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The State Secret Protection Act Is Not Like the Classified Information Procedures Act (CIPA)

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Supporters of the State Secret Protection Act (H.R. 984, SSPA) regularly claim that its limitations on the state secrets privilege are analogous to those in the Classified Information Procedures Act (CIPA).[1] But CIPA, as its name reflects, is a purely procedural statute that imposes no substantive limitations on the assertion of the state secrets privilege. Further, in no case does CIPA *require* the government to disclose classified information to criminal defendants or the public. But when essential information is kept from a defendant, CIPA may require that some charges or even the entire case against him be dropped. In this way, CIPA carefully balances the essential need to protect secrecy in some state affairs with criminal defendants' constitutional rights.

The SSPA, by contrast, would significantly limit the government's ability to assert the state secrets privilege to protect even highly classified military, intelligence, and diplomatic information. And it would give judges complete discretion to order the disclosure of such information, no matter the potential risk to national security. In addition to violating the President's constitutional authority to enforce secrecy in certain domains,[2] the SSPA would risk disclosing sensitive intelligence and diplomatic relationships, to the detriment of the nation's security and foreign policy.[3] In the ways that count, the House's version of the State Secret Protection Act is entirely unlike the Classified Information Procedures Act.

Talking Points

- Contrary to the claims of some supporters of the proposed State Secret Protection Act, the Classified Information Procedures Act imposes *no* substantive limitations on the assertion of the state secrets privilege.
- Specifically, CIPA *never* requires the government to disclose classified information, thereby respecting the President's constitutional authority to enforce secrecy regarding diplomacy and national security.
- By contrast, the SSPA would require the disclosure of highly classified information in a variety of contexts, putting at risk the nation's security and foreign policy. It falsely assumes that judges are as qualified as intelligence specialists to make classification and disclosure decisions.
- Indeed, every one of the SSPA's departures from CIPA threatens the disclosure of national security secrets.
- CIPA's deferential approach to the problem of classified information in criminal cases should lead Congress to be wary of the intrusive approach that the SSPA would bring to civil justice.

This paper, in its entirety, can be found at:
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This paper provides a brief comparison of the essential differences between CIPA and the SSPA, demonstrating that the two differ in more than a dozen significant ways. Each of the SSPA's departures from CIPA are ones that threaten the disclosure of national security secrets.

The Comparison

CIPA (18 U.S.C. app 3)	H.R. 984
Cases are initiated by the government.	Cases are initiated by private parties.
If national security secrets are at risk of exposure, the government can have charges or the entire case dismissed.	A judge decides whether to dismiss claims. § 7(b).
The court must adhere to the security procedures established by the Chief Justice, which empower a DOJ-approved "court security officer" to impose extensive protections. § 9(a).	The court "shall take steps to protect sensitive information," but the judge has complete discretion as to what those steps shall be. § 3(a).
The government need provide the court with only an affidavit. § 4.	The government would have to provide *all* potentially privileged materials to the court. § 6 (b)(1)(A).
The government decides whether materials are classified and will be disclosed. § 1(a).	The judge decides whether materials are unprivileged and must be disclosed. § 7(a).
The government may make its showing *ex parte*. §§ 4, 6(c)(2).	The court must conduct two hearings, at least one of which will include opposing counsel. §§ 3(c), 6(a), 5(d)(2).
The government may submit an affidavit to the court explaining the need for nondisclosure. §§ 4, 6(c)(2).	The government *must* submit an affidavit to the court *and* make public an unclassified affidavit. § 4(b).

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1. *See, e.g., State Secrets Protection Act of 2008: Hearing on H.R. 5607 Before the Subcomm. on the Const., Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 109th Cong. 2 (2008) (statement of Rep. Jerrold Nadler, Chairman of the Subcomm.) (arguing that an identical bill in the previous Congress would "do the same in civil cases" as CIPA did "[i]n the criminal context."); *State Secrets Protection Act of 2009: Hearing on H.R. 984 Before the Subcomm. on the Const., Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2009) (statement of Asa Hutchison, former DHS Undersecretary) (stating that "[j]udges already conduct similar review of sensitive information under such statutes as…the Classified Information Procedures Act (CIPA)"), available at http://www.constitutionproject.org/manage/file/157.pdf.
2. Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 111 (1948); United States v. Nixon, 418 U.S. 683, 713 (1974); Dept. of the Navy v. Egan, 484 U.S. 518, 527 (1988).
3. State Secrets Protection Act of 2009: *Hearing on H.R. 984 Before the Subcomm. on the Const., Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2009) (statement of Andrew M. Grossman, Senior Legal Policy Analyst, The Heritage Foundation), *available at* http://www.heritage.org/Research/LegalIssues/tst060409a.cfm.

CIPA (18 U.S.C. app 3)	H.R. 984
The government may choose to prepare a substitute for privileged information. §§ 4, 6(c)(1)(B).	The court may *order* the production of a substitute or redacted version of privileged information. §§ 3(d), 7(b).
The court has no authority to appoint an expert witness to speak to disclosure of the information.	The court may appoint a "special master" or "expert witness" to "facilitate the court's duties. § 5 (b).
Only judges, and staff with security clearances, may be given access to classified information. Security Procedures § 4.	The court could grant access to anybody. § 3(a).
The court has no authority to order that a security clearance review be conducted.	The court may order the government to conduct an expedited security review to provide a party or counsel with a security clearance. § 5(e).
The court gives strong deference to executive classification decisions and harm assessments. §§ 1, 4.	The court affords *no* deference to determinations made by government officials and experts. § 7.
Discovery against the government could be blocked to protect state secrets. § 4.	Discovery is mandated in every case. § 7(c).
If the privilege is rejected, the court may dismiss some or all counts, find against the U.S. on that issue, or strike a witness's testimony. § 6(e)(2).	If the privilege is rejected, the classified information is disclosed. § 7(a).

Conclusion

In the ways that count, the Classified Information Procedures Act and the State Secrets Protection Act are absolutely nothing alike. The former respects the President's authority to classify and protect important national security and diplomatic information, while the latter affords the executive branch no deference whatsoever, on the false assumption that judges are as qualified as intelligence specialists to make classification and disclosure decisions.[4] If anything, CIPA's deferential approach to the problem of classified information in criminal cases should lead Congress to be wary of the intrusive approach that the SSPA would bring to civil justice.

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4. This is not to say, though, that CIPA's gloss on the state secrets privilege strikes the right balance in every case. In certain types of cases, for example, the law's assignments of burdens of proof hinder effective prosecution. But in the vast majority of cases, CIPA is both practical and fair.