St. Mary's Law Journal

Volume 39 | Number 1 Article 5

1-1-2007

What We Owe the World are Thoughtful War-Crimes Trials That Do Justice without Unduly Jeopardizing Innocent Lives by Compromising Vital Intelligence Comment.

Sherry M. Barnash

COMMENT

"WHAT WE OWE THE WORLD ARE THOUGHTFUL WAR-CRIMES TRIALS THAT DO JUSTICE WITHOUT UNDULY JEOPARDIZING INNOCENT LIVES BY COMPROMISING VITAL INTELLIGENCE."[1]

SHERRY M. BARNASH

1. Andrew C. McCarthy, *Trials of This Century*, NAT'L REV., Oct. 9, 2006, at 38, 42.

I. OVERVIEW

In *Hamdan v. Rumsfeld*,[2] the United States Supreme Court held that the military commission convened to try accused terrorist Salim Ahmed Hamdan was unlawful.[3] The Court concluded that the Government could not lawfully proceed with its prosecution using the established commission rules, partly because the commission differed from courts-martial under the Uniform Code of Military Justice (UCMJ),[4] and partly because it did not follow certain aspects of the Geneva Conventions.[5] One procedure the

2. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

3. *Id.* at 2759 (concluding that Hamdan's commission structure and procedures did not comport with either the Uniform Code of Military Justice (UCMJ) or the Geneva Conventions).

4. 10 U.S.C. § 836 (2000); *Hamdan*, 126 S. Ct. at 2791 (deciding that the practicality showing required to deviate from court-martial procedures was different than that required to deviate from Article III court procedures, and that the President's determination of impracticability was insufficient). The Court determined that the uniformity requirement stated in Article 36(b) of the UCMJ meant that court-martial procedures must be followed unless the Government proves the existence of some exigency that necessitates deviation. *Id.* at 2756. But this interpretation leads one to wonder why Congress would provide for different types of military tribunals if they must be uniform. As Justice Thomas points out in his dissent, Article 36(b) is best understood to indicate a desire for uniformity among the different branches of the military, not between the different types of tribunals. *Id.* at 2842 (Thomas, J., dissenting); *see also Hearings Concerning Military Commissions in Light of the Supreme Court's Decision in* Hamdan v. Rumsfeld, 109th Cong. 8 (2006) (statement of David A. Schlueter, Hardy Professor of Law, St. Mary's University), 2006 WL 2007260, *available at* http://armed-services.senate.gov/statemnt/2006/July/Schlueter%2007-19-06.pdf, at 4 (stating that a desire to address dissimilar practices that existed among the various branches prior to enacting the UCMJ is the more common understanding of Article 36(b)).

5. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *Hamdan*, 126 S. Ct. at 2798 (stating the commission fails to meet the general requirements of Common Article 3). The plurality was particularly concerned with the provision allowing the defendant to be excluded from some proceedings if classified information might be compromised. *Id.* at 2797. Justice

Court found troubling was a provision in Military Commission Order No. 1[6] that allowed the exclusion of the defendant and his *civilian* counsel from certain proceedings. Section 6(B)(3) provided for the closure of part or all of a proceeding, but the defendant's *military* counsel could not be excluded.[7] Additionally, Section 6(D)(5)(b) denied the defendant personal access to classified evidence, if necessary, but no such evidence could be used against the defendant unless it had been provided to his military defense counsel.[8] Importantly, if denying such access deprived the defendant of a "full and fair trial," the evidence could not be admitted, regardless of its probative value.[9] Without deciding if this provision was "strictly 'contrary to or inconsistent with' other provisions of the UCMJ," the Court instead held that the President had not sufficiently justified non-courts-martial procedures.[10] This, despite the President's specific finding "that it

---

Kennedy, however, declined to consider whether Common Article 3 would prohibit this provision, agreeing with Justice Thomas that there were safeguards in place and noting that "it remains to be seen whether [Hamdan] will suffer any prejudicial exclusion." *Id.* at 2809 (Kennedy, J., concurring).

6. Military Commission Order No. 1 (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

7. *Id.* § 6(B)(3). The Commission Order was originally issued March 21, 2002, and that version was published in the Code of Federal Regulations. It was amended on August 31, 2005. The Court refers to the amended version in its opinion and uses the paragraph designations from the Order itself and not C.F.R. designations. For ease of comparison, the commentary in the text follows this same convention.

8. *Id.* § 6(D)(5)(b).

9. *Id.* The amended order includes the following text in section 6(D)(5)(b):

> The Accused and the Civilian Defense Counsel shall be provided access to Protected Information falling under Section 5(E) to the extent consistent with national security, law enforcement interests, and applicable law. If access to such Protected Information is denied and an adequate substitute for that information, such as described above, is unavailable, the Prosecution shall not introduce the Protected Information as evidence without the approval of the Chief Prosecutor; and the Presiding Officer, notwithstanding any determination of probative value under Section 6(D)(1), shall not admit the Protected Information as evidence if the admission of such evidence would result in the denial of a full and fair trial.

Id.

10. *Hamdan*, 126 S. Ct. at 2791 (interpreting Article 36(b) to require uniformity between the three types of military trials). While granting that the President's determination under 36(a) is due complete deference, the Court presumes any such determination under 36(b) requires *the Court* to decide whether the different procedures are practical. *Id.* at 2792; *see also id.* at 2801 (Kennedy, J., concurring) (citing the Court's conclusion that congressional language differences and the meaning of "practicable" require a judicial, not executive, determination of need for deviation). Given the general

is not practicable" to use standard procedures,[11] which is the only requirement listed in Article 36 of the UCMJ.[12]

But is denial of access something new? As it turns out, this provision is not as inconsistent with American jurisprudence as the plurality decision in *Hamdan* seems to suggest.[13] Nearly three decades ago, Congress enacted the Classified Information Procedures Act (CIPA).[14] Originally enacted to counter criminal defendants who threatened to reveal classified information if prosecuted,[15] CIPA provides for judicial review to prevent such

---

similarity between civilian criminal trials and military courts-martial, the Court's reasoning would make Article 36(b) redundant. If the statute allows the President to make a determination under 36(a) that "principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," *id.* at 2801 (Kennedy, J., concurring) (quoting 10 U.S.C. § 836 (2000)), are not practical for use in a military commission—a form of military adjudication distinct from courts-martial—it makes little sense to then require the commission rules to be uniform with those of a court-martial.

11. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002), *reprinted in* 10 U.S.C. § 801 (Supp. II 2002).

12. 10 U.S.C. § 836 (2000). Paragraph (a) provided that procedures for military commissions "may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in . . . United States district courts" so long as the procedures are consistent with the Code. *Id.* Paragraph (b) simply stated that the rules and regulations created under Article 36 "shall be uniform insofar as practicable." *Id.* Article 36 has since been amended to provide for a military commission exception as a response to the Court's holding. Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a)(3), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.A. § 836 (West Supp. 2007)).

13. *See Hamdan*, 126 S. Ct. at 2786, 2792, 2798 (deciding exclusion is a "glaring condition" that is "particularly disturbing" and contrary to "customary international law"). Justices Souter, Ginsberg, and Breyer joined with Justice Stevens in this portion of the opinion. Justice Kennedy pointed out, however, that the presiding officer must make a "fairness determination" if the defendant is excluded from a portion of the trial, and that determination is then subject to judicial review. *Id.* at 2809 (Kennedy, J., concurring).

14. Classified Information Procedures Act, 18 U.S.C. app. §§ 1–16 (2000 & Supp. IV 2004).

15. *See* United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988) (citing S. REP. NO. 96-823, at 4 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4297)); United States v. Collins, 720 F.2d 1195, 1196–97 (11th Cir. 1983) (explaining the problem of evaluating national security costs in prosecuting defendants with access to classified information prior to CIPA); S. REP. NO. 96-823, at 3 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4296 (explaining that "graymail" is the term used to describe this tactic in the hopes of forcing the government to drop its prosecution); Edward J. Klaris et al., *The Press and the Public's First Amendment Right of Access to Terrorism On Trial: A Position Paper*, 22 CARDOZO ARTS & ENT. L.J. 767, 828 (2005) (indicating CIPA was initially designed to deal with defendants who already possessed the classified information at issue); Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 277 (1986) (explaining the term "graymail").

disclosures and to allow the Government to withhold national defense information from the defendant.[16] The courts have successfully applied CIPA in prosecutions for drug trafficking,[17] espionage,[18] attempted murder and witness tampering,[19] air piracy and hostage taking,[20] gun-running,[21] misappropriation of funds,[22] and impersonation of an officer of the Central Intelligence Agency (CIA) and mail fraud.[23] These procedures are essentially the same as those outlined by the Secretary of

16. Classified Information Procedures Act, 18 U.S.C. app. §§ 2–6 (2000).

17. United States v. Porter, 701 F.2d 1158, 1162 (6th Cir. 1983) (concluding the defendants received a fair trial even though their defense "may have been hampered to some degree" by denial of access to classified information).

18. United States v. Lee, 90 F. Supp. 2d 1324, 1329 (D.N.M. 2000) (finding CIPA procedures did not violate defendant's Fifth or Sixth Amendment rights).

19. United States v. Wilson, 750 F.2d 7, 9 (2d Cir. 1984) (concluding defendant's evidence was properly excluded as generally inadmissible). This defendant was also convicted in Texas of illegally shipping twenty tons of C-4 plastic explosive to Libya. United States v. Wilson, 732 F.2d 404, 406 (5th Cir. 1984). He sought to introduce classified evidence which he claimed would show he was working with the knowledge and consent of the CIA and thus lacked the requisite intent for conviction. *Id.* at 412. The Fifth Circuit concluded that the evidence had been properly excluded as irrelevant and immaterial regardless of its classified nature. *Id.* The defendant also argued on appeal that the trial judge did not comply with section 6(a) of CIPA because he only orally gave his reasons for exclusion whereas CIPA requires the determination to be put in writing. *Id.* at 413. The appellate court found that the error "did not impact on the defense or upon the verdict of the jury" as the oral pronouncement was dictated into the record. *Id.* *See generally* Jeff Jarvis, Note, *Protecting the Nation's National Security: The Classified Information Procedures Act*, 20 T. MARSHALL L. REV. 319, 340–42 (1995) (discussing the events and activities resulting in the prosecution's and the defendant's constitutional claims).

20. United States v. Yunis, 867 F.2d 617, 625 (D.C. Cir. 1989) (holding defendant failed to show requested information would be "helpful" to his defense). The district court had ordered the release of transcripts from several taped conversations between Yunis and an informant, and the Government sought an interlocutory appeal pursuant to section 7 of CIPA. *Id.* at 618. The appellate court concluded that only a few of the statements "were even marginally relevant" and were not helpful enough to outweigh the Government's "classified information privilege." *Id.*

21. United States v. Clegg, 740 F.2d 16, 18 (9th Cir. 1984) (ruling on interlocutory appeal that the district court had not abused its discretion by compelling discovery of classified information after deciding the Government's proposed redacted version was an unacceptable substitute).

22. United States v. Collins, 720 F.2d 1195, 1198 (11th Cir. 1983) (concluding the defendant's notice to the court of anticipated disclosure of classified information for his defense was fatally insufficient).

23. United States v. Jolliff, 548 F. Supp. 229, 230 (D. Md. 1981) (concluding the terms of the recently enacted Classified Information Procedures Act are not unconstitutionally vague and its procedures do not violate a defendant's Fifth or Sixth Amendment rights).

Defense in Military Commission Order No. 1.[24] If CIPA provides adequate constitutional protection for American citizens,[25] why does the Court find similar procedures so offensive in the prosecution of suspected enemy combatants?[26]

The prosecution of those who illegally compromise sensitive information is a legitimate act of government,[27] and the

---

24. *Compare* Classified Information Procedures Act, 18 U.S.C. app. §§ 3–6 (2000), *with* Military Commission Order No. 1, § 6 (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. CIPA allows for a protective order restricting disclosure of classified information. Classified Information Procedures Act, 18 U.S.C. app. § 3 (2000). It allows for the use of alternate forms of disclosure, with an ex parte, in camera determination of the request for use of alternate forms, and a requirement that the record of such inspection be sealed for any appellate review. *Id.* §§ 4, 6(c)–(d). CIPA requires that only the defendant give notice of intent to use classified information at trial, and provides for sanctions if the notice is inadequate. *Id.* § 5. If the Government refuses to disclose requested classified information, CIPA allows the court to dismiss the action unless it determines "the interests of justice would not be served," in which case it may take whatever action it deems appropriate. *Id.* § 6(e)(2). In comparison, the Order also authorizes protective orders, although the commission's options include classifiable and "protected" information. Military Commission Order No. 1, § 6(D)(5)(a) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. The Order allows for alternate forms of disclosure, with ex parte in camera determination of the request, but if the military defense counsel is not given access to the information, it cannot be used at trial. *Id.* § 6(D)(5)(b). This information must also be sealed and preserved for appeal. *Id.* § 6(D)(5)(d). Under the Order, *both* sides are required to give notice "as soon as practicable" of any intent to offer protected information into evidence. *Id.* § 6(D)(5)(a). If protected information is withheld from the accused or civilian counsel, and an adequate substitution is not provided, the evidence is inadmissible, regardless of its probative value, and if the accused will be denied "a full and fair trial." *Id.* § 6(D)(5)(b).

25. *See* United States v. Porter, 701 F.2d 1158, 1162 (6th Cir. 1983) (concluding the trial court's decision not to dismiss the charges, as allowed by CIPA, did not result in a constitutional violation); United States v. Lee, 90 F. Supp. 2d 1324, 1329 (D.N.M. 2000) (finding "that the carefully balanced framework" of CIPA does not violate the defendant's Fifth and Sixth Amendment rights); *Jolliff*, 548 F. Supp. at 230–31 (holding that the terms of CIPA are neither unconstitutionally vague nor in violation of the Fifth or Sixth Amendments).

26. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2792 & n.52 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (stating that the Court's objections with the commission procedures go "beyond rules preventing access to classified information" but finding fault with procedures designed to protect classified information).

27. *See* U.S. CONST. art. I, § 8, cl. 18 (granting Congress power to govern accordingly); *see also* U.S. CONST. art. II, § 3 (giving the President the same). The Necessary and Proper Clause gives Congress the power to pass legislation safeguarding certain information and outlawing the unauthorized compromise of that information. U.S. CONST. art. I, § 8, cl. 18. In order to "take Care that the Laws be faithfully executed," U.S. CONST., art. II, § 3, the President issues Executive Orders "prescrib[ing] a uniform system for classifying, safeguarding, and declassifying national security information." *See, e.g.*, Exec. Order No. 13,292, 3 C.F.R. 196 (2004) (outlining the procedures for classifying

prosecution of individuals captured during hostilities and held to account for their actions against the nation is equally legitimate.[28] But our system of justice holds that all are deemed innocent until proven guilty, and that the Constitution grants specific protections to anyone accused of violating our laws.[29] When the prosecution of such violations involves sensitive information or classified methods, the government's interest in protecting those secrets must be balanced against the accused's access to a fair proceeding.[30] With the enactment of CIPA, the courts have been able to do just that, and the commission convened to prosecute accused terrorist Salim Ahmed Hamdan was designed to do no less.[31] In response to the Court's ruling in *Hamdan*, Congress has passed legislation expressly establishing military commissions[32] and authorizing CIPA-like procedures for the protection of information vital to our war effort.[33]

---

information).

28. U.S. CONST. art. I, § 8. Article I, Section 8 vests in Congress the power to: "provide for the common Defence" of the nation, *id.* cl. 1; "constitute Tribunals inferior to the supreme Court[,]" *id.* cl. 9; "define and punish ... Offences against the Law of Nations[,]" *id.* cl. 10; and "make Rules concerning Captures on Land and Water[,]" *id.* cl. 11.

29. *See* U.S. CONST. amend. V (protecting against double jeopardy, compelled self-incrimination, and providing for due process); *id.* amend. VI (providing for assistance of defense counsel).

30. Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 277 (1986).

31. *See* Military Commission Order No. 1, § 5 (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf (outlining the procedures to which the accused is entitled). If Hamdan had actually stood trial before his commission, he, like any other commission defendant, would have been given sufficient notice of the charges against him—in his native language, if necessary. *Id.* § 5(A). He would have been presumed innocent until proven guilty beyond a reasonable doubt. *Id.* § 5(B), (C). He was entitled to discovery, including anything that might be exculpatory, consistent with national security needs. *Id.* § 5(E). Further, he could not have been compelled to testify, and no inferences could have been drawn from his decision, *id.* § 5(F), and he was entitled to obtain reasonably available witnesses and documents at the Government's expense, Military Commission Order No. 1, § 5(H) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. At all times, he was entitled to an interpreter, as necessary, *id.* § 5(J), and protected from double jeopardy, *id.* § 5(P).

32. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. §§ 948a–950w).

33. *Id.* §§ 949d(f), 949j(c). On remand, the district judge who first ruled on Hamdan's challenge to the commission rules concluded that the Act had successfully stripped the courts of jurisdiction and that Hamdan was not constitutionally entitled to habeas corpus. Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 16–19 (D.D.C. 2006). While no further appeal of *Hamdan* has been pursued, several other detainees have unsuccessfully

This Comment presents a review of the way our nation has attempted to protect its security while prosecuting those who, for whatever reason, have tried to undermine that security. After an historical perspective, it discusses the role of CIPA in balancing the rights of the accused with the government's interest in protecting secrets, and how that approach has worked in our civilian court system. Procedures set out for Hamdan's commission are compared and discussed in the next section. The twentieth century law enforcement approach to combating terrorism follows, and finally, the recent legislation in response to the *Hamdan* decision is presented. As many commentators have pointed out, not only are the commissions outlined in the President's order constitutionally valid,[34] they are the better forum for this type of adjudication.[35] Now that Congress has

---

challenged the jurisdiction-stripping provisions of the Military Commissions Act of 2006 (MCA). *In re* Guantanamo Detainee Cases 355 F. Supp. 2d 443 (D.D.C. 2005), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 127 S. Ct. 1478 (U.S. Apr. 2, 2007) (No. 06-1195); Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005), *vacated sub.nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 127 S. Ct. 1478 (U.S. Apr. 2, 2007) (No. 06-1196). However, the Court has recently consolidated the *Boumediene* and *Khalid* cases and granted a petition for rehearing, vacating its previous denials of certiorari. Boumediene v. Bush, 127 S. Ct. 3078 (2007). This case is listed on the Court's docket for the 2007–2008 term. Medill Journalism, NW. U., U.S. Supreme Court 2007–2008 Case List, http://docket.medill.northwestern.edu/archives/004607.php (last visited Oct. 31, 2007).

34. *See* John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899, 932 (2003) (pointing out that the Supreme Court has repeatedly found "[l]aw of war military commissions" legitimate for prosecuting enemy combatants); Douglas W. Kmiec, *Observing the Separation of Powers: The President's War Power Necessarily Remains "The Power to Wage War Successfully,"* 53 DRAKE L. REV. 851, 894 (2005) (recognizing that the Constitution allocates to the President, not the judiciary, the authority to wage war); Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (citing historical use of military commissions and noting that they protect "constitutional values of civil liberties" by ensuring defeat of our enemies).

35. *See* Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 633–34 (2002) (arguing that military commissions are best for prosecuting those who commit acts of aggression against the nation because "the determination that someone is an *enemy* . . . is a political, not a judicial, decision"); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 351 (2003) (concluding that military tribunals are better suited to try war criminals); Brian Haagensen II, Comment, *Federal Courts Versus Military Commissions: The Comedy of No Comity*, 32 OHIO N.U. L. REV. 395, 426 (2006) (asserting that military commissions are congressionally authorized and supported by history); Andrew C. McCarthy, *Trials of This Century*, NAT'L REV., Oct. 9, 2006, at 38,

enacted the Military Commissions Act of 2006, there can be little doubt as to the President's authority.[36]

II. A BRIEF HISTORY OF PROTECTING SECRETS

The need to protect sensitive information that affects national security was not born on that fateful day in September 2001. Since before our Founding Fathers risked life and limb to establish this great nation, man has understood the need to prevent his enemy from discovering his secrets.[37] That effort did not change with the

---

40–42 (pointing out that commissions are better able to prevent exploitation by accused terrorists of our legal system's openness). *But see* James Nicholas Boeving, *The Right to Be Present Before Military Commissions and Federal Courts: Protecting National Security in an Age of Classified Information*, 30 HARV J.L. & PUB. POL'Y 463, 576–77 (2007) (preferring trial in civilian courts, but not without modification to existing procedures, including a defendant's right of presence).

36. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (commenting on the interdependency of presidential authority and congressional action). Justice Jackson outlined three scenarios regarding executive action in relation to Congress and the legal consequences of each scenario: when the President acts in harmony with Congress, "his authority is at its maximum"; when he acts in an area where Congress has not spoken, his authority may be uncertain; but when the President's actions are incompatible with congressional will, his authority "is at its lowest ebb." *Id.* In his concurrence, Justice Kennedy cites Justice Jackson's "three-part scheme" as the proper framework for evaluating the President's order establishing military commissions. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2800–01 (2006) (Kennedy, J., concurring), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. Agreeing with the Court's interpretation of Article 36(b), *id.* at 2801, Justice Kennedy concludes that Hamdan's commission "exceeds the bounds Congress has placed on the President's authority," *id.* at 2808, and thus runs afoul of Justice Jackson's third scenario. However, now that Congress has expressly authorized the President to convene military commissions by enacting the Military Commissions Act, the President's authority must be at its highest. *See also* Samuel Estreicher & Diarmuid O'Scannlain, *The Limits of* Hamdan v. Rumsfeld, 9 GREEN BAG 2d 353, 354 (2006) (commenting that Justice Jackson's first scenario was more likely the situation than that seen by the Court, in light of the enactment of the Detainee Treatment Act); Matt Apuzzo, *Judge Backs Bush on Terror Law,* SUN-SENTINEL (Ft. Lauderdale, Fla.), Dec. 14, 2006, at A13, *available at* 2006 WLNR 21560149 (reporting on the district court's decision on remand).

37. *See* SUN TZU, THE ART OF WAR 78 (Lionel Giles trans., Barnes & Noble Books 2003) (1910) (listing important considerations in planning war). In Chapter 1, ancient Chinese General Sun Tzu states, "All warfare is based on deception." In pointing out the intuitive understanding of this translation, Mr. Giles relates that British Field Marshall Wellington was especially adept at "conceal[ing] his movements and deceiv[ing] both friend and foe." *Id.* Sun Tzu goes on to list other uses of deception in time of war, succinctly stating that "[t]hese military devices, leading to victory, must not be divulged beforehand." *Id.* at 79. Almost three hundred years later, Hannibal's brother would discover the importance of protecting his military plans. The Romans intercepted a letter outlining his strategy, and that information was then used to defeat him in battle. 2

formation of the United States. While the Constitution only mentions secrecy as it pertains to the Congressional Record,[38] Congress has enacted additional legislation designed to prevent unauthorized disclosure of information deemed worthy of protection.[39] Presidents have taken measures to protect information by issuing executive orders,[40] and the nation's highest court "has long recognized that a legitimate government privilege protects national security concerns."[41] In 2004 alone, over fifteen million documents were classified[42] and thus protected. Preventing the use of such information by "a hostile element whose goal is to damage the interests of the United States"[43] is the primary basis for classifying national security information.[44]

Two categories of information the government protects through secrecy are national defense and foreign relations information,

---

MAGILL'S GUIDE TO MILITARY HISTORY 743 (John Powell ed., Salem Press 2001).

38. U.S. CONST. art. I, § 5, cl. 3; *see also* REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 5 (1997), *available at* http://www.access.gpo.gov/congress/commissions/secrecy/index.html (discussing the methods utilized for protecting government secrets).

39. S. DOC. NO. 105-2, at 5, *available at* http://www.access.gpo.gov/congress/commissions/secrecy/index.html (naming four statutes granting the Executive Branch authority to maintain secrecy).

40. *Id.* (noting that "six executive orders since 1951" do not cover all the secrets protected by regulation). President Truman signed the first of these six orders on September 24, 1951, to establish minimum standards for identifying and protecting national security information. Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 27, 1951). Four classifications of security information were established: Top Secret, Secret, Confidential, and Restricted. *Id.* Presidents Eisenhower, Nixon, Carter, Reagan, and Clinton issued the remaining cited executive orders updating and refining the process, each revoking the previous order. *E.g.*, Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995), *reprinted in* 50 U.S.C. § 435 note (2000) (revoking Exec. Order No. 12,356, 47 Fed. Reg. 14,874, 47 Fed. Reg. 15,557 (Apr. 2, 1982)). The latest executive order on this subject was signed by President Bush on March 25, 2003, which did not revoke, but amended, President Clinton's Order. Exec. Order No. 13,292, 3 C.F.R. 196 (2006) (amending Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995), *reprinted in* 50 U.S.C. § 435 note (2000)).

41. United States v. Yunis, 867 F.2d 617, 622–23 (D.C. Cir. 1989).

42. Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 352 n.119 (2005) (citing a July 3, 2005, New York Times article indicating this number is almost twice the number of documents classified in 2001).

43. S. DOC. NO. 105-2, at 6, *available at* http://www.access.gpo.gov/congress/commissions/secrecy/index.html (citing a 1986 report of the Senate Select Committee on Intelligence).

44. *See, e.g.*, Exec. Order No. 13,292, 3 C.F.R. 196 (2006) (reiterating the purposes for protecting national security information).

collectively known as "national security information."[45] Prior to the enactment of CIPA, four specific acts protected this type of information: the Espionage Act,[46] the National Security Act,[47] the Atomic Energy Act,[48] and the Freedom of Information Act;[49] all of these are still in effect today. Additionally, the government has protected its interests through the use of the common law state secrets privilege[50] which expressly prohibits litigation when the privilege is properly invoked.[51]

A. *The Espionage Act*

The Espionage Act of 1917,[52] enacted shortly after America declared war on Germany, prohibited anyone from obtaining information regarding the armed forces "to be used to the injury of the United States, or to the advantage of any foreign nation."[53] If such information were gathered with the "intent or reason to

45. S. DOC. NO. 105-2, at 5, *available at* http://www.access.gpo.gov/congress/commissions/secrecy/index.html. The report lists five major information categories that secrecy regulations protect, but focuses on these two. *Id.* National defense information covers information about "military operations and weapons technology" while foreign relations information deals with diplomatic issues. *Id.*

46. 18 U.S.C. §§ 792–99 (2000 & Supp. IV 2004) (originally enacted as Espionage Act of 1917, ch. 30, 40 Stat. 217).

47. 50 U.S.C. §§ 401–42a (2000 & Supp. III 2003) (originally enacted as National Security Act of 1947, ch. 343, 61 Stat. 495).

48. 42 U.S.C. §§ 2011–2297h-13 (2000 & Supp. III 2003) (originally enacted as Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919).

49. Freedom of Information Act, 5 U.S.C. § 552 (2000 & Supp. IV 2004) (originally enacted as Act of July 4, 1967, Pub. L. No. 90-23, 81 Stat. 54).

50. *See* United States v. Reynolds, 345 U.S. 1, 7–8 (1953) (preventing disclosure of an aircraft accident report due to classified nature of aircraft equipment); Totten v. United States, 92 U.S. 105 (1875) (dismissing a claim for payment for intelligence gathering services during the Civil War as against public policy); Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998) (holding that a question of compliance with hazardous waste disposal regulations at a classified facility was itself a state secret and thus barred plaintiff's suit).

51. *See Reynolds*, 345 U.S. at 11 (stating that, if military secrets may be compromised, "even the most compelling necessity" will be insufficient to warrant disclosure); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (declaring that the realm of state secrets is a political one in which the judiciary should not interfere); Halkin v. Helms, 598 F.2d 1, 5 (D.C. Cir. 1978) (declaring the unquestionable nature of the privilege); ACLU v. NSA, 438 F. Supp. 2d 754, 759 (E.D. Mich. 2006), *rev'd on other grounds*, 493 F.3d 644 (6th Cir. 2007) (reaffirming the privilege but noting that case law has developed along two distinct lines).

52. Espionage Act of 1917, ch. 30, 40 Stat. 217 (1917) (current version at 18 U.S.C. §§ 792–99 (2000 & Supp. IV 2004)).

53. 18 U.S.C. § 2.

believe" any injury or advantage could be obtained during a time of war, the offense was punishable by death or thirty years in prison.[54] In 1919, Charles Schenck and Elizabeth Baer were convicted under the Espionage Act for interfering with the recruitment of soldiers.[55] The concern here was not with protecting information about the military, but with preventing dissemination of information "of such a nature as to create a clear and present danger"[56] to the national war effort. The Act has been revised over the years, but is currently still in force.[57]

Perhaps the most famous prosecution under the Espionage Act was that of Julius and Ethel Rosenberg,[58] who were executed for "conspiring to steal, deliver and transfer nuclear secrets to representatives of the Soviet Union."[59] The Rosenbergs, according to testimony at their trial, convinced Ethel's brother, David Greenglass, to divulge information regarding atomic experiments at Los Alamos, New Mexico.[60] The information was then ultimately transmitted to Soviet agents.[61] That the Union of Soviet Socialist Republics was not at that time a declared enemy of the United States was immaterial. The Act specifically prohibited furnishing information that could be used "to the advantage of a foreign nation" whether or not the United States was harmed in

---

54. *Id.*

55. Schenck v. United States, 249 U.S. 47 (1919).

56. *Id.* at 52.

57. 18 U.S.C. §§ 792–99 (2000 & Supp. IV 2004). Section 793 provides for fines, up to ten years imprisonment, or both, for gathering defense information or transferring it to unauthorized individuals. *Id.* § 793(a)–(f). Additionally, failure to promptly report the loss, theft, or destruction of defense information violates this section. *Id.* § 793(f). Section 794 specifically provides for "death or . . . imprisonment for any term of years or for life" when such information is gathered or transmitted for the purpose of aiding *any* foreign government. *Id.* § 794(a). However, violations are punishable by death only in time of war or if the information involves specified information, or if a violation leads to the discovery by a foreign government, and subsequent death, of a U.S. agent. *Id.* The remaining sections deal with methods of gathering and disseminating protected information or providing aid in such an effort. 18 U.S.C. §§ 792, 795–99. Unauthorized disclosure of classified national security information carries a penalty of an unspecified fine, up to ten years in prison, or both. *Id.* § 798(a).

58. United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).

59. Mitchell J. Michalec, Note, *The Classified Information Protection Act: Killing the Messenger or Killing the Message?*, 50 CLEV. ST. L. REV. 455, 464 (2003) (discussing the purpose of section 793 of the Espionage Act as it pertains to press leaks of classified information).

60. *Rosenberg*, 195 F.2d at 588.

61. *Id.*

the process.[62] The trial judge commented that the Rosenbergs' death sentences were justified to "demonstrate with finality that this nation's security must remain inviolate; that traffic in military secrets . . . must cease."[63]

B. *The National Security Act*

The Central Intelligence Agency (the Agency) was one of the agencies created by the National Security Act in 1947,[64] and its responsibilities include protecting intelligence sources and methods.[65] In 1977, Random House published a book written by former agent Frank Snepp about his experiences with the Agency.[66] The Government subsequently prosecuted Mr. Snepp for failing to have his manuscript approved prior to publication in accordance with a non-disclosure agreement.[67] An appeals court held that this failure "inflicted 'irreparable harm' on intelligence activities vital to our national security,"[68] and the Supreme Court expressly recognized the agreement as "an 'entirely appropriate'

62. *Id.* at 590. Three of the current espionage statutes still provide for this distinction, 18 U.S.C. §§ 793, 794, 798 (2000 & Supp. IV 2004), while other sections penalized certain violations regardless of intent. *Id.* §§ 795–97, 799 (2000).

63. *Rosenberg*, 195 F.2d at 605 n.28.

64. National Security Act of 1947, ch. 343, 61 Stat. 495 (current version at 50 U.S.C. §§ 401–442a (2000)).

65. 50 U.S.C. §§ 403-1(i), -5d(1) (2000) (originally enacted as National Security Act of 1947, ch. 343, § 102(d)(3), 61 Stat. 495, 498). The Act was amended in 2004, adding a Director of National Intelligence. National Security Intelligence Reform Act of 2004, Pub. L. No. 108-458, § 1011, § 102(a), 118 Stat. 3643, 3644 (codified at 50 U.S.C. § 403). This position also carries the responsibility of protecting intelligence sources and methods by establishing classification of and access to intelligence information. 50 U.S.C. § 403-1(i).

66. United States v. Snepp, 456 F. Supp. 176, 178–79 (E.D. Va. 1978), *aff'd in part, rev'd in part*, 595 F.2d 926 (4th Cir. 1979), *rev'd per curiam*, 444 U.S. 507 (1980).

67. *Id.* at 176. The district court found that the book's publication caused "irreparable harm and loss" to the United States and hampered the CIA's intelligence-gathering and protection abilities. *Id.* at 180. The Fourth Circuit agreed that Mr. Snepp was properly enjoined from further publication without obtaining approval from the CIA, United States v. Snepp, 595 F.2d 926, 934 (4th Cir. 1979), *rev'd per curiam*, 444 U.S. 507 (1980), but reversed the district's court imposition of a constructive trust on any profits received from the publication of the book, holding that the author had a First Amendment right to publish any unclassified information. *Id.* at 935–36. The Supreme Court reversed this ruling, citing the very problem that CIPA would soon be enacted to alleviate. Snepp v. United States, 444 U.S. 507, 514–15 (1980) (per curiam).

68. *Snepp*, 444 U.S. at 509 (citing the appellate court's affirmation of the injunction imposed by the district court).

exercise of the CIA Director's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure.'"[69]

The Court also recognized this mandate in *CIA v. Sims*,[70] when the Agency refused to disclose the identities of researchers and the locations of institutions involved in an Agency-funded human behavior research and development project.[71] Concluding that the Director was statutorily authorized to withhold the information,[72] the Court expressly recognized the National Security Act as granting broad authority to the Director of the Central Intelligence Agency "to protect all sources of intelligence information from disclosure."[73]

C. *The Atomic Energy Act*

Congress enacted the Atomic Energy Act of 1954,[74] specifically finding that "[t]he development, utilization, and control of atomic energy for military and all other purposes are vital to the common defense and security."[75] The Act provided "for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards,"[76] in an effort to encourage the development of atomic energy for peaceful uses, while safeguarding the nation.[77] Appropriate safeguards still include

69. *Snepp*, 444 U.S. at 510 n.3. The Court went on to state that the CIA would have been authorized to "impos[e] reasonable restrictions" on its employees' First Amendment rights, even without a nondisclosure agreement, in the process of protecting national interests. *Id.*

70. CIA v. Sims, 471 U.S. 159 (1985).

71. *Id.* at 162 (summarizing the project and citing its purpose). The project was the subject of several government investigations following some public disclosures, and, in 1977, two individuals filed a Freedom of Information Act request seeking specific information. *Id.* at 162–63. The Agency released some information, but refused to disclose names and affiliations of the researchers, claiming they were protected intelligence sources. *Id.* at 163–64.

72. *Id.* at 181 (finding the individuals were properly protected as intelligence sources).

73. *Sims*, 471 U.S. at 168–69. The Court further held that the researchers' institutional affiliations need not be disclosed because to do so "would lead to an unacceptable risk" of revealing the protected identities. *Id.* at 181.

74. Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. §§ 2011–2297h-13 (2000)).

75. 42 U.S.C. § 2012(a).

76. *Id.* § 2013(b).

77. *Id.* § 2011.

withholding information defined as restricted data[78] and ensuring information relating to the military use of atomic weapons is not given "to any nation or regional defense organization" as long as the United States uses the information for defense.[79] Information that relates to the "design, manufacture, or utilization of atomic weapons" is included in the definition of restricted data.[80]

When the Navy planned to develop a homeport in New York Harbor in 1987,[81] an environmental group sought an injunction until the Navy disclosed the environmental impact of such a development.[82] The Navy refused to either confirm or deny whether nuclear weapons would be deployed in the harbor, citing classification of such information under the Atomic Energy Act.[83] The Second Circuit[84] affirmed the district court's holding that information dealing with nuclear weapons deployment was exempt from public disclosure,[85] and thus environmental impact statements need not include any discussion of the potential effect of such deployment.[86]

D. *The Freedom of Information Act*

Emphasizing "the fullest responsible disclosure"[87] of informa-

78. *Id.* § 2162.

79. 42 U.S.C. § 2162(d).

80. *Id.* § 2014(y).

81. Hudson River Sloop Clearwater, Inc. v. Dep't of Navy (*Hudson I*), 659 F. Supp. 674, 676 (E.D.N.Y. 1987), *aff'd*, 891 F.2d 414 (2d Cir. 1989).

82. *Id.*

83. *Id.* at 679. The Navy also argued that the information was classified under a 1982 executive order. *Id.* As discussed in the next section, certain information is exempt from disclosure under the Freedom of Information Act, including information classified by an executive order or exempted by statute. *Id.*

84. Hudson River Sloop Clearwater, Inc. v. Dep't of Navy (*Hudson II*), 891 F.2d 414 (2d Cir. 1989).

85. *Id.* at 422 (agreeing that the district court properly considered the merits in denying disclosure). The district court did not decide whether disclosure was exempt based on the Atomic Energy Act, but did state that classification of information regarding the use of nuclear weapons was authorized by the Act. *Hudson I*, 659 F. Supp. at 683.

86. *Hudson II*, 891 F.2d at 424 (holding that Congress made that determination when it considered approval of the Navy's Homeport proposal); *Hudson I*, 659 F. Supp. at 679 (agreeing that the information is exempt from disclosure); *accord* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 145 (1981) (holding that Congress created a balance between the public's right to know and the nation's need for security in exempting nuclear weapons storage information).

87. EPA v. Mink, 410 U.S. 73, 80 (1973), *superseded by statute*, Act of Nov. 21, 1974,

tion to the public, the Freedom of Information Act (FOIA) took effect on July 4, 1967.[88] The Act requires federal agencies to disclose any information it has to anyone in the general public who asks for it—unless that information falls within specified exemptions.[89] Two of these exemptions are information properly classified by executive order "in the interest of national defense or foreign policy"[90] and information that is expressly protected from disclosure by other statutes.[91]

When two individuals sued the CIA over its refusal to disclose the names of researchers and institutions involved in a particular human behavior study,[92] the Supreme Court held the information was "intelligence sources and methods" protected by the National Security Act.[93] Designated as a withholding statute for purposes of exemption from FOIA disclosure, the Court upheld the Agency's position and ordered that the information not be disclosed.[94]

The Navy successfully invoked the executive order exemption on at least two occasions regarding its policy of neither confirming nor denying deployment of nuclear weapons.[95] The Court held that such information was exempt from public disclosure, having been properly classified by an executive order.[96]

Pub. L. No. 93-502, 88 Stat. 1561, *as recognized in* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) (quoting S. REP. NO. 89-813, at 3 (1965)).

88. Act of July 4, 1967 (Freedom of Information Act), Pub. L. No. 90-23, 81 Stat. 54 (codified as amended at 5 U.S.C. § 552 (2000 & Supp. IV 2004)).

89. Freedom of Information Act, 5 U.S.C. § 552(b) (2000). The Act lists nine specific categories of information that may be withheld from public disclosure, including internal agency personnel rules and practices, *id.* § 552(b)(2); privileged or confidential trade secrets, *id.* § 552(b)(4); certain personnel or medical files, *id.* § 552(b)(6); and specific information concerning wells, *id.* § 552(b)(9).

90. Freedom of Information Act § 552(b)(1).

91. *Id.* § 552(b)(3).

92. CIA v. Sims, 471 U.S. 159 (1985).

93. *Id.* at 173–74.

94. *Id.* at 181 (holding that Congress gave to the Director the responsibility of weighing the risks of disclosing certain information).

95. *See* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 144 (1981) (reversing the Ninth Circuit's order for the Navy to prepare a hypothetical environmental impact statement); Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414, 423 (2d Cir. 1989) (concluding that national security interests may sometimes outweigh environmental concerns).

96. *Weinberger*, 454 U.S. at 144–45 (stating that practically all nuclear weapons storage information is classified and therefore exempt from public disclosure).

E. *The State Secrets Privilege*

First delineated in *United States v. Reynolds*,[97] the government's privilege against revealing state secrets is a common law rule that traces back to 1875.[98] In *Totten v. United States*,[99] Justice Field held that allowing an action against the Government based on a secret contract would be contrary to public policy because it "would inevitably lead to the disclosure of matters which the law itself regards as confidential."[100] Once the Government properly invokes the privilege, the court, without examining the specific information, must decide whether the privilege is warranted.[101]

As recently as 2005, a unanimous Supreme Court ruled that litigation is categorically barred where the danger of revealing an espionage relationship with the government exists.[102] In that case, two foreign nationals attempted to sue the CIA, claiming the Agency had not fulfilled its promise to support them financially in exchange for their espionage activities in their former country.[103] The Court held the case was beyond judicial scrutiny because proving the existence of the relationship was necessary before the plaintiffs could prevail.[104] And in 2006, the Federal Circuit stated "the state secrets privilege is an absolute privilege" which cannot be overcome by "even the most compelling need" of a defendant for documents withheld by the government.[105]

---

97. United States v. Reynolds, 345 U.S. 1 (1953).

98. *See id.* at 6–7 (affirming the "well established" privilege to withhold military secrets). In a footnote, the Court cites several authorities in support of the privilege, beginning with *Totten v. United States*, 92 U.S. 105 (1875). *Reynolds*, 345 U.S. at 7 n.11.

99. Totten v. United States, 92 U.S. 105 (1875).

100. *Id.* at 107.

101. *Reynolds*, 345 U.S. at 7–8. The Court reviewed "available precedents" and gleaned the manner and method for applying the privilege: the government alone controls the privilege; it must be formally invoked by the appropriate department head, who must personally determine that the privilege applies; and the court determines the validity of the claim, without compromising the subject matter of the privilege. *Id.* If, after weighing all the factors, the court is satisfied that disclosure would be harmful, the claim "will be accepted without requiring further disclosure." *Id.* at 9.

102. *See* Tenet v. Doe, 544 U.S. 1, 10–11 (2005) (barring suits that require disclosure of the relationship). The Court took great pains, however, to distinguish the state secrets *evidentiary* privilege from the broader categorical *bar* announced in *Totten*. *Id.* at 8–10.

103. *Id.* at 5 (discussing the details of the respondents' claims against the Agency).

104. *Id.* at 8–11 (reversing the Ninth Circuit); *see also* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 146–47 (1981) (reversing the Ninth Circuit and citing *Totten* in determining that the complaint was "beyond judicial scrutiny").

105. Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1307 (Fed. Cir.

III. CLASSIFIED INFORMATION PROCEDURES ACT

One problem the government faces in prosecuting those who compromise classified information is that further disclosure in open court may be necessary for either side to properly present its case.[106] This dilemma has sometimes prevented full enforcement of our laws, whether or not they have national security implications.[107] In 1980, a congressional subcommittee recommended procedures that could be utilized by courts to protect national security interests without unduly sacrificing the rights and privileges of the accused.[108] In evaluating espionage and security leak prosecutions, the subcommittee identified three instances where disclosure of classified information was possible: pretrial discovery, as part of the Government's case-in-chief, or as part of an affirmative defense.[109] The Classified Information Procedures Act (CIPA) allows the Government to evaluate the risk of continued prosecution before a damaging disclosure is made in open court.

A. *How CIPA Works in Civilian Courts*

Originally enacted in 1980,[110] CIPA is designed to provide criminal procedures for pretrial, trial, and appellate processes whenever classified information is involved.[111] Classified information is defined by CIPA as anything that the government

---

2006).

106. *See* S. REP. NO. 96-823, at 2 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4295 (citing this as the key finding of the Subcommittee on Secrecy and Disclosure of the Select Committee on Intelligence); *see also* Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 278–79 (1986) (citing a congressional subcommittee report); Richard P. Salgado, Note, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427, 427–28 (1988) (highlighting the purpose behind passage of CIPA).

107. *See* S. REP. NO. 96-823, at 3 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4296 (citing Asst. Attn'y Gen. Heymann's testimony describing "graymail"). The committee points out, however, that while some defendants may threaten the use or discovery of classified information in an attempt to prevent prosecution, the "disclose or dismiss" problem exists even where the defendant acts in good faith. *Id.*

108. *Id.* at 2, 1980 U.S.C.C.A.N. at 4295–96.

109. Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 279 (1986).

110. Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. §§ 1–16 (2000 & Supp. IV 2004)).

111. 18 U.S.C. app. §§ 1–16 (2000 & Supp. IV 2004).

determines, whether by "[e]xecutive order, statute, or regulation," must be protected from unauthorized disclosure in the interest of national defense and foreign relations.[112] This definition also includes information defined by the Atomic Energy Act as "Restricted Data."[113]

1. Pretrial Procedures

In the course of preparing for trial, the parties involved typically make discovery requests to develop evidence and determine what the other side has in its arsenal. If the opposing party does not produce the requested information, the requesting party may ask the court to compel disclosure.[114] If either side expects to use classified information, CIPA is the framework designed to protect that information as much as possible.

Upon motion from either party, or on its own motion, the court must hold a pretrial conference to consider anything that relates to the use of classified information.[115] If the defendant expects that classified information will be disclosed in the course of his defense, he must notify the court and the U.S. Attorney within a specified time.[116] This notification must be in writing and must include a description of any information reasonably expected to be disclosed during any proceeding.[117] Any additional information that the defendant later determines is necessary for his defense also requires notification in this manner.[118] None of this information may actually be disclosed before the Government has a "reasonable opportunity" to evaluate the information and appeal its use, if

112. *Id.* § 1.

113. *Id.* § 1(a); *see* 42 U.S.C. § 2014(y) (2000) (defining "Restricted Data").

114. *See* FED. R. CRIM. P. 16(d)(2) (outlining the procedures for discovery and inspection of information under the control of the government and the defendant). Subsection (d) regulates discovery, giving the court the ability to deny or compel discovery of requested information. *Id.*

115. Classified Information Procedures Act, 18 U.S.C. app. § 2 (2000). This section also provides that any admission made by the defendant or his attorney during this pretrial conference may not be used to incriminate the defendant unless it is in writing and signed by both the defendant and his attorney. *Id.*

116. *Id.* § 5(a). The court may set the time frame for disclosure. If no time limit is expressly set, section 5 requires notice within thirty days before trial. *Id.*

117. *Id.*

118. 18 U.S.C. app. § 5(a).

it desires to do so.[119] If defendants do not follow these procedures, they may be precluded from using the information in any way.[120]

The Government then has the option of asking the court for a hearing to decide which classified information is relevant and whether it may be used at trial.[121] This procedure is the core of the legislation and it attempts to resolve the conflict between the Government's duty to prosecute those who transgress federal law and its duty to protect national security secrets.[122] The court is required to hold this hearing upon the Government's timely request, and make its ruling before any further pretrial or trial action begins.[123] If the Attorney General believes classified information may be disclosed during the hearing, the court is required to hold the hearing in camera, upon request.[124] For each item of classified information, CIPA requires the court to specify in writing the basis on which it determined whether the information is relevant, usable, or admissible at trial.[125]

---

119. *Id.*

120. *Id.* § 5(b).

121. *Id.* § 6(a).

122. S. REP. NO. 96-823 at 3, 7 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4296, 4300. In its General Statement, the Senate Judiciary Committee asserted that the proposed legislation, as far as it possibly could, resolved this all too often occurring conflict. *Id.* at 3, 1980 U.S.C.C.A.N. at 4296. Then Assistant Attorney General Philip Heymann summarized the defense tactic of "graymail" that precipitated this legislation, whereby the mere threatened disclosure of classified information might induce the Government to change its mind and terminate prosecution. *Id.* Essentially a coercive tactic, it is not necessarily underhanded, as a defendant may have a legitimate need to access classified information in order to fashion his defense. *Id.* at 3, 1980 U.S.C.C.A.N. at 4297.

123. Classified Information Procedures Act, 18 U.S.C. app. § 6(a) (2000). During the pretrial conference required by § 2, the court will establish the timing for filing of this motion. *Id.* § 2.

124. *Id.* The Attorney General must certify to the court that classified material may be disclosed if the hearing, or a portion of the hearing, is held in open court. *Id.* The Senate Judiciary Committee, in its report recommending passage of CIPA, expressed the hope that public hearings would be used as often as possible. *See* S. REP. NO. 96-823, at 8 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4301 (recognizing, however, that "discussion of [some] issue[s] in a public hearing would compromise the integrity of the sensitive information," and providing for the use of in camera proceedings).

125. Classified Information Procedures Act, 18 U.S.C. app. § 6(a) (2000). To allow the judge "to fashion creative and fair solutions" in determining relevancy and admissibility of the information, the Judiciary Committee believed the judge must know *why* the material was classified in the first place. S. REP. NO. 96-823, at 7 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4301. An argument was advanced that the judges should be required to determine relevancy and admissibility first to prevent their being

2. Protective Orders

As mentioned above, a defendant is prohibited from disclosing any information he knows or believes is classified at least until the Government has had an opportunity to request and receive a ruling on the information.[126] If the court denies the Government's motion to use alternate forms of evidence and the Attorney General files an objection by affidavit, the court is required to issue an order that prevents disclosure of any classified information provided to the defendant by the Government.[127] However, upon issuing such an order, the court is required to dismiss the indictment unless it determines that outright dismissal would not serve "the interests of justice."[128]

In 1996, the Second Circuit held[129] that a defendant could not

---

influenced by the Government's explanation and, on that basis alone, treat the information differently. *Id.*, 1980 U.S.C.C.A.N. at 4300. Presumably, the judge would find the information relevant and admissible, regardless of its classification, leading to a higher hurdle for the Government to overcome in withholding the information. On the other hand, knowing the Government's rationale for protecting the information might sway the judge to the Government's side, thus depriving the defendant of an impartial decision. The committee was emphatic that the court was not to weigh the Government's interest in national security against the defendant's discovery rights. *Id.* at 9, 1980 U.S.C.C.A.N. at 4303; *see also* Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 294 (1986) (discussing standards of admissibility used); Jeff Jarvis, Note, *Protecting the Nation's National Security: The Classified Information Procedures Act*, 20 T. MARSHALL L. REV 319, 328–29 (1995) (outlining procedures). *See generally* Richard P. Salgado, Note, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427, 433–37 (1988) (discussing the applicable admissibility standard and stating that Congress left it to the courts "to develop the appropriate evidentiary test").

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

127. *Id.* § 6(e)(1); *see also* FED. R. CRIM. P. 16(d)(1) (providing for a court order to "deny, restrict, or defer discovery or inspection, or grant other appropriate relief"); United States v. Libby, 453 F. Supp. 2d 35, 38 (D.D.C. 2006) (discussing the government's options). The committee stated that the court's order must ensure the defendant is not prejudiced in his defense preparations by the Government's refusal to disclose the information. S. REP. NO. 96-823, at 9 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4302.

128. Classified Information Procedures Act, 18 U.S.C. app. § 6(e)(2) (2000). In lieu of dismissal, the court may take other action as it deems appropriate. *Id.* CIPA identifies, but does not limit the court to, three possible alternative actions: dismissing specified counts, finding against the United States where the classified information relates to specific issues, or prohibiting witness testimony. *Id.* Whatever action the court decides to take, CIPA prevents it from taking effect until the United States has an opportunity to appeal the decision. *Id.* Section 7 of the Act provides for an expedited interlocutory appeal by the Government whenever a district court orders disclosure, imposes sanctions for nondisclosure, or denies the Government's request for a protective order. *Id.* § 7.

129. United States v. Pappas, 94 F.3d 795 (2d Cir. 1996).

appeal from an order prohibiting him from commenting on, confirming, or denying classified information "exchanged in the course of pending litigation."[130] Citing legislative history, the court determined that the protective order authorized by CIPA applies to classified information within the defendant's possession prior to trial, as well as that which he is privy to by nature of the trial.[131] However, such an order cannot prevent disclosure outside the context of the trial if the defendant gained access to that information independent of the court's processes.[132]

3. Alternate Forms of Evidence

In the event the Government must rely on classified information for its prosecution, or the court finds the defendant entitled to discovery of such information, CIPA allows redacted documents, unclassified summaries, or stipulations of relevant facts to be given to the defendant in lieu of the actual information.[133] The Government must satisfy the court that it has sufficient cause to withhold the information, which may be done through an ex parte, in camera inspection.[134] If the court allows the alternate form, the Government's underlying support must be sealed and included in

130. *Id.* at 798. The court went on to state that the protective order was appealable to the extent that it restrained the defendant from discussing information obtained outside of discovery. *Id.*

131. *Id.* at 800. Chief Judge Newman, writing for the panel, found three possible non-disclosure situations contemplated by CIPA: while the Government seeks a pretrial ruling, after the court rules that the Government's proposed alternatives are not acceptable, and in accordance with a protective order covering information disclosed during discovery. *Id.* at 799–800. The court determined that the third situation did not apply and the first two were discussed in the legislative history of the Act. *Pappas*, 94 F.3d at 800–01.

132. *Id.* at 801.

133. Classified Information Procedures Act, 18 U.S.C. app. §§ 4, 6(c)(1) (2000). Section 6 provides that these alternate forms must be allowed if requested by the Government, but only if the court determines the defendant's ability to present his defense is "substantially the same" as if the alternate forms were not allowed. *Id.*

134. *Id.* §§ 4, 6(c)(2). Under section 6, the Attorney General may certify in an affidavit that "identifiable damage to the national security of the United States" will result upon disclosure of the information, and further explain the reason behind the information's classification. *Id.* If disclosure is denied, the defendant may request the court reconsider its determination at any time before or during the trial, but the information will remain sealed unless the Government allows its disclosure. *Id.* § 6(d); *see also* S. REP. NO. 96-823, at 9 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4302 (allowing the Government to consent to disclosure).

the record for use by an appellate court, if necessary.[135] Consequently, the defendant may effectively be "precluded from ever learning what evidence was presented" by the Government.[136]

In *United States v. Clegg*,[137] the Ninth Circuit upheld a district court order directing the Government to fully disclose classified documents sought by the defendant.[138] The Government requested and received an ex parte, in camera review, but the district court found the redacted version offered by the Government to be inadequate.[139] After reviewing the sealed documents, the Ninth Circuit agreed that they were relevant and concluded that the district court had not abused its discretion in ordering the Government to make a full disclosure of the information.[140]

B. *How CIPA Compares to Hamdan's Commission*

First and foremost, Military Commission Order No. 1 provided that any individual deemed subject to a military commission be afforded "a full and fair trial."[141] Specifically, the first duty of the commission listed in section 6(B)(1) is the concise requirement to "[p]rovide a full and fair trial."[142] And while portions, or potentially all, of a proceeding might be closed, the Order provided that "[p]roceedings should be open to the maximum

135. Classified Information Procedures Act, 18 U.S.C. app. § 4 (2000). This section provides that the Government may request the use of alternate forms by written statement, and such statement is to be sealed and preserved for appeal. *Id.* The section 6(c) affidavit option seems to apply when the Government is resisting discovery, and not merely seeking to provide alternate forms of concededly discoverable information.

136. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600. The Court took exception to the procedures outlined in Military Commission Order No. 1, even though similar results are possible under CIPA. Of course, both the commission and a civilian court utilizing CIPA procedures are required to ensure the defendant is not unduly prejudiced by procedures designed to protect our national security. *Id.* at 2809 (Kennedy, J., concurring).

137. United States v. Clegg, 740 F.2d 16 (9th Cir. 1984).

138. *Id.* at 18. The defendant argued that CIPA only authorized an interlocutory appeal to prevent an order for public disclosure, not disclosure to the defendant; the court rejected this interpretation. *Id.*

139. *Id.* at 17.

140. *Id.* at 18.

141. Military Commission Order No. 1, §§ 1, 4(A)(5)(b), 5(H), 6(A)(5), 6(B)(1)–(2) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

142. *Id.* § 6(B)(1).

extent practicable."[143] The bases for closing proceedings included the protection of classified or protected information which might be used in the course of the trial.[144] The Military Commissions Act,[145] however, makes no mention of a "full and fair trial," but does include a balancing test virtually identical to Rule 403 of the Federal Rules of Evidence.[146]

1. Pretrial Procedures

Section 6(A)(5) of Military Commission Order No. 1 gave the commission authority to summon witnesses and require discovery "of documents and other evidentiary material."[147] These functions were required if requested by either party.[148] Therefore, a defendant before the commission was able to request disclosure just as any other criminal defendant in a civilian proceeding. The difference here was that the defendant *might* be excluded from any portion of a proceeding which the Presiding Officer decided to close.[149] However, while the accused and his *civilian* counsel might be excluded, his *military* counsel could not

143. *Id.* § 6(B)(3).

144. *Id.* Proceedings may also be closed to protect participants, including possible witnesses, from physical harm. *Id.* Given the situations under which the defendants are apprehended and the crimes for which they may be charged, it is not unforeseeable that participants, including the accused, could be at greater risk from harm than those involved with a typical criminal proceeding. But even our civilian courts have been known to take extra precautions when high profile or unusually dangerous participants are involved.

145. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. §§ 948a–950w).

146. *Compare* Military Commissions Act of 2006 (MCA) § 949a(b)(2)(F) (requiring the military judge to exclude evidence if its probative value is substantially outweighed by listed factors, including unfair prejudice), *with* FED. R. EVID. 403 (allowing the exclusion of evidence under the same circumstances), *and* MIL. R. EVID. 403 (allowing the exclusion of evidence under the same circumstances). Since the enactment of the MCA, Secretary of Defense Robert Gates has published a Manual for Military Commissions (MMC) based on the existing Manual for Courts-Martial. Part III of the MMC consists of the Military Commission Rules of Evidence, including Rule 505 which absolutely protects classified information "if disclosure would be detrimental to the national security." MIL. COMM. R. EVID. 505, *available at* http://www.defenselink.mil/pubs/pdfs/Part%20III%20%20MCREs%20(FINAL).pdf.

147. Military Commission Order No. 1, § 6(A)(5)(a), (c) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

148. *Id.* § 6(A)(5).

149. *Id.* § 6(B)(3). The Presiding Officer was to be a military officer who was also a judge advocate from any of the U.S. armed services. *Id.* § 4(A)(4).

be excluded at all.[150]

The Military Commission Order did not spell out the pretrial proceedings as explicitly as CIPA, but it did require timely notification to the Presiding Officer if protected information was intended to be used by either side.[151] Additionally, it provided the accused with his choice of military counsel, provided that the officer was available.[152] The accused could also employ civilian counsel, provided the attorney met particular qualifications, including being eligible for a security clearance.[153]

The Military Commissions Act, on the other hand, provides that the accused shall be included in all proceedings, save when the members are deliberating or voting.[154] Like the Order, the Act additionally allows for the exclusion of the accused if he persists in disrupting the proceedings or his conduct threatens the physical safety of any participant.[155] However, while not excluded from most proceedings, the Act does exclude the defendant from access to certain classified information[156] and any materials provided in

150. Military Commission Order No. 1, § 6(B)(3) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. The provision for closing all or part of any proceeding is available upon a sufficient showing by either the accused or the Government. *Id.* The Presiding Officer may "exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof." *Id.* The Appointing Authority is authorized, at his discretion, to release transcripts of any or all proceedings, or completely open the proceedings to the public and press, and is admonished to do so "to the maximum extent practicable." *Id.*

151. Military Commission Order No. 1, § 6(D)(5)(a)(v) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. The Order required notification "[a]s soon as practicable" if either side intended to offer "Protected Information." *Id.* Section 6(D)(5)(a) lists five categories of "Protected Information," including classified or classifiable information, *id.* § 6(D)(5)(a)(i), and "information concerning intelligence and law enforcement sources, methods, or activities[,]" *id.* § 6(D)(5)(a)(iv).

152. *Id.* § 4(C)(3)(a).

153. Military Commission Order No. 1, § 4(C)(3)(b) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. In addition to being eligible for SECRET or higher access, the civilian attorney was required to be a U.S. citizen; be a member of the bar in any "State, district, territory, or possession of the United States, or before a Federal court;" not have been sanctioned for any relevant misconduct; and sign a compliance agreement. *Id.*

154. Military Commissions Act of 2006, Pub. L. 109-366, § 949d(a)(2)–(c), 120 Stat. 2600, 2611 (to be codified at 10 U.S.C. § 949d(a)(2)–(c)).

155. *Id.* § 949d(e).

156. *See id.* § 949c(b)(4) (preventing civilian defense counsel from disclosing any classified information received in connection with his advocacy of the defendant "to any person not authorized to receive it"). While not directly prohibiting counsel from sharing such information with the accused, counsel could be provided information that he would

support of the Government's assertion of a new National Security Privilege.[157] There is no pretrial hearing as with CIPA, and the trial court seems to have less discretion regarding the disclosure of classified information to the defendant.[158]

2. Protective Orders

Like CIPA, Military Commission Order No. 1 provided for protective orders to be issued by the Presiding Officer.[159] The stated purpose was to safeguard "Protected Information," defined not only as classified information, but also as classifiable information.[160] It further protected intelligence "sources, methods, or activities"; information that is legally protected from unauthorized disclosure; and "information concerning other national security interests."[161] While information submitted by the Government in support of its motion for limited disclosure could be considered by the commission ex parte and in camera, any information so considered was inadmissible if the military defense counsel was not allowed to review it.[162] Additionally, all protected information, whether admitted into evidence or merely reviewed by the commission and subsequently withheld from the defense, was to "be sealed and annexed to the" trial record and made available for closed review by the reviewing authorities.[163]

The Military Commissions Act makes no separate provision for a protective order, but the participants are still restricted from disclosing classified information. The defense counsel, particularly, is required to "protect any classified information received" as a result of representing the accused, and is precluded from disclosing

be required to withhold, at least theoretically, from the defendant.

157. *Id.* § 949d(f)(3).

158. Military Commissions Act of 2006 § 949j(c). The Act does allow for compulsion of discovery similar to civilian courts, but it expressly provides that the commission shall, upon the Government's motion, authorize unclassified alternative forms of evidence in lieu of actual information. *Id.* § 949j(b)–(c)(1). The Act also requires the commission to allow the Government to prevent disclosure of the classified "sources, methods, or activities" used by the Government to obtain evidence. *Id.* § 949j(c)(2).

159. Military Commission Order No. 1, § 6(D)(5)(a) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

160. *Id.* § 6(D)(5)(a)(i).

161. *Id.* § 6(D)(5)(a)(ii), (iv), (v).

162. *Id.* § 6(D)(5)(b).

163. *Id.* § 6(D)(5)(d).

that information to unauthorized individuals.[164] Where the Commission *Order* required the Government to provide information deemed necessary to a full and fair trial, subject to protective actions by the court, the Commission *Act* declares that classified information is privileged from disclosure if the Government finds it to be detrimental to national security.[165]

3. Alternate Forms of Evidence

Consistent with CIPA, both the Order and the Act allow for alternate forms of evidence to be used in order to protect certain information.[166] The Order allowed the Presiding Officer discretion in determining the best method for admitting witness testimony and other evidence.[167] Possible options for protection of sensitive information included closed proceedings and the use of declassified summaries.[168] At the Government's request, or on his own motion, the Presiding Officer was required to authorize the release of information to the defense team in one of three alternate forms: redacted documents, a substitute or summary in place of the sensitive information, or a stipulation as to what that information "would tend to prove."[169] This was the type of motion to be considered in camera, ex parte. As previously noted, however, none of the supporting information was to be considered by the commission if the military defense counsel was not given

164. Military Commissions Act of 2006, Pub. L. No. 109-366, § 949c(b)(4), 120 Stat. 2600, 2610 (to be codified at 10 U.S.C. § 949c(b)(4)). As discussed in note 157, this has the potential to include the accused.

165. *Compare* Military Commission Order No. 1, 32 C.F.R. § 9.6(d)(5)(ii) (2006) (providing for limited disclosure but excluding any evidence not provided to military counsel), *and* Military Commission Order No. 1 (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf (providing further that if an adequate substitute for undisclosed information is not available, such information is inadmissible if accused is denied "a full and fair trial"), *with* Military Commissions Act of 2006 § 949d(f)(1) (establishing a new national security privilege applicable to every stage of commission proceedings).

166. Military Commissions Act of 2006 § 949d(f)(2); Classified Information Procedures Act, 18 U.S.C. app. §§ 4, 6(c)(1) (2000); Military Commission Order No. 1 § 9.6(d)(5)(ii).

167. Military Commission Order No. 1, § 6(D)(2)(d) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

168. *Id.*

169. *Id.* § 6(D)(5)(b).

access to it.[170]

Like the Order, the Act allows the Government to use the same three alternatives forms when submitting protected information.[171] Additionally, the Government may also assert a newly defined National Security Privilege whenever classified information might be disclosed.[172] If the Government exercises its privilege, the military judge must take "suitable action," which may include an ex parte, in camera review of the claim or a continuance to allow consultation with the appropriate classifying agency.[173] Any claim of the privilege, and any information reviewed by the judge in connection with the privilege, must be kept from the accused at the Government's request.[174] The final subparagraph in this section of the Act allows the Secretary of Defense to design any additional regulations regarding procedures for protecting classified information or for its use in military commissions.[175] However, any such modifications or new regulations must be submitted to both the House and Senate Committees on Armed Services at least sixty days before they are to become effective.[176]

IV. PROSECUTING TERRORISTS

In 1950, Justice Jackson remarked that "[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security."[177] In recognizing the generous grant of constitutional rights to any who choose to live within our borders, Justice Jackson pointed out that those who have not chosen to live here and who continue to serve our enemies have not been granted access to our courts.[178] Yet, the terrorist acts committed in recent history have been treated by the United States not as acts of war,

170. *Id.*
171. Military Commissions Act of 2006 § 949d(f)(2).
172. *Id.* § 949d(f)(2)(C).
173. *Id.*
174. *Id.* § 949d(f)(3).
175. *Id.* § 949d(f)(4).
176. Military Commissions Act of 2006, Pub. L. No. 109-366, § 949d(f)(4), 120 Stat. 2600, 2610 (to be codified at 10 U.S.C. § 949d(f)(4)).
177. Johnson v. Eisentrager, 339 U.S. 763, 774 (1950).
178. *Id.* at 776.

but as isolated infractions of law, at least when they occurred on American soil. The problem is that while our criminal justice system is designed to deal with bad actors, the prosecution of suspected enemy agents very often involves sensitive information and war-time security.

A. *The Law Enforcement Approach*

Acts of terrorism are not a recent phenomenon, nor have they always been committed by foreign agents in distant lands.[179] But until this century, the government's response to both foreign and domestic acts of terror has generally been one of law enforcement,[180] and the federal criminal code lists offenses of terrorism that can be prosecuted in federal courts.[181] In 1986, President Reagan created the Alien Border Control Committee, directed at deporting suspected terrorists or sympathizers who were in the country in violation of their visa status.[182] When the World Trade Center was bombed the first time in 1993, the group responsible for that act was hunted down and convicted in federal

179. *See* United States v. McVeigh, 153 F.3d 1166, 1222 (10th Cir. 1998) (affirming conviction of American citizen in Oklahoma City bombing); United States v. Kaczynski, 239 F.3d 1108, 1119 (9th Cir. 2001) (affirming guilty plea in domestic Unabomber case).

180. *See* United States v. Rahman, 189 F.3d 88, 160 (2d Cir. 1999) (affirming conviction for conspiracy to level war); United States v. Rezaq, 134 F.3d 1121, 1126 (D.C. Cir. 1998) (prosecuting Palestinian skyjacker who shot three Americans because demands were not met); United States v. Yunis, 924 F.2d 1086, 1099 (D.C. Cir. 1991) (affirming conviction for aircraft piracy and hostage taking); United States v. Bin Laden, 126 F. Supp. 2d 264, 268 (S.D.N.Y. 2000) (indicting Al Qaeda members in 1998 embassy bombings); United States v. Yousef, 927 F. Supp. 673, 683 (S.D.N.Y. 1996) (denying motion to dismiss in aircraft bombing prosecution); *see also* Dan Eggen & Vernon Loeb, *U.S. Indicts 14 Suspects in Saudi Arabia Blast*, WASH. POST, June 22, 2001, at A1 (reporting that a federal grand jury handed down a forty-six count indictment); David B. Rivkin, Jr. & Lee A. Casey, *Claims and Counterclaims*, WALL ST. J., Oct. 5, 2006, at A20 (citing the Clinton administration's response as one of law enforcement).

181. 18 U.S.C. § 32 (2000) (criminalizing destruction of aircraft); 18 U.S.C. § 1111 (2000 & Supp. III 2003) (criminalizing murder); 18 U.S.C. § 1203 (2000) (criminalizing hostage taking); 18 U.S.C. § 2332a (2000 & Supp. IV 2004) (criminalizing the use of weapons of mass destruction); 18 U.S.C. § 2339 (Supp. II 2002) (criminalizing harboring or concealing terrorists); 18 U.S.C. § 2384 (2000) (criminalizing seditious conspiracy).

182. *See* William C. Banks, *The "L.A. Eight" and Investigation of Terrorist Threats in the United States*, 31 COLUM. HUM. RTS. L. REV. 479, 480 (2000) (discussing the creation of the committee); Deborah W. Meyers, *U.S. Border Enforcement: From Horseback to High-Tech*, MPI INSIGHT (Migration Policy Institute, Wash. D.C.), Nov. 2005, at 1, 4, 27 n.23 (listing some committee proposals).

court.[183] Home-grown terrorists have also been convicted under criminal statutes, but that seems an appropriate response absent an identifiable foreign influence.

1. International Acts of Terrorism

One of the first politicians to see terrorism as an act of war was Secretary of State George Schultz, a member of the Reagan administration in the early 1980s.[184] President Reagan utilized that characterization on more than one occasion, but the United States rarely used military force in response to terrorist acts during the last two decades of the twentieth century.[185] In 1986, a presidential directive recognized that terrorism was sometimes a law enforcement issue and at other times necessitated a military response.[186] Under this directive, President Reagan established the Alien Border Control Committee in an effort to use immigration law as a means of protecting America from the threat of terrorism.[187]

---

183. United States v. Salameh, 152 F.3d 88, 108 (2d Cir. 1998); *see also* United States v. Yousef, 327 F.3d 56, 135–37 (2d Cir. 2003) (summarizing World Trade Center bombing); Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1219–20 (2002) (discussing episodes of terrorism).

184. Robert M. Chesney, *Careful Thinking About Counterterrorism Policy*, 1 J. NAT'L SECURITY L. & POL'Y 169, 172 (2005) (reviewing PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR (2003)) (noting the debate between the Secretary of State and Secretary of Defense). Secretary Schultz advocated using military force against terrorism, seeing recent acts as an attack on the American lifestyle. *Id.*

185. *See* NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 71–82, 96–98 (2004) (evaluating responses to terrorist acts prior to September 11, 2001); Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 352–60 (2005) (discussing the paradigm shifts resulting from the attacks on September 11, 2001); Robert M. Chesney, *Careful Thinking About Counterterrorism Policy*, 1 J. NAT'L SECURITY L. & POL'Y 169, 174 (2005) (reviewing PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR (2003)) (noting that while the phrase "war against terrorism" was becoming more popular, there was only minor use of military force to counter terrorism).

186. *See* Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 353 (2005) (discussing National Security Decision Directive 207).

187. William C. Banks, *The "L.A. Eight" and Investigation of Terrorist Threats in the United States*, 31 COLUM. HUM. RTS. L. REV. 479, 479–80 (2000) (quoting President Reagan's directive to focus on deporting Palestine Liberation Organization (PLO) activists without compromising classified information); *see also* Deborah W. Meyers, *U.S. Border Enforcement: From Horseback to High-Tech*, MPI INSIGHT (Migration Policy Institute, Wash. D.C.), Nov. 2005, at 1, 4, 27 n.23 (highlighting the directive's

That same year, Congress authorized the Federal Bureau of Investigation (FBI) to investigate acts of terrorism against U.S. citizens outside our borders.[188] In short order, a Counterterrorist Center was formed that combined the forces of the FBI and the CIA in an effort to combat international terrorism.[189] This task force's goal was to capture terrorists and prosecute them in the criminal justice system.[190]

From 1988 until the attacks of September 11, 2001, the standard procedure was to seek indictments against those who committed acts of terrorism.[191] When Pan Am Flight 103 exploded over Lockerbie, Scotland, forensic investigators identified a Libyan timing device in the wreckage,[192] and two Libyans were eventually tried in a Scottish court.[193] When the World Trade Center was damaged in 1993 by a truck bomb that exploded in the underground parking lot,[194] those responsible were eventually convicted in New York.[195] Three years later, another truck bomb was used to attack an apartment complex in Saudi Arabia,[196] and the U.S. responded by charging fourteen people with forty-six counts

---

establishment of the Alien Border Control Committee). This task force was comprised of several federal agencies and was created to devise a plan for deporting terrorists and securing the border, if necessary. *Id.*

188. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 75 (2004).

189. *Id.*

190. *See id.* at 75–76 (describing the value of utilizing the FBI to analyze evidence).

191. Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 354 (2005); *see also* NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 72–74 (2004) (describing pre-9/11 FBI focus).

192. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 75–76 (2004).

193. Donald G. McNeil, Jr., *The Lockerbie Verdict: The Overview; Libyan Convicted by Scottish Court in '88 Pan Am Blast*, N.Y. TIMES, Feb. 1, 2001, at A1. One suspect was convicted and the other released. *Id.* An individual whose brother was killed in the explosion cited the verdict as proof the attack was "an orchestrated strike against the Western world." *Id.*

194. United States v. Salameh, 152 F.3d 88, 108 (2d Cir. 1998) (reiterating the facts leading up to the bombing); NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 71 (2004).

195. United States v. Yousef, 327 F.3d 56, 173 (2d Cir. 2003) (affirming conviction); *Salameh*, 152 F.3d at 161 (affirming convictions of four individuals).

196. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 60 (2004); Dan Eggen & Vernon Loeb, *U.S. Indicts 14 Suspects in Saudi Arabia Blast*, WASH. POST, June 22, 2001, at A1.

of criminal acts.[197] In addition, two men were indicted following the bombing of the U.S.S. *Cole* in 2000.[198] While criminal prosecutions were relatively successful, the approach was cumbersome and involved the risk of compromising classified information and intelligence sources and methods.[199] Eventually the success of this approach was seen as "obscuring the need to examine the character and extent of the new threat facing the United States."[200]

2. Domestic Acts of Terrorism

Although the 1993 attack on the World Trade Center was an attack on U.S. soil, its actors were of foreign origin. Unfortunately, we have experienced attacks from some of our own citizens as well. When a massive bomb seriously damaged the Alfred P. Murrah building in Oklahoma City in April 1995, authorities initially suspected international terrorists.[201] In response, President Clinton issued a classified directive, identifying terrorism as a crime and as a national security issue.[202] Eventually, two Americans, Timothy McVeigh and Terry Nichols, were convicted of planning and executing the attack.[203] Because American citizens were responsible, trial in a domestic court of law was the appropriate response. Although there was some speculation of foreign involvement, ultimately only McVeigh and Nichols were held accountable.

197. Dan Eggen & Vernon Loeb, *U.S. Indicts 14 Suspects in Saudi Arabia Blast*, WASH. POST, June 22, 2001, at A1.

198. Eric Lichtblau, *Aftereffects: The Cole Bombing; U.S. Indicts 2 Men for Attack on American Ship in Yemen*, N.Y. TIMES, May 16, 2003, at A17. The two men were indicted after escaping from Yemeni custody. *Id.* Six individuals were eventually convicted in the attack, including the two indicted in the United States. Neil MacFarquhar & David Johnston, *Death Sentences in Attack on Cole*, N.Y. TIMES, Sept. 30, 2004, at A1. Of the six convicted, two received death sentences and the others were sentenced to up to ten years in prison. *Id.*

199. *See* Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 356–58 (2005) (pointing out several disadvantages, including the ability of terrorists to use our system to communicate sensitive information).

200. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 72 (2004).

201. *Id.* at 100.

202. *Id.* at 101.

203. United States v. Nichols, 169 F.3d 1255, 1260 (10th Cir. 1999); United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998).

Likewise, the investigation and prosecution of Theodore Kaczynski for several bombings were properly handled by civilian law enforcement methods.[204] Designated the "Unabomber" by the FBI,[205] Kaczynski sent several bombs through the postal service, killing three people and injuring several others.[206] But while prosecution of an American charged with terrorist acts against his own country may be appropriate, responding to attacks of foreign origin is decidedly a national defense issue. And, "the determination that someone is an enemy of the United States, and therefore subject to [military commissions] for trying their alleged criminality . . . is a political, not a judicial, decision."[207]

B. *The Military Approach*

A fundamental difference between a law enforcement approach and a military approach is one of objective. The former seeks to capture and hold accountable those who commit defined offenses against society. The latter's purpose is to conquer an enemy.

The decision to use military force in response to terrorism did not originate with President George W. Bush. In April 1986, President Reagan ordered strikes against certain military targets in Libya, justifying the action as a self-defense measure in response to "a continuous and on-going attack against United States nationals."[208] The Libyan government was credited with a series of attacks, including the then recent bombing of a discotheque in Berlin that killed an American soldier and injured over 200 others.[209]

In response to an Iraqi plot to assassinate former President George H.W. Bush, President Bill Clinton ordered the launch of Tomahawk missiles against Iraqi Intelligence Service headquarters

---

204. United States v. Kaczynski, 239 F.3d 1108 (9th Cir. 2001).

205. *Kaczynski*, 239 F.3d at 1110.

206. *Kaczynski*, 239 F.3d at 1120 (Reinhardt, J., dissenting).

207. Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 634 (2002).

208. Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615, 640 (1992).

209. *Id.* at 639–40 (discussing the events surrounding the attacks and allegations of attempts to assassinate Muammar Qaddafi, the Libyan leader); *see also* David Turndorf, Note, *The U.S. Raid on Libya: A Forceful Response to Terrorism*, 14 BROOK. J. INT'L L. 187, 192–94 (1988) (noting a "marked change in U.S. policy" toward terrorism).

in Baghdad.[210] Five years later, President Clinton responded to the coordinated bombings of our embassies in Kenya and Tanzania by launching cruise missiles against an Afghan terrorist training camp and a pharmaceutical facility in Sudan.[211] But while these reactions involved the military, there was no attempt to declare war or adjudicate any war crimes.[212]

The sudden and unprovoked attacks of September 11, 2001, thrust the nation into recognizing and declaring an actual war on terrorism.[213] No longer treated as a criminal justice issue, the military approach necessarily changed how the "enemy" was classified. And because this enemy does not follow, indeed eschews, traditional rules of war, those captured are properly categorized as unlawful combatants, and eligible for prosecution by military commissions.[214]

---

210. *See* Paul Bedard, *Clinton Defends Secrecy; Polls Show Rise in His Support*, WASH. TIMES, June 29, 1993, at A1 (reporting that the secret "late-night assault" was launched in retaliation for the assassination attempts). Interestingly, a similar attack was depicted in the Hollywood film, *The American President*. THE AMERICAN PRESIDENT (Castle Rock Entertainment 1995). Of course, the justification for the attack on "Libyan Intelligence Headquarters" (not Iraqi) was different, but the use of the phrase "proportional response" appears deliberate. *Id.*

211. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 116–17 (2004); *see also* James Bovard, *Déjà vu Five Years Before Iraq*, WASH. TIMES (D.C.), Aug. 31, 2003, at B04, *available at* 2003 WLNR 757712 (commenting on the turn of fate for bin Laden resulting from the President's reaction); James Risen, *A Nation Challenged: The Ringleader; Bin Laden Has Less Room to Hide, U.S. Says*, N.Y. TIMES, Nov. 14, 2001, at B2 (referencing the missile strikes on a training camp). *See generally* Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335 (2005) (listing exceptions to the typical law enforcement response to terrorism before September 11, 2001).

212. *See* United States v. Bin Laden, 92 F. Supp. 2d 225 (S.D.N.Y. 2000) (discussing the indictments arising out of the embassy bombings); Bill Gertz, *Pentagon: 23 Tomahawks Chop Spy Complex*, WASH. TIMES, June 27, 1993, at A12 (reporting the strike on Iraqi Intelligence Headquarters "was designed to be a proportionate response" to the assassination attempt on former President Bush).

213. *See* Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. IV 2004)) (granting specific statutory authorization to the President "to use all necessary and appropriate force"). While Congress did not make a specific declaration of war, the AUMF expressly recognized the President's constitutional authority to deter and prevent further attacks against the nation. *Id.* As Commander in Chief of the armed forces, it seems clear the President was authorized to use all the tools available to him in that capacity, including military commissions. U.S. CONST. art. II, § 2, cl. 1; *see also* President's Address to the Nation, 42 WEEKLY COMP. PRES. DOC. 1597 (Sept. 11, 2006) (calling this war "the decisive ideological struggle of the [twenty-first] century").

214. DAVID B. RIVKIN, JR. ET AL., MILITARY COMMISSIONS ACT OF 2006: STRIKING

Military commissions have existed for more than 150 years, and much has been written on their history.[215] In accordance with that history, President Bush issued a Military Order[216] that authorized trial by military commission of certain non-citizens and specifically stated the minimum requirement of providing "a full and fair trial."[217] Having declared a national defense emergency,[218] the President found "the principles of law and the rules of evidence" used in prosecuting federal crimes impracticable for the commissions outlined in the Order.[219]

Acting within his authority as Commander in Chief and under U.S. law,[220] President Bush established the commissions and authorized the Secretary of Defense to "issue such orders and regulations" required to carry out the President's order.[221] Four

---

THE RIGHT BALANCE, THE FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD. 7–8 (2006), http://www.fed-soc.org/doclib/20070326_MCA2006StrikingtheRightBalance.pdf.

215. Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for* Hamdan v. Rumsfeld, 186 MIL. L. REV. 1, 7–84 (2005); John M. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899, 902–13 (2003); David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2027–73 (2003); Haridimos V. Thravalos, Comment, *The Military Commission in the War on Terrorism*, 51 VILL. L. REV. 737, 739–55 (2006).

216. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

217. *Id.* at 57,834. Section 4 of the President's military order establishes the authority of the Secretary of Defense in regards to trials of those who are "Subject to this Order." *Id.* at 57,834–35. Subsection (c) directs the Secretary to establish rules of conduct for those trials, and paragraph (2) requires that at a minimum the rules must provide for "a full and fair trial[.]" *Id.*

218. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833–34 (Nov. 13, 2001). Section 1(g) declares the President's determination that "an extraordinary emergency exists for national defense purposes" which requires issuing this military order. *Id.*; *see also* Proclamation No. 7463, 66 Fed. Reg. 48,199, 48,199 (Sept. 14, 2001) (declaring that the terrorist attacks have created a national emergency).

219. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001). The President, in section 1(f), made this determination mindful of the threat to national safety and in accordance with Article 36(a) of the UCMJ. *Id.*

220. *Id.* The President specifically cited congressional authority granted by the AUMF, in addition to the UCMJ. *Id.*; Uniform Code of Military Justice arts. 21, 36, 10 U.S.C. §§ 821, 836 (2000); Authorization for Use of Military Force, Pub. L. No. 107-40, § 102, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. IV 2004)).

221. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001). The authority delegated to the Secretary of Defense in section 4(b) requires him to appoint commissions as necessary. *Id.*

months later, Secretary Rumsfeld issued Military Commission Order No. 1, which outlined the "policy, assign[ed] responsibilities, and prescribe[d] procedures"[222] for the military commissions to be used in prosecuting those whom the President determined were subject to his Military Order.[223]

In July 2003, Salim Ahmed Hamdan was declared eligible to stand trial before a military commission.[224] Subsequently, a Navy lawyer, Lt. Cmdr. Charles Swift, was detailed to handle Hamdan's defense.[225] With the help of Neal Katyal,[226] a civilian lawyer on the defense team and a professor at Georgetown University Law School, the defense launched an effort to challenge the legality of the commission, and the case eventually made its way to the United States Supreme Court.

In *Hamdan v. Rumsfeld*, the Court granted review due to its "recogni[tion] ... that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure."[227] After tracing the history of military commissions,[228] Justice Stevens, writing for the Court, recognized that the President had the authority to convene commissions,[229] but declared this particular

222. Military Commission Order No. 1, 32 C.F.R. § 9.1 (2006).

223. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) (defining the term "individual subject to this order" in section 4(b)).

224. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 155 (2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (citing a Department of Defense press release that listed enemy combatants determined by the President to be subject to trial by military commission).

225. *See, e.g.*, Nina Totenberg, *Law Professor Beats the Odds in Detainee Case*, NPR MORNING EDITION (Sept. 5, 2006), http://www.npr.org/templates/story/story.php?storyId=5767777 (reporting that Swift received "a letter appointing him as counsel"); *see also* Military Commission Order No. 1, § 4(C)(2) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf (requiring that the accused be provided military defense counsel). The order directs detailed defense counsel to zealously advocate for the accused and represent his or her interests at all times. *Id.* § 4(C)(2)(a)–(b).

226. *See, e.g.*, Nina Totenberg, *Law Professor Beats the Odds in Detainee Case*, NPR MORNING EDITION (Sept. 5, 2006), http://www.npr.org/templates/story/story.php?storyId=5767777 (recapping the development of the defense team and its strategy as the case made its way to the Supreme Court).

227. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (citing *Ex parte* Quirin, 317 U.S. 1, 19 (1942)).

228. *Id.* at 2772–77.

229. *Id.* at 2774–75 (citing *Ex parte* Quirin, 317 U.S. 1, 19 (1942)).

commission illegal, concluding that the commission's procedures did not comport with the Uniform Code of Military Justice or the Geneva Convention.[230] Critics of the decision point out that the Court misread the UCMJ, and that the Geneva Convention does not apply.[231]

The *Hamdan* plurality further relied on Article 75 of Protocol I to the Geneva Convention[232] to demonstrate that the commission's ex parte, in camera inspection of classified information

230. *Id.* at 2759, 2786.

231. *See id.* at 2841–42, 2846–47 (Thomas, J., dissenting) (finding the majority's interpretation of Article 36(b) inconsistent with its legislative history and that Common Article 3 only applies once sentence has been passed and carried out); Hamdan v. Rumsfeld, 415 F.3d 33, 42–43 (D.C. Cir. 2005), *rev'g*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd*, 126 S. Ct. 2749 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (holding that the district court erred in interpreting Article 36(b) to require uniformity throughout the code and that Common Article 3 would only apply after sentencing, essentially disagreeing with the Court's yet-stated objections); Samuel Estreicher & Diarmuid O'Scannlain, *The Limits of* Hamdan v. Rumsfeld, 9 GREEN BAG 2d 353, 354, 358 (2006) (noting that there is nothing in the legislative history to indicate the uniformity requirement found by the Court, and that the Geneva Convention is not judicially enforceable); David B. Rivkin, Jr. & Lee A. Casey, *Judgment at Guantanamo*, WALL ST. J., Sept. 9, 2006, at A9 (asserting the Geneva Convention only applies to lawful combatants, which Al Qaeda members are not); *see also Testimony on Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld: *Hearing Before the S. Comm. on Armed Servs.*, 109th Cong. (2006) (statement of Dr. James J. Carafano, Senior Research Fellow, The Heritage Foundation), 2006 WL 2007259, *available at* http://armed-services.senate.gov/statemnt/2006/July/Carafano%2007-19-06.pdf (stating that detainees are properly classified as unlawful combatants, who are not entitled to the same treatment as Geneva Convention-defined prisoners of war); *Hearings Concerning Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld, 109th Cong. (2006) (statement of David A. Schlueter, Hardy Professor of Law, St. Mary's University), 2006 WL 2007260, *available at* http://armed-services.senate.gov/statemnt/2006/July/Schlueter%2007-19-06.pdf, at 8 (proposing amendment to Article 36(b) to comport with its "most common reading" of uniformity across the services). *But see Hearings Concerning Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld, 109th Cong. (2006) (prepared statement of Professor Neal Katyal, Georgetown University Law Center), http://armed-services.senate.gov/statemnt/2006/July/Katyal%2007-19-06.pdf, at 5 (stating "these irregular, ad hoc military commissions" do not satisfy Common Article 3); Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for* Hamdan v. Rumsfeld, 186 MIL. L. REV. 1, 111–13 (2005) (noting that international law does not recognize conspiracy as a law of war offense, and therefore the commission is not constitutionally authorized); Erwin Chemerinsky, *In Guantanamo Case, Justices Rein in Executive Power*, 24-SEP TRIAL 60, 60 (2006) (declaring the Court's decision to be the most important of the 2005–2006 term).

232. Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, http://www.icrc.org/ihl.nsf/WebART/470-750096?OpenDocument.

was unlawful.[233] While recognizing that the United States did not ratify Protocol I, Justice Stevens asserted the nation's refusal to do so was not due to the contents of that article at all.[234] Without explanation, the Court heralds the "right to be tried in [one's] presence"[235] as a right due anyone "in the hands of an enemy."[236] The Court was apparently referring to a provision of the commission's procedures that allowed for the *possibility* of excluding a defendant from "all or part of a proceeding[.]"[237] However, as Justice Kennedy pointed in his concurrence, an unratified provision to an international treaty should not be

233. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2798 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. The plurality recognized the Government's need to protect sensitive information, but insisted that the accused must be given access to information used to convict him. *Id.* But as Justice Kennedy pointed out, the commission may not consider "secret evidence" if the accused will, in the process, be denied a "full and fair trial." *Id.* at 2809 (Kennedy, J., concurring). The plurality actually found fault with the government for not defining when it would be fair to convict a detainee on undisclosed evidence, and argued that the mere assurance of fairness is insufficient. *Id.* at 2798 n.67 (plurality opinion). But as Justice Kennedy further noted, this fairness determination is subject to judicial review, *id.* at 2809 (Kennedy, J., concurring), and certainly a conclusion of unfairness cannot be reached until a conviction is actually handed down. As of the Court's decision, no evidence had been offered, let alone admitted, against the accused. *Hamdan*, 126 S. Ct. at 2809 (Kennedy, J., concurring).

234. *Id.* at 2797 (plurality opinion) (quoting William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003)). Mr. Taft, a former Deputy Secretary of Defense and Legal Advisor to the Department of State, *see* Fried, Frank, Harris, Shriver & Jacobson, L.L.P., Attorney Bio., http://www.ffhsj.com/index.cfm?pageID=42&itemID=620&more=1 (last visited Oct. 12, 2007) (listing Mr. Taft's credentials), also noted that the United States has scrupulously honored its humanitarian commitments in this war. William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003). The plurality's inference that an accused would be tried in absentia is disingenuous given the safeguards outlined in Secretary Rumsfeld's order.

235. *Hamdan*, 126 S. Ct. at 2797 (quoting Article 75(4)(e) of Protocol I to the Geneva Convention).

236. *Id.* (citing William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003)). If only there were as much demonstrated concern over the treatment of our citizens in the hands of terrorists. *See, e.g.*, Rory McCarthy, *Missing U.S. Reporter—In Chains with a Gun to His Head*, THE GUARDIAN (London), Jan. 29, 2002, at Home 2, *available at* http://www.guardian.co.uk/international/story/0,,641075,00.html (detailing the kidnapping and initial treatment of Daniel Pearl, an American reporter whom terrorists captured and held in retaliation for the detention of prisoners at Guantanamo Bay before they beheaded him).

237. Military Commission Order No. 1, § 6(B)(3) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

declared binding law.[238]

Curiously, the plurality seems to have conveniently ignored the provisions that specifically preclude consideration of any evidence withheld from the defendant's military defense counsel[239] or that would otherwise prevent "a full and fair trial."[240] The Commission Order additionally allowed for the defendant to appeal to the Court of Military Commission Review, the D.C. Circuit, and to petition for review by the Supreme Court.[241] As one author pointed out, "somewhere in the course of review, re-review, and re-re-review, the nation's top judges" should be able to assure the defendant's rights have been adequately protected.[242]

V. CONGRESS ANSWERS THE COURT

In his concurring opinion, Justice Breyer condensed the *Hamdan* Court's holding to the single assertion that "Congress has not issued the Executive a 'blank check.'"[243] Declaring that Congress had indeed *denied* authority for the commissions outlined by the President, Justice Breyer pointed out that nothing prevented the President from asking Congress to give him the authority the Court said he did not presently possess.[244] In

238. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2809 (2006) (Kennedy, J., concurring), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (noting that Congress has not adopted Protocol I).

239. Military Commission Order No. 1, § 6(D)(5)(b) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

240. Military Commission Order No. 1, §§ 1, 4(A)(5)(b), 5(H), 6(A)(5), 6(B)(1)–(2) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

241. *See Hamdan*, 126 S. Ct. at 2818–19 (Scalia, J., dissenting) (delineating the various avenues available to the defendant); Military Commission Order No. 1 § 6(H)(4)–(6) (stating the basic procedures for appeal from Military Commission Review). *But see* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,835–36 (Nov. 13, 2001) (emphasizing, in section 7(b)(1)–(2), the exclusive jurisdiction of the military tribunals in these cases as well as prohibiting detainees from seeking relief from "any court of the United States").

242. Andrew C. McCarthy, *Trials of This Century*, NAT'L REV., Oct. 9, 2006, at 38, 42; *see also Hamdan*, 126 S. Ct. at 2818, 2819 n.7 (Scalia, J., dissenting) (pointing out the accused's adequate appellate options); *id.* at 2848 (Thomas, J., dissenting) (outlining the judicial guarantees afforded the accused).

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

244. *Id.* at 2799. What Justice Breyer failed to note, however, is that the plurality he quoted was referring to the rights of citizens, *see* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion), and not alien detainees who are captured on a foreign battlefield.

response, the President proposed, and a bipartisan majority of Congress enacted,[245] the Military Commissions Act of 2006[246] which President Bush signed into law on October 17, 2006. Extensive discussions between Congress and the Bush administration resulted in the codification of military commission procedures "that would allow for the fair and effective prosecution of . . . unlawful enemy combatants."[247] Not everyone is satisfied with the outcome, of course, but the fact is that the Act provides to suspected terrorists "more due process and more judicial involvement" than the U.S. Constitution requires.[248]

The Military Commissions Act still provides for the exclusion of the defendant from "any portion of a proceeding" if he continues to disrupt the proceedings after having been warned to behave, or if "the physical safety of individuals" requires such exclusion.[249] But except for defendant misconduct, or when the commission members deliberate or vote, section 949d(b) expressly states that the accused, his defense counsel, and trial counsel shall be present for "all proceedings of a military commission under this chapter[.]"[250] This does not mean, however, that classified information is not protected.

If disclosing classified information "would be detrimental to the

245. Sixty-five senators (12-D, 53-R), 152 CONG. REC. S10,420 (daily ed. Sept. 28, 2006), and two hundred fifty representatives (32-D, 218-R), 152 CONG. REC. H7,959 (daily ed. Sept. 29, 2006), voted for the Act. In his letter accompanying the proposed legislation, President Bush specifically stated it was drafted in response to the *Hamdan* decision. Message to Congress Transmitting Draft Legislation on Military Commissions, 42 WEEKLY COMP. PRES. DOC. 1576 (Sept. 6, 2006).

246. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. §§ 948a-950w).

247. Message to Congress Transmitting Draft Legislation on Military Commissions, 42 WEEKLY COMP. PRES. DOC. 1576 (Sept. 6, 2006); *see also* Adam Liptak, *Detainee Deal Comes with Contradictions*, N.Y. TIMES, Sept. 23, 2006, at A1 (describing the negotiations as "hard-fought"); DAVID B. RIVKIN, JR. ET AL., MILITARY COMMISSIONS ACT OF 2006: STRIKING THE RIGHT BALANCE, THE FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD. 21 (2006), http://www.fed-soc.org/doclib/20070326_MCA2006StrikingtheRightBalance.pdf (concluding the Act is an historic piece of legislation resulting in government "harmony on the key legal issues involved in this war").

248. DAVID B. RIVKIN, JR. ET AL., MILITARY COMMISSIONS ACT OF 2006: STRIKING THE RIGHT BALANCE, THE FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD. 4 (2006), http://www.fed-soc.org/doclib/20070326_MCA2006StrikingtheRightBalance.pdf.

249. Military Commissions Act of 2006 § 949d(e) (using, but not defining, the phrase "conduct that justifies exclusion from the courtroom").

250. *Id.* § 949d(b) (requiring, in addition, that all such proceedings be part of the record).

national security," section 949d(f) directs that the information must be protected during "all stages" of the military commission proceeding.[251] The military judge is required to allow redaction, substitution or summary, or stipulation of classified information by the Government to the extent practicable during both discovery and trial.[252] And the use of ex parte, in camera review of trial counsel's national security privilege assertion remains intact,[253] as does the protection of "sources, methods or activities" used by the Government to obtain its evidence.[254] Notably, the safeguard of prohibiting the admission of evidence that has not been disclosed to military counsel seems to have been eliminated. Instead, the provision that allows for in camera review of materials in support of the Government privilege expressly states that the information "shall not be disclosed to the accused."[255]

VI. CONCLUSION

Article 51 of the United Nations Charter recognizes a sovereign nation's inherent right of self-defense.[256] On September 11, 2001, nineteen men boarded four different commercial aircraft and

251. *Id.* § 949d(f)(1)(A).

252. *Id.* §§ 949d(f)(2)(A), 949j(c).

253. *Id.* § 949d(f)(2)(C).

254. Military Commissions Act of 2006, Pub. L. No. 109-366, § 949d(f)(2)(B), 120 Stat. 2600, 2612 (to be codified at 10 U.S.C. § 949d(f)(2)(B)) (providing for an unclassified summary upon a showing that evidence is reliable and obtained through classified "sources, methods, or activities").

255. *Id.* § 949d(f)(3). The accused's option to choose his military defense counsel, assuming the requested counsel was available, was also deleted by the Act. Military Commission Order No. 1, § 4(C)(3)(a) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. The new statute only directs that military counsel will be provided. Military Commissions Act of 2006 § 949c(b)(2). The defendant may still elect to retain civilian counsel provided counsel meets the same requirements as stated in the Order. *Compare* Military Commissions Act of 2006 § 949c(b)(3), *with* Military Commission Order No. 1, § 4(C)(3)(b) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. Presumably because civilian counsel may no longer be excluded from most proceedings, the Act includes a provision requiring civilian counsel to "protect any classified information received during the course of representation" and prohibiting disclosure "to any person not authorized to receive it." Military Commissions Act of 2006 §§ 949c(b)(4), 949d(b)(1). It would seem logical that counsel *may* be prevented from divulging information to the *accused* if he is deemed "unauthorized" in some fashion to receive that information, but counsel should still be able to ensure fundamental fairness and protect whatever due process rights an unlawful enemy combatant might have.

256. U.N. Charter art. 51.

turned them into weapons of mass destruction, killing nearly 3,000 civilians on U.S. soil. Exercising our right of self-defense, our military forces have taken the fight to the enemy's strongholds. As Commander in Chief, President Bush issued a military order outlining the manner in which captured enemy combatants would be detained and tried, balancing the desire to provide each detainee with a fair trial with the duty to protect the security of our nation. In that light, Secretary of Defense Rumsfeld outlined the procedures to be used by the commissions to protect classified information whenever it might be disclosed.

Before the first trial had commenced,[257] the Supreme Court declared the commission's procedures illegal, while reluctantly recognizing the President's probable authority to convene such commissions.[258] Justice Breyer's comment that "no emergency prevents consultation with Congress"[259] misses the point that Military Commission Order No. 1 was first issued barely six months after the Twin Towers in New York crumbled to the ground, and Congress had already granted the President the authority "to use all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States[.]"[260] The Uniform Code of Military Justice has, for over fifty years, authorized the use of military commissions and granted the President the authority to establish their governing procedures.[261] His only constraint was to "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," but even this requirement was conditioned on his determination of whether

257. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 155 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (stating Hamdan was challenging the *plan* to try him).

258. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (declining to squarely face the issue of whether the President's authority exists absent Congressional action).

259. *Id.* at 2799 (Breyer, J., concurring).

260. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. IV 2004)).

261. Uniform Code of Military Justice, art. 36a, 10 U.S.C. § 836(a) (2000). This section, along with the bulk of the Code, was enacted in May 1950. Act of May 5, 1950, ch. 169, art. 36(a), 64 Stat. 107, 120 (codified as amended at 10 U.S.C. § 836(a) (2000)).

those principles and rules were "practicable."[262] And the President alone was given authority to make the determination as to their feasibility.[263] As has been pointed out, where protection of classified information was at issue, the rules of evidence adopted by the Commission Order were quite similar to those enacted by Congress in 1980, and upheld in numerous domestic criminal prosecutions.[264]

Between March 2002, when the commission procedures were first published, and June 2003, when Hamdan and five others were designated as triable by military commission,[265] Congress made no attempt to alter the President's authorization.[266] The procedures outlined were consistent with historical use of military commissions and the President's wartime authority. And in light of CIPA, the commission's procedures, designed to deny our *enemies* information vital to our ability to wage and win this war, were only slightly different than those routinely used to prevent

---

262. Uniform Code of Military Justice, art. 36a, 10 U.S.C. § 836(a) (2000).

263. *See id.* (allocating this authority to the President alone). Section (a) provides that the President must apply the same rules and principles used in federal district courts to any procedure that he establishes—unless *he* determines those rules and principles are not practicable. *Id.* The article makes no mention of meeting a standard established by the Supreme Court. *Id.*

264. *See* United States v. Mejia, 448 F.3d 436, 458 (D.C. Cir. 2006) (equating the use of ex parte, in camera proceedings under CIPA with those under the Jencks Act, 18 U.S.C. § 3500(b) (2000), and Brady v. Maryland, 373 U.S. 83 (1963), and finding the defendant not entitled to participate in the proceeding or have access to the evidence); United States v. Dumeisi, 424 F.3d 566, 578 (7th Cir. 2005) (finding no abuse of discretion for allowing an unclassified summary); United States v. Gurolla, 333 F.3d 944, 951 (9th Cir. 2003) (noting that the defense must be notified when classified information is withheld, but a lack of notification is harmless if information is not "relevant and helpful to the defense"); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998) (finding ex parte, in camera proceedings proper to determine relevancy or confidential nature of evidence); United States v. Innamorati, 996 F.2d 456, 487 (1st Cir. 1993) (stating there are times when a court is permitted to rule in camera and ex parte); United States v. Clegg, 740 F.2d 16, 18 (9th Cir. 1984) (affirming the trial court's use of in camera, ex parte examination, as well as its decision that information was discoverable and the Government's proposed alternative was inadequate); United States v. Collins, 603 F. Supp. 301, 304–06 (S.D. Fla. 1985) (finding CIPA's section 6(c) allowance for stipulation or unclassified summary was constitutional).

265. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2760 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (relating timeline).

266. *See id.* at 2823 (Thomas, J., dissenting) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) for the proposition that lack of congressional action does not imply disapproval of executive action); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (commenting on the interdependency of Presidential authority and congressional action).

American citizens from obtaining or disclosing to others possibly even *less* sensitive information.

The Court did not hold that these procedures were "strictly 'contrary to or inconsistent with' other provisions of the UCMJ"[267] and did not even address whether they were contrary to "the rules of evidence generally recognized"[268] by domestic criminal courts. Professor Katyal, the civilian attorney who argued to have the Court invalidate the President's authority to convene military commissions even before charges were filed,[269] testified that Hamdan was denied "fundamental rights, including the right to be present at his own trial and to confront the evidence against him."[270] His testimony epitomized the mischaracterization of the commission procedures by failing to recognize that nothing could be admitted into evidence against the accused, nor could any proceeding be held, unless the accused's military counsel was present and given access and opportunity to represent the accused's interests.[271]

Even if the Appointing Authority or Presiding Officer determined a need to close the proceedings, exclusion of the accused was not required.[272] In the event that both the accused and his civilian counsel were excluded from a portion of the proceedings, and the military defense counsel could not be trusted to adequately represent the accused's interests, certainly one of the mandatory military or available civilian appellate reviews authorized by the Order would be able to determine if justice had been circumvented. Even Justice Kennedy, while concurring in *Hamdan*, recognized that an accused may not necessarily "have

267. *Hamdan*, 126 S. Ct. at 2791; Uniform Code of Military Justice, art. 36(a), 10 U.S.C. § 836(a) (2000).

268. Uniform Code of Military Justice, art. 36(a), 10 U.S.C. § 836(a) (2000).

269. *Hearings Concerning Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld, 109th Cong. (2006) (statement of Professor Neal Katyal, Georgetown University Law Center), http://armed-services.senate.gov/statemnt/2006/July/Katyal%2007-19-06.pdf, at 1.

270. *Id.* at 3.

271. Military Commission Order No. 1, § 6(B)(3), (D)(5)(b) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

272. *Id.* § 6(B)(3). "A decision to close a proceeding or portion thereof *may* include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel *may not* be excluded from any trial proceeding or portion thereof." *Id.* (emphasis added).

the right to be present at all stages of a criminal trial."[273] Both Justice Kennedy, in his concurrence, and Justice Thomas, in his dissent, pointed out that the Order prohibited the admission of undisclosed evidence if such action would prevent the accused from receiving "a full and fair trial."[274]

Ignoring the Court's own historical recognition that executive foreign policy decisions are political and as such "are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility,"[275] and that Congress had granted the President authority to convene military commissions,[276] five Justices nevertheless pronounced Hamdan's commission invalid. As Justice Thomas pointed out, this was an inappropriate determination of "what is quintessentially a policy and military judgment,"[277] and the Court should have declined to grant certiorari.[278]

Because the Court ruled as it did, the President and Congress responded by enacting the Military Commissions Act of 2006. This bipartisan legislation provides for, among other things, procedures to prevent the disclosure of classified information to those who might "transmit what they learn" to our enemies.[279] The individuals designated as triable by military commissions are

273. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2809 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Kennedy, J., concurring).

274. *Id.* (Kennedy, J., concurring); *id.* at 2848 (Thomas, J., dissenting). Justice Kennedy also recognized that the determination of fairness "is unambiguously subject to judicial review" and "it remains to be seen whether [Hamdan] will suffer any prejudicial exclusion." *Id.* at 2809 (Kennedy, J., concurring).

275. *Id.* at 2825 (Thomas, J., dissenting) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

276. *Hamdan*, 126 S. Ct. at 2825 (Thomas, J., dissenting); Uniform Code of Military Justice, art. 36, 10 U.S.C. § 836 (2000); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (reported as a note to 50 U.S.C. § 1541 (Supp. IV 2004)).

277. *Hamdan*, 126 S. Ct. at 2838 (Thomas, J., dissenting).

278. *See id.* at 2819–20 (Scalia, J., dissenting) (citing equity and congressional provision of adequate review as reason for the courts to abstain); *id.* at 2823 (Thomas, J., dissenting) (chiding the majority for presuming to second guess the President on military and foreign affairs issues); *cf.* Brian Haagensen II, Comment, *Federal Courts Versus Military Commissions: The Comedy of No Comity*, 32 OHIO N.U. L. REV. 395, 395 (2006) (declaring that the judiciary's absence of comity toward the executive has created confusion).

279. Andrew C. McCarthy, *Trials of This Century*, NAT'L REV., Oct. 9, 2006, at 38, 40.

neither common criminals nor protected prisoners of war,[280] but suspected unlawful enemy combatants who deliberately choose to ignore the rules of war recognized by nation states. Let us hope the Court's action has not helped to embolden an enemy who is determined to "continu[e] this policy in bleeding America to the point of bankruptcy."[281]

280. Clare Dyer, *POWs or Common Criminals, They're Entitled to Protection*, THE GUARDIAN (London), Jan. 30, 2002, at Features 14. In this interview, Judge Richard Goldstone asserts that the term "unlawful combatants" is "not recognised by international law[,]" but that the detainees are not likely prisoners of war. *Id.* His assessment of the procedures outlined by the President's order and his palpable distrust of the military justice system is regrettable.

281. Usama bin Ladin, Speech in Videotape Sent to Al-Jazeera (Oct. 29, 2004), http://english.aljazeera.net/English/archive/archive?ArchiveId=7403.