Extraordinary Renditions and the State Secrets Privilege: Keeping Focus on the Task at Hand

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I. Current Debate over the State Secrets Privilege........631
   A. Source and Scope of the Privilege ..................631
   B. The Bush Administration’s Employment of the
      Privilege .........................................................636
   C. Who Should Check the Executive’s Assertion of
      the Privilege?.................................................638
II. Why this Debate Misses the Mark..........................639
III. Proposed Solution...........................................643
   A. CIPA as a Guide..........................................644
   B. ABA Proposal .............................................646
   C. Consequences for Successful Invocation of the
      Privilege .......................................................649
   D. Benefits of Proposed Changes .........................651
IV. Conclusion......................................................652

The United States’ current practice of extraordinary renditions1 has attracted both the attention and criticism of many within the domestic and international communities. The criticism covers virtually every aspect of that program, from the legality of renditions under international and domestic law, to the treatment of those individuals subjected to rendition. Recent attention has focused on what some claim as the Bush administration’s efforts to avoid any legal accountability for alleged constitutional and

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1 The term “extraordinary renditions” refers to a program that began in the early
1990s and continues to this day, whereby the Central Intelligence Agency, together with
other U.S. government agencies, transfer foreign nationals suspected of involvement in
terrorism to detention and interrogation in countries where – in the U.S. Government’s
view – federal and international legal safeguards do not apply. Suspects are detained and
interrogated either by U.S. personnel at U.S.-run detention facilities outside U.S.
sovereign territory or, alternatively, are handed over to the custody of foreign agents for
interrogation.
statutory violations committed while the United States rendered and either directly or indirectly subjected the victims of the renditions to torture and other cruel, inhumane and degrading treatment.2

Indeed, after their release, some of those who claim to have been subject to extraordinary rendition have filed lawsuits in the U.S. federal courts claiming constitutional and statutory violations committed by both government agencies and government contractors involved in these renditions.3 In cases where the United States has been named as a party to the lawsuits, and in other cases where the United States has intervened, the government has sought to dismiss the lawsuits on the ground that any litigation of these issues would require the disclosure of classified and other sensitive information.4 According to the government, if this protected information and the existence or non-existence of rendition programs were disclosed, or even acknowledged, there is a reasonable danger that such disclosure would harm national security interests.5 Based on what has come to be known as the state secrets privilege, the government has successfully prevented a number of cases by plaintiffs who claim to be victims of extraordinary rendition and torture from going forward.6

In this paper I will discuss the use of the state secrets privilege in the context of civil suits brought against the United States government and private contractors working for the federal government by alleged victims of extraordinary rendition. The paper focuses on how best to achieve meaningful oversight of the executive’s actions and allow the courts to fulfill their important role of providing individuals the opportunity to have their rights vindicated and protected, while at the same time securing legitimate state secrets. I hope that this focus on extraordinary


3 El-Masri v. United States, 479 F.3d 296, 312 (4th Cir. 2007).

4 See, e.g., id. at 312.


rendition cases may also have broader applicability in other areas where the state secrets privilege is frequently asserted.\(^7\)

I will first discuss what I believe are the current points of dispute surrounding the privilege. These points of dispute concern the origins of the privilege, the manner in which the Bush administration has invoked the privilege post 9/11, and which branch of government is best suited to correct the perceived problems with the current status of the privilege. From there I will briefly address why I believe these points of contention, while important, to some degree miss the more significant and pragmatic point; if the privilege as currently formulated prevents meaningful oversight of executive actions and does not strike a fair balance between individual rights and the protection of legitimate state secrets, what must be done to craft a better privilege?

In the final part of the paper, I will take on the task of suggesting a combination of solutions which I believe will place the state secrets privilege on better footing, so that it is not simply used by the executive as a means of avoiding accountability for the way it chooses to engage in extraordinary renditions. Admittedly, these suggested solutions are tentative and I do not offer them as either a complete and final word on the subject, or as a silver bullet that will absolutely resolve all problems associated with the state secrets privilege. It is my hope that these suggestions will provoke further thought on this important issue.

I. Current Debate over the State Secrets Privilege

A. Source and Scope of the Privilege

The state secrets privilege is not new to the Bush administration and it has been part of our judicial system in some form since the beginning of the Republic.\(^8\) Rather than provide a detailed discussion of the origin of the privilege, I will address two of the most often cited cases relating to the state secrets privilege

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\(^7\) See, e.g., Terkel v. AT&T, 441 F. Supp. 2d 899 (N.D. Ill. 2006); Al Odah, 346 F. Supp. 2d 1.

\(^8\) See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 143 (1803) (noting in dicta that Attorney General Lincoln may not have had to disclose information communicated to him in confidence); Totten v. United States, 92 U.S. 105, 107 (1875) (holding that the existence and terms of a contract between the President and a secret agent were privileged from disclosure).
to put into focus the current debate over the source of the privilege. The first case, *Totten v. United States*,\(^9\) arose out of a claim from a Union spy during the Civil War. In *Totten*, the plaintiff filed a claim against the government on behalf of the estate of William A. Lloyd.\(^10\) The plaintiffs claimed that in 1861 Mr. Lloyd entered into an agreement with President Lincoln to spy on the Confederacy.\(^11\) According to the plaintiff, Mr. Lloyd agreed to travel into the southern states to ascertain the number of Confederate troops stationed at different locations and to gather and report other information that would be beneficial to the Union.\(^12\) In return, the President agreed to pay Mr. Lloyd $200 a month.\(^13\)

The Court of Claims found that Mr. Lloyd had only been compensated for his expenses, but the court disagreed as to the President’s authority to enter into such an agreement and declined the claim.\(^14\) The Supreme Court, however, had no difficulty deciding that the President did in fact have the authority to enter into such agreements during war time as part of his commander-in-chief authority.\(^15\) The Court focused on the very nature of such a secret agreement between the government and a secret agent. By its terms, both parties “must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter.”\(^16\) According to the Court, the revelation of such an agreement could compromise or embarrass the government in its public duties.\(^17\) In essence, the Court concluded that if a secret service was required to address and litigate claims such as these and to subject these agreements to public exposure, the government could not perform important and necessary functions. For public policy reasons, the Court rejected the Lloyd estate’s claim against the government and in so doing recognized a type of

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\(^9\) *Totten v. United States*, 92 U.S. 105 (1875).
\(^10\) *Id.* at 105.
\(^11\) *Id.*
\(^12\) *Id.* at 105-06.
\(^13\) *Id.* at 106.
\(^14\) *Id.*
\(^15\) *Totten*, 92 U.S. at 106.
\(^16\) *Id.*
\(^17\) *Id.*
state secrets privilege.18

The current incarnation of the state secrets privilege derives from the Cold War era case of *United States v. Reynolds*.19 In *Reynolds*, the families of three civilians brought suit against the government under the Tort Claims Act for the deaths of their spouses in the crash of a B-29 military aircraft.20 The aircraft had been testing secret electronic equipment when a fire broke out during the flight killing three of the four civilians on board.21

The plaintiffs sought production of the accident investigation report compiled by the Air Force as well as the statements of three surviving crew members.22 The government resisted the release of this information, citing both Air Force regulations and the need to protect highly secret military equipment and national security.23 When ordered by the District Court to produce the documents for the court’s determination of the existence of privileged material, the government refused and a judgment of negligence was entered in favor of the plaintiffs.24

The government appealed and received more favorable consideration by the Supreme Court. At the outset the Court said it was unwilling to decide the case on broad constitutional issues of executive department power or whether the Tort Claims Act represents a waiver of that power.25 Instead, the Court focused on what it felt was a much narrower basis, the evidentiary laws of privilege.26 The Court said that, in essence, the government was claiming a state secrets privilege, which according to the Court was a well established privilege under the law of evidence.27

Even though judicial experience with the state secrets privilege was limited, the Court was able to discern its parameters. The privilege belongs to the government and must be asserted by the

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18 *Id.* at 107.
20 *Id.* at 2-3.
21 *Id.* at 2.
22 *Id.* at 3.
23 *Id.* at 3-4.
24 *Id.* at 5.
26 *Id.* at 6-7.
27 *Id.*
head of the department which has control over the matter after the department head has personally considered the matter. In addition, the privilege should not be lightly invoked and the court in which the proceeding is being held has the ultimate authority as to whether the privilege exists. This aspect of the Court's opinion is straightforward and relatively unremarkable.

The Court went on to note that the real challenge for any tribunal is to properly assess whether the privilege exists without at the same time risking the very disclosure of the information sought to be protected. To address this balancing of interests, the Court drew an analogy to a witness's privilege against self incrimination. The Court noted that, as with the privilege against self incrimination, some formula of compromise should be developed and applied in the state secrets context. The Court reasoned that the government should not automatically be required to disclose information ex parte and in camera even to the judge who is making the privilege assessment. In cases where there is a reasonable danger that disclosure of the evidence will expose military matters which in the interests of national security should not be disclosed, the tribunal should not require the examination of the protected material, even by a judge alone, in chambers.

Applying that formula, the Court held that the government should not have been required to disclose this information to the judge because under the circumstances there was a reasonable possibility that military secrets were involved and a sufficient showing of privilege had been made by the government. The Court also stated that a showing of necessity should help to determine how deeply a tribunal should probe in determining the claim of privilege. The greater the need for the information, the

28 Id. at 7-8.
29 Id. at 7-9.
30 Id. at 8.
31 Reynolds, 345 U.S. at 8-9.
32 Id.
33 Id. at 10.
34 Id.
35 Id. at 10-11.
36 Id. at 11.
more the court should probe to determine if a privilege exists. In contrast, if there are substitutes to this information from other sources, less probing is required. The Court was also careful to say that no degree of necessity would trump a legitimate claim of privilege. This is the state secrets privilege that is currently applied by the courts the disagreement over the source and the scope of the privilege stems from this case.

Some contend that, because the state secrets privilege was created by the courts and specifically by the Supreme Court in *Totten* and *Reynolds*, it is primarily a common law privilege. This common law origin is important to those who assert that since the courts created the privilege, courts have the power to modify or change the privilege as needed in a particular case. Additionally, because the privilege is a common law creation, Congress has the authority to codify the privilege by statute and in so doing, it can place limits on the executive’s ability to assert and rely on the privilege.

Not everyone, however, sees the state secrets privilege as a court-created doctrine. The very context in which the privilege is asserted to protect military secrets and national security interests suggests that the privilege stems from the president’s Article II powers as commander-in-chief and from his authority to conduct foreign relations on behalf of the United States. Even the Reynolds Court suggests in a footnote that the executive’s power to suppress documents has its roots in such executive power. Many who believe that the source for the state secrets privilege is

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37 *Reynolds*, 345 U.S. at 11.

38 *Id.* It is beyond the scope of this paper to conduct a detailed criticism of the *Reynolds* opinion. Rather, this opinion is discussed in order to understand the origins of the privilege as it currently exists.

39 *Id.*


41 See id.


43 U.S. Const. art. II, §2.


45 U.S. v. Reynolds, 345 U.S. 1, 6 n.9 (1953).
the executive’s inherent powers under the Constitution contend that neither the Congress nor the courts have the competence or the constitutional authority to modify, change or ignore the privilege. See, e.g., John Yoo, Courts at War, 91 CORNELL L. REV. 573, 590-591 (2006). Some argue, accordingly, that the privilege is absolute and can be exercised at the sole discretion of the executive who is in the best position to know when disclosure of protected information would have an adverse impact on national security interests.

B. The Bush Administration’s Employment of the Privilege

The second area of debate surrounding the state secrets privilege concerns how the Bush administration has asserted the privilege. Those critical of the President claim that his administration is asserting the privilege much more frequently than his predecessors. See William G. Weaver & Robert M. Pallitto, State Secrets and Executive Power, 120 POL. SCI. Q. 85 (2005); see Frost, supra note 42; see Telman, supra note 40. Some critics also contend that the Bush administration has asserted the privilege in a way that is qualitatively different from how the privilege was used by past administrations.

Those who contend that the Bush administration used the privilege much more frequently point to the number of times and the broad spectrum of cases where the privilege is being asserted. Id. at 101. They note for example, that between 1953, when the Court recognized the privilege, and 1976, the privilege was asserted somewhere between four and eleven times. Id.; see also Shayana Kadidal, The State Secrets Privilege and Executive Misconduct, JURIST Forum, May 30, 2006, available at http://jurist.law.pitt.edu/forumy/2006/05/state-secrets-privilege-and-executive.php. In the next 25 years there were a total of between fifty-one and fifty-nine reported cases where courts ruled on the privilege. See Weaver & Pallitto, supra note 49. These critics assert that the post 9/11 Bush administration has “expand[ed] the privilege to cover a wide variety of contexts” and that the

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47 See id. at 590-600.
48 See William G. Weaver & Robert M. Pallitto, State Secrets and Executive Power, 120 POL. SCI. Q. 85 (2005); see Frost, supra note 42; see Telman, supra note 40.
49 See Weaver & Pallitto, supra note 49.
50 Id. at 101.
52 Weaver & Pallitto, supra note 48, at 101; Frost, supra note 42, at 1938.
administration is asserting the privilege much more often.53

Closely related to this increased quantitative use of the privilege is the assertion that the Bush administration has used the privilege in a qualitatively different and much more sweeping manner than its predecessors.54 Specifically, some critics claim that the administration has asserted the privilege at a much earlier, pre-discovery stage of the trial process.55 Rather then attempting to limit discovery, the administration sought to aggressively dismiss the entire complaint.56

Behind both of these criticisms is the fear or belief that the Bush administration asserted the privilege not to protect legitimate state secrets, but to protect members of the administration from accountability for the illegal manner in which it has conducted the war on terror.57 This suspicion stems from the obvious point that there is an inherent conflict of interest in giving the administration the authority to decide for itself what information should be protected and what information should be released.58

Professor Robert Chesney has provided a very thoughtful counter-argument to claims that the Bush administration has used the state secrets privilege in a quantitatively and qualitatively different manner than past presidents.59 Professor Chesney presents exhaustive research of both pre and post 9/11 cases and concludes that the data does not support the conclusion that the Bush administration has resorted to the use of the privilege with greater frequency than prior administrations.60 As to the qualitative use of the privilege, Professor Chesney concludes that the government has been seeking outright dismissal of complaints on state secrets grounds with considerable success since the

53 Weaver & Pallitto, supra note 48, at 107-08; see Frost, supra note 42, at 1938; see also Kadidal, supra note 51.
54 Kadidal, supra note 51.
55 Id.
56 Frost, supra note 42, at 1939-40.
57 Kadidal, supra note 51.
58 Telman, supra note 40, at 12-13; Weaver & Pallitto, supra note 48, at 107.
60 Id. at 1301.
C. Who Should Check the Executive’s Assertion of the Privilege?

For those who either believe that the administration has abused the state secrets privilege or at least believe that the current application of the privilege by the courts is ineffectual, an additional area of debate exists. The question for these critics is: who is better suited to check the executive’s unwarranted assertion of power via the privilege?

Some contend that any reforms to the state secrets privilege as well as oversight of the executive’s actions must come from Congress. The history of the state secrets privilege proves that courts are simply incapable or unwilling to apply the privilege in any way that would strike an appropriate balance between the interests of the state and the rights of the individual. Congress, on the other hand, through the combined use of legislation and oversight, is the branch best suited to check the executive’s power.

Others of course take the opposite view. While Congress may have the authority to check the executive’s assertion of power through the state secrets privilege, it will not act for a number of

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61 Id. at 1307.

62 See, e.g. Victor Hansen & Lawrence Friedman, The Case Against Secret Evidence, 12 Roger Williams U. L. Rev. 772 (2007) (arguing that Congress has Constitutional responsibility to serve as a check on executive power in war time); Kenneth Anderson, It’s Congress’s War Too, N.Y. Times, Sep. 3, 2006 § 6 (Magazine) at 20 (arguing that responsibility for democratically establishing policy in the war on terror falls to the legislative branch).


64 See e.g., Chesney, supra note 59, at 1311-13 (arguing for members of congressional intelligence committees to serve as advisors to Article III courts on specific cases and for the creation of a FISC type court to hear cases that have been dismissed by federal courts). Even many of those who see a role for the courts have suggested that Congress take a more active role in legislation and oversight. See e.g., Frost, supra note 42, at 1958-61 (suggesting that instead of dismissing cases where the state secrets privilege is successfully invoked, courts should refer cases back to Congress for specific oversight).

65 See, e.g. Telman, supra note 40.
reasons. First, it is doubtful that any statutory solution developed by Congress could be flexible enough and yet clear enough to be applied in all the various contexts in which the state secrets privilege arises.\textsuperscript{66} There is also the belief that Congress lacks the political will, particularly in war time, to conduct meaningful oversight.\textsuperscript{67} This coupled with the fact that, when oversight is conducted, it is often done behind closed doors, where members have no ability to share information, make effective oversight impossible.\textsuperscript{68} These critics suggest that the courts must craft flexible and workable solutions in individual cases.\textsuperscript{69}

II. Why this Debate Misses the Mark

These three topics have garnered much of the attention in the current debate and discussion of the state secrets privilege. To be sure, each of these topics is important for many reasons, not the least of which is that one’s position on these various issues tends to determine how one feels about the need to reform the state secrets privilege and what form that might take. Nonetheless, focusing too much on these issues, which are never likely to be resolved to everyone’s satisfaction, can detract from the real task at hand, which is to ensure a workable and fair formulation of the state secrets privilege.

On the question of whether the privilege is of common law origin or stems from the executive’s inherent Article II powers, I have concluded, as have others,\textsuperscript{70} that the answer is a little bit of both. The best analogy to explain the source and scope of the privilege is that the privilege has an inalterable constitutional core surrounded by a revisable common law shell that has developed over time.\textsuperscript{71} Of course, this analogy does not answer the more vexing question of where the line is between the constitutional core and the common law shell. The difficulty, if not the impossibility, of drawing an exact line, however, does not give the

\textsuperscript{66} Id. at 16.
\textsuperscript{68} Telman, \textit{supra} note 40, at 18-19.
\textsuperscript{69} See, e.g., \textit{id.; see also} Weaver & Pallitto, \textit{supra} note 48.
\textsuperscript{70} See, e.g. Chesney, \textit{supra} note 59, at 1309-10.
\textsuperscript{71} Id.
executive authority to assert the privilege at its complete and unfettered discretion. Nor does it give Congress and the courts a justification to stand on the sidelines as passive observers.

As with most aspects of our constitutional framework of checks and balances, clear delineation of responsibilities and exact line drawing between the three branches of government is not found in either the text or the history of the Constitution. The extent and scope of the state secrets privilege relies to an extent on the forbearance of each branch of government to act only within its scope. With that forbearance comes the understanding that, when one branch of government pushes too far, the natural and expected consequence should be that the other branches will push back. Rather than focusing too much, then, on where the line exists between the executive, Congress, and the courts as to the source and scope of the state secrets privilege, I believe it is more important to understand that if the scope of the privilege is undefined as to executive, it is likewise undefined as to Congress and the courts. This fluidity gives Congress and the courts the ability and responsibility to push back when each determines that the executive has pushed too far.

On the second area of debate, whether the Bush administration asserted the privilege in a way quantitatively and qualitatively different from its predecessors, here too, the debate is not as important as the underlying issue. Perhaps the administration asserted the privilege in a way that was historically different. Perhaps the administration’s use of the privilege in the post 9/11 world was a natural evolution of the privilege and the Bush administration was merely standing on the shoulders of past administrations. Or, perhaps it is a combination of the times we are in and the threats we face as a country that explains why the Bush administration is actively asserting the privilege in extraordinary renditions and other cases. Any one of these explanations, or a combination of these explanations along with others, does not, however, get at the core issue, which is whether the state secrets privilege in its current formulation appropriately balances competing interests and provides sufficient guidance to courts tasked with resolving these issues.

An argument can be made that the current formulation of the

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72 See Hansen & Friedman, supra note 62.
privilege was flawed from its inception. A state secrets privilege that allows the executive to prevent even the court from reviewing the disputed information *ex parte* and *in camera* comes with a significant risk that the executive’s rationale for asserting the privilege will have less to do with protecting national security and more to do with the executive’s desire to avoid accountability. Even in the *Reynolds* case itself, Freedom of Information Act (FOIA) petitions filed years later revealed that the excluded evidence did not contain classified information. Rather, the accident report contained information pointing to the government’s negligence. The critical point is not so much whether the Bush administration used the privilege in some new way. Rather, the focus should be on whether the privilege is so flawed and so open for abuse that it needs to be changed.

This point leads to the third area of dispute, whether Congress or the courts are better suited to change or “fix” the privilege, so that it better serves its intended purposes. As with the other current areas of dispute, this debate risks missing the mark. If the executive is in fact using the privilege to avoid accountability, and if the current formulation allows the executive to do this, both Congress and the courts should check the administration’s unjustified assertion of power.

The time has come, I believe, for Congress to codify the privilege as a formal rule of evidence, to provide a more clearly defined structure for courts to apply. This goes back to the very rationale for codifying the federal rules of evidence more than thirty years ago. When the federal rules were initially proposed, they included an entire section on privileges including proposed rule of evidence 509, titled “Secrets of State and other Official Information.”

Congress rejected the advisory committee’s attempt to codify this and other privileges, and in its place adopted a rule that reserved for Congress the right to codify privileges by statute in

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75 *Id.*

76 *Fed. R. Evid.* 509 (Revised Proposed Draft 1973), 56 F.R.D. 183, 251 (1973). This proposed rule, in large part, was a codification of the state secrets privilege established by the Reynolds court.
the future.\textsuperscript{77} In the absence of constitutional or statutory authority, federal courts are to be governed by common law privileges.\textsuperscript{78} Congress’s primary rationale for rejecting specific rules of privilege focused on how state privilege rules would be applied in diversity cases and other suits where state substantive law is the object of the evidence.\textsuperscript{79} The House and Senate committees also believed that there was no compelling federal interest in codifying privileges and those privileges should continue to be developed by the courts with a uniform standard applicable to both criminal and civil cases.\textsuperscript{80}

More than thirty years later, the rationale that kept Congress from codifying a state secrets privilege no longer applies. First, there is quite clearly an important federal interest in codifying the state secrets privilege to agencies of the federal government. Such a codification would resolve issues as to whether the federal law of privileges should apply or whether some state form of the privilege should apply via rule of evidence 501.

More importantly, codification of the rule would provide courts greater and more uniform guidance than is currently provided under the common law rule announced in \textit{Reynolds}. Codification would lead to clearer guidance for federal agencies as well, and ensure a more uniform application of the rules across the circuits, diminishing the risk of forum shopping by either plaintiffs or the government.

Most importantly, codification of the rule has at least the potential to better serve as a check against the executive’s assertion of the privilege as a means of avoiding accountability. The privilege is an evidentiary privilege and was never intended to equate to executive immunity.\textsuperscript{81} Codification of the rule, with a clearer delineation of the operations and application of the privilege, would serve as a legitimate check on executive power.

Additionally, one of the stated reasons for not codifying the privilege rules was to ensure the development of a uniform

\textsuperscript{77} \textit{Fed. R. Evid.} 501.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Fed. R. Evid.} 501 advisory committee’s note.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} U.S. v. Reynolds, 345 U.S. 1, 8 n.21 (1953).
standard applicable in both civil and criminal trials. As it stands now, no uniform standard exists. In 1980, Congress passed the Classified Information Procedures Act (CIPA) to address assertions of the state secrets privilege in federal criminal cases. This statute provides a very detailed set of procedures on how to deal with classified information in criminal trials. The provisions of CIPA stand in sharp contrast to the Reynolds version of the privilege in civil cases. We do not in fact have uniform development of the state secrets privilege and for that reason as well, it is time for Congress to act.

In short, codification of the privilege is needed to provide uniformity and guidance to the courts, which have the responsibility of assessing the privilege in individual cases. Courts then should be expected to implement the privilege in a way that gives individual litigants the opportunity to pursue remedies through the judicial system whenever possible, while still protecting legitimate state secrets. The executive should also be expected to shoulder some of the costs of asserting the privilege and protecting state secrets when it is done at the expense of individual litigants. And most importantly, the privilege should not immunize the executive from appropriate oversight by Congress and the courts.

III. Proposed Solution

In this final section, I will set out what I believe is the most effective and pragmatic codification of the state secrets privilege. This codification should seek to achieve several objectives. First, the privilege should allow for meaningful oversight of executive actions. Second, to the greatest degree possible individuals should have the opportunity to use the judicial system as a means of pursuing their claims. Third, the privilege must protect legitimate state secrets. Fourth, the privilege should be structured to protect the government from baseless lawsuits. Finally, even in cases where the government correctly claims the state secrets privilege, the burdens of that consequence should not be born solely by the individual. The government itself must shoulder some of the costs.

82 Fed R. Evid. 501 advisory committee’s note.

of asserting the privilege. The solution that I propose below is an attempt to achieve these ends.

A. CIPA as a Guide

Fortunately, Congress has already grappled with many of these issues in the criminal context with the passage of CIPA in 1980, which provides helpful guidance in crafting a state secrets privilege for civil cases. CIPA was designed to address the problem of “graymail,” where a criminal defendant threatens to disclose classified information at trial in hopes of forcing the government to dismiss the case rather than risk disclosure. CIPA was also enacted to manage the tension between a criminal defendant’s right to discover classified information and introduce that information at trial and the government’s legitimate interest in preventing the disclosure of information related to national security.

CIPA establishes a standard for when information will be discoverable and admissible at trial. For discovery purposes, the defendant must show that the information is material to the defense. If the defense later seeks to introduce that evidence at trial, it must establish that the information is useful, relevant and admissible. If the defense makes the required showing, the government is given the option to either disclose the information or request a modification or substitution of the information requested. At trial, rather than disclosing the information, the government has the option of admitting the relevant facts that the classified information would tend to prove, or substituting a summary of the information in a non-classified form. If these

84 It is beyond the scope of this article to provide a detailed explanation of CIPA. Please note that what follows is a general outline of CIPA’s basic provisions.
86 United States v. Dumeisi, 424 F.3d 566, 578 (7th Cir. 2005).
87 Classified Information Procedures Act, supra note 84.
88 United States v. Libby, 429 F. Supp. 2d. 1, 7-8 (D.D.C. 2006); United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004) (holding that the District Court must determine whether the information the Government seeks to withhold is material to the defense).
89 Classified Information Procedures Act, supra note 83, §§ 2-6.
90 Id. § 4.
91 Id. § 6(c). See also Moussaoui, 382 F.3d at 476 (discussing procedure once the
substitutes will not provide the defendant with substantially the same ability to make his defense, the government can elect between disclosing the information and dismissing the charge.\textsuperscript{92}

In addition to these provisions, CIPA provides the government with the ability to seek an interlocutory appeal of a court ordered disclosure.\textsuperscript{93} CIPA also gives the government and the court broad authority to close trial proceedings to the public in order to protect classified information.\textsuperscript{94}

Congress should adopt a similar privilege in the civil context. There are those who would argue that a CIPA-like privilege is not applicable in the civil context because different interests are involved.\textsuperscript{95} In the criminal context, the government has the ultimate control of the case and can decide not to bring a criminal action if the potential harm to national security that would result in the disclosure of evidence is too high.\textsuperscript{96} If the government chooses to bring an action, it has the duty to see that justice is done and cannot use the state secrets privilege to deprive the defendant of evidence that may be material to his defense.\textsuperscript{97} The Court in \textit{Reynolds} noted that this rationale does not apply in a civil case, where the government is not the moving party.\textsuperscript{98}

While it may be true that the same interests are not at stake in the civil context where the government is not the moving party, it is short sighted to assume that no similar issues are at stake. The government’s use of extraordinary renditions serves to illustrate the similarity of these interests. The government has made the decision that this rendition program is a necessary tool in the global war on terrorism. The President himself has defended a program that allows suspected terrorists to be snatched from any place in the world and transported and interrogated at secret “black sites” as an essential intelligence gathering aspect of this war.\textsuperscript{99}

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\textsuperscript{92} Classified Information Procedures Act, \textit{supra} note 83, §§ 6(c), 6(e).
\textsuperscript{93} \textit{Id.} § 7.
\textsuperscript{94} \textit{Id.} § 6(a).
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} U.S. v. Reynolds, 345 U.S. 1, 12 (1953).
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{99}See President George W. Bush, Speech in Defense of Detainee Program (Sep. 6, 2006)
\end{flushleft}
As with a criminal prosecution, in the case of the extraordinary renditions program, ultimately the government is in control. Just as the government must bear some of the costs if it decides to proceed with a criminal prosecution that involves classified evidence, so too the government should bear some of the costs for operating an extraordinary renditions program which can potentially snag someone like Khaled El-Masri in its net. Just as the rights of a criminal defendant are important and must be protected from government overreaching, so too must the rights of someone like El-Masri be protected from illegal and erroneous government actions. To simply conclude that there are no similar interests in civil and criminal cases because the government is the defendant in a civil action gives too much deference to government interests at the expense of the individual, and it conflicts with the need to ensure government accountability and respect for the rule of law.

B. ABA Proposal

The American Bar Association Section of Individual Rights and Responsibilities has recognized the important interests at stake in the civil context and has proposed the outline of a privilege that has much in common with CIPA. 100 This proposed outline goes a long way in achieving the important goals of a pragmatic and effective state secrets privilege, and Congress should consider the ABA’s proposal carefully. Some key points of this proposal warrant discussion.

The proposal would allow the government “to plead the privilege in its answer to particular allegations . . . without admitting or denying those allegations and no adverse inference could be drawn against the government for doing so.” 101 In addition, the government would be required to provide a “full and complete explanation of its privilege claim” and make the


101 Recommendation at a, app. at 1.
evidence at issue available for an in camera review by the court.\textsuperscript{102} This is an important departure from the current Reynolds practice which permits the government to assert the privilege without disclosing the evidence at issue for judicial review.\textsuperscript{103} This change will help ensure a more fair evaluation of the privilege and help prevent the government from asserting the privilege merely as a way to avoid accountability. Courts evaluating the state secrets privilege in criminal cases have proven to be capable of adequately protecting national security interests while conducting this review and there is no reason to believe that they would not be as careful and competent in the civil context. History has shown over the past fifty years that the extreme caution under the Reynolds system is not warranted and the Reynolds case itself shows just how easy it is for the government to skirt accountability by refusing to even provide the evidence to the court for an in camera review.

Next, in order to prevent the assertion of the privilege from stopping litigation even before discovery is conducted, the ABA proposal “[p]ermits the discovery of non-privileged evidence that may tend to prove the plaintiff’s claim or the defendant’s defense” if that evidence can be “segregated from privileged evidence.”\textsuperscript{104} In addition, any motion to dismiss or for summary judgment based on the state secrets privilege would “be deferred until the parties complete discovery of the facts relevant to the motion and the court resolves any privilege claims.”\textsuperscript{105} These proposals represent a significant improvement over the current practice and provide the plaintiff at least some opportunity to make a case. If Congress adopts this proposal, courts will have adequate tools to allow cases to proceed through the discovery phase while still protecting national security interests.

In addition, the ABA proposal includes a number of CIPA-like provisions which require the government, whenever possible, to either produce non-privileged substitutes for privileged evidence or admit the relevant facts if that evidence is essential to

\begin{itemize}
\item \textsuperscript{102} Id. at b, app. at 1.
\item \textsuperscript{103} Reynolds, 345 U.S. at 10.
\item \textsuperscript{104} Recommendation at d, app. at 1.
\item \textsuperscript{105} Id. at f, app. at 2.
\end{itemize}
prove a claim or defense in the case.\textsuperscript{106} Once the court takes all of these steps and reviews proffered evidence by the parties, the court will not enter a judgment for the government based on the state secrets privilege if the plaintiff is able to prove a prima facie case with non-privileged evidence unless the government’s ability to defend against the plaintiff would be substantially impaired because of the defendant’s need to present specific privileged information.\textsuperscript{107} The benefit of this provision is that it better reflects the need to keep the courts open and available to plaintiffs who may have a legitimate claim against the government and permits them to make their case based on non-privileged evidence.\textsuperscript{108} By requiring the plaintiff to make a prima facie showing, this provision also helps to weed out baseless claims and it serves to prevent the kind of “graymail” issue which CIPA also addresses in the criminal context.

There are two areas where I believe the ABA proposal does not go far enough. One relates to the standard for requiring alternatives to the privileged evidence. The second deals with the consequences to the plaintiff when the government successfully asserts the privilege and the litigation is dismissed. The standard suggested in the ABA proposal for requiring the government to provide some alternative to the privileged evidence is “a substitute that provides a substantially equivalent opportunity to litigate the claim or defense as would the privileged evidence.”\textsuperscript{109} This standard is more favorable to the government than the standard for requiring alternative evidence under CIPA. The CIPA standard is “substantially the same ability to make his defense as would disclosure of the specified information.”\textsuperscript{110} “Substantially equivalent opportunity to litigate” is similar but it is not the same as “substantially the same ability.” The CIPA standard recognizes the fact that the substitute evidence should be of the same evidentiary quality as the privileged information. This higher standard reduces the risk that the government will attempt to substitute evidence of a lesser evidentiary quality than the

\textsuperscript{106} Id. at e, app. at 1-2.
\textsuperscript{107} Id. at g, app. at 2.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at e(ii), app. at 1.
\textsuperscript{110} Classified Information Procedures Act, \textit{supra} note 83, § 6(c).
privileged information. Adopting the same standard also recognizes that the interests protected by CIPA are similar to the interests protected by a CIPA-like rule in the civil context.

C. Consequences for Successful Invocation of the Privilege

In the criminal context CIPA is very clear that if the classified evidence is useful, relevant, and admissible, and a substitute for the classified evidence is not appropriate, the government must elect between disclosing the evidence or dismissing the case.\textsuperscript{111} While a similar option could be crafted in the civil context, few have suggested this approach. Still the question remains what to do in the situation where the plaintiff cannot proceed with the claim because the court has determined under this CIPA-like process that the government has a legitimate state secrets privilege. I suggest that in these situations a type of claims compensation fund could be created and administered by the appropriate government agency as a means for providing an opportunity for some compensation for legitimate cases while still protecting state secrets. My proposal is focused on a claimant like Khaled El-Masri, who alleged that he was subjected to illegal treatment by government agents and contractors and that he was mistakenly captured and detained in the administration’s extraordinary renditions program. However, similar compensation funds could be created in other contexts where the government successfully asserts the state secrets privilege.

Taking El-Masri as an example, assume that his case is dismissed because he was unable to make a prima facia case without reliance on privileged evidence and no adequate substitutes are available. If the court dismisses his case on that ground, he would then have the opportunity to present his case to the agency that administers the renditions program, likely the Central Intelligence Agency. As a condition for submitting his claim, he would agree to non-disclosure provisions that would preclude him from disclosing the claim or any potential settlement.

The claim would then be evaluated by members of the agency with the appropriate security clearances and knowledge of and access to the relevant information. These agency representatives would have the authority and responsibility of evaluating the

\textsuperscript{111} Id. §§ 6(c), 6(e)
claims and providing compensation where appropriate. The obvious concern with a program such as this is whether the agency could be trusted to fairly evaluate the conduct and actions of its own personnel. In this case, there could be a strong tendency to deny claims, particularly since the claimant has no recourse to the courts that have already dismissed the claim on state secrets grounds.

There is, however, significant precedent for these kinds of programs in the military context and they have a long history of successful and fair adjudications. Take, for example, the United States Army Claims Program. This program is operated under statutory and regulatory authority and is designed to adjudicate and pay claims to claimants who allege such things as medical malpractice, property damage and similar claims alleging negligence of Army personnel.\(^\text{112}\) Under the Army Claims Program, military and civilian officials within the Department of Defense investigate and adjudicate claims and pay claimants when appropriate.\(^\text{113}\) This program alleviates the need for litigation in appropriate cases.\(^\text{114}\)

There is no reason to think that other government agencies that are required to follow statutory and regulatory guidance would be any less capable of evaluating claims that have been dismissed because of the successful invocation of the state secrets privilege. The likely number of cases in the renditions context would be fairly small and would not represent a significant administrative burden on the agency. Because cases would only be potentially eligible for the compensation fund after they have been dismissed from an Article III court due to the successful invocation of the state secrets privilege, that process would prevent a government agency from being flooded with baseless claims.

Such a program would allow a claimant some compensation when the courts are closed to his case because of the state secrets privilege. In addition, the government agency, and ultimately the executive, would be required to bear some of the costs for establishing and running an extraordinary renditions program. As

\(^{112}\) Purpose of the Army Claims System, 32 C.F.R. §536.1, §536.2 (2007).

\(^{113}\) Id. § 536.3.

\(^{114}\) Id. § 536.1.
it stands now, if the executive successfully asserts the state secrets privilege, it bears none of the costs for any illegal, wrongful or mistaken conduct. Placing some of the costs back on the executive would have the added benefit of encouraging the executive to conform its conduct to relevant legal requirements. In addition, this compensation fund program would provide one more layer of oversight into the executive’s conduct. Congress would be responsible for appropriating the necessary funding for the compensation fund and as part of its oversight function, Congress could require the funded agency to provide periodic reporting on how the fund is being administered. This process gives Congress an additional tool to ensure executive accountability while still protecting privileged information.

D. Benefits of Proposed Changes

Taken together, there are a number of benefits for codifying the state secrets privilege along the lines of CIPA and establishing some type of compensation fund. First, these proposals involve both Congress and the courts. Congress codifies the privilege and oversees the administration of a compensation fund. The courts are responsible for determining when the state secrets privilege is properly invoked and they are able to do so with greater access to information and more guidance from Congress. Involving both Congress and the courts is necessary to provide an effective check on possible excesses by the executive.

There are added benefits to a state secrets privilege codified along the lines of CIPA. CIPA has a proven history of effectively balancing the interests of the individual against the need to protect national security. This codification achieves the added benefit of bringing the rules of evidence in criminal and civil cases more in line with each other, an important goal of the Federal Rules of Evidence. These proposed changes are also sufficiently robust to deter frivolous litigation and the threat of “graymail” in the civil context.

This codified privilege also ensures greater opportunity for individual litigants to have access to the courts to address governmental abuses. In those cases where the state secrets privilege does prevent the case from going forward, claimants still have an opportunity for compensation under the compensation fund program administered by the appropriate agency.
In achieving all of these objectives, legitimate national security interests are still protected. The executive is not prevented from claiming state secrets in the appropriate case. With these proposed changes, the executive must bear some of the cost of asserting the privilege. More importantly, the executive is now subjected to oversight from both Congress and the courts, thus ensuring that the state secrets privilege does not become synonymous with executive immunity.

IV. Conclusion

In fighting the war on terror, the Bush administration has operated a number of programs which it believed necessary to successfully prosecute the war. One of the most controversial of these programs is the use of extraordinary renditions as a means of capturing and interrogating people suspected of being involved in terrorism. To date, the administration has successfully prevented the courts from litigating claims involving these programs by asserting the state secrets privilege.

The debate is likely to continue over the origins of the state secrets privilege, the manner in which the Bush administration is asserting the privilege, and whether Congress or the courts should check the executive’s assertion of authority. While these debates are useful in illuminating important issues surrounding the privilege, to some degree, each of these debates misses the more critical question: if the state secrets privilege established in Reynolds fails to strike the appropriate balance, what must be done to correct the problem?

I believe there is a role for both the Congress and the courts in this process. Congress has proven successful in the past in codifying a state secrets privilege in the criminal context and courts have proven very capable of applying that privilege in individual cases. A CIPA-like statute is warranted in the civil context and the ABA proposal serves as a very helpful guideline. In addition, a claims compensation fund overseen by Congress and administered by the appropriate executive agency will help ensure that individuals have an opportunity to assert their claims when the courts are unable to adjudicate their lawsuits. This process will ensure that the executive bears some of the costs for its conduct and it provides for greater Congressional and judicial oversight, while still protecting legitimate national security interests.
Appendix A

REVISED REPORT 116A

AMERICAN BAR ASSOCIATION SECTION OF
INDIVIDUAL RIGHTS AND RESPONSIBILITIES
ASSOCIATION OF THE BAR OF THE CITY OF NEW
YORK REPORT TO THE HOUSE OF DELEGATES
RECOMMENDATION

RESOLVED, That the American Bar Association supports procedures and standards designed to ensure that whenever possible, federal civil cases are not dismissed based solely on the state secrets privilege; and 4 FURTHER RESOLVED, That, in 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) that:

a. Permits the government to plead the privilege in its answer to particular allegations in the complaint without admitting or denying those allegations, and draw no adverse inferences against the government for doing so;

b. Requires the government to provide a full and complete explanation of its privilege claim and to make available for in camera review the evidence the government claims is subject to the privilege;

c. Requires a judicial assessment of the legitimacy of the government’s privilege claims and deems privileged only evidence disclosure of which the court finds is reasonably likely to be significantly detrimental or injurious to the national defense or to cause substantial injury to the diplomatic relations of the United States;

d. Permits the discovery of non-privileged evidence that may tend to prove the plaintiff’s claim or the defendant’s defense,
provided that such evidence can be effectively segregated from privileged evidence, and where appropriate, provides for protective orders, *in camera* hearings, special masters to assist (including when the claim of privilege involves voluminous records), or other measures where necessary to protect the government’s legitimate national security interests;

e. Requires the government to produce a non-privileged substitute for privileged evidence, consisting of a summary of the privileged evidence, a version of the evidence with privileged information redacted, or a statement admitting relevant facts that the privileged evidence would tend to prove, provided that:

   (i) The evidence is essential to prove a claim or defense in the case;

   (ii) The court finds that it is possible, without revealing privileged evidence, for the government to produce a substitute that provides a substantially equivalent opportunity to litigate the claim or defense as would the privileged evidence; and

   (iii) In cases in which the government is a party asserting a claim or defense that implicates the privilege, the government is given the opportunity to elect between producing the non-privileged substitute and conceding the claim or defense to which the privileged evidence pertains;

f. Provides that a ruling on a motion to dismiss, or for summary judgment, based on the state secrets privilege be deferred until the parties complete discovery of facts relevant to the motion and the court resolves any privilege claims asserted as to those facts under the procedures described above;

g. Provides that, after the court takes these steps and reviews evidence proffered by both parties, judgment for the defendant based on the state secrets privilege is denied if the court finds that the plaintiff is able to prove a *prima facie* case with non-privileged evidence (including non-privileged evidence from sources outside the U.S. government), unless the court also finds, following *in camera* review, that the defendant’s ability to defend against the plaintiff’s case would be substantially impaired because the
defendant is unable to present specific privileged evidence; and

h. Entitles the government to take an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege, imposing sanctions for nondisclosure of such evidence, or refusing a protective order to prevent disclosure of such evidence.