No. 04-8385

IN THE

Supreme Court of the United States

ZACARIAS MOUSSAOUI,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS BRIEF OF RUTHERFORD INSTITUTE AND ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment permits the Government to prosecute a person for a crime while denying him access to witnesses in his favor.

2. Whether the Court should grant review now, before Petitioner's trial, because (*i*) the issue is important, certain to recur, and ripe for review; (*ii*) the lower courts would benefit from the Court's guidance; and (*iii*) resolution of the issue is fundamental to the further conduct of the case.

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INTEREST OF AMICI[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. Founded in 1982 by its president, John W. Whitehead, the Institute educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have appeared as counsel before this Court and federal appeals courts in many significant civil liberties cases and have filed briefs as amici in numerous criminal procedure cases. Institute attorneys are currently handling several hundred civil rights cases nationally at all levels in federal and state courts. The Institute has also published articles and educational materials in this area. The present case raises important criminal justice and civil liberties concerns, and so is of significance to the Institute.

The Allard K. Lowenstein International Human Rights Clinic at Yale Law School has spent almost two decades working to protect core human rights values around the world. In recent years, the Clinic has paid increasing attention to efforts to ensure respect for international human rights standards – including the basic fair-trial rights at issue in this case – here in the United States.

STATEMENT

1. Petitioner is under indictment on six counts of conspiracy to wage war against the United States. Under four counts of the indictment, Petitioner faces the death penalty.

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[1] Letters of consent have been lodged. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than amici and its counsel made a monetary contribution to the preparation or submission of this brief.

Much of the indictment concerns the activities of the alleged conspiracies with respect to the September 11, 2001 terrorist attacks. The United States maintains, however, that proof of Petitioner's involvement in the September 11 attacks is not necessary to obtain a conviction, *United States v. Moussaoui*, 282 F. Supp. 2d 480, 484 (E.D. Va. 2003), and the District Court described the September 11 allegations as being of "marginal relevance" to the charges against Petitioner, at 487. Petitioner claims that he played no role in the September 11 attacks.

Invoking his rights under the Compulsory Process Clause of the Sixth Amendment, Petitioner moved before trial to depose certain potentially exculpatory witnesses are being held incommunicado by the Government. The Government opposed Petitioner's motion. The District Court found that Petitioner "ha[d] made sufficient showings that the detainees at issue could offer testimony which would undermine the Government's contention that the defendant intentionally 'participated in an act' or 'engaged in an act of violence' that directly resulted in thousands of deaths on September 11, 2001. The defense has also adequately demonstrated that the detainees could provide testimony supporting the contention that Moussaoui may have been only a minor participant in the charged offenses." 282 F. Supp. 2d at 486.

Rather than dismiss the indictment, the District Court allowed the government to propose substitutions under the standards established by the Classified Information Procedures Act, 18 U.S.C. App. 3 ("CIPA"). The Government offered to provide summaries of classified reports purporting to describe information obtained from Government interrogations of the witnesses. The reports were written to summarize information of "actionable foreign intelligence value," *United States* v. *Moussaoui*, 382 F.3d 453, 488 (4th Cir. 2004) (Gregory, J., dissenting), not to

summarize information potentially helpful to Petitioner. The content of the reports and summaries would be decided solely by the Government.

The District Court found the Government's proposed substitutions inadequate. However, in view of the Government's claim of national security, the court also denied Petitioner's motion for pretrial access to the witnesses and their production at trial. Instead, the District Court ordered that the witnesses' testimony be preserved through video depositions, under Fed. R. Crim. P. 15(a)(1), in which the witnesses would participate from a remote location and Petitioner and his counsel would question them in the presence of the court and government counsel. 382 F.3d at 458. The Government refused to allow Petitioner access to the witnesses even on these terms.

The District Court acknowledged that the usual step in such circumstances would be to dismiss the indictment. 282 F. Supp. 2d at 482-83. However, citing the "unprecedented investment of both human and material resources in this case," *id.* at 483, the court allowed the case to continue. To compensate for the Government's refusal to allow Petitioner access to the witnesses, the District Court prohibited the Government from arguing that Petitioner had any connection with the September 11 attacks and from seeking the death penalty. *Id.* at 487.

2. The U.S. Court of Appeals for the Fourth Circuit accepted an interlocutory appeal of the District Court's order. In a divided opinion, the Court of Appeals affirmed that the government could not, consistent with the Sixth Amendment, prosecute Petitioner while denying him the benefit of exculpatory witness testimony, and agreed that it was appropriate to look to CIPA for "guidance in determining the nature of the remedies that may be available" if the government refuses to provide the accused with

access to the potentially helpful witnesses. 382 F.3d at 476. CIPA authorizes a court to substitute summaries of classified information that would have otherwise been disclosed to the public at trial, *United States* v. *Moussaoui*, 333 F.3d 509, 514 (4th Cir. 2003), but only if the court finds that "the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." CIPA § 6(c)(1).

In considering the appropriate remedy for the Government's refusal to afford Petitioner access to the witnesses in his favor, the panel majority acknowledged that "[u]nder such circumstances, dismissal of the indictment is the usual course. * * * Like the district court, however, we believe that a more measured approach is required." 382 F.3d at 476 (citation omitted). But the majority rejected the District Court's remedy, holding that the District Court had erred in treating Government-prepared summaries of Government-prepared reports of Government-conducted interrogations an inherently inadequate substitute for access to the witnesses themselves. *Id.* at 477-78. The majority vacated the District Court's order and directed it to engage in an "interactive process" to compile summaries of the reports in lieu of the video deposition. *Id.* at 480.

Under this judicially improvised procedure, Petitioner's access to the witnesses would be restricted to summaries of reports of Government-written interrogation summaries. (Although Petitioner might submit questions to the government, whether these questions are asked or the answers recorded lie entirely at the discretion of government officials.) Petitioner and his counsel would select for submission to the jury portions of the Government summaries. The Government would have an opportunity to seek to include other portions to ensure that the portions

submitted to the jury would not be misleading. The District Court would then "compile the substitutions, using such additional language as may be necessary to aid the understanding of the jury." *Id.* at 482.

Judge Gregory, dissenting, objected that the majority's remedy would unconstitutionally deprive Petitioner of his right to make a capital defense by impeding his ability to show, as a mitigating factor, that he had played, at most, a minor role in the September 11 attacks. "To leave open the possibility of a sentence of death given these constraints on Moussaoui's ability to defend himself would, in my view, subvert the well-established rule that a defendant cannot be sentenced to death if the jury is precluded from considering mitigating evidence pertaining to the defendant's role in the offense." *Id.* at 488-89. Judge Gregory would have upheld the District Court's dismissal of the death notice as the appropriate remedy. *Id.* at 489.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals recognizes, for the first time in this nation's history, a "national security" exception to the Sixth Amendment. Such an exception is contrary to the very premise of an adversary system of justice. It is an exception that the Framers rejected, that Congress chose not to authorize, and that this Court has never approved. In recognizing this exception, the Court of Appeals succumbed to one of the many attempts by the Executive since September 11 to free itself from judicial accountability and constitutional constraint.

Review is warranted now, before Petitioner's trial, because the question presented is ripe for review and certain to recur, with ever-increasing frequency, in the ongoing and conceivably never-ending War on Terror. The lower federal courts would benefit from early guidance

from this Court as to what the Constitution requires and forbids when prosecutorial claims of national security clash with fair-trial rights of defendants. Review now is also warranted because resolution of the issues presented is fundamental to the further conduct of the case.

1. This case involves a question of national importance worthy of review.

a. A defendant's right to obtain witnesses in his favor is fundamental to the adversary system of justice.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973). The right of the accused in a criminal proceeding to compel the attendance of witnesses and present their testimony to a jury is "an essential attribute of the adversary system itself." *Taylor* v. *Illinois*, 484 U.S. 400, 408 (1988). As the Court has stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. *Texas*, 388 U.S. 14, 19 (1967). That Petitioner is a foreign citizen does not change the equation. See *Harisiades* v. *Mascitti*, 342 U.S. 580, 586 n.9 (1952).

Historical evidence indicates that the Compulsory Process Clause "was intended to provide defendants with

subpoena power that they lacked at common law." *Taylor*, 484 U.S. at 407. The Framers knew well that the procedural disadvantages imposed on defendants in sixteenth-century England – including the lack of compulsory process – often resulted in "innocent defendants [being put] to their deaths * * *." Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 85, 89 (1974). In incorporating the right to compulsory process into the Bill of Rights, the Framers rejected the inquisitorial common-law practice of sentencing to death defendants who stood accused of crimes against the state without affording them an opportunity to present witnesses who could rebut the sovereign's accusations. As the Court has noted:

> Justice Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all.

Washington, 388 U.S. at 19.

The Crown's abuse of its power to circumvent a defendant's ability to present favorable witnesses at trial in a criminal case gained attention in a series of celebrated treason cases, leading to the reformation of the procedural rules under the common law. Westen, *supra*, at 87-90. Ultimately, Blackstone observed, providing the prosecution and defense with equivalent compulsory process powers became a basic feature of criminal procedure: "[I]n all cases of treason and felony, all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him," and the accused "shall have the same compulsive process to bring his witnesses *for* him, as was usual to compel their appearance *against* him." William Blackstone, *Commentaries on the Laws of Eng-*

land: A Facsimile of the First Edition of 1756-1769, Vol. IV, Of Public Wrongs 345, 354 (1979 ed.) (emphasis in original).

Nine of the thirteen Colonies, plus Vermont, included in their constitutions provisions guaranteeing defendants the right to present witnesses or evidence. Westen, *supra*, at 94. "Particulars varied from state to state," but the early state constitutions shared "a common principle" of providing the defendant with a meaningful opportunity to present his defense. *Taylor*, 484 U.S. at 408 n.13. Indeed, that right was deemed so fundamental that the omission of that right (and the right to counsel) in the national Constitution was "a matter of surprise." Joseph Story, *Commentaries on the Constitution of the United States*, Vol. II, § 1794, at 599 (2001, reissue of 3d ed., 1858). The states moved swiftly to cure the omission, strongly supporting incorporation of the right to compulsory process in the Bill of Rights. Westen, *supra*, at 95-96. Unlike several other provisions that were hotly debated, the Compulsory Process Clause was approved without controversy. Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 30-34 (1951). The incorporation of this right and the right to counsel in the Bill of Rights was a "matter of honest congratulation among all the friends of rational liberty." Story, *supra*, at 599.

b. Compromising a defendant's right to obtain witnesses in his favor for reasons of national security is contrary to the intent of the Framers and this Court's cases.

Shortly after the Founding, in this nation's most famous treason case, Chief Justice Marshall rejected the notion that courts may abandon the adversarial process when faced with the Executive's claims of national secu-

rity. *United States* v. *Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14692D) (*Burr I*); *United States* v. *Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694) (*Burr II*). Accused by President Jefferson of conspiring to start a war that would jeopardize the security of the United States, Burr moved to subpoena letters in the President's possession. Chief Justice Marshall rejected the President's argument that the papers "might contain state secrets, which could not be divulged without endangering the national safety." *Burr I*, 25 F. Cas. at 31. Declaring that the Compulsory Process Clause "must be deemed sacred by the courts," *id.* at 33, the Chief Justice ruled that a court "has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defence." *Id.* at 35.

Since the Founding, the Court has consistently rejected judicially created deviations from the adversary system of justice. See, *e.g.*, *Rock* v. *Arkansas*, 483 U.S. 44 (1987); *Chambers*, 410 U.S. 284; *Washington*, 388 U.S. 14. As the Court has recently declared, the "Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and [even a well-intentioned court] * * * lack[s] authority to replace it with one of its own devising." *Crawford* v. *Texas*, 124 S. Ct. 1354, 1373 (2004).

The substitutions procedure approved by the Court of Appeals compromises a defendant's right to examine witnesses in three ways that this Court has identified as essential to the adversary process. It compromises (1) the disclosure of all relevant facts; (2) a defendant's right to control the presentation of its case; and (3) a defendant's right to submit his full case to the jury.

"The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Taylor*, 484 U.S. at 409 (citing *United States* v. *Nixon*, 418

U.S. 683, 709 (1974)). If the accused is denied the opportunity to examine potentially helpful witnesses, his presentation of exculpatory evidence is incomplete, perhaps decisively so. Here, the classified reports from which the Government prepares its summaries may not contain all exculpatory information obtained by the interrogators, and there is no means by which the trial court can ensure the accuracy or completeness of the reports. *See Moussaoui*, 382 F.3d at 487-88 (Gregory, J., dissenting). Moreover, as the panel majority acknowledged, the summaries are focused on information with foreign intelligence value and "were not prepared with this litigation in mind." *Id.* at 458 n.5. Most important, the reports, and therefore the summaries, do not contain exculpatory facts that might have become known under questioning by Petitioner. The Compulsory Process Clause has little meaning for the defendant who cannot examine potentially exculpatory witnesses and present a full version of the facts to the jury.

Under the procedure directed by the Court of Appeals, the Government would effectively serve as the agent of the accused – a logical impossibility. As this Court has stated, "[t]he determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis* v. *United States*, 384 U.S. 855, 875 (1966). The procedure approved by the Court of Appeals leaves the Government master of the defense evidence that the jury may hear, a result that this Court has condemned as incompatible with the adversary process: "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact* * *." *Id.* at 873. Even good-faith error would be cold comfort to Petitioner. *Castro* v. *United States*, 540 U.S. 375, 386-87 (2003).

Under such a procedure, the jury's role is also critically impaired. The accused is guaranteed "the right to present [his] version of the facts * * * to the jury so it may decide where the truth lies." *Washington*, 388 U.S. at 19. The right to compel the attendance of a witness effectuates "the right to have the witness' testimony heard by the trier of fact." *Taylor*, 484 U.S. at 409. By disabling the defendant from obtaining and presenting evidence in his defense, the substitution procedure leaves the jury with an incomplete, unreliable, and one-sided version of the facts. The "ends of criminal justice would be defeated" if judgment of a defendant's guilt or innocent were determined based on such a "partial" presentation of fact. *Nixon*, 418 U.S. at 709 (1974).

Finally, this Court has rejected the *ad hoc* judicial balancing conducted the Court of Appeals. Its cases make clear that when national security interests are asserted to bar a defendant's access to evidence in a criminal trial, the Government must be put to the choice of permitting the defendant to examine his witnesses or else dismissing the indictment. See, *e.g.*, *Jencks* v. *United States*, 353 U.S. 657, 672 (1957); *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953). The sanction of dismissal is remedial, "a means of protecting the rights of the Defendant, and of protecting the integrity of these judicial proceedings." *Moussaoui*, 382 F.3d at 484 n.1 (Gregory, J., dissenting).

To leave to the Government the questioning of potentially exculpatory witnesses, and the recording and preparation of descriptions of their answers (especially if in a foreign tongue), is to render the Compulsory Process Clause, and the adversary system it protects, an empty guarantee.

c. Compromising a defendant's right to obtain witnesses in his favor for reasons of national security is contrary to the intent of Congress as expressed in CIPA.

Congress enacted CIPA in response to a growing number of indictments that were abandoned by the Government because defendants, former government officials, threatened to disclose classified information to the public. Staff of Subcomm. on Secrecy and Disclosure of the Senate Select Comm. on Intelligence, *National Security Secrets and the Administration of Justice*, 95th Cong., 2d Sess. 32 (1978). In enacting CIPA, Congress sought to preempt such "graymail," but Congress never intended to compromise a defendant's right to present his defense. Such *ad hoc* judicial legislating is particularly troubling in light of CIPA's purpose of providing "uniformity, rationality and consistency" to prosecutions involving national security. H.R. Rep. No. 96-831(II), at 3 (1980) ["House Judiciary Report"]; see also H.R. Rep. No. 96-831(I) at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294 ["House Intelligence Report"].

The text of CIPA makes clear that a court may permit substitutions of classified information *only* "if it finds that the statement or summary will provide the defendant with *substantially the same ability* to make his defense as would disclosure of the specific classified information." CIPA §3(6)(c) (emphasis added). And in its report on CIPA, the House Intelligence Committee stated: "To require, as some have suggested, that a criminal defendant meet a higher standard of admissibility when classified information is at issue might well offend against" the "well-settled" principle that "the common law state se-

crets privilege is not applicable in the criminal arena." House Intelligence Report at 15 n. 12.

CIPA sets up procedures to regulate the disclosure of classified information during discovery (CIPA § 4), "any trial or pretrial proceeding" (CIPA §§ 5-6), and "the examination of a witness" (CIPA § 8(c)). As the Court of Appeals correctly concluded, *Moussaoui*, 382 F.3d at 471 n.20, none of these provisions is applicable in this case. Section 4 applies strictly to "documents," but Petitioner seeks a deposition. Sections 5 and 6 apply to "the disclosure of classified information by the defendant to the public at a trial or pretrial proceeding, not the pretrial disclosure of classified information to the defendant or his attorneys." *Moussaoui*, 333 F.3d at 514. And CIPA § 8(c) allows the Government to object to the disclosure of classified information "during the examination" of a witness.

CIPA's remedies are carefully tailored and neutral. Documents (not testimony) subject to discovery are to be appropriately reviewed and redacted by the court (not the Government) before they are disclosed to the defendant. CIPA § 4. Classified information that would be disclosed to the public in a hearing (*i.e.*, specific information, already in the defendant's possession, that the defendant developed in discovery) is subject to editing or substitution as long as the substitution "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." CIPA § 6(c)(1). The Government may object to specific witness testimony *during examination*, but not before. CIPA § 8(c).

At all times, the defendant is allowed to develop his case by conventional means, with the court intervening on the Government's objection to prevent the disclosure of particular classified information. In no case does CIPA limit the accused to evidence developed by the Govern-

ment or force the accused to rely on the Government to gather, select, and organize exculpatory evidence.

Courts applying CIPA have been punctilious in adhering to the strict standards set out in the statute and protecting defendants' fair-trial rights. The only other court to consider a proposed CIPA substitution that would have denied the defendant a full examination of a witness rejected the proposal as inadequate and unconstitutional. In *United States* v. *Poindexter*, 732 F. Supp. 142 (D.D.C. 1990) (Greene, J.), the defendant, a former National Security Advisor indicted in Iran-Contra, sought to call former President Ronald Reagan as a witness. The Government proposed that the former President be permitted to answer written interrogatories in lieu of live testimony. The District Court ruled that "written answers to interrogatories are inadequate to fulfill the essence of the Sixth Amendment right. * * * The utility of, and hence the necessity for, the give-and-take of oral testimony is obviously * * * great[ ] in a criminal case where the liberty of the accused is at stake." *Id.* at 155. The District Court ordered that President Reagan be deposed by videotape, with the District Court in attendance. Other courts have also employed procedures that protected classified information while still enabling full examination of defense witnesses.[2]

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[2] See, *e.g.*, *United States* v. *Noriega*, 117 F.3d 1206 (11th Cir. 1997) (prohibiting introduction of classified documents related to defendant's dealings with the United States Government while he was a military leader in Panama, but allowing defendant to testify to his knowledge of that relationship); *United States* v. *Rewald*, 899 F.2d 836 (9th Cir. 1989) (allowing testimony describing interactions with the CIA but not permitting defendant to reveal specific details, and noting that an individual with direct knowledge of the activities was available to testify at trial); *United States* v. *Clegg*, 846 F.2d 1221, 1223-24 (...continued)

The legislative history of CIPA confirms Congress's intent to "carefully craft[ ]" a law ensuring that "the defendant's case is not adversely affected because classified information is involved." House Judiciary Report at 19. The requirement that any substitution provide a defendant "substantially the same ability to make his defense," CIPA § 6(c)(1), was "intended to convey a standard of substantially equivalent disclosure," H.R. Conf. Rep. No. 96-1436, at 12 (1980), reprinted in 1980 U.S.C.C.A.N. 4307, 4310 ["Conference Report"], and thus requires "in effect, *equivalent* disclosure." House Intelligence Report at 20. A court's restriction or substitution "[presumes] that the defendant should not stand in a worse position, because of the fact that classified information is involved." Senate Report at 8. To that end Congress strictly limited the use of such substitutions to classified information with little relevance to the defendant:

> The Committee expects the court to pay particular attention to the language chosen for the statement or summary. Basically, the government's request

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(9th Cir. 1988) (substitution inadequate in the case of a defendant who believed his arms dealings had Government approval because certain omissions might "decrease the reasonableness of Clegg's belief that the government approved his activities"); *United States* v. *Rezaq*, 134 F.3d 1121, 1143 (D.C. Cir. 1988) (approving substitution of classified documents only after exhaustively reviewing classified information to confirm that "[n]o information was omitted from the substitutions that might have been helpful to [the] defense."); *United States* v. *North*, Crim. No. 88-0080-02, 1988 WL 148481 (D.D.C. Dec. 18, 1988) (Gesell, J.) (allowing full questioning before the jury, but redacting the trial transcript to reduce disclosure to the public); *United States* v. *George*, Crim. Nos. 91-0521 (RCL), 92-0215 (RCL), 1992 WL 200027 (D.D.C. Jul. 29, 1992) (Lamberth, J.) (having undercover CIA agents testify behind screens to protect their identities).

> should be granted in those circumstances where the use of the specific classified information, rather than the statement or summary, is of *no effective importance to the defendant.*

House Judiciary Report at 19 (emphasis added).

Congress allowed a court to substitute summaries for classified information only after it "devoted a good deal of scrutiny * * * in order to ensure that the provision is both constitutional and fair." House Intelligence Report at 19. Congress carefully reviewed "important issues of criminal procedure and constitutional law," House Judiciary Report at 5, and recognized the importance of preserving the defendant's advocatory role in the adversarial process. *Id.* at 20 (quoting *Dennis*, 384 U.S. 855, on the importance of full access to exculpatory information to the adversarial system).

Significantly, both the House and the Senate rejected suggestions that the sanctions be modified according to the importance of the national interest involved. In crafting a sanction, "the court should *not* balance the national security interest of the government against the rights of the defendant to obtain the information." Senate Report at 9 (emphasis added). Sanctions are "in no manner intended to be the result of a balancing test where the national security interest is weighed against the degree of importance the excluded evidence bears to the defendant's case." House Intelligence Report at 21.

CIPA does not embody a "compromise" between national security concerns and criminal process rights, but a commitment to the principle any accommodation to the Government's claims of national security leaves the accused no worse off that any defendant in any other case. The substitution procedure approved by the Court of Appeal is contrary to this Congressional policy.

2. The Executive's challenge to the Judicial Power also warrants the Court's attention.

Since the September 11 attacks, the Executive Branch has responded aggressively to the threat of terrorism. But it has also moved aggressively, in the name of combating terrorism, to free itself from the constraints of our historic system of checks and balances. In one instance after another, the Executive Branch has challenged a central function of the Judicial Branch in our constitutional order: restraining the Political Branches – and the federal courts themselves – from exceeding the powers granted them by the Constitution. In the trilogy of detainee habeas cases decided last summer, this Court served notice that it would not accept the Executive's effort to avoid accountability to the Judiciary when fundamental rights are at stake. *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul* v. *Bush*, 124. S. Ct. 2686 (2004); *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711 (2004).

Just as the Executive sought to suspend the Great Writ in the habeas trilogy, the Executive here seeks to suspend the Sixth Amendment; and it seeks to do so on the same basis: When the Executive invokes "national security," its powers are beyond review and therefore absolute. In this case, the Court of Appeals acquiesced in the Executive's bid to graft a national security exception onto the Constitution's guarantee of compulsory process. This Court should once again remind the lower courts – and the Executive – that "a state of war is not a blank check for the President" where constitutional rights are at stake. *See Hamdi*, 124 S. Ct. at 2650. The Court should instruct the lower courts in the constitutionally appropriate response in circumstances such as those presented here, lest lower courts emulate the Fourth Circuit's constitutionally unbalanced improvisation.

3. Review is warranted now.

Petitioner seeks review of a Court of Appeals decision that places him at risk of lengthy imprisonment – and even death – while denying him access to potentially exculpatory witnesses. The legitimacy of a national security justification for this breathtaking abridgment of Sixth Amendment rights presents an issue of manifest national importance. The occasion for the abridgement in this case – the Government's prosecution of an alleged terrorist, and its refusal to allow the accused access to witnesses on national security grounds – is likely to recur. The issue requires no further development.

Few issues could be more urgent than whether a defendant in a capital case may be denied access to potentially exculpatory witnesses because the Government claims that damage to national security might otherwise result. Few procedures could be more incompatible with basic constitutional assumptions than procedures that trust the Government to control potentially exculpatory evidence that could undermine the Government's own case. Even if the Government could be presumed to act in good faith – an assumption the Constitution does not permit in a criminal case – procedures that aim to relay potentially exculpatory testimony to a defendant using summaries of reports of translations of interviews conducted by Government agents are so inherently unreliable and unfair as to be constitutionally unacceptable.

The Court has previously granted interlocutory review on issues involving threshold questions of judicial power.[3]

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[3] *See, e.g., Cheney* v. *United States Dist. Ct.*, 124 S. Ct. 2576 (2004) (certiorari to decide Court of Appeals' power to prevent enforcement of pre-trial discovery orders that might tread on Presidential prerogatives); *Mazurek* v. *Armstrong*, 520 U.S. (...continued)

The Court has similarly granted interlocutory review when rights fundamental to the administration of justice were in question. In *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), for example, the Court "granted certiorari * * * because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Id.* at 501 (citation omitted).

The stakes in *Beacon Theatres* – a civil case – pale in comparison to the stakes here, a criminal case where the accused stands to lose not merely his liberty but his life. "The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism. As the Court explained, the need for information in the criminal context is much weightier because 'our historic[al] commitment to the rule of law * * * is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.'" *Cheney*, 124 S. Ct. at 2589 (citing *Nixon*, 418 U.S. at 708-09).

Apart from the threat to life and liberty that Petitioner faces in the future, Petitioner already has been deprived of his liberty for more than three years awaiting trial, and resolution of the issues presented is "fundamental to the further conduct of the case." *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 377 (1945).[4] The scope of Petitioner's

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968 (1997) (per curiam) (certiorari to review an order vacating a denial of a preliminary injunction of a 'physicians-only' abortion law); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 44 (1938) (certiorari to review decision affirming district court's equity jurisdiction to enjoin NLRB proceedings).

[4] In *General Motors*, the Court granted interlocutory review to decide whether costs for vacating a property acquired by gov-
(...continued)

Compulsory Process rights (and the constitutionality of any remedy granted by the courts) is a threshold issue of law. Requiring Petitioner's case to go forward now would risk an enormous waste of judicial resources on an important issue that is likely to recur and ripe for review, and would risk retrial of Petitioner.

Given the ongoing and possibly never-ending War on Terror, prosecutions in terrorism cases such as this are certain to recur. Until this Court provides guidance, the lower courts will have only the majority opinion of the Court of Appeals to consult as on-point authority, its errant gloss on this Court's Sixth Amendment jurisprudence notwithstanding. For this reason as well, review now is warranted.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully,

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ernment taking are an expense requiring compensation. Other cases in which the Court has granted review of interlocutory orders because the question presented "is fundamental to the further conduct of the case" include *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 153 (1964) (certiorari to decide whether the Jones Act provides an exclusive remedy); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (certiorari to review decision implicating sovereign immunity defense); and *Land* v. *Dollar*, 330 U.S. 731, 734 (1947) (certiorari to review of reversal of dismissal of action against United States).

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