

Litigating National Security Cases in the Aftermath of 9/11

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The treacherous terrorist attacks against the United States on September 11, 2001, and the aftershocks that are still being felt years later, have had a profound effect on the legal landscape in the United States. In 9/11's immediate aftermath, Congress, in a rare and fleeting moment of bipartisanship, gave the President far-reaching authority to combat terrorism. Among other measures, Congress authorized the President to use military force against the 9/11 terrorists and those who aided or harbored them,¹ enacted the USA PATRIOT Act to give the President unprecedented law enforcement and detention authority over suspected terrorists and those believed to be providing material support to terrorists,² placed entire categories of unclassified, previously accessible, government-held information off-limits to the public,³ and, by creating the Department of Homeland Security, reorganized the Executive Branch to consolidate and better coordinate our nation's security agencies.⁴ The President has used this authority to undertake massive and ongoing military operations in Iraq and Afghanistan, to detain indefinitely and without criminal charges hundreds of foreign nationals and even American citizens,⁵ to step up counter-terrorism

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1. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 (Supp. III 2003)).

2. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

3. *See, e.g.*, Homeland Security Act of 2002, §§212-214, 116 Stat. 2135, 2150-2155 (codified at 6 U.S.C. §§131-133 (Supp. IV 2004)) (exemption for voluntarily shared critical infrastructure information).

4. Homeland Security Act of 2002, *supra* note 3.

5. *See, e.g.*, *Center for National Security Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (unsuccessful effort under the Freedom of Information Act to obtain information about the identities of certain detainees).

activity domestically and world-wide,⁶ and to cut back on public access to government information.

With few exceptions, the courts have shown considerable deference to executive branch actions taken in the name of fighting terrorism, giving the President a green light to wage a global war on terror. Such judicial deference to national security claims is neither new nor surprising.⁷ But the accretion of executive power in the wake of 9/11 is extraordinary, even if not unprecedented, and, in a government that operates under a structural Constitution that depends on checks and balances, it provides reason for concern.

My submission is that the 9/11 attacks still cast a shadow that profoundly affects how courts deal with national security claims, and that that shadow is likely to persist for some time. Since 9/11, courts have been far more reluctant than usual to give searching scrutiny to national security claims. A comprehensive review of the Administration's invocation of national security to justify the actions it has taken is beyond the scope of this article.⁸ Instead, I draw on my litigation experience and use a few of the cases I have worked on to illustrate just how far the Administration has gone to press its national security arguments, and to show how willing some courts have been to defer to those claims. I begin with several examples of agency overreaching, then

6. For example, soon after 9/11 the Administration began conducting some electronic surveillance without obtaining orders from the Foreign Intelligence Surveillance Court. *See, e.g.*, John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105 (2006). Several lower courts have refused to dismiss cases relating to the Administration's warrantless electronic surveillance programs. *See, e.g.*, Hepting v. AT&T, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (rejecting government motion to dismiss case alleging that AT&T assisted the government in unlawfully monitoring customer communications and records); *Al-Haramain v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006) (rejecting government motion to dismiss a lawsuit challenging the NSA's warrantless electronic surveillance program); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (ruling the NSA surveillance program unconstitutional and illegal, and ordering that it be halted). The United States Court of Appeals for the Sixth Circuit stayed the order pending appeal. 467 F.3d 590 (6th Cir. 2006).

7. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Korematsu v. United States*, 323 U.S. 214 (1944). *See generally* DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455 (2003); Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL. REV. 153, 162-176 (2004) (historical account of the use of the detention power).

8. I am unaware of any such comprehensive review. Since 2002, the Reporters Committee for Freedom of the Press has been preparing an annual White Paper entitled *Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public's Right to Know*. The Sixth Edition of this report is available on the Committee's website at <http://www.rcfp.org/homefrontconfidential>.

turn to illustrations of excessive judicial deference to national security claims.⁹

THE GOVERNMENT'S EFFORT TO SILENCE FBI
WHISTLEBLOWER SIBEL EDMONDS

My first example relates to the Justice Department's response to allegations of FBI malfeasance made by Sibel Edmonds. Following the terrorist attacks of September 11, 2001, the FBI hired Edmonds, an expert in Middle Eastern languages, as a contract linguist.¹⁰ Soon after she began working in the FBI translation unit, Edmonds observed what 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."¹¹ Edmonds reported her observations up the chain of command at the FBI. Soon thereafter, her contract was terminated.¹²

Edmonds's allegations concerning problems in the FBI's translation unit came to the Senate Judiciary Committee's attention, and on June 17, 2002, the FBI held an unclassified briefing for Committee members and staff to discuss

9. Recent Supreme Court decisions suggest that the Court may be willing play a more active role in scrutinizing national security claims arising from the war on terror than it has in the past, when the United States was engaged in more conventional armed conflict. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding invalid the plan for military commissions that had been announced by the President); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that the government could not lawfully continue to detain a U.S. citizen without providing additional process); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the Guantanamo detainees were entitled to challenge the legality of their confinement); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (holding that Padilla's challenge to military detention was improperly filed in New York, and needed to be refiled in South Carolina, but suggesting that the challenge could be brought); *see also* Stephen R. Shapiro, *The Role of Courts in the War Against Terrorism: A Preliminary Assessment*, FLETCHER F. WORLD AFF., Winter 2005, at 103; Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. NAT'L SECURITY L. & POL'Y 73 (2005). But many national security claims arise, not in the context of a constitutional clash between civil liberties and national security, but in more mundane cases, where the likelihood of Supreme Court review is quite remote. It is those cases that I mainly focus on here, and it is my submission that in these cases lower courts show enormous, and often unwarranted, deference to national security claims.

10. Edmonds filed a whistleblower suit against the Department of Justice and others, *Edmonds v. Dep't of Justice*, Civ. No. 02-1448 (RBW) (D.D.C. filed July 22, 2002). *See Edmonds v. Dep't of Justice*, 323 F. Supp. 2d 65, 67 (D.D.C. 2004). She also 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 reported at 272 F. Supp. 2d 35. I will refer to the former as the "Edmonds whistleblower suit" and to the latter as the "Edmonds FOIA suit."

11. *Edmonds v. Dep't of Justice*, 323 F. Supp. 2d at 67 (quoting the complaint).

12. *See id.* at 68-70.

the FBI's response.¹³ Following the briefing, on June 19, 2002, Senators Patrick Leahy and Charles Grassley sent a letter to Glenn Fine, Inspector General of the Department of Justice, asking Fine to pursue particular lines of inquiry during the course of his investigation of Edmonds's claims. The June 19 letter was disseminated widely and posted on Senator Leahy's and Senator Grassley's websites,¹⁴ and its entire text was printed in the Congressional Record.¹⁵ On July 9, 2002, the FBI held a second unclassified briefing for Senate Judiciary Committee members and staff to present information relating to Edmonds's allegations and problems at the FBI translation unit.

On August 13, 2002, Senators Leahy and Grassley sent a letter to Attorney General John Ashcroft about the investigation of Edmonds's claims. The August 13 letter was disseminated widely and posted on Senator Leahy's and Senator Grassley's websites.¹⁶ 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 referring to the June 17, 2002, FBI briefing regarding the claims made by Edmonds. Senator Grassley's October 28 letter was also disseminated widely and posted on his website.¹⁷

Meanwhile, on July 22, 2002, Edmonds filed a whistleblower suit. The government did not defend on the merits, but instead invoked the state secrets privilege and moved to dismiss the case. As discussed in detail below, the government prevailed on that defense.¹⁸ Similarly, the government invoked the state secrets privilege to bar Edmonds from testifying in *Burnett v. Al Baraka Investment & Development Corporation*, a case brought by the families of those killed on September 11 against Saudi individuals and entities implicated in financing al Qaeda.¹⁹

Ultimately, Edmonds's allegations were substantially confirmed by the Inspector General in a classified report, portions of which were later

13. See Declaration of Danielle Brian ¶14, *Project on Government Oversight v. Department of Justice*, Civil Action No. 1:04cv01032 (JDB) (D.D.C.) [hereinafter Brian Declaration]. Brian's declaration and all of the other submissions in the case are available in "pdf" format on PACER, the electronic docket system of the federal courts.

14. *Id.* ¶17.

15. 148 Cong. Rec. S5842 (June 20, 2002).

16. Brian Declaration, *supra* note 13, ¶19.

17. *Id.* ¶20.

18. *Edmonds v. Dep't of Justice*, 323 F. Supp. 2d at 81-82. Following a brief oral argument from which members of the public and the press were excluded, the court of appeals affirmed in an unpublished, one sentence order. 2005 U.S. App. LEXIS 8116 (D.C. Cir. May 6, 2005). Edmonds's petition for a writ of certiorari, challenging both the court's ruling and its exclusion of the public and press from the argument, was denied. 126 S. Ct. 734 (2005).

19. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82, 84 (D.D.C. 2004).

declassified and made public. 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.’”²⁰ 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 he pledged to “conduct additional investigation as appropriate.”²¹

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

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 4-5632.²²

Following notice that the information from the briefings of June 17 and July 9, 2002, had been classified, Senators Leahy and Grassley removed from their

20. Letter from Robert S. Mueller, III, Director, Federal Bureau of Investigation, to Orrin G. Hatch, Chairman, Senate Judiciary Committee, July 21, 2004 (quoting classified OIG report), attached to Brian Declaration, *supra* note 13, as Exhibit F.

21. *Id.*

22. Brian Declaration, *supra* note 13, ¶21 & Exhibit G.

websites the letters of June 19 and August 13, 2002.²³ Senator Grassley's letter of October 28, 2002, was not removed from his website.²⁴

Although the June 19 and August 13 letters were taken down from the Senators' websites, copies remain available from various sources, including the district court's electronic docket in the whistleblower case.²⁵ The June 19 letter was also printed in the *Congressional Record* and was available on numerous websites.²⁶ Similarly, the letter of August 13, 2002, was an exhibit to two different pleadings in the Edmonds whistleblower case,²⁷ and it was available for public access at various websites.²⁸ Although the government was aware that the letters remained available to the public through the Court's electronic docket in the whistleblower case, it made no effort to have the letters placed under seal or otherwise to shield them from public view.

In fact, the June 19, 2002, letter was released by the government to Edmonds in response to a FOIA request. Although the government claimed exemptions from disclosure for the vast majority of the documents Edmonds requested,²⁹ it released the June 19 letter bearing a stamp stating that "all information contained herein is unclassified."³⁰

The Justice Department's decision to classify all Edmonds-related material in May 2004 raised a vexing and recurring question of national security law: When, if ever, is the government justified in classifying (and therefore potentially attaching criminal sanctions to punish the disclosure of) information that is readily available to the public from non-government sources? The question was hardly an idle one. The Project on Government Oversight (POGO), a Washington, D.C.-based watchdog group, needed an answer because it had obtained copies of the June 19 and August 13 letters before they were removed from the Senators' websites. POGO wanted to post the letters on its website. It planned to discuss them and the information they contain.³¹ But POGO was aware that, at least in the government's view, the

23. *Id.* ¶22.

24. *Id.* ¶26. It remains available at http://grassley.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=3910&Month=10&Year=2002.

25. The June 19 letter is included as Exhibit 3 to Docket No. 6, Exhibit 5 to Docket No. 22, and Exhibit 4 to Docket No. 33 in *Edmonds v. Dep't of Justice*, Civil Action No. 02-1448 (RBW) (D.D.C.).

26. See Brian Declaration, *supra* note 13, ¶23.

27. Exhibit 7 to Docket No. 22; Exhibit 5 to Docket No. 33.

28. See Brian Declaration, *supra* note 13, ¶24.

29. See *Edmonds v. FBI*, 272 F. Supp. 2d 35, 42 (D.D.C. 2003),

30. See Exhibit 4 to Docket No. 33 in *Edmonds v. Dep't of Justice*.

31. Brian Declaration, *supra* note 13, ¶¶17, 19, 28.

knowing dissemination of classified information might be a felony.³² POGO was thus unwilling to disseminate the newly-classified letters and the information set forth in them without some assurance that the organization and its staff would not face prosecution.

The government had threatened to prosecute POGO in the past under similar circumstances, making POGO gun-shy about proceeding. For example, during the course of litigation concerning the burning of hazardous waste at Area 51 (a “secret” government testing facility in Nevada), POGO obtained an unclassified Area 51 security manual. The Air Force retroactively classified the manual, demanded its return, threatened to prosecute POGO and anyone else who had it in their possession, and insisted on access to *all* POGO’s files to determine whether POGO was in the possession of other classified information.³³ Ultimately, an agreement was reached under which the group avoided prosecution, but POGO was stripped of its ability effectively to participate in and encourage public debate about environmental matters at Area 51.³⁴

In another case, when POGO issued a letter critical of the Nuclear Regulatory Commission’s testing of defenses against sabotage at the nuclear generating station at Indian Point, New York, the NRC ordered POGO to remove the letter from its website under the threat of criminal prosecution. The NRC alleged that the letter contained “safeguards information” subject to strict controls, and that public release of POGO’s letter was an act punishable by both criminal and civil sanctions.³⁵ Despite POGO’s belief that the letter contained no safeguards information, it 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

32. For example, 18 U.S.C. §798(a) (2000) provides, in part, 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 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.”

33. Brian Declaration, *supra* note 13, ¶8.

34. *Id.* ¶¶5-8.

35. *See* 42 U.S.C. §2167 (2000). Safeguards information is treated in much the same manner as classified information, and knowingly disseminating safeguards information to someone not cleared to receive it is felony. 42 U.S.C. §2273 (2000).

few passages in the September 11, 2003, letter that it insisted POGO not publish, three months had elapsed, during which POGO had been forced into silence on the entire topic of safety at Indian Point.³⁶

POGO was especially worried about the Edmonds material because of the government's focused effort to forbid further dissemination of Edmonds's allegations. During a Senate Judiciary Committee hearing on June 8, 2004, Attorney General John Ashcroft took personal responsibility for the decision to classify the information, claiming 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."³⁷ Ashcroft acknowledged that the information had been in the public domain without restriction for two years, but he maintained that classification was nevertheless required, 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.³⁸

POGO was thus in a bind. It wanted to disseminate and discuss the letters, but was concerned about provoking the government to sanction it or prosecute its employees if it proceeded. To avoid prosecution but nonetheless challenge the government's decision, POGO filed suit in June 2004, seeking a declaration that the Justice Department's classification of the Senators'

36. See *infra* text accompanying notes 78-93; see also Brian Declaration, *supra* note 13, ¶¶9-12.

37. *The Federal Government's Counterterrorism Efforts: Hearing Before the S. Judiciary Comm.*, 108th Cong. (2004) (testimony of John Ashcroft, Attorney General).

38. *Id.* (emphasis added). Although Attorney General Ashcroft did not use the label in his testimony, in litigation the government argued that classification of the Edmonds's information was necessary under the so-called "mosaic" theory. That theory "describes a basic precept of intelligence gathering: Disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information. Combining the items illuminates their interrelationships and breeds analytic synergies, so that the resulting mosaic of information is worth more than the sum of its parts." David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005).

letters was improper and that classification of information that is easily accessible in the public domain constitutes an impermissible prior restraint.³⁹

To understand POGO's argument about the impropriety of the classification determination here, it is important briefly to review the law governing classification. The authority to classify information in accordance with applicable Executive Orders derives from the National Security Act.⁴⁰ Currently, classification of government information is controlled by Executive Order 12,958, as amended by Executive Order 13,292.⁴¹ Two provisions of the Executive Orders formed the core of POGO's argument. Section 1.1(a)(2) of Executive Order 12,958 permits information to be classified if, but only if, "the information is owned by, produced by or for, or is under the control of the United States Government." And Section 1.7(c) of Executive Order 13,292 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.

POGO argued that it did not matter whether the Department of Justice characterized the classification decision as an initial classification or a reclassification, because classification would have been improper in either

39. Complaint, POGO v. Ashcroft, Civil Action No. 04-1032 (JDB) (D.D.C. filed June 23, 2004). All of the submissions in this case are available from PACER.

40. 50 U.S.C. §435 (Supp. III 2003).

41. Exec. Order No. 12,958, *Classified National Security Information*, 60 Fed. Reg. 19,825 (Apr. 20, 1995); Exec. Order No. 13,292, *Further Amendment to Executive Order 12958, as Amended, Classified National Security Information*, 68 Fed. Reg. 15,315 (Mar. 28, 2003). POGO was unable to pinpoint 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, POGO alleged that it appeared that Executive Order 13,292 was in effect at the time of the classification decision. The government appeared to concede that fact in the course of the litigation. *See* Defendants' Memorandum in Support of Motion to Dismiss at 2, 11-12 (referring to "[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.").

case. Initial classification would be forbidden for the simple reason that the information at issue was in the public domain, and thus classification could not meet the terms of Section 1.1(a)(2). Indeed, the classification system rests on the premise that the government may only forbid the dissemination of information it controls, as opposed to public information.⁴² As to “reclassification,” POGO pointed out that Section 1.7(c)(2) of Executive Order 13,292 permits the reclassification of information following its release to the public only where “the information may be reasonably recovered.” The information 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 remained) on various websites, were repeatedly filed as exhibits to publicly available court documents, and, with respect to the June 19 letter, were published in the *Congressional Record*. Because the information was in the public domain and could not be recovered, reclassification would fail to meet the requirements of the executive order and would be unlawful.⁴³

POGO’s prior restraint argument was also straightforward.⁴⁴ POGO contended that the Justice Department’s classification of information known to be in the public domain and not subject to retrieval was a forbidden prior restraint, because classification carried with it the threat of criminal sanction for disseminating the information, thus chilling protected speech.⁴⁵ A prior

42. POGO also argued that, to the extent that the Justice Department (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 of problems at the FBI), the classification determination could not satisfy the strict classification standard set out in Section 1.1(a)(4) of Executive Order 13,292, which requires a finding that “the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security.” POGO noted that the timing of the classification suggested that the *Burnett* case and the *Edmonds* whistleblower litigation were factors in the decision to attempt a classification of the information. POGO pointed out that 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 that defendant Ashcroft submitted a declaration asserting the state secrets privilege in *Burnett* on May 14, 2004. *See Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82, 82 (D.D.C. 2004).

43. POGO also maintained that the Justice Department 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.

44. Prior restraints are “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).

45. *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).

restraint on expression is not necessarily unconstitutional, but it bears “a heavy presumption against its constitutional validity.”⁴⁶ Prior restraints are a special vice because they suppress communication “either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.”⁴⁷ To be 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.”⁴⁸ In considering prior restraint claims, courts generally apply a balancing test to determine whether the restraint is justified.⁴⁹ In so doing, however, courts recognize the strong presumption in favor of allowing unfettered publication of protected speech without the chilling effect of potential criminal liability.⁵⁰

The fact that the information is classified does not necessarily foreclose a finding of an unconstitutional prior restraint. In the famous *Pentagon Papers* case,⁵¹ the government sought to enjoin *The New York Times* and *The Washington Post* from publishing a classified study entitled “History of U.S. Decision-Making Process on Viet Nam Policy.” The Court held that an injunction against the publication of the study constituted an unconstitutional prior restraint, notwithstanding the fact that the study was highly classified.⁵² Thus, even the dissemination of classified information can be protected by the

46. *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971); 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.”).

47. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973).

48. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

49. See *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-442 (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.’”) (quoting Professor Paul A. Freund).

50. See *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Davis v. East Baton Rouge Parish School Board*, 78 F.3d 920, 928 (5th Cir. 1996).

51. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

52. *Id.* at 714. Although *Pentagon Papers* included nine separate opinions, a majority of the 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, 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”); *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”). See generally John Cary Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341 (1993).

First Amendment.⁵³ POGO argued that the primary rationale of *Pentagon Papers* – 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”⁵⁴ – was fully applicable to POGO’s function as an organization committed to government oversight.

As a final matter, POGO maintained that its case was stronger than previous prior restraint cases because, in those cases, the government could at least argue that publication would expose previously secret information to general public view.⁵⁵ Here the information was not and had never been “secret” in any meaningful sense. Thus, POGO claimed that its case did not present one of the narrow exceptions in which a prior restraint against publication of classified information is justified due to national security concerns.⁵⁶

The government defended the case vigorously. The government first argued that POGO lacked standing to sue.⁵⁷ POGO had alleged that it faced

53. 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 of access to classified materials previously disclosed to the public when disclosure could endanger national security).

54. *Pentagon Papers*, 403 U.S. at 728 (Stewart, J., joined by White, J. concurring).

55. *Cf. United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.) (entering preliminary injunction barring publication of an article on how to build a hydrogen bomb only after finding that some of 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).

56. In 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, 1142-1145 (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, 1317 (4th Cir. 1972) (emphasizing that the government has no legitimate interest in suppressing information obtained from public sources); *see also Snapp 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).

57. *See* Defendants’ Reply Memorandum in Further Support of Motion to Dismiss, Opposition to Plaintiff’s Motion for Summary Judgment, and Cross-Motion for Summary Judgment, at 2-11 [hereinafter Defendants’ Further Reply Memorandum]. The government also argued, albeit in a much more cursory way, that POGO had no right of action and that the decision to classify the information was in fact consistent with the applicable executive orders. Because the government did not emphasize either of these arguments, I do not address them

a credible and imminent threat of prosecution and thus met the injury-in-fact standing requirement under cases like *Babbitt v. United Farm Workers National Union*.⁵⁸ But the government disagreed, arguing that the *Babbitt* line of cases, which involved facial overbreadth challenges, did not apply where the plaintiff was bringing a first-party pre-enforcement challenge to a criminal statute. According to the government, POGO could not “demonstrate that [it] faces a threat of prosecution under the statute which is credible and immediate, and not merely abstract or speculative.”⁵⁹ POGO could not “even allege that the government has *even threatened* to take *any action* against it with respect to the letters.”⁶⁰ POGO’s claims of past threats of prosecution had no bearing here, because in neither case was POGO “actually prosecuted.”⁶¹ And finally, the public availability of the letters “undercut” POGO claims of standing because the “government’s inaction with respect to the letters already accessible to the public” cast doubt on the likelihood that POGO would be prosecuted for further disseminating the letters.⁶²

The government also argued that the classification of information did not impose a prior restraint on its dissemination.⁶³ In the government’s view, classification *deters* release of sensitive government information by threatening criminal sanctions. But because classification does not prohibit dissemination outright, it does not qualify as a prior restraint.⁶⁴ Accordingly, unless the government took an affirmative step to prevent POGO from disseminating the information – in the form of an injunction issued by a court or some other directly coercive legal prohibition – the prior restraint doctrine does not come into play.⁶⁵

POGO countered each of the government’s claims. As to standing, POGO argued that it met the “intention to engage” standard laid down in *Babbitt*, because it had refrained from publishing the letters only because of

here.

58. 442 U.S. 289, 298 (1979).

59. Defendants’ Further Reply Memorandum, at 5 (quoting *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997)).

60. *Id.* at 9 (emphasis in original).

61. *Id.*

62. *Id.*

63. *Id.* at 18.

64. *Id.*

65. *Id.* In making this argument, the government relied on cases like *Alexander v. United States*, 509 U.S. 544, 550 (1993) (“court orders that actually forbid speech activities . . . are classic examples of prior restraint”). See also *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (restraining order); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973) (agency order).

the threat of imminent criminal prosecution.⁶⁶ The proof of the imminence of the risk, POGO contended, was the Justice Department's refusal to accept POGO's offer to dismiss the action if the Department would assure POGO that it would not be prosecuted for disseminating the letters.⁶⁷ As to the prior restraint issue, POGO noted that administrative orders have been held to impose prior restraints, and that the Justice Department's classification order – backed by criminal penalties – effectively prohibited the dissemination of information.⁶⁸

The district court scheduled argument for February 22, 2005. Faced with the prospect of having to defend in open court the proposition that the government could forbid the publication of letters exchanged between U.S. Senators and high-level Justice Department officials that remained widely available to the public and the press through the Internet and even the Congressional Record, the Justice Department capitulated. It mooted the action by providing the plaintiffs additional copies of the letters, claiming that an additional review of the records determined that they were not, after all, classified. Why the government waited for eight months while the case was pending, and took the diametrically opposed position in litigation, was not explained.

What is important about this story is not its conclusion. In my view, no court would have upheld the government's right to attach criminal sanctions to the publication of widely available information.⁶⁹ What is important about this story is that the Justice Department, at the direction of the Attorney General and with the clearance of top Justice Department officials, used the

66. *Babbitt v. United Farm Workers Union*, 442 U.S. 289, 298 (1979). There is an important, and unresolved, conflict in lower court opinions about whether the threat of imminent prosecution is sufficient to meet the *Babbitt* standard. Some circuits have found that a threat of prosecution is sufficiently imminent even in the absence of a direct threat of enforcement, where circumstances support such an inference. *See, e.g., Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003); *Gun Owners' Action League v. Swift*, 284 F.3d 198 (1st Cir. 2002); *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 30-31 (1st Cir. 1999); *Peoples Rights Org. v. City of Columbus*, 152 F.3d 522, 531 (6th Cir. 1998); *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003). *But see San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996). At least one circuit requires the plaintiff to make an unconditional threat to violate the law before a pre-enforcement challenge will be entertained. *See, e.g., Seegars v. Gonzales*, 396 F.3d 1248, 1251 (D.C. Cir. 2005); *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997). *But see Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (finding justiciable a facial challenge to the District of Columbia gun control law notwithstanding the absence of a clear-cut threat of prosecution).

67. Project on Government Oversight Reply Memorandum (POGO Rep. Mem.) at 2-3.

68. *Id.*

69. It would have been possible, however, for a court to dismiss the action on ripeness grounds and hold that POGO would have to disseminate the Edmonds information and raise its arguments as defenses to a government prosecution or other enforcement action.

classification process for demonstrably improper ends: To stifle discussion about important allegations of malfeasance by the FBI, to silence a critic whose credibility had been confirmed by the Department's own Inspector General, and to deprive a civil jury of testimony relevant to the case before it. Although the Justice Department's claim that it had the power to classify information in the public domain that it had no hope (and no intention) of retrieving was unprecedented and at odds with the executive order governing classification, the Department's stratagem worked. POGO and other organizations refrained from public debate over allegations of FBI malfeasance, and Edmonds did not testify on behalf of the 9/11 families in the *Burnett* litigation.

The only arguably applicable precedent shows the extreme length to which the Justice Department went in this case. In the *Progressive* litigation, the government sought to enjoin *The Progressive* from publishing an article that described how to design the ultimate weapon of mass destruction – the hydrogen bomb.⁷⁰ The government acknowledged initially that some of the relevant information was available to the public. But the government argued that the injunction was warranted because it was actively taking steps to retrieve that information and classify it to ensure that it would no longer be publicly available. On the basis of that representation, the district court entered the injunction the government requested.⁷¹ The government agreed, however, to dismiss the case on appeal when it determined that it could not, as a practical matter, retrieve the public domain information that would be reported in the article.⁷²

No secrets relating to weapons of mass destruction were contained in the Edmonds documents. Nor, of course, did the government have any intention of retrieving the information. It obviously could not put the genie back in the bottle. Rather, the classification process was used to muzzle a determined critic and stifle public discussion on an important issue. Were this case an isolated one, its significance might be open to question. But, as the other examples that follow show, it was not unusual at all.

70. *United States v. The Progressive*, 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). The *Progressive* litigation is discussed in detail in Powe, *supra* note 55.

71. *Id.* at 993-994.

72. *United States v. Progressive, Inc.*, 610 F.2d 819 (7th Cir. 1979) (order dissolving injunction).

RENE CHUN AND THE NRC

Rene Chun is a freelance reporter who agreed to write a feature story for *Playboy* about the security at civilian nuclear power plants. In the wake of 9/11, considerable attention had been paid to allegations that security at these facilities did not match the threat from well-armed terrorists who were willing to sacrifice their lives in order to breach the containment vessels of a nuclear reactor in an effort to trigger another Chernobyl. After months of investigation, Chun wrote an article entitled *The China Syndrome 2003* that was published in the May 2003 issue of *Playboy*. The article laid out a number of charges about lax security at nuclear power plants, and especially at Indian Point, New York. The problems described in the article included overworked, undertrained, and poorly armed security guards; rigged security tests conducted by the NRC to allay public and congressional concerns about weak security; and serious lapses in power plant design that left vital areas of the plant vulnerable to terrorist attack.

Perhaps the most significant aspect of Chun's article was the disclosure that the storage pool for spent fuel rods at Indian Point is not, as the NRC and the plant operator claimed, entirely below ground. In fact, portions of the storage pool are above grade. Thus, a terrorist attack that damaged the storage pool could cause sufficient loss of coolant, exposing the spent fuel rods to air, which would in turn cause them to ignite and release a cloud of deadly radiation that could reach New York City.

The NRC believed that the Chun's article revealed safeguards information, and it undertook an investigation to determine who had provided the information to Chun. After Chun refused to turn over his research material to the NRC, the agency served a subpoena on him in July 2004, directing him to provide all of his notes and tape recordings relating to the article and to appear to give testimony to NRC investigators. It quickly became apparent that the NRC's investigation was focusing on a source identified in the article, and that Chun was being asked to give evidence and to testify against a source he had named. Chun did not want to become a witness for the prosecution in a case in which his source was the defendant, so he moved to quash the subpoena. He argued that forcing a journalist to turn over his notes and research materials without first exhausting other means of acquiring relevant information violated long-standing Department of Justice rules governing the use of subpoenas against journalists,⁷³ and that, in any event, it was at odds with the qualified privilege the Court has

73. See 28 C.F.R. §50.10 (2007); see also *McGraw-Hill, Inc. v. Arizona (In re Petroleum Prods. Antitrust Litig.)*, 680 F.2d 5, 8 (2d Cir. 1982) (discussing the regulations).

recognized to protect journalists from having to divulge sources of information gathering.⁷⁴

The NRC denied the motion, finding that it was not subject to the restrictions imposed by the Justice Department and that any privilege Chun might have was overshadowed by the NRC's investigatory needs.⁷⁵ The NRC's order made it crystal clear that the agency was seeking Chun's notes, tape recordings, and testimony to "confirm that the statements attributed to the former employee in the [*Playboy*] article are indeed exactly what he told Mr. Chun," so that evidence could be used to prosecute the former employee for leaking safeguards information.⁷⁶ Chun decided to refuse to produce his notes and tapes to the NRC, which would have forced the NRC to bring a civil enforcement proceeding against him, allowing Chun's privilege claims to be reviewed by a federal court. But all of Chun's tapes, notes and research materials had been sent to *Playboy* to facilitate the fact-checking and libel review process. It is a common practice for newspapers and magazines to ask journalists to submit their source material to assist in the fact-checking process, and Chun's contract with *Playboy* required him to do so. *Playboy* searched for those materials after Chun informed the magazine about the NRC subpoena, but *Playboy* could not find them. Without Chun's tapes and notes, the NRC apparently decided that it could not proceed against the source, and it appears to have abandoned its efforts to pursue the matter further.

So, one might ask, why is this anything other than a garden-variety investigation pursued by an agency with an important national security

74. See Motion to Quash Subpoena, *In re* Subpoena Issued to Rene Chun, Case No. 1-2003-037 (NRC July 28, 2004). Chun's argument was based on *Branzburg v. Hayes*, 408 U.S. 665 (1972), which established some degree of protection for news gathering activities by journalists. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. At the time the motion was filed, there was widespread agreement in the circuit courts that a qualified privilege exists under the First Amendment for at least some unpublished information. See, e.g., *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-596 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139, 147-148 (3d Cir. 1980); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-993 & n.9 (8th Cir. 1972); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-437 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705, 714-715 (D.C. Cir. 1981). More recently, however, courts have questioned whether there is any constitutionally-based privilege for news-gathering activities performed by journalists. See, e.g., *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2006); *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 989 (D.C. Cir. 2005).

75. See Memorandum and Order, *In re* Rene Chun, CLI-04-34 (NRC Dec. 8, 2004). The NRC's orders are available on its website through its "Adams" search feature. This document is designated "ML043430494" or can be retrieved by typing "Chun" into the search feature.

76. *Id.* at 10.

mission? In my view, there are two aspects of the NRC's investigation that are danger signals that, at least here, do not appear to be false alarms. First, the NRC's dogged pursuit of Chun had nothing to do with learning information unavailable to the NRC. The NRC knew the source of the information alleged to be safeguards information, and it had interviewed the source extensively. Chun was pivotal to the NRC only because it wanted a journalist to be the star prosecution witness against his source. The NRC understood precisely the chilling effect such a spectacle would have on the willingness of those involved in the security of civilian nuclear plants to speak candidly with journalists.⁷⁷ My sense is that the Commission pursued Chun for precisely that reason. Second, my concern on that score was heightened by the fact that none of the information revealed in Chun's article had come exclusively from that source. Indeed, the most striking revelation in the article – the fact that the storage pool for spent fuel rods at Indian Point are partially above grade – had come from multiple sources that were identified in the article. The information provided by the source the NRC wanted to prosecute focused on the vulnerabilities of the plant to an assault by trained terrorists and the shortcomings in the NRC's tests to measure Indian Point's defenses. But those allegations had been made repeatedly by other journalists, and also by the Government Accountability Office. Thus, there was substantial reason to believe that the NRC wanted to focus on the insider to deter others employed in the nuclear power industry from speaking to journalists about safety or security concerns.

POGO AND THE NRC

The NRC's sensitivity to criticism over the defenses in place at Indian Point was also evident in the extraordinary measures it took to suppress a letter POGO had sent to the NRC and posted on its website. The letter was highly critical of security tests the NRC had performed at Indian Point. The NRC had lauded the success of these tests in press releases and letters to the New York congressional delegation, claiming that they proved that the defenses at Indian Point were adequate to repel even a determined attack by

77. At the time the NRC was attempting to use Chun's testimony to implicate his source, it would have been, at least as far as Chun was concerned, a violation of journalistic ethics for a reporter to permit information obtained from a source to be used in the prosecution of the source. The prosecution of I. Lewis ("Scooter") Libby appears to have marked a sea change in the willingness of journalists to assist in the prosecution of sources, with much of the evidence against Libby coming from journalists. Although Judith Miller, a *New York Times* reporter, initially went to jail rather than testify before a grand jury about her communications with Libby, *see In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir. 2005), both Miller and other reporters testified both before the grand jury and at Libby's trial.

a group of well-armed terrorists.⁷⁸ POGO sent a letter to the NRC on September 11, 2003, highlighting the shortcomings of the tests and lambasting the NRC for touting the security of a plant that it knew, or should have known, was especially vulnerable to a terrorist attack.

Less than a year earlier, POGO had issued a blistering 150-page report outlining in detail the shortcomings of the defenses at Indian Point and similar facilities.⁷⁹ Among POGO's critical findings were that

- the plant's defenses depended in part on "bullet resistant enclosures," but these enclosures were not built to withstand an assault with heavy weapons (assault rifles and .50 caliber machine guns) that were readily available to terrorists;
- because the Indian Point plant is sited along the Hudson river, a river-based assault would be possible, but the defenses on the river side of the plant were woefully insufficient to repel a river-based attack;
- the guards defending the plant were poorly trained, overworked, poorly armed, and incapable of defending the plant against an assault by even a small group of well trained and heavily armed terrorists who were willing to die in the attack.

POGO's letter largely reiterated these concerns, but also took the NRC to task for what POGO saw as a deliberate misrepresentation of the results of NRC's tests of the defenses at Indian Point.⁸⁰ On September 15, 2003, Danielle Brian, POGO's Executive Director, received a telephone call from senior NRC officials demanding that POGO remove the letter from its website and not distribute the letter further because it contained safeguards information. When asked by Brian to identify the portions of the letter containing safeguard information, the NRC officials pointed to one brief passage of the letter, but refused to say whether other passages of the letter were also cause for concern. The same day, the NRC sent a letter to POGO claiming that "a public discussion of some of those issues [raised in POGO's

78. See, e.g., Letter from Nils J. Diaz, Chairman, Nuclear Regulatory Comm'n, to members of New York's congressional delegation, Aug. 4, 2003 (stating that the NRC test of the defenses at Indian Point "indicates that the licensee has a strong defensive capability and strategy") (on file with author).

79. POGO, NUCLEAR POWER PLANT SECURITY: VOICES FROM INSIDE THE FENCES (2002), available at <http://pogo.org/p/environment/eo-020901-nukepower.html>.

80. See Matthew L. Wald, *Group Says that Test of Nuclear Facility Was Too Easy*, N.Y. TIMES, Sept. 16, 2003, at A27.

letter] would not be in the best interests of the United States.” The letter went on to warn that the NRC has “decided to treat your letter as Safeguards Information and will not make it or our response public.”⁸¹

Efforts by Brian to determine what portions of the letter contained safeguards information were met with a “Catch-22” response by NRC officials. They asserted that because she was not cleared to review safeguards information, the NRC could not tell her what portions of the letter contained safeguards information, and that any further dissemination of the letter would violate the Atomic Energy Act and subject anyone associated with its dissemination to prosecution.

The NRC’s position was confirmed in a follow up letter dated October 8, 2003. That letter rejected POGO’s proposal that the NRC identify the portions of POGO’s letter that “needed to be redacted so that [POGO] could put a redacted version of [POGO’s] letter on [POGO’s] website.” The agency claimed that it had “now established that a redacted letter would improperly reveal information which has been designated as Safeguards Information (SGI).” The letter went on to warn that any dissemination of POGO’s initial letter, or of the subsequent correspondence between POGO and the NRC, would be a crime: “As you know, the unauthorized disclosure of SGI is subject to criminal penalties and/or civil penalties, pursuant to Sections 147, 223a, and 234a of the Atomic Energy Act of 1954, as amended.” The letter details the numerous NRC regulations governing the “penalties for inadequate protection and unauthorized disclosure of SGI.”⁸²

The NRC’s position put POGO in a bind. Without knowing what portions of POGO’s letter offended the NRC, POGO could not safely speak out on *any* issue addressed in its letter. Through counsel, POGO demanded that the NRC reconsider its position. POGO argued that the NRC’s position “is tantamount to a demand that Brian and POGO cease any discussion, in writing or orally, now and forever, of their view that the test the Commission used to assess the defenses at the Indian Point generating station was seriously flawed.” POGO maintained that “[s]o long as the Commission refuses to identify what portions of the letter are objectionable, the Commission has presented Ms. Brian and POGO with a Hobson’s choice: They either remain silent about their criticisms of the Commission’s tests of Indian Point’s defenses, or they

81. Letter from Nuclear Regulatory Comm’n to Danielle Brian, Executive Director, POGO, Sept. 15, 2003 (on file with author).

82. Letter from Roy P. Zimmerman, Director, Office of Nuclear Security Incident Response, Nuclear Regulatory Comm’n, to Danielle Brian, Executive Director, POGO, Oct. 8, 2003 (on file with author).

disseminate their views and risk criminal prosecution because they may unknowingly misstep and reveal ‘safeguards information.’”⁸³

POGO also challenged the NRC’s assertion that it had no obligation to identify the portions of POGO’s letter that allegedly contained safeguards information. POGO contended that the NRC’s definition of safeguards information was so vague that the NRC was, in essence, seeking to “force Ms. Brian and POGO to read the Commission’s mind about what is or is not ‘safeguards information’ at the pain of criminal sanctions.” Due process, POGO contended, required more.⁸⁴ Next, POGO argued that information identifying the flaws in the Commission’s testing program cannot qualify as safeguards information. The statutory definition of “safeguards information” is “information which specifically identifies a licensee’s or applicant’s detailed” security information.⁸⁵ That definition does not stretch to encompass information about the adequacy of the NRC testing program.⁸⁶ POGO also contended that, “to the extent that the letter identifies any of the security measures in operation at Indian Point” that “information was not acquired from the licensee, its personnel, or anyone affiliated with the licensee. Rather, those passages of the letter draw on information about Indian Point that has been made publicly available in the press, by the Commission itself, and by POGO in a previous publication that was screened by senior Commission staff, including the Commission’s General Counsel.”⁸⁷ POGO pointed out that courts have rejected the idea that national security claims can justify the suppression of otherwise public information.⁸⁸ And finally, POGO pointed out that the procedures for handling national security claims under the Freedom of Information Act (FOIA)⁸⁹ demonstrate that agencies have the ability, and obligation, to review classified information and release non-classified segregable information.⁹⁰ If agencies have to routinely review even classified information to make segregability determinations under FOIA, then surely the NRC could do the same here. POGO made clear that, unless the NRC promptly reconsidered its position, POGO would go to court.

83. Letter from David C. Vladeck, attorney for POGO, to Roy P. Zimmerman, Director, Office of Nuclear Security Incident Response, Nuclear Regulatory Comm’n, Oct. 14, 2003 (on file with author).

84. *Id.* at 2 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002)).

85. *Id.* (quoting 42 U.S.C. §2167).

86. *Id.* (citing 10 C.F.R. §73.21).

87. *Id.* at 2-3.

88. *Id.* at 3.

89. 5 U.S.C. § 552 (Supp. IV 2004).

90. *See, e.g., Donovan v. FBI*, 806 F.2d 55, 60 (2d Cir. 1986).

Two weeks later, the NRC responded with a proposal to permit POGO to be given a marked up copy of POGO's letter identifying those portions the NRC deemed objectionable, provided that POGO would be willing to become a repository for safeguards information subject to close NRC oversight. NRC's letter warned that "[o]nce POGO becomes aware of the safeguards information" contained in its letter, "POGO becomes obligated by law to protect that information from unauthorized disclosure, in accordance with applicable requirements in 10 C.F.R. Part 73. This means that POGO must destroy documents containing the safeguards information or keep the information secure in the way specified in Part 73."⁹¹ POGO was unwilling to subject itself to the NRC's control as an NRC-regulated repository for safeguards information, so it rejected the NRC's proposal. POGO instead urged the NRC to meet with POGO in a secure NRC facility, where POGO's staff and counsel could discuss the matter with the NRC.

After several more weeks of wrangling, the NRC acceded to that proposal. In the end, NRC's objections to POGO's initial letter turned out to be remarkably trivial.⁹² In December 2003, POGO released a revised letter that made precisely the same allegations of NRC misfeasance, although in language that had been slightly altered to satisfy the NRC's objections. By that time, of course, the uproar over the alleged deficiencies in the NRC's test of Indian Point's defenses had died down – a point driven home in a *Washington Post* article accusing the NRC of trying to "complicate efforts to hold officials accountable for their decisions."⁹³ In this case, as in Rene Chun's, the NRC efforts succeeded in dampening public criticism.

THE REBIRTH OF THE STATE SECRETS PRIVILEGE

As noted above, after the FBI fired Edmonds, she brought suit contending that her discharge violated the First and Fifth Amendments and the Privacy

91. Letter from Roy P. Zimmerman, Director, Office of Nuclear Security Incident Response, Nuclear Regulatory Comm'n, to David C. Vladeck, attorney for POGO, Oct. 28, 2003 (on file with author). The security requirements imposed by Part 73 are demanding, far beyond the means of a small non-profit organization like POGO.

92. Although the NRC has never abandoned its claim that POGO's initial September 11, 2003, letter contains safeguards material, that letter has remained available on the web. Although POGO took the letter down from its website on December 15, 2003, it remained available on other websites, including on the "memoryhole" website, *see* <http://www.the-memoryhole.org/nukes/pogo-letter.htm>, and the NRC made no effort to have it removed from any of these websites. POGO's revised letter is available at <http://pogo.org/p/environment/el-031201-nrc.html>.

93. R. Jeffrey Smith, *Nuclear Security Decisions Are Shrouded in Secrecy: Agency Withholds Unclassified Information*, WASH. POST, March 29, 2004, at A21.

Act.⁹⁴ Edmonds's First Amendment claim alleged that her complaints about misconduct were constitutionally protected and that her termination by the FBI was retaliatory, and her Fifth Amendment claim alleged that her termination violated her right to procedural due process. Her Privacy Act claim asserted that confidential information maintained by the Justice Department was unlawfully leaked to undermine her credibility and to impugn her reputation.⁹⁵

The government did not answer or otherwise defend the action on the merits. Instead, it argued that the case had to be dismissed in its entirety based on the state secrets privilege, which is a common law evidentiary privilege that allows that government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security."⁹⁶ The Supreme Court outlined the proper use of the privilege in *Reynolds v. United States*.⁹⁷ First, the privilege may be invoked only upon "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."⁹⁸ Second, the privilege does not automatically require the dismissal of the action; in *Reynolds*, after the Court upheld the government's claim of privilege, it nonetheless remanded the case for further proceedings, including discovery, and the case ultimately settled.⁹⁹

94. I did not represent Edmonds. She was represented by Mark Zaid in the district court; Ann Beeson, Melissa Goodwin, and Benjamin Wizner of the ACLU were appellate counsel. In my view, Edmonds's lawyers did an exceptional job, and some of the discussion that follows draws on their submissions to the district court and court of appeals. I represented a wide range of amici in the court of appeals supporting reversal.

95. *Edmonds v. Dep't of Justice*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004).

96. *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983); see also Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive*, 91 YALE L.J. 570 (1982).

97. 345 U.S. 1 (1953).

98. *Id.* at 3.

99. See *id.* at 12 (remand); LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 117-118 (2006) (settlement). The *Reynolds* litigation has also given substance to fears that the state secrets privilege can be manipulated for improper purposes by the Executive Branch. In *Reynolds*, family members of civilians who died in a crash of a military plane sued for damages, and the government invoked the state secrets privilege to fend off a discovery request for the flight accident report. The government argued that the report contained secret information about military equipment being tested on the flight. 345 U.S. at 3-5. Although the Court upheld the privilege claim, the flight accident report has recently been declassified, and it contains no details about the secret equipment, leading some to claim that the government had misled the Court in *Reynolds*. See *Herring v. United States*, 2004 WL 2040272, *8 (E.D. Pa. Sept. 10, 2004) (dismissing action filed under Fed. R. Civ. P. 60(b) to reopen the *Reynolds* litigation, but observing that the report blames "engine failure" for the crash and "does not . . . refer to any newly developed electronic devices or secret electronic equipment"); see also Barry Siegel, *The Secret of the B-29*, L.A.

In the fifty years since *Reynolds*, the state secrets privilege has been sparingly invoked because “of the serious potential for defeating worthy claims for violations of rights that would otherwise be proved,”¹⁰⁰ and its application has been limited to “information that would result in the impairment of the nation’s defense capabilities, disclosure of information-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.”¹⁰¹ The privilege has most often been invoked in response to specific discovery requests, not to dismiss an action outright prior to any discovery.¹⁰² Indeed, the typical consequence of a successful invocation of the privilege is simply to “remove the evidence from the case,” not to require dismissal.¹⁰³

With that background in mind, I turn to the government’s claim that the state secrets privilege required Edmonds’s whistleblower case to be dismissed at the threshold. To support its privilege claim, the government submitted both a classified and an unclassified declaration from Attorney General Ashcroft, as well as a classified declaration from Bruce Gebhardt, the Deputy Director of the FBI. The relevant passage of Attorney General Ashcroft’s unclassified declaration simply states:

Based on my personal consideration of the matter, I have concluded that further disclosure of the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case reasonably could be expected to cause serious damage to the national security interests of the United States. Any further elaboration concerning this matter on the public record would reveal information that could cause the very harms my assertion of the state secrets privilege is intended to prevent.¹⁰⁴

TIMES, Apr. 18, 2004, at A1.

100. *In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989).

101. *Id.* at 476.

102. *See, e.g.*, *DTM Research LLC v. A.T. & T. Corp.*, 245 F.3d 327 (4th Cir. 2001); *Linder v. Dep’t of Defense*, 133 F.3d 17, 21 (D.C. Cir. 1998); *Northrop Corp. v. McDonnell-Douglas Corp.*, 751 F.2d 395, 400 (D.C. Cir. 1988); *Ellsberg v. Mitchell*, 709 F.2d 51, 54-55 (D.C. Cir. 1983); *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982); *Halkin v. Helms*, 690 F.2d 977, 985 (D.C. Cir. 1982); *Halkin v. Helms*, 598 F.2d 1, 4 (D.C. Cir. 1978).

103. *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989); *see also id.* at 477 (“[d]ismissal of a suit” on state secrets grounds “and the consequent denial of a forum without giving the plaintiff her day in court” is “draconian”). Dismissal *is* required in the rare case in which a plaintiff brings a case to enforce a secret espionage agreement. *See Tenet v. Doe*, 544 U.S. 1 (2005); *Totten v. United States*, 92 U.S. 105 (1875). And a growing number of lower courts have dismissed other kinds of cases when they determine that a trial would unreasonably risk exposure of sensitive information. *See, e.g.*, *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (dismissing claim of racial discrimination against the CIA).

104. *Edmonds v. Dep’t of Justice*, 323 F. Supp. 2d 65, 75-76 (D.D.C. 2004).

Based solely on the declarations submitted by the Attorney General and Gebhardt, the district court granted the government's motion; the district court apparently did not review any of the records alleged to fall within the scope of the privilege.¹⁰⁵ And although the district court acknowledged that much of the information surrounding Edmonds's allegations had been made public, it held that public revelation of these core facts did not matter.¹⁰⁶ So long as the information claimed to be privileged was not identical to the information in the public domain, the district court concluded it had a duty to uphold the government's state secrets claim and dismiss the case in its entirety.¹⁰⁷

There are several disturbing features of the district court's decision. First, the court treated the state secrets privilege as creating an immunity from suit, not as a discovery privilege, or even as barring the introduction into evidence of particular information, although the Supreme Court made it clear in *Webster v. Doe* that a serious constitutional question would arise if state secret claims could be used to foreclose litigation of a colorable constitutional claim.¹⁰⁸ Indeed, the district court did not even see fit to review the allegedly privileged materials to determine the validity of the government's privilege claim. Thus, it violated the D.C. Circuit's long-standing rule that where invocation of the state secrets privilege would, if upheld, defeat a claim, and where "the government's assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful in camera examination of the material is not only appropriate, but obligatory."¹⁰⁹

Second, the court shut its eyes to developments in national security law since the advent of the state secrets doctrine. The doctrine pre-dates the passage of the Freedom of Information Act, and especially the 1974 amendments to FOIA that clarified that national security claims should be reviewed by courts de novo. Under FOIA, the government has the burden of identifying relevant records, demonstrating that each record was properly classified under the applicable executive orders, and establishing that no segregable portion of the record could be released.¹¹⁰ At the very least, the practices that have been developed under FOIA should have informed the district court's analysis and prompted it to engage in a review of the allegedly privileged documents in camera.

105. *Id.* at 76.

106. *Id.* at 77.

107. *Id.*

108. 486 U.S. 592, 603 (1988).

109. *Ellsberg v. Mitchell*, 709 F.2d 51, 59 n.37 (D.C. Cir. 1983) (citations omitted); *see Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401 (D.C. Cir. 1984).

110. *See Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978); *Allen v. CIA*, 636 F.2d 1287, 1294 (D.C. Cir. 1980).

Third, the court found it irrelevant that much of the information that the plaintiff would need to make out her affirmative case was not simply public, but had been made public by the government itself through de-classified portions of Inspector General reports, unclassified congressional briefings, and other means. For instance, in concluding that it would be impossible for Edmonds to make out a First Amendment claim, the district court noted that both “the nature of plaintiff’s employment” and “the events surrounding her termination” constituted state secrets.¹¹¹ But those facts were not secrets. The nature of Edmonds’s employment was revealed by the FBI at two unclassified congressional briefings and in letters from Senators to the Department of Justice that had been available to the public for years, and the Office of the Inspector General had already concluded that Edmonds’s contract was terminated “in large part because of her allegations of misconduct.”¹¹² And the Privacy Act claim asserted by Edmonds would plainly not turn on secret information. The “Privacy Act prohibits disclosure of any individual’s ‘record’ that is contained in a ‘system of records’ to another person without the individual’s consent.”¹¹³ There is no question that Edmonds’s information was contained in a system of records and that the FBI leaked personal information relating to Edmonds to the press to discredit her.¹¹⁴ The only question left to be answered was who, within the FBI, was responsible for the leak. FBI special agents are law enforcement personnel, not covert intelligence operatives, and the identities of FBI special agents are routinely revealed in civil and criminal litigation.¹¹⁵ The irony here is that, to discredit Edmonds, the FBI leaked false information about her to the press, and then successfully invoked the state secret privilege to shield the names of the FBI agents who violated Edmonds’s privacy rights. That is hardly the purpose the state secrets privilege is intended to serve.

111. *Edmonds v. Department of Justice*, 323 F. Supp. 2d 65, 79 (D.D.C. 2004).

112. U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI’S ACTIONS IN CONNECTION WITH ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS (UNCLASSIFIED SUMMARY) 31-32 (2005), available at <http://www.usdoj.gov/oig/special/0501/final.pdf>.

113. *Chang v. Dep’t of the Navy*, 314 F. Supp. 2d 35, 40 (D.D.C. 2004) (quoting 5 U.S.C. §552a(b)); see also *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000); *Taylor v. Dep’t of Justice*, 257 F. Supp. 2d 101, 112-113 (D.D.C. 2003).

114. Edmonds identified two unauthorized disclosures to the press. One was reflected in a June 8, 2002, article in the Associated Press, which quoted anonymous government sources who claimed that Edmonds was under investigation for security breaches. The other was a June 18, 2002, *Washington Post* story that quoted anonymous government sources who stated that Edmonds was fired for being disruptive, that she had breached security, and that she had been subjected to a polygraph test.

115. See, e.g., *August v. FBI*, 328 F.3d 697, 699 (D.C. Cir. 2003); *United States v. Evans*, 216 F.3d 80, 84 (D.C. Cir. 2000).

Finally, the district court made no effort to facilitate any adversarial testing of the government's claims. There are procedures available to permit the plaintiff to play some role in assessing national security claims. For instance, some courts have ruled that the government must provide a public explanation of its basis for the privilege claim, in order to allow parties to contest that claim.¹¹⁶ Other courts have routinely authorized, and at times compelled, the clearance of counsel so that they can receive, and comment on under seal, sensitive national security information.¹¹⁷ There is nothing novel about this practice. Courts have also permitted, at times, submissions under seal. Although these are extreme measures to be employed sparingly, a closed hearing on preliminary matters with portions of the record sealed pending the court's determination of whether the privilege was properly asserted would have at least injected a degree of adversarial process into this case, which was entirely one-sided. Such procedures exist as a possible way to adjudicate national security issues without public exposure of state secrets.¹¹⁸ Indeed, in the famous *Pentagon Papers* case, the United States filed a "secret brief" in the Supreme Court that remained sealed for many years after the case was decided, though counsel for newspapers opposing the government had access to it immediately.¹¹⁹

Not surprisingly, the whistleblower case did not end well for Edmonds. She appealed to the D.C. Circuit, which not only affirmed the district court ruling without opinion, but did so after excluding the public and press from the oral argument.¹²⁰ The Supreme Court denied certiorari, putting an end to

116. See, e.g., *Ellsberg v. Mitchell*, 709 F.2d 51, 60-64 (D.C. Cir. 1983).

117. In cases in which the government has attempted to enjoin publication of information involving national security issues, counsel for the prospective publisher has had access not only to the information, but also to the in camera submissions of the government that sought to justify orders forbidding publication. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. The Progressive*, 486 F. Supp. 5 (W.D. Wis. 1979).

118. See, e.g., *In re United States*, 872 F.2d 472, 478 (D.D.C. 1989) (suggesting use of bench trials, in camera review, and protective orders to safeguard sensitive information); *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958).

119. See *Sims*, *supra* note 52, at 427-453 (1993) (reproducing the once-sealed briefs of the United States and the Washington Post, which had been exchanged by the parties at the time of oral argument).

120. *Edmonds v. DOJ*, 2005 U.S. App. LEXIS 8116 (D.C. Cir. May 6, 2005). After the district court issued its ruling, the DOJ's Office of the Inspector General released a 39-page unclassified summary of the 100-page report it had prepared concerning Edmonds's allegations. The summary disclosed that the OIG "found that many of Edmonds' core allegations relating to the co-worker were supported by either documentary evidence or witnesses other than Edmonds," "that the FBI significantly mishandled this matter," and that the FBI had stopped using Edmonds's services "in large part because of her allegations of misconduct." A REVIEW OF THE FBI'S ACTIONS IN CONNECTION WITH ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS (UNCLASSIFIED SUMMARY), *supra* note 112, at 10, 31-32.

the litigation once and for all.¹²¹

Were *Edmonds* an aberrational case, it would not be cause for concern. But it appears to be the tip of an iceberg. Since 9/11, the government has invoked the state secrets privilege again and again, either to argue that a case should be dismissed in its entirety, or that important evidence be shielded from discovery, and it has succeeded at nearly every turn.¹²² What was once an obscure, sparingly invoked doctrine now seems to be the Executive Branch's main line of defense in national security litigation. And until the courts searchingly review these claims, there is every reason to believe that they will proliferate.

CONCLUSION

History will, at some point, assess the complicated legacy of President George W. Bush. But one thing is certain. There will be substantial reasons to remember him as the "secrecy" President – the President who rewrote the rules to restrict what he believed to be unwarranted access to government information. Examples of pro-secrecy initiatives undertaken by the Bush administration are legion. Many of these efforts went too far, and in my view, would not have been undertaken had the Administration had more reason to anticipate searching judicial review of its actions. The courts must ensure that national security concerns are not allowed to deprive litigants and the public of the information needed for a full public debate about the policies being used to fight terrorism.

Because the courts have been reluctant to engage in searching review of national security claims in the shadow of 9/11, agencies like the Department of Justice and the Nuclear Regulatory Commission have been emboldened to cloak their work in secrecy that would, in the past, have been unthinkable and unsustainable. It is hard to imagine that Attorney General Ashcroft would have classified information in the public domain if he had thought that there

121. *Edmonds v. DOJ*, 126 S. Ct. 734 (2005).

122. *See, e.g., El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (dismissing on state secrets grounds a damage action based on allegations that torture followed extraordinary rendition); *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (dismissing on state secrets grounds a Title VII action brought by an African-American officer); *Tenenbaum v. Simonini*, 372 F.3d 776 (6th Cir. 2004) (dismissing on state secrets grounds apparent *Bivens* action against federal officers); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001) (holding that the relationship between CIA and British lender was precluded from discovery under privilege); *see also* Louis Fisher, *National Security Whistleblowers* (Cong. Res. Serv. RL 33215) 36-38, Dec. 30, 2005 (describing how invocation of the state secrets privilege destroys protections nominally available to whistleblowers). The Administration's state secrets claims have met resistance only in cases involving the NSA's warrantless surveillance program. *See the cases cited supra* note 6.

was a real risk that a court would review the classification decision with care. It is hard to believe that the NRC would have threatened POGO with prosecution for discussing information accessible to all on the Internet if it had to justify that threat before a probing court. It is hard to accept that the NRC would have aggressively pursued Rene Chun had it thought it would have to defend its position before a court sensitive to the First Amendment issues entwined with a journalist's interactions with a source. And it is hard to see how the Administration would have succeeded in achieving the dramatic expansion of the state secrets privilege if the courts had exercised any measure of independent review. The courts' acquiescence to these expansive national security claims has allowed the government to avoid accountability for, or even review of, questionable conduct.

The legal consequences of 9/11 and the executive and legislative policies shaped in response to it will long occupy the courts. Complex questions about the detention of persons alleged to be enemy fighters, conditions of confinement, interrogation practices, rendition, and military commissions, among others, remain to be resolved, and I have not attempted here to analyze those issues or suggest how they should be resolved. However, I have sought to describe some aspects of the long, sometimes impenetrable shadow of secrecy that has made it more difficult to litigate against the government. A revival of the judiciary's traditional skepticism toward government efforts to curb open public discussion of vital public issues is essential and overdue.