuse cases is whether a defendant may be excluded during the examination and cross-examination of adverse witnesses at trial. This

325. See *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985) ("This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination.").

326. *Kentucky v. Stincer*, 482 U.S. 730 (1987).

327. *Id.* at 732-33.

328. *Id.* at 739.

329. *Id.* at 740. It must be remembered, however, that the Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Fensterer*, 474 U.S. at 20.

330. *Stincer*, 482 U.S. at 740.

issue is governed principally by two cases. The first case, *Coy v. Iowa*,³³¹ examined the validity of a state statute that allowed the trial court to “require a party be confined [*sic*] to an adjacent room or behind a screen or mirror that permits the [defendant] to see and hear the child during the child’s testimony, but does not allow the child to see or hear the [defendant].”³³² The trial court used this procedure and the defendant was subsequently convicted of sexually assaulting two thirteen year old girls.³³³ Writing for the Court, Justice Scalia stated that the Confrontation Clause “guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”³³⁴ With this in mind, the Court concluded that “[i]t is difficult to imagine a more obvious or damaging violation of the defendant’s right to a face-to-face encounter” than the procedures in the Iowa statute.³³⁵ In so holding, the Court rejected the State’s argument that the protective procedure was necessary based on the statutory presumption of trauma to the victim should she be forced to face her attacker.³³⁶ “Since there ha[d] been no individualized findings that these particular witnesses needed special protection,” however, the Court left “for another day . . . the question whether any exceptions [to the right to face-to-face confrontation] exist.”³³⁷ Justice O’Connor stated in her concurrence that “nothing in today’s decision necessarily dooms such efforts by state legislatures to protect child witnesses.”³³⁸ The Court made clear, however, that “[w]hatever [such exceptions] may be, they would surely be allowed only when necessary to further an important public policy.”³³⁹

The Court heard a similar case two years later, but came to a different conclusion.³⁴⁰ *Maryland v. Craig* presented the same question, whether it was consistent with the Confrontation Clause to allow a child witness to testify against the defendant via one-way closed circuit television.³⁴¹ Maryland law provided

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

332. *Id.* at 1014 n.1 (alteration added) (quoting IOWA CODE § 910A.14).

333. *Id.* at 1014–15.

334. *Id.* at 1016.

335. *Id.* at 1020.

336. *Coy*, 487 U.S. at 1021.

337. *Id.*

338. *Id.* at 1022–23 (O’Connor, J., concurring).

339. *Id.* at 1021 (majority opinion).

340. This development has not been without its critics. See King, *supra* note 324.

341. *Maryland v. Craig*, 497 U.S. 836, 840 (1990).

similar child victim protections as the Iowa law,³⁴² yet the Court held that testimony via closed circuit television was permissible under the Confrontation Clause upon a finding of necessity.³⁴³ Writing for the Court, Justice O'Connor limited the holding of *Coy*, commenting that "[w]e have never held . . . that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial,"³⁴⁴ nor is it "an indispensable element of the Sixth Amendment guarantee."³⁴⁵ The Court picked up the question reserved in *Coy*,³⁴⁶ and observed that Maryland's procedure, unlike that in *Coy*, did not presume trauma, furthered a substantial state interest, and did not violate the defendant's right of confrontation.³⁴⁷ The Court noted that although the Confrontation Clause "reflects a *preference* for face-to-face confrontation,"³⁴⁸ this preference may be overcome "where a denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."³⁴⁹

342. The Maryland law provided that:

[A] court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if . . . [t]he judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

Id. at 840–41 n.1 (quoting MARYLAND CTS. & JUD. PROC. CODE ANN. § 9-102 (1989)).

343. *Id.* at 855, 860.

344. *Id.* at 844.

345. *Id.* at 849.

346. *See supra* note 337 and accompanying text.

347. *Craig*, 497 U.S. at 853–60.

348. *Id.* at 849.

349. *Id.* at 849–50; *see also* Spigarolo v. Meachum, 934 F.2d 19, 22–23 (2d Cir. 1991). In *Spigarolo*, the Second Circuit reaffirmed *Craig* and held that the Confrontation Clause was not violated by a Connecticut statutory procedure under which a child's testimony could be taken outside of the presence of the defendant if the court found that the child would be traumatized by testifying in the presence of the defendant. In *Spigarolo*, the trial judge and counsel for both the prosecution and the defense were present, and the child witness was subject to examination and cross-examination.

While *Craig* represents the law of the land, it is not immune to criticism. It has been scorned as "a radical departure from the Supreme Court's pronouncement only two years earlier in *Coy v. Iowa*." King, *supra* note 324, at 50. Moreover, it is complained that *Craig* transformed the Confrontation Clause's explicit guarantee into a "mere preference" based on social policy considerations, which "could lead to the virtual elimination of the right to confrontation." *Id.* at 55. Despite these criticisms, a number of states have enacted laws allowing the use of one-way or two-way closed circuit television testimony in child abuse cases. ALA. CODE § 15-

The Court's recent decision in *Crawford v. Washington* confirms the strong presumption in favor of face-to-face confrontation and the clear preference for presence of the accused.³⁵⁰ While this case did not address the issue of the presence of the accused,³⁵¹ it reaffirmed that exceptions to the Confrontation Clause are rare, stating that "the Framers would not have allowed admission of testimonial statements of a witness who

25-3 (1988); ALASKA STAT. 12.45.046 (1988); ARIZ. REV. STAT. ANN. § 13-4253 (1991); CAL. PENAL CODE § 1347 (1991); CONN. GEN. STAT. § 54-86g (1989); HAW. R. EVID. 616; IDAHO CODE § 19-3024A (1989); ILL. COMP. STAT. 38/106A-3 (1989); IND. CODE § 35-37-4-8 (1988); IOWA CODE § 910A.14 (1990); KAN. STAT. ANN. § 38-1558 (1991); KY. REV. STAT. ANN. § 421-350 (1989); LA. REV. STAT. ANN. § 15:283 (1990); MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (1990); MASS. GEN. L. ch. 278, § 16D (1991); MINN. STAT. § 595.02 (1992); MISS. CODE ANN. § 13-1-405 (1989); N.J. REV. STAT. § 2A:84A-32.4 (1991); N.Y. CRIM. PROC. L. §§ 65.00-65.30 (1990); OHIO REV. CODE ANN. §§ 2907.41(C), (E) (1991); OKLA. STAT. tit. 22, § 753(B) (1988); OR. REV. STAT. § 40.460(24) (1989); 42 PA. CONS. STAT. §§ 5982, 5985 (1988); R.I. GEN. LAWS § 11-37-13.2 (1989); TEX. CODE CRIM. PROC. ANN. art. 38.017, § 3 (1990); UTAH R. CRIM. PROC. 15.5; VT. R. EVID. 807(d)-(e); VA. CODE ANN. § 18.2-67.9 (1991). Many states also allow videotaped testimony of child abuse victims to be introduced. ALA. CODE § 15-25-2 (1988); ARIZ. REV. STAT. ANN. § 13-4251 (1991); ARK. CODE ANN. § 16-44-203 (1987); CAL. PENAL CODE § 1346 (1991); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1991); CONN. GEN. STAT. § 54-86g (1989); DEL. CODE ANN. tit. 11, § 3511 (1991); FLA. STAT. § 92.53 (1989); HAW. R. EVID. 616; ILL. COMP. STAT. 38/106A-2 (1989); IND. CODE §§ 35-37-4-8(c), (d), (f), (g) (1988); KY. REV. STAT. ANN. § 421-350(4) (1989); MASS. GEN. L. ch. 278, § 16D (1991); MICH. COMP. LAWS § 600.216a(5) (1990); MINN. STAT. § 595.02(4) (1992); MISS. CODE ANN. § 13-1-407 (1989); MO. REV. STAT. §§ 491.675-491.690 (1986); NEB. REV. STAT. § 29-1926 (1989); NEV. REV. STAT. § 174.227 (1989); N.H. REV. STAT. ANN. § 517:13-a (1989); N.M. STAT. ANN. § 30-9-17 (1984); OHIO REV. CODE ANN. §§ 2907.41(A), (B), (D), (E) (1991); OR. REV. STAT. § 40.460(24) (1989); 42 PA. CONS. STAT. §§ 5982, 5984 (1988); R.I. GEN. LAWS § 11-37-13.2 (1989); S.C. CODE ANN. § 16-3-1530(G) (1985); S.D. CODIFIED LAWS § 23A-12-9 (1988); TENN. CODE ANN. §§ 24-7-116(d), (e), (f) (1989); TEX. CODE CRIM. PROC. ANN. art. 38.017, § 4 (1990); UTAH R. CRIM. PROC. 15.5; VT. R. EVID. 807(d); WIS. STAT. § 967.043(7) (1990); WYO. STAT. § 7-11-408 (1987).

350. *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* identified "[v]arious formulations of [the] core class of 'testimonial' statements," but did not make a "precise articulation" of its definition. *Id.* at 51-52. Recently, however, the Supreme Court defined testimonial statements in the context of police interrogations in *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006). The Court distinguished testimonial from nontestimonial statements:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id.

351. *Crawford* dealt only with whether specific testimony was admissible.

did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."³⁵² This decision does not touch directly on the defendant's presence, but instead examines the defendant's ability to cross-examine a witness against him in order to assure the fairness of the proceedings. Given that public policy may in certain instances allow limitations on the right to be present, much of the concern voiced in *Crawford* would be limited so long as defense counsel remains present to conduct a full cross-examination.

While the exclusion of the defendant is rare in criminal trials, two conclusions can be drawn from the instances in which it has been permitted. First, the outright exclusion of the defendant from criminal proceedings is allowed only when later opportunities for confrontation will arise. This is the rationale behind permitting the exclusion of a defendant from pretrial hearings, such as those involved in *Stincer*. In these cases, the defendant had a later opportunity to fully cross-examine the witness who was the subject of the pretrial proceedings. Second, in the rare circumstances where a defendant was excluded from trial,³⁵³ the defendant was permitted to listen to the testimony and observe the demeanor of the witness.³⁵⁴

With these two broad propositions in mind, one can now address the central question: whether it would be constitutionally permissible for the federal courts to utilize procedures that allow the limited exclusion of a defendant, but not his counsel, from trial proceedings to protect classified information. Although the question is easy to frame, its answer is much more elusive. Some will likely read the above section and conclude that the exclusion of the defendant from portions of his trial would be incompatible with the right to be present in federal criminal trials. Although the national security interests are undoubtedly more substantial than the individual interests in

352. *Crawford*, 541 U.S. at 53–54.

353. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 345–46 (1970) (affirming a lower court's removal of a defendant after he forfeited his right to be present and confront his accuser because he was disruptive, unruly, and repeatedly ignored the trial judge's warnings that he would be removed if he persisted).

354. The defendant will not always know the identity of the declarant. For instance, in *United States v. De Los Santos*, 810 F.2d 1326, 1334–35 (5th Cir. 1987), the Fifth Circuit held that excluding the defendant from a suppression hearing based on the chance that the defendant might learn the identity of the informant did not violate the Confrontation Clause.

Coy, *Craig*, or *Stincer*, such a drastic deviation from the Sixth Amendment right to be present (and possibly the Fifth Amendment right to be present for purposes of due process) is difficult to comprehend. Such a deviation might have been within comprehension at one time, but some authors argue that *Crawford* sounds the “death knell” for such proceedings.³⁵⁵ This was apparently the thought of the district court in *Hamdan* in its passing reference to *Crawford*.³⁵⁶

The conclusion that exclusion of the defendant from portions of his trial is incompatible with the right to be present in federal criminal trials is fairly easy to draw and, indeed, was my initial conclusion. After more thoughtful consideration of the issue, though, this Article posits that it is possible to exclude a defendant from portions of a federal criminal terrorism trial while remaining consistent with the Sixth Amendment. Before delving too deeply into this controversial issue, it must be noted that this Article is referring, like the procedures originally prescribed for military commissions, to a judge-made determination on a case-by-case basis when particular circumstances arise and specific conditions are met, rather than an automatic exclusion when particular circumstances arise. Any provision requiring the automatic or absolute exclusion of the defendant would be quickly struck down, just as the automatic presumption of trauma in the Iowa statute was struck down in *Coy*.

Although the aforementioned cases demonstrate a presumption in favor of confrontation and presence, none of them create a categorical rule against the limited exclusion of the defendant. Rather, the cases support the opposite conclusion and recognize that there may be permissible deviations from the right to be present. These cases expressly leave open the question of whether there may be additional permissible inroads carved into the right to be present beyond those necessitated in sex abuse prosecutions when circumstances so merit.

355. See Joshua L. Dratel, *The Impact of Crawford v. Washington on Terrorism Prosecutions*, 28 CHAMPION 19, 20 (2004). Dratel goes so far as to argue that *Crawford* should bring an end to all proceedings that utilize secret evidence and that exclude the defendant from portions of the trial. This larger conclusion is no doubt speculative and one with which this Article disagrees. See *supra* notes 351–54 and accompanying text.

356. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 168 n.14 (D.D.C. 2004).

2. *Judicial Review of a Decision to Exclude a Defendant*

There is no *per se* rule requiring absolute presence, so the next inquiry concerns how courts would review a particular exclusion of a defendant from a portion of his criminal trial. Presuming that a statute provides judicial discretion in determining when a defendant ought to be excluded from a portion of the trial, the question becomes how such a determination would be reviewed upon appeal. This inquiry presupposes that there may be instances in which exclusion would be permitted and others where exclusion would not be constitutionally permissible.

For much of American history, any constitutional error by a trial court required automatic appellate reversal.³⁵⁷ This changed in 1967 when the Supreme Court, in *Chapman v. California*, held that not all federal constitutional errors require reversal.³⁵⁸ Instead, the Court established the harmless error doctrine, under which “judgments shall not be reversed for ‘errors or defects which do not affect the substantial rights of the parties.’”³⁵⁹ The core of this doctrine is that “there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.”³⁶⁰ Under this doctrine, the burden is on the government to prove that the error was indeed harmless.³⁶¹ The question that the reviewing court must answer in these circumstances is “whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.”³⁶² For the error to be deemed

357. See David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1403 (1997).

358. See *Chapman v. California*, 386 U.S. 18, 21–22 (1967) (“We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. . . . We decline to adopt any such rule.”).

359. *Id.* at 22 (citing the Federal Harmless-Error Statute, 28 U.S.C. § 2111 (2000)).

360. *Id.*

361. See *United States v. Durham*, 287 F.3d 1297, 1308 (11th Cir. 2002) (“Once violation of [a defendant’s right to be present at trial and to participate in his own defense] has been established, ‘defendant’s conviction is unconstitutionally tainted and reversal is required unless the state proves the error was harmless beyond a reasonable doubt.’” (quoting *Proffitt v. Wainwright*, 685 F.2d 1227, 1260 n.49 (11th Cir. 1982))).

362. *Chapman*, 386 U.S. at 23.

harmless the court must be satisfied "that it was harmless beyond a reasonable doubt."³⁶³

This inquiry was somewhat complicated by the Court's decision in *Arizona v. Fulminante*, which created a distinction between trial errors and structural errors.³⁶⁴ The Court, in an opinion by then-Justice Rehnquist, defined a trial error as an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."³⁶⁵ In contrast, structural errors are those that affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself;"³⁶⁶ these errors therefore require automatic reversal.

Although this dichotomy may be troubling to some,³⁶⁷ it does not significantly hinder a discussion of the right to be present in federal criminal proceedings because, like most other constitutional rights,³⁶⁸ the right to be present is generally subject to

363. *Id.* at 24.

364. See *Arizona v. Fulminante*, 499 U.S. 279, 307–09 (1991); see also McCord, *supra* note 357, at 1401 (criticizing this dichotomy).

365. *Fulminante*, 499 U.S. at 307–08.

366. *Id.* at 310.

367. See, e.g., McCord, *supra* note 357, at 1454–59.

368. See *United States v. Hasting*, 461 U.S. 499, 509 (1983) ("[I]t is the duty of a reviewing court . . . to ignore errors that are harmless, including most constitutional violations . . ."). For example, the Court in *Fulminante* recognized the following errors were subject to harmless error review:

unconstitutionally overbroad jury instructions at the sentencing stage of a capital case; . . . admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause; . . . jury instruction containing an erroneous conclusive presumption; . . . jury instruction misstating an element of the offense; . . . jury instruction containing an erroneous rebuttable presumption; . . . erroneous exclusion of defendant's testimony regarding the circumstances of his confession; . . . restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause; . . . denial of a defendant's right to be present at trial; . . . improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause; . . . statute improperly forbidding trial court's giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause; . . . failure to instruct the jury on the presumption of innocence; . . . admission of identification evidence in violation of the Sixth Amendment Counsel Clause; . . . admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Counsel Clause; . . . confession obtained in violation of *Massiah v. United*

harmless error review.³⁶⁹ This standard of review applies not only to a defendant's right to be present under the Due Process Clause,³⁷⁰ but also to a defendant's Sixth Amendment right to be present for purposes of confrontation.³⁷¹ When evaluating whether a particular deprivation of the right to be present is harmless error, the courts look to a number of factors, including the importance of the proffered testimony, whether there were corroborating circumstances or evidence, the existence and extent of cross-examination, and the totality and strength of the government's case.³⁷² Determining the precise set of factors that the court should consider in the cases that would arise under this Article's inquiry, though, is purely speculative because there is no precedent for the procedures being discussed. Nevertheless, it is reasonable to assume that, in addition to the aforementioned factors, a court would also consider factors like the overall value of the information gained during the absence of the defendant, the risk to national security were the defendant to be present, and the amount of prejudice caused to the defendant.

Despite case law to the contrary, some might argue that the denial of a defendant's right to be present should be considered a structural error under the Due Process Clause and therefore subject to automatic reversal.³⁷³ In the few cases that have clas-

States; . . . admission of evidence obtained in violation of the Fourth Amendment; . . . denial of counsel at a preliminary hearing in violation of the Sixth Amendment Confrontation Clause.

Fulminante, 499 U.S. at 306–07 (internal citations omitted).

369. See *Rushen v. Spain*, 464 U.S. 114, 117 n.2 (1983) (“[T]he right to be present . . . [is] subject to harmless error review . . . unless the deprivation by its very nature cannot be harmless.”); *United States v. Feliciano*, 223 F.3d 102, 111–12 (2d Cir. 2000); *United States v. Alikpo*, 944 F.2d 206, 209 (5th Cir. 1991) (stating that the commencement of trial in defendant's absence without waiver of right to be present may be harmless error, but only if court finds beyond a reasonable doubt that defendant's absence did not prejudice his substantial rights); *Diaz v. Herbert*, 317 F. Supp. 2d 462, 475 (S.D.N.Y. 2004) (“Generally, a denial of a defendant's right to be present at all material stages of a trial is reviewed for harmless error.”).

370. E.g., *United States v. Frazin*, 780 F.2d 1461, 1469 (9th Cir. 1986) (“[V]iolation of defendant's due process right to be present at all stages of trial is subject . . . to harmless error rule . . .”).

371. E.g., *United States v. Shepherd*, 284 F.3d 965, 968 (8th Cir. 2002) (“[T]he [Sixth Amendment] right to be present during all critical stages of the proceedings . . . [is] subject to harmless error analysis.” (internal citation omitted)).

372. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

373. See *Campbell v. Rice*, 302 F.3d 892, 898 (9th Cir. 2002); *Bohan v. Kuhlmann*, 234 F. Supp. 2d 231, 267 (S.D.N.Y. 2002). Some other rights whose violation leads to structural error include the unlawful exclusion of members of the defendant's

sified the denial of the right to be present as a structural rather than trial error, the court has explained that the lack of presence must permeate the entire trial from beginning to end or drastically "affect[] the framework within which the trial proceeds."³⁷⁴ To state it another way, in order for the denial of presence to be classified as a structural, rather than trial, error and require automatic reversal, the denial of presence must fundamentally undermine the fairness or validity of the trial.³⁷⁵

The most pertinent example of such a determination is *United States v. Alfano*, in which a defendant, through no apparent fault of his own, was excluded from more than two weeks of his trial.³⁷⁶ Because of his absence, the defendant missed the summations of other defense counsel, the prosecutor's rebuttal summation, the court's charge to the jury, numerous questions posed by the jury, the opportunities for defense counsel to argue as to how the questions should be answered, and the reading of the verdict.³⁷⁷ The District Court for the Southern District of New York found that such a prolonged absence necessitated a reversal of the conviction and required a new trial. Although the appeal in the case was filed pursuant to Rule 43 of the Federal Rules of Criminal Procedure³⁷⁸ and did not reach a constitutional inquiry,³⁷⁹ the situation redressed by the court under the rules is one which would likely have been found to violate the constitutional right to be present if that inquiry been reached. In determining whether a particular denial of presence is a structural error, the court must look at not only the particular right involved, but also and more importantly, the "nature, context and significance of the violation."³⁸⁰

Like the determination of the existence of trial error, determining whether an error is structural will be done upon review *following conviction* and would be reviewed on a case-by-case basis,

race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986), the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-78, n.8 (1984), and the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 50, n.9 (1984).

374. *Campbell*, 302 F.3d at 898 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)).

375. *Bohan*, 234 F. Supp. 2d at 267.

376. See *United States v. Alfano*, 664 F. Supp. 160, 161 (S.D.N.Y. 1987).

377. *Id.* at 162.

378. *Id.* at 161.

379. *Id.* at 162.

380. *Bohan v. Kuhlmann*, 234 F. Supp. 2d 231, 267 (S.D.N.Y. 2002).

allowing the court to determine in each particular case whether exclusion was harmless.³⁸¹ After a review of the harmless error jurisprudence, the court may conclude that a particular deprivation of the right to be present does not affect the fundamental fairness of the trial. Finally, since the existence of structural error requires that the error permeate the entire trial,³⁸² it is unlikely that such a case would arise except in the most extreme circumstances, and in those circumstances the court could still make such a determination on a case-by-case basis.

Given the presumption in favor of the application of the harmless error doctrine and the flexibility of determining when to apply the structural error doctrine, it is likely that any limitation on the right to be present would be subject to harmless error review. This does not mean that in every case the exclusion of a defendant will be deemed harmless error.³⁸³ It means only that it would not be *per se* unconstitutional for the trial judge to exclude the defendant in order to protect national security interests, presuming there is statutory authority.³⁸⁴ The law suggests a form of case-by-case balancing that would adequately protect the defendant's right to be present while at the same time allowing the government to try its case knowing that it will likely be subject to harmless error review upon appeal.

B. *Using the Classified Information Procedures Act in Terrorism Trials: An Argument for Amendment*

Although it would be unconstitutional to completely exclude a defendant from trial, the aforementioned cases leave some room to fashion permissible exceptions to the right to be present. This Part explores what possible exceptions Congress ought to consider and in what framework any such exceptions should be placed. Fortunately, in this area of the law one is not forced to begin with a blank slate. Rather, the inquiry may draw upon and extend the rules promulgated under the Classi-

381. See *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991).

382. See *id.* at 309–10.

383. As in other areas of law, some circumstances will lead a court to find that the error was not harmless.

384. See *infra* Part II.B.3 for a discussion of some of the possible statutory amendments to CIPA under which a judge might act.

fied Information Procedures Act (CIPA).³⁸⁵ The use of CIPA in the context of terrorism trials was precisely the recommendation of Philip Heymann, who was deeply involved in the drafting of CIPA,³⁸⁶ although specific proposals for the extension of CIPA to addressing problems in the context of terrorism trials remain absent. The courts likewise seem to support the use of CIPA in the terrorism context.³⁸⁷

In three Subparts, this Part contends that CIPA does not go far enough and should be amended to allow for procedures akin to those found in Military Order No.1, or, alternatively, to alter existing procedures already accepted in criminal cases in order that the Government may be better able to safeguard classified information. Subpart II.B.1 briefly summarizes the structure, intent, and practice of CIPA as it currently exists. Subpart II.B.2 argues that CIPA, in its present form, is inadequate to safeguard the national security interests of the United States that might arise in terrorism trials. Finally, in order to increase the protection of national security information while at the same time maintaining the fair trial rights of

385. Classified Information Procedures Act (CIPA), Pub. L. No. 96-456, 94 Stat. 2025 (codified at 18 U.S.C. app. (2000)). Hamdan's counsel even recognized the possibility of using CIPA to protect classified information, although he likely did not contemplate the suggestions below. See Brief for Appellee, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2004) (No. 04-5393).

386. See PHILIP B. HEYMAN & JULIETTE N. KAYYEM, PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 52 (2004). Professors Heymann and Kayyem suggest that:

1. The United States Congress should consider the need for adding to the terms of the Classified Information Procedures Act such provisions as are thought necessary to permit the trial of terrorists and others for violations of federal terrorist statutes or the rules of war.
2. As in the case of CIPA, there must be adequate guarantees that any modifications of familiar court or court martial procedures do not significantly undermine the fairness of a trial.
3. Subject to that constraint any modifications adopted should protect national security secrets from revelation either to the defendant or to a wider public during a trial.
4. If the constraint of fair trial cannot be met and if any trial would disclose critical national security secrets, only temporary detention can be used, not as a punishment but as a form of needed, but temporary, incapacitation.

Id. at 52.

387. See, e.g., United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004); Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005); United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003); United States v. Bin Laden, 2001 WL 66393 (S.D.N.Y. 2001); United States v. Ressaam, 221 F. Supp. 2d 1252 (W.D. Wash. 2002); United States v. Rezaq, 899 F. Supp. 697 (D.D.C. 1995).

the defendant, Subpart II.B.3 suggests two basic amendments to CIPA.

1. *CIPA: History, Purpose, and Structure*

The Classified Information Procedures Act was passed in 1980 to address the problem of graymail,³⁸⁸ which arose most often in the prosecution of U.S. intelligence operatives and personnel.³⁸⁹ Graymail “refers to the actions of a criminal defendant in seeking access to, revealing, or threatening to reveal classified information in connection with his defense.”³⁹⁰ Although this characterization may be somewhat simplistic³⁹¹ and perhaps erroneously implies that the defendant is doing something improper,³⁹² it nonetheless conveys in a very basic sense the problem addressed by CIPA: the disclosure of classified information.

388. For the legislative history of CIPA see S. JUDICIARY COMM., CLASSIFIED INFORMATION PROCEDURES ACT, S. REP. NO. 96-823 (1980); PERMANENT SELECT H. COMM. ON INTELLIGENCE, CLASSIFIED INFORMATION CRIMINAL TRIAL PROCEDURES ACT, H. REP. NO. 96-831, pt. 1 (1980); PERMANENT SELECT H. COMM. ON INTELLIGENCE, CLASSIFIED INFORMATION CRIMINAL TRIAL PROCEDURES ACT, H. REP. NO. 96-831, pt. 2 (1980); COMM. OF CONFERENCE, CLASSIFIED INFORMATION PROCEDURES ACT, H. REP. NO. 96-1436 (1980).

389. See H. REP. NO. 96-831, pt. 1, at 6-7. The Report commented that “[t]hese cases are not confined to any particular area of alleged illegal activity: the crimes involved have included espionage, murder, perjury, narcotics distribution, burglary, and civil rights violations among others.” *Id.*

390. *Id.* at 7.

391. One commentator has broken down the concept of graymail into two forms, implicit and explicit:

The graymail threat in criminal prosecutions may be express or implied. An express graymail threat occurs when the defendant pressures for the release of classified information as a means of forcing the Government to drop the prosecution or when the defense threatens the Government with disclosure of classified information in the hope of thwarting the prosecution. Implied graymail describes those attempts by the defense to obtain or disclose classified information which are simply the exercise of the defendant’s legitimate right to prepare and conduct an adequate defense. In both situations, the government may be presented with a disclose-or-dismiss dilemma.

Karen Greve, Note, *Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 CASE W. RES. L. REV. 84, 85 n.5 (1980).

392. See *Use of Classified Information in Federal Criminal Cases: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 96th Cong. 1 (1980) (statement of Rep. Edwards, Chairman, Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary). The term graymail “is perhaps a misnomer, because it implies something improper, verging on the illegal, when, in fact, it may be that the defendant is merely seeking to exercise his right to present his case to a jury in open court.” *Id.*

Prior to CIPA's enactment, the government was often placed in a no-win, disclose-or-dismiss dilemma, whereby prosecutors had to decide between disclosing the classified information with the attendant risks to national security, or abandoning the prosecution altogether in order to prevent disclosure.³⁹³ CIPA established pretrial procedures to help protect national security information from improper and unnecessary disclosure³⁹⁴ and gave "the defendant a sword in his battle to avoid a conviction and the government a shield to protect its national security interests."³⁹⁵

Under CIPA, the defense is required to notify the government prior to trial if it intends to "disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution."³⁹⁶ Upon such notification, the government may request an in camera hearing to determine the "use, relevance, or admissibility" of the classified information prior to the trial.³⁹⁷ If the court determines that the classified information must be disclosed, the government may then seek a court order authorizing either "the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or . . . the substitution for such classified information of a summary of the specific classified information."³⁹⁸ CIPA also allows the United States Attorney General to file an affidavit declaring that the disclo-

393. *Graymail Legislation: Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 96th Cong. 1 (1979) (statement of Rep. Morgan Murphy, Chairman, H. Permanent Select Comm. on Intelligence); see also H. REP. NO. 96-831, pt. 1, at 8 (remarks of Assistant Att'y Gen. Philip Heymann). Heymann noted that "[i]n the past, the government has foregone prosecution of conduct it believed to violate criminal laws in order to avoid compromising national security information." *Id.*

394. CIPA was enacted

to insure that classified information which bears no possible relationship to the issues in a criminal trial is not disclosed. It is also intended to insure that classified information that is relevant to the defendant's case will be identified prior to trial, before it is publicly revealed, so that the Government can make an informed decision in determining whether or not the benefits of prosecution will outweigh the harm stemming from public disclosure of such information

126 CONG. REC. 26503 (1980) (statement of Rep. Romano Mazzoli).

395. Timothy Shea, Note, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials*, 27 AM. CRIM. L. REV. 657, 662 (1990).

396. Classified Information Procedures Act, 18 U.S.C. app. 3, § 5(a) (2000).

397. *Id.* § 6(a).

398. *Id.* § 6(c)(1)(A)(B).

sure of the classified information “would cause identifiable damage” to national security; if requested, the trial court may examine the affidavit in camera and ex parte.³⁹⁹

The court may only approve a motion for substitution, however, upon a finding that “the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.”⁴⁰⁰ If the court denies a government request and the Attorney General then files an affidavit objecting to the disclosure of the classified information at issue, the court must “order that the defendant not disclose or cause the disclosure of such information.”⁴⁰¹ If the defendant is so restrained, however, the court may then dismiss the indictment in its entirety, or, if doing so would not be in the interests of justice, order other corrective measures in the defendant’s favor, such as finding against the government on the issue to which the excluded classified information related.⁴⁰²

During the trial stage, CIPA allows the court to order the admission of only a portion of a writing, recording, or photograph “unless the whole ought in fairness be considered.”⁴⁰³ The court may similarly limit the scope of witness testimony regarding classified information when the admissibility of that testimony has not been determined prior to the examination of the witness.⁴⁰⁴

Although CIPA was enacted to prevent the disclose-or-dismiss dilemma, it does not and cannot in all cases ensure that this Hobson’s choice is eliminated.⁴⁰⁵ Instead, CIPA merely re-

399. *Id.* § 6(c)(2).

400. *Id.* § 6(c)(1).

401. Classified Information Procedures Act, 18 U.S.C. app. 3, § 6(e)(1) (2000).

402. *Id.* § 6(e)(2).

403. *Id.* § 8(b).

404. *Id.* § 8(c).

405. Section 12(b) of CIPA explicitly recognizes that the Department of Justice may sometimes determine that it would rather dismiss the indictment than disclose the classified information. Section 12(b) provides that:

When the Department of Justice decides not to prosecute a violation of Federal law pursuant to subsection (a), an appropriate official of the Department of Justice shall prepare written findings detailing the reasons for the decision not to prosecute. The findings shall include—

- (1) the intelligence information which the Department of Justice officials believe might be disclosed,
- (2) the purpose for which the information might be disclosed,
- (3) the probability that the information would be disclosed, and

duces the likelihood that the government will be placed in this predicament and provides the government more notice when such a dilemma might arise.

2. *The (Mis)use of CIPA in Terrorism Trials*

The legal war on terrorism has created concerns about the disclosure of classified information that were not contemplated by CIPA. Although the government has often attempted to prosecute terrorists in civilian court,⁴⁰⁶ the U.S. criminal justice system is not designed to protect citizens from terrorists,⁴⁰⁷ and existing laws do not adequately address the disclosure problems that federal prosecutors face in terrorism trials. Therefore, prosecutors and courts have increasingly relied upon the provisions of CIPA, either explicitly⁴⁰⁸ or by analogy,⁴⁰⁹ in an attempt to protect classified information. This Subpart argues that not only is reliance on CIPA in terrorism trials generally inconsistent with the legislative history of the Act, but also that applying CIPA in terrorism trials results in inadequate protection of U.S. national security interests.

The primary purpose of CIPA was to prevent a defendant from disclosing classified information during trial because doing so would reveal the information to the public at large.⁴¹⁰ The underlying assumption of the Act's drafters was that it would be used in circumstances involving U.S. government personnel, contractors, or similarly situated individuals who had access to classified national security information.⁴¹¹ The wording of the notice re-

(4) the possible consequences such disclosure would have on the national security.

Id. § 12(b). Furthermore, this dilemma may also be created inadvertently by the discretion granted to the judge in fashioning the relief he deems appropriate under § 6(e)(2).

406. See FISHER, *supra* note 78, at 210–11.

407. See, e.g., Hemingway, *supra* note 138, at 4.

408. See, e.g., United States v. Yunis, 867 F.2d 617, 619–20 (D.C. Cir. 1989); United States v. Rezaq, 134 F.3d 1121, 1142–43 (D.C. Cir. 1989); United States v. Koubriti, 307 F. Supp. 2d 891, 895 (E.D. Mich. 2004).

409. See, e.g., United States v. Moussaoui, 382 F.3d 453, 471–72 (4th Cir. 2004). Despite recognizing that CIPA does not guide the case, the Court went on to analogize to CIPA procedures throughout. *Id.*; see also United States v. Moussaoui, No. CR. 01-455-A, 2003 WL 21263699 (E.D. Va. Mar. 10, 2003) (mem). The court found that although CIPA does not apply to the case, it “provides the most analogous legal framework within which to resolve these motions.” *Id.* at *3.

410. See S. REP. NO. 96-823, at 2 (1980).

411. See generally Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 278–83 (1986).

quirement in Section 5 of the Act indicates that the defendant would already know which parts of information that he was seeking to use at trial were classified. Otherwise, the requirement that the defendant give prior notice of the classified information sought to be disclosed would be nonsensical.

The events surrounding CIPA's enactment support this conclusion. The years preceding the Act's adoption saw numerous attempts to prosecute spies and acts of espionage.⁴¹² The fear of disclosing sensitive classified information in such prosecutions led to calls for legislation to combat the graymail problem.⁴¹³ In addition, the memory of Watergate and the frustration felt in other attempts to prosecute high ranking government officials shaped how Congress viewed the problem when drafting CIPA.⁴¹⁴

Further support can be drawn from the legislative reports accompanying the Act. In commenting on the graymail problem, then-Assistant Attorney General Philip Heymann commented that the dismissal of charges in order to protect classified information "foster[ed] the perception that *government officials and private persons with access to military or technological secrets* have a broad de facto immunity from prosecution for a variety of crimes. This perception . . . promotes concern that there is no effective check against *improper conduct by members of our intelligence agencies.*"⁴¹⁵ Indeed, the cases cited in the legislative history as examples of the problems sought to be addressed by CIPA involve espionage⁴¹⁶ and other activities of government

412. *Id.* at 323–24 (noting that concern over the disclosure of classified information in espionage prosecution was the impetus behind the passage of CIPA); Jeff Jarvis, Note, *Protecting the Nation's National Security: The Classified Information Procedures Act*, 20 T. MARSHALL L. REV. 319, 319 (1995) (noting that prosecution of spies began in earnest in the 1970s, and that the fear of disclosure of classified information in these prosecutions lead to the introduction of CIPA); H. REP. NO. 96-831, pt. 1, at 6 (1980) (noting that "[t]he past few years have witnessed a significant increase in the number of criminal cases in which the use or disclosure of classified information has become an issue").

413. See Ford Fessenden, *Defendant's Best Defense is Classified*, NEWSDAY, Feb. 13, 1989, at 15.

414. See 126 CONG. REC. 20,26054 (1980) (statement of Rep. Henry Hyde).

415. S. REP. NO. 96-823, at 4 (remarks of Assistant Att'y Gen. Philip Heymann) (emphasis added); see also H. REP. NO. 96-831, pt. 1, at 8 (remarks of Assistant Att'y Gen. Philip Heymann).

416. The four reports listed in note 388 *supra*, cited the following cases, all of which involved espionage: *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944); *United States v. Berrellez* (D. D.C. Crim. No. 78-120); *United States v. Kampiles* (N.D. Ind. Crim. No. HCR 78-77).

employees.⁴¹⁷ Perhaps most compelling is the illustrations that the drafters used to demonstrate an example of what CIPA was intended to prevent or reduce. One such cited case is *United States v. Berrellez*, in which two high level officials of ITT were charged with perjury and other offenses related to an investigation into ITT's involvement in Chilean political activities in the 1970s. Prior to trial, the defendants informed the government that, in order to prove their innocence, they intended to offer classified information demonstrating that the allegedly perjured testimony was given at the request of the U.S. government.⁴¹⁸ The government made numerous protective order requests and sought a ruling that the information sought to be introduced by the defendant was inadmissible. Both the district court and the court of appeals denied the government's request.⁴¹⁹ The government dismissed the case and in response to graymail accusations, the defense lawyer stated that "we had information that was relevant to a legitimate defense."⁴²⁰

Prior to the war on terrorism, the courts almost uniformly agreed with this interpretation of CIPA. For example, in *United States v. Wilson*, the defendant was charged and convicted of plotting to murder prosecution witnesses.⁴²¹ He filed proper notice under CIPA and sought to admit classified information that indicated that he was an agent of the United States engaged in covert operations. The defendant alleged that this activity informed his mens rea and supported his defense. He also sought to introduce classified information to demonstrate his character traits and the personal relationships he had built which he argued would disprove the charges against him.⁴²² Although the court did allow the defendant to testify as to his employment within U.S. intelligence agencies, it denied his request to disclose other portions of classified information.⁴²³ The Second Circuit, in reviewing these rulings, deemed this case

417. H. REP. NO. 2, 96-831, pt. 2, at 1 (1980) (citing *United States v. Gray*, 502 F. Supp. 150 (D.D.C. 1980) (involving U.S. employees who had access to classified information)).

418. See H. REP. NO. 96-831, pt. 1, at 8.

419. *Id.* at 9 nn.4-5 and accompanying text.

420. *Id.* at 10 (emphasis added).

421. *United States v. Wilson*, 750 F.2d 7, 8 (2d Cir. 1984).

422. *Id.* at 9.

423. *United States v. Wilson*, 586 F. Supp. 1011, 1016-17 (S.D.N.Y. 1983).

“the kind of situation that Congress had in mind when it enacted” CIPA.⁴²⁴

Perhaps even more illustrative is *United States v. Collins*, the case cited in *Wilson* for the proposition that it was the type of case for which CIPA was enacted.⁴²⁵ Collins, a retired Air Force general, allegedly misused money belonging to the United States Air Force. As part of his defense, Collins sought to introduce classified information about the joint intelligence and military operations of the U.S. government regarding secret overseas bank accounts.⁴²⁶ Situations like this, where the defendant had acquired specific knowledge contained in classified documents resulting from his employment with government, military, or other intelligence agencies, are far removed from the circumstances in the terrorism cases now flooding the courts.

While certain provisions of CIPA are ambiguous, its legislative history helps reveal the intended scope of the Act and shows that the Act arguably does not reach the terrorism cases plaguing the courts today, unless the suspects are deemed to be entitled to classified information in discovery. Although the legislative history should not be conclusive as to the interpretation of the Act,⁴²⁷ keeping the history of the Act in mind allows one to recognize the gaps that applying CIPA in terrorism trials causes in the practice and procedures of federal courts.

Even when CIPA is applied in terrorism cases, the provisions of the Act do not adequately safeguard the national security interests of the United States because they do not go far enough to shield classified information from unnecessary disclosure. The provisions in CIPA were “designed to give the government advance notice of what classified information will be admissible during trial; they are not designed to effect the admissibility determination itself.”⁴²⁸ And although judges should be mindful of national security implications under CIPA,⁴²⁹ the

424. *Wilson*, 750 F.2d at 9.

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

426. *Id.* at 1197–98.

427. See, e.g., SCALIA, *supra* note 260, at 31–34.

428. H. REP. NO. 96-831, pt. 1, at 10.

429. See *United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985) (“[I]n passing upon a motion under Section 6(c) [for a statement of a summary of the classified information] the trial judge should bear in mind that the proffered defense evidence does involve national security.”).

only truly unique aspect of CIPA is the provision authorizing substitution of summaries for classified documents.⁴³⁰ Furthermore, even that provision may be inadequate to protect national security in the present circumstances because of the broad discretion granted to the trial court. Indeed, had CIPA never been enacted, the government could have raised the privilege at trial and the court would have undertaken a balancing test similar to that used in *Roviaro v. United States*,⁴³¹ which compared the accused's interest in having access to classified information with the government's interest in keeping such information secret.⁴³²

There is no coherent body of applicable law describing the way that CIPA is applied in terrorism cases, because only a few cases have dealt with CIPA in the context of terrorism.⁴³³ In the cases that have arisen, there is little support for retaining CIPA as it is. It is not difficult to imagine scenarios where CIPA's current provisions would be inadequate to protect classified information, thereby threatening national security and placing the prosecutor once again in a disclose-or-dismiss dilemma.

One must remember that CIPA was not intended to "alter substantive rights or to change the rules of evidence or criminal procedure."⁴³⁴ With this in mind, imagine a situation where the government seeks to elicit testimony from an individual, perhaps a government official, and hopes to keep the individual's response fairly narrow in an effort to prevent the defendant from hearing certain national security related information. Then, in cross-examination, the defendant's counsel seeks to elicit classified information. Under CIPA, there is little that can be done to prevent the defendant from hearing the classified information. Section 8(c) only allows the government to object; the judge may then consider what action might be appropriate.⁴³⁵ This procedure is intended to mirror the pre-trial procedures, but will necessarily occur mid-trial and is in no way in-

430. See Tamanaha, *supra* note 411, at 306.

431. *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957).

432. NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 356 (2003) (quoting *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985)).

433. See *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005); *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005), *rev'd* 423 F.3d 386 (4th Cir. 2005); *United States v. Bin Laden*, No. 5(7) 98 CR. 1023 LBS, 2001 WL 66393 (S.D.N.Y. 2001).

434. 126 CONG. REC. 26504 (1980) (statement of Rep. Don Edwards).

435. Classified Information Procedures Act, 18 U.S.C. app. 3, § 8(c) (2000).

tended to affect the standards for admissibility of evidence.⁴³⁶ This situation could thus lead to a defendant being present during portions of trial in which classified information is revealed, and although the procedures in CIPA aim to prevent such presence as much as possible, once the information is revealed there is no way to prevent its further disclosure outside of the courtroom.

A second, and perhaps more alarming, example of the disclosure of classified information in terrorism prosecutions was displayed in the Guantanamo detainee litigation. Judge Green criticized the use of classified information by the Combatant Status Review Tribunal (CSRT) to determine the detainee's status without, *inter alia*, allowing the defendant access to the classified material.⁴³⁷ Although CIPA was not directly implicated, and the court's ruling hinged on both the denial of counsel and the refusal to allow the defendant to view classified information,⁴³⁸ the judge's comments nicely demonstrate the concern that one must have in formulating the procedures used to protect classified information.

When it comes to terrorism prosecutions, one must always think about the worst case scenario in order to ensure that the nation is adequately safeguarded. Not only do terrorism cases often fall squarely outside of the intended scope of CIPA, but CIPA often does not extend to portions of terrorism trials which it arguably ought to. Thus, more thought must go into crafting solutions to this troublesome discrepancy. If proper terrorism prosecutions are to be conducted in federal court, and if such prosecutions are to be conducive to the protection of classified information, careful consideration must be given to the legislative framework under which the prosecutions might proceed, and current law must be altered accordingly.

3. *Amending CIPA: Proposals for Change*

"Terrorism prosecutions are often developed through intelligence information that the government is reluctant to reveal for fear of compromising sources or methods of obtaining the information, or where the information itself has a national secu-

436. See H. REP. NO. 96-831, pt. 1, at 19 (1980).

437. *In re Guantanamo*, 355 F. Supp. 2d at 470-72.

438. *Id.* at 472.

rity dimension."⁴³⁹ The procedures of CIPA, although no doubt beneficial, have been inadequate in this context and therefore should be amended to allow for the limited exclusion of the defendant from portions of trial in order to better protect the bona fide national security interests of the United States.⁴⁴⁰ This Subpart will recommend two alterations to CIPA that would enable it to apply more effectively in terrorism trials.

The first and most obvious change is to add a provision mandating the application of CIPA to terrorism proceedings. As mentioned earlier, the legislative history of the Act indicates that it was not drafted with terrorism prosecutions in mind.⁴⁴¹ Furthermore, while CIPA has been used both explicitly and by analogy in terrorism trials, a specific amendment to the Act to allow for such application would provide much-needed clarity for courts, allowing them to apply CIPA without resorting to complicated reasoning through analogy. Once this is accomplished, further amendment may also be necessary to ensure that the Act is applied appropriately and that classified information is adequately protected.

The second, more substantive amendment is to add a provision that expressly allows for the exclusion of a defendant from trial proceedings in limited circumstances. This is a controversial proposal, but one that is necessary to protect U.S. national security interests while allowing terrorism prosecutions to continue unfettered. Some of the most obvious concerns should be deflected if defendant's counsel, after receiving the appropriate security clearance, is allowed to remain present throughout the trial. This proposal could conceivably take one, or all, of the following three forms.

First, CIPA could be amended to allow for the defendant's exclusion from pretrial hearings that address or consider classified information.⁴⁴² This suggestion is limited only to pretrial

439. ABRAMS, *supra* note 432, at 338.

440. There are, perhaps, a number of other amendments to CIPA which might further insulate classified information from unauthorized or unnecessary disclosure. Amendments extending beyond the right to be present and its necessary components, however, are beyond the scope of this Article.

441. See *supra* note 388 and accompanying text.

442. Although there are various types of pretrial proceedings that might be implicated by this proposed amendment, such as grand jury proceedings, voir dire, and pretrial conferences, this proposal could be crafted in such a way so as to ensure that whatever constitutional safeguards are already in place for such proceedings are not legislatively overruled. I have avoided too much detail in this

proceedings and would not extend to the defendant's right to be present during the course of trial (at least during proceedings in front of the jury). Currently, the pretrial conference provisions of CIPA contemplate that the defendant may attend many such proceedings.⁴⁴³ While the court may in limited circumstances rule on motions *ex parte* and *in camera*, the current structure of CIPA provides some barriers to an absolute right to close pretrial proceedings to a defendant.⁴⁴⁴ The proposed amendment would remove the judge's discretion in determining when a defendant is to be excluded and would allow the government to exclude a defendant upon a showing of bona fide national security concerns.

This amendment should not garner too much criticism since it has been endorsed and accepted in other areas of criminal practice. The most notable example is *Stincer*, in which the exclusion of the defendant from a competency hearing regarding two of the witnesses against him was upheld as not violating the defendant's right to be present.⁴⁴⁵ Similarly, in *United States v. De Los Santos*, the defendant—but not his counsel—was excluded from a pretrial suppression hearing in order to protect the identity of a DEA informant.⁴⁴⁶ The Fifth Circuit upheld the trial court's decision, ruling that it was within the court's dis-

regard because exclusion from such proceedings generally is permissible, and I envision Congress taking the necessary care to ensure that the fairness of such proceedings is maintained.

443. See Classified Information Procedures Act, 18 U.S.C. app. 3, § 2 (2000). This section, entitled "Pretrial Conferences," states that "[n]o admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant." Courts, however, have consistently ruled that questions resolved during a CIPA hearing regarding the protection of classified information are questions of law that may be resolved outside the presence of the defendant. See, e.g., *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261–62 (9th Cir. 1998); *United States v. Cardoen*, 898 F. Supp. 1563, 1571–72 (S.D. Fla. 1994).

444. See Classified Information Procedures Act, 18 U.S.C. app. 3, § 4. This section deals with the disclosure of classified information, and provides:

The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an *ex parte* showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Id. (emphasis added).

445. See *supra* notes 326–30 and accompanying text.

446. *United States v. De Los Santos*, 819 F.2d 94, 95 (5th Cir. 1987).

cretion and was not a violation of the defendant's right of confrontation.⁴⁴⁷ These cases are but two examples of the general proposition that there is no general constitutional prohibition on excluding the defendant from pretrial proceedings.⁴⁴⁸

More recently, courts have seemingly adopted such a position in regards to the disclosure of classified information in terrorism trials. For example, in *United States v. Moussaoui*, the Government sought to exclude the defendant, although not his standby counsel,⁴⁴⁹ from pretrial proceedings to determine the admissibility of certain classified information pursuant to CIPA.⁴⁵⁰ The district court found that "the United States' interest in protecting its national security information outweighs the defendant's desire to review the classified discovery," and that "Moussaoui's Fifth and Sixth Amendment rights are adequately protected by standby counsel's review of the classified discovery and their participation in any proceedings held pursuant to [CIPA] . . . even though the defendant will be excluded from these proceedings."⁴⁵¹ The proposed amendment would codify existing practice and remove the discretionary determination by the district court, thereby creating a simpler procedure and more consistent body of law that would help protect classified information vital to the national security.

447. *Id.* at 97.

448. See also *United States v. Miller*, 480 F.2d 1008 (5th Cir. 1973) (upholding conviction where an airline employee testified in the absence of the defendant that the defendant fit the hijacker profile and where the defense attorney was present to cross-examine the witness); *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972) (upholding conviction where the defendant was excluded from the portion of the suppression hearing delineating parts of FAA hijacker profile, but where the defense attorney was present).

449. The proper role of standby counsel will be discussed more fully in Part III *infra*. A standby counsel is an attorney appointed to be prepared to represent a pro se defendant where the court deems necessary or to provide the pro se defendant with legal advice. BLACK'S LAW DICTIONARY 375 (8th ed. 2004).

450. *United States v. Moussaoui*, No. CR. 01-455-A, 2002 WL 1987964 (E.D. Va. Aug. 23, 2002). The government inadvertently disclosed classified material to Moussaoui, *United States v. Moussaoui*, No. CR.A. 01-455-A, 2003 WL 18777698 (E.D. Va. Mar. 19, 2003), and the trial judge authorized limited disclosure of classified information to him. *United States v. Moussaoui*, 2003 WL 21266186 (E.D. Va. Mar. 28, 2003). For a more thorough discussion of the early proceedings in *Moussaoui*, see FISHER, *supra* note 78, at 211-20.

451. The court openly acknowledged that this case is "[u]nlike the usual case involving classified discovery in which a defendant charged with espionage has previously possessed the classified information at issue." *Moussaoui*, 2002 WL 1987964, at *1.

Second, a defendant might be excluded from portions of witness examination on an ad hoc basis, while his security-cleared counsel could remain present. The defendant's counsel would be prohibited from disclosing to his client the contents of the examination that are deemed classified by the government. This suggestion obviously differs from the above proposal in that the defendant could conceivably be excluded from a portion of the trial. This proposal is more complicated and less certain to withstand constitutional scrutiny because it has not been tested in the courts. The most obvious concern in this proposal is ensuring that the defendant has an opportunity to defend the charges against him adequately. If the defendant is excluded from witness examination and is not allowed to communicate with his counsel about the content of the classified information (the current procedures of the military commission under Military Order No. 1), a number of constitutional concerns, such as the right to counsel, would no doubt arise.⁴⁵²

To alleviate at least some of these concerns, this proposal would incorporate a substitution procedure similar to the existing procedure under CIPA.⁴⁵³ Unlike the current CIPA substitution procedure, however, this proposed substitution would occur after the examination of the witness and upon a motion by the government. This method of substitution arguably grants more protection to the defendant than presently exists under CIPA, because in the pretrial stages under CIPA Section 6, the substitution is formulated and approved ex parte, when the defendant cannot oppose it and never had access to the underlying documents.⁴⁵⁴ In contrast, the defendant's security-cleared counsel under the proposed method would already have had an opportunity to hear the testimony and test its veracity through cross-examination.

Incorporating a substitution procedure into this proposal should also reduce concern over a possible violation of the right to be present. Historically, the purpose of the right to be present to confront the accuser was to "prevent depositions or

452. U.S. CONST. amend. VI.

453. Classified Information Procedures Act, 18 U.S.C. app. 3, § 6(c)(2) (2000).

454. *Id.* For a criticism of this provision, see Tamanaha, *supra* note 411, at 308. Tamanaha comments that under § 6, "The defendant has no way of knowing whether the substitution contains all the discoverable information, or whether it correctly states that information . . ." *Id.*

ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness."⁴⁵⁵ So long as counsel remains present to question the witness, the historic purpose of the Sixth Amendment right to be present is fulfilled. Furthermore, not only have the existing substitution procedures under CIPA been upheld as consistent with the Sixth Amendment right to confrontation,⁴⁵⁶ there are numerous instances in which courts have upheld the substitution of summaries for classified information.⁴⁵⁷ In addition, while substitution might seem an odd remedy because it appears to limit attorney-client communication, it is not unheard of for courts to restrict the information that counsel can communicate to a client,⁴⁵⁸ even though "restrictions on communication between a

455. *Mattox v. United States*, 156 U.S. 237, 242 (1895).

456. *See United States v. Wilson*, 721 F.2d 967, 976 (4th Cir. 1983) (holding that CIPA provisions did not infringe on defendant's confrontation rights or privilege against self incrimination); *United States v. Bin Laden*, No. S(7) 98 CR. 1023 LBS., 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001).

457. *See, e.g., United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998) (holding that the district court did not err in substituting bare statements of fact for discoverable classified documents in a prosecution for aircraft piracy pursuant to CIPA; no information that might have helped defense was omitted from substitutions and discoverable documents had no unclassified features that might have been disclosed); *United States v. North*, 713 F. Supp. 1442, 1443 (D.D.C. 1989) (holding that the substitution for classified information of a forty-four page document containing admissions of fact by the United States in a criminal prosecution arising out of the Iran-Contra affair provided defendant with substantially the same ability to make his defense as the disclosure of the specific classified information); *United States v. Collins*, 603 F. Supp. 301, 304 (S.D. Fla. 1985) (holding that § 6(c) of CIPA does not violate due process by authorizing the substitution of an admission of relevant facts or a summary in lieu of specific classified information sought to be introduced by a defendant). *Contra United States v. Fernandez*, 913 F.2d 148, 158 (4th Cir. 1990) (holding that the district court properly rejected the government's proposed substitutions for classified materials where substitutions failed to provide defendant with substantially the same ability to defend himself as disclosure of specific classified information would have provided); *United States v. Clegg*, 846 F.2d 1221, 1224 (9th Cir. 1988) (holding that the denial of the government's motion under § 6(c) to substitute nonclassified information for the classified information the defendant proposed to introduce at trial was proper where the proposed substitution would decrease the reasonableness of the defendant's belief that the government approved his activities, which was the core of his defense).

458. *See, e.g., United States v. Herrero*, 893 F.2d 1512 (7th Cir. 1990) (finding no infringement of defendant's right to effective assistance of counsel where the court prohibited defense counsel from revealing the name of the confidential informant to the defendant); *United States v. Hung*, 667 F.2d 1105, 1107 (4th Cir. 1981) (finding no violation of the Sixth Amendment right to counsel where defense counsel, but not the defendants, were allowed to examine documents to assist the court in making Jencks Act determinations); *United States v. Pelton*, 578

defendant and his attorney should only be imposed in limited circumstances and should be no more restrictive than necessary to protect the countervailing interests at stake.”⁴⁵⁹ It is beyond the scope of this Article to analyze when a particular substitution might or might not be appropriate. The important point is that the goal of substitution is “to place the defendant, as nearly as possible, in the position he would be in if the classified information were available to him”⁴⁶⁰ while at the same time protecting national security information from unnecessary disclosure.

Moreover, defendants would be advantaged with the passage of this proposal. Presently, the CIPA substitution proceedings allow the government to unilaterally propose substitutions. In contrast, the proposal suggested here grants defense counsel input into establishing the necessary substitutions because he has already been given access to the classified material and is able to know what information will likely be necessary for his client to receive a fair trial. Of course, the judge will make the final determination in both instances, but the latter clearly provides more protection for the defendant than does the former, which itself has been upheld numerous times.⁴⁶¹

F.2d 701, 707 (8th Cir. 1978) (upholding the district court’s decision to withhold from the defendant tape recordings of her voice in order to protect the identity of cooperating witnesses); *United States v. Anderson*, 509 F.2d 724, 730 (9th Cir. 1974) (permitting defense counsel, but not defendant, access to in camera hearing).

459. *Bin Laden*, 2001 WL 66393, at *3 (citing *Geders v. United States*, 425 U.S. 80, 89–91 (1976) (holding that defendant was unconstitutionally denied the effective assistance of counsel when he was ordered by the trial judge not to confer with counsel about anything during a seventeen-hour recess between defendant’s direct and cross-examination)); *see also* *Morgan v. Bennett*, 204 F.3d 360, 365 (2d Cir. 2000) (“[T]he court may not properly restrict the attorney’s ability to advise the defendant unless the defendant’s right to receive such advice is outweighed by some other important interest.”).

460. *United States v. Moussaoui*, 382 F.3d 453, 477 (4th Cir. 2004).

461. *See, e.g., id.* (holding that substitution adequately protected defendant’s constitutional rights); *United States v. Rewald*, 889 F.2d 836, 847 (9th Cir. 1989) (noting that “CIPA permits the district court to authorize the government to redact information from classified documents, to substitute a summary of the information in the documents, or to substitute a statement admitting relevant facts”); *United States v. Collins*, 603 F. Supp. 301, 304–05 (S.D. Fla. 1985) (denying vagueness challenge to CIPA § 6(c)); *see also* *Shea, supra* note 395, at 670 (noting that thus far “no court has struck a provision of CIPA based on violation of the defendant’s constitutional rights”).

This is not to say that all of the government’s proposed substitutions will be used instead of the classified information, for on some occasions the courts may

The third proposal involves slightly altering certain procedures already accepted in other areas of criminal procedure to better protect national security information while still adequately protecting the defendant's rights during the course of a trial. The alterations would allow witnesses, in certain limited instances, to testify outside the presence of the defendant and allow the court to use technology to prevent the defendant from seeing the witness's face or hearing certain classified information. This proposal draws largely from the Court's approval, in *Maryland v. Craig*, of the use of a closed circuit video feed to allow a child victim to testify against her abuser outside of the defendant's presence.⁴⁶² Recognizing that such techniques are acceptable in certain circumstances, slight alterations could be made in the context of CIPA to allow for greater protection of classified information. First, one could alter the witness's appearance in order to protect his identity from being disclosed to the defendant if such disclosure might jeopardize national security. Second, and perhaps more importantly, a time delay could be imposed on the video feed so as to allow for necessary edits. Such a procedure has been used in other circumstances to edit for content, but has not, to the Author's knowledge, ever been used in trial proceedings.⁴⁶³ Although this would be a novel use of technology, if coupled with the proposed substitution procedures discussed above, it would provide adequate safeguards to the defendant's rights and increase the safekeeping of national security information.

The aforementioned proposals only scratch the surface of the possibilities for amending CIPA. All proposed amendments

find the proposed substitutions inadequate to guarantee a full and fair trial. *See, e.g., Fernandez*, 913 F.2d at 148 (affirming district court's rejection of government's proposed substitutions and dismissal of the indictment); *Clegg*, 846 F.2d at 1221 (affirming district court's denial of government's motion for substitution of non-classified summaries for classified documents). *Contra United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (upholding substitution as within the trial court's discretion); *Rezaq*, 134 F.3d at 1143 (concluding that proposed substitutions for classified documents were acceptable because "[n]o information was omitted from the substitutions that might have been helpful to [the] defense, and the discoverable documents had no unclassified features that might have been disclosed to" the defendant).

462. This case is discussed in more detail in *supra* Part II.A.1.

463. *See* CNN.com, *CBS to Use 'Enhanced' Tape-delay for Grammys*, Feb. 4, 2004, <http://www.cnn.com/2004/SHOWBIZ/TV/02/03/grammys.tape.delay/> (describing a response to the infamous Janet Jackson "wardrobe malfunction" at the Super Bowl).

should strive, as the proposals stated in this Article do, to maintain consistency with constitutional safeguards as presently understood while at the same time strengthening the protection afforded to the government's national security interests and reaffirming the tradition of the courts to "show[] great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs."⁴⁶⁴

III. THE PRO SE PROBLEM

The aforementioned amendments may enhance the national security value of CIPA. All of them depend, however, on the accuracy of one crucial assumption: the accused is represented by counsel. What happens, then, when the accused seeks to represent himself pro se? While this issue was not presented in *Hamdan*, it certainly was on the minds of those involved in the dispute.⁴⁶⁵ The issue did arise in *United States v. Moussaoui*, in which the defendant sought to represent himself pro se. In that case, the lower court vacillated in deciding whether to grant the defendant the right to represent himself. Moussaoui was originally allowed to represent himself with standby counsel,⁴⁶⁶ but his disruptive behavior caused the trial judge to remove his right to represent himself.⁴⁶⁷ One of the dangers of allowing an alleged terrorist to represent himself throughout the trial is that he might gain access to classified information that he could

464. *Hamdi v. Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002).

465. Amici in *Hamdan* argued that "excluding an accused from essential proceedings would effectively deny a pro se accused his right of self-representation." See Brief of Military Attorneys Detailed to Represent Ali Hamza Ahmad Sulayman Al Bahlul Before a Military Commission as Amicus Curiae in Support of Petitioner-Appellee and Affirmance, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2004) (No. 04-5393).

466. See *United States v. Moussaoui*, No. CRIM.01-455-A, 2002 WL 1311730 (E.D. Va. Apr. 29, 2002) (deferring request by Moussaoui to dismiss his court appointed counsel); *United States v. Moussaoui*, No. CRIM.01-455-A, 2002 WL 1311738 (E.D. Va. June 14, 2002) (granting motion to proceed pro se); *United States v. Moussaoui*, No. CRIM.01-455-A, 2002 WL 1311741 (E.D. Va. June 17, 2002) (appointing standby counsel).

467. The ruling of the district judge removing Moussaoui's pro se right is not posted yet on Westlaw but has been widely reported. See FISHER, *supra* note 78 at 214; Jerry Markon, *Court Reins in Terror Suspect*, WASH. POST, Dec. 30, 2003, at B3; Jerry Markon, *Lawyers Restored for Moussaoui*, WASH. POST, Nov. 15, 2003, at A2.

publicize during trial, a threat that was realized in *Moussaoui*⁴⁶⁸ and that would undermine U.S. efforts in the war on terror.⁴⁶⁹ This Part addresses the concerns related to pro se representation and concludes that there are procedures through which relevant national security concerns can be addressed.

The landmark case of *Faretta v. California* governs the right of a defendant to represent himself in criminal proceedings.⁴⁷⁰ In *Faretta*, the lower court, believing that a defendant's lack of knowledge about trial procedure would prevent him from adequately conducting his own defense, denied a defendant's request to represent himself.⁴⁷¹ The Supreme Court reversed, holding that the right to self-representation is "necessarily implied in the structure of the [Sixth] Amendment."⁴⁷² The Court found that, although the text of the amendment does not provide an independent right to self-representation, such a right was implied in the structure of the amendment and the historical roots of the right to counsel.⁴⁷³ The Sixth Amendment, it reasoned, is designed to "be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment."⁴⁷⁴ Further complicating this process is that unlike the denial of the right to be present, the refusal to allow a defendant to represent himself is considered a structural error and is thus subject to automatic reversal by courts of appeal.⁴⁷⁵

468. The government has already inadvertently disclosed classified material to Moussaoui since he began to represent himself. See *United States v. Moussaoui*, No. CR.A. 01-455-A, 2003 WL 1877698 (E.D. Va. Mar. 19, 2003).

469. See Neil A. Lewis, *Moussaoui's Defense Plan Complicates Terror Trial*, N.Y. TIMES, Apr. 26, 2002, at A12.

470. *Faretta v. California*, 422 U.S. 806 (1975).

471. *Id.* at 807–11.

472. *Id.* at 819.

473. *Id.* at 821.

474. *Id.* at 820.

475. See *McKaskle v. Wiggins*, 465 U.S. 168, 177–78 & n.8 (1984). In a now famous footnote, the Court commented that "[s]ince the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." *Id.* at 177–78 n.8; see *supra* Part II.A.2 for a discussion of structural error.

The Court in *Faretta*, however, recognized that the right to self-representation is not absolute.⁴⁷⁶ The Court reaffirmed this proposition in *McKaskle v. Wiggins* and at the same time concluded that court appointment of standby counsel is fully consistent with a defendant's right to self-representation.⁴⁷⁷ One purpose of standby counsel is merely to aid the defendant in overcoming "routine procedural or evidentiary obstacles."⁴⁷⁸ The permissibility of the participation of standby counsel is judged on a case-by-case basis under a two-pronged test: (1) whether standby counsel's participation, over defendant's objection, "effectively allow[ed] counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance;" and (2) whether other participation of standby counsel "destroy[ed] the jury's perception that the defendant is representing himself."⁴⁷⁹

Courts faced with challenges to the appointment of standby counsel have developed distinctions between the role of standby counsel outside the presence of the jury (for example, at a preliminary hearing) and during the trial with the jury present. The conduct of standby counsel outside the presence of a jury has been treated as rarely objectionable and is based on the belief that the trial judge is "considered capable of differentiating the claims presented by a *pro se* defendant from those presented by standby counsel. Accordingly, the appearance of a *pro se* defendant's self-representation will not be unacceptably undermined by counsel's participation outside the presence of the jury."⁴⁸⁰

This flexibility outside the presence of the jury is beneficial for terrorism trials, and more specifically for the proposals above. Indeed, when the defendant in *Moussaoui* was proceeding *pro se*, the district court felt it necessary to appoint standby

476. *Faretta*, 422 U.S. at 834 n.46.

477. *McKaskle*, 465 U.S. at 176-77, 184.

478. *Id.* at 183.

479. *Id.* at 178; *see also* State v. Davenport, 827 A.2d 1063, 1071 (N.J. 2003) (emphasis omitted). The New Jersey Supreme Court concluded that in order to establish a violation of the *Faretta* right to self-representation, a "defendant must show that the participation of standby counsel either (1) deprived him of actual control over the case that he presented to the jury, or (2) destroyed the perception of the jury that defendant was representing himself and in control of the case." *Id.* at 1071.

480. *McKaskle*, 465 U.S. at 179 (citations omitted).

counsel to, among other things, review the classified national security documents once counsel had received the appropriate security clearance.⁴⁸¹ When Moussaoui challenged his exclusion from reviewing the classified information, the district court ruled that “Moussaoui’s Fifth and Sixth Amendment rights are adequately protected by standby counsel’s review of the classified discovery and their participation in any proceedings held pursuant to [CIPA] . . . even though the defendant will be excluded from these proceedings.”⁴⁸² Under existing law there is no conflict between a defendant’s right to self-representation on the one hand and the use of standby counsel during pretrial hearings on the other. The proposal (mentioned above) to limit defendant presence during pretrial proceedings should therefore withstand constitutional scrutiny in this regard.⁴⁸³

The two latter proposals may face more strenuous objection because they relate to a defendant’s right to self-representation at trial.⁴⁸⁴ In *McKaskle*, the Court found that “unsolicited and excessively intrusive participation by standby counsel” may undermine the “objectives underlying” the right to self-representation.⁴⁸⁵ “In proceedings before a jury the defendant may legitimately be concerned that multiple voices for the defense will confuse the message the defendant wishes to convey, thus defeating *Faretta*’s objectives. Accordingly, the *Faretta* right must impose some limits on the extent of standby counsel’s unsolicited participation.”⁴⁸⁶ One of the primary limits imposed on standby counsel’s representation is that it not confuse “the jury’s perception that the defendant is representing himself.”⁴⁸⁷

This is not to say that standby counsel cannot be moderately active in the defense, for the Court has flatly rejected the propo-

481. *United States v. Moussaoui*, No. CRIM.01-455-A, 2002 WL 1311741 (E.D. Va. June 17, 2002) (ordering appointment of standby counsel); *see also* FISHER, *supra* note 78, at 213 (recognizing that Moussaoui would not have the same access to classified materials as would court-appointed counsel).

482. *United States v. Moussaoui*, No. CR. 01-455-A, 2002 WL 1987964 (E.D. Va. Aug. 23, 2002) (denying Moussaoui’s motion to gain access to classified information).

483. *See supra* notes 442–51 and accompanying text.

484. *See supra* notes 452–63 and accompanying text.

485. *McKaskle*, 465 U.S. at 177.

486. *Id.* (internal quotations omitted).

487. *Id.* at 178.

sition that standby counsel is “to be seen, but not heard.”⁴⁸⁸ Citing *McKaskle*, the Court in *Martinez v. California Court of Appeals* stated that “standby counsel may participate in the trial proceedings, even without the express consent of the defendant, so long as that participation does not ‘seriously undermin[e]’ the ‘appearance before the jury’ that the defendant is representing himself.”⁴⁸⁹ Indeed, even a pro se defendant’s right to cross-examine witnesses can be limited where circumstances so require.⁴⁹⁰ Unfortunately, the precise contours of standby counsel’s role have never been clearly prescribed and the law “gives little affirmative guidance to standby counsel.”⁴⁹¹

In evaluating a pro se defendant’s claim that he was denied his right to self-representation because of the interference of standby counsel, two main issues arise. The first is whether it appears to the jury that standby counsel, rather than the pro se defendant, has control over the matter. This inquiry appears straightforward, but it is not inflexible because standby counsel is allowed to assist the pro se defendant with the mechanics of trial even if it “somewhat undermines” the defendant’s appearance of control over the defense.⁴⁹² In the context of sexual abuse cases, the courts have commonly appointed standby counsel and required them to conduct the cross-examination of the alleged victim.⁴⁹³ For example, in *Fields v. Murray*,⁴⁹⁴ the Fourth Circuit rejected a pro se defendant’s allegation that a trial court order violated his right to self-representation by refusing to allow him to personally cross-examine the victim. The appellate court affirmed the trial court’s decision to require

488. *Wiggins v. Estelle*, 681 F.2d 266, 273 (5th Cir. 1982), *rev’d sub nom.* *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984).

489. *See* *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000) (citing *McKaskle*, 465 U.S. at 187) (quotations and alteration in original).

490. *See* *McKaskle*, 465 U.S. at 184; *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995).

491. Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 703 (2000). Poulin comments that “[j]udicial decisions, rules of professional responsibility, and standards promulgated by the American Bar Association provide minimal insight into the role of standby counsel.”

492. *McKaskle*, 465 U.S. at 184.

493. For a general discussion of this issue, see Julia Anderson, *The Sixth Amendment: Protecting Defendant’s Rights at the Expense of Child Victims*, 30 J. MARSHALL L. REV. 767 (1997).

494. 49 F.3d 1024 (4th Cir. 1995).

standby counsel to conduct the cross-examination of the victim.⁴⁹⁵ State courts have upheld similar determinations.⁴⁹⁶

Interestingly, another instance involved the appointment of standby counsel for the specific purpose of cross-examining a particular witness. In *United States v. Rahman*, numerous defendants were indicted for conspiring to bomb public buildings.⁴⁹⁷ The issue in that case involved whether one law firm could represent all of the defendants if each defendant had knowingly waived the conflict of interest. Despite the strenuous objections of the defendants and their counsel, the court ordered the appointment of standby counsel “to conduct cross-examination of any former client of the . . . firm who takes the stand at trial, so as to minimize the risk that that client’s privileged communications to the . . . firm will influence the cross-examination.”⁴⁹⁸ Although *Rahman* does not directly confront the issue of the right to be present, it does demonstrate that, in unique circumstances, courts may fashion exceptions to the

495. *Id.* at 1034–37. This decision was later reaffirmed in *Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000). The *Bell* court stated:

We think it reasonable for the trial court to have concluded on the basis of the facts before it that the[] eleven through thirteen-year-old girls who had experienced repeated sexual abuse would be emotionally harmed if they were personally cross-examined in open court by [the defendant], their alleged abuser. We therefore find adequate the trial court’s determination that denial of this personal cross-examination was necessary to prevent emotional trauma to the girls.

Id. at 174 n.18 (quoting *Fields*, 49 F.3d at 1036).

496. See, e.g., *State v. Taylor*, 562 A.2d 445, 454 (R.I. 1989); *In re Adoption of J.S.P.L.*, 532 N.W.2d 653, 661–62 (N.D. 1995); *State v. Estabrook*, 842 P.2d 1001, 1006 (Wash. App. Div. 2 1993). *Contra* *Commonwealth v. Conefrey*, 570 N.E.2d 1384 (Mass. 1991) (reversing the lower court’s ruling requiring standby counsel to conduct the witness examination). The *Conefrey* court stated:

The *mere belief* held by the judge that the complainant could be intimidated or harmed beyond the normal limits associated with a trial involving a young complainant, or that she might respond untruthfully if she was questioned by the defendant, is not sufficient to justify the restriction placed on cross-examination. If it had been formally established during a *voir dire*, or in the course of the cross-examination itself, that the defendant would or could not conduct a proper examination without interfering with the rights of the complainant or distorting the truth-seeking function of the trial, the judge might have been correct in limiting the form of the defendant’s cross-examination.

Id. at 1390–91.

497. *United States v. Rahman*, 837 F. Supp. 64 (S.D.N.Y. 1993).

498. *Id.* at 71.

right to counsel and appoint standby counsel to conduct a particular cross-examination.⁴⁹⁹

However, the *Fields* line of cases has potential negative implications for the present inquiry. First, the extent to which the sexual abuse cases can be used in this context should not be overstated. The issue of self-representation was not necessary to the disposition of *Fields* because the court ruled that the defendant had waived his right to represent himself.⁵⁰⁰ Furthermore, *Fields* “desired to proceed *pro se* only . . . to cross-examine personally the young girls” whom he was charged of raping.⁵⁰¹ Given the trauma involved in the crime and the cross-examination,⁵⁰² the trial court’s decision to preclude the pro se defendant from cross-examining the girls was consistent with public policy.⁵⁰³ Second, the circumstances in which courts have allowed the appointment of standby counsel are narrow. Although the pro se defendant in *Fields* was not permitted to conduct cross-examination, the court decided this way because the purposes of self-representation were “otherwise assured,”⁵⁰⁴ which meant that the defendant maintained the right to face the accuser, to observe the witnesses’ testimony, and to direct counsel to ask specific questions.⁵⁰⁵

These narrow exceptions do not necessarily mean that limitations cannot be placed on a pro se defendant’s right to self-representation in a terrorism trial. Comparing the public policy involved in the sexual abuse cases and in *Rahman* to the public

499. The scope of the right of counsel is particularly relevant to the question of whether a terrorist defendant may choose his own counsel, and from the jurisprudence one can speculate that such a right may be limited.

500. *Fields v. Murray*, 49 F.3d 1024, 1034 (4th Cir. 1995).

501. *Id.*

502. *Id.* at 1036. The court noted that

all of these girls “call[ed] him dad,” and that he had treated them “as if they were [his] own kids.” This letter admitted that one of these girls had “burst into tears” at a preliminary hearing “because she was embarrassed” and that the same girl “had wet the bed repeatedly.” Further, *Fields* declared in this letter that in cross-examining the girls he would “not approach them closer than three feet and . . . would request the courts [sic] permission if for some reason he needed to get closer;” despite *Fields*’ protestations to the contrary, it can be inferred from this statement that *Fields*’ intention in the cross-examination was to intimidate the girls, especially given their close relationship to him.

Id.

503. *Id.* at 1037.

504. *Id.* at 1034 (quoting *Maryland v. Craig*, 497 U.S. 836, 850 (1990)).

505. *Fields*, 49 F.3d at 1035–36.

policy issues in terrorism trials, it is not unreasonable to amplify the deference given to the government to undertake its prosecution. In addition, a curative instruction to the jury regarding why the defendant is absent or why standby counsel is examining a particular witness might increase the likelihood that the jury will understand that the defendant still represents himself.⁵⁰⁶

Like much of the previous discussion, a particular determination of whether standby counsel's conduct caused the jury to perceive that the defendant was no longer representing himself will likely turn on a holistic consideration of the facts; no one fact is likely to be dispositive. In the context of a pro se defendant, the more classified information that is presented at trial, the more that a pro se defendant will be excluded. Thus, standby counsel will control more of the trial and increase the likelihood that any conviction will be reversed on appeal. There is no categorical or per se rule, however, that would prevent a limitation on the right to proceed pro se without the assistance of standby counsel.

The second area of concern regarding the appointment of standby counsel is the fear of unduly prejudicing the defense, regardless of the public policy interest involved. Little case law exists in this area. Notably, in the cases mentioned above, no trial or appellate court found that a defendant was unduly prejudiced by the conduct of standby counsel alone.⁵⁰⁷ In the context of this Article's proposals, the inquiry must be whether the defendant's right to self-representation would be unduly prejudiced if he were excluded from portions of his trial.

Although not directly on point, there is a small but controversial line of cases that involve a pro se defendant who was shackled *while* he was representing himself. In those cases, the courts found that the shackles did not infringe upon the defendant's right to self-representation.⁵⁰⁸ In *Stewart v. Corbin*, the Ninth Circuit allowed the shackling of a pro se defendant be-

506. Similar instructions have been given regarding the substitution of classified information. For example, in *Moussaoui* the jury was to be told that the government provided substitute testimony derived from statements of the witnesses made "under conditions that provide circumstantial guarantees of reliability." *United States v. Moussaoui*, 382 F.3d 453, 480 (4th Cir. 2004).

507. See *Fields*, 49 F.3d at 1034; *In re Adoption of J.S.P.L.*, 532 N.W.2d 653, 661-62 (N.D. 1995); *State v. Taylor*, 562 A.2d 445, 454 (R.I. 1989); *State v. Estabrook*, 842 P.2d 1001, 1006 (Wash. App. Div. 2 1993).

508. See Brooksany Barrowes, Comment, *The Permissibility of Shackling or Gaging Pro Se Criminal Defendants*, 1998 U. CHI. LEGAL. F. 349, 349 (1998).

cause evidence submitted before trial “tend[ed] to show that [the defendant] was a violent, disruptive, dangerous and contumacious individual who was a very high escape risk and who also presented a distinct risk of physical assault to courtroom personnel.”⁵⁰⁹ Perhaps more interestingly, the defendant in *Corbin* was also gagged during portions of the trial.⁵¹⁰ The court imposed this restriction because the defendant “began his opening statement to the jury by telling them that the victim was a convicted car thief” and “[w]hen the trial court warned [the defendant] that his behavior was unacceptable, [he] blurted out twice that he had been denied the opportunity to take a lie detector test.”⁵¹¹ After offering the defendant “the option of continuing the trial in a soundproof cell,” which he unsurprisingly denied, the court appointed standby counsel and ordered the defendant gagged.⁵¹² Occasionally, when the jury was out of the courtroom, the court ordered the gag removed so that the defendant could converse with counsel.⁵¹³ The Ninth Circuit held that even though the gag and the shackles interfered with Stewart’s right of self-representation, the interference was necessary; therefore, the trial court’s decision to gag and shackle the defendant did not violate his right to self-representation.⁵¹⁴ The Eighth Circuit made essentially the same ruling in a similar case involving the same defendant.⁵¹⁵

Even though cases like these are both rare and controversial, and not all courts have ruled in the same fashion,⁵¹⁶ they nevertheless provide a useful guide as to the extent to which the right to self-representation might be limited. Concerns about shackling and gagging generally are outside the scope of the

509. *Stewart v. Corbin*, 850 F.2d 492, 494 (9th Cir. 1988).

510. *Id.* at 496.

511. *Id.* at 495.

512. *Id.* at 496.

513. *Id.*

514. *Corbin*, 850 F.2d at 500.

515. *United States v. Stewart*, 20 F.3d 911 (8th Cir. 1994) (reaching the same holding as the *Corbin* court). The Eighth Circuit said the possibility of prejudice resulting from shackling the defendant must be balanced against the “need to maintain order in the courtroom and custody over incarcerated persons.” *Id.* at 915.

516. *See Oses v. Massachusetts*, 961 F.2d 985, 986 (1st Cir. 1992) (holding that restraining the pro se defendant with leg irons, wrist manacles, and attempting to gag him was a clear violation of the right to self-representation). This case, however, can be distinguished based on its facts and the hostility of the judge.

inquiry,⁵¹⁷ yet these cases demonstrate that even though such protective measures necessarily prejudice a pro se defendant's right to self-representation, in limited circumstances, the courts have found such measures appropriate and consistent with a defendant's right to self-representation.

In considering prejudice to the defendant, the relevant inquiry is how a given procedure appears to the jury. Comparing a situation where, on the one hand, a defendant either cross-examines a witness while walking in shackles or cannot cross-examine a witness because of a court-inserted gag, and on the other hand, a situation where a defendant is calmly led from the courtroom, the jury is told why the defendant must leave, and standby counsel conducts the examination, the latter does not appear to be more prejudicial than the former. If the court takes the procedures too far, objections will undoubtedly be raised and perhaps a conviction will be overturned. This Article is not concerned with *ex post* objections, but only whether the proposals outlined above can survive an *ex ante* attack. While case law is lacking, the aforementioned analogies suggest that there may be circumstances in which the above proposals would survive attack, even if the defendant is attempting to proceed pro se.

Finally, it is worth mentioning that the Supreme Court recently limited the right to self-representation when it rejected the claim that defendants have a right to represent themselves on appeal.⁵¹⁸ Coupling this development with the Supreme Court's own skeptical language in *Faretta*⁵¹⁹ has led some scholars to conclude that "the right to self-representation is surely the most likely to be eliminated by the Supreme Court in the

517. For a discussion, see Barrowes, *supra* note 508.

518. *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162–63 (2000).

519. *Faretta v. California*, 422 U.S. 806 (1975). The Court curiously commented that

There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant.

Id. at 832–33 (citations omitted).

foreseeable future—and deservedly so.”⁵²⁰ Commentators have routinely criticized the historical conclusions of *Faretta*⁵²¹ and, more importantly, have questioned the legitimacy and efficacy of the right to self-representation.⁵²² A perfect example is the fine line that courts must walk between “violating the defendant’s Sixth Amendment right to assistance of counsel and violating the defendant’s right to proceed *pro se*.”⁵²³ Every judge “must be alert to clever defendants who could seek to play one constitutional right against another, claiming that the trial judge either failed to restrict or overly restricted the role of standby counsel.”⁵²⁴ This balancing act can be easily seen in the post-conviction challenges commonly raised by *pro se* defendants. If standby counsel was very inactive, either of his own volition or per judicial instruction, the *pro se* defendant may claim that he was denied effective assistance of counsel. If, on the other hand, standby counsel was very active in the proceedings, the *pro se* defendant may allege that he was denied his right to represent himself. This demonstrates that the right to self-representation is becoming more limited, and if the present attacks continue, it may become further restricted in the future. Ultimately, this restriction would make it easier to deal with the *pro se* defendant in terrorism trials operating under the suggestions above.

520. Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 622 (2005).

521. See, e.g., Howard J. Schwab, *How Far Faretta: Creating Implied Constitutional Rights*, 6 SAN FERN. V. L. REV. 1, 8–11 (1977) (accusing the Court of taking out “bits and pieces of the past” to support its argument); Marlee S. Myers, Note, *A Fool for a Client: The Supreme Court Rules on the Pro Se Right*, 37 U. PITT. L. REV. 403, 407–09 (1975) (arguing that the majority’s historical analysis was both irrelevant and incorrect); Kenneth J. Weinberger, Note, *A Constitutional Right to Self-Representation—Faretta v. California*, 25 DEPAUL L. REV. 774, 779–80 (1976) (suggesting that the Court incorrectly assumed the Framers regarded self-representation as fundamental).

522. See Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 165 (2000) (arguing that the defendant’s abuse of the right alone is reason enough to do away with its guarantee); Toone, *supra* note 520, at 623 (arguing that the personal autonomy rationale in *Faretta* is deeply flawed and logically incorrect).

523. Poulin, *supra* note 491, at 678.

524. *Molino v. DuBois*, 848 F. Supp. 11, 14 (D. Mass. 1994); see also *United States v. Singleton*, 107 F.3d 1091, 1095–96 (4th Cir. 1997) (discussing the difficulty of protecting both the right to assistance of counsel and the right to self-representation).

Perhaps, however, this inquiry is not even necessary in terrorism trials. Courts could require terrorists to utilize standby counsel even to the point where the counsel essentially acts as a full representative, rather than as a useful aid. This requirement would have been particularly beneficial in the trial of Zacarias Moussaoui. Moussaoui espoused fundamentalist rhetoric and criticized the judicial proceedings and officers throughout his pro se representation.⁵²⁵ Although the court tolerated such abuse during the pretrial phases, the court was less forgiving of Moussaoui's transgressions once the jury became involved. While Moussaoui might have required some form of restraint similar to restrictions placed on the defendant in *Corbin*, that did not occur. Recall that "[i]n every trial there is more at stake than just the interests of the accused."⁵²⁶ Sexual abuse cases implicate the interests of the victims, conflict-of-interest cases raise attorney-client privilege issues, and terrorism trials create national security concerns. The concerns regarding the security of classified information are no doubt as compelling as the aforementioned interests, if not more so.⁵²⁷ In terrorism prosecutions, "the public interest [may be] so great that the presence and participation of counsel, even when opposed by the accused, [may be] warranted in order to vindicate the process itself."⁵²⁸

IV. CONCLUSION

"In wartime, reason and history both suggest that [the balance between freedom and order] shifts . . . in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being."⁵²⁹ Recent terrorism prosecu-

525. See *United States v. Moussaoui*, No. 1:01CR00455 (E.D. Va. Dec. 11, 2001), and the numerous motions, pleadings, and orders therein.

526. *Mayberry v. Pennsylvania*, 400 U.S. 455, 468 (1971) (Burger, C.J., concurring).

527. See, e.g., *United States v. Haugen*, 58 F. Supp. 436 (E.D. Wash. 1944). The court commented that "[t]he right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable." *Id.* at 438.

528. *Mayberry*, 400 U.S. at 468.

529. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 222 (1998); see also RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006). Posner comments that "the proper way to think about constitutional rights in a time like this is in terms of the metaphor of a balance . . . with

tions demonstrate the tension between the duty of government to safeguard national security interests and its obligation to prosecute individuals who violate the law.⁵³⁰ This tension served as a central justification for the creation of military commissions, whose purpose was “to do justice[,] and if the effect of a technical rule is found to exclude material facts, or otherwise obstruct a full investigation, the rule may, and should be, departed from.”⁵³¹ Such commissions have not only been utilized for years,⁵³² but more importantly, may be adapted to fit the exigencies of a particular conflict.⁵³³ This flexibility should have caused Congress to more closely examine the notion of presence, and the MCA should have included the option to exclude a defendant from portions of trial in order to protect national security information.

The right to be present in federal court is not as inflexible as one might imagine. Rather, throughout history this right has been subject to limited exceptions. Certainly the exclusion of a defendant from a large portion of his trial would create substantial constitutional concerns. As *Craig* and *Stincer* demonstrate, however, exclusion may be appropriate when it is necessary to protect a vital public policy like national security.⁵³⁴ Nevertheless, the procedures that might be necessary or helpful in protecting classified national security information could raise a number of constitutional concerns. Although these concerns might be overcome,⁵³⁵ an obvious question arises: Would it be better for the nation and perhaps even the alleged terror-

the balance needing and receiving readjustment from time to time as the weights of the respective interests change.” *Id.* at 148.

530. See S. REP. NO. 96-823, at 3 (1980); see also YOO, INSIDER’S ACCOUNT, *supra* note 50, at 204, 216 (noting that the purpose behind military commissions is to balance the competing needs for security and fair trials, and that military commissions are the “historic compromise” between these two goals).

531. DUDLEY, *supra* note 148, at 246.

532. See Green, *supra* note 129; Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT’L L. 328, 332 (2002); Hugh Latimer, *A Legitimate Tool*, NAT’L L.J., Apr. 15, 2001, at A21 (“The legitimacy of using military commissions in this country for trying ‘unlawful combatants,’ such as members of Al-Qaeda charged with violating the laws of war, is not open to serious question.”).

533. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion of O’Connor, J.); Madsen v. Kinsella, 343 U.S. 341, 347–48 (1952); *In re Yamashita*, 327 U.S. 1, 18–23 (1946).

534. See *supra* Part II.A.

535. See *supra* Part II.B.3.

ists to be tried before a military commission or similar judicial forum?⁵³⁶

Rather than drastically altering our civilian justice system to accommodate terrorism trials, perhaps it makes more sense to assign such individuals to trial before military commissions.⁵³⁷ “During war there is a natural tension between legal safeguards and the military mission. American criminal procedures, established during peacetime, are sometimes out-of-place on the battlefield.”⁵³⁸ After all, although many of the procedures created by Military Order No. 1 may “fall far short of those that would apply to U.S. citizens or military members tried by court-martial,”⁵³⁹ they are nonetheless permissible in military commissions, at least where necessity is shown.⁵⁴⁰ Such deviations are normal, and U.S. courts historically have accepted them as legitimate.⁵⁴¹ Even Nuremberg, often hailed as a triumph of international law, recognized the power to exclude the defendant from portions of trial when the Tribunal felt it necessary or practicable.⁵⁴² Despite the legitimacy of altering

536. There has been some suggestion that the costs of trying terrorists in federal court outweighs the possible benefits and should thus be avoided. See Andrew Cohen, *It's Just Not Worth It* (Feb. 7, 2005), <http://www.cbsnews.com/stories/2006/02/07/opinion/courtwatch/printable1289212.shtml>. It has even been suggested that perhaps the best course of action is not to try accused terrorists at all, but rather to hold them until the end of hostilities. See David Glazier, *Why Try Them At All?, Intel Dump* (Aug. 5, 2006), http://inteldump.powerblogs.com/archives/archive_2006_07_30-2006_08_05.shtml#1154768913.

537. Belknap, *supra* note 132, at 447 (“The use of such tribunals to try terrorists apprehended outside the United States for war crimes committed in other countries, such as Afghanistan, makes a good deal of sense.”); Hemingway, *supra* note 138, at 10 (“[M]ilitary commissions strike the perfect balance between providing a full and fair trial while at the same time protecting national security information.”); *but see* Dorf, *supra* note 211 (“[I]t is hardly obvious that the criminal justice system is, in fact, inadequate for trying terrorists.”).

538. R. Peter Masterson, *Military Commissions and the War on Terrorism*, 36 INT’L L. 1165, 1172 (2002).

539. Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT’L L. 320, 328 (2002).

540. Passage of the MCA does not alter this conclusion generally because it gives the Executive wide latitude in a number of areas. It also does not alter this fact as it relates to presence. Not only would it have been permissible for Congress to allow the exclusion of an accused from portions of trial, but also a strong argument can be made that the provisions in the MCA do in fact exclude the defendant from relevant portions of trial, although those procedures are dressed up in notions of *in camera* and *ex parte* hearings.

541. *Contra* FISHER, *supra* note 78, at 255 (arguing that whatever was tolerable at the time of *Quirin* is not acceptable today).

542. See *supra* note 164 and accompanying text.

the procedures in federal criminal court, numerous objections may emanate not only from the legal issues involved, but also from political concerns that have increasingly infiltrated the civilian justice system.

There certainly are advantages of keeping these trials in military commissions. Not only do more procedural and constitutional hurdles arise in federal court, but more importantly, the interests of the government are not guaranteed the same protection as could be given in military commissions, even assuming the above suggestions apply to federal criminal proceedings. One must remember that “terrorists are not common criminals, and they have been tried as such only with difficulty.”⁵⁴³ The case of Zacarias Moussaoui provides an excellent example of some of the problems that arise in a federal trial. Perhaps Moussaoui’s case should have been brought before a military commission.⁵⁴⁴ In *Moussaoui*, there was a sea of highly sensitive information to which the defendant had to have access, albeit in summary form, despite the security consequences of providing such information.⁵⁴⁵ The district court explicitly recognized this conflict, commenting that “[w]hen the government elected to bring Moussaoui to trial in this civilian tribunal, it assumed the responsibility of abiding by well-established principles of due process.”⁵⁴⁶ Not only does this display the obvious complications of conducting terrorism trials in federal court, but it also suggests that the trial of such individuals could properly proceed before a military commission. Some have observed that “taking Moussaoui out of the civilian justice system would both better address security concerns and create a firewall so that existing constitutional prin-

543. Solis, *supra* note 145, at 195.

544. See YOO, INSIDER’S ACCOUNT, *supra* note 50, at 210 (commenting that the Moussaoui trial “shows why the civilian criminal justice system is inadequate to the task of fighting” terrorism); *id.* at 229 (commenting that Moussaoui’s trial showed that “civilian courts with juries, maximum civil rights protections, and the luxury of time cannot handle enemy combatants in wartime”); Lewis, *supra* note 469, at A12.

545. See Wedgwood, *supra* note 532, at 330 (“Any intelligence used as proof against a defendant must, by definition, also be revealed to state or nonstate adversaries who care to listen.”); see also Coffey, *supra* note 146, at A16 (discussing *Brady v. Maryland*, 373 U.S. 83 (1963)).

546. United States v. Moussaoui, No. CR. 01-455-A, 2003 WL 21263699 at *6 (E.D. Va. Mar. 10, 2003) (mem).

ciples in civilian trial don't start to bend under the weight of the war on terror."⁵⁴⁷

Another unaddressed concern that may further promote trying suspected terrorists in military commissions rather than federal courts is the jury.⁵⁴⁸ There is no doubt that the right to a jury trial does not attach to military commissions.⁵⁴⁹ In contrast, the Constitution, which fully governs trials in federal courts even if it does not fully govern military trials, clearly provides that the defendant has a right to be tried by a jury upon his re-

547. Coffey, *supra* note 146, at A16; *see also* YOO, INSIDER'S ACCOUNT, *supra* note 50, at 219 (noting that a principal concern about trying terrorists in civilian court "ought to be that compromises that favor national security will permanently affect our domestic criminal law in times of peace").

In fact, the government deliberated about removing Moussaoui to a military commission rather than proceeding with trial in federal court. *See* Susan Schmidt, *Prosecution of Moussaoui Nears a Crossroad*, WASH. POST, Jan. 21, 2003, at A8. Senators likewise wondered why the United States was not trying him before a military commission. At an Armed Services Committee hearing, Senator Joseph Lieberman asked, "If we will not try Zacarias Moussaoui before a military tribunal, who will we try in a military tribunal?" Walter Pincus, *Senators Ask: Why No Tribunal for Suspect?*, WASH. POST, Dec. 13, 2001, at A14. Senator Carl Levin expressed a similar sentiment, stating that "the glove fits so perfectly here." Katharine Q. Seelye, *Justice Department Decision to Forgo Tribunal Bypasses Pentagon*, N.Y. TIMES, Dec. 13, 2001, at B6.

548. When Congress was considering the adoption of the UCMJ, it considered why courts-martial should not have the same procedural and due process rights as civilian trials. George Spiegelberg, then-chairman of the special committee military justice for the ABA, responded that different rights were accorded "[b]ecause trials of civilians in time of peace are not the same as the trial of soldiers, sailors, and airmen in a time of war. There must necessarily be a certain giving up of constitutional guarantees." *UCMJ Senate Hearings*, *supra* note 96, at 81. When asked why, he responded, "[b]ecause it would be impossible, for instance, in a foreign theater to have a civilian jury sit in case of an enlisted man or an officer charged with a crime in that region." *Id.* Indeed, at the hearings it was commented that although the civilian jury system proceeds upon the notion that its better for 99 guilty men to go free than to convict one innocent man, "if an army must face the problem of the 99 and 1, its decision would be—must be—that the 1 innocent man will have to suffer if that is the cost of convicting his 99 guilty comrades." *Id.* at 139 (statement of Frederick Bernays Weiner).

A further problem with jury trials, which is beyond the scope of this Article, is the concern that juror sympathies and assumptions will lead to an unfair jury. *See* Neal Vidmar, *Trial by Jury Involving Persons Accused of Terrorism or Supporting Terrorism*, in *LAW AND PSYCHOLOGY* (Freeman ed. 2006), available at <http://ssrn.com/abstract=934792>.

549. TILLOTSON, *supra* note 142, at 196; *see also* *DeWar v. Hunter*, 170 F.2d 993, 997 (10th Cir. 1948) (holding that the right to a jury trial under the Sixth Amendment does not attach to courts-martial). Necessarily this holding means that no right to a jury trial exists before military commissions.

quest.⁵⁵⁰ There are two implications of this divergent practice. First, there seems to be an implicit conflict between the purpose of the jury and the goal of a terrorism trial. The civilian legal system “is designed to err on the side of letting the guilty go free rather than convicting the innocent.”⁵⁵¹ When the United States is faced with terrorist attacks, however, some argue that “we can no longer afford procedures that err so heavily on the side of freeing the guilty. Protection of society and the lives of thousands of potential victims becomes paramount.”⁵⁵² Although this Article does not necessarily support the above proposition taken to its logical extreme, it is nevertheless useful to recognize, as did the court in *Moussaoui*, that after September 11th there has been an increased tension in balancing national security interests and constitutional rights.⁵⁵³

The second aspect of the jury trial that raises national security concerns is its very existence.⁵⁵⁴ The jury itself may, at least in a limited way, undermine the rationale for the above proposals. After all, if the information sought to be excluded from the defendant is so important to national security, what would justify allowing a lay jury to have such information? Although the risks of disclosure by the jury are surely not as high as those arising from a particular defendant, they are nonetheless present and must be considered. In the context of the military commission, however, the secret information would only be disclosed to the judge, who presumably has undergone background and security checks and is less likely to disclose the information.

550. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” (emphasis added)).

551. Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 379 (1996).

552. *Id.*

553. This tension was surely present prior to September 11th, but has been brought into sharper focus in the post-September 11th criminal proceedings. See, e.g., *United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 21263699 at *5-6 (E.D. Va. Mar. 10, 2003) (mem).

554. This statement should not be read as a criticism of the right to a jury trial which is a fundamental and proper aspect of our civilian justice system that should not be altered or limited. Recognition that when it comes to trying terrorists, the jury trial system possesses significant problems regarding the disclosure of classified information is important, however. See FISHER, *supra* note 78, at 216-21 (discussing the issue of a “public trial” in *Moussaoui*).

One solution to the “jury problem” is to try the accused in civilian court outside the presence of the jury.⁵⁵⁵ This suggestion is derived largely from *Quirin*, in which the Court noted that not all trials in civilian court require a trial by jury and that those offenses that could be tried without a jury at common law do not fall within the constitutional right to a jury trial.⁵⁵⁶ Although this Article does not fully address the jury trial issue, it must be noted that this proposition is questionable. First, *Quirin* was not concerned with the right to a jury trial in civilian court, but discussed only whether the right extends to military commissions; the Court found it does not.⁵⁵⁷ Second, the precedential force of *Quirin* has been seriously undermined (perhaps erroneously) by recent cases.⁵⁵⁸

Although trial before military commissions would be more secure and expeditious, some believe that terrorism trials would be more legitimate in civilian court and therefore suggest that terrorists should be tried in civilian court rather than in military commissions.⁵⁵⁹ Within this latter group are two divergent views. Some suggest that trial in civilian courts would be proper under existing procedures,⁵⁶⁰ and others suggest that although conducting trial in civilian courts is preferable, it requires some modification to existing law.⁵⁶¹ This Article would

555. Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 663 (2002).

556. *Ex parte Quirin*, 317 U.S. 1, 39–41 (1942).

557. *Id.* at 40–41. Indeed, the Constitution requires indictment by a grand jury “except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,” U.S. CONST. amend. V, but does not provide a similar exception for trial by jury. Thus, the structure of the Constitution indicates that trial by jury would be required even for accused terrorists.

558. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2749–77 (2006). In distinguishing the facts of the case from *Quirin*, the Court commented, “*Quirin* represents the high water mark of military power to try enemy combatants for war crimes.” *Id.* at 2777.

559. See *supra* notes 555–58 and accompanying text.

560. See Detlev Vagts, *Which Courts Should Try Persons Accused of Terrorism?*, 14 EUR. J. INT'L L. 313 (2003).

561. See HEYMANN & KAYYEM, *supra* note 386, at 51 (suggesting that trial in civilian courts would increase the perceived fairness given to alleged terrorists, but that in order to adequately protect the national security interest CIPA should be amended). Heymann and Kayyem comment that

[t]he present use of military commissions face grave difficulties in being, and especially in appearing to be unbiased, because they deal only with enemy soldiers, not with U.S. military personnel or civilians. Its procedures and rules of

certainly fall in the latter category. Although this Article does not take a position on whether criminal proceedings against terrorists should take place in civilian court or military commissions, this Article has sought to make one point clear: if trials are to be held in civilian court, existing procedures are not adequate to protect information relating to national security, and alterations to existing procedures must be made. The defendant's right to be present at trial is an obvious starting point for reform.

The right to be present before both military commissions and federal courts is a flexible concept, and it may be limited in appropriate circumstances.⁵⁶² The above suggestions only scratch the surface of possible legislative responses to limit the rights of a defendant in a terrorism trial, but the precise boundaries of such limitations can only be tested under the specific facts of an individual case. And even though procedures such as those outlined above could pass constitutional muster, they may not, on the whole, be the preferred method of confronting the legal aspects of the war on terror. One must move forward with the costs and benefits in mind and make a reasoned determination that recognizes not only the rights of the defendant, but also the national security interests of the United States. Proceeding in this manner allows one to consider better whether trial should be conducted before a military commission or alternatively in federal court, knowing that the defendant may, in either context, be excluded on a case-by-case basis.

evidence were decided *ex parte* and for the particular defendants and not on the basis of legislation, open administrative process or precedent.

Id. at 55; see also Emanuel Gross, *Trying Terrorists—Justifications for Differing Trial Rules: The Balance Between Security Considerations and Human Rights*, 13 *IND. INT'L & COMP. L. REV.* 1 (2002). Gross argues that “[c]onducting the trial of terrorists within the existing system will achieve the goal of deterrence much more ably than conducting a trial in ‘secret’ tribunals.” *Id.* at 57. While Gross argues for trial in civilian courts, he takes a more restrictive view of defendants’ rights and suggests that many rights may be “justifiably violated . . . when dealing with the trial of terrorist suspects.” *Id.* at 55.

562. See *supra* Part II.A for a discussion of the potential flexibility of the confrontation requirement for terrorism trials held in federal court.