Pepperdine Law Review

Volume 36 | Issue 1 Article 4

12-15-2008

The Muted Rise of the Silent Witness Rule in National Security Litigation: The Eastern District of Virginia's Answer to the Fight Over Classified Information at Trial

Jonathan M. Lamb

The Muted Rise of the Silent Witness Rule in National Security Litigation: The Eastern District of Virginia's Answer to the Fight Over Classified Information at Trial

I. INTRODUCTION

In 2003, German citizen Khaled El-Masri found himself abducted while on vacation in Macedonia.[1] Blindfolded and transported to an airport,

1. Petition for Writ of Certiorari at 2, El-Masri v. United States, 128 S. Ct. 373 (2007) (No. 06-1613), 2007 WL 1624819. Macedonian officials initially detained El-Masri while attempting to pass through the border between Serbia and Macedonia. *Id.* According to El-Masri, he was held in a hotel and interrogated by Macedonian officials regarding alleged ties with Islamic fundamentalists and told that he could return to Germany (his country of citizenship) if he confessed to membership in Al-Qaeda. *Id.* at 2–3. Moreover, El-Masri alleges that his interrogators denied him access to an attorney, his family, or contact with the German embassy during confinement. *Id.* at 2.

United States Central Intelligence Agency (CIA) agents allegedly took over his custody.[2]

> There he was beaten, stripped naked, and thrown to the ground. A hard object was forced into his anus. When his blindfold was removed, he saw seven or eight men, dressed in black, with hoods and black gloves. He was placed in a diaper and sweatsuit, subjected to full sensory deprivation, shackled, and hurried to a plane, where he was chained spread-eagled to the floor. He was injected with drugs and flown to Baghdad, then on to Kabul, Afghanistan.[3]

El-Masri alleges that he was kept incommunicado for nearly five months, detained in a CIA prison in Kabul, and only after a hunger strike and forced feeding through a nasal tube was he mysteriously placed on a flight to Germany and released.[4]

The public will probably never learn what actually happened because the government asserted the "state secrets privilege" upon commencement of El-Masri's civil lawsuit.[5] With this privilege, the government protects state

---

2. *Id.* at 3. "After twenty-three days of detention, Mr. El-Masri was videotaped, blindfolded, and transported to an airport, where he was turned over to U.S. agents." *Id.*

3. *Id.*

4. *Id.* at 3–5. According to El-Masri, hooded men came into his cell and force-fed him through a nasal tube after four weeks of a self-initiated hunger strike. *Id.* at 4. El-Masri told the press that "[a]fter five months, they simply took me back and dropped me like a piece of luggage in the woods of Albania." Bill Mears, *Supreme Court Refuses to Hear CIA Kidnapping Allegation*, CNN.com, Oct. 9, 2007, http://www.cnn.com/2007/US/law/10/09/cia.rendition/index.html. After being dropped in Albania, El-Masri was allegedly transported to Mother Theresa Airport in Tirana, Albania and placed on a flight to Germany. Petition for Writ of Certiorari, *supra* note 1, at 5. Upon his arrival in Germany, El-Masri promptly related the events to an attorney who reported to German authorities. *Id.* Upon a preliminary investigation, German prosecutors issued arrest warrants for unnamed CIA operatives allegedly involved in the affair (part of the investigation involved a test of El-Masri's hair and the results confirmed prolonged deprivation of food and presence in "a South-Asian" country). *Id.*

5. *See infra* Part II (discussing the history, development, criticisms, and use of the state secrets privilege). El-Masri initiated the civil complaint against the United States in district court on December 6, 2005. El-Masri v. Tenet (*El-Masri I*), 437 F. Supp. 2d 530, 534 (E.D. Va. 2006), *aff'd sub nom.* El-Masri v. United States (*El-Masri II*), 479 F.3d 296 (4th Cir. 2007). El-Masri brought the civil complaint against then CIA Director George Tenet (acting in his individual capacity), several corporate defendants, and unnamed CIA agents whom allegedly participated in the actual events. *El-Masri I*, 437 F. Supp. 2d at 534. Moreover, the complaint alleged that

> El-Masri had not only been held against his will, but had also been mistreated in a number of other ways during his detention, including being beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility, including his family or the German government.

El-Masri II, 479 F.3d at 300 (citing many of the allegations and facts found by the district court in *El-Masri I*). The United States submitted a formal claim of the state secrets privilege to the court on

secrets from public disclosure at trial by having the case dismissed in its entirety.[6] The district court accepted the assertion of the privilege in El-Masri's case and ordered the case dismissed.[7] Subsequently, the Fourth Circuit affirmed.[8] Finally, El-Masri's pursuit of justice ended when his words fell on deaf ears—the highest ears in the land—as the Supreme Court denied his writ of certiorari in 2007.[9] By refusing to hear the case, the Court left El-Masri without a forum in which to attempt to prove his claims of abduction, extraordinary rendition,[10] and torture by the CIA.

While El-Masri's allegations seem extraordinary, lesser claims have also been dismissed pursuant to the state secrets privilege.[11] This prompted critics to allege that the government invoked the privilege far too often in

---

March 8, 2006. *El-Masri I*, 437 F. Supp. 2d at 535; *see also* notes 69–71 and accompanying text (discussing the elements for a "formal" claim of privilege). The court took a concurrent motion to dismiss under advisement, heard oral arguments on May 12, 2006, and granted dismissal on the same day. *El-Masri I*, 437 F. Supp. 2d at 535.

6. *See infra* Part II.A for a brief overview of the purpose and use of the state secrets privilege.

7. "I was humiliated, I was beaten, I was drugged," claimed El-Masri. Mears, *supra* note 4. The district court responded, "the United States' motion to dismiss must be, and hereby is, GRANTED." *El-Masri I*, 437 F. Supp. 2d at 541.

8. The court of appeals reluctantly recognized "the gravity of [its] conclusion that [Plaintiff] must be denied a judicial forum for his Complaint . . . and affirm[ed] the Order of the district court." *El-Masri II*, 479 F.3d at 313.

9. Upon petition to the Supreme Court, El-Masri received a one-line response: "Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit *denied*." El-Masri v. United States, 128 S. Ct. 373 (2007) (denying certiorari from *El-Masri II*, 479 F.3d 296, alleging illegal kidnapping, rendition, torture, and interrogation of a German citizen by the CIA) (emphasis added). A German parliamentary investigation remained underway at the time El-Masri submitted his brief to the Supreme Court in 2007. Petition for Writ of Certiorari, *supra* note 1, at 5–6. However, a European inquiry's findings supported El-Masri's allegations. *Id.*

10. The Fourth Circuit adopted the wording of El-Masri's complaint when explaining the concept of "extraordinary rendition":

> El-Masri alleged that his detention and interrogation were "carried out pursuant to an unlawful policy and practice devised and implemented by defendant Tenet known as 'extraordinary rendition': the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws."

El-Masri II, 479 F.3d at 300 (quoting Complaint ¶ 3, *El-Masri I*, 437 F. Supp. 2d at 530). The "extraordinary rendition" program is a complex method of avoiding United States laws on torture and interrogation. *See* Janet Cooper Alexander, *Jurisdiction-Stripping In a Time of Terror*, 95 CAL. L. REV. 1193, 1209–11 (2007) (summary of the "extraordinary rendition" program); Tarik Abdel-Monem, *Precedent of the European Convention on Human Rights to the CIA's High Value Detainees Program In and Through Europe*, 31 SUFFOLK TRANSNAT'L L. REV. 45, 45–52 (2007) (describing the "extraordinary rendition" program and Europe's complicity in the program); Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, The NEW YORKER, Feb. 14, 2005, at 106, 108.

11. *See infra* notes 14–19 and accompanying text (describing other "lesser" claims that have been dismissed pursuant to the state secrets privilege).

recent years due to the aggressive anti-terrorism policies of the war on terror.[12] These anti-terrorism policies often left the United States at the defendant counsel's table answering for mistakes and unconstitutional actions.[13] For example, the state secrets privilege prevented litigation of claims of unconstitutional and illegal wiretapping,[14] illegal firings of CIA and executive branch whistleblowers,[15] Federal Bureau of Investigation (FBI) surveillance of a twelve-year-old boy,[16] discrimination at intelligence agencies,[17] and psychological operations,[18] among others.[19]

---

12. LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 212 (2006) (asserting that the use of the state secrets privilege has been "on an upward climb"); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) (arguing that the Bush Administration "raised the privilege in twenty-eight percent more cases per year than in the previous decade, and . . . sought dismissal in ninety-two percent more cases per year than in the previous decade."); William G. Weaver and Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 85 (2005) ("Since the administration of Jimmy Carter, there has been a sharp increase in secrecy claims by executive branch officials . . . ."); *contra* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1297–99 (2007) (arguing that the privilege has not been asserted with a significant increase recently—finding that the privilege was asserted twenty-three times from 1981 to 1990, twenty-five times from 1991 to 2000, and twenty times from 2001 to 2006).

13. *See infra* notes 14–19 and accompanying text.

14. *See* Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) (upholding a dismissal under the state secrets privilege for an action brought against the CIA, FBI, National Security Agency (NSA), Defense Intelligence Agency (DIA), Western Union International, RCA Global Communications, and ITT World Communications for allegedly illegal and warrantless interceptions of international cable, telephone, and wire transmissions of individuals and organizations who opposed the Vietnam war).

15. *See* Barlow v. United States, No. 98-887X, 2000 WL 1141087 (Fed. Cl. Aug. 3, 2000) (holding that government action withholding documents under the state secrets privilege was valid in an action by plaintiff contesting termination from the Department of Defense (DoD) Office of Non-Proliferation Policy as a violation of the Whistleblower Protection Act, 5 U.S.C. § 2302 (1994), even though the plaintiff and counsel each held the requisite security clearances). Generally, the Whistleblower Act makes it a statutory violation for the government to take personnel action against employees because they report what they reasonably believe is a government violation of the law. *Barlow*, 2000 WL 1141087, at *2.

16. *See* Patterson v. Federal Bureau of Investigation, 893 F.2d 595 (3d Cir. 1990) (affirming exemption of the FBI, under the state secrets privilege, from disclosure of information under a Freedom of Information Act request by a sixth grade boy whom the FBI monitored due to a flood of international correspondence stemming from a school project).

17. *See* Tilden v. Tenet, 140 F. Supp. 2d 623 (E.D. Va. 2000) (dismissing gender discrimination claim of CIA employee under the state secrets privilege).

18. *See* Black v. United States, 62 F.3d 1115 (8th Cir. 1995) (holding dismissal under the state secrets privilege valid in an action where a government contractor alleged a campaign of harassment and psychological attack by the CIA upon reporting suspicious questioning by a Soviet mathematician).

19. *See* Weaver & Pallitto, *supra* note 12, at 90–91. Other causes of action relating to the war on terror include illegal imprisonment, abduction, illegal surveillance, discrimination, limitation on public demonstrations, and wrongful termination. *See, e.g.*, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (alleging torture, abduction, and illegal rendition); Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005) (race discrimination); Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8 (1st Cir.

Each of these examples illustrates a seemingly unjust dismissal due to the state secrets privilege. Yet the state secrets "problem" is emblematic of a larger judicial issue which is not confined to civil cases: the tension between the government's interest in protecting classified information and society's interest in justice by resolution on the merits.[20] The United States must be allowed to prosecute terrorists, conspirators, and enemies by using classified information as evidence. How may the government do this without compromising the rights of the accused? Conversely, the United States should arguably be held liable for mistakes and unconstitutional actions resulting from aggressive anti-terrorism policies. How might the government act as a defendant in civil actions, yet adequately protect classified information while allowing plaintiffs some access to it for use at a trial?

The answer might be a little known evidentiary doctrine called the "silent witness rule."[21] The rule recently received approval by Judge T. S. Ellis in the Eastern District of Virginia.[22] Under the silent witness rule, trial participants would have copies of a classified document "key" designating code names for classified places, names, documents, or other information.[23] When referring to classified information during trial, trial participants[24] would use the code name to reference a particular piece of classified information, thereby protecting the actual information from disclosure.[25]

2004) (limiting public demonstrations); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006) (illegal surveillance and disclosure of phone records); Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004) (illegal termination).

20. The rules of civil procedure require that defendants and plaintiffs alike must have access to materials necessary to adequately litigate or defend their cases. *See generally* FED. R. CIV. P. 1–86. Conversely, government secrets which may include the classified evidence needed to litigate a claim are often protected from disclosure by statute. *See infra* Part III (describing the Classified Information Procedures Act (CIPA)).

21. *See infra* Part IV (describing the "silent witness rule," its development, and subsequent approval).

22. United States v. Rosen, 520 F. Supp. 2d 786, 797 n.20 (E.D. Va. 2007) (approving the silent witness rule for use in a four minute and six second segment of recorded conversation); *see infra* Part IV (discussing the development and approval of the silent witness rule).

23. *Rosen*, 520 F. Supp. 2d at 793–94. Although the public could still observe the trial, the key card prohibits disclosure of the classified information. *Id.* The United States government proposed the use of the silent witness rule in a handful of circumstances over the last twenty-five to thirty years, with unclear results. *See infra* Part IV.B (describing the minimal attempts to implement the silent witness rule).

24. "Trial participants" include the judge, jury, defendant, counsel for defendant, and counsel for the prosecution or plaintiff. *Rosen*, 520 F. Supp. 2d at 793–94.

25. *See id.* For example, a defense witness might indicate his or her presence at "Airport *A*." The trial participants consult the key card, which indicates "Airport *A*" is actually "Baghdad International Airport." The judge, jury, defendant, and counsels would understand the witness's

The procedure allows classified evidence to be used at trial without fear of public disclosure.[26] The approval currently extends to use in the criminal arena, where the United States prosecutes persons for their roles in crimes such as espionage, conspiracy, disclosing classified information, and giving false testimony.[27] This Comment hopes to address Judge Ellis's recent judicial approval of the silent witness rule and whether its approval for use in the criminal arena implicitly endorses its use in civil actions.[28] However, this Comment does not suppose to analyze the practical applicability of invoking the silent witness rule in the civil arena, but instead endeavors to present the information necessary to understand this new doctrine.

Part II will acquaint the reader as to the history of the state secrets privilege and survey some of the current legal thought.[29] Part III will discuss the Classified Information Procedures Act (CIPA, or the Act), its application to classified evidence in national security litigation, and the government's reliance on the Act to justify the use of the silent witness rule.[30] Part IV will address the preliminary case law history of the silent witness rule,[31] culminating with an analysis of Judge Ellis's opinion in *United States v. Rosen*—arguing that his approval creates an answer to the state secrets "problem."[32] Part VI will conclude the Comment.[33]

II. THE STATE SECRETS "PROBLEM"

A. The State Secrets Privilege Defined

Recent history has revealed a noticeable assertion of the state secrets privilege—an evidentiary privilege where the government moves a court to dismiss a civil case in which the United States is a defendant or intervenor

---

indication, but the public would be unaware as to the actual location.

26. *See infra* notes 176–78 and accompanying text.

27. *See Rosen*, 520 F. Supp. 2d 786 (prosecution for conspiracy to violate the Espionage Act, and aiding and abetting unauthorized disclosure of National Defense Information); United States v. Libby, 467 F. Supp. 2d 20 (D.D.C. 2006) (prosecution for false statements to the FBI and false testimony to a grand jury); *see also* United States v. Fernandez, 913 F.2d 148 (4th Cir. 1990) (prosecution for making misrepresentations to the Inspector General of the CIA, and making false statements to the Tower Commission); United States v. Zettl, 835 F.2d 1059 (4th Cir. 1987) (prosecution for conspiracy, conversion, and espionage). A discussion of United States District Court Judge T. S. Ellis's opinion approving the silent witness rule in *Rosen* follows in Part IV.C.

28. Civil cases do not pose the same constitutional concerns as criminal actions. *See* Robert E. Stein, *Revised Report 116A to the House of Delegates*, 2007 A.B.A. SEC. OF INDIVIDUAL RTS. & RESPS. 1, 8, 9, *available at* www.abanet.org/adminlaw/annual2007/State-Secrets-Report-Full-HOD.pdf; *see also infra* Part IV.C.4.

29. *See infra* notes 34–130 and accompanying text.

30. *See infra* notes 131–75 and accompanying text.

31. *See infra* notes 176–254 and accompanying text.

32. *See infra* notes 255–332 and accompanying text.

33. *See infra* notes 333–39 and accompanying text.

because litigation in open court will likely reveal state secrets or other classified information to the public.[34] In general terms, the state secrets privilege "protects information that would result in 'impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.'"[35] The privilege can only be asserted by the head of an executive branch agency with control over the state secret, and the agency head may only assert the claim upon personal review of the information.[36] The privilege protects classified information from disclosure and often results in outright dismissal of any claim against the United States because the plaintiff cannot access information essential to the claim.[37] It derived

34. In state secrets cases, the government argues that that the potential risk to national security is too great for disclosure of classified information at trial and backs it up with a formal claim of the privilege by the head of the agency with control of the information. Upon successful assertion of the state secrets privilege, the court will dismiss a case due to national security dangers. *See infra* notes 78–81 and accompanying text (illustrating the purpose and use of the state secrets privilege).

35. Frost, *supra* note 12, at 1935–36 (quoting Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983)).

36. The claim of privilege can only be invoked through the procedural framework adopted by the Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953). The head of an executive agency must assert the privilege, vowing that disclosure of sensitive information in open court would pose such a risk to national security that the only adequate alternative is dismissal. *See infra* notes 62–70 and accompanying text (discussing *Reynolds* and the formal requirements for government assertion of the state secrets privilege). "[O]nce the privilege is found to attach, it is absolute and cannot be overcome by a showing of need or offsetting considerations." Chesney, *supra* note 12, at 1252 (citing *Reynolds*, 345 U.S. at 11). Not only must the privilege be asserted by the government through the head of an executive agency, but the government is the only entity that may claim the state secrets privilege. *Reynolds*, 345 U.S. at 7–8. According to *Reynolds*:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. . . . There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.

Id. (footnotes omitted); *see also infra* note 69 and accompanying text (explaining the process for invocation of the state secrets privilege).

37. *See infra* Part II.C. When the privilege attaches to particular evidence, the claimant can be left without access to the very information that would prove the case. Therefore, courts have little option other than to dismiss the case. Thus, the state secrets privilege is used most often to dismiss civil cases brought against the United States, but it has been argued that the privilege could also be used to dismiss federal criminal prosecutions by the government. *See* Stein, *supra* note 28, at 1; Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 316–17 (1986) ("It follows . . . that all properly classified information qualifies for the state secrets privilege."). *See also* Chesney, *supra* note 12, at 1297–98. Chesney shows that the government "prevailed more often than not" when seeking dismissals under the state secrets privilege. *Id.* In sixty-five published opinions regarding the state secrets privilege (from 1973–2001), "twenty-three of the twenty-eight dismissal motions were granted, as were thirty of the thirty-seven discovery motions." *Id.* at 1298.

from English and American common law, finding its true beginnings in early American court decisions on executive privilege.[38]

B. History and Development

American jurisprudence first mentioned the state secrets privilege (although not by that name) during 1803 in the watershed case of *Marbury v. Madison*.[39] Although *Marbury* is widely known as the landmark case regarding judicial review, the opinion also encompassed decisions on evidentiary procedure.[40] The Supreme Court decision, written by Chief Justice Marshall, suggested in dicta that Attorney General Levi Lincoln would not have been forced to disclose information which was communicated to him in confidence by the President of the United States.[41]

---

38. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14692D).

39. *Marbury*, 5 U.S. (1 Cranch) at 137. According to Robert M. Chesney, the Court in *Marbury* was the first to allude to the privilege that would later become the "state secrets privilege." Chesney, *supra* note 12, at 1271.

40. *See* Chesney, *supra* note 12, at 1271. In the course of litigating for the delivery of Marbury's commission as Justice of the Peace, the Supreme Court addressed evidentiary concerns and the resulting separation of powers issues. *Id.* Marbury sought to prove that his commission was found in the Secretary of State's office by hearing testimony from Attorney General Levi Lincoln (who acted as Jefferson's Secretary of State). *Id.* at 1271–72. Yet Attorney General Lincoln did not want to testify as to anything he learned while acting in his official capacity as Secretary of State. *Id.* at 1272.

41. The *Marbury* Court noted that:

> The [S]ecretary of [S]tate . . . is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are undoubtedly facts, which may come to their knowledge by means of their connection with the [S]ecretary of [S]tate, respecting which they cannot be bound to answer. Such are the facts concerning foreign correspondencies, and confidential communications between the head of the department and the President.
>
> . . . .
>
> Mr. Lincoln, [A]ttorney [G]eneral, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as [S]ecretary of [S]tate at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as [S]ecretary of [State].

Marbury, 5 U.S. (1 Cranch) at 141–43. The aforementioned quote demonstrates Mr. Lincoln's struggle with whether to reveal the confidential information related to him by the President, but that upon seeking advice from trusted persons, he decided that he should not answer any questions that would reveal the communications between himself and the President. The Court, however, found:

> There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state anything which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right

Although this suggestion of such an evidentiary privilege was the first in a published Supreme Court opinion, the decision failed to elaborate on the specific application of the privilege.[42]

The Court revisited the issue during an evidentiary matter in the *United States v. Burr*[43] treason trial of 1807, where Aaron Burr sought production of a letter from General James Wilkinson to the President of the United States that purported to detail Burr's treacherous actions.[44] Chief Justice Marshall indicated that if the letter contained "any matter which it would be imprudent to disclose, . . . such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed."[45] The

---

to know.

Id. at 144–45. Chesney notes that:

> Marbury had sought to elicit testimony from Attorney General Levi Lincoln—who had been the acting Secretary of State in the opening months of the Jefferson administration—concerning whether the commissions at issue in that case had been found in the Secretary of State's office. Lincoln objected, arguing that he should not testify "as to any facts which came officially to his knowledge while acting as [S]ecretary of [S]tate." Ultimately, the Court sided with Marbury, reasoning that there was nothing confidential about the information he sought concerning the location of the commissions at a particular point in time. The Court suggested in dicta, however, that Lincoln would not have been "obliged" to disclose information "communicated to him in confidence."

Chesney, *supra* note 12, at 1271–72 (quoting *Marbury*, 5 U.S. (1 Cranch) at 143–44).

42. Chesney, *supra* note 12, at 1271. *Marbury*'s exact language stated: "If there had been [confidential information] he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it." *Marbury*, 5 U.S. (1 Cranch) at 144. The opinion failed to detail the exact application of the privilege whether the privilege extended to confidential communications of executive branch officials, to certain confidential information, to any actions taken by an executive officer in furtherance of their duties, or to some combination of interactions between executive officers and confidential information or communications. Chesney, *supra* note 12, at 1272.

43. United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14692D).

44. *Id.* at 30. Chief Justice Marshall sat as a judge on the Circuit Court, although he was, at the time, the Chief Justice of the United States Supreme Court. Chesney, *supra* note 12, at 1272 n.130. The arguments over issuing a subpoena for production of the letter "turned more upon the propriety of granting the motion, than upon any strictly legal question." *Burr*, 25 F. Cas. at 31.

> On the part of the prosecution it was insisted that the subpoena was unnecessary, because certified copies of any documents in the executive departments could be obtained by a proper application. It was said to be improper to call upon the [P]resident to produce the letter of Gen. Wilkinson, because it was a private letter, and probably contained confidential communications, which the [P]resident ought not and could not be compelled to disclose. It might contain state secrets, which could not be divulged without endangering the national safety. It was argued that the documents demanded could not be material to the defence, and objected that the affidavit [of Aaron Burr] did not even state, in positive terms, that they would be material.

Id.

45. *Burr*, 25 F. Cas. at 37.

evidentiary matter became moot, but Chief Justice Marshall curiously noted that the prosecution *did not* refuse to produce the documents because disclosure would "endanger the public safety."[46] In this way, Chief Justice Marshall signaled the existence of an evidentiary privilege that could suppress evidence concerning public safety.[47] Chief Justice Marshall's comments remain important for the "introduction of the notion that risk to public safety might impact the discoverability of information held by the government."[48] Chief Justice Marshall's opinion in *Burr* foreshadowed the importance of public safety and classified information that would codify the modern state secrets privilege, but the Court did not speak on the subject again until 1875, sixty-eight years later.[49]

Yet the absence of published American decisions on the evidentiary privilege did not stifle the increasing scholarship and development of the privilege.[50] By way of example, Robert M. Chesney cites the American edition of Thomas Starkie's English evidence law treatise and its "public policy" and "state policy" privilege.[51] Starkie asserted that "[t]here are some instances . . . where the law excludes particular evidence, not because in its own nature it is suspicious or doubtful, but on grounds of public policy, and because greater mischief and inconvenience would result from the reception than from the exclusion of such evidence."[52] Additionally, Starkie included in his writings another category of privilege rooted in "grounds of state policy," where evidence should be excluded from use because its disclosure would be "prejudicial to the community."[53]

---

46. *Id.* "There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety." *Id.*

47. *See id.*

48. Chesney, *supra* note 12, at 1273. Thomas Starkie's "state policy" privilege stemmed from three distinct English privileges. *Id.* at 1274. The "informer's privilege" shielded communications between government officials and their confidential informants. *Id.* at 1274. The deliberative process privilege shielded certain government communications that are used in intra-governmental discussions and operations. *Id.* The third and most pertinent English privilege provided that some factual information could be kept from public disclosure based on security grounds. *Id.* This "security privilege" flowed from an 1817 English decision, *Rex v. Watson*, 171 Eng. Rep. 591, 604 (K.B. 1817), concerning an alleged plot to overthrow the British Government where a Tower of London employee was not allowed to testify as to the accuracy of a map of the Tower found in the conspirators' possession. Chesney, *supra* note 12, at 1274–75.

49. The *Burr* decision in 1807 was the last reference to the evidentiary privilege until *Totten v. United States*, 92 U.S. 105 (1875). Chesney, *supra* note 12, at 1273, 1277.

50. *See* Chesney, *supra* note 12, at 1273–77. British treatises continued to develop evidence law, and some of these treatises published American editions with citations to American law when possible. *Id.* at 1273.

51. *Id.* at 1273–75.

52. *Id.* at 1273–74 (quoting THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS, § LXXVI at 103 (Boston, Wells and Lilly 1826)).

53. Chesney, *supra* note 12, at 1274.

Development of the privilege continued, through the first evidence treatise written from an American perspective, up until the publication of the first of two Supreme Court cases that construed the new privilege into what is now known as the modern state secrets privilege.[54]

The modern formulation of the state secrets privilege flows from two cases: *Totten v. United States*,[55] and *United States v. Reynolds*.[56] *Totten*, in 1875, involved the estate of a Union spy and its attempt to enforce a purported contract with President Abraham Lincoln.[57] The estate alleged that the government only reimbursed Totten for expenses incurred during the exercise of duties and failed to pay the full contract salary.[58] Affirming dismissal by the Court of Claims, the Supreme Court found that the "secrecy which such contracts impose precludes any action for their enforcement."[59] The Court stated that, as a general principle, a court of justice cannot hear matters where trial would lead to the disclosure of information where the law prohibits such disclosure.[60] Cases involving government secrets fall

---

54. *Id.* at 1276–77. Chesney states that Harvard Law School Professor Simon Greenleaf's treatise, *A Treatise on the Law of Evidence* (7th ed. 1854), is arguably the first major treatise of evidence law published from an explicitly American perspective. Chesney, *supra* note 12, at 1276–77.

55. 92 U.S. 105 (1875).

56. 345 U.S. 1 (1953).

57. *See Totten*, 92 U.S. at 105–06. The facts, as found by the Court, were as follows:

> The action was brought to recover compensation for services alleged to have been rendered by the claimant's intestate, William A. Lloyd, under a contract with President Lincoln, made in July, 1861, by which he was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President; for which services he was to be paid $200 a month.

Id.

58. *Id.* at 106.

59. *Id.* at 107.

60. *Id.* The Court placed government secrets at the same level of protection as utterances in a confessional, attorney–client communications, or physician's privilege.

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

Id. The Court further noted that the publicity of the secret contract would itself be a breach of that contract, and thus precluded recovery. *Id.*

especially within this category because such secrets are often protected by statute.[61] *Totten* clarified the instances where the privilege would be applicable, but a procedure for officially invoking the privilege still did not exist.

Reynolds, however, provides the modern framework for invocation of the state secrets privilege.[62] In the three *Reynolds* actions, widows of several service men that died in a plane crash while testing secret electronics equipment sued the government under the Federal Tort Claims Act.[63] In district court, the government resisted production of the accident report on the grounds that "the investigation board report and survivors' statements could not be furnished without seriously hampering national security, flying safety, and the development of highly technical and secret military equipment."[64] The district court denied the government's assertions of privilege and instead ordered production.[65] The district court issued another order finding for the plaintiffs on the issue of liability when the government failed to produce the report.[66] On appeal, the Court of Appeals for the Third Circuit found that "[s]tate secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding," but that the decision of the district court denying the government's claim of privilege did

---

61. *See* Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16 (1980) (prescribing methods for protecting classified information from public disclosure).

62. Chesney, *supra* note 12, at 1283.

63. United States v. Reynolds, 345 U.S. 1, 2 (1953). Originally enacted in 1946, the Federal Tort Claims Act (FTCA) waives sovereign immunity and subjects the United States to liability for some tort claims. 28 U.S.C. §§ 1346(b), 2671 *et seq.* (2000). Prior to the FTCA, the only remedy available for the tortious acts of federal employees was to file a private bill with the United States Congress. Frank Hanley Santoro, *A Practical Guide to the Federal Tort Claims Act*, 63 CONN. B.J. 224, 224 (1989).

64. Reynolds v. United States, 192 F.2d 987, 990 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953). Initially, the government did not resist production of the accident report based on the still ephemeral state secrets privilege, but because the Secretary of the Air Force "determined that it would not be in the public interest to furnish this report of investigation as requested by counsel in this case." *Id.* The letter from the Secretary, describing the reasoning for non-production, went on:

> This report was prepared under regulations which are designed to insure the collection of all pertinent information regarding aircraft accidents . . . and the optimum promotion of flying safety. Because this matter is one of such primary importance to the Air Force, it has been found necessary to restrict the use of aircraft accident reports to the official purpose for which they are intended. Under our regulations, this type of report is not available in courts-martial proceedings or other forms of disciplinary action or in the determination of pecuniary liability.
>
> It is hoped that the extreme importance which the Department of the Air Force places upon the confidential nature of its official aircraft accident reports will be fully appreciated and understood by your Honorable Court.

Id. at 990 (internal quotation marks omitted).

65. *Id.* at 990–91.

66. *Id.* at 991.

not contain error meriting reversal.[67] Chief Justice Vinson, writing for the Supreme Court, reversed and held that "where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail."[68] Chief Justice Vinson articulated a set of formal criteria that must be met for a valid assertion of the privilege, requiring the head of the executive agency with control of the information to: (1) assert the privilege, (2) personally review the information to determine applicability, and (3) lodge a formal claim of privilege with the court if the agency head determines the privilege applies.[69] The Supreme Court effectively endorsed the state secrets privilege and indicated that absent evidence to the contrary, a court is obliged to accept the government's assertion of the privilege.[70]

Although the Court was helpful in articulating formal criteria for asserting the privilege, Chief Justice Vinson required significantly less review of the evidence than mandated by the courts below. Importantly, Chief Justice Vinson modified the Third Circuit's requirement of automatic "ex parte" and "in camera" review of the evidence in determining application of the privilege.[71] He instead determined that the government

---

67. *Id.* at 996. The court further noted that the judiciary is competent to determine whether the evidence is subject to the privilege through examination of the evidence in camera and ex parte. *Id.* at 997; *see also infra* note 71 and accompanying text (defining "in camera" and "ex parte").

68. United States v. Reynolds, 345 U.S. 1, 11 (1953). Fred Vinson was the thirteenth Chief Justice of the Supreme Court, nominated by President Harry Truman in 1946. JAN PALMER, THE VINSON COURT ERA: THE SUPREME COURT'S CONFERENCE VOTES 6 (1990).

69. *Reynolds*, 345 U.S. at 7–8. According to the Court:

> The 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 actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

Id.

70. *See id.* at 11.

71. *See id.* at 10. Chief Justice Vinson stated:

> [W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. 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.

Id. Later in the opinion, Chief Justice Vinson applied this rule, and found that "[t]here is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident." *Id.* at 11. "Ex parte" examinations consist of only the court and one party, without notice to or arguments from the adverse party. BLACK'S LAW DICTIONARY 616 (8th ed. 2004). "In camera" proceedings take place in the judge's private chambers, in the courtroom with all spectators excluded, or when the court is not in session. *Id.* at 775.

must not always present the evidence to the court for review, but first a court must apply the deferential "reasonable danger" test to determine whether further inquiry is necessary.[72] Under this test, a court looks at the context of the case in deciding whether "there is a reasonable danger that compulsion of the evidence" will disclose information that would harm national security.[73] Chief Justice Vinson attempted to fashion a compromise between the need for the court to keep some information secret and leaving a court with the ability to check the executive.[74]

Many years later, once the government declassified the *Reynolds* accident report, it became clear that it did not contain any information about the secret electronic equipment.[75] Herein lies the primary point of agitation for those who oppose the current use of the state secrets privilege—had the court reviewed the documents, it would have been clear that the state secrets privilege was not applicable.[76] This example alone demonstrates the

---

72. *Reynolds*, 345 U.S. at 10 ("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.").

73. *Reynolds*, 345 U.S. at 10. Vinson believed that it would sometimes be obvious from the mere context of the case that a reasonable danger was present. Chesney, *supra* note 12, at 1286. In such cases, reviewing information in camera or ex parte would increase the danger of disclosure and should not be done. *Id.* at 1287. According to Chesney, the reasonable danger test left open several questions for consideration. *Id.* For example, how deferential should the court be to the claims of privilege by the government? *Id.* When the information is necessary a court should not accept the claim of privilege lightly, but the court would still be deferential to any claim of privilege. *Id.* Following his "reasonable danger" test, Chief Justice Vinson was satisfied that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." *Reynolds*, 345 U.S. at 10.

74. *See* Christopher D. Yamaoka, *The State Secrets Privilege: What's Wrong With It, How It Got That Way, and How the Courts Can Fix It*, HASTINGS CONST. L.Q. 139, 155–56 (2007) (discussing in broad terms the problems with the state secrets privilege).

75. *See* FISHER, *supra* note 12, at 166–69. Several of the original plaintiffs in *Reynolds* attempted to get access to the accident report through Freedom of Information Act requests in 1991. *Id.* at 165. Each time they requested the report, the government fulfilled the request but sent the document's redacted version. *Id.* Finally, in 2000, the daughter of one of the crash victims requested and received the full and un-redacted accident report, declassified in 1996, and distributed it to the other victim's families. *Id.* at 166–67. Upon seeing the declassified accident report, the family was shocked to see that "what 'had been blacked out all those years ago was not government secrets, but the names of those who had been at fault.'" *Id.* at 166. On March 4, 2003, the families petitioned the Supreme Court for a writ of *error coram nobis*. *Id.* at 176. Such a writ allows parties to petition a court to "review and correct its judgment because it was based on error of fact." *Id.* at 169. According to the *Reynolds* families, an error of fact occurred because the government asserted that the accident report contained secret military information when it turned out the reports "include[d] nothing approaching a 'military secret.'" *Id.* at 177. On June 23, 2003, the Supreme Court denied the petition to file a writ of *error coram nobis*. *In re* Herring, 539 U.S. 940 (2003). In October of 2003 the *Reynolds* families started over at district court, seeking relief from fraud perpetrated upon the court. FISHER, *supra* note 12, at 188. The district court found for the government, the Third Circuit agreed, and the Supreme Court again denied certiorari. *Id.* at 197, 207, 211.

76. Chesney, *supra* note 12, at 1288. The report at issue did not contain information about the classified equipment aboard the *Reynolds* flight. *Id.* "Had the Supreme Court permitted the district

fundamental error in *Reynolds*, its subsequent application, and illustrates the controversy over the state secrets privilege.[77]

C. *State Secrets Controversy*

When the government asserts the state secrets privilege, a civil action brought against the United States may be subject to outright dismissal, depriving the litigant of a venue to prove the merits of the action.[78] In such a situation, the government is unwilling to risk disclosure of classified information (or even acknowledge existence of such information) and refuses to produce the necessary documentary evidence for use at trial.[79] Moreover, the United States usually invokes the state secrets privilege when acting as a defendant in a civil action.[80] However, the state secrets privilege might also be used in a criminal trial where a defendant seeks discovery of classified information for use in a defense.[81] The American people are either deprived of the ability to prosecute and convict a criminal defendant—possibly a defendant involved in espionage or terrorism against the United States—or a civil plaintiff is deprived of a remedy for alleged wrongdoings.

---

judge to conduct an *in camera*, ex parte review of the report, the judge presumably would have discovered this fact." *Id.*

77. *See id.* at 1288. Chesney is careful to note that subsequent courts have been careful to avoid the *Reynolds* error in that they ensure the proffered evidence actually contains classified information. *Id.* at 1289.

78. *See id.* at 1252 (citing United States v. Reynolds, 345 U.S. 1 (1953)); *see also supra* note 36 and accompanying text. Not only will the state secrets privilege have bearing on a civil claim against the United States, but it will affect the outcome of criminal prosecutions.

> The privilege affects litigation in at least three different ways. First, it can bar evidence from admission in the litigation. The plaintiff's case will then go forward without the barred evidence, and will be dismissed only if the plaintiff is unable to prove the prima facie elements of the claim without it. Second, if the privilege deprives the defendant of information that would provide a valid defense, then the court may grant summary judgment for the defendant. And third, "notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege."

Frost, *supra* note 12, at 1937 (internal citation omitted); *see also* Brian M. Tomney, *Contemplating the Use of Classified or State Secret Information Obtained Ex Parte on the Merits in Civil Litigation:* Bl(a)ck Tea Society v. City of Boston, 57 ME. L. REV. 641, 649 (2005).

79. *See generally* FISHER, *supra* note 12, at 212–52.

80. *See* Stein, *supra* note 28, at 1.

81. *See* Tomney, *supra* note 78, at 650; Stein, *supra* note 28, at 8–9; Tamanaha, *supra* note 37, at 316–17.

1. The American Bar Association Call for Action

The American Bar Association (ABA), among other groups, recently called on Congress to enact legislation that deals with problems inherent in the current use of the state secrets privilege.[82] The ABA Section of Individual Rights and Responsibilities and the Association of the Bar of the City of New York submitted a report and recommendation to the ABA House of Delegates in August of 2007, outlining the state secrets problem and possible solutions.[83] As the government is the only party that may assert the state secrets privilege, the report and recommendation called for legislative action, and urged the judiciary to act as an independent check on government assertions of the privilege.[84]

2. Current Thoughts on State Secrets

There already exists a plethora of academic literature espousing the shortcomings of the state secrets privilege in its current form.[85] This Comment does not suppose to repeat what more versed and eloquent writers have already exposed. The possible problems and alleged current misuses[86]

---

82. *See* Stein, *supra* note 28, at 1. The American Bar Association supports legislation or judicial scrutiny, which assures that "federal civil cases *are not dismissed based solely on the state secrets privilege.*" *Id.* (emphasis added). "[I]n furtherance of this objective the American Bar Association urges Congress to enact legislation governing federal civil cases implicating the state secrets privilege (including cases in which the government is an original party or an intervenor) . . . ." *Id.*

83. *See generally id.*

84. *See id.* at 1.

85. *See* Yamaoka, *supra* note 74, at 156; *see also infra* notes 87–130 and accompanying text (relating the shortcomings of the state secrets privilege).

86. Some argue that the use of the privilege increased during the administration of President George W. Bush. *See, e.g.*, Frost, *supra* note 12, at 1938. Frost cites other authors' contentions that the Bush Administration used the privilege with greater frequency than previous generations.

> But starting in 1977, the executive raised the privilege with greater frequency. . . . Scholars debate whether the Bush Administration's assertion of the state secrets privilege differs from past practice. Several contend that it does, claiming that the executive is now raising the privilege with far greater frequency and is using it to obtain outright dismissals rather than simply to limit discovery.

Id. Frost concludes that "[t]he Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade." *Id.* at 1939. Other authors agree in principle, citing their own numbers. "Indeed, recent cases indicate that Bush Administration lawyers are using the privilege with offhanded abandon. In one case, DOJ attorneys raised the privilege on 245 separate occasions . . . ." Weaver and Pallitto, *supra* note 12, at 109.

Others argue that the United States seeks dismissal on state secrets grounds at nearly the same rate as previous decades. *See* Chesney, *supra* note 12, at 1249, 1301. "The available data do suggest that the privilege has continued to play an important role during the Bush [A]dministration, but it does not support the conclusion that the Bush [A]dministration chooses to resort to the privilege with greater frequency than prior administrations or in unprecedented substantive contexts." *Id.* at 1301. Either way, the literature debating the use of the state secrets privilege is prevalent. *See supra* notes 12, 28, 36, 78, and *infra* note 121; *see also* David Kay and Michael

of the privilege have been well discussed, but for the reader's benefit, some of the current thoughts on the state secrets privilege are discussed below.

One critic views the state secrets privilege as an attack on democratic accountability and suggests a new system of courts to deal with classified civil trials.[87] Another believes the privilege works directly against the rights of private citizens and suggests that the government should be forced to lose any case where the state secrets privilege is invoked.[88] Still others disagree regarding how to deal with the issue, whether through Congress, the judiciary, or some other already existing rules or regulations.[89] One thing is clear—critics agree that the state secrets privilege presents a real problem in need of a solution.

Robert M. Chesney, for example, criticizes the judicial treatment of *El-Masri v. Tenet*[90] and the court's application of the *Reynolds*' "reasonable danger" test.[91] The government asserted the state secrets privilege upon the commencement of El-Masri's civil complaint pursuant to the United States' "extraordinary rendition program" and fulfilled each of the *Reynolds*' formalities.[92] The district court found that the government met all the requirements for the privilege and dismissed the case; subsequently, the Fourth Circuit affirmed under the holding in *Reynolds*.[93] Chesney argues that *El-Masri* demonstrates how the state secrets privilege conflicts with democratic accountability and enforcement of the rule of law.[94] Although government secrecy is necessary in some circumstances, it comes with a

German, *Abusing the Secrets Shield*, WASH. POST, June 18, 2007, at A17 (calling for independent judicial review of the evidence in state secrets cases); Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. TIMES, June 4, 2006, at A1 (asserting that the state secrets privilege has been used more under the administration of George W. Bush than any presidential administration); Stein, *supra* note 28.

87. *See* Chesney, *supra* note 12, at 1249.

88. *See infra* note 106 and accompanying text.

89. *See* Weaver & Pallitto, *supra* note 12, at 86 (2005). *But see* Chesney, *supra* note 12; Frost, *supra* note 12, at 1958.

90. El-Masri v. Tenet (*El-Masri I*), 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd sub nom.* El-Masri v. United States (*El-Masri II*), 479 F.3d 296 (4th Cir.), *cert. denied*, 128 S. Ct. 373 (2007).

91. *El-Masri II*, 479 F.3d at 307; *see also* Chesney, *supra* note 12, at 1249.

92. *El-Masri I*, 437 F. Supp. 2d at 537. *El-Masri* revolved around the United States' "extraordinary rendition" program where the government allegedly transferred a terrorist suspect of German citizenship to a foreign location for questioning by "unscrupulous" methods. Chesney, *supra* note 12, at 1255; *see also supra* Part I (describing *El-Masri* in detail). The government satisfied the formal privilege elements. *El-Masri I*, 437 F. Supp. 2d at 537. "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." United States v. Reynolds, 345 U.S. 1, 7–8 (1953).

93. *El-Masri II*, 479 F.3d at 299.

94. *See* Chesney, *supra* note 12, at 1266.

cost—injury to the democratic process and government accountability to its citizens.[95] El-Masri, for example, was deprived of the ability to "attempt to establish even the legal sufficiency of his claims, a harm that arguably is experienced by the larger public as well."[96] The question remains: How may we protect secret government information without depriving civil litigants of their day in court? Aside from an obvious change from the ultra-deferential standard in *Reynolds*, Chesney proposes another possible solution.[97] He suggests a court system similar to the current Foreign Intelligence Surveillance Courts (FISC).[98] Here, Congress could authorize judges to transfer cases to a specially created court that would hold non-public proceedings rather than dismiss the action on state secrets grounds.[99] At least, Chesney suggests, Article III judges would hear the cases—admittedly in camera and "on a permanently sealed, bench-trial basis."[100] Although this suggestion is a step in the right direction, Chesney himself believes the suggestion is "far from ideal."[101] Indeed, such a suggestion utilizes a model already in practice (the FISC) and so it provides a concrete process to follow. Yet the specially created courts do not address the public's aversion to secrecy and will not likely convince the public that justice is being served.

Louis Fisher believes that the privilege is unnecessary and contradictory to the rights of private American citizens.[102] He suggests that the judiciary

---

95. *Id.* Many argue that the Bush Administration has used the privilege too many times—cutting off legitimate litigation before it starts. *Id.* at 1306–07. Chesney also argues that the administration has not drastically increased the use of the privilege, but that the government has been seeking dismissal of cases under this privilege, with relative frequency, since the 1970s. *Id.* at 1307.

96. *Id.* at 1266. Moreover, Chesney notes that no United States citizen has brought a case against the government for extraordinary rendition. *Id.* at 1266. Chesney challenges his reader to imagine a situation where a citizen was denied the ability to even attempt to prove his or her case. *Id.* at 1266–67. This scenario demonstrates the reason for the heated academic criticism of the privilege. *Id.*

97. *Id.* at 1311.

98. *Id.* at 1313. In 1978, Congress enacted the Foreign Intelligence Surveillance Act (FISA) to deal with a peculiar problem: the government needed to conduct surveillance operations of foreign targets in order to thwart terrorist attacks, but such surveillance would only be admissible in domestic court if conducted under the authority of a warrant attained pursuant to probable cause that a crime had *already* been committed. *See* John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 441–42 (2003). The government wanted a way to conduct surveillance that would be admissible in domestic court, conducted per a warrant based on evidence of a crime that had *not yet* been committed. *Id.* at 442. Congress, through FISA, established the FISC and empowered it to issue warrants for surveillance of a foreign power or an agent of a foreign power. *Id.* In pertinent part, FISA proceedings are held ex parte and the government is the only party present so that classified information can be discussed openly without the fear of public disclosure. *Id.* at 442–43.

99. *See* Chesney, *supra* note 12, at 1313.

100. *Id.*

101. *Id.* at 1314.

102. *See generally* FISHER, *supra* note 12.

should look at evidence in camera to assure that a relationship exists between the evidence and national security concerns.[103] In such a circumstance, a judge must be willing to challenge the determination of the head of an executive department.[104] Instead of a deferential standard, the privilege should be regarded as qualified rather than absolute so that it may be subject to adversarial scrutiny.[105] In the alternative, Fisher suggests that the government should be forced to lose the case if it elects to assert the privilege.[106] From his perspective, the government has nothing to lose in asserting the privilege and must be put to the test—assert the privilege and

---

103. *Id.* at 253–54. In describing a solution to the state secrets "problem," Fisher responds to Chief Justice Vinson's treatment of *United States v. Reynolds*, 345 U.S. 1 (1953).

> The logical answer would be for a court to look at the documents in camera to assure that the department's judgment was on reasonable grounds. Judicial scrutiny of the documents might reveal that the official would not have personally considered the affidavit, because the documents had no remote relationship to national security or military secrets.

FISHER, *supra* note 12, at 253–54.

104. FISHER, *supra* note 12, at 254. Judges must be willing to challenge the determinations of the executive official lodging the claim of privilege with the court, whether through in camera review or other judicial scrutiny. *Id.* Fisher claims that the Supreme Court's flawed analysis in *Reynolds* ties the hands of the judiciary. *Id.* Chief Justice Vinson's opinion in *Reynolds* does not describe how the judiciary can hold executive officials accountable while protecting "the legitimate rights of private citizens to gain access to needed documents." *Id.* Chief Justice Vinson's proclamation that courts determine the privilege's applicability from "'from all the evidence'" is qualified by the mandate to "'not jeopardize the security which the privilege is meant to protect.'" *Id.* at 254–55 (quoting *Reynolds*, 345 U.S at 9–10). Fisher looks to Chief Justice Vinson's opinion as circular in reasoning, requiring deference to the executive determination of the privilege's applicability while also requiring the judiciary to assess the presence of a "reasonable danger" to national security "without requiring further disclosure." *Id.* at 256. Such flawed reasoning results in nearly certain deference to the executive head's affidavit. *Id.*

> Litigants have little reason in such cases to expect judges to exercise the independence they claim to possess. In such cases, the courtroom is not a place where the private litigant has a fighting chance. The private party is pitted against two superior forces: the executive branch joined with the judiciary.

Id. at 257.

105. "The state secrets privilege must be regarded as qualified, not absolute. Otherwise there is no adversary process in court, no exercise of judicial independence over what evidence is needed, and no fairness accorded to private litigants who challenge the government." FISHER, *supra* note 12, at 257. Instead of deference to the executive, Congress and the judiciary should adopt a skeptical approach to executive claims of secrecy. *Id.* The *Reynolds* case indicates that the government does not merit deference because its state secrets assertion of privilege turned out to be false. *Id.*; *see also supra* notes 68–77 and accompanying text (discussing *Reynolds* and its allegedly flawed holding).

106. FISHER, *supra* note 12, at 257. If the government asserts the state secrets privilege because the requested information is vital to United States national security concerns, then "a fair resolution would be for the courts to decide in the plaintiff's favor, as the district court and the Third Circuit did in *Reynolds*." *Id.* (discussing Reynolds v. United States, 192 F.2d 987, 991, 998 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953)).

be willing to lose the case.[107] "Disposing of a case in that manner may reward plaintiffs who have unproven cases, but it also puts the government on notice that asserting state secrets comes at a price."[108] Here, however, it could easily be argued that the public loses, rather than wins. Such a scenario could indeed create extraordinary monetary burdens for the judiciary and the tax base alike. Under such a plan, any former government employee with a piece of particularly sensitive classified information could win an uncontested monetary judgment. However, Fisher steadfastly believes that the government should be forced to pay a hefty price for keeping a necessary secret.[109]

William G. Weaver and Robert M. Pallitto argue that the privilege obstructs the judiciary's constitutional duty to oversee the executive.[110] The American system of government, with open checks and balances on each of the three branches of government, provides a "powerful argument[] for judicial oversight of executive branch action even if national security is involved."[111] According to Weaver and Pallitto, "[t]he privilege, as now employed, is tantamount to courts capitulating in their oversight function" and failing in the constitutional duty to balance the other branches of government.[112] Moreover, the state secrets privilege erodes the

---

107. FISHER, *supra* note 12, at 257. Finding for the plaintiff when the government asserts the privilege puts the government on notice that state secrets privilege assertions come with significant cost. *Id.* "That principle is understood in criminal proceedings. If the government refuses to release documents needed by the defendant, it must agree to drop the case. The accused goes free." *Id.*

108. *Id.*

109. *See supra* note 107 and accompanying text.

110. *See generally* Weaver & Pallitto, *supra* note 12, at 86. "Despite frequent involvement by Congress in issues concerning executive secrecy, most challenges to refusals to disclose information are handled in the courts, and we believe that the state secrets privilege, a judicial creation, is now judicially mishandled to the detriment of our constitutional system." *Id.*

111. *Id.* at 89–90. Such a liberal and democratic country as the United States is defined by the oversight and accountability provided by the balance of power. Indeed, Weaver and Pallitto advance "powerful arguments for judicial oversight of executive branch action even if national security is involved." *Id.* at 90. They argue that allowing executive agencies to violate the constitutional rights of United States citizens without judgment in open court is contrary to the rule of law. *Id.* Further, the mere existence of the privilege enables executive agencies to abuse it because it protects the agency from judicial oversight. The executive will be tempted to use the privilege to "avoid embarrassment, to handicap political enemies, and to prevent criminal investigation of administrative action." *Id.* Perhaps most convincingly, Weaver and Pallitto argue that the state secrets privilege impedes on the judiciary's constitutional duty to provide oversight of the executive. *Id.* They ably summarize their concerns regarding the state secrets privilege: "Although the privilege is crucial to national security, it is also a bane to constitutional government, and we believe that the judiciary must carefully and selectively exercise oversight of administrators to prevent abuse of the citizenry and the Constitution and the weakening of the rule of law." *Id.*

112. *Id.* at 90. The deference to executive assertions of the privilege is a dangerous precedent emanating from the *Reynolds* case. *Id.* at 102–03. Judicial deference may tempt the executive to violate constitutional rights of citizens, knowing that asserting the privilege will eliminate the possible disclosure of such violations. *Id.* at 103. Compounding the problem, the court's refusal to test the executive "double[s] the damage by refusing to impose costs on the executive branch for its

Constitution's role as the supreme law of the land; it places remarkable power in the hands of the executive because the judiciary nearly always grants the government's invocation of the state secrets privilege.[113] The executive abuses the privilege at the expense of an open and democratic society, while the judiciary and Congress sit idly by.[114]

Amanda Frost initially argues that courts should be reluctant to dismiss cases when the executive is seeking to prevent review of constitutional challenges to specific executive programs.[115] If such judicial restraint is unsuccessful or impossible, courts should have the option of foregoing jurisdiction and transferring oversight back to Congress.[116] According to Frost, Congress already "checks" executive actions through oversight hearings, impeachment proceedings, power of the purse, and enactment of new law.[117] It should not be a stretch for Congress to effect oversight of the state secrets privilege through the same mechanisms.[118] Only when the judiciary is satisfied that Congress is effectively policing the executive should the judiciary willingly dismiss cases under the executive assertion of the state secrets privilege.[119] Finally, Frost asserts that if neither of the aforementioned solutions can be successfully implemented, the judiciary must stand up and challenge the executive on its assertions of privilege.[120]

---

breaches [of the Constitution]." *Id.*

113. *See id.* at 86–87, 111–12. The current state of the privilege "virtually guarantees that its assertion in any particular case will be successful," *id. at* 111, and therefore the executive loses nothing, not even resources, by asserting the privilege. *Id.* at 86, 111 ("At present, it is costless for the president to assert a privacy privilege . . . .").

114. *See id.* at 111–12.

115. *See* Frost, *supra* note 12, at 1958. Congress delegated oversight power to the federal judiciary; courts should not be so quick to refuse this oversight responsibility by granting outright dismissals based only on the executive's claim. *Id.* Instead, courts should take steps short of dismissal and "attempt to respond to the executive's claim of privilege by narrowing discovery, providing for discovery under seal, or modifying plaintiff's claims." *Id.* As a general matter, courts should not dismiss cases until some discovery has occurred. *Id.*

116. *Id.* at 1959. Frost argues that Congress might be better positioned to deal with the state secrets "problem." *Id.* "If a court is not the proper institution to delve into the constitutionality of executive conduct because its inquiry would jeopardize national security, then Congress can take over that task." *Id.* Congress granted the power of oversight to the judiciary in the first place, through creation of the courts; so if the courts are not the proper forum for oversight regarding national security, then it makes sense to return the responsibility to Congress. *Id.*

117. *Id.*

118. *Id.*

119. *See id.* at 1934. Because the executive assertion of the state secrets privilege often results in complete dismissal, courts should only do so if Congress is actively engaging in effective oversight through hearings, legislation, or other means of balancing the executive. *See id.*

120. *Id.* at 1962–63. Congress might not accept the transfer of oversight from the judiciary. *Id.* at 1962. "If Congress appears unwilling or unable to inquire into the legality of executive conduct,

Professor D. A. Jeremy Telman reacts to the pre-discovery dismissal of actions when allegations have already been exposed through press reports or acknowledged by the government.[121] Telman believes that "courts have transformed the [p]rivilege into a new and extraordinarily expansive doctrine of executive immunity" through a confusion of the language in *Totten* and *Reynolds*.[122] He opposes congressional oversight of the privilege because Congress does not have a good track record of opposing the executive, especially during times of war.[123] Moreover, Telman states that Congress has been unwilling to pass legislation that would fix abuses of the privilege.[124] The only way to truly fix the privilege is to allow the courts to use creative solutions to protect state secrets while allowing litigants their day in court.[125] Courts could remand the entire trial for in camera proceedings,[126] appoint counsel with requisite security clearances,[127] issue a

---

however, then the judiciary's obligation to review that conduct is all the stronger." *Id.*

121. *See generally* D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499 (2007).

122. *Id.* at 500. At one point, the difference between the state secrets privilege as understood in *United States v. Reynolds*, 345 U.S. 1 (1953), and the doctrine in *Totten v. United States*, 92 U.S. 105 (1875), was clear. Telman, *supra* note 121, at 522. The state secrets privilege was meant to be an evidentiary rule that limited discovery or precluded specific evidence from introduction at trial. *Id.* The *Totten* doctrine immediately stops an action when the case itself would "inevitably" lead to the disclosure of confidential information protected by law. *Id.* However, the two doctrines have become intertwined such that courts dismiss cases pre-discovery under the state secrets privilege, although "the impact of the [p]rivilege could not possibly be discerned until discovery is completed." *Id.* at 523.

123. Telman, *supra* note 121, at 516–17. Recent history proved that Congress will not "second-guess executive decisions relating to national security" during times of war. *Id.* at 516. "Congress appears to lack the institutional will to stand up to the President in the realm of foreign affairs." *Id.* at 517.

124. *Id.* at 516–18. Congress has not passed legislation that would restrict the executive's use of the privilege. Telman admits that "it is hard to imagine" what a statutory solution to the state secrets "problem" would look like. *Id.* at 514. Even so, Congress has the power to pass legislation that would define and restrict the use of the privilege, and has had plenty of opportunity to do so. *Id.* at 516–18.

125. *Id.* at 521. "*Reynolds* left a lot of room for courts to be creative . . . ." *Id.*

126. *See* Halpern v. United States, 258 F.2d 36, 43 (2d Cir. 1958) (holding that a district court is not required to hold in camera proceedings, but that it should hold such proceedings if the hearing can be held without "serious risk of divulgence" of secrets). The court further found "that a trial in camera in which the privilege relating to state secrets may not be availed of by the United States is permissible, if, in the judgment of the district court, such a trial can be carried out without substantial risk that secret information will be publicly divulged." *Id.* at 44; *see also* Telman, *supra* note 121, at 519–20.

127. *See* Al Odah v. United States, 346 F. Supp. 2d 1, 14 (D.D.C. 2004) (This is an order by the district court requiring plaintiff's counsel to acquire necessary security clearances equal to the classification level of evidence presented at trial, in order to represent plaintiff. The case, *Al Odah v. United States*, was eventually swept into the controversy surrounding Guantanamo Bay enemy combatant detainees and their habeas corpus petitions, resolved by the Supreme Court in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).). The court also noted that the government decision to grant a security clearance "amounts to a determination that the attorney can be trusted with information at that level of clearance" and that "there are significant statutory sanctions relating to

protective order, or place time restrictions on the scope of the privilege[128]—approaches that courts have successfully used in the past.[129] Telman asserts that the judiciary is best poised to balance, on a case-by-case basis, the clash between the protection of secrets and individual rights.[130]

Whether one agrees with the aforementioned authors or not, their commentaries allege significant problems with the state secrets privilege and its use to dismiss civil actions. The proposed solutions are as numerous as the perspectives on the "problem." There must be a better way to protect national security concerns in civil actions other than outright dismissal.

III. THE CLASSIFIED INFORMATION PROCEDURES ACT

The government does not dismiss cases against federal *criminal* defendants when the introduction of classified information is necessary at trial. Instead, the government follows procedures in the Classified Information Procedures Act (CIPA), which is pertinent to this discussion for two reasons. First, the CIPA is the statutory mandate for dealing with classified evidence in federal criminal prosecutions.[131] As this Comment presents a state secrets solution through a new evidentiary doctrine called the "silent witness rule," a close look at the CIPA is necessary because it offers valuable insight into evidentiary rules governing classified information methods that have already received legislative approval and judicial application.[132] Second, the government implies that the silent witness rule is an outgrowth of the CIPA.[133] In fact, the very idea behind the silent witness

---

the misuse or disclosure of classified information" which help prevent disclosure. *Id.*; *see also* Telman, *supra* note 121, at 520 n.139. Moreover, the "[d]isclosure of classified information is subject to fines, imprisonment, and loss of personal property." FISHER, *supra* note 12, at 228.

128. *See, e.g.*, *In re* United States, 872 F.2d 472 (D.C. Cir. 1989) (twenty-year-old secret surveillance of a Communist Party member did not create a reasonable danger to national security); *see also* Telman, *supra* note 121, at 521 (noting that the aforementioned case, *In re United States*, demonstrates that the government has a time limit to argue that there is a reasonable danger to national security).

129. *See* Telman, *supra* note 121, at 519–22.

130. *Id.* at 527.

131. The "CIPA 'was designed to establish procedures to harmonize a defendant's right to obtain and present exculpatory material upon his trial and the government's right to protect classified material in the national interest.'" United States v. Pappas, 94 F.3d 795, 799 (2d Cir. 1996) (quoting United States v. Wilson, 571 F. Supp. 1422, 1426 (S.D.N.Y. 1983)).

132. *See infra* Part IV (discussing the silent witness rule).

133. It remains difficult to ascertain whether the government attempted to use the silent witness rule as a potential document substitution under CIPA section 6 or whether the government introduced the rule as a creation of its own. Two cases suggest, though only by implication, that the government attempted to assert the silent witness rule *as part* of the CIPA. In *United States v. Zettl*,

rule emanates from procedures allowed under CIPA section 6.[134] Moreover, the silent witness rule must not run afoul of CIPA procedures, or it cannot be used at criminal trial (and thus the implication for use in the civil arena becomes more difficult).[135] Therefore, the CIPA necessitates a close examination, beginning with its enactment and general provisions.

A. Enactment

In 1980, Congress enacted the CIPA to deal with the problem of "graymail" in national security litigation.[136] "Graymail" refers to the situation where a defendant threatens to disclose classified information during the course of litigation, forcing the government to dismiss the case rather than risk disclosure of sensitive information.[137] To combat this problem and the resulting dismissals, Congress enacted the CIPA.[138] The

---

the government introduced the silent witness rule as an option during a CIPA section 6(c) substitution hearing. United States v. Zettl, 835 F.2d 1062–63 (4th Cir. 1987). "At the 6(c) substitution hearing, the district court also ruled upon the government's request for what the court called the silent witness rule to be used at trial for the handling of classified documents." *Id.* at 1063. In *United States v. Fernandez*, the court noted that the government proposed substitutions on July 12 pursuant to CIPA section 6(c), and revised them on July 14, 21, and 24. United States v. Fernandez, 913 F.2d 148, 152 (4th Cir. 1990). Later, the court stated that "on July 24, the morning of trial, the government submitted revised proposals which provided that the * * * * locations could be referred to by a number in open court that correlated with a written key provided to the jurors identifying the actual locations." *Id.* at 153; *see also id.* at 150 n.1 (noting that omitted classified information is denoted as "* * * *"). The July 24 revision of the proposed CIPA substitutions asserted a tactic that meets the definition of the silent witness rule (although it was not called by that name). Therefore, by implication, the government proposed the silent witness rule under the CIPA.

134. Classified Information Procedures Act, 18 U.S.C. app. 3 § 6 (1980).

135. "The threshold question that must be resolved with respect to the [silent witness rule]'s use in this case is whether it is even permissible to use in the CIPA context." United States v. Rosen, 520 F. Supp. 2d 786, 795 (E.D. Va. 2007).

136. Tamanaha, *supra* note 37, at 277. "The Classified Information Procedures Act (CIPA) was enacted by Congress in 1980 to deal with the growing graymail problem. CIPA is an omnibus act containing pretrial and trial procedures to be applied whenever classified information may be involved in a criminal case." *Id.*

137. The possibility for graymail may present itself in several situations. At times, defendant and counsel press the government for release of classified information during the discovery process, forcing the government to produce the document or face dismissal of the action. In other situations, the government must present classified information to make a case against the defendant. Also, the defendant might already possess the classified information, and intend to disclose the information at trial as part of a defense. *See* United States v. Pappas, 94 F.3d 795, 799 (2d Cir. 1996); Tamanaha, *supra* note 37, at 277.

138. United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985). "CIPA was enacted by Congress in an effort to combat the growing problem of graymail, a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the criminal charge against him." *Id.* at 1105 (citing S. REP. NO. 96-823, at 1–2 (1980), *reprinted in* U.S.C.C.A.N. 4294, 4294–95).

Act has survived judicial scrutiny and interpretation since 1980, and now is an important mechanism for protecting classified information.[139]

B. Provisions: The Act Itself

The CIPA creates an environment where the government is able to prosecute defendants in national security cases, while protecting classified information.[140] Even with the Act's protections, the risk of disclosure is

---

139. *See* United States v. O'Hara, 301 F.3d 563, 568 (7th Cir. 2002).

> CIPA's plain terms evidence Congress's intent to protect classified information from unnecessary disclosure at any stage of a criminal trial. Any other interpretation would be wholly inconsistent with and threaten to undermine CIPA's fundamental purpose–protecting and restricting the discovery of classified information in a way that does not impair the defendant's right to a fair trial.

Id. Although the CIPA's constitutionality has been challenged on many occasions, it has survived such challenges because courts construe the CIPA as a rule of evidence that does not seek to establish new rules regarding admissibility. As one commentator notes:

> Defendants have unsuccessfully used the [F]ifth [A]mendment due process guarantees to defeat CIPA protective orders or evidentiary rulings regarding classified information. Instead, the courts have relied on the evidentiary standards of the federal rules or common law doctrines to exclude proffered evidence . . . . Again, using the federal rules, the Eleventh Circuit in *United States v. Anderson* commented that a defendant's right to present a full and complete defense is not compromised by the requirement that he comply with the established rules of procedure and evidence. In other words, a criminal defendant's right to present a full defense and to receive a fair trial does not entitle him to place before the jury evidence normally inadmissible. In reviewing constitutional challenges made by the defendant, courts have consistently relied on the established rules of evidence and related case law, claiming that CIPA does not undertake to create new substantive law governing admissibility.

Timothy J. Shea, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials*, 27 AM. CRIM. L. REV. 657, 675–76 (1990) (internal quotations omitted).

140. The "CIPA establishes several procedures to minimize the risk of graymail and to adjust the competing interests of the Government in maintaining its secrets and of the defendant in mounting an effective defense." *Pappas*, 94 F.3d at 799. In order to determine the scope and application of the CIPA, the Act first defines both "classified information" and "national security":

> (a) 'Classified information', as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security . . . .
>
> (b) 'National security', as used in this Act, means the national defense and foreign relations of the United States.

Classified Information Procedures Act, 18 U.S.C. app. 3 § 1(a)–(b) (1980). The CIPA also protects against disclosure of "restricted data" as defined in paragraph (r) of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. § 2014(y) (1954)). *Id.*

The definitions of "classified information" and "national security" were subject to constitutional attack in *United States v. Wilson*, 571 F. Supp. 1422 (S.D.N.Y. 1983). The defendant argued that the terms were vague, thus rendering the CIPA void. *Id.* at 1426. He maintained that,

sometimes too great for the United States to prosecute defendants. Moreover, inherent within the CIPA's mechanisms lay the conflict between the Sixth Amendment right to public trial and the government's need to protect sensitive information by closing parts of trials to public view.[141] The CIPA outlines specific procedures that a court must follow when the use of classified information is necessary in federal criminal prosecutions.[142] The Act offers procedures designed to protect the secrecy of the classified information used at such trials, while allowing the trial to move forward.[143] In the words of one court, the "CIPA established a procedural framework for ruling on questions of admissibility involving classified information before introduction of the evidence in open court."[144]

Mechanisms in the CIPA are implicated in at least two different situations. A criminal defendant may already know particular classified information needed to execute a defense. In this case a defendant seeks permission to disclose the classified information at trial and must notify the court and the government of the intention to do so.[145] Conversely, the government may wish to use classified information as evidence in the prosecution, but it must abide by the CIPA's protective mechanisms.[146] In such circumstances the government may choose to disclose the classified information at trial pursuant to the regulations in the CIPA and present the information to the defense in discovery. The specific procedures in the CIPA are somewhat complex, and necessitate a section-by-section breakdown.

---

because the government information classification level was something he could not know (because of its classified nature), any case subject to the CIPA would leave a defendant with an "impossible burden" to fulfill. *Id.* There existed no way to ascertain the burden of notifying the government of the intent to use "classified information" because a defendant would not know whether the information was classified or not. *Id.* The judge ruled against the argument, stating that "[t]he terms so defined in the Act convey a reasonable degree of certainty to a defendant of what is required." *Id.* at 1427.

Even the newly created International Criminal Court incorporates procedures for protection of national security information, allowing substitutes, summaries, redactions, limitations, and in camera or ex parte proceedings in order to protect national security information. *See* Rome Statute of the International Criminal Court art. 72, July 1, 2002, 2187 U.N.T.S. 90.

141. *See generally* Tamanaha, *supra* note 37, at 277. The Sixth Amendment reads, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI.

142. *See* 18 U.S.C. app. 3 §§ 1–16 (1980).

143. *Pappas*, 94 F.3d at 799.

144. United States v. Anderson, 872 F.2d 1508, 1514 (11th Cir. 1989).

145. Unauthorized disclosure of classified information is a serious federal offense, so a defendant must get permission to use such information in his defense and follow the proper CIPA procedures for use at trial.

146. Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16 (1980).

1. Pretrial Conferences and Protective Orders

At the initiation of a national security action, a party may move the court for a pretrial conference to discuss the proposed use of classified information at trial.[147] However, the pretrial conference will not result in any court decision as to the proper use or admissibility of evidence.[148] A pretrial conference will be granted at either the parties' or the court's request because it encourages parties to resolve questions about the handling of classified information without the court's involvement and before the trial begins.[149] Furthermore, the pretrial conference allows the court to familiarize itself with the CIPA and its requirements for control of evidence at trial.[150]

If the United States moves, the court will issue a protective order prohibiting the disclosure of classified information outside of trial.[151] This

147. *Id.* § 2. Section 2 reads as follows:

> At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any matters which relate to classified information or which may promote a fair and expeditious trial. No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

Id. § 2.

148. *See* Tamanaha, *supra* note 37, at 286 n.47. "The legislative history to this section emphasizes that 'no substantive issues concerning the use of classified information are to be decided in a "pre-trial conference" under this section; instead, the bill requires such issues to be decided at the hearing under section 6.'" *Id.* (quoting S. REP NO. 96-823, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4299).

149. *See id.* at 285–86. "Nevertheless, inclusion of this section in CIPA is useful insofar as it encourages participants to utilize pretrial conferences to resolve questions on how and when to proceed . . . ." *Id.* at 286.

150. *See id.* Also, Tamanaha notes that many judges are not familiar with the workings or procedures of the CIPA, and thus, need time to familiarize themselves with the processes. *Id.* If questions regarding the CIPA can be resolved in pretrial conferences, then the court's burden is reduced. *Id.*

151. Classified Information Procedures Act § 3. Section 3 reads as follows: "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 in a district court of the United States." *Id.* In *United States v. Ressam*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002), the constitutional validity of CIPA protective orders came into question. The court held that the "public's qualified right of free access under the First Amendment" does not apply to government documents submitted to the court in CIPA related criminal proceedings. *Id.* at 1265.

order is used to ensure that any classified information provided by the government to the defense will not be disclosed to the public.[152] Even when providing classified information to the trial participants, the CIPA also prescribes specific methods by which the government may further control the disclosure.

2. Alternatives to Disclosure During Discovery: Substitution, Redaction, or Admission

When a defendant requests classified information during discovery, the CIPA affords the government several alternatives to production pursuant to CIPA section 4.[153] The government may move the court for permission to redact or delete portions of the requested document, submit substitutes for any classified information requested by the opposing party, or admit the specific facts the requested document would tend to prove.[154] However, the court will only allow such alternatives upon a "sufficient showing" of necessity.[155] The substitution or admission alternatives are ostensibly better

---

152. Tamanaha, *supra* note 37, at 286. Tamanaha also notes that the protective order might not always protect the information from disclosure if the defendant was already in possession of the material before trial. *Id.* at 286–87. However, courts have extended the protective order to encompass any classified information in the possession of the defense, whether the government provided it or not. *Id.* at 287.

153. Classified Information Procedures Act § 4. Any information, classified or not, is requested during discovery under Federal Rule of Criminal Procedure 16. *See* Tamanaha, *supra* note 37, at 291. Rule 16 grants the court the authority to limit or modify disclosure if necessary to protect national security. *Id.* However, Congress included the same protection under CIPA because judges had previously been reluctant to exert their authority under Rule 16 to limit such access. *Id.*

154. Classified Information Procedures Act § 4. Section 4 reads as follows:

> The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Id. The government must file an affidavit, stating that revelation of the true document or information would damage national security if disclosed, before the court will allow submission of substitutions, admissions, or redactions. *See* Tamanaha, *supra* note 37, at 291–92. It is possible that a court will not find the affidavit compelling, and instead, will order the production of the true document or information. *Id.* at 292.

155. Tamanaha, *supra* note 37, at 290. Discovery proceeds under the Federal Rule of Evidence, so the burden of production falls on the government when a defendant requests classified information. To protect against unnecessary disclosure, CIPA allows the government to aver "that the information at issue may damage national security if disclosed." *Id.* at 291. The court will consider the government guarantee to be a "sufficient showing" that the government must delete, modify, redact, or substitute information in lieu of producing the true document. *Id.* at 290–91.

for the defendant because the other options might involve heavy redaction, limited access, or denial of access to the documents. The court might not authorize the government to proceed with any of the alternatives and will instead authorize the production of the true document.[156] On the other hand, the defendant might already have the classified information in possession.

3. The Notice Requirement

There are times when the defendant will already be in possession of classified information and will wish to disclose it at trial to provide a defense.[157] As a protective mechanism, the CIPA provides that the defendant must give the government notice of his intention to disclose classified information.[158] The government will then have a "reasonable

---

"Redaction" allows the government to conceal the sensitive information from a document or otherwise obscure its view. *Id.* at 291 n.73. "Substitution" allows the government to offer a summary of the pertinent information contained in a document or present other less sensitive documents that tend show the same information. *Id.* at 290. "Admission" allows the government to confess whatever fact the classified information would tend to prove, in lieu of disclosing the classified document. *Id.*

156. *See id.* at 291–92. "Once classified information is deemed discoverable the burden falls on the government to show why it must delete information from, or otherwise modify or substitute, the documents to be released." *Id.* at 291. "If the government's proposed substitution is found by the court to be inadequate, the prosecution must release the information in its original form or face sanctions." *Id.* at 291–92 (internal footnotes omitted). A "true document" refers to an unmodified document presented without summaries, redactions, or any other changes.

157. *See* S. REP. NO. 96-823, at 6–7 (1980) ("[W]hen a defendant expects to disclose or cause the disclosure of classified information in a trial, he must notify the Government and the court before trial or during trial as soon as he discovers the possibility."), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4300.

158. *See* Classified Information Procedures Act § 5. Section 5 reads as follows:

> If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

Id. § 5(a). In 2000, the notice and hearing requirements of the CIPA came under constitutional

opportunity" to pursue other avenues besides disclosure of information through the procedures outlined below in CIPA section 6.[159]

4. The Heart of the Act: CIPA Section 6

CIPA section 6 is the center of the Act and outlines specific procedures to follow when a defendant seeks to use classified information at trial.[160] The section "sets forth the procedures to be followed whenever decisions regarding the form and use of classified information are made."[161] Section 6 is especially important to this Comment because it outlines procedures that protect classified information from public disclosure through the use of alternatives; this same technique enables the silent witness rule to function within the bounds of CIPA.[162]

At the request of the government, the court will conduct a section 6 "relevance hearing" to "make all determinations concerning the use, relevance, or admissibility of classified information."[163] At this hearing, the court determines whether proffered evidence is relevant for admission at trial.[164] Yet if the Attorney General certifies to the court that the hearing itself might result in the disclosure of classified information, then the hearing will be held in camera to prevent public disclosure.[165]

---

attack based on the theory that they restricted a defendant's right to confront government witnesses or remain silent during trial pursuant to the Fifth and Sixth Amendments. *See* United States v. Lee, 90 F. Supp. 2d 1324, 1326 (D.N.M. 2000). The district court found that the requirements did not violate the defendant's due process rights. *Id.* at 1329.

159. Classified Information Procedures Act § 5(a). The purpose of the notice requirement is to forbid disclosure of classified information, not as a restraint on free speech, but to allow the government to pursue other avenues that might not require disclosure. S. REP. NO. 96-823, at 7 (1980).

160. Classified Information Procedures Act § 6. The United States Senate Report, accompanying CIPA, clearly states that section 6 is meant to be the central aspect of the Act.

> This section is the heart of the bill. It establishes a procedure for a hearing often *in camera*, with both the prosecution and the defense present. The purpose of the hearing is to determine before trial whether the classified information at issue is admissible and in what form it may be introduced.

S. REP. NO. 96-823, at 7.

161. Tamanaha, *supra* note 37, at 294.

162. *See infra* Part IV.B–C.

163. Classified Information Procedures Act § 6(a).

164. *See id.* However, the court may not consider that the information is classified when determining relevance or admissibility, and the relevance inquiry will be governed solely by the Federal Rules of Evidence. *See* United States v. Baptista-Rodriguez, 17 F.3d 1354, 1364 (11th Cir. 1994) (citing United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985); United States v. Anderson, 872 F.2d 1508, 1514 (11th Cir. 1989)).

165. Classified Information Procedures Act § 6(a). Section 6(a) reads, in pertinent part: "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." *Id.* § 6(a). Furthermore, "[t]he court shall hold a hearing on any motion under this section. Any such hearing

If the court authorizes the disclosure of classified information at the relevance hearing, CIPA section 6 gives the government a second opportunity to move the court for permission to submit substitutions. In light of court authorized disclosure, the government may again seek permission to submit a summary of the information or a statement admitting relevant facts in lieu of disclosure.[166] These alternatives are evaluated at a section 6(c) "substitution hearing" where the court determines whether to grant the government motion and allow substitutions.[167] Here, the court has an important role in determining fairness to the defendant because the CIPA requires that a court only grant such a motion if the substituted or admitted information would provide "substantially the same ability" to present a case as would disclosure of the classified information.[168] Yet even if the court denies a motion to submit a substitution or admission, the Attorney General may file an affidavit objecting to disclosure and the court *must* order that the party not disclose the information.[169] In the end the government has the option of whether to disclose the classified information, although non-compliance with the court order may have consequences.[170] When a defendant is precluded from disclosing classified information necessary for a defense due to government refusal to produce such information, the court may elect to dismiss specific counts of the indictment against the defendant, find against the United States on any or all counts, or eliminate testimony of a government witness.[171] However, the government may file an

---

shall be held in camera at the request of the Attorney General." *Id.* § 6(c)(1).

166. *See id.* § 6(c)(1); *see infra* text accompanying note 183 for language set forth in CIPA section 6(c)(1).

167. *Id.* § 6(c).

168. *Id.* § 6(c)(1). "The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." *Id.* The district court affirmed this established principle in *United States v. Libby*, 467 F. Supp. 2d 20, 24–25 (D.D.C. 2006), stating that "the Court is not limited in the manner in which it permits substitutions, so long as the approved substitutions 'provide the defendant with substantially the same ability to make his defense.'" *Id.* (citation omitted).

169. Classified Information Procedures Act § 6(e)(1).

170. *Id.* § 6(e)(2). If the government refuses to disclose classified information pursuant to a court order, the court may dismiss the charges against a defendant. Tamanaha, *supra* note 37, at 298.

171. Classified Information Procedures Act § 6(e)(2). The Senate Report illustrates both situations where classified information should be disclosed and where disclosure will be impossible, resulting in the necessary dismissal of a case. The report uses a sliding scale to evaluate the trade-offs regarding disclosure of classified information.

> In cases where the information is so sensitive that this alternative is unacceptable to the Government on the grounds of national security, a high official of the Department of Justice can object to the disclosure of the information. The court then must issue an order

interlocutory appeal to a court of appeals to contest a district court order that authorized disclosure of classified information, imposed judicial sanctions against the government, or refused to issue a protective order.[172]

All this, of course, provides a remarkable parallel to the recent controversy surrounding the state secrets doctrine. In a state secrets case, a civil action (and possibly a criminal action) brought against the United States may be subject to outright dismissal, depriving the litigant of a chance to prove the merits of the action.[173] Conversely, in criminal actions involving the CIPA, the government may be subject to a court order compelling production of a classified document.[174] The government may not be willing or able to provide such a sensitive document, ostensibly in the name of national security, and the American people are deprived of the ability to prosecute and convict a criminal defendant—possibly a defendant involved in terrorism or espionage against the United States.[175] In neither

---

> that is designed to ensure that the defendant's ability to prepare for his defense is not impaired due to the Government's decision not to disclose the information. In testimony before the Senate Intelligence Committee, Phillip Lacovara, former Deputy Solicitor General, explained that a sliding scale of sanctions can be taken against the Government when the Government has a legitimate claim that national security information cannot be disclosed.
>
> "At one end of the scale, for example, if the defendant's possible use for the information is totally speculative, the case simply could be continued without disclosure. At the other end of the scale, where the information is central to the question of guilt or innocence and where no alternative to public disclosure is possible, dismissal may be necessary. In between, procedures such as instructing the jury to assume that the missing information would have proved a given proposition may be possible. Certainly the Department of Justice should press for some intermediate treatment like that before deciding that the case must be abandoned."
>
> It should be emphasized, however, that the court should not balance the national security interests of the Government against the rights of the defendant to obtain the information. The sanctions against the Government are designed to make the defendant whole again. After the Judge has issued this order, the Government may exercise its right to take an interlocutory appeal.

S. REP. NO. 96-823, at 9 (1980) (quoting former Deputy Solicitor General Phillip Lacovara), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4302–03. But the courts are authorized to use discretion regarding the proper sanctions in a particular case. It appears that in at least one case, the United States refused to adhere to a court ordered disclosure of information and the non-disclosure resulted in dismissal. *See* United States v. Fernandez, 913 F.2d 148, 153–54 (4th Cir. 1990). The United States appealed an order from the district court's evidentiary rulings under the CIPA as well as a sanction dismissing the action. *Id.* at 154. The Fourth Circuit affirmed the judgments of the district court and it appears that the action against Fernandez was dismissed under the authority of CIPA section 6(e)(2). *Id.* at 163. *But cf.* United States v. Moussaoui, 382 F.3d 453, 476 (4th Cir. 2004) (asserting that dismissal would be appropriate under the CIPA for government refusal to produce relevant enemy combatant witnesses, but that "a more measured approach is required" because the government correctly exercised its prerogative in protecting classified information from disclosure).

172. Classified Information Procedures Act § 7.

173. *See supra* Part I.A.

174. Classified Information Procedures Act § 6(a).

175. In the event that the head of an executive agency files an affidavit refusing to produce discoverable documents, the prosecution in a criminal case has little choice in whether to continue

situation does dismissal seem to be the best choice for either the government or the opposing party—a new twist on CIPA might provide the answer.

IV. THE SILENT WITNESS RULE: A STATE SECRETS SOLUTION

A. Conceived from the Language of the CIPA

From the language of the CIPA, the government crafted the silent witness rule, in which trial participants refer to classified information through the use of a document or "key card" designating code names for classified places, names, or documents.[176] Instead of disclosing a piece of classified information, trial participants use the corresponding code word to indicate a particular reference.[177] Thus, the silent witness rule protects against public disclosure of classified information used as evidence.[178] Such a proposal might indeed eliminate the need for state secrets dismissals in cases such as *El-Masri*[179] and *Reynolds*,[180] because state secrets are protected while litigation continues.

The evidentiary theory behind the silent witness rule emanates from the substitution mechanisms of CIPA section 6.[181] The section allows the government to offer substitutes for classified documents instead of the actual documents or information.[182] The pertinent language from CIPA section 6(c) states:

> Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by

---

the prosecution if the evidence is necessary to either party. The court will dismiss the case, sanction the government, or find against the United States. *Id.* § 6(e)(2).

176. *See* United States v. Rosen, 520 F. Supp. 2d 786, 793–94 (E.D. Va. 2007). "Trial participants" include the judge, jury, witnesses, defendant, defense counsel, and government counsel. *Id.* Although the public could still observe the trial, the key card prohibits disclosure of the classified information. *Id.*

177. *See supra* note 25 and accompanying text.

178. *See id.* at 794. Public observers in the court gallery would not, ostensibly, be able to discover the classified information due to use of the code words. The record would reflect the use of the code words as well, and so a reading of the record would not reveal the classified information.

179. El-Masri v. United States, 479 F.3d 296 (4th Cir.), *cert. denied*, 128 S. Ct. 373 (2007); *see also supra* Part I.

180. United States v. Reynolds, 345 U.S. 1, 2 (1953) (Vinson, C.J.); *see also supra* Part II.

181. *See infra* note 274 and accompanying text (describing the government's introduction of the silent witness rule under CIPA section 6).

182. In some cases, the requested information is audio recording or testimony from a particular witness rather than printed document. *See* United States v. Rosen, 520 F. Supp. 2d 786, 797 n.20 (E.D. Va. 2007); United States v. Marzook, 435 F. Supp. 2d 708, 714 (N.D. Ill. 2006).

> this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or (B) the substitution for such classified information of a summary of the specific classified information.[183]

This language is the backbone of the silent witness rule and allows substitutions to be admitted as evidence so long as the trial remains fair to both parties.[184] As stated in *United States v. Zettl*:[185]

> Under such a rule, the witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel and the jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury.[186]

---

183. Classified Information Procedures Act, 18 U.S.C. app. 3 § 6(c) (1980).

184. The CIPA grants wide latitude for the government to propose substitutions for classified evidence. Courts should be careful to remember that a particular case may deal with evidence of a highly sensitive nature that could significantly damage national security if revealed. "However, in passing upon a motion under Section 6(c) the trial judge should bear in mind that the proffered defense evidence does involve national security. Such a motion should be granted if the alternative 'will provide the defendant with substantially the same ability to make his defense.'" United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985) (internal citation omitted). It is not for the court to determine whether or not disclosure of the information would harm national security; thus, the court should not attempt to balance the government's national security concerns against the rights of the defendant to have access to the information. *See* Tamanaha, *supra* note 37, at 298–99. The government proposes alternatives to disclosure, which the court will evaluate and determine whether the defendant will be afforded substantially the same ability to make a defense, using the substitution rather than the true document.

> Whether or not an alternative would be sufficient for the protection of the national interest in the security of classified information is not to be determined by the court. What may appear to the court to be innocuous may be dangerously revealing to those more informed. The government is the party to propose Section 6(c) alternatives. The court may find that a 6(c) alternative proposed by the government will provide the defendant with his defense, even though the defendant might rather threaten his prosecutor with the disclosure of more detail.

Juan, 776 F.2d at 258–59.

185. United States v. Zettl, 835 F.2d 1059 (4th Cir. 1987).

186. *Id.* at 1063. "Trial participants" include the judge, prosecution, defendant, and defendant's counsel. *Rosen*, 520 F. Supp. 2d at 793–94. Although the public could still observe the trial, the use of the key cards prohibits disclosure of the classified information. *Id.* at 794.

Per the silent witness rule, the trial participants would refer to classified places, names, or documents through the use of code words printed on a "key card" in lieu of the actual information.[187] Therefore, each trial participant could know the classified information of reference by looking at the corresponding information on the key card.[188] The doctrine allows use of the information to the extent necessary for a fair trial while protecting the information from public disclosure because neither the record nor the audience would know the pertinent information.[189]

187. *Rosen*, 520 F. Supp. 2d at 793.
188. *Id.*
189. *See id.* at 794.

B. *Development: Implicit Approvals of the Silent Witness Rule*

A few cases illustrate approvals of similar presentations of evidence,[190] but only three published cases verify the government's attempts to introduce the silent witness rule to the judiciary.[191] In two of the three attempts, the

190. "Other courts, without using the '[silent witness rule]' term, have approved the presentation of evidence in one form to the jury and in another form to the public. In doing so, these courts have given effect to Congress'[s] express intent in enacting CIPA that federal district judges" should fashion creative solutions to the problems arising through the use of classified information at trial. *Id.* at 796. The approvals included the use of classified documents at trial while redacted versions were made available to the public, the use of "key cards" to hide the identities of witnesses from the public but not from the trial participants, and the use of alternate names, locations, and pseudonyms to protect classified information from public disclosure. *Id.* Such implicit approvals demonstrate that the judiciary is willing to entertain the silent witness rule—or at least similar evidentiary mechanisms.

In *United States v. Pelton*, 696 F. Supp. 156, 156 (D. Md. 1986), the United States charged Ronald William Pelton with six counts of delivery of national defense information to a foreign government, as well as several lesser offenses. *Id.* The government intended to offer several pieces of classified evidence, including two recordings of telephone calls that Pelton allegedly made, and proposed to offer a redacted version of the recordings to the public and the press while playing the unredacted version to the court and trial participants through headphones. *Id.* at 156–57. The court agreed with the defendant and intervenors that such a proposal would amount to court closure appropriate only in limited circumstances and further agreed that a presumption against closure existed. *Id.* at 157–58. However, upon weighing the interest of the public in maintaining open and public trial and the interest of the government in protecting national security, the court held that "both interests can be reasonably well-accommodated by making public a redacted version of the transcripts." *Id.* at 159. In this way, the court paralleled the silent witness rule's proposition that trial participants can access information during trial that will not be made public.

In *United States v. George*, Nos. 91-0521(RCL) and 92-0215(RCL), 1992 WL 200027, at *1 (D.D.C. July 29, 1992), the court ruled on a government motion to protect the identities of undercover CIA officers called to testify at trial. *See id.* at *1–3. An affidavit by the Deputy Director of the CIA requested that: (1) the court authorize the officers to testify in light disguise; (2) no courtroom artist be allowed to sketch the officers; and (3) the names not be publicly disclosed. *Id.* at *1–2. To effect these requests, the government proposed to disclose the witnesses' identities to the trial participants in the form of a "key card" which revealed their true names and that the court permit the witnesses to enter and exit the courthouse without using public entrances. *Id.* The defendant opposed the motion only to the extent that he preferred the officers shield their identities from public view by testifying behind a screen instead of in light disguise. *Id.* at *2. The court approved all the Deputy Director's requests except the witnesses were ordered to testify behind a screen rather than in light disguise. *Id.* Importantly, the court approved a presentation of evidence similar to the silent witness rule through the use of a "key card" to relate the true identities of the witnesses to the trial participants. *See id.* at *3.

Moreover, the Court of Appeals for the Fourth Circuit confirmed that the district court could decide, in its discretion, whether "non-substantive changes" such as alternate names and locations would be appropriate substitutions under the CIPA. United States v. Moussaoui, 382 F.3d 453, 457, 480 (4th Cir. 2004) (allowing the use of substitutions in lieu of classified evidence in a case of conspiracy regarding the September 11th attacks). Likewise, the district court in *United States v. Marzook*, 435 F. Supp. 2d 708 (N.D. Ill. 2006) allowed Israeli agents to testify using pseudonyms in a RICO (Racketeer Influenced and Corrupt Organizations) action against defendants who allegedly conspired to support the Hamas terrorist organization.

191. *See Rosen*, 520 F. Supp. 2d at 794. According to Judge Ellis, the only three cases with published dispositions include *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990), *United States v. North*, No. 88-0080-02, 1988 WL 148481 (D.D.C. Dec. 12, 1988), and *United States v.*

district court denied the proposal due to specific circumstances in the cases.[192] In the third case, the court tacitly approved the proposal, but never had the opportunity to implement it because of interlocutory appeal by the government.[193] Yet each of these cases demonstrates implicit judicial approval of the concept.[194]

1. *United States v. Zettl*

United States v. Zettl, in 1987, was the first case to allude to the silent witness rule.[195] The case consisted of a government interlocutory appeal from a pre-trial evidentiary ruling in a trial for conspiracy, conversion, and espionage.[196] Defendants allegedly passed classified information to unauthorized persons who used it to obtain a competitive advantage in the

---

Zettl, 835 F.2d 1059 (4th Cir. 1987). *Rosen*, 520 F. Supp. 2d at 794 n.11.

192. *See Fernandez*, 913 F.2d at 161–62; *see also North*, 1988 WL 148481, at *3.

193. *See Zettl*, 835 F.2d at 1063–64.

194. *Rosen*, 520 F. Supp. 2d at 796. "The [silent witness rule] is a novel evidence presentation technique that has received little judicial attention in the context of the use of classified information in trials. No published decision has explicitly approved or endorsed use of the rule in this context. Indeed, the government has only proposed the [silent witness rule] in three reported cases." *Id.* at 794. "And, indeed, while no court has squarely addressed this precise question, a few courts have implicitly approved the use of the [silent witness rule] at trial." *Id.* at 796. Though not referred to as "the silent witness rule," other courts have approved presentations of evidence in similar form. *See supra* note 190 and accompanying text.

195. *Zettl*, 835 F.2d at 1059 (argued November 11, 1986 and decided December 17, 1987).

196. *Id.* at 1060. Bernie E. Zettl, defendant and paid contractor for GTE, worked with co-defendants Robert R. Carter and Walter R. Edgington. *Id.* At the time, Carter and Edgington possessed Top Secret security clearances, and Zettl possessed a Secret clearance. *Id.* at 1061 n.8. Each of the three defendants was charged with conspiracy to convert classified documents to their own use, in violation of 18 U.S.C. § 371. *Id.* at 1060. Specifically, Zettl was charged with conversion and use of the 1984 Navy Program Element Descriptions (PEDs) without authority to do so, in violation of 18 U.S.C. § 641. *Id.* Edgington was charged with receiving, retaining, and concealing the 1984 PEDs with the intent to convert them to his own use, in violation of 18 U.S.C. §§ 641–642. *Id.* Zettl was charged with delivering the 1984 PEDs to Edgington, a person not authorized to receive them, in violation of the Espionage Act, 18 U.S.C. § 793(e). *Id.* Edgington was also charged, under the Espionage Act, for receiving the 1984 PEDs while not authorized to receive the documents. *Id.* Specifically, the indictments alleged that the three conspired to convert classified United States Navy documents to their own use. *Id.*

> The documents were primarily budgetary information that would then be disseminated to some employees within GTE to be used in preparing bids and contracts to be submitted to the government. Through possession of these documents, GTE had access to [Department of Defense (DoD)] information about the kinds of electronic technology the government would be seeking through government contracts and the amount of money DoD would seek from Congress to carry on these various projects.

Id.

bidding for government contracts.[197] The defendants used classified documents accessed through their place of work, the most sensitive of which were Navy Program Element Descriptions (PEDs) for 1984 that included internal government budgetary numbers classified as Secret.[198]

At trial, pursuant to CIPA section 5, the defendants notified the government of their intention to use classified documents for their defense.[199] At a closed section 6(a) relevancy hearing, the government objected to the defendant's use of any classified documents other than the 1984 PEDs (which the government "planned to introduce in their entirety").[200] Throughout this process, the government steadfastly took the position that the district court's only role during the hearing was to evaluate the relevance of the classified documents.[201] The court found, after lengthy

---

197. *Zettl*, 835 F.2d at 1060–61. Usually, access to classified information is controlled with dual protections from the classifying government agency. *See* Exec. Order No. 13,292, 68 Fed. Reg. 15315 (Mar. 25, 2003). First, the person accessing the information must have a security clearance equal to, or higher than the classification level of the information or document. *Id.* The highest clearance is "Top Secret," followed by "Secret," and then "Confidential." *Id.* Second, the person must have the requisite "need to know" the information. *Id.* According to *Zettl*, "need to know" is

> a determination made by the possessor of classified information that a prospective recipient, in the interest of national security, has a requirement for access to . . . knowledge of, or possession of the classified information in order to perform tasks or services essential to the fulfillment of a classified contract or program.

Zettl, 835 F.2d at 1061 n.9 (citing DoD 5220.22-R, *Industrial Security Manual for Safe-Guarding Classified Information* (Dec. 4 1985)). The access to internal government budgetary numbers explained the technology the government would seek to acquire, and the amount of money the DoD would seek from Congress in order to contract for these technologies. *Id.* at 1060. Therefore, GTE would know how much money the government would be willing to spend.

198. *See Zettl*, 835 F.2d at 1060–61. The government alleged that only portions of the classified PEDs were available to properly cleared individuals who had the need to know the information. *Id.* at 1061. According to the government, defendant Edgington received the complete PEDs (not just the portions available) from Zettl. *Id.* Although each of the defendants held proper security clearances, none had a "need to know." *Id.* Thus, under the government's theory, the mere possession of the complete PEDs without the "need to know" was a violation of the law. *Id.* The defense argued that the defendants were authorized to receive the information through the proper channels, so receiving the same information from a different source cannot be illegal. *Id.*

199. *Id.* at 1061; Classified Information Procedures Act, 18 U.S.C. app. 3 § 5(a) (1980). "Section 5(a) requires a criminal defendant who expects to disclose or cause the disclosure of classified information in connection with the trial or pretrial proceedings to provide, to the court and prosecution, written notice and a brief description of the classified information." Tamanaha, *supra* note 37, at 292.

200. *Zettl*, 835 F.2d at 1061–62. The government requested the closed "relevancy" hearing pursuant to CIPA section 6(a). At the hearing, the district court had to determine the relevance of the 1984 PEDs, consisting of 920 un-classified pages and 300 classified pages. *Id.* at 1062. The court reviewed all the PEDs documents under the assumption that the government would be using a large amount of classified information in the prosecution. *Id.*

201. *Zettl*, 835 F.2d at 1062. The government believed it inappropriate that the court rule, during the CIPA section 6(a) relevance hearing, on any application of common law privileges the United States might want to assert. *Id.* Therefore, the government did not assert any privileges related to the evidence under review at the relevance hearing. *Id.* However, the failure to assert any privilege resulted from an apparent misunderstanding of the Fourth Circuit's holding in *United States v. Smith*,

examination, that nearly 192 documents were relevant to the defense and tentatively admitted them for use at trial.[202] The government then moved to submit substitutions for the tentatively admitted classified documents under CIPA section 6(c) in order to prevent unnecessary disclosure of the classified information.[203] After hearing four proposed substitutions at the section 6(c) substitution hearing, the district court rejected the proposals and found that none of the recommendations were adequate.[204]

At the aforementioned section 6(c) substitution hearing, the government suggested the district court adopt the "silent witness rule" as to most of the classified documents.[205] Under the proposal in *Zettl*, a witness would not disclose any of the classified information in open court.[206] Instead the judge, jury, defense counsel, and prosecution would have copies of the classified document under examination.[207] The witness would refer to specific portions of the document throughout the testimony without revealing the actual information.[208] The judge, jury, and counsel would be able to look at

780 F.2d 1102 (4th Cir. 1985). In *Smith*, the court stated that "[t]he district court correctly concluded that CIPA was merely a procedural tool requiring a pretrial court ruling on the admissibility of classified information." *Smith*, 780 F.2d at 1106. Likely, the government construed *Smith* to mean that no rulings could take place at the section 6(a) relevance hearing other than decisions on relevance.

202. *Zettl*, 835 F.2d at 1062. The court acted upon the assumption that the United States would introduce all the PEDs documents at trial, and proceeded to consider "hundreds of classified documents identified by the defense." *Id.* The process of review took the court several days. *Id.* The court tentatively admitted the documents, presumably because the court expected the United States to raise privilege issues. *Id.*

203. *Id.* at 1063. Rather than disclose the actual classified document, the government proposed the court accept a statement admitting the facts that the PEDs would tend to prove. *Id.* As long as the statement placed the defendant in the same evidentiary position as the actual documents would have, the court would likely grant the motion. *Id.* at 1062 n.13. Under the scheme, the government would keep the classified documents safe from public disclosure while the defense would have admissions of pertinent fact by the United States. *Id.* at 1062–63.

204. *Id.* at 1063. The district court found the substitutions inadequate because the proposals did not meet the section 6(c)(1) requirement that the court grant such motion only if the defendant would have "substantially the same ability" to make its defense as it would have with full use of the classified documents. *Id.* at 1062 & n.13, 1063. The government offered three proposed substitutions, while the defense offered their own proposed substitutions. *Id.* at 1063.

205. *Id.* The Fourth Circuit related what happened at the district court level: "At the 6(c) substitution hearing, the district court also ruled upon the government's request for what the court called the silent witness rule to be used at trial for the handling of classified documents." *Id.*

206. *Id.* "By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury." *Id.*

207. *Id.*

208. *Id.* Upon hearing a witness's testimony, the jury would look at the part of the document referenced in the testimony. *Id.* The jury would understand what the witness referred to, without any party revealing the actual information to the public or on the record. *Id.*

the sections of the classified document referred to during questioning and would understand the witness's responses.[209] The district court approved the use of this scheme during the trial as to most of the classified documents, reiterating that the 1984 PEDs would be admitted for use in open court.[210]

From the outset of trial the government was "ambivalent as to whether or not it would introduce the 1984 Navy PEDs into evidence."[211] The government assured the court that the PEDs would be introduced.[212] Upon such introduction, the court intended to allow the government to offer evidence of whether disclosure "would create an identifiable danger to . . . national security."[213] If such evidence were presented, then the court would take the proper precautions to assure the protection of classified

---

209. *Id.*

210. *Id.* The defense indicated that it would not object to the silent witness rule as to the majority of the classified documents, but that they would likely object to the use of the silent witness rule with regard to the 1984 PEDs. *Id.* The trial court's admission of the 1984 PEDs for use at trial created confusion for the United States. *Id.* "The government construes the district court's direction to mean that it was ordering the United States to offer the document into evidence without qualification and in all events . . . ." *Id.* at 1063 n.14. The United States believed that this tentative admission was the final decision of the trial court, while the trial court expected the government to assert a privilege upon the tentative admission. *Id.* at 1064. Instead, the district court was attempting to give "a thinly veiled warning that the government might suffer adverse consequences if the document were not offered into evidence." *Id.* at 1063 n.14.

211. *Id.* at 1063. There remained questions regarding what the government "intended to prove from [the PEDs], how much thereof it intended to introduce into evidence, and its refusal to be pinned down as to a theory of the case with respect to the classified documents and testimony." *Id.* at 1064. Once introduced by the government, the court intended to allow defendants the opportunity to explain whether they legitimately came into possession of the classified documents and whether they had the requisite "need to know." *Id.*; *see also supra* note 197 and accompanying text (defining "need to know").

212. *Zettl*, 835 F.2d at 1063 & n.14. Even upon assurances by the United States Attorney that the government intended to introduce the PEDs as evidence at trial, there remained legitimate concern as to what the government intended to prove. *Id.* at 1064. Due to these assurances, the district court assumed that all of the 1984 PEDs documents would be offered as evidence of the defendant's guilt. *Id.* The government, however, asserted that it should have the discretion to introduce the whole document, only the portions related to the programs at issue, or attempt to prove its case without the PEDs, and that the district court's only role would be to determine relevance of the documents at trial. *Id.* at 1063–64. In construing the government's arguments, and the relationship between the government and the court, the opinion noted that:

> The government construes the district court's direction to mean that it was ordering the United States to offer the document into evidence without qualification and in all events; we do not. We think that, read in context, the direction of the district court was a thinly veiled warning that the government might suffer adverse consequences if the documents were not offered into evidence. The government, not the court, is the final authority on whether it will offer a classified document into evidence. The court, not the government, then decides the consequences of any failure to offer such evidence.

Id. at 1063 n.14.

213. *Id.* at 1064. The district court found that the government did not present any evidence of such an identifiable danger to national security that would require an "evaluation of its previous rulings on relevance and admissibility." *Id.*

information.[214] However, the government assumed that the tentative admission in open court would be without any qualification or protection and appealed the evidentiary decisions to the Fourth Circuit through interlocutory appeal.[215]

In reviewing the rulings, the Fourth Circuit noted that the language used by the district court regarding an "identifiable danger to . . . national security" referred to the *Reynolds* decision regarding the state secrets privilege rather than protection of classified information under the CIPA.[216] The Circuit found for the government, stating that it was entitled to assert any privilege it might have, including state secrets, during CIPA section 6(a) relevancy hearings and section 6(c) substitution hearings.[217] Because the appeal itself was from a pretrial order regarding the admissibility of classified evidence, the Fourth Circuit did not consider whether the silent witness rule was proper.[218] The district court approved the silent witness rule for limited use in *Zettl*, but never implemented the rule because of the interlocutory appeal.[219]

2. *United States v. North*

In 1990 the United States charged Lieutenant Colonel Oliver L. North, a former member of the National Security Council, with crimes related to the

---

214. *Id.*

> The district court finally acquiesced in the government's position and explicitly stated in its order that it had indicated that its initial rulings on relevancy and admissibility were tentative based on its belief that the government would present or proffer evidence showing that the public disclosure of a particular item of classified information would create an identifiable danger to the national security . . . .

Id.

215. *Id.* The government's appeal of the evidentiary rulings also supports the notion that the government believed the information would be disclosed without adequate protections afforded under the CIPA. *Id.*

216. *Id.* (citing United States v. Reynolds, 345 U.S. 1, 7–8 (1953)).

> While the language of the court was that of the statute, it obviously was referring to . . . [*Reynolds*], in which the Court stated that a claim of privilege for a state secret be lodged by the head of the department which has control of the matter after personal consideration of that officer.

Zettl, 835 F.2d at 1064.

217. *Zettl*, 835 F.2d at 1065–66. The court further clarified its ruling, that by holding that "the state secret and informer's privilege should be asserted in the [section] 6(a) hearings, we do not mean to imply that similar considerations should not be present in the court's consideration of substitution motions under [section] 6(c)." *Id.* at 1067.

218. *See id.* at 1064–67.

219. *Id.*

attempted cover-up of the "Iran-Contra Affair."[220] Congressional investigating committees subpoenaed the testimony of North, who asserted his Fifth Amendment right against self-incrimination.[221] However, the government compelled his testimony and North testified at investigatory hearings.[222] Subsequently, a district court convicted North of criminal wrongdoings perpetrated while trying to cover up the Affair.[223]

During the prosecution in *United States v. North*,[224] the district court held a series of hearings under the CIPA to determine the relevancy and permissible disclosure of documents the government proposed to offer in its

---

220. United States v. North, 910 F.2d 843, 851 (D.C. Cir. 1990) (appeal from convictions for criminal wrongdoing related to the Iran-Contra affair). When a Lebanese newspaper reported that the United States was selling arms to Iran in an attempt to secure the release of American hostages while secretly diverting some of the money to aid Nicaraguan rebels, Congress launched an investigation. *Id.* The Iran-Contra Affair involved the clandestine sale of arms and munitions to Iran, the proceeds of which were diverted to assist Nicaraguan rebels known as the "Contras." *Id.* According to the official investigation:

> The Iran/contra affair concerned two secret Reagan Administration policies whose operations were coordinated by National Security Council staff. The Iran operation involved efforts in 1985 and 1986 to obtain the release of Americans held hostage in the Middle East through the sale of U.S. weapons to Iran, despite an embargo on such sales. The contra operations from 1984 through most of 1986 involved the secret governmental support of contra military and paramilitary activities in Nicaragua, despite congressional prohibition of this support.
>
> The Iran and contra operations were merged when funds generated from the sale of weapons to Iran were diverted to support the contra effort in Nicaragua. Although this "diversion" may be the most dramatic aspect of Iran/contra, it is important to emphasize that both the Iran and contra operations, separately, violated United States policy and law.

1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS xiii (1993), *available at* http://fas.org/irp/offdocs/walsh/execsum.htm (internal footnotes omitted).

221. *North*, 910 F.2d at 851.

222. *Id.* The government gave North use immunity during the testimony, pursuant to 18 U.S.C. § 6002, which authorizes a congressional committee or agency of the United States to order a witness to testify even though the witness asserts the Fifth Amendment right against self incrimination. *Id.* Under this statute, nothing said pursuant to compulsion may be used against the witness in a criminal trial, with the exception of prosecution for perjury, giving a false statement, or refusing to testify under the order. *Id.* at 853 n.1. The government may still prosecute the witness for crimes through the "Kastigar doctrine," which allows the government to use evidence derived from a legitimate source that is completely independent from the immunized testimony. Elizabeth Bradshaw, *The Scope of the Use Immunity Statute and Its Perjury Exception: Can Immunized Evidence be Used to Prosecute Perjury or Crimes Committed* After *an Immunized Proceeding?*, 15 GEO. MASON L. REV. 161, 173 & n.85 (2007) (citing Kastigar v. United States, 406 U.S. 441(1972)).

223. *North*, 910 F.2d at 851. The district court convicted North.

> After extensive pretrial proceedings and a twelve-week trial, North was convicted in May of 1989 on three counts: aiding and abetting an endeavor to obstruct Congress in violation of 18 U.S.C. §§ 1505 and 2 ("Count 6"); destroying, altering, or removing official NSC documents in violation of 18 U.S.C. § 2071 ("Count 9"); and accepting an illegal gratuity, consisting of a security system for his home, in violation of 18 U.S.C. § 201(c)(1)(B) ("Count 10").

Id. at 851–52.

224. United States v. North, No. 88-0080-02, 1988 WL 148481 (D.D.C. Dec. 12, 1988).

prosecution.[225] The in camera proceedings required the court to determine whether the government's use of classified evidence through redaction and substitution would be allowable at trial.[226]

The court was concerned both with protecting the classified information and providing the jury with pertinent information in an understandable form.[227] After in camera proceedings, the district court decided not to allow CIPA substitutions.[228] Instead, the court decided to move forward with the action and directed the government to disclose the pertinent classified information, subject only to minimal protections.[229] During the same hearing the district court rejected the government's suggestion that "only the Court, counsel, and jurors shall use documents . . . under the so-called 'silent-witness rule.'"[230] Specifically, the court found that the silent witness

225. *North*, 1988 WL 148481, at *1. The hearings proceeded under CIPA section 6. *Id.*

226. *Id.* North opposed any redaction or substitution under the CIPA, arguing that the statute violated his rights under the Fifth and Sixth Amendments to the United States Constitution. *Id.* North hoped that he would be allowed to inform the court "of his defense *ex parte* and that the Court should release classified materials to accommodate that defense without consulting the government." *Id.* at *1 n.1. Yet the court found that "CIPA and criminal pretrial practice generally requires use of the normal adversary process at this late stage of the case." *Id.*

227. *Id.* at *1. The court considered two factors when reviewing North's opposition.

> Only two factors have served as the basis for each of the Court's rulings during the course of the *in camera* hearings as well as decisions recorded in this public Memorandum. Primarily the Court has sought to identify relevant and material facts contained in classified text which the government proposes to withhold, and to require disclosure accordingly. Secondarily, it has been obliged to focus on the need for disclosure to place the expected proof in a context which will enable the jury to understand the proof as it is entered into evidence. At no time has the Court ordered disclosure because it considered the classification of the information inappropriate under the controlling classification procedures.

Id.

228. *Id.*

229. *Id.* at *2. The court decided that the names of government officials and United States citizens must be identified, except those names associated with intelligence agencies. *Id.* References to the countries of Nicaragua, Costa Rica, El Salvador, Honduras, Guatemala, Jamaica, Iran, Israel, and other geographic locations within those countries were ordered to be identified. *Id.* Other counties and geographic locations mentioned in the classified documents were ordered to be referred to as "a South American country," "a European country," and so forth. *Id.* The location of any CIA facility was substituted for a neutral word such as "city," "village," etcetera. *Id.* Foreign officials were designated by the contra affiliation and rank. *Id.* For files, designations or references to degree of classification were not allowed, but information pertaining to the distribution of such files remained available for examination. *Id.* Methods of intelligence collection remained classified, substituted for the terms "reliable intelligence" or "up-to-date intelligence." *Id.* Redactions in tape recordings were approved. *Id.*

230. *Id.* at *3 (citing United States v. Zettl, 835 F.2d 1059 (4th Cir. 1987)).

rule would not serve the interests of this particular case because of the "thousands of pages of redacted material and numerous substitutions."[231]

3. *United States v. Fernandez*

In another trial relating to the Iran-Contra Affair, two investigative bodies began to investigate the role of Joseph Fernandez, Chief of Station for the CIA in Costa Rica.[232] Allegedly, Fernandez lied to the investigative bodies about the purpose and ownership of an airstrip in Costa Rica, the involvement of Lieutenant Colonel Oliver L. North, and contents of shipments he delivered to the Nicaraguan Contras.[233] As a defense, Fernandez intended to show that his statements to the investigating bodies were actually true.[234] In order to prove the truth of his statements, Fernandez needed to introduce classified evidence at trial that allegedly revealed the truth about the CIA's relationship with the Costa Rican airstrip.[235] Pursuant to the CIPA, Fernandez notified the government and the district court of his intent to introduce nearly 5000 possibly relevant classified documents tending to prove the CIA's relationship with the airstrip and presence in Costa Rica.[236]

The court conducted hearings regarding the admissibility and relevance of the information under CIPA section 6(a) and agreed that Fernandez needed to disclose classified information to demonstrate the CIA's role in the Iran-Contra Affair and to prove the veracity of Fernandez's statements.[237] After the district court authorized the disclosure of the information, the government moved to admit substitutions of the classified

231. *Id.* at *3.

232. United States v. Fernandez, 913 F.2d 148, 150 (4th Cir. 1990). On April 29, 1989, the United States indicted Fernandez on two counts of making false statements to the investigative bodies, one of which was the CIA Inspector General. *Id.* at 150. The CIA Office of Inspector General started investigating the Iran-Contra Affair in November of 1986 pursuant to a disclosure by the Attorney General that proceeds from arms sales "may have been diverted to assist the Nicaraguan resistance forces known as the Contras." *Id.*

233. *Id.* at 150–51.

234. *Id.* at 151. By showing that his statements were true, Fernandez would avoid prosecution for allegedly making false official statements to the investigating bodies.

235. *Id.* Counts one and two of the indictment charged specific false statements relating to the location of an airstrip in Costa Rica. *Id.* at 150. Moreover, the indictment alleged that Fernandez lied about his contact with a National Security Council staffer in Costa Rica allegedly connected to the airstrip construction, specifying that Fernandez told the investigators that the Costa Rican government built the airstrip for training activities pursuant to a feared invasion from Nicaragua. *Id.* at 150–51. To prove his innocence, Fernandez intended to demonstrate that "the airstrip was part of a comprehensive * * * * initiative designed to repel a potential invasion by Nicaragua." *Id.* at 151; *see also id.* at 150 n.1 (noting that omitted classified information is denoted as "* * * *").

236. *Id.* at 151.

237. *Id.* at 152. The court ruled that some categories of evidence were irrelevant, but it also ruled that two categories of information were relevant to Fernandez's defense. *Id.*

information under CIPA section 6(c).[238] The court rejected several of the government's proposals for substitutions because they failed to adequately describe the nature of the program and were "inadequate to 'provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information'" per the requirements in section 6(c)(1).[239]

On the morning of trial, the government pursued an eleventh-hour effort to protect the information by proposing the use of the silent witness rule.[240] The proposal indicated that pertinent locations could be identified by a number when referred to in open court.[241] A written key provided to the jury would identify the names of the locations referred to during testimony.[242] The district court rejected this proposal because it would not provide Fernandez with a fair trial.[243]

Before trial, the Attorney General filed an affidavit under CIPA section 6(e)(1), prohibiting the disclosure of any of the classified information at trial.[244] The district court dismissed with prejudice the charges against Fernandez because the inability to use the information in his defense violated his right to a fair trial.[245] The government appealed from the district court's evidentiary rulings, proposed substitutions, and dismissal.[246]

On appeal, the Fourth Circuit held "the court did not abuse its discretion either in admitting [the] evidence or in rejecting the government's proposed substitutions for this evidence."[247] The circuit further found that the district

---

238. *Id*

239. *Id.* at 152–53 (quoting Classified Information Procedures Act, 18 U.S.C. app. 3 § 6(c)(1) (1980)).

240. *Fernandez*, 913 F.2d at 153.

241. *Id.* ("Finally, on July 24, the morning of trial, the government submitted revised proposals which provided that the * * * * locations could be referred to by a number in open court that correlated with a written key provided to the jurors identifying the actual locations."); *see also id.* at 150 n.1 (noting that omitted classified information is denoted as "* * * *").

242. *Id.* at 153.

243. *Id.* ("Relying on its July 13 ruling that the actual identity of the * * * * was required to provide Fernandez with a fair trial, the district court rejected these proposals too."); *see also id.* at 150 n.1 (noting that omitted classified information is denoted as "* * * *").

244. *Id.* The Attorney General's affidavit was accompanied by affidavits by the Director of the CIA, the Deputy Director for Operations of the CIA, and an unnamed official. *Id.* These accompanying affidavits corroborated the Attorney General's affidavit. *Id.*

245. *Id.* The court ruled that the "information concerning the stations and projects was 'essential for the defendant to put forth a defense in this case and to receive a fair trial.'" *Id.* (internal citation omitted). Moreover, because the "'affidavit prevents the disclosure of all that information,' the entire case had to be dismissed with prejudice." *Id.* (internal citation omitted).

246. *Id.* at 153–54.

247. *Id.* at 155. Due to the CIPA's special treatment of substitutes for classified information, the

court ruled against the silent witness rule proposal because of the *untimely attempt* and hurried introduction by the government.[248] The hurried and unorganized nature of the proposal's introduction also led the circuit to find that "the government's presentation of the proposal before the district court was sketchy at best" because it did not address whether use of the silent witness rule would give Fernandez enough latitude to tell his story.[249] The

---

Fourth Circuit reviewed the substitutions "with some care." *Id.* at 157. Although "a trial court must accept the government's proposed substitutions 'if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense,'" the circuit affirmed that none of the government's section 6(c) substitution proposals adhered to the CIPA's requirements. *Id.* at 161 (quoting Classified Information Procedures Act § 6(c)(1)). A court is required to accept the proposed substitutions only if the defendant is left with substantially the same ability to provide for defense. Classified Information Procedures Act § 6(c)(1).

248. *Fernandez*, 913 F.2d at 160–62. The government proposed the silent witness rule at the last minute. *Id.* at 161. According to the circuit court, "[t]he district court's rejection of the government's proposed substitution presented just prior to jury selection on the morning of trial also [did] not amount to abuse of discretion. The government made this belated proposal to the trial judge ten minutes after jury selection was set to begin." *Id.* Fernandez's attorney objected to the silent witness rule proposal and stated:

> This court has ruled time and time again that the specific locations are crucial to the defense in this case. It is going to be necessary for the defense to identify on maps so the jury will be able to see graphically where these various locations are in order to tell the story that needs to be told in order to defend Mr. Fernandez.

Id. at 161–62. The trial judge also noted his frustration at the government's last minute proposal:

> I guess I am kind of at this point that I am getting a little impatient with the pace at which we are moving here. It is now ten minutes after ten, and we were supposed to start selecting a jury at 10 O'clock this morning. We had a CIPA hearing better than a week ago. In fact, we had the hearing over two days. My ruling was very clear.

Id. at 162.

249. *Id.* The district court was adamant that Fernandez be allowed to disclose certain classified locations because they were imperative to his argument. *Id.* at 153. The court already ruled the evidence was relevant during the CIPA relevancy hearings. *Id.* The Fourth Circuit clearly stated their own findings:

> In addition, the key card proposal, though ingenious, is an artificial means of presenting evidence. Although embellished on appeal, the government's presentation of the proposal before the district court was sketchy at best. Perhaps in part because the key card proposal was presented in a belated and hurried fashion, the government never made it clear to the trial judge, and indeed it remains unclear to us, how much latitude the key card substitutes would give Fernandez to tell his story about the CIA involvement in the resupply operation. The litigants continue to disagree strongly about the scope of the key card proposal. To take but one example, Fernandez contends that the card system would not allow him to point out in open court * * * * (a point central to his defense), while Independent Counsel insists that it would. CIPA charges the government with proposing the substitutions . . . and we think the burden must be on the government to delineate the substitutions' precise scope before the trial court.

Id. at 162 (internal citations omitted); *see also id.* at 150 n.1 (noting that the court used asterisks to indicate the omission of classified information). Additionally, the circuit held that it was within the district court's discretion to consider how the "complicated key card system might confuse or distract the jury." *Id.* at 162. The court continued:

> With this system, the * * * * would be referred to as * * * * and the witnesses and the jury would apparently consult a key card to discover their actual locations. Jurors would thus have to make continuous reference to a key card and a map while at the same time

Fourth Circuit finally rejected the use of the silent witness rule "in light of the belatedness and artificiality of the proposed substitution, the uncertainty about its scope, its potential to confuse the jury, and the district court's prior valid findings that the . . . identity . . . was essential to Fernandez's defense."[250] The rule was not rejected because of an inherent flaw, but instead due to poor presentation and uncertainty regarding whether the rule would afford Fernandez the ability to make a defense.[251]

In two of the first three government attempts to introduce the silent witness rule at trial, the district court denied the proposal due to the particular circumstances of the cases.[252] In the third attempt, the court approved the proposal, but it was never implemented because of interlocutory appeal by the government.[253] Yet each of these cases demonstrates judicial approval of the silent witness rule.[254] Not until *United States v. Rosen* did the court explicitly endorse the use of the silent witness rule.

C. United States v. Rosen*: Victory for the Silent Witness Rule*

Perhaps the best way to implement a solution to the state secrets "problem" is to use existing laws and mechanisms in new and creative ways—enter the silent witness rule and its conception from the language of the CIPA.[255] The court in *United States v. Rosen* stands for the first real approval of the creative silent witness rule in criminal trials.[256]

---

focusing on the content of the testimony.

Id.

250. *Id.* "It seems clear, therefore, that the key card proposal was far from an interchangeable substitute for the real thing." *Id.*

251. *Id.*

252. *See id.* at 161–62; *see also* United States v. North, No. 88-0080-02, 1988 WL 148481, at *3 (D.D.C. Dec. 12, 1988).

253. *See* United States v. Zettl, 835 F.2d 1059, 1063–64 (4th Cir. 1987).

254. United States v. Rosen, 520 F. Supp. 2d 786, 794 (E.D. Va. 2007).

> The [silent witness rule] is a novel evidence presentation technique that has received little judicial attention in the context of the use of classified information in trials. No published decision has explicitly approved or endorsed use of the rule in this context. Indeed, the government has only proposed the [silent witness rule] in three reported cases.

Id. "And, indeed, while no court has squarely addressed this precise question, a few courts have implicitly approved the use of the [silent witness rule] at trial." *Id.* at 796.

255. By using existing law to combat state secrets issues, solutions will not have to wait until legislative action moves forward or the judiciary decides to take a strong stand against government assertions of the state secrets privilege.

256. *See Rosen*, 520 F. Supp. 2d at 797 n.20 (approving use of the silent witness rule for part of

In late 2007, United States District Court Judge T. S. Ellis approved the limited use of the "silent witness rule" for a four-minute and six-second segment of recorded conversation to be used as evidence at trial.[257] The decision marks the first time the rule has received approval and significant discussion in a published opinion.[258] The proposal was couched in existing legislation—the CIPA[259]—in a novel attempt to protect classified information from public disclosure while allowing the trial to move forward.[260] Judge Ellis's memorandum opinion devoted substantial discussion to the viability of the silent witness rule and caught the attention of commentators and critics.[261] His conclusion that the rule can comport with strict constitutional concerns for criminal actions implicitly approves the rule for use in the civil arena, and hence cases involving the state secrets privilege.[262]

Judge Ellis discussed the theory and constitutional viability of the silent witness rule in a published opinion, but reserved application of his findings to *Rosen*'s facts through a sealed non-public order.[263] The public only knows that Judge Ellis actually approved the rule for use in *Rosen* due to a footnote in the published opinion.[264]

---

recorded conversations); *see also supra* Part IV.B (discussing implicit approvals of the silent witness rule). Although federal courts considered the silent witness rule on several occasions, no court approved or implemented it in any case. *See supra* Part IV.B.

257. *Rosen*, 520 F. Supp. 2d at 797 n.20.

258. In only one other case was the rule explicitly approved, *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987), but the evidentiary rulings were appealed to the Fourth Circuit and so the rule was never implemented. *See supra* Part IV.B.1.

259. *See supra* Part III (presenting and discussing the CIPA).

260. *See supra* Part IV.A; *see also supra* notes 205–10 and accompanying text (relating the government's attempt to introduce the silent witness rule under the CIPA).

261. *See generally Rosen*, 520 F. Supp. 2d 786; *see also* Secrecy News, AIPAC Court Considers "Silent Witness" Procedure, http://www.fas.org/blog/secrecy/2007.html (Mar. 27, 2007); Secrecy News, AIPAC Court Adopts Silent Witness Rule, http://www.fas.org/blog/secrecy/2007.html (Nov. 7, 2007).

262. *See* Stein, *supra* note 28, at 1, 8, 9.

263. *Rosen*, 520 F. Supp. 2d at 793–99 (discussing the silent witness rule and its viability given the procedures mandated under the CIPA). "A separate classified, sealed order will issue applying the principles elucidated here and setting forth the specific rulings made with respect to the government's second CIPA [section] 6(c) motion." *Id.* at 802.

264. *Id.* at 797 n.20 ("During the course of the [section] 6(c) hearings, the use of the [silent witness rule] was approved for only four minutes and six seconds (4:06), out of a total of four hours, thirteen minutes and fifty-one seconds (4:13:51) of recorded conversations.").

1. Brief Facts[265]

In 2005, the government charged defendants Steven Rosen and Keith Weissman with violations of the Espionage Act.[266] Generally, the indictments charged that the defendants cultivated sources in the United States government in order to obtain access to classified National Defense Information (NDI)—conspiring to pass the information to members of the American Israeli Public Affairs Committee (AIPAC) and others.[267] The defendants allegedly passed classified information to foreign officials and media personnel, and continued to meet with sources inside the United States government for a period of years between 1999 and 2004.[268] Other particular facts of this case are not necessary to this discussion; it is merely

265. The information contained in this section is drawn from a single case with multiple published orders and opinions from the Eastern District of Virginia. The facts of the opinion analyzed in this Comment, *United States v. Rosen*, 520 F. Supp. 2d 786, 794 (E.D. Va. 2007), were not clear from the opinion itself. Therefore, some of the facts are drawn from another opinion in the same case, *United States v. Rosen* (*Rosen I*), 445 F. Supp. 2d 602, 608 (E.D. Va. 2006). Yet, many of the specific facts in this case do not bear on the analysis of the silent witness rule and are not necessary to relate, although some are discussed later. *See infra* notes 267–68.

266. *Rosen*, 520 F. Supp. 2d at 789. The government charged defendants with "conspiracy to violate the Espionage Act, in violation of 18 U.S.C. §§ 793(g) and (e)." *Id.* As well, the government charged Rosen individually with "aiding and abetting . . . [in the] unauthorized disclosure of national defense information, in violation of 18 U.S.C. § 793(d)." *Id.*

267. *Rosen I*, 445 F. Supp. 2d at 608–09. AIPAC employed Rosen and Weissman during the times relevant to this case. *Id.* at 608. AIPAC is an organization that lobbies the United States government on behalf of Israel. *Id.* at 607. Many of the court documents were filed under seal and are not available to the public. *Rosen*, 520 F. Supp. 2d at 789. Specifically, AIPAC employed Rosen as its Director of Foreign Policy Issues while co-defendant Weissman was employed as AIPAC's Senior Middle East Analyst. *Rosen I*, 445 F. Supp. 2d at 608. Rosen once held a security clearance during years in the 1970s and 1980s pursuant to employment at the RAND Corporation. *Id.* The clearance was terminated in 1982. *Id.* Weissman never had a security clearance as far as the Court was aware. *Id.*

268. *Rosen I*, 445 F. Supp. 2d 602, 608–11. According to the indictment, Rosen related intelligence information to a foreign official on April 13, 1999. *Id.* at 608. Weissman told the same foreign official on June 11, 1999 that he had obtained a secret FBI report related to a specific bombing of the Khobar Towers. *Id.* On December 12, 2000, both Rosen and Weissman allegedly met with a United States government official who had access to classified information. *Id.* On January 18 and March 12, 2002, Rosen allegedly received classified information from a different United States official and relayed it to AIPAC employees and foreign nationals. *Id.* at 608–09. On February 12, 2003, Rosen and Weissman allegedly met with a United States Department of Defense employee, Lawrence Franklin, who relayed classified information to them. *Id.* at 609. Rosen related some of this information to the media in 2003. *Id.* On June 26, 2003, Franklin related classified information to Rosen and Weissman concerning attacks on United States service men in Iraq. *Id.* The FBI began an investigation of Rosen and Weissman with the cooperation of Franklin in 2004. *Id.* at 609–10.

pertinent that the government charged Rosen and Weissman with criminal violations of the Espionage Act.[269]

2. The Government's Proposal

Due to the nature of the criminal case, involving large amounts of classified information, the CIPA governed the procedures for use and discovery of the classified information in *Rosen*.[270] Initially the government filed a motion seeking to use the silent witness rule on most of the classified information to be presented at trial.[271] The court denied this first motion and, in fact, struck the motion entirely from the record.[272] Of note, the court struck the motion because "the government's proposed extensive use of the [silent witness rule] effectively closed the trial to the public and . . . the government had not adequately justified this trial closure."[273]

In a second CIPA section 6(c) motion, the government limited the proposed use of the silent witness rule and additionally proposed that section 6(c) substitutions be made available both to the jury and to the public.[274] According to the court the proposal was "now ripe for resolution," allowing Judge Ellis to render a decision on the motion for use of the proposed silent witness rule.[275]

---

269. *See infra* note 266.

270. *Rosen*, 520 F. Supp. 2d at 789 ("This case involves a large volume of classified information. Discovery of such information, and its use at trial, is governed by [the] CIPA."). The CIPA is the statutory mandate for the handling of classified information during a federal criminal trial. *See supra* Part III (presenting and discussing the CIPA).

271. *Rosen*, 520 F. Supp. 2d at 790.

272. *Id.*

273. *Id.* Under *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), there exists a presumption of trial openness:

> The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Id. at 508 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569–71 (1980)).

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. at 510. According to the district court in *Rosen*, the case presently discussed, the government did not meet the applicable *Press-Enterprise* standard for a closed trial. *Rosen*, 520 F. Supp. 2d at 790.

274. *Rosen*, 520 F. Supp. 2d at 790. The court requested briefs from both the prosecution and the defense regarding whether the CIPA allows the use of the silent witness rule. *Id.*; *see also infra* notes 294, 304, 311 and accompanying text.

275. *Rosen*, 520 F. Supp. 2d at 790 ("The motion has been fully briefed and argued, and is now ripe for resolution.").

Before discussing the viability of the silent witness rule, the court first stated that the purpose of the CIPA "is to identify in advance of trial the universe of classified information to be disclosed at trial and to minimize unnecessary disclosure of classified information by use of substitutions, redactions, and summaries that do not meaningfully impair defendants' ability to present a defense."[276] The statement sets the tone for Judge Ellis to analyze the silent witness rule and to pay special attention to defendant Rosen's ability to present a defense. Additionally, the court noted that the purpose of CIPA section 6(c) substitution rule is to provide fairness for both parties at trial while providing adequate protection for classified information.[277] The court also paid special attention to its charge to be sensitive "to the dynamics of jury trials and to the ways in which typical jurors respond to evidence and a judge's instructions."[278]

3. Judge Ellis's Examination

Judge Ellis defined the silent witness rule as "a procedure whereby certain evidence designated by the government is made known to the judge, the jury, counsel, and witnesses, but is withheld from the public."[279] The process, as understood by Judge Ellis, involved a system of references to commonly used codes corresponding to particular pieces of information.[280] Counsel would refer to a code during trial and the judge, jury, counsel, and witnesses would refer to a key, alerting pertinent parties to the definition or information of reference.[281] When the silent witness rule relates to recorded evidence, then counsel, jurors, witnesses, and the judge would have access to

276. *Id.* The court also acknowledged that the goal of protecting classified information while allowing the defendant to present an adequate defense is difficult in complex cases such as the one at bar. *Id.* Indeed, eleven section 6(c) substitution hearing days had already been conducted, and the court anticipated many more. *Id.*

277. *Id.* ("It is quite clear . . . that the touchstone of permissible CIPA [section] 6(c) substitutions, summaries or redactions is fairness.").

278. *Id.* at 791. The CIPA not only turns on the ability of the court to determine whether actual evidence is admissible at trial, but how the introduction of substituted evidence will affect the jury's understanding of the evidence. *Id.* Fairness to both parties in trial is also determined in part by the court's ability to relate expectations and instructions to the jury. *Id.* Therefore, the court will consider the jury in making decisions on relevance of evidence. *Id.*

279. *Id.* at 793.

280. *Id.* at 793–94. According to Judge Ellis, "[u]nder this procedure, a witness referring to this evidence would not specifically identify or describe it, but would instead refer to it by reference to page and line numbers of a document or transcript, or more commonly by use of codes such as 'Person 1,' or 'Country A,' etc." *Id.* at 793.

281. *Id.* at 793–94.

headphones over which the sound recording would be played.[282] The public would not have access to the key cards, classified documents, or recordings.[283]

However, Judge Ellis noted a major flaw in the silent witness rule relating to accidental disclosure during use of the key cards.[284] Although counsel might well be careful to refer only to the code names, the witness is not bound during cross-examination to refer to the same codes when speaking on personal identifying information or experiences.[285] Utilizing a version of Judge Ellis's own example, "City *X*" might indeed be code for Seattle, Washington in the United States.[286] Throughout testimony the witness would be bound to adhere to the code name when speaking on the classified information, but upon cross examination the witness might be asked the city of his current residence.[287] If the witness also lives in Seattle, Washington, the public might easily be able to deduce that "City *X*" is the same Seattle, Washington.[288] Although such a deduction might not be conclusive, it certainly poses a risk to disclosure.[289]

Framing the issues for examination, Judge Ellis went on to note that the silent witness rule has the effect of closing parts of the trial to the public and therefore, possesses qualities distinguishable from the CIPA.[290] Whereas use of classic CIPA procedures involving substitutions, summaries, and redactions of classified information allow both the public and the parties to hear the very same trial, the result of the silent witness rule is that trial participants hear and see a different trial than the public.[291] But the main

---

282. *Id.* at 794.

> Any recordings containing the portions designated for [silent witness rule] treatment would be played in open court, but would revert to static when the portions designated to be treated under the [silent witness rule] are reached; thus, the public would not hear these portions. At the same time, however, jurors, counsel, and the judge would listen on headphones to the unredacted recording.

Id.

283. *Id.*

284. *Id.* at 794 n.10. "It is important to note that it became apparent during the course of CIPA [section] 6(c) hearings that vigorous cross-examination may well lead to disclosure in open court of information sought to be protected by the [silent witness rule]." *Id.* Thus, in such circumstances the silent witness rule will not achieve its goal of prohibiting disclosure.

285. *See id.*

286. *See id.*

287. *See id.*

288. The example of "City *X*" is an iteration of the example used by Judge Ellis in his opinion, recognizing that the public might be able to deduct the meaning of the code word through a witness's answers to other questions. *See id.*

289. *Id.*

290. *Id.* at 794. CIPA substitutions are publicly available while the silent witness rule keeps information hidden from public consumption. *Id.*

291. *Id.*

> Use of conventional CIPA [section] 6(c) substitutions, summaries, and redactions results

issue, according to Judge Ellis, was whether the use of the silent witness rule was permissible within the legal framework established by the CIPA.[292] Indeed, Judge Ellis discussed whether the CIPA provided the *only* procedure for use of classified information at trial, which would have precluded the court from considering the silent witness rule.[293]

However, the beauty of the government's proposed silent witness rule was that it was marketed as a CIPA section 6(c) substitution.[294] Therefore, if the court found the CIPA to be the only permissible way for dealing with classified information, then the silent witness rule was still viable.[295] "Put differently, the question is whether CIPA provides the exclusive means of dealing with classified information in criminal trials and, even if so, whether the [silent witness rule] can be said to be authorized by CIPA [section] 6(c) as constituting a species of 'summary' or 'substitution' under that provision."[296] Therefore, the government's proposed silent witness rule was a new attempt to provide a CIPA substitute for classified information at trial.[297]

Indeed, the silent witness rule is a novel idea that has sustained minimal judicial scrutiny.[298] According to Judge Ellis, the government only proposed the rule by name in three reported cases.[299] In only one of these three cases,

---

> in trial participants and the public seeing and hearing the same trial, whereas use of the [silent witness rule] results in the trial participants hearing or seeing some evidence the public does not see or hear. In other words, the [silent witness rule] results in closing a part of the trial to the public.

Id.

292. *Id.* at 795 ("The threshold question that must be resolved with respect to the [silent witness rule]'s use in this case is whether it is even permissible to use in the CIPA context.").

293. *Id.*

294. *Id.* at 794. Judge Ellis called the silent witness rule "a novel evidence presentation technique." *Id.* The government, in its supporting brief, called for the court to read the CIPA section 6(c) substitution procedure broadly.

> Specifically, Section 6(c)(1) provides for an alternative to disclosure of the specific classified information at trial. This provision of CIPA, allowing the court to order substitutions should be read broadly. *The silent witness rule is a type of substitution and is an alternative to disclosure of the information at trial as contemplated by CIPA.*

Government's Memorandum of Law Addressing Use of the "Silent Witness Rule" as Permitted by the Classified Information Procedures Act at 2, United States v. Rosen, No. 1:05-CR-225 (E.D. Va. Aug. 29, 2007), 2007 WL 3352462 (emphasis added).

295. *Rosen*, 520 F. Supp. 2d at 794; *see also supra* note 294.

296. *Rosen*, 520 F. Supp. 2d at 795.

297. *See supra* note 294 and accompanying text (discussing the government's position that the silent witness rule is a type of substitution permitted under the CIPA).

298. *Rosen*, 520 F. Supp. 2d at 794–95.

299. *Id.* at 794. The cases with published dispositions include *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990), *United States v. North*, No. 88-0080-02, 1988 WL 148481(D.D.C. Dec. 12,

did the court tacitly approve the use of the rule.[300] However, the silent witness rule was never actually used in the trial because of a government appeal from other evidentiary decisions in that case.[301] Moreover, Judge Ellis suggested that other decisions approved presentations of evidence where the trial participants had different access to evidence than the public—a striking similarity to the silent witness rule.[302] There was, and is, little written analysis of the rule with regard to the procedures outlined in the CIPA.[303]

Outlining the arguments against the silent witness rule, Judge Ellis cited defendant Rosen's chief argument, namely that the CIPA's comprehensive treatment of classified information suggests that Congress intended the CIPA to prescribe the *only* method of handling classified evidence at trial.[304] Judge Ellis disagreed with Rosen's characterization, because the "CIPA, while undeniably detailed in some respects, is neither explicitly nor implicitly exclusive as to the trial treatment of classified information."[305]

1998), and *United States v. Zettl*, 835 F.2d 1059 (4th Cir. 1987). *Rosen*, 520 F. Supp. 2d at 794 n.11; *see also* discussion *supra* Part IV.B.

300. *Rosen*, 520 F. Supp. 2d at 794.

301. *Id.* The Court of Appeal for the Fourth Circuit did not reach the issue of the silent witness rule in their published decision; the government appealed the evidentiary rulings of the district court to the court of appeals through a CIPA sanctioned interlocutory appeal. *See supra* Part IV.B.1 (discussing *Zettl*, 835 F.2d 1059).

302. *Rosen*, 520 F. Supp. 2d at 796. The "implicit" and "similar evidence" approvals have been discussed, at length, earlier in this Comment. *See supra* Part IV.B. However, the case against Zacarias Moussaoui in the Eastern District of Virginia, contains a reference to approval of the silent witness rule in a footnote to an order regarding publication of documentary evidence: "Excepted from this Order are all classified exhibits published to the jury under the silent witness rule." Order at 1 n.1, United States v. Moussaoui, No. 01-CR-455 LMB (E.D. Va. Mar. 24, 2006), http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/71918/0.pdf.

303. *Rosen*, 520 F. Supp. 2d at 794–96. According to Judge Ellis, "[t]his paucity of judicial precedent on the [silent witness rule]'s use in CIPA cases counsels caution with respect to its use in this context." *Id.* at 794–95.

304. *Id.* at 795. Rosen argued that Congress implemented comprehensive legislation to deal with the problem of graymail in national security litigation. Supplemental Brief Regarding Inapplicability of the Silent Witness Rule at 15, United States v. Rosen, No. 05-CR-225 (E.D. Va. 2007), 2007 WL 3352463. According to Rosen, Congress considered all the possible implications and issues surrounding the use of classified information in trial when implementing the CIPA. *Id.* One of the main issues Congress dealt with was the competing interest of the constitutional right to public trial. *Id.* at 16. "Given the comprehensive nature of the CIPA legislation, CIPA's omission of any mechanism for closure of trial proceedings reflects the choice that the Administration advocated and Congress enacted to protect the values served by fully open, public trials." *Id.* Moreover, Rosen argued that Congress did not intend any additional steps that the prosecution could take to avoid disclosure (short of dismissing the action or submitting an affidavit by the head of the executive agency prohibiting disclosure) once the evidence passed safely through the section 6(c) substitution and relevancy hearings. *Id.* Rosen concluded that "[t]he Justice Department and Congress proceeded with the understanding that, but for CIPA's summaries, stipulations and redactions, the choice was for the government to disclose or dismiss—not to be accorded a different type of bite at the apple." *Id.* at 17.

305. *Rosen*, 520 F. Supp. 2d at 795. The CIPA fails to provide guidance on any number of issues

Therefore, the CIPA does not immediately preclude the use of the silent witness rule at trial.[306]

However, Judge Ellis did find that the silent witness rule was not merely another version of CIPA section 6(c) substitution.[307] He reasoned that unlike the proposed silent witness rule, CIPA substitutions do not effectively close parts of the trial to the public.[308] The CIPA envisions that documentary evidence and court testimony will be available for public consumption in the same form as given to the trial participants.[309] Judge Ellis unequivocally stated that "the [silent witness rule] is not part of CIPA."[310] As such, he quickly disposed of Rosen's argument that the silent witness rule runs afoul of Federal Rule of Criminal Procedure 26.[311]

---

relating to the use of classified information at trial. *Id.* at 795–96. There exists no statutory guidance on classification markings as possibly hearsay, limiting jury instructions, witness testimony by pseudonym or other concealment, access of experts to the classified information, or the classified information privilege. *Id.*

306. *Id.* at 796. "In sum, CIPA is neither exhaustive nor explicitly exclusive with respect to the presentation of classified testimony or documents at trial. It follows that CIPA cannot be said to exclude the use of the [silent witness rule] at trial." *Id.* Judge Ellis recognized that because the CIPA failed to provide guidance on many issues that arise when dealing with classified evidence at trial, the defendant's contention that the CIPA provides all exclusive means for the use of such classified information did not hold any weight. *Id.*

307. *Id.* at 797.

308. *Id.*

309. *Id.* Judge Ellis states that:

> CIPA [section] 6(c) redactions and substitutions, unlike the [silent witness rule], do not effect any closing of the trial to the public. To the contrary, CIPA plainly envisions that substitutions and redactions will be made available in the same form to the public as to the trial participants. This is confirmed not only by the plain meaning of CIPA's text, but also by the absence of any statutory language or legislative history concerning the First Amendment considerations raised by the partial closing of the trial that results from the [silent witness rule]'s use.

Id.

310. *Id.*

311. *Id.* at 796–97. The majority of the defendant's brief to the court regarding the inapplicability of the silent witness rule rested on Federal Rule of Criminal Procedure 26. *See* Supplemental Brief Regarding Inapplicability of the Silent Witness Rule at 15, United States v. Rosen, No. 05-CR-225 (E.D. Va. 2007), 2007 WL 3352463. The rule reads as follows: "In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072–2077." FED. R. CRIM. P. 26. Yet Judge Ellis was not persuaded, even for a moment. In fact, he brushed aside the defendant's argument with haste.

> Nor is Rule 26 of any aid to defendants' argument. The Rule is general and aspirational and suffers the fate of all general rules: It has well-established exceptions. Courts in criminal cases have in a variety of circumstances partially closed proceedings to accommodate overriding interests, such as the safety of confidential informants and undercover officers. The [silent witness rule] is simply another of these exceptions.

Rosen, 520 F. Supp. 2d at 796–97.

Judge Ellis moved forward with a "fairness" analysis of the silent witness rule due to the court's charge, under the CIPA, to provide the defendant "substantially the same ability" to proceed with a defense as would have been available given the use of the classified information.[312] The court found that a "fairness" analysis under the silent witness rule would be more difficult than the analysis under the CIPA because the rule required the court to "consider all the mechanics" of the rule's use at trial.[313] Yet, because Judge Ellis determined that the silent witness rule is not a part of the CIPA, the "substantially the same ability" test did not apply.[314] Therefore, the court took the more difficult and expansive view of fairness, deciding that a court must determine whether the silent witness rule hampered the defendant's ability under the CIPA "fairness test" to

> fairly present evidence, cross-examine, and argue to the jury about the facts protected by the [silent witness rule], whether an ordinary juror will be able to follow the evidence and argument if presented by the [silent witness rule], and whether the prejudice from the rule's use is curable by an instruction or otherwise.[315]

The silent witness rule also raised Sixth Amendment concerns with regard to the defendant's right to an open trial, because the rule effectively closes parts of the trial to the public.[316] Conveniently, Judge Ellis found that

---

312. Classified Information Procedures Act, 18 U.S.C. App. 3 § 6(c)(1) (1980) ("The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.").

313. *Rosen*, 520 F. Supp. 2d at 798. It was easy for Judge Ellis to dismiss some of the tests for unfairness, because "the [silent witness rule], unlike a conventional summary or redaction, permits the jury to view the actual evidence the government seeks to protect from public disclosure, there is no potential for unfairness based on the factfinder's inability to learn relevant, classified facts which have been summarized or redacted out." *Id.* Yet substantial unfairness was possible according the Judge Ellis, based on the practical implementation and use of the rule at trial:

> Yet there is potential for unfairness in the [silent witness rule]'s use; it lies (i) in the awkwardness of presentation and resulting jury confusion, (ii) in witnesses' and counsel's inability to explore fully and argue about the facts protected by the [silent witness rule], and (iii) in the prejudice from employing a procedure that suggests to the jury that the information being discussed is a closely-held government secret when the jury itself must decide that very issue.

Id. (citing United States v. Rosen, 487 F. Supp. 2d 703, 707–21 (E.D. Va. 2007)).

314. *Rosen*, 520 F. Supp. 2d at 798.

315. *Id.* at 799. Judge Ellis noted that the new fairness analysis "is no easy task, but it is required." *Id.*

316. *Id.*

> This right helps ensure that the public sees the evidence and proceedings so that it can make its own assessment about the fairness of the proceedings. This public scrutiny of a trial provides some insurance against an unfair prosecution or proceeding. The public's assessment of the fairness of a trial may be impaired by the use of the [silent witness rule]

the "public trial concern is adequately accommodated by the *Press-Enterprise* test for trial closure, as the analysis for closing a trial under the First Amendment is the same as the analysis required for closing a trial under the Sixth Amendment."[317] For Judge Ellis to justify the use of the silent witness rule, it had to pass both the CIPA "fairness test" and the constitutional fairness test outlined by the Supreme Court in *Press-Enterprise Co. v. Superior Court*.[318]

> To summarize, because the concerns animating both *Press-Enterprise* and CIPA are present when the [silent witness rule] is used, it is appropriate to approve use of the [silent witness rule] only when both tests are satisfied, that is only when the government establishes (i) an overriding reason for closing the trial, (ii) that the closure is no broader than necessary to protect that interest, (iii) that no reasonable alternatives exist to closure, and (iv) that the use of the [silent witness rule] provides defendants with substantially the same ability to make their defense as full public disclosure of the evidence, presented without the use of codes.[319]

Unfortunately, the classified nature of the issues in *Rosen* precluded Judge Ellis from publicly disclosing his application of the decision to the particular facts of the case.[320] Yet, the opinion *does* note that the court *approved* the very limited use of the silent witness rule for a segment of recorded conversation—implying that *Rosen* indeed met the tests.[321]

---

if that use distorts the meaning of the underlying evidence.

Id.; *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

317. *Rosen*, 520 F. Supp. 2d at 799. The *Press-Enterprise* test for trial closure is met when there is a compelling interest to justify trial closure, the closure is not overly broad, and no reasonable alternatives to trial closure exist. *Id.* (citing Press-Enter. Co. v. Super. Ct., 464 U.S. 501, 509–10 (1984)).

318. *See Press-Enter. Co.*, 464 U.S. at 508; *Rosen*, 520 F. Supp. 2d at 799.

319. *Rosen*, 520 F. Supp. 2d at 799.

320. *Id.* at 802 ("This Memorandum Opinion outlines the legal principles governing the disposition of the government's second motion pursuant to CIPA [section] 6(c). A separate classified, sealed order will issue applying the principles elucidated here and setting forth the specific rulings made with respect to the government's second CIPA [section] 6(c) motion.").

321. *See supra* note 257 and accompanying text (noting Judge Ellis's approval of the silent witness rule).

4. A State Secrets Solution

Since the government generally uses the state secrets privilege when it is a defendant in civil cases, the silent witness rule might first appear to be lacking since *Rosen* approved it for use in criminal actions.[322] Yet criminal cases have unique constitutional concerns not present in the civil arena.[323] It follows that if the silent witness rule meets constitutional requirements for criminal actions, it could be applied as an alternative to state secrets dismissals of civil actions. Thus, the silent witness rule provides a much needed alternative to state secrets dismissals and provides a real avenue for litigating civil claims against the government while protecting sensitive government information from public disclosure. In fact, the ABA argued for new legislation similar to the CIPA, which sets policies and procedures for the use of classified information at trial.[324] Legislation that satisfies the CIPA's constitutional concerns in criminal cases will, necessarily, make application to civil cases constitutionally viable.[325] Therefore, *Rosen*'s approval for use in criminal trial paves the way for use in the civil arena; the silent witness rule provides a viable way to present classified information to the court during litigation while keeping the information from the public.[326] The silent witness rule's use in civil litigation could change the current norms regarding the state secrets privilege—El-Masri's claims of torture and extraordinary rendition would have been adjudicated in a court of law while the families in *Reynolds* may not have felt betrayed by their government.[327]

Judge Ellis may have been the first judge to explicitly approve the use of the silent witness rule in a case moving forward.[328] Indeed, the rule survived constitutional scrutiny for use at a criminal proceeding, although the rule's use at a criminal trial is governed by multiple tests.[329] However, use of the silent witness rule in civil actions against the United States would likely pass the *Press-Enterprise* test in most every situation. In state secrets cases, the

322. Stein, *supra* note 28, at 1.

323. *Id.* at 1, 8, 9.

324. *Id.* at 8–9. As mentioned previously, the CIPA outlines specific procedures which a court must follow when classified information is used as evidence in federal criminal trials. Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16 (1980). As well, the CIPA offers procedures designed to protect the secrecy of the classified information used at such trials, allowing the government to pursue alternatives to disclosure such as submission of redacted documents or summaries of pertinent information. *Id.* § 4.

325. *See* Stein, *supra* note 28, at 8–9. "CIPA (and the Fifth and Sixth Amendment principles underlying CIPA) do not apply in civil cases . . . ." *Id.* at 8. "The lesser standard incorporated into the proposed policy recognizes that the Fifth and Sixth Amendment interests underlying CIPA do not apply in a civil case." *Id.* at 9.

326. *See supra* Part IV.A.

327. *See supra* notes 1–10, 62–70, 75–77, 90–96 and accompanying text.

328. *See supra* notes 298–301, 303 and accompanying text.

329. *See supra* notes 314–19 and accompanying text.

plaintiff is left without a venue to assert a claim, so meeting the test should prove no obstacle—a closed trial is better than no trial.[330] Moreover, state secrets cases would likely pass the CIPA fairness test, because the government as defendant would not be in a different evidentiary position than before the privilege was invoked.[331] Therefore, the rule could be used in civil actions and also as a solution to the state secrets "problem."[332]

V. CONCLUSION

Although the silent witness rule is still in the early stages of judicial development and approval, it provides a new avenue for addressing state secrets dismissals.[333] Certainly the silent witness rule could have enabled Khaled El-Masri to litigate his claims of extraordinary rendition.[334] Yet even with the protections afforded to classified information under such a rule, the government might still make a reasonable case that *any* possibility of disclosure outweighs the public interest in a trial on the merits.[335] The government has the final say on whether the risk of disclosure is too great, and rightly so.[336]

Although the additional tests do not seem to create a significant new burden for the silent witness rule's application in *Rosen*, the added requirements still supply another hurdle for criminal and civil actions to clear.[337] As this Comment is theoretical in its approach to the state secrets "problem," this additional hurdle supplies more questions than answers regarding the practicability of applying the rule to the civil arena. Will the cases that most deserve adjudication on the merits be able to pass the tests? Moreover, Judge Ellis approved only a very small segment of testimony for silent witness rule application; will the rule crumble under the weight of large amounts of classified information?[338] And since this is a trial court opinion, will higher courts accept Judge Ellis's analysis? *Rosen* is indeed a victory for the silent witness rule, but it is hardly decisive.

330. *See supra* notes 34, 37, 78 and accompanying text.
331. *See supra* notes 79–81 and accompanying text.
332. *See supra* Part IV.C.4.
333. *See supra* notes 322–32 and accompanying text.
334. *See supra* Part I.
335. *See supra* note 169 and accompanying text.
336. *See supra* note 170 and accompanying text.
337. *See supra* notes 312–21, 330–31 and accompanying text.
338. *See supra* notes 257, 321 and accompanying text.

Nonetheless, the story should still be told, and the rule has potential. It wound its way slowly through American jurisprudence, waiting twenty or more years before full approval, but Judge Ellis found it ripe for decision at just the moment state secrets opponents' cries grew loudest. It remains to be seen whether Congress or the judiciary will grab hold of it, but the rule's silent rise cannot be ignored.

Jonathan M. Lamb*

* Juris Doctor Candidate, 2009, Pepperdine University School of Law; Master of Public Policy Candidate, 2008, Pepperdine School of Public Policy; Bachelor of Arts in Politics, 2004, Pomona College. I would like to thank my wife Tawny for encouraging and putting up with me throughout the writing of this Comment. I would also like to thank Tarak Anada and Lynsey Blackmon for their suggestions and guidance, while reserving special thanks to Ryan Sorahan for leading me through the entire writing process and reading endless drafts of this text. Finally, I would like to thank each member of the Lamb, Phillips, and Martinat families for their continuous encouragement and support.