No. 05-190

In The
Supreme Court of the United States

SIBEL EDMONDS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF NATIONAL SECURITY ARCHIVE, THE PROJECT ON GOVERNMENT SECRECY OF THE FEDERATION OF AMERICAN SCIENTISTS, THE NATIONAL WHISTLEBLOWER CENTER, THE PROJECT ON GOVERNMENT OVERSIGHT, PUBLIC CITIZEN, INC., THE GOVERNMENT ACCOUNTABILITY PROJECT, THE NATIONAL FREEDOM OF INFORMATION COALITION, AMERICAN LIBRARY ASSOCIATION, THE NATIONAL AIR DISASTER ALLIANCE, AND SEPTEMBER 11TH ADVOCATES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae submit this brief in support of Petitioner Sibel Edmonds, a contract linguist fired by the Federal Bureau of Investigation (FBI) in retaliation for reporting serious problems in the translation unit where she worked.[1] 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. The District Court dismissed Ms. Edmonds' case on the basis of the Government's invocation of the privilege. Cert. App. 5a-33a.

On January 14, 2005, the U.S. Department of Justice Office of the Inspector General released a detailed, 39-page "Unclassified Summary" of a 100-page report in which it concludes that "many of [Ms. Edmonds'] 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."[2]

The Court of Appeals for the District of Columbia Circuit sealed the courtroom during argument on Ms. Edmonds' appeal and affirmed the District Court ruling without separate written opinion. Cert. App. 1a-2a.

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[1] The parties have consented to the filing of this brief. Letters of consent are on file with the clerk's office. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than the *amici curiae*, its members and its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Office of Inspector General, Dep't of Justice, *A Review of the FBI's Actions in Connection With Allegations Raised by Contract Linguist Sibel Edmonds* 31 (2005) (hereinafter "DOJ OIG Report"), http://www.usdoj.gov/oig/special/0501/final.pdf.

Several of the *amici* are nonprofit organizations that have long monitored government secrecy policy. Since the September 11 attacks, these *amici* have seen a dramatic increase in barriers to information. These *amici* have seen how openness has proven to be a check against government abuses and has advanced the security of the nation.

The other *amici* are nonprofit associations that represent the families of victims of the 9/11 terrorist attacks. These groups work for greater public access to government information relating to the attacks.

Amici file this brief to urge the Court to provide meaningful review to the Government's claimed need for secrecy in this case. Unquestioning judicial deference to Government secrecy claims permits the Government to hide from the public matters that do not put national security at risk. Those matters, whether withheld as a litigation strategy, for convenience, or for malfeasance, do not merit judicial protection. The need for meaningful judicial review of secrecy claims is at its highest when the Government seeks to interfere with fundamental rights, such as Ms. Edmonds' right to bring her suit. *Amici* wish to alert the Court that the summary disposition of Ms. Edmonds' constitutional and statutory claims sends a clear and chilling message to government employees – namely, that an employee calls public attention to problems at the agency, even those that endanger national security, at his or her peril.

The National Security Archive is a non-governmental research institute and library located at the George Washington University that collects and publishes declassified documents concerning United States foreign policy and national security matters.

The Project on Government Secrecy of the Federation of American Scientists promotes public access to government information through research, advocacy, investigative reporting, and publication of government records.

The National Whistleblower Center (NWC) promotes public access to information and government accountability through research, public education and advocacy. NWC

has provided support and advocacy on behalf of employee-whistleblowers who have exposed abuse of civil liberties and civil rights by the Federal Bureau of Investigation.

The Project On Government Oversight (POGO) is a politically-independent, nonprofit watchdog that strives to promote a government that is accountable to the citizenry. POGO investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests.

Public Citizen, Inc., a public interest organization with approximately 130,000 members, 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 National Freedom of Information Coalition is the national organization of state groups dedicated to fostering access to government records and meetings.

The American Library Association is the oldest and largest library association in the world, with over 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 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.

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.

This brief is filed with the consent of counsel for all parties in the case.

SUMMARY OF ARGUMENT

The United States was founded on democratic principles that recognize the importance of informed public debate concerning government activities. The need for such debate is at its apex in the area of national defense and military relations. Yet, the Government's reflexive response to national security threats is to increase secrecy. That reaction does not necessarily serve the national interest. As the numerous investigations into the September 11 attacks on the United States each concluded, excessive secrecy was part of the problem that interfered with detection and prevention of the attacks.

In the four years since the September 11 attacks on the United States, there has been a growing invocation of national security necessity as a justification for increased secrecy. Increasingly, the government appears to be using its most potent tool against judicial review, the state secrets privilege, to forestall all independent consideration of legal claims against law enforcement, intelligence and military agencies.

Experience shows, however, that the Government does not always have an incentive to limit secrecy to instances when national security demands such protection. Thus, meaningful judicial review is necessary to separate out the legitimate and illegitimate claims for secrecy.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY TO THE LOWER COURTS THE SIGNIFICANT ROLE THAT JUDICIAL REVIEW PLAYS IN EVALUATING THE GOVERNMENT'S DEMANDS FOR SECRECY.

a. Excessive Secrecy Imposes Significant Social Costs on Society.

Amici recognize the paramount importance of protecting our national safety. But *amici* respectfully suggest that government transparency is not an enemy of those efforts. Rather, an informed citizenry is one of our nation's highest ideals and is essential for improving the quality of government decisionmaking. In times of war or national crisis, the public's role in governance is especially critical. As Justice Stewart noted, in his oft-quoted concurrence in *New York Times Co. v. United States*:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government.

New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). Yet, the Government often insists that broad secrecy is necessary to protect security.

While there is no doubt that there is a social cost to sharing highly sensitive information that could be used by a terrorist, there also are real costs associated with keeping unnecessary secrets. As the Director of the Information Security Oversight Office (ISOO), the governmental agency responsible to the President for policy oversight of

the government-wide security classification system and the National Industrial Security Program,[3] explains:

> Classification, of course, can be a double-edged sword. Limitations on dissemination of information that are designed to deny information to the enemy on the battlefield can increase the risk of a lack of awareness on the part of our own forces, contributing to the potential for friendly fire incidents or other failures. Similarly, imposing strict compartmentalization of information obtained from human agents increases the risk that a Government official with access to other information that could cast doubt on the reliability of the agent would not know of the use of that agent's information elsewhere in the Government. Simply put, secrecy comes at a price.[4]

That price includes undermining the legitimacy of government actions,[5] reducing accountability,[6] hindering

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[3] *See* About ISOO, http://www.archives.gov/isoo/about_isoo/about_isoo.html) (last visited July 27, 2005).

[4] *Emerging Threats: Overclassification and Pseudo-classification: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform*, 109th Cong. (2005) (statement of J. William Leonard, Director, ISOO, Nat'l Archives and Records Admin.), http://reform.house.gov/UploadedFiles/ISOO Leonard testimony final 3-2-05 hearing.pdf.

[5] *See, e.g.*, *Report of the Comm'n on Reducing and Protecting and Reducing Gov't Secrecy*, S. Doc. No. 105-2, at 8 (1997), http://www.access.gpo.gov/congress/commissions/secrecy/ ("[T]he failure to ensure timely access to government information, subject to carefully delineated exceptions, risks leaving the public uninformed of decisions of great consequence. As a result, there may be a heightened degree of cynicism and distrust of government, including in contexts far removed from the area in which the secrecy was maintained.").

[6] *See, e.g., ACLU v. Dep't of Defense*, 339 F. Supp. 2d 501, 504-05 (S.D.N.Y. 2004) (ordering government to process records under FOIA concerning detainees abroad: "The information plaintiffs have requested are matters of significant public interest. Yet, the glacial pace at which defendant agencies have been responding to plaintiffs' requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires. If the

(Continued on following page)

critical technological and scientific progress,[7] interfering with the efficiency of the marketplace,[8] and breeding paranoia.[9]

Indeed, this is the lesson of the inquiries concerning the September 11 attacks on the United States: better information dissemination will empower the public and enable agencies to better protect national security. It was directly addressed by Eleanor Hill, Staff Director, Joint House-Senate Intelligence Committee Investigation into September 11 Attacks, who explained in a Staff Statement summarizing the testimony and evidence,

> [T]he record suggests that, prior to September 11th, the U.S. intelligence and law enforcement communities were fighting a war against terrorism largely without the benefit of what some would call their most potent weapon in that effort: an alert and committed American public.

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documents are more of an embarrassment than a secret, the public should know of our government's treatment of individuals captured and held abroad.").

[7] *See, e.g.*, Nat'l Acad. of Sciences, *Seeking Security: Pathogens, Open Access, and Genome Databases* 54-57 (2004), http://www.nap.edu/books/0309093058/html/52.html ("[A]ny policy stringent enough to reduce the chance that a malefactor would access data would probably also impede legitimate scientists in using the data and would therefore slow discovery. . . . It is possible that the harm done during a process of negotiating such an agreement – through building walls of mistrust between peoples – would be greater than the benefit gained through the sense of security that such a regime might provide. . . . There is some concern that restricting access to this information might lead to a situation in which the mainstream scientific community is unaware of dangers that may threaten us.").

[8] *E.g.*, Aaron Edlin & Joseph E. Stiglitz, *Discouraging Rivals: Managerial Rent-Seeking and Economic Inefficiencies*, 85 Am. Econ. Rev. 1301 (1995).

[9] *See* Kennedy Assassination Records Review Bd., *Final Report* 1 (1998), http://www.archives.gov/research/jfk/review-board/report/ ("30 years of government secrecy relating to the assassination of President John F. Kennedy led the American public to believe that the government had something to hide.").

> One needs look no further for proof of the latter point than the heroics of the passengers on Flight 93 or the quick action of the flight attendant who identified shoe bomber Richard Reid.[10]

This conclusion is echoed in the Report of the National Commission on Terrorist Attacks on the United States ("9/11 Commission"), which includes only one finding that the attacks on the World Trade Center and the Pentagon might have been prevented. According to the interrogation of the hijackers' paymaster, Ramzi Binalshibh, if the organizers – particularly Khalid Sheikh Mohammed – had known that the so-called 20th hijacker, Zacarias Moussaoui, had been arrested at his Minnesota flight school on immigration charges, then Bin Ladin and Mohammed would have called off the 9/11 attacks.[11] News of that arrest might also have alerted the FBI agent in Phoenix who warned of Islamic militants in flight schools in a July 2001 memo. Instead that memo vanished into the FBI's vaults in Washington and was not connected to Moussaoui in time to prevent the attacks.[12] The Commission's wording on this issue is important: only "publicity . . . might have derailed the plot."[13] Disclosure of security-related information may reduce risk by alerting the public to threats and

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[10] *Intelligence Community's Response to Past Terrorist Attacks Against the United States from February 1993 to September 2001: Hearing Before the J. H./S. Intelligence Comm.*, 107th Cong. (2002) (Joint Inquiry Staff Statement, Eleanor Hill, Staff Dir.), http://intelligence.senate.gov/0210hrg/021008/hill.pdf.

[11] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 247, 276 & 541 n. 107 (2004), http://www.9-11commission.gov/.

[12] *See Joint Investigation Into September 11th: Hearing Before the J. H./S. Intelligence Comm.*, 107th Cong. (2002), http://intelligence.senate.gov/0209hrg/020924/hill.pdf (Joint Inquiry Staff Statement, Eleanor Hill, Staff Dir., on "The FBI's Handling of the Phoenix Electronic Communication and Investigation of Zacarias Moussaoui Prior to September 11, 2001.")

[13] *The 9/11 Commission Report, supra* note 11, at 276.

enabling better-informed responses from both local and federal agencies.

The rationale behind the nation's central openness law, the Freedom of Information Act, 5 U.S.C. § 552, reflects the notion that sharing information with the public will help, not harm, society. The FOIA mandates complete openness, with only carefully delineated exemptions from that general rule. *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). In enacting the law, Congress sought to "enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities," *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 17 (1974) (internal quotes omitted), and to prevent the damage that pervasive secrecy in government agencies did to public confidence in their Government. *See* S. Rep. No. 813 (1965), as reprinted in S. Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, S. Doc. No. 93-82, at 45 (1974) [hereinafter *FOIA Sourcebook*] ("A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.").

The benefit recognized by Congress is that informed democratic participation ensures that elected officials make decisions in our national security interest. As Luther Gulick, a high-level Roosevelt administration official during World War II, observed, despite the apparent efficiencies of totalitarian political organizations, democracy and expressive freedom gave the United States and its democratic allies an important competitive advantage because public debate encouraged wise policy choices.[14]

[14] Cass R. Sunstein, *Why Societies Need Dissent* 8 (2003) (citing Luther Gulick, *Administrative Reflections from World War II* 121-29 (1948)).

And the necessary corollary to this point – that secrecy can interfere with informed decisionmaking in areas of foreign and national security policy – is true as well. For example, as Senator Daniel Patrick Moynihan concluded in *Secrecy: The American Experience*, the Cold War and related arms race were greatly exacerbated by the secrecy imposed by the military establishment. *Id.* at 154-77 (1998).

Overclassification and unneeded secrecy also undermine the effort to keep truly sensitive information secret, "[f]or when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or careless, and to be manipulated by those intent on self-protection or self-promotion." *New York Times Co.*, 403 U.S. at 729 (Stewart, J., concurring). Indeed, this is the same conclusion reached by the ISOO in its 2002 Report to the President:

> Much the same way the indiscriminate use of antibiotics reduces their effectiveness in combating infections, classifying either too much information or for too long can reduce the effectiveness of the classification system, which, more than anything else, is dependent upon the confidence of the people touched by it. While there is always a temptation to err on the side of caution, especially in times of war, the challenge for agencies is to similarly avoid damaging the nation's security by hoarding information.[15]

Moreover, government transparency is a central principle of democracy. As Secretary of Defense Donald Rumsfeld recognized in a recent op-ed in the *Wall Street Journal*, "[a]s more citizens gain access to new forms of information, to new ways of learning of the outside world, it will be that much more difficult for governments to cement their [anti-democratic] rule by holding monopolies on news and commentary." Donald Rumsfeld, *War of the*

[15] ISOO, *Report to the President* 7 (2002), http://www.archives.gov/isoo/reports/2002-annual-report.pdf.

Worlds, Wall St. J., July 18, 2005, at A12. This is consistent with the international consensus that the right to know about the activities of government is a fundamental human right.[16]

b. Secrecy Has Grown Exponentially Over the Last Four Years and Government Officials Admit That Much of it is Unnecessary.

Over the past four years there has been a dramatic upsurge in government secrecy. Classification has multiplied, reaching an all-time high of 15.6 million classification actions in 2004, nearly double the number in 2001.[17] Moreover, the cost of the program has skyrocketed from an estimated $4.7 billion in 2002 to $7.2 billion in 2004.[18]

Officials from throughout the military and intelligence sectors have admitted that much of this classification activity is unnecessary. Secretary of Defense Donald Rumsfeld recently acknowledged the problem of overclassification: "I have long believed that too much material is classified across the federal government as a general rule. . . . "[19] The extent of over-classification is significant. Under repeated questioning from members of Congress at a 2004 hearing concerning over-classification, Deputy

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[16] *See* Universal Declaration of Human Rights, art. 19, Dec. 10, 1948, UN Resolution 217A(III); African Charter on Human and Peoples' Rights, art. 9, June 26, 1981; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950; American Convention on Human Rights, art. 13, Nov. 22, 1969; Inter-American Comm'n on Human Rights, Declaration of Principles on Freedom of Expression, para. 4, Oct. 19, 2000.

[17] ISOO, *2004 Report to the President* 3 (2005), http://www.archives.gov/isoo/reports/2004-annual-report.pdf.

[18] ISOO, *2004 Report on Cost Estimates for Security Classification Activities for 2004* 3 (2005), http://www.archives.gov/isoo/reports/2004-cost-report.pdf; ISOO, *2001 Report to the President* 9 (2002), http://www.archives.gov/isoo/reports/2001-annual-report.pdf.

[19] Donald Rumsfeld, *War of the Worlds*, Wall St. J., July 18, 2005, at A12.

Secretary of Defense for Counterintelligence and Security Carol A. Haave eventually conceded that approximately 50 percent of classification decisions are over-classifications.[20] These opinions echoed that of now-CIA Director Porter Goss, who told the 9/11 Commission, "we overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for them."[21]

Former Solicitor General of the United States Erwin Griswold, who led the government's fight for secrecy in the Pentagon Papers case, acknowledged some of the reasons:

> It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.[22]

At the same time that unnecessary classification has surged, a number of new laws have been enacted post-September 11 creating new categories of secret information. These include, among others: the critical

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[20] *Subcommittee on National Security, Emerging Threats and International Relations of the House Committee on Gov't Reform Hearing*, 108th Cong. (2004) (testimony of Carol A. Haave), http://www.fas.org/sgp/congress/2004/082404transcript.pdf; *see id*. (Testimony of J. William Leonard, Director of ISOO) ("It is no secret that the government classifies too much information.").

[21] *9/11 Commission Hearing*, (Testimony of then Chair of the House Permanent Select Committee on Intelligence, now Director of Central Intelligence, Porter Goss) (2003), http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm#panel_two.

[22] Erwin N. Griswold, *Secrets Not Worth Keeping: The courts and classified information*, Wash. Post, Feb. 15, 1989, at A25.

infrastructure information provisions of the Homeland Security Act of 2002, 6 U.S.C.S. § 133 (2005); the so-called gag order provisions of Section 215 of the Patriot Act, 50 U.S.C.S. § 1861 (2005); and the revisions to the sensitive security information provisions of the Air Transportation Security Act. 49 U.S.C.S. §§ 114(s), 40119 (2005).

The government also has expanded its use of the "mosaic" theory of intelligence gathering to a level never before seen, perhaps finally falling down the "'slippery slope'" "lurking in the background of the [mosaic] theory" that the Third Circuit recognized in *American Friends Service Committee v. Department of Defense*, 831 F.2d 441, 445 (3d Cir. 1987). The mosaic theory rests on the claim that innocuous bits of information can be combined to pose a risk to national security. Several courts have highlighted the risks attendant to the theory. For example, in *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 709 (6th Cir. 2002), the court struck down the blanket closure of immigration hearings and cautioned:

> The Government could use its 'mosaic intelligence' argument as a justification to close any public hearing completely and categorically, including criminal proceedings. The Government could operate in virtual secrecy in all matters dealing, even remotely with 'national security,' resulting in a wholesale suspension of First Amendment rights.

And, as in this case, the government appears to be expanding use of a potentially more powerful litigation tactic – motions to dismiss lawsuits on the basis of state secrets privilege. "In the twenty-three years between the decision in [*United States v. Reynolds*, 345 U.S. 1 (1953)] and the election of Jimmy Carter, in 1976, there are four reported cases where the government invoked the privilege. Between 1977 and 2001, there are a total of fifty-one reported cases where courts ruled on invocation of the

privilege."[23] In the three and one-half years since then, there have been at least six district court decisions and seven court of appeals decisions concerning the privilege that resulted in written opinions.[24] Because it prevents any judicial inquiry into the merits of the underlying claims, invocation of state secrets privilege has been a successful litigation tactic.

The government does not have an incentive to check abuse of the privilege. In cases such as Ms. Edmonds', the termination of the lawsuit ends public inquiry into allegations of mismanagement or malfeasance, as well as any governmental liability. The Government has an interest instead in preserving such secrecy; it permits the Government to pursue unimpeded its aims.

The government's penchant for overclassification is particularly troubling in the context of this case, where it is being used not only to retroactively classify information that already is widely disseminated, but also to prevent a person from exercising the right to bring a lawsuit to vindicate her claim that she was wrongfully discharged in violation of her First and Fourth Amendment rights and that her rights under the Privacy Act were violated.

c. Meaningful Judicial Review of Government Secrecy is Necessary to Prevent Overreaching.

When there is an absence of internal and external checks against government misconduct, the judiciary is critically necessary to protect against overreaching.

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[23] William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 101 (2005). Indeed, it has proven difficult to ascertain the breadth of circumstances when the state secrets privilege has been invoked. *See id.* at 111 (describing lack of any success in efforts to obtain policy guidance on use of state secrets privilege from three dozen agencies and their sub components).

[24] Based on a search in LexisNexis Academic Universe conducted on September 2, 2005.

Our nation's experience when extreme secrecy has been invoked in the past is that secrecy can stem from many motives – some legitimate and some possibly illegitimate. The government has no independent incentive to separate out the illegitimate incentives. This certainly is the lesson of cases such as *Korematsu v. United States*, 323 U.S. 214 (1944), and *New York Times Co.,* 403 U.S. 713, which demonstrate the danger of a doctrine of deference that precludes dispositive counterarguments and prompts judges to decline substantive review of agencies' positions.

Korematsu concerned an order that directed the exclusion from the West Coast of all persons of Japanese ancestry. It was held constitutional. In that case, the Court's finding of "military necessity" was based on the representation of government lawyers that Japanese Americans were *committing espionage and sabotage* by signaling enemy ships from shore. Documents later released under FOIA revealed that government attorneys had suppressed key evidence and authoritative reports from the Office of Naval Intelligence, the FBI, the Federal Communications Commission, and Army intelligence that flatly contradicted the government claim that Japanese Americans were a threat to security. *Korematsu v. United States*, 584 F. Supp. 1406, 1416-19 (N.D. CA 1984). Had the court required an explanation of the evidence to support the central rationale for interning thousands of Japanese Americans, it would have learned that there was no evidence and would have been able to discern what likely was the true rationale for the policy. The complete deference granted to the government in *Korematsu* – without any effort to ensure the veracity of the government's claims – undermined accountability.

New York Times Co. involved an effort to enjoin *The New York Times* and *Washington Post* from publishing a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" ("Pentagon Papers"). As with *Korematsu*, review of the materials shielded by government secrecy demonstrates that the motivation behind the secrecy was not protection of national security. The Pentagon Papers described a series of misrepresentations and

poor policy decisions concerning the Vietnam War. They were improperly leaked. As former Solicitor General Erwin Griswold eventually admitted: "I have never seen any trace of a threat to the national security from publication. Indeed, I have never seen it suggested that there was such an actual threat."[25] The Supreme Court denied the Government's efforts to enjoin publication by newspapers. Had the Pentagon Papers not been leaked, there would have been no First Amendment clash to resolve – secrecy for the purpose of covering up government misrepresentations would have triumphed.

Even *United States v. Reynolds*, 345 U.S. 1 (1953), the case in which this Court endorsed the state secrets privilege, illustrates the tendency of government to give in to the lure of secrecy and overly deferential judicial review. *Reynolds* was a tort lawsuit brought by widows of three civilians killed in a crash of an Air Force plane. The plaintiffs sought in discovery the official accident investigation report. The District Court ordered the government to produce the document and when the Air Force refused, entered an order finding in the plaintiffs' favor on the merits of the suit. The Court of Appeals affirmed the ruling. The Supreme Court reversed.

In 2000, the daughter of one of the deceased civilians obtained the declassified accident investigation report when researching the incident on the Internet. The claim of privilege in 1953 was based on the fact that the aircraft was involved in a "confidential mission" and "carried confidential equipment." *Herring v. United States*, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at *17 (E.D. Pa. Sept. 10, 2004). Today we know that the accident report at issue in Reynolds contained no details about secret military equipment. *Id.* at *26 (noting that the accident report does not refer to newly developed or secret electronic equipment).

[25] Griswold, *supra* note 22, at A25.

While it is likely that there always will be some sensitive security information in a case involving a secret military mission, just as in any case relating to an employee of a military, intelligence, or law enforcement agency, such claims should not be simply taken on faith. Had the Supreme Court permitted the lower court to require an *in camera* review of the accident investigation report, it would have enabled the court to ask the military to explain its rationale. Even if the court would have upheld the state secrets privilege on that explanation, the decision to extinguish a plaintiff's legal rights would have been based on the actual rationale for the secrecy, and not on a vague claim that the matter involved a secret mission. Certainly, the need to explain itself to a federal court has a salutary effect on the actions of the government.

Similarly, Ms. Edmonds' case raises signals that the government may be overreaching. First, there is evidence that there may be some legitimacy to Ms. Edmonds' claims. The Justice Department's Inspector General concluded that Ms. Edmonds' allegations "were, in fact, the most significant factor in the FBI's decision to terminate her services." DOJ OIG Report, *supra* note 2, at 31. In addition, Ms. Edmonds' allegations triggered widespread concern by Members of Congress and the acknowledgment by the FBI that some of Ms. Edmonds' allegations "were not unfounded." Petr.'s Br. at 3.

Second, 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. Despite the retroactive classification, no effort was made to regain control over the information. In addition, the publicly-released Justice Department Inspector General's report included many details of Ms. Edmonds' employment and allegations.

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."

In cases such as these, the courts are the only branch that can act as a check against government overreaching. Congress is limited in terms of the breadth, speed, and frequency with which it can perform oversight. Yet, the lower courts act as though they are disempowered because classified information may be involved in the case. There is no doubt that any individual working in a job like Ms. Edmonds' – an FBI translator who translated intercepted communications – would come into contact with classified information. Yet, that alone does not mean that Ms. Edmonds should be denied her day in court. Nonetheless, the Government's position in this case sends a clear message to all government personnel who work on national security matters – there is no protection for you if you blow the whistle on wrongdoing.

Acquiescence by the judiciary to such overbroad assertions of secrecy is not mandated by our constitutional system. The U.S. Constitution itself contains only one specific mention of secrecy, in Article I, Section 5, which states:

> Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

U.S. Const. art. I, § 5. Thus, the Constitution compels publicity for Congress's proceedings and accountability for its actions, with secrecy as the exception that proves the rule. The Executive's power to keep information secret is not mentioned in the Constitution, but is derived from the Article II powers vested in the President as

commander-in-chief and as maker of treaties (with the advice and consent of the Senate).[26]

The constitutional system of checks and balances does not permit the executive branch to act beyond the accountability of the judiciary. As the Supreme Court reminded the executive branch when it mandated due process for enemy combatants, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 603 (2004) (O'Connor, J., plurality opinion).

Congress also has acknowledged the judiciary's constitutional role in policing executive claims of secrecy. In a definitive pronouncement on the issue, Congress overturned *EPA v. Mink*, 410 U.S. 73 (1973), with the 1974 amendments to the FOIA, 5 U.S.C. § 552. President Ford vetoed the amendments based on his view that it would be unconstitutional for a judge to decide whether a record was properly classified.[27] Congress overrode that veto, ensuring that the FOIA explicitly provides for judges to conduct *in camera* review of records despite the Government's assertion of national security. This authority was given to judges to safeguard against arbitrary, capricious, and myopic use of the awesome power of the classification stamp by the government bureaucracy. S. Rep. No. 93-854 (1974), as reprinted in *FOIA SourceBook,* at 183.

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[26] U.S. Const. art. II, § 2. These significant presidential powers are balanced by congressional authority to "provide for the common Defence," *id.* art. I, § 8, cl. 1; "declare War . . . and make Rules concerning Captures on Land and Water," *id*. cl. 11; "make Rules for the Government and Regulation of the land and naval Forces," *id*. cl. 14; advise in and consent to the making of treaties, *id.* art. II, § 2, cl. 2; "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by th[e] Constitution in the Government of the United States," *id*. art. I, § 8, cl. 18; and insist that "[n]o money shall be drawn from the Treasury, but in consequence of Appropriations made by Law." *Id.* § 9, cl. 7.

[27] Veto Message from President Ford to the House of Representatives (Oct. 17, 1974), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/101774%20Veto%20Message.pdf.

Nor has Congress made any 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. *See*, *e.g., Reynolds*, 345 U.S. at 9-10 ("[J]udicial control over the evidence in a case cannot be abdicated to the caprice 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."). 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 courts are certainly competent to scrutinize the need for secrecy and to use the substantial array of procedures available to a court to permit the use of classified information without its revelation to the public. The Supreme Court's intervention is necessary to make clear to the lower courts that an executive claim of secrecy does not render a matter non-justiciable. Instead, courts are to use all of the tools available to fulfill their constitutional duty to resolve disputes.

Since *Reynolds*, unquestioning judicial acquiescence to assertions of the state secrets privilege has been the rule rather than the exception, despite *Reynolds* clear direction that courts have an important role to play in assessing the Government's privilege claims. For this reason, this Court's intervention is needed to explain to lower courts what that scrutiny involves.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioner's Brief, the Court should grant a writ of certiorari.

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