

No. 04-5286

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SIBEL EDMONDS,

*Plaintiff-Appellant,*

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the District of Columbia

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**BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT BY  
PROJECT ON GOVERNMENT OVERSIGHT; NATIONAL SECURITY  
ARCHIVE FUND, INC.; PUBLIC CITIZEN, INC.; GOVERNMENT  
ACCOUNTABILITY PROJECT; FREEDOM OF INFORMATION CENTER;  
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AMERICAN  
LIBRARY ASSOCIATION; ASSOCIATION OF RESEARCH LIBRARIES;  
9/11 FAMILIES UNITED TO BANKRUPT TERRORISM; COALITION OF 9/11  
FAMILIES; NATIONAL AIR DISASTER ALLIANCE; 9/11 FAMILIES FOR A  
SECURE AMERICA; SEPTEMBER 11TH ADVOCATES; AND  
WORLD TRADE CENTER UNITED FAMILY GROUP**

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**CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND  
RELATED CASES UNDER LOCAL RULE 28(a)(1)  
(INCLUDING F.R.A.P. 26.1 STATEMENT)**

Pursuant to Rule 28(a)(1) of this Court (and Federal Rule of Appellate Procedure 26.1),  
counsel for amici curiae certify as follows:

**A. Parties and Amici**

The following is a list of all parties and amici who have appeared before the district court  
and in this Court.

Plaintiff-Appellant: Sibel Edmonds.

Defendants-Appellees: United States Department of Justice; Federal Bureau of  
Investigation; John Ashcroft; Robert S. Mueller, III; Thomas Frields; and George  
Stukenbroker.

Amici Curiae: Project On Government Oversight; National Security Archive Fund, Inc.; Public Citizen, Inc.; Government Accountability Project; Freedom of Information Center; Reporters Committee for Freedom of the Press; American Library Association; Association of Research Libraries; 9/11 Families United to Bankrupt Terrorism; Coalition of 9/11 Families; National Air Disaster Alliance; 9/11 Families for a Secure America; September 11th Advocates; and World Trade Center United Family Group.

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, counsel certifies that amici are nonprofit organizations that seek to improve transparency in government by working for greater public access to government information and by opposing excessive government secrecy, and/or nonprofit associations that represent the families of victims of the 9/11 terrorist attacks and seek greater public access to government information relating to the events of 9/11. Amici have no parent companies and no publicly held company has an ownership interest in any of the amici organizations.

**B. Ruling Under Review**

The ruling under review is the Memorandum Opinion and Order of District Judge Reggie B. Walton, dated July 6, 2004, dismissing this action. J.A. 9. The Memorandum Opinion is published at the following official citation: *Edmonds v. United States Department of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004).

**C. Related Cases**

This case has not previously been before this Court or any other court except the court below. Counsel for amici are not aware of any related cases as that phrase is defined in Circuit Rule 28(a)(1)(C). Counsel for amici are aware of two cases currently pending that involve some

of the same parties and underlying facts, but the issues in those cases are distinct from the issues presented here. Those cases are *Edmonds v. Federal Bureau of Investigation*, No. 04-5177, pending before this Court, and *Project On Government Oversight (POGO) v. Ashcroft*, No. 04-1032-JDB, pending before the United States District Court for the District of Columbia.

Respectfully submitted,

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## **GLOSSARY**

CIA	Central Intelligence Agency
CIPA	Classified Information Procedures Act, codified at 18 U.S.C. app. III
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act, codified at 5 U.S.C. § 552
OIG	U.S. Department of Justice, Office of the Inspector General
POGO	Project On Government Oversight



## STATEMENT OF INTEREST

Amici curiae submit this brief in support of plaintiff-appellant Sibel Edmonds, a contract linguist fired by the FBI in retaliation for reporting serious problems in the translation unit where she worked. Ms. Edmonds brought this case to challenge her termination and seek redress for government disclosures to the media about her. After Ms. Edmonds filed suit, the government classified all of the information related to her case and invoked the state secrets privilege, even though it had previously released much of the information during unclassified congressional briefings, and even though much of that information had been disseminated to the public through the traditional media and on the Internet.

On January 14, 2005, the U.S. Department of Justice's Office of the Inspector General released a detailed, 39-page "Unclassified Summary" of a 100-page report entitled "*A Review of the FBI's Actions in Connection With Allegations Raised By Contract Linguist Sibel Edmonds.*" The unclassified summary (hereinafter "OIG Report") concludes that "many of her allegations were supported, that the FBI did not take them seriously enough, and that her allegations were, in fact, the most significant factor in the FBI's decision to terminate her services." *Id.* at 31. The OIG report is available at <http://www.usdoj.gov/oig/igspecr1.htm>. Most pertinent to this case, however, is the extensive background information provided in the report — information that, standing alone, would go a long way towards establishing Ms. Edmonds' prima facie case under the First Amendment and the Due Process Clause.

Several of the amici are nonprofit organizations that seek to improve transparency in government by working for greater public access to government documents and information, and by opposing excessive government secrecy. These amici are concerned that the decision below threatens the public's ability to obtain information, discuss important issues, and advocate for

greater government accountability, because the overbroad and unchecked use of the state secrets privilege undermines government accountability by denying a forum for potentially legitimate claims of government wrongdoing. These amici are also concerned that the summary disposition of Ms. Edmonds' constitutional and statutory claims, without any appreciable effort by the court below to preserve her access to judicial review, will send a clear and chilling message to government employees in agencies engaged in national security work — namely, that an employee calls public attention to problems at the agency, even those that endanger our national security, at his or her peril.

The other amici are nonprofit associations that represent the families of victims of the 9/11 terrorist attacks. The 9/11 family groups work for greater public access to government information relating to the attacks; they believe that the decision below interferes unnecessarily with their ability to obtain such information.

**The Project On Government Oversight (POGO)** is a politically-independent, nonprofit watchdog headquartered in Washington, DC, that strives to promote a government that is accountable to the citizenry. Founded in 1981, POGO investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests. POGO's investigators and journalists take leads from government insiders and whistleblowers and verify the information through investigations using FOIA, interviews, and other fact-finding strategies. POGO then reports its findings to the media, Congress, and the public, both in print and electronic media.

**The National Security Archive Fund, Inc.** ("the Archive") is an independent, nongovernmental research institute and library located at George Washington University in

Washington, DC. The Archive was established in 1985 to promote research and public education on U.S. governmental and national security decision-making and to promote and encourage openness in government and government accountability. The Archive collects and publishes declassified documents obtained through FOIA and other open government laws. The Archive is the world's largest nongovernmental library of declassified documents, has published more than 500,000 pages of declassified records in various formats, and has become the leading nonprofit user of FOIA.

**Public Citizen, Inc.**, a public interest organization with approximately 160,000 members, was founded in 1971 and is headquartered in Washington, DC. Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues. In particular, Public Citizen promotes openness and democratic accountability in government by requesting and making use of government records, and by providing technical and legal assistance to individuals, public interest groups, and the media who seek access to information held by government agencies.

**The Government Accountability Project** is a 28-year-old non-profit public interest group that promotes government and corporate accountability by advancing occupational free speech, defending whistleblowers, and empowering citizen activists.

**The Freedom of Information Center** is a reference and research center in the University of Missouri School of Journalism dedicated to the study of open government. The Center serves the general public and the media on questions regarding access to government documents and information and conducts research on access issues. Established in 1958, the Center has a collection of more than one million articles and documents about access to

information at the state, federal and local levels, in addition to a wide collection of online document accessible through its webpage.

**The Reporters Committee for Freedom of the Press** is an association of reporters and editors that works to defend the First Amendment and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and FOIA litigation since 1970. The Reporters Committee has a strong interest in preserving access to information concerning the federal government and in avoiding the consequences of overbroad rules that could prohibit public oversight of government affairs.

**The American Library Association** is the oldest and largest library association in the world, with some 65,000 members and a mission to provide leadership in the development, promotion and improvement of library and information services to enhance learning and ensure access to information for all.

**The Association of Research Libraries (ARL)** is a nonprofit association of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service.

**9/11 Families United to Bankrupt Terrorism** investigates and seeks to counter the banks, foundations, charities, companies, and individuals who financed Al Qaeda and Osama Bin Laden. It has filed suit against these terrorist financiers and it has a particular interest in

having Sibel Edmonds testify in its lawsuit. That testimony has been precluded by the government's invocation of the state secrets privilege.

**The Coalition of 9/11 Families** is the largest 9/11 advocacy group, representing over 4,000 9/11 family members, survivors, rescue workers, and others, with respect to preservation of the spiritual and historical significance of the World Trade Center site. The Coalition of 9/11 Families' mission is to preserve the historical significance of 9/11 through peer support events, information resources, and advocacy work concerning the future memorial at the World Trade Center site.

**The National Air Disaster Alliance** is the largest grassroots air safety organization in the United States, representing survivors, those who have lost loved ones, aviation professionals, the traveling public, and others affected by over 100 air disasters worldwide including the 9/11 terrorist attacks. It is a non-profit corporation that seeks to raise the standard of safety, security, survivability, and support through constructive communications with all levels of government, public and private agencies, manufacturers, and industry associations.

**9/11 Families for a Secure America** works to expose officials who were responsible for the policies that allowed 9/11 to occur. It recommends border security reform and seeks the election of public officials who support border security laws and regulations and their strict enforcement.

**September 11th Advocates** (a.k.a. "The Jersey Girls") is a group of family members of 9/11 victims formed to advocate for an independent commission to investigate the terrorist attacks and congressional action to implement the commission's recommendations.

**World Trade Center United Family Group** is a nonprofit support and information association that believes in the value of building a community of trust and shared experience for 9/11 families, survivors, and rescue workers. The group organizes peer support events, disseminates pertinent information, enhances an online peer support forum, and conducts community advocacy and outreach efforts. The group serves as a living tribute to the thousands of innocent men, women, and children killed in the 9/11 attacks on America.

On December 8, 2004, this Court granted the unopposed motion of POGO, the Archive, and Public Citizen for leave to file an amicus brief in this case. By unopposed motion filed with this brief, the other amici seek leave to join the brief authorized by the prior order. Because the Court's decision in this case will have a significant impact on government accountability and public access to information, amici urge this Court to reverse the judgment of the district court and remand the case for further proceedings.

#### **BACKGROUND AND SUMMARY OF THE ARGUMENT**

Amici agree with the arguments set forth by Ms. Edmonds. Reliance on a common-law evidentiary privilege to dismiss all of Ms. Edmonds' constitutional and statutory claims at the threshold is indefensible, especially where, as here, much of the information surrounding Ms. Edmonds' allegations and the failure of the FBI to take them seriously is a matter of public record, and the Justice Department's Inspector General has concluded that Ms. Edmonds' allegations "were, in fact, the most significant factor in the FBI's decision to terminate her services." OIG Report at 31. Although amici recognize that the government has an interest in ensuring the secrecy of national security information, the district court below failed to fulfill its duty to ensure that Ms. Edmonds' claims were not sacrificed needlessly. After all, Congress has

made no effort to preclude claims such as those brought by Ms. Edmonds. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). Indeed, *Webster* admonished that a “serious constitutional question” would arise if consideration of Doe’s constitutional claims were foreclosed. *Id.* It follows that executive branch efforts to proscribe judicial review of such claims must be examined with great care. By failing to take the steps necessary to determine whether an accommodation was possible that would have permitted the plaintiff to prove her case without compromising national security information, the district court abdicated the judicial oversight role stressed by the courts that have examined this issue. *See, e.g., Reynolds v. United States*, 345 U.S. 1, 9-10 (1953) (“[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive of executive officers.”); *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) (“[A] court must not merely unthinkingly ratify the executive’s assertion of absolute privilege, lest it inappropriately abandon its important judicial role.”); *Ellsberg v Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) (“[T]he 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.”). This failure is a serious one. Before accepting the executive branch’s claim of state secrets privilege, the court must scrutinize the basis for the claim.

The district court should have, but did not, assure itself that: 1) the case could not have been litigated to judgment without the introduction of properly classified information; *and* 2) the substantial array of procedures available to a court to permit the use of classified information without its revelation to the public would have been insufficient to safeguard such information in the course of a judicial proceeding to entertain Ms. Edmonds’ claims. The district court did not

have before it sufficient information to make the first determination, and the court never addressed any of the measures that might have been employed to permit Ms. Edmonds' case to go forward while protecting sensitive information. The court simply rushed to dismiss this action and extinguish Ms. Edmonds' constitutional claims.

To make matters worse, the district court brushed aside the fact that much of the information surrounding Ms. Edmonds' allegations and the government's response to them was in the public domain and widely disseminated *before* the government engaged in a retroactive classification as a predicate for invoking the state secrets privilege. Indeed, before the government asserted the privilege in this case, the FBI on two occasions provided unclassified briefings to members and staff of the Senate Judiciary Committee during which the FBI released information relating to Ms. Edmonds' employment with the FBI, her discovery of serious problems in the FBI translation unit, details of her allegations about the FBI's misfeasance, and her subsequent termination. J.A. 73-74, 80-81, 173-176. Much of that information was reported in the media and disseminated via the Internet.

Ms. Edmonds' allegations triggered widespread concern by Members of Congress, who communicated their concern in letters to Department of Justice officials that set forth in considerable detail the nature of Ms. Edmonds' allegations and the information released by the FBI. J.A. 73-74, 80-81. Notwithstanding the broad dissemination of this information and the strict limits on classifying information in the public domain in the relevant Executive Orders, the Department of Justice, in a highly unusual move, classified retroactively all information relating to Ms. Edmonds' lawsuit. This fact, together with the timing and breadth of the classification



decision, strongly suggests that the classification was designed to bolster the government's claim of privilege rather than to protect sensitive national security information.

For example, on October 18, 2002, Attorney General Ashcroft asserted the state secrets privilege in this case by declaring 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; *but see* OIG Report at 3-9 (providing detailed information about these topics). Although Mr. Ashcroft's declaration is silent as to the classification decision made in conjunction with assertion of the privilege, the government has asserted in another case that, on October 18, 2002, the FBI classified the "mosaic of information related to Ms. Edmonds' employment case." Declaration of Marion E. Bowman, filed November 22, 2004 with Defendants' Motion for Summary Judgment, in *Project On Government Oversight (POGO) v. Ashcroft*, No. 04-1032-JDB (D.D.C.).<sup>1</sup>

Although the government claims that it retroactively classified this information simultaneously with its invocation of the state secrets privilege in this case, the government made no effort to recover the information from the public domain or to stop its further spread until May 2004, when it notified congressional staffers that information discussed during the summer 2002 briefings had been subsequently classified. *Id.* The FBI took this action only after

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<sup>1</sup> *POGO* is a First Amendment challenge to a prior restraint resulting from the government's classification of information *after* its release to the public. The plaintiff in *POGO* lawfully obtained and desires to disseminate the now-classified information, but has been restrained from doing so by fear of prosecution under criminal statutes that, the government contends, prohibit the dissemination of classified information even by those who are not government employees.

asserting the state secrets privilege to stop Ms. Edmonds from testifying in a case brought by the families of those killed on September 11 against Saudi individuals and entities alleged to have financed al-Qaeda, *see Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82 (D.D.C. 2004), and only after the government was ordered to produce any relevant unclassified information that had been previously disclosed. J.A. 216.

These facts send a danger signal that strongly suggests that the classification on which the government rests its assertion of the state secrets privilege would not have occurred but for the government's desire to use the state secrets privilege as a litigation tactic to deprive Ms. Edmonds of the right to prove in court what the Inspector General has found — namely, that her allegations were the “most significant factor in the FBI's decision to terminate her services” — and to foreclose Ms. Edmonds' testimony before the trial court hearing the 9/11 damages case. The district court's failure to determine whether the government's assertion of the state secrets privilege was a false alarm not only served to unfairly deny Ms. Edmonds her day in court, it countenanced a wave of unnecessary secrecy that denies the public access to government information concerning one of the most significant events in our nation's modern history.

### **ARGUMENT**

Amici adopt the appellant's arguments on the merits and do not repeat them here. Amici wish to add two points that are fairly drawn from appellant's argument but do not stand out in appellant's more comprehensive treatment of the legal issues.

**I. The District Court Failed to Assess the Validity of the Government’s Secrecy Claims.**

The district court abdicated its oversight function by focusing its decision on whether the government had satisfied the procedural requirements for invoking the state secrets privilege, while failing to determine whether the underlying materials the government sought to withhold were properly classified and also subject to withholding on state secrets grounds. Although the district court “reviewed several classified declarations . . . which specifically detail the ‘reasonable danger’ that revelation of classified information would have,” J.A. 24, there is no indication that the district court reviewed the classified materials themselves to determine the validity of the government’s secrecy claims. Nothing in the district court record suggests that the government provided the district court documents *in camera* and explained why each document was essential to a fair adjudication of Ms. Edmonds’ claims, or that the district court determined that each document was in fact properly classified and also subject to withholding on state secrets grounds. This Court has made clear that, where, as here, the state secrets privilege is invoked as grounds for dismissal and the subject of the controversy is not itself a state secret, such review is “not only appropriate” but is “obligatory.” *See, e.g., Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401 (D.C. Cir. 1984); *Ellsberg*, 709 F.2d at 59 n.37; *In re United States*, 872 F.2d at 478-79. For this reason alone, the decision below cannot stand.

Moreover, the decision below is at odds with developments in national security law since the advent of the state secrets doctrine. The doctrine pre-dates passage of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and especially the 1974 amendments to FOIA, which clarified that exemption 1 claims should be reviewed *de novo*. Ironically, if this case had been brought under FOIA simply to get information that might be classified, the government would

have the burden of identifying relevant records, demonstrating that each record was properly classified under the applicable Executive Orders, and establishing that no segregable portions of the records could be released.<sup>2</sup> *See Ray v. Turner*, 587 F.2d 1187, 1194-95 (D.C. Cir. 1978); *Allen v. CIA*, 636 F.2d 1287, 1294 (D.C. Cir. 1980). Here, in contrast, it does not appear that the district court had before it even a bare-bones identification of the records that the government contends are: 1) properly classified; 2) essential to an adjudication of the case; and 3) so sensitive that they could not be used at trial subject to appropriate procedures and a protective order barring their release to the public. As a result, Ms. Edmonds' constitutional claims received less intensive review from the court than she would have been entitled to under FOIA.

Had the district court examined the materials the government claims are privileged, it would have concluded that at least some of the materials were not properly classified under the applicable Executive Order and cannot be considered secret in any meaningful sense. To the extent that the information that the government claims is privileged was classified simultaneously with the government's invocation of the state secrets privilege in this case, the classification was controlled by Executive Order 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995), and was unlawful because the government may not classify public information. *See* Executive Order 12958, Sec. 1.2(a)(2) (prohibiting the original classification of information not owned,

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<sup>2</sup> We do not mean to suggest that information may be withheld under the state secrets privilege just because it is properly classified under an Executive Order. Application of the state secrets privilege depends on a showing, independent of classification, that the revelation of the information claimed to be a state secret would lead to demonstrable harm to the national security. In this case, the public record does not reveal whether the district court upheld the state secrets privilege claim simply because the government asserted that the information needed to adjudicate the case was classified, or because the government made an effort to demonstrate in its *in camera*, *ex parte* submissions that national security would be harmed by the disclosure of this information in judicial proceedings.

produced, or controlled by the government) & Sec. 1.8(c) (prohibiting reclassification of information after release to the public). Moreover, it is unlawful for the government to classify information for an improper purpose, such as gaining a litigation advantage or hampering congressional oversight. *See, e.g.*, Executive Order 12958, Sec. 1.8(a)(1) & (2) (prohibiting classification to conceal violations of law, inefficiency, or administrative error, or to prevent embarrassment to a person, organization, or agency). But regardless of the appropriateness of *classifying* public information, it would run counter to the idea of the state *secrets* privilege to allow the government to claim the privilege for materials that are not “secret,” such as information that may be accessed through the Internet. For this reason, the district court’s approval of the broadside invocation of state secrets privilege here cannot be sustained.

In other cases involving sensitive national security information, the courts have drawn a line between sensitive information that is not public and information that, while arguably sensitive, is public, protecting the former but not the latter. *See, e.g., McGehee v. Casey*, 718 F.2d 1137, 1142-45 (D.C. Cir. 1983) (upholding pre-clearance review by CIA of former agent’s manuscript only on express understanding that CIA could not order the redaction of public source information); *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972) (emphasizing that the government has no legitimate interest in suppressing information obtained from public sources); *see also Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (dictum) (suggesting that it would be inappropriate for the CIA to insist that information in the public domain be suppressed). Indeed, it is hard to imagine how information that has already been disseminated in full on the Internet and remains publicly available can “pose a reasonable danger to secrets of state.” *In re United States*, 872 F.2d at 475.

## II. The District Court Failed to Consider Alternatives to Dismissal.

The district court compounded its error by failing to consider whether there were procedures that would permit the plaintiff to play a role in its deliberations on the government's claim that the case must be dismissed at the threshold, in its entirety, on state secrets grounds. Indeed, by relying solely on the government's *in camera*, *ex parte* affidavits to justify the dismissal of this action, the procedure used by the district court was completely one-sided and did not permit any adversarial testing of the government's claims. *See generally Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). There are, however, several procedures that the district court should have considered prior to dismissing Ms. Edmonds' case.

A. *Providing Security Clearances for Ms. Edmonds' Counsel.* Putting aside the question whether the plaintiff has a constitutional right for her attorneys to have access to information claimed to be secret in order to assist the court in considering the government's privilege claim, *see Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003), courts have routinely authorized and, at times, compelled the clearance of counsel so that they can receive sensitive national security information.

For instance, in cases in which the government has attempted to enjoin the publication of allegedly sensitive national security information, counsel for the defendants not only had access to the information, but also to the *in camera* submissions of the government that sought to justify orders forbidding publication. *See New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. The Progressive, Inc.*, 486 F. Supp. 5 (W.D. Wis. 1979). Counsel also routinely receive clearances to advocate the interests of former and current employees of national security agencies who seek to have manuscripts cleared for publication. Pre-publication clearance is

required because such officials are generally required to sign secrecy agreements that provide for such review, and because the courts have implied a fiduciary duty of confidentiality on federal employees holding positions of trust. *Snepp*, 444 U.S. at 510-511. But as the government acknowledged in its brief in *Stillman* (at 35), counsel for former officials have had access to classified information in the course of representing their clients in pre-publication review cases. In criminal cases involving classified and sensitive information, defense counsel are not only *authorized* to obtain a security clearance to review classified information, but are at times *compelled* to do so. *See, e.g., United States v. Usama Bin Laden*, 58 F. Supp. 2d 113 (S.D.N.Y. 1999) (requiring defense counsel to obtain security clearances). And private attorneys are permitted access to classified records in government contract and employment cases against the CIA and other national security agencies where even the true identity of the plaintiff and his or her affiliation with the agency are classified facts and litigation of the claim involves access to classified information. *See Doe v. Tenet*, 329 F.3d 1135, 1148 (9th Cir. 2003) (pointing out that plaintiff’s counsel had received security clearances from the CIA), *cert. granted*, 124 S. Ct. 2908 (June 28, 2004).

Defense Department regulations specifically contemplate that counsel may have access to classified information when “necessary to adequately represent his or her client” in litigation.<sup>3</sup>

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<sup>3</sup> Department of Defense Directive 5200.2-R, § C3.4.4.6 provides:

Attorneys representing DoD military, civilian or contractor personnel requiring access to DoD classified information to properly represent their clients, shall normally be investigated by DIS and cleared in accordance with the procedures in paragraph C3.4.2. This shall be done upon certification of the General Counsel of the DoD Component involved in the litigation that access to specified classified information, on the part of the attorney concerned, is necessary to adequately represent his or her client. In exceptional instances,

When private counsel meet the government's standards of trustworthiness and are granted access to sensitive information, a number of precautions are taken to prevent even inadvertent disclosures. First, the attorney signs a secrecy agreement and courts enter stringent protective orders. Second, access is provided only in secure areas controlled by the government. Thus, any risk of disclosure associated with storage of classified information at a private attorney's office is eliminated.

Although these procedures safeguard sensitive information, they go a long way to inject some degree of adversariness into a judicial proceeding that would otherwise be unwholesomely one-sided. Here, where Ms. Edmonds had access to virtually all of the information she would need to both make out her affirmative case, and where her counsel could have been cleared to review the government's *in camera* submissions, the district court erred by not even considering whether to take this often-followed step.

*B. Discovery and Adjudication May be Managed to Protect Secrets.* In general, amici do not approve of sealing records or holding secret trials. But in this case, Ms. Edmonds' entire case was dismissed on the basis of a secret proceeding that was entirely one-sided. Thus, although they are extreme measures to be employed sparingly, a closed hearing on preliminary matters with portions of the record sealed pending the court's determination of whether the privilege was properly invoked would have at least injected a degree of adversarial process into this case, and would have constituted the lesser of two evils. Such procedures exist as a possible

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where the exigencies of a given situation do not permit timely compliance with the provisions of paragraph C3.4.2, access may be granted with the written approval of an authority designated in Appendix 5 provided that as a minimum (a) a favorable name check of the FBI and the DCII [Defense Central Security Index] has been completed, and (b) a DoD non-disclosure agreement has been executed.



way to adjudicate national security issues without public exposure of state secrets. *See, e.g., Halpern v. United States*, 258 F.2d 36, 43 (2nd Cir. 1958) (suggesting that a closed hearing to consider the validity of a patent for classified equipment would not necessarily be “undesirable or unfeasible”); *In re United States*, 872 F.2d at 478 (suggesting use of bench trials, in camera review, and protective orders to safeguard sensitive information). Indeed, in the famous Pentagon Papers case, the United States filed a “secret brief” in the Supreme Court that remained sealed for decades after the case was decided. *See* John Cary Sims, *Triangulating the Boundaries of the Pentagon Papers Case*, 2 Wm. & Mary Bill of Rts. J. 341 (1993).

The Classified Information Procedures Act (“CIPA”), 18 U.S.C. app. III, § 1, et seq., although technically not applicable to this civil case, also demonstrates that procedures are available to courts to proceed to the merits of cases even where classified information is integral to the proceeding. Among other things, CIPA contemplates that, in certain cases, defendants may obtain access to classified information through discovery, subject to appropriate protective orders. *Id.* §§ 3 & 4. CIPA authorizes the government, with court approval based on a “sufficient showing,” “to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, [and] to substitute a summary of the information for such classified documents[.]” *Id.* § 4. CIPA also provides for an *in camera* (but not *ex parte*) hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would, in normal circumstances, be made during the trial or pretrial proceeding. *Id.* § 6(a). The court is required set forth its determination with respect to “each item of classified information.” *Id.* For classified information that is determined to be both relevant and admissible, the CIPA

provides alternative procedures for disclosure. *Id.* § 6(c). The court may order the substitution of “a summary of the specific classified information” or a “statement admitting relevant facts that the specific classified information would tend to prove.” *Id.* Records of such hearings may be sealed. *Id.* § 6(d). Finally, CIPA directs the Chief Justice of the United States, in consultation with various security officials, to prescribe rules for the protection of classified information against unauthorized disclosure. *Id.* § 9(a). Detailed rules set forth by Chief Justice Burger are set forth as a note to this provision.

These procedures provide guideposts for a court confronted with a broad-scale assertion of the state secrets privilege, and such procedures should have been explored in this case. Nonetheless, the district court did not do so. Where, as here, the government is seeking complete dismissal of an action for national security reasons, a court should consider these possibilities before determining that there is no way both to adjudicate the case and to protect state secrets.

### **CONCLUSION**

For the foregoing reasons and those set forth in the brief of appellant Edmonds, this Court should reverse the judgment of the district court and remand for further proceedings.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

I certify that the foregoing Brief of Amici Curiae complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d). As calculated by my word processing software (WordPerfect), the brief (not including those parts excluded under the Federal Rules of Appellate Procedure and the local rules of this Court) contains 5,253 words.

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) as modified by Circuit Rule 32(a)(1) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect in Times New Roman with a 12-point font.

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**CERTIFICATE OF SERVICE**

I certify that on January 19, 2005, two copies of the foregoing Brief of Amici Curiae were sent by U.S. Mail, and one copy was sent electronically, to the following counsel of record:

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