No. 05-190

In the Supreme Court of the United States

SIBEL EDMONDS, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the unavailability of evidence protected by the state secrets privilege required dismissal of this lawsuit.

2. Whether the court of appeals erred in closing oral argument to the public.

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OPINIONS BELOW

The judgment (Pet. App. 1a-2a) and pre-argument order (Pet. App. 3a-4a) of the court of appeals are unreported. The opinion of the district court (Pet. App. 5a-33a) is reported at 323 F. Supp. 2d 65.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2005. The petition for a writ of certiorari was filed on August 3, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Sibel Edmonds brought this suit against the Federal Bureau of Investigation (FBI), the Department of Justice, and four government officials in their official capacities for relief under the Privacy Act

of 1974, 5 U.S.C. 552a, the Administrative Procedure Act, 5 U.S.C. 551-552, 701-706, and the First and Fifth Amendments to the Constitution. The complaint alleges that petitioner performed translation services for the FBI from September 2001 until her contract was terminated in March 2002, and made several reports to FBI management of alleged misconduct within the FBI's translator program between December 2001 and March 2002. In petitioner's view, FBI supervisors and managers failed to address her allegations and retaliated against her for reporting her concerns. Pet. App. 5a-10a.

The government did not answer the complaint. Instead, then-Attorney General John Ashcroft invoked the state secrets privilege in a public declaration that was accompanied by classified declarations of the Attorney General and then-FBI Deputy Director Bruce Gebhardt. Pet. App. 16a-17a. The Attorney General asserted the state secrets privilege over "the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case," and explained that "further disclosure of [that] information * * * reasonably could be expected to cause serious damage to the national security interests of the United States." *Id.* at 19a (quoting Decl. of Att'y Gen. Ashcroft ¶ 5).

The Attorney General's public declaration explained that he could not publicly make a more detailed explanation of the basis for invoking the state secrets privilege because any such explanation would disclose the very information the privilege is designed to protect. C.A. App. 56. The Attorney General therefore referred the district court to the classified declarations and explained that the information at issue was properly classified un-

der Section 1.3 of Executive Order No. 12,958, 3 C.F.R. 333 (1996). See Pet. App. 6a, 16a-17a; C.A. App. 56. The Attorney General later reaffirmed the classified nature of the information, and formally reasserted the privilege, in a second public declaration. See *id.* at 169-171.

In conjunction with the Attorney General's assertion of the privilege, the government moved to dismiss on the ground that the case could not be litigated without disclosing privileged information, which reasonably could be expected to cause serious harm to national security. The government explained that the privileged information was central to both petitioner's allegations and the government's defenses. See Gov't C.A. Br. 14-15.

2. After full briefing on the motion to dismiss, and after reviewing the classified materials in camera and ex parte, the district court ordered the government to produce another classified declaration explaining "why 'sensitive information [cannot] be disentangled from nonsensitive information,'" and "why the plaintiff is unable to proceed with her claims and why the government cannot defend against those claims without revealing classified information." Pet. App. 35a (quoting *Ellsberg* v. *Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984)) (brackets in original). After the government produced that affidavit, the court upheld the Attorney General's assertion of the privilege and dismissed the complaint. *Id.* at 5a-33a.

The district court found that the Attorney General had properly invoked the state secrets privilege and that the classified declarations demonstrated "the 'reasonable danger' that revelation of classified information would have on both 'intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.'" Pet. App. 22a (quoting *Ellsberg*,

709 F.2d at 57) (footnotes omitted). The court was "unable publicly to explain [its] conclusion in any more detail," however, because, in light of the classified nature of the privileged information, "[i]t is one of the unfortunate features of this area of the law that open discussion of how the general principles apply to particular facts is impossible." *Id.* at 23a (quoting *Ellsberg*, 709 F.2d at 59 n.41).

The court then considered whether dismissal was necessary. It explained that dismissal is appropriate if the plaintiff is unable to prove a prima facie case or the defendant is deprived of a valid defense due to the exclusion of the privileged evidence, or if the very subject matter of the suit is a state secret. Pet. App. 25a-26a. "Upon conducting a thorough review of the several classified declarations," the court concluded that "the plaintiff is not only unable to prove the prima facie elements of each of her claims without the disclosure of privileged information, but * * * the defendants are unable to assert valid defenses to her claims without such disclosures." *Id.* at 27a.

The court explained in detail why the litigation of each of petitioner's claims would require the disclosure of classified, privileged information by both petitioner and respondents. The court determined that the factors governing petitioner's First Amendment retaliation claim include "whether the plaintiff's speech during the course of her employment was on a matter of public concern, whether a balancing could be undertaken of the government's interest versus the plaintiff's interest in disclosure of this information, whether the plaintiff's speech was the motivating fact for her termination, or whether there were other reasons for her termination." Pet. App. 28a. "[A]ny effort by the plaintiff to establish

these elements or by the defendants to rebut them would risk disclosure of privileged information," the court explained, because "not only is the nature of the plaintiff's employment the subject of the state secrets privilege, but so are the events surrounding her termination." *Ibid*.

Because petitioner's due process claim is based on allegations that defamatory statements were made by respondents, the court concluded that litigating that claim would require petitioner "to refute the allegations made about her." Pet. App. 29a-30a. Petitioner could not do so without revealing privileged information, however, because litigating the truth of those allegations would "necessarily implicate the classified nature of plaintiff's duties with the FBI and the substance of what happened in the underlying dispute." *Id*. at 30a (quoting Resp. Mem. 13).

The court next considered petitioner's Privacy Act claim, which would require her to prove an egregious and unlawful disclosure of information in a system of records pertaining to her job. Pet. App. 30a-31a. Because "documents related to the plaintiff's employment, termination and security review that comprise the system of records are privileged, and because the plaintiff would be unable to depose witnesses whose identities are privileged or to otherwise identify through discovery the individual or individuals who purportedly released the privileged information," the court concluded that petitioner is "unable to proceed with her Privacy Act claims." *Id*. at 31a.

Finally, the court determined that the privileged information could not be separated from the non-privileged information in such a way as to allow the case to proceed, and that there was no alternative to dismissal

that would protect the national security interests of the United States. Pet. App. 32a & n.7. Thus, although it acknowledged that dismissal is "a drastic remedy," *id.* at 31a (quoting *In re United States*, 872 F.2d 472, 477 (D.C. Cir.), cert. dismissed, 493 U.S. 960 (1989)), the court concluded that "the plaintiff's case must be dismissed, albeit with great consternation, in the interests of national security," *id.* at 32a-33a.

3. Petitioner appealed. The court of appeals informed the parties one day before oral argument that only counsel of record would be permitted in the courtroom during argument. Various news organizations moved to intervene and challenged the D.C. Circuit's decision to close the argument. In a brief unpublished order, the court of appeals granted the motions to intervene but denied the requests to open the argument to the public. Pet. App. 3a-4a. Neither petitioner nor the intervenor news organizations sought review of that order from this Court before argument was held.

After hearing argument concerning unclassified matters from counsel of record for both sides, the court of appeals closed the courtroom to all but government counsel and proceeded to inquire about the classified portions of the record. Shortly after the argument, the D.C. Circuit released a transcript of the unclassified portion of the argument.

In an unpublished per curiam judgment, the court of appeals affirmed the judgment of the district court "for the reasons given in that court's opinion." Pet. App. 1a-2a.

ARGUMENT

The court of appeals' unpublished judgment is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner does not dispute that the Attorney General properly invoked the state secrets privilege and that the privilege prevents the discovery of classified information and requires the exclusion of such information from the case. Nor could she. "The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security." *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 546 (5th Cir. 1991); see *United States* v. *Reynolds*, 345 U.S. 1, 6-7 (1953). As this Court has explained, the privilege may be invoked by "the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 8 (footnote omitted). Where there is a "reasonable danger" that disclosure of the information would expose state secrets that, "in the interest of national security, should not be divulged," the privilege applies and is absolute. *Id.* at 10. "[E]ven the most compelling necessity cannot overcome the claim of privilege" if state secrets are at stake. *Id.* at 11.

The Attorney General properly invoked the state secrets privilege after personally considering the matter. Pet. App. 16a-24a. The district court carefully reviewed the classified declarations, and requested an additional declaration, before satisfying itself that "the invocation of the state secrets privilege is proper." *Id.* at 22a-23a. The court of appeals likewise questioned

government counsel about the classified materials at oral argument. The classified declarations, which are part of the record in the court of appeals,[1] amply support the lower courts' conclusion that the state secrets privilege applies in this case. Petitioner does not appear to seek further review of that fact-bound determination.

2. Instead, petitioner argues (Pet. 18-26) that the district court should not have dismissed this case, but instead should have permitted non-privileged discovery.

a. It is common ground that in some cases the state secrets privilege does not require dismissal because a case may be able to proceed based solely on non-privileged evidence. In *Reynolds*, for example, this Court remanded for further proceedings after upholding the government's invocation of the state secrets privilege because it appeared that the plaintiffs could "adduce the essential facts as to [the elements of their claims] without resort to material touching upon military secrets." 345 U.S. at 11.

In other cases, however, the privileged information is so central to the disputed issues that the case cannot proceed without it. The courts of appeals have uniformly recognized that dismissal is appropriate if the exclusion of the privileged evidence would prevent the plaintiff from establishing a prima facie case or prevent a defendant from establishing a valid defense. See, *e.g.*, *Zuckerbraun*, 935 F.2d at 547; *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), cert. dismissed, 493 U.S. 960 (1989); *Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir.), cert. denied, 525 U.S. 967 (1998). Dismissal is also appropriate when the very subject of the suit is a state

[1] The government also could furnish a copy of those declarations directly to the Court in connection with its consideration of the petition.

secret. See, *e.g.*, *Kasza*, 133 F.3d at 1166; *McDonnell Douglas Corp.* v. *United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003).

Petitioner conceded below that dismissal is appropriate in those circumstances. See Pet. C.A. Br. 17, 22. The district court correctly determined that dismissal is appropriate in this case because "the plaintiff is not only unable to prove the prima facie elements of each of her claims without the disclosure of privileged information, but * * * the defendants are unable to assert valid defenses to her claims without such disclosure," Pet. App. 27a. The classified materials show that the district court's conclusion is correct and that any prior disclosures in the media or elsewhere did not contradict the Attorney General's assertion that further disclosure would harm national security. See *id.* at 23a-24a. As the district court recognized, however, a detailed explanation of those points cannot be made publicly because doing so would "forc[e] a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8; see Pet. App. 22a-23a. The court of appeals' unpublished order affirming the district court's application of settled legal principles to the facts of this case does not warrant further review.[2]

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[2] Petitioner repeatedly refers (Pet. 8-9, 24-25) to a report of the Department of Justice Office of Inspector General (OIG). But that report, which recognized the sensitivity of the information at issue here, is consistent with the assertion of the privilege and dismissal of this suit. Although the OIG released a 35-page unclassified summary of its classified report, the full classified report is much longer and has not been released to the public. See OIG, *A Review of the FBI's Actions in Connection with Allegations Raised By Contract Linguist Sibel Edmonds—Unclassified Summary* 2-3 (Jan. 2005). The unclassified summary explains that it "does not include all of the facts in the full report" and is sometimes "difficult to understand * * * because much

b. Although petitioner contends (Pet. 18-20) that the courts of appeals are divided on the proper procedures a court should follow in determining whether to dismiss a case, there is no such conflict, and the district court afforded ample procedural protections to petitioner.

i. Petitioner contends primarily (Pet. 18, 19) that "courts have disagreed about whether the state secrets privilege ever justifies dismissal at the pleading stage," or whether courts should instead "first allow[] non-privileged discovery" before dismissing. But petitioner cites no case in which any court of appeals has ever held that dismissal is *never* appropriate at the pleading stage. Nor, conversely, has petitioner cited any case in which a court of appeals has held that dismissal is *always* appropriate at the pleading stage.

Instead, the courts that have dismissed cases have done so because it would not have been possible to litigate the cases without revealing privileged information, without regard to whether the cases were then at the pleading or a later stage of the litigation.[3] In contrast,

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of the information from the full report remains classified and cannot be included." *Id*. at 3 n.1. Because the information in the public record is necessarily incomplete, it does not support the disclosure of extensive classified details, the release of which would cause serious harm to national security.

[3] See *Zuckerbraun*, 935 F.2d at 547-548; *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138, 1142, 1144 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Tenenbaum* v. *Simonini*, 372 F.3d 776, 777 (6th Cir.), cert. denied, 125 S. Ct. 605 (2004); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996); *Bowles* v. *United States*, 950 F.2d 154, 156 (4th Cir. 1991); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243-1244 (4th Cir. 1985); *Kasza*, 133 F.3d at 1170; *Molerio* v. *FBI*, 749 F.2d 815, 822-826 (D.C. Cir. 1984); *McDonnell Douglas*, 323 F.3d at 1022.

the courts that have not dismissed at the pleading stage or some later stage have emphasized that it was possible that the cases *could* be litigated to final judgment without disclosing privileged information.[4] All of the courts of appeals have applied the same legal standard—whether the case could be litigated without disclosing privileged information—and have based their decisions on the facts of each case. In *Ellsberg* v. *Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984), for example, the D.C. Circuit affirmed the dismissal of claims as to which the plaintiff could not "make out a *prima facie* case without the [privileged] information," but reversed the dismissal of other claims as to which the plaintiff might have been able to do so. *Id*. at 65, 68. The erroneousness of petitioner's assertion of a circuit split is further underscored by the fact that she puts some circuits on *both* sides of the supposed circuit split, when in reality the cited decisions applied the same legal standards to different facts in a consistent manner.[5]

Nor would a categorical rule precluding dismissal at the current stage make sense. As the privileged facts of

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[4] See *In re United States*, 872 F.2d at 478-479; *DTM Research, L.L.C.* v. *AT&T*, 245 F.3d 327, 333-334 (4th Cir. 2001); *Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356, 1364-1365 (Fed. Cir. 2001); *Clift* v. *United States*, 597 F.2d 826, 830 (2d Cir. 1979); *Heine* v. *Raus*, 399 F.2d 785, 791 (4th Cir. 1968).

[5] See *DTM Research*, 245 F.3d at 334 (Fourth Circuit decision remanding for further proceedings while explaining the consistency of that result with other Fourth Circuit cases, including *Farnsworth Cannon*, *supra*, which petitioner places on the other side of the supposed circuit split, see Pet. 19); *Molerio*, *supra* (D.C. Circuit decision affirming dismissal while following and distinguishing on its facts that circuit's decision in *Ellsberg*, *supra*, which petitioner places on the other side of the supposed circuit split, see Pet. 20).

this case demonstrate, it is clear at the outset of some cases that litigation cannot proceed without disclosing privileged information. In such cases, subjecting the parties to non-privileged discovery would be pointless, and would serve only to subject the parties to unnecessary effort and expense while risking the disclosure of sensitive information. Just as in any other context, cases should be dismissed when further non-privileged factual development could not alter the result. Cf. Fed. R. Civ. P. 56(c) (summary judgment is appropriate when there is no genuine dispute of *material* fact).

Although petitioner relies heavily (Pet. 14, 17-18, 23) on *Totten* v. *United States*, 92 U.S. 105 (1876), that case does not support her position. *Totten* articulated the "longstanding rule * * * prohibiting suits against the Government based on covert espionage agreements." *Tenet* v. *Doe*, 125 S. Ct. 1230, 1233 (2005). This Court took great care in *Tenet* to distinguish the state secrets privilege from *Totten*'s "broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden." *Id.* at 1236; see *id.* at 1237 (rejecting the view that "the *Totten* bar has been reduced to an example of the state secrets privilege"). Petitioner appears to assume (see Pet. 23) that because a *Totten* case *must* be dismissed at the pleading stage, state secrets cases may *never* be dismissed at that stage. But there is no basis for that assumption. If anything, *Totten* supports dismissal here to the extent that it stands for the proposition that a case should be dismissed if it cannot be litigated without disclosing classified information. See *Totten*, 92 U.S. at 107.

ii. The other conflicts alleged by petitioner are both illusory and irrelevant. Although petitioner contends (Pet. 21) that the circuits are divided on "whether a

judge is obligated to examine the allegedly privileged material," this Court already held in *Reynolds* that whether a judge must analyze the actual privileged material depends upon the individualized circumstances of each case. 345 U.S. at 10-11. The cases cited by petitioner (Pet. 21) are not to the contrary. See *Ellsberg*, 709 F.2d at 59 n.37 (stating that "*in camera* review of the material is * * * obligatory" where, unlike here, "a litigant must lose if the claim is upheld *and the government's assertions are dubious*") (emphasis added); *ACLU* v. *Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) (en banc) (stating that in camera review of documents is "often" required, but not describing the circumstances under which such review is in fact required).

In any event, the question whether a court must examine allegedly privileged material is not presented by this case. The district court carefully reviewed classified declarations that described the privileged information. In the court of appeals, petitioner never argued that the district court should have undertaken further review of the classified information, and instead recognized that "the court apparently considered defendants' secret evidence in detail." Pet. C.A. Br. 26-27. Because the issue was neither pressed nor passed upon below, further review is unwarranted. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

iii. The final alleged circuit split relates to whether a court should consider alternatives to dismissal. Pet. 21. There is no such circuit split because no court of appeals has refused to consider alternatives. Although petitioner contends that alternatives were not expressly considered in *Farnsworth Cannon* and *Tenenbaum*, both of those decisions expressly concluded that further litigation would inevitably lead to the disclosure of state

secrets, which necessarily means that effective alternatives to dismissal were not available. See *Farnsworth Cannon*, 635 F.2d at 281; *Tenenbaum*, 372 F.3d at 777. Neither decision ruled out the use of alternatives in appropriate cases.

In any event, the district court in this case *agreed* with petitioner that alternatives to dismissal should be considered, and determined that "there are no viable alternatives" in the circumstances of this case. Pet. App. 32a n.7. Thus, even if there were a circuit split on the issue, it would not be implicated by this case.

c. Although petitioner contends (Pet. 22) that urgent guidance is needed because "the government's use of the privilege is on the rise," her statistics indicate that the state secrets privilege has been litigated on average only twice a year during the past quarter-century, both before and after the events of September 11, 2001. See *ibid.* This Court already articulated the overarching legal principles in *Reynolds*, *supra*, and the courts of appeals have applied the privilege in a consistent and practical manner ever since, as explained above. Further guidance on the state secrets privilege does not appear to be needed, either in general or on the specific procedural issues raised by petitioner.

3. Petitioner's request (Pet. 26-29) for review of the court of appeals' decision to close the courtroom to members of the public comes too late. The argument has already been held, the public has already been excluded from the courtroom, and no action by this Court could alter those facts. Before the argument was held, petitioner and members of the media sought reconsideration of the court of appeals' decision to close the courtroom, but that court denied their motions and no one sought review from this Court before the argument was held.

Even now the intervening members of the media have not sought further review.

There is no ongoing injury from the court of appeals' precautionary closing of the courtroom because that court released a transcript of the argument shortly after it was held. Petitioner has identified no further remedy this Court could order.

Nor does this case satisfy the "capable of repetition yet evading review" exception to the mootness doctrine. That exception "applies only in exceptional situations where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998) (internal quotations and citations omitted). Neither circumstance is satisfied here. The issue can be fully litigated, as demonstrated by the cases cited by petitioner in which the issue was fully litigated. See Pet. 26-28. And there is no reason to expect that petitioner herself will be subject to the same action again.

Even if the issue were not moot, the court of appeals' cursory, unpublished order would not warrant further review. Petitioner does not appear to allege a conflict between that order and any decision of another court of appeals regarding whether the courtroom should have been closed under the circumstances of this case. The court of appeals' order lacks precedential significance in any event because it does not articulate any legal standards that could be applied to other cases. Cf. D.C. Cir. Rule 36(c)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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