

Prosecuting Suspected Terrorists: The Role of the Civilian Courts

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Although the George W. Bush Administration has successfully prosecuted dozens of terrorism cases in the federal courts since the 9/11 attacks,¹ Administration officials and other observers continue to argue that we need a special forum or specialized procedures for at least some sorts of terrorism cases. The principal concern has been that the rights available in federal court—especially the defendant’s rights to confront the evidence against him, to obtain evidence in his favor, and to be tried in a public proceeding—could jeopardize classified information that must be kept secret. On the other hand, any process that compromises these rights can unfairly hamper a defendant’s ability to defend himself and can open the door to the abuse of executive power.

One attempt to solve this problem has taken the form of an entirely new system of tribunals—the military commissions designed to try terrorism suspects under rules of procedure and evidence crafted specifically with terrorism prosecutions in mind. That approach, ostensibly intended to streamline the trial process and avoid the supposed complexities of federal criminal procedure, has thus far had the opposite effect. While terrorism prosecutions in the federal courts have proceeded with no more complication and delay than attend any complex criminal case, the military commissions have been mired in litigation and have yet to result in a single trial.² At the same time, the military commission system, though it has yet to yield any discernable benefits for the United States, has hampered cooperation with European allies and exacted heavy reputational costs that damage our effectiveness in many ways. If the military commission system itself is unnecessary, moreover, those costs are entirely needless.

The need for a special system of tribunals has been wildly exaggerated. The federal courts are already well-equipped to protect classified information and to handle all the other supposed complexities of terrorism trials. Quite simply, terrorism suspects

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¹ For compilations of post-9/11 terrorism prosecutions, see CTR. ON LAW & SEC.: NYU SCHOOL OF LAW, *TERRORIST TRIALS: A REPORT CARD* (2005), available at <http://216.239.59.104/search?q=cache:FH3YbvXMEyQJ:www.lawandsecurity.org/publications/terroristtrialreportcard.pdf+%22Terrorist+Trials:+A+Report+Card%22&hl=en&ct=clnk&cd=1&gl=us>.

² In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court held that the military commission system, as established by the President’s executive order, conflicted with existing statute and treaty law, and that the entire system as it then stood was therefore void. Congress responded by passing the Military Commissions Act of 2006, 10 U.S.C.A. §948a et seq. (Supp. 2008), authorizing yet another new system that will again be challenged in the federal courts. In the only military commissions case concluded to date, David Hicks pleaded guilty to a single count of providing material support to terrorism, under an arrangement that allowed him to return home to serve his nine-month sentence in his native Australia. See Michael Melia, *Australian Gitmo Detainee Gets 9 Months*, WASH. POST, Mar. 31, 2007; Josh White, *Australian’s Guilty Plea is First at Guantanamo*, WASH. POST, Mar. 27, 2007, at A1. [Editor’s Note: Since the drafting of this article, the military commission trial of Salim Hamdan has occurred.]

can and should be indicted and tried for their alleged crimes in the ordinary civilian court system. That approach will avoid further damage to America's reputation for respecting human rights, and it will enhance our ability to win the whole-hearted cooperation of our allies in the global counterterrorism effort, including our ability to extradite terror suspects held in allied nations abroad. That approach will ensure an essential check on government power through independent judicial oversight of the momentous executive decision to deprive an individual of his liberty.

Not least important, and somewhat paradoxically, that approach will also permit much more expeditious and efficient prosecution, conviction and punishment than a newly created system of military tribunals will ever be able to achieve. Supporters of the new military tribunals are mostly well-intentioned patriots who are genuinely disturbed by the prospect of jeopardizing classified information in conventional trials. But in many instances they also seem to be influenced by instinctive mistrust of judicial oversight, by unwarranted confidence in the probity and competence of an unchecked executive, and by a failure to focus on a pragmatic assessment of the most practical means available to get the job done. Detainees who have indeed perpetrated or attempted to launch acts of brutal violence against defenseless civilians should be convincingly convicted and promptly, severely punished; yet the military tribunal system has allowed these individuals to paint themselves as victims. Reliance on proven procedures of unquestioned legitimacy would eliminate that distraction and quickly return the focus of attention, as it should be, to the actual culpability of the alleged perpetrators.

What, then, would be the impact on the government's exceedingly important interest in protecting sources and methods of sensitive intelligence? Although the conflict between affording a traditional adversarial trial and protecting classified information is often portrayed as irreconcilable, federal courts have decades of experience dealing with precisely this dilemma. And the courts have repeatedly shown that the tensions between secrecy and accountability can be minimized or avoided altogether. Most prominently, the Classified Information Procedures Act ("CIPA") allows courts to filter out any classified information that is not strictly necessary to the resolution of the disputed issues in the case.³

The CIPA statute has proven highly effective. Between 1966 and 1975, only two espionage prosecutions were brought in federal court.⁴ Since CIPA's enactment, however, there have been dozens of espionage prosecutions—62 during the 1980s alone.⁵ The Senate Select Committee on Intelligence concluded shortly before 9/11 that CIPA "has proven to be a very successful mechanism for enabling prosecutions that involve national security information to proceed in a manner that is both fair to the defendant and protective of the sensitive national security intelligence information."⁶

CIPA has also worked well in terrorism prosecutions. In most of the major terrorism cases brought in the 1990s, CIPA was not much needed because few secrecy issues arose. Yet, these cases included prosecutions against those responsible for the 1993 World Trade Center bombing, the prosecution of Ramzi Yousef for the foiled 1994 attempt to blow up twelve airliners over the Pacific, and the prosecution of Ahmed

³ Classified Information Procedures Act, 18 U.S.C. app. § 3, (2008).

⁴ See GRIFFIN B. BELL & RONALD J. OSTROW, *TAKING CARE OF THE LAW* 106 (1982).

⁵ See KATHERINE L. HERBIG & MARTIN F. WISKOFF, DEF. PERSONNEL SEC. RESEARCH CTR., *ESPIONAGE AGAINST THE UNITED STATES BY AMERICAN CITIZENS 1947-2001* 11 (2002), available at <http://www.fas.org/sgp/library/spies.pdf> (hereinafter "Espionage Report").

⁶ S.Rep. No.107-5, at 34 (2001), available at http://www.fas.org/irp/congress/2001_rpt/srep107-51.html.

Rassam for the December 1999 Millennium Plot to detonate a bomb at Los Angeles International Airport. The government uncovered damning physical evidence against the defendants in all of these cases and did not need to rely on evidence involving classified sources or methods.

One case in which CIPA was put to the test before 9/11 was the embassy bombings prosecution, brought in the wake of the simultaneous August 1998 attacks carried out on the U.S. embassies in Kenya and Tanzania. The indictment charged the defendants with a wide-ranging conspiracy to attack American citizens, including the embassy bombings and numerous other terrorist acts. The broad scope of the alleged conspiracy implicated a vast amount of discoverable material, much of it classified. Yet CIPA (along with related protective measures) prevented any improper disclosure of such information.

Discovery, rather than trial, is where most classified information problems arise in a terrorism prosecution. CIPA requires the judge to make difficult determinations about precisely what information should be disclosed to the defense and what information should be withheld. Deciding what information is “helpful” or “essential” to the defense may be impossible without standing in defense counsel’s shoes. Moreover, where large amounts of potentially discoverable classified materials are involved, the problem is compounded; requiring a judge to sift through all the materials to determine what bits of information must pass through to the defense may be extremely laborious. In light of these practical difficulties, courts applying CIPA in the terrorism context have sought to facilitate the production of classified discovery materials, by ordering their disclosure only to members of the defense team who have obtained the requisite security clearance. In effect, these protective orders allow cleared counsel to review classified discovery materials, while blocking the defendant or members of his entourage from seeing the materials and possibly passing sensitive information on to confederates. Such a protective order was successfully used in the embassy bombings case, for example; a substantial quantity of classified information was provided to cleared counsel during discovery on a “counsel’s eyes-only” basis.⁷

CIPA does not specifically authorize the cleared-counsel process and “counsel’s eyes-only” protective orders. Nonetheless, courts have inherent power to structure the discovery process,⁸ and they have used it to restrict the defendant’s access to classified discovery materials in terrorism cases, in effect supplementing CIPA.

As a pragmatic matter, the “counsel’s eyes-only” solution collapses if the defendant is his own lawyer. This wrinkle arose in *Moussaoui*, in which the defendant sought to represent himself. The trial court originally found Moussaoui competent to do so but warned that, even if he chose to act as his own counsel, he might not be able to review classified evidence in the case.⁹ When Moussaoui later moved for access to classified discovery materials, the judge denied the request. Moussaoui’s interests, she ruled, could be adequately protected by disclosing classified materials instead to “standby” defense counsel, appointed by the court to provide a second voice representing Moussaoui’s interests.¹⁰ It is an open question whether such an arrangement

⁷ See *United States v. Bin Laden*, 2001 WL 66393 (S.D.N.Y.2001) (upholding constitutionality of protective order).

⁸ See FED. R. CRIM. P. 16(d)(1) (“At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief”).

⁹ See Philip Shenon, *Judge Lets Man Accused in Sept. 11 Plot Defend Himself*, N.Y. TIMES, June 14, 2002, at A27.

¹⁰ See *United States v. Moussaoui*, 2002 WL 1987964, at *1 (E.D. Va. 2002).

can be squared with Supreme Court case law holding that a trial judge cannot force counsel upon a defendant found competent to represent himself.¹¹

It would be useful for Congress to refine and formalize the cleared-counsel model. In past terrorism cases, security clearances for defense counsel and related personnel have been issued *ad hoc* in each case. But background investigations required for clearance can take months to complete and, therefore, can delay a case considerably. A permanent, institutional mechanism would provide better assurance that cleared defense personnel are always available quickly for terrorism cases. While such pre-cleared counsel should not supplant the defendant's choice of counsel, they could at least provide a supplement, perhaps serving as standby counsel designated to review classified discovery materials where defendant's chosen counsel lacks the requisite clearance. Equally important is developing a corps of cleared paralegals, translators, and other personnel whose assistance defense counsel or judges may need.

Congressional attention should also be directed toward defining appropriate limits on the cleared-counsel discovery model. There are dangers inherent in blocking a counsel from consulting with his client when reviewing sensitive discovery materials. In the ordinary criminal case, a defendant is entitled to review all materials produced by the government during discovery and to consult with counsel about them. Excluding the defendant from this process when classified discovery materials are involved may force defense counsel to operate in the dark. Although to date, defense counsel have been able to analyze most discovery materials without the client's assistance, some situations could require the defendant's input. For example, if the government produces intercepts of communications involving events in which the defendant took part, the defendant may be better situated than counsel to decipher the communications and determine how they might fit into his defense. Without the ability to ask his client about the intercepts—*e.g.*, who the parties to the conversation are, or whether the government's translation of the intercepts is accurate—defense counsel may be deprived of the ammunition essential to mount an effective adversarial challenge.

Courts recognize the validity of these concerns. Thus, where courts have ordered classified discovery materials to be disclosed to cleared defense counsel only, they have still left the door open for counsel to demonstrate a need to consult with the defendant about specific materials. In essence, courts have created a rebuttable presumption that classified discovery materials may be adequately reviewed by defense counsel alone. To prove otherwise, counsel bears the burden of showing that the defendant's personal input is necessary in order to evaluate a particular item of information adequately.¹² Congress would do well to examine this standard carefully. Particularly in circumstances in which discovery materials relate to events about which the defendant has personal knowledge, it seems unrealistic and unfair to expect counsel to bear that burden at a point when he has not been allowed to ascertain what his client could tell him.

¹¹ See *Faretta v. California*, 422 U.S. 806, 833-36 (1975).

¹² See *Bin Laden*, 2001 WL at *4; *United States v. Rezaq*, 156 F.R.D. 514, 524. Courts in terrorism cases have also excluded the defendant from being personally present in any CIPA proceedings (*i.e.*, proceedings regarding whether and in what form classified information may be obtained in discovery or used at trial). While such exclusion has been challenged by defense counsel, again on the grounds that the defendant's personal input is necessary to evaluate the relevance of classified information to the case, courts have held that CIPA proceedings concern matters of law rather than fact and can be adequately argued by defense counsel, without the defendant's personal presence. See, *e.g.*, *id.* at *6-*7; *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261-62 (9th Cir. 1998).

In terrorism cases to date, neither the prosecution nor the defense has used classified information directly as evidence at trial. Classified information has been declassified by intelligence officials prior to trial and subsequently used as evidence, and classified information has also been replaced with unclassified substitutions under CIPA. Nonetheless, it is foreseeable that in some future case, it may be imperative to maintain the confidentiality of sensitive information, such as the identity of a witness.

Restricting the public's access to such information is one way to address these concerns. CIPA itself does not authorize a court to facilitate the use of classified information by excluding the public from trial. Nevertheless, courts have inherent authority to restrict public access in order to accommodate a compelling governmental interest, so long as the restrictions are no broader than necessary.¹³ The justifications for such closures apply with considerable force in the CIPA context, where forcing a Central Intelligence Agency ("CIA") agent or intelligence source to testify in public could jeopardize not only the witness's safety, but also national security. For example, courts have applied the "silent witness rule," under which classified documents may be entered into evidence without exposing their contents to the public. Under this approach, the witness is given a copy of the classified document, along with the court, the parties, and the jury. The witness answers questions about the document by pointing the jury to the relevant portions of it, without discussing the contents of the document openly; the document itself is filed under seal. In this way the classified information contained in the document is not made public, but it still may be entered into evidence and considered by the jury.¹⁴ How far courts can go in limiting public access to trial proceedings during the presentation of classified evidence is a somewhat open question.

This is another area that could benefit from legislation. Congress should clarify when and how trial proceedings may be closed in order to protect classified information. Legislation should confirm that courts have the power to exclude the press and the general public during the introduction of classified information and should provide guidance as to how to apply this power. Beyond giving guidance to the courts, clarifying legislation would help the government predict when courts would accept restrictions on public access. Greater certainty would enable the government to determine whether the national security risks of prosecuting a particular terrorism case will be adequately contained and will help persuade foreign intelligence officials to testify, by assuring them that their testimony will not be publicly disclosed.

Legislative guidance could clarify three points:

1. *When is closure permissible?* If evidence is properly classified, then by definition its public dissemination would harm national security, and there would be a compelling interest to support closure. The catch, of course, lies in determining whether the evidence is properly classified. When courts in past cases have restricted public access, in order to protect classified evidence, they have insisted on independently assessing the claimed harm to national security. Otherwise, the government could abuse its classification power to thwart public scrutiny. Yet customary practices for conducting such assessments are ill-defined and obscure. Clarifying legislation should require an appropriately

¹³ See *Brown v. Artuz*, 283 F.3d 492, 501-02 (2nd Cir. 2002) (finding that safety of undercover police officer "surely constitutes an overriding interest" justifying closure); *Bowden v. Keane*, 237 F.3d 125, 130 (2nd Cir. 2001) (same); *Bell v. Jarvis*, 236 F.3d 149, 167-68 (4th Cir. 2000) (finding it "settled that the state's interest in protecting minor rape victims is a compelling one," sufficient to justify well-tailored closure).

¹⁴ See *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987).

high-ranking official to certify the national security interest and then detail precisely what showing the government must make in such circumstances in order to satisfy the court's independent judgment that the national security certification is appropriate.¹⁵

2. *Procedures.* Clarifying legislation should also specify the kind of hearing appropriate for making the national security determination. It would rarely, if ever, be permissible for the showing to be made *ex parte*. At a minimum, cleared defense counsel should have the opportunity to contest the government's national security claims.
3. *Compensatory public disclosure.* Closure legislation should also spell out ways to make available to the public as much as possible of the content of the information presented in closed session. For example, witnesses could testify behind a screen so that the content of their testimony is disclosed while revealing their identity only to the trial participants, or unclassified summaries of their testimony could be released at some point shortly after the day's testimony has concluded.

There remains, though, the problem of ensuring that classified evidence presented in a closed trial session does not leak out. As to the potential for leaks by prosecutors, defense counsel, and court staff, security clearance provides a satisfactory solution. With respect to the jury, however, the answers are less clear.

Although jurors could conceivably be subjected to background investigations and security clearance procedures, until now those precautions apparently have never been taken, and they would be extremely problematic.¹⁶ This is another issue that might benefit from congressional consideration.

There are other ways, however, to mitigate the risk of jury leaks. In espionage trials, simply warning jurors of the threat of criminal prosecution has proven sufficient to prevent improper leaks. The use of anonymous juries—already a well-established practice in cases where jury safety or privacy is an issue—could further mitigate the risk of jury leaks, by reducing the danger that jurors will be approached by the press about evidence presented in closed session. In contrast to other countries that have encountered difficulty in trying terrorism cases by jury, our government does not face

¹⁵ Courts have considerable experience making such determinations. Under Exemption One of the Freedom of Information Act, agencies are permitted to refuse disclosure of matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) *are in fact properly classified* pursuant to such Executive order." 5 U.S.C. §552(b)(1) (2008). For recent cases in which judges have reviewed national security materials in camera in order to determine whether they were properly classified, *see, e.g.*, *Am. Civil Liberties Union v. Fed. Bureau of Investigation*, 429 F. Supp. 2d 179 (D.D.C. 2006) (rejecting Exemption One claim and ordering disclosure of part of one classified document). *See also* *N.Y. Times Co. v. Dep't of Def.*, 499 F. Supp. 2d 501 (S.D.N.Y. 2007) (reviewing material *in camera* but finding that material in question had been properly classified); *Associated Press v. Dep't of Def.*, 498 F. Supp. 2d 707 (S.D.N.Y. 2007) (same); *Wheeler v. Dep't of Justice*, 403 F. Supp. 2d 1 (D.C.C. 2005) (same); *Fla. Immigration Advocacy Ctr. v. Nat'l Sec. Agency*, 380 F. Supp. 2d 1332 (S.D. Fla. 2005) (same).

¹⁶ The rules established by the Chief Justice, detailing security protocols for federal courts to follow in cases involving classified information, caution: "Nothing contained in these procedures shall be construed to require an investigation or security clearance of the members of the jury or interfere with the functions of a jury, including access to classified information introduced as evidence in the trial of a case." *See* 18 U.S.C. app. 3, Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, § 6.

any systemic problem of jury disloyalty. Jury trials did, for example, pose an impediment to successful prosecution during Britain's long struggle against terrorists in Northern Ireland, leading the government eventually to suspend the right to jury trial. Those problems resulted from pervasive local support for the IRA terrorists and the practical impossibility of selecting a jury that would not contain a significant number of IRA sympathizers.¹⁷ There is no such problem, of course, in prosecuting suspected al Qaeda members in the United States today.

Like the general public, the defendant has a right to be present at trial, but the defendant's right is considerably stronger. The defendant's right to know all the evidence against him cuts to the core of a fair and effective adversarial proceeding. As a result, in the absence of unruly behavior, the defendant has an unqualified right to be present throughout the presentation of evidence at trial.¹⁸ While "counsel's eyes-only" protective orders limit the defendant's full participation in *pre-trial discovery*, in no case have the courts excluded a defendant from *trial* during the introduction of classified evidence, nor have they otherwise restricted the defendant's right to know any evidence seen by the jury. Such measures apparently have never even been considered, much less implemented. No matter how exceptional the circumstances, it seems doubtful that constitutionally acceptable procedures could be devised for presenting classified evidence at a criminal trial without fully disclosing it to the defendant.¹⁹

But in any event, experience to date has indicated no need to depart from this bedrock norm, given the availability of measures to prevent the defendant from passing classified evidence to the outside world in the rare cases where such evidence must be introduced.

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The need to protect sensitive information in terrorism trials poses a genuinely difficult problem. But creating any system of special courts to deal with this problem is dangerously short-sighted. Any system that provides special insulation for national security secrets must, by its very nature, weaken independent oversight of the executive. Any such system must by its very nature set aside procedural safeguards that have a well-established pedigree and a widely accepted legitimacy. And any system that produces these results must inevitably prove counter-productive and unsustainable over the long term.

Three imperatives must be respected:

1. the need to resolve complex factual questions accurately;
2. the need to resolve questions of individual responsibility through a process that will be widely accepted as fair; and
3. the need to minimize official carelessness, malfeasance, and other abuses which not only harm individuals, but also render the counterterrorism effort itself less effective.

¹⁷ See, e.g., John D. Jackson, Katie Quinn & Tom O'Malley, *The Jury System in Contemporary Ireland: In The Shadow of a Troubled Past*, 62 LAW & CONTEMP. PROBS. 203, 221 (1999).

¹⁸ The defendant has the right to be present at trial at any point where his exclusion would "interfere[] with his opportunity for effective cross-examination," *Kentucky v. Stincer*, 482 U.S. 730, 740 (1987), or where his presence otherwise "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934).

¹⁹ See *Coy v. Iowa*, 487 U.S. 1012 (1988).

These imperatives can be satisfied, without resorting to a new system of courts, simply by relying on the judicial system and the carefully developed body of precedent that we already have. The ordinary federal court system makes available many tools to protect classified information without compromising the defendant's right to a fair trial:

- courts can craft unclassified substitutes for sensitive evidence;
- courts can use protective orders when classified evidence must be disclosed during the discovery process or at trial, so that classified discovery material is available only to cleared counsel, and they can order closure of trial proceedings so that evidence disclosed to the defendant and the jury at trial does not become available to the wider public;
- the government can declassify information of only modest sensitivity in instances where the benefits of using it in court outweigh any marginal risks to the national security;
- the prosecution can craft alternate charges that can be proved without reliance on classified evidence; and
- the prosecution can seek to postpone the start of trial, within the limits permitted by the Speedy Trial Act, in order to insure that the defendant will remain in custody (under strictly time-limited, pre-trial detention) while unclassified evidence is developed and classified evidence becomes less sensitive, so that it can more easily be declassified.

Although these approaches may not suffice to eliminate every conceivable secrecy problem, they progressively narrow the difficulties, so that, at worst, only a narrow set of concerns is likely to remain, even in the most problematic cases. And if existing tools turn out to be imperfect in the context of a particular, unusually complex prosecution, case-by-case adjudication and multiple layers of review can permit courts to flesh out ways of dealing with unusual problems in ways that sustain accountability and respect our constitutional values.

Prior to CIPA's enactment in 1980, it was widely believed that espionage cases could not be prosecuted in federal court without putting classified information at risk. Congress could have attempted to address that problem by establishing special courts in which evidence could be concealed from the defendant and from the public. After all, we were in a "cold war" with the Soviet Union throughout this period, not to mention long-running periods of active military operations and intensive combat with heavy casualties in Korean and Vietnam. But Congress recognized the even-greater importance of maintaining the separation of powers and preserving the role of the federal courts as the linch-pin of the checks and balances essential to our system of government. Through CIPA, therefore, Congress chose to craft a narrower solution that remained within the structures of existing institutions, and that solution, fine-tuned by the courts over the years, has proved both workable and fair.

There is no reason to believe that a similar approach, based on modest, narrowly crafted procedures, cannot appropriately address the special difficulties presented in cases involving global terrorism. If the available tools are refined along the lines sug-

gested above, courts will be well-equipped to resolve novel secrecy problems, protecting classified information where necessary, while preserving transparency and accountability through an effective adversary system.

Workable solutions, of course, will not always be perfect or cost-free. But there are and *should be* limits on how far the courts and Congress can go in accommodating executive branch preferences for secrecy. To the extent that a rare terrorism case may some day arise in which courts cannot find a way to accommodate secrecy concerns and still try the suspect fairly, the problem would not lie with our judicial system. The problem—if it can be called a problem—would lie in our commitment to fairness, recognizing that we must have reliable findings of guilt, reached in an effective adversary process, before we deprive individuals of their life or liberty. As the Israeli Supreme Court aptly observed:

Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they [add to] its strength.²⁰

²⁰ HCJ 5100/94 Pub. Comm. Against Torture in Israel v. State of Israel [1999] IsrSC 53(4) 817, 39.