CLASSIFIED EVIDENCE AND THE CONFRONTATION CLAUSE: CORRECTING A MISAPPLICATION OF THE CLASSIFIED INFORMATION PROCEDURES ACT

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I. Introduction

The use of classified information as evidence in criminal trials involves balancing the Executive's simultaneous interests in prosecuting criminals and preventing disclosure of secrets relevant to national security and ongoing military affairs abroad.[1] The legitimacy of these interests led to

[1] Throughout this note, reference to the interest of the prosecutor implies that the prosecutor is representing both the interests of the Executive in prosecuting criminals and protecting the secret information. The classified information is in each case in the possession of either the military or various intelligence agencies, components of the

the passage of the Classified Information Procedures Act (CIPA).[2] CIPA establishes procedures which allow the government to present substitutes for the classified evidence to preserve its confidentiality. Courts have deemed CIPA constitutional in the cases in which it has arisen, but until the recent case of *United States v. Moussaoui*[3] they have not allowed the prosecution to replace the testimony of defense witnesses with written summaries that approximate such evidence.[4]

In *Moussaoui*, the Fourth Circuit wrongly allowed the prosecution to make this substitution. In doing so, the Court misinterpreted the development of CIPA case law and overextended its reach by not affording sufficient weight to the defendant's Sixth Amendment right to cross-examine and to have the jury assess the witnesses' credibility. This Note argues that the misapplication stemmed from the court's undue willingness to defer to the Executive's foreign affairs power. Though such deference is common in classified information cases, the Fourth Circuit elevated the latitude to an impermissible level in violating the defendant's right to cross-examine material witnesses.

The consequence of rejecting the Fourth Circuit decision is not a return to the pre-CIPA era, during which prosecutors faced the Hobson's choice of granting the defendant access to the witness or dismissing the case. CIPA authorizes the courts to strike a more workable balance between the Executive's and defendants' interests.[5] Alternatives to the outright preclusion of testimony exist, and this Note discusses the viability of several such options. Alternatives that deny a defendant a right to a fair trial, however, are impermissible under all circumstances, regardless of the strength of the Executive interest.

II. The Competing Interests of the Defendant and the Executive

The defendant's interest in obtaining and admitting evidence and the Executive's interest in keeping classified material secret are both grounded in the Constitution,[6] and thus a court must accord each great

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Executive branch. Thus, the terms "prosecution's interest" and "Executive interest" may both be used to represent the interest at issue, depending on the appropriate context.

[2] Classified Information Procedures Act, 18 U.S.C. app. §§ 1-16 (2000).

[3] 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 161 L. Ed. 2d 496 (2005).

[4] The masculine pronoun will be used throughout this Note to represent the impersonal defendant and witnesses because the central case at issue, the *Moussaoui* case, involved a defendant and witnesses of that gender.

[5] 18 U.S.C. app. § 6(e)(2) (2000) ("[W]hen the court determines that the interests of justice would not be served by the dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate.").

[6] *See infra* Section II.A & II.B.

weight. As this Section will demonstrate, however, the defendant's interest must prevail when the two come into conflict in the context of a criminal trial, provided the defendant has established that the evidence will be useful to him during the proceedings.[7] The relevancy requirement is stricter when the evidence is classified.[8]

A. *A Defendant's Rights Under the Confrontation Clause*

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."[9] Under *Brady v. Maryland,*[10] a defendant has a right to discover, and the prosecution must produce, all "evidence material to the guilt or punishment of the accused."[11] Under *Brady's* standard, the defendant must show that suppression of the evidence would undermine the outcome of the trial.[12]

The Supreme Court's holding in *Jencks v. United States*[13] and Congress's subsequent passage of "the Jencks Act,"[14] dictate the standard regarding the withholding of witness statements in the possession of the prosecution. In *Jencks*, the Supreme Court held that in a criminal trial, the government could not withhold documents relevant to witness testimony on the grounds of privilege.[15] The *Jencks* Court stated that the defendant was "entitled to an order directing the Government to produce for inspection all reports of [the two witnesses] in its possession, written and, when orally made, as recorded by the FBI, touching the events and activities as to which they testified at trial."[16] In response to this holding, Congress passed the "Jencks Act," which adopted the holding of the

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[7] *See infra* Section II.A.2.

[8] *Id.*

[9] U.S. CONST. amend. VI. The particulars of the Sixth Amendment right to confront witnesses are addressed later in this article.

[10] 373 U.S. 83 (1963).

[11] Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL'Y REV. 331, 340 (1997).

> The failure to produce such evidence may constitute reversible error where the defendant is convicted. For example, such error has been found where the prosecution failed to disclose that evidence contained perjured testimony, did not abide by a pretrial request for specific evidence, or failed to respond to a generalized request for Brady information.

Id. at 340-41. *See also* Banks v. Dretke, 540 U.S. 668, 698-99 (2004) (holding that the suppression of material evidence by state in violation of *Brady* is sufficient to overcome procedural default at a *habeas corpus* proceeding).

[12] Fredman, *supra* note 11, at 340-41.

[13] 353 U.S. 657 (1957).

[14] 18 U.S.C. § 3500 (2000).

[15] *Jencks*, 353 U.S. at 671.

[16] *Id*. at 668.

Court, but limited it to statements made by the witness.[17] Thus, a defendant has the right to view all related witness statements in possession of the government that the witness made at any stage of the proceeding.

1. *Crawford v. Washington*: The Importance of Confrontation

The rationale for the right to cross-examine witnesses is that it allows the defendant to see the witness face to face and subject him to the ordeal of a cross-examination.[18] The Supreme Court affirmed the importance of this Sixth Amendment right in *Crawford v. Washington.*[19] The Court initially determined that the constitutional right to cross examine witness statements did not only apply to in-court statements, determining that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."[20] In other words, statements a declarant makes to law enforcement officials are of the type that one would "reasonably expect to be used prosecutorially," and thus the protections of the Sixth Amendment apply.[21]

Crawford also held that the Confrontation Clause is a procedural guarantee, not a substantive one.[22] As such, the clause is not just about ensuring the reliability of evidence, it makes a judgment "about how reliability can best be determined."[23] Since this procedural guarantee is ingrained in the Constitution, courts may not substitute their own judgments about whether evidence is nonetheless reliable in the absence of an opportunity for cross-examination. The only exceptions to this right are those that preserve the equity of the process, without regard to reliability.[24] The only time that the process preserves the same level of fairness is in the

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[17] 18 USC § 3500(b) (2000) ("After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.").

[18] Mattox v. United States, 156 U.S. 237, 244 (1895).

[19] Crawford v. Washington, 541 U.S. 36 (2004). In *Crawford,* the Supreme Court reversed a state court's ruling that an out of court statement made by a wife against a husband defendant was admissible, despite the fact that the husband did not have the opportunity to cross-examine the wife due to the state marital privilege. The Court noted that the wife made her responses to often leading questions by the detective, and that she herself was a suspect in the case. Thus, it was in her own interest to implicate her husband. This fact pattern is highly relevant to the *Moussaoui* case, discussed *infra*, in which government interrogators questioned prisoners who had an interest in implicating others to lessen their own culpability or appease their captors.

[20] *Id.* at 53.

[21] *Id.* at 51.

[22] *Id.* at 61.

[23] *Id.*

[24] *Id.* at 62.

following case: "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[25] Thus, under *Crawford*, a defendant must have the opportunity to cross-examine witness statements at some point in the process.

The *Crawford* Court rejected the argument that an exception to this right exists when a judge makes a determination that the un-tested statements are 'reliable.'[26] It stated that the Confrontation Clause does not guarantee reliability; it provides that the defendant may test the reliability of statements through cross-examination.[27] The Court also refused to accept that if an interrogation was conducted by a government official it had indicia of reliability or a presumption of neutrality.[28] Rather, the Court emphasized that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse."[29] The logical conclusion this quotation highlights is that if the person framing the questions has the same interest as the prosecutor, the potential unfairness to a defendant who cannot challenge the questions and answers increases.

The opportunity to question a witness gives the defendant the ability to expose his statements as untrue or affirm their accuracy.[30] In the CIPA context, a judge makes a ruling on whether the prosecution's proposed substitutions for classified evidence preserve a defendant's rights in the evidence; the judge must not deprive the defendant of this opportunity. Given the holding in *Crawford*, it is clear that a judge may not determine that a substitution including testimonial statements includes adequate guarantees of reliability such that the opportunity to cross-examine is unnecessary. Section V addresses this point in greater detail.

The *Crawford* Court did not state that the cross-examination must occur at trial. Conducting a trial in the presence of the trier of fact allows

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[25] *Id.* at 59.

[26] *Id.* at 61-62. (In doing so, the Court overruled the rationale for its holding in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), in which it conditioned the admissibility of hearsay evidence on whether the evidenced possessed "particularized guarantees of trustworthiness." The *Crawford* court found that the notion of reliability was too "amorphous" to protect the guarantees of the Sixth Amendment.)

[27] *Id.* at 61 (holding that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.").

[28] *Id.* at 66.

[29] *Id.* at 56.

[30] *Id.* at 62.

for assessment of the credibility of the witness from his demeanor and other factors. The Supreme Court has affirmed the importance of this element of cross-examination.[31] If the defendant has had a prior opportunity to cross-examine and the witness is unavailable, the common law hearsay exception may not require testimony at trial.[32] The prosecution has the burden of establishing unavailability by demonstrating that it made a good faith effort to secure the presence of the witness.[33]

Thus, the right to cross-examine witnesses is unchallengeable, but in some circumstances the witness may not need to give testimony in court to satisfy the constitutional requirements. The prosecution may argue that because a witness possesses classified information he is unavailable to testify.[34] In such circumstances, the court should require that the prosecution make an effort to secure the presence of the witness at trial. The court may also explore remedies such as videotaped depositions to circumvent this obstacle.

2. Classified Evidence: Raising the Relevancy Burden

The presence of classified evidence also affects the relevancy burden a defendant must satisfy to introduce the evidence at trial. The standard for admissibility of classified evidence is different from the admissibility of evidence generally. The Federal Rules of Evidence state that "all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by acts of Congress . . . or by other rules prescribed by the Supreme Court."[35] In the case of classified evidence, courts have imposed a higher standard of relevancy based on the stan-

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[31] *Mattox,* 156 U.S. at 242-43 ("The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.")

[32] *Crawford*, 541 U.S. at 53-54.

[33] Barber v. Page, 390 U.S. 719, 725 (1968) (noting also that courts may compel the presence at trial of witnesses in federal custody.).

[34] For example, if the witness is a prisoner providing information relating to an ongoing military operation, the Executive branch may not want to produce the witness because it may be afraid that the witness will also reveal classified evidence to the jury and to the public that is not relevant to the defense.

[35] Fed. R. Evid. 402. *See also* Fed. R. Evid. 401 ("'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.")

dard articulated in the *Roviaro* case, discussed *infra*.[36] Courts have described this stricter standard as requiring that the evidence be "highly relevant," or "material."[37]

If the evidence meets the appropriate standard of relevancy, it is admissible. As will be discussed in Section IV, however, the procedures of CIPA introduced a process that allows the prosecution to submit substitutions for admissible classified evidence, provided the substitutions preserve the defendant's ability to make his defense.[38] If evidence is highly relevant, the court must preserve all of the elements that make it so. One may be able to summarize or edit documentary evidence in many cases and still preserve its integrity. In the case of testimonial evidence, however, the relevant elements include the defendant's cross-examination of the witness and the witness' demeanor—which is important in the jury's determination of the credibility of the person making the statement.[39] Any written substitution cannot adequately preserve this quality of testimonial evidence.

B. *The Executive Interest in Protecting Classified Information*

Countering a defendant's interest in admitting classified information is the Executive's interest in protecting this information. Courts have long accepted the Executive branch's privilege to withhold classified information. Professor Sandra Jordan summarizes this right as follows:

> The presidential power to classify information in the interests of national security is derived from several sources, most notably the Constitution, which grants powers to the President as Chief Executive, as the commander-in-chief of the military, and as the principal instrument of foreign policy. This power has been exercised as a matter of course during the country's history, without much notice from the legislative or judicial branches.[40]

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[36] United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985) (holding that "The *Roviaro* standard as we view it is one that calls for balancing the public interest in protecting the information against the individual's right to prepare his defense. Its application results in a more strict rule of admissibility, and we think that standard should have been applied here."). *See also* Roviaro v. United States, 353 U.S. 53 (1957).

[37] *See Smith*, 780 F.2d at 1108 ("Disclosure is only required after a court has determined that the informer's testimony is highly relevant."); United States v. Barnes, 486 F.2d 776, 778 (8th Cir. 1973) ("Certainly one of the most relevant factors to be weighed by the court is whether or not the evidence is *material* to the accused's defense or a fair determination of the cause.").

[38] 18 U.S.C. app. § 6(c) (2000).

[39] Fieldcrest Cannon, Inc. v. NLRB, 97 F.3d 65, 71 (4th Cir. 1996).

[40] Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice after Iran-Contra,* 91 COLUM. L. REV. 1651, 1657-58 (1991).

When classified information pertains to the Executive's interest in domestic affairs, courts permit little deference when such secrecy diminishes the defendant's rights. When the evidence relates to foreign affairs and ongoing military conflicts, however, courts afford the Executive greater latitude to withhold information absent a strong showing of relevance by the defendant.[41]

III. Pre-CIPA Balancing and the Sixth Amendment

While the Executive interest in keeping secret information classified is compelling, it does not preclude interference from the courts because of the weight of the defendant's interest. Prior to the Fourth Circuit holding in *Moussaoui*, a balancing test had emerged that weighed the competing interests as follows: the Executive's failure to disclose information it deems classified cannot interfere with the defendant's right to a fair trial, but courts may require a stronger showing of materiality if the evidence relates to foreign affairs. Once a court determines that the testimony of a witness is relevant, the right to cross-examine such testimony is part of the package of rights that make up the right to a fair trial under *Crawford* and thus a court must preserve it.

A. Roviaro*: Creating the Standard of Interest-Balancing*

Roviaro v. United States[42] is the seminal case in any discussion of the Executive privilege to withhold classified evidence. The case involved a drug trafficker that requested access to an informant who provided information to the government.[43] The prosecution charged that the defendant sold drugs to "John Doe," a government informant.[44] The defense filed a motion requesting the government to identify John Doe and make him available for cross-examination.[45] The prosecution withheld the identity of the informer. The district court held that the prosecution was acting within its privilege in doing so.[46] The court defined the privilege as "the

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[41] *Id*. Professor Jordan phrases the issue as whether or not the evidence relates to 'national security,' but this characterization is too broad and fails to recognize that it is courts' unwillingness to intrude in foreign and military affairs that controls the strictness of their analysis of a claim of government privilege. Others have recognized that judicial deference is broader in this context. *See* Peter Margulies, *Judging Terror in the 'Zone of Twilight': Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. Rev. 383, 399 (2004) ("Courts have carved out an even more substantial zone of deference regarding military and foreign affairs decisions, again based on the fear that holding the government to a higher level of accountability will undermine the government's ability to respond to exigent circumstances.").

[42] *Roviaro,* 353 U.S. at 53.

[43] *Id.* at 55.

[44] *Id.*

[45] *Id.*

[46] *Id.*

furtherance and protection of the public interest in effective law enforcement."[47] In doing so, presumably it was referring to the Executive's power under the Constitution to "take care that the Laws be faithfully executed."[48]

The Supreme Court acknowledged the government's legitimate interest in protecting the informant's identity, which furthered law enforcement by encouraging other informants to assist the government.[49] The Court nevertheless allowed the defense to cross-examine the informer, holding that the defendant's right to a fair trial overcame the Executive's privilege because the information was both relevant and helpful to the defense.[50] The Court did not address which party had the burden of proving relevancy and helpfulness; it simply stated that "[t]he materiality of John Doe's possible testimony must be determined by reference to the offense charged and the evidence relating to that count."[51]

The Court opined that each case involving disclosure of privileged information required a balancing of the rights of the defendant against the government interest at stake: "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."[52] It stated clearly, however, that the Executive privilege could not protect evidence that contributed to a defendant's right to a fair trial.[53]

B. *The Varying Strength of the Executive Interest*

In another pre-CIPA classified evidence case involving the Executive privilege, the Supreme Court acknowledged that it accorded more weight to the Executive's power in foreign and military affairs than it did to the Executive's domestic power.[54] In *United States v. Nixon*, President Nixon refused to produce recordings of secret conversations, claiming that the Executive privilege protected conversations between high-ranking officials. Nixon also argued that one branch of the government could not

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[47] *Id.* at 59.

[48] U.S. CONST. art. II, § 3.

[49] *Roviaro*, 353 U.S. at 59 (recognizing that the government had a right to encourage "the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials").

[50] *Id.* at 60-61.

[51] *Id.* at 62. Subsequent case law established that the judge must make the relevancy determination in light of the circumstances. *See Smith*, 780 F.2d at 118 ("The decision of whether the testimony of the informer will be relevant and helpful is usually within the trial judge's discretion.").

[52] *Roviaro*, 353 U.S. at 62.

[53] *Id.* at 62 (suggesting that the factors that would be determinative are "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors").

[54] United States v. Nixon, 418 U.S. 683, 710 (1974).

intrude on another branch of government acting within its sphere of power.[55] The Court disagreed, stating that the Executive's power was not absolute, even when it was acting within a sphere granted to it by the Constitution.[56]

The Court in *Nixon* was more comfortable requiring the Executive to reveal information relevant only to domestic matters because such local issues are more definitively within the Article III powers of the judicial branch.[57] Courts construe executive power more narrowly in this context.[58] Subsequent Circuit Court decisions citing *Roviaro* and *Nixon* have reinforced the idea that different levels of judicial deference to Executive power are warranted in the foreign and domestic contexts. The Seventh Circuit used *Nixon* to support the idea that Executive assertions that evidence is classified deserve more deference when they relate to foreign and military affairs.[59]

The Fourth Circuit succinctly stated the courts' differing roles in the foreign and domestic context when dealing with Executive privilege in espionage cases as follows:

> Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic security surveillance, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.[60]

Here, the Fourth Circuit accorded different strength to the Executive interest in foreign and domestic categories, as the Court did in *Nixon*. While the presence of foreign and military affairs increases the strength of the Executive interest, courts have continued to follow the *Roviaro* holding that while a balancing of interests is appropriate, the Executive

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[55] *Id.* at 705.

[56] *Id.* at 706. The Court stated:

> [N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises.

Id.

[57] *Id.* at 707.

> To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

Id.

[58] Margulies, *supra* note 41, at 413.

[59] Stein v. U.S. Dep't of Justice, 662 F.2d 1245, 1255 (7th Cir. 1981).

[60] United States v. Truong Dinh Hung, 629 F.2d 908, 914 (4th Cir. 1980).

privilege must give way to a defendant's right to a fair trial.[61] The presence of foreign or military affairs may be one factor that increases the strength of the Executive interest, but it is not an automatic block to judicial inquiry. CIPA was not passed to alter this balance; its intent was to allow courts more flexibility in resolving conflicts pertaining to the admission of classified evidence.[62]

IV. CIPA: Procedures for Determining the Admissibility of Classified Evidence

Prior to CIPA, if the court ruled in favor of the defendant, the prosecution had the option of either releasing the evidence or dismissing the action.[63] Such a possibility encouraged defendants to request the discovery of classified evidence or threaten to use the classified evidence in their possession in the hopes of having the prosecution dismiss the case—a technique known as "graymail."[64] Provided the defendant could prove that the evidence was relevant to the case, the Executive was forced into the position of weighing the importance of protecting the information against the importance of prosecution. Because the classified evidence had to be relevant to the case for the defense to use "graymail," the term does not imply an improper defense motive. The permissibility of such a tactic, however, left open the possibility that the Executive branch would not pursue legitimate criminal charges simply because the defendant was in possession of classified evidence.

Congress enacted CIPA to allow the prosecution an alternative to dismissal of the case when the secrecy interest outweighed the prosecutorial one.[65] The statute increases the burden on the defendant to specify how he will use the evidence and provides procedures for separate pre-trial proceedings in which a judge determines the admissibility of classified evidence.[66] Thus, the defendant must reveal any information it reasonably expects to reveal during the cross-examination of witnesses.[67] Despite the imposition of the new procedural rules, certain provisions of

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[61] *See* United States v. Smith, 780 F.2d 1102, 1107-08 (4th Cir. 1985). *See also* United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990) ("Although *Smith* requires a court to take into account the government's interest in protecting national security, it also stresses that this interest cannot override the defendant's right to a fair trial"); United States v. Rahman, 870 F. Supp. 47, 52 (S.D.N.Y 1994) (applying *Roviaro* balancing test to decision whether to allow disclosure of classified information that would affect foreign affairs of the United States).

[62] Jordan, *supra* note 40, at 1652-53.

[63] *Id.* at 1651-52.

[64] *Id.* at 1652.

[65] *Id.* at 1658.

[66] United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983).

[67] Major Christopher Maher, *The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information,* 120 MIL. L. REV. 83, 104 (1988).

CIPA, particularly those dealing with evidence substitutions, should not be applied in the context of testimonial evidence.[68] The Fourth Circuit *Moussaoui* decision is the first case to authorize this improper application.

Either party, or the court, can initiate CIPA proceedings if it believes that classified evidence will play a role in the case.[69] If the defense "reasonably expects to disclose or cause the disclosure of classified evidence in any manner," it must give notice in writing to the court and to the prosecution of its intentions.[70] If the defendant does not give proper notice, the court may preclude disclosure of the classified evidence.[71] The notice provision applies both to documentary evidence and testimony of witnesses.[72] If the prosecution anticipates that the use of classified evidence will be an issue in the case, it may file a motion for a pretrial conference for the judge to decide matters relating to classified evidence, and the judge decides at the hearing whether defendant's interest in a fair trial outweighs the Executive interest.[73]

The prosecution may also file a motion with the court if the defendant requests discovery of classified information or the prosecution believes that the defendant will present classified evidence; the defendant is not entitled to view the motion or its explanation for why the information must remain confidential.[74] The judge may review the request *in camera*—the motion need only reveal to the judge enough information to make the prosecution's argument.[75] The defendant may rebut the assertion that the evidence must remain classified with arguments demonstrating the materiality of the evidence. The defendant has the burden of demonstrating that the evidence is instrumental to his right to a fair trial.[76] The court must then balance the defendant's interest in disclosure against the Executive interest in nondisclosure; thus, CIPA institutes a stricter admissibility requirement than the basic relevancy standard of the Federal Rules of Evidence.[77]

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[68] United States v. Collins, 603 F. Supp. 301, 303 (S.D. Fla. 1985) ("[T]he right to compulsory process, to require the attendance of witnesses, is in no manner affected by section 6(c) substitutions. There is no per se exclusion of defense witnesses.").

[69] Classified Information Procedures Act § 2.

[70] *Id*. § 5(a).

[71] *Id*. app. § 5(b).

[72] Jordan, *supra* note 40, at 1659.

[73] Classified Information Procedures Act § 2.

[74] Maher, *supra* note 67, at 110.

[75] *Id.*

[76] *Fernandez*, 913 F.2d at 154.

[77] *Id*. ("Although the relevance of classified information under § 6(c) should be governed by Fed R. Evid. 401, all relevant evidence is not automatically admissible under CIPA. . . . [T]he admissibility of relevant evidence under § 6(c) of CIPA involves a further balancing of the public interest in nondisclosure against the defendant's right to prepare a defense.").

If the court determines that classified information is discoverable based on its relevancy and importance to the defense, the court may order the prosecution to produce either the evidence or an adequate substitution.[78] The adequacy of the proposed substitution is determined as follows:

> [§6](c) ALTERNATIVE PROCEDURE FOR DISCLOSURE OF CLASSIFIED INFORMATION— (1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—
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> (A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or
>
> (B) the substitution for such classified information of a summary of the specific classified information.
>
> The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.[79]

Therein lays the innovation of the CIPA legislation. The determination of relevancy in a CIPA proceeding is the same as it was under the prior Executive privilege precedent.[80] The allowance for evidence substitutions, however, creates an alternative to a dismissal of a case if the Executive branch decides the risk of disclosure of the evidence in its current form outweighs its interest in a prosecution. Thus, the court can preclude the discovery or admissibility of classified evidence if either the defendant has not shown that the evidence is material to his defense or the court determines that the proposed substitution substantially approximates the classified evidence or provides the facts the classified evidence would tend to prove.[81]

Although CIPA purportedly applies to all forms of evidence, there is no substitute for the value to the defense of a live witness. In these instances, however, the statute does not limit the judge to the pre-CIPA dilemma of allowing the testimony in live court or dismissing the case. The judge must exercise the discretion that CIPA grants her in crafting a

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[78] 18 U.S.C. app. § 6(c) (2000).

[79] *Id.*

[80] United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989) ("The same concerns inform our construction of CIPA and the classified information privilege, and the same concerns must inform analyses by district courts in passing on the discoverability of classified information.").

[81] *See* 18 U.S.C. App. § 6(c)

workable solution that respects the interests of both parties.[82] Prior to the *Moussaoui* case, one district court specifically rejected the notion that Section 6 of CIPA could alter a defendant's right to cross-examine and present witnesses.[83] As will be discussed in Section VI.B, however, the Fourth Circuit in *Moussaoui* disagreed.

V. Post-CIPA Decisions: Affirming *Roviaro* as the Controlling Standard

Post-CIPA cases have not significantly altered the *Roviaro* test for balancing competing interests. As in the pre-CIPA context, the Executive privilege to keep evidence classified often prevails in foreign and military affairs, but not when it interferes with a defendant's right to a fair trial.

A. Smith *and* Rahman*: CIPA as a Procedural Tool*

In *United States v. Rahman,*[84] a case concerning the prosecution of defendants involved in the 1993 bombing of the World Trade Center, the district court held that certain documents were not discoverable because revealing the evidence "would potentially disclose an intelligence source and also potentially injure the foreign relations of the United States."[85] The district court adopted the balancing test developed in the wake of *Roviaro*, stating the test as a weighing of the value of the information to the defendant against the possible damage to the government's security interest that disclosure would cause.[86] The court found that in the case of material information contained in the classified documents, the defendant had not sufficiently established the value of the classified information to his defense to outweigh the Executive interest in protecting the information.[87]

The only piece of evidence that the court held discoverable was a document bearing on the credibility of a government witness.[88] The court did not explain why this piece of evidence was more relevant, but implicit in

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[82] *See id.* at § 6(e)(2).

> Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate.

Id.

[83] *Collins*, 603 F. Supp. at 303.

[84] 870 F. Supp. 47 (S.D.N.Y. 1994).

[85] *Id*. at 53.

[86] *Id.* at 52.

[87] *Id.* at 53.

[88] *Id*.

its finding is that such evidence is always material to the defense.[89] The court in *Rahman* did not view CIPA as altering the *Roviaro* precedent for the balancing of interests.[90]

In *United States v. Smith*,[91] the Fourth Circuit emphasized that CIPA had not changed the substantive law.[92] The defendant, Smith, argued that by passing CIPA and allowing the government to introduce substitutions for classified evidence, Congress actually intended to weaken the government's ability to withhold classified evidence altogether.[93] By providing the substitution alternative, the defendant claimed that Congress intended for more classified evidence to enter trials. In rejecting this argument, the court stated that CIPA simply shifted the ruling on the admissibility of classified evidence to the pre-trial stage and provided additional procedures to conduct such determinations; *Roviaro* was still the proper standard admissibility determinations.[94] Applying the *Roviaro* standard, the court in *Smith* deferred to the government's interest in protecting the evidence, giving significant weight to the fact that the evidence related to intelligence gathering abroad.[95]

One can read the *Rahman* and *Smith* cases in two ways: either as asserting the strength of the Executive interest in protecting classified evidence, or as preserving the pre-CIPA precedent. The latter interpretation is more appropriate. While both cases emphasized the deference courts should afford to the Executive in foreign affairs, the *Smith* court explicitly rejected the notion that CIPA affected any change in the interests of either the defendant or the government; the court in *Rahman* stopped short of extending the Executive privilege to preclude the admission of material witness testimony. Neither party may use CIPA as a tool to bolster its substantive rights. The Fourth Circuit thus erred in *Mous-*

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[89] *See, e.g.,* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of the accused to present witnesses in his own defense.").

[90] *Rahman*, 870 F. Supp. at 52.

> Here, the test to be applied involves balancing the defendant's need for the information or its value to the defendant, against the possible damage to the government's security interests from disclosure. Certain courts have drawn an analogy between deciding whether to direct disclosure of classified information and deciding whether to direct disclosure of a government informant's identity pursuant to [Roviaro].

Id.

[91] *Smith*, 780 F. 2d at 1102.

[92] *Id.* at 1106 ("No new substantive law was created by the enactment of CIPA . . . . [T]he district court correctly concluded that CIPA was merely a procedural tool requiring a pretrial court ruling on the admissibility of classified information.").

[93] *Id.* at 1109 ("Smith argues that even if the government's *Roviaro* type privilege exists, in the government's exercise of that privilege it must follow the substitution procedure of § 6(c) of CIPA rather than seek exclusion of the evidence altogether.").

[94] *Id.* at 1110.

[95] *Id.* at 1109 ("Law enforcement domestic informers generally know who their enemies are; intelligence agents ofttimes do not.").

saoui when it permitted the Executive to expand its privilege through the use of the CIPA substitution process.

B. Fernandez*: Limiting the Scope of Permissible Substitutions*

United States v. Fernandez,[96] a case attached to the Iran-Contra scandal, offers further evidence of the unwillingness of pre-CIPA courts to expand the Executive's right to withhold classified evidence.[97] The case also demonstrates how courts will judge the admissibility of the Executive's proposed substitutions under CIPA. Fernandez was a CIA station chief in Costa Rica during the investigation of military support to the Iran Contras; the independent counsel prosecuting the case accused Fernandez of lying to the investigators.[98] In his defense, Fernandez sought to introduce classified documents to prove the veracity of his statements to the investigators.[99] Applying the *Smith* balancing standard, which was based on *Roviaro*, the Fourth Circuit upheld the lower court's determination that much of the evidence was material to the defense and necessary for a fair trial; thus, the defendant's interest in the evidence defeated the Executive interest in national security.[100] Though *Fernandez* involved the use of documentary evidence, the court noted that the defendant's right to present the evidence would be inviolate if the classified evidence had been witness testimony.[101]

The court correctly focused on the strength of the defendant's interest without devoting much space to an analysis of the government's interest. The court accepted that it had "no authority to consider judgments made by the Attorney General concerning the extent to which the information in issue here implicates national security."[102] Once the prosecution asserts its interest, a court should not determine the relative strength of

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[96] 913 F.2d 148 (4th Cir. 1990).

[97] *Id*. at 154.

[98] *Id* at 151.

[99] *Id*.

[100] *Id.* at 160. The court explained:

> Moreover, for many of the same reasons stated in our discussion of the admissibility of information concerning the locations, the district court did not misapply *Smith*. The district court made clear that throughout the entire § 6(a) hearing on admissibility, it was 'weighing the interests of security against the necessity for the defendant to have certain information in order to receive a fair trial.' As explained earlier, *Smith* states that a defendant's interest in a fair trial will prevail for purposes of § 6(a) relevancy determinations where there is a finding by the trial court that the relevant information was necessary to the defense. Thus, the court's specific finding that the stations 'are necessary for the defendant's defense to be divulged' satisfies the requirements of *Smith*.

Id.

[101] *Id*. at 154 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense." (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1979))).

[102] *Id*.

that interest in different contexts because this is a determination for the Executive branch.[103] Accepting the Executive interest as strong, the court should focus, as it did in *Fernandez*, on the strength of the defendant's interest. If it decides that the evidence is material to the defense and thus necessary for a fair trial, the court should order the prosecution to produce the information or witnesses.[104]

Once the *Fernandez* court determined that the defendant's interest outweighed that of the Executive, it then decided whether the prosecution's proposed substitutions for the evidence would "provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."[105] The substitutions in this case offered only general information about government operations in Costa Rica and Nicaragua.[106] In rejecting the substitutions, the court offered a clear statement about the proper standard to apply in such evaluations:

> If the vague, extremely abbreviated descriptions of the projects were accepted as exclusive substitutes for Fernandez's own testimony about his role in and understanding of the projects, for classified cables written by him that corroborated his understanding, and for his direct and cross-examination of witnesses involved in these projects, Fernandez's constitutionally guaranteed ability to present a defense would be severely compromised. The substitutions would have required the jury to judge Fernandez's role in the airstrip project, and thus the truth of his statements about it, in a contextual vacuum.[107]

The Fourth Circuit's analysis reaffirms the notion that CIPA in no way hinders a defendant's ability to present material evidence, and that the relevance of such evidence is not limited to the mere facts that it portrays. Equally important is the defendant's right to present the evidence in context and control the presentation. The same circuit misapplied this standard in the *Moussaoui* case.

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[103] CIA v. Sims, 471 U.S. 159, 176 (1985) (holding that courts are in no position to gauge the importance of classified information or the harm that revealing it will cause).

[104] *Fernandez*, 913 F.2d at 157 ("[a] finding that particular classified information is necessary to the defense is enough to defeat the contrary interest in protecting national security").

[105] 18 U.S.C. app. § 6(c)(1) (2000).

[106] *Fernandez*, 913 F.2d at 157.

[107] *Id.* at 158.

VI. The Error in *Moussaoui*: A Misinterpretation of CIPA and the Executive Privilege

Allowing the Executive branch to redact and summarize classified documents is a legitimate process that avoids exposing defendants, juries, and the public to information that may endanger the lives of intelligence agents abroad. Prior to the holding in *Moussaoui*, courts had established a workable standard that controlled the release of information contained in classified documents without holding that the prosecution could bar access to material defense witnesses.

Zacarias Moussaoui was arrested for an immigration violation and charged with conspiracy relating to the September 11, 2001 terrorist attacks.[108] The prosecution later added six additional charges, including conspiracy to use weapons of mass destruction, and sought the death penalty.[109] In his defense, Moussaoui sought access to prisoners in military custody for suspected affiliation with the terror group al Qaeda, claiming that such prisoners could provide testimony material to his defense.[110] On January 31, 2002, after finding that the witnesses possessed potentially material information, the district court ordered that the prosecution allow Moussaoui to depose these witnesses.[111] The prosecution refused to allow depositions of the witnesses. It filed a petition with the lower court under Section 6(e) of CIPA claiming that the witnesses might reveal information pertinent to national security.[112] The prosecution then attempted to offer written summaries as a substitute for the testimony of the witnesses, a proposal the district court rejected.[113] The proposed substitutions consisted of written responses to questions that interrogators had asked the witnesses independent of the Moussaoui litigation.[114]

A. *The District Court Decision*

The district court held that the prosecution's refusal to comply with its initial order did not compel a dismissal of the case; instead, the court held that the prosecution could not refer to the September 11 hijackings because the witnesses at issue might have had exculpatory evidence regarding this charge.[115] The court reiterated that it would be unconstitutional to impose a death sentence on Moussaoui if the prosecution had deprived him of material information that he had shown the witnesses might possess, particularly considering the broad and sweeping nature of

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[108] United States v. Moussaoui, 382 F.3d 453, 457 (4th Cir. 2004).

[109] *Id.*

[110] *Id.* at 458 & n.4.

[111] United States v. Moussaoui, 282 F. Supp. 2d 480, 481 (E.D. Va. 2003), *vacated by* 365 F.3d 292 (4th Cir. 2004).

[112] *Id.*

[113] *Moussaoui*, 382 F.3d at 458-59.

[114] *Id.* at 458-59 & n.5.

[115] *Id.* at 459-60.

the charges.[116] To seek a death sentence, the prosecution had to prove "that the defendant intentionally 'participated in an act' or 'engaged in an act of violence' that directly resulted in thousands of deaths on September 11, 2001."[117] Because the witness testimony related to this element of the charge, the prosecution could not use the testimony without allowing the defendant to depose these witnesses, and thus could not prove the requisite intent to warrant capital punishment.

Although the court found that Moussaoui had the right to depose the classified witnesses before the prosecution could use their testimony as evidence, this remedy still denies the defendant the right to have the jury assess the credibility of the witnesses as they deliver their testimony.[118] Under *Crawford*, the *Moussaoui* court's solution would be constitutional if the witnesses were unavailable, but there is no indication that the court required a showing that this was the case. The judge did not state that presenting the witnesses at trial would allow for more damaging revelations of classified information than would occur as a result of the depositions.

In an article criticizing the district court's decision, Peter Margulies argues that in a post-September 11 world, the burden of proof in a terrorism case may reside with the defendant, and thus, depriving him of material exculpatory evidence at trial may prevent him from overcoming a natural bias in the jury.[119] While Margulies' argument is speculative, it is not hard to imagine that a defendant such as Moussaoui, a self-admitted member of al Qaeda, will have a hard time overcoming this bias without the strongest available evidence. This burden shift may encourage defendants in terrorism cases to accept guilty pleas on weak prosecutorial evidence.[120]

While the district court's solution did not allow for the presence of the witnesses at trial, in recognizing the defendant's right to cross-examine

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[116] *Moussaoui*, 282 F. Supp. 2d at 486. As the district court explained:

> Considering the broad nature of the charged conspiracies as described by the United States in its recent pleadings in this case, it simply cannot be the case that Moussaoui, a remote or minor participant in "al Qaeda's war against the United States," can lawfully be sentenced to death for the actions of other members of Al Qaeda, who perpetrated the September 11 attacks, without any evidence that the defendant, himself, had any direct involvement in, or knowledge of, the planning or execution of those attacks. To the extent that the prosecution believes that Moussaoui possessed knowledge of the attacks sufficient to render his statements to law enforcement at the time of his arrest "acts" which directly resulted in death, the Government's refusal to comply with this Court's Orders of January 31 and August 29, 2003 prevents the defendant from offering trial testimony that could undermine the Government's argument.

Id.

[117] *Id.* at 486.

[118] Margulies, *supra* note 41, at 434.

[119] *Id*. at 433.

[120] *Id*. at 434-45.

the witnesses it preserved the more fundamental quality of the Sixth Amendment. The Fourth Circuit denied that the defendant had a right to cross-examination in this instance, and in doing so it misapplied CIPA precedent and more importantly, the Constitution.

B. *The Fourth Circuit Decision*

On appeal, the Fourth Circuit agreed with the district court that the current form of the prosecution's proposal was not an adequate substitution for the deposition of the witnesses, but it rejected the notion that the prosecution could not craft adequate replacements for the opportunity to cross-examine.[121] It remanded the case for a determination of what would constitute adequate written substitutions for the deposed testimony.[122] Although the court acknowledged that a defendant's rights to view all material evidence is supreme to the Executive interest, it misinterpreted the import of this right to lie in the content of the evidence and disregarded the importance of the form of presentation. The court used CIPA's procedures to argue that a written substitution for witness testimony preserves a defendant's rights, and in doing so ignored the importance of cross-examination and witness credibility. The erosion of the defendant's rights stems from the judicial deference the court believed it should afford the Executive in the context of the case.

The Fourth Circuit first laid out in great length the importance of the Executive power to regulate foreign and military affairs, as well as national security.[123] It then accepted as true the prosecution's assertion that the production of the classified witness would have a negative affect on the global war on terror and might even bolster the efforts of the enemy by taking time away from members of the military who would have to participate in the proceedings.[124] An analysis of this argument follows the summary of the holding.

After weighing Moussaoui's countervailing interests, however, the Fourth Circuit agreed with the lower court's determination that if the witnesses had information material to his defense, Moussaoui must have

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[121] United States v. Moussaoui, 382 F.3d 453, 482 (4th Cir. 2004).

[122] *Id*.

[123] *Id*. at 469-70 ("[I]n accordance with [the] constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." (quoting Hamdi v. Rumsfeld, 296 F.3d 278, 281 (4th Cir. 2002) (*Hamdi II*))).

[124] *Id* at 470-71. In advancing this argument, the prosecution cited to *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Id*. In *Eisentrager*, enemy prisoners were captured in China during World War II, convicted by a military commission and transported to Germany to serve their sentences. The prisoners filed a writ of habeas corpus. The writ was denied, partially because the court believed that allowing the prisoners and their witnesses to appear in court would undermine the authority of the field commanders during a time of war. 339 U.S. at 779.

access to that information in some form.[125] It accepted that the right to compulsory process is fundamental.[126] Citing *Chambers v. Mississippi*,[127] the court further stipulated that the ability to compel the attendance of witnesses is inherent in the Sixth Amendment right to present a defense.[128] It acknowledged that the precedent developed after *Roviaro* established that the particular Executive privilege of protecting classified information must give way to a defendant's Sixth Amendment rights, and stated that the traditional remedy is for the prosecution to dismiss the case or present the evidence.[129] In spite of this finding, and having established that Moussaoui had met his burden of showing that the witness testimony was material to his defense, the court still allowed the prosecution to offer a substitution for witness testimony, using CIPA to justify its ruling.[130] This was a misapplication of CIPA precedent.

The Fourth Circuit correctly stated that CIPA allows for the prosecution to make adequate substitutions for the classified evidence so that it does not have to make the decision to reveal the information or let the defendant go free, provided that the substitutions preserve the defendant's rights.[131] As mentioned, the proposed substitutions consisted of a written summary of questions and answers from an interrogation conducted by the Executive branch independent of the *Moussaoui* trial.[132] The court rejected these substitutions, but unlike the district court, it did not require that either Moussaoui gain access to the witness or the prosecution dismiss the charges relevant to the evidence.[133]

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[125] *Id.* at 476 ("In addition to the pronouncements of the Supreme Court in this area, we are also mindful of Congress' judgment, expressed in CIPA, that the Executive's interest in protecting classified information does not overcome a defendant's right to present his case.").

[126] *Id.* at 471 ("The importance of the Sixth Amendment right to compulsory process is not subject to question—it is integral to our adversarial criminal justice system.").

[127] 410 U.S. 284 (1973).

[128] *Moussaoui*, 382 F.3d at 471 ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . . [F]ew rights are more fundamental than that of an accused to present witnesses in his own defense" (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Washington v. Texas, 388 U.S. 14, 19 (1967))).

[129] *Id.* at 474.

[130] *Id.* at 477-80.

[131] *Id*. at 477; *see also* 18 U.S.C. App. § 6(c)(1) (2000) (the government may avoid the disclosure of classified information by proposing a substitute for the information, which the district court must accept if it "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information").

[132] *Id.* at 459.

[133] *Id*. at 477-78. As the Fourth Circuit explained:

> Government proposed substitutions for the witnesses' deposition testimony in the form of a series of statements derived from the [Redacted] summaries. The

To counter the CIPA requirement that the substitutions must "provide the defendant with substantially the same ability to make his defense,"[134] the court cited two cases, one in which a court allowed the prosecutor's substitutions for *documentary evidence*, and the *Fernandez* case, in which the court rejected the prosecution's substitutions as inadequate and dismissed the charges.[135] It extracted from these cases the proposition that substitutions are adequate so long as they do not "materially disadvantage the defendant," even though neither of the cases cited refers to this standard of adequacy for the submissions.[136] The court further diminished the requirement for the substitutions by referring to a civil case stating the idea that "access . . . is ultimately a matter of providing an opportunity to have one's claim resolved in a meaningful manner, and does not guarantee that such claim will be presented in the most effective manner."[137] Such a statement, made outside of the context of a criminal trial, does not correspond with the court's earlier declaration that no right is more fundamental than the right to compel the attendance of witnesses.[138]

The *Moussaoui* court attempted to balance the value of having the witnesses present at trial against the cost of doing so, but it miscalculated the weight of the relevant interests. If the defendant has shown that the evidence is material, which the court did not dispute, and the evidence is in testimonial form, the court must admit the evidence in the form of wit-

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district court rejected all proposed substitutions as inadequate. The ruling of the district court was based on its conclusions regarding the inherent inadequacy of the substitutions and its findings regarding the specific failings of the Government's proposals. For the reasons set forth below, we reject the ruling of the district court that any substitution for the witnesses' testimony would be inadequate. We agree, however, with the assessment that the particular proposals submitted by the Government are inadequate in their current form.

Id.

[134] 18 U.S.C. App. § 6(c)(1).

[135] *Moussaoui*, 382 F.3d at 477; United States v. Fernandez, 913 F.2d 148, 158 (4th Cir. 1990); United States v. Rezaq, 134 F.3d 1121, 1143 (D.C. Cir. 1998).

[136] *Moussaoui*, 382 F.3d at 477. The court reads the statement in *Rezaq* that substitutions cannot deprive the defendant of information that "might have been helpful to the defense," and the instruction in *Fernandez* that the substitution need not preserve an "insignificant tactical advantage" for the defendant as requiring that the substitutions need only not "materially disadvantage" the defendant. The two earlier cases clearly suggest that the government substitutions most closely adhere to the classified evidence and may only leave out insignificant information. *Id*.

[137] *Id. See* Ball v. Woods, 402 F. Supp. 803, 810 (M.D. Ala. 1975). In *Ball*, a civil trial, the court held that the ability of the district court to issue an order compelling state prison officials to produce a prisoner witness was a discretionary power of the court, not an absolute right of the defendant. *Id*. An important distinction from *Moussaoui* is that the defense had already had an opportunity to cross-examine the prisoner.

[138] *Moussaoui*, 382 F.3d at 471.

ness testimony. Some alteration in the timing and settings of the testimony may be permissible, and in this sense some balancing may be appropriate, but the prosecution may not reduce the testimony to a written summary.

The *Moussaoui* court purported to preserve the defendant's Sixth Amendment rights by requiring the prosecution to produce the classified evidence in some form;[139] however, it set such a low standard for what would constitute an adequate substitution that it diminished the right itself. The most egregious deterioration occurred when the court dismissed the value of the right to cross examine. It acknowledged that one of the benefits of a live presence of a witness is that the jury may take measure of the demeanor and appearance of the witness and hear the questions and answers in the proper context.[140] The court stated, however, that a written summary may replicate such a benefit by the judge providing jury instructions stating that the jurors must take into account the circumstances under which the witness answered the questions.[141] The court cited no precedent for the idea that jury instructions and redacted summaries are an adequate substitution for live testimony, for none exists. The solution the court crafted was that Moussaoui would highlight the portions of the proposed substitutions he believed to be material, the district court would allow the prosecution an opportunity to rebut, and then the district court judge would craft the instructions to the jury.[142]

The solution the Fourth Circuit presented ignored the recent Supreme Court holding in *Crawford v. Washington*.[143] In *Moussaoui*, the Fourth Circuit avoided *Crawford's* direct statement that the Sixth Amendment disallowed testimonial hearsay by claiming that it was Moussaoui who

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[139] *Id.* at 479 ("[W]e hold that the [Redacted] summaries (which, as the district court determined, accurately recapitulate the [Redacted] reports) provide an adequate basis for the creation of written statements that may be submitted to the jury in lieu of the witnesses' deposition testimony.").

[140] *Id.* at 480-81.

[141] *Id.* As the appellate court explained:

> As previously indicated, the jury must be provided with certain information regarding the substitutions. . . . [T]he jury must be informed, at a minimum, that the substitutions are what the witnesses would say if called to testify; that the substitutions are derived from statements obtained under conditions that provide circumstantial guarantees of reliability; that the substitutions contain statements obtained over the course of weeks or months; that members of the prosecution team have contributed to [Redacted] the witnesses.

Id.

[142] *Id.* at 482.

[143] 541 U.S. 36 (2004). The *Moussaoui* defense, in its certiorari petition to the United States Supreme Court, made the argument, not incorporated herein, that the Fourth Circuit decision violated *Crawford*. *See* Petition for a Writ of Certiorari, United States v. Moussaoui (4th Cir. Jan. 10, 2005) (No. 04-8385).

was choosing to introduce the evidence in the form of hearsay.[144] The court suggested that *Crawford* was satisfied as long as Moussaoui was entering the evidence and not the government. In doing so, he would be assenting to its form, and the lack of cross-examination would not be a problem because Moussaoui would only include exculpatory statements in his admissions and would not need to attack the truthfulness.

In essence, Moussaoui would have had to accept the government substitutions and introduce the parts he considered helpful. The court presented the scenario as a choice between Moussaoui introducing the evidence as hearsay on his own behalf or not introducing it at all.[145] However, any witness responses he submitted would be responses to questions posed by government officials that he did not have an opportunity to cross-examine. Since he did not ask the questions, he should have had some opportunity to challenge the form of the questions or ask them with his own technique. The *Crawford* Court specifically stated that responses to interrogations by government officials were the type of "testimonial" evidence the Confrontation Clause addresses.[146]

The Fourth Circuit suggested that it would allow Moussaoui to submit questions that the government officials could ask,[147] but again, this solution would not recreate the ability of the defendant to ask the questions himself, particularly when the interrogators would be government officials holding the witness in custody. The court also acknowledged that the rule of completeness would allow the prosecution to respond to the exculpatory portions that Moussaoui chose to enter by introducing inculpatory material to counter his entries.[148] Even if such evidence were limited to clarification and context, Moussaoui would never have had a chance to challenge this material, and thus the admission of such evidence would violate *Crawford*.

C. *Undue Deference to the Executive Interest*

Underlying the Fourth Circuit decision is its deference to the Executive interest in foreign and military affairs. The court even suggested that the importance of the military and intelligence actions at home and abroad served as indicia of reliability for the witnesses' statements that the prosecution wanted to use as a substitute for cross-examination.[149] As men-

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[144] United States v. Moussaoui, 365 F.3d 292, 316 (4th Cir. 2004), *amended by* 382 F.3d 453 (4th Cir. 2004).

[145] *Id.*

[146] *Crawford,* 541 U.S. at 53.

[147] *Moussaoui*, 382 F.3d at 479.

[148] *Id.,* 382 F.3d at 481.

[149] *Id.*, 382 F.3d at 478. The Fourth Circuit stated:

> The answer to the concerns of the district court regarding the accuracy of the [Redacted] reports is that those who are [Redacted] the witnesses have a profound interest in obtaining accurate information from the witnesses and in

tioned, the *Crawford* Court stated that the Framers wanted to assure that defendants could challenge such interrogations by government officials.[150] Such questioners are not concerned with furthering the interests of the defendant.[151] Given the revelations about military interrogation techniques in regard to prisoners at Abu Ghraib and Guantanamo, a court should not presume such reliability in a criminal trial with the death penalty at issue.[152]

The Fourth Circuit's deference to the stated Executive interest, which this Note briefly summarized in Section VI.B, was also based on somewhat outdated notions of obstacles to ongoing military operation that production of a witness might present. The Court referred to *Johnson v. Eisentrager* in its statement of the Executive interest, and while it acknowledged that the "concerns of *Johnson* do not exactly translate to the present context," it afforded all Executive assertions great weight.[153] The Court in *Eisentrager* found that forcing the military to produce enemy aliens obtained abroad for appearance in civil courts in the United States during World War II was an impermissible barrier to the war effort; at least part of the concern was that trying such prisoners would require costs and resource expenditure.[154] In today's world, such a problem could easily be solved by conducting examinations of witnesses over video, although this admittedly involves some costs.

The *Moussaoui* court also highlighted some concerns of *Eisentrager* that are still relevant today, such as the comfort a prisoner might get from exposure to the court system which might increase his resistance to interrogation.[155] Other legitimate interests attach to the Executive's desire to protect classified information. The point of this Note is not to minimize these legitimate concerns, but rather to argue that courts can solve some of these concerns with practical solutions, such as video testimony. The remaining concerns, though legitimate, are inferior to a defendant's con-

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> reporting that information accurately to those who can use it to prevent acts of terrorism and to capture other al Qaeda operatives. These considerations provide sufficient indicia of reliability to alleviate the concerns of the district court.

Id.

[150] *Crawford,* 541 U.S. at 66 ("The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.").

[151] *Id.*

[152] Tim Golden, *U.S. Is Examining Plan to Bolster Detainee Rights*, N.Y. TIMES, Mar. 27, 2005 at 1; Anthony Lewis, *Gunatanamo's Long Shadow*, N.Y. TIMES, June 21, 2005 at 21; Richard A. Serrano, *Two Army Dog Handlers Charged in Abuse Scandal*, L.A. TIMES, June 3, 2005 at A7.

[153] *Moussaoui*, 382 F.3d at 471. *See* Johnson v. Eisentrager, 339 U.S. 763, 767 (1950).

[154] *Eisentrager*, 338 U.S. at 778-79.

[155] *Moussaoui*, 383 F.3d at 470.

stitutional rights in the context of a criminal trial. The Executive is the dominant actor in foreign and military relations abroad, but such a mandate does not supersede clear Supreme Court precedent and the developed line of CIPA interpretations in a United States criminal trial.

While the consequences of eroding the rights of a confessed member of al Qaeda such as Moussaoui may not appear significant or highly problematic, the precedent that such an action sets may have more severe repercussions. A defendant may be likely to accept a guilty plea agreement on weak prosecution evidence, believing that without access to his witness the chance of acquittal is slim.[156] In many cases where the *Moussaoui* precedent will apply, the witnesses that the defendant will seek to present will also be in United States custody. Such witnesses have an immediate interest in satisfying their interrogators because it might result in more favorable treatment. With the ability to cross-examine, the defense could highlight this fact and attack the credibility of the witness. After the holding in *Moussaoui*, in place of such testimony the jury will only have the written responses and an instruction that they must consider the circumstances. A defendant may understandably feel that his right to a fair trial will be compromised and accept a plea agreement when he realizes that this will be the case.

VII. A Possible Solution

Given the Executive's legitimate interest in protecting classified information, and *Moussaoui's* impermissible solution, courts must create a more workable solution to the situation in which the prosecution asserts that the testimony of a witness will reveal secret information. One alternative is to dismiss the action, but Congress passed CIPA to prevent this very result. The other extreme is the equally impermissible result in *Moussaoui*. In between, however, are some plausible mediums that will more adequately preserve a defendant's right to confront evidence and the Executive interest in keeping information classified.

A potential starting point is to prohibit the presence of the public at trials involving classified evidence, particularly in cases in which the defendant waives his right to a public trial. At least one critic has suggested that closing off to the public the part of the proceedings that involves classified evidence is an effective way of preserving the interests of both parties.[157] While the concurrent Sixth Amendment right to a public trial is implicated in such procedures, this right is not absolute.[158] In *Press Enterprise v. Superior Court of California,*[159] the Supreme Court held that only on rare occasions should the public be prevented from hav-

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[156] Margulies, *supra* note 41, at 435.

[157] Jordan, *supra* note 40, at 1692-93.

[158] *Id.* at 1689.

[159] *Press Enter. Co v. Super. Ct. of Cal.*, 464 U.S. 501 (1984).

ing access to a criminal trial.[160] The Court stated that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[161] The value of the public's presence is the maintenance of society's confidence in the fairness of the proceedings.[162]

In certain cases, it may be appropriate to close proceedings to the public, but the blanket assertion of the Executive's interest in preserving the secrecy of classified evidence, or of a defendant's interest if he is the party arguing for closure, is not enough to warrant closure. The judge should attempt to preserve a public presence in as much of the trial as possible, and only close proceedings when the classified information may be directly at issue. As the subsequent paragraphs will demonstrate, if the judge correctly uses the pre-trial procedures of CIPA, he may be able to preserve openness by resolving classified matters before trial begins.

The court could also require that the jurors and all courtroom personnel undergo security clearance and take a separate oath not to repeat the exposed evidence.[163] Military trials often limit jury selection to those individuals who have the proper clearance to hear the case.[164] While the Sixth Circuit found that the Executive could conduct security screening of all courtroom personnel before allowing them to participate in cases involving classified evidence,[165] this latitude should not extend to conducting background checks of juries.

While the procedures of military proceedings offer a tempting alternative because they are better structured to handle sensitive matters, jury pools should not be limited to those who can survive a security screening because this may give the prosecution undue influence in selecting the jury. Jordan argues that such a pool is limited only to people who have the same security clearance as the defendant, and thus the jury is still composed of one's peers.[166] This argument assumes that the witness and defendant possess classified information due to their involvement in intelligence or the military, and traditionally most classified cases do involve such people. *Moussaoui* demonstrates that this is not always the case, however, and no comparable level of clearance standard exists to which *Moussaoui* could compare, unless courts attempted to construct juries of people with similar levels of involvement in al Qaeda affairs. Thus,

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[160] *Id.* (holding that the state court must release transcripts of voir dire proceedings in a rape trial to the public, except for those parts that would reveal the identity of individuals needing protection).

[161] *Id.* at 510.

[162] *Id.* at 509.

[163] Jordan, *supra* note 40, at 1693-94 & FN 201.

[164] *Id.* at 1695.

[165] United States v. Smith, 899 F.2d 564, 564 (6th Cir. 1990).

[166] Jordan, *supra* note 40, at 1696.

requiring jury security clearance may not be a good option. Restricting public access may be permissible, but limiting the jury is not.

Another possible solution might be to create a video recording of the defense's cross-examination of a witness and to afford the trial judge and the prosecution the opportunity to edit out portions of the testimony that the Executive branch wants excluded from the case. Courts have previously approved the use of video depositions and allowed fact finders to view the video to evaluate the demeanor of the witness, particularly when the witness is otherwise unavailable.[167] The district court in *Moussaoui* intended to allow Moussaoui to interview the material witness via video conference to gather information, though presumably the video would not be shown during trial.[168]

To further limit the exposure of the evidence, the court could require the defense counsel to undergo some form of security clearance before participating in the video-recorded testimony. If cleared, counsel would have the opportunity to cross-examine the witness. In *United States v. bin Laden*, a case involving terrorist suspects and CIPA, a federal court held that such a requirement of defense counsel security clearance did not violate a defendant's right to counsel.[169] In *bin Laden*, the defendants argued that requiring their counsel to undergo security clearance and prohibiting counsel from sharing the confidential information with them interfered with their Sixth Amendment and Fifth Amendment rights.[170] The court found that the defendants had not demonstrated how interaction with counsel regarding the information would help their defense since their understanding of the information and its legal relevance was no better than that of counsel, and thus the effectiveness of counsel and the preservation of the other constitutional rights was not in doubt.[171]

The *bin Laden* decision demonstrates that the question of whether limiting access to cleared defense counsel is permissible will depend on the facts of each case. In cases where the defendant already has knowledge of the classified evidence, preventing him from discussing the information that his attorney gathers would be impermissible. Further, if the defendant decides to represent himself, as Moussaoui intended to do, the court

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[167] *See In re* Daniels, 69 F.R.D.579, 581 (N.D. Ga. 1975) ("The video taped deposition should be allowed to give the fact finders greater insight by allowing them to observe the witness' demeanor and manner of testifying."). *See also* Carson v. Burlington, 52 F.R.D. 492, 492 (D. Neb. 1971).

[168] Margulies, *supra* note 41, at 433.

[169] United States v. Bin Laden, No. 98-1023 2001 U.S. Dist. LEXIS 719, at *6-8, *15 (S.D.N.Y. Jan. 25, 2001).

[170] *Id.* at *2-4 (arguing that preventing defendants from discussing the material with counsel violated "the effective assistance of his counsel; (2) the right to confront witnesses; (3) the opportunity to be present at critical proceedings; and (4) the ability to assist in the preparation and presentation of his defense").

[171] *Id.* (balancing this speculative assertion against the strong Executive interest in controlling access to the information).

would have to grant him access to the witnesses. Such a solution would only be admissible when isolating the defendant from classified proceedings—such as pre-trial CIPA hearings or examination of classified witnesses—would have no discernible effect on the defendant's rights. Such circumstances may be rare, but *bin Laden* demonstrates that the remedy is not automatically invalid.

In a proceeding involving detained terror suspects as witnesses, the prosecution asserted that the presentment of a detainee witness would interfere with the ongoing interrogation of the prisoner, but again, workable solutions are available to minimize the interference.[172] The defense counsel could question the prisoner while the latter is still in prison under circumstances that minimize interference. It is important to approach obstacles to respective interests with intermediate solutions. The failure of the *Moussaoui* court was that it enacted a drastic solution with severe consequences, rather than using balanced methods that preserved fairness while respecting the Executive interest.

While no option strikes a perfect balance between Executive interest, public access, and a defendant's rights, courts may allow the particular circumstances and the agreements between parties to fashion the most appropriate resolution in each case. The prosecution always has the option of dismissing the charges if it decides that evidence the court has ruled admissible is more important than the prosecution of the defendant. CIPA allows the trial judge flexibility, with the main requirement that whatever remedy the judge creates, it must as nearly as possible recreate the actual classified evidence and the resulting procedure may not violate a defendant's right to a fair trial. The Fourth Circuit decision, however, is not an acceptable solution, and its *Moussaoui* holding creates a dangerous precedent.

VIII. Conclusion

The *Moussaoui* decision probably reflects both the Executive's increased aggressiveness in testing the limits of a defendant's constitutional rights due to the pressing need to combat terrorism and the judicial branch's discomfort in interfering with such efforts. The ability to regulate the release of classified information may directly affect the success of military and intelligence efforts, but precedent in the cases before *Moussaoui* is unambiguous. A defendant's right to confront evidence and cross-examine witnesses is built into the Sixth Amendment of the Constitution. Written summaries of military interrogations of defense witnesses are an unacceptable substitution for cross-examination. By concluding

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[172] Defendant's Response to Government's Supplemental Memorandum Regarding Defense Access to Potential Witnesses in Department of Defense Custody, United States v. Lindh, CR No. 02-37-A (E.D. Va. May 24, 2002).

that written documents could replace live testimony, the Fourth Circuit misinterpreted the case law of CIPA.

The benefit and the danger inherent in CIPA is that it grants courts the flexibility and discretion to determine how best to handle cases in which material evidence for the defendant is the same information that the Executive branch wishes to protect. The benefit of such elasticity is that the court may craft a remedy that parallels the particular facts of the case at hand. The problem, as it is with most instances of judicial discretion, is one of abuse. Instances of abuse will likely arise in cases in which the defendant is not particularly sympathetic, as was the case with Zacarias Moussaoui. On the other side, the Executive interest in ongoing intelligence and military operations is vital. As the Fourth Circuit itself acknowledged, however, when dealing with the defendant's right to a fair trial, this right supersedes the Executive's interest in protecting sensitive information. Thus, a court has no authority to violate this right when constructing a solution under CIPA procedures. Defendants must have the opportunity to examine material witnesses; CIPA provides no flexibility in this regard. The judge's solution may dictate the forum in which the defense interviews the witnesses, and may even prevent the witness from testifying at trial as the district court ordered in *Moussaoui* (though this last proposition is also debatable). It is essential that the interview happen at some point.

In *Reid v. Covert*,[173] the Supreme Court emphasized that courts must check even the slightest encroachment on constitutional rights before the encroachment grows broader:

> The attitude appears to be that a slight encroachment on the Bill of Rights and other safeguards in the Constitution need cause little concern. . . . "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . ."[174]

Even the slightest infringement on a defendant's Sixth Amendment rights is impermissible, even when enacted in deference to the Executive interest in ongoing conflicts abroad.

The solution this Note proposes – counsel clearance in certain cases and the use of pre-recorded video deposition – adheres more closely to Congressional intent in passing CIPA. Congress was concerned with the extremes that pre-CIPA procedures forced: either admit the evidence or dismiss the case. In passing the legislation, Congress enabled courts to craft workable solutions that preserved the prosecution's ability to prosecute and maintain the secrecy of some evidence, except when such secrecy interfered impermissibly with the defendant's rights. The *Mous-*

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[173] 354 U.S. 1 (1957).

[174] *Id.* at 39-40.

saoui court abused this flexibility by creating a precedent that encourages another extreme. Before CIPA, the prosecution had to decide whether to sacrifice secrecy or dismiss a case. After *Moussaoui*, the defendant may face a situation in which he must either plead guilty or stand trial without key evidence. The Sixth Amendment prevents such a result, and CIPA does not authorize it.

The Supreme Court denied certiorari of the Fourth Circuit's decision, and soon after Moussaoui pleaded guilty to the charges against him.[175] It is possible, however, that the issue of access to the detainee witnesses will arise again at the sentencing hearing, depending on how the Supreme Court rules on upcoming cases involving the introduction of new evidence at sentencing.[176] If the issue does arise, the reviewing court should allow Moussaoui access to the witnesses to obtain exculpatory evidence before potentially sentencing him to death.

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[175] Neil A. Lewis, *Surprise Terror Plea Leaves Unresolved Issues*, N.Y. TIMES, April 24, 2005, §1, at 30.

[176] Linda Greenhouse, *Review Set for Evidence in Murder Trial's Penalty Phase*, N.Y. TIMES, April 26, 2005, at A13.