No. 04-5286

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

SIBEL EDMONDS,

Plaintiff–Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants–Appellees.

Appeal from the United States District Court
for the District of Columbia
Case No. 1:02-CV-01448-RBW
The Honorable Reggie B. Walton

BRIEF OF THE PLAINTIFF-APPELLANT

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. On July 6, 2004, the district court entered an order dismissing the action. Ms. Edmonds timely appealed. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing this case based on the government's assertion of the state secrets privilege, prior to discovery, without first allowing plaintiff to prove her claim with nonprivileged evidence, and without considering alternatives to dismissal.

STATEMENT OF THE CASE

Plaintiff-Appellant Sibel Edmonds, an FBI contract linguist, filed this action against the FBI, the Department of Justice, and various high-level officials, alleging violations of the First Amendment, the Privacy Act, and the Due Process Clause arising from her retaliatory firing and from the government's subsequent disclosures to the media. On July 6, 2004, the district court dismissed the suit, prior to discovery, on the basis of the state secrets privilege. This appeal followed.

STATEMENT OF THE FACTS

Following the terrorist attacks of September 11, 2001, Sibel Edmonds was hired by the FBI as a contract linguist to perform translation services in the Bureau's Washington Field Office. Joint Appendix ("J.A.") 38 (Compl. ¶¶ 10-12). To obtain the requisite security clearance, Ms. Edmonds was subjected to, and passed, a polygraph examination and a ten-year background investigation. J.A. 38-39 (Compl. ¶ 14).

Between December 2001 and March 2002, Ms. Edmonds reported a number of allegations to FBI management officials concerning "serious breaches in the FBI security

program and a breakdown in the quality of translations as a result of willful misconduct and gross incompetence." J.A. 39 (Compl. ¶ 15). Ms. Edmonds' reports of misconduct included allegations that numerous communications were left untranslated or mistranslated, thereby jeopardizing intelligence and law enforcement investigations related to the September 11 attacks and other ongoing counterterrorism, counterintelligence, and law enforcement investigations. Ms. Edmonds further reported that a fellow employee who had been granted a security clearance had past and ongoing associations with one or more targets of an ongoing FBI investigation and was suspected of leaking information to those targets; that the same employee had improperly instructed Ms. Edmonds and another employee not to listen to or translate certain FBI wiretaps concerning those targets; and that the employee in question had threatened the lives and safety of Ms. Edmonds and a member of her family who resided in a foreign country. Finally, Ms. Edmonds reported that FBI management had failed to take corrective action in response to her reports and serious concerns, but had instead retaliated against her. J.A. 39-40 (Compl. ¶ 16).

Ms. Edmonds raised her allegations of security breaches and misconduct up the FBI chain of command without effect, finally reporting them to the FBI's Office of Professional Responsibility and to the United States Department of Justice's Office of Inspector General. J.A. 41 (Compl. ¶ 23). Two weeks later, on March 22, 2002, Ms. Edmonds was fired, escorted from the building, and informed that she "would never step foot in the FBI again." J.A. 41-42 (Compl. ¶ 24). On April 2, 2002, Ms. Edmonds was notified in writing that she had been "terminated completely for the Government's convenience." J.A. 42 (Compl. ¶ 25).

Ms. Edmonds' allegations of security breaches came to the attention of Senator Charles Grassley, who wrote to FBI Director Mueller on May 8, 2002, expressing concern about Ms. Edmonds' reports of misconduct and security violations and about apparent retaliation by the

FBI. J.A. 42 (Compl. ¶ 27). On June 17, 2002, the FBI held an unclassified briefing for the Senate Judiciary Committee and committee staff regarding Edmonds' allegations, "some of which the FBI verified were not unfounded." J.A. 83-85. Thereafter, Senator Grassley, joined by Senator Patrick Leahy, wrote to Glenn Fine, Inspector General of the Department of Justice, describing the FBI's June 17 testimony and requesting that the Office of Inspector General (OIG) pursue Ms. Edmonds' allegations. J.A. 73-74. In particular, the Senators' letter reported that the FBI had confirmed the validity of Ms. Edmonds' allegations relating to her fellow employee's misconduct and the qualification of translators at Guantanamo Bay, Cuba. The entire text of the letter was printed in the Congressional Record. 148 Cong. Rec. S5842 (June 20, 2002).

The FBI provided a second unclassified briefing to the Judiciary Committee members and staff on July 9, 2002. J.A. 200-01, 108-09. The FBI once again presented information relating to Ms. Edmonds' allegations concerning misconduct and mismanagement in the FBI translation unit. Following the briefing, Senators Grassley and Leahy wrote several additional widely disseminated letters to FBI Director Mueller and to Attorney General Ashcroft regarding Ms. Edmonds, including an August 13, 2002 letter to the Attorney General concerning the status of the investigation of Ms. Edmonds' allegations, J.A. 80-81, and an October 28, 2002, letter to Director Mueller suggesting an independent audit and review of the translation unit. J.A. 108-09.

Meanwhile, even as the substance of Ms. Edmonds' allegations was being largely corroborated by the FBI in briefings to Congress, press accounts quoted anonymous government officials who cast doubt on Ms. Edmonds' credibility in an apparent attempt to discredit her allegations. For example, on June 8, 2002, the Associated Press published an article quoting "Government officials, who spoke only on condition of anonymity," who stated that Ms.

Edmonds' allegations had not been corroborated, that she herself was being investigated for security breaches, and that she had been fired for performance issues. J.A. 42-43 (Compl. ¶¶ 27-31), 59-60. The article further reported that "FBI officials said they believe the [translation] program is solid and secure even as they let the investigations move forward." J.A. 59-60. Similarly, a June 18, 2002 story in the Washington Post quoted anonymous government officials who stated that the "FBI fired" Ms. Edmonds because her "disruptiveness hurt her on-the-job performance" and she "had been found to have breached security." J.A. 68-71. The article included a defense of Ms. Edmonds from Senator Grassley, who stated that Ms. Edmonds had "made these allegations in good faith and even though the deck was stacked against her," and that the "FBI even admits to a number of her allegations . . . ." J.A. 68-71.

Ms. Edmonds brought this suit against the Department of Justice, the FBI, and various high-level officials on July 22, 2002, alleging violations of the First Amendment, the Privacy Act, and the Due Process Clause arising from her retaliatory firing and from the government's subsequent disclosures to the media. Rather than respond to the merits of Ms. Edmonds' claims, on October 18, 2002, Attorney General Ashcroft invoked the state secrets privilege and moved to dismiss the suit prior to discovery, asserting that "further disclosure of the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case reasonably could be expected to cause serious damage to the national security interests of the United States." J.A. 55-57 (Ashcroft Decl. ¶ 5). In a press release issued the same day, the Department of Justice insisted that it had invoked the privilege and sought the dismissal of Ms. Edmonds' suit because "the litigation create[d] substantial risks of disclosing classified and sensitive national security information that could cause serious damage to our

country's security." J.A. 91. The Department of Justice thereafter moved successfully to stay all discovery pending the court's adjudication of the state secrets issue.

The government invoked the state secrets privilege a second time in an attempt to block Ms. Edmonds from being deposed in a case brought by families of those killed on September 11 against Saudi individuals and entities alleged to have financed al-Qaeda. *See Burnett v. Al Baraka Investment & Dev. Corp.*, 323 F. Supp. 2d 82 (D.D.C. 2004). Counsel for the families argued, as had counsel for Ms. Edmonds, that much of the evidence the government sought to block had previously been disclosed in unclassified briefings and in the media. Accordingly, the district court ordered the government to produce "any unclassified documents or other unclassified information in its possession that has been presented to the United States Senate or any other forum or individuals which is relevant to the substance of Sibel Edmonds' potential deposition." J.A. 216.

In response, the government took the extraordinary step of moving to classify *retroactively* the information it had presented to the Senate Judiciary Committee.[1] On May 13, 2004, the following email message was sent to staff of the Senate Judiciary Committee:

> The FBI would like to put all Judiciary Committee staffers on notice that it now considers some of the information contained in two Judiciary Committee briefings to be classified. Those briefings occurred on June 17, 2002, and July 9th, 2002, and concerned a woman named Sibel Edmonds, who worked as a translator for the FBI. *The decision to treat the information as classified from this point forward relates to civil litigation in which the FBI is seeking to quash certain information.* The FBI believes that certain public comments have put the information in a context that gives rise to a need to protect the information.

[1] The lawfulness of the government's retroactive classification of information it had previously made public is the subject of a separate lawsuit. *See Project on Government Oversight v. Ashcroft*, No.1:04-CV-01032-JDB (D.D.C. filed 6/23/04).

> Any staffer who attended those briefings, or who learns about those briefings, should be aware that the FBI now considers the information classified and should therefore avoid further dissemination.
>
> If you attended this briefing and took notes, please contact Pat Makanui, Office of Senate Security, at 4-5632. If you have any questions, please call Nick Rossi at (202) 324-7484.

J.A. 200-01 (emph. added). The government did not inform the district court of these actions, though the court later learned of them from the plaintiff. Since the retroactive classification, the government has made no effort to remove this information from public view, and it remains available on several public web sites.

On May 20, 2004, Senator Grassley responded to the retroactive classification in comments to the *New York Times,* declaring that "[w]hat the F.B.I. is up to here is ludicrous," J.A. 178-79, and characterizing the classification order as being "as close to a gag order as you can get."[2] An FBI official who spoke on the condition of anonymity disclosed that "the decision to classify the material was made by the Justice Department." J.A. 178-79. Attorney General Ashcroft corroborated that statement in testimony before the Senate Judiciary Committee on June 8, 2004, where he explained that the retroactive classification decision was "relate[d] to both a lawsuit which [was] underway and the national security interests of the United States."[3]

On July 6, 2004, the district court, relying on *ex parte* submissions by the government, dismissed Ms. Edmonds' case on state secrets grounds. J.A. 9-34. The court first rejected Ms. Edmonds' contention that the government had not properly invoked the state secrets privilege, holding that Attorney General Ashcroft's declaration provided sufficient evidence that the

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[2] Indeed, one of the retroactively classified documents was released to Ms. Edmonds in response to a FOIA request, and was marked "unclassified," well after the government's invocation of the privilege. J.A. 176, 184-85.

[3] *See DOJ Oversight: Counterterrorism & Other Topics: Hearing Before the Senate Judiciary Committee,* 108th Cong. (2004).

Attorney General had personally considered the matter prior to his formal invocation, and that the declaration -- considered alongside classified declarations submitted to the court for *in camera* review -- was sufficiently specific to support the propriety of the invocation. J.A. 18-25. The court then turned immediately to the question whether dismissal of Ms. Edmonds' case was warranted. J.A. 25. Relying solely on the government's *ex parte* submissions, and without providing Ms. Edmonds the opportunity to produce nonprivileged evidence in support of her claims or to conduct any discovery, the court held that Ms. Edmonds would be "unable to prove the prima facie elements of each of her claims without the disclosure of privileged information," and that defendants would be "unable to assert valid defenses to her claims without such disclosures." J.A. 28. The court accepted the government's broad assertion that both the "nature of [Ms. Edmonds'] employment" and the "events surrounding her termination" constituted state secrets. J.A. 29. Accordingly, the court maintained that the ordinary requirement that state secrets be "disentangled" from unprivileged evidence could not be accomplished, and the entire litigation had to be terminated at the pleading stage.

Two weeks after the district court issued its opinion, FBI Director Robert Mueller sent a letter to Senator Hatch in which he noted that the Department of Justice's Inspector General had "recently completed its classified report on the allegations of Sibel Edmonds" and had concluded that "Ms. Edmonds' allegations 'were at least a contributing factor in why the FBI terminated her services.'"[4] In further support of Ms. Edmonds' allegations of security breaches in the FBI translation unit, in July 2004 the Department of Justice's Inspector General released a redacted

[4] Letter from FBI Director Mueller to Senator Hatch, dated July 21, 2004, at 1 (available at http://www.pogo.org/m/hsp/hsp-040721-Mueller.pdf); *see also* Eric Lichtblau, *Whistle-blowing Said to be Factor in an F.B.I. Firing,* N.Y.Times, July 28, 2004, at A1 ("[A] classified Justice Department investigation has concluded that a former F.B.I. translator at the center of a growing

and unclassified executive summary of its audit of the translation services unit of the FBI.[5] The audit revealed a serious backlog of over 370,000 hours of counterintelligence translations and over 119,000 hours of counterterrorism translations since September 11, and disclosed ongoing problems with the Quality Control Program that continue to cause inaccurate translations.[6]

SUMMARY OF ARGUMENT

Sibel Edmonds risked her job to report serious security breaches within the FBI that could threaten the nation's security. The FBI rewarded her by firing her and leaking information to the press in an effort to discredit her allegations of wrongdoing. When Ms. Edmonds filed this lawsuit to redress violations of her free speech, privacy, and due process rights, the government – desperate to prevent further public confirmation of Ms. Edmonds' serious allegations – moved to dismiss her suit prior to any discovery. The government invoked the state secrets doctrine, a rare and absolute evidentiary privilege, to argue that allowing Ms. Edmonds' case to proceed would harm national security. To support its radical theory that every aspect of the case involved state secrets, the government went so far as to classify retroactively prior briefings to Congress in which the FBI had confirmed many of Ms. Edmonds' allegations. Accepting the government's vast expansion of the state secrets privilege to defeat Ms. Edmonds' claims, the district court dismissed the case at the pleading stage.

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controversy was dismissed in part because she accused the bureau of ineptitude, and it found that the F.B.I. did not aggressively investigate her claims of espionage against a co-worker.").

[5] *The Federal Bureau of Investigation's Foreign Language Program -- Translation of Counterterrorism and Counterintelligence Foreign Language Material*, Rep. No. 04-25, July 2004, Office of the Inspector General, at pg. ii (available at http://www.usdoj.gov/oig/audit/FBI/0425/index.htm).

[6] Ms. Edmonds filed a separate lawsuit seeking disclosure of the Inspector General's report about her allegations. *Edmonds v. United States Dept. of Justice*, No. 1:04-CV-01623-RMV (D.D.C. filed 9/22/04). On January 6, 2005, the government informed the court in that case that the Inspector General is expected to publish an unclassified version of the report on January 13, 2005, the day after this brief is due.

The use of the state secrets privilege to justify dismissal of an entire action on the basis of the state secrets privilege prior to discovery is a drastic remedy, strongly disfavored by this Court and rarely employed by any other courts. The state secrets privilege is a common law evidentiary privilege designed to shield disclosure of legitimately sensitive evidence, not to broadly justify dismissal of a lawsuit prior to discovery. Courts have relied on the state secrets privilege to dismiss cases only in two extremely rare situations, neither of which applies here. The first is where the very subject matter of the action is a state secret. The second is where a court determines, after discovery and the consideration of nonprivileged evidence, that one of the parties is unable to prove or validly defend against a claim without relying on privileged evidence.

The district court's dismissal went far beyond the cautious approach to state secrets urged by the Supreme Court and this Court. First, the district court erred in implying that the very subject matter of Ms. Edmonds' case constitutes a state secret because of "the nature of the plaintiff's employment" and the "events surrounding her termination." In fact the duties of contract linguists are widely known and largely irrelevant to Ms. Edmonds' claims. In addition, a great deal of information about Ms. Edmonds' termination has already been disclosed publicly by the government itself. Ms. Edmonds' wrongful termination case is simply not akin to cases involving secret contracts or covert CIA missions.

Second, the district court fundamentally erred in dismissing Ms. Edmonds' case prior to discovery and the consideration of nonprivileged evidence. This Court has routinely held that granting judgment to the government in a state secrets case is appropriate only where the plaintiff is unable to prove a prima facie case with nonprivileged evidence, or the defendant is unable to assert a valid defense without privileged evidence. In clear error, the district court

concluded that Ms. Edmonds' case could not be litigated without privileged evidence before any discovery had occurred. And while the district court relied on defendants' secret evidence, it gave Ms. Edmonds no opportunity to submit nonprivileged evidence to prove her claims. The district court simply had no way of knowing at this early stage of the case which allegations were even in dispute, or whether either party had a compelling need for state secrets to prove or defend against the claims. The district court's procedure made a mockery of the adversarial process and denied Ms. Edmonds her constitutional right to a day in court.

The district court itself realized that dismissal was "draconian." Nevertheless, at the government's urging, the district court effectively converted the state secrets doctrine from a discrete evidentiary privilege into a broad and limitless tool to hide government wrongdoing that threatens national security. If sanctioned by this Court, the ruling has the potential for far-reaching adverse consequences. The government will have every incentive to employ the privilege to prevent future disclosures of its own wrongdoing, and to deprive government employees of any protection for disclosing conduct that may threaten the nation's security. In sum, the district court's premature dismissal of the action was unsupported by law, and its judgment must be reversed.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal of the action at the pleading stage. Because the district court's conclusions "constitute findings of law rather than fact, [this Court] do[es] not defer to the judgment of the district court . . . but rather make[s] [its] own independent assessment" of the issues in dispute. *Molerio v. FBI*, 749 F.2d 815, 820 (D.C. Cir. 1984). Moreover, this Court "accept[s] the facts as alleged in the complaint." *Moore v. Valder*, 65 F.3d 189, 192 (D.C. Cir. 1995).

ARGUMENT

I. The dismissal of an entire case on the basis of the state secrets privilege is a rare and drastic remedy.

The state secrets privilege is a common law evidentiary rule that permits the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." *Ellsberg v. Mitchell,* 709 F.2d 51, 56 (D.C. Cir. 1983); *see also In re United States*, 872 F.2d 472, 474 (D.C. Cir. 1989). It is used to protect "information that would result in impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *In re United States,* 872 F.2d at 476 (quotations and citation omitted). The state secrets privilege is rarely invoked because "of the serious potential for defeating worthy claims for violations of rights that would otherwise be proved ...." *Id.* The Supreme Court outlined the proper use of the state secrets privilege fifty years ago in *Reynolds v. United States,* 345 U.S. 1 (1953), and has not considered the doctrine since then.[7] In *Reynolds*, the family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. *Id.* at 3. The Court first held that the privilege could be invoked only upon "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8. Later courts have held that these strict invocation requirements "lessen[ ] the possibility of reflexive invocation of

[7] Notably, at the time the comparable privilege was recognized in England, the Crown, when party to a litigation, was not even "required to give discovery of documents at all." *Duncan v. Cammell, Laird & Co.,* [1942] A.C. 634, 635; *see also* Note, *The Military and State Secrets*

the doctrine as a routine way to avoid adverse judicial decisions." *Doe v. Tenet,* 329 F.3d 1135, 1154 (9th Cir. 2003), *cert granted,* 124 S. Ct. 2908 (Jun. 28, 2004).[8]

The *Reynolds* Court then upheld the claim of privilege over the accident report, *but did not dismiss the suit.* Rather, it remanded the case for further proceedings, explaining that:

> There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.

345 U.S. at 11. Upon remand, plaintiff's counsel deposed the surviving crew members, and the case was ultimately settled. *Id.*; *see also infra* at p. 17 (discussing recent disclosures about the *Reynolds* suit).

In the majority of cases since *Reynolds,* this Court and other courts have considered the state secrets privilege in response to particular discovery requests, not in support of a motion to dismiss an action prior to any discovery. *See, e.g., Linder v. Dep't of Defense*, 133 F.3d 17, 21 (D.C. Cir. 1998); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 397, (D.C. Cir. 1984); *Ellsberg,* 709 F.2d at 54-55; *Halkin v. Helms*, 690 F.2d 977, 985 (D.C. Cir. 1982) (*"Halkin II"*); *Attorney General v. The Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982); *Halkin*

Privilege: Protection for the National Security or Immunity for the Executive?, 91 YALE L.J. 570, 572-73 (1982) (discussing history of the privilege).

[8] In this case, the parties and the district court devoted substantial attention to the question whether the government had satisfied the procedural requirements attendant to invocation of the state secrets privilege. J.A. 18-25. Ms. Edmonds continues to believe that the government's invocation of the state secrets privilege was defective as to both process and substance, and that the district court erred by not requiring the government to present a more thorough and specific public explanation of its invocation. However, Ms. Edmonds has focused her appeal on the propriety of the district court's dismissal, rather than the formal requirements of the government's invocation, because a remand on the latter question alone would likely result in

v. Helms, 598 F.2d 1, 4 (D.C. Cir. 1978) ("*Halkin I*"); *Virtual Defense and Dev. Int'l v. Republic of Moldova*, 133 F. Supp. 2d 9, 23 (D.D.C. 2001).[9] As in *Reynolds*, the typical consequence of a successful invocation of the privilege is simply to "remove the [privileged] evidence from the case," not to dismiss the suit. *In re United States*, 872 F.2d at 476.

Even when the state secrets privilege is invoked to deny access to evidence during discovery, courts have construed the privilege narrowly. *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 560 (S.D.N.Y. 2002) ("[T]he contours of the privilege for state secrets are narrow, and have been so defined in accord with uniquely American concerns for democracy, openness, and separation of powers."). This Court has held that "the privilege may not be used to shield any material not strictly necessary to prevent injury to national security, and whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg*, 709 F.2d at 57; *see also Northrop Corp.*, 751 F.2d at 399. Courts have also used "creativity and care" to devise "procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985)

Numerous courts have cautioned that "[d]ismissal of a suit" on state secrets grounds at any point of the litigation "and the consequent denial of a forum without giving the plaintiff her day in court . . . is . . . draconian." *In re United States,* 872 F.2d at 477. That is because "denial

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protracted and duplicative judicial proceedings that would delay, but not avoid, adjudication of the substantive issue before the Court.

[9] *DTM Research L.L.C. v. A.T. & T. Corp.*, 245 F.3d 327 (4th Cir. 2001); *Crater Corp. v. Lucent Technologies, Inc.*, 255 F.3d 1361 (Fed. Cir. 2001); *In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991); *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982); *ACLU v. Brown*, 619 F.2d 1170 (7th Cir. 1980) (en banc); *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975); *Yang v. Reno*, 157 F.R.D. 625 (M.D. Pa. 1994); *United States v. Koreh*, 144 F.R.D. 218 (D. N.J. 1992); *Zoltek Corp. v. United States*, 61 Fed. Cl. 12 (Fed. Cl. 2004); *Foster v. United States*, 12 Cl. Ct. 492 (Cl. Ct. 1987); *American Tel. & Tel. Co. v. United States*, 4 Cl. Ct. 157 (Cl. Ct. 1983).

of the forum provided under the Constitution for the resolution of disputes . . . is a drastic remedy ...." *Fitzgerald,* 776 F.2d at 1242; *In re United States,* 872 F.2d at 477; *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) ("An aggrieved party should not lightly be deprived of the constitutional right to petition the courts for relief.").

The use of the state secrets privilege to dismiss an entire case *prior to discovery* is almost always improper, as this Court has recognized.[10] In *In re United States*, a widow sued the FBI for unlawful surveillance of her husband during the McCarthy era. 872 F.2d at 474. The Attorney General moved to dismiss on state secrets grounds, prior to answering the complaint. The district court denied the motion, and the government appealed. This Court rejected the government's blanket assertion of the privilege to dismiss the case, reasoning that "an item-by-item determination of the privilege will amply accommodate the Government's concerns." *Id.* at 479. Holding that it was "unconvinced that the district court would be unable to disentangle the sensitive from the nonsensitive information as the case unfold[ed]," the Court outlined several alternatives that would protect against sensitive disclosures. *Id.* (quotations omitted). Other cases in this Circuit have similarly resisted dismissing suits based on a broad state secrets claim prior to discovery. *See, e.g. Ellsberg,* 709 F.2d at 65 (reversing partial dismissal on state secrets grounds because "dismissal of the relevant portion of the suit would be proper only if the plaintiffs were manifestly unable to make out a *prima facie* case without the [privileged] information"); *Halkin I,* 598 F.2d at 11 (upholding the invocation of the privilege but remanding the case for further proceedings); *The Irish People, Inc.*, 684 F.2d at 955 (upholding invocation of the privilege but declining to dismiss the case).

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[10] Broad and premature claims of privilege, moreover, are inconsistent with the well-established principle that "[e]videntiary privileges are to be construed narrowly, to permit the broadest

Numerous other courts have similarly rejected the broad invocation of the state secrets privilege to dismiss a case prematurely. In *DTM Research L.L.C.*, the Fourth Circuit rejected a "categorical rule mandating dismissal every time the state secrets privilege is validly invoked" in a litigation, and remanded the case for further proceedings after relying on the state secrets privilege to quash a subpoena. 245 F.3d at 334. In *Doe v. Tenet*, the Ninth Circuit reasoned that because "refusing to adjudicate" a claim on state secrets grounds "sacrifice[s] [a litigant's] asserted constitutional interests . . . , both the government and the courts need to consider discretely, rather than by formula, whether this is a case in which there is simply no acceptable alternative to that sacrifice." 329 F.3d at 1146.[11]

Dismissing a case on state secrets grounds prior to discovery is also improper because neither the court nor the parties can know at the pleading stage whether privileged evidence will be necessary or even relevant to the litigation. *See In re United States,* 872 F.2d at 478 (affirming the district court's refusal to accept a "broad application of the privilege to all of petitioner's information, before the relevancy of that information ha[d] ever been determined"); *see also Crater Corp.*, 255 F.3d at 1371 (declining to reach state secrets issue because the allegedly secret evidence was not relevant to plaintiff's claim). A blanket assertion of the privilege so early in the litigation places plaintiffs in an impossible position: they must convince a court that litigation of their claim need not disclose state secrets, but they are forced to do so

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possible discovery, consistent with the purposes of the privileges." *United States v. Nixon*, 418 U.S. 683 (1974).

[11] *See also Jabara v. Webster*, 691 F.2d 272 (upholding claim of state secrets with regard to a Fourth Amendment claim, but deciding case on the merits); *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968) (upholding privilege but remanding for further proceedings); *Barlow v. United States,* 53 Fed. Cl. 667 (Fed. Cl. 2002) (upholding privilege but remanding for trial on former CIA employee retaliation claim); *Foster v. United States*, 12 Cl. Ct. 492 (upholding privilege but case not dismissed); *Spock*, 464 F.Supp. at 520 (S.D.N.Y. 1978) (rejecting pre-discovery motion to dismiss on state secrets grounds as premature).

prior to any discovery. *See, e.g., Halkin II*, 690 F.2d at 984 (dismissing the case for lack of standing as a result of the privilege, only after the parties had "fought the bulk of their dispute on the battlefield of discovery").

When a court prematurely dismisses a case based on state secrets, it abdicates its important role as a check on excessive government secrecy, and the ultimate authority regarding questions of evidence. As the Supreme Court cautioned in *Reynolds*, "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 9-10. This Court has similarly held that "a court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role." *In re United States,* 872 F.2d at 475; *see also Ellsberg,* 709 F.2d at 58 ("[T]o ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine the instances of its invocation"); *Molerio*, 749 F.2d at 822 ("the validity of the government's assertion must be judicially assessed").

Recently disclosed facts regarding the *Reynolds* litigation, the modern foundation of the state secrets privilege, teach that strong judicial oversight in state secrets cases is an absolute necessity. The government had claimed that disclosing the flight accident report in that case would jeopardize secret military equipment and harm national security. The report was recently declassified, and the survivors of the men who perished on that flight learned a disturbing truth. The government had misled the Court. In fact, the accident report contained no details whatsoever about the secret equipment. *See Herring v. United States,* 2004 WL 2040272, *8 (E.D. Pa. Sept. 10, 2004) (noting that the accident report "does not refer... to any newly developed electronic devices or secret electronic equipment"). The government's true motivation in asserting the state secrets privilege was not to protect military secrets but rather to

cover up its own negligence. *See id.* (the accident report revealed that "engine failure caused the crash" and that "had the plane complied with the technical orders . . . the accident might have been avoided"); *see also* Barry Siegel, *The Secret of the B-29*, L.A. Times, Apr. 18, 2004, A1 (reporting on the recently unclassified accident report and the *Reynolds* litigation). To avoid unknowingly sanctioning other executive cover ups, courts must continue to exercise strong judicial oversight whenever the government invokes the state secrets privilege.

As discussed more fully below, this Court has approved the dismissal of cases on state secrets grounds only in two extremely rare situations: 1) where the very subject matter of the suit is a state secret, *see infra* Section II, or 2) where a court determines, *after discovery*, that one of the parties is unable to prove or validly defend against a claim without relying on privileged evidence, s*ee infra* Section III. Because neither situation applies in this case, the district court erred in dismissing the case based on the government's premature and overbroad assertion of the state secrets privilege.

II. The district court erred in implying that the very subject matter of Ms. Edmonds' case constitutes a state secret.

Dismissal of a case on state secrets grounds *prior to discovery* is proper only in an extremely narrow category of cases in which the very subject matter of the suit is a state secret. As many courts have held, "unless the very question upon which the case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be . . . central . . . the plaintiff's case should be allowed to proceed." DTM Research L.L.C., 245 F.3d at 334 (internal quotation marks omitted). This principle derives from *Totten v. United States*, 92 U.S. 105 (1875), in which the Supreme Court dismissed an action to enforce a secret contract for espionage between a covert spy and President Lincoln because the contract itself was secret. The *Totten* principle is generally limited to cases involving secret contracts, *see Guong v. United*

States, 860 F.2d 1063 (Fed. Cir. 1988), covert CIA missions, *see Siglar v. LeVan*, 485 F. Supp. 185 (D. Md. 1980), or secret military equipment, *see Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991). In *Reynolds,* the Supreme Court treated *Totten* as an aberration because, given the secret nature of the contract, it was "so obvious that the action should never prevail over the privilege." *Reynolds*, 345 U.S. at 11, n.26. In *Zweibon v. Mitchell*, this Court explained that dismissal had been appropriate in *Totten* only because "the contract for the spying mission of necessity contained an implied covenant of secrecy and [a] suit on the contract would itself constitute a breach justifying denial of any relief." 516 F. 2d 594, 625, n.80 (D.C. Cir. 1975). As one district court noted, *Totten* has now been "modified by a century of legal experience, which teaches that the courts have broad authority to inquire into national security matters so long as proper safeguards are applied to avoid unwarranted disclosures." *United States v. Ehrlichman*, 376 F. Supp. 29, 32 n.1 (D.D.C. 1974); s*ee also Doe v. Tenet*, 329 F.3d at 1147-1148 (rejecting *Totten's* application to a case involving alleged CIA contract spies);[12] *Clift v. United States,* 597 F.2d 826, 830 (2d Cir. 1979) (limiting the scope of the *Totten* to the narrow facts of the case, and holding that it did not apply to the action because there was "no [secret] contract, [and] it was the Government that imposed [the] secrecy").

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[12] Although the Supreme Court has granted certiorari in *Doe v. Tenet*, *see* 124 S. Ct. 2908 (June 28, 2004), the issue before the Court has no bearing on Ms. Edmonds' appeal. In *Doe*, the Ninth Circuit joined this Court and the Second Circuit in holding that *Totten* is the "progenitor of the state secrets doctrine," but not a distinct jurisdictional bar to maintenance of suits involving contracts for espionage services. 329 F.3d at 1150 n.9 (citing *Ehrlichman,* 376 F. Supp. at 32 n.1; and *Clift,* 597 F.2d at 828-30). In its petition for certiorari, the government contends that the Ninth Circuit (and this Court) erred in holding that, since *Reynolds*, *Totten* permits dismissal of cases in which the very subject matter is a state secret only *after* compliance with the formalities and court investigation requirements of the state secrets doctrine. *See* 2004 WL 759643 (April 6, 2004). As Ms. Edmonds' suit does not involve a contract for espionage services, and as it is undisputed that the state secrets doctrine as enunciated in *Reynolds* governs Ms. Edmonds' appeal, it is virtually inconceivable that the outcome in *Tenet v. Doe* will have any effect on the issues before this Court.

Because the very subject matter of this case is not a state secret, *Totten* provides no support for the district's court's dismissal. Ms. Edmonds, an FBI contract translator with security clearance, was fired in retaliation for speaking out about serious security breaches within the agency. Her case involves no secret spy contract, *see Totten*, no military equipment or weapons systems, *see Zuckerbraun*, and no covert mission or identity, *see Guong*. By dismissing Ms. Edmonds' case before discovery and the consideration of nonprivileged evidence, the district court stretched the *Totten* principle far beyond the important limits recognized in this Court and in other courts. While not expressly relying on *Totten* and its progeny, the court held that dismissal of the case was necessary because "the nature of the plaintiff's employment" and the "events surrounding her termination" are state secrets.[13] J.A. 28. *See also infra* § III.B.

The nature of Edmonds' job plainly is not a state secret, and in fact is irrelevant to her claims. In stark contrast to covert spies, the duties of FBI contract linguists are public knowledge and have been widely discussed in the press. Contract linguists assist in the translation of documents and wiretaps related to the government's counterterrorism efforts.[14] Indeed, the FBI itself describes the duties of contract linguists and the Foreign Language

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[13] In addition, the district erred in implying that the mosaic theory may support dismissal at this stage. J.A. 26, 31-32. Although some courts have held that the government may invoke the mosaic theory to prevent disclosure of a particular document that may appear innocuous, this Court has never authorized the use of the mosaic theory to justify *dismissal* of an action at the pleading stage. *See, e.g., In re United States,* 872 F.2d at 475 (despite recognition of the mosaic theory, rejecting an overbroad assertion of the state secrets privilege in the early stages of a litigation). If the mere invocation of the mosaic theory by the government is held to justify dismissal of litigation at the pleading stage, then the "draconian" remedy of dismissal becomes the norm rather than the "rarely" invoked exception, *see id.* at 478, and wholly undermines the carefully crafted state secrets invocation rules developed by the courts in the last fifty years.

[14] *See e.g.,* J.A. 59-60 ("Since Sept. 11, the linguists have played a key role in interpreting and translating such sensitive documents as all-Qaida-related wiretaps, documents recovered in Afghanistan and interrogations with al-Qaida prisoners held at Guantanamo Bay Naval Base in Cuba.").

Program in detail on its public website.[15] FBI officials, moreover, have not hesitated to defend the quality of the translation unit to the press. J.A. 59-60, 68-71. Though the *content* of the translations is sensitive and might well involve state secrets, none of Ms. Edmonds' claims requires delving into such matters.

The assertion that all of the events surrounding Ms. Edmonds' termination are state secrets is equally implausible. A great deal of information about her termination is public – *and much of it was disclosed by the government itself.* The first public knowledge of Edmonds' termination and her allegations of security breaches came from press articles that relied on anonymous sources *within the FBI.* J.A. 59-60, 68-71. The FBI also participated in two unclassified briefings to Congress in which it confirmed several of her allegations. J.A. 83-85, 108-09, 200-01; *cf. Ellsberg*, 709 F.2d at 55 (noting that where government had made certain admissions, it appropriately refrained from asserting the privilege over that information); *Jabara v. Kelley,* 75 F.R.D. 475, 493 (E.D. Mich. 1977) (where the same information over which the government claims the privilege had been revealed in a report to Congress, "it would be a farce to conclude" that the information "remain[ed] a military or state secret"). A letter describing the details of that briefing was printed in the Congressional Record, 148 Cong. Rec. S5842 (June 20, 2002), posted on Senators' websites, and widely distributed. One of these letters was released to Ms. Edmonds under FOIA and marked as unclassified well after the government's invocation of the state secrets privilege in this case. J.A. 184-85. The press also reported that the FBI had confirmed the veracity of Ms. Edmonds' allegations. J.A. 68-71, 83-85, 87. The events

[15] *See, e.g.*, https://www.fbijobs.com/jobdesc.asp?requisitionid=25 (requesting applicants for an FBI contract linguist position and describing duties); see also http://www.fbi.gov/terrorinfo/counterrorism/waronterrorhome.htm

surrounding Ms. Edmonds' termination simply cannot be considered state secrets when information about them has been so widely distributed.

After invoking the state secrets privilege in this case, the government took the remarkable step of retroactively classifying the congressional briefings. These actions are highly suspect, and in fact the government essentially conceded that the briefings were classified specifically to bolster its state secrets argument in this case. J.A. 200-01. The government did not inform the district court of its actions, and it appears to have discussed the information provided to Congress only in its secret declarations. Since the retroactive classification, moreover, the government has made no effort to remove this purportedly classified information from public view. The district court, which was later notified about these shenanigans, J.A. 173-174, thus committed a grave error in accepting the government's argument that the events surrounding Ms. Edmonds' termination constituted state secrets. *See In re United States*, 872 F.2d at 478 (in rejecting privilege claim, relying in part on the fact that so much information relevant to the litigation had already been released under FOIA); *Ellsberg*, 709 F.2d at 61 (relying in part on the fact that so much relevant information was already public in rejecting portion of privilege claim); *Spock,* 464 F. Supp. at 519 (rejecting privilege where certain allegations had "already received widespread publicity"); *see also Snepp v. United States*, 444 U.S. 507, 511-512 (1980) (suggesting government has no interest, and lacks authority, to suppress national security information already in the public domain); *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) ("The government has no legitimate interest in censoring unclassified materials," nor information that "derives from public sources.").

Like other courts faced with overbroad assertions of the state secrets privilege prior to discovery, the district court should have rejected the implication that the very nature of the case

involved state secrets, opting instead to require the government to assert the privilege on an item-by-item basis during discovery. Acknowledging the potential danger to our system of justice, another district court correctly rejected the government's reliance on the privilege to dismiss the case:

> The relief sought by the Government goes beyond the traditional remedies fashioned by the courts in order to protect state secrets or other information . . . . [T]he Government seeks to foreclose the plaintiff at the pleading stage. Such a result would be unfair and not in keeping with the basic constitutional tenets of this country. Here, [unlike *Totten*] where the only disclosure in issue is the admission or denial of the allegation that interception of communications occurred an allegation which also already received widespread publicity the abrogation of the plaintiff's right of access to the courts would undermine our country's historic commitment to the rule of law.

Spock, 464 F. Supp. at 519-520 (S.D.N.Y. 1978); *see also In re United States*, 872 F. 2d at 478; *Monarch Assur. P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001). Because the very subject matter of this litigation is not a state secret, dismissal at the pleading stage was error.

III. The district court erred in dismissing the case without first allowing nonsensitive discovery and considering nonprivileged evidence.

When the very subject matter of an action is not a state secret, courts have routinely declined to decide cases on state secrets grounds without first allowing nonprivileged discovery to proceed and then considering nonprivileged evidence to prove or defend against the claims. *In re United States*, 872 F.2d at 476; *Ellsberg*, 709 F.2d at 64 n.55. Granting judgment in favor of defendants is appropriate after discovery only where the plaintiff is unable to prove a *prima facie* case with nonprivileged evidence or the defendant is unable to assert a valid defense without privileged evidence – a radical conclusion rarely reached by the courts. *Molerio*, 749 F.2d at 822; *Halkin II*, 690 F.2d at 998. The district court committed clear error by concluding prematurely that Ms. Edmonds' case could not proceed. At this early stage of the case, the court

simply had no way of knowing which allegations were disputed, or whether either party had a compelling need to rely on state secrets. The court's biased consideration of only defendants' secret declarations denied Ms. Edmonds her day in court. Even at this early stage of the litigation, Ms. Edmonds has evidence that suggests the case could be decided without relying on privileged information.

A. Courts must allow nonsensitive discovery and consider nonprivileged evidence before dismissing a case on state secrets grounds.

Under the long-standing holdings of this Court, a case may not be dismissed on state secrets grounds without first considering whether it can be decided based on nonprivileged information.[16] In *Ellsberg*, the Court remanded a dismissal where the district court "did not even consider whether the plaintiffs were capable of making out a prima facie case without the privileged information." 709 F. 2d at 65 n.55; *see also Molerio*, 749 F. 2d at 822 (terminating lawsuit only after evaluating plaintiffs' nonprivileged evidence); *Halkin II*, 690 F.2d at 998 (same). Several other circuits have also rejected dismissal on state secrets grounds and remanded for further proceedings where plaintiff has "not conceded that without the requested documents he would be unable to proceed, however difficult it might be to do so." *Clift*, 597 F.2d at 830; *see also Bareford*, 973 F.2d at 1141-42 (a plaintiff's case may go forward "without

[16] This Court has held that when the privilege denies the plaintiff information necessary to prove her case, "dismissal" is appropriate; when privileged information denies the defendant a valid defense, summary judgment is appropriate. *In re United States*, 872 F.2d at 476. Other appellate courts have noted that, since in either event the district court first considers nonprivileged evidence, summary judgment is the appropriate standard. *See, e.g., Monarch Assur. P.L.C.*, 244 F.3d at 1361 (finding dismissal for failure to state a claim "inappropriate" where the state secrets privilege is the basis for dismissal; rather, summary judgment standards should apply); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992) (state secrets questions most appropriately dealt with on a motion for summary judgment); *Zuckerbraun*, 935 F.2d at 547 (same); *cf. American Tel. & Tel. Co.*, 4 Cl. Ct. 157 (dismissing claim on state secrets grounds *without prejudice* in the event that plaintiff could come forward later with nonprivileged evidence).

the privileged information and would be dismissed only if the remaining information were insufficient to make out a prima facie case").[17] In this case, the district court erred in dismissing prematurely, without first allowing Ms. Edmonds to engage in nonsensitive discovery and to present nonprivileged evidence in support of her claims. J.A. 28.

When the government urges dismissal based on state secrets before it files an answer, it is impossible for a court to know what allegations are relevant or even in dispute.[18] For this reason, this Court has correctly refused "to dismiss the plaintiff's complaint merely on the basis of [the government's] unilateral assertion that privileged information lies at the core of th[e] case." *In re United States,* 872 F. 2d. at 477. Rather, the Court upheld the lower court's conclusion that "broad application of the privilege to all of petitioner's information, before the relevancy of that information has even been determined, was inappropriate at this early stage of the proceedings." *In re United States*, 872 F.2d at 478. A court is in a much better position to determine a litigant's

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[17] *See also Monarch Assur. P.L.C.,* 244 F.3d at 1364 (reversing dismissal on state secrets grounds so that plaintiff could engage in further discovery to support claim with nonprivileged evidence); *Kasza v. Browner,* 133 F.3d 1159, 1166 (9th Cir. 1998) ("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."); *In re Under Seal,* 945 F.2d 1285 (summary judgment granted only after plaintiff could not prove there was a genuine issue of material fact with nonprivileged evidence); *Jabara v. Webster,* 691 F.2d at 276 (privilege upheld, but case decided on the merits because the pertinent facts could be established with nonprivileged evidence); *Barlow v. United States,* 53 Cl. Ct. 667 (despite invocation of the privilege with respect to some evidence, full-blown trial conducted on the merits, with nonprivileged evidence); *McDonnell Douglas Corp. v. United States,* 37 Fed. Cl. 270, 280-281 (Fed. Cl. 1996) (terminating case because state secrets privilege deprived both plaintiff and defendant of the ability to prove their cases, but only after giving "plaintiffs an opportunity to make a *prima facie* showing that they could make a case without the privileged information.").

[18] Federal Rule of Civil Procedure 8(b) states that in an answer, a party "shall state in short and plain terms the party's defenses to each claim asserted and *shall* admit or deny the averments upon which the adverse party relies." The purpose of this requirement is to "apprise the opponent of those allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable the plaintiff to prevail." Wright & Miller, Fed. Prac. & Proc. Civ. 3d §1261.

need for privileged information when the privilege is asserted during discovery on an "item-by-item" basis, rather than as a blanket assertion to urge dismissal before defendants file an answer. *Id; see also National Lawyers Guild v. Attorney General*, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (holding that privilege must be asserted on an document-by-document basis). In this case, like *In re United States,* the district court could not know at this early stage which allegations were even in dispute, or whether either party had a compelling need to rely on states secrets.[19] *See Ellsberg*, 709 F.2d at 58-59 ("the more compelling a litigant's showing of need for the information in question, the deeper the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."); *see also Reynolds*, 345 U.S. at 11.

Courts have routinely allowed nonsensitive discovery to proceed even after upholding a claim of privilege over certain evidence. The Supreme Court set the stage for this approach over fifty years ago when it held in *Reynolds* that "it should be possible . . . to adduce the essential facts as to causation without resort to material touching upon military secrets," and remanded the case for depositions. *Reynolds,* 345 U.S. at 11. Indeed, "an action as to which a certain avenue of discovery would compromise state secrets need not be dismissed if an alternative, non-sensitive avenue of discovery is available." *In re United States*, 872 F.2d at 481 (Ginsburg, J., concurring and dissenting); *see also id.* at 476; *Ellsberg*, 709 F.2d at 54; *The Irish People, Inc.*, 684 F.2d at 931; *Halkin I*, 598 F. 2d at 6.[20]

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[19] Because the government has publicly admitted to a number of Ms. Edmonds' allegations, it is quite possible that it would have no basis for denying certain key allegations in its answer.

[20] *See also Monarch Assur. P.L.C.*, 244 F.3d at 1364 (upholding privilege but remanding because discovery had been unduly limited); *Crater Corp.*, 255 F.3d at 1365 (government provided some discovery despite invocation of the privilege); In re Under Seal, 945 F.2d at 1287 (same); Patterson v. FBI, 893 F.2d 595, 598 (3d Cir. 1990) (same); Zoltek, 61 Fed. Cl. 14 (same); Barlow, 53 Fed. Cl. 667 (same); Kinoy, 67 F.R.D. at 4-5 (same).

When the government asserts the privilege over particular evidence, a court also has an independent duty to disentangle the sensitive information from the nonsensitive. *Ellsberg*, 709 F.2d at 63. Here again, the district court erred by engaging in that analysis prematurely. Relying only on the government's secret musings about the evidence that *might* be relevant in the case, the court engaged in pure speculation in concluding that it "is not possible for 'sensitive information [to] be disentangled from nonsensitive information.'" J.A. 33 (quoting *Ellsberg*, 709 F.2d at 57); *cf. In re United States,* 872 F. 2d at 479 (court was "unconvinced that the district court would be unable to 'disentangle' the sensitive from the nonsensitive information as the case unfold[ed]"). Instead, like other courts faced with cases involving state secrets and other sensitive matters, the district court should have allowed discovery to proceed and considered other alternatives to protect against unauthorized disclosure, for example, by requiring security clearance for classified evidence, allowing redactions, or issuing protective orders. *See Ehrlichman*, 376 F. Supp. at 32 n.1 ("courts have broad authority to inquire into national security matters so long as proper safeguards are applied to avoid unwarranted disclosures"); *see also infra* Section IV.

To require the district court to allow discovery and consider nonprivileged evidence before deciding a case on state secrets grounds is far from a hollow gesture. As one court explained, "on balance, the possible harm or inconvenience to the witnesses, and the additional effort to be entailed by the Government and the court, do not seem to outweigh the possible harm to plaintiffs and the appearance of unfairness consequent to denying them full opportunity to make their case." *Monarch Assur. P.L.C.*, 244 F.3d at 1365. The district court erred in prematurely dismissing this case and denying plaintiff any opportunity to prove her case based on nonprivileged evidence. While the court apparently considered defendants' secret evidence in

detail, it gave plaintiff no corresponding opportunity to submit nonprivileged evidence to prove her claims. It is hard to imagine a more biased way to decide a case. Our adversarial system of justice simply does not allow a court to decide a case based only on one party's secret evidence. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) ("fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights"); *id.* at 143 (Black, J., concurring); *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) ("The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts.").

B. Even at this early stage of the litigation, the available evidence strongly suggests that the case could be decided without relying on state secrets.

After engaging in a cursory analysis of plaintiff's claims, the district court concluded that the case could not go forward without requiring the parties to rely on privileged evidence. J.A. 28-32. If the case were remanded to follow the proper procedure, discovery could proceed, and the government could assert the state secrets privilege over discrete evidence. *See, e.g., In re United States*, 872 F.2d at 478. During that process, the district court could fulfill its duty to disentangle sensitive from nonsensitive information, and allow plaintiff access to all nonprivileged evidence relevant to her claims. After discovery, either party could move for summary judgment or go forward to trial with nonprivileged evidence. At that point, if plaintiff could not prove her case without privileged evidence, or defendants could not assert a valid defense without privileged evidence, only then would the state secrets privilege justify the entry of judgment for defendants. *See id.* Though this Court should remand and allow the case to proceed, even at this early stage of the litigation the evidence currently available to Ms. Edmonds strongly suggests that the case could be decided without the need for either party to rely on state secrets.

1. Privacy Act Claims

The Privacy Act "prohibits disclosure of any individual's 'record' that is contained in a 'system of records' to another person without the individual's consent." *Chang v. Dep't of the Navy,* 314 F. Supp. 2d 35, 40 (D.D.C. 2004) (quoting 5 U.S.C. §552a(b)); *Taylor v. DOJ,* 257 F. Supp. 2d 101, 112 (D.D.C. 2003). To prove a claim for wrongful disclosure under the Privacy Act, a plaintiff must establish that "the agency disclosed 'any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.'"[21] *Krieger v. Fadely,* 211 F.3d 134, 136 (D.C. Cir. 2000) (quoting 5 U.S.C. § 552a(b)). Contrary to the district court's conclusion, neither party would need to rely on state secrets to prove or defend against Ms. Edmonds' Privacy Act claim.[22]

Ms. Edmonds has alleged that defendants willfully and unlawfully leaked to the press personal information about her without her consent, including that she was "subject to a security review, [her] job performance and other information contained in the [FBI's] personnel, security and investigative files." J.A. 44 (Compl. ¶ 37). Ms. Edmonds has identified two unauthorized disclosures by the government to the press that would clearly violate the Privacy Act. In the June 8, 2002 article in the *Associated Press*, anonymous government officials commented on her

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[21] "The Act defines 'record' as: any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or *employment history* and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph." *Bartel v. FAA*, 725 F.2d 1403, 1407-1408 (D.C. Cir. 1984) (*quoting* 5 U.S.C. § 552a(a)(4)) (emphasis added).

[22] Ms. Edmonds pled additional Privacy Act theories that might implicate the truth or falsity of the government's disclosures. However, at the pleading stage of the litigation, it is impossible to determine whether Ms. Edmonds could have proven even those claims with nonprivileged evidence, and it was improper for the district court to presume that she could not.

job performance and disclosed that Ms. Edmonds was being investigated for security breaches. J.A. 59-60. In the June 18, 2002 article in *The Washington Post*, anonymous government officials stated that Ms. Edmonds was fired because her disruptiveness hurt her on-the-job performance, that she was found to have breached security, and that she had been subject to a polygraph. J.A. 68-71. The Privacy Act prohibits unauthorized disclosures, whether written or oral, to any person or agency, *see* 5 U.S.C. § 552a(b); the government's disclosure of information to the press is clearly covered. *See Tripp v. Dep't of Defense*, 219 F. Supp. 2d 85, 91 (D.D.C. 2002) (unauthorized disclosures to media can state a Privacy Act violation).

To prove that a record is entitled to protection under the Privacy Act, a plaintiff need only show the maintenance of a system of records that can be "retrieved by an individual's name or other personal identifier." *Chang,* 314 F. Supp. 2d at 40 (quoting *Bartel*, 725 F. 2d at 1408 n.10). As the leaked information in this case pertains to Ms. Edmonds' personal employment history at the FBI, she will easily to be able to establish this element. In fact, were defendants to file an Answer, it is likely that they would concede that the information is maintained in a system of records.

Rather than allow Ms. Edmonds some discovery on her Privacy Act claims and then consider any nonprivileged evidence to support them, the district court swallowed the government's speculation that litigating the claim would jeopardize state secrets. First, the district court wrongly assumed that Ms. Edmonds would have to probe the substantive content of the systems of records to prove her claims. J.A. 31. As discussed above, however, the content of a system of records is irrelevant in a claim for wrongful disclosure under the Privacy Act. Second, the district court assumed that Ms. Edmonds would be unable to depose witnesses and thus could not prove who wrongly released her records. The court opined that since "the nature

of [Edmonds'] employment is privileged, 'identifying the individuals involved, where they work, what they do, their personal background, and their expertise,' is not possible." J.A. 31-32 (quoting Govt. Brief at 15); *cf. Vymetalik v. FBI,* 785 F.2d 1090 (D.C. Cir. 1986) (holding entire FBI records system was not exempt from the Privacy Act). The court thus erroneously concluded that the identity of all persons who have access to FBI personnel files is a state secret. It is hard to imagine how disclosing the mere identity of such individuals, or asking them whether they in fact leaked the records to the press, could possibly jeopardize state secrets. *Cf. Ellsberg,* 709 F.2d at 60 ("We cannot see . . . how any further disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials."). Taken to its logical extreme, the court's reasoning suggests that no individual with access to sensitive or classified information could ever be deposed. This simply cannot be, and is not, the law. Employees of the FBI, including its Special Agents, are law enforcement personnel, not covert intelligence operatives. Indeed, the FBI routinely reveals the names of its Special Agents in both civil and criminal litigation. *See, e.g., August v. FBI,* 328 F.3d 697, 699 (D.C. Cir. 2003) (noting that FBI Special Agent filed public declaration in FOIA case); *United States v. Evans,* 216 F.3d 80, 84 (D.C. Cir. 2000) (noting that FBI Special Agent publicly testified at criminal trial);" *see also Reynolds,* 345 U.S. at 11 (allowing depositions of flight survivors, even though they may have been aware of military secrets); *Barlow,* 53 Fed. Cl. 667, 669 n.4; (individuals with highly classified knowledge deposed, and gave public testimony at trial); *United States v. Lockheed Martin Corp.,* 1998 WL 306755 (D.D.C. May 29, 1998) (setting parameters of protective order to protect any classified information that may come out in depositions of defense contractors in civil litigation); *Pfeiffer v. CIA,* 1994 WL 80869 (D.D.C.

Mar. 3, 1994), *aff.* 60 F. 3d 861 (D.C. Cir. 1995), (individuals with classified knowledge deposed).

The government's invocation of the state secrets privilege to defeat Ms. Edmonds' Privacy Act claims is particularly ironic and unjust. The FBI itself leaked private information about Ms. Edmonds to the press to discredit her allegations of serious security breaches within the agency. It cannot now rely on the state secrets doctrine to defeat a valid claim by shielding the names of the FBI employees who violated Ms. Edmonds' privacy rights.

2. First Amendment Claim

The four elements of a public employee's First Amendment retaliation claim are: (1) whether the employee was "speaking on a matter of public concern"; (2) whether the employee's interest in speaking is "outweighed" by a governmental interest; (3) whether the employee's "speech was a substantial or motivating factor" in her termination; and (4) whether the government employer "would have reached the same decision even absent the protected conduct." *Tao v. Freeh*, 27 F.3d 635, 638-639 (D.C. Cir. 1994); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers,* 461 U.S. 138 (1983); *O'Donnell v. Barry*, 148 F.3d 1126 (D.C. Cir. 1998).

In prematurely concluding that it was impossible for Ms. Edmonds' First Amendment claim to proceed, the district court once again indulged in pure speculation. The court held that both "the nature of the plaintiff's employment" and "the events surrounding her termination" constituted state secrets. J.A. 29. *See also supra* at Section II. If discovery were allowed to proceed, it is likely that Edmonds could establish a *prima facie* claim without reference to privileged information. First, the government cannot seriously contend that Ms. Edmonds did not speak on a matter of public concern. Ms. Edmonds' speech questioned the integrity of the

FBI's counterterrorism investigations, including investigations into the September 11th attacks, and exposed potential flaws in the nation's security. J.A. 39-40 (Compl. ¶ 16); *see also Edmonds v. FBI*, 2002 WL 32539613, *4 (D.D.C. Dec 03, 2002); *Hall v. Ford,* 856 F.2d 255, 259 (D.C. Cir. 1988) ("[S]peech that concerns issues about which information is needed or appropriate to enable members of society to make informed decisions about the operation of their government merits the highest degree of first amendment protection.") (internal quotations omitted). Members of Congress, the Department of Justice's Inspector General, and the 9/11 Commission have all seriously considered Ms. Edmonds' allegations. The media has widely reported on them. J.A. 68-71, 83-85, 87. *Cf. Tao,* 27 F.3d at 640 (media coverage indicated the issues plaintiff raised were of "public concern"). There is no doubt that Ms. Edmonds could establish that she spoke on a matter of public concern without relying on privileged information.

There is also a plethora of nonprivileged evidence establishing that Ms. Edmonds' disclosures of security breaches were a motivating factor in her discharge. Many of her substantive allegations have already been confirmed by the FBI. J.A. 83-85; 148 Cong. Rec. S5482 (June 20, 2002). The Inspector General's report apparently concludes that Ms. Edmonds' disclosures were "at least a contributing factor in why the FBI terminated her services."[23] Her allegations have also been confirmed by the unclassified portions of the Inspector General's Audit of the FBI translation unit.[24]

It is also well-established that a First Amendment retaliation claim can be proved through circumstantial evidence. *Clark v. Library of Congress,* 750 F.2d 89, 101-102 (D.C. Cir. 1984)

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[23] *See supra* n.4, n.6.

[24] *The Federal Bureau of Investigation's Foreign Language Program -- Translation of Counterterrorism and Counterintelligence Foreign Language Material*, Report No. 04-25, July 2004, Office of the Inspector General, at pg. ii (available at http://www.usdoj.gov/oig/audit/FBI/0425/index.htm).

(plaintiff may use circumstantial evidence to prove that protected conduct was a substantial or motivating factor in the adverse employment action). Courts have held that proximity in time is a relevant factor in establishing whether an employment action was retaliatory. *See, e.g., Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 104 (D.C. Cir. 2003); *Jones v. Rivers*, 722 F. Supp. 771, 781 (D.D.C. 1989); *Alexis v. Dist. of Columbia*, 44 F. Supp. 2d 331, 347 (D.D.C. 1999). Ms. Edmonds was fired soon after she disclosed her concerns to senior management, and two weeks after she disclosed her concerns to the FBI's Office of Professional Responsibility and the Inspector General. J.A. 40-41 (Compl. ¶¶ 17-24). Soon thereafter, the government began leaking negative information about Ms. Edmonds to the press. J.A. 59-60, 68-71. With nonprivileged discovery, Ms. Edmonds could unearth additional evidence to support her claims. For example, she could depose other employees at the FBI who have also faced retaliation for exposing problems in the translation unit.

The district court incorrectly presumed that the parties would have to litigate the truth or falsity of Ms. Edmonds' speech in order to decide her First Amendment claim. J.A. 29. Like Title VII claims, though, First Amendment retaliation claims do not rest on whether a plaintiff's speech is factually true. *See Morris v. Washington Metro. Area Transit Auth.*, 702 F.2d 1037, 1049 (D.C. Cir. 1983) ("The logical structure of a retaliation case, whether based upon Title VII or the First Amendment," is the same.); *Rogers v. McCall,* 488 F. Supp. 689, 697 (D.D.C. 1980) (to establish a Title VII retaliation claim for reporting allegedly discriminatory acts, plaintiff "need not prove that the underlying claim for discrimination was true"); *Kubicko v. Ogden Logistics Services,* 181 F.3d 544, 554 (4th Cir. 1999) (proving claim that plaintiff was retaliated against for giving testimony in a Title VII investigation "d[id] not turn on the substance of an employee's testimony regardless of how unreasonable that testimony may be"). Rather, Ms.

Edmonds' claim turns on whether she had a right to voice her concerns, based on a good faith belief that there were serious problems in the translation unit, without retaliation. *See, e.g., Morris,* 702 F.2d at 1043 (plaintiff in First Amendment and Title VII retaliation action need only prove he had a "reasonable belief" that he was reporting unlawful activity for which he was retaliated against); *Parker v. Baltimore & O. R. Co.,* 652 F.2d 1012, 1020 (D.C. Cir. 1981) (Title VII retaliation claim stated where plaintiff can "demonstrate a good faith, reasonable belief that the challenged practice violate[d] Title VII").

Once Ms. Edmonds establishes the elements of her *prima facie* case, as outlined above, the burden shifts to the government to prove that its interest outweighs Ms. Edmonds' right to speak on matters of public concern.[25] The government has no legitimate interest in covering up malfeasance, or silencing employees who report concerns about national security through proper channels. Moreover, when an employee is acting as a whistleblower, her right to speak is entitled to additional weight. *See Foster v. Ripley,* 645 F.2d 1142, 1148 (D.C. Cir. 1981) (in First Amendment retaliation analysis, an employee's speech "interest is entitled to more weight when [she] is commenting on a matter of general interest or acting as a whistleblower").

Finally, defendant must then prove "by a preponderance of the evidence that it would have reached the same decision" regarding the adverse employment action "even in the absence of the protected conduct." *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977). Again, with little discussion, the district court concluded that the government could not assert a valid defense without relying on state secrets. J.A. 29. If the court relied on the

[25] In evaluating the government's interest, this Court has considered "whether the statement impairs discipline by superior or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *O'Donnell,* 148 F.3d at 1135.

government's secret evidence to conclude that the government would have terminated her despite her speech, which is not at all clear from the opinion, such reliance is grossly improper prior to any discovery and without giving Ms. Edmonds any opportunity to present opposing evidence. *See In Re United States*, 872 F.2d at 478. Were the court to employ the proper procedure during discovery, it might well be able to disentangle sufficient nonsensitive information from any allegedly sensitive information to allow litigation of any purported defense. Or Ms. Edmonds, if given the opportunity, might be able to present nonprivileged evidence that would ultimately refute any explanation provided by the government in its secret submissions.

3. Due Process Claims

Like her Privacy Act and First Amendment claims, Ms. Edmonds' Due Process claims are predicated on nonprivileged evidence, and proving them would not require adjudicating the truth of her whistleblowing allegations.[26] This Court has held that "[g]overnment action that has the effect of seriously affecting, if not destroying a plaintiff's ability to pursue his chosen profession, or substantially reducing the value of his human capital . . . infringes a liberty interest" protected by the Constitution. *O'Donnell,* 148 F.3d at 1141 (internal citations and quotations omitted). When the government imposes a stigma that infringes on a liberty interest, a plaintiff is entitled to due process, namely, an opportunity to clear her name before the agency. To prevail on a stigma claim, Ms. Edmonds need not prove that the stigmatizing statements or

[26] Ms. Edmonds pled additional due process theories that may bear on the accuracy of the government's statements about her. Once again, the district court erred by presuming at the pleading stage that Ms. Edmonds would be unable to prove her claims with nonprivileged evidence.

actions were false, but merely that the government's statements have sufficiently infringed on her liberty interests to entitle her to a hearing before the agency to clear her name. As the Supreme Court has explained, the "truth or falsity of the [government's stigmatizing] statement ... neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired." *Bishop v. Wood,* 426 U.S. 341, 349 (1976); *see also Doe v. DOJ,* 753 F.2d 1092, 1112-13 (D.C. Cir. 1985); *Harper v. Blumenthal*, 478 F. Supp. 176, 188 (D.D.C. 1979) ("in deciding whether a government employee's Liberty interest has been impaired, the truth or falsity of the reason given for his discharge is not an issue . . . [and] should not be considered").

Under this Court's holdings, Ms. Edmonds could prove that she was entitled to a name-clearing hearing by first establishing that the FBI's public statements regarding her termination were sufficiently stigmatizing. *Alexis*, 44 F. Supp. 2d 331, 339; *Karteseva v. Dep't of State*, 37 F.3d 1524, 1527 (D.C. Cir. 1995); *Doe v. DOJ*, 753 F.2d at 1105. Ms. Edmonds would then need to prove that the stigmatizing statements have prevented her from pursuing her chosen career as a government translator. *Karteseva*, 37 F. 3d at 1528; *Doe v. DOJ,* 753 F. 2d at 1112-1113. Neither element would require Ms. Edmonds to rely on state secrets or even to probe sensitive information.

Indeed, even the district court did not question Ms. Edmonds' ability to state a stigma claim with nonprivileged evidence. Rather, the court held that Ms. Edmonds could not be granted a *remedy* – the name-clearing hearing – without disclosure of privileged information. J.A. 30. However, the district court erroneously assumed that a name-clearing hearing would require a public adjudication of the truth of the government-imposed stigma. J.A. 30-31. This Court has made clear that a name-clearing hearing typically occurs before the agency itself, not

in open court. *Doe v. DOJ,* 753 F.2d at 1112; *Moore v. Agency for Int'l. Dev.*, 80 F.3d 546, 548 (D.C. Cir. 1996) (name-clearing hearing is conducted by the agency); *see also Doe v. Tenet,* 329 F.3d at 1154 (explaining that state secrets may not interfere with adjudication of the due process claim because plaintiffs "primarily seek due process within the agency, not before the courts"). Name-clearing hearings are inherently flexible, and measures may be taken to safeguard sensitive information, if necessary, even at the agency level. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (due process "is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather a flexible doctrine); *Doe v. DOJ,* 753 F. 2d at 1113 (noting that, on remand, "the district court will be required to determine the precise nature of the name-clearing procedure that the Department must provide Doe"). Especially at such an early stage of the litigation, the district court erred in dismissing Ms. Edmonds' due process claim based on the state secrets privilege.

C. The district court erred in failing to consider alternatives to dismissal.

The district court failed in its duty to consider alternatives to dismissal before terminating this litigation. As one court explained, "[o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted." *Fitzgerald,* 776 F.2d at 1244. Courts must use "creativity and care" to devise "procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form." *Id.* at 1238 n.3; *see also In re United States*, 872 F.2d at 478 (discussing measures to protect sensitive information as the case proceeds); *Doe v. Tenet*, 329 F.3d at 1152 ("[W]here constitutional issues are raised, the courts must consider the fully panoply of alternative litigation methods outlined above – *in camera* review, sealed records, and, if necessary, secret proceedings – before concluding that the only alternative is to dismiss the case

and thereby deny the plaintiff's claimed constitutional rights."). This duty is vital to protect an injured party's constitutional right of access to the courts to redress her grievances. As this Court has emphasized, "[m]eaningful access to the courts is a fundamental right of citizenship in this country. Indeed, all other legal rights would be illusory without it." *Martin v. Lauer,* 686 F.2d 24, 32 (D.C. Cir. 1982) (internal citations and quotations omitted).

Because of the injustice of dismissal, this Court has sought creative alternatives that allow the injured party to vindicate her rights while protecting state secrets from disclosure. For example, in *In re United States*, the Court discussed several alternatives to dismissal, noting that "the information remains in the Government's custody, and the parties' discovery stipulation has preserved the Government's right to assert the privilege and to support its assertions by submissions of representative samples of documents for *in camera* review." 872 F. 2d. at 478. Moreover, "the parties have provided for the protection of third party privacy by agreeing to mechanisms limiting the disclosure of certain documents, including redaction of names." *Id.* Finally, the Court noted that a bench trial "w[ould] reduce the threat of unauthorized disclosure of confidential material." *Id.* Similarly, in *The Irish People, Inc*, the Court upheld the invocation of the privilege but refused to dismiss the case, suggesting that the district court could make representative findings of fact and provide summaries of withheld information. The Court noted that "the district court may properly itself delve more deeply than it might ordinarily into marshalling the evidence on both sides for the selective prosecution claim." *The Irish People*, 684 F.2d at 955. Other courts have utilized a number of additional tools to safeguard sensitive information in cases involving state secrets, including (1) protective orders, *Lockheed Martin Corp.,* 1998 WL 306755; (2) seals, *In re Under Seal,* 945 F.2d at 1287; *Doe v. Tenet,* 329 F.3d at 1148; (3) bench trials, *In re United States,* 872 F. 2d. at 478; (4) the use of special masters, *Loral*

Corp. v. McDonnell Douglas Corp, 558 F.2d 1130, 1132 (2d Cir. 1977); and (5) *in camera* trials, *Halpern*, 258 F.2d at 41.[27]

Any alternative is clearly preferable to the draconian dismissal of a case at the pleading stage. The district court's failure to consider seriously any of these alternatives, prior to any discovery and without knowing the extent to which state secrets are even necessary to litigate the claims, was clear error. Ignoring these options deprived Ms. Edmonds of her constitutional right of meaningful access to the courts.

IV. The government's overbroad invocation of the state secrets privilege distorts the doctrine, will deter whistleblowers, and may jeopardize national security.

The government's overbroad invocation of the state secrets privilege will have far-reaching adverse consequences on legal doctrine, on future whistleblowers, and on national security. Indeed, so sweeping is its rationale that it is impossible to identify a limiting principle that would prevent the future misuse of the state secrets doctrine as a sword against any manner of litigation that touches upon classified or sensitive subjects.

To invoke the state secrets privilege, Attorney General Ashcroft offered the troubling and ungrounded contention that disclosing "the nature of the duties of plaintiff or the other contract translators in this case" could reasonably "be expected to cause serious damage to the national

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[27] In addition, courts routinely deal with classified information in criminal cases. The Classified Information Procedures Act ("CIPA") sets forth a comprehensive regime for safeguarding classified information in litigation. *See generally* CIPA, 18 U.S.C. app. III § 1 *et seq.* Under CIPA, courts review and consider classified material as a matter of course. *See, e.g., United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998) (reviewing classified materials in detail). When necessary, protective orders are utilized to prevent the release of classified information beyond the parties to the litigation. *See, e.g.,* 18 U.S.C. app. III § 3; *United States v. Pappas,* 94 F.3d 795, 797 (2d Cir. 1996); *United States v. Musa*, 833 F. Supp. 752, 758-61 (E.D. Mo. 1993). Courts have also handled classified information in civil cases. *See, e.g., NY Times v. United States,* 403 U.S. 713, 723 (1971) (Douglas, J. concurring); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001); *McGehee,* 718 F.2d at 1148-49; *Barlow,* 53 Fed. Cl. at 667.

security interests of the United States."[28] That contention, if accepted, would have broad and unanticipated effects on a whole range of cases involving employees in classified environments. If Ms. Edmonds' status as an FBI translator, her security clearance, and the classified nature of her day-to-day work may in and of themselves be invoked as bases for dismissal of litigation pursuant to the state secrets doctrine, then many thousands of government employees may find themselves similarly deprived of a judicial forum should the government, for whatever reason, claim the privilege. Indeed, litigation that has long been considered routine might suddenly be at risk. *See e.g., Tao*, 27 F. 3d at 635 (reversing grant of summary judgment against FBI translator who raised First Amendment retaliation challenge and allowing case to proceed); *Barlow,* 53 Fed. Cl. at 667 (adjudicating lawfulness of termination of Department of Defense employee in case involving Pakistan's nuclear program); *Buttino v. FBI,* 801 F. Supp. 298 (N.D. Cal. 1992) (denying summary judgment to FBI in challenge by agent to revocation of security clearance). As the Supreme Court has observed in the highly sensitive context of litigation against the Central Intelligence Agency, lawsuits "attacking the hiring and promotion policies of the Agency are routinely entertained in federal court," notwithstanding the Agency's stated objection to litigants' "'rummaging around' in the Agency's affairs to the detriment of national security." *Webster v. Doe,* 486 U.S. 592, 604 (1988). Such litigation is possible because "the District Court has the latitude to control any discovery process which may be instituted so as to balance [a

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[28] Attorney General Ashcroft's public affidavit contains only the following justification for asserting the state secrets privilege:

> I have concluded that further disclosure of the information underlying the case, including the nature of the duties of plaintiff or other contract translators at issue in this case reasonably could be expected to cause serious damage to the national security interests of the United States. Any further elaboration concerning this matter on the public record would reveal information that could cause the very harms my assertion of the state secrets privilege is intended to prevent.

J.A. 55 (Ashcroft Decl.).

plaintiff's] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.*; *see also M.K. v. Tenet,* 99 F. Supp. 2d 12 (D.D.C. 2000) (denying CIA's motion to dismiss in action brought by CIA employees challenging, *inter alia,* adverse determinations predicated on allegedly inaccurate records). Should this Court validate the government's efforts to expand dramatically the reach of the privilege and permit the dismissal of Ms. Edmonds' suit on the grounds stated, the government will have every incentive to deploy the state secrets privilege as an instrument against embarrassing disclosures, rather than against legitimately threatening ones, and government employees who work in classified environments will have little protection against unlawful conduct by their superiors.

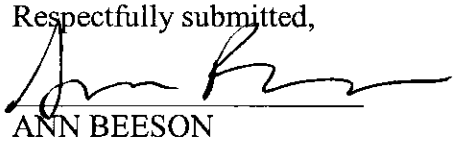
In short, if the state secrets privilege can be invoked to terminate at the outset any litigation brought by employees whose work is similar to Ms. Edmonds', then the government may retaliate with impunity against whistleblowers who disclose government misconduct. In this regard, the government may not claim a monopoly on the language of national security. By seeking to create a legal atmosphere in which national security whistleblowers will be deterred from raising their concerns by the utter lack of employment protections, the government may well make the nation less safe, not more. Indeed, since the attacks of September 11, "there has been a surge of national security whistleblowers whose disclosures are warnings so that tragedy will not recur." Testimony of Thomas Devine, Government Accountability Project, Senate Governmental Affairs Comm. on S.1358, Nov. 12, 2003, at 9, available at http://govt.aff.senate.gov/_files/111203define.pdf. These citizens, at great risk, have dared to confront a "bureaucracy [that] has been satisfied to maintain the false appearance of security, rather than implementing well-known solutions to long-confirmed, festering problems." *Id.* It is

precisely these government employees who are most at risk from the district court's overbroad construction of the state secrets privilege. This Court, in clarifying the breadth and proper application of the privilege, must remain mindful that "invocation of the state secrets privilege can have adverse as well as salutary effects on national security interests." *Doe v. Tenet*, 329 F.3d at 1151; *see also NY Times Co.*, 403 U.S. at 719 (1971) (Black, J. concurring) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand for further proceedings.

Respectfully submitted,



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Dated: January 12, 2005

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I hereby certify that I caused two true and correct copies of the Brief of Plaintiff-Appellant and the Joint Appendix to be hand-delivered on January 12, 2005 to:

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