THE CLASSIFIED INFORMATION PROCEDURES ACT: EFFECTS ON THE ENTRAPMENT DEFENSE AT THE EXPENSE OF DEFENDANTS

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I. INTRODUCTION

At the time of writing, no defendant charged with domestic terrorism has successfully asserted entrapment as a defense at trial.[1] While asserting this labored defense, there are numerous hurdles defendants face in a criminal proceeding.[2] Those hurdles are heightened for an accused terrorist.[3] A complex and unintended obstacle is the Classified Information Procedures Act ("CIPA"), a federal procedural statute, enacted to protect national security interests while concurrently protecting the defendant's rights.[4] As a procedural statute, CIPA "neither adds to nor detracts from the substantive rights of the defendant or the disco[v]ery obligations of the government."[5] CIPA has been repeatedly challenged since its enactment.[6] The attacks primarily rise out of constitutional violations by the procedures of CIPA.[7] This Comment argues that CIPA needs to be remodeled to close the gaps that allow the constitutional violations and better protect the constitutional rights of defendants who assert entrapment as a defense in a terrorism trial.

Terrorism simultaneously devastates and enrages society.[8] The reaction causes a unique pressure on law enforcement and courts to protect the nation while protecting individuals' rights.[9] Since the

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[1] Collin Poirot, *The Anatomy of a Federal Terrorism Prosecution: A Blueprint for Repression and Entrapment*, COL. HUM. RTS. L. REV. 85-86 (2020) (discussing the entrapment defense).
[2] Piotr M. Szpunar, *Premediating Predisposition: Informants, Entrapment, and Connectivity in Counterterrorism,* 34 CRITICAL STUD. IN MEDIA COMMC'N., 371, 374 (2017).
[3] *See id.*
[4] LARRY M. EIG, CONG. RSCH. SERV., LTR 89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 14 (1989).
[5] U.S. Dep't of Just., Just. Manual, Crim. Res. Manual § 2054, https://www.justice.gov/archives/jm/criminal-resource-manual-2054-synopsis-classified-information-procedures-act-cipa (last updated Jan. 17, 2020).
[6] Timothy J. Shea, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials*, 27 AM. CRIM. L. REV. 657, 669 (1990).
[7] *See id.*
[8] RONALD J. SIEVERT, DEFENSE, LIBERTY, AND THE CONSTITUTION: EXPLORING THE CRITICAL NATIONAL SECURITY ISSUES OF OUR TIME 2 (2005).
[9] *See id.*

horrible attacks that took place on September 11, 2001, the U.S. government went through a complete overhaul of its approach to prosecuting terrorism.[10] This resulted in the Federal Bureau of Investigation's ("FBI") preemptive approach and strategy to find potential terrorists before they strike.[11] After the investigative agency captures the suspected terrorist, the goal is to successfully prosecute the suspect.[12] When investigating suspected terrorists, the government often uses measures that are not commonly utilized in common criminal investigations.[13] These measures and the classified information obtained may be relevant to the criminal case against a defendant accused of terrorism.[14] CIPA sets up protective procedures over this classified information so the information will not be released to the public, including the defendant in some cases.[15] The procedures created by CIPA involve permitting only defense counsel, not the defendant, to view the material, allowing the prosecution substituting the actual classified information with summary of the classified information, or creating a new way for the classified information to remain outside of the public view.[16] However, these procedures come with constitutional questions.[17]

This Comment will discuss the constitutional issues that arise when a defendant who asserts entrapment as a defense must operate under CIPA procedures. For the defendant to prevail with an entrapment defense, the defendant must prove the government

[10] Christopher A. Shields et al., *How 9/11 Changed the Prosecution of Terrorism, in* THE IMPACT OF 9/11 AND THE NEW LEGAL LANDSCAPE 125, 125 (Matthew J. Morgan ed., 2009).
[11] U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, *Terrorism 2002-2005* 2, 30 (2005) [hereinafter *Terrorism 2002-2005*].
[12] U.S. Dep't of Just., Just. Manual § 9-90.210 (2020).
[13] *See* JON SHANE, CONFIDENTIAL INFORMANTS: A CLOSER LOOK AT POLICE POLICY 21 (2016); OFFICE OF INSPECTOR GENERAL, THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES (Sept. 2005), https://oig.justice.gov/sites/default/files/archive/special/0509/chapter3.htm
[14] LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 1 (1989).
[15] *See* Classified Information Procedures Act, 18 U.S.C. app. § 3.
[16] *See infra* Part IV, Section B.
[17] *See* Shea, *supra* note 6, at 661.

induced them to commit a crime.[18] This can be a challenging burden.[19] Because of terrorism's close connection to national security, the government often uses sting operations and other confidential means of investigation.[20] In cases where the defendant utilizes the entrapment defense, the government actions are under scrutiny.[21] Under CIPA, for the defendant to access any information from the investigation, the information must, at the very least, be proven relevant to their defense under the Federal Rules of Evidence.[22] However, circuits diverge when applying relevancy rules in admitting evidence.[23] CIPA emphasizes that defendants must be afforded "substantially the same ability to make his defense as would disclosure of the specific classified information."[24] This Comment will begin by outlining the background of national security and the federal government's approach to prosecuting terrorism. Next, the focus will shift to CIPA, describing how a CIPA proceeding functions, including the processes followed by the prosecution and defense. The background section will also explain the entrapment defense and why asserting the entrapment defense is more difficult with CIPA in play.

This Comment will conclude by addressing the structural problems with applying CIPA. This Comment will first analyze the difficulty in asserting entrapment as a defense in a terrorism trial with and without CIPA. Next, this Comment will discuss the possible Sixth Amendment infringements applied with an entrapment proceeding. To conclude, the Comment will analyze possible solutions to fill the gaps of CIPA proposed by both Congress and the United States Supreme Court.

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[18] U.S. Dep't of Just., Just. Manual, Crim. Res. Manual § 645, https://www.justice.gov/archives/jm/criminal-resource-manual-645-entrapment-elements (last updated Jan. 22, 2020) (citing Mathews v. United States, 485 U.S. 58, 63 (1988)).
[19] Szpunar, *supra* note 2, at 375.
[20] *See id.*
[21] *See id.*
[22] United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983).
[23] *See infra* Part V.
[24] Classified Information Procedures Act, 18 U.S.C. app. § 6(c)(1).

II. BACKGROUND

A. *Difficulties Defining National Security*

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the nation."[25] National security is intentionally understood as "broad," and the definition itself is left vague due to its constantly evolving nature.[26] Generally, national security can encompass anything within the bounds of the national defense and foreign relations of the United States.[27] The traditional idea of what national security encompassed was left in the past as the United States headed into the 21st century.[28] The United States no longer restricted the definition of national security to military security, but expanded it to address any surrounding threats.[29] The Department of Justice ("DOJ") provides an extensive list of authorized national security defenses and illegal activities, but this list is not exhaustive.[30] More recently, the Biden-Harris Administration released the 2022 National Security Strategy, noting "[t]he world is now at an inflection point. This decade will be decisive, in setting the terms of our competition with the [People's Republic of China], managing the acute threat posed by Russia, and in our efforts to deal with shared challenges, particularly climate change, pandemics, and

[25] Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).
[26] *National Security Council*, THE WHITE HOUSE, https://www.whitehouse.gov/nsc/ (last visited Sept. 5, 2022).
[27] Classified Information Procedures Act, Pub. L. No. 96–456, 94 Stat. 2025 (1980).
[28] Kim R. Holmes, *What is National Security?*, THE HERITAGE FOUNDATION 19 (Oct. 7, 2014) https://www.heritage.org/sites/default/files/2019-10/2015_IndexOfUSMilitaryStrength_What%20Is%20National%20Security.pdf.
[29] *Id.*
[30] *See id.*; *see also* U.S. Dep't of Just., Just. Manual § 9-90.010 (2016) ("National security encompasses the national defense, foreign intelligence and counterintelligence, international and internal security, and foreign relations. This includes countering terrorism; combating espionage and economic espionage conducted for the benefit of any foreign government . . . .").

economic turbulence."[31] As threats evolve, national security will demand a broader definition.[32]

In the years leading up to September 11, 2011, the United States suffered various attacks against people and infrastructure.[33] In 1993, a group of individuals, including Ramsey Yousef, executed an attack on The World Trade Center and planned to bomb various bridges and tunnels throughout New York City.[34] Additionally, in 1994, Ramsey Yousef plotted a separate attack, which included bombing airliners over the Pacific Ocean.[35] Perhaps one of the most distressing attack on America took place on April 19, 1995, when an American citizen violently attacked the Alfred P. Murrah federal building in Oklahoma with bombs.[36] Terrorism was still a new and unclear topic. Experts described the attacks as "criminal acts of terrorism" and spurred the beginning of America's definition of terrorism.[37] The FBI described the Oklahoma attacks as the deadliest event of homegrown terrorism.[38] President Clinton went one step further than the FBI in addressing an unrelated attack when he publicly denounced the perpetrators of the USS Cole bombings in Yemen and the Khobar towers attacks as "cowardly terrorists."[39]

The United States of America took a drastic shift in defense against national security threats following September 11, 2001.[40]

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[31] PRESIDENT JOSEPH R. BIDEN, THE WHITE HOUSE, NATIONAL SECURITY STRATEGY, 12-13 (Oct. 12, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf.
[32] *See National Security Council*, *supra* note 26.
[33] SIEVERT, *supra* note 8, at 37.
[34] *See id.*; Bureau of Diplomatic Sec., *1993 World Trade Center Bombing*, U.S. DEP'T. STATE (Feb. 21, 2019), https://www.state.gov/1993-world-trade-center-bombing/.
[35] *See* SIEVERT, *supra* note 8, at 37.
[36] M.E. BOWMAN, *Domestic Terrorism*, *in* NAT'L SEC. L. & POL'Y 1463 (John Norton Moore, et al. eds., 3d ed. 2015).
[37] SIEVERT, *supra* note 8, at 37.
[38] *See The Oklahoma City Bombing*, FED. BUREAU OF INVESTIGATION (Apr. 16, 2015), https://www.fbi.gov/news/stories/the-oklahoma-city-bombing-20-years-later.
[39] *See* SIEVERT, *supra* note 8, at 37.
[40] George W. Bush, The National Security Strategy of the United States of America, THE WHITE HOUSE (Sept. 17, 2002), https://georgewbush-

Following the attacks, the DOJ sharply shifted to a preventative mindset in combating terrorism.[41] This substantial difference in approach eliminated the prerequisite for violence to occur before the government could prosecute for terrorism.[42] Former Attorney General John Ashcroft mandated that the FBI and the Executive Office of U.S. Attorneys "intercept, interrupt and prosecute suspected terrorists before another event like 9/11."[43] Furthering this approach, Congress passed the Antiterrorism Act, criminalizing providing any material support or resources to designated foreign terrorist organizations.[44] This Act significantly broadened the concept of terrorism and allowed for the prosecution of many more individuals, including some without any direct connection to violence.[45] "[A] terrorist plot may be highly inchoate and also involve speech and associational activities protected by the First Amendment," and result in a prosecution and conviction.[46] Terrorism was no longer limited to a person or group, but also could also attach to nations, gaining the term "State Sponsors of Terrorism."[47]

The definitions of terrorism and act of war were seemingly blurred together, with no defined line to separate them.[48] The current United States Code defines an act of war and domestic terrorism within the same statute.[49] An act of war can involve "any act,"

whitehouse.archives.gov/nsc/nss/2002/nssintro.html ("To defeat this threat we must make use of every tool in our arsenal—military power, better homeland defenses, law enforcement, intelligence, and vigorous efforts to cut off terrorist financing," outlining eight strategies to achieve the American goal of security and protection including to "transform America's national security institutions to meet the challenges and opportunities of the twenty-first century.").

[41] *See id.*

[42] *See id.*

[43] CHRIS SHIELDS ET AL., AN ASSESSMENT OF DEFENSE AND PROSECUTORIAL STRATEGIES IN TERRORISM TRIALS: IMPLICATIONS FOR STATE AND FEDERAL PROSECUTORS xii (2008).

[44] 18 U.S.C. § 2339B(a)(1) (2015); WADIE E. SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS 5 (2015) [hereinafter CRIMES OF TERROR].

[45] *See* CRIMES OF TERROR, *supra* note 44, at 5-6.

[46] *Id.* at 11.

[47] *Id.* at 13.

[48] *Id.* at 38.

[49] *See* 18 U.S.C. § 2331(4)-(5) (2006).

regardless of whether or not war has been declared, between two or more nations.[50] Domestic terrorism means any activity "dangerous to human life," violating U.S. law, intending to influence, intimidate, or affect the United States, on U.S. territory.[51] The most notable difference between the definitions is the intended target of the aggressive act.[52] Daniel Pickard[53] described terrorism as "[v]iolence . . . used for political/religious objectives in order to effect an intended audience and thereby to alter an issue of public policy."[54] Alternatively, Donna Artz[55] stressed that to differentiate terrorism from military acts, the fundamental elements of terrorism specify that the intended targets are non-combatant civilians.[56] With vague definitions of terrorism, there comes the risk of varying applications and standards used for terrorism prosecutions.

B. The United States's Approach To Combatting Domestic Terrorism

There are a variety of federal entities and communities in the U.S. that focus their work on preserving national security and combatting domestic terrorism. The Law Enforcement Community ("LEC") is a community of federal investigative and prosecutorial agencies[57] with a mission to "identify, target, investigate, arrest, prosecute, and convict those persons who commit crimes in violation of Federal laws.[58]" The Intelligence Community ("IC") "perform[s]

[50] *Id.* at § 2331(4).
[51] *Id.* at § 2331(5).
[52] *Id.*
[53] Daniel Pickard is a partner at Wiley Rein & Fielding LLP, Washington, D.C., and Adjunct Professor of International Trade Law and Regulation at George Mason University Antonin Scalia Law School.
[54] SIEVERT, *supra* note 8, at 38 (quoting Mottola v. Nixon, 318 F. Supp. 538, 550 (N.D. Cal. 1970)).
[55] Donna Artz is the Director of the Center for Global Law and Practice at Syracuse University.
[56] *See* SIEVERT, *supra* note 8, at 38.
[57] The "Law Enforcement Community" includes all federal investigative and prosecutorial agencies, each with "very distinct identities, mandates, and methods." U.S. Dep't of Just., Just. Manual § 9-90.210 (2020).
[58] *Id.*

intelligence activities necessary for the conduct of foreign relations and the protection of the national security, including the collection of information and the production and dissemination of intelligence."[59] While both entities have distinctly different purposes, the LEC and the IC both work to protect sensitive intelligence sources.[60] Additionally, when a national security issue is involved in a criminal prosecution, the DOJ must coordinate with other entities in the military and intelligence communities.[61] The Attorney General ultimately is responsible for proceeding with a criminal prosecution where national security issues are involved.[62]

As a member of the IC, the FBI investigative techniques for domestic terrorism are conducted in accordance with the Attorney General's Guidelines on General Crimes, Racketeering Enterprise, and Terrorism Enterprise Investigations.[63] The Attorney General's Guidelines for Domestic FBI Operations takes a uniform, but broad approach to facilitating compliance standards.[64] These guidelines determine which level of investigation the FBI can take and the standards and procedures they must follow.[65] These guidelines identify domestic terrorists as "U.S. persons who reside in the United States, who are not acting on behalf of a foreign power, and who may

[59] *Id.*
[60] "The intelligence community (IC) includes the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, and the National Reconnaissance Office. It also includes the intelligence components of the Department of State, Federal Bureau of Investigation, Department of Treasury, Department of Energy, and the respective military services." *Id.*
[61] U.S. Dep't of Just., Just. Manual § 9-90.010 (2016).
[62] *Id.*
[63] *See Terrorism 2002-2005*, *supra* note 11, at iv.
[64] U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 13 (Sept. 29, 2008), https://www.justice.gov/archive/opa/docs/guidelines.pdf ("The FBI shall not hesitate to use any lawful method consistent with these Guidelines, even if intrusive, where the degree of intrusiveness is warranted . . . . This point is to be particularly observed in investigations relating to terrorism.").
[65] *See* Eric Halliday & Rachael Hanna, *How the Federal Government Investigates and Prosecutes Domestic Terrorism*, LAWFARE (Feb. 16, 2021, 11:17 AM), https://www.lawfareblog.com/how-federal-government-investigates-and-prosecutes-domestic-terrorism.

be conducting criminal activities in support of terrorist objectives."[66] The FBI identifies two distinct categories of terrorism activity: (1) "[a] terrorist *incident* is a violent act or an act dangerous to human life, in violation of the criminal laws of the United States, or of any state, to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives," and (2) "[a] terrorism *prevention* is a documented instance in which a violent act by a known or suspected terrorist group or individual with the means and a proven propensity for violence is successfully interdicted through investigative activity."[67]

In the early years following 9/11, the FBI investigated more diverse terrorism threats than expected.[68] From 2002 to 2005, there were fourteen prevented acts of terrorism.[69] Of the fourteen prevented acts of terrorism, eight stemmed from "right-wing extremism."[70] These prevented acts of terrorism included actions by white supremacists, constitutionalists, tax protestors, and anti-abortion movements.[71] The majority of the prevented acts of terrorism from this time period were carried out by domestic extremists.[72] From March 2002 to November 2002, the FBI encountered an unusual series of animal rights-related domestic acts of terrorism.[73] For example, on two separate occasions in 2002, animal rights activists the released of over 250 mink from an animal farm in Pennsylvania.[74] After the mink were released, the activists set the barn on fire.[75] The United States charged the animal rights group responsible with multiple counts of domestic terrorism, arson, and vandalism.[76]

[66] *Terrorism 2002-2005*, *supra* note 11, at iv.
[67] *Id.* at v.
[68] *See id.* at 29.
[69] *See generally id.* at 1, 29.
[70] *Id.* at 1, 29.
[71] *See id.* at 1, 29.
[72] *Terrorism 2002-2005*, *supra* note 11, at 1.
[73] *See id.* at 3.
[74] *See id.*
[75] *See id.*
[76] *See id.*

A growing fear of "radicalization"[77] resulted in a two-fold approach to investigate potential threats post 9/11.[78] The first step is "FBI informants proactively seeking out targets, suggesting a plot, and then providing the means with which to carry it out."[79] Next, the FBI begins "intense spying and surveillance."[80] Following 9/11, to stop terrorist plots before they form, the FBI and other government authorities relied heavily on inside informants and undercover surveillance operatives.[81] The FBI acted swiftly and aggressively, recruiting over 15,000 new informants following the new post-9/11 mandate.[82] Many of these informants were convicted criminals and the targeted communities were primarily Muslim American.[83] In September 2011, "FBI agents were instructed to view the Islamic faith, without any qualifiers, as a threat in and of itself."[84] The FBI alone

[77] Before 9/11, Islam and Muslim Americans were perceived as "radicalized" and "terrorists." *See* CRIMES OF TERROR, *supra* note 44, at 11. The government's preemptive approach to stopping a terrorist plot reflected an "an overt suspicion to Islam and Muslims, who are seen as inextricably linked to terrorism." *Id.* Because of this increased attention towards these communities, "the activity under scrutiny could very well be innocuous, and the defendant charged with terrorist crimes unwitting and maybe even innocent, leading to very real doubts about whether a threat actually existed in the first place." *Id.* For example, religious activity amongst Muslim communities was at risk of scrutiny. *Id.* The underlying fear was "American Muslims might become radicalized at home and then wish to launch an attack on their own." *Id.*

[78] *See id.* at 12.

[79] CRIMES OF TERROR, *supra* note 44, at 12.

[80] *Id.* ("In both situations, the effect has been deleterious to the relationship between the authorities and the communities targeted.").

[81] *See id.* at 11.

[82] Trevor Aaronson, *How This FBI Strategy is Actually Creating US-Based Terrorists*, TED CONF., at 01:46 (Mar. 2015), https://www.ted.com/talks/trevor_aaronson_how_this_fbi_strategy_is_actually_creating_us_based_terrorists.

[83] *Id.* A notable example of this is former FBI informant Craig Monteilh. "[Craig] admitted that he was a convicted criminal, and despite a non-disclosure agreement he'd signed with the agency, alleged that FBI agents sent him into mosques with no reason at all to be suspicious of their targets other than that they were Muslim. Monteilh even said that FBI agents told him to have sex with Muslim women in order to gather pillow-talk intelligence." Trevor Aaronson, *An FBI Informant Makes a New Career as a Defense Expert*, THE INTERCEPT (May 20, 2015, 10:34 AM), https://theintercept.com/2015/05/20/craig-monteilh/.

[84] CRIMES ON TERROR, *supra* note 44, at 17.

spent $3.3 billion in domestic counterterrorism efforts, compared to their $2.6 billion in expenses for traditional criminal activity in 2015.[85]

Before 9/11, the DOJ focused on prosecuting individuals and groups connected with previous acts of violence.[86] Historically, the federal government targeted threatening communities such as the Ku Klux Klan, communists, anarchists, and civil rights activists using sting operations and confidential informants to gain information.[87] The FBI continued these targeted operations in 1956 by starting the Counterintelligence Program ("COINTELPRO"), extending their targeted communities to include the Workers Party, and the Black Panther Party.[88] Acting under COINTELPRO, FBI agents were directed to "eliminate" targeted social movements.[89] The government prioritized stopping the "dangerous" people, and often forwent constitutionally protected individual rights when operating undercover.[90] This disregard of protected individual rights led to the term "agent provocateurs," meaning the officer was provoking actions to gain convictions.[91]

Confidential informants and undercover agents are potentially the most important tool for domestic terrorism

[85] Aaronson, *supra* note 83, at 00:36 (citing U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, *Authorization and Budget Request to Congress* (Mar. 2014)).
[86] *See* CRIMES OF TERROR, *supra note* 44, at 4..
[87] Carissa Prevratil, *Creating Terrorists: Issues with Counterterrorism Tactics and the Entrapment Defense*, V Ramapo J. L & Soc'y 1, 41 (2020), https://www.ramapo.edu/law-journal/files/2021/07/Volume-51ed.-Ramapo-Journal-of-Law-and-Society.pdf.
[88] *See Cointelpro*, U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, https://vault.fbi.gov/cointel-pro (last visited. Sept. 5, 2022). COINTELPRO was highly criticized for First Amendment violations and for more reasons by both Congress and the American people. *Id.* More specifically, the program was infamous for its use of heavy surveillance targeted at communities unfavorable to the government. *See* Prevratil, *supra* note 87.
[89] Jesse J. Norris, *Entrapment and Terrorism on the Left: An Analysis of Post-9/11 Cases*, 19 NEW. CRIM. L. REV. 236, 241 (2016).
[90] *See* Prevratil, *supra* note 87.
[91] *Id.* Despite the "excessive and illegal targeting" COINTELPRO authorized, no entrapment cases were ever successful in court. *See* Norris, *supra* note 89, at 236.

investigations.[92] There are three general classifications of informants: (1) anonymous tipsters, (2) non-criminal/citizen informants, and (3) criminal informants.[93] An anonymous tipster is a regular citizen looking to "aid law enforcement out of concern for society, or for their own personal safety" and does not expect compensation for their contribution.[94] A non-criminal/citizen informant is someone who "knows the offender's routine activities and patterns of behavior . . . but is not seeking any personal benefit."[95] A criminal confidential informant is offered compensation or some personal benefit in exchange for information or help with an investigation.[96] These benefits include reduced sentences, money, relief from prosecution, reduced charges, and more.[97] For example, an informant working for the FBI could earn over $100,000 for any case of terrorism they brought in.[98] Criminal confidential informants must be credible to be valued by the police.[99] Therefore, criminal confidential informants do their best to build trust with law enforcement.[100] Though law enforcement will view criminal confidential informants with skepticism at first, this hesitation often fades when law enforcement have reason to believe the criminal confidential informant gathered information related to the investigation.[101] A former FBI informant stated during an interview about confidential informants and their investigation strategies, "Is it working? Yes. It is unconstitutional? Yes. But that's where we are with our democracy today—one thing that destroys the fabric of democracy, that's terrorism, and this is how

[92] *See* Halliday & Hanna, *supra* note 65.
[93] SHANE, *supra* note 13, at 21.
[94] *See id.* at 22.
[95] *Id.* at 21.
[96] *See id.* at 22.
[97] *Id.*
[98] Aaronson, *supra* note 83, at 02:03.
[99] SHANE, *supra* note 13, at 21.
[100] *Id.* at 22.
[101] *See id.*

we combat it."[102] Today, confidential informants are still highly utilized to thwart domestic terrorism plots before they can play out.[103]

C. Individual Liberties and Domestic Terrorism

In the United States, it is a challenge to investigate and prosecute domestic threats while protecting individual liberties.[104] Terrorism presents itself in a variety of forms and The United States prosecutes individuals for crimes that fall within the purview of the growing definition of terrorist acts.[105] American law tolerates constitutionally protected unpopular speech, but law enforcement is tasked with recognizing when this speech rises to enticing violence.[106] Americans hold law enforcement to high standards and expect that police powers are only to be used for proper purposes. This expectation includes balancing the danger of domestic terrorism and the protection of U.S. citizens' constitutional rights.[107] Like all criminal defendants, those accused of domestic terrorism are guaranteed constitutional rights during their trial: the right to counsel, the right against self-incrimination, the right to an impartial jury, the right to a speedy trial, and the right to confront opposing witnesses being amongst them.[108] Yet, as society recognizes threats inching closer to home, the demand for law enforcement action increases.[109] This urgency and demand for protection tempts law enforcement to ignore the inherent freedoms of American life.[110]

D. The Confidential Information Procedures Act

The government must only file criminal charges if doing so is in the interest of justice and there is enough admissible evidence to

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[102] Jesse J. Norris, *Accounting for the (Almost Complete) Failure of the Entrapment Defense in Post-9/11 US Terrorism* Cases, 45 L. & SOC. INQUIRY 194, 215 (2020).
[103] *See* Halliday & Hanna, *supra* note 65.
[104] BOWMAN, *supra* note 36, at 1463-64.
[105] *Id.*
[106] *See id.* at 1465-66.
[107] *Id.* at 1466.
[108] U.S. CONST. amends. V, VI.
[109] *See* BOWMAN, *supra* note 36, at 1466.
[110] *Id.*

prove the charge beyond a reasonable doubt, securing a conviction.[111] When a criminal prosecution risks disclosure of classified information to the public, the government is left with the difficult decision whether to dismiss the case.[112] This became known as the "disclose or dismiss" conundrum.[113] Prior to 1980, the government lacked a standard procedure to handle classified information in criminal proceedings because there was no effective way to determine the extent, nature, or relevance of classified information.[114] To remedy this, CIPA was enacted on October 15, 1980, to set standards for criminal court proceedings.[115]

1. Legislative History of CIPA

The government faced a significant national security dilemma when prosecuting defendants using classified information prior to the enactment of CIPA.[116] There were three ways classified information was publicly being disclosed in trials: (1) through the prosecution's case-in-chief, (2) through the defendant's case-in-chief, or (3) through the discovery process.[117] In the 1970s, prior to CIPA's enactment, defendants more regularly sought access to utilize classified information in connection with their defense.[118] "'Classified information,' . . . means 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 . . . ."[119] Under

[111] CRIM. JUST. STANDARDS FOR THE PROSECUTION 3-4.3 (AM. BAR ASS'N 2017).
[112] LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 1 (1989).
[113] *Id.*
[114] *Id.*
[115] *Id.*; Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980).
[116] LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 1 (1989).
[117] Harry Graver, *The Classified Information Procedures Act: What it Means and How it's Applied*, LAWFARE, (Nov. 20, 2017, 9:00 AM), https://www.lawfareblog.com/classified-information-procedures-act-what-it-means-and-how-its-applied.
[118] *See* S. Rep. No. 96-823, at 2, 4 (1980).
[119] Classified Information Procedures Act, 18 U.S.C. app. §1(a).

Brady v. Maryland, in a criminal case, the prosecution has an obligation to the defendant to provide "exculpatory information in its possession, and to provide the defendant with government witnesses' prior written statements pursuant to the Jencks Act."[120] This information was labeled "graymail,"[121] and while this information potentially could exonerate the defendant, there were significant national security risks with its exposure.[122]

Graymail occurred in a vast range of criminal prosecutions such as: espionage, bribery by U.S. officials, giving false testimony to Congress, murder, narcotic trials, and more.[123] To avoid compromising national security information entangled with graymail, the government regularly dismissed cases where the risks of exposure were too high.[124] These dismissals came with a cost.[125] Not only was the government precluded from redress of illegal conduct, but the

[120] EDWARD C. LIU & TODD GARVEY, CONG. RSCH. SERV., R41742, PROTECTING CLASSIFIED INFORMATION AND THE RIGHTS OF CRIMINAL DEFENDANTS: THE CLASSIFIED INFORMATION PROCEDURES ACT (2012).

[121] The term "graymail" was coined because prosecutors viewed the use of this information as pressure-inducing, like blackmail. 125 Cong. Rec. 26389 (Statement of Rep. Paul Simon) (quoting an editorial authored by Rep. Morgan Murphy). A graymail threat is expressly used when "the defendant pressures for the release of classified information as a means of forcing the Government to drop the prosecution or when the defense threatens the Government with the disclosure of classified information in the hope of thwarting the prosecution." *See* Karen H. Greve, *Graymail: The Disclosure or Dismiss Dilemma in Criminal Prosecutions*, 31 Case W. Reserve L. Rev. 84, 85 n.5 (1980). Graymail can also be implied. "[i]mplied graymail describes those attempts by the defense to obtain or disclose classified information which are simply the exercise of the defendant's legitimate right to prepare and conduct an adequate defense." *See id.*

[122] 125 Cong. Rec. 26389 (Statement of Rep. Paul Simon) (quoting an editorial authored by Rep. Morgan Murphy).

[123] *Id.*

[124] LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 1-2 (1989).

[125] *Id.*

public perception[126] of a fair and just criminal system was undermined.[127]

A subcommittee of the Senate Select Committee on Intelligence presented an extensive study of national security information in the House Intelligence Committee in 1979.[128] When observing prosecutions for national security cases, the study found extensive conflicts existing within the Executive Branch.[129] Specifically, the report noted enforcing espionage prosecutions against government actors was at the very center of the issue.[130] The committee recommended a formal standardized procedure for the Attorney General to introduce relevant information with risky national security implications.[131]

CIPA was introduced to mitigate the disclose or dismiss dilemma at the early stage of trial.[132] CIPA was also intended to ensure the defendant's constitutional rights stayed protected if the case proceeded.[133] CIPA "was designed to establish procedures to harmonize a defendant's right to obtain and present exculpatory material upon his trial and the government's right to protect classified material in the national interest."[134] CIPA stresses this protection in its requirement to "provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."[135] However, from the beginning of CIPA's enactment,

[126] Cent. Intel. Agency v. Sims, 471 U.S. 159, 175 (1985) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.") (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam)).
[127] LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 2 (1989).
[128] *See id.*
[129] *Id.* at 3.
[130] *Id.*
[131] *See id.* at 3-4.
[132] *See id.* at 1-2.
[133] LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 1 (1989).
[134] United States v. Wilson, 571 F. Supp. 1422, 1426 (S.D.N.Y. 1983).
[135] Classified Information Procedures Act, 18 U.S.C. app. § 6(c)(1).

Congress noted "[i]t remains problematic whether the disclose or dismal dilemma posed by a prosecution involving sensitive information at its core can be resolved in a manner that preserves the rights of the defendant."[136]

2. CIPA Used in Criminal Prosecutions

CIPA is a procedural statute that any party may seek to use in a criminal trial.[137] A party may invoke CIPA to use information that is potentially damaging to national security interests at trial.[138] The prosecution and defendant both may need to invoke CIPA because they plan to use this information as a part of their cases in chief.[139] The defense, in particular, may need CIPA to gain access to classified information through discovery.[140] Any party may raise CIPA to have the court consider "any matters which relate to classified information, or which may promote a fair and expeditious trial."[141] CIPA does not change or affect the overarching admissibility and evidential rules for either party.[142]

An example of a standard CIPA proceeding would follow the below steps. First, the defendant is required to timely notify the prosecution of any classified information the defendant plans to introduce at any point in the criminal proceeding by requesting a pretrial conference.[143] Then, the prosecution may file a pre-trial

[136] LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW (1989).
[137] Classified Information Procedures Act, 18 U.S.C. app. § 2.
[138] *See* Graver, *supra* note 117.
[139] *Id.*
[140] *Id.*
[141] Classified Information Procedures Act, 18 U.S.C. app. § 2.
[142] *See* Graver, *supra* note 117.
[143] The defendant must make this pre-trial notice in writing to the prosecution within the provided timeframe or within 30 days before trial. *See* Classified Information Procedures Act, 18 U.S.C. § 5. If the defendant fails to make this notice, "the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information." *Id.* This is known as a "Section 5 notice." *Id.* "Section 5(a) notice requires that the defendant state, with particularity,

motion for a protective order to be placed over the information the defense is requesting.[144] This motion requires a hearing to decide the relevance and admissibility[145] of the classified information.[146] The court then evaluates the materials through *ex parte* and/or in camera hearings and decides if classified information will be at all relevant to the case.[147] During this stage, the court does not make any substantive decisions about the admissibility of evidence.[148]

Because the *ex parte* hearing excludes the defense counsel from participating when the court considers the relevance of the classified information, the *ex parte* hearing has faced many objections in the past.[149] Courts have rejected these objections based on protecting classified information from reaching the hands of the defendant themselves.[150] If the court finds any of the classified information admissible, a protective order over the material is filed by the court.[151] This protective order could apply to information provided in discovery and information in the defendant's possession.[152] Then, rather than disclosing the information, the prosecution may file to use an alternative method to provide information.[153] They may provide either "a statement admitting relevant facts that the specific classified information would tend to

which items of classified information entrusted to him he reasonably expects will be revealed by his defense in this particular case." *See Collins*, 720 F.2d at 1199-1200.

[144] Classified Information Procedures Act, 18 U.S.C. app. § 6(a).

[145] This ruling is made under Federal Rules of Evidence Rule 401 and 403 tests for evidence. Government's Motion for Pretrial Conference Under Section 2 of Classified Information Procedures Act at 10, U.S. v. Thomas Andrews Drake, No. 10-CR-00181 (D. Md. filed May 5, 2010), ECF No. 15.

[146] Classified Information Procedures Act, 18 U.S.C. app § 6(a).

[147] Government's Motion for Pretrial Conference Under Section 2 of Classified Information Procedures Act, *supra* note 145, at 2-3.

[148] *Id.*

[149] Graver, *supra* note 117.

[150] *Id.*

[151] Classified Information Procedures Act, Pub. L. 96–456, § 6(c), 94 Stat. 2025 (1980).

[152] Graver, *supra* note 117.

[153] Classified Information Procedures Act, Pub. L. 96–456, § 6(c), 94 Stat. 2025 (1980).

prove[,]"[154] or "a summary of the specific classified information."[155] If the court finds that the summary provides the defendant "substantially the same ability to make his defense as would disclosure of the specific classified information," the court *shall* grant the motion.[156] The court may also authorize the prosecution to omit classified information from the trial altogether or in part.[157]

Additionally, this allows the prosecution to object to any witness, question, or line of inquiry not ruled admissible before trial.[158] Finally, if the court denies the government's request for a protective order, the prosecution may move for an expedited interlocutory appeal.[159] This appeal could result in the dismissal of the case in whole or in part, striking of testimony, preclusion of evidence, a holding against the prosecution only on matters including confidential information, or an order mandating other action the court deems necessary.[160]

Once the initial required preliminary matters of CIPA are finished, there are still structured obligations placed on both parties to ensure classified information stays protected.[161] If the court grants a protective order, the defense must take heightened security precautions to access any information provided to them.[162] These precautions may require the defense counsel to gain established credentials.[163] Additionally, in some cases, the information may only

[154] *Id.* at § 6(c)(a).
[155] *See id.* at § 6(c)(B).
[156] *See id.* at § 6(c).
[157] LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 6 (1989).
[158] *Id.* at 12.
[159] Classified Information Procedures Act, 18 U.S.C. app. § 7.
[160] LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 10 (1989).
[161] *See* Protective Order Pertaining to Classified Information, at 11-14, United States v. Toebbe, No. 21-CR-00049 (N.D.W. Va. Nov. 8, 2021); *see also* Memorandum of Understanding Regarding Receipt of Classified Information, at 2, 21-CR-00049 (N.D.W. Va. Nov. 8, 2021), ECF No. 66.
[162] *See* Protective Order Pertaining to Classified Information, *supra* note 144, at 1.
[163] *Id.* at 2.

be provided to the defense counsel, not the defendant, and may only be accessible in a secure area.[164] This area is approved and designated by the government's Classified Information Security Officer.[165] The court may require, by way of court order, the defense counsel to obtain a security clearance and need-to-know status to access all documents relating to the case.[166] "Documents" relating to the case could encompass all information, oral statements, recordings, notes, charts, or anything else the government deems classified.[167]

E. Admissibility of Evidence Under CIPA

> [T]he trial court is required to balance the public interest in nondisclosure against the defendant's right to prepare a defense. A decision on disclosure of such information must depend on the "particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the [evidence,] and other relevant factors."[168]

This balancing test often results in a strict rule of admissibility for classified information in criminal proceedings.[169] However, these rules of admissibility should not go beyond the standard Federal Rules of Evidence.[170] Under these standards, when the court rules on evidence admissibility, it should be treated as if the evidence was not classified.[171] Even if the evidence is relevant, this does not mean the evidence will automatically be considered admissible.[172] Courts have been reluctant to apply only standard relevance rules to classified information.[173] Some courts have gone as far as granting a

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[164] *Id.* at 2, 5, 8.
[165] *Id.* at 8.
[166] *See id.* at 2.
[167] *Id.* at 4.
[168] United States v. Abu Ali, 528 F.3d 210, 247 (4th Cir. 2008) (quoting Roviaro v. United States, 353 U.S. 61, 77 (1957)).
[169] United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985).
[170] *Id.* at 1106.
[171] Alexandra A.E. Shapiro & Nathan H. Seltzer, *Litigating Under the Classified Information Procedures Act*, 45 CRIM. L. BULL 917, 921-22 (2009).
[172] *Smith*, 780 F.2d at 1106.
[173] Shapiro & Seltzer, *supra* note 171, at 923.

government "privilege"[174] when determining what information the public can see at trial.[175] These courts hold the defendant to a higher standard when the defendant argues that confidential material is relevant.[176]

Circuits are divided in the level of relevance applied in CIPA proceedings.[177] Two leading standards are provided in *Brady v. Maryland* and *United States v. Yunis*.[178] The *Brady* standard is less favorable to defendants and is the bare minimum required by the United States Supreme Court in any criminal proceeding.[179] Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[180] Whereas, the *Yunis* standard requires the evidence must be "at least 'helpful to the defense of [the] accused'"[181] to be admitted under section four of CIPA.[182] This minimized standard alters the *Brady* minimum.[183] Several circuits have adopted the *Yunis* standard.[184]

[174] United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989) ("While CIPA creates no new rule of evidence regarding admissibility, the procedures it mandates protect a government privilege in classified information similar to the informant's privilege identified in *Roviaro*.").
[175] Shapiro & Seltzer, *supra* note 171, at 923.
[176] *Id.*
[177] United States v. Amawi, 695 F.3d 457, 469-70 (6th Cir. 2012).
[178] *Id.*
[179] *Id.*
[180] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[181] *Amawi*, 695 F.3d at 470 (quoting *Roviaro*, 353 U.S. at 60-61); *see also Yunis*, 695 F.3d at 622-623.
[182] Shapiro & Seltzer, *supra* note 171, at 923.
[183] *See Yunis*, 867 F.2d at 617.
[184] United States v. Hanna, 661 F.3d 271, 295 (6th Cir. 2011); United States v. Aref, 533 F.3d 72, 79-80 (2d Cir. 2008); United States v. Moussaoui, 382 F.3d 453, 472 (4th Cir. 2004); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998); United States v. Varca, 896 F.2d 900, 905 (5th Cir. 1990); *Smith*, 780 F.2d at 1107.

F. Objections to CIPA by the Defense

CIPA's enactment came with controversy.[185] The procedural statute continues to be federally litigated based on numerous constitutional challenges.[186] The court does not take lightly fundamental challenges to a defendant's right to produce a fair trial.[187] A significant issue is the defendant's overwhelming lack of access to information.[188] Defendants argue they need access to the classified information to find exculpatory information and prepare their defense.[189] This information typically includes "information about the means or methods the government used to identify and capture" the defendant, which is not possible for them to gain without disclosure by the government.[190] The Foreign Intelligence Surveillance Court held there is no public right to information gathered the Foreign Intelligence Information Act ("FISA") by electronic surveillance.[191] Because of this holding, gathered information pursuant to FISA is classified, and there is substantial overlap between CIPA and FISA in terrorism prosecutions.[192]

While the defendant may be provided with some information, they must only rely on the summaries if the court decides the information is too risky to expose.[193] To remedy the lack of information available to the defendant, courts have suggested the defendant should "use [] the summaries of intercepts and [] other

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[185] Graver, *supra* note 117.
[186] *Id.*
[187] United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense . . . [T]he right to present a defense . . . is a fundamental element of due process of law.") (first quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973); then quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).
[188] Graver, *supra* note 117.
[189] United States v. Holy Land Found. for Relief and Dev., No. 04-CR-240, 2007 WL 2004458, at *1 (N.D. Tex. July 11, 2007).
[190] Shapiro & Seltzer, *supra* note 171.
[191] Wesley S. McCann, *Addressing the Balance: Restructuring CIPA and FISA to Meet the Needs of Justice and the Criminal Justice System*, 80 Alb. L. Rev. 1131, 1136 (2016/2017).
[192] *Id.* at 1152-53.
[193] Graver, *supra* note 117.

criteria[,] . . . then the defendants can ask the government to review and declassify."[194] When summaries of classified information are provided, defendants have argued these summarized versions are "at best useless and at worst misleading."[195] Courts continuously reject these arguments.[196] In a minority of cases, some courts found "the government is simultaneously prosecuting the defendant and attempting to restrict his ability to use information that he feels necessary to defend himself against the prosecution."[197]

Additionally, defense counsel may be required to obtain a security clearance before viewing the summary.[198] Defendants argue this is a barrier to information relevant to the their defense and a violation of their Sixth Amendment right to put forward a fair defense.[199] A prominent example of this occurred in *In re Terrorist Bombings of United States Embassies in East Africa.*[200] In this matter, multiple defendants were accused of bombings in East Africa.[201] After a court issued a protective order using CIPA, one of the defendants was not granted access to the information relevant to their defense, but his designated counsel was.[202] This required the defendant's counsel to narrowly tailor communications with the defendant regarding his defense.[203] The defendant objected on the grounds that his Fifth Amendment and Sixth Amendment right to prepare a defense was violated.[204] The court ultimately upheld CIPA's constitutionality,

[194] United States v. Holy Land Found. for Relief and Dev., No. 04-CR-240, 2007 WL 2004458, at *1 (N.D. Tex. July 11, 2007).
[195] United States v. Holy Land Found. For Relief and Dev., No. 04-CR-240, 2007 WL 628059, at *2 (N.D. Tex. Feb. 27, 2007).
[196] *See id.*
[197] *Fernandez*, 913 F.2d at 154.
[198] Graver, *supra* note 117.
[199] *See id.*
[200] *See id.*
[201] In re Terrorist Bombings of U.S. Embassies in E. Africa v. Odeh, 552 F.3d 93, 101 (2d Cir. 2008).
[202] Graver, *supra* note 117.
[203] *See id.*
[204] *See id.*

holding that the defendant's counsel could "review a category of classified documents that they [could] not share with their client."[205]

There are also controversies regarding the government's ability to withhold information surrounding CIPA.[206] While CIPA is procedural, the actual outcomes have substantive effects on what information can and cannot come into trial.[207] The *ex parte* nature of CIPA mainly draws objections from the defense.[208] When applying the heightened standard of CIPA (relevant *and* helpful), defense counsel exposes their defense strategy to the prosecution during discovery.[209]

G. The Entrapment Defense

Entrapment serves as a complete defense to a crime.[210] To prove entrapment, the defense must show "(1) government inducement of the crime, and (2) the defendant's lack of predisposition to engage in the criminal conduct."[211] When assessing the elements of entrapment, federal courts apply a subjective test.[212] Government inducement is a more complex and determinative

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[205] *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d at 118 (citing United States v. Bin Laden, U.S. Dist. LEXIS 719, at *2 (S.D.N.Y. Jan. 25, 2001).
[206] Graver, *supra* note 117.
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *See* U.S. Dep't of Just., Crim. Res. Manual § 645, https://www.justice.gov/archives/jm/criminal-resource-manual-645-entrapment-elements (last updated Jan 22, 2020); *see also* Jacobson v. United States, 503 U.S. 540, 548 (1992) (holding the theory behind entrapment is that "[g]overnment agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.").
[211] *See* U.S. Dep't of Just., Crim. Res. Manual § 645, https://www.justice.gov/archives/jm/criminal-resource-manual-645-entrapment-elements (last updated Jan 22, 2020) (citing *Mathews*, 485 U.S. at 63).
[212] Vanessa A. Edkins & Lawrence S. Wrightsman, *The Psychology of Entrapment, in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 215, 223 (G. Daniel Lassiter, ed., 2004).

element for defendants to prove.[213] Inducement requires "a showing of at least persuasion or mild coercion; . . . pleas based on need, sympathy, or friendship; or extraordinary promises of the sort 'that would blind the ordinary person to his legal duties.'"[214] If the defendant successfully proves they were induced to commit the crime, the burden then shifts to the prosecution to prove beyond reasonable doubt that the defendant was predisposed.[215]

If the court finds there was predisposition to commit the accused crime, the entrapment defense is defeated.[216] To determine if the defendant was predisposed, the court looks to see if the defendant was not cautious and availed themselves of the opportunity of committing a crime.[217] The predisposition test emphasizes the mindset of the defendant.[218] Even without acting, the court could find the defendant was still predisposed.[219] In a traditional criminal trial, predisposition can be difficult to prove because jurors have a difficult time measuring it.[220] One way the prosecution demonstrates predisposition is by submitting the defendant's previous criminal record or a rumored bad reputation.[221] However, "evidence that

[213] *See* U.S. Dep't of Just., Crim. Res. Manual § 645, https://www.justice.gov/archives/jm/criminal-resource-manual-645-entrapment-elements (last updated Jan 22, 2020) (citing *Mathews*, 485 U.S. at 63).
[214] *See id.* (first citing United States v. Nations, 764 F.2s 1073, 1080 (5th Cir. 1985); then quoting United States v. Evans, 924 F.2d 714, 717 (7th Cir. 1991)).
[215] *See* Jacobson, 503 U.S. at 548-49.
[216] *See* U.S. Dep't of Just., *supra* note 191.
[217] *See* U.S. Dep't of Just., Crim. Res. Manual § 645, https://www.justice.gov/archives/jm/criminal-resource-manual-645-entrapment-elements (last updated Jan 22, 2020) (citing Mathews, 485 U.S. at63).
[218] *See* Edkins & Wrightsman, *supra* note 212, at 223-24.
[219] *See* U.S. Dep't of Just., *supra* note 191.
[220] *See* Edkins & Wrightsman, *supra* note 212, at 224.
[221] *See id.* The authors note this is inconsistent with the general rule of criminal law. *Id.* Federal Rule of Evidence 404(b) states that "prior crimes cannot be offered to prove the defendant was more likely to have committed the present crime." *Id.* Unlike usual criminal law restrictions, the jury is also allowed to hear testimony relating to the defendant's character and background. *Id.* For example, in a case involving bribery to U.S. Members of Congress, the prosecution offered evidence, that the jury was permitted to hear, regarding defendant previously accepting cash payments in efforts to prove predisposition. *Id.* The authors note this is "circular

merely indicates a generic inclination to act . . . is of little probative value in establishing predisposition."[222] The inducement offers made by law enforcement can be very large and the attempts can be persistent.[223] If the actions of the government are so extreme, they violate "fundamental fairness"[224] of due process, the court may preclude a conviction despite finding predisposition.[225] If, and only if, the defendant meets these two elements, can the defendant prevail utilizing an entrapment defense.

Experts argue the utility of the entrapment defense has been significantly eroded overtime.[226] Specifically, in terrorism prosecutions the entrapment defense has lost momentum.[227] Because terrorism has such a significant connection to national security defense, predisposition can be shown in numerous and broad ways.[228] This creates an even higher burden for the defendant when pleading entrapment:

> Whereas in most cases the government is required to show the defendant had a narrow and concrete 'design' to commit a specific criminal act prior to being induced, this burden is therefore lessened in terrorism prosecutions, and can be met using vaguer evidence of anti-American sentiments and a desire to inflict harm on the country.[229]

Providing evidence of government inducement beyond the defendant's personal knowledge is challenging.[230] For example, even before CIPA is used, federal materials used in sting operations are

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reasoning, with no independent demonstration of their predispositions" and is "absurd." *Id.*

[222] *See Jacobson*, 503 U.S. at 550.

[223] *See* Edkins & Wrightsman, *supra* note 212, at 224-25.

[224] United States v. Russell, 411 U.S. 423, 431-32 (1973).

[225] Susan Strawn, *Spy v. Spy: The Reliance on Authority Defense in National Security Cases*, 15 AM. J. CRIM. L. 161, 165 n.20 (1987).

[226] Poirot, *supra* note 1, at 80.

[227] *See id.* at 82.

[228] *See id.*

[229] *See id.*

[230] *See id.* at 83-85 (discussing the entrapment defense).

often inaccessible to a defendant.[231] The FBI routinely does not provide potentially exculpatory evidence obtained through sting operations, such as recorded and documented conversations, to defendants.[232] The FBI has previously reasoned these actions because of device malfunctioning or lack of importance in the conversations themselves, however many critics are skeptical of these excuses.[233] When these conversations are not recorded, the evidence used in the trial will depend on the testimony of the witnesses themselves.[234] As discussed previously, this testimony can be protected by CIPA.[235]

III. ANALYSIS

A. Entrapment in a Federal Terrorism Case is Difficult to Prove

Terrorism is a unique criminal offense.[236] While the idea of terrorism itself instills fear in people, terrorism prosecution can cause political ripple effects throughout society.[237] The extent and outcome of a terrorism trial have implications outside the legal world for the prosecutors trying the case.[238] For example, the outcome of a terrorism trial is likely to invite scrutiny from political officials and the media.[239] Therefore, when a prosecutor decides to bring a terrorism case to trial, they are likely confident in the evidence they have in order to secure a conviction.

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[231] *See id.*
[232] *See* Poirot, *supra* note 1, at 84-85.
[233] *See id.*
[234] *See id.*
[235] *See* LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 9-10 (1989).
[236] *See* SHIELDS ET AL., *supra* note 43, at ii.
[237] *See generally* Alex Braithwaite, *The Logic of Public Fear in Terrorism and Counter-terrorism*, J. Police and Crim. Psych. 95, 96 (2013) (discussing how terrorists use fear to influence the masses and affect policy change); *see also* Kelly R. Damphousse and Chris Shields, *The Morning After: Assessing the Effect of Major Terrorism Events on Prosecution Strategies and Outcomes*, J. Contemp. Crim. Just. 174, 175 (2007) (discussing how major terrorism events such as 9/11 affected media attention, and thus how law enforcement and prosecutors responded to events).
[238] *See* Damphousse and Shields, *supra* note 237, at 190-191.
[239] *See* Damphousse and Shields, *supra* note 237, at 174.

As the defense counsel, it is important to understand how the affirmative defense of entrapment will impact the jury. An entrapment defense could potentially have political implications, and, therefore, will not sit well with jury members. Prosecutors may choose to politicize the defendant's conduct even with subtle innuendos throughout all stages of the trial, hinting to the jury this individual is committed to a certain ideology.[240] The Terrorism Research Center in Fulbright College conducted studies showing juries may even penalize defendants who plead an affirmative defense with a political prosecution by the U.S. government implication.[241] The study found conviction rate reached 96.7% for defendants who plead an affirmative defense with a political innuendo.[242]

If defense counsel is willing to take the risk of upsetting the jury by asserting entrapment, there must be enough evidence to show entrapment took place. The entrapment defense itself would not exist or be used unless, at some point, a court has recognized it, yet entrapment has never been successful in a terrorism trial.[243] However, even though the defense has never succeeded in a terrorism trial, [244] entrapment may be too difficult to prove, even if it took place. The defendant must be able to prove that no terrorist activity would ever have occurred without the government's involvement.[245] A jury could see the government's actions as rational to defend national security, so the evidence proving otherwise must be exceptionally strong.[246] Without strong evidence to overcome a potential jury bias, an entrapment defense may never be successful.

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[240] CHRISTOPHER A. SHIELDS, AMERICAN TERRORISM TRIALS: PROSECUTORIAL AND DEFENSE STRATEGIES 11 (2012).
[241] *See* SHIELDS ET AL., *supra* note 43, at 88.
[242] See *id.* at 52.
[243] Poirot, *supra* note 1, at 85-86.
[244] *Id.*
[245] U.S. Dep't of Just., Just. Manual, Crim. Res. Manual § 645, https://www.justice.gov/archives/jm/criminal-resource-manual-645-entrapment-elements (last updated Jan. 22, 2020) (citing *Mathews*, 485 U.S. at 63).
[246] Jesse J. Norris and Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 614 (2015).

B. Entrapment in a Terrorism Case is Even More Difficult to Prove Operating Under CIPA

A defendant can prove entrapment by showing they were induced by the government to commit the crime and they were not predisposed in doing so.247 Both of these elements require extensive, time-consuming research into the investigation by the FBI and the background of the defendant themself. An entrapment defense strategy can be derailed if, under CIPA, the court deems evidence relied upon is too confidential to be admitted and instead allows the prosecution to substitute a summary.248 While the defendant is not required to show they lacked predisposition, a better defense strategy would be to demonstrate evidence to prove their innocence.

If the defendant goes to trial, they can expect to come across many obstacles. To start, the prosecution may have the advantage of more experience, power, funds, and resources.[249] A criminal defendant accused of terrorism and going to trial is subject to a long financial and difficult journey in court.[250] However, even if the defense is highly skilled in terrorism defense and equally prepared financially, CIPA may hinder a defendant's ability to effectively assert entrapment as a defense.[251]

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[247] U.S. Dep't of Just., Just. Manual, Crim. Res. Manual § 645, https://www.justice.gov/archives/jm/criminal-resource-manual-645-entrapment-elements (last updated Jan. 22, 2020) (citing *Mathews* v, 485 U.S. at 63).

[248] *See* Rachel S. Holzer, *National Security Versus Defense Counsel's "Need to Know": An Objective Standard for Resolving the Tension*, 73 FORDHAM L. REV. 1941, 1950, 1967 (2005).

[249] Norris, *supra* note 102, at 202.

[250] Bruce Denson, *How Much Does a Criminal Defense Attorney Cost?*, HG.ORG https://www.hg.org/legal-articles/how-much-does-a-criminal-defense-attorney-cost-61222#:~:text=The%20average%20cost%20for%20misdemeanor,defense%20is%20%2410%2C000%20to%20%2420%2C000 (last visited Dec. 20, 2022). *See also, Trial and Terror*, THE INTERCEPT, https://trial-and-terror.theintercept.com/people/ (last visited Dec. 21, 2022) (choose "Awaiting Trial") (stating that since 2001, 51 defendants are accused of terrorism and awaiting trial, the longest dates back to 2009).

[251] *See e.g.,* Norris *supra* note 102 at 202.

CIPA allows the government to keep secret information that is important to the case because it is confidential and pertains to national security.[252] However, the government may release this information in the form of a summary or substitution.[253] Part of the substitution or summary involves removing the confidential information from its original form and placing it into a new context or new admissible document.[254] In addition to confidential information, agents involved in the investigation may be deemed too classified to testify as a witness.[255] To remedy this, the courts have developed different solutions.[256] Courts may allow the agent to testify under a pseudonym without disclosing confidential information, or the agent may be provided with a document with the only questions and answers they are allowed to discuss.[257] However, a very important part of asserting entrapment is cross-examination of the prosecution witnesses to show inducement.

FBI agents employ creative tactics when investigating a potential terrorism case.[258] For example, government actors may threaten a suspect's life if they do not comply with the terrorist operation, pursue a romantic relationship with the suspect, and offer the suspect extreme material incentives.[259] Impeachment of the agent can be ineffective because of the restrictions set on the testimony of the agent, the very actor the defense is accusing of initiating the crime, to protect the U.S. government. Impeachment can undermine the agent's credibility, reliability, and truthfulness. A former FBI informant noted defense attorneys are sufficiently disadvantaged in

[252] *See* Classified Information Procedures Act, 18 U.S.C. app. §§ 4, 6(a).
[253] Classified Information Procedures Act, 18 U.S.C. app. § 6(c)(1)(A).
[254] Classified Information Procedures Act, 18 U.S.C. app. § 4; *see, e.g.*, Melanie Reid, *Secrets Behind Secrets: Disclosure of Classified Information Before and During Trial and Why CIPA Should Be Revamped,* 35 SETON HALL LEGIS. J. 272, 286 (2011) (citing United States v. Dumeisi, 424 F.3d 566, 577-78 (7th Cir. 2005)).
[255] United States v. Marzook, 412 F. Supp. 2d 913, 923. 925-28 (N.D. Ill. 2006).
[256] *See* Reid, supra note 254, at 286.
[257] *See id.*
[258] *See* Norris & Grol-Prokopczyk, *supra* note 246, at 629-32, 640.
[259] *Id.*at 629.

terrorism trials when attempting to assert entrapment as a defense because of their inability to sufficiently impeach the witness.[260]

The Sixth Amendment of the Constitution guarantees a citizen's right to a fair criminal trial.[261] To have a fair criminal trial, a defendant has a right to confront evidence brought against them and confront opposing witnesses.[262] The Sixth Amendment's Confrontation Clause goes beyond guaranteeing the defense an opportunity to cross-examine the opposing witness, but it guarantees an *effective* opportunity for the defendant to confront the opposing side.[263] An important limitation the Confrontation Clause draws is the rule against hearsay: a rule that forbids "statements made by an absent witness outside of court."[264] Hearsay rules target "written reports of accusations made by a witness outside of court during an examination or interrogation by a government official."[265] Government controls have the potential to influence the *ex parte* reports prepared in place of the actual confidential testimony.[266] By allowing a summary of a witness' testimony, "the government can use its control over the drafting process to further shade and shape the witness's testimony."[267] In an entrapment case, this is especially concerning due to the allegations the defendant must make against government actors in order to win their case.

The Sixth Amendment does not give the defendant unlimited options for their choice of counsel, but it does guarantee the right to effective counsel.[268] CIPA may require a defense counsel to retain a

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[260] Norris, *supra* note 102, at 202.
[261] U.S. CONST. amend. VI; *see* SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CTR. FOR JUST., THE SECRECY PROBLEM IN TERRORISM TRIALS 11 (2005), https://www.brennancenter.org/sites/default/files/2019-08/ReportTheSecrecyProblemTerrorismTrials.pdf.
[262] *See id.* at 12.
[263] *See id.* at 11-12.
[264] *Id.* at 12.
[265] *See id.*
[266] *See* TURNER & SCHULHOFER, *supra* note 261, at 12.
[267] *Id.*
[268] *See id.* at 26; U.S. CONST. amend. VI.

security clearance before proceeding with discovery.[269] While some attorneys experienced in this area of the law may already have a security clearance prepared, others may not. On average, a Top Secret security clearance takes around 159 days to process, and a Secret clearance takes around 132 days to process.[270] A terrorism investigation and case may take many years to come to completion.[271] For example, Iyman Faris was accused of planning an attack on the United States in the 1980's and did not accept a plea deal until 2003.[272] If, during discovery, the court finds the counsel is no longer allowed to view the evidence unless they have obtained a security clearance, the defendant may be stuck with limited options how on how to proceed.[273] While some may have the funds to continue the case for the additional time needed for their current attorney to gain the necessary security requirements, others may be left needing to retain entirely new counsel immediately before discovery. Obtaining new counsel with specialized knowledge for domestic terrorism entrapment cases with an acceptable level of security clearance is a tall task for any defendant.[274] As seen in *In re Terrorist Bombings of U.S. Embassies in E. Africa,* some defendants may be located outside of the United States while being tried for domestic terrorism within the United States.[275] Depending on the location and size of the jurisdiction, few attorneys may be willing and available to defend

[269] *See* Graver, *supra* note 117.
[270] *How Long Is The Security Clearance Process Taking?*, STAFFING RES. GRP., INC. https://srg-us.com/how-long-is-the-security-clearance-process-taking/ (last visited Sept. 18, 2022).
[271] SHIELDS ET AL., *supra* note 43, at 18.
[272] U.S. Dep't of Just., *Protecting America Through Investigation and Criminal Prosecution*, https://www.justice.gov/archive/911/protect.html.
[273] *See* Graver, *supra* note 117; *see* TURNER & SCHULHOFER, *supra* note 261, at 26.
[274] For defendant Al-'Owhali, finding *any* counsel available and able to defend his rights was a challenge. When Al-'Owhali was detained, interviewed, and questioned by American authorities in Kenya for over a week, he did not have a lawyer present. He could speak very little English but continued to request an American lawyer (through a translator) and to be tried on American soil. However, there were no American lawyers available for Al-'Owhali, so he proceeded without council. As authorities continued to question Al-'Owhali, he confessed to the alleged crime. On the flight from Kenya to American, Al-'Owhali invoked his right to court-appointed council. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d at 181-185.
[275] *Id.*

defendants accused of terrorism. Defendants have argued this paradigm is giving the prosecution a "veto" over their choice of counsel.[276]

Additionally, a defendant loses the opportunity to represent themselves if the court permits only counsel with a security clearance to view the evidence. If a defendant accused of terrorism is asserting entrapment as a defense, they may have a distrust for the U.S. government and deny government-provided counsel. By denying a defendant access to see the evidence against them, the court is effectively denying a defendant their right to competent representation because the defendant is not allowed to view the material necessary to prepare their defense.[277]

IV. CLOSING UP THE GAPS IN CIPA

The framers of CIPA left courts with room to expand and elaborate on the procedures listed. While CIPA provided adequate details to courts on how to proceed to avoid disclosure of classified information, CIPA did not specify how to facilitate the means of procedures.[278] This has led to different interpretations of CIPA amongst circuits.[279] For example, courts have decided to require counsel to retain security clearances, restrict public access to trials, or require evidence to be relevant beyond the required *Brady* standard.[280] These diverging procedures result in inconsistent playing fields.

A. Congress Should Decide Whether or Not Defense Counsel Needs a Security Clearance, Not Judges

Congress did not speak to whether the defense counsel needed to retain a security clearance when CIPA was in play. The issue of this requirement appears in notable CIPA appeals.[281] When waiting until

[276] *See* TURNER & SCHULHOFER, *supra* note 261, at 26.
[277] See *id.* at 27.
[278] *See id.* at 7.
[279] *See generally*, discussion *supra* Section V and accompanying cites.
[280] *See* TURNER & SCHULHOFER, *supra* note 261, at 21 n. 39, 51, 62.
[281] *See id.* at 26.

the judge decides on a case-by-case basis, the defendant is risking a disadvantage if their attorney does not have the clearance.[282] Congress can mitigate the danger of an unequal advantage by designating whether a defense counsel is required to obtain a security clearance in the language of CIPA. By Congress setting clear and consistent standards, there is no need for the defendant to wait and see whether they can retain the current counsel they still have.

B. The Supreme Court Should Rule on an Evidence Appeal Under CIPA

The Supreme Court has been presented with numerous opportunities to take an appeal involving the differences in how classified information and testimony is admitted into evidence at trial in CIPA cases amongst circuit courts.[283] While the Supreme Court has set a low standard in *Brady*, some circuit courts have applied even lower standards of sharing evidence, making evidence more difficult to bring into trial in some circuits than in others.[284] Additionally, the "relevant and helpful" standard provided in *Yunis* requires the court to make a judgment beyond the Federal Rules of Evidence.[285] Determining if the evidence is relevant to the overall case-in-chief is a responsibility that should remain with the judge. However, deciding if the evidence is "helpful" to the defense requires the court to understand the defense's strategy prior to trial prior. If the court must decide this, the best way to understand the strategy would be for the defense to disclose their strategy to the court *ex parte*.

An entrapment defense heavily relies on evidence involving government actions throughout the investigation.[286] Information involving an agent's communications, money offers, plans, threats, relationships, etc. may be relevant.[287] However, some jurisdictions

[282] *See id.* at 27.
[283] *See Hanna*, 661 F.3d at 294-95; *Aref*, 533 F.3d at 78-80; *Moussaoui*, 382 F.3d at 472; *Klimavicius-Viloria*, 144 F.3d at 1261; *Varca*, 896 F.2d at 905; *Smith*, 780 F.2d at 1107.
[284] *See Amawi*, 695 F.3d at 471.
[285] *Yunis*, 867 F.2d at 622.
[286] *See* Norris & Grol-Prokopczyk, *supra* note 2464, at 628-33.
[287] *See id.*at 629-32.

may decide that some parts of the investigation may not be helpful to the defense and not admit them under the *Yunis* standard.[288] The Supreme Court has the opportunity to strike down the narrowing rules circuits created following *Brady* or they may establish a more standardized rule. Either way, the Supreme Court has the power to hear a case challenging this part of the evidentiary ruling and the responsibility to uphold due process.

V. CONCLUSION

"Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government."[289]

There is no question that national security is among the Unites States's top priorities. With challenges and threats constantly evolving, the United States must protect the American people.[290] Part of this protection includes protection over democracy and American ideals.[291] National security does not have one definition; like the threats, it continues to evolve and shape itself into new and necessary forms. The responsibility and commitment of the federal government to the American people increases to meet these challenges.[292] While the protection of national security is the top priority of the government, the government must respect constitutional rights and protections of its people, even those who are accused of terrorism.[293]

CIPA was designed to protect classified national security information from being improperly disclosed.[294] However, the broad procedural language of CIPA allowed the courts to fill the open gaps.[295]

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[288] *See Yunis*, 867 F.2d at 622-23.
[289] George W. Bush, The National Security Strategy of the United States of America, THE WHITE HOUSE (Sept. 17, 2002), https://georgewbush-whitehouse.archives.gov/nsc/nssall.html. l
[290] *See* BIDEN, *supra* note 31.
[291] *See id.*
[292] *See id.* at 3.
[293] *See generally* TURNER & SCHULHOFER, *supra* note 261.
[294] LARRY M. EIG, CONG. RSCH. SERV., LTR89-172, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 3 (1989).
[295] Classified Information Procedures Act, 18 U.S.C. app. §§ 1, 6.

Congress was wary of the potential implications CIPA may have for defendants, but CIPA was left unchanged.[296] This results in different circuits requiring different standards for each CIPA proceeding.

Defendants accused of terrorism have a very slim chance at winning their case with an entrapment defense while operating under CIPA. Entrapment itself is already a risky defense based upon its complete lack of success and unfavorable opinions from the jury. But when CIPA is used, the government knows exactly which evidence the defense is relying on to make their case prior to trial. Additionally, the government is responsible for summarizing the exact pieces of evidence the defense is relying on to prove the government agent acted wrong. Finally, a judge could hold under CIPA the defense counsel is no longer qualified to represent the defendant because of the lack of clearance, and the defendant must restart their defense strategy. All of these pose a challenge to the defense and strike an imbalance in the trial.

Congress can take legislative action to mitigate this imbalance. Congress must equally consider national security interests and individual liberties. The Supreme Court has ruled on evidentiary matters in the past and this area of the law has room for a new decision regarding the unsettled area of relevance amongst circuits. Overall, these are actions that can have significant effects for defendants who are being accused of very serious crimes with lengthy sentences.

After the terrorist attacks on 9/11, the counterterrorism operations drastically expanded, and prosecutions significantly increased.[297] Nonetheless when operations pass over the line of undercover investigation and into the realm of entrapment, a defendant accused of terrorism should have the same level of constitutional rights as any other criminal defendant. CIPA has the potential to infringe upon these rights. A successful entrapment defense within a domestic terrorism trial would require the jury to

[296] Graver, *supra* note 117.

[297] *See* U.S. DEP'T OF JUST., *Fact Sheet: Justice Department Counter-Terrorism Efforts Since 9/11* (Sept. 11, 2008), https://www.justice.gov/archive/opa/pr/2008/September/08-nsd-807.html.

conclude the U.S. government manufactured a terrorism plot out of an innocent United States citizen.[298] While no defendants today have been successful in proving this defense in this context,[299] if the gaps of CIPA are addressed, the entrapment defense may be revived one day.

[298] U.S. Dep't of Just., Just. Manual, Crim. Res. Manual § 645, https://www.justice.gov/archives/jm/criminal-resource-manual-645-entrapment-elements (last updated Jan. 22, 2020) (citing *Mathews*, 485 U.S. at 63).
[299] Poirot, *supra* note 1, at 85-86.