CIPA v. State Secrets: How a Few Mistakes Confused Two Important National Security Privileges

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CIPA VERSUS STATE SECRETS: HOW A FEW MISTAKES CONFUSED TWO IMPORTANT NATIONAL SECURITY PRIVILEGES.

By S. Elisa Poteat

Introduction:

Greater numbers of terrorism cases have been prosecuted since 2001 than were prosecuted in the thirty years prior to that time. Improvements in technology and robust intelligence collection programs have created more potentially discoverable material in terrorism, espionage, leak, and general criminal cases.

The Classified Information Procedures Act (CIPA), passed in 1980, sets forth procedures to be used in criminal cases where classified information might be discoverable. The procedures are omnibus and cover the proceedings from the time of the filing of charges through appeal. CIPA has remained a durable article, but the statute has also shown some limitations since its increased use over the past decade. At present there appears to be a difference of opinion, if not a split, between the circuits as to the source of the privilege in classified information, and the procedures that apply to the discovery phase of trial. In the coming years, the Supreme Court will probably have to resolve these differences.

This article explores how the two major privileges protecting national security information are different from one another, and how they are different in terms of the procedures they require. In civil cases, the state secrets privilege and the procedures outlined by Supreme Court in Reynolds v. United States dictate how national security information is handled at the discovery phase. In criminal cases, the classified information or national security privilege and the procedures outlined in the Classified Information Procedures Act (CIPA) govern how classified information is handled from indictment through appeal. However, when CIPA was enacted, Congress failed to include language identifying the privilege that would trigger CIPA’s application. This omission has resulted in a system where national security prosecutions in different Federal Circuits require very different procedures. Despite this apparent omission, it

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3 18 U.S.C. App. III.

4 345 U.S. 1 (1953).
seems clear that the source of the classified information privilege is firmly rooted in the Article II, Section 2 authority of the President as Commander-in-Chief. The State Secrets privilege is likely rooted in the common law.

While it may seem important to require the head of agency to invoke the privilege, CIPA does not require it. Instead CIPA benefits defendants because it allows the prosecution to provide relevant and helpful classified information to a defendant in a non-classified format. The State secrets procedures do not. The case law that should guide the Supreme Court in deciding which procedures that apply to the privilege in classified information is scant, in part because at the height of Cold War, the Justice Department and the Central Intelligence Agency (CIA) entered a clandestine agreement whereby no espionage cases would be prosecuted without the express authority of the CIA Director. That agreement lasted for over 20 years.

Part I of this article discusses the history of the two privileges over the past two centuries. Part II discusses the history of CIPA and why that history reveals a difference between the two privileges and their procedures. Part III discusses the case law that reveals the differences between the two privileges. Part IV analyzes why there is a privilege in classified information based on both public policy and legislation. Part V discusses CIPA’s omnibus procedural scope and why it surely supplanted the procedures in Reynolds. Part VI suggests how Congress can resolve this confusion by a legislative correction, instead of waiting for the Supreme Court to resolve it.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 . . .


It is a very serious thing, if such a letter should contain any information material to the defence, 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 defence.

Chief Justice John Marshall, 1807.

² In preparation for this article I had the privilege of interviewing Mort Halperin (Halperin), who was testified before the Congress twice regarding CIPA as the representative of the American Civil liberties Union, Robert L. Keuch (Keuch), then the head of the Justice Department’s Criminal Division, who was also called before Congress on several occasions, Philip Lacovara (Lacovara), former Assistant Attorney General, and Phillip Heyman (Heyman), former Assistant Attorney General.
I. Roots of State Secrets and Classified Information Privileges:

The 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:

. . . the 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.

Just three years later, in his first State of the Union address, Washington requested that Congress fund an intelligence service, the Contingent Fund of Foreign Intercourse, to protect the national security interests of the country. Washington needed a better intelligence apparatus after his military communications were passed to the British by his trusted advisor, Doctor Benjamin Church.

By the time Thomas Jefferson became President, on March 4, 1805, America’s sovereignty was already facing challenges. In 1806, just 30 years after the Declaration of Independence was penned, over a thousand “Spanish troops ha[d] crossed the Sabine River” on the Louisiana-Texas border. Aaron Burr, Jefferson’s former Vice-President, was on the lam after killing Alexander Hamilton and was suspected of planning a coup d’état. President Jefferson sent Louisiana Governor John Graham to spy on Burr and report his findings. 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. Prosecutor George Hay agreed to turn over the letter in response to a writ, but he

\[\text{See also, The Evolution of the U.S. Intelligence Community - An Historical Overview.}\]

\[\text{See also, The Evolution of the U.S. Intelligence Community - An Historical Overview.}\]


\[\text{Nancy Isenberg, Fallen Founder; The Life of Aaron Burr, pp.304-306. Viking, 2007 (Isenberg).}\]

\[\text{Id. at 308, 311.}\]

\[\text{Id.}\]

\[\text{Id. at 311.}\]

\[\text{Id. at 312, 342; Kline, Mary-Jo, Political Correspondence and Public Papers of Aaron Burr, Vol II,}\]
reserved the right to withhold any confidential information in the letter, thereby invoking a somewhat vague Executive privilege. In denying the writ, Justice John Marshall acknowledged the existence of an Executive privilege protecting “secret” information from unauthorized disclosure during court proceedings. Presaging later cases that directly addressed a defendant’s right to have privileged information that is material to his defense, Marshall expressed concern about the withholding relevant but privileged information from criminal defendants. In the end, Marshall declined to suggest specific procedures courts should follow when applying the privilege. Neither did Marshall explicitly state that the privilege was rooted in the President’s

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13 Isenberg, at 345.

14 In United States v. Burr (25 F.Cas. 187, 192 (1807). 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 defence with as much liberality and tenderness as the case will admit.

    [It] is a very serious thing, if such a letter should contain any information material to the defence, 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 defence.

    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 shew 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.

(emphasis added) Id. at 191-192.

15 Burr, 25 F.Cas. at 192.

16 As discussed further below, the protection of information related to national security was discussed in Totten v. United States, 92 U.S. 105, 106 (1875), 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 . . .”; See also, Department of the Navy v. Egan, 484 U.S. 518,
role under Article II.

It would take almost two hundred years for procedures to be created.

Seventy years later, in *Totten v. United States*\(^\text{17}\), 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 not enforceable because it was required to be kept secret.\(^\text{18}\) However, the *Totten* case contained no discussion of the applicable privilege nor the exact procedures that might apply at the discovery phase had the case been deemed justiciable.\(^\text{19}\)

If classified information was not based in part on the President’s Article II authority, it seems that no one told Congress. Because in 1947, Congress passed the National Security Act of 1947, which placed the President in charge of intelligence agencies for the purpose of protecting national security.\(^\text{20}\) Congress amended it in 1950 years later, to included a section penalizing the unauthorized disclosure of information that was classified information by a Government agency, all of which were headed by an appointee of commander-in-chief:

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.\(^\text{21}\)

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\(^{17}\) *Totten*, 92 U.S. at 105 (1876). This case was affirmed recently by *Doe v. CIA*, 576 F.3d 95 (2d Cir. 2009).

\(^{18}\) *Id.* See also discussion of President’s role as commander-in-chief and organ of foreign affairs, as well as permissible delegation of authority to the Executive branch by the Legislative branch in *United States v. Curtiss-Wright*, 299 U.S. 304, 319-321.

\(^{19}\) Later cases have also distinguished *Totten* from state secrets cases by noting that *Totten’s* holding is limited to clandestine relationships. See e.g. *Tenet v. Doe*, 544 U.S. 1 (2005):

*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.’” *CIA v. Sims*, 471 U. S. 159, 175 (1985). 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.

\(^{20}\) 50 U.S.C. § 401 et seq.

\(^{21}\) 64 Stat 159, 81st Cong., 2d Sess. - Ch.s 182, 185, May 11, 13, 1050.
Nearly a century after *Totten*, in *Chicago & S. Air Lines, Inc. V. Waterman S.S. Corp.*, the Supreme Court continued to acknowledge the Executive’s authority to withhold national security information from discovery in civil cases, and also raising 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.

The in a civil case in 1953, *United States v. Reynolds*, the Supreme Court acknowledged a state secrets privilege that had roots in the common law, and it set the procedures to be used in civil cases when it would be invoked. In *Reynolds*, widows of men killed in a military plane crash sued the government, but upon requesting discovery, the Secretary of the Navy advised the trial court that the disclosure of information about certain airplane systems would damage the national security. The Court noted that state secrets privilege had roots going back to British the common law: “. . . the principles which control the application of the privilege emerge quite clearly from the available precedents.”

The Court also wrote:

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.

When there is a strong showing of necessity, the claim of privilege [by the government] should not be lightly accepted, but even the most compelling

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22/ 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 for example, *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.”).


24/ 345 U.S. 1 (1953).

25/ *Id.* at 2.

26/ *United States v. Reynolds*, 345 U.S. 1, 5-6.

Note that this article assumes that the information was valid national security information. It does not tackle the issues raised in Barry Siegel’s *Claim of Privilege*, (Harper Collins, 2008), at pp. 55-80, 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.
necessity [of the plaintiff] cannot be overcome by the claim of privilege if the court is ultimately satisfied that military secrets are at stake.\textsuperscript{27}

Although the material at issue pertain to military aviation capabilities, the Supreme Court declined, however, to decide state secrets in the context of the Executive’s Article II, Section 2 authority a Commander-in-Chief:

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. \[Citations omitted\] 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.\textsuperscript{28}

Is the state secrets privilege rooted no further than the common law, and the classified information privilege spawned entirely from the President’s Article II authority? Since \textit{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 . . .”\textsuperscript{29} This power “exists quite apart from any explicit congressional grant,”\textsuperscript{30} and has been described as a “compelling interest.”\textsuperscript{31}

Despite the Supreme Court’s statement that the state secrets privilege developed at common law, the Court 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.”\textsuperscript{32}

As later cases have noted, the classified information privilege “allows the executive branch to protect information whose secrecy is necessary to its military and foreign affairs responsibilities.”\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} at 3, 6 (1953), citing \textit{Burr} in n.18.
\item \textsuperscript{28} \textit{Id.}, citing \textit{Touhy v. Ragen}, 340 U.S. 462 (1951); \textit{Rescue Army v. Municipal Court of Los Angeles}, 331 U.S. 549, 574-585 (1947).
\item \textsuperscript{29} \textit{Id.} at 527.
\item \textsuperscript{30} \textit{Egan}, 484 U.S. at 527.
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.} See also, \textit{Snepp v. United States}, 444 U.S. 507, 509 n 3 (1980); \textit{United States v. Robel}, 389 U.S. 258, 267 (1967); \textit{Reynolds}, 345 U.S. at 10; \textit{Totten v. United States}, 92 U.S. 105, 106 (1875).
\item \textsuperscript{33} \textit{Id.} at 6. \textit{See also, El-Ganayhi v. United States}, 591 F.3d 176, 181, 185,189-190 (3d Cir. 2010) (discussion of constitutional roots of state secrets privilege); \textit{Stillman v. Department of Defense}, 209 F.Supp.2d 185, 190 (D.D.C. 2002) (“T[he federal government’s] ‘compelling interest’ in controlling access to national security information has been long recognized by the Supreme Court.”). \textit{See also}, Lindsay Windsor, \textit{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 897 (discussion of circuit differences on constitutional basis for state secrets).
\item \textsuperscript{34} \textit{El-Masri v. United States}, 479 F.3d 296, 303 (4th Cir. 2007). \textit{See also, NSA Telecommunications Record Litigation}, 564 F.Supp.2d 1109, 1123 (N.D.CA 2008):
Within a year of the Reynolds decision, the CIA and Justice Department entered a clandestine agreement that allowed the CIA to veto the prosecution of cases involving classified information. 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. The agreement only came to light when it was exposed by the Rockefeller

“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.” 345 U.S. at 6-7, 73 S.Ct. 528. 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. John Henry Wigmore (revised by Peter Tillers), I Evidence § 6.1 at 384-85 (Little, Brown & Co 1983). 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. See Reynolds, 345 U.S. at 6, 73 S.Ct. 528 & n9. Reynolds also cited to several other cases supporting the existence of a privilege - based on public policy - in favor of protecting military secrets: Firth Sterling Steel Co. v. Bethlehem Steel Co. 199 F. 353 (D.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. 303 (E.D.NY 1949) (allowing discovery in the absence of a showing that evidence involved a war secret or any threat to national security); Bank Line Int. 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”). Id.

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, 62 S.Ct. 676, 86 L.Ed. 956 (1942) (Jackson 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, 63 S.Ct. 573, 87 L.Ed. 838 (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, n. 7, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947). Accordingly, all rules of federal common law perform a function of constitutional significance.

In the specific context of the state secrets privilege, it would be unremarkable for the privilege to have a constitutional “core” or constitutional “overtones.” See Robert M Chesney, State Secrets and the Limits of National Security Litigation, 75 George Wash L Rev 1249, 1309-10 (2007). 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.

Id. For the findings on the impact of the clandestine agreement, see, http://www.fas.org/irp/cia/product/cocaine2/findings.html

Commission in 1975.36 37

Outlining what sounded like an elevated standard that would normally be associated with the judicial review of privileged material, 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 . . . 38

II. The Drafters Presumptions About the Classified Information Privilege

What did CIPA’s drafters intend should be the applicable privilege when they were deliberating over CIPA? After all, 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.”39

Some of the 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 onto its existence while conducting an investigation of intelligence agencies. Executive Order 11905; Report to the President by the Commission on CIA Activities in the United States, Chapter 5. Commenting on the reasons for this secret agreement to The Washington Post’s P.E Tyler, 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.” “Record Year Puts Spy-Catchers in Spotlight.” The Washington Post, Nov. 30 1985.

37 The Rockefeller Commission was established by Executive Order 118282 and issued its report in July 1975. For the findings on the impact of the clandestine agreement, see, http://www.fas.org/irp/cia/product/cocaine2/findings.html
38 Transcript of Hearings Before the Subcommittee on Government Information and Individual Rights, Committee on Government Operations, 19-5, September 23, 1976, at 1-2. (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 to danger to the national security. Id. at 5
apply in criminal cases, or did they mean that absolute privileges could not function in criminal cases so new procedures would have to be different in criminal cases?

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” (emphasis added).⁴⁰

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

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 (emphasis added).⁴¹

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 standard 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.⁴²

When their final joint report was drafted, the Senate and House wrote that state secrets did not apply to criminal cases.⁴³ Since CIPA governed criminal cases, that meant that the state secrets procedures in Reynolds did not apply to CIPA:

In this regard the Committee notes that it is well-settled that the common law state

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⁴¹ Hearing of the Permanent Select Committee on Intelligence House of Representatives, 96 H 431-2, p. 2, August 7, 1979, Comments of Hon. Morgan Murphy.

⁴² H.R. 96-831, Pt. 2, p.3, n. 8-9. Citing Andoschek, 142 F.2d at 503, and Coplon, 185 F.2d at 238. “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.” H.R. 96-831, Pt.2, p.3. July 11, 1979. Likewise there are other bits of legislative history that suggest Congress presupposed a privilege, such as when Congressman Edwards of California addressed the prejudice to the government that would ensue if it could not use “. . . relevant documents, even those otherwise privileged.” Emphasis added. H.R. 96-831, Pt. 2, p.3 (statements of Congressman Marvin Edwards, September 17, 1980).

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 Reynolds [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 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).

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.

So why did the drafters leave this out? 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).

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

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litigation, I suggest it would be advisable for Congress to set specific standards for the scope of the state secrets privilege. 46

CIPA was a product of its times - a response to public outcry over cases that were not made because the defendants had access to classified information which they could use to manipulate their way out of a prosecution. 47 Congress was then focused on to things: (1) constraining the Executive, and (2) empowering prosecutors to charge bad actors. 48 But Congress was not particularly focused on whether classified information was protected by a separate privilege. Was Congress so focused on creating procedures that they simply sidelined the privilege?

Then-Assistant Attorney General Phillip Heyman, disgusted by his inability to prosecute alleged CIA wrongdoers 49 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] foster[s] the perception that government officials and private persons with access to military or technical secrets have a broad de facto immunity from

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46 Id. at p. 56 (noting also that the state secret’s privilege as outlined in Reynolds was absolute and barred use of the information entirely). Lacovara 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.” Roviaro v. United States, 353 U.S. 53, 62 (1957).

Lacovara went on to recommend that a rule akin to the proposed Rule 509 would be helpful in establishing a privilege more narrow than state secrets. Id. at p. 77. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities Book II: Intelligence Activities and the Rights of Americans, S. Rep. No. 94-755, 290 (1976).


49 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 Commission 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. H.R. S. 1482 (Remarks by Congressman Romano L. Mazzoli; Classified Information Procedures Act)(1980) p. H10315-16; Proceedings and Debates of the 96th Congress, HR 4736, Classified Information Procedures Act, October 1, 1980, p. S14078-79 (Remarks of Senator Joseph Biden); H. Rept. No. 96-931, Pt. 1, p. 7 (1979).

Phillip Heyman, now a professor at Harvard Law School, was interviewed by telephone for this article in September 2012.
prosecution.\textsuperscript{50}

On October 1, 1980, Senator Joseph Biden introduced the Classified Information Procedures Act and stated he was doing so to prevent the practice of gray-mailing, whereby a defendant with access to classified information could shut down the prosecution by threatening to reveal that information as part of his defense.\textsuperscript{51}

The introduction on the south side of the Capitol, on October 2, 1980, was nearly the same.\textsuperscript{52} 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.”\textsuperscript{53}

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.”\textsuperscript{54} Was classified information privileged at the time Congress considered CIPA justifying Congress’s presumption?

In the years before CIPA, classified information was the subject of proposed legislation twice, so Congress had deliberated over it before. Just six years before CIPA, in 1974, the

\textsuperscript{50} H.R. No. 96-831, Part 2, p.2 and 7 (quoting the testimony of former Deputy Attorney General Phillip Heyman and citing Reynolds.) (1979).
\textsuperscript{51} 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.

\textsuperscript{53} H.R. 10315-16, 1980. 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 the handling of 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 bi-partisan support within Congress, and support from both the intelligence agencies, like the Central Intelligence Agency, and civil rights groups, like the American Civil Liberties Union.
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.” This could be evidence of the fact that Congress presumed classified information to be privileged. A year before that, the Senate rejected proposed Federal Rule of Evidence 509, which identified a “secrets of the state” privilege and required the head of agency to invoke it at the earliest stage of the proceedings. 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. However, no law precisely described classified information as privileged. In its final version, CIPA failed to state what privilege would trigger its application.

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56 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, et. seq.


58 Hereinafter, Rule 509.

59 Note by the Federal Judicial Center, Rule 501. The text of proposed rule of evidence

60 H.R.93-650, 93d Cong. 2 (1973) (noting 13 years of study on Federal Rules of Evidence, including proposed rule 509). See also, S.Rep. 93-1277, 93d Cong. 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.”)

61 Id. 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.

62 Id. Comments of Senator Biden. In Reynolds, the Supreme Court wrote:

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.

63 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.
III. The Common Law History of Classified Information Privilege.

Normally, one could look to case law to find guidance on how the two privileges were different. Because few criminal cases discussed classified information before CIPA’s enactment, this source of evidence is quite shallow. The lack of criminal cases before CIPA may have been the result of the clandestine agreement between the CIA and Justice, and the fact that “‘federal courts are not general common-law courts and do not possess ‘a general power to develop and apply their own rules of decision.”’\textsuperscript{61} While there were civil cases that discussed national security privileges\textsuperscript{62}, the criminal cases that were decided before CIPA can mislead a researcher because many involved no invocation of a classified information privilege at all, or simply discussed of information that had been declassified by an intelligence agency before trial.\textsuperscript{63}

Examples of cases that might confuse include those the cases against Judith Coplon\textsuperscript{64}, a young Justice Department analyst accused of spying for the Soviet Union\textsuperscript{65}. In \textit{Coplon}, the Second Circuit did not really apply the state secrets privilege. Instead the Circuit applied the

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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 United States Courts and Magistrates. Committee on Rules of
\textsuperscript{61} In re NSA Telecommunications Records, 564 F.Supp.2d 1109, 1117-18 (N.D.CA 2008), quoting Milwaukee
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. \textit{United States v. Boyce},
594 F.2d 1246 (9th Cir. 1979). See also, The Use of Classified Information in Litigation, p.43 (Testimony of
Robert L. Keuch, Assistant Attorney General, acknowledging agreement between CIA and Justice in contravention
\textsuperscript{62} For example, \textit{United States v. Marchetti}, 466 F.2d 1309, 1318 (4th Cir.), \textit{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.”).
\textsuperscript{63} Such cases do exist, however. \textit{See United States v. Abel}, 258 F.2d 485 (2nd 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. \textit{See, Thomas v. United States}, 151 F.2d 183 (6th Cir. 1945) (espionage case containing no discussion
of discovery or privilege or classified information); \textit{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). \textit{See also} \url{http://www.fas.org/irp/cia/product/cocaine2/findings.html}.
\textsuperscript{65} \textit{Coplon}, 185 F.2d at 638
\end{verbatim}
informant’s privilege standard (later articulated in Roviaro\textsuperscript{66}) with a national security overlay.\textsuperscript{67} This allowed the Second Circuit to conclude that information relevant and helpful to the defense should rightfully be provided in discovery. It would be a mistake to cite Coplon as supporting the application of the Reynolds procedures to criminal cases since FBI Director J. Edgar Hoover withheld the source of the information, the Venona Cables, from everyone on the trial team.\textsuperscript{68} The judge assumed that the national security information at issue was the wiretap logs and the identity of the wiretapper, though it does not appear that state secrets was ever actually invoked by the prosecution. Thus the court was arguably mistaken, or speaking in \textit{dicta}, when it said the protection of “state secrets,” the disclosure of which would have “imperil\textsubscript{ed} ‘national security”\textsuperscript{69}, might result in the crime going “unpunished.”\textsuperscript{70} 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” (emphasis added).\textsuperscript{71}

The cases that were prosecuted right after President Ford ended the secret CIA/Justice Department agreement did not discuss the discovery of classified information any more clearly.\textsuperscript{72} This was true even where opinions discussed protective orders, \textit{ex parte} hearings and a judicial review for relevant and helpful material. For example, in \textit{United States v. Kampiles}\textsuperscript{73}, the defendant was charged with selling secrets to the Soviets while in Athens, Greece. In a 17-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 discovery or privilege. This seems predictable considering that there were at least two \textit{ex parte} hearings to limit the cross-examination of the government’s witnesses who were intelligence officers, and no

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\item\textsuperscript{66} Roviaro, 353 U.S. at 53
\item\textsuperscript{67} Coplon, 185 F.2d at 53.
\item\textsuperscript{68} 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, \url{https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/venona-soviet-espionage-and-the-american-response-1939-1957/preface.htm} - ft52 (showing Venona Paper source of information not wiretap); Lamphere, The FBI-KGB War, p. 115; Clark to Truman, “Proposed Deportation of Valentine Gubitchev,” 16 March 1949, Document 24 (Venona Papers source of information re Coplon); \url{http://www.nsa.gov/about/_files/cryptologic_heritage/publications/coldwar/venona_story.pdf};
\item\textsuperscript{69} Id. at 638.
\item\textsuperscript{70} Id. at 638.
\item\textsuperscript{71} Id.
\item\textsuperscript{72} \textit{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); \textit{United States v. Boyce}, 594 F.2d 1246, 1251-53 (9th Cir. 1979) (espionage case containing discussion of classified information that reflects court used nearly the same procedures as were later outlined in CIPA Section 4 and 6 though no discussion of privilege or the invocation thereof);
\item\textsuperscript{73} 609 F.2d 1233 (7th Cir. 1978)
\end{enumerate}
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procedures to protect that information from the public.\textsuperscript{24}

Then in 1980, just months before CIPA’s enactment, the Fifth Circuit held that a trial court had erred in not holding an \textit{ex parte} hearing to review CIA documents that the defendants claimed would support their defense in \textit{United States v. Diaz-Munoz}.\textsuperscript{25} 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,\textsuperscript{26} but the opinion did not discuss whether the classified information was privileged.

Cases discussing the classified information privilege occurred after CIPA’s passage, but they were not consistent, and they tended to confuse both privileges and their procedures.

In 1983, in \textit{United States v. Collins}, the Eleventh Circuit never used the word “privilege” though it applied the heightened review standard normally associated with other evidentiary privileges.\textsuperscript{27} “CIPA appears premised on the assumption that, if material to the defense, and not otherwise avoidable, [classified information] shall be admissible.”\textsuperscript{28} The court did not discuss discovery, since the defendant had raised a public authority defense and disclosed that he intended to reveal classified information to explain why he had used funds he was accused of

\textsuperscript{24} \textit{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 case. Instead the court focused on the propriety of the \textit{ex parte} hearing, and noted that it used relevance as a standard:

It is settled that in camera \textit{ex parte} proceedings to evaluate bona fide Government claims regarding national security information are proper. \textit{United States v. Brown}, 539 F.2d 467, 470 (5th Cir. 1976) (per curiam); \textit{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 McNagney 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 \textit{ex parte} proceedings and subsequent rulings must fail.

\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{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.Code Cong. & Ad.News 4294, 4296-98. 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.

\textit{Id. at} 1197.
misappropriating.

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, but the court never discussed the applicable privilege.\(^79\)

In 1984, in *United States v. Clegg*\(^80\), the Ninth Circuit heard an appeal from a motion denying discovery under CIPA Section 4. In its limited discussion, the Ninth Circuit noted that “CIPA is as concerned with controlling disclosures to the defendant as to the public.”\(^81\) Yet the court never stated that CIPA’s “concern” was based on the fact that classified information is privileged, a conclusion one might make from the court’s verbiage.\(^82\)

Finally, in 1985, the Fourth Circuit mentioned a classified information privilege. Richard Craig Smith, charged with espionage for his role in selling classified information to the Soviet Union, notified the court that he would elicit classified information in order to defend himself.\(^83\) The court held that, “the District court erred in not applying such a *privilege* [as the informant privilege recognized in *Roviaro*] before ruling the relevant classified information admissible.”\(^84\) It went on to state its reasons for recognizing a privilege to protect classified information in detail while holding that the privilege was a qualified one in criminal cases nonetheless:

> 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

\(^79\) *United States v. Wilson*, 750 F.2d 7.8-9 (2d Cir. 1984) (no discussion of discovery but instead application of the relevance standard to the classified evidence defendant said he would elicit and exclusion of that evidence on grounds that it would confuse the jury, waste time and was cumulative under Fed.R.Evid. 403); *United States v. Pringle*, 751 F.2d 419, 427-28 (1st Cir. 1984) (another 1984 case wherein CIPA Section 5 notice given though court correctly noted Section 4 applied to discovery and trial court properly excluded classified information not relevant and helpful to the defense without discussion of privilege or who should invoke the privilege)

\(^80\) 740 F.2d 16,17-18 (9th Cir. 1984).

\(^81\) *Id.*

\(^82\) Similarly, in the 1985 case, *United States v. Juan*, the defendant raised a public authority defense to drug charges. Juan sought to subpoena intelligence records claiming that they would help him establish that he committed the charged crime under the reasonable belief that he was acting on behalf of a U.S. intelligence agency. At the hearing on the motion to quash the subpoena, the court found that Juan had made a showing that the classified material he sought by subpoena was material to his defense. The *Juan* court suggested to the government how they might use the various tools set forth in CIPA Section 4 - such as substitutions or summaries - to protect national security interests. The court never discussed whether classified information was privileged. Nor did the court discuss how and when that privilege would have to be invoked, if at all. *Id.* at 258-59.

\(^83\) *United States v. Smith*, 780 F.2d 1102, 1104-06 (4th Cir. 1985).

\(^84\) *Id.* at 1107-08 (containing a lengthy discussion of the factors courts should consider on a case-by-case basis in evaluating privileged classified information).
source of information to out 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.\textsuperscript{85}

The confusion about the applicable privilege seemed to have begun in the Ninth Circuit just eight years after CIPA was enacted. In \textit{United States v. Sarkissian}\textsuperscript{86}, the Ninth Circuit mistakenly cited the \textit{Reynolds} case, and a new narrative about CIPA began. \textit{Sarkissian} involved a group of Armenian terrorists who were plotting to bomb a Turkish consulate in the United States.\textsuperscript{87} In reality, despite its state secrets language, \textit{Sarkissian} never actually decided the issue of which procedures actually applied since the Ninth Circuit assumed that the declaration submitted by the Government met the \textit{Reynolds} standard.\textsuperscript{88} “We assume \textit{arguendo} that the enactment of CIPA does not affect the validity of \textit{Reynolds}.\textsuperscript{89}

In \textit{Sarkissian}\textsuperscript{90}, the Ninth Circuit mistakenly added procedures to CIPA thereby grafting the state secrets privilege onto the classified information privilege. \textit{Sarkissian} involved a group of Armenian terrorists who were plotting to bomb a Turkish consulate in the United States.\textsuperscript{91} In reality, despite its state secrets language, \textit{Sarkissian} never actually decided the issue of which procedures actually applied since the Ninth Circuit assumed that the declaration submitted by the Government met the \textit{Reynolds} standard.\textsuperscript{92} “We assume \textit{arguendo} that the enactment of CIPA does not affect the validity of \textit{Reynolds}.\textsuperscript{93}

Then in 1989, in \textit{United States v. Yunis}\textsuperscript{94}, the District of Columbia Circuit acknowledged the government’s “classified information privilege.”\textsuperscript{95} \textit{Yunis} did not require an invocation by the

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  \item \textsuperscript{85} \textit{Id.} at 1099. \textit{See also, United States v. Badia}, 827 F.2d 1458, 1464-65 (11th Cir. 1987) (discussion of implications of defendant’s failure to provide notice under CIPA Section 5 and review of trial court’s denial of his request to present classified information to support his claim he worked for the CIA while committing the charged offense but no discussion of privilege); \textit{United States v. Poindexter}, 698 F.Supp. 316, 317-18 (D.D.C. 1988) (evaluating CIPA Section 5 notice given by Admiral charged in Iran-Contra case but no discussion of CIPA Section or privilege); \textit{United States v. Rewald}, 889 F.2d 836 (9th Cir. 1989) (evaluating CIPA Section 5 notice in fraud case where defendant claimed he set up fraudulent company as part of his role in assisting the CIA but no discussion of privilege).
  \item \textsuperscript{86} 841 F.2d 959 (9th Cir. 1988).
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} \textit{Id.} at 966.
  \item \textsuperscript{89} \textit{Id.}
  \item \textsuperscript{90} 841 F.2d 959 (9th Cir. 1988).
  \item \textsuperscript{91} \textit{Id.}
  \item \textsuperscript{92} Instead, in \textit{Sarkissian}, the Ninth Circuit appears to have focused more on whether the invocation of privilege had to be done publicly. \textit{Id.} at 966. (“Defendants [] contend that the government must file a public claim of privilege before making an ex parte submission.”) (emphasis added).
  \item \textsuperscript{93} \textit{Id.}
  \item \textsuperscript{94} 867 F.2d 617, 622-623 (D.C. Cir. 1989).
  \item \textsuperscript{95} \textit{Id.} (“[S]ensitive considerations underlie the classified information privilege asserted here.”) (emphasis added).
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head of the agency as was required under Reynolds.

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 that he had hijacked the plane as part of a CIA operation. The Badia court cited Smith’s language about a government privilege in classified information intended to protect sources and methods of intelligence agencies. Badia did not import any of Reynolds procedures into those required under CIPA.

However, confusion persisted in 1998 United States v. Klimavicius-Viloria, and once again the Ninth Circuit fell into the trap of adding Reynolds’ procedures to CIPA. The Ninth Circuit noted that the government’s filing satisfied the Reynolds standards, which would quite obviously require an invocation of the privilege at the discovery phase by the head of the relevant intelligence agency. But the government never invoked the privilege through the head of agency in the trial court, so this statement was in error. Instead, the government’s declaration was executed by a subordinate official to whom classification authority had been delegated by the head of agency.

The states secrets confusion was perpetuated when the Second Circuit claimed it was following Klimavicius almost a decade later. Specifically, the Second Circuit stated that the applicable privilege was the state secrets privilege and that the Government was required to invoke the privilege at the discovery phase through the head of agency. In United States v. Aref, the Second Circuit imported the Reynolds civil procedures into criminal cases claiming that it was relying in part on Klimavicius in support of its holding. The result was a quilt of Reynolds and CIPA’s procedures that were probably not intended by CIPA’s drafters.

The Aref Court said the source of the applicable privilege was Reynolds - “most likely source for the protection of classified information lies in the common law privilege against disclosure of state secrets”. The Aref court confirmed the existence of the Executive’s authority to withhold classified information and noted that both CIPA and Federal Rule of

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20 United States v. Lopez-Lima, 738 F.Supp. 1404, 1406-07 (1990). See also, United States v. Pitts, 973 F.Supp. 576 (4th Cir. 1990)(discussing mostly sentencing issues in espionage case involving FBI agent who passed classified information to Soviet and then Russian agents, but no discussion of applicable privilege or procedures); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1363-65 (11th Cir. 1994) (discussing CIPA Section 5 notice and focusing on the admissibility of evidence that defendant’s actions were supported by a U.S. intelligence agency, but no discussion of privilege);

21 Id. at n.7.

22 144 F.3d 1249 (9th Cir. 1998).

23 See 144 F.3d at 1261 (“We have examined the Government’s sealed submissions and conclude that they satisfy Reynolds”)

24 See, United States v. Klimavicius-Viloria, 1996 WL 33418388, 85-86, 92(C.A. 9) (filing made by officer with original classification authority and not the head of agency which was sufficient to properly invoke CIPA.)

25 533 F.2d 72 (2d Cir. 2008).

26 Id.

27 Id.

28 533 F.3d at 78.
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.\textsuperscript{105}

The \textit{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. Indeed, in \textit{Aref}, the Second Circuit focused its analysis on Congress’ belief that the state secrets privilege did not apply in criminal cases.\textsuperscript{106} Congress did its belief that the state secret privilege did not apply in criminal cases in its joint report, but Congress correctly understood that the \textit{Reynolds} procedures could not work in criminal cases to balance a defendant’s fundamental rights.\textsuperscript{107}

When considering CIPA, Congress expressed a clear desire to redress the injustices that resulted when criminal cases were dismissed because the application of the \textit{Reynolds} procedures led to grey-mailing\textsuperscript{108} by defendants and created a sense that wrongdoers could get away with crimes by demanding classified information in discovery when here was no procedural mechanism to protect intelligence sources and methods. 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 \textit{Reynolds} for this point.\textsuperscript{109}

The \textit{Aref} court suggested that Congress erred in citing the \textit{Coplon}, \textit{Andolschek}, and \textit{Reynolds} cases for the notion that the state secrets privilege did not apply in criminal cases.\textsuperscript{110} The \textit{Aref} court then cited the same three cases as Congress did, \textit{Coplon}, \textit{Andolschek}, and \textit{Reynolds}, for the idea that the privilege to withhold information must give way when the information is relevant and helpful to the defense.\textsuperscript{111} This appears to be the same point that Congress made when it cited these three cases in its joint report explaining the need for CIPA.

\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{108} See \textit{United States v. Smith}, 780 F.2d 1102, 1105 (4\textsuperscript{th} Cir. 1985), defining grey-mailing 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.” See also, Criminal Law - Classified Information Procedures Act - second Circuit Holds that Government May Withhold Classified Information Unless Information Would be “Relevant and Helpful” To Defense - \textit{United States v. Aref}, 533 F.3d 72 (2d Cir. 2008), 122 Harv.L.Rev. 819, 820-822 (2008) (noting 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).
\textsuperscript{109} H.R. 96-831, pt.1, pp. 1-15, and n.12. (See note __, supra.)
\textsuperscript{110} Aref, 533 F.3d at 79.
\textsuperscript{111} Id. at 79. The Second Circuit contradicted itself to a degree in Aref on the rules of statutory construction since in other cases the Circuit noted that, “. . . the silence of Congress may itself express a clear legislative intent.” \textit{Ivorski v. U.S. I.N.S.}, 232 F.3d 124, 129-30 (2d Cir. 2000). The three-judge panel in Ivorski included Judge McLaughlin who also heard the \textit{Aref} case. The Second Circuit has also noted that the title of a statute may be useful in interpreting its meaning if it sheds light on some ambiguous word or phrase. \textit{Chen v. United States}, 434 F.3d 144, 152-53 (2d Cir. 2006). Since CIPA applies to “classified information” based on its title, it is arguably not fully co-extensive with state secrets.
Importantly, the *Aref* Court failed to note that CIPA’s procedures did not require an invocation of the privilege to withhold national security information at the stage of discovery.\(^{112}\) Thus the *Aref* court itself added *Reynolds*’ procedures on top of CIPA’s procedures.\(^{113}\)

In what appears to be carefully selected verbiage, the *Aref* Court characterized the *Reynolds*’ head of agency requirement as a “formality”\(^{114}\) and not a “procedure.”\(^{115}\) 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. As further explained below, this holding conflicts directly with CIPA Section 6’s language vesting the authority to withhold information in the Attorney General.\(^{116}\)

All the other circuits to consider *Aref* have declined to follow *Aref*’s holding on the issue of the head of agency requirement, thus departing from any notion that *Reynolds*’ procedure apply to criminal cases. The Fourth Circuit also alluded to the classified information privilege in *United States v. Rosen*\(^{117}\), as did the Fifth Circuit in *United States v. El-Mezain*.\(^{118}\) The Fourth Circuit declined to follow *Aref* in *United States v. Rosen*,\(^{119}\) and held that there was no requirement that the head of department invoke the privilege to withhold classified information from discovery under CIPA.\(^{120}\) In *Rosen*, the court emphasized the fundamental difference between the way privileges operate in civil cases and in criminal cases, and the absence of the head of agency requirement in the plain text of CIPA:

\(^{112}\) For practical reasons, some courts have appeared to move away from construing the head of agency requirement so literally. *See, Marriott International Resorts v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (“Delegated review by a subordinate undoubtedly results in more thorough, consistent, and timelier review of potentially privileged documents” in deliberative process privilege (internal citations omitted); *Chao v. Westside Drywall*, 254 F.R.D. 651, 657 (D.Org 2009) (“the general rule is that an agency head may delegate to a high-ranking subordinate the responsibility for invoking a government privilege”) (internal citations omitted). *See also, N.S.N. International Industry v. E.I. Dupont*, 140 F.R.D. 275, 281 (1991) (restating earlier opinions holding that head of agency need not personally review every document sought be withheld from discovery but only a sampling before invoking the privilege); *National Lawyers’ Guild v. Attorney General*, 96 F.R.D. 390, 403 (1982) (same).

\(^{113}\) The *Aref* court correctly acknowledged that privileges in criminal cases must bend to allow for disclosure in cases where the information is relevant and helpful to the defendant-as did Congress in enacting CIPA, and the courts did in the Burr decision and Reynolds’ dicta. *Aref*, 533 F.3d at 79. The Second Circuit also stated that it “adopt[ed] the [informant’s privilege] standard in Rovia[ro],” which was based on a materiality standard. *Id*.


\(^{115}\) “[F]ormality” is a word which is defined as “an established formal procedure that is required or conventional.” (emphases added) Mirriam-Webster at 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 excuse-able, it is difficult to conclude that a formality is anything other than a procedure. *Aref*, 533 F.3d at 80.

\(^{116}\) *Reynolds*, 345 U.S. at 12.

\(^{117}\) 557 F.3d 192, 195-196 (4th Cir. 2009)

\(^{118}\) 664 F.3d 521 (5th Cir. 2011) (acknowledging the Government’s “privilege to prevent discovery of classified information”).

\(^{119}\) 557 F.3d 192, 198 (4th Cir 2009).

\(^{120}\) *Id.*
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 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 our jurisdiction in this appeal.\textsuperscript{121}

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 join the Fourth Circuit in questioning whether Aref properly adopted and applied Reynolds in a criminal context.”\textsuperscript{122} 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.”\textsuperscript{123} The Fifth Circuit went on to note that the “CIPA discovery provision [CIPA §4] does not similarly require the Attorney General to act.”\textsuperscript{124}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 198.
\item El-Mezain, 664 F.3d 467, 521 (5th Cir. 2011) (citing Rosen, 557 F.3d at 198).
\item Id. at 520-521.
\item Id. at 520-522, citing CIPA §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, 104 S.Ct. 296, 78 L.Ed.2d 17 (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

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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 through a declaration “as long as the United States makes a sufficient showing for the privilege.” Moreover, the 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.

Was the Aref opinion’s head-of-agency requirement a product of the times, just as CIPA was a product of its times? The ruling in Aref came in response to an ACLU-supported request for discovery of information about whether any of the evidence withheld from Aref after the CIPA Section 4 hearing came from the so-called illegal wiretap program of the Bush Administration, which had been exposed by a former Justice employee in December 2005. Did the Second Circuit force the application of the state secrets privilege because the judges thought that, by having a head-of-agency invoke the privilege, somehow there was a greater likelihood that relevant and helpful information would be provided to the defense? There may be no way to determine if the judges were acting from irritation with the Justice Department.

IV. CIPA’s Comprehensive Procedures and Expansion of Trial Judge’s Role:

The cases that confuse the two privileges, by adding state secrets procedures on top of those set forth in CIPA, seem at odds with CIPA’s comprehensive scope. CIPA created a complete set of procedures that apply from charging through appeal. Congress repeatedly referred to CIPA’s procedures as “omnibus” in nature and 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.” 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. Indeed the title and preamble of CIPA make clear its intended comprehensive scope: “To provide certain pretrial, trial, and appellate

\[\text{omitted}.\]

\[\text{Id. citing Russello v. United States, 464 U.S. 16, 23 (1983) (‘. . . where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and on purpose in the disparate inclusion.’). See also, United States v. O’Donnell, 608 F.3d 546, 552-53 (9th Cir. 2010); Kapral v. United States, 166 F.3d 565, 579 (3d Cir. 1999).}\]

\[\text{Id. citing CIPA Section 3.}\]

\[533 F.3d at 72-73.}\]

http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0

\[\text{S.R. 96-823, pp. 2-3.}\]

\[\text{The Senate committee noted that they believed that the relevant and material standard from Roviaro would be the applicable standard of review for the classified material; however, they did not include it because ‘it [wa]s the intent of the Committee that the existing standards of use, relevance and/or admissibility’ would apply. S.Rep. No. 96-823, p. 25, quoting H.R. Rep. No. 96-831. CIPA also did not include language consistent with the Jencks Act (18 U.S.C. § 3500) because impeaching information, but the Senate expressed confidence that the relevant standard could still allow impeaching material to be made available to the defense. Id. at 26-27.}\]
procedures for criminal cases involving classified information.” It would be difficult to reconcile CIPA’s comprehensive scope with the conclusion that it was intended to create procedures to add to those set forth in Reynolds, such as the head of agency requirement.

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).

Section 4 allowed the Government to seek the court’s assistance in navigating the Government’s discovery obligations. Section 4 authorized the Government to: 1) delete from discovery classified information, 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. Nothing in Sections 1-4 require the Government invoke the classified information privilege through the head of the agency supplying the material. Instead, Section 4 states that “upon a sufficient showing” the court may authorize deletion.

Clearly if the information that the Government wanted to delete from discovery was exculpatory to a defendant in a criminal case, applying Reynolds’ procedures would not protect a defendant’s fundamental rights as set forth in Brady v. Maryland.

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130 Pub.L. 96-456, Preamble.
131 18 U.S.C. App. 3 § 1. 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.
132 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 (D.C. Cir. 1989) and S. Rep. No. 96-832, p. 25 (indicating that the informant’s privilege standard of relevant and helpful should apply under CIPA).
133 By its title, CIPA Section 4 applies to discovery, but it has been interpreted as applying to more than pretrial proceedings, but instead at any point in the proceedings. United States v. O’Hara, 301 F.3d 563, 569 (7th Cir. 2002).
134 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. 431-2, 1979, p.8. 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, Yale Law. J. (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.
135 Mort Halperin was interviewed by phone on September 19, 2012. He explained that 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. Halperin, Michael Sheininger, and Professor 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.” Sen.R. 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 he must know the reason for the classification before deciding on relevance and admissibility.”
136 371 U.S. 812 (1962)). See Clegg v. United States, 740 F.2d 16, 17 (9th Cir. 1984) (applying similar
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 sought to withhold from discovery under Section 4 is indeed discoverable. 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 at a point after the court denies such a motion would the Government be required under Section 6 to formally lodge its privilege to withhold 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.\(^\text{137}\) The heads of intelligence agencies are not referred to in CIPA.\(^\text{138}\)

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 (to include 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.

Another distinction between the *Reynolds* civil and the CIPA criminal procedures is that long before the Attorney General files such a declaration, the trial court works through CIPA’s procedures to determine what evidence is relevant, and to evaluate alternatives to disclosure, such as a summary or a substitution of information. Only if the trial judge does not agree to a procedural alternative to full disclosure of the classified information does the Attorney General

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standard and procedures, and ruling that “the [classified] materials are relevant to the development of a possible defense”).

Under CIPA Section 5, the defendant is required to provide written notice to the Government and the court if he expects to reveal classified information for the court’s and the government’s inspection some 30 days before trial. If the defendant fails to do so, under Section 5, the evidence can be precluded from trial and the defendant can be forbidden to examine witnesses about that information.

\(^{137}\) *El-Mezain*, 664 F.3d at 523:

> 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.”).

\(^{138}\) CIPA Section 6(c)(1) & (2). 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.
need to declare that the information should be withheld and thereby invoke the privilege.\textsuperscript{139}

In other words, under CIPA, the Attorney General does not need to invoke the classified information privilege to protect material given to the trial judge for discovery consideration under CIPA Section 4 until such time as the trial judge rules that classified information must be provided to the defense in its classified format. And then only if no alternative rendering of that evidence can be achieved. However, CIPA directs the trial judge and prosecution through problem solving steps before such an extreme result is reached. CIPA provides that if the trial court authorizes disclosure of classified information, the United States may move for substitution and accompany its motion with an affidavit contemplating simultaneous submission of procedural alternatives and adding the Attorney General’s declaration. Part of this section is logical since intelligence agency equities, and defendants’ rights to evidence, can often be protected throughout the proceedings by having the government provide an unclassified summary of the relevant information to the defense.

Where these arrangements can be forged with the guidance of the trial judge, CIPA does not suggest the involvement of an agency head in the process. Instead a declaration filed by an agency official with original classification authority should suffice to address the drafters’ concern that some showing be made that the information in question in properly classified. The omission of the agency head requirement at the discovery phase makes sense because the classified information is not being forever withheld at the point of discovery. It is being supplied to the court to fashion an alternative to disclosure of classified information that would not reveal irrelevant intelligence sources and methods.\textsuperscript{140} \textsuperscript{141}

Distinct from \textit{Reynolds}, which limited the amount of scrutiny a trial judge could give to the invocation of state secrets privilege, under CIPA, the trial judge has a significant role in handling classified information and determining the form in which information will be disclosed to the defense. This reflects CIPA’s function in expanding the existing judicial 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.”\textsuperscript{142} Rule 16 allows for the trial judge to review an \textit{ex

\textsuperscript{139} In instances where the trial Court urges a summary and the United States does not agree that it can be done without revealing intelligence sources and methods, the Attorney General would have to invoke the privilege to protect classified information by filing a declaration under CIPA Section 6. However, this action would do no more than restate what an agency official has said in an earlier declaration.

\textsuperscript{140} United States v. Fernandez, 913 F.2d 148, 154 (DC Cir. 1990) (Attorney General is the person who can fully withhold the information from discovery if he would attest that its release would damage the national security);

\textsuperscript{141} 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 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.

\textsuperscript{142} 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
parte written submission made by a party, and to make a determination about discovery. In that regard, CIPA’s terms are not new. CIPA requires that the party seeking to alter discovery of classified information must make a “sufficient showing.”\(^{143}\)

CIPA’s enhancement of trial judge’s role was a dramatic departure from the role of the trial judge under the states secrets procedures outlined in \textit{Reynolds}. Under the \textit{Reynolds} procedures in civil cases, the trial judge has a limited role once the information is determined to be privileged:

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 \textit{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.} \(^{144}\)

While \textit{Reynolds} specified that state secrets must be invoked through the agency head, in criminal cases, privileges are routinely invoked through someone other than the agency head. Often this happens invoked when the prosecutor makes representations to the trial court that the information at issue is privileged, as was the case with the informant’s privilege in \textit{Roviaro}, and family court records in \textit{United States v. Ritchie}.\(^{145}  \text{146}\)

Echoing the Supreme Court’s concern that the \textit{Reynolds} procedures could not work in criminal cases, the Ninth Circuit has also noted in \textit{dicta} the difference between the procedures in civil and criminal cases where the Government seeks to withhold privileged classified information:

Were this a \textit{criminal} case, the state secrets doctrine would apply more narrowly. \textit{See El-Masri v. United States}, 479 F.3d 296, 313 n.7 (4th Cir. 2007) ("[T]he Executive’s authority to protect [state secrets] is much broader in criminal prosecutions."); \textit{see also Reynolds}, 345 U.S. at 12 [].\(^{147}\)
The first and second canons of statutory construction require attorneys to read the statute, read the entire statute. Thus courts have noted that the “starting point for interpreting a statute is the language of the statute itself.” CIPA makes no mention of a head of agency requirement, and so it sets forth different procedures from those of Reynolds. Under CIPA, Congress vested in the Attorney General the authority to submit a certification that the disclosure of classified information in an individual case would result in “identifiable damage to the national security of the United States and explaining the basis for the classification of such information.” Thus CIPA’s plain language does not require invocation of the privilege to withhold classified information before the materiality of that information has even been established, before the defendant has given notice under CIPA Section 5, nor before the trial court has determined whether the defendant’s rights can be protected by conveying the information in an alternative format. In that regard, it clearly departs from Reynolds.

Instead, under CIPA Sections 6(c)(2) and 6(e), the Attorney General’s declaration is not required as a threshold matter at the time of discovery. Thus under CIPA’s plain language, the Government’s lead counsel, the Attorney General, is expected to assert the claim of privilege, not the head of the individual agency that developed, collected or controls the information.

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149 See e.g., Crandon v. United States, 494 U.S. 152, 158 (1990); K Mart Cor. V. Cartier, Inc. 486 U.S. 281, 291 (1988); Bethesda Hospital Ass’n v. Bowen, 485 U.S. 399, 405 (1988).
151 CIPA Section 6(c)(2). This was very different from the procedure outlined in Proposed Federal Rule of Evidence 509, which Congress ultimately rejected.
152 The third canon of statutory construction is that the text of the law be read in its contemporary context, and that legislators are presumed to have known the law when they enacted a particular statute. Cannon v. University of Chicago, 441 U.S. 677, 696-99 (1979). Given CIPA’s long road to enactment, the climate of the times in which it was enacted, and the recent exclusion of classified information from the FOIA statute, one could conclude that the Attorney General is the person to invoke the privilege in classified information. Then, only if no other method of disclosure can be worked out. There is nothing in CIPA that requires invocation of the privilege before the process of working out substitutions or summaries is complete.
153 United States v. El-Mezain, 664 F.3d 521 (5th Cir. 2011) (“Some CIPA provisions do require the Attorney General’s participation [CIPA §6(a)],” though CIPA contains no ‘equivalent requirement” that the privilege be invoked by an agency head).
154 See Fernandez, 913 F.2d at 150 (Even though Independent Counsel prosecuted a case, the “... Attorney General retains responsibility under CIPA for protection of national security secrets”); Appeal of the United States by the Attorney General, 887 F.2d 465,471 (executive branch duties concerning the “protection of information important to the national security have [not] been taken from the Attorney General ... [and delegated to another authority such as the Independent Counsel]”). Because CIPA Section 4 requires trial judges to determine whether classified information will be relevant and helpful to a defendant in a hearing, CIPA’s procedural requirements have been analogized to those of the informant’s privilege. United States v. Yunis, 867 F.2d 617, (D.C. Cir. 1989), citing Roviaro v. United States, 353 U.S. at 55. The informant’s privilege need not be invoked by the head of the agency. Roviaro v. United States, 353 U.S. at 55; Association of Women in Science v. Califano, 566 F.2d 339, 348 (D.C. Cir. 1977). Indeed, in Roviaro, the government’s objection alone was deemed sufficient to invoke the privilege. Id. See also, Founding Church of Scientology v. FBI, 104 F.R.D. 459,n.7 (informant’s privilege need not be invoked by
V. The Public Policy and Statutes Favoring a Privilege Specific to Classified Information

Regardless of what the courts have said about the source of the classified information privilege, it seems clear that there is, or should be, a privilege to protect classified information based on statutes and public policy.

As the Supreme Court observed, “It is well recognized that a privilege may be created by statute.”\(^{155}\) 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.\(^{156}\) Privilege rules “are intended to protect certain societal relationships and values, even though such protection may impose significant costs upon the litigation process.”\(^{157}\)

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, along with intelligence sources and methods.\(^{158}\) The long and consistent pattern of legislation protecting classified information clearly evinces Congress’ intent to create a privilege specific to classified information. This history also reflected a public policy favoring the protection of classified information against unauthorized disclosure.\(^{159}\) Courts have noted that the “interest in

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\(^{158}\) 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 at 622–23 (“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, 68 S.Ct. 431, 92 L.Ed. 568 (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.

\(^{159}\) Pierce County v. Guillen, 537 U.S. 129, 144-45 (2002) (highway statistics privileged); Baldridge v. Shapiro, 455 U.S. 345, 360 (1982) (raw census data privileged because a privilege may be created by a statute protecting a category of information and referring to Federal Rule of Evidence 501’s language about Acts of
protecting the confidentiality of classified information is equally, if not more, compelling than that in protecting the identities of law enforcement informants.”

The National Security Act of 1947 (The National Security Act) was major legislation that, among things, set standards protecting classified information. Though the Executive certainly had the authority to classify information in his role as steward the nation’s security under Article II, Section 2, 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. The National Security Act, defined classified information as being:

[A]ny information that has been determined by Executive Order 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...

Continuing to demonstrate its belief that classified material should receive specific statutory protections, 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


United States v. Smith, 780 F.2d 1102, 1111(1985) (concurring opinion citing the testimony of assistant attorney general given on February 7, 1980 before the committee considering CIPA).

50 U.S.C. § 401-442a (The National Security Act). Pursuant to the National Security Act, almost every President since Truman has issued an Executive Order (E.O.) on classified information and to whom the authority to classify and de-classify evidence is delegated. In 1951, President Truman issued E.O. 10290, the preamble of which read:

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 United States. Id.

E.O. 10290 created four categories of classified information, set parameters from access to those with a need to know. See also E.O. 10501 (1953, President Dwight D. Eisenhower) (same); E.O. 10816 (Eisenhower, 1959)(amending E.O. 10501 and clarifying certain classification rules); E.O. 10865 (Eisenhower, 1960); E.O. 10909 (Eisenhower, 1961) (amending earlier E.O. re safeguarding of classified information within industry; E.O. 10964 (President John F. Kennedy,1961) (amending E.O. 10501) (delegating to heads of agencies classification authority and clarifying terms); E.O. 10985 (1962, Kennedy); 11097 (Kennedy, 1963); E.O. 11652 (President Richard M. Nixon, 1972) (safeguarding classified information and establishing categories of classification); E.O. 11714 (Nixon,1973)(amending E.O. 11652); E.O. 12065 (President Jimmy Carter, 1978) (delegating original classification authority to agency heads and setting standards for classification); E.O. 12356 (President Ronald Reagan, 1982) (same); E.O. 12958 (President William Jefferson Clinton, 1995) (same); E.O. 12968 (Clinton, 1995) (amending E.O. 12958, same); E.O. 13292 (President George W. Bush, 2003) (creating categories of classified information and delegating classification authority to agency heads); E.O. 13526 (President Barak Obama, 2009) (same).

50 U.S.C. § 438. This definition of classified information was repeated in CIPA Section 1 demonstrating CIPA’s application to this classified information privilege. Earlier iterations of the National Security Act also refer to Executive orders discussing classified information.
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 *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 . . . (emphasis added).

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. Thus the contours of the classified information privilege included those set forth in Executive orders.

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. 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. This further demonstrated Congress’ intent that CIPA apply to the privilege to protect classified information as conceived in the National Security Act, which reflected a legislative goal of protecting the national security through the protection of classified information.

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164/ Congress’ 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 the province of the Commander-in-Chief and main diplomatic affairs organ - in this case forbidding sales of arms to certain foreign countries).

165/ Importantly, by its plain terms, E.O. 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.” E.O. 13526 §1.3 (a)-(c). Further, the President 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” (Id. at §6.1(a)) - to classified information was permitted were clearly defined as those with a “need-to-know” the information, who had signed “an approved non-disclosure agreement,” and who had been determined eligible by an “agency head” or “designee.” Id. at §4.1. As further set forth below, these subordinate officials are clearly capable of establishing material is classified for purposes of the heightened review standard set forth under CIPA. Most recently, President Barak Obama became the tenth President to issue an Executive Order (E.O. 13526) setting forth precise classification standards for Executive branch department heads, and delegating classification authority to those departments head and in turn their subordinates.

166/ Hearings of the Subcommittee on Legislation of the Permanent Committee on Intelligence in the House of Representatives, H431-2, August 7, 1979, p.6, referencing E.O.12065. 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. H.R. on H431-2, 1979, p 8. (Hearing Before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, 96th Congress, First Session).

167/ Id.
That CIPA applied to the pre-existing privilege in classified information is also plain from the consistent language in the National Security Act and CIPA. CIPA 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. 2012(y).¹⁶⁸

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:

State secrets “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 includes impairment of the nation’s defense capabilities, disclosure of intelligence gathering methods or capabilities, and disruption of diplomatic relations.”¹⁶⁹

“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.’¹⁷⁰ State secrets have been found to include military secrets, such as those involved in the Reynolds case,¹⁷¹ and matters affecting diplomatic relations between nations.¹⁷² State secrets can arguably include non-classified information such as Sensitive Security Information¹⁷³ or diplomatic communications that are not classified. 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 states secrets privilege is different from the classified information privilege.¹⁷⁴

¹⁶⁸ 18 U.S.C. App. 3 § 1.
¹⁷⁰ Ellsberg, 709 F.2d 51; Jabara, 75 F.R.D. at n. 25.
¹⁷¹ 345 U.S. at 2.
¹⁷³ See 49 CFR Part 1520.5, defining Sensitive Security Information (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.
¹⁷⁴ 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, 1065-66 (E.D.VA. 1987). However, the conditional nature of the privilege was not mis-characterized nor confused. Id.
VI. Legislative Correction:

It has been over two hundred years since 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”\(^{175}\) – and over thirty years since CIPA was enacted. Still some confusion remains.

Although CIPA was a bold effort to change how classified information was handled, it should be amended by Congress in three ways. First, it should clearly state that classified information is privileged and that its procedures apply to classified information as that term is defined in the National Security Act. Second, CIPA should also state that, at the discovery phase, the Government need only establish that the information is properly classified through an official who has original classification authority within the relevant agency. Third, CIPA should clearly state that the standard for review of the information by the trial court is whether the information is relevant and helpful to the defense.

Presently, a bill is pending before Congress that would correct some of the issues that have emerged under CIPA in the fullness of time.\(^{176}\) However, the bill does not specifically state that properly classified information is privileged and must be subjected to a heightened review standard just like other privileged information. Neither does the bill state that national security concerns must be among those considered by a court in weighing whether or not to allow discovery of classified material. The bill does not state who must invoke the privilege to protect classified information, nor at what stage of the proceedings such invocation must occur in order for the government to receive the heightened standard of review for classified information.

Military Rule of Evidence 505 has eliminated some of this confusion and can provide Congress with some guidance on these issues. It states:

(a) General rule of privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other privileges this rule applies to all stages of the proceedings.

(b) Definitions. As used in this rule:

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CIPA may arguably apply to non-classified information the disclosure of which might damage national security. The language in Section 1 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.

\(^{175}\) Burr, 25 F.Cas. at 192.


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(1)  **Classified Information.** “Classified information” means any information or material that has been determined by the United States Government pursuant to executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security. . .

(c)  **Who may claim the privilege.** The privilege may be claimed by the head of agency or military department or government agency concerned based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. The authority of the witness or trial counsel to do so is presumed in the absence of evidence to the contrary.177

The Military Commissions Act, § 949p-4 also set forth similarly clear guidance to avoid the problems that had arisen as a result of the Aref holding and the cases that preceded Aref.178

There seems little point to requiring the invocation of a privilege in certain information at the discovery phase before all avenues to admit the relevant information – stripped of irrelevant sources and methods – have been exhausted under CIPA Section 4. If the information can be fairly conveyed through a substitution, then it will not be withheld from discovery. Indeed, by invoking the privilege repeatedly, classified information is often more likely to be exposed. As the Supreme Court has recently noted, “Each assertion of the privilege can provide another clue about the Government’s covert programs or capabilities.”179 This would undermine one of the central goals of CIPA’s drafters, to protect classified information from unnecessary exposure.

**Conclusion:**

These suggested changes will create a continuity of procedures across Circuits. However, they will still leave the problem of how to handle non-classified information the disclosure of which would damage national security. For example, the disclosure of sensitive security information about airport security protocols would damage the national security interests of the United States. This information must be shared with other nations and individuals working in the private sector in order for aviation to function. Arguably it is privileged and should be subject to carefully crafted procedures under the law. Drafters of a new bill would be wise to consider other national security information as meritng the same procedural protection.


178  H.R. 2647-403. “Military Commissions Act of 2009.” Under this act, any person who is a “knowledgeable United States official possessing authority to classify information” can file a declaration stating that the information at issue could be expected to cause damage to the national security of the United States. *Id.* § 949p-4(a)(1). Moreover, the Military Commissions Act states that classified information is privileged. § 949-1(a).

179  *General Dynamics*, 131 S.Ct. at 1907. (citing Fitzgerald v. Penthouse International, Ltd., 776 F. 2d 1236, 1243, and n. 10 (CA4 1985)
The Congress of today seems plagued by acrimony compared to the Congress that passed CIPA. With the current state of affairs, it seems unlikely they will be able to amend CIPA to make it clearer. If no congressional action is taken, then the issue may have to be resolved by the Supreme Court. Or, it is also possible that, as they did once in *Reynolds*, the Court may choose to resolve the matter *without* deciding the basis of national security privileges.