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Supplementary Comparative Research on Secret Evidence: A closer examination of the procedure and practice in the United States

A Report for the Joint Committee on Human Rights

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TABLE OF CONTENTS

Executive Summary

On October 19, 2011, the UK Government issued a Green Paper on Justice and Security wherein it focused on the use of secret evidence and closed material proceedings in the UK.[1] On October 27, 2011 OPBP provided the Joint Committee on Human Rights (JCHR) with a comparative report on secret evidence procedures in order to assist the JCHR in its scrutiny of the Government's Green Paper. The October 2011 OPBP report provides a detailed comparative perspective on how secret evidence is treated across various jurisdictions and the human rights implications that arise from these uses.

Since October 2011, a number of groups and individuals have offered responses to the Government's Green Paper, some of which have called for a closer comparative analysis of secret evidence procedures in the United States (US). Of particular importance is the response of the Special Advocates submitted on December 16, 2011.[2] The Special Advocates (SAs) highlighted problematic aspects of their role in Closed Material Procedures (CMPs), chief of which is that direct communication with defendants is prohibited after the SAs have received the closed material.[3] The SAs are of the view that even with the involvement of Special Advocates, CMPs remain fundamentally unfair.[4] As a result, the following submission was made at the end of their response:[5]

> *"We urge that consideration be given to adopting an alternative system to deal with sensitive material, using directly instructed security-cleared lawyers receiving information subject to 'protective orders' (i.e. with features that characterise the system operated in the United States in habeas proceedings), which would provide a substantially greater measure of fairness, and has been shown to be workable without compromising material quite legitimately regarded as sensitive by the Government."*

Professor Clive Walker's response to the JCHR's inquiry into the Green Paper also points to the need to have a closer look at the US approach:[6]

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[1] *Justice and Security*, Cm 8194 (October 2011).
[2] *Justice and Security Green Paper: Response to Consultation from Special Advocates* (December 2011).
[3] Ibid., p. 7.
[4] Ibid., p. 2.
[5] Ibid., p. 21.
[6] Professor Clive Walker, *Submission to the Joint Committee on Human Rights Re: Inquiry into Ministry of Justice, Justice & Security Green Paper* (February 1, 2011), p. 6.

> *"[15] Appendix J of the Green Paper is particularly deficient in that no consideration is given to the lessons which might be learnt from the US legal system. The US faces more problems than most jurisdictions over disclosure because of the international spread of its intelligence and military agencies, but the potential obstacles have not been insuperable. Consideration should be given to the model of the Classified Information Procedures Act. The Act specifies procedures and safeguards which involve the presiding judge more closely in the oversight of disclosure through in camera review but do not alter the basic rules of disclosure of relevant material evidence."*

In light of the above, the JCHR requested a short piece of supplementary research on procedures involving the use of secret evidence in the United States. This paper focuses primarily on the use of directly instructed security-cleared counsel in *habeas corpus* proceedings in Guantanamo Bay and otherwise.

It should be noted that while the abovementioned statements laud the management of classified information in US criminal proceedings for its seemingly balanced nature, this is in stark contrast with what obtains in US *civil* proceedings where the doctrine of State Secrets privilege (SSP) may be invoked by the State in order to completely strike out civil actions.[7] Professor Walker makes reference to this tension in his report:[8]

> *"[17] The negotiated outcomes under the Classified Information Procedures Act are generally preferable to the less wholesome picture which sometimes emerges in US civil process under the doctrine of state secrets privilege. That doctrine has been increasingly invoked not only to exclude sensitive evidence in terrorism-related cases but also to terminate entirely civil actions against the state."*

The JCHR was therefore also interested in the relationship between the doctrine of States Secrets Privilege on the one hand and the use of security-cleared counsel in *habeas corpus* proceedings on the other. The key question is whether the disadvantages of the former approach undermine the perceived merits of the latter. This report therefore examines the use of state secrets privilege in US courts as well as ways in which this doctrine might influence the use of security-cleared counsel in *habeas* proceedings, if at all.

In summary, this report addresses the following questions which were asked of OPBP:

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[7] *El-Masri v Tenet* (2006) 437 F Supp 2d 530, (2007) 479 F 3d 296 (cert den 169 L Ed 2d 258; 2007). See Chesney, RM, 'State secrets and the limits of national security litigation' (2007) 75 *George Washington Law Review* 1249.

[8] Professor Clive Walker, supra n 6, p. 7.

1. How does a system of directly instructed security-cleared counsel operate in United States *habeas corpus* proceedings (and otherwise in the US)?

2. Does United States law recognize a doctrine of state secrets privilege which would operate to strike out civil proceedings that involve sensitive government secrets?

3. If so, what is the scope of this doctrine and what bearing does it have on the operation of security-cleared lawyers in the US context?

Classified Information Procedures Act (CIPA)

I – OVERVIEW AND SCOPE OF APPLICABILITY

The Classified Information Procedures Act (CIPA)[9] was enacted in 1980 to govern the use of classified evidence in federal criminal trials. Prior to the enactment of CIPA, it was particularly difficult for the government to assess the extent of relevant classified information at the pre-trial stage.[10] Prosecutors were therefore not in a position to make an informed decision on the risk of disclosure of sensitive material before embarking on a particular case. This led to a practice of "graymailing" by defendants who would threaten to release classified documents as a part of their defence if charges against them were not dismissed.[11] CIPA counters this problem by requiring a defendant, prior to trial, to notify the prosecution and the court of any classified information he expects to disclose in his defence[12] and further provides that the use of such information is subject to 'protective orders', guarding against its wider release.[13]

The general purposes of CIPA are described by the US government to be: the establishment of a procedure for preventing unnecessary disclosures of classified information and to enable the government to assess the national security "cost" of initiating proceedings beforehand without depriving non-government parties of substantive rights of discovery and access to information.[14] The extent to which this balance has been successfully achieved is questioned by many (as evidenced in the numerous criticisms levied at CIPA which are outlined below).

It should be noted that CIPA applies only to criminal proceedings and in that sense it is not directly applicable to *habeas corpus* proceedings as *habeas* proceedings constitute a *sui generis* jurisdiction which is not criminal in nature. That said, the procedures provided for under CIPA have largely informed the procedural rules applicable in Guantanamo Bay

[9] Title 18, U.S.C. App III.
[10] Larry Eig, *CIPA: An Overview*, Congressional Research Service Report for Congress (March 1989), p. 1.
[11] See Timothy J. Shea, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials,* 27 AM. CRIM. L. REV. 657, 662 (1990).
[12] CIPA, section 5.
[13] CIPA, section 3.
[14] Department of Justice, Criminal Resource Manual: "2054 Synopsis of Classified Information Procedures Act (CIPA)", available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm

habeas cases.[15] This is highlighted in further detail below. It is therefore important to gain an appreciation of the main procedural rules provided for in CIPA before assessing the relevant procedure in Guantanamo *habeas* cases.

II – KEY PROCEDURAL RULES UNDER CIPA

[A] Definition of classified information

Section 1 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 unauthorized disclosure for reasons of national security and any specified types of restricted data."*

"National security" as used in the Act means "the national defense and foreign relations of the United States".[16]

[B] Pre-trial Conference

Section 2 provides that a pre-trial conference must be held if either party to the litigation requests one or if the court initiates one of its own motion. The purpose of such conferences is to establish the timing of requests for discovery, the provision of notice required by the defendant in section 5 of the Act and the initiation of the procedure established by section 6 of the Act regarding the determination of what classified information may be presented at trial.

[C] Discovery of Classified Information by the Defendant

Section 4 of the Act provides:

> *"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, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove."*

[15] *Habeas Works: Federal Courts' proven capacity to handle Guantanamo cases*, A report from Former Federal Judges (June 2010), p. 17; See also *Al Odah v United States* No. 05-5117, 2009 WL 564310, at 7 (D.C. Cir. Mar. 6, 2009).
[16] CIPA, section 1(b).

It is important to note that this hearing which determines the government's disclosure obligation may be held *ex parte* and *in camera*. The courts have held that such *ex parte* discovery is constitutional in the face of challenges made about the procedure's fairness.[17] In *United States v Kampiles*[18] the court noted that: "It is settled that *in camera*, *ex parte* proceedings to evaluate bona fide Government claims regarding national security information are proper."

The government may withhold classified information during discovery unless the defendant can show that disclosure of the information being sought is not only relevant, but that it is also central to the defence or is essential to a fair determination of the case.[19] Further, the court will only allow substitution of the original information sought if it finds that the proposed substitution is adequate to protect the defendant's interests.[20]

The approach of the prosecutor will be to use section 4 to greatest effect. The Department of Justice's (DOJ) Criminal Resource Manual (a guide for prosecutors) provides that, in relation to section 4 hearings,

> *"Where supported by law, the prosecutor, during the proceeding, should first strive to have the court exclude as much classified information as possible from the government's discovery obligation."*[21]

In *United States v Yunis*, for example, the initial discovery proceedings were held *ex parte* and *in camera* before the relevant District Court.[22] Further, the court held that the threshold for discovery in this context is that the information might be "helpful to the defense of the accused". The court "recognised that the defendant and his counsel in CIPA cases are hampered by the fact that information they seek is not available to them until such a showing is made. Thus, it might be said, they cannot show the helpfulness of contents, because they do not know their nature". However, the Court held, "[t]his apparent Catch-22 is more apparent

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[17] *United States v. Jolliff*, 548 F. Supp. 229, 231-232 **(D.** Md. 1981).
[18] 609 F. 2d 1223 (7th Cir 1979).
[19] See *United States v. Pringle*, 751 F.2d 419 (1st Cir. 1984); *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988).
[20] *United States v. Clegg*, 740 F.2d 16, 18 (9th Cir. 1984).
[21] Department of Justice (DOJ) Criminal Resource Manual, "2054: Synopsis of Classified Information Procedures Act, at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm (accessed 22 February 2011).
[22] *US v Yunis* 867 F.2d 617 (DC Cir. 1989). For a recent example of ex parte, in camera inspection of information, see *US v Jin* 791 F.Supp.2d 612 (N.D.Ill 2011).

than real".[23] The Court's conclusion on this issue has been disputed by defence counsel involved in such cases.[24]

[D] Hearings to Consider Classified Information (Section 6)

Section 6(a) provides that:

> *"…the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding."*

The hearing takes place outside of trial and determines (i) whether the classified information sought to be used is admissible and should be disclosed and (ii) if disclosure is authorized the court also has to determine the form in which the evidence will be introduced.

The DOJ's Criminal Resource Manual describes the procedure under section 6(a) as follows:[25]

> *"The purpose of the hearing pursuant to section 6(a) of CIPA is for the court "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial...." 18 U.S.C. App. III § 6(a). The statute expressly provides that, after a pretrial section 6(a) hearing on the admissibility of evidence, the court shall enter its rulings prior to the commencement of trial. If the Attorney General or his/her designee certifies to the court in a petition that a public proceeding may result in the disclosure of classified information, then the hearing will be held in camera.*
>
> *"At the section 6(a) hearing, the court is to hear the defense proffer and the arguments of counsel, and then rule whether the classified information identified by the defense is relevant under the standards of Fed.R.Evid. 401.[26] The court's inquiry does not end there, for under Fed.R.Evid. 402, not all relevant evidence is admissible at trial. The Court therefore must also determine whether the evidence is cumulative, prejudicial, confusing, or misleading,[27] so that it should be excluded under Fed.R.Evid. 403."*

If the court orders disclosure, the United States may move that there be a substitution for such classified information with a statement admitting relevant facts that the specific classified information would tend to prove; or, the substitution for such classified information with a

[23] *US v Yunis* 867 F.2d 617 (DC Cir. 1989) at 624.
[24] Joshua Dratel, referred to by Yaroshefsky, "Secret Evidence", at 1071.
[25] DOJ Criminal Resource Manual, supra n 21.
[26] See *United States v. Smith* F.2d at 1106.
[27] See *United States v. Wilson* F.2d at 9

summary of the classified information.[28] The court will accede to the United States' request if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defence, as would full disclosure of the classified information.[29]

If the government refuses to disclose classified information or a summary of it as ordered by the court, then the court is authorised to impose sanctions on the government including dismissal of the government's case, or such part of it that depends on the use of the classified information.[30] It should be noted that the court cannot order the government to declassify the information or to turn it over to the defence; the ultimate choice of whether such information is handed over is placed with the government.[31] The government is free to choose not to disclose at the risk of the abovementioned sanctions.

[E] Protective Orders and the Use of Security Cleared Counsel

[i] The general nature of protective orders

Section 3 of the Act requires the court, upon the request of the government, to issue an order "to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case."

According to a 1980 report issued by the Senate Committee on the Judiciary, terms of a protective order may include, but are not limited to, prohibiting the disclosure of the information except as authorized by the court, as well as various provisions relating to storage and control of access to the material, and the making and handling of notes on the material.[32] Often, protective orders are filed *ex parte* and placed under seal.[33]

Those to whom a protective order applies must abide by its rules; violators may face sanctions for contempt of court, or even criminal charges.[34]

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[28] Section 6(c), CIPA.
[29] Ibid.
[30] CIPA s. 6(e)(2); *United States v. Collins*, 720 F.2d 1195, 1198 (11th Cir. 1983); *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984).
[31] *United States v Collins*, ibid.
[32] S Rep No 96-823 at 6, reprinted in 1980 USCCAN 4294 at 4299.
[33] See, for example, "Government's unopposed motion for Protective Orders", in *US v Stephen Jin-Woo Kim*, US District Court for the District of Columbia, October 2010, Obtained 22 February 2011, at http://www.fas.org/sgp/jud/kim/kim101310.pdf, at 622.
[34] Brendan M Driscoll, '*The Guantanamo Protective Order*' [2006] 30 Fordham International Law Journal 873, 887.

The DOJ Criminal Resource Manual provides a guide for prosecutors in relation to Protective Orders. It states that:[35]

> *"The protective order must be sufficiently comprehensive to ensure that access to classified information is restricted to cleared persons and to provide for adequate procedures and facilities for proper handling and protection of classified information during the pre-trial litigation and trial of the case. The requirement of security clearances does not extend to the judge or to the defendant (who would likely be ineligible, anyway)."*

It is therefore customary for protective orders to require that defence counsel obtain security clearance to prohibit such counsel from disclosing classified information to anyone who is not security cleared, including the defendant himself.

[ii] The Procedure for Obtaining Security Clearance

Defence counsel must undergo a thorough and lengthy procedure for obtaining security clearance. This is generally a three-part process: (a) an *application phase* - this involves verification of US citizenship, fingerprinting and completion of the Personnel Security Questionnaire (SF-86); (b) *background checks*; and (c) an *adjudication phase*.[36]

The US Department of State provides the following guidance on the security clearance application process:

> *"Decisions regarding eligibility for access to classified information take into account factors that that could cause a conflict of interest and place a person in the position of having to choose between his or her commitment to the United States, including the commitment to protect classified information and other compelling loyalty. Access decisions also take into account a person's reliability, trustworthiness and ability to protect classified information."*[37]

In *United States v Osama Bin Laden*,[38] defence counsel challenged the constitutionality of the requirement that defence attorneys obtain security clearance. Counsel highlighted that the process requires the disclosure of intimate, personal details including the applicant's past

[35] DOJ Criminal Resource Manual, supra n. 21.
[36] http://www.state.gov/m/ds/clearances/c10978.htm
[37] http://www.state.gov/m/ds/clearances/60321.htm
[38] 58 F. Supp. 2d 113 (S.D.N.Y. 1999) at 115.

history of mental health counseling.[39] Counsel also averred that the process compromises the defendant's right to choose his legal representative since counsel effectively cannot have conduct of the matter if security clearance is denied.[40] The court rejected this argument on the basis that "the Sixth Amendment does not promise a defendant his choice of counsel but rather aims to guarantee that each criminal defendant receives an effective advocate. *See Wheat v. United States*,486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)."[41] The court held that it was both constitutional and within the court's authority to require counsel to undergo security clearance in cases involving classified information.[42]

[iii] Access to Classified Information by Security Cleared Counsel

Wherever the court has ordered the disclosure of classified information, whether in original or summary form, security cleared defence counsel should be given access to this material. In practice, defence counsel acting in such cases have lamented that even with security clearances, they are often precluded from viewing key classified evidence:

> *" ... [the] principle issue we face as defense counsel in these cases is that we are precluded from certain information, even with security clearances. My security clearance is no less than the prosecutors', yet we are precluded from certain information by procedural rules and by a culture of secrecy that excludes us."*[43]

Protective orders may also limit the conditions or circumstances in which classified information may be viewed by cleared counsel. One example of this is in relation to Guantanamo *habeas* proceedings, discussed in further detail below.

[F] Notice of Intent to Use Classified Information

Section 5 provides that notice of a defendant's intention to disclose classified information must be communicated to the United States within a time limit specified by the court. This communication must notify the attorney for the United States and the court in writing. The defence further remains under an obligation throughout the course of the trial to provide notice to the United States whenever he or she intends to use classified information. If the

[39] Ibid. at 115 – 116.
[40] Ibid. at 119.
[41] Ibid.
[42] Ibid. at 122 – 123.
[43] Greenberg et al, *Secrecy and Government: America Faces the Future – Privacy in the Age of National Security*, The Center on Law and Security at the NYS School of Law (2009) at 47.

defendant fails to comply with the provisions of section 5, the court may preclude the admission of the evidence.

III – CRITICISMS OF CIPA

One of the chief criticisms levied against CIPA is that of the exclusion of defence counsel from *ex parte* hearings under section 4 which determine the government's disclosure obligations.[44] Critics have also lamented the imbalance created in the attorney-client relationship by virtue of the fact that the attorney is given access to the classified material while the defendant is not:[45]

> *" …even where defense counsel is allowed to access information, the defendant is not, and discussion between attorney and client is hindered. Classified evidence is often key, and defense counsel's ability to fact-find and investigate is severely crippled. Critics thus argue that CIPA has "in essence . . . created a rebuttable presumption that classified discovery materials may be adequately reviewed by defense counsel alone" and that a defendant's input is not required.*
>
> *"The imbalance of information between attorney and client also curtails defense counsel's ability to cross-examine witnesses and to access all of the evidence against a client. In addition, this presents challenges in preparing a defendant to testify. This not only puts a defendant "at a significant disadvantage" but also "call[s] into question" the "fundamental ethical mandates for counsel."[46] As one frustrated defense attorney questioned, "How do you prepare your client to testify when you have fifteen months of wiretaps related to your client that are off limits to him?"[47] A further result of this inhibited communication is the undermining of trust between attorney and client."*

These criticisms strongly resonate with those levied against Closed Material Proceedings and the compromised role of Special Advocates therein. It therefore calls into question the Special Advocates' normative claim that the use of directly instructed security cleared counsel more effectively protects the defendant's procedural rights.

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[44] Ellen Yaroshefsky, "Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts" (2006) 34 *Hofstra Law Review* 1063 at 1070.

[45] Sarah Lorr, "Reconciling Classified Evidence and a Petitioner's Right to a 'Meaningful Review' at Guantanamo Bay: A Legislative Solution" (2009) 77(5) *Fordham Law Review* 2669 at 2700 – 2701.

[46] Yaroshefsky, supra note 43.

[47] Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: Stuck in the Middle,* 2 CARDOZO PUB. L. POLICY & ETHICS J. 65 at 69 (2003).

Further criticisms against CIPA strike at whether its procedural mechanisms are appropriate for use in cases against non-government parties. According to Ellen C. Yaroshefsky, professor of Ethics and Criminal Law at Cardozo School of Law, the Act was intended for cases where a government employee who was already security-cleared and already in possession of classified information wished to admit this information in proceedings against him or her by the government in order to assist his or her case.[48] CIPA provided a procedure for allowing use of such information without compromising national security through disclosure to the public at large. Yaroshefsky argues that application of CIPA to a situation of a non-government party who does not have prior access to the classified information, which is to be admitted *against* him, distorts the original purpose of CIPA.[49]

[48] Yaroshefsky, supra note 44, pp. 1067 – 1070.
[49] Ibid.

The Operation of Security Cleared Counsel in Guantanamo Habeas Applications

I - BACKGROUND

The rights currently afforded to applicants in *habeas corpus* proceedings challenging detention in Guantanamo Bay are the result of a long process of interaction and sometimes conflict between the executive government of the US and the federal courts. A brief history of the key points of this conflict may therefore be of assistance in understanding what these rights are and how they came to be enjoyed.

Upon the establishment of a military detention facility in Guantanamo Bay, the US executive initially denied that it had an obligation to guarantee constitutional rights to those held within this facility. This contention included the constitutional right to challenge any government detention by issuing a writ of *habeas corpus* in federal courts. Challenges to an individual's detention were carried out before a specialized Combatant Status Review Tribunal (CSRT), procedures for which were governed by the *Military Commission Act* (2006) and the *Detainee Treatment Act* (2005).

Applicants before the CSRT were afforded very minimal rights, including initially being denied access to civilian lawyers and having to rely for representation upon a non-lawyer military officer assigned to the detained individual. Generally, classified information was presented only to the detained person's representative, either in whole or in summarized form, but not to the detained person. Appeal against a finding of the CSRT on the *habeas* writ was limited to narrow appeals heard by the DC Circuit of the Federal Court.

In *Boumediene v. Bush*[50], the US Supreme Court found that this system for hearing *habeas corpus* applications was unconstitutional. The Court stressed that the procedural rights constitutionally mandated for a *habeas corpus* application need not meet the rigorous requirements of a proper criminal trial. Nonetheless, the detained person must be given a "meaningful opportunity" to demonstrate that he was being held unlawfully.[51] That is, if Congress intended to suspend normal *habeas* procedures (as it did for Guantanamo Bay

[50] 553 U.S. 723 (2008).
[51] Ibid.

detainees with the *Military Commission Act*), it had to provide an adequate substitute that offered a meaningful opportunity to the detained person to demonstrate that he is being held pursuant to an erroneous application or interpretation of the relevant law, and any review or appellate procedure must have some ability to correct errors, to assess the sufficiency of the government's evidence, and to consider exculpatory evidence.

The Supreme Court held in *Boumediene* that the CSRT procedure involved serious procedural deficiencies and did not constitute an adequate substitute to normal *habeas* procedures. As a result of this seminal ruling, all *habeas corpus* applications by Guantanamo Bay detainees are now heard before federal courts.

II – PROCEDURAL FRAMEWORK REGARDING CLASSIFIED INFORMATION

It should be noted that the *Boumediene* ruling declined to lay down a detailed procedural framework regarding the handling of classified information. The Court explicitly recognized "the government['s] legitimate interest in protecting sources and methods of intelligence gathering" and expected "that the District Court will use its discretion to accommodate this interest to the greatest extent possible."[52] The precise procedure was therefore left open as a matter for the District Courts to decide. Some writers have recommended that the procedures under CIPA should be invoked in this regard.[53]

The current judicial approach appears to be that procedural mechanisms under CIPA have been used to inform the procedure in Guantanamo *habeas* cases; however, strictly speaking CIPA itself remains inapplicable to *habeas* proceedings[54] since such proceedings are not criminal in nature.

[52] *Boumediene,* 128 S. Ct. at 2276.
[53] New York State Bar Association's Committee on Civil Rights, *Supplemental Report on Boumediene v. Bush and the Procedural Framework for Guantanamo Detainee Habeas Petitions* (28 July, 2008); See also Lorr, supra note 45 at 2727.
[54] See *Al Odah v United States* No. 05-5117, 2009 WL 564310, at 7 (D.C. Cir. Mar. 6, 2009) where CIPA was applied "by analogy" to resolve a question concerning classified information in the habeas context.

The CIPA-inspired procedural framework is borne out in a report by former Federal Judges regarding the court's handling of Guantanamo *habeas* applications.[55] Regarding procedures for protecting classified information, it states:

> *"The risk that classified information will be wrongfully released to the public has been a central concern throughout the Guantánamo habeas litigation. To meet this concern, and using the considerable expertise they have developed applying the Classified Information Procedures Act (CIPA), the lower courts have fashioned a set of rules that seeks to strike a careful balance between protecting classified information and ensuring that petitioners have enough information to challenge their detention. These rules fall into two categories: restrictions on counsel and restrictions on the detainee.*
>
> *"With respect to the former, no attorney may travel to Guantánamo, meet with a detainee, or receive and review classified material unless he or she has first received a security clearance based on a thorough background investigation by the FBI. In other words, every attorney authorized to see classified information and meet with a detainee has been cleared to do so by the FBI. Even after receiving security clearances, however, counsel must agree in writing to comply with a strict Protective Order which not only lays out counsel's obligations with respect to classified information, but also warns counsel of the potential consequences, including possible criminal sanctions, should they violate the Order. One requirement of the Protective Order bars counsel from disclosing classified information to any detainee, including his or her client. Furthermore, all classified documents released by the government are stored in a secure facility in the Washington, D.C., area that is staffed by the Department of Justice 24 hours a day and closed to the public."*[56]

The section below examines in greater detail how protective orders and the use of security cleared counsel have been adapted and applied in Guantanamo *habeas* applications.

III – PROTECTIVE ORDERS AND THE USE OF SECURITY CLEARED COUNSEL

In the interest of judicial consistency, most courts handling Guantanamo prisoners' cases have adopted the same protective order issued by U.S. District Judge Joyce Hens Green on November 8, 2004.[57] This has come to be known as the Green Protective Order.

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[55] *Habeas Works: Federal Courts' proven capacity to handle Guantanamo cases*, A report from Former Federal Judges (June 2010), p. 17.
[56] Ibid.
[57] *See* Brendan M. Driscoll, "The Guantanamo Protective Order" (2006-2007) 30 Fordham International Law Journal 873 at 874-875, n. 6; In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174 at 174-183 (implementing original protective order).

The Green Protective Order outlines detailed stipulations on meetings and communication between the detainee and security cleared counsel and the extent to which correspondence between counsel and the detainee may be inspected by a "privilege team" of the US Defence Department.[58] The Green Protective Order stipulates that any material learned from a prisoner at Guantanamo is determined to be presumptively classified, and thus may not be disclosed to any unauthorised person unless it has been approved for disclosure by the privilege team or by the Court itself.[59] Further, all attorney notes taken in client meetings must be submitted to the privilege team for classification review.[60]

It should be noted that the Green Protective Order was instituted pre-*Boumediene* and thus before the management of Guantanamo *habeas* applications by Federal Courts. That said, based on our findings, there is no indication that there has been a significant departure from the Green Protective Order model in post-*Boumediene* Guantanamo *habeas* applications. In the 2010 report of Former Federal Judges, a description of the protective orders employed post-*Boumediene* bears many similarities with the Green model:

> *"…under the Protective Order, whatever the detainee shares with counsel is presumptively classified and cannot be further disclosed unless reviewed by the government and determined to be unclassified. In addition, the detainee's personal letters and even legal mail are screened by the government, which means the detainee cannot divulge classified information he learns to the outside world. In short, the District Court has taken elaborate precautions to ensure that no classified information is mishandled or inadvertently disclosed."*[61]

Baher Azmy, Professor of Law at Seton Hall Law School and counsel to one of the petitioners in *Boumediene*, sheds further light on the nature of Protective Orders in Guantanamo *habeas* cases. In an article published in 2010 (two years after *Boumediene*), Azmy notes the following:[62]

> *"The operative protective order specifically prohibits sharing classified information with detainees, absent leave of court. More restrictive procedures are in place to govern the habeas cases of the so-called "high value detainees," i.e., those detainees who the CIA secreted in "black sites" prior to their transfer to Guantanamo. The*

[58] Driscoll, ibid at 894.
[59] *See* In *re Guantanamo Detainee Cases*, 344 F. Supp. 2d at 190.
[60] Ibid.
[61] *Habeas Works*, supra note 55, p 18.
[62] Baher Azmy, "Executive Detention, *Boumediene*, and the New Common Law of Habeas" (2010) 95 *Iowa Law Review* 445 at 536.

Government dedicated a "secure facility," run by the Department of Justice Court Security Office, in which all classified information must be kept and where habeas counsel must work when preparing any filings containing classified information. Courts routinely require counsel to file documents under seal. The habeas courts have closed hearings in which counsel might disclose any classified information and even preclude detainees from listening to discussions of classified evidence at hearings."

The Doctrine of State Secrets Privilege

This section of the brief outlines the operation of the state secrets privilege in United States civil law. First, the various elements of the state secrets privilege are explained and related to United Kingdom law where applicable. Secondly, a recent application of the state secrets privilege with regard to extraordinary rendition is discussed. Thirdly, the scope of the US state secrets privilege is outlined in further depth. Finally, some general comments about the relationship between state secrets privilege and *habeas corpus* proceedings at Guantanamo Bay are offered.

I - GENERAL RULES

United States law operates a doctrine of state secrets which can be applied to 'strike out' and effectively shut down civil litigation which involves the scrutiny of security sensitive information. In that respect, the State Secrets Privilege is a 'nuclear' provision in the common law which ends all litigation if successfully relied upon by the Government. It should be noted that the State Secrets Doctrine applies to the protection of *military secrets* in litigation. However, this part of the doctrine has been subject to a rather expansive interpretation.

There are two important aspects to the state secrets doctrine: (i) the *Totten* bar, which when applied shuts down litigation altogether (the 'nuclear' provision) and (ii) procedures invoked pursuant to the *Reynolds* privilege, which to some extent mirrors the UK common law doctrine of Public Interest Immunity (PII). If information is subject to the *Reynolds* privilege then neither party (i.e. government nor applicant) can rely upon that information and it is excluded from the litigation. The decision to exclude is made by a judge. To this end, the *Reynolds* privilege operates like the rule in *Conway v Rimmer*[63] in the domestic law of PII.

The origins of the "*Totten* bar" lie in a post-Civil War contract dispute between the estate of an alleged spy (claiming that he had not been adequately compensated for espionage services during the Civil War) and the United States. The Supreme Court held that the action was barred in its entirety, given that "as a general principle public policy forbids the maintenance

[63] *Conway v Rimmer* [1968] UKHL 2.

of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters [that] the law itself regards as confidential…". According to J.S. Karich[64], the "key question in determining whether *Totten* applies is whether the very subject matter of the action is a matter of state secret and a complete bar to litigation is necessary to prevent revelation of those secrets harmful to national security." Application of the *Totten* bar is "designed not merely to defeat the asserted claims, but to preclude judicial inquiry entirely."[65] The *Totten* bar has most recently been discussed by the Supreme Court in *General Dynamics Corp v the US*[66], where Scalia J held that the principle is not a procedural rule but part of the court's common law authority to fashion contractual remedies based on public policy.

II - RECENT APPLICATION OF THE STATE SECRETS PRIVILEGE

The most recent application of the United States state secrets privilege in the context of extraordinary rendition and the 'War on Terror' took place in September 2010. In *Mohamed v Jeppesen Dataplan Inc.*[67] the 9th Circuit Court of Appeals, sitting *en banc* (i.e. with all eligible judges present), ruled by a margin of 6-5 that the State Secrets Doctrine should apply to an action in tort against Jeppesen Dataplan Inc. with the effect that the entire claim was struck out. Jeppesen Dataplan is the company alleged to have provided the aircraft used in the extraordinary rendition of terrorist suspects on behalf of the Central Intelligence Agency (CIA). Binyam Mohamed and Bisher Al-Rawi were among the Plaintiffs in this litigation.

The Plaintiffs had established the basis for their tort action pursuant to the Alien Tort Statute, 28 U.S.C. § 1350 under two broad heads of claim, the first being "forced disappearance" and the second being "torture and other cruel, inhuman or degrading treatment" by relying on information already in the public domain. The Director General of the CIA and the United States government subsequently intervened to argue that the state secrets doctrine should be

[64] JS Karich, "Restoring balances to checks and balances: checking the executive's power under the state secrets doctrine, *Mohammed v Jeppesen Dataplan, Inc"* 114 W. Va. L. Rev. 759
[65] *Tenet v. Doe*, 544 U.S. 1, 7 n.4 (2005) in *Mohamed v Jeppesen Dataplan Inc.* [13530].
[66] *General Dynamics v. United States*, 131 S. Ct. 1900 (2011)
[67] *Mohamed v Jeppesen Dataplan Inc*, Court of Appeals (9th Circuit) No. 08-15693 D.C. No. 5:07-CV-02798-JW September 8, 2010.

applied to prevent further disclosure of classified material to the litigants. The DC Court of Appeals addressed the scope of the State Secrets Doctrine as a matter of principle.

The alternative approach argued for by Mohamed *et al*, and favoured by the minority, was the application of the *Reynolds* privilege.[68] The *Reynolds* privilege operates in an extremely similar fashion to PII: where privilege is successfully claimed the relevant evidence is excluded from the litigation, allowing the litigation to continue whilst maintaining "equality of arms" between the parties. In common with PII, the case for application of privilege must be made by the equivalent of a Minister (in *Jeppesen* it was the Director General of the CIA) and independently determined by a judge.[69]

The court in *Jeppesen* noted that *Reynolds* allowed for the state secrets privilege to be asserted at any stage in the procedure, even at the pleading stage, before a request for evidence had in fact been made. The court broadly noted three circumstances in which the application of the *Reynolds* privilege might lead to dismissal of a case. These included where the plaintiff was unable to prove the prima facie elements of his claim with non-privileged evidence; where the privileged evidence was necessary for the defendant to establish a valid defence to the claim; and where the privileged evidence was inseparable from necessary non-privileged evidence, and litigating the case would present an unacceptable risk of disclosing state secrets. The last example was found to be the case in *Jeppesen*: this explains why the case could not be tried, despite the public knowledge of many of the surrounding circumstances.

III - THE SCOPE OF THE STATES SECRETS PRIVILEGE IN UNITED STATES LAW

The state secrets privilege is a doctrine of the common law of the United States of America. However, it was held by the US Supreme Court in *United States v Nixon*[70] to have a "constitutional dimension" which meant that where an executive claim of privilege "relates to

[68] *United States v. Reynolds*, 345 U.S. 1 (1953).
[69] There is a parallel rule in PII law, see *Conway v Rimmer* [1968] UKHL 2 – any claim for privilege on PII grounds by must be accompanied by a Ministerial Certificate must be evaluated *in camera* and approved by a judge.
[70] *United States v. Nixon* 418 U.S. 683, 710 (1974).

the effective discharge of a President's powers, it is constitutionally based."[71] In US Constitutional law the doctrine of deference dictates that "the Executive's constitutional authority is at its broadest in the realm of military and foreign affairs."[72] To invoke the state secrets privilege an official of the US Government must file a 'Statement of Interest' in the underlying proceedings, pursuant to 28 U.S.C. § 517.

One important example of the state secrets privilege being used to strike out a claim is furnished by *El-Masri*[73], a case concerning the government's policy of extraordinary rendition. This case provides key insight on the role and approach of the judiciary in its application of State secret's privilege and is therefore discussed in greater detail below.

El-Masri attempted to sue George Tenet, former director of the Central Intelligence Agency, alongside the airlines he alleged were complicit in his rendition. The federal district court agreed with the government's claim that state secrets were central to El-Masri's case and national security interests would be compromised should it be allowed to proceed. The court therefore dismissed the suit at the motion-to-dismiss stage, prior to the government's filing an answer to the complaint. This dismissal was upheld by the Federal Appeals Court, and the Supreme Court denied certiorari in 2007.

The judgment following the initial appeal, handed down by the Fourth Circuit Court of Appeals, has been regarded as particularly controversial. According to the majority, "in certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure. In such a situation, a court is obliged to accept the executive branch's claim of privilege without further demand." The court accordingly dismissed the possibility of an *in camera* inspection, held that the facts necessary to litigate the case were state secrets, and affirmed the District Court's dismissal of the case. Referring to *Totten*, they considered that El-Masri's case would involve detailed analysis of the workings of the CIA, and that, even if this objection were overcome, the government would be unable to adequately defend itself without the use of secret material.

[71] *United States v Nixon*, 418 U.S. 683, 710 (1974), at 711.
[72] *Khaled El-Masri v Tenet* (2007) DC Court of Appeals 4th Circuit, No. 06-1667, p. 9.
[73] *El-Masri*, No. 06-1667, 2 March 2007

The Fourth Circuit Court of Appeals also acknowledged that there was a significant amount of information about El-Masri's particular case already in the public domain. The Court saw its task as one of reviewing *de novo* the District Court's "legal determinations involving state secrets" including its decision to grant dismissal of a complaint on state secrets grounds.[74]

The Fourth Circuit declared that "a court faced with a state secrets privilege question is obliged to resolve the matter by use of a three-part analysis." The tripartite test is as follows:

(1) The procedural requirements for invoking the state secrets privilege must be met (i.e. it can be claimed only by the United States Government and not a private party, and the claim must be formally lodged with the responsible head of the relevant government department),
(2) the Court must decide whether the information for which privilege is claimed actually qualifies as privileged under the state secrets doctrine; and
(3) if the subject information is determined to be privileged, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim (i.e. should the *Totten* bar be applied or the *Reynolds* privilege).

In *El-Masri* the court considered the first leg of the tripartite test to be easily satisfied. With respect to the second leg, it asserted that the test was one of "reasonableness" tempered with "utmost deference"[75] to the responsibilities of the Executive branch. Specifically, "a court is obliged to honor the Executive's assertion of the privilege if it is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged".'[76] To explain the rule in *United States v Nixon* that "utmost deference" to the judgment of the Executive is required, the court referred to further authority on the point from the Fourth Circuit which indicated the institutional limitations of the court in the evaluation of national security information: "[t]he courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area."[77]

[74] *Sterling v. Tenet*, 416 F.3d 338, 342 (4th Cir. 2005).
[75] US v Nixon 418 U.S. 683, 710 (1974).
[76] *Reynolds*, 345 U.S. at 10.
[77] *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972).

The burden falls upon the Executive to satisfy the court that the *Reynolds* standard of "reasonable danger" is satisfied. It is open to the court to conduct an *in camera* review of the evidence for which privilege is claimed, and further, the *intensity of review* is determined with reference to "the importance of the assertedly [sic] privileged information to the position of the party seeking it. *See Reynolds*, 345 U.S. at 11."[78] However, once information is determined to be privileged under the state secrets doctrine, it is absolutely protected from disclosure — even for the purpose of *in camera* examination by the court. The Fourth Circuit said: "[*Reynolds*] could not be more specific: 'When . . . the occasion for the privilege is appropriate, [the] court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.'."[79] However, if an overwhelming amount of information satisfies the *Reynolds* privilege then the court will consider the application of the *Totten* bar.

As noted above, the Court in *El-Masri* ultimately ruled to disallow the action on the basis that establishing the truth or falsehood of Mr El-Masri's case would involve revealing information about CIA personnel decisions and possibly even testimony by CIA operatives which the court considered to be a danger to national security in itself.[80]

Moreover, the Court rejected Mr El-Masri's suggestion that a "closed" proceeding using security cleared counsel and an *in camera* trial procedure should be used to protect the classified information, yet allow his claim to proceed. In other words, El-Masri argued for something akin to the British statutory closed material procedure which operates in control order proceedings, but the court rejected this request. In dismissing El-Masri's claim for the institution of such a procedure the Court returned to the holding in *Reynolds* which states that "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[81]

The state secrets privilege has been applied to entirely strike out litigation across a wide range of subject matter, some of which would appear at first glance to have a minimal impact on national security. Actions which have been dismissed under the state secrets doctrine include dismissal of a libel action alleging that a magazine article on the Navy's classified

[78] El-Masri, p. 12.
[79] El-Masri, p. 12.
[80] El-Masri p. 17-18.
[81] *Reynolds,* 345 U.S. at 10.

marine mammal program had accused the plaintiff of espionage,[82] the dismissal of a Title VII action initiated by an African-American CIA officer alleging unlawful discriminatory practices by CIA management,[83] and of an action alleging that executive branch officials had engaged in a "campaign of harassment and psychological attacks" against the plaintiff).[84]

In the *Sterling* case, the Fourth Circuit agreed that the claim in itself engaged no state secrets, but still went on to hold that the case was untriable because "resolution of the matter would have required disclosure of how the CIA makes sensitive personnel decisions, and would have involved the production of witnesses whose very participation in a court proceeding would risk exposing privileged information."[85]

If the State Secrets doctrine is imported into United Kingdom law, which is one of the suggested routes put forward by the Intelligence and Security Committee (ISC), there is a serious risk that decisions to 'strike out' litigation on the ground of state secrets will fall foul of Articles 6 and 13 ECHR jurisprudence because it risks denying claimants access to court.[86]

IV - THE RELATIONSHIP BETWEEN STATE SECRETS PRIVILEGE AND THE OPERATION OF SECURITY CLEARED COUNSEL IN THE UNITED STATES.

The state secrets privilege is a doctrine of United States common law used in civil cases and has little bearing on the operation of security-cleared lawyers in the context of Guantanamo *habeas corpus* litigation. In *Reynolds*, Chief Justice Vinson commented that:

> *"[the] rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented."*

[82] *Fitzgerald v. Penthouse International, Ltd* 776 F.2d 1236, 1237-38 (4th Cir. 1985).
[83] *Sterling* 416 F.3d at 341 (2005).
[84] *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1140 (5th Cir. 1992)
[85] *El-Masri,* p. 20, referring to *Sterling*.
[86] *Tinnelly and Sons v United Kingdom* [1998] ECHR 56.

In other words, there is a clear disconnect between criminal and civil standards of fairness in United States law. Criminal proceedings, in which the state is always the instigator, are assumed to have a much higher standard of disclosure than civil proceedings. It is also clear from the legislative history of the CIPA that the state secrets privilege was assumed to apply only to civil litigation, and not criminal procedures. In its report on the CIPA, the House of Representatives Select Committee on Intelligence stated that 'the common law state secrets privilege is not applicable in the criminal arena.'[87] The corollary is also true: CIPA does not apply to civil litigation.

However, momentary doubt was cast upon the purely civil scope of the state secrets privilege in the criminal case of *United States v Aref*[88], in which the court considered that the statement by Chief Justice Vinson in *Reynolds* "simply sweeps too broadly". In this case, the Second Circuit thought that "the common-law privilege against disclosure of state secrets" was "the most likely source" of the governmental privilege against disclosing classified information under section 4 of the CIPA. Judge McLaughlin went on to interpret *Reynolds* as not absolutely excluding the privilege in criminal cases, but instead concluding that "it must give way under some circumstances to a criminal defendant's right to present a meaningful defense."

This interpretation of the state secrets privilege has been criticised in the case note on *Aref* in the Harvard Law Review[89] where it was warned that "[t]he political controversy and precedential implications that the state secrets doctrine has developed in civil litigation could undermine the legitimacy of prosecutions involving classified information, while spreading the privilege's use to criminal law may weaken the political checks necessary to restrain its use in civil litigation" [90], and further that *US v Aref* risks "calling two very different privileges - an absolute civil privilege marked by judicial deference and a qualified criminal privilege protected by judicial vigilance - by the same name".

As stated above, both CIPA and the state secrets privilege are inapplicable to *habeas corpus* proceedings at Guantanamo Bay. In *Boumediene v Bush*, Justice Kennedy briefly discussed the *Reynolds* privilege in the context of *habeas corpus* proceedings where national security

[87] H.R. Rep. 96-831, pt. 1, at 15 n. 12
[88] *United States v. Aref*, 533 F.3d 72 (2d Cir. 2008).
[89] 122 Harv. L. Rev. 819 (2008-2009)
[90] 122 Harv. L. Rev. 819 (2008-2009)

was at issue. After noting that the court was making "no attempt to anticipate all of the evidentiary and access-to-counsel issues" that would arise during *habeas corpus* proceedings, Justice Kennedy mentioned the *Reynolds* privilege as a comparison point after noting that the District Court would be expected to use its discretion to accommodate the Government's interest in protecting sources and methods of intelligence gathering "to the greatest extent possible;".[91]

Based on our findings, there is no evidence that the state secrets doctrine has been invoked in Guantanamo *habeas* proceedings. However, it is important to bear in mind the wide procedural flexibility conferred on District Courts in *habeas* matters in the absence of any clear procedural rules laid down in *Boumediene*. Whether such flexibility may result in the invocation of the *Reynolds* privilege remains to be seen. It is, however, highly doubtful given that procedures thus far have more closely modelled CIPA procedures invoked in criminal proceedings. Further, as noted above, the court in *Boumediene* stressed that while a *habeas* application need not meet the rigorous requirements of a criminal trial, the detained person must be given a "meaningful opportunity" for the review of his case. The application of state secrets privilege to such cases would undoubtedly call into question whether the "meaningful opportunity" standard is being met. Writers have posited that this standard is best fulfilled through the application of CIPA-type mechanisms[92] and this is the procedure which has thus far been followed by the courts.[93]

[91] *Boumediene v. Bush* 553 U.S. 723, opinion of Justice Kennedy, at 796.

[92] New York State Bar Association's Committee on Civil Rights, *Supplemental Report on Boumediene v. Bush and the Procedural Framework for Guantanamo Detainee Habeas Petitions* (28 July, 2008); See also Lorr, supra note 45 at 2727.

[93] *Habeas Works: Federal Courts' proven capacity to handle Guantanamo cases*, A report from Former Federal Judges (June 2010), p. 17; See also *Al Odah v United States* No. 05-5117, 2009 WL 564310, at 7 (D.C. Cir. Mar. 6, 2009).