

SECRET EVIDENCE IS SLOWLY ERODING THE ADVERSARY SYSTEM: CIPA AND FISA IN THE COURTS

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I. INTRODUCTION

The Bush administration is reportedly the most secretive in United States history.¹ The unprecedented scope of secrecy in intelligence gathering, detentions, decision-making, data collection, and legislative implementation has recently received public scrutiny.² Often justified as

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1. David E. Sanger, *The Washington Secret Often Isn't*, N.Y. TIMES, Oct. 23, 2005, § 4 at 1 (recognizing the Bush administration as “the most secretive White House in modern history”). This article was written months before the revelation that the executive branch authorized a secret surveillance without securing warrants pursuant to the Foreign Intelligence Surveillance Act (“FISA”). Eric Lichtblau and David E. Sanger, *Administration Cites War Vote in Spying Case*, NY TIMES, Dec. 20, 2005, at 1. This program, whose legality is questionable, necessarily has a significant impact on this article.

2. See *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 920 (D.C. Cir. 2003) (upholding government's refusal to make public the information about detention of more than 1000 undocumented aliens after 9/11); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQ. L. 1 (2004); Peter Margulies, *Above Contempt?: Regulating Government Overreaching in Terrorism Cases*, 34 SW. U. L. REV. 449 (2005); Eric Lichtblau, *FBI Watched Activist Groups, New Files Show*, N.Y. TIMES, Dec. 20, 2005, at A1 (reporting intelligence gathering against domestic political organizations); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (reporting detentions in secret prisons); James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (revealing that the National Security Agency had been monitoring international telephone calls and e-mail messages without warrants for the previous three years); CTR. ON LAW AND SECURITY, *TERRORIST TRIALS: A REPORT CARD 2* (Feb. 2005), available at

essential to preserve national security, enhanced secrecy is a steady evisceration of the transparency and accountability essential to a functioning democracy.

While of a different dimension, concerns about transparency and accountability exist within the judicial system by the government's use of secret evidence in federal criminal prosecutions—that is, information of potential evidentiary value not shared with the defendant, and often not shared with defense counsel.³ Secret evidence raises critical issues for our adversary system, including the protection of fundamental constitutional rights and the balancing of the historical roles of the prosecutor, defense lawyer, and court. Its use raises significant issues as to whether defense counsel can fulfill her ethical responsibility as a diligent, competent, zealous advocate for her client.⁴

I argue that such secret evidence, which has and will continue to seep slowly into a wide range of federal criminal prosecutions, undermines the ability of defense counsel to perform her essential role and, in so doing, shifts the balance in an untenable fashion within our adversary system. I make modest suggestions to maintain the proper functioning of the adversary system in cases where secret evidence is implicated.

<http://www.law.nyu.edu/centers/lawsecurity/publications/terroristtrialreportcard.pdf> [hereinafter TERRORIST TRIALS] (recommending transparency in data collection for terrorism-related cases).

3. Secret evidence is defined elsewhere as “evidence—whether classified or unclassified—that is not disclosed to the accused himself.” Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962 n.7 (2005). There are many other aspects of secrecy in the judicial system that are beyond the scope of this Article. *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1029-30 (11th Cir. 2005) (reaffirming that secret dockets are unconstitutional); *United States v. Abuhamra*, 389 F.3d 309, 314 (2d Cir. 2004) (rejecting reliance on secret evidence to deny bail); *Detroit Free Press v. Ashcroft*, 195 F. SupP.2d 937, 940 (E.D. Mich. 2002) (holding that secret immigration proceedings that are closed to the public violate the First Amendment); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 953-54 (2002) (discussing massive secret preventive detention); see also sources cited *supra* note 2.

4. In this Article, I focus upon the most significant ethical concerns for defense counsel in cases involving secret evidence. Its use raises ethical issues beyond the scope of this Article including an array of complex issues for prosecutors who face significant problems in carrying out their discovery obligations. There are a myriad of agencies who classify information in the name of intelligence gathering, such as the Defense Intelligence Agency, National Security Agency, Central Intelligence Agency, and the Federal Bureau of Investigation. The distrust between and among agencies, the inability of the prosecutors to obtain access to all of the information and, in circumstances where there is access, disagreements about whether the information should be declassified, all give rise to ethical and tactical dilemmas for prosecutors. See Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 280-81 (1986) (discussing friction between the Justice Department (“DOJ”) and intelligence agencies); Mark D. Villaverde, Note, *Structuring the Prosecutor’s Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1475 (2003) (describing the dilemma faced by prosecutors due to the disclosure threat posed by criminal prosecutions).

II. CLASSIFIED INFORMATION PROCEDURES ACT AND FOREIGN INTELLIGENCE SURVEILLANCE ACT IN THE COURTS

Secret evidence, not new to this administration, exists throughout tribunals in our legal system, whether in an immigration context, in combatant status review tribunals, or in military courts.⁵

In a series of immigration cases in the late 1990s, the Clinton Administration utilized secret evidence—information not made available to the defense lawyer or the detainee—in seeking deportation or exclusion from the United States.⁶ In one noted case, *Kiareldeen v. Reno*, a thirty-three year-old Palestinian was detained in an immigration proceeding for nineteen months based on evidence that consisted exclusively of hearsay allegations.⁷ The government claimed that he was “a threat to the national security,” and that he was a member of a terrorist organization.⁸ At no point during his detention was he provided even the sketchiest details of the alleged threats or of the associations and relationships he supposedly had with terrorist organizations. At his immigration hearing, where he addressed these vague allegations as best he could without seeing any evidence, he testified that the likely source was his wife, with whom he was in a custody dispute.⁹ In the past, she repeatedly had made false allegations of domestic violence and terrorist ties.¹⁰ The trial court ruled in his favor, saying he had rebutted the charges and released him on bond.¹¹ On appeal, the court ruled that the reliance on secret evidence violated his due process rights because (1) it deprived him of meaningful notice and an opportunity to confront the evidence against him, and (2) exclusively hearsay evidence could not be

5. The overriding issue of secrecy and assertions of executive power—for example, the extent to which executive decision-making is subject to judicial review—will continue to be the subject of litigation. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004) (rejecting the government’s claim that the detention of enemy combatants is not subject to judicial review); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (granting federal habeas jurisdiction to hear petitions of detainees at Guantanamo Bay in Cuba); James B. Anderson, *Hamdi v. Rumsfeld: Judicious Balancing at the Intersection of the Executive’s Power to Detain and the Citizen-Detainee’s Right to Due Process*, 95 J. CRIM. L. & CRIMINOLOGY 689, 689-90 (2005); Adam Liptak, *In Terror Cases, Administration Sets Own Rules*, N.Y. TIMES, Nov. 27, 2005, at A1.

6. See, e.g., *Najjar v. Reno*, 97 F. SupP.2d 1329 (S.D. Fla. 2000); *Kiareldeen v. Reno*, 71 F. SupP.2d 402 (D. N.J. 1999).

7. See *Kiareldeen*, 71 F. SupP.2d at 404.

8. *Id.*

9. See *id.* at 416.

10. See *id.* at 417.

11. See *id.* at 418.

tested for reliability.¹² This was the third case in an immigration context holding that secret evidence is unconstitutional.¹³

In federal criminal cases, where fundamental Fifth and Sixth Amendment rights are at the core of our constitutionalized adversary system, there is greater scrutiny than in immigration cases. Nevertheless, the use of secret evidence is distorting the adversary system.

A. *Fundamentals of the Adversary System*

In Article III courts, we presume that the defendant, through his counsel, has access to incriminating and exculpatory facts, has the opportunity to thoroughly investigate the case, to cross examine witnesses and, if he chooses, to testify on his own behalf and to present witnesses.¹⁴ We expect and require the lawyer to mount a zealous defense.¹⁵ These fundamental ethical mandates for counsel are called into question in a growing number of criminal prosecutions, notably those that result from the work of intelligence agencies or other government agencies that classify information.¹⁶ In such cases, because information that is material and relevant is not readily available to the defense, the defendant is placed at a significant disadvantage in case investigation, preparation, and presentation.

12. *See id.*

13. *See id.*; Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 614-16 (2005); *see also* Rafeedie v. INS, 880 F.2d 506, 523 (D.C. Cir. 1989) (noting that “how much process is due involves a consideration of the government’s interests in dispensing with procedural safeguards”).

14. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS (3d ed. 2004). Discovery in federal criminal cases is limited. *See generally* Jencks Act, 18 U.S.C. § 3500(c) (2000); FED. R. CIV. P. 16(a)(2); *Discovery*, 34 GEO. L. J. ANN. REV. CRIM. PROC. 316 (2005).

15. *See* FREEDMAN & SMITH, *supra* note 14, at 82-84 (noting that the ethical duty of zealous advocacy is contained in the New York Code of Professional Responsibility but has been excised in the ethical rules of nearly all of the jurisdictions by the Model Rules of Professional Conduct which instead impose a duty to be diligent and competent); Roger C. Cramton, *Furthering Justice By Improving the Adversary System and Making Lawyers More Accountable*, 70 FORDHAM L. REV. 1599, 1601-02 (2002) (noting that zealous advocacy, while excised from the Model Rules, is considered by many lawyers to be their most sacred duty); Anita Bernstein, Remarks at the Lawyers’ Ethics in an Adversary System Legal Ethics Conference (Nov. 1, 2005).

16. Civil cases present similar issues. *See* ACLU v. Dep’t of Def., 339 F. Supp.2d 501, 505 (S.D.N.Y. 2004) (requiring the disclosure of previously unreleased documents after the government’s repeated failure to respond to or claim an exemption from a request by plaintiff under the Freedom of Information Act); Doe v. Dep’t of Justice, 790 F. Supp. 17, 18 (D.D.C. 1992) (reviewing the government’s attempt to avoid disclosure of classified documents about its treatment of detainees in a Freedom of Information Act suit); *see also* Ctr. for Nat’l Sec. Studies v. Dep’t of Justice, 331 F.3d 918, 920 (D.C. Cir. 2003) (concerning the release of information on persons detained in the wake of 9/11 by the government under the Freedom of Information Act).

This is primarily the result of two statutes, the Classified Information Procedures Act (“CIPA”) which governs the disclosure of classified information,¹⁷ and the Foreign Intelligence Surveillance Act (“FISA”), which addresses procedures for surveillance techniques to gather foreign intelligence information.¹⁸

B. *Classified Information Procedures Act*

CIPA was enacted to protect against “gray-mailing” or threats by government officials or intelligence operatives such as Oliver North, Wen Ho Lee, and John Poindexter, who were in a position to threaten to release confidential government information unless the charges against them were dismissed.¹⁹ The statute provided a mechanism for these defendants to utilize requested materials in their defense under a number of conditions—notably that carefully delineated information was subject to a protective order preventing its release.²⁰ In these typically “insider” cases, the defendant previously had access to the classified information and the offense was for work-related conduct. In such cases, the government typically produces all the classified information to security-

17. See 18 U.S.C. app. §§ 1-16 (1982). Classified information is “any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security” *Id.* § 1(a); see also Ralph V. Seep, Annotation, *Validity and Construction of Classified Information Procedures Act (18 USCS Appx §§ 1-16)*, 103 A.L.R. Fed. 219 (1991).

18. See 50 U.S.C. § 1862(a) (2000). Secret evidence also includes the state secrets privilege, invoked primarily in civil cases. It has been criticized as leading to abuses. Due to its expanded use, the state secrets privilege “could bring court cases challenging the government’s anti-terrorism policies to a screeching halt.” *Morning Edition: A Look at State Secret Privileges* (NPR radio broadcast Sept. 9, 2005); see also *United States v. Reynolds*, 345 U.S. 1 (1952) (discussing state secrets privilege used to cover up military errors); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (upholding dismissal of wrongful death claim against missile defense systems manufacturers, designers and testers); *Edmonds v. Dep’t of Justice*, 323 F. Supp.2d 65 (D.D.C. 2004), *cert denied*, 2005 WL 3144129 (Nov. 28, 2005) (dismissing the case of the FBI whistleblower); Christopher Brancart, *Rethinking the State Secrets Privilege*, 9 WHITTIER L. REV. 1, 2 (1987); Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 699-700 (2005).

Secret evidence also encompasses exceptions under the Freedom of Information Act (“FOIA”) where the “disclosure of the existence of records could reasonably be expected to interfere with enforcement proceedings,” and the subject is unaware of its pendency. 5 U.S.C. § 552(c)(1)(B) (2000); see also *Winterstein v. Dep’t of Justice*, 89 F. Supp.2d 79, 83 (D.D.C. 2000) (denying FOIA request where it related to ongoing investigation); Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy after September 11*, 2002 UTAH L. REV. 481, 501 n.102 (2002) (discussing the mosaic theory).

19. See *United States v. North*, 708 F. Supp. 399 (D.D.C. 1988); *United States v. Lee*, 90 F. Supp.2d 1324 (D.N.M. 2000); *United States v. Poindexter*, 698 F. Supp. 316 (D.D.C. 1988).

20. See CIPA, 18 U.S.C. app. § 5 (2000).

cleared defense counsel and the defendant, who himself has security clearance for access to the classified documents, reviews the evidence with his lawyer. Consequently, CIPA works relatively effectively at the discovery stage to afford the defendant basic Fifth and Sixth Amendment rights, while preserving the government's national security concerns.²¹

CIPA's purpose is distorted, however, by its use in what is termed "outsider cases," notably terrorism-related, international drug conspiracies, international defense contractor cases and others implicating foreign relations where the defendant never had and never will have access to the material.²² In this expanding category of cases there is no possibility of "gray-mailing"; the defendant cannot reveal classified information other than that provided in discovery.²³

CIPA sets forth detailed procedures for "matters relating to classified information that may arise in connection with the prosecution."²⁴ Where the government possesses classified, potentially relevant information, section 4 of CIPA permits it to present such information *ex parte, in camera* to the trial court for a determination as to whether the documents are discoverable. The court, while not required to do so, typically makes such a determination without the benefit of input from the defense counsel.²⁵ If deemed material and relevant, the court either balances the need for the information against the claim of

21. In such cases, the controversy between defense counsel and the government is at the second stage—the determination of admissibility of evidence at trial.

22. There is a third category of what can be deemed "quasi insider" cases where the defendant is a government insider but is indicted for activities outside the scope of his duties and does not have access to classified information related to the charges against him. This includes, for instance, the highly publicized cases against Brian Regan, Aldrich Ames, and Robert Hanssen. See generally *FBI Digs Up Secret Documents in Spy Case*, CNN, July 28, 2003, at <http://www.cnn.com/2003/US/07/28/regan.search> (reporting Regan's offer to sell secrets to Iraq, China, and Libya); *On this Day: CIA Double Agent Jailed For Life*, BBC NEWS, at http://news.bbc.co.uk/onthisday/low/dates/stories/april/28/newsid_2501000/2501007.stm (last visited Apr. 4, 2006) (reporting the story of CIA agent Aldrich Ames); Monica Davey, *Secret Passage*, CHI. TRIB. MAG., Apr. 21, 2002, available at http://www.cicentre.com/Documents/DOC_Hanssen_Tribunemag.htm (describing the story of Robert Hanssen). I am indebted to attorney John Klein, who has served as counsel for Oliver North, Wen Ho Lee, and J.I. Smith, for this typology.

23. CIPA provides for classification of information determined to require protection for reasons of national security. National security is defined as "national defense and foreign relations." 18 U.S.C. app. § 1(b). This broad definition encompasses a wide range of crimes. See *infra* notes 96-97.

24. 18 U.S.C. app. § 2.

25. See *id.* § 4 ("The court . . . may authorize the United States to delete specified items of classified information . . . , to substitute a summary . . . , or to substitute a statement admitting relevant facts . . . in the form of a written statement to be inspected by the court alone.").

government privilege or imposes a heightened standard of relevance to determine whether the information is discoverable.²⁶ Once the court decides the classified information should be disclosed to defense counsel, it can either: (1) order disclosure of the classified information or (2) permit the government to submit a summary of the information or a statement admitting relevant facts that the classified information would tend to prove if such a substitute would provide the defendant with substantially the same ability to make his defense as would the disclosure.²⁷ If the government chooses not to disclose the information, the court can impose sanctions such as dismissal of a count or claim.²⁸ The court *cannot* order the government to declassify the information or require that it be turned over to the defense.²⁹ The government may also

26. CIPA concerns both discovery of classified information and its admissibility at trial. There is abundant case law that the classified nature of the evidence should not affect the determination of its disclosure and admissibility, thus the traditional materiality and relevance discovery standard (FED. R. EVID. 401) should be applicable. *See* *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363 (11th Cir. 1994) (“CIPA does not create new law governing the admissibility of evidence.”); *United States v. Wilson*, 732 F.2d 404, 412 (5th Cir. 1984) (stating that “CIPA does not ‘undertake to create new substantive law governing admissibility’” of evidence); *United States v. Clegg*, 740 F.2d 16, 18 (9th Cir. 1984) (granting discovery because the classified materials submitted *in camera* “are relevant to the development of a possible defense”); *United States v. Pickard*, 236 F. Supp.2d 1204, 1209 (D. Kan. 2002) (stating that CIPA creates no “new right of or limits on discovery”). Despite such case law, courts have imposed either a heightened standard of relevance or a balancing test of relevance versus national security to decide whether information is discoverable. *See* *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (stating that protection of government’s classified information requires a higher threshold of materiality for disclosure); *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (allowing balancing for both discovery and admissibility); *United States v. Pringle*, 751 F.2d 419, 427 (1st Cir. 1984) (stating that CIPA requires a balancing test for discovery); *see also* Seep, *supra* note 17, at 234 (stating that courts have used a balancing test in determining whether discovery is proper).

As to standards for evaluating admissibility of evidence, circuit courts differ as to whether a balancing test is applicable. *See* *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990) (holding that a balancing test should be used, but one that does not “override the defendant’s right to fair trial”); *United States v. Anderson*, 872 F.2d 1508 (11th Cir. 1989); *United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985) (using no balancing test for determining admissibility); *United States v. Smith*, 780 F.2d 1102, 1107 (4th Cir. 1985) (stating that the court is required to use a balancing test for admissibility).

27. *See* CIPA, 18 U.S.C. app. § 6(c).

28. Pursuant to a section 4 application, the government can request that items of classified information from the disclosed documents remain classified. *See id.* § 4; *see also* *United States v. Moussaoui*, 336 F.3d 279, 285 (4th Cir. 2003) (stating that “‘disclose or dismiss’—was just what Congress sought to eradicate by enacting CIPA”).

29. The court may “encourage” the government to de-classify the information and provide it to defense counsel, but it has no authority to order the government to do so. Classification is an executive, not judicial, function, and the fact of classification cannot be challenged under CIPA. *United States v. Collins*, 720 F.2d 1195, 1198 n.2 (11th Cir. 1983) (“It is an Executive function to classify information, not a judicial one.”); *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984) (stating that the classification cannot be challenged by defendant or the court), *rev’d on other*

request in a section 4 application deletion of items of classified information from the documents to be disclosed.³⁰

Only a lawyer who has received a security clearance from the government is entitled to review the classified material.³¹ The lengthy procedure to obtain such security clearance permits defense lawyers to review documents classified at all levels—top secret, secret, or confidential.³² Counsel's review of such documents is subject to a protective order that precludes any release of the information—including to the defendant.³³

C. *Fundamental Ethical Conflicts for Diligent, Competent, Zealous Defense Counsel*

Despite the fact that courts uniformly have upheld the constitutionality of CIPA against claims that its provisions violate the Fifth and Sixth Amendments,³⁴ profound ethical dilemmas exist for

grounds, 780 F.2d 1102 (4th Cir. 1985) (en banc) Defendants may challenge whether material is properly classified. Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995). Merely because the government claims that information is classified does not mean that it is. While courts may be skeptical about the classification of some documents, the very fact of classification typically results in at least a heightened standard of relevance before a court deems a document discoverable. *United States v. Yunis*, 924 F.2d 1086, 1095 (D.C. Cir. 1991) (discussing the higher threshold of materiality where government asserts a privilege). However subtle, the executive branch wields control of the scope of disclosure through its power to decide what information is classified. *See Tamanaha*, *supra* note 4, at 300, 313-14.

30. Other sections of CIPA authorize pretrial conferences and adversarial hearings where the *defendant* reasonably expects to disclose classified evidence. *See* CIPA, 18 U.S.C. app. §§ 5-6. In such a case, the government may request a hearing to make determinations as to admissibility of classified evidence. In these proceedings, the court has the options of substitution, redaction, summarized information, or sanctions should the government choose not to disclose the classified material. *Pringle*, 751 F.2d at 427; *see infra* notes 42, 92 for government use of section 4 *ex parte* proceedings to avoid adversary proceedings.

31. *See United States v. Bin Laden*, 58 F. SupP.2d 113, 118 (S.D.N.Y. 1999).

32. Exec. Order No. 12,958, 3 C.F.R. 333, 335-36 (1996), *reprinted in* 50 U.S.C. § 435 (2000); *Bin Laden*, 58 F. SupP.2d at 118 (finding that court has authority to compel counsel to undergo DOJ-initiated security clearance procedures).

33. CIPA, 18 U.S.C. app. § 3. *But see United States v. Ressay*, 221 F. SupP.2d 1252, 1264-65 (W.D. Wash. 2002) (holding that the First Amendment right of access attaches to protective orders and discovery plays a significant role in the judicial process and the open administration of justice).

34. *Yunis*, 924 F.2d at 1094; *United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984) (finding "no constitutional infirmity" in section 5 requirements); *United States v. Porter*, 701 F.2d 1158, 1162-63 (6th Cir. 1983) (holding that section 4 is not violative of the Fifth or Sixth Amendments); *United States v. Wilson*, 721 F.2d 967, 976 (4th Cir. 1983); *United States v. Lee*, 90 F. SupP.2d 1324, 1329 (D.N.M. 2000) (finding that CIPA is not violative of the Fifth and Sixth Amendments); *United States v. Poindexter*, 725 F. Supp. 13, 32-33 (D.D.C. 1989); *United States v. North*, 708 F. Supp. 399 (D.D.C. 1988) (holding that section 5 pretrial notification is constitutional); *United States*

defense counsel. The most significant one arises because defense counsel is typically excluded from the court's initial review of classified material to determine whether information is discoverable.³⁵ While in a number of reported cases defense lawyers made requests to attend such sessions, these were denied.³⁶ Without access to the documents, counsel cannot effectively argue for their disclosure. Despite a judicial view that this "apparent Catch-22 is more apparent than real,"³⁷ defense lawyers, who have a significantly different role and perspective than the prosecutor or court, believe that their ethical responsibilities are compromised and their client's right to effective assistance of counsel is jeopardized.³⁸ How, at such an early stage, can we be assured that a court can make an informed decision *ex parte* about the materiality and relevance of information to a defense that is still in the early stages of development?

By role definition, the court and the government do not share the defense's perspective as to what evidence might be material or relevant. Prosecutors are not in the best position to evaluate whether certain classified documents are relevant and material to a defense theory of which they may be unaware.³⁹ Even though the court is in a more neutral

v. Jolliff, 548 F. Supp. 229, 231 (D. Md. 1981) (limiting defendant's discovery rights following an *ex parte*, *in camera* proceeding is not a Sixth Amendment violation); *see also* Seep, *supra* note 17.

35. *Ex parte* proceedings have been approved. *United States v. Klimavisius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (finding *ex parte*, *in camera* hearing appropriate); *United States v. Innamorati*, 996 F.2d 456, 487-88 (1st Cir. 1993) (permitting the lower court to rule on an issue *ex parte*, *in camera* in rare situations where confidentiality concerns outweigh the interest in adversarial litigation); *United States v. Pringle*, 751 F.2d 419, 426-27 (1st Cir. 1984); *United States v. Kampiles*, 609 F.2d 1233, 1248 (7th Cir. 1979) ("It is settled that *in camera ex parte* proceedings to evaluate bona fide Government claims regarding national security information are proper."). *See infra* note 92 for a discussion of the difference between *ex parte* proceedings in section 4 and adversarial ones in section 6 applications.

36. *See United States v. Pollard*, 290 F. Supp.2d 165, 166 (D.D.C. 2003) (denying the request of attorneys with high level security clearance to obtain access to client records, refusing to permit counsel to participate in the *in camera* review of the documents, and citing a case denying counsel's ability to view documents).

37. *United States v. Yunis*, 867 F.2d 617, 624 (D.C. Cir. 1989).

38. Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 81, 90-91, 97-98 (2001) [hereinafter Dratel, *Ethical Issues*].

39. *Panel Discussion: Criminal Discovery in Practice*, 15 GA. ST. U. L. REV., 781, 785-86 (1999) (statement of G. Doug Jones) ("[T]he biggest problem I've always had with criminal discovery . . . as [a] United States Attorney, [is that] I have a real hard time convincing my Assistant U.S. Attorneys that they often don't know what may be material to the defense."). Prosecutors acting in good faith sometimes become wedded to their theory and cannot recognize alternative theories. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 945-47 (1999); MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 326 (2d ed. 2002) (noting Abbe Smith's view that in

position, it too, should not be expected to anticipate the material that is relevant to a defense. While courts are “expected . . . ‘to fashion creative and fair solutions’ for classified information problems,”⁴⁰ in many cases the court’s view is not an adequate substitute for that of competent, diligent counsel. Moreover, such secrecy from counsel with appropriate security clearance undermines respect for the process which is so essential to the maintenance of an effective justice system.⁴¹

There is a growing concern that CIPA is being used as a back door means for the government to withhold information otherwise subject to discovery under Rule 16.⁴²

A recent case, *United States v. Mejia*, raises the issue of the extent to which CIPA may be utilized to preclude disclosure of relevant Rule 16 material.⁴³ In *Mejia*, a drug trafficking conspiracy was initiated by the Drug Enforcement Agency in Costa Rica, and the defendants were detained in Panama and brought to the United States where they were prosecuted and convicted of one count of conspiracy to import drugs.⁴⁴ The defendant learned, on appeal, that the DOJ had obtained, without

the typical criminal case, “the culture of prosecution fosters rigidity, cynicism, and a tendency to willful or careless abuse of official power”).

40. *United States v. Poindexter*, 698 F. Supp. 316, 320 (D.D.C. 1988) (quoting S. Rep. No. 96-823 (1980), reprinted in 1978 U.S.C.C.A.N. 4294, 4301).

41. The integrity of the criminal justice system is threatened when the process is one in which the “government has gained substantial control over proceedings.” Rachel S. Holzer, *National Security Versus Defense Counsel’s “Need to Know”: An Objective Standard for Resolving the Tension*, 73 FORDHAM L. REV. 1941, 1966 (2005). At least one court has noted that the government conflates the public interest with its own position. *Al-Marri v. Bush*, No. 04-2035, 2005 U.S. Dist. LEXIS 6259, at *20 (D.D.C. Apr. 4, 2005) (citing *Abdah v. Bush*, No. 04-CV-1245, 2005 U.S. Dist. LEXIS 4144 (D.D.C. Mar. 12, 2005)).

42. See Holzer, *supra* note 41, at 1966-67; Saul M. Pilchen & Benjamin B. Klubes, *Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel*, 31 AM. CRIM. L. REV. 191 (1994); Richard P. Salgado, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427, 429 n.17 (1988); Seep, *supra* note 17, at 234; Tamahana, *supra* note 4, at 308 (noting that government use of section 4 *ex parte* procedures “threatens to swallow” the protections in section 6).

CIPA heightens the existing informational disadvantage of defense counsel that exists in all criminal cases. Because the appellate standard for reversal is outcome determinative, there are few consequences for failure to diligently discharge the duty to produce *Brady* material in a timely fashion. *United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (stating that the failure to disclose summary of classified information until days before trial is not a “*Brady* [or *Giglio*] violation”) (citation omitted); Jay Goldberg, *The Adversarial System in Criminal Cases: Achieving Justice*, N.Y.L.J., Nov. 17, 2005 at 4, 8 (citing *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001)) (“It is a common refrain by trial judges that their hands are ‘tied’ by *Coppa* and as a result all must be left to the judgment of the prosecutor.”).

43. *United States v. Mejia*, No. 02-3067, 2005 U.S. App. LEXIS 19359, at *1-2 (D.C. Cir. Sept. 6, 2005).

44. *United States v. Mejia*, No. 02-3067, 2006 U.S. App. LEXIS 13833, at *2-10 (D.C. Cir. June 2, 2006).

notice to the prosecutor or the defendant, an *ex parte* order protecting from disclosure certain classified materials related to the defendants “arguably subject to discovery under Fed. R. Crim. P. 16.”⁴⁵ Apparently, on the eve of trial, the DOJ filed an *ex parte, in camera* request that the court review certain material.⁴⁶ The court determined that it was not *Brady* material and sealed the file without notice to the prosecutor or the defendant.⁴⁷ The Court of Appeals for the D.C. Circuit ordered the parties to brief the issue “whether, to what extent, and under what circumstances CIPA § 4 and Fed R. Crim P. 16(d)(1) authorize the non-disclosure of information otherwise arguably subject to discovery under Rule 16.”⁴⁸ The issue framed by the court suggests not only the preclusion of defense counsel from examination of such classified material, but that instances where discoverable material is simply not produced in original, summary or substitute form, there is no notice to any party and there are no sanctions to the government’s case—all circumstances not contemplated by CIPA.

A second and critical ethical dilemma is that even in cases where classified information is disclosed to defense counsel, she is prohibited from sharing the information with her client who does not have security clearance to review the materials.

As a prominent criminal defense lawyer said:

Instead, in this situation the client has no idea what the classified information is, but counsel cannot share it with him. . . . So how do you know what is relevant and what is not relevant? How do you know what is good to introduce into evidence and what is bad to introduce into evidence . . . ?

. . . .

45. 2005 U.S. App. LEXIS 19359, at *1-2.

46. *Id.* at *1.

47. *Id.*

48. *Id.* While section 4 permits the United States to make an *ex parte* requests to the court to keep information classified and subject to a protective order, it does not authorize non-disclosure of materials arguably subject to discovery under Rule 16. *See Roviato v. United States*, 353 U.S. 53, 59-61 (1957) (explaining that government has informant’s privilege, but it cannot prosecute a defendant without disclosing information relevant and helpful to the defendant, regardless of whether the government has a weighty interest in maintaining the secrecy of the information); *United States v. Gurolla*, 333 F.3d 944, 951 (9th Cir. 2003); *United States v. Innamorati*, 996 F.2d 456, 457 (1st Cir. 1993); *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (holding that CIPA protects a government privilege akin to the informant’s privilege, triggering a higher threshold of demonstrated materiality).

How do you prepare your client to testify when you have fifteen months of wire taps related to your client that are off limits to him?⁴⁹

Without the ability to utilize the information, counsel often cannot conduct an adequate investigation and prepare a defense. Significantly, the preparation of the defendants' potential testimony is severely hampered when counsel can only confront the evidence against him selectively. There is no simple resolution of this ethical dilemma. Perhaps, the only viable result of the appropriate balancing of the defendant's constitutional rights against the government's national security concerns may be to provide access to the information to security cleared defense counsel who is not permitted to share the information with his client. Most attorneys would rather have access to the information to defend the case and grapple with this ethical dilemma in lieu of not having the information.⁵⁰

The third significant problem is summary evidence. Even in cases where the defense lawyer has a high-level security clearance, the lawyer may have to accept summaries or substituted statements with relevant facts in lieu of the actual information in the classified documents.⁵¹ Such substitutions not only deprive the defendant of the particulars of the documents in question, but prohibit the lawyers from utilizing the underlying facts to develop further exculpatory information. Second, summary evidence deprives the defendant of the right of confrontation which guarantees not merely the formal opportunity to cross-examine but the opportunity for *effective* cross examination.⁵² It is "critical for

49. Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: Stuck in the Middle*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 65, 69 (2003) [hereinafter *Ethical Issues 2*]. The problems are exacerbated where language and cultural barriers exist. *See id.*

50. Some defense lawyers would not choose this resolution because of the inherent conflict it creates between the lawyer client relationship and the concern that the attorney cannot separate information he knows from that shared with the client. *See* Tamanaha, *supra* note 4, at 289-90 (discussing the difficulties this creates for defense counsel); *see also* discussion *infra* Part IV, for proposals to produce selected information to defendant.

51. CIPA, 18 U.S.C. app. § 4 (1982).

52. *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965); *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973) (discussing the fundamental right of confrontation). Summary evidence can be unreliable. In a carefully crafted opinion that reaffirmed the significance of the defendant's constitutional rights in a difficult terrorism prosecution, Judge Brinkema held that the summaries of reports of the detainee's interrogation prepared by government officials in district court were unreliable. *United States v. Moussaoui*, 382 F.3d 453, 478 (4th Cir. 2004). The defendant, known as the twentieth hijacker, who appeared pro se, claimed that depositions of "enemy combatants" in U.S. custody overseas could exonerate him of responsibility for September 11. The district court ruled that his Fifth Amendment due process right and his Sixth Amendment right to compulsory process outweighed the government's national security interest for access to government detainees who possessed relevant and material exculpatory information. *See* *United States v. Moussaoui*, No.

ensuring the integrity of the fact-finding process' and 'is the principal means by which the believability of a witness and the truth of his testimony are tested.'"⁵³ If we continue to believe that cross-examination is the engine that drives the trial process, depriving a defendant of such possibility must only occur in the most particularized circumstances of demonstrated need for secrecy where the defense lawyer has participated in the process of making that determination.⁵⁴ While Congress urged judges to ensure that admissions and summaries were crafted so that the government obtained no unfair advantage in the trial, the practice of "substitutions and stipulations" can significantly alter the adversary process.⁵⁵ They are "powerful weapons for the prosecution with a high potential for abuse."⁵⁶

A recent death penalty case, *United States v. Denis*, is illustrative of the limitations on effective cross-examination by the use of summary evidence.⁵⁷ In *Denis*, the defendants were charged with conspiracy with intent to distribute cocaine and using or carrying a firearm during a drug trafficking crime.⁵⁸ Avila, a key government witness claimed that he caught Denis on tape admitting to being the shooter. Denis denied it and

CR. 01-455-A, 2003 WL 21263699, at *5 (E.D. Va. Mar. 10, 2003); *see also* *United States v. Moussaoui*, 282 F. SupP.2d 480, 482 (E.D. Va. 2003); *United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 22258213 (E.D. Va. Aug. 29, 2003); *United States v. Collins*, 720 F.2d 1195, 1198 (11th Cir. 1983) (holding that substitutions are not sufficiently specific); *United States v. Clegg*, 740 F.2d 16, 18 (9th Cir. 1984) (finding substitutions inadequate).

53. *United States v. Begay*, 937 F.2d 515, 520 (10th Cir. 1991).

54. JOHN HENRY WIGMORE, 5 EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940); Peter Margulies provides detailed analysis of the problems created by summary evidence. *See generally* Margulies, *supra* note 2 (noting that summary evidence has minimized impact before a jury).

55. *United States v. Rezaq*, 134 F.3d 1121, 1143 (D.C. Cir. 1998) (finding no abuse of discretion for summary substitution). The constitutionality of the use of testimonial substitutions has not been decided. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding that confrontation clause bars admission of all testimonial hearsay unless the accused has had an opportunity, at or before trial, to cross-examine the declarant witness); Joshua Dratel, *The Impact of Crawford v. Washington on Terrorism Prosecutions*, 28 CHAMPION 19 (2004).

56. Tamanaha, *supra* note 4, at 306. Beyond the ethical issues, there are procedural hurdles in cases involving classified information which increase the defense lawyer's difficulty in defending a case. The mechanics of reviewing CIPA materials is necessarily onerous and time consuming. Classified information can only be reviewed in a Secure Compartmentalized Information Facility ("SCIF") by a person who has undergone a comprehensive security investigation and is "cleared" to gain access to CIPA materials. *See* Act of Oct. 15, 1980, Pub. L. No. 96-456, 94 Stat. 2025, §§ 1-4; Gerald E. Rosen, *United States District Court Judge, The War on Terrorism in the Courts*, Remarks at the Thomas M. Cooley Law School Distinguished Brief Award Banquet (July 24, 2004), in 21 T.M. COOLEY L. REV 159, 164 (2004).

57. *See United States v. Denis*, 246 F. SupP.2d 1250 (S.D. Fla. 2002), *aff'd*, No. 03-11086, 107 Fed. Appx. 182 (11th Cir. May 13, 2004).

58. *Id.* at 1252.

claimed that Avila doctored the audiotape.⁵⁹ The government, on the third day of trial, announced that a CIPA issue had arisen.⁶⁰ After chastising the prosecution for failure to raise the issue earlier, and conducting an *ex parte, in camera* hearing,⁶¹ the court ruled that the government had to disclose some of the information pursuant to *Brady v. Maryland*,⁶² but permitted a substitute pleading in lieu of cross-examination.⁶³ That pleading referred to Avila as an “intelligence asset” and gave two reasons for his termination from the FBI including their belief that he had “‘edited or spliced’ a tape-recording.”⁶⁴ The defendant was not permitted to obtain the name of the agent who terminated Avila from the FBI for use in its defense.⁶⁵ When Avila testified, the defense was precluded from cross-examining him about being a spy for the Cuban government, and having received Cuban spy training.⁶⁶ The defense argued that it could not adequately attack Avila’s credibility because the substitutions prevented questioning him about the previously doctored tapes, his training as a double agent and his motive to testify to avoid prosecution for espionage.⁶⁷ The court’s rejection of the defense contentions was upheld on appeal.⁶⁸ Denis was convicted on all counts.⁶⁹

D. Foreign Intelligence Surveillance Act

A second form of secret evidence, often intertwined with and exacerbated by the problems created by CIPA, is information obtained pursuant to the Foreign Intelligence Surveillance Act (“FISA”). FISA, enacted in 1978 to regulate the government’s use of electronic surveillance to gather foreign intelligence information, requires that the

59. Brief of Appellant at 42-43, *United States v. Denis*, No. 03-11806-EE (11th Cir. 2003).

60. *Id.* at 10.

61. *Id.* By raising the CIPA issue mid-trial, the government avoided section 6 of CIPA which provides for a pretrial hearing with both the government and defendant in attendance at which the court determines the use, admissibility, and relevance of the classified information. CIPA, 18 U.S.C. app. § 6 (1982). Instead, the government invoked section 4 of CIPA which applies only to the discovery of classified information by defendants. *Id.* at § 4. There is no record of the proceeding because there was no court reporter available with the appropriate security clearance. See *infra* note 92 explaining the government’s tactical use of section 4 to avoid an adversary hearing.

62. Brief of Appellant, *supra* note 59, at 11 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

63. *Id.* at 11.

64. *Id.*

65. *Id.* at 12-13.

66. *Id.* at 13.

67. *Id.* at 13-14. The Miami Herald newspaper had revealed Avila to be a double agent of the United States and Cuba. Cynthia Corzo & Alfonso Chardy, *Cuba Sent Coded Orders on Radio, Spy Says*, MIAMI HERALD, Nov. 17, 1992, at 19A.

68. *United States v. Denis*, 107 Fed. Appx. 182 (11th Cir. 2004).

69. See Brief of Appellant, *supra* note 59, at 13.

government seek a warrant from a statutorily created FISA court upon an *ex parte* showing that the target of the surveillance is an “agent of a foreign power,” where “agent” is broadly defined to include any officer or employee of a foreign power.⁷⁰

FISA initially required the government to certify that the purpose of the surveillance was to obtain foreign intelligence information.⁷¹ Legislative history and subsequent case law established that the government had to demonstrate that its “primary purpose” was to gather evidence for foreign intelligence rather than criminal prosecution.⁷² The 2001 PATRIOT Act expanded the government’s powers under FISA and permits a wide range of surveillance techniques in a broader range of circumstances without a showing of probable cause, so long as a “significant purpose” of the intrusion is to collect foreign intelligence.⁷³

70. See 50 U.S.C. § 1801(b) (2000). FISA provides, in part, that the government may obtain a warrant for “a group engaged in international terrorism or activities in preparation therefor,” *id.* § 1801(a)(4), or any person who “acts on behalf of a foreign power . . . or when such person knowingly aids or abets any person in the conduct of such activities.” *Id.* § 1801(b)(1)(B). “Foreign power” includes a “foreign-based political organization, not substantially composed of United States persons.” *Id.* § 1801(a)(5). An employee of Amnesty International could be such an agent. See Cole, *supra* note 3, at 973.

“International terrorism” encompasses a broad range of crimes including activities that

- (1) involve violent acts . . . that are a violation of the criminal laws of the United States or of any State . . . [or]
- (2) appear to be intended—
 - (a) to intimidate or coerce a civilian population;
 - (b) to influence the policy of a government by intimidation or coercion; or
 - (c) to affect the conduct of a government by assassination or kidnapping

Id. § 1801(c).

71. *Id.* § 1804(a)(7)(A)-(B). The “primary purpose” standard, derived from legislative history, was established by case law. See Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL’Y 319, 358-67 (2005) (tracing the history of FISA and the primary purpose doctrine, and arguing that case law is wrong); Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1337 n.217 (2004).

72. See *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980) (“[T]he executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons.”); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987) (upholding telephone surveillance because its “primary objective” was “acquiring foreign intelligence information,” not “investigating a criminal act”); *United States v. Pelton*, 835 F.2d 1067, 1076 (4th Cir. 1987) (finding surveillance to be legal because its “primary purpose . . . was to gather foreign intelligence information”); J. Christopher Champion, *The Revamped FISA: Striking a Better Balance Between the Government’s Need to Protect Itself and the Fourth Amendment*, 58 VAND. L. REV. 1671, 1672-86 (2005) (discussing the evolution and development of the “primary purpose” test).

73. FISA powers were amended by the PATRIOT Act, 50 U.S.C. §§ 1801-11 (2001), and further amended by Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 102A(f)(6), 118 Stat. 3638, 3650 (2004) (codified as amended at 50 U.S.C.S. §§ 403-1

The FISA court's judicial approval process remains secret with rare exception.⁷⁴ Rarely is a government application rejected.⁷⁵

The existence of the FISA warrant is kept secret unless the person is prosecuted using the evidence seized.⁷⁶ In such a prosecution, the relevant information obtained by FISA is subject to discovery, but unlike those based upon probable cause, the defendant is not entitled to obtain the underlying warrant,⁷⁷ nor is the defendant entitled to receive all of the FISA wiretaps of his own conversations.⁷⁸ And, judicial review is limited; the court cannot "second guess" the accuracy of the executive branch's certification that the purpose of the surveillance is to gather foreign intelligence information.⁷⁹

(LexisNexis 2004)); *In re Sealed Case*, 310 F.3d 717, 746 (Foreign Int. Surv. Ct. Rev. 2002) (holding, *inter alia*, that the significant purpose test satisfies the Fourth Amendment).

74. For a glimpse into the FISA court's operation, see *In re Sealed Case*, 310 F.3d 717 and *In re All Matters Submitted to the FISA Court*, 218 F. Supp.2d 611 (Foreign Int. Surv. Ct. Rev. 2002) [hereinafter FISA Trial Court Opinions].

75. Only five of 14,000 warrant applications were rejected by the FISA court prior to 2001. Dahlia Lithwick & Julia Turner, *A Guide to the Patriot Act, Part 2*, SLATE, Sept. 9, 2003, <http://www.slate.com/id/2088106>. This occurred, even though the FISA trial court, in a rare opinion, established that at least 75 of those warrants were based on false allegations. FISA Trial Court Opinions, 218 F. Supp.2d at 620-21.

76. 50 U.S.C.S. § 1825(g) (LexisNexis 2002). The target of the approved surveillance may never learn of such surveillance unless the government seeks to use the information obtained against the person in a subsequent prosecution. 50 U.S.C. § 1806 (b)-(g) (2000).

77. The relevant statute provides that a defendant challenging a FISA application may be permitted to review the application and order when disclosure is "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f). The statute also provides that if the Attorney General files an affidavit stating that "disclosure or an adversary hearing would harm the national security of the United States," the court must consider the application and order *in camera* review to determine if the surveillance was lawful. *Id.* Although the defendant may move for disclosure of the underlying warrant, there are no known cases where the disclosure has been made. Dratel, *Ethical Issues*, *supra* note 38, at 94; see, e.g., *United States v. Rahman*, 861 F. Supp. 247 (S.D.N.Y. 1994), *aff'd*, 189 F.3d 88 (2d Cir. 1999), *cert. denied*, 528 U.S. 982 (finding that application for FISA warrant contained sufficient information that defendants knowingly engaged in sabotage or international terrorism, or aided and abetted another in doing so, thus they are "agents of a foreign power" within the meaning of FISA); *United States v. Sarkissian*, 841 F.2d 959, 962-64 (9th Cir. 1988) (holding that a warrantless search "requires exigent circumstances supported by probable cause," and allowing the search because there was not sufficient time to obtain a warrant); *United States v. Duggan*, 743 F.2d 59, 78 (2d Cir. 1984) (upholding trial court's refusal to disclose FISA warrant as not necessary for accurate determination of the legality of the surveillance).

78. See, e.g., *Rahman*, 861 F. Supp. at 250-51 (denying defendants access to their own recorded conversations because such disclosure was not necessary to determine whether the surveillance was legal).

79. *Duggan*, 743 F.2d at 77.

Perhaps the most important and controversial provision of the PATRIOT Act, FISA warrants threaten to become an “end run around the probable cause requirements” of the Fourth Amendment.⁸⁰

In terrorism-related indictments, international drug conspiracies, and other cases in which the government has sought a FISA warrant, it often has thousands of hours of conversations.⁸¹ Typically, those conversations are classified.

Recent cases demonstrate a recurrent problem with FISA generated information in criminal prosecutions: the government selectively declassifies intercepted communications to aid its case against the defendants, but will not, and need not under CIPA, declassify all of the conversations that contain its own conversations.⁸²

In *United States v. Al Hussayen*, where a doctoral student was prosecuted for providing material support to a terrorist organization for alleged online assistance in recruiting and financing terrorism, the government refused to declassify thousands of FISA interceptions of the defendant’s telephone conversations and e-mails.⁸³ It only declassified the ones that it intended to use against him, arguing that while declassified communications are alleged to be incriminating, classified communications are not.⁸⁴ Significantly, in derogation of its duty under *Brady v. Maryland*,⁸⁵ the government argued that it could not be responsible for identifying exculpatory evidence within such material because it could not digest all of the interceptions.⁸⁶ The defense claimed that the government’s tactical and selective use of the classification

80. Cole, *supra* note 3, at 974 (discussing probable cause in the context of the criminal wiretap statute); David Cole, *Imaginary Walls and Unnecessary Fixes*, in PATRIOT DEBATES: EXPERTS DEBATE THE USA PATRIOT ACT (2005), available at <http://www.patriotdebates.com/218-2> (discussing the “questionable constitutionality” of FISA section 218); Champion, *supra* note 72, at 1672-73 nn.8-9 (citing case law that states that the Act is not to be used as such an “end run”); Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1624-27 (2004) (discussing the tension between FISA procedures and Fourth Amendment requirements).

81. See Dratel, *Ethical Issues*, *supra* note 38, at 87-92. Notably in terrorism cases, the conversations are predominantly in Arabic and there are often few qualified translators who are willing to apply for a security clearance. See *id.* at 87.

82. See *infra* notes 83-87.

83. Case No. 03-048-C-EJL (D. Idaho 2003).

84. See Reply to Response to Motion to Require Defense to Accept Discovery, *United States v. Al-Hussayen*, No. 03-048-C-EJL (D. Idaho 2003) (on file with author) [hereinafter Reply to Response to Discovery Motion]. Some districts, such as the United States Attorneys’ Office for the Southern District of New York, typically declassify and disclose all of defendant’s conversations obtained pursuant to FISA wiretaps.

85. 373 U.S. 83 (1963).

86. Reply to Response to Discovery Motion, *supra* note 84, at 2-3.

authority denied Al-Huyassen with “functional access to exculpatory intercepts.”⁸⁷

While the government’s position in *Al-Huyassen* appears to be an extreme, in a number of cases it has neither translated nor declassified many tape recordings made pursuant to FISA.⁸⁸

In *United States v. Sami Al-Arian*, a recent high profile case where a college professor was charged with seventeen crimes arising out of alleged support and leadership of Hamas, a Palestinian Islamic Jihad organization designated as “terrorist,” the government resisted declassifying thousands of the defendant’s own conversations that were intercepted pursuant to FISA until “encouragement” by the court.⁸⁹ In *United States v. Holy Land Foundation for Relief and Development*, where defendants are charged with providing material support to designated Palestinian terrorist organizations, the government produced 15,000 transcripts of FISA wiretaps that are under review by defense counsel and subject to a protective order.⁹⁰ The vast majority of FISA transcripts of the defendants’ own conversations have not been declassified and are not translated. The defendant cannot review the documents to advise his lawyer which conversations might be most helpful to his defense.

These cases suggest that procedures that were designed to protect classified information from tactical advantage by a defendant have been utilized inadvertently or intentionally by the government for its tactical advantage. Discovery that might otherwise be provided pursuant to Federal Rule of Civil Procedure 16 or *Brady v. Maryland* is, as a consequence of FISA and CIPA, either not disclosed, or disclosed in summary form such that defense counsel cannot conduct necessary investigation and prepare a defense.⁹¹

87. Reply Memorandum in Support of Motion to Declare CIPA Unconstitutional as Applied in This Case, *United States v. Al-Hussayen*, CR-03-048-C-EJL (D. Idaho 2005) (on file with author). This is the first known instance of the government’s denial of the defendant’s own intercepted telephonic or electronic communications. Moreover, the government did not provide a security clearance for an Arabic interpreter thus making it impossible for counsel to have access to the conversations. This matter is not reported. The defendant was found not guilty by a jury.

88. *Id.*; see *infra* notes 89-91 and accompanying text.

89. See, e.g., Elaine Silvestrini, *Al-Arian Gains Access to Evidence*, TAMPA TRIB., Aug. 28, 2003, at 1.

90. Indictment at 12, No. 04-CR-240G (N.D. Tex. July 26, 2004).

91. The government has effectively utilized section 4 of CIPA to deprive the court of input from defense counsel. In cases where the government should have made a section 6 application, thereby permitting the issues to be addressed in an adversary proceeding, it filed an application under section 4 which is treated as an *ex parte* secret proceeding. See, e.g., *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998); *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990);

III. SECRET EVIDENCE IS SEEPING INTO THE CRIMINAL JUSTICE SYSTEM

The impact of secret evidence upon the adversary system has yet to be acknowledged, in large measure because of the unstated belief that FISA and CIPA are confined to a narrow range of terrorism cases. Secret evidence, however, is likely to have a widespread effect on the federal criminal justice system for at least three reasons.

First, the executive branch, notorious for over-classification of documents prior to this administration, has greatly enhanced its classification of documents and is now classifying documents at an unheralded pace.⁹² Since 2001, it has doubled the number of documents that are classified to fifteen million a year, and has authorized additional governmental offices empowered to classify information.⁹³ Thus, CIPA will be invoked in an expanded number of cases. Moreover, since 2001, FISA warrants have increased dramatically.⁹⁴

Salgado, *supra* note 42, at 429 n.17; Tamanaha, *supra* note 4, at 307-08 (explaining that section 4 threatens to swallow protections contained in section 6 because the government may produce all of the discoverable information in the form of *ex parte* approved substitutions).

92. It is widely recognized that “the Federal Government exhibits a proclivity for over-classification of information.” Ray v. Turner, 587 F.2d 1187, 1209 (D.C. Cir. 1978) (Wright, J. concurring) (quoting former Sen. Baker).

93. Editorial, *The Dangerous Comfort of Secrecy*, N.Y. TIMES, July 12, 2005, at A20. As the New York Times recently editorialized:

The Bush Administration is classifying the documents to be kept from public scrutiny at the rate of 125 a minute.

....

No one questions the need for governments to keep secret things that truly need to be kept secret, especially in combating terrorists. But the government’s addiction to secrecy is making an unnecessary casualty of the openness vital to democracy.

Id.

Agencies such as the Agriculture Department and the Federal Information Security Oversight Office are classifying documents, “cloaking nonlethal cases of mismanagement and bureaucratic embarrassment.” *Id.* Thus, over-classification of documents is not unique to this administration.

94. See generally Electronic Privacy Information Center, Foreign Intelligence Surveillance Act Orders 1979-2004, http://www.epic.org/privacy/wiretap/stats/fisa_stats.html (last visited Apr. 3, 2006). President George W. Bush criticized the use of secret evidence for new immigrants, and commented that “secret evidence . . . [was] a creature of the Clinton/Gore Justice Department,” and pledged to work with legislative leaders to “ensure respect for the law—and for all law-abiding citizens.” Letter from Laura W. Murphy, Director of the Washington National Office of the ACLU, to President Bush on the Use of Secret Evidence in Immigration Proceedings (July 13, 2001), available at <http://www.aclu.org/immigrants/evidence/11785leg20010713.html> (quoting a written statement made by President Bush). Despite this statement, secret evidence problems are exacerbated in the Bush administration. See *supra* note 93.

Second, “terrorism-related” prosecutions, where FISA and CIPA are invoked, involve a wide range of criminal statutes that demonstrate the government’s strained expansive interpretation of the term “terrorism.”⁹⁵ This phenomenon predated 9/11. A Government Accountability Office (“GAO”) study of criminal prosecutions that the Justice Department categorized as terrorism from 1997 to 2001 “were nothing of the sort, frequently involving such subjects as mentally ill individuals, drunken airline passengers and convicts rioting for food.”⁹⁶

Terrorism prosecutions subsequent to 2001 have similarly strained classifications. Journalists analyzing cases categorized as terrorism by the federal government demonstrated that many of these cases had questionable links to “terrorist violence.” In Iowa, an in-depth analysis of thirty-five terrorism-related cases revealed that most of the defendants were ultimately charged with fraud or theft.⁹⁷ U.S. District Court Judge Robert Pratt, who presided over at least six of the cases said, “If there have been terrorism-related arrests in Iowa, I haven’t heard about them.”⁹⁸ In Indiana, ten cases federal prosecutors categorized as being related to terrorism were hardly those involving terrorist violence.⁹⁹

This phenomenon is not unique to the “war on terrorism.” Historically, the government has stretched the meaning of statutes beyond their original intent. As the late Chief Justice Rehnquist wrote, in

95. See TERRORIST TRIALS, *supra* note 2 at 3 (documenting the categories of crime encompassed within “terrorism,” including false statements, document fraud, immigration fraud, firearms, financial crimes, national security, terrorism support, and others). See generally Matthew Piers, *Malevolent Destruction of a Muslim Charity: A Commentary on the Prosecution of Benevolence International Foundation*, 25 PACE L. REV. 339 (2005). Piers explains that terrorism was originally defined as “actions calculated to create fear among a civilian population and has come to mean acts of a violent nature with a political purpose.” *Id.* at 339 n.8.

96. Transactional Records Access Clearinghouse (“TRAC”), TRAC at Work, <http://www.trac.syr.edu/tracatwork/articles/congress/GAO0302.html> (last visited Apr. 3, 2006) (citing GAO report).

97. Bert Dalmer, *U.S. Links 35 Arrests in Iowa to Terror*, DES MOINES REGISTER, July 18, 2004, available at <http://www.dmregister.com/apps/pbcs.dll/article?AID=/20040718/NEWS01/407180386/1001&lead=1>.

98. *Id.*

99. Shannon Tan, “Terror Related” Cases Really Aren’t, Critics Say, INDIANAPOLIS STAR, Apr. 7, 2003, at 1B (“[M]any prosecutions that federal official labeled ‘antiterrorism’ were actually for minor crimes . . .”). See generally Eric Lichtblau, *Threats and Responses: Prosecutions; Terror Cases Rise, but Most are Small-Scale, Study Says*, N.Y. TIMES, Feb. 14, 2003, at A16. Nearly seventy-five percent of cases labeled “terrorism” are for document and credit card fraud. Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes From Drugs to Swindling*, N.Y. TIMES, Sept. 28, 2003, § 1, at 1. The government may, of course, charge persons it believes to be “terrorists” with lesser crimes such as document or credit card fraud for a number of reasons, including its interest in protecting information from discovery. TERRORIST TRIALS, *supra* note 2, at 2 (recommending reconsideration of this strategy).

commenting upon the RICO statute, the “legislative history of the RICO Act strongly suggests that Congress never intended that civil RICO should be used, as it is today, in ordinary commercial disputes far divorced from the influences of organized crime.”¹⁰⁰ Similarly, forfeiture statutes to combat the “war on drugs” have been invoked in circumstances that distort the statute’s purpose.¹⁰¹ Such unintended use of statutes can be expected to continue in the “war on terrorism,” which has no definable end.

Third, and perhaps of greatest significance, CIPA and FISA will necessarily be invoked in a greater number of prosecutions because of the internationalization of crime and law enforcement.¹⁰²

At the dawn of the next millennium, and looking back over the past century, perhaps no single phenomenon is of greater significance to criminal justice in America than the international dimensions of crime and justice. In a relatively short period of time, the world has changed dramatically, and the physical boundaries that separated countries have given way to a global economy, instantaneous communication, and the ability to span the globe in less than a day. With these events have come numerous changes that profoundly affect the rule of law and the criminal justice system in the United States as well in other countries.¹⁰³

This includes cases that span international boundaries involving allegations of money laundering, bribery, various forms of corruption, economic espionage, export of controlled items, weapons production, and distribution, as well as government contracts with other nations. In short, classified information will infect the criminal justice system.

100. William Rehnquist, *Get RICO Cases Out of My Courtroom*, WALL ST. J., May 19, 1989, at A14; see A. Laxmidas Sawkar, *From the Mafia to Milking Cows: State RICO Act Expansion*, 41 ARIZ. L. REV. 1133 (1999); see also David B. Sentelle, *Civil RICO: The Judges’ Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 CAMPBELL L. REV. 145, 146 (1990).

101. Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 589-90 (1995) (“As a result of drug war forfeiture precedents, we are now positioned in principle to take the homes and offices of anyone who commits, or permits others to commit, *any* crime on the premises . . .”).

102. See *infra* note 104. Classification pertains to matters of national security whose definition includes “foreign relations.” See *supra* note 23. All matters with international dimensions pertain to foreign relations. See *supra* note 70.

103. Richard H. Ward, *The Internationalization of Criminal Justice*, in 2 CRIMINAL JUSTICE 2000, at 267, 270 (2000), available at <http://www.ojp.usdoj.gov/nij/international/internat.pdf>; see also PERMANENT SELECT COMM. ON INTELLIGENCE, 104TH CONG., IC21: THE INTELLIGENCE COMMUNITY IN THE 21ST CENTURY (1996), available at http://www.fas.org/irp/congress/1996_rpt/ic21/ic21013.htm (finding that international crime poses a national security concern).

The very fact that the use of secret evidence will become a recurrent issue rather than an exception in federal criminal cases implies that there will be a slowly shifting norm toward greater tolerance of a more limited role for the defense lawyer and increasingly limited interpretations of the defendant's Fifth and Sixth Amendment rights. While some courts have been exquisitely sensitive to the adversary process and have insured the preservation of fundamental rights,¹⁰⁴ reliance upon judicial remedies should be guarded at best. Despite recent judicial skepticism about the exercise of prosecutorial discretion and blanket assertions of national security,¹⁰⁵ it is too soon to know whether a skeptical approach will become normative. Historically, courts have imposed some limitations where the government stretches a statute beyond its intent, but such judicial action is not commonplace.¹⁰⁶

In fact, excessive legislative and judicial deference to executive claims of national security is the norm in perceived "times of crisis."¹⁰⁷ From the excesses of the prosecution of World War I dissenters, to the excesses of surveillance during the Vietnam War, government overreaching in highly charged situations is well documented.¹⁰⁸ Regret and repudiation become the response to such deference some forty to fifty years later. Judicial skepticism about government assertions of national security suggest that at least some courts have been vigilant

104. See, e.g., *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) (denying government's request to transfer U.S. citizen detainee because it appeared that the attempt to do so was to avoid Supreme Court review); *Hanft v. Padilla*, 126 S. Ct. 978 (2005) (reversing the Court of Appeals decision that the President possessed authority to detain enemy combatant); *Al-Marri v. Bush*, No. 04-2035, 2005 U.S. Dist. LEXIS 6259, at *1-2 (D.D.C. Apr. 4, 2005) (granting Guantanamo detainee's request for thirty days notice before transfer); *Elmaghraby v. Ashcroft*, No. 04-CV-1409-JG SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) (refusing to dismiss civil rights case challenging classification and continued confinement of Muslim prisoners in maximum security unit); *United States v. Moussaoui*, 282 F. Supp.2d 480 (E.D. Va. 2003) (striking government's notice of death penalty and precluding introduction of evidence related to 9/11 where prosecution did not make potential exculpatory evidence available to defendant); *United States v. Koubriti*, 305 F. Supp.2d 723 (E.D. Mich. 2003) (formally admonishing Attorney General Ashcroft for violating court order limiting extrajudicial comment); *United States v. Sattar*, 272 F. Supp.2d 348 (S.D.N.Y. 2003) (dismissing, on constitutional grounds, terrorism charge in indictment against attorney Lynne Stewart and others).

105. See *supra* notes 5, 104.

106. See Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should be Charged with Criminal Conduct?*, 109 PENN. ST. L. REV. 1059, 1063 (2005); Margulies, *supra* note 2, at 465-89.

107. Margulies, *supra* note 2, at 507.

108. DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION 68-77 (2002); HAYNES JOHNSON, THE AGE OF ANXIETY: MCCARTHYISM TO TERRORISM (2005); Cole, *supra* note 3, at 955; Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity and Procedure After September 11*, 84 B.U. L. REV. 383, 394 (2004); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995) (discussing Attorney General McGrath's use of secret evidence).

about the judicial role and the lessons of history. It remains, of course, too soon to tell whether historians will look more charitably at executive and judicial decision-making in the post-9/11 era.

Moreover, the lack of empirical data about the use of CIPA and FISA will permit this issue to escape warranted scrutiny. Apart from careful analyses by investigative journalists and occasional reports by the GAO, little attention is focused upon the nature of cases in which secret evidence is used.¹⁰⁹

Much of the data about secret evidence is secret and subject to protective orders. There are, for instance, no data on (1) the number or certainly the nature of CIPA proceedings within criminal cases to determine the extent to which classified information with otherwise discoverable information is subject to a balancing test of national security versus materiality and relevancy prior to production to the defense; (2) the number and nature of cases in which the proceedings are all *ex parte*; (3) the nature of protective orders;¹¹⁰ (4) the use and particulars of summary evidence; or (5) the extent to which sanctions are imposed for the government's decision not to declassify and produce discoverable material. Few of these issues appear in reported cases.¹¹¹ Criminal defense lawyers are under protective orders and cannot answer obvious questions to draw conclusions about the systemic effects of the use of FISA and CIPA. Information about secret evidence is secret.¹¹²

Without such data, these cases, illustrative of the manner in which secret evidence infects and distorts the adversary system, will be viewed as aberrational, limited to "serious terrorism" charges and insufficiently numerous to deserve significant attention. Such a conclusion should be viewed skeptically. Historically, cases demonstrating problems in the criminal justice system, such as those of eyewitness identification, laboratory procedures, and methods of police interrogation, were dismissed initially as aberrational.¹¹³ Until DNA permitted conclusive scientific proof of innocence, there was systemic resistance to such

109. See *supra* notes 92-99.

110. *United States v. Musa*, 833 F. Supp. 752, 754 (E.D. Mo. 1993) (noting that there are few cases discussing section 3 protective orders).

111. Most of the reported cases are cited in this Article.

112. Telephone conferences and interviews with prosecutors and more than fifteen criminal defense lawyers (June-Nov. 2005).

113. See generally JIM DWYER ET AL., *ACTUAL INNOCENCE* (2001) (cataloguing documented reasons for wrongful convictions which were dismissed as anecdotal or aberrant until DNA established scientific proof of innocence); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 178-79 (2005).

claims.¹¹⁴ In other words, the anecdotal, collective wisdom of experienced defense counsel ought to be taken seriously. Traditionally this has not been the case.¹¹⁵

IV. MODEST PROPOSALS

Legislation is required to remedy the systemic problems created by secret evidence. First, it is necessary to hold FISA accountable to the adversary process by permitting defendants to have access to the underlying FISA warrants.¹¹⁶ Second, CIPA should be revised to provide for a clear process for discovery and admissibility of evidence.¹¹⁷

Short of legislative action, there are several modest workable proposals that will assist in securing fundamental rights that lie at the core of our adversary system.

First, with explicit recognition that the ethical dilemmas created by FISA and CIPA infect every aspect of the attorney-client relationship and should be minimized, there should be a presumption that defense counsel, with appropriate security clearances, will participate in the review of classified information to determine disclosure issues. Rarely has a court included defense counsel in the discovery process.¹¹⁸ After the court's initial review of the government's *ex parte* application and its exclusion of material that is wholly irrelevant, the court should hold either an *in camera* proceeding with defense counsel or an adversarial proceeding to hear argument as to disclosure of the classified information. With the benefit of carefully articulated reasons as to

114. DWYER ET AL., *supra* note 113.

115. See generally Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000); Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL'Y 83 (2003); Marvin D. Miller, *A Conversation with Sam Dash*, 23 CHAMPION 22 (June 1999).

116. See Cole, *Imaginary Walls and Unnecessary Fixes*, *supra* note 80.

117. See Salgado, *supra* note 42, at 442 (arguing that CIPA should provide for a discovery process that instructs a court to resolve relevance issues before deciding upon privilege questions); Holzer, *supra* note 41, at 1970-84 (arguing for a ten part analysis to determine whether classified information should be disclosed).

118. Despite the fact that these *ex parte* proceedings are "proper," they are not required by CIPA. See *United States v. Kampiles*, 609 F.2d 1233, 1248 (7th Cir. 1979); *United States v. Sarkissian*, 841 F.2d 959, 965-66 (approving *ex parte* balancing by court). Such practice should be reevaluated. CIPA invokes unique issues of excluding significant evidence because of national security "balancing" that is not present in other circumstances where courts conduct *ex parte* proceedings. See, e.g., *United States v. Mulderig*, 120 F.3d 534, 540 (5th Cir. 1997) (finding *ex parte* review appropriate to withhold irrelevant evidence); *United States v. Pelton*, 578 F.2d 701, 707 (8th Cir. 1978) (upholding *ex parte* proceeding to avoid revealing identity of witnesses); see *In re Taylor*, 567 F.2d 1183, 1187-88 (2d Cir. 1977) (discussing various *ex parte* procedures).

relevance, materiality and national security, the court's decision as to disclosure will be more fully informed.¹¹⁹

Defense counsel with such security clearance should be afforded presumptive access to the arguably relevant classified information. This is the accepted practice in military courts where both military and security-cleared defense counsel have access to such classified information.¹²⁰ While military lawyers operate within a closed system that imposes a set of shared values, the structure of the federal criminal justice system has significant parallels.

Our constitutionalized adversary system relies upon the tripartite system of judge, prosecutor and defense lawyer. The defense lawyer, like the court and prosecutor, is sworn to uphold the Constitution and is bound by ethical rules that govern the profession. Due deference and respect for the critical role of defense counsel as the guardian of individual liberties dictates that counsel be included in the process similar to that of military counsel. Defense counsel, who are responsible for insuring compliance with protective orders and other impositions upon traditional aspects of the attorney-client relationship, are exquisitely sensitive to their role and its limitations. Representing the most despised of the culture and operating under difficult circumstances, these lawyers do their utmost to embody the noble traditions of zealous lawyering for a client within the difficult bounds imposed by various regulations and protective orders.¹²¹ They have secured the highest levels of clearance to review classified information. Any concern about the risk of disclosure of classified information should be tempered by the fact that lawyers are keenly aware that they risk criminal prosecution for unauthorized disclosure of such information. No lawyer willingly

119. Generalized invocation that disclosure will "breach national security" should not be sufficient because "information may be gratuitously classified." Holzer, *supra* note 41, at 1967 (citations omitted) (arguing for objective ten part test to determine whether information should be disclosed).

120. See U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1, § 4(C)(3)(b)(iv) (Aug. 31, 2005) (entitling accused to retain civilian counsel, if counsel has security clearance of Secret or higher); *id.* § 6(D)(5)(a)-(b) (governing protective orders and limited disclosures of classified information). In *United States v. King*, 53 M.J. 425 (C.A.A.F. 2000), the government refused to grant all of the client's defense attorneys the same level of clearance to review documents and requested that a monitor with the highest level of clearance be part of defense consultations. The court, denying the government's requests, held that all the lawyers must have the same level of clearance to review classified documents. See *id.* Otherwise counsel would be unable to consult with one another. The Court of Appeals for the Armed Forces denied the request for a monitor. See *id.*; see also David E. Rovella, *Defense in Spy Case Cries Foul*, NAT'L L. J., Aug. 21, 2000, at A11.

121. See generally Dratel, *Ethical Issues 2*, *supra* note 49.

undertakes such a risk.¹²² Given the stakes for a proper functioning of the adversary system, any lingering apprehension should cede to inclusion of the defense lawyer in this critical process.¹²³

Second, upon a particularized and strong showing of the need to share documents with a client, the court should engage in careful analysis to determine whether specified documents are essential for client review, and, in such cases, strongly urge the government to declassify the documents, find a substitute means to allow the defendant to review the essential information, or impose sanctions.¹²⁴ While the protection of national security requires balancing with fundamental Fifth and Sixth Amendment rights, the government's concerns should be particularized and the ultimate balance exquisitely crafted to insure that the compromise is as minimally invasive as possible of the attorney-client relationship and client's constitutional rights.¹²⁵ Our "fragile system of accountability at the heart of our criminal justice system"¹²⁶ requires preservation of the effective assistance of defense counsel, a right from which all other rights flow.¹²⁷

V. CONCLUSION

The recent terrorism related and international drug conspiracy cases raise significant questions about distortions in the adversary system through the use of classified and other secret information. The defense lawyer is hampered in her ability to carry out her ethical mandates to competently, diligently and zealously represent her client. Particularly in the age of over-classification of documents and internationalization of crime and law enforcement, there exists serious concern that CIPA and FISA procedures, heretofore accepted as constitutional, are eroding fundamental Fifth and Sixth Amendment rights. If secret evidence

122. Similar concerns are not expressed for court security officers with appropriate clearance who have access to the classified information. See Act of Oct. 15, 1980, Pub. L. No. 96-456, 94 Stat. 2025, § 2.

123. The parties should be afforded notice of the fact of a section 4 request. Notice to the parties would at least permit the defense (and perhaps the prosecutor) to make appropriate inquiry regarding the existence of *Brady* or FRCP 16 material. See *supra* notes 57-69 and accompanying text.

124. See Holzer, *supra* note 41, at 1970-84 (suggesting a ten part analysis for determination of whether classified evidence is necessary for defendant's case).

125. See generally Sam A. Schmidt & Joshua L. Dratel, *Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions*, 48 N.Y.L. SCH. L. REV. 69, 74 (2004).

126. Margulies, *supra* note 2, at 455.

127. See FREEDMAN & SMITH, *supra* note 14, at 13 n.5 (citing Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1957)).

results in distortion in Article III courts where defendants have fundamental constitutional rights, the concerns are amplified for other tribunals.

With recognition of the executive's role in assuring the nation's safety and being cautious about separation of powers concerns, the courts and legislature should recognize that secret evidence has and will continue to distort the functioning of our delicately balanced adversary system. Procedures should be adopted to insure the proper respect for and maintenance of the defense lawyer's role.

QUESTION AND ANSWER

PROFESSOR SIMON: Thank you very much. No doubt that has stirred some people who want to go to the microphone to ask questions.

PROFESSOR APPLEMAN: Laura Appleman. Hi. Ellen. I really, really agree with your comments and I couldn't help thinking about what Steve Saltzburg said yesterday about the quiet erosion of habeas rights particularly with this new streamline act. I know you were trying not to be too expansive and I'm just going to jump in and say, I really see this as a general systemic trend to nibble away at the rights of all defendants. Obviously the problem is worse for indigent criminal defendants, but really there is an erosion of rights for all defendants, and now the secret evidence. So I guess my question to you is two part, which is what can we do about it and why do you think this is happening?

PROFESSOR YAROSHEFSKY: The problems are daunting and it is difficult to find solutions, at least short term ones. As to the reasons for this slow erosion, politics and judicial appointments play a significant role. There are issues that are going up now on the use of 9/11 tapes. Many people have argued that the tyranny of small decisions over several decades have brought us to this current crisis. The sentencing guidelines shifted the balance in the federal system at least between prosecutors and judges. The grand jury system is perverted beyond its original purpose. Executive power—whether by the president or the DOJ—is the key issue for our time. Will our new Supreme Court draw lines in a manner that preserves appropriate limits on the exercise of such power? There is cause for serious concern.

As for the issue of what can be done, we need a conference to discuss this topic. As a modest beginning, we can start with the first question that some lawyers ask—one that we discussed during Professor Ogletree's talk yesterday—that is, whether litigation is an effective strategy given the significant changes in the composition of the federal

courts. I am not at all certain about the utility of affirmative litigation, nor sanguine about the likely results. Nevertheless, there are and will continue to be some issues where litigation might advance individual rights and curtail assertions of executive power.

Most of the legal issues will be decided in criminal cases and frankly, I am not sanguine about the prospect that case law will uphold defendants' rights and the role of defense counsel. I believe there will be a steady erosion of such rights. It is important that lawyers move beyond litigation to preserve our legal system. Education and organizing are essential. We need to work with high schools and colleges to insure an understanding about what is at stake. We need to work with organizations, like the National Association of Criminal Defense Lawyers which lobbies Congress, drafts legislation, litigates and provides essential support to defense lawyers. There are many prosecutors who have expressed their grave concern about recent developments in the executive branch. We need to forge ties with such prosecutors. Obviously, there is no simple solution, but a multifaceted and long term strategy is essential. Unfortunately at this moment, there is little reason for optimism, but looking backward twenty years from now, I hope we will see that there were positive developments.

MR. CHARNOV: Bruce Charnov, Hofstra University. On a personal note, in 1975 while on active duty with the Navy I completed my doctoral dissertation in clinical organizational psychology. That dissertation was the product of an investigation of the military and cultivation of the self and self-concept. Really it asked, what does boot camp do to you? It contained a sentence in there that said that the United States Navy boot camps differ little other than in duration and location from Chinese Communist prison camps. Based on that sentence, my doctoral dissertation was classified confidential, and twelve years later I got a post card in the mail that I was now free to publish it if I so desired.

PROFESSOR YAROSHEFSKY: And did you?

MR. CHARNOV: No, it was too late. I moved on to other things, among things law school. In fact, this law school.

PROFESSOR YAROSHEFSKY: Yesterday, there was an article on the front page of the *New York Times* about information about the Vietnam War that was just declassified.¹²⁸

128. Scott Shane, *Vietnam Study, Casting Doubts, Remains Secret*, N.Y. TIMES, Oct. 31, 2005, at A1.

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PROFESSOR WOLFRAM: Chuck Wolfram. I enjoyed your talk very much, and I'm sure I'll enjoy the paper very much. I might have been the only one, but it struck me that there was somewhat of a large disconnect between your description of the problem, which seemed to be a pervasive erosion of the adversary system, and your modest proposals, which seem to be incrementalist to the extreme. Is that all there is? Is that all that has to be done to these statutes and their implementation to correct the problem or are you assuming that they'll be struck down as unconstitutional?

PROFESSOR YAROSHEFSKY: Thank you for your question. No, I am certainly not assuming that the statutes will be declared unconstitutional. And you are correct that my proposals are modest. Certainly, serious attempts to deal with the overreaching problems require legislation such as insuring that FISA warrants are available in the criminal process. One, of course, has to be hesitant about the legislature. In terms of CIPA, I'm a little more cautious, because I'm hesitant to return the statute to the legislature to say we need an entirely new statute for obvious political reasons. I think we can work within the CIPA statute as it exists so long as judges can understand that these proceedings should not be *ex parte*. Once we involve the defense lawyer in the process and allow the defendant to have access, at least these modest proposals may provide some measure of restoration of a balance.

PROFESSOR WOLFRAM: I really don't know enough about the field at all to offer suggestions. I do note this disconnect. I gather you're saying that largely for strategic political reasons you're keeping your proposals modest, hoping that those might be adopted since it appears that the larger proposals would simply be ignored.

PROFESSOR YAROSHEFSKY: Yes, I have kept these proposals modest in the hope that they are attainable.

MR. TEMPLE: Ralph Temple. It occurs to me, that it would be a great service if the scholars would collect in one place that was easily accessible to lawyers litigating these cases, all the instances where information withheld from the government when finally discovered, really didn't relate to security, really didn't sustain the government's position, and just to name one dramatic example that happened about two years ago, the FISA Court which I think was constructed—I mean, I don't know the membership and that it's a rubber stamp operation. But even the FISA Court which for how long has been rubber stamping FBI applications for warrants exploded in anger, and issued opinions condemning the FBI for lying to it in seventy-five cases. Now, that is incredible and, of course, we never read, and I doubt that there's ever

been any discipline within the FBI against those who committed a form of perjury who lied in sworn statements to the court. I think that any time you find yourself in front of a judge, and you're trying to argue against the secrecy, it would be helpful if you could point to a body of data that says this stuff, your Honor, when it's brought to light, more often than not doesn't hold up.

PROFESSOR YAROSHEFSKY: Thank you, Ralph. There are two centers—at NYU there's a center on law and security that's trying to gather such data. Also, lawyers around the country as part of the National Association and Criminal Defense Lawyers Group gather such data. The overriding problem in such a process is what I mentioned—most of the information is secret.

PROFESSOR SIMON: Thank you very much. [Applause]