UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIBEL EDMONDS	*	
	*	
Plaintiff	*	
	*	
v.	*	Civil Action No. 02-1448 (RBW)
	*	
U.S. DEPARTMENT OF JUSTICE et. al.	*	
	*	
Defendant	*	

* * * * * * * * * * * *

PLAINTIFF'S MOTION FOR DECLARATORY RELIEF
OR, ALTERNATIVELY, TO CONDUCT LIMITED DISCOVERY

Plaintiff Sibel Edmonds, by and through her undersigned counsel, respectfully requests that this Court declare that any information provided by the defendant Federal Bureau of Investigation to Congress concerning the plaintiff and her allegations is unclassified and is not subject to the State Secrets privilege. Alternatively, the plaintiff seeks permission to conduct limited discovery regarding the extent to which the information provided to Congress is, in fact, classified, and if classified whether it has been properly classified, and/or the manner by which it has been reclassified.

As this Motion is in direct conflict with the defendants' pending Motion to Dismiss, consent was not sought as it would be futile. The defendants obviously oppose this Motion. A proposed Order accompanies this Motion.

Date: June 23, 2004

Respectfully Submitted,
/s/

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR DECLARATORY RELIEF OR,
ALTERNATIVELY, TO CONDUCT LIMITED DISCOVERY

Plaintiff Sibel Edmonds ("Edmonds"), who served as a linguist for the defendant Federal Bureau of Investigation ("FBI") until she became a Whistleblower and was terminated, is facing a daunting battle. At every turn the Government seeks to undercut her ability to expose the truth and pursue vindication of her efforts. The latest twist reveals the continuing Chutzpah of a Government that views itself unaccountable to the rules that govern the rest of our democratic society.

Two years after unclassified meetings occurred between the FBI and staff members for the Senate Judiciary Committee concerning Edmonds and her allegations, the defendants have suddenly now "classified" the information discussed, including open correspondence widely disseminated by Senators Charles Grassley (R-IA) and Patrick Leahy (D-VT). This was done solely for the purposes of subverting Edmonds' lawsuit and strengthening the defendants' invocation of the State Secrets privilege. The reclassification of information in this case, however, was not only improper and illegal, but reflective of a clear abuse of the system.

Therefore, this Court should exercise its inherent and statutory authority to declare that the relevant information is, in fact, unclassified. As a result, the information is freely available for Edmonds' use in this litigation. Although sufficient facts exist to permit such a conclusion, alternatively, if the Court believes additional information is needed, discovery should be permitted before any ruling is issued on the defendants' substantive Motion.

RELEVANT BACKGROUND

Following the hearing held on April 26, 2004, this Court ordered the defendants to submit "any unclassified documents or other unclassified information in its possession that has been presented to the United States Senate or any other forum or individuals which is relevant to the substance of Sibel Edmonds' potential deposition testimony by May 10, 2004." See Order at 1 (dated April 26, 2004).

Having earlier invoked the State Secrets privilege in order to avoid the necessity of responding to Edmonds' claims, the FBI found itself facing a serious dilemma. The briefing meetings between the FBI and staff members of the U.S. Senate that were held on June 17, 2002, and June 25, 2002, were unequivocally unclassified.[1] Not only did at least one uncleared Senate staff member participate in the meeting, which was held in an unsecured room, but the information was widely disseminated afterwards both verbally

[1] The FBI has described those meetings as involving discussions regarding "certain aspects of Ms. Edmonds' allegations about the FBI and the Language Services Program, including the fact that a particular contract monitor had not had contacts of concern with foreign government officials; and that another particular contract monitor had received a waiver of the language requirements." See Declaration of Eleni P. Kalisch, Assistant Director, Federal Bureau of Investigation at ¶3 (dated May 13, 2004), attached as Exhibit "3" to Defendants' Notice of Filing (filed May 14, 2004). The description of what the FBI allegedly told the Senate staff, however, is in dispute. The details would be revealed through discovery.

and in writing.[2] See Declaration of David K. Colapinto, Esq. at ¶9 (dated June 23, 2004)("Colapinto Decl."), attached as Exhibit "1". Therefore, *any* and *all* information discussed at these meetings concerning Edmonds and her claims would, as a matter of law, necessarily fall outside of the State Secrets privilege and be subject to use for litigation in this, and any other, lawsuit.[3]

Thus, in order to extricate itself from this quagmire and avoid the need to abide by the Court's request, the FBI and Department of Justice have taken yet another unprecedented step and "classified" the information two years after the fact. See "*Material Given to Congress In 2002 Is Now Classified*", New York Times, May 20, 2004, attached at Exhibit "2". Additionally, on May 14, 2004, the defendants submitted several

[2] When federal agencies need to present Senate Staff with classified information on Capitol Hill, the meetings will typically take place either in the offices of the Senate Select Intelligence Committee or Senate Security, both of which maintain SCIFs (Sensitive Compartmented Information Facility). Upon information and belief, those present at one or both of the meetings included Margaret Gulotta (Chief of Language Services, FBI), Faith Burton (Special Counsel, Office of Legislative Affairs, FBI), Stephen Dettlebach (representing Sen. Leahy, now an Assistant U.S. Attorney), John Elliff (representing Sen. Leahy, and now employed by the FBI), John Drake (representing Sen. Grassley) and Dennis Holly (representing Sen. Grassley, and detailed from the U.S. Secret Service). Mr. Drake, who still works on Capitol Hill, was not cleared to participate in classified discussions.

[3] In addition to the two Senate briefings, the FBI conducted at least one substantive briefing in or around October or November 2002, regarding Edmonds and her allegations for the Office of Congressman Frank Wolf, Chairman of the House Appropriations Subcommittee on Commerce, Justice, State and the Judiciary. See Exhibit "3". This briefing is not referenced in any of the defendants' declarations that were publicly filed on May 14, 2004. As far is known, the defendants have not "classified" the information provided to Congressman Wolf, though it no doubt mirrors the information discussed in the Senate briefings. Furthermore, Edmonds' original counsel, who does not have a security clearance, participated in unclassified meetings with Edmonds and the Department of Justice's Office of Inspector General, with the knowledge of the defendants, and discussed the same information without any limitations imposed upon him. See Colapinto Decl. at ¶¶3-8. Indeed, he was permitted to take and retain detailed notes. Id. at ¶¶5,8.

unclassified and classified, in camera, ex parte, declarations addressing the Court's Order of April 26, 2004. The unclassified declarations generally noted the existence of the Congressional briefings but claim no documents were provided, which is certainly not surprising. In not one public declaration, or in its Notice of Filing, did the government bother to inform the Court that it had now classified the information presented to the Senate in 2002.

Following its review of the government's classified and unclassified declarations, and mindful of its obligation under, among others, Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983), to ensure that the state secrets "privilege may not be used to shield any material not strictly necessary to prevent injury to national security" and that "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter," the Court ordered that the government further:

> produce a declaration articulating its position regarding why "sensitive information [cannot] be disentangled from nonsensitive information" in order to allow the plaintiff to proceed with her claims. The government should focus its response to this Order on why the plaintiff is unable to proceed with her claims and why the government cannot defend against these claims without revealing classified information. The government shall produce this declaration to the Court for its ex parte, in camera inspection by Wednesday, June 9, 2004.

See Order at 2 (filed June 3, 2004).

In light of the defendants' willful abuse of the classification system, and given that neither Edmond or her counsel will likely be permitted an opportunity to review or comment upon the alleged classified declarations that have been filed in this case by the defendants, Edmonds is compelled to formally challenge the government's actions and respond to the continuing attempt to sabotage her lawsuit.

In considering the arguments herein, this Court should ultimately conclude that it cannot condone this transparent attempt to further abuse a national security system that was designed to protect our nation's interests, and dissuade itself that it must not help a federal agency cover-up its misconduct and embarrassments.[4]

I. ANY INFORMATION PROVIDED BY THE FBI TO THE U.S. SENATE AND HOUSE OF REPRESENTATIVES CONCERNING SIBEL EDMONDS FALLS OUTSIDE OF THE STATE SECRETS PRIVILEGE AS IT IS UNCLASSIFIED

At the outset, this Court should recognize that it possesses the authority to not only challenge but to reject the government's contentions. Courts are, of course, in no way incapable of grasping the Executive Branch's "national security" decisions. In fact, there is no mistaking that the "text of the Constitution does not expressly commit control over information that bears on national security to the Executive Branch." Stillman v. Dept' of Defense et al., 209 F.Supp.2d 185, 203 (D.D.C. 2002), rev'd on other grounds, Stillman v. Central Intelligence Agency et al., 319 F.3d 546 (D.C.Cir. 2003).

For example, in United States v. United States District Court (Keith), 407 U.S. 297 (1972), the Supreme Court confronted the issue of whether the government was required to obtain a warrant to perform so-called "national security" surveillance. In urging that a warrant was not required, the government "insist[ed] that courts 'as a practical matter would have neither the knowledge nor the techniques necessary ... to protect national security.' These security problems, the Government contend[ed], involve 'a large number of complex and subtle factors' beyond the competence of courts to evaluate." Id. at 319. The argument was pointedly rejected. As Justice Powell explained, "Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in [these] cases."

[4] Judge Huvelle stated Edmonds' allegations "call into question the integrity" of the FBI and public confidence in the agency. See Edmonds v. FBI, Civil Action No. 02-1294 (D.D.C.)(ESH), Order at 8 (dated December 2, 2002).

Id. at 320. In fact, the Court recognized that review of the Executive's claims by "a 'neutral and detached magistrate'" is particularly important in contexts implicating national security. Id. at 316 (citation omitted).

Even in FOIA cases, where the government clearly has the advantage when national security issues are at stake, the D.C. Circuit Court of Appeals has unquestionably upheld the Judiciary's ability to question an agency's national security determination. In commenting on the Congressional override of President Ford's veto of the 1974 FOIA legislation, the Court of Appeals opined that "this vote of confidence in the competence of the judiciary affirms our own belief that judges do, in fact, have the capabilities needed to consider and weigh data pertaining to the foreign affairs and national defense of this nation." Washington Post Co. v. U.S. Department of State, 840 F.2d 26, 35 (D.C.Cir. 1988). It is also well settled that while "the attempt to claim Executive prerogatives or infringe liberty in the name of security and order may be motivated by the highest of ideals, the judiciary must remain vigilantly prepared to fulfill its own responsibility to channel Executive action within constitutional bounds." Zweibon v. Mitchell, 516 F.2d 594, 604-05 (D.C. Cir. 1975)(en banc), cert. denied, 425 U.S. 944 (1976).

Even more directly on point, the very body of case law underlying the government's invocation of the State Secrets privilege demands that this Court look behind the defendants' actions. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." See United States v. Reynolds, 345 U.S. 1, 9-10 (1953). [5] "Without judicial control over the assertion of the privilege, the danger exists that the state secrets privilege will be asserted more frequently and sweepingly than

[5]Recent events arising out of the Reynolds litigation fifty years after the Supreme Court decided the case reveals the dangers surrounding misuse and abuse of the privilege. See "*A 1953 case echoes in high court: The administration asks that fraud-on-court allegations be dismissed***"**, National Law Journal, June 10, 2003, at 5; "*The secret's out: 17th century doctrine invoked to challenge 1953 ruling based on Air Force's national security claim in fatal crash*", Miami Daily Business Review , Mar. 11, 2003 (recently declassified documents reveal Air Force lied to Supreme Court in Reynolds).

necessary leaving individual litigants without recourse." NSN International Industry v. E.I. DuPont De Nemours, 140 F.R.D. 275, 278 (S.D.N.Y. 1991), citing Ellsberg, 709 F.2d at 57.

Although "utmost deference" is to be accorded to the Executive's expertise, see United States v. Nixon, 418 U.S. 683, 710 (1974), the government must show, and the court must separately confirm, that "the information poses a reasonable danger to secrets of state." Halkin v. Helms, 690 F.2d 977, 990 (D.C.Cir. 1982).[6] "Once the privilege has been formally claimed, the court must balance the 'executive's expertise in assessing privilege on the grounds of military or diplomatic security' against the mandate that a court 'not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role.'" Virtual Defense and Development International v. Republic of Moldova, 133 F.Supp.2d 9, 23 (D.D.C. 2001), quoting In re U.S., 872 F.2d 472, 475-76 (D.C. Cir.), cert. denied, 110 S. Ct. 398 (1989).

"All questions of government are ultimately questions of ends and means. The end may be legitimate, its accomplishment may be entrusted solely to the President, yet the judiciary still may properly scrutinize the manner in which the objective is to be achieved….[A] large measure of discretion gives rise to judicial deference, not immunity from judicial review of constitutional claims." National Federation of Federal Employees v. Greenberg, 983 F.2d 286, 290 (D.C.Cir. 1993).[7]

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[6]In such a case, the litigant must demonstrate that "the information is relevant to a material aspect of the litigant's case and that the litigant is unable to obtain the crucial data (or adequate substitute) from any other source." Ellsberg, 709 F.2d 51 at 59, 59 n.37. However, "the more compelling a litigant's showing of need for the information in question, the deeper 'the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.'" Id. at 58-59, citing Reynolds, 345 U.S. at 10.

[7]Certainly courts defer to the Executive Branch's discretion on national security. Discretion, however, is not equivalent to acquiescence. It bends in either direction. Granting the defendants' broad Motion would erode the existing balance of power between the Judiciary and Executive by tilting that discretion towards the Executive Branch for no good reason. "Under no circumstances should the Judiciary become the handmaiden of the Executive." U.S. v. Smith, 899 F.2d 564, 569 (6th Cir. 1990).

Finally, if this Court did not possess the authority to both review and reverse the defendants' classification decisions, then the Supreme Court and the D.C. Circuit Court of Appeals would not have repeatedly upheld the judicial review of classification determinations that now exists in many contexts. See e.g., Snepp v. United States, 444 U.S. 507, 513 n.8 (1980)(requiring judicial review of pre-publication classification determinations); Reynolds, 345 U.S. at 1 (allowing deferential judicial review of claims of State Secrets privilege); McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983)(requiring judicial review of pre-publication classification determinations); Salisbury v. United States, 690 F.2d 966 (D.C. Cir. 1982)(allowing judicial review pursuant to Freedom of Information Act of documents withheld pursuant to national security exemption).

A. The Government Has Illegally Re-Classified Information That Has Properly Undergone Declassification

Specific facts surrounding Edmonds's case was the subject of at least two meetings on June 17, 2002, and July 9, 2002, between the FBI and staff members of the Senate Judiciary Committee. Based on these meetings, Senators Leahy and Grassely sent letters to the FBI and Department of Justice. On June 19, 2002, they jointly wrote to DOJ Inspector General Glenn A. Fine, and on August 13, 2002, they wrote to Attorney General Ashcroft. See Exhibits "4" and "5", respectively. Finally, on October 28, 2002, following the airing of a 60 Minutes episode concerning Edmonds, Senator Grassely sent a separate letter to FBI Director Robert Mueller. See Exhibit "6".

In fact, for nearly two years, copies of these letters were available on the websites of Senators Grassely and Leahy. It was only until the defendants informed the Senate Judiciary Committee that the information was suddenly classified that the letters were

removed from the websites.[8] Of course, notwithstanding the removal from the Senate websites, these letters have been widely disseminated by multiple sources to such an extent that they can never be retrieved. Copies can be located on numerous other websites, none of which the defendants can control.[9] Additionally, either the full text of the letters have been reproduced or specific language from the letters have been quoted by various members of the established news media.[10] See also Colapinto Decl. at ¶9 (noting counsel has copies of the alleged "classified" letters).

Finally, in addition to the copies attached to this Motion, copies also remain part of the Court's official open record and are available through Pacer. See e.g., Plaintiff's Opposition to Motion to Dismiss (dated Dec. 20, 2002)(Filing #22), at Exhibits #5, 7, and 16. Copies of the letters can also be found among filings in Edmonds' related FOIA/PA litigation. See e.g., Edmonds v. FBI, Civil Action No. 02-1294 (D.D.C.)(ESH), Plaintiff's Opposition to Defendant's Motion for Summary Judgement at Exhibits "8" and "9" (dated April 10, 2003). The defendants obviously know about the existence of all, if not most of, these sources, yet has never taken any steps to seal these materials. The failure to do so concedes that the documents and the information therein is irreperably

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[8] However, Senator Grassley's website still maintains online a copy of his October 28, 2002, letter to FBI Director Mueller. See *http://grassley.senate.gov/releases/2002/p02r10-28.htm*.

[9] See e.g., (1) *http://www.libertyforum.org/showthreaded.php?Cat=&%20Board=news_crime&Number=1397278&page=&view=&am*; (2) *http://sullivan40.diaryland.com/sibel.html*; (3) *http://www.thememoryhole.org /spy/edmonds.htm#letter*; (4) *http://www.disinfopedia.org/wiki.phtml?title=Sibel_Edmonds*; (5) *http://cleveland.indymedia.org/news/2004/04/9950.php*.

[10] See e.g., (1) *http://www.cnn.com/2002/US/06/19/fbi.translators/index.html*; (2) *http://www.washingtonpost.com/wp-srv/onpolitics/articles/Ashcroftletter.html*; (3) *http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A14843-2002Aug13&notFound=true.*

unretrievable, as well as acknowledges the lack of sensitivity surrounding the information.

Notwithstanding this fact, based solely in response to comments by Edmonds' counsel, which were then acted upon by this Court in its April 26, 2004 Order, the government illegally reclassified information pertaining to Edmonds in order to strengthen its litigation posture. On May 13, 2004, just one day before the defendants responded to this Court with its Notice of Filing, the Senate Judiciary Committee sent out the following e-mail to relevant individuals:

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

See Exhibit "7" (a copy of this e-mail can also be found posted at *http://www.pogo.org/m/gp/gp-EdmondsRetroClassification.pdf*). Not surprisingly, it appears the defendants did not bother to inform the Court of these actions in the publicly filed agency declarations.

As this Court knows, in addition to this litigation, Edmonds also sought judicial intervention pursuant to the Freedom of Information/Privacy Acts ("FOIA/PA") based on requests for information concerning herself. See Edmonds v. FBI, Civil Action No. 02-1294 (D.D.C.)(ESH). In response to her requests, the FBI processed nearly 1,500 pages, although the overwhelming majority were withheld for a variety of grounds. The

defendants recently filed copies of these pages as Exhibit "1" to its Notice of Filing dated May 14, 2004. See Government's Notice of Filing, Exhibit "1" (filed May 14, 2004).

Included among these declassified documents was the June 19, 2002, letter (now allegedly classified) sent to Inspector General Fine by Senators Leahy and Grassely. See Exhibit "4".[11] The first line of the letter notes that the "Senate Judicary Committee has received *unclassified information* from the FBI regarding allegations made by Ms. Sibel Edmonds…." Id. (emphasis added). Of note, the FBI has stamped the document to indicate that "All information contained herein is unclassified." Id.

Another page from Edmonds' declassified FOIA/PA file is a Washington Post article "*2 FBI Whistle-Blowers Allege Lax Security, Possible Espionage*". See Exhibit "8".[12] This page, however, indicates that "All *FBI* information contained herein is unclassified." Id. (emphasis added).[13] The article details Edmonds' allegations concerning the FBI, all of which were the subject of the two Senate meetings.

A. Executive Order 12,958 Prohibits Reclassification

As the Court can see from the face of the documents, these pages underwent a proper declassification review by the government in 2003, and that includes *all* of the information contained therein. These are unclassified documents, as is the specific information, and they always have been.

[11] As can be seen on the document itself, for identification purposes the defendants have assigned this Bates number — EDMONDS – 810.

[12] The document bears the defendants' Bates identification number of EDMONDS – 278.

[13] An online version of this article can also be found within the FBI's files as EDMONDS – 807-809. However, this version notes that "All information contained herein is unclassified."

Nevertheless, per procedure, the documents underwent a declassification review pursuant to the provisions of Executive Order 12,958, which President Clinton signed on April 17, 1995. Any modifications to the classification status of these document or the information therein must be in compliance with this Executive Order. See Lesar v. DOJ, 636 F.2d 472, 480 (D.C. Cir. 1980)(classification of information must conform to procedural and substantive criteria of applicable Executive Order). Failure of an agency to abide by the criteria can have a significant impact on the availability of the information. See e.g., Halperin v. Department of State, 565 F.2d 699, 703-07 (D.C. Cir. 1977)(failure to apply correct substantive standard and other procedural errors is sufficient to require disclosure unless government can meet the standard for prior restraint).

Whether information can be reclassified was specifically addressed in the 1995 Executive Order. Section 1.8 categorically prohibits information from being reclassified "after it has been declassified and released to the public under proper authority."

Therefore, it is simply unequivocal that the defendants cannot reclassify any of the documents, or the information contained therein, that were declassified in 2003. Thus, this information also cannot serve as the basis for the invocation of the State Secrets privilege.[14]

[14] The qualifying language is "[w]hen *properly* invoked, the state secrets privilege is absolute." Ellsberg, 709 F.2d at 57 (emphasis added). Indeed, one area of inquiry for the Judiciary when assessing the invocation of the State Secrets privilege is whether the invocation is too broad. Black v. CIA, 62 F.3d 1115, 1119 (8th Cir. 1995). Clearly, at least with respect to any of the information that the FBI provided to Congress, the privilege has been improperly and too broadly invoked.

B. Executive Order 13,292 Still Prohibits Reclassification Under The Existing Circumstances

President Bush slightly modified Executive Order 12958 on March 25, 2003, and issued a revised Executive Order. Subject to strict conditions, agencies may now reclassify information after it has been declassified and released to the public. See Exec. Order No. 13,292, § 1.7(c). The action must be taken under the "personal authority of the agency head or deputy agency head," who must determine in writing that the reclassification is necessary to protect national security. Id. § 1.7(c)(1); see also 32 C.F.R. § 2001.13(a)(2003)(directive issued by Information Security Oversight Office describing procedures for reclassifying information pursuant to section 1.7(c) of Executive Order 13,292).

Further, the information previously declassified and released must be "reasonably recovered" by the agency from all public holders, and it must be withdrawn from public access in archives and reading rooms. Exec. Order 13,292, § 1.7(c)(2); see also 32 C.F.R. § 2001.13(a)(1). Finally, the agency head or deputy agency head must report any agency reclassification action to the Director of the Information Security Oversight Office within thirty days, along with a description of the agency's recovery efforts, the number of public holders of the information, and the agency's efforts to brief any such public holders. Exec. Order 13,292, § 1.7(c)(3); see also 32 C.F.R. § 2001.13(b).

Similarly, Executive Order 13,292 also authorizes the classification of a record after an agency has received a FOIA request for it, although such belated classification is permitted only through the "personal participation" of designated high-level officials and only on a "document-by-document basis." Id., § 1.7(d).

Not one of these provisions as set forth in Executive Order 13,292 have been followed by the defendants. William Leonard, the Director of the National Archives & Records Administration's Information Security Oversight Office ("ISOO"), which controls and oversees government classification matters, recently told the New Republic that:

> "No agency has notified me that it has exercised a reclassification," he says. Moreover, even if it had tried (and it didn't), it's unlikely that Justice could prove to the isoo that the information was recoverable: Despite being removed from the Senate websites, the Grassley-Leahy letters are still available online, either through Google caches, the Lexis-Nexis database, or websites that downloaded them when they were still available. "If it's on the Web," says Leonard, "it is not reasonably recoverable."

New Republic, June 7, 2004, at 12 (copy attached at Exhibit "9").

Whether under President Clinton's original EO 12,958, or President Bush's modified version of Executive Order 13,292, the defendants cannot reclassify any of the documents, or the information contained therein, that are now at issue. Thus, this information also cannot serve as the basis for the invocation of the State Secrets privilege.

C. The FBI Has Improperly Classified Information To Illegally Cover-up Violations of Law, Inefficiency, Administrative Error, And Embarrassing Information And The Action Was Undertaken For The Purposes Of Simply Securing A Litigation Advantage Against Edmonds

As with prior orders, Executive Order 13,292 contains a number of distinct limitations on classification. Specifically, information may not be classified in order to conceal violations of law, inefficiency, or administrative error, id. at § 1.7(a)(1), to prevent embarrassment to a person, organization, or agency, id. at § 1.7(a)(2), or to

prevent or delay the disclosure of information that does not require national security protection. Id. at § 1.7(a)(4).

It is unnecessary to provide specific details regarding these provisions at this stage. Any review of the numerous documents describing Edmonds' allegations, and especially in light of the recent actions of the defendants, amply demonstrates that this litigation involves violations of law, inefficiency, or administrative error, and embarrassment. See e.g., "*Senators Question FBI on New Security Breach Allegations*", Washington Cox Newspapers, August 14, 2002, attached at Exhibit "10".

In any event, it is rare that the government can obtain dismissal of a case from the outset, even under the State Secrets privilege, and courts are cautioned to even entertain the prospect. Cases have historically been permitted to proceed into discovery, during which time the Court can review specific objections raised by the government. See e.g., Molerio v. Federal Bureau of Investigation, 749 F.2d 815, 826 (D.C.Cir. 1984)(affirming dismissal on ground of privilege after FBI answered complaint and complied with discovery requests, although redacting many documents produced to eliminate information that would jeopardize state secrets or the national security); Ellsberg, 709 F.2d at 70 (reversing dismissal); Halkin, 690 F.2d at 984, 1009 (affirming dismissal after parties had fought "the bulk of their dispute on the battlefield of discovery"); Halkin v. Helms, 598 F.2d 1, 5 (D.C.Cir. 1978)(affirming partial dismissal and reversing decision rejecting privilege that was certified as interlocutory appeal). See also Reynolds, 345 U.S. at 11-12 (remanded for further proceedings without privileged material); DTM Research, LLC v. AT & T Corp., 245 F.3d 327 (4th Cir. 2001)(quashing of subpoena that threatened state secrets did not foreclose possibility of fair trial and did not warrant

dismissal); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 400-02 (D.C.Cir. 1984)(remanded for further proceedings without privileged material); Halpern v. United States, 258 F.2d 36, 44 (2d Cir. 1958)(remanded for trial *in camera*).

II. ALTERNATIVELY, LIMITED DISCOVERY SHOULD BE PERMITTED TO ALLOW EDMONDS TO EXPLORE THE CIRCUMSTANCES SURROUNDING THE FBI'S MEETINGS WITH THE U.S. SENATE AND HOUSE OF REPRESENTATIVES AND ITS ATTEMPTS TO RECLASSIFY THE RELEVANT INFORMATION

The e-mail circulated to Senate staff members noted that the "FBI would like to put all Judiciary Committee staffers on notice that it now considers *some of the information* contained in two Judiciary Committee briefings to be classified." See Exhibit "7" (emphasis added). Although the law appears clear that the defendants cannot take the actions they did, nonetheless if this Court does not believe it has sufficient factual information Edmonds should be entitled to pursue discovery to ascertain whether the defendants followed the applicable Executive Orders in reclassifying her information, as well as to determine exactly what information remains unclassified. See Schaffer v. Kissenger, 505 F.2d 389, 390-91 (D.C. Cir. 1974); Halperin v. NSC, 452 F.Supp. 47 (D.D.C. 1978), aff'd without opinion, 612 F.2d 586 (D.C. Cir. 1980).

III. EDMONDS' ALLEGATIONS CLEARLY CONTAIN CLAIMS THAT DO NOT REQUIRE THE NEED TO INVOLVE CLASSIFIED INFORMATION, EITHER AS AN OFFENSIVE OR DEFENSIVE WEAPON

Finally, Edmonds filed this action on July 22, 2002, seeking declaratory and injunctive relief pursuant to various provisions of the Privacy Act of 1974, as amended, 5 U.S.C. §§ 552a(b), the Administrative Procedures Act, 5 U.S.C. §§ 551-552 and 701-706, and the First Amendment and Fifth Amendment of the United States Constitution. See Complaint (filed July 22, 2002). Even a cursory review of the pleading demonstrates

that one or more of her claims can proceed without the need for classified information. As Edmonds does not wish to repeat prior arguments, consider this one example.

Edmonds asserts that the defendants unlawfully disseminated information from records maintained in her privacy act systems to third parties without her authorization or pursuant to a recognized exception under the Privacy Act. See 5 U.S.C. § 552a(b).These included, but are not limited to, the following instances (as set forth in her Complaint):

> 28. On June 8. 2002, the Associated Press ("AP") published an article, which was widely disseminated on its news wire, quoting "Government officials, who spoke only on condition of anonymity," about Plaintiff.[15]
>
> 29. The June 8, 2002 AP article reported the Defendants were investigating Plaintiff's whistleblower "allegations of security lapses in the translator program that has played an important role interpreting interviews and intercepts of Osama bin Laden's network since Sept. 11." Citing only "Government officials, who spoke only on condition of anonymity," the AP reported that "the FBI has been unable to corroborate the whistle-blower's allegations."
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> 30. In addition, again citing to unnamed government officials, the AP reported on June 8, 2002 that Plaintiff, "a contract employee in the FBI linguist program, was fired last spring for performance issues. She subsequently was subjected to a security review herself, the officials said."
>
> 31. The June 8, 2002 AP article also reported that "The FBI has focused its investigation on whether either the accused or the whistle-blower compromised national security, officials said."
>
> 32. On June 18, 2002, the Washington Post published an article citing to "Government officials" who said "the FBI fired" Plaintiff "because her 'disruptiveness' hurt her on-the-job 'performance.'" In addition, the Washington Post reported in its June 18th article that "FBI officials" said that Plaintiff "had been found to have breached security."

These asserted facts, conveniently presented by anonymous sources employed by the defendants, are either completely false or intentionally distorted in order to impugn

[15] A copy of the article appeared in *The Free Lance-Star* published in Fredericksburg, Virginia, and is attached at Exhibit “11”. This copy was maintained in the FBI files and was declassified and designated Bates number EDMONDS -773.

Edmonds' credibility. Either way, the release of this information from Edmonds' Privacy Act system of records was neither authorized nor permitted by an exception. It would be a simple matter to confirm through discovery whether Edmonds was "fired last spring for performance issues", "subjected to a security review herself", fired "because her 'disruptiveness' hurt her on-the-job 'performance'"[16] or was "found to have breached security."[17] Not one of these factual questions has anything to do with classified information, and each of them violates the Privacy Act. See Pilon v. Dep't of Justice, 73 F.3d 1111 (D.C. Cir. 1996).

There is no legitimate arguable basis for the defendants to contend the State Secrets privilege could prevent Edmonds from pursuing one or more of her claims.

CONCLUSION

Based on the foregoing, plaintiff's Motion should be granted, the defendants' State Secrets Motion should be denied, and discovery permitted on the merits.

Date: June 23, 2004

Respectfully Submitted,
/s/

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[16] The only document ever provided Edmonds indicated she was terminated "completely for the Government's convenience". See Exhibit "12" (released through FOIA/PA as Bates number EDMONDS – 677).

[17] Even if the defendants refuse to acknowledge the source of the unlawful disclosures, the reporters who wrote the stories are subject to discovery. See Wen Ho Lee v. U.S. Dep't of Justice, 287 F.Supp.2d 15 (D.D.C.)(2003)(plaintiff allowed to depose media in Privacy Act litigation involving unlawful disclosures by government officials).