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)

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants' reply and accompanying materials provide new detail regarding the classification decision that caused the prior restraint that POGO challenges in this case, but the essential facts remain undisputed:

- POGO lawfully obtained copies of two letters that contain information that the FBI classified *after* the letters were released to the public;
- These letters were, and remain, available on the Internet to anyone who wants to obtain them;
- Criminal statutes prohibit the dissemination of classified information;
- POGO desires to disseminate the information in the letters, and the letters themselves, but has been restrained by fear of prosecution; and
- Defendants refuse to disclaim any interest in prosecuting POGO if POGO disseminates the letters.

Taken together, these facts make POGO's case. They demonstrate that POGO is facing a classic prior restraint, which not only constitutes injury-in-fact, but also violates POGO's First Amendment right to discuss and disseminate matters of public record. And they demonstrate the impropriety of defendants' effort to classify information in the public domain that cannot reasonably be retrieved by the government.

Nonetheless, defendants argue that POGO lacks standing and suffers no prior restraint because the government has not yet taken action directed specifically against POGO. But this argument misses the mark. The entire point of a classification system, backed up with criminal penalties, is to impose a prior restraint on speech. The government imposes that restraint to prevent the disclosure of *secret* national security information by putting those with access to classified information on notice that they disclose it at their peril. Typically, the classification of government-held information does not interfere with protected speech because the classified information remains in the exclusive control of the government. But this case is unlike any other classification case of which we are aware because the defendants classified information after releasing it to the public and permitting it to be widely circulated, both in the press and via the Internet. Thus, it is defendants' after-the-fact classification of public information that imposes a prior restraint that violates POGO's First Amendment right to discuss information it lawfully obtained.

Thus, the act of classification itself triggers the threat of prosecution and imposes the restraint that defendants assert is lacking. Indeed, defendants' claim that the threat to POGO is insufficient to support standing or constitute a prior restraint is belied by defendants' refusal to resolve this case by stating that POGO will not be prosecuted or otherwise sanctioned if it

publishes the two letters at issue. Accordingly, defendants' motion to dismiss and cross-motion for summary judgment should be denied, and POGO's motion for summary judgment should be granted.

ARGUMENT

I. POGO Has Standing Because Defendants' Classification of Public Information Has Restricted POGO's Constitutional Right to Free Speech.

Defendants' first error is to assert that POGO must be singled-out and specifically threatened with prosecution before it has suffered an injury-in-fact sufficient to establish standing to challenge a prior restraint. That is not the law. As POGO explained in its opening memorandum, it is settled that "it is not necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights." *Babbit v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979)(quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). So long as the plaintiff faces a credible threat of prosecution and is deterred from engaging in protected activities, the plaintiff has standing. For instance, in *Doe v. Bolton*, 410 U.S. 179, 188 (1973), the Court granted doctors standing to challenge an abortion statute as a violation of due process even though they had not been prosecuted or specifically threatened with prosecution. Pre-enforcement First Amendment challenges are justiciable where there is a credible threat of enforcement, because the "alleged danger of the statute is, in large measure, one of self-censorship, a harm that can be realized without a prosecution." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988). That is precisely the harm that POGO suffers in this case.

But even if defendants' vision of the law were correct, it only undercuts their case. Classification is, by definition, a particularized threat of prosecution because it notifies those

with classified information that disclosure is prohibited and violations carry harsh sanctions. Indeed, defendants acknowledge, as they must, that restraining speech is the purpose of the statutes that criminalize the disclosure of classified information. Defs' Reply at 4-6. Where the threat of prosecution has interfered with a core right protected by the First Amendment, standing requirements are less stringent 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); *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.").

Nevertheless, defendants insist that the "credible threat of prosecution" standard set forth in *Babbitt* cannot apply to this case because *Babbitt* involved a facial challenge to a statute on First Amendment grounds, and thus embodies a relaxed standing requirement. Defs' Reply at 3-4, discussing *Babbitt*, 442 U.S. at 298. But defendants attribute the relaxed standing requirement in facial overbreadth cases to a rationale that applies with even greater force to this case — the risk that constitutionally protected speech or expression may be stifled. Defs' Reply at 4 (citing cases). Indeed, this is a prior restraint case and not, as defendants characterize it, "a run-of-the-mill preenforcement challenge" to the statutes that criminalize the dissemination of classified information. *Id.* The existence of the applicable criminal statutes is relevant to demonstrate that the act of classification has imposed a prior restraint by triggering the threat of prosecution.

Defendants also maintain that the threat of prosecution that has caused POGO to refrain from disseminating the classified information is too remote to confer standing under either *Babbit* or *Navegar*. *Compare Babbitt*, 442 U.S. at 298 ("credible threat of prosecution"), *with*

Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997) (threat of prosecution must be "credible and immediate, and not merely abstract or speculative"). First, defendants argue that the government's history of threatening to prosecute POGO under similar circumstances is irrelevant, because in this case the government has not taken action directed specifically at POGO. Defs' Reply at 8-9. However, POGO does not have to be singled-out and specifically threatened to have a well-founded fear, because the classification puts POGO on notice that it disseminates the information at its peril. *See Navegar,* 103 F.3d at 1000 (rejecting need for "an explicit verbal 'threat'" to support conclusion that party faces a credible threat of prosecution).

Defendants also argue that their failure to take action to remove classified material from the public domain indicates that POGO should not fear prosecution if it disseminates the letters. Defs' Reply at 10. That claim is directly contradicted by defendants' admission that the FBI notified congressional staffers about the classification "in an effort to stem further disclosure of classified information." Defs' Reply at 14; Bowman Decl. ¶ 6. It also contradicts the testimony of Attorney General Ashcroft who, under questioning about the propriety of classifying this information retroactively after its release to the public, explained:

> Well, if — let me just put it this way — if there is spilt milk, and there is no damage done; if you can re-collect it and put it back in the jar, you're better off than saying, 'Well, it's spilt. 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.*

DOJ Oversight: Counterterrorism & Other Topics: Hearing Before the Senate Judiciary Committee, 108th Cong. (June 8, 2004) (testimony of John Ashcroft) (emphasis added).

Nonetheless, it is true that defendants have for the most part failed to take effective measures to retrieve the classified information from the public domain, which undermines

defendants' claim that the classification is proper. But the fundamental point here is this: Although defendants' haphazard "effort to stem further disclosure" is fraught with ambiguity, the measure that would resolve this case once and for all is not. POGO has repeatedly offered to dismiss this action if defendants state that POGO will not be sanctioned for disseminating and discussing the information in the letters, but defendants have steadfastly *refused* to state that they will not prosecute POGO. Defendants' unwillingness to resolve this case by simply disclaiming any interest in prosecuting POGO demonstrates that POGO has good reason to fear prosecution. And defendants' clear message to congressional staffers underscores that defendants are willing to take action to halt further disclosure of the information.

II. Any Lack of a Private Right of Action Under the Executive Order is Irrelevant, Because POGO Brings a Constitutional Challenge to a Prior Restraint.

Defendants assert repeatedly that Executive Order 12958 provides no private right of action, as though that means the Court can never consider the propriety of a classification decision. As POGO explained in its opening memorandum at 17-20, the dissemination of even properly classified information can be protected by the First Amendment, and information that is improperly classified (because it is already in the public domain or is classified for an improper purpose) cannot present the rare circumstance where a prior restraint is permissible for national security reasons. Thus, POGO does not depend on the Executive Order for an independent cause of action. Rather, POGO uses defendants' failure to comply with the Executive Order to demonstrate that defendants cannot justify the prior restraint.

III. Whether Defendants' Action Is Characterized as a Reclassification or an Original Classification Is Immaterial to POGO's Motion for Summary Judgment.

In their reply, defendants emphasize that the information POGO desires to disseminate was classified on October 18, 2002, in an original classification of the "mosaic of information related to Ms. Edmonds' employment case," and on February 10, 2003, when "[m]ore precise contours of the mosaic of information . . . were identified and derivatively classified" in the context of Ms. Edmonds' Fredom of Information Act (FOIA) case. Defs' Reply at 13, citing *Edmonds v. United States Dep't of Justice*, Civ. No. 02-1448 (RBW) (the employment case), and *Edmonds v. FBI*, Civ. No. 02-1294 (ESH) (the FOIA case); *see also* Executive Order 12958, Sec. 2.1(a) ("'[D]erivative classification' means the incorporating, paraphrasing, restating or generating in new form information that is already classified."). Thus, defendants assert that the information was classified pursuant to Executive Order 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995), and not reclassified pursuant to Executive Order 13292, 68 Fed. Reg. 15315 (Mar. 25, 2003), as POGO had claimed. Whether defendants engaged in an "original classification" or a "reclassification" is immaterial to POGO's motion for summary judgment. The essential fact is undisputed: POGO desires to disseminate letters containing information that defendants classified after the information had been released to the public.[1]

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[1] POGO had concluded that the classification was made after Executive Order 13292 took effect, because it was not until May 2004 that the FBI contacted congressional staffers to notify them that information discussed during the summer 2002 briefings had been classified. *See* POGO's Opening Memorandum at 8 n.5. Senator Grassley reached the same conclusion as POGO, stating on June 8, 2004, that the information "was just recently reclassified." *DOJ Oversight: Counterterrorism & Other Topics: Hearing Before the Senate Judiciary Committee*, 108th Cong. Defendants now claim that there was a 20-month gap between the classification decision and their notice to Congress. *See* Defs' Reply at 13-15; Kalisch Decl. ¶ 2. Because it is immaterial, POGO is willing to accept for purposes of the pending motions defendants' claims regarding the timing of the classification decisions. However, POGO notes that defendants have

As POGO explained in its opening memorandum at 23-24 & n.10, the classification was unlawful regardless of whether it was an original classification under Executive Order 12958, or a reclassification under Executive Order 13292, because the government may not properly classify public information. *See* Executive Order 12958, Sec. 1.2(a)(2) (prohibiting the original classification of information not owned, produced, or controlled by the government) and Sec. 1.8(c) (prohibiting reclassification of information after release to the public). Moreover, it is unlawful for the government to classify information for an improper purpose (*e.g.*, to gain an advantage in civil litigation or to hamper congressional oversight), whether by original classification under Executive Order 12958 or by reclassification under Executive Order 13292. *See, e.g.,* Executive Order 12958, Sec. 1.8(a)(1) & (2) (prohibiting classification in order to conceal violations of law, inefficiency, or administrative error, or to prevent embarrassment to a person, organization, or agency). Defendants concede that the information at issue was classified in conjunction with the government's invocation of the state secrets privilege in the Edmonds whistleblower case. Defs' Reply at 13.

IV. Defendants' Classification Has Imposed an Unconstitutional Prior Restraint.

Significantly, defendants do not dispute that a prior restraint on POGO's ability to discuss and disseminate the letters at issue would be unconstitutional. Rather, in a replay of their

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taken different positions at different times with regard to the classification status of the letters. For example, defendants now claim that the information in the letters was originally classified under the mosaic theory on October 18, 2002, derivatively classified on February 10, 2003, and has not been reclassified following declassification. However, in response to Ms. Edmonds' FOIA request, 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 Civ. No. 02-1448. By taking inconsistent positions, defendants have forced POGO to guess about the classification status of the letters, even as defendants refuse to assure POGO that it will not be prosecuted if it guesses wrong and discloses classified information.

standing argument, defendants assert that "without action taken directly against a plaintiff, there can be no restraint." Defs' Reply at 18. Defendants' argument is as specious when used to deny that POGO is restrained as it is when used to deny that POGO has standing. Defendants have accomplished a prior restraint in violation of POGO's First Amendment rights because: 1) defendants classified information in the letters that POGO wants to disclose; 2) criminal statutes forbid the dissemination of classified information; and 3) defendants refuse to disclaim any interest in prosecuting POGO if POGO disseminates the letters. These circumstances impose a restraint on POGO equal to that imposed on the parties in the cases cited in POGO's opening memorandum at 17-19.

CONCLUSION

POGO has standing, and defendants' classification of the information at issue has imposed a prior restraint that violates the First Amendment. Therefore, POGO's motion for summary judgment should be granted, and defendants' motion to dismiss and cross-motion for summary judgment should be denied.

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Respectfully submitted,

/s/

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