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**SMALL SCHOOL.
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ANALYZING THE CONSTITUTIONAL TENSIONS AND APPLICABILITY OF MILITARY RULE OF EVIDENCE 505 IN COURTS-MARTIAL OVER UNITED STATES SERVICE MEMBERS: SECRECY IN THE SHADOW OF *LONETREE*

MAJOR JOSHUA E. KASTENBERG¹

The advent of the cold war brought concerns over classified national security information becoming public in criminal trials. The federal government, in response, enacted the Classified Information Procedures Act (CIPA)² in 1980. During the same time the CIPA was being finalized in Congressional conference, President James Carter provided the United States Military with a similar mandate to protect evidence. Rather than creating a specific act, the executive branch provided the military a “privilege” mechanism to prevent disclosure in the Military Rules of Evidence (MRE), under rule 505.³ From its inception until 1990, military prosecutors made little use of MRE 505. However, in *United States v. Lonetree*,⁴ a court-martial was tasked with protecting sensitive information regarding Soviet-directed espionage. The trial court had to balance the inherently broader discovery rights of an accused against the need to protect information crucial to national security.⁵ Since *Lonetree*, little analysis has occurred regarding the use of

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² 18 U.S.C. app. 3 § 1-16 (1982).

³ UNIFORM CODE OF MILITARY JUSTICE (UCMJ) MRE 505. See, e.g., Captain Mark G. Jackson, *The Court-Martial is Closed: The Clash Between the Constitution and National Security*, 30 A.F. L. REV. 1 (1989). Jackson noted that President James Carter amended the Manual for Courts-Martial (MCM) to include the Military Rules of Evidence in order to mirror the federal rules. *Id.* (citing 16 Weekly Comp. Pres. Doc. 493 (Mar. 14, 1980); Exec. Order 12,198, 45 Fed. Reg. 16,932 (1980)).

⁴ 31 M.J. 849 (NMCMR 1990) [hereinafter *Lonetree*], *aff'd* 35 M.J. 396 (CMA 1992) *cert. denied*, 507 U.S. 1017 (1993) [hereinafter *Lonetree III*].

⁵ Under military law, a person accused of offenses is entitled to broader discovery rights than found in federal law. See, e.g., *United States v. Adens*, 56 M.J. 724 (ACCA 2002) [stating that broad discovery rights prevents gamesmanship]; *United States v. Eshalomi*, 23 M.J. 12 (CMA

MRE 505. Yet, MRE 505 remains an important feature of military justice, just as CIPA does to federal law. Because military members may be prosecuted for the failure to control or maintain sensitive information, the future likelihood of MRE 505 being invoked by the government is almost certain. Indeed, in the past two years, military prosecutors in two high-profile cases, *United States v. Yee*,⁶ and *United States v. al-Halabi*,⁷ have invoked MRE 505's protections. Currently, with trials stemming from the *abu-Gharib* prisoner of war abuse investigation, and the overall "Global War on terrorism," knowledge of the parameters of MRE 505 will be important to all sides in the court-martial process.

This article analyzes MRE 505 in both a comparative and Constitutional context. Part I provides a procedural overview of both MRE 505, and its federal counterpart, CIPA, for protecting evidence vital to national security in the criminal court context. Both mechanisms for protecting sensitive information are analyzed for their efficiency from a prosecutorial perspective. A study of CIPA is also provided because of the lack of military case law and current analysis of MRE 505. CIPA and federal case law remain important in providing guidance on the parameters of protecting classified information in courts-martial.

Part II analyzes the defendant's twin Constitutionally-based rights to present a complete defense and to a public trial. MRE 505, impacts to some degree, these twin rights. The right to a public trial also bears importance as, on occasion, third parties assert this right.

Part III then reviews the legal framework of MRE 505 within the salient *Lonetree* case. Within the context of that case, particular attention is focused on two issues: the right of public access and the responsibility to protect classified evidence.

Part IV analyzes likely legal areas of future review. Continued analysis on the right of public access is important because there has been a trend toward increased media interest for military cases.⁸ The responsibility to protect

1986) [holding that while Supreme Court decisions create minimal thresholds for discovery compliance, the president promulgated rules for military courts requiring full disclosure.]

⁶ For a discussion of the background and ultimate decision to drop charges against Yee, see Neil A. Lewis, "Charges Dropped Against Chaplain," N.Y. Times, Mar. 20, 2004, at A1; and Neil A. Lewis & Thom Shanker, "As Chaplain's Spy Case Nears, Some Ask Why It Went So Far," N.Y. Times, Jan. 4, 2004, at A1.

⁷ For a discussion of the background and current status of *United States v. al Halabi*, see Denny Walsh, "Judge Denies Bid to Drop Spy Case," Sacramento Bee, June 17, 2004, at A1.

⁸ See, e.g., Lieutenant Colonel Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 MIL. L. REV. 1, 2 (2000). Lind writes, "Military cases are attracting local and national media interest. As the armed forces grow smaller, fewer people have experienced military life. Thus, the military justice system is foreign to more and more Americans. People are interested in learning about how military justice works. The media sells its product by generating news that is interesting to the public." *Id.*

classified evidence is of importance, but for reasons that include an increased role of the military in combating terrorism in both overseas and potentially domestic operations, as well as other traditional reasons. Second, the issue of an accused's right to a present a complete defense will continue to affect the application of MRE 505 in trials. Finally, the right of an accused to choose defense counsel may be impacted by the application of MRE 505. While this article concludes the reasonable application of MRE 505 is constitutional, judge advocates and agency attorneys should analyze the possible impact both in the charging process and in the pursuit of justice. Likewise, potential defense counsel should be fully aware of the law, its impact on the accused's rights, and potential arguments for disclosure prior to trial.

Before proceeding however, a brief mention of the courts-martial process bears importance as persons familiar with federal criminal law may be unfamiliar with terminology used in the Uniform Code of Military Justice (UCMJ).⁹ Courts-martial may be divided into three types: general, special, and summary. This breakdown is, in part, based on sentencing limitations. Because the military does not have mandated sentencing guidelines, sentencing occurs in a two dimensional context. Each offense possesses a jurisdictional ceiling on punishment.¹⁰ However, the special and summary courts-martial forum further set a maximum ceiling.¹¹

⁹ See, 10 U.S.C. §816. There are three types of courts-martial in each of the service branches. These are:

- (1) general courts-martial, consisting of
 - (a) a military judge and not less than five members; or
 - (b) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;
- (2) special courts-martial, consisting of
 - (a) not less than three members; or
 - (b) a military judge and not less than three members; or
 - (c)) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;
- (3) summary courts-martial, consisting of one commissioned officer.

Id.

¹⁰ UCMJ Articles 80 through 134 each proscribe maximum punishments for offenses.

¹¹ The maximum jurisdictional limit of a Special Court-Martial consists of discharge from active duty with a bad conduct discharge, confinement for one year, reduction to the lowest enlisted grade, two-thirds forfeiture of pay and allowance, and the possibility of a fine. See, 10 U.S.C. sec 819, Art 19, as amended by Pub. L 106-65 S. 1059 (HR 1401), 5 October 1999.

The maximum sentence which may be imposed by summary courts-martial are: one month's confinement at hard labor; 45 days' hard labor without confinement; two months' restriction to specified limits; reduction to the lowest enlisted pay grade; and forfeiture of two-thirds pay for one month. Art. 20, UCMJ, 10 U.S.C. § 820. Not all these sentence elements

In military law, the terms indictment and defendant are not used. Instead of indictment, the term preferral is utilized.¹² However, these terms are not strictly synonymous. Likewise, instead of 'defendant,' the term 'accused' is used.¹³ These terms are roughly synonymous in regard to the legal rights of charged persons.¹⁴

The charging process begins with preferral of charges against an accused. Any person subject to the UCMJ may prefer charges against an accused.¹⁵ Where an enlisted general court-martial is contemplated, a preliminary investigation known as a UCMJ Article 32 investigation is held.¹⁶ For all officers charged, an article 32 hearing is accomplished, as officers may on be tried in general courts-martial.¹⁷ Although roughly akin to the grand jury process, there are substantial differences, not pertinent to this article. Should the charges be recommended either for a general court-martial or special court martial, the charges must be referred by a convening authority.¹⁸ Once the charges are referred to a court-martial, an independent military judiciary becomes involved with discovery matters, scheduling, evidentiary rulings, and oversight of the case.¹⁹

may be imposed in one sentence, and enlisted persons above the fourth enlisted pay grade may not be sentenced to confinement or hard labor by summary courts-martial, or reduced except to the next inferior grade. MCM pp 16b and 127c. See also, *Middendorf, Sec of Navy v. Henry*, 425 U.S. 25, 33, 96 S. Ct. 1281, 1287, 47 L. Ed. 2d 556 (1976)

¹² See, RCM 307 Preferral of charges. It is important to note that any person subject to the UCMJ may prefer charges. However, an accuser who prefers charges must sign the charges and specifications under oath before a commissioned officer authorized to administer oaths, and state that he or she has personal knowledge of the charges or has investigated the matters in them. Additionally the accuser must believe the charges to be true under a unique standard which reads "true in fact to the best of that person's knowledge and belief." *Id.*, see also *United States v. Miller*, 31 M.J. 798 (AFCMR 1990)

¹³ See, RCM 308

¹⁴ Over time, the court-martial has come to substantively mirror the federal criminal court system. See, e.g., *United States v. Smith*, 27 M.J. 242 (CMA 1988). There are, however, specific rights of military members not found in state and federal courts, such as the legal protection against unlawful command influence. See, e.g., *Weiss v. United States*, 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994) *Curry v. Secretary of the Army*, 595 F.2d 873, 879 (1979); *United States v. Stoneman*, 57 M.J. 35 (2002) (each reaffirming unlawful command influence as "the mortal enemy of military justice").

¹⁵ See R.C.M. 307. The individual preferring charges must be sworn and believe, to their best knowledge, the substance of the charges to be true.

¹⁶ See UCMJ, Article 32. For a discussion regarding the differences between an Article 32 hearing and a grand jury proceeding, see Lieutenant Colonel Theodore Essex and Major Leslea Pickle, *A Reply to the Cox Commission on the 50th Anniversary of the Uniform Code of Military Justice*, 52 A.F.L. Rev. 233, 250-51 (2002)

¹⁷ See UCMJ, Article 32

¹⁸ See R.C.M. 601

¹⁹ See, e.g., *Weiss v. United States*, 510 U.S., at 180-81, (holding that the military justice system possesses inherent safeguards to insure judicial impartiality)

I: Classified Information Procedure Act and MRE 505: Overview

A. CIPA

The Supreme Court has both carved exceptions and recognized limits to a defendant's Constitutional rights.²⁰ Some of these rights might be viewed as impacting the traditional view of the right to a fair trial.²¹ For instance, the right of individual liberty may become secondary in wartime where the government believes the individual to be dangerous to national security.²² In criminal cases involving sexual abuse against children, there is no absolute Sixth Amendment confrontation clause right to confront the child witness in the presence of the defendant.²³ Likewise, in rape and sexual assault cases, mechanisms exist to protect the identity of the victim from the public.²⁴ In terms of national security related evidence, the importance of protecting such information against public view is balanced through CIPA.

Passed by Congress in 1980, CIPA was designed to address a growing problem of graymail.²⁵ Graymail is a term describing a defendant's threat to expose classified intelligence through otherwise lawful procedural means

²⁰ See e.g., *Powell v. Alabama*, 287 U.S. 45, 53 (1932) [holding the right to secure defense counsel of choice is not absolute]

²¹ *But see*, BLACKS LAW DICTIONARY (defining a fair and impartial trial as "a hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration of evidence and facts as a whole"). The dictionary cites *Raney v. Commonwealth* for the proposition that a fair trial is "one where the accuser's legal rights are safeguarded and respected." BLACKS LAW DICTIONARY, 596 6th ed. 1990. See, *Irwin v. Dowd*, 366 U.S. 717, 728 (1961), holding:

More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the state has the burden of establishing guilt solely on the basis of the evidence produced in court and under circumstances assuring an accused all the safeguards of a fair trial.

Id., at 729 (Frankfurter J. concurring).

²² See e.g., *Ludecke v. Watkins*, 335 U.S. 160, (1948) [permitting the internments of foreign nationals of an enemy state during time of war]

²³ See, e.g., *Maryland v. Craig* 497 U.S. 836 (1990) [permitting a child victim to testify outside of the presence of a defendant in specified circumstances]

²⁴ See, e.g., MRE 412 [limiting the admissibility of a victim's sexual conduct that is unrelated to an accused's charged offense]; Federal Rule of Evidence (FRE) 412 [limiting the admissibility of a victim's sexual conduct that is unrelated to an defendant's charged offense]; and, *United States v. Yazzie*, 59 F.3d 807 (9th Cir 1998)

²⁵ See, e.g., David I. Greenberger, *An Overview of the Ethical Implications of the Classified Information Procedures Act*, 12 GEO. J. LEG. ETHICS 151 (1998) (citing, S. Rep. No. 96-456, at 2 (1980)) (defining Graymail as a tactic of threatening to disclose classified information during the course of the prosecution in order to influence prosecutorial discretion). *also*, Sandra Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUMB. L. REV. 1651 (1991).

during trial.²⁶ Graymail use in cases involving classified information is problematic for the government because it has dissuaded prosecution in some cases.²⁷ CIPA was not designed to provide prosecutors otherwise repugnant advantages over defendants.²⁸ Federal courts are obligated to watch for overzealous use of CIPA and do not always accept government proffers of necessity to protect classified evidence. For instance, in *United States v. Fernandez*,²⁹ the government appealed a trial judge's order to release classified information, or in the alternative, to dismiss charges against a defendant.³⁰ On prosecution appeal, the Fourth Circuit held the trial judge did not abuse his discretion in executing this order.³¹ The trial judge reviewed the contested evidence and based his order on this review as well as the arguments of both parties.³² He concluded that requirements of a fair trial, including the right to present a complete defense necessitated the release of evidence.³³

CIPA defines classified information as "any information or material that has been determined by the United States government pursuant to an Executive Order, statute, or regulation, to require protection against authorized disclosure for reasons of national security."³⁴ Likewise, national security is defined as "the national defense and foreign relations of the United States."³⁵ Neither of these terms have been found to be unconstitutionally vague.³⁶ CIPA permits any party, after an issue of indictment, to move the court for a pretrial conference "to consider matters relating to classified information that may arise in connection with the prosecution."³⁷ In this conference, the court must consider timing of discovery requests, the provision of notice requirements, and the procedure to determine the use, relevance, and admissibility, of classified information.³⁸

²⁶ Greenberger, *supra* note 22 at 152.

²⁷ See, e.g., Richard Salgado, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427, 429-91 (1988).

²⁸ *United States v. La Rouche Campaign*, 695 F. Supp 1282, 1285 (D. Mass 1988).

²⁹ 913 F.2d 148 (4th Cir. 1990).

³⁰ *Id.* at 149. Joseph Fernandez had been interviewed by officers from the inspector general concerning his tenure as CIA station chief in San Jose, Costa Rica. He specifically was questioned about paramilitary support activities, his association with Col Oliver North, and the construction of an airstrip with CIA funds. *Id.* He was later charged with making false statements to the investigators as well as obstruction of justice. *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ 18 U.S.C. app 3 §1.

³⁵ 18 U.S.C. app 3. §1

³⁶ See *United States v. Wilson*, 571 F. Supp. 1422 (D.C. NY 1983) *United States v. Joliff*, 548 F. Supp 229 (D.C. Md 1981)

³⁷ 18 U.S.C. app 3, § 2 (2000)

³⁸ *Id.*

CIPA permits the prosecution to seek a protective order from the court.³⁹ This protective order is designed to prevent any classified information disclosed by the United States to a party in the criminal case.⁴⁰ The order is also intended to establish adequate procedures to protect classified information at all stages of the trial.⁴¹ CIPA requires the appointment of a court security officer (CSO) to oversee the order.⁴² The CSO is charged to insure classified information is properly handled while assisting both parties and the court in obtaining security clearances.⁴³

As noted above, CIPA was not designed to provide an advantage for the prosecution by limiting discovery. Indeed, Section 4 of CIPA balances the discovery rights of a defendant against the government's national security considerations. It permits the court to redact or delete classified items not relevant to an element of a specific defense.⁴⁴ It also permits the government to provide a summary substitute of information.⁴⁵ However, the government appears required to provide the court, *in camera*, with a complete copy of the evidence to insure the defendant's discovery rights are intact.⁴⁶ Section 4 does not abrogate discovery requirements under the Federal Rules of Criminal Procedure, nor is the *in camera* process unconstitutionally constraining on the right to mount a defense.⁴⁷ Finally, during the discovery process, classified

³⁹ 18 U.S.C. app 3, § 3. See also *United States v. Pappas*, 94 F.3d 795 (2nd Cir. 1996). In *Pappas*, the government argued a judge's protective order was not a proper subject for an interlocutory appeal. *Id.* In determining when a protective order is appealable, the Second Circuit held:

the scope of CIPA prohibitions on a defendant's disclosure of classified information may be summarized as follows: information conveyed by the Government to the defendant in the course of pretrial discovery or the presentation of the Government's case may be prohibited from disclosure, including public disclosure outside the courtroom, but information acquired by the defendant prior to the criminal prosecution may be prohibited from disclosure only "in connection with the trial" and not outside the trial.

Id. at 801. Thus, where a judge provides a broad protective order for matters outside the pending litigation, a defendant may seek an interlocutory appeal. However, in the military context, it may be the case that public dissemination of classified materials may cause further charges for dereliction of duty, or disbarment of civilian defense counsel.

⁴⁰ 18 U.S.C. app 3, §3.

⁴¹ *Id.*

⁴² *Id.* The CSO is an employee of the Department of Justice's Management Division. *Id.*

⁴³ *Id.*

⁴⁴ 18 U.S.C. app. 3, § 3.

⁴⁵ *Id.*

⁴⁶ *Id.* For understanding the court's procedural requirements, see 18 U.S.C. app 6(d). Under this provision, the courts are required to seal all materials it determines, during an *in camera* proceeding, as non-discoverable. Because either party may seek appellate relief, the sealed information is available for consideration to the appellate court.

⁴⁷ See, e.g., *United States v. Wilson*, 721 F.2d 967, 976 (4th Cir. 1983), *cert. denied.*, 479 U.S. 839 (1986) [holding *in camera* review by trial judge comported with due process requirements]; *United States v. Joliff*, 548 F. Supp. 229, 232 [holding the use of *in camera* proceedings are "particularly appropriate" prior to the release of classified evidence]; *United States v. Wen Ho*

information is not discoverable on a mere showing of theoretical relevance in face of the government's classified information privilege.⁴⁸

Once the defense is provided with classified information, they are required to inform the government of their intent to disclose the information at trial.⁴⁹ This includes instances where the defendant has been privy to classified information prior to trial, by virtue of employment.⁵⁰ The notice must adequately specify the classified information, including, hard-copy materials, statements intended for open court, testimony envisioned as elicited from witnesses on cross or direct examination, or any attempt at making information public.⁵¹ The remedy for an incomplete or late notice includes a further order for specificity, or even suppression.⁵² For instance, in *United States v. Collins*,⁵³ a retired United States Air Force general was prosecuted in federal court for misuse of government monies while he was on active duty.⁵⁴ Collins notified the government of his intent to use classified information in his defense.⁵⁵ The prosecution objected to Collins' notice arguing it lacked specificity.⁵⁶ The trial judge concluded the notice lacked specificity and

Lee, 90 F. Supp.2d 1324, 1326 (D.C. NM 2000). [holding in camera proceedings appropriate in cases where classified evidence may be divulged.]

⁴⁸ See, *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989).

⁴⁹ 18 U.S.C. app. 3, § 5. See also, *United States v. Miller*, 874 F.2d 1255, 1276 (9th Cir. 1989), rehearing denied 884 F.2d 1149 (9th Cir. 1990), cert. denied 510 U.S. 894 (1991). [holding that a generalized description of classified evidence satisfied the CIPA notice requirement].

⁵⁰ See., *United States v. Collins*, 720 F.2d 1195 (11th Cir 1983).

⁵¹ *Id.*

⁵² *Id.*

⁵³ 720 F.2d 1195 (11th Cir 1983).

⁵⁴ *Id.*, at 1196. Interestingly, the Secretary of the Air Force did not recall him to active duty for prosecution before court-martial. A recall to active duty would have been lawful. See, e.g., UCMJ Article 2(a); *United States v. Overton*, 24 M.J.309 (CMA 1984) cert. denied 428 U.S. 976 (1987); *Sands v. Colby*, 35 M.J. 620 (ACMR 1992). However, a finding of guilt before a court-martial could have resulted in loss of all retirement benefits. See e.g., *United States v. Reed*, 54 M.J. 37 (CAAF 2000). [holding that although dismissal of an officer usually results in a loss of retirement benefits, such a loss is seen as a collateral consequence to the court martial sentence.]

⁵⁵ 720 F.2d, at 1197. Collins notification read as follows:

Said classified information concerns activities of the U.S. Government with respect to joint Intelligence/Military operations and the utilization of secret overseas bank accounts to finance said operations. Moreover, said classified information includes the developing of secret government bank accounts and the transfer of funds surreptitiously into the United States Treasury. In addition the defendant intends to disclose or cause the disclosure of all matters coming within the defendant's administration as Director of (his job description) for the United States Air Force, and, as such, his operation of a unit of said department called "(named)" which coordinated many operations in Southeast Asia and elsewhere.

Id., at 1197-98.

⁵⁶ *Id.*

ordered Collins' to supplement the notice.⁵⁷ Collins failed to comply, and the court, despite prosecution objections, permitted Collins to generally admit classified information.⁵⁸ However, because the government remained unaware of specific evidence, the prosecution directly appealed to the circuit court.⁵⁹ The Eleventh Circuit held that Collins' notification lacked specificity and remanded the case to the district court for further proceedings.⁶⁰ Had Collins refused to comply with the Eleventh Circuit's ruling, it is conceivable the trial court could have suppressed his classified evidence from the trier of fact.

Once the defense provides notice, the prosecution is afforded the opportunity to object to the use, relevance, and admissibility of the evidence as per section (c).⁶¹ Additionally, the prosecution may motion the court to permit summaries or redacted copies in lieu of the original classified information.⁶² Likewise, limitations on testimony may be sought and granted.⁶³ For instance, in *United States v. Collins*,⁶⁴ on remand, the defense argued section 6(c) was unconstitutional because it precluded the right to a complete defense.⁶⁵ The district court held that through its gatekeeper duties it insured the right remained intact.⁶⁶ Although the court felt *Collins* presented a case of "first impression," it alluded to its power to alter evidence presentation through FRE 401 and 403, was the basis for its ability to limit evidence under CIPA.⁶⁷ *Collins*, is an important benchmark case for an additional reason. The District Court's articulated that the historic basis underlying the right to obtain discovery and present a complete defense is not eroded under CIPA.⁶⁸ Second, the court found its gatekeeper duties in CIPA cases

Should the court fail to grant relief, CIPA affords the prosecution the right, via interlocutory appeal, to seek relief through the appellate process.⁶⁹ The attorney general may also file an affidavit objecting to disclosure.⁷⁰ If this

⁵⁷ *Id.* The district court ordered General Collins to make a "good faith effort" to supplement the notice, but no new or supplemental notice was filed or required. *Id.* The court ordered the government to furnish defendant with information to assist defendant in identifying and describing classified information, and the government furnished various documents. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*, at 1119-1200. stating, The court must not countenance a Section 5(a) notice which allows a defendant to cloak his intentions and leave the government subject to surprise at what may be revealed in the defense. To do so would merely require the defendant to reduce "graymail" to writing. *Id.*

⁶¹ 18 U.S.C. app.3 § 6 (2000)

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 603 F. Supp. 301 (S.D. Fla 1985) [hereinafter *Collins II*]

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See id.*, at 304.

⁶⁸ *Id.*, at 303

⁶⁹ 18 U.S.C. app. 3 § 6(e)(1) (2000).

⁷⁰ 18 U.S.C. app.3 § 7.

occurs, the court may require the prosecution to dismiss charges.⁷¹ Forcible dismissal is unlikely for two reasons. First, Congress designed CIPA to prevent a forcible dismissal of charges. Second, Federal courts have recognized CIPA's design to prevent "graymail," as the government possesses a strong interest in bringing suspected criminal offenders to trial as part of its police power.

B. Military Rule of Evidence 505

In a court-martial, government information may be privileged under two different rules of evidence. Military Rule of Evidence (MRE) 505 provides protection for classified information. MRE 506 provides protection for unclassified, but important government information.⁷² This article does not address MRE 506.

MRE 505 permits a privilege against evidentiary disclosure where the disclosure would be detrimental to national security.⁷³ It also encompasses all stages of a criminal proceeding.⁷⁴ The rule defines the term classified information as "any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulations, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. 2014."⁷⁵ Additionally, MRE 505 defines "national security" as "the national defense and foreign relations of the United States."⁷⁶ These terms, although not considered in a military context, as noted above, have been upheld as valid terms and not unconstitutionally vague.

The privilege may be asserted by the head of the executive or military department or government agency.⁷⁷ The condition for asserting the privilege is twofold. First, the information must be properly classified.⁷⁸ Second, a release of the information must be detrimental to the national security.⁷⁹ An assertion of the privilege does not require the agency head to appear at court.⁸⁰ Instead, the agency head may delegate the assertion to trial counsel, or a

⁷¹ *Id.*

⁷² See MRE 506; *United States v. Rivers*, 44 M.J. 839 (ACCA 1998). This rule is also known as the public interest privilege. While this rule is not analyzed in this Article, mention of it is required for the remaining analysis.

⁷³ MRE 505(a).

⁷⁴ *Id.* MRE 505 states:(a) General rule of privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other rules of privilege this rule applies to all stages of the proceedings.

⁷⁵ MRE 505(b)(1); 42 U.S.C. 2014.

⁷⁶ MRE 505(b)(2).

⁷⁷ MRE 505(c).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

witness.⁸¹ The authority of either is assumed in the absence of contrary evidence.⁸² Only one published decision analyzes the delegation of power issue. In *United States v. Flannigan*,⁸³ the Air Force Court determined that the commander of the Air Force Office of Special Investigations (AFOSI) did not have the authority to, *sua sponte*, declare material classified.⁸⁴ The Air Force Court of Criminal Appeals concluded the plain language of MRE 505 mandates only the “head of the military department concerned” possessed that authority.⁸⁵ The court recognized the Secretary of the Air Force could have properly delegated authority to the AFOSI commander, but had not done so.⁸⁶ Interestingly, both the prosecution and AFOSI would have been better served in arguing the public policy exceptions under MRE 506.

Additionally, the quantum of evidence (or burden on the accused) required to dispute proper classification, proper delegation of authority, or impact on national security has not been fully established. Given the traditional deference of courts to executive determinations, the quantum of required evidence would be greater than the preponderance standard typical in other pretrial motion determinations, making the burden of the defendant very high.⁸⁷ For instance, in *United States v. Pruner*,⁸⁸ an agency’s decision to not declassify information was discussed by the Court of Military Appeals. Pruner was prosecuted under the UCMJ for desertion on the eve of the first Persian Gulf War.⁸⁹ He was assigned as an intelligence analyst with the 1st Infantry Division.⁹⁰ Pruner motioned the court to order evidence declassified, not for findings, but for extenuation and mitigation in sentencing.⁹¹ In the alternative, he motioned the court to force the prosecution to dismiss charges.⁹² Neither

⁸¹ *Id.*

⁸² *Id.*

⁸³ 28 M.J. 988 (AFCMR 1989) *rev.d* 31 M.J. 240 (1990) (reversing in part on other grounds) Flannigan, an AFOSI agent was convicted of dereliction of duty (UCMJ, Article 92), wrongful use of marijuana (UCMJ, Article 112a), and adultery (UCMJ, Article 134). *Id.*, He was sentenced to a bad conduct discharge, reduction to E-2 and seven months confinement. *Id.*, at 988. However, on appeal, the Air Force court reassessed the sentence a bad conduct discharge, reduction to E-3 and a seven months confinement. *Id.* at 991.

⁸⁴ *Id.* at 989-90. AFOSI sought to declare specific regulations titled “OSI Regulation 124-68, Undercover Guide,” and “OSI Pamphlet 124-51” as vital to national security. *Id.*

⁸⁵ *Id.* at 990.

⁸⁶ *Id.*

⁸⁷ See, e.g., MRE 311; *United States v. Beckett*, 49 M.J. 354 (CAAF 1998).

⁸⁸ 31 M.J. 272 (CMA 1991).

⁸⁹ *Id.* Specifically, Pruner was charged with desertion with intent to avoid hazardous duty (UCMJ, Article 85), absence without leave with intent to avoid maneuvers (UCMJ, Article 86), and missing a movement (UCMJ, Article 80). He also unsuccessfully sought to enjoin the Army from prosecution in the federal courts. See *Pruner v. Department of the Army*, 755 F. Supp 362 (D. Kan. 1991).

⁹⁰ Pruner, 19 M.J. at 273. Pruner also asked to court for permission to release classified information to his military and civilian defense counsel.

⁹¹ *Id.*

⁹² *Id.*

the military judge at trial, nor the Army Court of Criminal Appeals found disclosure was required, in part, because Pruner failed to comply with procedural disclosure requirements.⁹³ Thus, the Army Court of Criminal Appeals did not fashion a burden of proof for an accused to overcome.

As noted above, referral of charges constitutes the convening authority's decision to try charges before courts-martial. Referral of charges also imposes discovery requirements on the government. However, where classified evidence is in question an additional burden is placed on the government. Prior to referral of charges, the convening authority must notify an accused that evidence of a classified nature exists, but that such evidence will not be provided to the defense.⁹⁴ The convening authority may delete classified specified items of documentary evidence prior to providing a copy to the defense.⁹⁵ A summary of evidence may also be provided.⁹⁶ Substitute statements in lieu of original statements are also possible.⁹⁷ Finally, the convening authority may decide against any disclosure if no means to protect the national security may be accomplished during disclosure.⁹⁸ However, in each of these possibilities, the original items must be provided to the military judge for *in camera* review.⁹⁹ The military judge then becomes the arbiter of sealed evidence, insuring a fair trial. The convening authority may also permit the defense to review the entire original evidence but place limits on the location of viewing and disclosure.¹⁰⁰

After referral of charges but prior to trial, either the prosecution or defense can seek a pretrial session to consider and resolve matters relating to the discovery or presentation of classified matters.¹⁰¹ Moreover, the military judge is required to hold a pretrial session when classified matters arise.¹⁰² He or she must determine the timing of requests for discovery; whether the accused has stated an intention to disclose classified information and, the initiation of *in camera* proceedings to determine disclosure.¹⁰³ It is possible that where an accused, holding a security clearance or other pertinent classified information, is charged with an offense such as dereliction of duty, the accused may seek to testify as to classified material as part of a recognized defense.¹⁰⁴

⁹³ *Id.* Pruner's arguments are highly suspicious of "graymail" because the classified information he claimed to possess.

⁹⁴ See e.g., MRE 505(d)(1).

⁹⁵ *Id.*

⁹⁶ MRE 505(d)(2).

⁹⁷ MRE 505(d)(3).

⁹⁸ MRE 505(d)(5).

⁹⁹ MRE 707(g)(2) provides for *in camera* review. A party motions the judge for *in camera* review if it seeks to have discovery denied, restricted, or deferred. *Id.*

¹⁰⁰ MRE 505(d)(4).

¹⁰¹ MRE 505(e). This section arguably exists to ensure a steady flow of trial.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ MRE 505(f).

Where the accused claims privilege under MRE 505 and the defense intends to introduce classified evidence, the defense is required to notify the prosecution and convening authority.¹⁰⁵ This notification enables the convening authority to seek a judicial *in camera* determination as to release of evidence,¹⁰⁶ dismiss the all charges, dismiss the specifications and charges to which the evidence relates,¹⁰⁷ or, take other action to ensure the interest of justice are served.¹⁰⁸ It is essential to note that, nothing in the rule prevents the prosecution from seeking suppression under other rules of evidence, namely MRE's 401-402¹⁰⁹ and MRE 403.¹¹⁰ However, the prosecution must be careful not to argue that the fact some evidence is classified, the military judge should weigh this in a standard admissibility determination.¹¹¹

Within MRE 505, there are different means of protecting or preventing the disclosure of evidence. The prosecution can seek a protective order from the military judge.¹¹² The nature of the protection may take several forms such

¹⁰⁵ *Id.*

¹⁰⁶ MRE 505(f)(1).

¹⁰⁷ MRE 505(f)(2).

¹⁰⁸ MRE 505(f)(3).

¹⁰⁹ MRE 401 reads:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* MRE 402 reads in pertinent part, "Evidence which is not relevant is not admissible." MRE 402. MRE 401 is an exact copy of FRE 401. Likewise MRE 402 closely follows FRE 402.

¹¹⁰ MRE 403 reads:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by the consideration of undue delay, waste of time, or needless presentation of the evidence." *Id.* MRE 403 is an exact copy of FRE 403.

¹¹¹ Although no military case law is on point as to this issue, see, e.g., *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363 (11th Cir. 1994) [In this case, the Eleventh Circuit held, "the district court may not take into account the fact that evidence is classified when determining its "use, relevance, or admissibility.]

¹¹² MRE 505(g)(1) reads:

(1) Protective order. If the Government agrees to disclose classified information to the accused, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(A) Prohibiting the disclosure of the information except as authorized by the military judge; (B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed; (C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice; (D) All persons requiring security clearances shall cooperate with investigatory personnel in any investigations which are necessary to obtain a security clearance; (E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense; (F) Regulating the making and handling of notes taken from material containing classified information; or (G)

as an order to store documents at a single protected location, or regulate the taking and handling of notes. The prosecution can also motion the judge to prevent disclosure of evidence to the defense altogether, with possible substitute evidence such as summaries or redactions from reports.¹¹³ As part of the judicial determination, procedures are set for *in camera* review.¹¹⁴ In terms

Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

MRE 505(g)(1).

¹¹³ MRE 505(g)(2) reads:

(2) Limited disclosure. The military judge, upon motion of the Government, shall authorize (A) the deletion of specified items of classified information from documents to be made available to the defendant, (B) the substitution of a portion or summary of the information for such classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge *in camera* and shall not be disclosed to the accused.

¹¹⁴ MRE 505(i) *In camera* proceedings for cases involving classified information.

(1) Definition. For purposes of this subdivision, an "in camera proceeding" is a session under Article 39(a) from which the public is excluded.

(2) Motion for in camera proceeding. Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an in camera proceeding concerning the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege under this rule may grant the Government leave to move for an in camera proceeding concerning the use of additional classified information.

(3) Demonstration of national security nature of the information. In order to obtain an in camera proceeding under this rule, the Government shall submit the classified information and an affidavit *ex parte* for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.

(4) In camera proceeding.

(A) Procedure. Upon finding that the Government has met the standard set forth in subdivision (i)(3) with respect to some or all of the classified information at issue, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding the military judge shall determine whether the information may be disclosed at the court-martial proceeding. Where the Government's motion under this subdivision is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

of defense counsel and witnesses being able to view classified information, the onus is placed on all parties to facilitate the background clearance process.¹¹⁵

Where an accused indicates his intention to disclose classified information, a notice requirement is placed on the defense. The accused is required to provide both the prosecution and military judge notice, at a minimum time prior to arraignment.¹¹⁶ This requirement is a continuing duty and there must be adequate specificity as to the contents of the testimony or evidence.¹¹⁷ Under MRE 505, an accused is prohibited from disclosing classified information without first providing notice.¹¹⁸ This is so the government has the opportunity to seek protection of the classified information.¹¹⁹ The rule provides sanctions for failing to provide adequate notice. These sanctions include suppression of evidence or prohibiting examination of witnesses with respect to the classified information.¹²⁰

Likewise, where the prosecution fails to disclose evidence, or if the military judge determines the accused is entitled access to classified evidence, the rule provides possible sanctions against the government. These sanctions include limiting witness testimony,¹²¹ declaring a mistrial,¹²² findings against the government in issues where the classified information is relevant,¹²³ and dismissing charges.¹²⁴ The latter action may occur with or without prejudice to the government.¹²⁵

While in trial, the military judge serves as a "gatekeeper" for classified evidence. He or she is empowered to prevent unnecessary disclosure of classified information.¹²⁶ Additionally, the military judge may permit admission of only part of a writing or recording, or photograph that contains

¹¹⁵ MRE 506, *supra* note 106. See, e.g., Lieutenant Colonel Eugene R. Milhizer and Lieutenant Colonel Thomas W. McShane, *Analysis of Change 6 to the 1984 Manual for Courts-Martial*, 1994 ARMY LAW. 40, 43. MRE 505(g)(1)(D) was amended to require the cooperation of all persons requiring security clearances, including defense counsel, in investigations necessary to obtain such clearances. *Id.* The amendment recognizes that the military judge has authority to require such cooperation from those involved in both the preparation and the conduct of the trial. *Id.*

¹¹⁶ MRE 505(h)(1). The accused is required to notify prior to arraignment. However, the rule envisions earlier notification so that the military judge may fashion procedures during trial to protect information. *Id.*

¹¹⁷ MRE 505(h)(2)-(3). The notice required must be more than a mere general statement of areas about which evidence may be introduced. The statement must particularize items of classified information. *Id.*

¹¹⁸ MRE 505(h)(4).

¹¹⁹ *Id.*

¹²⁰ MRE 505(h)(5).

¹²¹ MRE 505(i)(4)(E)(I).

¹²² MRE 505(i)(4)(E)(II).

¹²³ MRE 505(i)(4)(E)(III).

¹²⁴ MRE 505(i)(4)(E)(IV).

¹²⁵ *Id.*

¹²⁶ MRE 505(j)(2).

classified information.¹²⁷ The military judge may also prohibit a witness from testifying as to classified matters.¹²⁸ Finally, the military judge may close the trial to the public.¹²⁹ Wherever classified information is protected, this protection extends to a portion, or all, of the record of trial.¹³⁰

II. Federal and Military Law: Public Access and the Right to a “Complete Defense,” in light of balancing concerns:

In the context of trials concerning national security information, perhaps the two greatest issues are disclosure of information to the public and discovery rights. Within the issue of disclosure come three separate concerns. The first concern involves the defendant’s right to a public trial. Additionally, the rights of third parties, such as media, have a “qualified First Amendment right” to attend and report on trials. In cases involving espionage, there is a trend toward media interest.¹³¹ A third concern involves the presentation of evidence via the evidentiary rules under the Military Rules of Evidence. The basis of this right begins in the pretrial discovery requirements on the government. In terms of discovery rights, as noted above, in military courts-martial, an accused is afforded broader discovery rights than found in either federal or most state law. MRE 505 serves as a mechanism for limiting these rights through the military judge’s role as a gatekeeper. Secondly, the defense may be precluded from presentation of evidence for non-compliance with MRE 505.

A. Right to Public trial under United States and Military Law and the Qualified First Amendment Rights of Third Parties; in the National Security Context

A defendant has a right to a public trial.¹³² This right is rooted in the common law concept of public transparency to ensure due process and a fair

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ MRE 505(j)(5).

¹³⁰ MRE 505(k).

¹³¹ See, e.g., Major Christopher M. Maher, *The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information*, 120 MIL. L. REV. 83 (1988).

¹³² See, e.g., *Press Enterprise Co., v. Superior Court of California (Press Enterprise I)*, 464 U.S. 501 (1984). Holding that the right of public access includes jury voir dire processes. Likewise, in *Gannett Co., v. Di Pasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), the Court held the public enjoyed a qualified right to attend pretrial hearings. *Id.* at 397. Additionally, in *Globe Newspaper Co., v. Superior Court for Norfolk County*, 457 U.S. 596, (1982), the Court found that both the press and public had a “qualified First Amendment right” to attend a criminal trial. *Id.*

trial.¹³³ The right to a public trial also applies to third parties in a First Amendment context.¹³⁴ The burden on the government to prohibit the press from reporting an essentially public function is exceedingly high.¹³⁵ Almost all aspects of the judiciary are considered subject to public scrutiny.

The right to public trial is guaranteed as a basic right in the Sixth Amendment's public trial clause, which provides that "in all criminal prosecutions, the accused shall enjoy the right to a . . . public trial."¹³⁶ For instance, in *Waller v. Georgia*,¹³⁷ the Court held that a prosecution sought court closure was unjustified. The prosecution motioned the trial court to close a pretrial hearing involving wiretap evidence because of a fear that public disclosure could harm the ability to investigate and prosecute persons other than the defendants.¹³⁸ In reversing a lower court's acceptance of this argument, the Court reasoned that public access enhances the goals of the criminal process. These goals include ensuring the prosecutor and judge carry out their duties openly and responsibly,¹³⁹ encouraging witnesses to testify truthfully while discouraging perjury,¹⁴⁰ and keeping all parties to the trial "keenly alive to a sense of their responsibility and to the importance of their functions."¹⁴¹

As in the case of several Sixth Amendment issues, the right to an open trial is not absolute. In *Press-Enterprise Co. v. Superior Court of California*, (hereafter, *Press-Enterprise II*)¹⁴² the Court developed a test for determining when a trial may be closed to the public. The case issue originated in the context of a criminal trial. The state brought a twelve-count murder charge against a nurse and sought the death penalty.¹⁴³ The defendant successfully motioned the local magistrate to exclude the public from all proceedings. The

¹³³ See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 570, 65 L.Ed.2d 973, 100 S.Ct. 2814 (1980). In *Richmond Newspapers*, the court held: "One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether the system of criminal justice is fair and right." *Id.*, at 573., citing *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950). In *Richmond Newspapers*, however, one of the court's primary concerns dealt with the trial court's failure to make specific findings of fact where the defendant would be prejudiced by having his trial open to the public. *Id.*, at 581.

¹³⁴ U.S. CONST. AMEND. I The First Amendment provides that "Congress shall make no law... abridging the freedom of speech or the press." U.S. CONST. AMEND. I

¹³⁵ See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 715-17 (1971) (Black J. concurring).

¹³⁶ U.S. CONST. AMEND. VI.

¹³⁷ 467 U.S. 39 (1984)

¹³⁸ *Id.* at 42, On appeal, the Georgia supreme court held the trial judge properly balanced the prosecutors request with the defendant's right to a public trial. *Id.*

¹³⁹ *Id.* at 46.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*, (citing *In re Oliver*, 333 U.S. 257, 270 n. 25, (1948) (quoting Thomas Cooley, *Constitutional Limitations* 647 (8th ed. 1927))

¹⁴² 478 U.S. 1, (1986).

¹⁴³ *Id.* at 2.

motion was granted under the California penal code.¹⁴⁴ A news consortium unsuccessfully challenged the magistrate's decision at both the state appellate and state supreme-court.¹⁴⁵ However, their challenge resulted in only the preliminary trial hearing being conducted. On review, the Court recognized this was a novel issue as prior decisions involved closed hearings at the behest of the prosecution.¹⁴⁶ The Court also acknowledged a tension between a defendant's Sixth Amendment right to a fair trial and the First Amendment rights of third parties.¹⁴⁷ The Court held that "while open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity."¹⁴⁸ Moreover, the term "qualified First Amendment right of access" was maintained throughout the case.¹⁴⁹

Two other cases directly bear on the media's right to attend and report on trials. In *Nebraska Press Ass'n v. Stuart*,¹⁵⁰ the Court considered a trial judge's ruling prohibiting the press from reporting on specific evidentiary facts prior to the empanelment of a jury.¹⁵¹ The judge's order was premised on the issue of the right to an impartial and unbiased jury.¹⁵² The Court acknowledged a possibility that excessive media coverage could make empanelling an unbiased jury difficult.¹⁵³ The Court also recognized a tension

¹⁴⁴ *Id.* at 3. California Penal Code section 868 (1985) required criminal proceedings to be open, "unless exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial." *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*, at 7. Two years prior to *Press-Enterprise*, the Court, in *Waller v. Georgia*, 469 U.S. 39, 104 S.Ct 2210, 81 L.Ed.2d 31 (1984), held where a defendant objects to the closure of a suppression hearing, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced. *Id.* at 47.

¹⁴⁷ In *Press Enterprise Co.*, 478 U.S. at 8, the court acknowledged the history of public access to trials predated the Norman conquest of England. *Id.* However, the Court also concluded there are some government operations that would "totally be frustrated if conducted openly." *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ 427 U.S. 539 (1976).

¹⁵¹ *Id.*, at 550.

¹⁵² *Id.*

¹⁵³ *Id.*, at 548. The Court acknowledged the tension existed for much of United States history in writing:

The trial of Aaron Burr in 1807 presented Mr. Chief Justice Marshall, presiding as a trial judge, with acute problems in selecting an unbiased jury. Few people in the area of Virginia from which jurors were drawn had not formed some opinions concerning Mr. Burr or the case, from newspaper accounts and heightened discussion both private and public. The Chief Justice conducted a searching voir dire of the two panels eventually called, and rendered a substantial opinion on the purposes of voir dire and the standards to be applied.

Id., citing, 1 Causes Celebres, Trial of Aaron Burr for Treason 404-427, 473-481 (1879); (No. 14, 692g)(CC Va. 1807)). Burr was acquitted, so there was no occasion for appellate review to examine the problem of prejudicial pretrial publicity. Mr. Chief Justice Marshall's careful voir dire inquiry into the matter of possible bias makes clear that the problem is not a new one. *Id.*

between the First and Sixth Amendments, but held that while there may be instances the right to public access may be overcome by other matters of greater importance, even in the face of pervasive media, a defendant's Sixth Amendment right to an unbiased jury is not among them.¹⁵⁴ This ruling is premised on the belief that *voire dire* and other procedural mechanisms may be used to obtain an unbiased jury. However, issues of *bona fide* national security concerns may overcome the First Amendment where the Sixth Amendment does not. Thus, the term “qualified First Amendment Right” has been a subject of debate in the context of national security considerations.

In 2002, the Third Circuit, held that where *bona fide* national security considerations are at risk, the media - and public - may be barred from view.¹⁵⁵ However, the Third Circuit acknowledged its decision was limited to deportation proceedings.¹⁵⁶ Additionally, it recognized its decision was counter to a similar case decided by the Sixth Circuit.¹⁵⁷ The government sought the court to distinguish between Article III courts and Article I proceedings such as deportation hearings.¹⁵⁸ One of the important features of *New Jersey Media Group* is that while the Third Circuit declined to distinguish Article III courts from other proceedings, it did distinguish access to political branch proceedings.¹⁵⁹

¹⁵⁴ *Id.* at 570, 96 S.Ct., at 2808. The Court specifically held:

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.

Id.
¹⁵⁵

¹⁵⁶ *Id.* at 201

¹⁵⁷ *Id.* (citing, *Detroit Free Press v. Ashcroft*, 303 F.2d 681 (6th Cir. 2002)).

¹⁵⁸ *Id.*, at 207. The Court specifically held:

The Government contends that while *Richmond Newspapers* properly applies to civil and criminal proceedings under Article III, the Constitution's text militates against extending First Amendment rights to non-Article III proceedings such as deportation. Its premise is one of *expressio unius est exclusio alterius*: Article III is silent on the question of public access to judicial trials, but the Sixth Amendment expressly incorporates the common law tradition of public trials, thus supporting the notion that the First Amendment likewise incorporates that tradition for Article III purposes. Citing, (Gov't Brief at 21-22.) Articles I and II, conversely, do address the question of access, and they do not provide for Executive or Legislative proceedings to be open to the public.

Id. (emphasis added).

¹⁵⁹ *Id.* at 210. The Court recognized that Social Security administrative proceedings, federal energy regulation hearings, and administrative hearings related to national security matters may be closed to the public. *Id.*, (citing 5 C.F.R. 2638.505(e)(2) (hearings on ethics charges against government employees may be closed "in the best interests of national security, the respondent employee, a witness, the public or other affected persons"))

The Third Circuit acknowledged six concerns in upholding the government's closure of the deportation proceedings. First, public hearings would reveal the investigation techniques.¹⁶⁰ Second, patterns of unlawful entry into the United States might provide terrorist organizations with information to construct a means for entry.¹⁶¹ Third, information on specific individuals may provide terrorist cells the ability to evolve their operations.¹⁶² Fourth, and additionally, terrorist cells may alter the time of their attacks.¹⁶³ Fifth, open proceedings might enable terrorist organizations to alter evidence in the hopes of interfering with the proceedings.¹⁶⁴ Finally, the Immigration and Naturalization Service (INS) has an interest in protecting the privacy of detainees who have no connection to terrorist organizations.¹⁶⁵ Ultimately, the Third Circuit decided that these national security considerations outweighed the right to an open deportation hearing.¹⁶⁶

Courts-martial are similar to Article III courts, but their authority rests in the Executive branch under Article I. However, in the courts-martial context, an emerging body of law suggests that the public also has a strong, but qualified right to all stages in the court martial process.¹⁶⁷ This right possibly extends to the pretrial confinement determination process;¹⁶⁸ and definitely in Article 32 hearings,¹⁶⁹ courts-martial,¹⁷⁰ and appellate proceedings.¹⁷¹

¹⁶⁰ *Id.*, at 218.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*, at 218-19

¹⁶⁶ *Id.*, at 219. The Court acknowledged the executive branch's duty to prevent another September 11, where it feared that such a failure could lead to even greater demands for restriction on liberty. Additionally, this decision is not without its detractors. *See, e.g., RECENT CASE: First Amendment - Public Access to Deportation Hearings - Third Circuit Holds That the Government Can Close "Special Interest" Deportation Hearings*, 116 HARV. L. REV. 1193 (2003).

¹⁶⁷ *See, e.g., ABC, Inc. v. Powell*, 47 M.J. 363 (CAAF 1997). [holding that an Article 32 investigation is an open process]

¹⁶⁸ *See, MANUAL FOR COURTS-MARTIAL Rule 305* (2002). Pretrial confinement determinations are essentially administrative in that the reviewing authority (magistrate) need not be a military judge. The accused is not afforded the right to counsel in such proceedings. However, as in the case of Summary courts-martial, it has become common practice to provide defense counsel for pretrial confinement determinations.

¹⁶⁹ The pretrial investigation of charges under Article 32, UCMJ, although not a court-martial, is a judicial proceeding. *See, e.g., MacDonald v. Hodson*, 19 U.S.C.M.A. 582, 42 C.M.R. 184, 185 (1970). [holding an Article 32 should be open to the public] *But see, e.g., San Antonio Express News v. Morrow*, 44 M.J. 706 (AFCCA 1996). In *Morrow*, the Air Force court upheld an Article 32 investigating officer's determination to close the Article 32 to media. However, the court acknowledged that the law favors a public proceeding:

We also believe the American public is best served by pretrial investigations that, like courts-martial, are open to public scrutiny. As was said of courts-martial, such

However, the right is not absolute. For instance MRE 412 provides the court a mechanism to protect alleged victims of sexual assault from public trial on potentially embarrassing matters relating to sexual conduct.¹⁷² Additionally, child witnesses appear to be afforded some protections against public scrutiny.¹⁷³ And finally, where national security considerations exist, the right to public trial may give way to those concerns.¹⁷⁴

B. The Right to a Complete Defense: Potential CIPA and MRE 505 Limits on Cross-Examination and Credibility Evidence

1. Generally

The Sixth Amendment affords a defendant the right to a complete defense.¹⁷⁵ One aspect of a complete defense is the defendant's ability to obtain the background and identity of prosecution witnesses for possible impeachment and bias purposes. As noted further below, in cases involving undercover agents or national security matters, courts have recognized a balancing test between the defendant's constitutional right and the needs of protecting persons or evidence from public knowledge. Difficulties exist in circumventing an accused's right to fully probe witnesses and present a complete defense. While these cases involve public security concerns, none present national security considerations.

scrutiny 'is believed to effect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury.' We believe the accused, the press, and the public have a recognizable interest in being informed of the workings of our entire court-martial process, and that no public interest is served by a blanket rule closing pretrial hearings.

Id., citing *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985), *cert. denied*, 474 U.S. 1062 (1986) (citations omitted).

¹⁷⁰ See e.g., *United States v. Fiske*, 28 M.J. 1013 (AFCMR 1993); *United States v. Travers*, 25 M.J. 61 (CMA 1991); In *Fiske*, the defense counsel sought a closed hearing to which the military judge granted without placing a reason on the record of trial. This caused the court to comment:

"This is the second case we are aware of in this decade that a military judge has closed an Air Force court-martial trial without a reason therefore being articulated on the record. That's two too many."

Id.

¹⁷¹ See, e.g., MANUAL FOR COURTS-MARTIAL, Rule 1203.

¹⁷² See MRE 412; *United States v. Graham*, 54 M.J. 605, 607 (NMCCA 2000).

¹⁷³ See, e.g., *United States v. McCollum*, 56 M.J. 837 (AFCCA 2002).

¹⁷⁴ This later issue is analyzed in greater detail below

¹⁷⁵ See e.g., *California v. Trombetta*, 467 U.S. 479, 485 (1984) [holding that the Constitutional guarantee of due process requires that criminal defendants be afforded a meaningful opportunity to present a complete defense.]

In *Alford v. United States*,¹⁷⁶ the Court reversed a conviction where the trial judge prohibited the defense from cross-examining a witness as to that individual's place of residence.¹⁷⁷ The witness had been placed in federal protective custody and the defense argued that such matters were proper for bias.¹⁷⁸ The Court reasoned that cross-examination of a witness is a "matter of right."¹⁷⁹ Short of self-incrimination concerns, a judge should normally not prohibit cross-examination testimony where the identity of a witness is concerned.¹⁸⁰

In *United States v. Rovario*¹⁸¹ the Court recognized a privilege against informant identities that permits the government to withhold disclosure of either the identity or contents of a communication that would endanger the secrecy of that information.¹⁸² The privilege exists to "further the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials, and, by preserving their anonymity, encourages them to perform that obligation."¹⁸³ However, this privilege must give way when disclosure of the information "is relevant and helpful to the defense of an accused."¹⁸⁴

In *Smith v. Illinois*,¹⁸⁵ the Court reviewed the use of pseudonym testimony by a government informant. A prosecution witness, "James Jordan" was not required to testify as to his real name or residence.¹⁸⁶ In reversing the lower court, the Court recognized the defendant was not *per se* denied cross-examination, but that the denial affected the ability to probe the witness' credibility.¹⁸⁷ The Court appeared to place concern on the denial of full cross examination, in part, because the witness was a government informant.¹⁸⁸

¹⁷⁶ 282 U.S. 687 (1930).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ 353 U.S. 53 (1957).

¹⁸² *Id.* at 59

¹⁸³ *Id.*

¹⁸⁴ *Id.*, at 60-61

¹⁸⁵ 390 U.S. 131 (1968).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* The Court noted:

At trial, the principal witness against the petitioner was a man who identified himself on direct examination as James Jordan. This witness testified he had purchased a bag of heroin from the petitioner in a restaurant with marked money provided by two Chicago police officers. The officers corroborated part of his testimony but only this witness and the petitioner testified to the crucial events inside the restaurant and the petitioner's version of those events was entirely different. The only real question at trial, therefore, was the relative credibility of the petitioner and this prosecution witness.

Id.

Alford, *Rovario*, and *Smith*, provide limited guidance regarding the issue of witness identity protection. Although witness identity protection, and public trials are interrelated issues, these cases, however, are of only limited value since none involved national security evidence and do not remotely touch on hard evidence such as methodologies, reports, or a list of other possibilities.

2. *National Security Considerations in Federal Court: United States v. Yunis*

Cases involving classified evidence that impact national security are problematic for courts. Unlike the *Alford* progeny of cases, issues of national security are viewed as having a greater secrecy interest by courts. Therefore, courts must perform a delicate balance between the defendant's right to present a "complete defense," and the United States' ability and right to protect evidence where disclosure might harm the national security.

In *United States v. Yunis*,¹⁸⁹ the D.C. Circuit Court was confronted with the issue of classified information which the defense claimed was important to their case. Yunis was a Lebanese citizen on trial for various aircraft hijacking charges on 11 June 1985.¹⁹⁰ In order to capture Yunis, the FBI recruited an individual named Jamal Hamdan into a government informant program.¹⁹¹ The two met on several occasions where their conversation was intercepted by an undisclosed law enforcement gathering source or method.¹⁹² Most of the conversation had little to do with the hijacking and instead centered on personal items.¹⁹³ Still, the FBI collected enough evidence to obtain a warrant for his arrest.¹⁹⁴ In September 1987, Hamdan and Yunis arrived in Cyprus under the ruse of conducting a narcotics deal.¹⁹⁵ On 13 September 1987, Yunis was captured by the FBI after boarding a yacht manned by agents.¹⁹⁶ From there, he was transported back to the United States where he was arraigned for trial.¹⁹⁷ In preparing for trial, his defense counsel sought discovery of several classified documents and recordings.¹⁹⁸ The prosecution refused to provide the

¹⁸⁹ 867 F.2d 617 (D.C. Cir. 1989).

¹⁹⁰ *Id.* at 618. Yunis, along with several other men, hijacked a Royal Jordanian Airlines aircraft with a full crew complement and sixty passengers, including six Americans. *Id.* After attempting and failing to fly to Tunis and Syria, Yunis and his compatriots evacuated the crew and passengers and blew up the aircraft. *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* The District Court characterized the transcripts of these conversations as something "interesting for an Ann Landers column or Dorothy Dixon, or someone of that sort." *Id.*

¹⁹⁴ *Id.*, at 619.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* From the yacht, Yunis was transferred to a United States Navy munitions ship, the *Butte*, and then to the U.S.S. *Saratoga*, an aircraft carrier. *Id.* From that point, Yunis was flown on a naval aircraft to Andrews Air Force Base, Washington D.C. *Id.*

¹⁹⁸ *Id.* In a motion to compel discovery, the defense sought the following:

evidence requested, claiming the defense failed to state provisions of law entitling them to the evidence as well as the relevance of the specific items sought.¹⁹⁹ Additionally, the prosecution sought to keep some of the requested evidence as non-discoverable classified information.²⁰⁰ In a series of pretrial motions, the district court ordered the prosecution to provide indexed lists of classified evidence, and the summary of all recordings between Yunis and Hamdan.²⁰¹ The prosecution complied, in part, but withheld some recoding evidence on the basis of national security. The district court, in response conducted a three-part inquiry as to the sought evidence. The first step of this inquiry was to determine relevance. The second step was a determination of materiality. Finally, as the third step, the court balanced the rights of the accused against the perceived harm to national security. The district court then ordered the prosecution to fully comply with its earlier discovery ruling.²⁰² In response, the prosecution filed an interlocutory appeal with the circuit court.²⁰³

The circuit court began its analysis with a discussion of Section 4 of CIPA. The court concluded that Section 4 created no rights of discovery or abridgement, but rather contemplated an “application of the general law of discovery in criminal cases to the classified information area with limitations imposed based on the sensitive nature of the classified information.”²⁰⁴ The court acknowledged relevancy constitutes a very low threshold of proof.²⁰⁵

1. Documents generated by other federal agencies, to include military and intelligence organizations in connection with this case... this is to include any foreign governments who assisted...

12. Copies of all tapes or documentation of conversations between Jamal Hamdan and Mr. Yunis...

22. Any and all information concerning any tapes or wiretaps used in this case. The request includes, but is not limited, to any intercepted wire, oral or electronic communications, mobile tracking devices, pen registers, and trap and trace devices. The breadth of the request covers past or present operations whether domestic (warrant required) or *national security in nature and authorization*.

Id.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* In a pretrial motion, the prosecution relied on section 2 of CIPA which provides:

At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion... the court shall promptly hold a pretrial conference to establish the timing of requests for discovery.

Id.

²⁰¹ *Id.*

²⁰² *Id.*, at 621. In response, the prosecution notified the court of their intention to not call Hamdan as a witness and argued the sought evidence was no longer material. *Id.* However, the district court appeared unmoved by this argument. *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 621. Section 4 reads:

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure...

²⁰⁵ *Id.*

This is particularly the case where the defendant's own statements are at issue.²⁰⁶ The circuit court concluded the lower court's determination of relevancy to be correct.²⁰⁷ However, after an *in camera* review of the classified information, the circuit court found "two, or at most three, sentence fragments in the transcribed conversations possessed "even the remotest relevance to any issue."²⁰⁸

The circuit court further acknowledged a government privilege for national security concerns. This privilege is not written into CIPA, but rather the latter law establishes procedures to protect classified information. In part, the circuit court confined their analysis in the shadow of *Rovario*.²⁰⁹ However, the circuit court took exception to the district court's analysis of the privilege test's third prong of balancing the national security considerations against the materiality of the evidence.²¹⁰ The circuit court appeared to give deference to the government's position, recognizing its "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."²¹¹ As a result of this defense, the circuit court concluded that "a mere showing of theoretical relevance" is not enough to overcome the privilege, but rather an entitlement only to information that is helpful to the defense of the accused, is the proper threshold.²¹² The circuit court then concluded that the sought evidence was not sufficiently helpful to the defense to warrant disclosure.²¹³

²⁰⁶ *Id.* at 621-22. The court held, generally speaking, the production of a defendant's own statements has become, "practically a matter of right even without a showing of materiality." *Id.* citing *United States v. Haldeman*, 559 F.2d 31, 74 n. 80 (D.C. Cir 1976) (*en banc*), *cert denied* 431 U.S. 933 (1977).

²⁰⁷ *Yunis*, 867 F.2d 617, 620 (D.C. Cir. 1989).

²⁰⁸ *Id.* at 622.

²⁰⁹ *Id.* at 623. The court held, CIPA's procedures protect classified information similar to the informants privilege identified in *Rovario*. *Id.*

²¹⁰ *Id.* The court concluded:

[T]he District Judge, in his review... apparently misapprehended, at least in part, the nature of the sensitive information the government sought to protect. Our own view of the government's affidavits and transcripts reveals that much of the government's security interest in the conversation lies not so much in the contents of the conversations, as in the time, place, and nature of the government's ability to intercept the conversation at all. Things that did make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist who could learn much about the nation's intelligence gathering capabilities from what these documents revealed about sources and methods.

Id.

²¹¹ *Id.*

²¹² *Id.* (citing *Rovario*, 353 U.S. at 60-61)

²¹³ *Id.* at 62-65 The court acknowledged the possibility of depriving a defendant of potential evidence. *Id.* However, in the case of *Yunis*, the defendant was readily available to assist his counsel in his defense, particularly as to the conversations he engaged in with Hamdan. *Id.* Additionally, the Circuit Court did not employ the three part test used by the trial court. *Id.*

Yunis provides additional guidance for both sides in a federal trial. On the one hand, the decision forces the defense to show relevance where it intends to disclose or demands access to classified material. The prosecution, likewise must be prepared to divulge all potential evidence to the judge for an *in camera* review. Such evidence may be voluminous, but any determination for release or relevance is within the discretion of the judge and not the prosecution.

III: CASE ANALYSIS: *UNITED STATES V. LONETREE* (I & II)

In *United States v. Lonetree*²¹⁴ the then Court of Military Appeals upheld the efficacy of conducting part of a court martial outside of public view. The court also upheld the protection of witness identity for national security reasons. Of important note, the Supreme Court did not grant the case *certiorari*. *Lonetree* involved espionage allegations against a Marine Corps embassy guard in Moscow. Essentially, Sergeant Clayton Lonetree, became involved in a romantic involvement with a Soviet agent named Violetta Seina. During their relationship, he passed confidential information to another Soviet agent named Yefimov (aka Uncle Sasha). This information included the names and locations of covert United States intelligence agents, as well as, personnel information regarding the United States embassies in Vienna and Moscow.²¹⁵ At trial, he was charged, and ultimately convicted of violating thirteen specifications of the UCMJ.²¹⁶ Because of the sensitive national security nature of the court-martial, the prosecution motioned the court, pursuant to MRE 505(j)(5), to seal the public from certain witness testimony.²¹⁷ Over defense objection, the military judge ordered the public excluded from part of the court-martial.²¹⁸ However, the judge did not make

However, the circuit court did not repudiate the test's usage either. *Id.* Merely, the Circuit Court held the defendant failed the second prong of the test and did not conduct a balancing as required by the third prong. *Id.* at 625.

²¹⁴ 31 M.J. 849 (NMCMA 1990), *cert. denied* 507 U.S. 1017 (1993).

²¹⁵ *Id.*, at 852.

²¹⁶ *Id.*, at 852. Sgt Lonetree was convicted of three specifications under Article 81, UCMJ (Conspiracy to commit espionage); four specifications under Article 92, UCMJ (Failure to obey order or regulation); five specifications under Article 134, UCMJ (General Article Violation); and one specification under Article 106a (Espionage). He was sentenced to thirty years, but this sentence was reduced by the Convening authority to twenty-five years. Lonetree served only nine of these years before his release. *See, e.g.*, CNN News release, 28 February 1996. [describing Lonetree's release from confinement]

²¹⁷ Lonetree, 31 M.J. at 853.

²¹⁸ *Id.* The Navy Marine Court noted that some intelligence agents testified in closed sessions, while other agent testimony occurred in a divided setting between closed hearings and public view. *Id.* Sgt Lonetree was defended by both military and civilian defense counsel. Sergeant Lonetree's military defense counsel was provided to him at no personal expense. However, he retained Mr. William Kunstler and Mr. Michael Stuhff, who later became the focus for a claim of ineffective assistance of counsel. *Lonetree*, 35 M.J. 396, 412.

individual findings of fact for each witness. Rather the judge ruled, after *in camera* review, generally as to subject matter.

On appeal, Lonetree argued each closure required a separate judicial finding. The Navy-marine court decided otherwise, holding that MRE 505 does not require separate judicial findings for each closed section.²¹⁹ Rather MRE 505 is directed toward the information sought to be exempted from disclosure at a public trial.²²⁰ Thus, any number of witnesses testifying to the protected evidence will not require separate findings.²²¹ Lonetree also objected to the method of closing the court-martial and lack of accompanying judicial instructions for each closure.²²² The Navy Marine Court held that the trial judge erred in not providing oral instructions to the trier of fact for each disclosure.²²³ However, the appellate court also found this omission constituted harmless error.²²⁴

The second national security issue at trial and on appeal dealt with the protection of witness identity and information. At the prosecution's urging, the court prevented the defense from learning the identity of a government witness and obtaining classified information.²²⁵ As a result of this ruling, a witness was permitted to testify under a pseudonym and the defense was prohibited from obtaining certain classified evidence.²²⁶ On appeal, the Navy-Marine court analyzed this unique issue in light of both the Sixth Amendment-based right to cross examine witnesses, as well as the broad right of discovery.²²⁷ The court then analyzed the background and purpose of MRE 505, finding its

²¹⁹ *Id.*, at 853

²²⁰ *Id.*, (citing MRE 505(i)(4)(A) and (C)).

²²¹ *Id.* The court specifically held:

To require a military judge to make specific findings each time a series of questions is to be asked of a witness, after the judge had already determined the responses were classified, would be to create unnecessary and disruptive bifurcation of the trial and constitute an exercise in redundancy. The confusion would make a difficult trial an incomprehensible one and would be the antithesis of a fair and orderly proceeding within the context of the facts of this case.

Id.

²²² *Id.*, at 854.

²²³ *Id.*, at 854-55

²²⁴ *Id.* The court appeared concerned along the same lines as the Supreme Court's reasoning in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), that jurors cannot differentiate between the importance of a court protected disclosure and the credibility of the testimony. However, the court also held, "While error, there was not prejudice, because the weight of the evidence against Sergeant Lonetree was so overwhelming that the failure to give the instructions had no effect upon the findings." *Lonetree*, 31 M.J. at 855.

²²⁵ *Id.*, at 856. The military judge reviewed the prosecution's evidence *in camera*, along with an accompanying top-secret affidavit to support invoking MRE 505's classified information privilege. *Id.*

²²⁶ *Id.* The court held MRE 505(g)(2) applied when the government needs to limit or prevent disclosure. *Id.*

²²⁷ *Id.*

roots in both the House version of the CIPA,²²⁸ and the Supreme Court's review of executive privilege in several cases.²²⁹ The Navy-Marine court concluded that CIPA was intended to counter the problem of "graymail" then seeping into United States criminal courts.²³⁰ The court then analyzed MRE 505 in a balancing context between an accused's rights and the need to protect national security information.²³¹ The court also distinguished the use of MRE 505 in *Lonetree* from *Alford* and *Smith*. As noted earlier, in *Smith*, a prosecution witness testified under alias without enunciating a good reason, while in *Alford*, the prosecution had a government agent testify under a pseudonym. The Navy-Marine court distinguished the cases holding neither *Alford* nor *Smith* created a *per se* rule against pseudonym testimony.²³² Even though the court ruled against a *per se* rule, the use of a pseudonym may deprive the defense from impeachment evidence. The court recognized the Sixth Amendment might be violated when an accused is prohibited from "placing an adverse witness in his proper setting."²³³ Nonetheless, the court found the right of impeachment is not absolute.²³⁴ Indeed, the court placed reliance on the two prong test set in *Rovario*, as well as the Court's statement that it is necessary to balance, "the public interest in protecting the flow of information against the individual's right to prepare his defense."²³⁵ The Navy-Marine court then required this two-part test for the accused to show prejudice. Relying on *Yunis*, the court held the accused must prove the requested material is relevant and material. The court recognized that while the first threshold is satisfied by "a mere showing of theoretical" relevance, the term "material" denotes a higher standard of proof.²³⁶ Also, the Navy-marine court relied on *Yunis*, for the efficacy of *in camera* review procedures.²³⁷

²²⁸ 18 U.S.C.App. § 1-16

²²⁹ *Lonetree*, 31 M.J. at 857 (citing *United States v. Reynolds*, 345 U.S. 1(1953)); *United States v. Nixon*, 418 U.S. 683 (1974).

²³⁰ *Lonetree*, 31 M.J. at 857. The court defined "graymail" as occurring "when an accused seeks discovery or disclosure of sensitive national security information for the purpose of forcing the Government to discontinue prosecution to safeguard the information." *Id.*, citing *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985).

²³¹ *Lonetree* 31 M.J., at 858.

²³² *Id.* The court also analyzed *United States v. Alston*, 460 F.2d 48, 51 (5th Cir 1972) in reaching a conclusion that no *per se* rule existed against pseudonym testimony. *Id.*

²³³ *Id.*, at 859.

²³⁴ *Id.*, (citing *McGrath v. Vinzant*, 528 F.2d 681, 684 (1st Cir. 1976)).

²³⁵ *Lonetree*, 31 M.J. at 859. Holding: First, the privilege must be applicable to the circumstances of the case and not be limited by its underlying purpose. *Id.* Thus, if the information to be protected is known to the accused and can no longer be protected, then the privilege cannot be invoked. *Id.* Second, based on notions of fundamental fairness, when the information is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.*

²³⁶ *Lonetree*, 31 M.J. at 860.

²³⁷ *Id.*

In reviewing the facts of *Lonetree*, the Navy-Marine court placed weight on the fact that John Doe, had repeated contacts with the KGB.²³⁸ The only significant substantive issue regarding his testimony was a single prior inconsistent statement. His trial testimony was corroborated in part by the testimony of other witnesses, and it sufficiently corroborated Sergeant Lonetree's confession. Finally, the court appeared pleased with the military judge's instruction to the trier of fact that the defense was restricted from cross examination into John Doe's credibility.²³⁹

In *Lonetree II*, the then Court of Military Appeals upheld the Navy-Marine Court's decision and adopted its Sixth Amendment analysis. The Court of Military Appeals held that the evidence relating to John Doe's background provided the defense with sufficient information for cross-examination.²⁴⁰ The Court of Military Appeals first recognized that an accused's "right to know a witness's background is not without limit."²⁴¹ The Court then analyzed prior federal court holdings, in particular, *Rovario* and *Yunis*. The Court found particularly relevant, the District of Columbia Circuit Court's application of a two-part structure in *Yunis*, where a balancing test was not required because the evidence of John Doe was cumulative.²⁴²

As with the case of the Navy-Marine Court, the Court of Military Appeals possessed the contested *in camera* evidence relating to John Doe's testimony. The Court found the *in camera* evidence was not so essential as to deprive Lonetree of due process.²⁴³ The Court's reasoning for not finding a denial of due process was based, in part, on the fact that John Doe did not provide a central piece of evidence to the prosecution's case because Lonetree had confessed.²⁴⁴ Moreover, the Court of Military Appeals found the trial

²³⁸ *Id.* The court found as corroborating facts to both Doe's testimony and Lonetree's confession the following: Lonetree had expressed admiration for the KGB, *Id.* He purchased expensive clothing items for Violetta. *Id.* He possessed pictures and letters from her. *Id.* He received gifts from "Uncle Sasha" including a jewelry case. *Id.* He later expressed fear of the KGB. *Id.* At one point he sought leave during a period the KGB wanted him to surreptitiously visit Moscow. *Id.*

²³⁹ *Id.* at 864. The judge at trial instructed the court as follows:

Under normal circumstances the defense has full opportunity to cross-examine a witness concerning his or her true name, background and/or circumstances surrounding his or her testimony. In one respect, cross-examination into these matters assists you, the finders of fact, in determining the credibility of the witness. Therefore, you may consider the restriction I have placed on John Doe's testimony as well as the restriction of the defense's cross-examination in evaluating his credibility. If, after hearing John Doe's testimony and observing his demeanor, you have enough information to determine his credibility, then you may give such weight to his testimony that is commensurate with that determination.

Id. at 864-65.

²⁴⁰ 35 M.J. at 405.

²⁴¹ *Id.* at 408.

²⁴² *Id.* at 409-10.

²⁴³ *Id.* at 410.

²⁴⁴ *Id.*

judge had properly exercised the “safety of persons” in maintaining John Doe’s identity as secret.²⁴⁵

An issue of first instance also arose in *Lonetree II*. The government motioned the Navy-Marine Court to close the court for oral argument. That court directed a closed session for all arguments pertaining to classified information.²⁴⁶ *Lonetree* appealed this issue to the Court of Military Appeals. That court found the Navy-Marine Court’s action proper.²⁴⁷

IV: *LONETREE’S* AFTERMATH AND FUTURE CONSIDERATIONS

Since *Lonetree*, there have been few espionage courts-martial, and of these none has challenged the constitutionality of MRE 505.²⁴⁸ However, there have been cases involving a compromise of national security based on dereliction of duty, or failing to obey a lawful regulation. For instance, in *United States v. Brown*,²⁴⁹ an active duty member was sentenced to two years confinement and a bad conduct discharge for sending classified information to an unauthorized person.²⁵⁰ On appeal, *Brown* did not challenge the MRE 505 procedures which closed his court-martial to the public during certain testimony. Instead, he appealed the jurisdiction of the convening authority to try the case.²⁵¹ Likewise, in *United States v. Fleming*,²⁵² the accused was convicted of mishandling and failing to safeguard classified information.²⁵³ During the trial, the military judge failed to instruct the trier of fact that his order to seal the courtroom to the public did not constitute a statement of guilt.²⁵⁴ The Court of Military Appeals did not consider the failure to constitute reversible error.²⁵⁵ In *United States v. Roller*,²⁵⁶ the accused was

²⁴⁵ *Id.* at 411.

²⁴⁶ *Id.*

²⁴⁷ *Id.* While rare, *in camera* oral arguments are not unheard of in federal courts. See, e.g., *Application of the United States*, 427 F.2d 639, 641 (9th Cir 1970)[recognizing the rarity of *in camera* evidentiary reviews]; *Central National Bank v. U.S. Department of Treasury*, 912 F.2d 897, 900 (7th Cir. 1990) [recognizing the need for *in camera* evidentiary reviews]

²⁴⁸ See, e.g., *United States v. Anzalone*, 40 M.J. 658 (NMCCA 1994). *Anzalone* was prosecuted and convicted of attempted espionage. Although the court utilized the MRE 505 procedure to protect classified evidence, the accused did not appeal, the court’s grant of a closed hearing during part of the trial. The main issue in *Anzalone’s* appeal was one of factual sufficiency.

²⁴⁹ 39 M.J. 114 (CMA 1994).

²⁵⁰ *Id.* at 115.

²⁵¹ *Id.* This argument was found to be without merit.

²⁵² 38 M.J. 126 (CMA 1993).

²⁵³ *Id.* *Fleming* was a mixed pleas case. He was sentenced to a bad conduct discharge and four years confinement. *Id.* However, the convening authority reduced his sentence to twenty-four months. *Id.* *Fleming* collected, for his personal use, hundreds of photographs taken from a submarine periscope. *Id.* These photographs constituted classified material. *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* However, the court pointed out that in *United States v. Grunden*, 2 M.J. 116 (CMA 1977), the court mandated such an instruction because the failure to do so might cause the trier

convicted of “permitting” classified material to be removed from its place of storage.²⁵⁷ As in these other cases, Roller did not challenge the use of MRE 505 on appeal. Instead, he argued a “factual sufficiency” basis for challenging his conviction.²⁵⁸ However, the fact that *Lonetree* remains “good law,” and that federal CIPA law strengthens the case for both courtroom closure and limiting discovery rights as to classified material, does not mean analysis on MRE 505 should cease. Three salient areas ought to continue as a focus for concern: the *defacto* limitation on right to counsel because of security clearance concerns; the discovery limitation tensions inherent with the right to have counsel fully investigate the offenses and present a complete defense, and the right of public access. As seen from the analysis below, these issues are interrelated in the context of a trial involving MRE 505.

A. Right to Counsel:

Because most military defense counsel will possess some type of clearance, it is likely that most will be entitled to review classified documents. This does not remain true of civilian defense counsel. An accused has the right to contract a civilian defense counsel in most courts-martial cases,²⁵⁹ however, this right is not absolute.²⁶⁰ The right to a specific counsel may give way to docketing considerations, status and availability of defense counsel, and, perhaps, the lack of a security clearance.²⁶¹ Should the accused seek a security clearance for a civilian defense counsel, he will likely abrogate his right to a speedy trial.²⁶² This appeared a concern even prior to the existence of MRE

of fact to infer guilt. *United States v. Grunden*, 2 M.J. 116 (CMA 1977). In *Fleming*, the judge tailored a separate presumption of innocence instruction that was lacking in *Grunden*.

²⁵⁶ 37 M.J. 1093 (CMA 1993).

²⁵⁷ *Id.* Roller accidentally removed classified material from his place of work and then took it home. *Id.* When he discovered the material, he stored it at home, with the intention of destroying it. *Id.* However, a contracted mover began to pack the contents of his garage and discovered the information. *Id.* Roller was convicted on this basis. He received ten months and a bad conduct discharge. *Id.*

²⁵⁸ *Id.*

²⁵⁹ See, e.g., *United States v. Miller*, 47 M.J. 352, 358 (CMA 1997) In *Miller*, the military judge refused to grant a continuance so that the accused’s newly contracted civilian defense counsel could have time to prepare for trial. *Id.* The Court of Appeals determined *Miller* was prejudiced by the denial of a continuance. *Id.*

The right to counsel is rooted in the Sixth Amendment. For a comprehensive analysis of this right in military courts, see, e.g., Lt Col. Norman K. Thompson and Capt Joshua E. Kastenberg, *The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value*, 49 A.F. L. REV. 1 (2000)

²⁶⁰ See e.g. *United States v. Beckley*, 55 M.J. 15 (CAAF 2001); *United States v. Thomas*, 22 M.J. 57, 59 (CMA 1986) (citing *Morris v. Slappy*, 461 U.S. 1 (1983)).

²⁶¹ See, e.g., *United States v. Bin Laden*, 58 F. Supp. 113, 118-19 (S.D.N.Y 1999).

²⁶² See, e.g., RCM 707.

505. In *United States v. Nichols*,²⁶³ an intelligence officer retained a civilian counsel in a court-martial involving classified materials. Because the civilian counsel did not possess a security clearance, he was unable to attend the Article 32 hearing.²⁶⁴ The court recognized the potential problem with cases involving civilian counsel but concluded the possibility of inordinate delay rests with the accused's choice of counsel, assuming that the counsel can even obtain clearance.²⁶⁵

A secondary issue arises in the context of an "uncleared counsel." Should the civilian counsel be unable, or unwilling, to obtain a clearance, the accused will likely need to find other counsel or be content with his appointed counsel. If the accused seeks to continue representation by an uncleared counsel, and the court permits this representation, the counsel will ultimately be precluded from a full representation of his client.²⁶⁶ A less than full representation is an anathema to military practice. Because counsel are expected to be competent to practice before a court, any limitations on the right to counsel in the national security context, are probably found in the rules related to competency to practice.²⁶⁷ One case provides military courts with guidance on this issue. In *United States v. Bin Laden*,²⁶⁸ the District Court for the Southern District of New York held the right to select counsel is not an absolute right.²⁶⁹ In that case, the prosecution moved the court to compel clearance of defense counsel.²⁷⁰ The prospective defense counsel objected against a compelled background inquiry.²⁷¹ The District Court, in response

²⁶³ 8 U.S.C.M.A. 119, 23 C.M.R. 343, 350-53 (CMA 1957). The Court, in *Nichols* recognized the government had three choices in dealing with an accused represented by civilian counsel:

"It can permit the accused to be defended by his own lawyer, or it can defer further proceedings against him, or it can, for proper cause, disbar the lawyer presented by the accused from practice before courts-martial."

Id. at 349.

²⁶⁴ *Id.*

²⁶⁵ *Id.* (holding: It is arguable that if exclusion of counsel is not permitted, except as a result of a disbarment proceeding, an accused's choice of questionable counsel can inordinately delay the proceedings against him)

²⁶⁶ See e.g. *United States v. Schmidt*, 59 M.J. 841 (AFCCA 2004) rev. 60 M.J. 1 (CAAF 2002). In *Schmidt*, the Air Force initially denied the accused's counsel access to classified material by virtue of counsel not possessing a proper clearance. Ultimately, counsel obtained a proper clearance, but the government refused to permit the accused to "discuss classified material," with the civilian counsel. The Air Force Court upheld the trial judge's ruling. However, CAAF reversed, finding the lower court erroneously relied on MRE 505(h)(1). This section only applies to public disclosure and not communication between attorney and client. 60 M.J. 1, 2.

²⁶⁷ See, e.g., *Beckley*, 55 M.J. 15, 17 (CAAF 2001). *In re application of Skewes*, 52 M.J. 562 (AFCCA 1999); *United States v. Calhoun*, 47 M.J. 520, 526-27 (AFCCA 1997).

²⁶⁸ 58 F. Supp 113 (SDNY 1999).

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 115.

²⁷¹ *Id.* at 118-19.

held that because of the national security risks involved in the case, a background inquiry was appropriate.²⁷² Thus, under *bin Laden* the onus of a “cleared counsel” falls on the accused.

B. Discovery Limitations and the Right to a Complete Defense

Every case involving the use of *in camera* proceedings and evidentiary substitutions such as summaries and redactions, undoubtedly raises appeals issues. As noted throughout this Article, the concepts of due process and the right to a fair trial frown on discovery limits. Possibilities for limitations arise, such as in the case of witness identities, statements against interest, and a lack of access to all prior inconsistent statements of witnesses. For instance, a scenario where an undercover operative provides several inconsistent statements, the defense normally would utilize these for impeachment purposes. However, the prior inconsistent statements may become unavailable (and unknown) to the defense through the redaction and summary process. In part, the defense is stymied because they may, at best, be only able to argue theoretical relevance, at the outset of trial and the military judge would be within his or her discretion to deny discovery.

As a result, an accused is faced with two choices: sealing the courtroom from the public and accept a non-disclosure “gag” order from the judge, or limiting the defense in both discovery and presentation of evidence. While this may seem as an unfortunate choice, the law currently recognizes a balance between a public trial and national security concerns. This choice becomes important to the accused for an additional reason. While the service appellate courts enjoy fact-finding responsibilities, they are also at liberty to apply the harmless error test to otherwise erroneous rulings by the military judge. It may also be incumbent upon the accused to limit his counsel choices to service members (and perhaps the few civilians) who already possess a high-level security clearance.

C. Continuing Media Interest

As long as criminal trials occur involving national security, the media will maintain an interest. For instance, in *United States v. King*,²⁷³ a naval cryptologist was charged with espionage. Ultimately his charges were dropped, it appears in some part, due to high media exposure.²⁷⁴ Guidance for determining when a court-martial should be closed to public view has existed

²⁷² *Id.*

²⁷³ See, e.g., *King v. Ramos*, NMCCA (unpub. 26 Jan. 2001); also *King v. United States*, NMCCA (unpub. 7 Dec. 2000).

²⁷⁴ See, e.g., “Navy Espionage Case Expected to be Dropped,” ABC News television broadcast, Mar. 9 2001).

for some time.²⁷⁵ Prior to the existence of MRE 505, the then Court of Military Review, observed, “The right to a public trial is not absolute and under exceptional circumstances, limited portions of a criminal trial may be partially closed over defense objection. In each instance, the exclusion must be used sparingly with the emphasis always toward a public trial.”²⁷⁶ In *Grunden*, the Court of Military Appeals fashioned a two-part test to determine which portions of a trial involving matters of national security could be closed to the public. The two part test was enunciated as “the trial judge or (Article 32) investigating officer must first determine whether the perceived need urged as grounds for the exclusion of the public is of sufficient magnitude so as to outweigh the danger of miscarriage of justice.”²⁷⁷ The second part of the test was premised on where the “need outweighs the danger of a miscarriage of justice, he must then determine the scope of the exclusion.” The language in *Gruden* suggests a very high burden of necessity for the government to overcome.²⁷⁸ *Gruden* remains controlling law for judicial determinations in courtroom closure issues. Yet, the term “national security,” itself, implies the “heavy burden” standard is overcome by proper classification.

While third party assertions to a public trial are troubling to the prosecution, in the national security context, they may also present difficulties for the defense. There may be instances such as where a pretrial agreement is conditioned on a closed hearing. Additionally, a closed court may afford an accused a stronger argument to obtain classified evidence and present it to the trier of fact. This argument has merit, in part, because most military members have some type of clearance. As a result, the military judge may find it less likely the chance for classified evidence to be disseminated to the public.

Finally, because of the nature of military justice and the involvement of a convening authority, in cases where disclosure of classified information is possible, nothing prevents a convening authority from moving the case to a remote location. In essence, there is no lawful prohibition against moving a court-martial to Diego Garcia, Guantanamo, or Adak. Administratively moving a court-martial to a remote site may be problematic in other ways, and it should only occur where no other alternative is possible. Such a move might prove monetarily costly and present additional public policy considerations. At the same time, an accused has no constitutional right to choose the place of his court-martial.

²⁷⁵ *Jackson*, *supra* note 2 at 16-20.

²⁷⁶ *Id.* at 118.

²⁷⁷ *Id.* at 122.

²⁷⁸ *See id.* at 120. To fulfill the requirements of this two-part test, the government must demonstrate that it has met the heavy burden of justifying the imposition of restraints on the right to an open trial. *Id.* The Government must do this by demonstrating the classification of the materials in question and delineating the portions of the case that will involve those materials. *Id.*

V. CONCLUSION

Trials involving matters of national security are complex because of the necessary balance between an accused's Constitutional rights to present a complete defense and a public trial, as well as third-party rights to attend and report on trials, versus the recognized need to maintain secrecy over information vital to national security. The absence of a formal cold war does not mitigate the importance of protecting classified information. Indeed, a number of entities, state and non-state actors alike, may be interested in learning how the United States creates, processes, and safeguards classified information, as much as what is contained in the information itself. However, it is possible to ensure a fair trial within the constraints of MRE 505. Because trials involving MRE 505 are rare, a valuable corpus of persuasive law can be found in the federal CIPA cases. This article has provided analysis as to the workings and potential pitfalls of both CIPA and MRE 505. While each service branch will approach trials involving classified information in an administratively different manner, the legal basis for continuing the reasonable use of MRE 505 is sound.

