

Discovering the Artichoke: How Mistakes and Omissions Have Blurred the Enabling Intent of the Classified Information Procedures Act

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INTRODUCTION

The Classified Information Procedures Act (CIPA)¹ is not well understood and has become confused with the state secrets privilege almost since its enactment in 1980. These misunderstandings about CIPA have resulted in a split in the federal circuit courts over how CIPA functions. While the state secrets privilege was intended to block the discovery of military and state secrets, CIPA was intended to enable the discovery of classified information. CIPA's procedures reflect the drafters' understanding that they needed to protect intelligence sources and methods as well as the rights of criminal defendants. Yet courts and practitioners have imagined that CIPA and state secrets should be combined. This combination by some courts forgets CIPA's original purpose.

The misunderstandings about CIPA are partly the result of the spotty and sometimes erroneous legal history of national security privileges over two centuries of American jurisprudence. They are partly the result of the failure of Congress to include specific language in CIPA that might have eliminated this confusion.

CIPA should be amended to end this confusion and enhance its original goals – to enable discovery to protect a defendant's rights and to protect intelligence sources and methods vital to the national security of the United States from unnecessary public exposure.²

The necessity of procuring good intelligence is apparent and need not be further urged – All that remains for me to add is, that you keep the whole matter as secret as possible. For upon Secrecy, success depends in most Enterprises of the kind, & for want of it, they are generally defeated, however well planned.

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1. Classified Information Procedures Act, 18 U.S.C. app. 3 (hereinafter "CIPA").

2. In preparation for this article I had the privilege of interviewing a number of people who helped draft and refine CIPA back in 1979 and 1980: Mort Halperin (hereinafter "Halperin"), who had testified before Congress twice regarding CIPA as the representative of the American Civil Liberties Union; Robert L. Keuch (hereinafter "Keuch"), who had been the head of the Justice Department's Criminal Division, and was called before Congress on several occasions; Phillip Heyman (hereinafter "Heyman"), who had been the Assistant Attorney General; and George Jameson (hereinafter "Jameson"), who had been Director of the CIA's Office of Policy and Coordination.

George Washington, Letter to Colonel Elias Dayton, 26 July 1777.

It is a very serious thing, if such a letter should contain any information material to the defense, to withhold it from the accused the power of making use of it. It is a very serious thing to proceed to trial under such circumstances. I cannot precisely lay down any general rule for such a case. Perhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on it, unless such a letter could be shown to be absolutely necessary in his defense.

Chief Justice John Marshall, 1807.

I. THE HISTORY OF THE NATIONAL SECURITY PRIVILEGE

In understanding how CIPA became misunderstood, it is important to recall that the privileges to protect classified information and state secrets may have common origins in both the Constitution and the common law.

A. Revolutionary War to Civil War History of National Security Privileges

Although the value of classified information is often viewed with skepticism since at least the Watergate scandal, protected national security information was an essential part of the development and protection of democracy in the United States. The specific authority of the Executive to protect national security information is likely rooted in the President's powers as Commander in Chief under Article II, Section 2 of the United States Constitution. In 1787, the drafters of the Constitution, including George Washington himself, empowered the President to be:

[T]he Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

The Framers even believed secrecy could protect Congress and help it to function:

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, *excepting such Parts as may in their Judgment require Secrecy*; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.³

Just three years later, in his first State of the Union address, President Washington requested that Congress fund an intelligence service, the Contin-

3. U.S. CONST. art. I, §5 (emphasis added).

gent Fund of Foreign Intercourse, to protect the national security interests of the country.⁴ Washington needed a better intelligence apparatus after his military communications were passed to the British by his trusted advisor, Doctor Benjamin Church.⁵

By the time Thomas Jefferson became President on March 4, 1805, America's sovereignty was already facing challenges. Jefferson once wrote, "I like a little rebellion now and then. It is like a storm in the atmosphere."⁶ While he liked the idea of a public check on government, Jefferson also knew the importance of secrets to the preservation of the national security of the United States. He even created a cipher to conceal his communications with Meriwether Lewis. The cipher allowed Jefferson and Lewis to use the word "artichoke" where the two meant "antipode."⁷

In 1806, just thirty years after the Declaration of Independence was penned, over a thousand "Spanish troops ha[d] crossed the Sabine River" on the Louisiana-Texas border.⁸ Aaron Burr, Jefferson's former Vice President, was on the lam after killing Alexander Hamilton and was suspected of planning a coup d'état.⁹ President Jefferson sent Louisiana Governor John Graham to spy on Burr and report his findings.¹⁰

When Burr was arrested and charged with treason, he requested an encoded letter sent from General John Wilkinson to President Jefferson claiming that the letter would support his defense.¹¹ Prosecutor George Hay agreed to turn over the letter in response to a writ, but he reserved the right to withhold any confidential information in the letter, thereby invoking a somewhat vague executive privilege.¹² In denying the writ, Justice John Marshall acknowledged the existence of an executive privilege protecting "secret" information from

4. See George Washington, President of the United States, First State of the Union Address (Jan. 8, 1790).

The interests of the United States require that our intercourse with other nations should be facilitated by such provisions as will enable me to fulfill my duty in that respect in the manner which circumstances may render most conducive to the public good, and to this end, that the compensation to be made to the persons who may be employed, should according to the nature of their appointments, be defined by law, and a competent fund designated for defraying the expenses incident to the conduct of our foreign affairs.

Id.; see also HAROLD BROWN & WARREN RUDMAN, THE EVOLUTION OF THE U.S. INTELLIGENCE COMMUNITY – AN HISTORICAL OVERVIEW, in PREPARING FOR THE 21ST CENTURY: AN APPRAISAL OF U.S. INTELLIGENCE (1996), available at <http://www.gpo.gov/fdsys/pkg/gpo-intelligence/pdf/gpo-intelligence-22-1.pdf>.

5. G.J.A. O'TOOLE, HONORABLE TREACHERY: A HISTORY OF U.S. INTELLIGENCE, ESPIONAGE, AND COVERT ACTION FROM THE AMERICAN REVOLUTION TO THE CIA 15 (1991).

6. Erin Allen, *A Birthday Fit for a President*, LIB. OF CONG. BLOG (Apr. 12, 2013), <http://blogs.loc.gov/loc/2013/04/a-birthday-fit-for-a-president>.

7. *Id.*

8. NANCY ISENBERG, *FALLEN FOUNDER: THE LIFE OF AARON BURR* 304-306 (2007).

9. See *id.* at 308, 311.

10. See *id.* at 311.

11. See *id.*, *supra* note 8, at 312, 342; MARY-JO KLINE, *POLITICAL CORRESPONDENCE AND PUBLIC PAPERS OF AARON BURR*, VOL. II (1983).

12. See ISENBERG, *supra* note 8, at 345.

unauthorized disclosure during court proceedings.¹³ Presaging later cases that directly addressed a defendant's right to have privileged information that is material to his defense, Marshall expressed concern about withholding relevant but privileged information from criminal defendants.¹⁴ In the end, however, Marshall declined to suggest specific procedures courts should follow when applying the privilege,¹⁵ and Marshall never explicitly stated that the privilege was rooted in the President's role under Article II.

Seventy years after *Burr*, in *Totten v. United States*,¹⁶ the estate of a man who claimed to have entered a clandestine agreement with the Union Army sued to collect compensation owed for those services during the Civil War. The Supreme Court held that a secret contract for spy services was unenforceable

13. See *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807). Chief Justice Marshall wrote:

I admit, that in such a case, much reliance must be placed on the declaration of the president; and I do think that a privilege does exist to withhold private letters of a certain description. The reason is this: Letters to the president in his private character, are often written to him in consequence of his public character, and may relate to public concerns. Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view

Had the president, when he transmitted it, subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all proper respect would have been paid to it; but he has made no such reservation

[In] Criminal cases . . . courts will always apply the rules of evidence to criminal prosecutions so as to treat the defense with as much liberality and tenderness as the case will admit

[I]t is a very serious thing, if such a letter should contain any information material to the defense, to withhold it from the accused the power of making use of it. It is a very serious thing to proceed to trial under such circumstances. I cannot precisely lay down any general rule for such a case. Perhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on it, unless such a letter could be shown to be absolutely necessary in his defense. The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused. But on objections being made by the president to the production of a paper, the court would not proceed further in case without such an affidavit as would clearly show the paper to be essential to the justice of the case

But to induce the court to take any definite and decisive step with respect to the prosecution, founded on the refusal of the president to exhibit a paper, for reasons stated himself, the materiality of that paper ought to be shown.

Id. at 191-192 (emphasis added).

14. See *Burr*, 25 F. Cas. at 192.

15. The protection of information related to national security was discussed in *Totten v. United States*, wherein the Supreme Court acknowledged the authority of the President as Commander in Chief to "employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy." 92 U.S. 105, 106 (1875), *aff'd* by *Doe v. CIA*, 576 F.3d 95 (2d Cir. 2009); see also *Dep't of the Navy v. Egan*, 484 U.S. 518, 525 (1988).

16. *Totten*, 92 U.S. at 105.

because it was required to be kept secret.¹⁷ In *dicta*, however, the Court clearly referred to the secret agreement as being privileged, likening it to other material that is privileged in the law:

[A]s a general principle, [] public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind, and thus defeat a recovery of that kind

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. *On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.*¹⁸

B. Executive Authority to Classify and Protect Information

As World War II drew to a close, the intelligence community was expanded and the President's role as Commander in Chief was enhanced by legislation. A

17. *Id.*; see also *United States v. Curtiss-Wright*, 299 U.S. 304, 319-321 (1936) (discussing the President's role as Commander in Chief and organ of foreign affairs, as well as permissible delegation of authority to executive branch by legislative branch).

18. *Totten*, 92 U.S. at 107 (emphasis added). Later cases have also distinguished *Totten* from the body of state secrets cases by noting that *Totten*'s holding is limited to clandestine relationships:

Reynolds therefore cannot plausibly be read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships

The state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule. The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable: "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" Forcing the Government to litigate these claims would also make it vulnerable to "graymail," *i.e.*, individual lawsuits brought to induce the CIA to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations. And requiring the Government to invoke the privilege on a case-by-case basis risks the perception that it is either confirming or denying relationships with individual plaintiffs.

Tenet v. Doe, 544 U.S. 1, 9-11 (2005) (quoting *CIA v. Sims*, 471 U.S. 159, 175 (1985)).

part of this expansion was the development of classification standards. Although none of the laws passed addressed a privilege applicable to classified information or state secrets, penalties for disclosure of that information were also developed at law. Thus the consequences of disclosing classified information strongly suggested it was privileged from unnecessary disclosure.

In 1947, Congress passed the National Security Act, which placed the President in charge of intelligence agencies responsible for protecting the national security.¹⁹ Congress amended the National Security Act in 1950 to include a section penalizing the unauthorized disclosure of information that was classified by a government agency under the following definition:

The term classified "information" as used herein shall be construed to mean information which, at the time of a violation under this Act, is, for reasons of national security, specifically designated by a United States Government agency for limited or restricted dissemination or distribution.²⁰

C. *The Reynolds to CIPA Era*

Nearly a century after *Totten*, in *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*,²¹ the Supreme Court continued to acknowledge the Executive's authority to withhold national security information from discovery in civil cases, and raised the issue of executive privilege to protect such information without ever using the word "privilege":

The President, both as the Commander in Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.²²

Then in a civil case in 1953, *United States v. Reynolds*,²³ the Supreme Court decided that the state secrets privilege had roots in the common law. In its opinion, the Court established strict procedures to be used in civil cases when the state secrets privilege would be invoked because it would completely block

19. The National Security Act, 50 U.S.C. §401 (1947).

20. Act of May 13, 1950, Pub. L. No. 51-513, 64 Stat. 159 (1950) (preventing disclosures about cryptography).

21. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.* Civil Aeronautics Bd., 333 U.S. 103, 111 (1948). Prior to *Reynolds*, other cases acknowledged a state secrets privilege but assigned different procedures for the invocation of the privilege. See *Bank Line v. United States*, 163 F.2d 133, 138 (2d Cir. 1947) ("The existence of governmental privileges must be established by the party invoking them and the right government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of the private individual, without recourse to prerogative writs where such writs would not be available to the ordinary citizen.").

22. *Waterman*, 333 U.S. at 103; see also *United States v. Nixon*, 418 U.S. 683, 710 (1974) (citing *Burr*, 25 F. Cas. at 190) (distinguishing national security privilege from general executive privilege).

23. See generally *United States v. Reynolds*, 345 U.S. 1 (1953).

the discovery of the information:²⁴

The [military and state secrets] privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after personal consideration by that officer.

Where there is a strong showing of necessity, the claim of privilege [by the government] should not be lightly accepted, but even the most compelling necessity [of the plaintiff] cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.²⁵

Although the information at issue pertained to military aviation capabilities, a seemingly obvious province of the Commander in Chief, the Supreme Court declined to decide the case in the context of the Executive's Article II, Section 2 authority:

We have had broad propositions pressed upon us for decision. On behalf of the Government it has been urged that the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest. Respondents have asserted that the executive's power to withhold documents was waived by the Tort Claims Act. Both positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision.²⁶

Since *Burr*, no case has contradicted the principle that the President's Article II authority includes the authority to "classify and control access to information bearing on the national security."²⁷ This power "exists quite apart from any explicit congressional grant,"²⁸ and has been described as a "compelling inter-

24. In *Reynolds*, widows of men killed in a military plane crash sued the government, but when they requested discovery, the Secretary of the Navy advised the trial court that the disclosure of that information would damage the national security. *See id.* at 2, 5-6. Note that this article assumes that the information was valid national security information. It does not tackle the issues raised by Barry Siegel challenging the legitimacy of actual claim in the *Reynolds* case, and raising several factual points that arguably undercut the integrity of the opinion: 1) that the information sought to be withheld was the lack of defense capability and not existing classified information; and, 2) that the classification level of the accident report at issue was raised from "restricted" to "secret" to avoid providing discovery to the widows of those killed in the accident. *See* BARRY SIEGEL, CLAIM OF PRIVILEGE 55-80 (2008); *see also* Herring v. United States, 424 F.3d 384, 392 (3d Cir. 2009) (finding no fraud in assertion of state secrets in *Reynolds*, in part because exposure of the inadequacy of systems at the time may have damaged national security).

25. *Reynolds*, 345 U.S. at 11 (citing *Totten*, 92 U.S. at 105).

26. *Id.* at 6 (footnote omitted) (citing *Touhy v. Ragen*, 340 U.S. 462 (1951)); *see also* *Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 574-585 (1947).

27. *Egan*, 484 U.S. at 527.

28. *Id.*

est.”²⁹

Despite the Supreme Court’s statement that the state secrets privilege developed at common law, other courts have noted that the privilege “performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign affairs responsibilities,”³⁰ a clear reference to the President’s Article II, Section 2 powers.³¹ State secrets and a classified information privilege are arguably both

29. *Id.*; see also *Snepp v. United States*, 444 U.S. 507, 509 (1980); *United States v. Robel*, 389 U.S. 258, 267 (1967); *Reynolds*, 345 U.S. at 10; *Totten*, 92 U.S. at 106.

30. *Reynolds*, 345 U.S. at 6; see also *El-Ganayhi v. United States*, 591 F.3d 176, 181, 185, 189-190 (3d Cir. 2010) (discussing constitutional roots of state secrets privilege); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006); *Stillman v. Dep’t of Defense*, 209 F. Supp. 2d 185, 190 (D.D.C. 2002) (“The federal government’s ‘compelling interest’ in controlling access to national security information has been long recognized by the Supreme Court.”); see generally *Lindsay Windsor, Is the State Secrets Privilege in the Constitution? The Basis of the State Secrets Privilege in Inherent Executive Powers And Why Court-Implemented Safeguards are Constitutional and Prudent*, 43 GEO. J. INT’L L. 897 (discussing circuit differences on constitutional basis for state secrets).

31. *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007); see also *In re NSA Telecomm. Record Litig.*, 564 F. Supp. 2d 1109, 1123-1124 (N.D. Cal. 2008) (citations omitted):

Reynolds itself, holding that the state secrets privilege is part of the federal common law, leaves little room for defendants’ argument that the state secrets privilege is actually rooted in the Constitution. *Reynolds* stated that the state secrets privilege was “well-established in the law of evidence.” At the time [*Reynolds* was decided], Congress had not yet approved the Federal Rules of Evidence, and therefore the only “law of evidence” to apply in federal court was an amalgam of common law, local practice and statutory provisions with indefinite contours. The Court declined to address the constitutional question whether Congress could limit executive branch authority to withhold sensitive documents, but merely interpreted and applied federal common law.

Reynolds also cited to several other cases supporting the existence of a privilege - based on public policy - in favor of protecting military secrets. See generally *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912) (excluding evidence from discovery for reasons of “public policy” favoring “protecting military secrets”); *Pollen v. Ford Instruments*, 26 F. Supp. 583 (E.D.N.Y. 1939) (excluding evidence from discovery that the subject of a classified agreement with the military on grounds disclosure would harm the national security); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949) (allowing discovery in the absence of a showing that evidence involved a war secret or any threat to national security); *Bank Line Ltd. v. United States*, 68 F.Supp. 587 (E.D.N.Y. 1946) (allowing discovery where “no reasons of national security presently involved which would place the hearing in a special privileged class”).

Defendants’ attempt to establish a strict dichotomy between federal common law and constitutional interpretation is, moreover, misconceived because all rules of federal common law have some grounding in the Constitution. “Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present.” *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J. concurring). The rules of federal common law on money and banking, for instance, all derive from the Constitution. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (in disbursements of funds and payment of debts, United States exercises a constitutional function or power). The federal common law pertaining to tort suits brought by United States soldiers against private tortfeasors flows from Congress’s powers under Article I section 8. *United States v. Standard Oil Co.*, 332 U.S. 301, 306 (1947). Accordingly, all rules of federal common law perform a function of constitutional significance.

executive privileges. Thus separating the two privileges based on their origins can be complicated.

D. The Legislative History of CIPA and Events That Drove Its Passage

The history that led up to CIPA's passage supports the conclusion that CIPA served an enabling purpose and was therefore different from state secrets.

Within a year of the *Reynolds* decision, the CIA and the Justice Department entered a clandestine agreement that allowed the CIA to not report internal violations of the law to the Justice Department.³² This agreement probably limited the development of law on the subject of a classified information privilege for at least two and a half decades during the height of the Cold War. According to those familiar with the agreement, its terms ensured that no espionage cases would be initiated.³³ The agreement only came to public light when it was exposed by the Rockefeller Commission in 1975.^{34,35}

In the specific context of the state secrets privilege, it would be unremarkable for the privilege to have a constitutional "core" or constitutional "overtones." Article II might be nothing more than the source of federal policy that courts look to when applying the common law state secrets privilege. But constitutionally-inspired deference to the executive branch is not the same as constitutional law.

In re NSA Telecomm. Record Litig., 564 F. Supp. at 1123-1124 (citations omitted).

32. For the findings on the impact of the clandestine agreement, see CENT. INT. AGENCY, REPORT OF INVESTIGATION: ALLEGATIONS OF CONNECTIONS BETWEEN CIA AND THE CONTRAS IN COCAINE TRAFFICKING TO THE UNITED STATES (96-0143-IC), VOLUME II: THE CONTRA STORY, FINDINGS (1998), available at <https://www.cia.gov/library/reports/general-reports-1/cocaine/contra-story/findings.html> [hereinafter CIA REPORT].

33. GRIFFIN B. BELL, TAKING CARE OF LAW 100 (1982); THOMAS B. ALLEN AND NORMAN POLMAR, MERCHANTS OF TREASON 154 (1988). This deal was ended by President Gerald Ford in 1976 after the Rockefeller Commission stumbled onto its existence while conducting an investigation of intelligence agencies. See Exec. Order No. 11905, 41 Fed. Reg. 7703 (Feb. 18, 1976); COMM'N ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 48-57 (1975) (hereinafter ROCKEFELLER COMM'N REPORT).

Commenting on the reasons for this secret agreement to *The Washington Post's* P.E. Tyler, then Attorney General Griffin Bell stated, "[T]he intelligence community had come to believe that every time you prosecuted a spy you would lose the secret, and that it was better public policy – the best of two evils – to let the spy go and keep the secret. But I had the idea that you could prosecute these cases without losing the secret." P.E. Tyler, *Record Year Puts Spy-Catchers in Spotlight*, WASH. POST, Nov. 30, 1985, at A24.

In phone interviews, both Keuch and Jameson reported that CIA attorneys and their counterparts at the Justice Department discussed espionage and leak cases during the period of the clandestine agreement. However, more often than not, the risk of prosecution could not be adequately assessed in the absence of established procedures for the handling of classified information in criminal cases. The result of these conversations was often that no prosecution would occur. Telephone interview with Keuch, former Head of Crim. Div., Dep't of Justice (Oct. 2012 and Nov. 2012); telephone interview with George Jameson, former Dir. of Office of Policy and Coordination, CIA (Apr. 2013).

34. *Justice Department Treatment of Criminal Cases Involving CIA Personnel and Claims of National Security: Hearings Before a Subcomm. of the Comm. on Gov't Op.*, 94th Cong. 401, 401-429 (1975).

35. The Rockefeller Commission was established by Exec. Order No. 11,828, 40 Fed. Reg. 1219 (Jan. 4, 1975), and issued its report in July 1975. See ROCKEFELLER COMM'N REPORT, *supra* note 33. For the findings on the impact of the clandestine agreement see CIA REPORT, *supra* note 32.

Calling for an enabling response to the problem of handling classified information at trial, Representative Bella S. Abzug introduced a report on how the Justice Department treated cases involving CIA personnel and claims of national security in 1976 as follows:

What [this report] does is to make recommendations that there should be legislation which clearly and narrowly defines the term ‘National Security’ . . . legislation giving Federal judges access to national [security] information, and power to decide independently whether the information the agencies wish to withhold in the course of discovery is either irrelevant or too sensitive.³⁶

With the benefit of hindsight, courts have concluded that CIPA “create[d] no new privilege,” and “*presuppose[d]* a governmental privilege against disclosure of classified information.”³⁷ But Congress failed to include language stating that classified information was privileged. This left a gap in which many have wrongly imagined state secrets privilege applies.

Some of CIPA’s drafters stated that the state secrets privilege defined in *Reynolds* should not be a part of the new law. Did they mean that the subject matter covered by state secrets did not apply in criminal cases, or did they mean that absolute privileges could not function in criminal cases so the procedures outlined in *Reynolds* would not protect a defendant’s rights?

In the earliest discussions of CIPA, Senator Joseph Biden raised the issue of a “*new state secret privilege [that] might more narrowly define the type of information to which the Government could invoke the privilege.*”³⁸

As Congressman Morgan Murphy stated during one of the first hearings on the bill that would become CIPA:

36. *Justice Department’s Treatment of Criminal Cases Involving CIA Personnel and Claims of National Security: Hearing Before the Subcomm. on Gov’t Info. and Individual Rights, Comm. on Gov’t Operations*, 94th Cong. 1-2 (1976) (referring to the *Puttaporn* case, wherein a CIA asset was linked to narcotics trafficking in Thailand). Representative Frank McClosky replied that the Justice Department admitted in earlier hearings that exposure of the information it had sought to protect presented danger to the national security. *Id.* at 5.

37. *United States v. Aref*, 533 F.3d 72 (2d Cir. 2008), 78, 81; *see United States v. Abu-Jihad*, 630 F.3d 102, 140 (2d Cir. 2010); *United States v. Abu Ali*, 528 F.3d 210, 247-248 (4th Cir. 2008); *United States v. Mejia*, 448 F.3d 436, 455 (D.C. Cir. 2006); *United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *United States v. Hanna*, 661 F.3d 271, 296 (6th Cir. 2011); *United States v. Hanjuan Jin*, 791 F. Supp. 2d 612, 618 (N.D. Ill. 2011); *United States v. Libby*, 453 F. Supp. 2d 35, 38-39 (D.D.C. 2006); *United States v. Drake*, No. 10-RDB-181, 2011 WL 2175007 (D. Md. June 2, 2011). Relying on the legislative history of CIPA alone to prove that Congress presupposed a privilege has its limitations. As Supreme Court Justice Antonin Scalia has written, “In any piece of major legislation, the legislative history is extensive, and there is something for everybody.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997).

38. *The Use of Classified Information in Litigation: Hearing Before the Subcomm. on Secrecy and Disclosure of the Select Comm. on Intelligence*, 95th Cong. 36-37 (1978) [hereinafter *Hearing on Classified Information in Litigation*].

I wish to emphasize that neither [the House nor Senate] version of the bill is designed to allow the withholding from the defendant of any relevant and admissible evidence. *A state secrets privilege is not being introduced into the criminal law.*³⁹

In light of the need for defendants to have access to information material to their defense, Murphy seemed to be addressing the fact that the privilege to withhold classified information would have to be conditional rather than absolute. He did not seem to be saying that CIPA and state secrets applied to different categories of information. When it finally issued its joint report on CIPA on July 11, 1979, Congress specifically referred to how privileges would need to be conditional in criminal cases, which departed from the *Reynolds* state secrets procedures that would render the evidence unavailable to both parties:

The disclose or dismiss dilemma can never be eliminated entirely. Inherent in every espionage trial for example is the principle set out in innumerable court decisions [] that when the government chooses to prosecute an individual for a crime, it cannot deny him the right to meet the case against him by introducing relevant documents, even those otherwise privileged.⁴⁰

When their final joint report was drafted, the Senate and House wrote that state secrets did not apply to criminal cases.⁴¹

In this regard the Committee notes that *it is well-settled that the common law state secrets privilege is not applicable in the criminal arena*. To require, as some have suggested, that a criminal defendant meet a higher standard of admissibility [such as “need” for the material as opposed to relevance to a defense] when classified information is at issue might well offend against this principle. See *Reynold* [sic] *v. U.S.*[,] 345 U.S. 1 (1953); *U.S. v. Andolschek*, 142 F.2d 503 (2d Cir. 1944); *U.S. v. Coplon*, 185 F.2d 629 (1950). In *Reynolds*, a tort action against the government, the Supreme Court noted: “Respondents have cited us to those cases in the criminal field, where it has been held that the government can invoke its evidentiary privileges only at the

39. *Graymail Legislation: Hearing of the Permanent Select Comm. on Intelligence*, 96th Cong. 2 (1979) (statement of Hon. Morgan Murphy, Congressman) (emphasis added).

40. H.R. REP. 96-831, pt. 2, at 3, n.8-9 (1979) (citing *United States v. Andolschek*, 142 F.2d 503 [2d Cir. 1944]) (also citing *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950)). “The government must decide whether the public prejudice of allowing the crime to go unpunished is greater than the disclosure of those states secrets which might be relevant to the defense.” *Id.* Likewise there are other bits of legislative history that suggest Congress presupposed a privilege, such as when Congressman Marvin Edwards of California addressed the prejudice to the government that would ensue if it could not use “. . . relevant documents, even those otherwise privileged.” *Id.* (emphasis added).

41. *Id.* See Note, *Executive Privilege and the Freedom of Information Act: The Constitutional Foundation of the Amended National Security Exemption*, 4 Wash. U. L.Q. 609, 619-621, 623, 626 (1976) (noting that commentators have criticized *Reynolds* for its inexactness on the constitutional issues regarding separation of powers and privilege and indicating privilege would be qualified in certain situations).

price of letting the defendant go free. The rationale of the criminal cases is that, since the government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake a prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.” (at 12, footnotes omitted). In *Coplan*, Learned Hand wrote: “In *United States v. Andolschek* we held that, when the government chooses to prosecute an individual for a crime, it was not free to deny him the right to meet the case against him by introducing relevant documents, otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such ‘state secrets’ as might be relevant to the defense.” (at 638, footnotes omitted).⁴²

As further described below, despite these statements about CIPA, some courts have stated that the source of the privilege in CIPA is state secrets from *Reynolds*. After all, the final iteration of CIPA gave no title to the applicable privilege. Instead it gave a title to the subject matter it covered - specifically classified information and certain other narrowly defined material. Debate about CIPA has often centered on whether state secrets and CIPA apply to different categories of information and not on whether their processes are completely different. In interviews, some of the drafters of CIPA said that CIPA was crafted to devise wholly separate the procedures applicable in the criminal from those used in the civil arena.⁴³ What they did not say, but what seems possible, is that the information covered by CIPA likely overlaps with the information covered by state secrets.

So why did the drafters leave out language defining the scope of the privilege? They were told they needed to clarify the privilege by former Solicitor General Philip A. Lacovara, who had been a special prosecutor during Watergate:

[T]he scope of the government’s right to withhold national security information as privileged is not yet settled. In the Nixon tapes case, the Supreme Court refused to find the President’s claim of a generalized executive privilege broad enough to justify withholding the tapes from the Special Prosecutor for use in a criminal trial, but strongly implied that a privilege claim based on military or diplomatic secrecy could prevail in such a situation. *United States v. Nixon*, 418 U.S. 683, 710-11 (1974).⁴⁴

Further definition of the “state secrets” privilege is in the hands of Congress. The proposed Federal Rules of Evidence originally promulgated by the

42. H.R. RES. 96-831, pt.1, at 1-15, n.12 (1980).

43. Telephone interview with Heyman, former Assistant Att’y Gen. (Sept. 5, 2012); telephone interview with Jameson, former Dir. of Off. of Pol’y and Coordination, CIA (Apr. 2013).

44. *Hearing on Classified Information in Litigation*, *supra* note 38, at 56. *See id.*, at 2, 59, 76 (discussing *United States v. Nixon*).

Supreme Court included a rule defining a privilege for state secrets, but Congress found all the proposed rules dealing with privileges unacceptable and rejected them. In dealing with the problem of disclosure of national security information in criminal litigation, I suggest it would be advisable for Congress to set specific standards for the scope of the state secrets privilege.⁴⁵

CIPA was arguably a product of its times. It was a response to public outcry over cases that were not made because the potential defendants, who were leakers and bad intelligence actors, had access to classified information they could use to manipulate their way out of a prosecution.⁴⁶ Congress was then focused on (1) constraining the Executive, (2) empowering prosecutors to charge bad actors, (3) allowing for discovery and use of classified information in criminal cases, and (4) protecting intelligence equities.⁴⁷ With that many goals, Congress may have compromised away a statement regarding the scope of the applicable privilege.

Then-Assistant Attorney General Phillip Heyman, disgusted by his inability to prosecute alleged CIA wrongdoers⁴⁸ because of the lack of clear procedures, implored Congress to act:

In recent years there have been a number of highly publicized criminal cases in which the disclosure of sensitive classified information has been an issue. Such cases include but are not limited to traditional espionage trials as well as cases involving alleged wrongdoing by government officials. In the past, the government has foregone the prosecution of some cases in order to avoid compromising national security information. [The dismissal of such cases]

45. *Id.* at 56 (noting that the state secrets privilege as outlined in *Reynolds* was absolute and barred use of the information entirely). Locovara went on to note:

In an analogous area of the government's assertion in a criminal case that the identity of the informer is privilege, for instance, the Supreme Court has held that whether disclosure is essential to the continuing viability of the case depends on "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."

Id. (quoting *Roviaro v. United States*, 353 U.S. 53, 62 (1957)). Locovara also recommended that a rule akin to the proposed Rule 509 would be helpful in establishing a privilege more narrow than state secrets. *Roviaro*, 353 U.S. at 62; S. REP. NO. 94-755, BOOK II, at 290 (1976) (hereinafter CHURCH COMM. REPORT).

46. See CHURCH COMM. REPORT, *supra* note 45, at 290.

47. Many lawyers grappling with CIPA today will not recall that in the late 1970s, following the publication of the Rockefeller Commission Report and the Church Committee Hearings, there was a growing public concern that leakers of classified information and CIA agents exceeding their authority could get away with crimes by threatening to expose classified information in the course of their defense. The Church Committee Hearings dealing with misconduct on the part of the CIA concluded at the end of 1975 by finding that the CIA had been involved in plots to overthrow foreign governments, assassinate leaders, and engage in unlawful activities targeting U.S. citizens in the United States. 126 CONG. REC. 28,984 (1980) (Remarks by Congressman Romano L. Mazzoli) (discussing "graymail" by potential leakers) [hereinafter Mazzoli Remarks]; 126 CONG. REC. 28,811, 28,811-28,812 (1980) (Remarks of Senator Joseph Biden) [hereinafter Biden Remarks]; H.R. REP. NO. 96-931, pt. 1, at 7 (1979).

48. Telephone interview with Heyman, former Assistant Att'y Gen. (Sept. 2012).

foster[s] the perception that government officials and private persons with access to military or technical secrets have a broad *de facto* immunity from prosecution.⁴⁹

The enabling intent of CIPA was clear upon its introduction in the House and Senate. On October 1, 1980, Senator Joseph Biden introduced CIPA and stated he was doing so to prevent the practice of graymailing, whereby a defendant with access to classified information could shut down the prosecution by threatening to reveal that information as part of his defense.⁵⁰ The introduction on the south side of the Capitol, on October 2, 1980, was nearly the same.⁵¹ Congressman Romano Mazzoli of Kentucky introduced the bill that would be CIPA stating, “[T]his important legislation responds to a phenomenon currently threatening both the fair administration of justice and the effective operation of our intelligence services.”⁵²

As the Supreme Court has observed, “it is always appropriate to assume that our elected representatives, like other citizens, know the law . . . [and that] evaluation of congressional action taken [at a particular time] must take into account its contemporary legal context.”⁵³ In the years before CIPA’s enactment, classified information was the subject of proposed legislation to protect it

49. H.R. REP. NO. 96-831, pt. 2, at 2, 7 (1979) (quoting the testimony of former Deputy Attorney General Phillip Heyman and citing *Reynolds*).

50.

Senator Biden stated:

Mr. President, I am pleased to support the Classified Information Procedures Act. This bill is the product of over three years of effort in the Intelligence and Judiciary Committees to resolve the quote “graymail” problem. Graymail is the tactic used by defendants in national security cases to force the Department of Justice to drop criminal cases by threatening to disclose classified information.

In a report issued by the Subcommittee on Secrecy and Disclosure in 1978, the Intelligence Committee listed a number of cases where this tactic was a factor:

- First, the perjury prosecution of former CIA Director Richard Helms;
- Second, a number of recent serious espionage cases;
- Third, leak cases;
- Fourth, bribery cases, including the TCIA investigation;
- Fifth, narcotics trafficking cases;
- Sixth, the Nha Trang murder investigation during the Viet Nam War; and
- Seventh, part of the Watergate case.

Biden Remarks, *supra* note 47, at 28,811.

51. Mazzoli Remarks, *supra* note 47, at 28,984; Biden Remarks, *supra* note 47, at 28,811; H.R. REP. 96-931, Pt. 1, at 7 (1979).

52. Mazzoli Remarks, *supra* note 47, at 28,984. The drafters of CIPA, like many in the country at the time, had a distrust of the executive branch and its intelligence services, including the FBI, according to several men who participated in the drafting and hearings on CIPA. The lack of clear procedures for handling classified information at trial was something the bill’s sponsors wanted to correct. In what may seem remarkable in light of today’s political climate, CIPA moved forward with bipartisan support within Congress and support from intelligence agencies, like the CIA, and civil rights groups, like the American Civil Liberties Union.

53. *Canon v. Univ. of Chicago*, 441 U.S. 677, 696, 698-699 (1979).

from public disclosure twice. Congress would be presumed to have known this. Just six years before CIPA, in 1974, the Freedom of Information Act (FOIA) was amended to exclude information that was “specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy.”⁵⁴ A year before that, the Senate rejected proposed Federal Rule of Evidence 509,⁵⁵ which identified a “secrets of the state” privilege and required the head of the relevant agency to invoke it at the earliest stage of the proceedings.⁵⁶ Had it passed, Rule 509 would have applied to both criminal and civil cases, and would have codified the head of agency requirement that was set forth in *Reynolds*. In his comments about CIPA, Senator Biden noted the fact that Congress had rejected proposed Rule 509. Biden opined that CIPA should clarify the ability of the trial judge to go behind the classification of the information, something that was essentially forbidden under *Reynolds*.⁵⁷

54. *Justice Department Handling of Cases Involving Classified Data and Claims of National Security: Hearing Before the Subcomm. on the H. Gov't Operations*, 95th Cong. 11 (1978) (statement of Robert L. Keuch, Dep. Asst. Att'y Gen. of the United States) (“You also state that you wished to examine the feasibility of employing in criminal trials the device of in camera inspection of national security information prescribed in the Freedom of Information Act, 5 U.S.C. 552”). See 5 U.S.C. §552(a)(4)(B) (2006); see also *The N.Y. Times Co. v. Gonzalez*, 382 F. Supp. 2d 457, 493-494 (S.D.N.Y. 2005), *rev'd* by 459 F.3d 160 (2d Cir. 2006) (“Rule 501 is a rare, explicit congressional directive for fashioning federal common law.”); *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 240-241 (2005) (Congress rejected particular privileges itemized in proposed Rule 509 in lieu of broad Rule 501).

55. *Hopson*, 232 F.R.D. at 240.

56. Note by the Federal Judicial Center, Rule 501. See H.R. REP. NO 93-650, at 2 (1973) (noting thirteen years of study on Federal Rules of Evidence including proposed rule 509); see also S. REP. NO. 93-1277, at 6 (1973) (eliminating Supreme Court’s proposed rules defining privileges of “secrets of the state and official information,” and noting such definition “could not be given effect unless of constitutional dimension.”)

57. *Hearing on Classified Information in Litigation*, *supra* note 38. Senator Biden stated:

Section 509 was rejected by the Congress as it reviewed the rules proposed by the Supreme Court. However, any proposal made at this time might respond to the criticism of section 509 [later reduced to Federal Rule of Evidence 501 and omitting a specific reference to state secrets] . . . It might give a greater role to the court in reviewing the claim of privilege, including the authority to go beyond and behind the classification to determine the actual damage to the national security if the information were disclosed.

Id. at 36-37. Biden posed his questions to Robert L. Keuch, Deputy Assistant Attorney General of the Criminal Division of the Department of Justice. Biden followed his question about the scope of the privilege with several other questions. Keuch’s response did not address the privilege question, but focused instead on the use of *ex parte* proceedings to resolve questions about classified information, a focus of Biden’s later questions. *Id.* at 37. In contrast to Biden’s suggestion that courts play a role in evaluating the legitimacy of the classification of the material at issue, in *Reynolds*, the Supreme Court suggested that judges should not even review classified material:

It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

345 U.S. at 533.

In its final version, CIPA only included language that indicated the government had to make a “sufficient showing” in order to trigger its application.⁵⁸

Congress would have found it difficult to rely on case law for specific guidance on the discovery of classified information since so few published opinions before 1980 discussed the subject. This may have resulted from the clandestine agreement between the CIA and the Justice Department, which prevented most prosecutions that would reveal classified information. It may have resulted in part because “federal courts are not general common-law courts and do not possess ‘a general power to develop and apply their own rules of decision.’”⁵⁹ It may have resulted from the lack of a uniform system of classification until the 1950s, when the clandestine agreement was made. Of the pre-CIPA cases that did result in published opinions, most involved either (1) no invocation of a classified information privilege at all,⁶⁰ or (2) information that had already been declassified before trial.⁶¹

Examples of the pre-CIPA cases that might have misled Congress include the two cases against Judith Coplon, a young Justice Department analyst accused of

58. CIPA, 18 U.S.C. app. 3 §4 (2006). Rule 509, as proposed in 1971, read in part:

Military and State Secrets:

(a) General Rule of Privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the disclosure of the evidence will be detrimental or injurious to the national defense or the international relations of the United States.

(b) Procedure. The privilege may be claimed only by the chief officer of the department of government administering the subject matter which the evidence concerns. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon. The judge may take any protective measure which the interests of the government and the furtherance of justice may require.

REVISED DRAFT OF PROPOSED RULES OF EVIDENCE TO THE U.S. COURTS AND MAGISTRATES, JUDICIAL CONFERENCE OF THE UNITED STATES, COMM. ON RULES OF PRACTICE AND PROCEDURE 62-63 (1971).

59. *In re NSA Telecomm.*, 564 F. Supp. 2d at 1117-1118 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981)). Immediately following the revocation of this agreement and before CIPA's enactment, several espionage cases were prosecuted. At least one case applied procedures that looked very similar to those later outlined in CIPA. *See generally, e.g., United States v. Boyce*, 594 F.2d 1246 (9th Cir. 1979); *Hearing on Classified Information in Litigation*, *supra* note 38, at 43 (statement of Robert L. Keuch, Deputy Assistant Att'y Gen., Crim. Div., U.S. Dep't of Justice) (acknowledging agreement between CIA and Justice Department in contravention of 28 U.S.C. §535 and noting that Exec. Order No. 11,905 ended that agreement).

60. *See, e.g., United States v. Marchetti*, 466 F.2d 1309, 1315, 1318 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972) (“Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest.”).

61. *See United States v. Abel*, 258 F.2d 485 (2d Cir. 1958) (espionage case including extensive discussion of spies' cryptonyms and dead drop locations, but no discussion of privilege or discovery related to classified information). Cases pre-dating the 1954 Justice-CIA agreement are not more elucidating. *See generally Thomas v. United States*, 151 F.2d 183 (6th Cir. 1945) (espionage case containing no discussion of discovery or privilege or classified information); *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952) (espionage case against Julius and Ethel Rosenberg containing no discussion of privilege or classified information or discovery issues); CIA REPORT, *supra* note 32.

spying for the Soviet Union.⁶² In *Coplon*, the Second Circuit did not actually apply the state secrets privilege. Instead the Circuit applied the informant's privilege standard (later articulated in *Roviaro*⁶³) with a national security overlay.⁶⁴ This allowed the Second Circuit to conclude that information relevant and helpful to the defense should rightfully be provided in discovery. *Coplon* did not support the application of the *Reynolds* procedures to criminal cases based on its facts. FBI Director J. Edgar Hoover withheld the source of the information about Coplon, the Venona Cables, from everyone on the trial team. So prosecutors did not seek to invoke state secrets as some reviewing the opinion have imagined.⁶⁵ Instead, the judge assumed that the national security information at issue was the wiretap logs and the identity of the wiretapper. Thus the court was arguably mistaken, or speaking in *dicta*, when it said the protection of "state secrets," the disclosure of which would have "imperial[ed] 'national security,'"⁶⁶ might result in the crime going "unpunished."⁶⁷ That is because state secrets would have blocked discovery of the information. Sounding a *Reynolds*-like tone, the court wrote that, "[t]his *privilege* will often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions of [the] power to assert their rights or to defend themselves."⁶⁸

The cases that were prosecuted right after President Ford ended the secret CIA-Justice Department agreement, and just before CIPA's enactment, were not particularly clear about the application of the privilege to protect classified information.⁶⁹ This was true even where opinions discussed protective orders, *ex parte* hearings, and a judicial review of classified material to determine

62. *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950).

63. *See Roviaro*, 353 U.S. at 53.

64. *See Coplon*, 185 F.2d at 636-640.

65. *Id.* at 638. Then FBI Director J. Edgar Hoover kept the information about the Venona Cables, which had identified Coplon as a Soviet spy, from the prosecutor and the judge. *See CENT. INTEL. AGENCY, V VENONA: SOVIET ESPIONAGE AND THE AMERICAN RESPONSE 1939-1957* (1996) (showing Venona Paper source of information not wiretap); ROBERT J. LAMPHERE, *THE FBI-KGB WAR: A SPECIAL AGENT'S STORY* 115 (1995); Memorandum from Tom C. Clark to President Harry S. Truman, "Proposed Deportation of Valentine A. Gubitchev," (Mar. 16, 1949) (Venona Papers source of information regarding Coplon); ROBERT BENSON, *THE VENONA STORY* (2001), available at http://www.nsa.gov/about/_files/cryptologic_heritage/publications/coldwar/venona_story.pdf; *see also Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951) (discussing leads developed from wiretapping, but no indication that the government actually invoked state secrets privilege); *United States v. Coplon*, 91 F. Supp. 867 (D.D.C. 1950) (no reference to invocation state secrets); *United States v. Coplon*, 88 F. Supp. 921 (S.D.N.Y. 1950) (no indication that government actually invoked state secrets, but discussion of informer's privilege regarding wiretap, and assumption that confidential informant was the wiretapper, as later repeated by Judge Learned Hand); *United States v. Coplon*, 84 F. Supp. 472 (S.D.N.Y. 1949).

66. 185 F.2d at 638.

67. *Id.*

68. *Id.* (emphasis added).

69. *United States v. Dedeyan*, 584 F.2d 36, 40-41 (4th Cir. 1979) (espionage case upholding limits placed on cross examination in order to protect information concerning national defense); *United States v. Boyce*, 594 F.2d 1246, 1251-1253 (9th Cir. 1979) (espionage case containing discussion of classified information that reflects court used nearly the same procedures as were later outlined in CIPA Sections 4 and 6, though no discussion of privilege or the invocation thereof).

whether it was relevant and helpful to the defense. However, the cases do reflect a judicial recognition that information relevant and helpful to the defense should be provided.

For example, in *United States v. Kampiles*,⁷⁰ the defendant was charged with selling secret information to the Soviets while in Athens, Greece. In a seventeen-page opinion that discussed the testimony of a counter-intelligence agent, and the top-secret classification of the material Kampiles sold, there were no references to the discovery provided or to the applicable privilege.⁷¹

Then in 1980, just months before CIPA's enactment, discovery of classified information was discussed in the context of a defendant's rights. The Fifth Circuit held that a trial court had erred in not holding an *ex parte* hearing to review CIA documents that the defendants claimed would support their defense in *United States v. Diaz-Munoz*.⁷² The Fifth Circuit said that if the CIA would not produce the documents for the court's review, then certain counts of the indictment would have to be dismissed.⁷³

What emerged from these pre-CIPA cases, and was later reflected in CIPA's terms, was the need for Congress to create procedures to enable discovery of classified information, not a way to block it.

II. HOW CIPA WAS INTENDED TO FUNCTION

CIPA addressed the dual need to protect intelligence sources and methods and protect a defendant's fundamental rights. When and if classified information had

70. *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1978).

71. *Id.* at 1248. The court employed procedures that looked like those later codified in CIPA, but it did not discuss a heightened review standard used by courts in evaluating privileged material for discovery and use in criminal cases. Instead the court focused on the propriety of the *ex parte* hearing and noted that it used relevance as a standard:

It is settled that *in camera ex parte* proceedings to evaluate bona fide Government claims regarding national security information are proper. *United States v. Brown*, 539 F.2d 467, 470 (5th Cir. 1976) (per curiam); *In re Taylor*, 567 F.2d 1183, 1188 (2d Cir. 1977). Given the subject matter of this case, the district judge was warranted in using that procedure. Our study of both November hearing transcripts and the material supplied to Judge McNagny on November 14 has convinced us that the information defendant sought was highly sensitive and thus a proper subject of a protective order. No competing policy favoring disclosure was present, for our review of the information withheld by the trial judge disclosed no material that would have aided in the defense of Kampiles. The file contains no reference to Kampiles until August 1978 and substantiates the Government's contention that the defendant was not involved in the KH-11 investigation until that time. The brief references to him in August 1978 memoranda also contain nothing that would support his defense. Since the information was not exculpatory, the defendant could not have been prejudiced by its non-disclosure and the limits set on his counsel's cross-examination. Consequently his objection to the *in camera ex parte* proceedings and subsequent rulings must fail.

Id. It is likely that the discussion of the discovery of classified information occurred during the two *ex parte* hearings to limit the cross-examination of the government's witnesses who were intelligence officers, but the opinion does not state that.

72. *United States v. Diaz-Munoz*, 632 F.2d 1330, 1334 (5th Cir. 1980).

73. *Id.*

to be withheld from discovery entirely on national security grounds, CIPA empowered the Attorney General to block its admission, use, or discovery only after efforts to resolve the conflict had been exhausted before a federal judge. Prior to the judicial consideration of the classified evidence, CIPA Section 4 required only that the government make a “sufficient showing.”

Moreover, Congress did not leave CIPA open for ad hoc supplements to its procedures. To the contrary, Congress repeatedly referred to CIPA’s procedures as “omnibus” in nature.⁷⁴ In the House version of the bill, Congress went so far as to note what they had left out of the bill and why because the drafters intended the bill as omnibus in nature.⁷⁵ Indeed the title and preamble of CIPA suggest its comprehensiveness: “To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.”⁷⁶ A mental walk through the CIPA’s procedures reveals its comprehensive scope.

According to CIPA Section 1, its procedures applied to:

[A]ny information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined by paragraph r. of the section 11 of the Atomic Energy Act of 1954 (42. U.S.C. [section] 2012(y)).⁷⁷

Section 4 allowed the court’s assistance in navigating the Government’s discovery obligations. Section 4 authorized the Government to 1) delete from discovery classified information,⁷⁸ 2) produce to the defendant a substitution for the actual classified information, or 3) produce to the defendant a summary in lieu of the classified information.⁷⁹ Nothing in Sections 1 through 4 requires the Government invoke the classified information privilege through the head of the

74. S. REP. NO. 96-823, at 2-3 (1980). Congress also noted that CIPA was intended to “help ensure that the intelligence agencies are subject to the rule of law and to help strengthen the enforcement of laws designed to protect both the national security and civil liberties.” *Id.*

75. The Senate committee noted that they believed that the relevant and material standard from *Roviaro* would be the applicable standard of review for the classified material; however, they did not include it because “‘it [wa]s the intent of the Committee that the existing standards of use, relevance and/or admissibility’ would apply [to classified evidence].” *Id.* at 25 (quoting H.R. REP. NO. 96-831, at 14 (1980)). CIPA also did not include language consistent with the Jencks Act, 18 U.S.C. §3500, but the Senate expressed confidence that the relevant standard could still allow impeaching material to be made available to the defense. S. REP. NO. 96-823, at 26-27 (1980).

76. CIPA, 18 U.S.C. app. 3, pmbl. (2006).

77. *Id.* §§1-3. Section 2 provides for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Under Section 3, trial courts are required to enter a protective order preventing disclosure of any classified information to the defendant.

78. Case law and the legislative history indicate that the standard for review was “relevant and helpful” to the defense. *See* *United States v. Yunis*, 867 F.2d 617, 622 (D.C. Cir. 1989) (emphasis in original) (quoting *Roviaro*, 353 U.S. at 60-61); S. REP. NO. 96-832, at 25 (1980) (indicating that the informant’s privilege standard of relevant and helpful should apply under CIPA).

79. By its title, CIPA Section 4 applies to discovery, but it has been interpreted as applying to more than pre-trial proceedings, but instead at any point in the proceedings. *See* *United States v. O’Hara*, 301 F.3d 563, 569 (7th Cir. 2002).

agency supplying the material. Instead, Section 4 states that “upon a sufficient showing” the court may authorize deletion.^{80,81}

Legal scholars have discussed what the government must do to establish this sufficient showing under CIPA Section 4. For example, Laura Donohue has written:

In contrast to the utmost deference required in state secrets cases, CIPA requires that the government make a sufficient showing that classified information cannot be disclosed. *Unlike state secrets, where only the director of an agency can invoke the privilege, CIPA allows any prosecutor to request section 4 procedures.* And where the privilege presents an absolute bar, CIPA contemplates a balance between the defendant’s right to mount a defense and the government’s right to secrecy.⁸²

The invocation by a prosecutor is consistent with the procedures required in criminal cases where many privileges are routinely invoked through someone other than the holder of the privilege. Often the prosecutor simply makes representations to the trial court that the information at issue is privileged, as was the case with the informant’s privilege in *Roviaro*, and family court records

80. Congress noted that it intended for the government to only have to establish proper classification as a threshold matter in order to receive *ex parte in camera* review of the classified information under CIPA Section 4. H.R. REP. 431-2, at 8 (1979). For an early discussion of discovery and admissibility issues under CIPA, see Richard P. Salgado, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427 (1988). Upon authorizing deletion or summaries or substitutions of information, the court must create a record for appeal, and include in that record the full statement of the material deleted, substituted or summarized under the terms of CIPA Section 4.

81. Mort Halperin explained that he had not wanted CIPA to allow the government to “submit an explanation for the basis of the classification [of the particular information at issue]” to be reviewed *in camera*. Interview with Halperin, Senior Advisor of the Open Society Institute and former Director of the American Civil Liberties Union in Washington (Sept. 19, 2012). At the time they testified before Congress about CIPA, Halperin, Michael Sheininger, and Prof. William Greenhalgh believed that judges would “be unduly influenced by the government’s explanation and as a result would treat the information in question differently simply because it is classified.” S. REP. NO 96-823, at 7 (1980). However, Congress ultimately placed faith in federal judges to “fashion creative and fair solutions to these problems; to do so [a federal judge] must know the reason for the classification before deciding on relevance and admissibility.” *Id.*

82. Donohue goes on to cite Former Assistant Attorney General David Kris and J. Douglas Wilson whose treatise on National Security Law included the following analysis:

The absolute protection provided by the state secrets privilege is also in tension with the defendant’s right under *Brady v. Maryland* to information necessary to obtain a fair trial. Applying the state secrets privilege to criminal cases would create the very problem that Congress sought to address by enacting CIPA: forcing the government to decide between producing to the defendant sensitive classified information in discovery or invoking the privilege and preventing all disclosure of classified information . . .

Laura K. Donohue, *In the Shadow of State Secrets*, 159 U. PA. L. REV. 77, 208-209 (2010) (footnotes omitted). Donohue includes a discussion of how classified information must be given over in discovery even if the subject matter overlaps with that of the classified information privilege where evidence is relevant and helpful to the defense. *See id.* at 209-215.

privilege in *United States v. Ritchie*.⁸³ Courts thereafter review the material pursuant to a heightened review standard to determine whether it is relevant and helpful to the defense.

CIPA Section 5 requires a defendant to notify the court if he would expose classified information in the course of his defense.

CIPA then provides for an elaborate process under Section 6 whereby the government may challenge the defendant's plan to use or reveal classified information. Under CIPA Section 6 the government may also challenge a court's ruling that information it seeks to withhold from discovery under Section 4 is indeed discoverable and/or admissible. The government may seek a hearing on the use, relevance, and admissibility of the information. As to each item of classified information, the court must set forth in writing the basis for its determination. The government then may move under Section 6, that in lieu of the disclosure of classified information, the court order a substitution for such information of either 1) a statement admitting facts that the information would tend to prove, or 2) a summary of the specific information. Only if the court denies such a motion would the government be required under Section 6 to formally lodge its privilege to block the disclosure, use, or admission of classified information.

By the language of Section 6, the person who declares that disclosure of the classified information would cause "identifiable damage to the national security of the United States" is the Attorney General.⁸⁴ The heads of intelligence agencies are not referred to in CIPA.⁸⁵

The Attorney General can use the authority given him under CIPA to withhold even relevant documents where the disclosure of those documents would result in damage to the national security under CIPA Section 6. However, the trial judge is vested with concomitant authority to impose sanctions (including dismissal) on the government where the Attorney General refuses to turn over classified material that the trial court has determined is both relevant and helpful to the defense.⁸⁶

83. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *Roviaro*, 353 U.S. at 60.

84. *United States v. El-Mezain*, 664 F.3d 467, 523 (5th Cir. 2011).

Although the Government's claim of privilege may yield when the information is essential to fairly determine the issues at trial or when necessary for an important part of the defense, the defendants want us to second guess in the first instance the Government's determination of what is properly considered classified information. We decline to do so. *See United States v. Abu Ali*, 528 F.3d 210, 253 (4th Cir. 2008) ("[W]e have no authority[] to consider judgments made by the Attorney General concerning the extent to which the information in issue here implicates national security.").

85. CIPA, 18 U.S.C. app. 3 §6(c)(1)-(2) (2006). Section 7 outlines the procedures for interlocutory appeal from the trial court's rulings under CIPA, and Section 8 sets forth how the privilege is introduced into evidence. *See id.* at §6(c)(7)-(8).

86. The requirement of an Attorney General's declaration is arguably a flaw in CIPA. By the time of a CIPA Section 6 hearing, a sufficient showing that the information at issue is properly classified has already been made. Thus an Attorney General's declaration often restates what the trial judge has

Different from *Reynolds*' blocking function, under CIPA, the trial judge has a significant role in evaluating classified information and determining the form in which information will be disclosed to the defense.⁸⁷ CIPA clearly expanded the judge's role under Federal Rule of Criminal Procedure 16(d), which allows a request to "deny, restrict, or defer discovery" upon a showing of "good cause."⁸⁸

already been told by an original classifier. This extra requirement does not serve to help the defense or protect the defendant's right to evidence material to his defense. If it helps at all, one might argue, it is in the requirement that that Attorney General be accountable for the representations of the intelligence community that it sponsors through CIPA filings *ex parte*. Once a court knows that relevant and helpful information is going to be withheld from a defendant, it can bring sanctions to meet that denial of discovery.

87. The trial judge's role in evaluating a government claim of state secrets has not expanded significantly since *Reynolds*, though the Fourth Circuit wrote:

After a court has confirmed that the *Reynolds* procedural prerequisites are satisfied, it must determine whether the information that the United States seeks to shield is a state secret, and thus privileged from disclosure. This inquiry is a difficult one, for it pits the judiciary's search for truth against the Executive's duty to maintain the nation's security. [Citations omitted.] The *Reynolds* Court recognized this tension, observing that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" – no matter how great the interest in national security – but that the President's ability to preserve state secrets likewise cannot be placed entirely at the mercy of the courts. Moreover, a court evaluating a claim of privilege must "do so without forcing a disclosure of the very thing the privilege is designed to protect."

A court is obliged to honor the Executive's assertion of the privilege if it is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. In assessing the risk that such a disclosure might pose to national security, a court is obliged to accord the "utmost deference" to the responsibilities of the executive branch. *Nixon*, 418 U.S. at 710. Such deference is appropriate not only for constitutional reasons, but also practical ones: the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information. In the related context of confidentiality classification decisions, we have observed that "[t]he courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area." *Marchetti*, 466 F.2d at 1318. The executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis, in which "[t]he significance of one item of information may frequently depend upon knowledge of many other items of information," and "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Id.* In the same vein, in those situations where the state secrets privilege has been invoked because disclosure risks impairing our foreign relations, the President's assessment of the diplomatic situation is entitled to great weight.

El-Masri, 479 F.3d at 304. In the end, however, information can be withheld entirely, even if it is relevant and helpful to the non-government party in civil actions. The judge's role in that part of the evaluation is constrained, true to state secrets' blocking function.

88. Fed. R. Crim. P. 16(d)(1), which provides:

Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party's statement under seal.

Id. Under CIPA, the trial court issues a protective order, reviews material *ex parte*, and fashions relief

Rule 16 allows for the trial judge to review an *ex parte* written submission made by a party, and to make a determination about discovery. State secrets cast the judge in a different role.⁸⁹ Once the state secrets privilege is invoked, under *Reynolds*, the role of the trial judge was circumscribed:

It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that the compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and *the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.*⁹⁰

III. THE MISUNDERSTANDINGS AND THE EMERGENCE OF A CIRCUIT SPLIT

After CIPA was passed, its enabling intent was sometimes forgotten. In 1983, in *United States v. Collins*,⁹¹ the Eleventh Circuit remembered CIPA's enabling purpose when it wrote, "CIPA appears premised on the assumption that, if material to the defense and not otherwise avoidable, [classified information] shall be admissible [not just discoverable]."⁹² However, by 1988, in the case of

by allowing for a substitution or summary of classified information that will protect irrelevant sources and methods of intelligence, and requires preservation of all *ex parte* material for appeal of the issues. 18 U.S.C. app. 3 §§3-4, 6.

89. Echoing the Supreme Court's concern that the *Reynolds* procedures could not work in criminal cases, the Ninth Circuit has also noted in *dicta* the difference between the procedures in civil and criminal cases where the Government seeks to withhold privileged classified information: "Were this a *criminal* case, the state secrets doctrine would apply more narrowly." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 n.3 (9th Cir. 2010) (en banc) ("[T]he Executive's authority to protect [state secrets] is much broader in criminal prosecutions." (quoting *El-Masri v. United States*, 479 F.3d 296, 313 n.7 (4th Cir. 2007)); *see also Reynolds*, 345 U.S. at 12.

90. *Reynolds*, 345 U.S. at 12. "Sometimes, however, review may require examination of the classified material itself." *Doe v. CIA*, 576 F.3d 95, 105 (2d Cir. 2009) (citing *El-Masri*, 479 F.3d at 305); *see also Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983).

91. *United States v. Collins*, 720 F.2d 1195 (11th Cir. 1983).

92. *Id.* at 1196. *Collins* continued:

The looming, but unevaluated, threat that the nation's security might be damaged by a prosecution has been termed "greymail" practiced upon the government. S. Rep. No. 823, 96th Cong., 2d Sess. 4 (1980), reprinted in 1980 U.S.C. Cong. & Ad. News 4294, 4296-4298. Sensitive regard for national security was seen as having resulted in foregoing prosecutions for serious crimes, even in cases where the chances were great that, properly handled prior to trial, a defendant could well have been accorded due process without any cost in public revelation of classified information.

Id. at 1197. A year later, in *United States v. Wilson*, in 1984, the defendant gave notice under CIPA Section 5 that he was going to have to disclose classified information in his case to establish that his actions were done with the consent and authority of a U.S. intelligence agency. The trial court ruled that the classified evidence should be excluded, not because it was classified, but because it would confuse the jury, waste time, and was cumulative under Fed. R. Evid. 403. *United States v. Wilson*, 750 F.2d 7, 8-9 (2d Cir. 1984); *accord United States v. Pringle*, 751 F.2d 419, 427-428 (1st Cir. 1984) (holding trial court properly excluded classified information not relevant and helpful to the defense). Similarly, in the 1985 case, *United States v. Juan*, the court suggested to the government how they might use the various

United States v. Sarkissian,⁹³ the Ninth Circuit began to blur the line between state secrets and CIPA, and to conflate the state secrets' blocking procedures with CIPA's enabling procedures.

Sarkissian involved a group of Armenian terrorists who were plotting to bomb a Turkish consulate in the United States.⁹⁴ In upholding the trial court's findings denying discovery under CIPA Section 4, the Ninth Circuit noted that the declaration submitted by the government met the *Reynolds* standard.⁹⁵ But the court failed to note CIPA's "sufficient showing" standard. Thus in *Sarkissian*, the court misunderstood CIPA's intent to enable discovery before an invocation of the privilege blocked admission.⁹⁶

CIPA's enabling function was clearly understood by the District of Columbia Circuit in 1989, in *United States v. Yunis*,⁹⁷ when it likened the government's "classified information privilege" to the informant's privilege – not to state secrets.⁹⁸ *Yunis* did not require an invocation by the head of the agency under *Reynolds*. Instead the *Yunis* court acknowledged that classified information relevant and helpful to the defense would be discoverable, and, accordingly, the court conducted a review of the information.⁹⁹

tools set forth in CIPA Section 4 - such as substitutions or summaries - to protect intelligence sources and methods that might be gleaned from otherwise discoverable classified information. *See United States v. Juan*, 776 F.2d 256, 258-259 (11th Cir. 1985). In *United States v. Smith*, 780 F.2d 1102, 1104-1106 (4th Cir. 1985), the Fourth Circuit likened the classified information privilege to the informant's privilege:

The gathering of [classified] information and the methods used resemble closely the gathering of law enforcement information. The confidentiality of sources and the methods used in both instances are critical. Persons who supply information to the government regarding matters taking place in foreign countries are likely to be outside the United States. Their safety would immediately be placed in jeopardy if their identities were made public. Revealing such information absent an essential need by a defendant would also result in the drying up of a primary source of information to our intelligence community

To give the domestic informer of the police more protection than the foreign informer of the CIA seems to us to place the security of the nation from foreign danger on a lower plane than the security of the nation from the danger of domestic criminals. In our opinion the national interest is as well served by cooperation with the CIA as with the domestic police.

Id. at 1108-1109. Similarly, in 1990, in *United States v. Badia*, the Eleventh Circuit ruled that a defendant charged with hijacking a plane could present evidence of his relationship to the CIA in support of his defense. *United States v. Badia*, 827 F.2d 1458 (11th Cir. 1987). The *Badia* court cited *Collins*' language about a government privilege in classified information intended to protect sources and methods of intelligence agencies. Notably *Badia* did not import any of *Reynolds* procedures into those required under CIPA.

93. *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988).

94. *Id.*

95. *See id.* at 966 ("We assume *arguendo* that the enactment of CIPA does not affect the validity of *Reynolds*."). Indeed CIPA would not have invalidated *Reynolds* because CIPA applies only to criminal cases, where *Reynolds* applies only to civil cases.

96. *Id.*

97. *United States v. Yunis*, 867 F.2d 617, 622-623 (D.C. Cir. 1989).

98. *Id.* at 622 ("[S]ensitive considerations underlie the classified information privilege asserted here.").

99. *Id.*

Within years, the Ninth Circuit again mistakenly conflated CIPA's procedures with those of *Reynolds*, and missed an important aspect of the factual records of the trial below. This mistake began in 1998, in *United States v. Klimavicius-Viloria*.¹⁰⁰ The opinion reported that the government's declaration in the trial court satisfied the *Reynolds* standards.¹⁰¹ But the Ninth Circuit was in fact mistaken. The government never invoked the privilege through the head of agency at the time of discovery, as would have been required by *Reynolds*. Instead, consistent with CIPA's enabling function, the government's declaration regarding the classified information was executed by a subordinate official to whom classification authority had been delegated by the head of agency.¹⁰² Upon that apparently sufficient showing, the trial court thereafter determined the relevance of the evidence rather than simply blocking its production.¹⁰³

Apparently unaware of the Ninth Circuit's error in *Klimavicius*, in *United States v. Aref*,¹⁰⁴ the Second Circuit relied on *Klimavicius* for its erroneous holding.¹⁰⁵ The *Aref* court concluded that state secrets was the source of the applicable privilege, and the head of the agency must invoke the privilege before discovery issues could be resolved under CIPA.¹⁰⁶ Thus, forgetting the enabling purpose of CIPA, the Second Circuit added to CIPA a requirement that was unnecessary before discovery, and was not contained within CIPA's omnibus procedures. Not surprisingly, the *Aref* court determined that the government's failure to invoke the privilege was harmless error.¹⁰⁷ This conclusion made sense because the trial court was permitted to evaluate the relevance of the evidence to the defendant's case, instead of being blocked from doing so under *Reynolds*.¹⁰⁸

Losing the intent of CIPA's drafters, the *Aref* court also mistakenly suggested that Congress erred in citing *Coplon*, *Andolschek*, and *Reynolds*.¹⁰⁹ Yet, these

100. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998).

101. *See id.* at 1261 ("We have examined the government's sealed submissions and conclude that they satisfy *Reynolds*.").

102. *See United States v. Klimavicius-Viloria*, No. 96-50546, 1996 WL 33418388, at *85-86, 92 (9th Cir. 1996) (filing made by officer with original classification authority and not the head of agency).

103. *Id.* at 96.

104. *United States v. Aref*, 533 F.3d 72 (2d Cir. 2008).

105. *Id.* at 79.

106. *Id.*

107. The *Aref* court confirmed the existence of the Executive's authority to withhold classified information and noted that both CIPA and Federal Rule of Criminal Procedure 16(d)(1)(allowing district courts to restrict the discovery of national security information) presupposed a governmental privilege against the disclosure of classified information. *Id.* at 78.

108. The *Aref* court said the source of the applicable privilege was *Reynolds*. *See id.* ("The most likely source for the protection of classified information lies in the common law privilege against disclosure of state secrets.")

109. In its analysis, the *Aref* court seems to have assumed congressional error during the legislative process – that somehow Congress did not mean what it said when it said it was not applying the state secrets privilege. Congress wrote that the state secret privilege did not apply in criminal cases in its joint report. Therefore, Congress correctly understood that the *Reynolds* procedures could not work in criminal cases to balance a defendant's fundamental rights. *See H.R. REP. NO. 96-831*, at 1-15, n.12

three cases all stand for the principle that, when information is material to the defense, it should be provided. The *Aref* court then cited the same three cases as Congress did, *Coplon*, *Andolschek*, and *Reynolds*, for the idea that the privilege to withhold information must give way when the information is relevant and helpful to the defense – the very essence of CIPA’s enabling intent.¹¹⁰

Aref also lost sight of the omnibus nature of CIPA. In what seems like carefully selected verbiage, the *Aref* court characterized the *Reynolds* head-of-agency requirement as a “formality”¹¹¹ and not a “procedure.”¹¹² These two words are arguably synonyms. As a functional matter, it is difficult to envision the head-of-department requirement as anything other than a procedure.¹¹³

All the other circuits to consider *Aref* have declined to follow *Aref*’s holding that *Reynolds* procedures apply to criminal cases.

The Fourth Circuit declined to follow *Aref* in *United States v. Rosen*,¹¹⁴ and held that there was no requirement that the head of agency invoke the privilege to withhold classified information from discovery under CIPA.¹¹⁵ Instead the government was only required to establish proper classification:

In the civil context (as in *Reynolds*) where liberty is not at stake, a court is entitled to require the government to meet a higher standard for determining

(1980). Contrary to the Second Circuit’s speculation, Congress did express a clear desire to redress the injustices that resulted when criminal cases were dismissed because of the application of the *Reynolds* procedures. *Id.* This allowed defendants to engage in graymailing. *See United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985) (defining graymailing as the “practice whereby a criminal defendant threatens to reveal classified information during a trial in the hope of forcing the government to drop the criminal charges”). In fact, referring to trial courts’ long-existing authority to make pre-trial determinations regarding use, admissibility, and relevance of information that is not classified, Congress wrote that the state secrets civil procedures did not apply in the criminal context, even citing *Reynolds* for this point H.R. REP. NO. 96-831, pt.1 at 15 n.12; *see also* Note, *Criminal Law – Classified Information Procedures Act – Second Circuit Holds that Government May Withhold Classified Information Unless Information Would be “Relevant and Helpful” To Defense – United States v. Aref*, 533 F.3d 72 (2d Cir. 2008), 122 HARV. L. REV. 819, 820-822 (2008) (noting that Second Circuit’s conflation of state secrets concepts and blurring of absolute and qualified privileges in its opinion and highlighting irony of court’s findings that disclosure of the information at issue would have harmed the national security); *see* H.R. REP. NO. 96-831, at 1-15, n.12 (1980).

110. *Aref*, 533 F.2d at 79. Subsequent Second Circuit cases have followed *Aref*’s holding, also concluding there was harmless error when a head of agency did not invoke the privilege. *See, e.g.*, *United States v. Abu-Jihad*, 630 F.3d 102 (2d Cir. 2010); *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009); *United States v. El-Hanafi*, No. 10-CR-162, 2012 WL 603649 (S.D.N.Y. Feb. 24, 2012).

111. “Formality” is defined as “an established formal procedure that is required or conventional.” *Definition of Formality*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/formality>. Although the *Aref* court arguably used this particular language in order to characterize the government’s failure to file a head-of-agency declaration as excusable, it is difficult to conclude that a formality is anything other than a procedure. *See Aref*, 533 F.3d at 80.

112. *Id.*

113. *See Reynolds*, 345 U.S. at 12. This holding conflicts directly with CIPA Section 6’s language vesting the authority to withhold information in the Attorney General only after all other avenues of providing relevant discovery have been exhausted through Section 4’s carefully designed procedures.

114. *United States v. Rosen*, 557 F.3d 192, 198 (4th Cir. 2009).

115. *Id.*

whether information has properly been deemed to be classified. Thus, although the *Reynolds* Court held the government to a high standard on the stakes at issue in that civil proceeding, it is not clear that the *Aref* court properly adopted and applied *Reynolds* in the criminal context. Our trepidation on adopting the rule in *Aref* is further reinforced by the absence in CIPA of any agency head requirement. In such circumstances, we conclude that the absence of a statement from the relevant agency heads invoking CIPA protection does not present a barrier to the exercise of our jurisdiction in this appeal.¹¹⁶

The Fifth Circuit joined the Fourth Circuit in declining to require the Government to have the head of agency invoke its privilege to withhold classified information in the case of *United States v. El-Mezain*: “We therefore join the Fourth Circuit in questioning whether *Aref* properly adopted and applied *Reynolds* in a criminal context.”¹¹⁷ Emphasizing the differences in civil and criminal cases, the Fifth Circuit noted that “CIPA is procedural . . .” and that “there is no equivalent requirement in CIPA that the government privilege must be initiated by an agency head.”¹¹⁸ The Fifth Circuit went on to note that the “CIPA discovery provision [CIPA §4] does not similarly require the Attorney General to act.”¹¹⁹

116. *Id.*

117. *El-Mezain*, 664 F.3d 467, 521 (5th Cir. 2011) (citing *Rosen*, 557 F.3d at 198).

118. *Id.* at 519, 521.

119. *Id.* at 521 (citing CIPA, 18 U.S.C. app. 3, §4).

[T]here is no equivalent requirement in CIPA that the governmental privilege must be initiated by an agency head. *See id.* CIPA imposes upon district courts a mandatory duty to prevent the disclosure of any classified materials by issuing a protective order “[u]pon motion of the United States.” 18 U.S.C. app. 3, §3 (“Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case . . .”) (emphasis added); *see In re Terrorist Bombings*, 552 F.3d at 121. Some CIPA provisions do require the Attorney General’s participation. *See, e.g.*, 18 U.S.C. app. 3, §6(a) (“Any hearing held pursuant to this subsection [or any portion of such hearing specified in the request of the Attorney General] shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.”); 18 U.S.C. app. 3, §6(e)(1) (“Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.”). However, the CIPA discovery provision does not similarly require the Attorney General to act. *See* 18 U.S.C. app. 3, §4 (providing only that “upon a sufficient showing” the district court may authorize “the United States” to withhold classified information). The absence of a requirement in CIPA that the Attorney General assert the privilege suggests that the district court may order withholding of classified information from discovery without an explicit claim from the agency head as long as the United States otherwise makes a sufficient showing for the privilege. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (alteration in original) (internal quotation marks and citation omitted).

Relying on the canons of statutory construction, the Fifth Circuit concluded that the trial court was fully authorized under CIPA to delete materials from discovery before the Attorney General invoked the privilege to withhold classified information, “as long as the United States [] makes a sufficient showing for the privilege.”¹²⁰

Thus there remains a split between the circuits, where some recognize CIPA’s enabling purpose, and others still imagine it falls into a state secrets blocking scheme and requires blocking procedures.

IV. CIPA SHOULD BE AMENDED TO ELIMINATE CONFUSION

Congress should amend CIPA to eliminate the confusion and enhance its enabling purpose. First, CIPA should acknowledge that classified information is privileged from unnecessary public exposure. Second, CIPA should be amended to state that the person with original classification authority may make the sufficient showing that information at issue was properly classified. Third, CIPA should clearly state that courts should evaluate any potentially discoverable classified information under the “relevant and helpful” standard. Fourth, CIPA should clearly state that the Attorney General – not the head of the relevant intelligence agency – need only block the admission of classified information when no summary, substitution, or protected disclosure of that information can be made without causing damage to the national security.

The first suggested amendment depends on a majority of Congress agreeing that properly classified information is indeed privileged. Congress need not recall the words of the Founding Fathers over 200 years ago to agree that the preservation of national security depends on keeping certain information secret. Congress can easily acknowledge that there is a strong, contemporary public policy favoring the protection of properly classified information. As the Supreme Court observed, “It is well recognized that a privilege may be created by statute.”¹²¹ Where the statutes protecting the information in question show “a strong policy of nondisclosure,” one may presume that Congress intended the information to be privileged.¹²² Privilege rules “are intended to protect certain

664 F.3d at 521-522.

120. *Id.* at 522 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and on purpose in the disparate inclusion.”); *see also* *United States v. O’Donnell*, 608 F.3d 546, 552-553 (9th Cir. 2010); *Kapral v. United States*, 166 F.3d 565, 579 (3d Cir. 1999). Moreover, the *El-Mezain* court noted there seems little purpose to having a requirement that the privilege be invoked at the time of discovery because CIPA already contains a mandate requiring that district courts protect classified information from disclosure through a protective order. 664 F.3d at 519-520 (citing CIPA, 18 U.S.C. app. 3, §3 (2006)).

121. *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982); *see also* *Pierce v. Guillen*, 537 U.S. 129, 144 (2003).

122. *Baldrige*, 455 U.S. at 361 (“This strong policy of non-disclosure indicates that Congress intended the confidentiality provisions to constitute a ‘privilege’ within the meaning of the Federal Rules. Disclosure by way of civil discovery would undermine the very purpose of confidentiality

societal relationships and values, even though such protection may impose significant costs upon the litigation process.”¹²³

One can reasonably conclude that contemporary American society values the protection of properly classified information in furtherance of the national security of the United States.¹²⁴ The long and consistent pattern of legislation protecting classified information clearly evinces that societal value.¹²⁵ Courts have noted that:

The government has a substantial interest in protecting sensitive sources and methods of gathering information. The gathering of such information and the methods used resemble closely the gathering of law enforcement information. The confidentiality of sources and the methods used in both instances are critical.¹²⁶

contemplated by Congress.”); *see also* *Weil v. The Long Island Sav. Bank*, 195 F.Supp.2d 383, 388-389 (E.D.N.Y. 2001) (holding that the statute authorizing Treasury regulations prohibits the disclosure of certain reports, even in civil litigation). Privileges must serve to advance public policy. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *St. Regis Paper Co. v. United States*, 368 U.S. 208, 219 (1962) (census information is protected by a public policy favoring privacy in citizen census reporting to promote candor and truth); *Ibrahim v. Dep’t of Homeland Sec.*, No. C-06-00545, 2009 WL 5069133, at *7-8, 14 (N.D. Cal. 2009), *rev’d by*, 669 F.3d 983 (9th Cir. 2012) (continuing to provide protections to Sensitive Security Information consistent with it being privileged and denying a request for an order allowing its disclosure to Ms. Ibrahim’s expert witnesses absent a background check and some showing that expert had a “need to know”). The public policy to protect the national security of the United States cannot be seriously disputed. *See* Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 810-12 (1985) (discussing national interests in protecting classified information).

123. Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1782 (1994) (quoting CHRISTOPHER B. MUELLER & LAIRD KIRKPATRICK, *EVIDENCE UNDER THE RULES* 853 [2d ed. 1993]).

124. *See United States v. El-Mezain*, 664 F.3d 467, 521 (5th Cir. 2011):

No one seriously disputes that the Government possesses an important privilege to withhold classified information, nor do we believe a contrary assertion could be sustained. *See Yunis*, 867 F.2d 617, 622-623 (“The Supreme Court has long recognized that a legitimate government privilege protects national security concerns.”) (citing *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“[The executive branch] has available intelligence services whose reports are not and ought not to be published to the world.”)). Therefore, we conclude that the failure of a Government agency head to invoke the classified information privilege here does not constitute reversible error.

664 F.3d at 522. For an extensive discussion of instances of unauthorized disclosure of classified information and the impact on American intelligence collection and public confidence, *see* Jeffrey T. Richelson, *Intelligence Secrets and Unauthorized Disclosures: Confronting Some Fundamental Issues*, *International Journal of Intelligence and Counterintelligence*, 25:4 INT’L J. INTELL. AND COUNTERINTELL. 639 (2012).

125. *See, e.g.*, *Pierce Cnty.*, 537 U.S. at 144-145 (2002) (highway statistics privileged); *Baldrige*, 455 U.S. at 360 (raw census data privileged because a privilege may be created by a statute protecting a category of information and referring to Fed. R. Evid. 501 language about acts of Congress creating privileges); *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987) (family court records privileged protected by statute and public policy).

126. *United States v. Smith*, 780 F.2d 1102, 1108 (1985).

Evidence of a classified information privilege can also reasonably be deduced from legislation. The National Security Act of 1947 (hereinafter “The National Security Act”), for example, set standards protecting classified information. The Executive certainly had the authority to classify information in his role as steward of the nation’s security under Article II, Section 2; however, under the National Security Act, Congress specifically authorized the President to classify information, to protect classified information, and to delegate to those agency heads the authority to classify information.¹²⁷ The National Security Act defined classified information as being:

[A]ny information that has been determined pursuant to Executive Order No. 12356 of April 2, 1982, or successive orders, or the Atomic Energy Act of 1954, to require protection against unauthorized disclosure and that is so designated.¹²⁸

Congress valued properly classified information sufficiently that, in 1951, Congress set criminal penalties for the willful and unauthorized disclosure of particular types of national security information:

Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interests of the United States or for the benefit of any foreign government to the detriment of the United States any

127. National Security Act, 50 U.S.C. §§401-442a (2012). Pursuant to the National Security Act, almost every President since Truman has issued an Executive Order on classified information and to whom the authority to classify and de-classify evidence is delegated. In 1951, President Truman issued an order called, “Prescribing Regulations Establishing Minimum Standards for the Classification, Transmission, and Handling, by Department and Agencies of the Executive Branch, of Official Information which Requires Safeguarding in the Interest of the Security of the United States.” Exec. Order No. 10,290, 16 Fed. Reg. 9795 (1951). It created four categories of classified information, and set parameters from access to those with a need to know. *Id.*; see also, e.g., Exec. Order No. 10,501, 18 Fed. Reg. 7049 (1953) (Eisenhower); Exec. Order No. 10,816, 24 Fed. Reg. 3777 (1959) (Eisenhower) (amending Exec. Order No. 10,501 and clarifying certain classification rules); Exec. Order No. 10,865, 25 Fed. Reg. 1583 (1960) (Eisenhower); Exec. Order No. 10,909, 26 Fed. Reg. 508 (1961) (Eisenhower) (amending Exec. Order No. 10,865 on safeguarding classified information within industry); Proclamation No. 10,964, 26 Fed. Reg. 8932 (1961) (Kennedy) (amending Exec. Order No. 10501) (delegating to heads of agencies classification authority and clarifying terms); Exec. Order No. 10,985, 27 Fed. Reg. 439 (1962) (Kennedy); Exec. Order No. 11,097, 28 Fed. Reg. 2225 (1963) (Kennedy); Exec. Order No. 11,652, 37 Fed. Reg. 5209 (1972) (Nixon) (safeguarding classified information and establishing categories of classification); Exec. Order No. 11,714, 38 Fed. Reg. 10245 (1973) (Nixon) (amending Exec. Order No. 11,652); Exec. Order No. 12,065, 43 Fed. Reg. 28949 (1978) (Carter) (delegating original classification authority to agency heads and setting standards for classification); Exec. Order No. 12,356, 47 Fed. Reg. 14874 (1982) (Reagan) (same); Exec. Order No. 12,958, 60 Fed. Reg. 19825 (1995) (Clinton) (same); Exec. Order No. 12,968, 60 Fed. Reg. 40245 (1995) (Clinton) (amending Exec. Order No. 12958); Exec. Order No. 13,292, 68 F.R. 15315 (2003) (G.W. Bush) (creating categories of classified information and delegating classification authority to agency heads); Exec. Order No. 13,526, 75 Fed. Reg. 707 (2009) (Obama) (same).

128. 50 U.S.C. §438(2) (1999). This definition of classified information was repeated in CIPA, 18 U.S.C. app. 3 §1, demonstrating CIPA’s application to this classified information privilege.

classified information . . . shall be punished . . . The term “classified information” means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution.¹²⁹

Congress also clarified the President’s authority to protect classified information, and to delegate the authority to classify information to heads of the various intelligence agencies created by the National Security Act of 1947, and its amendments.¹³⁰ The contours of the classified information privilege included those set forth in Executive orders.¹³¹

Thus to make the first suggested amendment to CIPA, Congress would not have to reach very far. In the earliest iterations of the bill that would become CIPA, Congress aligned its definition of classified information with the definition that was contained in the then-applicable Executive Order.¹³² Congress reported that “the definition of ‘national security’ in subsection (b) [of CIPA] tracked the definition of that term in . . .” the then-applicable Executive Order.¹³³ This further demonstrated Congress’s intent to protect the national security by protecting classified information.

Congress also deliberately extended CIPA’s application to:

129. 50 U.S.C. §798(a) (1951) (emphasis added); *see also* 18 U.S.C. §§793, 794, 952 (1996); 50 U.S.C. §783(b). However, Congress anticipated that persons who could have access to classified information included “[f]ederal judges appointed by the President.” 50 U.S.C. §437.

130. Congress’s delegation of authority to the President to create standards for classification in furtherance of the national security was not an unconstitutional delegation of legislative authority to the Executive. *See United States v. Curtiss-Wright*, 299 U.S. 304, 319-320 (1936) (Congress does not make an unconstitutional delegation of legislative authority to the Executive where legislation concerns matters of national security and foreign affairs rightly in the province of the Commander in Chief and main diplomatic affairs organ - in this case forbidding sales of arms to certain foreign countries).

131. Importantly, by its plain terms, Exec. Order No. 13526 delegated the authority to classify materials to agency heads, and gave those agency heads authority to delegate original classification to “subordinate officials [who] have a demonstrable and continuing need to exercise this authority.” §1.3(c)(1), 75 F.R. 707 (2009). Further, President Obama required certain training for these subordinate officials to insure the proper exercise of their authority to classify information and to protect such classified information against unauthorized disclosure. *Id.* at §1.3(d). In addition, as in all the prior Executive orders, the persons to whom lawful access – meaning “the ability or opportunity to gain knowledge” – to classified information was permitted were clearly defined as those with a “need to know” the information, who had signed “an approved nondisclosure agreement,” and who had been determined eligible by an “agency head” or “designee.” *Id.* at §4.1(a)-(c). As further set forth below, these subordinate officials are clearly capable of establishing material classified for purposes of the heightened review standard set forth under CIPA. Most recently, President Barack Obama became the tenth President to issue an Executive order setting forth precise classification standards for executive branch department heads and delegating classification authority to those department heads and in turn their subordinates. *See* Exec. Order No. 13526.

132. *Hearing on H.R. 431-2 Before the Subcomm. on Legislation of the Permanent Comm. on Intelligence*, 96th Cong. 6 (1979) [hereinafter *Hearing on H.R. 431-2*] (referencing Exec. Order. No. 12065, 43 Fed. Reg. 28949 [1978]). Later drafts of the bill did not change the fact that CIPA tracked the language in the National Security Act. So the fact that CIPA applied to the classified information privilege also did not change as the bill passed through the legislative process. *Id.* at 8.

133. *Id.*

[A]ny information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined by paragraph r. of the section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2012(y)).^{134,135}

Thus a clear amendment to CIPA stating that classified information is privileged would be consistent with both law and public policy.¹³⁶

Second, Congress should amend CIPA to state that persons with original

134. CIPA, 18 U.S.C. app. 3 §1(a) (2006).

135. By contrast, there is no specific statute or series of statutes that define and protect state secrets generally. State secrets is a broader concept that includes a number of categories of information:

[S]tate secrets doctrine pertains generally to *national security concerns*, the privilege has been viewed as both expansive and malleable. The various harms, against which protection is sought by invocation of the privilege include impairment of the nation's defense capabilities, disclosure of intelligence gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.

Ellsberg v. Mitchell, 709 F.2d 51, 57 (1983) (emphasis in original); Jabara v. Kelley, 75 F.R.D. 475, 483 n.25 (E.D. Mich. 1977).

136. "Although the term 'military or state secrets' is amorphous in nature, it should be defined in light of 'reason and experience,' much in the same way that the term 'national defense' has been defined in 18 U.S.C. §793: *i.e.*, a 'generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.'" Ellsberg, 709 F.2d 57, n.24 (quoting Jabara, 75 F.R.D. at 483 n.25). State secrets have been found to include military secrets, such as those involved in the *Reynolds* case, 345 U.S. at 2, and matters affecting diplomatic relations between nations. *See generally, e.g.*, *Att'y Gen. of the United States v. The Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982); *The Republic of China v. Nat'l Union Fire Ins. Co.*, 142 F. Supp. 551 (D. Md. 1956). State secrets can arguably include non-classified information such as Sensitive Security Information (SSI). *See* 49 C.F.R. §1520.5 (2009) (defining SSI as including information obtained in the conduct of security activities whose public disclosure would, in the judgment of the specified government agency, harm transportation security, be an unwarranted invasion of privacy, or reveal trade secrets or privileges or confidential information). Thus the privilege to protect state secrets, while held by the Executive, is not a clearly defined privilege even if the procedures for its invocation are rooted in common law. In that regard, the state secrets privilege is different from the classified information privilege. Some confusion has occurred because of the nature of the privilege invoked by the government. In at least one case, the invocation of the privilege appeared to conflate state secrets and the informant privilege: "The privilege which the government now seeks to assert is that of the kindred privileges of state secret and the informer." *United States v. Zettl*, 835 F.2d 1059, 1065 (E.D. Va. 1987). However, the conditional nature of the privilege was not mis-characterized nor confused. *Id.* at 1065-1066. In its current iteration, CIPA may arguably apply to non-classified information the disclosure of which might damage national security. The language in Section 1(a) reads: "[A]ny 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." Many categories of information might damage national security if exposed, including SSI, which is described in regulations. If the two privileges do overlap in terms of their subject matter, their procedures clearly are different, with CIPA setting forth omnibus procedures to be used in criminal cases. Thus if Congress wishes CIPA to cover certain categories of information, and deems those categories of information to be privileged, it must state as much in any amendment to CIPA.

In concluding that properly classified information is privileged, Congress would not be legislating away any rights of the individual to defend himself against criminal charges. It will remain true that all privileged material must be turned over where it is relevant and helpful to the defense, or the government will experience the consequences of that deprivation.

classification authority can make a sufficient showing about proper classification. Such an amendment would be consistent with CIPA's enabling purpose. It would make clear that an agency head need not invoke a privilege before a court has determined relevance and worked through CIPA's problem-solving procedures. It would therefore be consistent with CIPA's enabling intent.¹³⁷

Third, although there seems to be a national understanding among the federal circuit courts that the relevant standard for review of classified information at the discovery phase is the "relevant and helpful" standard, CIPA should contain clear language to this effect. This would be consistent with CIPA's enabling intent, and would also prevent future courts from ordering or blocking discovery of information where they should not.

Fourth, although CIPA Section 6 is mostly clear on this point, CIPA should clearly state that the person to block the use, admission, or discovery of classified information is the Attorney General. Further, consistent with CIPA's enabling intent, no such invocation should be required until the court has ruled the information is: (1) relevant and helpful; (2) ordered to be provided in discovery; and (3) cannot be provided in a summary, substitution, or other protected means without harming a defendant's fundamental rights. Only then must the Attorney General block its production and the prosecution suffer the consequences of that invocation.

It has been over two hundred years since Chief Justice Marshall struggled to come up with procedures for handling privileged information in criminal cases – "I cannot precisely lay down any general rule for such a case"¹³⁸ – and over thirty years since CIPA was enacted. The time has come for Congress to answer Chief Justice Marshall with precision.

137. This would prevent requiring the government to assert the privilege repeatedly throughout the proceedings. Such repeated invocations would undermine one of the central goals of CIPA's drafters, to protect classified information from unnecessary exposure. As the Supreme Court has recently noted, "Each assertion of the privilege can provide another clue about the Government's covert programs or capabilities." *Gen. Dynamics Corp. v. United States*, 131 S.Ct 1900, 1907 (2011) (citing *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243 n.10 (4th Cir. 1985)).

138. *Burr*, 25 F. Cas. at 192.