CRIMINAL LAW — CLASSIFIED INFORMATION PROCEDURES ACT — SECOND CIRCUIT HOLDS THAT GOVERNMENT MAY WITHHOLD CLASSIFIED INFORMATION UNLESS INFORMATION WOULD BE "RELEVANT AND HELPFUL" TO DEFENSE. — *United States v. Aref*, 533 F.3d 72 (2d Cir. 2008).

The Classified Information Procedures Act[1] (CIPA) is designed to allow the government to protect sensitive information from disclosure in a criminal prosecution, without thereby impairing the defense of the accused.[2] As its name implies, CIPA specifies procedures by which courts adjudicate issues surrounding disclosure or protection of classified information, but it specifies neither the source nor the scope of any privilege the government might enjoy in withholding classified information sought by the defense.[3] Recently, in *United States v. Aref*,[4] the Second Circuit held that the state secrets privilege enabled the government to refuse discovery of information governed by CIPA, unless that information was "relevant and helpful" to the defense.[5] In so doing, the court cited a privilege that evolved in civil litigation, where it is highly controversial because it demands great deference to the executive branch's desire to protect sensitive information. Although the court modified the substance of the privilege to adequately protect criminal defendants, it was unwise to use the state secrets label at all. The appropriate standards of privilege in civil and criminal litigation are very different, and confusing the two under the same name may have negative consequences for the law in both realms. The political controversy and precedential implications that the state secrets doctrine has developed in civil litigation could undermine the legitimacy of prosecutions involving classified information, while spreading the privilege's use to criminal law may weaken the political checks necessary to restrain its use in civil litigation.

Yassin Aref and Mohammed Hossain were arrested following a sting operation centered on the sale of a surface-to-air missile and were charged with numerous offenses, including attempt to commit money laundering and attempt to provide material support to a designated terrorist organization.[6] In pretrial proceedings before the District Court for the Northern District of New York, the government sought protective orders pursuant to CIPA to protect certain "classified infor-

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[1] 18 U.S.C. app. 3 (2006).
[2] United States v. O'Hara, 301 F.3d 563, 568 (7th Cir. 2002).
[3] United States v. Mejia, 448 F.3d 436, 455 (D.C. Cir. 2006).
[4] 533 F.3d 72 (2d Cir. 2008).
[5] *Id.* at 78–79 (quoting Roviaro v. United States, 353 U.S. 53, 60 (1957)).
[6] *Id.* at 76.

mation that might otherwise have been discoverable."[7] Following the publication of a *New York Times* article stating that the government's warrantless electronic surveillance program had played a role in the investigation of Aref,[8] the defense sought to obtain all documentation gathered from that surveillance.[9] The government resisted this with its own classified motions, filed in camera, ex parte.[10]

The district court issued three sealed orders denying Aref's motion to compel discovery and largely granting the government's request for protective orders.[11] In sealing those orders, the court stated that the government had, pursuant to CIPA, asserted that the withheld materials "contained classified information impacting the national security of this Country."[12] The court reviewed the materials in camera and "determined to sign the . . . proposed Orders" protecting the materials.[13] On appeal, the defendants claimed the court had erred in denying them access to classified information.[14]

The Second Circuit affirmed. Writing for a unanimous panel, Judge McLaughlin began by noting that although CIPA "does not itself *create* a privilege," it "*presupposes* a governmental privilege against disclosing classified information."[15] This left the court to determine the identity and nature of that privilege, a matter of first impression in the Second Circuit.[16] With little explanation, Judge McLaughlin stated that "[t]he most likely source for the protection of classified information lies in the common-law privilege against disclosure of state secrets."[17] He then addressed an explicit statement in CIPA's legislative history that the "state secrets privilege is not appli-

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[7] *Id.*

[8] *Id.*; *see* Lowell Bergman et al., *Spy Agency Data After Sept. 11 Led F.B.I. to Dead Ends*, N.Y. TIMES, Jan. 17, 2006, at A14.

[9] *Aref*, 533 F.3d at 77. Aref also sought dismissal of his indictment, suppression of any evidence gained as a result of "illegal electronic surveillance," and an order forcing the government to admit or deny that it conducted such surveillance against him. *Id.*

[10] *Id.*

[11] United States v. Aref, No. 04-CR-402, 2006 WL 839538 (N.D.N.Y. Mar. 28, 2006). The Second Circuit opinion indicates that some portions of the government's initial motions for protective orders were denied. *Aref*, 533 F.3d at 77. However, because both the district court's orders and the government's motions remain sealed, it is not possible to determine the extent of the denial. The defendants and the New York Civil Liberties Union (NYCLU) sought, without substantial success, to unseal these documents. *Id.*; *see also* Aref v. United States, 452 F.3d 202, 206 (2d Cir. 2006) (per curiam).

[12] *Aref*, 2006 WL 839538, at *1.

[13] *Id.* at *2.

[14] *Aref*, 533 F.3d at 78.

[15] *Id.*

[16] *Id.* at 76.

[17] *Id.* at 78.

cable in the criminal arena."[18] He rejected this assertion primarily through his analysis of the Supreme Court's seminal state secrets case, *United States v. Reynolds*,[19] a civil action in which the government successfully invoked the privilege to deny discovery of classified information to plaintiffs suing in tort. The *Reynolds* Court described state secrets as a potentially absolute privilege, which, if properly asserted, could not be overcome by "even the most compelling necessity" of the plaintiff.[20] *Reynolds* explicitly distinguished the government's strong privilege as a civil defendant from the criminal context, in which "it is unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."[21] Contrary to the legislative history, Judge McLaughlin did not find that this language meant the state secrets privilege was unavailable in the criminal context, but rather that it was not absolute, and "must give way under some circumstances to a criminal defendant's right to present a meaningful defense."[22]

To define those circumstances Judge McLaughlin turned to another Supreme Court precedent. He reasoned that the qualified state secrets privilege he found applicable in prosecutions involving CIPA was "consistent with *Roviaro v. United States*, in which the Supreme Court held that, in a criminal case, the Government's privilege to withhold the identity of a confidential informant 'must give way' when the information 'is relevant and helpful to the defense of an accused.'"[23] Judge McLaughlin noted that he was following the weight of other circuits, most of which had found that the "relevant and helpful" standard of *Roviaro*'s informant's privilege is also appropriate in adjudicating CIPA disclosures.[24]

The court then outlined the steps necessary to apply this standard. First, the district court must "decide whether the classified information the Government possesses is discoverable."[25] Then, for the state se-

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[18] *Id.* at 79 (quoting the report of the House of Representatives Select Committee on Intelligence, H.R. REP. No. 96-831, pt. 1, at 15 n.12 (1980)).

[19] 345 U.S. 1 (1953).

[20] *Id.* at 11.

[21] *Id.* at 12.

[22] *Aref*, 533 F.3d at 79.

[23] *Aref*, 533 F.3d at 79 (citation omitted) (quoting *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957)).

[24] *Id.* at 80 (collecting cases). Congress considered writing the *Roviaro* standard into CIPA, but ultimately did not do so. This deliberate omission could support the argument that Congress did not intend *Roviaro* to set the standard. *See* United States v. Smith, 780 F.2d 1102, 1111–13 (4th Cir. 1985) (en banc) (Butzner, J., dissenting). Although most circuits have adopted *Roviaro*'s standard, there are exceptions. *See, e.g.*, United States v. Baptista-Rodriguez, 17 F.3d 1354, 1363–64 (11th Cir. 1994) (finding a showing of relevance alone sufficient to require disclosure).

[25] *Aref*, 533 F.3d at 80.

crets privilege to apply, a court must apply two prongs from *Reynolds*, finding that "(1) there is 'a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged,' and (2) the privilege is 'lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.'"[26] Finally, "[i]f the evidence is discoverable but the information is privileged," the court must determine if it is "helpful or material to the defense."[27]

Using these steps, the court reviewed the district court's actions for an abuse of discretion.[28] Proceeding under the assumption that the information in question was discoverable, Judge McLaughlin stated that the panel had reviewed it and agreed "the Government has established a reasonable danger that disclosure would jeopardize national security."[29] He then noted that the government had failed to comply with *Reynolds*'s requirement that the privilege be invoked through the "head of the department which has control over the matter, after actual personal consideration by that officer."[30] The court declined to remand the matter so that the government could comply with this "formality," but warned the government to do so in the future.[31] Having determined that the privilege applied, the court affirmed the district court's issuance of the protective orders, finding that withholding the classified information in question "did not deny the defendants any helpful evidence."[32]

The Second Circuit's adoption of the "relevant and helpful" standard for requiring disclosure rightly protects defendants from prejudice resulting from the government's desire to protect classified information. Given that, the court was unwise to label the relevant privilege as state secrets. The state secrets privilege evolved in civil litigation, where it is marked by a high degree of judicial deference to

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[26] *Id.* (alteration in original) (quoting United States v. Reynolds, 345 U.S. 1, 8, 10 (1953)).

[27] *Id.* The court had previously found the phrase "relevant and helpful" to mean "material to the defense." *Id.* at 79. In the context of CIPA, the D.C. Circuit interpreted these phrases, both of which appear in *Roviaro*, with similar results. United States v. Yunis, 867 F.2d 617, 625 (D.C. Cir. 1989) (finding the terms interchangeable, but that "'helpful to the defense of an accused' provides more guidance in a trial context").

[28] *Aref*, 533 F.3d at 80.

[29] *Id.*

[30] *Id.* (quoting *Reynolds*, 345 U.S. at 8) (internal quotation marks omitted).

[31] *Id.*

[32] *Id.* The court then resolved several other issues. It quickly rejected defendant's claims that the district court's ex parte hearings with the government were improper, finding these expressly permitted by CIPA and the Federal Rules of Evidence. *Id.* at 81. The court also considered the NYCLU's appeal of its motion to intervene, *supra* note 11, affirming the district court's denial. *Aref*, 533 F.3d at 81–83. The court rejected the appellants' other challenges, which were "governed by settled law," in a separate summary order. *Id.* at 76; United States v. Aref, Nos. 07-0981-CR, 07-1101-CR, 07-1125-CR, 2008 WL 2663348 (2d Cir. July 2, 2008) (summary order).

the Executive, and the privilege follows the principle that the government's need for secrecy trumps its opponent's need for even the most essential information. Importing this controversial doctrine into CIPA cases could unnecessarily reduce the legitimacy of such prosecutions by wrongly implying that a defendant's interests might be sacrificed in the same manner as those of his civil counterpart. Furthermore, applying the state secrets privilege in criminal cases negatively affects the political checks that restrain its use in civil litigation by making its invocation more routine and therefore less subject to controversy.

When the government seeks to protect information in the name of national security, the vital difference between criminal and civil litigation is whether the government or its legal opponent bears the costs of secrecy. In criminal cases, the government must bear these costs: courts will not allow the government to prosecute someone and simultaneously use privilege to deny the defendant information helpful to his defense. The government can always decide to keep its secrets, but it may be able to do so only at the cost of dismissing a prosecution.[33] The *Aref* court recognized this when it adopted *Roviaro*'s qualified standard of privilege, insisting that if the government possesses information helpful to the defense, it must disclose that information or dismiss its prosecution.[34] However, the Supreme Court has held that "such rationale has no application in a civil forum."[35] There, *Reynolds* gives the government an *absolute* privilege for state secrets, and it is the government's opponent that must bear the costs, as the plaintiff's action will often be dismissed if the need to protect state secrets prevents him from discovering information necessary to his claim or even if it prevents the government from defending the case effectively.[36]

The harsh and absolute state secrets privilege in civil litigation is controversial and has been especially so in recent years. Scholars have questioned the privilege's historical and doctrinal foundations[37] and whether the Bush Administration applied it in an unprecedented and irresponsible manner.[38] This controversy is not limited to academic

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[33] *See* United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944). Judge Learned Hand's reasoning in *Andolschek* and its successor, *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950), is relied on by all the key decisions discussed in this comment. *See* Roviaro v. United States, 353 U.S. 53, 61 (1957) (citing both); *Reynolds*, 345 U.S. at 12 (noting that *Andolschek*'s rationale does not apply in the civil forum); *Aref*, 533 F.3d at 79 (discussing both).

[34] *Roviaro*, 353 U.S. at 60–61 (citing *Andolschek*, 142 F.2d at 506).

[35] *Reynolds*, 345 U.S. at 12 (citing *Andolschek*, 142 F.2d at 503).

[36] *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1253 (2007).

[37] *See* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 212, 253 (2006).

[38] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939–41 (2007).

circles.[39] The administration has used the state secrets privilege to shield well-known and highly divisive programs, such as warrantless electronic surveillance and rendition of terrorism suspects.[40] Indeed, the state secrets privilege seems *designed* to force public controversy. By allowing the Executive an absolute privilege over information, courts are forgoing much of their ability to check improper behavior on the part of the Executive.[41] It is in this light that the *Reynolds* requirement that the state secrets privilege be asserted by a department head after "actual, personal consideration," deemed a mere "formality" by the *Aref* court, makes sense: it substitutes a political check for the now absent judicial check. Courts are deferring to the judgment of the Executive about which state secrets must be protected, even at the cost of leaving no legal remedy to wronged plaintiffs, so they at least insist that a senior, politically accountable officer make such a decision.[42]

This dynamic and its attendant purposeful creation of controversy have no place in criminal litigation. The *Reynolds* Court created the modern civil state secrets privilege, but also noted that it would be "unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."[43] Yet *Aref* invites confusion by calling two very different privileges — an absolute civil privilege marked by judicial deference and a qualified criminal privilege protected by judicial vigilance — by the same name. Inviting district courts, and those who litigate before them, to turn to decades of civil precedent urging judicial deference to an absolute executive privilege seems unwise if one in fact wants courts to aggressively protect defendants' access to information: District courts can commit decisive errors when they fail to recognize that treatment of classified information in one forum cannot be imported into another.[44] If even traces of the deference associated with the civil state secrets privilege seep into

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[39] *See, e.g.*, BARRY SIEGEL, A CLAIM OF PRIVILEGE (2008) (discussing and criticizing the state secrets privilege from a layman's perspective).

[40] *See* ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007) (warrantless electronic surveillance); El-Masri v. Tenet, 479 F.3d 296 (4th Cir. 2007) (rendition).

[41] *See* Frost, *supra* note 38, at 1950–59 (arguing that assertion of the state secrets privilege may in effect nullify the courts' role in restraining executive power).

[42] In a criminal case, this is a much less meaningful check on executive behavior, as in initiating a prosecution the Executive has already reached the conclusion that it is pursuing a necessary and just end. *See* United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950).

[43] United States v. Reynolds, 345 U.S. 1, 12 (1953).

[44] *See, e.g.*, Boim v. Holy Land Found. for Relief and Dev., 511 F.3d 707, 720–33 (7th Cir. 2007) (overturning a district court's holding of collateral estoppel because, inter alia, in the case on which the estoppel was based, the government had been able to use classified information without disclosure to the defendant, a procedure that Boim, a private party, could not have employed), *vacated pending reh'g en banc* (7th Cir. 2008).

criminal litigation, this could create the impression, accurate or not, of unfair government secrecy.

This is a non-trivial concern. Belief that the government plays fairly in prosecutions — that it does not hide behind national security to withhold exculpatory information from those it prosecutes and that our courts actively guard against this — is an important public value.[45] This is especially true in terrorism prosecutions such as *Aref*. Concern about sacrificing civil liberties in the pursuit of terrorists pervades the public debate on this issue.[46] Nor is the American public the only audience whose perception of our judicial processes matters. Terrorism is not simply the agenda of a group of likeminded criminals — it is a political movement, a global insurgency that depends on the attitudes of the populace from which it springs.[47] This makes the perceived legitimacy of the American government's actions important among the Muslim population worldwide, much of which is already suspicious that the U.S. government is hostile to Islam.[48] Creating the impression that Muslims charged with terrorism offenses are deprived of rights and opportunities that would be available to other defendants can only further this perception. When a Muslim man alleged that the U.S. government erroneously kidnapped him to Afghanistan, the government invoked the state secrets privilege to have his civil suit quickly dismissed.[49] Perhaps the Executive was right to invoke the privilege in that case, judging that the political costs — both domestically and abroad — were outweighed by the need to preserve classified information. *Aref* is different: A jury convicted Aref after an open trial, and two independent courts ensured he had access to all the information helpful to his case. Here there should be no political costs, and courts should not risk creating them by adopting a doctrine that implies deference to government secrecy where in fact there was none.

Applying this label in criminal litigation can also have negative consequences in the forum for which the state secrets privilege was originally designed — civil actions against the government. The *Reynolds* Court stated that this privilege "is not to be lightly invoked,"[50] and critics of the current administration's use of the privilege in civil suits allege that it has become too routine.[51] Requiring the government to invoke this privilege whenever it seeks to protect classified in-

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[45] *See Coplon*, 185 F.2d at 638.

[46] *See, e.g.*, BENJAMIN WITTES, LAW AND THE LONG WAR (2008).

[47] DAVID C. GOMPERT & JOHN GORDON IV, WAR BY OTHER MEANS 5–19 (2008), *available at* http://www.rand.org/pubs/monographs/2008/RAND_MG595.2.pdf.

[48] *See* JOHN L. ESPOSITO & DALIA MOGAHED, WHO SPEAKS FOR ISLAM 87–91 (2008).

[49] El-Masri v. Tenet, 479 F.3d 296, 300 (4th Cir. 2007). Chesney, *supra* note 36, at 1254–63, discusses this case at length.

[50] United States v. Reynolds, 345 U.S. 1, 7 (1953).

[51] *See* Frost, *supra* note 38, at 1938 & n.28.

formation in a criminal case will greatly increase its use.[52] This can only make courts, the concerned public, and the Executive itself see use of the privilege as routine, weakening these political checks in civil cases, where they are needed to restrain a near absolute privilege.

The Second Circuit's decision is particularly unfortunate given that other circuits have suggested more promising approaches to defining the government's privilege in protecting classified information in a criminal prosecution. Several circuits have applied *Roviaro*'s standard of "relevant and helpful to the defense" directly, without explicitly labeling the privilege at all.[53] This approach has some appeal: it has the Supreme Court's imprimatur, and *Roviaro*'s "informant's privilege" is often a close fit to the type of information CIPA seeks to protect.[54] Other circuits have used the "relevant and helpful" standard as well, but recognized that the government enjoys a privilege in classified information as such, distinct from other privileges.[55] This approach has the virtue of simplicity, in calling the privilege precisely what it is, rather than forcing it into the mold of another. This could be important in cases where the informant's privilege does not easily apply, such as espionage cases where it is the defendant who is seeking to introduce substantive classified data into evidence.[56] Both choices (and perhaps others) are superior to the state secrets privilege, which should be confined to the civil realm where it evolved and to which it is best suited. Instead, the Second Circuit's attempt to adapt a civil privilege to criminal litigation threatens to confuse the standards applicable in both fields, to the benefit of neither.

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[52] Professor Robert Chesney catalogues seventeen distinct civil cases in which the state secrets privilege was invoked between 2001 and 2006 — and this in a period where the administration was accused of overusing the privilege. Chesney, *supra* note 36, at 1329–32. In that same period there were at least twenty-six cases in federal district courts involving CIPA.

[53] *See* United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985) (en banc) (holding the "government interest protected by nondisclosure is analogous" to that in *Roviaro*); United States v. Pringle, 751 F.2d 419, 428 (1st Cir. 1984) (citing *Roviaro* to affirm protection of information that was not relevant or helpful to the defense).

[54] In addition to protecting the identity of human sources, the principle extends to "sources and methods," including sensitive technical means of surveillance. *See Smith*, 780 F.2d at 1108.

[55] The D.C. Circuit pioneered this approach in *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), identifying "a government privilege in classified information similar to the informant's privilege identified in *Roviaro*." *Id.* at 623. The *Yunis* court did not derive this privilege from *Reynolds* or the state secrets doctrine, but instead a seemingly more general "national security privilege," relying on *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); and *United States v. Nixon*, 418 U.S. 683, 710 (1974). *Yunis*, 867 F.2d at 623. Although *Nixon* itself does cite *Reynolds*, *see* 418 U.S. at 710–11, because the D.C. Circuit incorporated none of the procedures associated with *Reynolds* and did not cite it or mention the state secrets privilege, it nonetheless seems clear the *Yunis* court was identifying a privilege distinct from state secrets. This approach appears to have influenced other circuits. *See* United States v. Abu Ali, 528 F.3d 210, 245 (4th Cir. 2008); United States v. Varca, 896 F.2d 900, 905 (5th Cir. 1990).

[56] CIPA was originally designed with this type of case in mind. *See Smith*, 780 F.2d at 1105.