UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROJECT ON GOVERNMENT OVERSIGHT, Plaintiff, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, and UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	)	Civil Action No. 1:04cv01032 (JDB)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff Project On Government Oversight ("POGO") filed this action seeking a declaratory judgment that defendants' retroactive classification of embarrassing information about FBI incompetence and possible corruption is unlawful and constitutes an impermissible prior restraint on POGO's First Amendment right to free expression. POGO wishes to discuss and disseminate two letters written by U.S. Senators to the Justice Department that, for two years, were available on the Senators' websites and remain available to the public elsewhere, but were recently reclassified by defendants. Defendants have refused to state unequivocally that POGO will not be prosecuted or otherwise sanctioned if it publishes the letters that POGO lawfully obtained before defendants reclassified them. If defendants did so state, POGO would voluntarily dismiss its complaint. Instead of providing POGO with an assurance that it may disseminate the letters, defendants have moved to dismiss POGO's claim for lack of standing. The fact that defendants will not state that POGO may publish the information at issue without risk demonstrates that POGO's fear of prosecution is reasonable. Therefore, this Court should deny defendants' motion to dismiss and, for the reasons set forth below, grant summary judgment to POGO.

II. BACKGROUND

A. Factual Background

Following the terrorist attacks of September 11, 2001, the FBI hired Sibel Edmonds as a contract linguist. *Edmonds v. United States Dep't of Justice*, 323 F. Supp. 2d 65, 67 (D.D.C. 2004).[1] Soon after she began working in the FBI translation unit, Ms. Edmonds observed what

[1] Ms. Edmonds filed a Freedom of Information Act (FOIA) suit against the FBI, *Edmonds v. FBI*, Civ. No. 02-1294 (ESH) (D.D.C. filed June 27, 2002), which culminated in the decision at 272 F. Supp. 2d 35, and a whistleblower suit against the Department of Justice and

she perceived to be "'serious breaches in the FBI security program and a break-down in the quality of translations as a result of willful misconduct and gross incompetence.'" *Id.* (quoting complaint). Ms. Edmonds reported her observations up the chain of command at the FBI. Thereafter, Ms. Edmonds was fired. *Id.*

Ms. Edmonds' allegations concerning problems in the FBI's translation unit came to the attention of the Senate Judiciary Committee and, on June 17, 2002, the FBI held an unclassified briefing for Committee members and staff. During this unclassified briefing, the FBI discussed information relating to Ms. Edmonds' allegations specifically and problems with the FBI's translation unit generally. Brian Dec. ¶ 14.

On June 19, 2002, Senators Patrick Leahy and Charles Grassley sent a letter to Glenn Fine, Inspector General of the Department of Justice, asking that Fine pursue particular matters in the course of his investigation of Ms. Edmonds' claims. The letter of June 19 was disseminated widely and posted on Senator Leahy's and Senator Grassley's websites. *Id.* ¶ 17. The entire text of the June 19 letter was printed in the Congressional Record. 148 Cong. Rec. S. 5842 (June 20, 2002).

On July 9, 2002, the FBI again held an unclassified briefing for Senate Judiciary Committee members and staff. The FBI again presented information relating to Ms. Edmonds' allegations and problems at the FBI translation unit. Brian Dec. ¶ 14.

On August 13, 2002, Senators Leahy and Grassley sent a letter to Attorney General John Ashcroft regarding the status of the investigation of Ms. Edmonds' claims. The August 13 letter

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others, *Edmonds v. United States Dep't of Justice*, Civ. No. 02-1448 (RBW) (D.D.C. filed July 22, 2002), which culminated in the decision at 323 F. Supp. 2d 65. POGO will refer to the former as "the Edmonds FOIA suit" and the latter as "the Edmonds whistleblower suit."

was disseminated widely and posted on Senator Leahy's and Senator Grassley's websites. *Id.* ¶ 19.

On October 28, 2002, Senator Grassley sent a letter to Robert Mueller, Director of the FBI, expressing the Senator's concern with the FBI's translation capabilities and referencing the June 17, 2002, FBI briefing regarding the claims made by Ms. Edmonds. Senator Grassley's October 28 letter was disseminated widely and posted on the Senator's website. *Id.* ¶ 20.

Meanwhile, on July 22, 2002, Ms. Edmonds had filed her whistleblower suit. The government did not defend the whistleblower suit on the merits. Rather, the government asserted the state secrets privilege and moved to dismiss the case. *See* Docket No. 13 in No. 02-1448. The government eventually prevailed. *Edmonds*, 323 F. Supp. 2d at 81. Similarly, the government prevailed in its efforts to stop Ms. Edmonds from testifying in a case brought by the families of those killed on September 11 against Saudi individuals and entities implicated in financing al-Qaeda. *Burnett v. Al Baraka Investment & Development Corp.,* 323 F. Supp. 2d 82, 84 (D.D.C. 2004). Although the government successfully invoked the state secrets privilege in these cases, some of Ms. Edmonds' allegations have been verified by the Inspector General in a classified report. On July 21, 2004, FBI Director Robert Mueller sent a letter to Senator Hatch, with copies to Senators Leahy and Grassley, confirming that the Office of the Inspector General (OIG) had concluded "that Ms. Edmonds' allegations 'were at least a contributing factor in why the FBI terminated her services.'" Mueller letter of July 21, 2004 (quoting classified OIG report), attached to Brian Dec. as Ex. F. Director Mueller also noted that "the OIG criticized the FBI's failure to adequately pursue Ms. Edmonds' allegations of espionage as they related to one of her colleagues" and pledged to "conduct additional investigation as appropriate." *Id.*

During the pendency of the government's motion to dismiss Ms. Edmonds' whistleblower case and its effort to bar her from testifying in *Burnett*, both on grounds of the state secrets privilege, the government decided to classify retroactively the information it had presented to the Senate Judiciary Committee during the unclassified briefings of June 17 and July 9, 2002. On May 13, 2004, the following message was sent by e-mail to the staff of the Senate Judiciary Committee:

> 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. If you attended this briefing and took notes, please contact Pat Makanui, Office of Senate Security, at 4-5632. If you have any questions, please call Nick Rossi at (202) 324-7484.

Brian Dec. ¶ 21 & Ex. G. Following notice that the information from the briefings of June 17 and July 9, 2002, had been reclassified, Senators Leahy and Grassley removed from their websites the letters of June 19 and August 13, 2002.[2] *Id.* ¶ 22. Senator Grassley's letter of October 28, 2002, was not removed from his website. It remains accessible at http://grassley.senate.gov/releases/2002/p02r10-28.htm. *Id.* ¶ 26.

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[2] Sometime after this lawsuit was filed, the June 19 and August 13 letters reappeared on Senator Leahy's website. On August 12, 2004, the June 19 letter was accessible at http://leahy.senate.gov/s/2002/200206/061902a.html and the August 13 letter was available at http://leahy.senate.gov/s/2002/200208/081302.html. When the availability of these letters was brought to the attention of Senator Leahy's staff, the staff had the letters removed, citing the retroactive classification decision. Brian Dec. ¶ 22.

Although the June 19 and August 13 letters were removed from the Senators' websites, copies remain available from various sources, including this Court's electronic docket. For example, the letter of June 19, 2002, is attached as an exhibit to three different pleadings in the Edmonds whistleblower case.[3] It is also printed in the Congressional Record and can be accessed at various websites. Brian Dec. ¶ 23. Similarly, the letter of August 13, 2002, is attached as an exhibit to two different pleadings in the Edmonds whistleblower case,[4] and it can be accessed at various websites. *Id.* ¶ 24. Although the government is aware that the letters are available to the public through the Court's electronic docket in the whistleblower case, the government has not moved to have the letters placed under seal or made any other effort to shield them from public view.

In fact, at least one of the letters was released by the government to Ms. Edmonds in response to a FOIA request. Although the government claimed exemptions from disclosure for the vast majority of the documents Ms. Edmonds requested, *see Edmonds v. FBI,* 272 F. Supp. 2d 35, 42 (D.D.C. 2003), the government released the letter of June 19, 2002, marked as "Edmonds-810," and bearing a stamp stating that "all information contained herein is unclassified." *See* Exhibit 4 to Docket No. 33 in No. 02-1448.

POGO obtained copies of the June 19 and August 13 letters before they were removed from the Senators' websites. Brian Dec. ¶¶ 17 & 19. In furtherance of its mission to serve the public interest by promoting government accountability, POGO desires to post, discuss, and

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[3] The June 19 letter is included in Exhibit 3 to Docket No. 6; Exhibit 5 to Docket No. 22; and Exhibit 4 to Docket No. 33.

[4] The August 13 letter is included in Exhibit 7 to Docket No. 22, and Exhibit 5 to Docket No. 33.

disseminate these documents and the information they contain. *Id.* ¶ 28. However, because POGO is aware that the information in the documents has been reclassified, POGO has refrained from doing so, out of fear of criminal prosecution or other adverse action by the government. *Id.* Indeed, the government has threatened to prosecute POGO in the past under similar circumstances. *Id.*

For example, during the course of litigation concerning the burning of hazardous waste at Area 51 (the government's secret testing facility in Nevada), POGO obtained an unclassified Area 51 security manual. The Air Force retroactively classified the security manual, threatened to prosecute POGO and anyone else who had it in their possession, and demanded access to POGO's files to determine what other "classified" information POGO possessed. Ultimately, an agreement was reached under which POGO avoided prosecution, but POGO was stripped of its ability effectively to participate in and encourage public debate about environmental matters at Area 51. *Id.* ¶¶ 5-8.

Unfortunately, the Area 51 episode is not the only time POGO has been threatened with criminal and civil sanctions for seeking to disseminate information in the public domain that the government subsequently decided was classified. For example, when POGO issued a letter critical of the Nuclear Regulatory Commission's testing of the defenses against sabotage in place at the nuclear generating station at Indian Point, New York, the NRC ordered POGO to remove the entire letter from its website under the threat of criminal prosecution. The NRC alleged that, even though POGO is not a licensee or otherwise regulated by the NRC, the letter contained safeguards information within the meaning of 42 U.S.C. § 2167. Despite POGO's belief that the letter contained no safeguards information, POGO complied with the NRC's order and removed

the letter from its website, although the letter remained easily retrievable from other websites. By the time the NRC identified the few passages in the September 11, 2003 letter it insisted POGO not publish because the NRC objected to POGO's characterization of the information, POGO had for three months been forced into silence on the entire topic of safety at Indian Point. Brian Dec. ¶¶ 9-12.

During a Senate Judiciary Committee hearing on June 8, 2004, defendant Ashcroft took personal responsibility for the decision to reclassify the information at issue in this case. Defendant Ashcroft claimed that "the national interests of the United States would be seriously impaired if information provided in one briefing to the Congress were to be made generally available." *DOJ Oversight: Counterterrorism & Other Topics: Hearing Before the Senate Judiciary Committee*, 108th Cong. (2004) (testimony of John Ashcroft, Attorney General). He acknowledged that the information had been in the public domain without restriction for an extended period of time, but maintained that reclassification was nevertheless appropriate, explaining:

> Well, let me just put it this way: If there is spilled milk and there is no damage done, *if you can recollect it and put it back in the jar*, you're better off than saying, 'Well, it's spilled, no damage has been done, we might as well wait until damage is done.' Our responsibility is if information is made available which is against the national interest to be in the public sphere to say we should do what we can to curtail the availability of the information. It's on that basis that I made the decision.

Id. (emphasis added).

B. Procedural Background

POGO filed this action on June 23, 2004. The same day, in the whistleblower case, Ms. Edmonds filed a motion seeking a declaration that the government's reclassification of the information at issue was unlawful. *See* Docket No. 33 in No. 02-1448. Therefore, pursuant to the requirements of LCvR 40.5(b)(3), POGO filed in this action a notice of related case. The Court in the whistleblower case dismissed that action on July 6, 2004, without reaching the issues presented in this case. *See* Docket No. 37 in No. 02-1448.

C. Statutory and Regulatory Background

Classification of government information is controlled by Executive Order 12958, as amended by Executive Order 13292.[5] Section 1.7(c) of Executive Order 13292 provides:

> Information may be reclassified after declassification and release to the public under proper authority only in accordance with the following conditions:
> (1) the reclassification action is taken under the personal authority of the agency head or deputy agency head, who determines in writing that the reclassification of the information is necessary in the interest of the national security;
> (2) the information may be reasonably recovered; and
> (3) the reclassification action is reported promptly to the Director of the Information Security Oversight Office.

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[5] Executive Order 12958 was issued on April 17, 1995. 60 Fed. Reg. 19825. It was amended by Executive Order 13292 on March 25, 2003. 68 Fed. Reg. 15315. POGO is unaware of the specific date of the classification decision at issue. However, based on the fact that one of the letters was marked "unclassified" and produced in January 2003 in response to a FOIA request, and the fact that the classification decision was announced to the staff of the Senate Judiciary Committee on May 13, 2004, it appears that Executive Order 13292 was in effect at the time of the classification decision. Further, in their memorandum in support of their motion to dismiss, defendants assert that "the classification at issue was entirely consistent with the applicable Executive Orders," Def. Mem. at 1 n.1, and defendants cite "[t]he Executive Order in question," "the applicable Executive Orders," and "[t]he executive order at issue here," as "Executive Order 12958, as amended by Executive Order 13292." *Id.* at 2, 11 & 12.

The authority to classify information in accordance with the Executive Order derives from the National Security Act, 50 U.S.C. § 435. The dissemination of classified national security information is prohibited by various statutes, including 18 U.S.C. §§ 793 and 798.

III. ARGUMENT

A. POGO Has Standing to Bring Suit and Its Claim Is Ripe Because POGO Has a Reasonable Fear of Prosecution If POGO Disseminates the Information at Issue.

A case or controversy exists under Article III where the plaintiff alleges that: 1) it has suffered an "injury-in-fact;" 2) the injury was "fairly traceable" to the defendant's conduct; and 3) the injury would likely be redressed by the judicial relief sought. *Navegar, Inc. v. United States*, 103 F.3d 994, 997 (D.C. Cir. 1997); *see also Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982). Defendants assert that POGO lacks Article III standing to bring its First Amendment claim because POGO has not yet been prosecuted for disseminating classified information, and thus has not yet suffered an injury-in-fact. Defendants assert that in the absence of a formal and specific government order targeted to POGO that instructs POGO not to disseminate the information, the possibility that POGO will be prosecuted is too speculative to support standing.[6] Defendants take this position even though: 1) criminal statutes forbid the dissemination of classified information; 2) the government has threatened to prosecute POGO in the past under similar circumstances; 3) the government refuses to offer any assurance that it will not prosecute POGO for disseminating the information at issue; and 4) reclassification is proper only where the

[6] Defendants also frame this argument under the ripeness doctrine, but the analysis is the same.

government is prepared to use the tools at its disposal to recover the information and prevent its further dissemination.

Although defendants are correct that an injury-in-fact must be actual and concrete, rather than hypothetical or abstract, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)), the government errs by claiming that POGO must expose itself to prosecution before it can establish an injury-in-fact. Here, POGO can establish injury-in-fact because it can show that: 1) it has an intention to engage in conduct that implicates a constitutional interest; 2) the conduct at issue is prohibited by statute, and 3) a credible threat of prosecution exists. *Babbitt*, 442 U.S. at 298; *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 30-31 (1st Cir. 1999).

1. POGO Intends to Engage in a Course of Conduct That Implicates a Constitutional Interest.

It is beyond dispute that POGO intends to engage in conduct that implicates a constitutional interest. POGO seeks to disseminate the information at issue and has refrained from doing so only because the information has been reclassified by defendants. Brian Dec. ¶ 28. Publishing and otherwise disseminating information is a core right protected by the First Amendment. *See generally New York Times v. United States*, 403 U.S. 713 (1971). Thus, POGO has satisfied the "intent to engage" element of the *Babbitt* test. *See Rhode Island Ass'n of Realtors*, 199 F.3d at 31 (trade association that obtained information it wished to use to solicit new members had standing to challenge a statute that criminalized the use of public records for purely commercial reasons because the association's desire to solicit new members implicated its First Amendment freedom of association).

2. The Dissemination of Classified Information Is Prohibited by Statute.

POGO satisfies the second element of the *Babbitt* test because the dissemination of classified national security information is prohibited by statute. For example, 18 U.S.C. § 798(a) provides that "[w]hoever knowingly and willfully . . . makes available to an unauthorized person, or publishes . . . any classified information . . . (3) concerning the communication intelligence activities of the United States or any foreign government; or (4) obtained by the processes of communication intelligence from the communications of any foreign government . . . shall be fined under this title or imprisoned not more than 10 years, or both." Similarly, under 18 U.S.C. §§ 793(d) and (e), anyone having (1) lawful or unauthorized "possession of, access to, or control over any document . . . or information relating to the national defense; (2) "which information the possessor knows or has reason to believe could be used to the injury of the United States"; and (3) who "willfully communicates, delivers, transmits or causes to be communicated, delivered or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it"; (4) "[s]hall be fined under this title or imprisoned not more than ten years, or both."

POGO believes it will have viable defenses available if it is prosecuted under these statutes because state action to punish the publication of truthful, lawfully obtained information seldom meets constitutional standards. *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) ("if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order"); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (First Amendment does not permit criminal punishment of the

news media for publishing truthful information regarding confidential proceedings of a judicial commission because interests advanced by imposition of criminal sanctions do not justify such restrictions on freedom of speech and press); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (damages could not be recovered against a broadcasting company for broadcasting the name of a rape victim, in violation of a statute making it a crime to broadcast a rape victim's name, when that information was already in the public domain). *But cf. New York Times Co.*, 403 U.S. 713 (holding that an injunction against newspapers' publishing of a classified document would constitute an unconstitutional prior restraint, but not deciding whether the newspapers were protected from civil or criminal prosecution); *United States v. Morison*, 844 F.2d 1057, 1068 (4th Cir. 1988) (government employee who leaked classified information to the press was convicted under 18 U.S.C. §§ 793(d) and (e) after the court rejected the employee's First Amendment argument, stating that the First Amendment is not intended to "confer a license on either the reporter or his news source to violate valid criminal laws"). Regardless whether POGO would have defenses available, the threat of prosecution is nevertheless credible, a conclusion driven home by the government's refusal to say otherwise.

3. POGO has a Reasonable and Credible Fear of Prosecution if it Disseminates the Information at Issue.

To satisfy the *Babbitt* test, POGO must face a credible threat of imminent prosecution if it engages in the intended conduct. 442 U.S. at 298. The threat of prosecution must be reasonable, and may not be "imaginary or speculative." *Id.* at 298-99; *see also Younger v. Harris*, 401 U.S. 37, 42 (1971); *Navegar,* 103 F.3d at 998. In determining whether a threat of prosecution exists, courts have made clear that the determination is fact-specific and is made on a case-by-case basis. *See Id.* at 999; *Rhode Island Ass'n of Realtors*, 199 F.3d at 30.

One relevant factor is the nature of the conduct that is proscribed. In the context of preenforcement challenges to statutes that restrict conduct protected by the First Amendment, courts have found the credible threat of prosecution standard to be "quite forgiving." *Id.* at 31 (citing cases). Because POGO has alleged that the reclassification at issue here has interfered with its constitutional right to free speech, this Court must be particularly vigilant in protecting that right. *See id.* ("when First Amendment values are at risk, courts must be especially sensitive to the danger of self-censorship") (citing *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988)). Indeed, standing requirements are less stringent when freedom of speech is at issue because of "the overriding importance of maintaining a free and open market for the interchange of ideas." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (defendant whose own speech is unprotected may challenge the constitutionality of a statute allegedly prohibiting protected speech because the existence of such a statute may cause others to refrain from taking part in constitutionally protected expression).

Further, where the challenge is being made to a statute that is likely to be invoked (as opposed to antiquated laws that the government is unlikely ever to enforce), the threat of imminent prosecution will be presumed absent compelling evidence to the contrary. *See id.*; *cf. Navegar*, 103 F.3d at 1000 (a threat of imminent prosecution "can be deemed speculative only if it is likely that the government may simply decline to enforce these provisions at all"). Because POGO has been threatened with prosecution for disclosing reclassified information in the past, *see supra* at 6, and because the government has a strong interest in enforcing a statute that bans the unauthorized disclosure of classified information, this Court should presume that the threat of prosecution is both imminent and reasonable.

POGO's concern here is heightened by the fact that the government decided to reclassify this information even though it had been widely available to the public for two years. As noted above, one requirement for reclassifying information is that "the information may reasonably be recovered." Executive Order 13292, Sec. 1.7(c)(2). Defendant Ashcroft, in defending his decision to reclassify this material, echoed that sentiment. He argued that reclassification made sense in this case because, "if you can recollect it [the allegedly sensitive information] and put it back in the jar, you're better off" than permitting the information to remain in the public. Here, of course, the only way defendants can put this information "back in the jar" is by threatening POGO with criminal prosecution or other sanction if it disseminates this information or otherwise makes it public.

Indeed, this point is dispositive because although defendants could have easily disclaimed any interest in silencing POGO, they have done precisely the opposite—they have submitted a motion to dismiss that is carefully crafted to keep open the door to prosecution or sanction of POGO if POGO disseminates the information. The courts have emphasized time and again that where, as here, the government has reserved a right to prosecute the plaintiff, that fact is powerful evidence that the plaintiff's fear of prosecution is reasonable. *See e.g., Babbitt*, 442 U.S. at 302; *Rhode Island Ass'n of Realtors*, 199 F.3d at 35. In *Babbitt*, the Supreme Court found the fact that "the State ha[d] not disavowed any intention of invoking the criminal penalty provision against [plaintiffs]" suggested that the plaintiffs had a reasonable fear of prosecution. *Babbitt*, 442 U.S. at 302. Just as the state maintained in *Babbitt*, defendants argue that no action has been taken against POGO, but defendants are careful to avoid stating that POGO will not be

prosecuted. This clear evasion should contribute to this Court's finding that POGO's fear of prosecution is reasonable and not merely speculative.

Finally, the Supreme Court has found that any past threats of prosecution are relevant to determining if a current fear of prosecution is reasonable. In *Younger*, the Court dismissed three plaintiffs that had joined a challenge to California's Criminal Syndicalism Act because they failed to allege that they "have ever been threatened with prosecution." *Younger*, 401 U.S. at 42. In that case, the dismissed plaintiffs stated only that they felt "inhibited" by the statute's enactment. *Id.* POGO's fear of prosecution in this situation is far more concrete, because POGO has been threatened twice before by the government in situations similar to the current controversy.

For all of these reasons, POGO has standing and its claim is ripe.

B. The Court Should Grant Summary Judgment for POGO on its Claim that Defendants' Reclassification of the Information At Issue is a Prior Restraint that Violates the First Amendment.

Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Washington Post v. HHS,* 865 F.2d 320, 325 (D.C. Cir. 1989). No genuine issue exists as to any material fact regarding POGO's claim that defendants' reclassification of the information at issue has imposed a prior restraint on POGO's ability to communicate important information to the public. Therefore, and for the reasons set forth below, the Court should enter judgment for POGO.

1. Prior Restraints That Impinge on First Amendment Rights Are Presumptively Unconstitutional.

The term prior restraint describes "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). Reclassification of the information at issue operates as a prior restraint because it is an advance determination that publication of the letters is prohibited and because it operates to chill protected speech by the threat of criminal sanction. *See Davis v. East Baton Rouge Parish School Board*, 78 F.3d 920, 928 (5th Cir. 1996) ("An order that prohibits the utterance or publication of particular information or commentary imposes a prior restraint on speech.") (citations omitted).

A prior restraint on expression is not necessarily unconstitutional, but bears "a heavy presumption against its constitutional validity." *New York Times*, 403 U.S. at 714; *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."). Prior restraints on speech are considered to be a special vice because they serve to suppress communication, "either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). To be found lawful, a prior restraint must: (1) "fit within one of the narrowly defined exceptions to the prohibition against prior restraints," and (2) "have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

The court should apply a balancing test to determine whether the prior restraint against POGO's publication of the reclassified information at issue is justified. *See Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 442-43 (1957) ("The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test….What is needed…is a pragmatic assessment of its operation in the particular circumstances.") (citations omitted). Furthermore, the court should recognize the strong presumption in favor of allowing unfettered publication of protected speech without the chilling effect of potential criminal liability, except in the very few cases where publication threatens national security, or represents a "clear and present danger" to the country. *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Davis*, 78 F.3d at 928.

2. The First Amendment Can Protect the Publication of National Security Information Even Where it Is Properly Classified.

The Supreme Court has held that the publication of classified information, such as the reclassified information at issue here, may be protected speech under the First Amendment. In *New York Times*, the government attempted to enjoin two newspapers from publishing a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." The Court held that an injunction against those newspapers' publication of this classified information

constituted an unconstitutional prior restraint. 403 U.S. at 714.[7] Thus, even the dissemination of classified information can be protected by the First Amendment.[8]

The chilling of free expression resulting from the threat of sanctions against POGO for publishing the reclassified information is more than sufficient to render the defendants' reclassification an unconstitutional prior restraint. By definition, a prior restraint "has an immediate and irreversible sanction, namely that it "freezes [speech] at least for the time." *Nebraska Press*, 427 U.S. at 559. Defendants' reclassification of the information at issue has stifled public discussion regarding Ms. Edmonds' reports of problems in the translation unit where she worked and the adequacy of the FBI's translation capabilities. To use the reclassified information to question the government's response to the attacks of September 11, 2001, POGO would need to disregard the defendants' classification order and risk criminal sanctions, as described above.

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[7] Although *New York Times* included nine separate opinions, the majority of Justices held that national security alone was too amorphous a rationale to override the protections of the First Amendment. *See* 403 U.S. at 719 and 722-723 (Douglas, J. joined by Black, J., concurring) (even where disclosure of classified information would have a "serious impact . . . that is no basis for sanctioning a previous restraint on the press"); *see also id*. at 726 (Brennan, J. concurring) (prior restraint only permissible in time of war); *id*. at 730 (Stewart, J., joined by White, J., concurring) (prior restraint only permissible when disclosure will "surely result in direct, immediate, and irreparable damage to our Nation or its people.").

[8] Courts have also held that the government did not fulfill its burden of demonstrating that an imposition of a prior restraint against the press was warranted with regard to other types of confidential information. *See, e.g., Oklahoma Publ'g Co. v. District Court,* 430 U.S. 308 (1977) (striking down a state-court injunction prohibiting the media from publishing the name or photograph of a boy being tried before the juvenile court as an unlawful prior restraint on expression). *But cf. American Library Ass'n v. Faurer,* 631 F. Supp. 416, 422 (D.D.C. 1986) (holding that plaintiffs did not have a First Amendment right to access classified materials previously disclosed to the public when disclosure could endanger national security).

The Supreme Court has held that the mere threat of sanctions, such as the threat that POGO may be held criminally liable for publishing the reclassified letters, may constitute a prior restraint on expression. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (state commission's blacklisting of certain allegedly obscene books operated as a prior restraint through the informal methods of persuasion and intimidation, even though the commission did not have a direct regulatory or suppressing function and no one had been prosecuted for the sale or possession of the blacklisted books); *cf. Southeastern Promotions*, 420 U.S. at 556 (total suppression of speech is not necessary to create a prior restraint; an auditorium director's denial of facilities for a musical show constituted a prior restraint on expression even though alternate facilities may have been available); *Interstate Circuit v. Dallas*, 390 U.S. 676, 688 (1968) (direct suppression of expression is not necessary to create a prior restraint; Court strikes down an ordinance requiring that a film may not be exhibited without classification as "not suitable for young persons").

Defendants cannot satisfy their heavy burden of showing that the chilling of speech resulting from the reclassification is justified under the First Amendment. In *New York Times*, 403 U.S. at 714, the Court indicated that the press has a qualified right under the First Amendment to publish classified information, regardless of whether it was obtained innocently or through wrongdoing. Although the prior restraint at issue in *New York Times* was a court injunction against publishing certain classified information, whereas the prior restraint in the instant case is the reclassification of publicly available documents, in both cases prior restrictions on protected speech serve to stifle essential public discourse on the workings of the government and are therefore constitutionally impermissible.

Indeed, the Supreme Court has recognized that the harm resulting from a prior restraint can be especially great when it chills the communication of news or commentary on current events—which is exactly what is at stake if POGO does not publish the information at issue because of its fear of criminal liability for publishing reclassified information. *See Nebraska Press*, 427 U.S. at 559. The primary rationale of *New York Times*—that an informed public opinion facilitated by a free press is the "only effective restraint upon executive policy and power in the areas of national defense"—is fully applicable to POGO's function as an organization committed to government oversight. *New York Times*, 403 U.S. at 728 (Stewart, J., joined by White, J. concurring).

3. The Prior Restraint That Defendants Have Imposed on POGO Is Particularly Objectionable Because the Information at Issue Is Already in the Public Domain.

POGO's case is markedly stronger than the prior restraint cases just discussed. In those cases, at least the government could argue that the underlying information was secret and that publication would expose previously secret information to general public view. That argument is unavailable to the government here, where the government seeks to silence POGO even though the information is not "secret" in any meaningful sense. The fact that the information has already been disseminated in full on the internet and remains publicly available indicates that national security will not be jeopardized if POGO is permitted to publish this information to facilitate public knowledge and debate of current events. Thus, this case does not present one of the narrow exceptions where a prior restraint against publication of classified information is justified due to national security concerns. Rather, permitting the threat of liability for publishing reclassified documents to prevent POGO from publishing the Senators' letters would

unconstitutionally stifle critical speech on the operation of the government without significantly enhancing national security.

In other cases involving sensitive national security information, the courts have drawn a line between sensitive information that is not public and information that, while arguably sensitive, is public, protecting the former but not the latter. *See, e.g., McGehee v. Casey,* 718 F.2d 1137, 1142-45 (D.C. Cir. 1983) (upholding pre-clearance review by CIA of former agent's manuscript only on express understanding that CIA could not order the redaction of public source information); *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972) (emphasizing that the government has no legitimate interest in suppressing information obtained from public sources); *see also Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (dictum) (suggesting that it would be inappropriate for the CIA to insist that information in the public domain be suppressed). This point applies with special force to information that the defendant screened prior to its release—as the defendant did with the June 19 letter that it released to Ms. Edmonds with the notation that it was "unclassified." *See generally United States v. Progressive, Inc.,* 467 F. Supp. 990 (W.D. Wis. 1979) (entering preliminary injunction barring publication of an article on how to build a hydrogen bomb only after finding that some of the information was not publicly available), *injunction dissolved*, 610 F.2d 819 (7th Cir. 1979) (dissolving injunction and dismissing case on appeal when it appeared that others had published the same information while the action was pending); *see also* L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. Colo. L. Rev. 55 (1990).

4. Defendants' Decision to Reclassify the Information at Issue Cannot Bolster Their Claim That a Prior Restraint Is Justified on National Security Grounds Because the Information Was Reclassified in Violation of the Applicable Executive Orders.

Defendants maintain that because the applicable Executive Orders do not by their own terms create a private right of action, the question of whether defendants followed their own rules in reclassifying the information at issue is not justiciable. Defendants err, however, in asserting that the lack of an independent cause of action divests this Court of the ability to consider whether the information at issue is properly classified. Indeed, courts routinely consider the propriety of classification decisions in adjudicating cases brought pursuant to statutes that attribute legal significance to whether information is properly classified. *See, e.g.,* Freedom of Information Act, 5 U.S.C. § 552(b)(1)(B) (providing exemption from disclosure for matters that are "in fact properly classified pursuant to [] Executive order"); *see also CIA v. Sims*, 471 U.S. 159 (1985). In fact, Congress amended FOIA to allow for judicial review of an agency's decision to withhold information under this exemption after the Supreme Court held judicial review in these cases was precluded. *See Ray v. Turner*, 587 F.2d 1157, 1189-95 (D.C. Cir. 1979) (discussing history of FOIA and the FOIA amendments following *EPA v. Mink*, 410 U.S. 73 (1973)). Similarly, this Court may need to determine the propriety of the classification decision at issue in this case to be assured that the case does not present the rare circumstance where publication would represent such a threat to national security that a prior restraint should be upheld.

a. Defendants failed to comply with Section 1.7(c)(2) of Executive Order 13292 because the information is in the public domain and cannot reasonably be recovered.

Section 1.7(c)(2) of Executive Order 13292 permits the reclassification of information following its release to the public only where "the information may be reasonably recovered." The information at issue in this case was provided by the FBI to members and staff of the Senate Judiciary Committee during unclassified briefings. The information was later incorporated in the letters of June 19 and August 13, 2002, which were posted (and remain) on various web sites, repeatedly filed as exhibits to publicly available court documents, and, with respect to the June 19 letter, published in the Congressional Record. Because the information is in the public domain and is not reasonably recoverable, the reclassification failed to conform with the requirement of section 1.7(c)(2) of the Executive Order and is unlawful.[9]

b. To the extent defendants argue that they have engaged in an original classification rather than a reclassification, defendants failed to comply with section 1.1(a)(2) of the Executive Order because they classified information that was not under the control of the government.

Defendants may argue that they need not comply with the requirements of section 1.7(c) of Executive Order 13292 because the classification at issue did not follow declassification and release to the public. Such a contention is belied by the fact that the information at issue was disclosed during unclassified briefings, and at least the June 19 letter was marked "unclassified" before it was released in response to a FOIA request. Regardless, defendants' characterization of

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[9] POGO also alleges that defendants failed to comply with section 1.7(c)(3) of the Executive Order because the reclassification action was not reported promptly to the Director of the Information Security Oversight Office. POGO does not rely on defendants' failure in this regard to support POGO's motion for summary judgment because it may involve a factual dispute requiring discovery to resolve.

their classification decision is of little consequence because to the extent section 1.7(c) does not apply, defendants have failed to comply with section 1.1(a)(2) of the Executive Order 13292. Section 1.1(a)(2) permits the original classification of information only if "the information is owned by, produced by or for, or is under the control of the United States Government." Because the information at issue is in the public domain, defendants cannot meet the terms of Executive Order 13292.[10]

Indeed, the classification system rests on the premise that the government may inhibit the dissemination of its own information, as opposed to public information. Thus, the classification of the public information at issue in this case is unlawful whether it is a reclassification under section 1.7(c), or an original classification under section 1.1(a). Similarly, to the extent the classification decision was made before March 25, 2003, it violated the terms of Executive Order 12958, which was then in effect. Section 1.8(c) of Executive Order 12958 explicitly prohibited reclassification of information after declassification and release to the public, and, with respect to original classification, section 1.2(a)(2) incorporated the same language as section 1.1(a)(2) of

[10] Moreover, to the extent defendants (re)classified the information for an improper purpose, *(e.g.,* to gain a litigation advantage by bolstering the government's assertion of the state secrets privilege in *Burnett* and the Edmonds whistleblower case or to avoid Congressional oversight with regard to problems at the FBI), the classification violates section 1.7(a) of the Executive Order. POGO does not rely on this ground to support POGO's motion for summary judgment because defendants' motivation is likely to involve fact disputes requiring discovery to resolve. Nevertheless, POGO notes that the timing of the classification suggests that the *Burnett* case and the Edmonds whistleblower litigation were factors in the decision to attempt a reclassification of the information. Indeed, both the May 13, 2004 e-mail announcing the classification, and defendant Ashcroft's testimony on June 8, 2004, mention the relationship of the information to civil litigation, and defendant Ashcroft submitted a declaration asserting the state secrets privilege in *Burnett* on May 14, 2004. *See Burnett*, 323 F. Supp. 2d at 82.

Executive Order 13292 (which, as explained above, does not permit classification of public information).

IV. CONCLUSION

For the foregoing reasons, the Court should deny defendants' motion to dismiss and grant summary judgment for POGO.

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Respectfully submitted,

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