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April 22, 2005

Mr. Mark J. Langer
Clerk, United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Third and Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Edmonds v.DOJ, No. 04-5286
oral argument held April 21, 2005

Dear Mr. Langer:

In her brief to this Court (at 35-37), appellant Sibel Edmonds contends that she can establish a Due Process entitlement to an administrative hearing pursuant to Codd v. Velger, 429 U.S. 624 (1977), and that such an administrative hearing could then be conducted without endangering the enormously sensitive information over which the Attorney General has invoked the state secrets privilege. At oral argument yesterday, Chief Judge Ginsburg asked the government to respond to these specific contentions. For the reasons explained below, we believe that the state secrets privilege precludes Ms. Edmonds from establishing that she is entitled to a Codd hearing.

First, Ms. Edmonds cannot demonstrate her alleged entitlement to a Codd hearing without reference to privileged information. As this Court has explained, such a hearing seeks to "remedy" the infringement of a constitutionally protected liberty interest in the reputation of a former government employee. See, e.g., Doe v. DOJ, 753 F.2d 1092, 1112 (D.C. Cir. 1985). To establish such an infringement here, Ms. Edmonds would have to show that the FBI, in the course of terminating her at-will contract, made defamatory statements that significantly foreclosed Ms. Edmonds from future employment opportunities for her specific translation services. See, e.g., Kartseva v. Department of State, 37 F.3d 1524, 1528 (D.C. Cir. 1995) (liberty interest implicated if government action "largely preclud[es] Kartseva from pursuing her chosen career as a Russian translator"); id. at 1529 ("if Kartseva can show that State's action precludes her from pursuing her profession as a Russian language translator, she will have identified a cognizable liberty interest"). As the classified declarations in this case make clear, any such inquiry in this case will implicate classified and privileged information. See SSA 21, 30, 44-45, 60-61.

Second, in this case, the only possible object of the Codd hearing would be to adjudicate the truth or falsity of information protected by the state secrets privilege. See Doe v. DOJ, 753 F.2d at 1114 ("the issue in the Codd hearing will be the veracity of the Department's charges, not the

propriety of the discharge itself"). As the district court recognized, the "nature of the charges allegedly made" against Ms. Edmonds is "comprised of privileged information," and the government thus would be "unable to adequately rebut the plaintiffs' assertions without revealing privileged information." JA 30. Because the proper assertion of the state secrets privilege removed such information entirely from this case, see, e.g., In re United States, 872 F.2d 472, 476 (D.C. Cir. 1989), a Codd hearing would be pointless. See Codd, 429 U.S. at 627 ("if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between the employer and a discharged employee which has some significant bearing on the employee's reputation"). The determination of such a "factual dispute" – about whether the statements at issue are "substantially false," see id. – would necessarily involve classified and privileged information.

Third, this Court has held that, in a Codd hearing as in other procedural due process contexts, courts determine the extent of process due by reference to the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976). See Doe v. DOJ, 753 F.2d at 1112-14. Under that test, courts must balance the nature of the private interest at issue, the risk of an erroneous deprivation of that interest, and the strength of the government's interest. See id. In this case, the full weight of the government's interest in protecting the confidentiality of the classified and privileged information at issue can be determined only by reference to the classified declarations setting forth that interest. Accordingly, to give due weight to the government interests at stake, any application of the Mathews balancing test, in determining the extent of any Codd hearing, would require consideration of classified and privileged information.

Those same government interests mandate that, if this Court were to reject our position that the judgment below should be affirmed, and were to order a Codd-like administrative hearing despite the absence of any finding that Ms. Edmonds' liberty interests have been violated, the administrative hearing would have to be tightly controlled to prevent the risk of disclosing highly sensitive classified and privileged information. Cf. Doe v. Cheney, 885 F.2d 898, 910 (1989) (extent of process due must take account of "the context of 'very sensitive' agencies, such as NSA"). At a minimum, although Ms. Edmonds could present an affirmative case at such an administrative hearing, both she and her counsel may be foreclosed from access to classified and privileged information relied on by the FBI. Courts generally lack authority to compel the Executive Branch to afford access to such information, see, e.g., Department of the Navy v. Egan, 484 U.S. 518, 527 (1988), and the FBI, as a matter of agency practice, does not generally grant security clearances to private counsel for internal agency administrative proceedings. Moreover, although the purpose of a Codd hearing is to afford an employee "'an opportunity to clear his name,'" see Codd, 429 U.S. at 627 (citation omitted), if such a hearing concluded that Ms. Edmonds' name had been wrongfully impugned, the extent of any subsequent public statement would have to be circumscribed by the need to protect classified and privileged information. Finally, the result of any Codd hearing should not be judicially reviewable. As shown at length in our brief, this case cannot be litigated except by reference to privileged information. Even if this Court were to conclude that such litigation would be permissible in the context of administrative adjudication (erroneously, in our judgment), any arguable advantage of administrative process over judicial process in protecting the information at issue would be lost if such administrative process were inevitably followed by further judicial proceedings.

We hope that this fully responds to the Court's questions. Please distribute this letter to Chief Judge Ginsburg and Judges Sentelle and Henderson. Thank you for your assistance.

Sincerely,

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