WHEN SECRECY THREATENS SECURITY: *EDMONDS V. DEPARTMENT OF JUSTICE* AND A PROPOSAL TO REFORM THE STATE SECRETS PRIVILEGE

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> *[T]he Appellate judges asked my attorneys and me (the plaintiff) to leave the courtroom, so that the government attorneys could secretly answer questions and make their argument. The guards escorted us, the plaintiff, out, locked the doors, and stood there in front of the courtroom and watched us for about fifteen minutes. So much for finally having my day in court; here I was, with my attorneys, standing outside the courtroom and being guarded, while in there, three judges were having a cozy mingling session with a large troop of government attorneys. Then, it was over; that was it; we were told to leave. In other words, my attorneys and I were barred from being present in our own court hearing, and my case remained covered up and gagged . . . .*[1]

INTRODUCTION

Somewhere between the designations of "patriot"[2] and "nightmare"[3] lies the truth about Sibel Edmonds. Somewhere between lies either one of the more troubling untold stories of the investigation of

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[1] Sibel Edmonds, *Gagged, but Not Dead* (May 14, 2005), http://www.justacitizen.com/articles_documents/May14-05-Gagged%20but%20not%20Dead.htm [hereinafter Edmonds, Gagged, but Not Dead].

[2] David Rose, *An Inconvenient Patriot*, VANITY FAIR, Sept. 2005, at 264, 264; Press Release, American Civil Liberties Union, Sibel Edmonds v. Department of Justice: A Patriot Silenced, Fighting to Keep America Safe (Sept. 26, 2005) [hereinafter Edmonds Press Release 1], http://informationclearinghouse.info/article9774.htm.

[3] Christopher Deliso, *An Interview with Sibel Edmonds*, ANTIWAR.COM, July 1, 2004, http://www.antiwar.com/deliso/?articleid=2917 ("[O]ne of the top guys . . . called me a 'nightmare.'").

the September 11 attacks,[4] or a hoax. Yet Edmonds' tale remains imprisoned by multiple gag orders[5] and, more pertinent to this Comment, the state secrets evidence privilege.[6]

Edmonds is a former FBI contract linguist who sued the Bureau, alleging that she was terminated for blowing the whistle on rampant corruption and espionage in the Bureau translation department.[7] She claims she approached her superiors with allegations of more than just garden variety malfeasance in her department—specifically, infiltration of the department by organized crime and foreign intelligence, as well as distortion and misdirection of the September 11 investigation and other terrorism probes.[8] An investigative journalist, culling sources from each rung of the FBI and Department of Justice ladder that Edmonds visited in raising her complaints, has argued that the case intersects with ongoing investigations of illegal payments allegedly made to members of Congress.[9]

Despite mainstream media coverage of Edmonds' story,[10] the attention of Congressmen and Senators,[11] and the intervention of the American Civil Liberties Union (ACLU),[12] Edmonds has yet to have a

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[4] *See, e.g.*, Eric Boehlert, *We Should Have Had Orange or Red-Type of Alert in June or July of 2001*, SALON.COM, March 26, 2004, http://www.salon.com/news/feature/2004/03/26/translator/index_np.html.

[5] Scott Horton, *Cracking the Case: An Interview with Sibel Edmonds*, ANTIWAR.COM, Aug. 22, 2005, http://www.antiwar.com/orig/horton.php?articleid=7032 ("I have several gag orders. In fact, based on the research that my attorneys, the ACLU, has [sic] conducted, I am the most gagged person in United States history . . . .").

[6] Edmonds v. Dep't of Justice, 323 F. Supp. 2d 65, 81–82 (D.D.C. 2004), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 734 (2005).

[7] Complaint, Edmonds v. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004) (No. 02-1448) [hereinafter Edmonds 2002 Complaint], *available at* http://www.thememoryhole.org/spy/edmonds.htm (last visited Aug. 8, 2005).

[8] *See id*; Complaint at ¶¶ 4–5, Edmonds v. United States, No. 1:05CV00540 (D.D.C. March 16, 2005) [hereinafter Edmonds 2005 Complaint], *available at* http://www.justacitizen.com/articles_documents/Final-SFX503-Mar16-05.pdf.

[9] Rose, *supra* note 2, at 281.

[10] *See* Eric Lichtblau, *Whistleblowing Said to Be Factor in FBI Firing*, N.Y. TIMES, July 29, 2004, at A1; *Paula Zahn Now* (CNN television broadcast Jan. 14, 2005), transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/0501/14/pzn.01.html; *60 Minutes* (CBS television broadcast Aug. 8, 2004), transcript *available at* http://www.cbsnews.com/stories/2002/10/25/60minutes/main526954.shtml.

[11] *See* Press Release, American Civil Liberties Union, Members of Congress Pledge Support for FBI Whistleblower Sibel Edmonds, (March 3, 2005) [hereinafter "Edmonds Press Release 2"], http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17640&c=206; Letter from U.S. Senators Patrick Leahy and Charles Grassley to U.S. Attorney General John Ashcroft (July 9, 2004), http://www.justacitizen.com/articles_documents/Leahy_Grassley_Letter_to_Ashcroft_7-9-04.pdf.

[12] *See* Edmonds Press Release 1, *supra* note 2.

day in court. That is because the Bush administration has thus far prevailed in invoking the state secrets privilege,[13] a little-known and rarely deployed[14] tool of evidence law that courts and the press alike have referred to as "draconian."[15] The District Court for the District of Columbia agreed with Attorney General Ashcroft's assessment that the procession of Edmonds' claim would result in the disclosure of evidence that would be harmful to national security, and dismissed the action.[16] The Court of Appeals for the D.C. Circuit affirmed in an unpublished opinion.[17] The U.S. Supreme Court denied Edmonds' petition for a writ of certiorari.[18]

What is the state secrets privilege?[19] It has been described as an evidence privilege dating back to eighteenth-century English jurisprudence,[20] protecting military and diplomatic secrets of the Executive in the name of the common good.[21] The Supreme Court affirmed its existence in 1953, holding it an absolute privilege against

[13] Edmonds v. Dep't of Justice, 323 F. Supp. 2d 65, 81–82 (D.D.C. 2004), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 734 (2005).

[14] The state secrets privilege has been invoked just over sixty times since 1953. *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101, 109 (2005) (tallying fifty-five uses of the privilege from 1953–2001 and seven since 2001). *But see* William Fisher, *"State Secrets" Privilege Not So Rare*, INTER PRESS SERVICE NEWS AGENCY, Aug. 15, 2005, http://ipsnews.net/news.asp?idnews=29902 (arguing that over sixty uses of the privilege indicates usage is not rare).

[15] *In re* United States, 872 F.2d 472, 477 (D.C. Cir. 1989); *Edmonds*, 323 F. Supp. 2d at 81; Rose, *supra* note 2, at 266.

[16] *Edmonds*, 323 F. Supp. 2d at 81–82.

[17] Edmonds v. Dep't of Justice, 161 F. App'x 6 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 734 (2005).

[18] 126 S. Ct. 734 (2005).

[19] For a discussion of the state secrets privilege in the context of privileges generally, see 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 509 (Joseph M. McLaughlin ed., 1996); 2 DAVID W. LOUISELL AND CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE §§ 224–27 (rev. ed. 1985).

[20] Weaver & Pallitto, *supra* note 14, at 97 (describing the Trial of Maha Rajah Nundocomar, (1775) 20 Howell's State Trials 923 (Sup. Ct. of Judicature, Bengal)).

[21] *See generally* United States v. Reynolds, 345 U.S. 1, 8–10 (1953); Beatson v. Skene, (1860) 5 Hurlstone & Norman 838, 853, 157 Eng. Rep. 1415, 1421 ("[I]f the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor . . . ."); Weaver & Pallitto, *supra* note 14, at 92 ("[T]he ultimate reason for upholding [the privilege's] use is . . . that it is necessary to the survival of the state."); 2 LOUISELL & MUELLER, *supra* note 19 at 961 ("The state secrets privilege is but a single instance in a larger effort, undertaken in the interest of self preservation, to keep certain sensitive information out of the hands of persons who might sell it or use it to the injury or detriment of the nation.").

discovery,[22] and has not formally revisited it since. The Court did not hold that the privilege was constitutionally based.[23]

The privilege has been invoked in cases that seem to have clearly warranted its application, such as commercial litigation involving defense contracts where sensitive documents describing secret military equipment were at issue.[24] The state secrets privilege has also reared its head, however, in cases where plaintiffs sued the government over constitutional violations[25] or blew the whistle on government practices that allegedly threatened national security.[26]

The growth of the national security state has required increasing levels of executive secrecy and deference to that secrecy.[27] The use of the privilege has been on the rise, however, since the Carter administration,[28] and the current administration has broadened the scope of information over which it claims privilege.[29] Courts and commenta-

[22] *Reynolds*, 345 U.S. at 6–7, 11.

[23] *Id.* at 6 ("Both positions [urged by the parties] have constitutional overtones which we find it unnecessary to pass upon . . . .").

[24] *See, e.g.*, Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 397–98 (D.C. Cir. 1984); Virtual Defs. & Dev. Int'l, Inc. v. Republic of Moldova, 133 F. Supp. 2d 9, 23 (D.D.C. 2000), *appeal dismissed*, No. 00-5427, 2001 U.S. App. LEXIS 7468 (D.C. Cir. Mar. 15, 2001); N.S.N. Int'l Indus. v. E.I. Dupont de Numours & Co., 140 F.R.D. 275, 276 (S.D.N.Y. 1991).

[25] *See, e.g.*, Black v. United States, 62 F.3d 1115, 1116-17 (8th Cir. 1995) (alleging a violation of Fourth Amendment rights); *In re* United States, 872 F.2d 472, 473–74 (D.C. Cir. 1989) (claiming violations stemming from FBI COINTELPRO program); Ellsberg v. Mitchell, 709 F.2d 51, 52–54 (D.C. Cir. 1983) (alleging a warrantless electronic surveillance in retaliation for leaking the Pentagon Papers to the press).

[26] Edmonds v. Dep't of Justice, 323 F. Supp. 2d 65, 69 (D.D.C. 2004), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 734 (2005); Order at 1, Horn v. Huddle, No. 94-1756 (D.D.C. July 28, 2004), *available at* http://www.fas.org/sgp/jud/statesec/horn072804.pdf. *See also* J.F.O. McAllister, *Getting in the Way of Good Policy: A U.S. Drug Enforcer in Burma Sues His Colleagues for Scuttling His Best Efforts to Curb Trafficking*, TIME, Nov. 7, 1994, at 50 (reporting the allegations of Drug Enforcement Administration (DEA) whistleblower Richard Horn).

[27] Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 576 (1982) [hereinafter *The Military and State Secrets Privilege*] ("In the current international setting . . . matters as diverse as international trade, manufacturing techniques, natural resource supplies, social unrest, and even meteorological conditions can affect national security.").

[28] Weaver & Pallitto, *supra* note 14, at 101 ("[B]etween the decision in *Reynolds* and the election of Jimmy Carter, in 1976, there were four reported cases in which the government invoked the privilege. Between 1977 and 2001, there were a total of fifty-one reported cases in which courts ruled on invocation of the privilege.").

[29] *Id.* at 111. President Bush, through Exec. Order No. 13,233, 66 Fed. Reg. 56025 (2001), extended authority to invoke the state secrets privilege to former presidents. Moreover, he has extended this authority to the Secretaries of Agriculture and Health and Human Services, as well as the head of the EPA. Weaver & Pallitto, *supra* note 14, at 111.

tors agree that the state secrets privilege is in tension with individual litigants' rights.[30] It also clashes with notions of transparency that inhere in a democracy.[31]

This Comment proposes that the state secrets privilege be reformed in order to prevent executive abuses. Part I traces the history of the privilege before 1953. Part II discusses the landmark 1953 Supreme Court case of *United States v. Reynolds*,[32] the rule it announced and its rationale, and brief Supreme Court treatments of *Reynolds* in *United States v. Nixon*[33] and *Tenet v. Doe*.[34] Part III describes the lower courts' handling of *Reynolds*, assesses proposed Rule of Evidence 509, the only congressional attempt at codifying the state secrets privilege, and categorizes types of state secrets cases. Part IV reviews the *Edmonds* case and the grave implications for national security it may hold. Finally, Part V evaluates commentators' suggestions for reform and proposes that where a whistleblower plaintiff alleges government actions or omissions that have threatened or are threatening national security, the state secrets privilege must be transformed into a qualified privilege in which the government faces a heightened standard for successful invocation.

I. THE HISTORY AND RATIONALE OF THE STATE SECRETS PRIVILEGE

The genesis of the state secrets privilege is not precisely known,[35] but English experience with a form of the privilege dates back to the late eighteenth century.[36] The Court in *Reynolds* described American

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[30] *See generally* 1 CHARLES MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 107 at 423 (John W. Strong ed., 5th ed. West Group 1999) (1954). McCormick writes:

> As the activities of modern government have expanded, the need of litigants for the disclosure and proof of documents and other information in the possession of government officials has correspondingly increased . . . . When this need is asserted and opposed, the public interest in the secrecy of "classified" information comes into direct conflict with the public interest in the protection of the claim of the individual to due process of law in the redress of grievances.

Id.

[31] President John F. Kennedy, Address "The President and the Press" Before the American Newspaper Publishers Association, 1 PUB. PAPERS 334 (Apr. 27, 1961) ("The very word 'secrecy' is repugnant in a free and open society . . . ."); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 128, 171 (1951) (Frankfurter, J., concurring) ("Secrecy is not congenial to truth-seeking . . . .").

[32] 345 U.S. 1 (1953).

[33] 418 U.S. 683 (1974).

[34] 544 U.S. 1 (2005).

[35] *The Military and State Secrets Privilege*, *supra* note 27, at 571.

[36] Weaver & Pallitto, *supra* note 14, at 97 (describing the Trial of Maha Rajah Nundocomar, (1775) 20 State Trials 923 (Sup. Ct. of Judicature, Bengal)).

experience with the privilege as "limited,"[37] yet an American court encountered an invocation of privilege covering military and diplomatic secrets at least as far back as 1807.[38] Moreover, the Framers debated the role of secrecy in the constitutional order even earlier than that.[39] Thus the state secrets privilege, as it currently stands in American jurisprudence, can be said to spring from two sources: first, English common law,[40] and second, the political debates and practices of the Framers at the time of the Founding and the early years of the republic.[41]

A. English Common Law

An understanding of a "crown privilege" granting authority to the monarch's counselors and ministers to resist compulsion of secret information dates back to Blackstone and can be found in practice in the late eighteenth century.[42] Blackstone in his *Commentaries* explained, "[T]he duty of a Privy Counselor appears from the oath of office, [which requires the Counselor] to keep the King's counsel secret . . . [and] to withstand all persons who would attempt the contrary."[43] In 1775, Governor General of India Warren Hastings employed the same reasoning in instructing his secretary to refuse to produce the books of the East India Company in the face of a judicial request, arguing they contained secrets important to the safety of Great Britain.[44] The court agreed that "curious and impertinent eyes" should not have access to the materials, but was firm in admonishing that a magistrate, not a Crown official, had the final say as to when evidence must be produced.[45]

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

[38] *See* United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d) (Chief Justice Marshall, sitting as Circuit Justice, held that Burr had the right to production of a letter from General Wilkinson to President Jefferson but that any elements whose exposure would threaten "public safety" would be suppressed).

[39] Weaver & Pallitto, *supra* note 14, at 94–95.

[40] *Reynolds*, 345 U.S. at 7–8; Weaver & Pallitto, *supra* note 14, at 93.

[41] Weaver & Pallitto, *supra* note 14, at 94–95.

[42] *Id.* at 97.

[43] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 230–31 (St. George Tucker ed., 1803) (1765).

[44] Weaver & Pallitto, *supra* note 14, at 97.

[45] *Id.* (citing the Trial of Maha Rajah Nundocomar, (1775) 20 Howell's State Trials 923, 1057 (Sup. Ct. of Judicature, Bengal)). The court said that a magistrate has this power "where justice shall require copies of the records and proceedings, from the highest court of judicature, down to the court of Pie-Powder." *Id.* (quoting *Nundocomar*, 20 Howell's State Trials at 1057).

Despite this admonition, the Crown prevailed in all reported cases in which it claimed that keeping documents secret was in the public interest.[46] The holding in the 1860 case of *Beatson v. Skene*[47] sums up the approach of the British courts in the early cases broaching the subject: "[I]f the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of justice . . . ."[48]

Two important issues arose in the early privilege cases: first, what form a proper objection to production should take; and second, whether an assertion of privilege should be conclusive.[49] On the first subject, British courts came to require that a political head of a department at least personally consider documents in issue before a subordinate raises an objection, if not physically appear to make the objection himself.[50] On the second subject a split of authority emerged, with one approach favoring judicial inspection of purportedly privileged materials and another calling for total deference to the crown.[51]

In 1942, the House of Lords set out the modern British state secrets rule in *Duncan v. Cammell, Laird and Co.*[52] Lord Chancellor Viscount, writing for the majority, affirmed the requirement that a department head personally consider the materials in issue[53] and held that "an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive . . . ."[54] The court also asserted, however, that decisions concerning these matters were to be made by judges, not government officials.[55] The court set out grounds that would *not* be sufficient to make an invocation of privilege valid: the mere fact that a document is marked "state," "official," or "confidential"; fear of opening up a department to criticism or parliamentary investigation; the possibility that production would require the testimony of officials who have significant

[46] Weaver & Pallitto, *supra* note 14, at 97.

[47] (1860) 5 Hurlstone & Norman 838, 157 Eng. Rep. 1415 (Exch.).

[48] *Id.* at 1421.

[49] Duncan v. Cammell, Laird, & Co., [1942] A.C. 624, 636–37 (H.L.) (appeal taken from Eng.).

[50] *Id.* at 637–38 (citing *Beatson*, 157 Eng. Rep. 1415; Hennessy v. Wright, (1888) 21 Q.B.D. 509; Kain v. Farrer, (1877) 37 L.T. 469 (C.P.)).

[51] *Id.* at 638–40 (comparing *Hennessy* with *Beatson* and others).

[52] [1942] A.C. 624 (H.L.).

[53] *Id.* at 638.

[54] *Id.* at 642.

[55] *Id.*

duties elsewhere; and the chance that production may expose inadequacies within a department or expose it to liability.[56] Lord Chancellor Viscount did not, however, explain how a court might probe a department head's motives in asserting privilege.[57]

B. The Development of the Privilege in American Jurisprudence

Withholding information from Congress actually predates the Founding, as the Committee of Secret Correspondence refused to share materials with the rest of the Continental Congress, citing an inability to trust a large political body with lives at stake.[58] Later the Framers debated the role secrecy should play in the republic.[59] James Wilson made the case for transparency,[60] while Elbridge Gerry, Roger Sherman, and John Jay favored secrecy in limited circumstances relating to "treaties and military operations."[61] Specifically, Jay argued:

> [I]t seldom happens in the negotiation of treaties . . . but that perfect *secrecy* and immediate *dispatch* are sometimes requisite . . . and there doubtless are many [people] who would rely on the secrecy of the president, but who would not confide in that of the Senate, and still less in that of a large popular assembly.[62]

The debate over secrecy continued into the Washington administration.[63] In 1792, President Washington was confronted with House efforts to investigate a Native American attack on the army, prompting the President and his advisers to consider the possibility of withholding information from Congress.[64] Washington concluded that the President may not disclose certain papers, citing political, rather than constitutional, reasons.[65] His advisers posited that where disclosure would be injurious to the public, papers should be kept secret; they did not, however, cite any authority for this position.[66]

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[56] *Id.*

[57] *See id.* at 642–43.

[58] Weaver & Pallitto, *supra* note 14, at 94.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* (quoting THE FEDERALIST No. 64 at 392 (John Jay)(Clinton Rossiter ed. 1961)).

[63] Weaver & Pallitto, *supra* note 14, at 94–95.

[64] *Id.* at 94–95 (citing 23 THE PAPERS OF THOMAS JEFFERSON 257 (Charles T. Cullen ed., Princeton University Press 1990) (1792) [hereinafter Jefferson Papers]). The attack in issue was the massacre of Major General St. Clair's army in 1791, in which over 600 soldiers were killed. *See generally Arthur St. Clair*, WIKIPEDIA, http://en.wikipedia.org/wiki/Arthur_St._Clair (last modified Sept. 2, 2005).

[65] Weaver & Pallitto, *supra* note 14, at 95.

[66] *Id.* (citing Jefferson Papers, *supra* note 64, at 262).

In 1796, the President withheld information from Congress in the face of an official request for the first time.[67] The House had asked to examine the instructions given to the minister to Great Britain relating to the Jay Treaty.[68] Washington refused.[69] This time he claimed his power was based in the Constitution, reasoning that the President alone had the power to make treaties.[70]

The trial of Aaron Burr saw a key development of the state secrets privilege, judicial recognition of the need for nondisclosure where disclosure of a document would be harmful to the public.[71] At the trial, Burr sought the production of a letter from General Wilkinson to President Jefferson.[72] Chief Justice Marshall, sitting as Circuit Justice, issued a subpoena *duces tecum* to Jefferson to produce the letter, but determined that any elements of the correspondence that would threaten "public safety" would be suppressed.[73]

In 1875, the Supreme Court decided *Totten v. United States*,[74] a case that concerned a matter closely related to the modern state secrets privilege. In *Totten*, the plaintiff sued for breach of contract, alleging he had entered into an agreement with President Lincoln in which he would spy on the Confederates behind enemy lines in exchange for monthly payments.[75] The Court held that where the contract in issue is one to perform "secret services," the case must be dismissed, as it will inevitably result in the disclosure of confidential information.[76] Determining first that the President may make such secret agreements pursuant to his commander-in-chief powers, the Court reasoned that the very subject matter of the case—the spy contract made between the plaintiff and President Lincoln—was an item of confidential information that may never be disclosed.[77] Therefore, the majority reasoned, any suit brought to enforce such a contract must be dismissed on the pleadings, as the secret information would

[67] Weaver & Pallitto, *supra* note 14, at 95.

[68] *Id.*

[69] *Id.*

[70] *Id.* (noting that "virtually every president since has justified withholding information from Congress on the same separation of powers grounds").

[71] United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d); Weaver & Pallitto, *supra* note 14, at 95.

[72] *Burr*, 25 F. Cas. at 32.

[73] *Id.* at 37.

[74] 92 U.S. 105 (1875).

[75] *Id.* at 105–06.

[76] *Id.* at 107.

[77] *Id.* at 106–07.

inevitably be disclosed.[78] The Court added that dismissal is required in cases in which confidential information that exists between a priest and a penitent, a husband and a wife, an attorney and a client, and a physician and a patient will inevitably be disclosed.[79] The Court did not mention, however, any protected item of confidential *government* information other than a contract to perform secret services, nor did it announce any general rule governing the state secrets privilege.[80]

The proposition that certain evidence ought to be privileged in order to protect military secrets is found in a few cases reported in the early decades of the twentieth century. In *Firth Sterling Steel Co. v. Bethlehem Steel Co.*,[81] the district judge held that in a commercial dispute the Navy was permitted on grounds of "public policy" to refuse to furnish blueprints of armor-piercing projectiles in development.[82] In *Pollen v. Ford Instrument Co.*,[83] a patent infringement action, the court held that the government could intervene to claim privilege as to the plans of certain weapons systems that the plaintiff had moved the court to order produced.[84] Finally, in *Bank Line, Ltd. v. United States*,[85] the Second Circuit declined to issue a writ of mandamus where the court below had ordered the production of Navy records relating to a ship collision in World War II, but suggested that the district court, on remand, consider *Duncan v. Cammell, Laird and Co.*[86] in determining the question of privilege.[87]

Firth and *Pollen* marked an evolution of the *Totten* rule towards the modern state secrets privilege. In both *Firth* and *Pollen*, the suits were allowed to proceed even though the court had held that the evidence in issue was a privileged military secret.[88] This practice of

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[78] *Id.* at 107.

[79] *Id.*

[80] *See Totten*, 92 U.S. at 107. Over a century after *Totten*, the Supreme Court affirmed its holding in *Tenet v. Doe*, 544 U.S. 1 (2005). The Court also distinguished the *Totten* rule from the state secrets privilege. *Tenet*, 544 U.S. at 9.

[81] 199 F. 353 (E.D. Pa. 1912).

[82] *Id.* at 356.

[83] 26 F. Supp. 583 (E.D.N.Y. 1939).

[84] *Id.* at 585–86 (citing Totten v. United States, 92 U.S. 105 (1875)) (reasoning that peacetime decisions as to military secrecy should be left to the Executive).

[85] 163 F.2d 133 (2d Cir. 1947).

[86] [1942] A.C. 624 (H.L.) (appeal taken from Eng.).

[87] Bank Line, Ltd. v. United States, 163 F.2d 133, 138–39 (2d Cir. 1949).

[88] *See Pollen*, 26 F. Supp. at 586 (denying motion to compel discovery, but not dismissing case); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353, 356 (E.D. Penn. 1912) (same). The *Pollen* case was litigated until 1940, while *Firth* was litigated until 1915. *See Pollen*, 108 F.2d 762 (2d Cir. 1940); *Firth*, 216 F. 755 (D. Pa. 1914), *rev'd*, 224 F. 937 (2d Cir. 1915).

severing privileged evidence and allowing a case to continue was distinguishable from the *Totten* situation in which a case must be dismissed where it could not proceed without disclosure of confidential information.[89]

II. THE *REYNOLDS* RULE AND ITS RATIONALE

In *United States v. Reynolds*,[90] decided in 1953, the Supreme Court for the first time addressed whether the government could invoke a privilege as to certain evidence where it claimed disclosure would be harmful to the public.[91] The plaintiffs had sued the government under the Tort Claims Act after their husbands, civilian observers aboard an Air Force B-29 bomber, were killed when the plane crashed.[92]

The plaintiffs moved the district court to compel production of the official Air Force accident report, and the court granted the motion.[93] The Secretary of the Air Force then sent a letter to the court stating that the report could not be furnished because it would be against the "public interest."[94] The court permitted a rehearing on the matter, where the Secretary filed a formal "Claim of Privilege" in which he stated that the bomber had been on a "highly secret mission" the day of the crash.[95] Moreover, the Judge Advocate General of the Air Force filed an affidavit in which he contended that disclosure of the report would threaten national security and offered to "produce the three surviving crew members, without cost, for examination by the plaintiffs."[96] In response to the "Claim of Privilege" and the affidavits, the court ordered the Air Force to submit the report for its examination so that it could determine whether the document should be privileged.[97] The government refused.[98] The court then ordered that all facts alleged on the plaintiffs' claim of negligence be established in their favor.[99]

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[89] *Totten*, 92 U.S. at 107.

[90] 345 U.S. 1 (1953).

[91] *See id.* at 7 ("Judicial experience with the privilege which protects military and state secrets has been limited in this country.").

[92] Brauner v. United States, 10 F.R.D. 468, 469 (E.D. Pa. 1950).

[93] *Id.* at 469, 471–72.

[94] Reynolds v. United States, 192 F.2d 987, 990 (3d Cir. 1951).

[95] *Id.*

[96] *Id.*

[97] *Id.* at 990–91.

[98] *Id.* at 991.

[99] *Id.*

A unanimous panel of the Court of Appeals for the Third Circuit affirmed.[100] The court first held that such a claim of privilege presented a justiciable question, governed by the laws of evidence upon submission of the materials in issue *in camera*.[101] Moreover, the panel held that to permit the government to conclusively determine the status of its own claim of privilege was to unconstitutionally "abdicate the judicial function."[102]

The Supreme Court reversed and remanded by a vote of six to three.[103] Chief Justice Vinson, writing for the majority, first declined to address the case on constitutional grounds, despite the briefs of both sides urging the Court to do so.[104] The Court observed that American courts had not had much experience with an evidence privilege protecting military secrets, but noted that such a privilege was well-established at English common law.[105] The majority cited the British case *Duncan v. Cammell, Laird and Co., Ltd.*[106] in demonstrating the existence of the privilege in England and relied upon it in formulating its holding on the American state secrets privilege.[107]

The Court announced a set of procedural requirements and a standard of review for cases in which the government invokes the privilege to protect military secrets.[108] Only the government may assert the privilege, and it may not be waived by private individuals.[109] "It is not to be lightly invoked."[110] Only a department head may invoke the privilege, and only after personally reviewing the materials

[100] Reynolds v. United States, 192 F.2d 987, 998 (3d Cir. 1951).

[101] *Id.* at 997.

[102] *Id.*

[103] United States v. Reynolds, 345 U.S. 1, 12 (1953). Justices Black, Frankfurter, and Jackson dissented. *Id.*

[104] *Id.* at 6. For an argument that the *Reynolds* decision may have been in fact constitutionally based, see 2 WEINSTEIN & BERGER, *supra* note 19, at 509–20.

[105] *Reynolds*, 345 U.S. at 7.

[106] [1942] A.C. 624, 636-37; *see supra* notes 52–57 and accompanying text.

[107] *Reynolds*, 345 U.S. at 8 nn.15 & 20–22. It has been argued that the Court's reliance on *Duncan* was "improvident" given that separation of powers has a decidedly less prominent role in British governance and that *Duncan*, like *Reynolds*, was a response to a military exigency, World War II. Weaver & Pallitto, *supra* note 14, at 99–100. The Third Circuit in *Reynolds* distinguished *Duncan* by noting the differences between American and British notions of separation of powers. *Reynolds*, 192 F.2d at 997 ("[W]hatever may be true in Great Britain the Government of the United States is one of checks and balances.") (footnote omitted).

[108] *Reynolds*, 345 U.S. at 7–11.

[109] *Id.* at 7.

[110] *Id.*

in issue.[111] It is incumbent upon the court to determine whether the materials should be privileged, but it should not do so through a practice that forces disclosure of the very evidence for which the government asserts privilege.[112] Yet the majority asserted that final authority rests with the court, "not the caprice of executive officers."[113] The Court held that the government will prevail on an invocation of privilege to protect military secrets wherever it can demonstrate "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[114] Unlike other executive privileges, the state secrets privilege is *absolute*: no showing of a litigant's necessity can overcome an invocation that meets the standard above, and necessity will only be considered in determining the extent to which a court need review the merits of the government's claim of privilege.[115] Thus, where a litigant demonstrates great need for the evidence, an invocation of privilege "should not be lightly accepted";[116] where such need seems lacking, however, the assertion of a department head may be conclusive.[117]

The Court thus outlined how a state secrets dispute should play out before a district court. In response to a discovery request, a department head may file a formal claim of privilege stating that, after personal consideration, he or she has determined that production presents a reasonable danger that a military secret will be divulged.[118] Where the litigant's need for the evidence is dubious, the claim of privilege will be conclusive.[119] Where there is greater need, a court

[111] *Id.* at 7–8. The Court did not elaborate on which executive officers are "department head[s]," nor did it describe just what form a proper invocation should take. In calling for a "department head" to claim privilege, the majority cited the *Duncan* requirement that he or she be the "*political* head of the department." *Id.* at 8 n.20 (quoting *Duncan*, [1942] A.C. at 638) (emphasis added). Since the invocation of the Secretary of the Air Force was sufficient in this case, the standard apparently does not require a Cabinet-level officer. As for the proper form of an invocation, the Court called only for a "formal claim of privilege . . . lodged . . . after actual personal consideration . . . ." *Id.* (footnote omitted). This indicates that a claim need not be supported by an affidavit, though it should be noted that in *Reynolds* the Judge Advocate General supported the Secretary's claim with an affidavit. *Id.* at 4–5.

[112] *Reynolds*, 345 U.S. at 8.

[113] *Id.* at 9–10.

[114] *Id.* at 10.

[115] *Id.* at 11.

[116] *Reynolds*, 345 U.S. at 11.

[117] *Id.*

[118] *Id.* at 7–8.

[119] *Id.* at 11.

may probe the merits of the formal claim further,[120] though always with an eye towards avoiding disclosure of a military secret, even to the court itself, wherever possible.[121]

Though the Court held for the United States in *Reynolds*, it did not dismiss the plaintiffs' claim. The majority rather remanded for further proceedings, reasoning that as the purportedly top secret electronic equipment had no causal relation to the crash, plaintiffs could still prove causation without the accident report.[122] The majority further noted that the government had made certain "alternatives" available to plaintiffs, such as the production of witnesses at no cost, and that plaintiffs should take advantage of them.[123] The parties eventually reached a settlement.[124]

Why was the Court so eager to clasp to the holding of *Duncan* and usher the state secrets privilege onto these shores? First, the majority noted that the time (1953) was one of "vigorous preparation for national defense."[125] Specifically, for purposes of the case at bar, the Court reasoned that air power was vital to national defense and the exposure of any secrets relating to it could be harmful.[126] Finally, the Court distinguished the case from criminal cases, where the government must dismiss the charges against a defendant if it asserts privilege over evidence material to the accused's defense.[127] Chief Justice Vinson reasoned that in the instant case the government was the defendant and the non-moving party (i.e., party not seeking privileged material) and was thus fully within its rights to assert the privilege.[128]

At the time, *Reynolds* fit neatly into what is the generally accepted rationale for the role of privileges in evidence law.[129] Wigmore lists four conditions that must be met in order for a privilege to arise:

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[120] *Id.*

[121] *Id.* at 10 ("[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.").

[122] *Id.* at 10.

[123] *Reynolds*, 345 U.S. at 11–12.

[124] Herring v. United States, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at *6 (E.D. Pa. Sept. 10, 2004), *aff'd*, 424 F.3d 384 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1909 (2006).

[125] *Reynolds*, 345 U.S. at 10.

[126] *Id.* at 10.

[127] *Id.* at 12.

[128] *Id.*

[129] For a discussion of privilege, see generally GLEN WEISSENBERGER & JOSEPH P. KINNEARY, WEISSENBURGER'S FEDERAL EVIDENCE § 501 (3d ed. 1998); 2 WEINSTEIN & BERGER, *supra* note 19, ¶¶ 501–13; 2 LOUISELL & MUELLER, *supra* note 19, §§ 200–49; 1 MCCORMICK ET AL., *supra* note 30, §§ 72–143.

> (1) The communications must originate in a *confidence* that they will not be discussed;
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*;
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[130]

Any effort to protect military secrets and diplomatic secrets, which the Supreme Court later stated was included in the state secrets privilege,[131] easily satisfies these first three conditions. Yet one can argue that in certain cases the state secrets privilege does not satisfy Wigmore's fourth condition; that is, the injury of disclosure is *not* greater than the benefit the evidence provides to the litigant, because it is possible that a plaintiff simply cannot proceed without such evidence,[132] while disclosure may only cause embarrassment at worst. But the Court in *Reynolds* correctly cast the potential injury as a *public* injury, while the benefit to be gained was only *private*.[133] Thus, the facts of the case actually dictate that the disposition be an easy one: on one side, the private litigants suffered a tragic loss but were really only three tort plaintiffs suing over a plane crash, while on the other side top-secret military equipment at the height of the Cold War was at stake. According to this reasoning, however, the calculus should change where the moving party can demonstrate that a *public* interest in disclosure outweighs the interest in non-disclosure that the government asserts.

Recently declassified documents indicate that *Reynolds* itself may demonstrate everything *wrong* with the state secrets privilege. The documents reveal that the B-29 in fact was *not* carrying any secret electronic equipment.[134] After declassification, relatives of the *Reynolds* plaintiffs sought to set aside the settlement reached in 1953, arguing that the Secretary of the Air Force perpetrated a fraud upon

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[130] WEISSENBERGER & KINNEARY, *supra* note 129, § 501.3 (citing 8 WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961)).

[131] United States v. Nixon, 418 U.S. 618, 706 (1974).

[132] *See infra* Part IV.

[133] *Reynolds*, 345 U.S. at 10–11 (discussing the respective importance of potential danger to national security and a litigant's need for evidence).

[134] Herring v. United States, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at *6 (E.D. Pa. Sept. 10, 2004), *aff'd*, 424 F.3d 384 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1909 (2006); *see also* Barry Siegel, *The Secret of the B-29*, L.A. TIMES, April 18, 2004, at A1.

the court in violation of the Federal Rules of Civil Procedure.[135] The district court granted the government's motion to dismiss, reasoning that no fraud was committed since, while no secret equipment was on board, the accident report contained details of the workings of a B-29 that could have been beneficial to enemy intelligence in 1953.[136]

The Supreme Court has never revisited *Reynolds*, but its brief encounters with the case in 1974 and 2005 indicate that it is still good law. In *United States v. Nixon*,[137] decided in 1974, the Court distinguished a President's generalized interest in the confidentiality of his internal communications from his need to protect military and diplomatic secrets, reasoning that production of communications of the former sort for *in camera* examination does not harm him in the way that production of the latter sort of communications does.[138] In 2005, the Court cited *Reynolds* in unanimously reaffirming the *Totten* rule in the case of *Tenet v. Doe*.[139] The Court rejected the Ninth Circuit's holding that *Reynolds* had replaced *Totten*, reasoning that *Reynolds* deals with a question of evidence while *Totten* calls for dismissal on the pleadings of certain claims that never even reach the issue of evidence.[140] Chief Justice Rehnquist's treatment of *Reynolds* indicates that the Court does not see any issue as to its continuing viability.[141]

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[135] *Herring*, 2004 U.S. Dist. LEXIS 18545, at *6–7; FED. R. CIV. P. 60(b).

[136] *Herring*, 2004 U.S. Dist. LEXIS 18545, at *19–21, 26–30, 37. The court took the "mosaic" approach to the state secrets privilege described *infra* at notes 149–151 and accompanying text. This formed part of the basis of the Third Circuit's affirmance of the case. *See Herring*, 424 F.3d at 391 n.3.

[137] 418 U.S. 683 (1974).

[138] *Id.* at 706. The Court, while not describing exactly how *in camera* inspection of purported state secrets would hurt the President, seemed to reach this conclusion on separation-of-powers grounds. Chief Justice Burger, writing for the majority, noted that "[a]s to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *Id.* at 710. The Court then quoted *C & S Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948):

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.

Nixon, 418 U.S. at 710.

[139] 544 U.S. 1 (2005).

[140] *Id.* at 9. The Court described the *Totten* rule as "a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry," a threshold issue similar to the prudential standing doctrine. *Id.* at 6.

[141] *Id.* at 9 (discussing United States v. Reynolds, 345 U.S. 1 (1953)).

III. LOWER COURTS' HANDLING OF *REYNOLDS* AND PROPOSED RULE 509

A. Scope of Privilege, Procedure, and Effects of a Successful Invocation

Lower courts have done well in determining the scope of information protected by the state secrets privilege. They have struggled, however, in hammering out the proper procedures *Reynolds* requires and in judging just what a successful invocation of the privilege means to a case.

In general, courts have taken an expansive view of what constitutes a state secret.[142] Taking their cue from the Supreme Court's dicta in *Nixon*,[143] lower courts have adopted the position that secrets relating to diplomatic relations, as well as military secrets, are protected by the state secrets privilege.[144] Moreover, secrets having to do with intelligence-gathering techniques are protected.[145] Thus, courts are in agreement that the government may assert a privilege over any evidence, the disclosure of which will injure national security.

Courts vary as to the extent of judicial review they require when the privilege is invoked. Some courts are quick to dismiss after a proper invocation,[146] while others are more demanding of the Executive.[147]

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[142] J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 584–85 (1994). An example of the privilege's seemingly endless expansion can be found in *Patterson v. FBI*, 893 F.2d 595 (3d Cir. 1990), where the Attorney General invoked the privilege to protect an FBI file maintained on a sixth grader who received mail from foreign countries as part of a school project. *Id.* at 600.

[143] *Compare Nixon*, 418 U.S. at 706, 710 (emphasizing the President's need to protect military *and* diplomatic secrets) *with Reynolds*, 345 U.S. at 6–7, 10-11 (discussing the importance of protecting military secrets).

[144] *See, e.g.*, Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983).

[145] *See, e.g.*, Halkin v. Helms ("*Halkin I*"), 598 F.2d 1, 8 (D.C. Cir. 1978).

[146] *See* Black v. United States, 62 F.3d 1115, 1119 (8th Cir. 1995); Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 547–48 (2d Cir. 1994); Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991).

[147] *See, e.g.*, *Ellsberg*, 709 F.2d at 59 ("When a litigant must lose if the claim is upheld and the government's assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful *in camera* examination is not only appropriate, but obligatory.") (citations omitted).

> [I]n situations in which close examination of the government's assertions is warranted, the trial judge should insist (1) that the formal claim of privilege be made on the public record and (2) that the government either (a) publicly explain in detail the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of the requested information or (b) indicate why such an explanation would itself endanger national security . . . . The gov-

Often courts seem tentative in applying the standard of review announced in *Reynolds*—that the government must show "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security should not be divulged."[148] They have taken what two commentators refer to as the "mosaic" approach to state secrets:[149] out of fear of the impact of disclosure of even seemingly harmless, unclassified information, courts cite their own lack of expertise and defer to the Executive.[150] These courts reason that enemy intelligence can synthesize seemingly benign evidence and thus gain insight into the inner workings of the government.[151]

A successful invocation of the state secrets privilege removes the privileged evidence from a case, at which point any one of three things may happen.[152] First, if a plaintiff cannot make out a prima facie case without the evidence, the case will be dismissed; otherwise it will continue.[153] Second, if a defendant is deprived of evidence material to his defense, summary judgment will be granted to the defendant.[154] Third, if the very subject matter of a case is privileged, then the case will be dismissed at the pleadings.[155]

Finally, one noteworthy aspect of lower courts' handling of *Reynolds* is their broad interpretation of the requirement that department heads personally consider purportedly privileged materials. Courts have held that, in situations requiring personal consideration by department heads under *Reynolds*, executive officers may make

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> ernment's public statement need be no more (and no less) specific than is practicable under the circumstances.

Id. at 63–64 (footnote omitted).

[148] *Reynolds*, 345 U.S. at 10.

[149] Weaver & Pallitto, *supra* note 14, at 103–04.

[150] *See, e.g.*, *Halkin I*, 598 F.2d at 8.

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.
>
> . . . .
>
> . . . Courts should accord the "utmost deference" to executive assertions of privilege upon grounds of military or diplomatic secrets.

Id. at 8–9 (citations omitted).

[151] Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998); *Halkin I*, 598 F.2d at 8.

[152] *Kasza*, 133 F.3d at 1166.

[153] *Id.*

[154] *Id.*

[155] *Id.*

their determinations based on summaries or other reports made to them by subordinates.[156]

B. The Odyssey of Rule 509

In the late 1960s and early 1970s the Advisory Committee for the Federal Rules of Evidence proposed thirteen privilege rules,[157] one of which was Rule 509, which addressed the state secrets privilege.[158] The Committee sought to approximate the holding of *Reynolds*, though the drafting process reveals tinkering with the standard and procedures announced in that case.[159]

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[156] Crater Corp. v. Lucent Techs., 423 F.3d 1260, 1266 (Fed. Cir. 2005), *reh'g denied*, No. 04-1349, 2005 U.S. App. LEXIS 28951, at *1 (Fed. Cir. Dec. 6, 2005) (en banc); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 400 (D.C. Cir. 1984).

[157] 2 WEINSTEIN & BERGER, *supra* note 19, at 501–02.

[158] 2 LOUISELL & MUELLER, *supra* note 19, § 225. For a discussion of the trek of the original privilege rules through Congress and the ultimate adoption of Rule 501, see 2 WEINSTEIN & BERGER, *supra* note 19, § 501[01].

[159] Proposed Rule 509 read in pertinent part:

> (a) Definitions.
>
> (1) Secret of state.— A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.
>
> (2) Official information.— "Official information" is information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest and which consists of: (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of 18 U.S.C. § 3500, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to 5 U.S.C. § 552.
>
> (b) General rule of privilege.— The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.
>
> (c) Procedures.— The privilege for secrets of state may be claimed only by the chief officer of the government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge upon motion of the government, may permit the government to make the required showing in the above

The preliminary draft of the Rule, released in 1969, called for the privilege to be effective where there was a *substantial* likelihood that "the evidence will *disclose a secret of state*."[160] The 1971 draft featured a shift in this standard, now calling for a *reasonable* likelihood that disclosure "*will be detrimental or injurious to the national defense or the international relations* of the United States."[161]

The 1971 draft was at once more lenient and more exacting. On the one hand, it lowered the likelihood of injury (from substantial to reasonable) that the government needed to demonstrate. This second draft, however, also *raised* the standard for the *type* of injury the government must demonstrate. While originally the Advisory Committee called only for the government to raise the specter of the disclosure of a state secret,[162] the second draft stipulated an executive officer must raise the alarm of injury to national defense or international relations.[163]

The difference may be demonstrated by reference to *Halkin v. Helms ("Halkin I").*[164] In *Halkin I*, the plaintiffs argued that the state

> form *in camera*. If the judge sustains the privilege upon a showing *in camera*, the entire text of the government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination *in camera* of the information itself. The judge may take any protective measure which the interests of the government and the furtherance of justice may require.
>
> (d) *Notice to government.*— If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.
>
> (e) *Effect of sustaining claim.*— If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.

FED. R. EVID. 509 (Proposed Draft 1973), *reprinted in* 2 WEINSTEIN & BERGER, *supra* note 19, § 509-1-2.

[160] FED. R. EVID. 509 (Proposed Draft 1969) (emphasis added); 2 WEINSTEIN & BERGER, *supra* note 19, § 509-9.

[161] FED. R. EVID. 509 (Proposed Draft 1971) (emphasis added); 2 WEINSTEIN & BERGER, *supra* note 19, § 509-9.

[162] FED. R. EVID. 509 (Proposed Draft 1969) (emphasis added); 2 WEINSTEIN & BERGER, *supra* note 19, § 509-9.

[163] FED. R. EVID. 509 (Proposed Draft 1971) (emphasis added); 2 WEINSTEIN & BERGER, *supra* note 19, § 509-9.

[164] 598 F.2d 1 (D.C. Cir. 1978).

secrets privilege should not protect, without more, the mere fact that the National Security Agency (NSA) intercepted their private communications.[165] Under the 1971 version of Rule 509, the danger that the *secret* of the interceptions would be revealed would not have been enough. The government would have had to demonstrate a reasonable likelihood that disclosure of that fact would harm national security.

The Justice Department was not pleased with this development.[166] It responded by proposing its own draft which, of course, called for a lower standard.[167] That proposed draft even went so far as to call for the classification of a document to be "conclusive on the issue of state secrets."[168]

The Advisory Committee adopted many of the Justice Department's suggestions in the final draft of Rule 509, which the Supreme Court transmitted in 1973.[169] In fact, both components of the standard in issue—the degree of injury and the sort of injury—were lowered.[170]

Rule 509(a)(1) defined a "secret of state" as "a governmental secret relating to the national defense or the international relations of the United States."[171] Subsection (b) set out the government's powers in asserting the privilege and the standard of review: "The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of *reasonable likelihood* of danger that the evidence *will disclose a secret of state* or official information, as defined in this rule."[172] As described above, this was the double-lowering of the state secrets standard, combining the most lenient of the 1969 and 1971 standards.[173] This language more closely tracked the standard announced in *Reynolds*, which held that a show-

[165] *Id.* at 8. The court rejected this argument. *Id.* at 8–9.

[166] 2 LOUISELL & MUELLER, *supra* note 19, at 945–46. The Justice Department objected to Proposed Rule 509 in part because it considered the standard of review governing state secrets claims— a reasonable likelihood of danger that disclosure will be detrimental to national defense or international relations—too demanding of the government. It also objected because the Advisory Committee had denied it a much-coveted official information privilege. *Id.*

[167] 2 WEINSTEIN & BERGER, *supra* note 19, § 509-11-12.

[168] *Id.*

[169] 2 LOUISELL & MUELLER, *supra* note 19, at 949–51.

[170] 2 WEINSTEIN & BERGER, *supra* note 19, at § 509-13.

[171] FED. R. EVID. 509 (Proposed Draft 1973).

[172] *Id.* (emphases added).

[173] *See supra* note 170 and accompanying text.

ing of a "reasonable danger" of the exposure of "military matters" was sufficient.[174]

Subsection (c) modified the *Reynolds* procedures. The Rule lightened the requirement that only a department head may invoke the state secrets privilege by giving agency heads the same authority.[175] Gone was the stipulation that an officer must personally consider the purportedly privileged materials.[176] Officers claiming the privilege were permitted to make their showing in the form of a written statement.[177] The judge and counsel were free to inspect this showing and whatever else the government submitted, unless the government successfully moved for *in camera* inspection.[178] The judge was free to take whatever protective measures were necessary.[179]

The Committee likely made these changes in order to allow more play in the joints, that is, to approximate the workings of modern government. It seems counter-productive to require a Cabinet-level officer, or an agency head for that matter, to inspect documents that may number in the thousands in order to prevail in asserting the state secrets privilege.[180]

The Advisory Committee set out an interesting new requirement in subsection (d). The Rule mandated that

> [i]f the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.[181]

Proposed Rule 509 imposed a *requirement* on judges to apprise the Executive of possible disclosure of a state secret.[182] This is notable

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[174] United States v. Reynolds, 345 U.S. 1, 10 (1953).

[175] FED. R. EVID. 509 (Proposed Draft 1973).

[176] *See id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *See* Crater Corp. v. Lucent Techs., 423 F.3d 1260, 1266 (Fed. Cir. 2005), *reh'g denied*, No. 04-1349, 2005 U.S. App. LEXIS 28951, at *1 (Fed. Cir. Dec. 6, 2005) (en banc); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 400 (D.C. Cir. 1984).

[181] FED. R. EVID. 509 (Proposed Draft 1973).

[182] This requirement forms part of this Comment's proposal set forth *infra* in Part V. The proposal also features a corresponding duty on the part of either the court or the Executive to transmit purportedly privileged materials to ranking members of Congress with security clearances where the privilege is invoked in a national security whistleblower case. *See Infra* Part V.

given the line of reasoning in state secrets jurisprudence that judges are ill-equipped to make such determinations concerning national security.[183] Suddenly judges were required to referee, in an area in which they were presumed to be unqualified, in order to broaden the net of privilege claims.

Subsection (e) set out the effects of a successful invocation.[184] In a case in which the government was a party and properly invoked the privilege, if the other party was deprived of material evidence, the judge was free to take measures as justice required, "including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action."[185] The Rule was silent on what a judge may do where the government intervened as a third party.[186]

Rule 509 suffered from a tragedy of timing. Though passage of rules of evidence is ordinarily mundane fare for Congress, the Supreme Court transmitted the Federal Rules just as the Watergate Scandal was exploding.[187] Suddenly Congress was faced with proposed codification of the state secrets and official information privileges at a time when it was headed for a showdown with the President over the withholding of information. The privilege rules ignited a debate that held up passage of the Federal Rules for two years.[188]

Ultimately Rule 509, along with all of the privilege rules, was voted down.[189] Congress, hostile overall to the codification of privileges, opted for a catch-all Rule 501, which provides, inter alia, that the rules of privilege in the federal courts are to be governed by the common law.[190]

What would have been the effect of Rule 509? It has been argued that while the Rule would have promoted "the broadest possible reading of *Reynolds*," the firestorm of criticism that attended its proposal was unfair.[191] Moreover, two commentators contend that Rule

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[183] *See, e.g.*, *Halkin I*, 598 F.2d 1, 8 (D.C. Cir. 1978).

[184] FED. R. EVID. 509 (Proposed Draft 1973).

[185] *Id.* The approach of finding against the government on an issue in which it invokes the privilege conflicts with the approach lower courts have taken. See *supra* notes 152–55 and accompanying text. This is precisely what the lower court did in *United States v. Reynolds*, 345 U.S. 1, 5 (1953).

[186] *See* FED. R. EVID. 509 (Proposed Draft 1973).

[187] 2 WEINSTEIN & BERGER, *supra* note 19, at 509-3.

[188] *Id.* ("[N]o single rule promulgated by the Supreme Court provoked as strong a reaction– almost all of it negative– as did Rule 509.").

[189] *Id.* at 501-2–3.

[190] *See* FED. R. EVID. 501.

[191] 2 LOUISELL & MUELLER, *supra* note 19, at 956.

509 left ambiguous the same things that *Reynolds* left ambiguous: the role of *in camera* inspection, the scope of the privilege, and the degree of deference due the Executive.[192] The procedural modifications were minor, though excising the requirement that department or agency heads personally consider purportedly privileged materials essentially guaranteed that anonymous underlings would make secrecy determinations. One major change was the obligation imposed on trial judges to provide notice to the government where there was a substantial possibility a state secret might be disclosed, a requirement which certainly would have broadened use of the privilege.

The lesson to be learned from the rise and fall of Rule 509 is that Congress can exercise a negative power to strike down an effort to officially enshrine government secrecy privileges. Whether or not it will exercise an *active* power to reform the state secrets privilege remains to be seen. It is certainly within Congress' purview to do so,[193] and this Comment urges that it take exactly this course of action.

C. Types of State Secrets Cases

Litigants have invoked the state secrets privilege in commercial disputes, often with the government intervening as a third party. These cases typically involve defense contracts or intellectual property issues.[194]

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[192] *Id.*

[193] For an example of Congress' exercise of this active power, see FED. R. EVID. 413–15 (setting out rules governing admissibility of similar crimes and acts in sex offense cases).

[194] *See* Crater Corp. v. Lucent Techs., 423 F.3d 1260, 1262–63 (Fed. Cir. 2005), *reh'g denied*, No. 04-1349, 2005 U.S. App. LEXIS 28951, at *1 (Fed. Cir. Dec. 6, 2005) (en banc) (misappropriation of trade secret claim related to underwater fiber optic cable technology); McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1021–22 (Fed. Cir. 2003) (breach of contract action over stealth bomber); DTM Research, L.L.C. v. AT&T Corp., 245 F.3d 327, 330 (4th Cir. 2001) (trade secret claim over telecommunications technology); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 397–98 (D.C. Cir. 1984) (defense contractor sued military contractor); Clift v. United States, 597 F.2d 826, 827–28 (2d Cir. 1979) (Invention Secrecy Act action); Halpern v. United States, 258 F.2d 36, 38 (2d Cir. 1958) (Invention Secrecy Act action); Virtual Defs. & Dev. Int'l, Inc. v. Republic of Moldova, 133 F. Supp. 2d 9, 23 (D.D.C. 2000), *appeal dismissed*, No. 00-5427, 2001 U.S. App. LEXIS 7468 (D.C. Cir. Mar. 15, 2001) (defense contractor claimed it was entitled to sales commission on sale of Mig-29s); Foster v. United States, 12 Cl. Ct. 492, 493 (Cl. Ct. 1987) (Invention Secrecy Act claim); Am. Tel. & Tel. Co. v. United States, 4 Cl. Ct. 157, 159 (Cl. Ct. 1983) (same); Pollen v. Ford Instrument Co., 26 F. Supp. 583, 584 (E.D.N.Y. 1939) (patent infringement); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353, 354 (E.D. Pa. 1912) (patent action over weapons).

Two narrow areas in which the government has invoked the privilege are employment discrimination cases and cases concerning intelligence relationships. In some cases, the Executive has claimed state secrets privilege where agents of certain federal agencies alleged discrimination in their line of work.[195] In other cases, involving intelligence matters, the privilege has been invoked, though resort to the *Totten* rule may have been more appropriate.[196]

Beginning in the 1970's, two rather disturbing strains of state secrets cases emerged. The first is a group of cases in which plaintiffs alleged the government violated their constitutional rights through warrantless surveillance and other harassment. The second is a collection of cases in which plaintiffs alleged the government had knowledge of certain sordid activities.

The surveillance cases, mostly litigated in the 1970s and 1980s, dealt with some fairly high profile matters.[197] Daniel Ellsberg, who leaked the Pentagon Papers to the press,[198] sued the government, alleging that the Nixon administration targeted him for warrantless surveillance out of reprisal.[199] A group of plaintiffs who were involved

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[195] Sterling v. Tenet, 416 F.3d 338, 341–42 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1052 (2006); Molerio v. FBI, 749 F.2d 815, 819 (D.C. Cir. 1984). In Sterling's appellate brief, counsel set forth a rather searing condemnation of the state secrets privilege:

> The government's increased use of secrecy as a sword rather than a shield has reached endemic proportions . . . . The Executive Branch, and in particular the CIA, appears blinded by an ambition to weaken the historical notion of separation of powers by attacking the courts' ability to adjudicate judicial matters, both civil and criminal, that may encroach upon national security information. That must now stop.

Appellant's Brief at 11, *Sterling*, 416 F.3d 338 (footnote omitted), *available at* http://www.fas.org/sgp/jud/sterling1204.pdf. The court in *Sterling* partially based its decision on the threat of "graymail," a process by which a plaintiff brings an action against an agency with the intention of getting the agency to settle out of fear of revealing classified information. *Sterling*, 416 F.3d at 344.

[196] Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1238–39 (4th Cir. 1985) (plaintiff sued Penthouse for libel after it printed a story linking him to CIA plans to weaponize marine mammals); Maxwell v. First Nat'l Bank of Md., 143 F.R.D. 590, 593–94 (D. Md. 1991) (plaintiff bank employee alleged life became "intolerable" after he learned a customer was really a front for a CIA money laundering operation); Heine v. Raus, 305 F. Supp. 816, 816–17 (D. Md. 1969) (plaintiff sued after defendant "outed" him as Soviet intelligence).

[197] The issue of warrantless domestic spying again rose to the forefront with the revelation that the Bush administration green-lighted such spying by the National Security Agency after the September 11 attacks. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

[198] *Daniel Ellsberg*, WIKIPEDIA, http://en.wikipedia.org/wiki/Daniel_Ellsberg (last visited Aug. 22, 2006).

[199] Ellsberg v. Mitchell, 709 F.2d 51, 52–53 (D.C. Cir. 1983).

in anti-Vietnam war organizations sued various agencies and officials, including CIA Directors Helms and Colby, alleging warrantless surveillance.[200] The ACLU followed, claiming that the military spied on civilians domestically.[201] Moreover, the government was sued over the now-infamous COINTELPRO FBI program.[202]

Another group of cases involved plaintiffs alleging government knowledge of illicit activity as support for their various causes of action.[203] An airline suing an insurance company after terrorists destroyed a plane sought to compel production of CIA documents confirming that Arab governments paid the terrorist group responsible.[204] Relatives of the deceased sued the government over the downing of an Iranian commercial aircraft by a Navy missile.[205] Parents sued suspected Contra operatives for the wrongful death of their son, who was tortured and murdered while working in Nicaragua; they subpoenaed two federal agencies for documents concerning the activities of the Contras at the time of the murder.[206]

In almost all of the cases noted above, the government invoked the state secrets privilege and prevailed.[207] Though some courts were

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[200] Halkin v. Helms ("Halkin I"), 598 F.2d 1, 3 (D.C. Cir. 1978); Halkin v. Helms ("*Halkin II*"), 690 F.2d 977, 980–81 (D.C. Cir. 1982).

[201] ACLU v. Brown, 619 F.2d 1170, 1172 (7th Cir. 1980) (en banc).

[202] *In re* United States, 872 F.2d 472, 474 (D.C. Cir. 1989). For a discussion of the COINTELPRO program, the objective of which was to neutralize leftist groups through infiltration and smear campaigns from 1956 to 1971, see generally *Going Undercover/Criminalizing Dissent?*, NOW WITH BILL MOYERS, March 5, 2004, http://www.pbs.org/now/politics/cointelpro.html; Paul Wolf, COINTELPRO ,http://www.icdc.com/~paulwolf/cointelpro/cointel.htm (last visited Sept. 3, 2006). Actress Jean Seberg, one of many celebrity targets of the program, blamed the miscarriage of her child on FBI harassment and ultimately committed suicide in 1979. *Jean Seberg: Politics*, http://www.saintjean.co.uk/politics.htm (last visited Sept. 3, 2006). For copies of COINTELPRO documents relating to Seberg and an account of her time targeted by the program, see *id.*

[203] Certain aspects of the *Edmonds* case fall into this category. *See Infra* Part V.C.

[204] Pan Am. World Airways, Inc. v. Aetna Cas. and Sur. Co., 368 F. Supp. 1098, 1100–01, 1140 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974).

[205] Nejad v. United States, 724 F. Supp. 753, 754 (C.D. Cal. 1989).

[206] Linder v. Calero-Portocarrero, 183 F.R.D. 314, 316 (D.D.C. 1998), *aff'd*, 251 F.3d 178 (D.C. Cir. 2001).

[207] *In re United States*, 872 F.2d at 481; Halkin v. Helms ("Halkin II"), 690 F.2d 977, 1001, 1003 (D.C. Cir. 1982) (partially basing its decision on the "constitutional requirement" that the needs of the litigant yield to the public interest); Halkin v. Helms ("Halkin I"), 598 F.2d 1, 11 (D.C. Cir. 1978); Ellsberg v. Mitchell, 709 F.2d 51, 59 (D.C. Cir. 1983) (holding that the district court's blocking discovery based on the privilege was correct "for the most part"); *Linder*, 183 F.R.D. at 325; *Nejad*, 724 F. Supp. at 756; *Pan Am. World Airways*, 368 F. Supp. at 1140–41. The court in *Brown* remanded to the district court for a determination as to the privilege where there was a new trial judge on the case. ACLU v. Brown, 619 F.2d 1170, 1173 (7th Cir.

more demanding than others, the end result was that each of these potentially explosive cases was stalled, halted, or outright dismissed.

These cases presented a challenge to the *Reynolds* framework. The surveillance cases, in particular, moved state secrets case law out of the black-and-white workability of *Reynolds* itself and commercial litigation cases, and confronted courts with the likelihood that victims of egregious constitutional violations were remediless. For the first time the possibility of bad faith in invoking the privilege crept into the picture—the possibility that government officials, tangled in allegations of mass invasions of privacy and political intimidation, were crouching behind the shield of the state secrets privilege.[208] In fact, the D.C. Circuit found an overreach in *Ellsberg v. Mitchell* when the government claimed it need not produce the names of the Attorneys General who authorized the allegedly unconstitutional surveillance.[209] The panel, unimpressed by the conjurations of broad national security interests, ordered the names be produced.[210]

Bound by Supreme Court precedent, the most courts could do in these cases was wring their hands at the mass of alleged potential violations that were going by the boards.[211] *Reynolds*, with its holding that the interests of a private litigant can never outweigh the properly asserted interests of the government,[212] forbade them from even considering that the interests of the plaintiffs in the surveillance cases approached those of the government. Yet, it can be argued that these plaintiffs invoked interests that equaled, or even outweighed, the potential harm to national security that the government decried.

1980) (en banc). The court in *Nat'l Lawyers Guild* set out procedures to be followed in claiming the privilege. Nat'l Lawyers Guild v. Attorney Gen., 96 F.R.D. 390, 403 (S.D.N.Y. 1982).

[208] The Ellsberg affair was a prominent part of the most notorious cover-up in modern U.S. politics, Watergate, as the first operation of the so-called "Plumbers" was breaking into Ellsberg's psychiatrist's office. *White House Plumbers*, WIKIPEDIA, http://en.wikipedia.org/wiki/White_House_Plumbers (last visited Aug. 22, 2006).

[209] *Ellsberg*, 709 F.2d at 60.

[210] *Id.* ("We cannot see, and the government does not even purport to explain, how any further disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials."). White House counsel Charles Colson served time in prison for obstruction of justice in the Ellsberg affair. *Revisiting Watergate: Key Players: Charles Colson*, WASHINGTONPOST.COM, http://www.washingtonpost.com/wp-srv/onpolitics/watergate/charles.html (last visited Aug. 22, 2006).

[211] *See In re United States*, 872 F.2d at 477 (calling denial of a forum without allowing a plaintiff a day in court "draconian"); *Halkin II*, 690 F.2d at 1001 (stating that only Congress could provide relief to parties alleging injury from the government "pursuing the ends of state").

[212] United States v. Reynolds, 345 U.S. 1, 11 (1953).

If correct in their allegations, they were standing up against threats to the Bill of Rights and supplying the political process with subjects for discourse. Yet, in the ultimate evaluation the plaintiffs alleged no government wrongdoing that directly threatened national security.

In the post-September 11th world, courts must grapple with invocations of the privilege in the context of two new areas: the war on terror and the phenomenon of national security whistleblowers.

Perhaps most notably, the government has invoked the state secrets privilege in a number of cases in which the plaintiffs have alleged they were the targets of warrantless electronic surveillance initiated by the National Security Agency.[213] Moreover, the suit of Khalid El-Masri, a German citizen who alleges he was abducted and "rendered" to Afghanistan for four months of torture, ran into the buzzsaw of the privilege.[214] The Global Relief Fund, a charity that

[213] The plaintiffs in the respective cases challenged the constitutionality of the so-called "terrorist surveillance program," which the *New York Times* reported President Bush authorized by secret order, a fact which the President himself confirmed in a radio address. James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; Kelli Arena, *Bush Says He Signed NSA Wiretap Order*, CNN.COM, Dec. 17, 2005, http://www.cnn.com/2005/POLITICS/12/17/bush.nsa. The government invoked the privilege as an intervenor in two of the reported cases and as a party defendant in the third. ACLU v. NSA/Cent. Sec. Serv., No. 06-CV-10204, 2006 U.S. Dist. LEXIS 57338, at *5 (E.D. Mich. Aug. 17, 2006) (party defendant); Terkel v. AT&T Corp., No. 06 C 2837, 2006 U.S. Dist. LEXIS 50812, at *2 (N.D. Ill. July 25, 2006) (intervenor); Hepting v. AT&T Corp., No. C-06-672 VRW, 2006 U.S. Dist. LEXIS 49955, at *7 (N.D. Cal. July 20, 2006) (intervenor). The courts upheld the privilege as to those alleged aspects of the program which were not made public, including alleged tracking of the phone records of millions of Americans, but denied it as to the aspect which the government publicly disclosed, monitoring communications between suspected al Qaeda members based in America and their cohorts abroad. *See ACLU*, 2006 U.S. Dist. LEXIS 57338 at *24—25; *Terkel*, 2006 U.S. Dist. LEXIS 50812, at *49–52; *Hepting*, 2006 U.S. Dist. LEXIS 49955 at *58–62. In the *ACLU* case, Judge Diggs Taylor ordered an injunction against the publicly disclosed aspect of the program, reasoning that "the public interest is clear, in this matter. It is the upholding of our Constitution." *ACLU*, 2006 U.S. Dist. LEXIS 57338 at *79.

[214] El-Masri v. Tenet, No 1:05cv1417, 2006 U.S. Dist. LEXIS 34577, at *2–7 (allegations), 17–25 (discussion of the privilege); *see also* Declaration of James P. Comey, Deputy Attorney General, Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. 04-CV-0249-DGT), *available at* http://www.fas.org/sgp/jud/arar-notice-011805.pdf (invocation of the privilege in reply to another rendition/torture case). The court in *Arar* held the government's state secrets claim was moot, as there were other grounds for dismissal. *Arar*, 414 F. Supp. 2d at 287. For a discussion of the *Arar* case and the secret "extraordinary rendition" program, see Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106. It has recently been revealed that a key feature of the program is a network of secret prisons which the United States maintains in Eastern Europe and Asia. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set up After 9/11*, WASH. POST, Nov. 2, 2005, at A01.

sued after the government allegedly conducted warrantless searches and froze its assets, met the same fate.[215] Sibel Edmonds leads the charge of national security whistleblowers, but remains the only such plaintiff to encounter the state secrets privilege. Other whistleblowers include: Coleen Rowley, one of *Time* magazine's 2002 Persons of the Year,[216] who blasted the FBI for throwing up roadblocks in the investigation of Zacarias Moussaoui;[217] Bogdan Dzakovic, a member of the Federal Aviation Administration (FAA) "Red Team" who told the September 11 Commission that the FAA knew before September 11th that the nation's commercial airplanes were vulnerable to hijackings;[218] Robert Wright, who alleged FBI intelligence agents thwarted counterterrorism investigations in order to protect their sources;[219] John Vincent, an FBI agent who sued the Bureau after it forbade him to talk to *New York Times* reporter Judith Miller about a bungled terrorism investigation;[220] Diane Kleiman, who alleges rampant corruption in the U.S. Customs Service and is suing for wrongful termination;[221] and Russ Tice, an NSA analyst who was fired after going to Capitol Hill with allegations that a Chinese spy worked with him at his former post at the Defense Intelligence Agency (DIA).[222]

Courts and commentators may shuffle the Arar, Global Relief Fund, and no-fly list cases into the same category as the surveillance cases (even though Arar alleges he was tortured in Syria!). The *Ed-*

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[215] Global Relief Fund, Inc. v. O'Neill, 205 F. Supp. 2d 885, 887 (N.D. Ill. 2002).

[216] Amanda Ripley & Maggie Sieger, *The Special Agent*, TIME, Dec. 30, 2002/Jan. 6, 2003, at 34.

[217] *See* Romesh Ratnesar & Michael Weisskopf, *How the FBI Blew the Case: The Inside Story of the FBI Whistle-Blower Who Accuses Her Bosses of Ignoring Warnings of 9/11. A Reading of Her Entire Memo Suggests a Bracing Blueprint for Change*, TIME, June 3, 2002, at 24.

[218] *See* Bogdan Dzakovic, Statement to the National Commission on Terrorist Attacks upon the United States (May 22, 2003), http://www.globalsecurity.org/security/library/congress/9-11_commission/030522-dzakovic.htm. Dzakovic also claims the FAA received a report on September 11 that one of the planes was hijacked with a firearm. *Id.*

[219] Press Release, Judicial Watch, FBI Agent Robert Wright Says FBI Agents Assigned to Intelligence Operations Continue to Protect Terrorists from Criminal Investigations and Prosecutions (Sept. 11, 2002), http://www.judicialwatch.org/printer_2469.shtml.

[220] *See* Complaint, Vincent v. FBI, No. 03-0226 (GK) (D.D.C. June 17, 2004), *available at* http://www.judicialwatch.org/cases/110/complaint.htm.

[221] Customs Coverup, http://www.customscoverup.com (last visited Aug. 28, 2006); Craig Horowitz, *An Inconvenient Woman*, NEW YORK, June 2, 2003, *available at* http://newyorkmetro.com/nymetro/news/crimelaw/n_8740/.

[222] James Ridgeway, *Intelligence Whistleblower Canned*, VILLAGE VOICE, May 4, 2005, *available at* http://www.villagevoice.com/news/0519,webmondo1,63748,6.html; Rose, *supra* note 2, at 280.

monds case and the particular brand of national security whistleblower litigation that may follow, however, pose a unique challenge to the viability of the *Reynolds* framework.

More than any other type of state secrets case, a national security whistleblower case carries the possibility that the public interest in disclosure, or at least allowing a case to go forward with judicial controls, outweighs the interest in secrecy. After all, in such a case a plaintiff necessarily alleges government wrongdoing (either malfeasance or nonfeasance) that threatened or is threatening national security.[223] On the one hand the government may argue that military or diplomatic secrets are at stake, but on the other hand are allegations that espionage rings and organized crime have infiltrated the FBI,[224] that terrorist investigations have been diverted,[225] that massive amounts of cocaine have been smuggled into the U.S. through corruption,[226] and that foreign intelligence operates at the DIA.[227] Dismissing these cases may protect some aspects of national security, but leave others extremely vulnerable.

IV. *EDMONDS V. DEPARTMENT OF JUSTICE*[228]

A. Facts

Sibel Edmonds answered a call from the FBI, the week after the September 11th attacks, to join the War on Terror as a contract linguist.[229] In time she found herself waging another war.

Edmonds was born in Turkey, raised in Iran, and attended college in the United States, where she has lived ever since.[230] She

[223] *See supra* notes 26, 216–222, and discussion of *Edmonds* case *infra* at Part V.A.

[224] *See supra* note 8; *infra* at Part V-A.

[225] *See supra* note 219 and accompanying text.

[226] *See supra* note 221 and accompanying text.

[227] *See supra* note 222 and accompanying text.

[228] Edmonds v. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 734 (2005).

[229] *See* Edmonds 2005 Complaint, *supra* note 8, ¶ 10, at 3. The 2005 complaint (setting out Edmonds' FTCA action against the federal government) arises from the same set of facts underlying Edmonds' suit under the Privacy Act, Administrative Procedures Act, and First and Fifth Amendments, but is more specific than its predecessor. *Compare* Edmonds 2005 Complaint, *supra* note 8 *with* Edmonds 2002 Complaint, *supra* note 7.

[230] Edmonds 2005 Complaint, *supra* note 8, ¶ 8, at 2; Rose, *supra* note 2, at 266–67.

speaks Turkish, Farsi, Azerbaijani, and English.[231] She does not speak Arabic.[232]

Under constraint of gag orders,[233] Edmonds alleges that as a contract linguist she was responsible for translating documents from the target language into English, and occasionally the other way around.[234] In her position she allegedly observed that a fellow translator in her department, Melek Can Dickerson, had improper contacts with subjects of FBI investigations.[235] Dickerson, according to Edmonds, translated wiretaps of these subjects and leaked information to them.[236] Moreover, she instructed Edmonds not to translate certain documents because she said she knew the subjects, and the documents did not contain any pertinent information.[237] As a result, documents and wiretaps relating to counterintelligence and counterterrorism investigations were mistranslated and distorted, throwing off the investigations.[238] Furthermore, work order documents related to the September 11th investigation were falsified and Edmonds' signature was forged on them.[239] Edmonds alleges that when she objected to these practices, Dickerson first attempted to bribe her[240] and then threatened her.[241]

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[231] Horton, *supra* note 5. Edmonds' FTCA complaint presents this by stating, "[p]ublished media reports have stated that she is fluent in Turkish and Farsi, and conversational in Azerbaijani." Edmonds 2005 Complaint, *supra* note 8, ¶ 7, at 2.

[232] Horton, *supra* note 5.

[233] *See* Horton, *supra* note 5.

[234] Edmonds 2005 Complaint, *supra* note 8, ¶ 11, at 3.

[235] *Id.* ¶ 17, at 4.

[236] *Id.*

[237] *Id.*

[238] *Id.* at 5.

[239] *Id.* For Edmonds' description to September 11 Commissioner Thomas Kean of Dickerson's actions and their repercussions, see Letter from Sibel Edmonds to Thomas Kean, Chairman, Nat'l Comm. on Terrorist Attacks upon the U.S. (Aug. 1, 2004), at 1–3 [hereinafter Kean Letter], http://www.justacitizen.com/articles_documents/Letter_to_Kean.pdf. In the letter Edmonds claims that "Dickerson and several FBI targets of investigation left the United States in 2002 . . . ." *Id.* at 3.

[240] Edmonds 2005 Complaint, *supra* note 8, ¶ 18, at 5–6. Allegedly Dickerson and her husband, who had worked for years as a military attaché in Ankara, paid a surprise visit to Edmonds and her husband at their home. *Id.* The couple encouraged them to join the American-Turkish Council, a prestigious and lucrative organization, and intimated that all they would have to do to get in was tell the group Edmonds worked for the FBI. *Id.*

[241] Rose, *supra* note 2, at 273. Edmonds claims that about a month after the surprise visit, Dickerson told her she was endangering her family in Turkey. *Id.* ("According to Edmonds, [Dickerson said,] 'Why are you doing this, Sibel? Why don't you just drop it? You know there could be serious consequences. Why put your family in Turkey in danger over this?'"). Edmonds alleges her sister fled Turkey for the

Edmonds has hinted that she witnessed even more sordid practices during her time as a contract linguist, though apparently gag orders keep her from elaborating.[242] Reportedly, she alleged to her superiors that the translation department was covering up evidence that foreign nationals had paid a State Department staffer in exchange for secrets, negotiated with a Pentagon official over weapons procurement, discussed installation of spies at research facilities in order to gain information regarding black-market nuclear weapons, and referred in recordings to drug operations and money laundering.[243] Moreover, one author claims Edmonds listened to phone calls in which targets spoke of attempting to bribe members of Congress of both parties.[244]

United States in early 2002 after Sibel warned her she was in danger. Edmonds 2005 Complaint, *supra* note 8, ¶ 24, at 8. Edmonds further charges that beginning in late 2002, Turkish newspapers began running stories labeling her a spy and an enemy of the Turkish state. *Id.* ¶¶ 55–63, at 14–16.

[242] Rose, *supra* note 2, at 271–73, 280–81. Reporter David Rose apparently obtained information on the case from congressional staffers present during both Edmonds' testimony and the FBI briefings at the secure Sensitive Compartmented Information facility. *Id.* (quoting congressional staffers). Edmonds says she is sure the staffers based their tips "on the wiretap recordings they heard and the documents [provided at the testimony and briefings]." Horton, *supra* note 5.

[243] Rose, *supra* note 2, at 272. Reportedly Edmonds translated documents and wiretaps relevant to an FBI investigation of Turkish nationals, particularly members of the American-Turkish Council (hereinafter "ATC") and targets inside the Turkish embassy in Washington. *Id.*; Horton, *supra* note 5. During the course of the investigations a special agent who had already formed his own suspicions about Dickerson directed Edmonds to go back and translate wiretaps which Dickerson had marked as "not pertinent." When Edmonds did so, according to Rose, she found information relating to the secret payments and negotiations mentioned above. Rose, *supra* note 2, at 272; Horton, *supra* note 5.

[244] Rose, *supra* note 2, at 281. In particular, the targets allegedly boasted about making an illegal contribution of $500,000 to House Speaker Dennis Hastert in 2000 in order to get him to pull a resolution from the House floor which would have condemned Turkey for its alleged genocide of the Armenians. *Id.* at 281–82; Horton, *supra* note 5. Supposedly there was an effort within the FBI to have a special prosecutor appointed to investigate the dealings with politicians, but nothing ever came about, though the Campaign for Responsibility and Ethics in Washington has filed a complaint requesting an investigation under federal election law as to whether Hastert accepted illegal foreign funds. Rose, *supra* note 2, at 281; Campaign for Responsibility and Ethics in Washington, CREW Files FEC Complaint Requesting Investigation into Foreign Donations to Rep. Dennis Hastert's Campaign (Aug. 16, 2005), http://www.citizensforethics.org/activities/campaign.php?view=80. As for the resolution supposedly pulled from the floor in 2000, the House International Relations Committee passed two such resolutions in October 2005 condemning the Armenian genocide. H.R. Res. 316, 109th Cong. (2005); H.R. Con. Res. 195, 109th Cong. (2005); *see also* Press Release, Armenian National Committee of America, House International Relations Committee Overwhelmingly Adopts Armenian Genocide Legislation (Sept. 15, 2005), http://www.anca.org/press_releases/press_releases.php?prid=813. As it happens, ATC Chairman Scowcroft wrote Hastert

The specifics of Edmonds' journey through the official channels of the FBI and Department of Justice are mostly undisputed. Starting in January 2002, she told her story to the Supervisory Language Specialist, the Acting Assistant Special Agent in Charge (ASAC), the FBI Security Office, the Executive Assistant Director for Counterterrorism and Counterintelligence, the Deputy Assistant Director for Counterterrorism and Counterintelligence, the FBI Office of Professional Responsibility (OPR), and the Department of Justice Office of the Inspector General (OIG).[245]

The efforts were unavailing. Edmonds underwent a polygraph examination administered to determine if she had made unauthorized disclosures of information outside the Bureau, and passed.[246] Otherwise nothing came of her allegations.[247]

In March 2002, with her complaints to the OPR and OIG still pending, Edmonds was terminated.[248] She claims that she was threatened with imprisonment as she was getting fired and that her superiors told her the OPR and OIG would never take her case.[249] Moreover, she alleges that a month later the Turkish security service executed a warrant at the home of her sister, who had already fled the country.[250]

a letter in September 2005 urging him to oppose the resolutions. Letter from Brent Scowcroft, Chairman, American-Turkish Council, to Dennis Hastert, Speaker of the House of Representatives (Sept. 12, 2005), http://www.anca.org/press_releases/press_releases.php?prid=810.

[245] Edmonds 2005 Complaint, *supra* note 8, ¶¶ 21, 23, 25, 30–31, at 6–9.

[246] *Id.* ¶ 33, at 8–9.

[247] *Id.* ¶ 17, at 5 ("FBI management failed to take corrective response to [Edmonds'] reports and serious concerns . . . .").

[248] *See id.* ¶ 38 at 10–11.

[249] *Id.* ¶ 38 at 11. Specifically, Edmonds alleges Supervisory Special Agent Tom Frields told her, in response to her vow that she'd see him again, "I will see you in jail." *Id.* Moreover, she claims that, after she mentioned the pending investigations, Frields told her, "[w]e have already called them. OIG and OPR are not willing to take your case and have told us that there will not be any investigation." Edmonds, 2005 Complaint, *supra* note 8, at 11.

[250] *Id.* ¶ 41, at 12. Supposedly the warrant read, "[f]or an important issue your deposition/interrogation is required. If you do not report to the station within 5 days, between 09:00 and 17:00, as is required by Turkish law CMK.132, you will be taken/arrested by force." Rose, *supra* note 2, at 279. Edmonds later forwarded through counsel a copy of the warrant to FBI Director Mueller and Attorney General Ashcroft, along with a statement that she and her family were in danger. Edmonds 2005 Complaint ¶ 43, at 12.

Edmonds soon attracted the attention of Senators Grassley and Leahy, who expressed their concerns to Attorney General Ashcroft.[251] Over the next few years she gave testimony in a "secure Sensitive Compartmented Information facility" to congressional staffers, OIG investigators, and September 11 Commission staffers.[252] Moreover, the FBI provided briefings to the same parties in the same facility.[253]

B. Edmonds battles the state secrets privilege and classifications

Edmonds filed suit in the District Court for the District of Columbia on July 22, 2002,[254] alleging violations of the Privacy Act,[255] Administrative Procedure Act,[256] and First and Fifth Amendments of the U.S. Constitution.[257] On October 18, 2002 Attorney General Ashcroft invoked the state secrets privilege,[258] touching off a battle of transparency versus secrecy that spilled onto other fronts.

In April 2004, Ashcroft intervened in a case filed by certain September 11 families against Saudi Arabia and certain Saudi companies, just as the plaintiffs were about to depose Edmonds, invoking the privilege and moving the court to quash the deposition.[259] Later, in May 2004, Ashcroft retroactively classified all Senate Judiciary Committee materials on Edmonds, including information on Leahy's and Grassley's websites, an unprecedented move.[260]

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[251] *See* Letter from U.S. Senators Charles E. Grassley and Patrick J. Leahy to John Ashcroft, U.S. Attorney Gen. (Aug. 13, 2002), http://www.justacitizen.com/articles_documents/Leahy_Grassley_Letter_to_Ashcroft_8-13-04.pdf.

[252] Rose, *supra* note 2, at 266.

[253] *Id.* at 271.

[254] Edmonds 2002 Complaint, *supra* note 7.

[255] 5 U.S.C. § 552a (2000).

[256] 5 U.S.C. §§ 551–59, 701–06 (2000).

[257] Edmonds 2002 Complaint, *supra* note 7. Edmonds sued for damages, reinstatement to her job, an order prohibiting the FBI from retaliating against her or her family, and other injunctive relief. *Id.* Edmonds also filed a suit against the FBI under the Freedom of Information Act, 5 U.S.C. § 552 (2000). The court granted summary judgment for the government on all but two of its claims of exemption from providing documents. Edmonds v. FBI, 272 F. Supp. 2d 35, 42 (D.D.C. 2003).

[258] Edmonds v. Dep't of Justice, 323 F. Supp. 2d 65, 73 (D.D.C. 2004), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005), *cert. denied*, 126 S, Ct. 734 (2005). The government also moved to dismiss. *Id.* at 68.

[259] Burnett v. Al Baraka Inv. & Dev. Corp., 323 F. Supp. 2d 82, 82 (D.D.C. 2004).

[260] Edmonds, Gagged, but Not Dead, *supra* note 1. The Justice Department backed off of this position after the Project on Government Oversight filed suit. Press Release, Project on Government Oversight, Justice Department Caves in: Allows Publication of Retroactively Classified Information (Feb. 22, 2005), http://www.pogo.org/p/government/ga-050202-classification.html.

In July 2004, District Judge Walton[261] upheld both the invocation of the privilege in the *Edmonds* case[262] and the motion to quash the deposition in the *Burnett* case.[263] Edmonds had challenged the government's invocation of the privilege in her case on the grounds that Ashcroft did not personally consider the purportedly privileged materials[264] and was not specific as to what should be privileged.[265] The court rejected these arguments, first holding that the Attorney General met the personal consideration requirement.[266] Relying on *Kasza v. Browner*,[267] the court reasoned that Ashcroft had expressed a level of consideration similar to that of the Secretary of the Air Force in that case,[268] and the deputy director of the FBI supported his declaration.[269] Turning to the specificity argument, the court stated that after reviewing several classified declarations *in camera*, it was satisfied that Ashcroft had met this obligation.[270] Judge Walton, however, added that he was unable to explain the basis of his decision, given secrecy concerns.[271] Finally, the court held the case should be dismissed, reasoning that Edmonds would not be able to support any of her claims.[272] The court based its decision on further classified decla-

[261] Judge Walton is currently presiding over the criminal case against I. Lewis "Scooter" Libby, former Chief of Staff for Vice President Cheney, who was indicted in October 2005 on charges of obstruction of justice, perjury, and making false statements. Kelli Arena et al., *Cheney's Top Aide Indicted; CIA Leak Probe Continues*, CNN.COM, Oct. 29, 2005, http://www.cnn.com/2005/POLITICS/10/28/leak.probe/index.html.

[262] *Edmonds*, 323 F. Supp. 2d at 73, 77.

[263] Burnett, 323 F. Supp. 2d at 84. The court granted the motion in part and denied it in part. *Id.*

[264] *Edmonds*, 323 F. Supp. 2d at 73.

[265] *Id.* at 75.

[266] *Id.*

[267] 133 F.3d 1159 (9th Cir. 1998).

[268] *Id.* at 1168 (setting out statement of the Secretary of the Air Force).

[269] *Edmonds*, 323 F. Supp. 2d at 75.

[270] *Id.* at 76.

[271] *Id.*

[272] *Id.* at 79–82. Citing *Kasza*, the court set out three possible outcomes where the state secrets privilege is successfully invoked:

> First, by invoking the privilege over particular evidence, the evidence is completely removed from the case. The plaintiff's case then goes forward based on evidence not covered by the privilege. If, after further proceedings, the plaintiff cannot prove the prima facie elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case.
>
> Alternatively, if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.

rations that privileged materials could not be disentangled from non-privileged materials.[273] Judge Walton, quoting *In re United States*,[274] wrote: "dismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court . . . is indeed draconian. Denial of the forum provided under the Constitution for the resolution of disputes . . . is a drastic remedy that has rarely been invoked."[275]

The same day as the decision in *Edmonds*, Judge Walton partially granted the government's motion to quash Edmond's deposition in the *Burnett* case, throwing out nine of the plaintiffs' eighteen proposed questions.[276] The court based its decision on the reasoning set out in the *Edmonds* opinion.[277] It also took the "mosaic" approach described above, positing that although certain questions seemed innocuous, privileged material would inevitably be disclosed during cross-examination.[278] Ultimately, the plaintiffs were permitted only to ask Edmonds her name, when she came to the United States, the level of her education, her first job out of school, whether she was ever an employee of the federal government, when she worked for the government, whether she still worked for the government, and what her current employment was.[279]

> Finally, notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the "very subject matter of the action" is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege. While dismissal of an action based on the state secrets privilege is harsh, the results are harsh in either direction and the state secrets doctrine finds the greater public good—ultimately the less harsh remedy—to bed dismissal.

Id. at 78 (quoting *Kasza*, 133 F.3d at 1166–67).

[273] *Edmonds,* 323 F. Supp. 2d at 79–81.

[274] 872 F.2d 472, 477 (D.C. Cir. 1989).

[275] *Edmonds*, 323 F. Supp. 2d at 81 (quoting *In re United States*, 872 F.2d at 477 (citation omitted) (internal quotations omitted).

[276] *Burnett,* 323 F. Supp. 2d at 84; *see also* Posting of Dacha Dude to http://homepage.mac.com/kaaawa/iblog/C177199123/E1350718859/index.html (July 9, 2004, 11:09 EST) [hereinafter Permissible Questions for Edmonds].

[277] *Burnett*, 323 F. Supp. 2d at 82–83.

[278] *Id.*

[279] Permissible Questions for Edmonds, *supra* note 276. The plaintiffs were *not* allowed to ask Edmonds the following questions: "2) When and where were you born?. . . 5) Where did you go to school? . . . .7) What did you focus your studies on in school? 8) What languages do you speak? 9) What is your fluency or proficiency in each of these languages? . . . 13) In what capacity have you been employed by the United States government?" *Id.* The plaintiffs were also not allowed to ask Edmonds a host of questions concerning the substance of her allegations set out in Grassley and Leahy's letter to Ashcroft. *Id.*

That same month the OIG published its final report on the Edmonds matter, which Attorney General Ashcroft promptly classified.[280] In January 2005, the OIG released an unclassified summary of its report.[281] Though stating that a final determination as to Dickerson's alleged espionage was beyond the scope of the report,[282] it concluded that some of Edmonds' claims were supported by evidence.[283] Moreover, the OIG determined that the FBI could not demonstrate by clear and convincing evidence that it would have terminated Edmonds if not for her allegations,[284] and the OIG further determined that the FBI's overall investigation of her claims was insufficient.[285] Finally, it recommended, among other things, that an employee from the FBI Language Services Section (or a special agent) interview each incoming contract linguist, that supervisors assign each translation assignment, that a uniform policy be adopted for signing translation work orders, and that a system be installed to track which linguists handle which materials.[286]

In May 2005, the D.C. Circuit Court of Appeals affirmed, in a one-line opinion that did not cite any cases or provide a basis for decision, the lower court's decision in *Edmonds*.[287] The court took the unusual step of announcing the day before oral argument that the press would be barred from the proceeding, even though the government had already offered to argue the case publicly.[288] Edmonds

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[280] Edmonds, *Gagged, but Not Dead*, *supra* note 1.

[281] U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, OFFICE OF OVERSIGHT AND REVIEW, A REVIEW OF THE FBI'S ACTIONS WITH ALLEGATIONS RAISED BY CONTRACT LINGUIST, SIBEL EDMONDS, UNCLASSIFIED SUMMARY (2005), [hereinafter OIG Report], *available at* http://www.usdoj.gov/oig/special/0501/final.pdf.

[282] *Id.* at 2. Dickerson was not named in the report.

[283] *Id.* at 11 ("Edmonds' assertions regarding the coworker, when viewed as a whole, raised substantial questions and were supported by various pieces of evidence.").

[284] *Id.* at 30.

[285] *Id.* at 34.

[286] *Id.* at 32–34.

[287] Edmonds v. Dep't of Justice, 161 F. App'x 6 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 734 (2005).

[288] Petition for a Writ of Certiorari, *Edmonds*, 161 F. App'x 6, 13 (D.C. Cir. 2005) (No. 05-190), *available at* http://www.justacitizen.com/articles_documents/edmonds%20cert[1].%20petition.pdf. The government offered to argue the case publicly on the assumption the courtroom would be cleared if the court wished to ask questions concerning classified information. *Id.* at 47a. Instead, the court ordered the press barred altogether. *Id.* at 12–13. Edmonds urged the Supreme Court to review this part of the case in addition to the state secrets privilege. *Id.* at 26–29; *see also* Edmonds, Gagged but Not Dead, *supra* note 1 ("Numerous media related entities tried to flex their lately weakened muscles and filed their motion to oppose this

filed a petition for a writ of certiorari in August 2005, which the Supreme Court denied in November 2005.[289]

C. How Does the Edmonds *Case Impact National Security?*

Allegations of espionage and organized crime rings infiltrating the FBI have an obvious nexus with national security. Yet Edmonds' claims go even further than that. The missing link in this whole tale, hinted at under constraint of gag orders, is its connection with September 11,[290] articulated in her letter to September 11 Commissioner Tom Kean.[291] Edmonds alleges that both before and after the attacks, information was intentionally withheld from special agents.[292] Overall Edmonds charges that:

> Only one month after the catastrophic events of Sept. 11, while many agents were working around the clock to obtain leads and information, the bureaucratic administrators in the FBI's largest and most important translation unit were covering up their past failures, blocking important leads and information, and jeopardizing ongoing terrorist investigations.[293]

It must be emphasized that Edmonds' allegations are just that, allegations. Yet the OIG has concluded that her claims concerning her coworker's activities were "supported by various pieces of evidence."[294] Moreover, the imposition of gag orders on her only begs the question: What is the government trying to hide?

Edmonds claims she can demonstrate that the actions of the State Department prior to September 11 amounted to "a blunder of a mammoth scale,"[295] and that the excessive FBI secrecy in her case is part of an effort to cover up epic missteps in the September 11 inves-

ruling. The judges denied their motion, and cited no reason; when asked for a reason they responded that they didn't have to provide any reason.").

[289] 126 S. Ct. 734 (2005).

[290] Deliso, *supra* note 3; Horton, *supra* note 5; Kean Letter, *supra* note 239, at 1–7.

[291] Kean Letter, *supra* note 239, at 1–7.

[292] *Id.* at 3–7. Specifically, Edmonds claims that evidence gleaned from counterintelligence investigations which intersected with terror investigations was intentionally blocked because it originated in certain countries with whom the State Department did not wish to harm diplomatic relations. *Id.* at 7. She also alleges that after September 11 her supervisor intentionally withheld from a special agent translated documents indicating that blueprints and other information on skyscrapers were being sent overseas prior to the attacks, as well as that visas were being illegally obtained from certain Middle Eastern embassies. *Id.* at 6.

[293] *Id.* at 6.

[294] OIG Report, *supra* note 281, at 11.

[295] Edmonds, Gagged, but Not Dead, *supra* note 1.

tigation.[296] Furthermore, one author has argued that Attorney General Ashcroft primarily invoked the state secrets privilege in order to protect the appointed officials who were implicated by Edmonds' allegations.[297]

As Edmonds has said, "[i]t is way past time for a little bit of critical thinking."[298] In short, her allegations have everything to do with national security.[299] The walls of the secure Sensitive Compartmented Information facility in which she testified can surely tell of what she knows about bribery of public officials,[300] black market nuclear transactions,[301] and moles in the FBI in league with suspected organized criminals and terrorists.[302]

As invocation of the state secrets privilege has thus far successfully crippled the *Edmonds* case,[303] the question becomes: Should countervailing national security interests be considered when the government invokes the privilege in the name of the common good?

V. PROPOSAL FOR REFORM

This Comment proposes that Congress pass a Rule of Evidence mandating that where a national security whistleblower alleges government wrongdoing[304] that has threatened or is threatening national security, the state secrets privilege must be transformed into a qualified privilege in which the government faces a heightened standard for successful invocation. In a case in which such facts are alleged, a judge must evaluate any purportedly privileged materials *in camera*. The judge must then balance the national security interests associated with the plaintiff's claim against the government's interest in

[296] Sibel Edmonds, *Where Is Accountability?*, ANTIWAR.COM, June 21, 2005, http://www.antiwar.com/edmonds/?articleid=6382.

[297] Rose, *supra* note 2, at 281. The author claims a congressional staffer told him this. *Id.*

[298] Edmonds, Gagged, but Not Dead, *supra* note 1.

[299] Representative Maloney called Edmonds' testimony before a House committee "absolutely and completely terrifying." Edmonds Press Release 2, *supra* note 11.

[300] *See supra* note 244 and accompanying text.

[301] *See Edmonds, Gagged but Not Dead*, *supra* note 1; *supra* note 243 and accompanying text. Edmonds claims her allegations have to do with "a lot of illegal activities that include multi-billion dollar drug-smuggling operations, [and] black-market nuclear sales to terrorists and unsavory regimes . . . ." Christopher Deliso, *"The Stakes Are Too High for Us to Stop Fighting Now": An Interview with FBI Whistleblower Sibel Edmonds*, ANTIWAR.COM, Aug. 15, 2005, http://www.antiwar.com/deliso/?articleid=6934.

[302] *See supra* note 243 and accompanying text.

[303] Edmonds v. Dep't of Justice, 161 F. App'x 6 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 734 (2005); Edmonds v. Dep't of Justice, 323 F. Supp. 2d at 79–82 (D.D.C. 2004).

[304] Congress should define "wrongdoing" to include both nonfeasance and malfeasance.

nondisclosure, and the government may only successfully resist discovery if it can demonstrate that disclosure—even *in camera* to merely the litigant and counsel—presents a substantial possibility that national security will be endangered and outweighs the countervailing national security interests asserted by plaintiff. A judge may interpret Congress's definitions of "whistleblower" and "national security" narrowly or broadly.[305] Moreover, the judge is to make use of *in camera* proceedings and protective orders as justice and national security require.

Furthermore, the Rule should feature certain procedural and reporting requirements designed to balance the interests of the three branches of government. First, there should be sanctions, civil and criminal, in order to check frivolous claims, thus preventing plaintiffs and counsel from wrongfully gaining access to sensitive information.[306] Second, either the judge or the department head invoking the privilege should have a duty to transmit all purportedly privileged materials to ranking members of Congress possessing security clearances.

A. Other Proposals for Reform

The best-known, and most nearly successful, proposal to alter the state secrets privilege was Proposed Rule 509.[307] As described above, it mostly codified *Reynolds*, broadened it in some places, and died at the hands of a Congress readying itself to take on President Nixon.[308]

Another approach to the privilege is reversion to the state of the law before *Reynolds*. Though amorphous and vague, Justices Black, Frankfurter, and Jackson in *Reynolds* favored the status quo in state secrets cases.[309] Specifically they agreed with the Third Circuit that

> a claim of privilege against disclosing evidence relevant to the issues in a pending law suit involves a justiciable question, tradi-

[305] Congress should define the term "whistleblower" to at least include "current or former federal employees or civilians working under contract to the United States who, to their detriment or personal risk, bring to light fraud, waste, and abuse in government operations and agencies when such improprieties compromise the national security of the United States." National Security Whistleblowers Coalition, http://www.nswbc.org/purpose.htm (last visited Aug. 22, 2006).

[306] These sanctions, over and above Rule 11 sanctions, are intended to root out all but the soundest claims where a plaintiff may gain access to secret information.

[307] *See supra* Part III.B.

[308] *Id.*

[309] United States v. Reynolds, 345 U.S. 1, 12 (1953) (Black, Frankfurter, and Jackson, Js., dissenting); *see also supra* text accompanying note 102.

> tionally within the competence of the courts, which is to be determined in accordance with the appropriate rules of evidence, upon the submission of the documents in question to the judge for his examination in camera.[310]

The Third Circuit's holding is in accord with the spirit of the Rule this Comment proposes, but lacks specific procedural requirements that would make the state secrets privilege workable.

One commentator has proposed a comparative standard in assessing all state secrets claims.[311] He argues that "[courts] should determine whether the danger from discovery conducted under conditions imposed by the court warrants withholding the information despite its disclosure value."[312] Yet such an approach—balancing the parties' interests regardless of the type of case a plaintiff brings—departs from the underlying goal of the state secrets privilege, which is protection of the common good.[313] The approach presupposes that the litigant's need in any case should be balanced against the asserted interests in nondisclosure, not contemplating that only in certain cases will a comparative standard serve the public interest more than an absolute privilege.

One commentator has proposed granting opposing counsel a special Justice Department security clearance where disclosure would harm the nation but the privileged material has the "strong potential to aid the opposing party."[314] This is not the most efficient or realistic approach, given how long clearances may take.[315] Again, the commentator proposes a comparative approach where the litigant can show a requisite level of need.[316] This Comment proposes a more focused approach designed to protect the very same national security that the state secrets privilege itself strives to protect.

Another commentator urges the adoption of either of two proposed statutes.[317] The first statute allows a plaintiff to recover damages, between a minimum of $1000 and a maximum of $250,000,

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[310] Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951).

[311] *The Military and State Secrets Privilege*, *supra* note 27, at 584–86.

[312] *Id.* at 584 (footnote omitted).

[313] *See generally supra* note 21.

[314] Brian M. Tomney, Note, 57 ME. L. REV. 641, 662 (2005).

[315] For example, it takes the FBI six to nine months to process top secret security clearances for state and local law enforcement. Security Clearance Process for State and Local Law Enforcement, http://www.fbi.gov/clearance/securityclearance.htm (last visited Aug. 22, 2006).

[316] *Id.* (explaining the proposed standard would apply wherever privileged evidence has the "strong potential to aid the opposing party.").

[317] Gardner, *supra* note 142, at 568.

where the invocation of the state secrets privilege has resulted in dismissal or has substantially affected the plaintiff's case and where the plaintiff can demonstrate a reasonable possibility that he or she would have prevailed on the merits.[318] The second statute permits a plaintiff, after successful invocation of the privilege, to petition the department head invoking it for a settlement compensating him or her, with leave to appeal to a State Secrets Compensation Board.[319] The proposals, while striving to address the interests of plaintiffs with legitimate cases, have weaknesses. These weaknesses include the risk of "graymail,"[320] the unworkability of a standard requiring a judge at the infancy of a case to determine whether there is a "reasonable possibility" of success on the merits,[321] a compensation scheme which resembles a workers' compensation scheme in its inability to make a plaintiff whole, and a lack of equitable relief.

Another scholar contends that where the government asserts the state secrets privilege, the statute of limitations for an action should be tolled until there is no longer a need for secrecy.[322] Yet an asserted need for secrecy may linger until after a litigant is dead, as was the case with the classified accident report in *Reynolds*.[323]

Finally, two commentators argue that the state secrets privilege is in tension with the constitutional order, particularly separation of powers.[324] The Supreme Court, however, refused to treat the privilege as a constitutional matter in *Reynolds*,[325] and in its later encounters with the matter in *Nixon* and *Tenet* expressed no such concerns.[326]

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[318] *Id.* at 602–03.

[319] *Id.* at 606–07.

[320] The Supreme Court has defined so-called "graymail" as the phenomenon of bringing "individual lawsuits . . . to induce [an agency] to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations. Tenet v. Doe, 544 U.S. 1, 11 (2005). The low threshold required for compensation in Gardner's proposed statutes leaves the government particularly vulnerable to graymail. Gardner, *supra* note 142, at 602–03, 606–07.

[321] Gardner, *supra* note 142, at 602.

[322] James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 910 (1966).

[323] *See* Herring v. United States, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545 (E.D. Pa. Sept. 10, 2004), *aff'd*, 424 F.3d 384 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1909 (2006).

[324] Weaver & Pallitto, *supra* note 14, at 112 (arguing the privilege "threatens to undermine the constitutional balance of power . . . ."); *see also* Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951) (holding that to permit the executive to conclusively determine claims of privilege is to "unconstitutionally abdicate the judicial function").

[325] United States v. Reynolds, 345 U.S. 1, 6 (1953).

[326] *See* Tenet v. Doe, 544 U.S. 1 (2005); United States v. Nixon, 418 U.S. 683 (1974).

In fact, in *Nixon* the Court hinted that Article II of the Constitution requires some measure of deference to the Executive where military and diplomatic secrets are concerned.[327]

B. Advantages of This Proposal

The Rule this Comment proposes corrects a flaw in the current state secrets privilege and otherwise leaves it intact, recognizing that the prevailing interest at all times is that of the common good. At present, the privilege fails to protect this common good where it serves to halt a suit by a national security whistleblower.[328] This Comment addresses this malfunction and harmonizes the interests of the three branches of government.

By imposing a stricter standard on the government where a whistleblower alleges threats to national security, only the most direct and serious of dangers to national security resulting from disclosure will prevent such a plaintiff from having a fair day in court. *In camera* proceedings and protective orders, where necessary, will preserve the government's interest in secrecy while allowing plaintiffs to seek damages, reinstatement to their jobs, and restoration of their security clearances. Reforming the state secrets privilege in this way will give teeth to current statutory protections for whistleblowers,[329] which currently are at the whim of the privilege as now interpreted. Overall this will serve the common good by helping patriotic, vigilant citizens to remain in their posts, free of retaliation, and report waste, fraud, and threats to national security as they emerge. The *Edmonds* case illustrates just what a whistleblower may report and just what prospects for relief he or she may hope to gain in the face of the state secrets privilege.[330]

The procedural requirements of the proposed Rule address the needs of the three branches. Required *in camera* review of purportedly privileged materials has the advantages of putting the government to its proof, rooting out bad faith invocations of the privilege, and familiarizing judges with the sort of evidence over which privi-

[327] *See Nixon*, 418 U.S. at 710 ("[President Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.").

[328] *See supra* Part IV.B.

[329] FBI employees are not entitled to the protection of federal whistleblower statutes, but rather must seek redress internally. Geoffrey Gray, *Code of Quiet*, VILLAGE VOICE, June 19–25, 2002, at 43. FBI whistleblower regulations currently do not offer protection to contractors such as Edmonds. *See* 28 C.F.R. § 27 (2005).

[330] *See supra* Part IV.B.

lege is claimed so that the judiciary as a whole can begin forming a more coherent approach to the privilege. *In camera* proceedings and protective orders will accommodate the government's need for secrecy.

Requiring either the judge or the Executive to transmit purportedly privileged materials to members of Congress with security clearances may be the most novel aspect of this proposal.[331] It offers the advantage of giving at least some members of Congress an idea as to what materials the Executive is attempting to keep secret. From this point there can be a dialogue as to Executive secrecy and its propriety. This requirement arms Congress with the tools to further refine the state secrets privilege without having to "rule in a vacuum."[332]

Essentially, the aim of this proposal is to protect the national interest. As one dissenting court of appeals judge explained in a recent commercial case upholding use of the privilege:

> [P]ersons who serve the government must have a reasonable way of resolving disputes. It is neither in the nation's interest, nor can it be the nation's intention, to bar judicial relief when disputes arise among persons who serve sensitive government business . . . .
>
> The judicial obligation is to enable resolution, with safeguards appropriate to the subject matter. Although there may be areas of such sensitivity that no judicial exposure can be countenanced—such as, perhaps, the formation of the Manhattan Project—there is no suggestion that the sensitive information [at issue in this case] can not be protected by well-established judicial procedures for preserving the security of sensitive information . . . .
>
> Trials in camera of issues subject to secrecy restraints are not new . . . .[333]

How would *Edmonds* play out under this proposed Rule? First, as a threshold matter, or at any point during the proceedings, the judge would have to determine whether her claims were frivolous. As long as she was free of this stigma, the judge would review all purportedly privileged materials. The national security interests associated with Edmonds' claims would be balanced against the government's inter-

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[331] In 1998 Congress debated legislation which would have allowed "executive branch employees to directly inform members of Congress or their staff representatives of waste, fraud, or violations of law by administrators." Weaver & Pallitto, *supra* note 14, at 107. The Justice Department objected to the legislation on separation of powers grounds, and it never became law. *Id.* This Comment's proposal differs in that only members of Congress with security clearances would receive the information, thus rendering the intrusion on the Executive minimal.

[332] Zagel, *supra* note 322, at 891.

[333] Crater Corp. v. Lucent Techs., 423 F.3d 1260, 1270–71 (Fed. Cir. 2005) (Newman, J., concurring in part, dissenting in part).

est in secrecy. That is, if she alleged terrorist investigations were compromised by sympathizers in the translation department, then the government would have to assert national security interests in secrecy which outweighed this; if she alleged black market nuclear activities, the government somehow would have to assert an interest in secrecy which would outweigh *that*. If necessary all further proceedings would be *in camer*a and subject to protective orders. All purportedly privileged materials would be transmitted to members of Congress with security clearances.

C. Arguments against this proposal

One issue facing this Rule is the scope and usefulness of its practical application. The state secrets privilege is a narrow area of evidence law, and whistleblower suits are a mere subset of state secrets suits. Yet, after the September 11 attacks, there has been a flood of national security whistleblowers alleging all sorts of wrongdoing which contributed to the most bloody terrorist attack ever carried out on American soil.[334] The emphasis should not be on the quantity of suits, but rather on their *magnitude*. The proposed Rule strives to accommodate a class of litigants who allege wrongdoing which could have implications for all Americans.

Another argument against this proposal is that balancing matters of national security may not be justiciable.[335] It should be noted, however, that in the present state secrets calculus this is precisely what courts do, though with a significant measure of deference to the Executive.[336] Moreover, the proposed Rule invites congressional oversight and at all times guarantees the secrecy which the government seeks.

It also can be argued that the political process will punish those Presidents whose officers use the state secrets privilege to escape blame for damage to national security. Yet excessive invocation of the privilege, combined with gag orders on litigants[337] and attempts to gag members of Congress,[338] stifles the political process before it can even take place.

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[334] *See supra* notes 216–20 and accompanying text.

[335] McCormick argues, where the privilege in question is *not* the state secrets privilege, that "judicial duties require an appraisal of private interests that must be reconciled with conflicting public policies. A judge may thus be better qualified than the executive to weigh both interests and to strike a proper balance." 1 MCCORMICK ET AL., *supra* note 30, at 438.

[336] *See supra* Part III.A.

[337] *See supra* note 5.

[338] *See supra* note 260 and accompanying text.

Yet another possible criticism of this proposal is that it does not go far enough. A strict interpretation of the proposed Rule would, for example, leave the surveillance plaintiffs out in the cold. While it is unacceptable that victims of constitutional violations may be without forums, this Comment does not dispute the basic tenet that the common good must be preserved above all else, meaning some litigants' claims cannot go forward. Under this proposal, however, a judge is always free to interpret "whistleblower" or "national security" broadly, meaning a plaintiff exposing a practice of warrantless surveillance could be a whistleblower, and a system of mass constitutional violations could be held to threaten national security.

Still another criticism of this proposal is that *in camera* exposure of privileged materials to judges, and transmission to select members of Congress, could harm national security by diminishing the quality of executive communications by revealing them to parties for whom they were never intended.[339] Executive officers, so the argument goes, will have a disincentive to pursue the ends of state if there is an ever-present risk that they will be subject to judicial and congressional scrutiny. Yet under this proposal, privileged materials will never be subjected to "curious and impertinent eyes."[340] There seems little danger in exposing sensitive evidence to federal judges appointed by the President and approved by the Senate.[341] Moreover, the only members of Congress who will ever handle state secrets under this proposal are those who have already been granted top secret clearance by the executive.

This leads to another argument against this proposal: if the danger to the executive is minimal, then *all* state secrets cases should be governed by the provisions set out in this Comment, not just national security whistleblower cases. There are two reasons why this argument is unavailing. First, some measure of deference is due to the executive and the judiciary, and this proposal advocates a compromise position in recognition of this. Though it may seem palatable to assail any claim of privilege which seems to have been made in bad faith, judges thus far have seemed uneasy at the prospect of examin-

[339] See *supra* note 130 and accompanying text, for Wigmore's four conditions which give rise to privilege and how they are intended to foster robust communications which the community prefers to be protected.

[340] Weaver & Pallitto, *supra* note 14, at 97 (citing the Trial of Maha Rajah Nundocomar, (1775) 20 State Trials 923, 1057 (Sup. Ct. of Judicature, Bengal)).

[341] 2 WEINSTEIN & BERGER, *supra* note 19, at §§ 509–20 ("[D]isclosure in camera to one federal district judge, whose appointment was ratified by the Senate itself, does not threaten the national security more than disclosure to the employees of the executive agency who classified the information.").

ing materials which they do not feel are for their eyes.[342] Moreover, the Supreme Court has cautioned that deference is owed to the Executive where state secrets are at stake.[343] Second, and perhaps more importantly, an important distinction must be made between state secrets cases in which plaintiffs' allegations have a direct nexus with national security and those which, while adjudicating important rights, feature an attenuated nexus. In the sort of national security whistleblower case which this proposal envisions, a plaintiff alleges that waste, fraud, corruption, and the like have put lives in danger;[344] thus a departure from the typical state secrets rule is appropriate because a whistleblower plaintiff permitted to pursue his or her claim can help put an end to such practices. A plaintiff in another sort of state secrets case, such as an employment discrimination case, does not allege that national security has been or is being directly threatened; the same danger of revealing secrets remains, and there is much less of a reason to depart from the *Reynolds* framework where the benefit to the litigant does not also bring a benefit to national security.

Finally, one can argue that tinkering with the state secrets privilege in this way is unconstitutional. The Supreme Court hinted in *Nixon* that the Constitution requires some deference to the Executive where it seeks to protect military and domestic secrets.[345] Yet this Comment leaves the state secrets privilege mostly intact and only alters it in an area in which it does more harm than good. Furthermore, there is a strong argument that the current state secrets privilege requires courts to unconstitutionally "abdicate the judicial function."[346]

CONCLUSION

One unfortunate consequence of allegations like Edmonds' is that, uncontested for so long, they tend to calcify into cynicism towards government. Indeed, a 2004 Zogby poll revealed that half of New York City residents believed that the government had foreknowledge of the September 11 attacks and consciously failed to act.[347] Perhaps most disconcerting is that among those under thirty

[342] *See supra* notes 149–51 and accompanying text.

[343] United States v. Nixon, 418 U.S. 683, 710–11 (1974).

[344] For example, a plaintiff may allege that persons working for the FBI are abetting suspected terrorists.

[345] *Nixon*, 418 U.S. at 710.

[346] *See* Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951).

[347] Zogby International, Half of New Yorkers Believe US Leaders Had Foreknowledge of Impending 9-11 Attacks and "Consciously Failed" To Act (Aug. 30, 2004), http://www.zogby.com/news/ReadNews.dbm?ID=855 [hereinafter Zogby Poll]. Ac-

years of age, who in the decades to come will be inheriting the reigns of this republic, 62.8% held that view.[348] As President Carter once said, "if we despise our own government, we have no future."[349]

Over 13,000 individuals have signed Sibel Edmonds' online petition seeking release of the classified OIG report.[350] Members of Congress have pledged support.[351] And for her part, Edmonds has vowed to soldier on:

> In the past three years, I have been threatened; I have been gagged several times; I have continuously been prevented from pursuing my due process; all reports and investigations looking into my case have been classified; and every governmental or investigative authority dealing with my case has been shut up. . . .
>
> [But] for those of you who may think that since I have been gagged and stopped by almost all available official channels, I must be ready to vaporize into thin air, please think again. I am gagged, but not dead; not yet.[352]

Congress must reform the state secrets privilege, and it must begin to do so by protecting national security whistleblowers. No doctrine designed to protect the common good should be used as a sword to strike down allegations that the common good is in danger.

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cording to a July 2006 Scripps Howard/Ohio University poll, thirty-six percent of Americans nationwide hold this view, including "a majority of young adults." Thomas Hargrove, *Third of Americans Suspect 9-11 Government Conspiracy*, SCRIPPS NEWS, http://www.scrippsnews.com/911poll (last visited August 2, 2006).

[348] Zogby Poll, *supra* note 347.

[349] Inaugural Address of President Jimmy Carter, 1 PUB. PAPERS 2 (Jan. 20, 1977).

[350] Sibel Edmonds, Release of Classified DOJ-IG Report on FBI Cover-Up Petition, http://www.petitiononline.com/deniz18/petition.html (last visited Aug. 22, 2006).

[351] Edmonds Press Release 2, *supra* note 11.

[352] Edmonds, Gagged, but Not Dead, *supra* note 1.