TILL DEATH DO US PART: PREPUBLICATION REVIEW IN THE INTELLIGENCE COMMUNITY

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As a condition of access to classified information, most employees of the U.S. intelligence community are required to sign nondisclosure agreements that mandate lifetime prepublication review. In essence, these agreements require employees to submit any works that discuss their experiences working in the intelligence community—whether written or oral, fiction or nonfiction—to their respective agencies and receive approval before seeking publication. Though these agreements constitute an exercise of prior restraint, the Supreme Court has held them constitutional. This Note does not argue for or against the constitutionality of prepublication review; instead, it explores how prepublication review is actually practiced by agencies and concludes that the current system, which lacks executive-branch-wide guidance, grants too much discretion to individual agencies. It compares the policies of individual agencies with the experiences of actual authors who have clashed with prepublication-review boards to argue that agencies conduct review in a manner that is inconsistent at best, and downright biased and discriminatory at worst.

The level of secrecy shrouding intelligence agencies and the concomitant dearth of publicly available information about their activities make it difficult to evaluate their performance and, by extension, the performance of our elected officials in overseeing such activities. In such circumstances, memoirs and other forms of expression by former agency employees become extremely valuable. The potential for discriminatory review—the approval of works that portray agencies in a positive light and the suppression of works more critical in tone—illuminates the need for an improved system of prepublication review: one that respects the intelligence community's need to protect legitimate national-security information but demands more robust protections for the First Amendment rights of potential authors and the public's need for information with which to evaluate the highly secretive activities of their government. This Note concludes by arguing that action is required from all three branches of government to improve the system of prepublication review.

INTRODUCTION

In 2009, Anthony Shaffer, a retired Lieutenant Colonel and career intelligence officer, sought to publish a memoir depicting his experi-

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ences working with the Defense Intelligence Agency (DIA) as an Army Reserve officer after 9/11. As required by several nondisclosure agreements he had signed to gain access to classified information, Shaffer submitted his manuscript to his superiors in the Army for prepublication review. After review by "two highly qualified Army Reserve officers,"[1] the Army determined the manuscript contained no classified information and approved it for publication. Shaffer forwarded the manuscript to his publishers. Shortly thereafter, the DIA intervened, demanding a copy of the manuscript so it could conduct its own review. The Army complied; meanwhile, the publisher continued working toward publication. Three weeks before the scheduled shipment of the first edition, the DIA notified Shaffer that the Army's review process was insufficient and that he would have to submit his manuscript officially to the DIA for proper review. Shaffer agreed to comply, but his publisher notified the government that it had already sent out several dozen copies of the book to reviewers. Undeterred, the government pressed forward with its demands for redactions and paid the publisher nearly $50,000 to destroy all remaining copies of the first edition.[2] The realities of the Internet Age, however, brought about a farcical result—various news organizations and private citizens purchased the unredacted first edition and published side-by-side comparisons of the two versions,[3] revealing not just the allegedly classified information, but what types of information the government considered sensitive enough to require redaction—itself a harm that the government seeks to avoid.[4] As discussed throughout this Note, Shaffer's experience is not unique.

Employees of intelligence community (IC) agencies[5] are required to sign a nondisclosure agreement that incurs certain lifetime obligations.[6] Two of the obligations are unsurprising: The employee agrees not to disclose classified information—information that is properly classified

1. First Amended Complaint at 5, Shaffer v. Def. Intelligence Agency, 901 F. Supp. 2d 113 (D.D.C. 2013) (No. 10-2119), available at http://www.fas.org/sgp/jud/shaffer/021312-complaint.pdf (on file with the *Columbia Law Review*).

2. Id. at 11.

3. Id. at 12–14.

4. See Def. Intelligence Agency, DIA Form No. 271, Conditions of Employment 5 (Nov. 20, 2008) [hereinafter DIA Employment Conditions], available at http://www.dia.mil/Portals/27/Documents/Careers/Pre-employment%20Forms/ConditionsofEmployment.doc (on file with the *Columbia Law Review*) ("An agreement is also required to authorize Agency pre-publication review of certain material prior to disclosure during and after employment with the DIA.").

5. See infra notes 13–14 and accompanying text (describing background and activities of IC).

6. See Exec. Order No. 12,968, 3 C.F.R. 391, 392 (1996) (requiring signing of nondisclosure agreement as precondition to accessing classified information); 32 C.F.R. § 2001.80 (2014) (requiring agencies to either use Standard Form (SF) 312 as their nondisclosure agreement or apply for waiver).

under Executive Order 13,526[7]—and to report to the Federal Bureau of Investigation (FBI) any attempt made by unauthorized persons to solicit classified information.[8] But in most cases, a third obligation is incurred: The employee must submit any works based on her experiences in the IC, whether fictional or nonfictional, for prepublication review.[9] Importantly, this is a lifelong commitment that remains valid even after separation from the agency.

The Supreme Court found such a lifetime obligation constitutional in *Snepp v. United States*.[10] Much of the legal literature on prepublication review has focused on its constitutionality, scrutinizing the Court's decision in that case.[11] This Note does not argue for or against the constitutionality of prepublication review. Instead, it attempts to shed light on the disarray of the current system through analysis of disparate agency policies and the experiences of authors pursuing publication. It concludes that the current system—conducted by individual agencies in a decentralized fashion, with no executive-branch-wide guidance—leads to arbitrary, inconsistent, and sometimes absurd results and does not conform with controlling case law, particularly with respect to *former* employees. It also deprives the public of important insight into a highly secretive area of government. The system is in need of an overhaul, and this Note proposes several avenues for reform.

Part I discusses the history of prepublication review and its constitutionality, decided under controversial circumstances in *Snepp*. It also analyzes *United States v. Marchetti*,[12] a Fourth Circuit decision upholding prepublication review that predates *Snepp* but has been relied upon as authoritative guidance both for agencies conducting prepublication review and for potential authors challenging it. Part II illuminates the prepublication-review policies of the IC agencies based on publicized and declassified guidelines and compares them with the actual experiences of current and former employees who have sought to have their memoirs published. It concludes that the unusually broad discretion granted to agencies in determining their prepublication-review policies creates a risk of abuse that is particularly problematic in light of the authors' First

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7. Information cannot be classified unless its unauthorized disclosure "could reasonably be expected to cause identifiable or describable damage to national security" and it pertains to one of eight enumerated categories. See Exec. Order No. 13,526, 3 C.F.R. 298, 300 (2010) (listing categories).

8. U.S. Gen. Servs. Admin., Standard Form No. 312, Classified Information Nondisclosure Agreement (July 2013) [hereinafter Standard Form 312], available at http://www.archives.gov/isoo/security-forms/sf312.pdf (on file with the *Columbia Law Review*).

9. See infra notes 100–102 and accompanying text (describing agency prepublication-review requirements).

10. 444 U.S. 507 (1980) (per curiam). For a discussion of the case, see infra Part I.B.3–4.

11. See infra notes 80–81 and accompanying text (listing articles considering constitutionality of review).

12. 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

Amendment rights. Finally, Part III proposes several solutions, arguing action is required from all three branches of government.

I. THE HISTORY AND CONSTITUTIONALITY OF PREPUBLICATION REVIEW

The history and constitutional rationale of prepublication review is important in understanding the role it plays in an environment of unprecedented secrecy. Part I discusses the history and constitutionality of prepublication-review policies. Part I.A seeks to demonstrate the value that publications by IC employees add to the dialogue on national-security issues. Part I.A.1 discusses the inherent advantages that the executive branch has in controlling that discourse, while Part I.A.2 and I.A.3 explore how such publications can counter this advantage. Part I.B focuses on the constitutionality of prepublication review, with Part I.B.1 first contextualizing review policies by discussing the First Amendment's strong presumption against prior restraint. Part I.B.2 analyzes the Fourth Circuit's decision in *Marchetti*, while Part I.B.3 discusses the Supreme Court's decision in *Snepp*. Part I.B.4 explores the aftermath of *Snepp* and the lasting impact the decision has had on prepublication-review policies.

A. *The Value of Publications by Current and Former Employees*

1. *The Executive's Advantage.* — The IC is a "federation of executive branch agencies and organizations that work separately and together to conduct intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States."[13] Its activities include the "[c]ollection of information needed by the President, the National Security Council, the Secretaries of State and Defense, and other executive-branch officials for the performance of their duties and responsibilities."[14] The breadth of its activities has increased dramatically in recent years,[15] as reflected in the rate at which its budget has grown.[16] The unauthorized disclosure of highly classified

13. Office of the Dir. of Nat'l Intelligence, ODNI FAQ 7, http://www.dni.gov/index.php/about/faq?tmpl=component&format=pdf (on file with the *Columbia Law Review*) (last visited Nov. 6, 2014).

14. Id.

15. See, e.g., Dana Priest & William M. Arkin, A Hidden World, Growing Beyond Control, Wash. Post (July 19, 2010, 4:50 PM), http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/print/ (on file with the *Columbia Law Review*) (describing rapid growth in number of personnel employed, and volume of data analyzed, by various agencies); Scott Shane, No Morsel Too Minuscule for All-Consuming N.S.A., N.Y. Times (Nov. 2, 2013), http://www.nytimes.com/2013/11/03/world/no-morsel-too-minuscule-for-all-consuming-nsa.html?pagewanted=all (on file with the *Columbia Law Review*) (describing National Security Agency's expansive collection of communications data).

16. The National Intelligence Program budget, which funds all intelligence activities except those under the purview of the military, for fiscal year 2014 was $50.5 billion. Press Release, Office of the Dir. of Nat'l Intelligence, DNI Releases Budget Figure for FY 2014 National Intelligence Program (Oct. 30, 2014), http://www.dni.gov/index.php/newsroo

information by former National Security Agency (NSA) contractor Edward Snowden has shed some light on the activities of the IC,[17] leading to calls for more official disclosure.[18]

Yet despite its increasingly influential role, the IC remains highly secretive,[19] and the courts have adopted a strong presumption in support of secrecy. The Supreme Court has declared that "no governmental interest is more compelling than the security of the Nation"[20] and has explicitly affirmed the President's constitutional power to classify information for its protection.[21] The Court has also recognized the government's "compelling interest" in withholding national-security information from unauthorized persons in the course of executive business.[22] The doctrine of executive privilege shields some executive-branch secrets from congressional scrutiny,[23] and courts have been hesitant to

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m/press-releases/198-press-releases-2014/1134-dni-releases-budget-figure-for-fy-2014-national-intelligence-program (on file with the *Columbia Law Review*). The Military Intelligence Program budget for the same period was $17.4 billion. Press Release, Dep't of Def., DOD Releases Military Intelligence Program (MIP) Appropriated Top Line Budget for Fiscal Year (FY) 2014 (Oct. 30, 2014), http://www.defense.gov/releases/release.aspx?releaseid=17010 (on file with the *Columbia Law Review*). The total comes to $67.9 billion. This reflects a marked increase since 9/11. See Barton Gellman & Greg Miller, 'Black Budget' Summary Details U.S. Spy Network's Successes, Failures and Objectives, Wash. Post (Aug. 29, 2013), http://www.washingtonpost.com/world/national-security/black-budget-summary-details-us-spy-networks-successes-failures-and-objectives/2013/08/29/7e57bb78-10ab-11e3-8cdd-bcdc09410972_story.html (on file with the *Columbia Law Review*) (reporting massive increases in budgets, including one-hundred percent increase in IC budget, since 2001).

17. See, e.g., Glenn Greenwald, XKeyscore: NSA Tool Collects 'Nearly Everything a User Does on the Internet,' Guardian (July 31, 2013, 8:56 AM), http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data (on file with the *Columbia Law Review*) (describing NSA collection of online data).

18. The Foreign Intelligence Surveillance Court recently ordered the Department of Justice to release secret opinions about section 215 of the Patriot Act. In re Orders of This Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-02, slip op. at 16 (FISA Ct. Sept. 13, 2013), available at http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-order-130813.pdf (on file with the *Columbia Law Review*) ("[U]nauthorized disclosure in June 2013 of a Section 215 order, and government statements in response to that disclosure, have engendered considerable public interest and debate about Section 215. Publication of FISC opinions relating to this provision would contribute to an informed debate.").

19. See Info. Sec. Oversight Office, Nat'l Archives & Records Admin., 2013 Report to the President 1 (2013) [hereinafter 2013 ISOO Report], available at http://www.archives.gov/isoo/reports/2013-annual-report.pdf (on file with the *Columbia Law Review*) (reporting over eighty million classification decisions in 2013).

20. Haig v. Agee, 453 U.S. 280, 307 (1981).

21. See Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) ("[The President's] authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.").

22. Id. (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam)).

23. See Todd Garvey & Alissa M. Dolan, Cong. Research Serv., R42670, Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments 8 (2012),

scrutinize national-security matters themselves.[24] The absence of checks and balances from the legislative and judicial branches of government has led to an accountability and oversight issue unlike any other. In other areas where these two branches exercise deference, voters act as the primary check on overzealous executive action;[25] but because the activities of IC agencies are so secretive, the public is unable to make informed evaluations about their conduct and efficacy.[26]

In contrast, there are many opportunities for the executive branch to portray itself in a favorable light. One prevalent method is the use of strategic leaks of information to the media.[27] This practice is common in Washington[28] and has been so for at least half a century.[29] Another method is direct influence, criticized most recently during the controversy surrounding the release of the motion picture *Zero Dark Thirty*. A declassified memo indicates the Central Intelligence Agency (CIA) was involved in the movie's production in order to "help promote an appropriate portrayal of the Agency and the Bin Laden operation."[30] A

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available at http://fas.org/sgp/crs/secrecy/R42670.pdf (on file with the *Columbia Law Review*) (reporting executive-branch statements have identified foreign relations and military affairs as presumptively covered by executive privilege).

24. See, e.g., Stephen Dycus et al., National Security Law 124 (5th ed. 2011) ("Courts have . . . tended to avoid the decision of national security disputes and thus to defer to the political branches in what may be an increasing number of cases.").

25. See Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (arguing "checks against any branch's abuse of its exclusive power" include "political check that the people will replace those in the political branches . . . who are guilty of abuse").

26. See 1 Arvin S. Quist, Security Classification of Information 138 (rev. Sept. 20, 2002), http://fas.org/sgp/library/quist/chap_6.pdf (on file with *the Columbia Law Review*) ("When information is classified, the public's knowledge of the government's activities is reduced, thereby impeding an informed public evaluation of governmental policies and government officials.").

27. See generally David E. Pozen, The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information, 127 Harv. L. Rev. 512 (2013) [hereinafter Pozen, Leaky Leviathan] (discussing benefit executive branch gains through current system of plants, leaks, and "pleaks"); Robert A. Sedler, The Media and National Security, 53 Wayne L. Rev. 1025, 1034 (2007) ("Sometimes government officials, in order to advance the government's purpose, voluntarily disclose information to the media, so that the media will assist them in conveying the government's message to the public.").

28. See Pozen, Leaky Leviathan, supra note 27, at 528 ("It is a commonplace that leaks course through the nation's capital. Classified information disclosures to the media are thought to occur so regularly in Washington as to constitute a routine method of communication about government." (quoting William E. Lee, Deep Background: Journalists, Sources, and the Perils of Leaking, 57 Am. U. L. Rev. 1453, 1467 (2008)) (internal quotation marks omitted)).

29. See Affidavit of Max Frankel para. 17, United States v. N.Y. Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971) (No. 71 Civ. 2662), 1971 WL 224067 (describing "informal but customary traffic in secret information" among reporters and officials in Washington).

30. Redacted Internal CIA Memorandum 1 (approved for release Apr. 22, 2013), available at https://s3.amazonaws.com/s3.documentcloud.org/documents/696468/boal-cia-memo.pdf (on file with the *Columbia Law Review*).

subsequent inquiry requested by Congress focused on whether classified information was provided; the fact that the Administration was involved in the filmmaking process was treated as almost de rigueur.[31]

2. *Publications by Insiders Offer Alternatives to Official Narrative.* — The abundance of authorized—or at least condoned—leaks combined with the paucity of information available from other sources makes it difficult for the public to evaluate the work of the IC effectively. In this context, memoirs and speeches by current and former employees provide the public with unique insight: The authors are insiders who have firsthand experience of the inner workings of the IC. Undoubtedly, many will be agency loyalists who provide nothing unavailable through official leaks and releases,[32] but the works of critical or neutral authors can provide the public with an otherwise unavailable perspective into the inner workings of secretive organizations.[33]

For example, the views of insiders have provided critical insight into the debate over the use of so-called "enhanced interrogation techniques."[34] Former senior CIA officials have defended the program, insisting the techniques led to actionable intelligence.[35] Former Vice President Dick Cheney has also spoken approvingly of such techniques,

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31. There were allegations that CIA Director Leon Panetta disclosed classified information to the directors, but the Department of Defense (DoD) Inspector General's (IG) final report states that both the DoD and CIA took all appropriate measures to protect classified information during their interactions with the movie producers. Office of the Deputy Inspector Gen. for Intelligence & Special Program Assessments, Dep't of Def., Report No. DODIG-2013-092, Release of Department of Defense Information to the Media 12–14 (2013), available at http://www.dodig.mil/pubs/documents/DODIG-2013-092.pdf (on file with the *Columbia Law Review*).

32. Such individuals may be receiving preferential treatment under current prepublication-review policies. See infra Part II.C.2.

33. Ian Shapira, CIA Memoirs Offer Revelations and Settle Scores Among Spies, Wash. Post (June 4, 2012), http://articles.washingtonpost.com/2012-06-04/local/35461165_1_cia-spymaster-john-kiriakou-publications-review-board (on file with the *Columbia Law Review*) ("'In many cases, [memoirs] are providing the only account there is, and people read the memoirs to flesh out a sparse public record.'") (quoting Steven Aftergood, Federation of American Scientists).

34. See The Constitution Project, The Report of the Constitution Project's Task Force on Detainee Treatment *passim* (2013), available at http://detaineetaskforce.org/pdf/Full-Report.pdf (on file with the *Columbia Law Review*) (providing "comprehensive record of detainee treatment across multiple administrations and multiple geographic theatres" based on "public records and interviews with more than 100 people, including former detainees, military and intelligence officers, interrogators and policymakers," based in part on accounts of detainee mistreatment written by former IC employees).

35. See, e.g., Mark Mansfield, Reflections on Service: A Conversation with Former CIA Director Michael Hayden, Stud. Intelligence, June 2010, at 63, 65–66 ("[W]hatever you may think of this, it worked and we did indeed get life-saving intelligence out of it."); John Rizzo, CIA's Enhanced Interrogation "Necessary and Effective," Frontline (Sept. 13, 2011, 2:24 PM), http://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/the-interrogator/john-rizzo-cias-enhanced-interrogation-necessary-and-effective/ (on file with the *Columbia Law Review*) (quoting former acting General Counsel of CIA in describing enhanced interrogation techniques as "necessary and effective").

claiming they produced "phenomenal" results.[36] Such claims are difficult to evaluate, as the details of individual cases and any intelligence derived from them are, of course, classified. The firsthand experiences of interrogators thus add a unique perspective to this debate.[37] The CIA itself appears to be wary of such firsthand accounts; it allegedly told a prospective author undergoing prepublication review, "We will not allow you to take the reader into the interrogation room. We will not allow you to make the prisoner a human being. To the extent that we can, we will take out anything that gives him a personality."[38] The availability of such alternative, credible accounts can act as a check against excessive manipulation of the national-security narrative by the government.

3. *Insider Publications May Assist Future FOIA Requests.* — Publications by insiders may serve another tangential but valuable purpose—alerting those requesting information through the Freedom of Information Act[39] (FOIA) to the existence of documents that may be of interest to them. In what has been called the problem of "prerequisite knowledge," a valid FOIA request for information requires a reasonably specific description of the document sought, but if the requestor is not even aware of the existence of the document, it is impossible to describe it.[40] Unclassified works by insiders may alert the general public to at least the existence, if not details, of contentious programs or interpretations. These publications may thereby "make shallow" otherwise "deep secrets."[41] Insider accounts are thus an important source of information that is difficult for the public to obtain elsewhere. As described in the following section, the constitutionality of prepublication review appears to be beyond question;

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36. Chris McGreal, Dick Cheney Defends Use of Torture on Al-Qaida Leaders, Guardian (Sept. 9, 2011, 1:17 PM), http://www.theguardian.com/world/2011/sep/09/dick-cheney-defends-torture-al-qaida (on file with the *Columbia Law Review*).

37. See, e.g., Dina Temple-Raston, In 'The Black Banners,' Ali Soufan Takes Readers Inside the Interrogation Room, Wash. Post (Oct. 28, 2011), http://www.washingtonpost.com/entertainment/books/in-the-black-banners-ali-soufan-takes-readers-inside-the-interrogation-room/2011/10/18/gIQAePOCQM_story.html (on file with the *Columbia Law Review*) ("Soufan is not a journalist. The conversations he re-creates in the early part of the book sound somewhat wooden and forced. But he redeems himself with detailed descriptions of what unfolded behind the closed doors of the world's interrogation rooms.").

38. Laura Miller, Censored by the CIA, Salon (Aug. 30, 2011, 8:31 AM), http://www.salon.com/2011/08/31/censored_by_cia/ (on file with the *Columbia Law Review*).

39. 5 U.S.C. § 552 (2012) (mandating full or partial disclosure of unreleased information and documents controlled by government unless one of nine exemptions is met).

40. See Seth F. Kreimer, The Freedom of Information Act and the Ecology of Transparency, 10 U. Pa. J. Const. L. 1011, 1025–27 (2008) (explaining unique challenge presented by FOIA requirement of reasonable specificity in describing information requested regarding classified national-security programs).

41. See David E. Pozen, Deep Secrecy, 62 Stan. L. Rev. 257, 274 (2010) (defining "deep secret" as one where "small group of similarly situated officials conceals its existence from the public and from other officials, such that the outsiders' ignorance precludes them from learning about, checking, or influencing the keepers' use of the information").

it is thus particularly important that the review policies of IC agencies be calibrated to achieve the maximum public disclosure possible without an adverse impact on national security.

B. *The Constitutionality of Prepublication Review*

There is no explicit statutory authority for prepublication review; authority has been implied from section 3024 of the National Security Act of 1947.[42] That text reads simply: "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."[43] The concept originated with a set of nondisclosure agreements that the CIA required its employees to sign as a condition of employment.[44] These agreements prevented employees from seeking publication of their manuscripts without written consent from the agency. Despite being an act of prior restraint,[45] such agreements were upheld by the Supreme Court.[46]

1. *The First Amendment and the Strong Presumption Against Prior Restraint.* — The First Amendment of the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[47] While some proponents of strong First Amendment protections have insisted that the phrase "shall make no law" is unambiguous and means neither Congress nor the courts can restrict speech,[48] the Court has consistently held that restraints on free expression may be "permitted for appropriate reasons."[49] Despite these exceptions, there is a special presumption against

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42. 50 U.S.C. §§ 401–442 (2012).

43. Id. § 403(i)(1). By way of clarification, the reorganization of the IC in 2004 shifted this mandate, which was originally assigned to the CIA Director, to the Director of National Intelligence. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, sec. 1011, § 102A(i), 118 Stat. 3638, 3651. Because some of the court decisions that follow predate the reorganization, they make repeated references to the *CIA* Director's mandate under the act, not the *ODNI* Director's.

44. See infra note 56–57 and accompanying text (describing requirements imposed on CIA employee).

45. See, e.g., Alexander v. United States, 509 U.S. 544, 553 (1993) ("The doctrine of prior restraint originated in the common law of England, where prior restraints of the press were not permitted, but punishment after publication was. This very limited application of the principle of freedom of speech was held inconsistent with our First Amendment . . . .").

46. Snepp v. United States, 444 U.S. 507, 507–08 (1980) (per curiam) (enforcing former CIA agent's employment agreement with Agency and imposing constructive trust on book profits). For academic works criticizing the decision, see infra note 81.

47. U.S. Const. amend. I.

48. See, e.g., Hugo L. Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865, 874, 879 (1960) ("The phrase 'Congress shall make no law' is composed of plain words, easily understood.").

49. Elrod v. Burns, 427 U.S. 347, 360 (1976).

the practice of prior restraint, as articulated most famously in *New York Times Co. v. United States*.[50]

Where the speech involves criticism of the government by its employees, the Court has held that "the interests of the [employee], as a citizen, in commenting upon matters of public concern" must be balanced against the interest of "the State as an employer, in promoting the efficiency of the public services it performs through its employees."[51] Comments by government employees on matters of public concern cannot be restricted just because they are critical in tone.[52] Courts have placed particular emphasis on the phrase "matters of public concern": Where the employee's expression "cannot be fairly considered as relating to any matter of political, social, or other concern to the community . . . officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[53] The issue is thus the balance between the public value of the speech and the government's interest in restricting it. In light of the benefits of insider publications articulated above,[54] such works should qualify as speech of public concern; the question, then, is the state's interest in restricting the employee's speech.

2. *The First Look:* Marchetti. — The first case to consider the constitutionality of mandating prepublication review in a nondisclosure agreement was *United States v. Marchetti*.[55] Victor Marchetti was a fourteen-year employee of the CIA who signed a secrecy agreement[56] both upon joining and resigning from the agency.[57] After resigning, he published a novel and several articles based on his experiences as an agent, and the government sought an injunction against further publication.[58] The Fourth Circuit upheld a district-court injunction requiring Marchetti to submit, at least thirty days in advance, any writing related to his experiences in the CIA.[59] Importantly, the court limited its scope to

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50. 403 U.S. 713, 714 (1971) (per curiam) ("'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))). This case is also known as *The Pentagon Papers Case*.

51. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

52. Id. at 570.

53. Connick v. Myers, 461 U.S. 138, 146 (1983).

54. See supra Part I.A (articulating benefits of publications by former employees of IC).

55. 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

56. Id. at 1312 (describing agreement through which Marchetti agreed "not to divulge in any way any classified information, intelligence, or knowledge, except in the performance of his official duties, unless specifically authorized in writing by the Director or his authorized representative").

57. Id.

58. Id. at 1313.

59. Id. at 1311.

classified information.[60] The Fourth Circuit recognized both the burden on Marchetti and the executive's right to secrecy[61] and held that, given the National Security Act of 1947's requirement that the CIA director protect intelligence sources and methods,[62] "a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment" was a reasonable means to protect such secrets.[63]

Applying this standard, the Fourth Circuit approved the secrecy agreement signed by Marchetti upon joining the agency but declined to enforce the agreement signed upon resignation, as it purported to restrict his ability to disclose *unclassified* information.[64] Additionally, the court stated that if classified information were found "in the public domain," then Marchetti should have as much right as anyone else to republish it. [65] Otherwise, the court found the requirement for prepublication review valid, with a few caveats that remain important today. First, recognizing prior restraint's heavy burden on prospective authors, the court held that the CIA "must act promptly to approve or disapprove any material" submitted by authors, suggesting a maximum response time of thirty days.[66] Second, the court held that to sustain such prior restraint, any author disagreeing with CIA prepublication decisions should be entitled to judicial review,[67] though it stated that such review would not extend to the original decision to classify.[68]

3. *The Supreme Court Weighs In:* Snepp v. United States. — Several years after the *Marchetti* decision, the Supreme Court weighed in on the constitutionality of prepublication review in *Snepp v. United States*.[69] Frank

60. Id. at 1318.

61. See id. at 1315 ("Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest.").

62. Id. at 1316.

63. See id. at 1317 (noting ex post criminal sanctions would be insufficient safeguard in light of potential harm from disclosure).

64. Id.

65. Id. at 1318. The D.C. Circuit similarly held that the government may not censor material already in the public domain, as it "has no legitimate interest in censoring unclassified materials." McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983).

66. *Marchetti*, 466 F.2d at 1317. This thirty-day period has remained influential in guiding agency policy but has since been treated as more of a soft goal than a hard requirement. See infra notes 156–158 and accompanying text.

67. *Marchetti*, 466 F.2d at 1317 (citing Freedman v. Maryland, 380 U.S. 51 (1965) (striking down Maryland's prior restraint regime for films because it lacked express guarantee of judicial review)).

68. Id. at 1318 ("The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.").

69. 444 U.S. 507 (1980) (per curiam).

Snepp worked for the CIA for eight years[70] and, despite having signed a secrecy agreement upon employment, published a book[71] based on his experiences without seeking prepublication review.[72] What distinguished his agreement from Marchetti's was a provision in which he agreed not to publish *any* information—classified or not—relating to the agency, its activities, or intelligence activities generally without prior approval.[73]

The Supreme Court held that Snepp's employment with the CIA involved "an extremely high degree of trust"[74] and that such a special trust relationship required that Snepp give the CIA "an opportunity to determine whether the material he proposed to publish would compromise classified information or sources."[75] For the Court, it was irrelevant whether or not the book *actually* contained classified information[76]—it dispensed with Snepp's First Amendment claim in a footnote.[77] The Court then cited the findings of the district court, concluding that "Snepp's breach of his explicit obligation" had "irreparably harmed the United States."[78] The Court placed a constructive trust on Snepp's profits, calling it "the most appropriate remedy."[79]

4. *Post-*Snepp*: Expansion, Backlash, and Regularization.* — Legal scholars had debated the use of nondisclosure agreements and prepublication review even before the decision in *Snepp*.[80] The decision drew immediate criticism, almost all of which focused on the constitutionality of prior

70. Frank Snepp, Irreparable Harm: A Firsthand Account of How One Agent Took on the CIA in an Epic Battle over Secrecy and Free Speech 60–61 (1999) [hereinafter Snepp, Irreparable Harm].

71. Frank Snepp, Decent Interval: An Insider's Account of Saigon's Indecent End Told by the CIA's Chief Strategy Analyst in Vietnam (1977).

72. *Snepp*, 444 U.S. at 507.

73. See id. at 508 ("Thus, Snepp had pledged not to divulge *classified* information and not to publish *any* information without prepublication clearance.").

74. Id. at 510.

75. Id. at 511.

76. Id.

77. Id. at 509 n.3.

78. Id. at 513. The Court placed particular emphasis on the statement of Stansfield Turner, then the CIA Director, about the loss of valuable intelligence sources due to Snepp's book. Id. at 512–13. Ironically enough, Turner later became an outspoken critic of the CIA's prepublication-review procedures after his own memoir was put through the process. See infra note 207 and accompanying text.

79. *Snepp*, 444 U.S. at 514–16.

80. See, e.g., James Peter Rau, Government Secrecy Agreements and the First Amendment, 28 Am. U. L. Rev. 395, 396–97 (1979) (analyzing two First Amendment doctrines, reasonableness standard and prior restraint, in context of prepublication review); Joshua B. Bolten, Comment, Enforcing the CIA's Secrecy Agreement Through Postpublication Civil Action: *United States v. Snepp*, 32 Stan. L. Rev. 409, 410 (1980) (arguing district court's decision in *Snepp* was correct in terms of remedy); Caroline Heck, Comment, National Security and the First Amendment: The CIA in the Marketplace of Ideas, 14 Harv. C.R.-C.L. L. Rev. 655, 658 (1979) (comparing secrecy agreements with nondisclosure agreements in private sector and concluding courts have given too much weight to government assertions of national-security issues).

restraint on current and former CIA employees.[81] Some scholars and practitioners urged Congress to act to counter the effects of the decision.[82] Instead, the decision was seized upon and became the catalyst for a major change in executive-branch policy. President Reagan relied on the reasoning in *Snepp* to pass National Security Decision Directive 84 (NSDD-84), which expanded the requirement to sign a nondisclosure agreement mandating prepublication review to *all* employees of the executive branch.[83] In response to heavy criticism from Congress,[84] President Reagan suspended NSDD-84's lifetime prepublication-review requirement in February 1984.[85] But this change "had little effect on prepublication review requirements" because employees were still required to sign other agreements before being granted access to sensitive compartmented information (SCI)[86]—information protected by a higher level of classification.[87] After years of public disagreement

81. See, e.g., Thomas M. Franck & James J. Eisen, Balancing National Security and Free Speech, 14 N.Y.U. J. Int'l L. & Pol. 339, 339–43 (1982) (asserting intent to "answer those questions *nunc pro tunc* that were not addressed in *Snepp*" and concluding there should be no fiduciary duty to submit to prepublication review where information being published is unclassified); Jonathan C. Medow, The First Amendment and the Secrecy State: *Snepp v. United States*, 130 U. Pa. L. Rev. 775, 840 (1982) (arguing case was wrongly decided based on case law concerning prior restraint and should be reconsidered at first opportunity); Diane F. Orentlicher, Comment, *Snepp v. United States*: The CIA Secrecy Agreement and the First Amendment, 81 Colum. L. Rev. 662, 706 (1981) (arguing decision goes against precedent in two particular areas: prior restraint and government restrictions of public employees' speech).

82. See, e.g., Comm. on Fed. Legislation, The Response to *Snepp v. United States*: A Proposal for the 97th Congress, 36 Rec. Ass'n B. City N.Y. 299, 299 (1981) (urging legislature to act to guarantee more robust First Amendment protections for employees of national-security organizations).

83. President Ronald Reagan, National Security Decision Directive No. 84, Safeguarding National Security Information 1 (Mar. 11, 1983), available at http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDDS/NSDD84.pdf (on file with the *Columbia Law Review*). The directive also emphasized an increase in the use of polygraph technology. Id. at 2–3.

84. See Louis Fisher, Congressional–Executive Struggles over Information: Secrecy Pledges, 42 Admin. L. Rev. 89, 92–94 (1990) (describing hearings held by Senate Committee on Governmental Affairs over constitutionality of directive, during which several senators expressed disapproval).

85. U.S. Gov't Accountability Office, No. GAO/NSIAD-91-106FS, Information Security: Federal Agency Use of Nondisclosure Agreements 10 (1991), available at http://www.gao.gov/assets/90/89057.pdf (on file with the *Columbia Law Review*).

86. U.S. Gov't Accountability Office, No. GAO/T-NSIAD-88-44, Classified Information Nondisclosure Agreements: Statement of Louis J. Rodrigues, Associate Director, National Security and International Affairs Division, Before the Subcommittee on Legislation and International Security, Committee on Government Operations, United States House of Representatives 3 (1988), available at http://www.gao.gov/assets/110/102256.pdf (on file with the *Columbia Law Review*).

87. See Office of the Dir. of Nat'l Intelligence, Intelligence Community Directive No. 703, Protection of Classified National Intelligence, Including Sensitive Compartmented Information 2 (June 21, 2012) [hereinafter IC Directive 703], available at http://fas.org/irp/dni/icd/icd-703.pdf (on file with the *Columbia Law Review*) (defining sensitive

between Congress and the executive[88]—as well as several lawsuits by executive-branch employees[89]—nondisclosure forms mandating prepublication review were still being utilized at the end of the Reagan Administration.[90] Thus, despite the initial public outcry over the proposal to expand the applicability of prepublication review,[91] such agreements became the norm for federal employees with access to sensitive information and have remained so.[92]

This Note does not question the constitutionality of such forms. Instead, it assesses the review process as actually practiced by IC agencies. It compares the policies and practices of all IC agencies, but focuses primarily on the CIA because it appears to be both the source of the highest number of controversies surrounding prepublication review[93] and—perhaps as a result—the agency with the most information publicly available about its review practices.

II. PREPUBLICATION REVIEW IN PRACTICE

Despite the apparent need for cohesive executive-branch policy, IC agencies are granted wide discretion in formulating their own prepublication-review practices. Part II explores the prepublication-

compartmented information as "subset of [classified information] concerning or derived from intelligence sources, methods or analytical processes").

88. See Fisher, supra note 84, at 92 (outlining disagreements between Congress and executive branch over expanded use of mandatory nondisclosure forms).

89. See Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153, 161 (1989) (per curiam) (reversing lower court's expansive ruling on power of executive and instructing it to exercise restraint); Nat'l Fed'n of Fed. Emps. v. United States, 695 F. Supp. 1196, 1202–03 (D.D.C. 1988) (finding term "classifiable," used in nondisclosure forms, to be insufficiently narrow to survive constitutional scrutiny); Nat'l Fed'n of Fed. Emps. v. United States, 688 F. Supp. 671, 676 (D.D.C. 1988) (addressing plaintiffs' objections to language contained in SF 189, SF 4193, and related forms).

90. Employees were still required to sign such nondisclosure agreements to gain access to SCI. See supra note 86 and accompanying text (explaining NSDD-84 still required employees to sign a nondisclosure agreement to access SCI).

91. Public outrage seems to have subsided rather quickly. See Donna A. Demac, Hearts and Minds Revisited: The Information Policies of the Reagan Administration, *in* Vincent Mosco & Janet Wasko, The Political Economy of Information 125, 129 (1988) ("If the administration anticipated that a population accustomed to news as entertainment and sensation would quickly grow bored with prepublication review . . . it was correct. The storm over NSDD 84 gave way to the eerie quiet surrounding government moves to [enforce its policies].").

92. See, e.g., DIA Employment Conditions, supra note 4 (requiring employees to sign agreement "not to disclose, in any fashion, classified information to unauthorized persons," which also authorizes "Agency pre-publication review of certain material prior to disclosure during and after employment with the DIA").

93. Although no single source has compiled comprehensive statistics on prepublication-review controversies among executive-branch agencies, an extensive review of relevant materials revealed that the majority of disputes that reach the courts or are covered by news outlets involve disagreement with the CIA. See infra Part II.C (discussing problematic practices of prepublication review).

review policies of IC agencies. Part II.A discusses the lack of executive-branch-wide guidance on review policies. Part II.B looks at the official policies of IC agencies, with II.B.1 focusing on the CIA, II.B.2 on the Department of Defense (DoD), and II.B.3 on other IC agencies. Part II.C looks at the actual implementation of these policies and illuminates potential issues. Part II.C.1 discusses the risk of opportunistic post hoc classification decisions. Part II.C.2 argues that the experiences of authors suggest agencies practice selective enforcement of their review policies. Finally, Part II.C.3 explores the risk of intimidation and delay tactics.

A. *The Lack of Executive-Branch-Wide Policies*

There is no explicit statutory authority for prepublication review,[94] and, more surprisingly, there is no executive-branch-wide policy governing prepublication review. Executive Order 13,526 ("Classified National Security Information") requires that a nondisclosure agreement be signed before access to classified information is granted[95] but otherwise does little more than parrot the language of the National Security Act of 1947.[96] The regulation implementing Executive Order 13,526 does require agencies to utilize a particular nondisclosure form: Standard Form (SF) 312.[97] SF 312 itself does not mandate prepublication review;[98] it only requires that the signatory not disclose classified information to unauthorized recipients.[99] Thus, access to classified information does not automatically trigger a prepublication-review obligation. In reality, however, most IC agencies have internal policies that, at the very least, require *current* employees to submit any proposed works for prepublication review.[100] Many agencies require *lifetime* prepublication review as a

94. See supra notes 42–46 and accompanying text (discussing basis for prepublication review).

95. Exec. Order No. 13,526, 3 C.F.R. 298, 314 (2010).

96. Compare id. at 723 (granting primary implementation authority to ISOO, but providing ODNI with authority, after consultation with heads of affected agencies and Director of ISOO, to issue guidance directives with respect to protection of intelligence sources, methods, and activities), with National Security Act of 1947, 50 U.S.C. § 403(i)(1) (2012) ("The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.").

97. See 32 C.F.R. § 2001.80(d)(2) (2014) (describing requirements of SF 312). Agencies may seek a waiver from ODNI to utilize a different form. Id. § 2001.80(d)(2)(viii).

98. See Info. Sec. Oversight Office, Classified Information Nondisclosure Agreement (Standard Form 312) Briefing Booklet 73 (Spring 2001 reprt.), available at http://www.wrc.noaa.gov/wrso/forms/standard-form-312_booklet.pdf (on file with the *Columbia Law Review*) ("There is no explicit or implicit prepublication review requirement in the SF 312 . . . .").

99. See Standard Form No. 312, supra note 8 (requiring signatory to agree not to divulge classified information unless signatory has "officially verified that the recipient has been properly authorized by the United States Government to receive it" or has obtained waiver).

100. See infra Part II.B (describing prepublication-review policies of IC agencies).

condition of employment.[101] Other agencies have no such conditions, but require employees to sign additional nondisclosure agreements—usually as a precondition to accessing SCI—that *do* incur lifetime prepublication-review obligations.[102] Thus, even where an agency does not categorically require prepublication review, employees may incur a lifetime obligation.

For this reason, agencies have discretion in determining which types of employees incur prepublication-review obligations, but their discretion does not end there: Because there is no executive-branch-wide policy outlining what prepublication review should entail, individual agencies determine the scope of prepublication review.[103] Two offices—the Information Security Oversight Office (ISOO) and the Office of the Director of National Intelligence (ODNI)—seemingly possess the authority to promulgate guidance but, as discussed next, have not done so.

ISOO—established in 1978 as a component of the National Archives and Records Administration—is the primary body that oversees the classification system.[104] Its mission is to "support the President by ensuring that the Government protects and provides proper access to information to advance the national and public interest" and to "lead efforts to standardize and assess the management of classified and controlled unclassified information through oversight, policy development, guidance, education, and reporting."[105] None of its guidance on implementing Executive Order 13,526 addresses prepublication review.[106]

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101. The CIA, DIA, and NSA do so. See CIA, Agency Prepublication Review of Certain Material Prepared for Public Dissemination (May 30, 2007) [hereinafter 2007 CIA Policy], available at https://www.fas.org/irp/cia/prb2007.pdf (on file with the *Columbia Law Review*) (establishing procedures for CIA prepublication review); DIA Employment Conditions, supra note 4 (requiring employees to sign agreement authorizing prepublication review); NSA, Statement of Conditions of Employment (June 2009), available at https://www.nsa.gov/careers/_files/P2771.pdf (on file with the *Columbia Law Review*) (same).

102. See Form 4414, Sensitive Compartmented Information Nondisclosure Agreement (Dec. 2013), http://www.ncix.gov/SEA/docs/FORM_4414_Rev_12_2013.pdf (on file with the *Columbia Law Review*) (requiring, in exchange for access to SCI, prepublication review of "any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI"). ODNI is currently in the process of updating IC Form 4414. Info. Sec. Oversight Office, ISOO Notice 2013-05: Revision of the Standard Form (SF) 312, "Classified Information Nondisclosure Agreement" 2 (Aug. 19, 2013), available at http://www.archives.gov/isoo/notices/notice-2013-05.pdf (on file with the *Columbia Law Review*).

103. See infra Part II.B (discussing disparate agency policies).

104. Elizabeth Goitein & David M. Shapiro, Brennan Ctr. for Justice, Reducing Overclassification Through Accountability 19 (2011), available at http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf (on file with the *Columbia Law Review*).

105. 2013 ISOO Report, supra note 19, at i.

106. See 32 C.F.R § 2001 (2014) (laying out review standards for agency classification, declassification, and safeguarding of national-security information).

Following the recommendations of the 9/11 Commission Report,[107] Congress created ODNI to unify and act as the head of the IC.[108] Many of the responsibilities previously delegated to the Director of Central Intelligence were transferred to ODNI, including the mandate "to protect intelligence sources and methods from unauthorized disclosure."[109] None of the publicly available implementing directives of ODNI provide executive-branch-wide guidance on prepublication review. Beyond requiring the heads of the IC elements to ensure that all employees have signed a nondisclosure agreement and are "advised of [their] legal and administrative obligations and the ramifications of a failure to meet those obligations,"[110] an ODNI directive addressing the protection of national-security information says nothing about prepublication review. Another directive on the protection of classified information is similarly silent.[111] The only policy document addressing prepublication review is an ODNI Instruction that applies only to employees who work directly for ODNI or are detailed there.[112] The lack of executive-branch-wide guidance leaves individual agencies responsible for developing their own policies. The following sections will analyze, to the extent possible, the review policies of IC agencies.

B. *Official IC Prepublication Policies*

1. *The CIA.* — The Publications Review Board (PRB) is responsible for the CIA's prepublication review of current and former employees' proposed publications.[113] Unlike those of some agencies, the CIA's review

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107. Nat'l Comm'n on Terrorist Attacks upon the U.S., The 9/11 Commission Report 411 (2004), available at www.9-11commission.gov/report/911Report.pdf (on file with the *Columbia Law Review*).

108. Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458, sec. 1011, § 102A(i), 118 Stat. 3638, 3651.

109. 50 U.S.C. § 403(i)(1) (2012); see also supra note 43 and accompanying text (explaining transfer of authority).

110. Office of the Dir. of Nat'l Intelligence, Intelligence Community Directive No. 700, Protection of National Intelligence 3 (June 7, 2012), available at http://www.dni.gov/files/documents/ICD/ICD_700.pdf (on file with the *Columbia Law Review*).

111. See IC Directive 703, supra note 87 (addressing classification issues specific to SCI but not mentioning prepublication review).

112. See Office of the Dir. of Nat'l Intelligence, Instruction 80.04: ODNI Pre-Publication Review of Information to Be Publicly Released 1 (Apr. 8, 2014) [hereinafter ODNI, Instruction 80.04], available at http://www.dni.gov/files/documents/CIO/Instr.%2080.04%20%20Pre-Publication%20Review%20of%20Information%20to%20be%20Publicly%20Relea.pdf (on file with the *Columbia Law Review*) (addressing scope of applicability).

113. See John Hollister Hedley, Reviewing the Work of CIA Authors: Secrets, Free Speech, and Fig Leaves, Stud. Intelligence, Spring 1998, at 75, 75, available at https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol41no5/pdf/v41i5a04p.pdf (on file with the *Columbia Law Review*) (explaining role of PRB in prepublication review for CIA).

policies are not publicly available.[114] The most recent PRB regulation accessible is a heavily redacted version dated May 30, 2007, and marked as approved for release in January 2008.[115] The regulations were updated in 2011[116] but have not been publicly released. Despite the lack of official policy documents, the CIA's frequent involvement in litigation over prepublication-review decisions and the apparent willingness of former PRB officials to describe the process means there is a surprising abundance of documents that may provide more insight into actual review policies than do the official policy documents of other agencies.

The PRB was created in 1976 but has been around in its current form only since 2007, when the CIA approved the creation of a full-time, fully staffed board.[117] This was in response to a large increase in the number of submissions—from 1980 to 2003, the Board reviewed between 200 and 400 manuscripts per year, while in 2010 the Board received over 1,800 and was anticipating more than 2,500 submissions for 2011.[118] The Board consists of a Chair and an Executive Secretary, designated by and reporting directly to the Chief of Information Management Services.[119] The rest of the Board is composed of senior representatives from each of the directorates, including those offices under the Office of the Director.[120] The Office of General Counsel (OGC) provides a nonvoting legal advisor.[121] Any decision to "deny-in-full" a manuscript for publication requires a majority vote of the Board,[122] which seems to suggest that no single directorate has disproportionate influence over the Board's decisions. The decision of the PRB to deny a manuscript in full or in part may be appealed. The author may submit additional materials and request reconsideration by the Board; if that request is denied, the author may appeal to the Associate Deputy Director of the CIA

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114. For example, the NSA's policies on prepublication review are available on its website. NSA, NSA/CSS Policy 1-30: Review of NSA/CSS Information Intended for Public Release (May 10, 2013) [hereinafter NSA Policy], available at http://www.nsa.gov/public_info/_files/nsacss_policies/Policy_1-30.pdf (on file with the *Columbia Law Review*).

115. 2007 CIA Policy, supra note 101.

116. See CIA Prepublication Review in the Information Age, Stud. Intelligence, Sept. 2011, at 9, 9–11, available at http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB431/docs/intell_ebb_018.PDF (on file with the *Columbia Law Review*) (attempting to correct misconception of regulations released in June 2011 as "strictest version yet").

117. Id.

118. Id. at 11. The author speculates that this sudden rise is due to a confluence of factors, including the proliferation of new publishing platforms, the introduction of new agency policies encouraging employees to broaden their perspectives through outside contacts, and the public's increasing interest in intelligence. Id.

119. 2007 CIA Policy, supra note 101, at sec. 2(c)(1).

120. Id. For an organizational chart of CIA leadership, see CIA Organization Chart, CIA, https://www.cia.gov/about-cia/leadership/ciaorgchart.jpg/image.jpg (on file with the *Columbia Law Review*) (last updated Feb. 18, 2014, 12:42 PM).

121. 2007 CIA Policy, supra note 101, at sec. 2(c)(1).

122. CIA Prepublication Review in the Information Age, supra note 116, at 15–16.

(ADD/CIA) within thirty days.[123] The decision of the ADD/CIA, who considers a recommendation from the OGC, is final.[124]

The CIA requires submission of all "intelligence-related materials intended for publication or public dissemination," explicitly excluding from its purview material "unrelated to intelligence, foreign relations, or CIA employment or contract matters."[125] It distinguishes between official and unofficial publications. Unofficial publications refer to works written by an employee who has signed "a CIA secrecy agreement" and who has prepared the work as a private individual and not in any official capacity.[126] Official publications are defined as works intended to be unclassified and prepared as part of the employee's official duties.[127]

In addition to the distinction between official and unofficial works, the CIA takes a bifurcated approach to review by treating current and former employees differently. Until July 2005, the PRB only reviewed publications by *former* employees; current employees had their works reviewed by their immediate supervisors.[128] The PRB now reviews works by both but applies different standards. Publications by former employees are reviewed "*solely* to determine whether it contains any classified information."[129] In contrast, the PRB is authorized to consider additional factors when reviewing the work of *current* employees. It may deny publication of information that could "reasonably be expected to impair the author's performance of his or her job duties; interfere with the authorized functions of the CIA, or; have an adverse effect on the foreign relations or security of the U.S."[130] Furthermore, the employee must obtain her immediate supervisor's concurrence (or, in the case of contractors, the contracting officer's concurrence) that the material is appropriate for publication.[131]

The CIA clearly states that it considers additional factors in reviewing a current employee's proposed publication.[132] But it seems to insist,

123. 2007 CIA Policy, supra note 101, at sec. 2(h)(1).

124. Id.

125. Id. at sec. 2(b)(1), (3).

126. Id. at sec. 2(b)(6). Accordingly, *both* current and former employees can author an unofficial publication.

127. Id. at sec. 2(b)(7). Accordingly, *only* current employees can author an official publication.

128. CIA Prepublication Review in the Information Age, supra note 116, at 10. But the PRB could take on review of a current employee's manuscript at the request of the employee's supervisors. Hedley, supra note 113, at 79.

129. 2007 CIA Policy, supra note 101, at sec. 2 (f)(2) (emphasis added).

130. Id. at sec. 2(g)(2).

131. Id. at sec. 2(g)(4)(a).

132. A recent example illuminates the importance of this distinction. Bridget Nolan was a graduate fellow for the CIA and sought to publish a dissertation based on her experiences there. She submitted a draft proposal to the PRB, and, despite her insistence that it contained no classified information, the draft proposal was rejected because it was deemed "inappropriate" for a current employee. Her dissertation was approved with

both in PRB policy documents and by implication in individual cases, that the works of former employees are reviewed solely for classified information.[133] The opinions of former employees who have gone through the prepublication-review process, as well as those of PRB officials themselves, suggest otherwise. They indicate the process is not based on such a simple, bright-line search for classified information but rather on an amalgam of varying factors that leads to inconsistent treatment and leaves open the possibility for abuse.[134]

2. *Department of Defense Agencies.* — Eight of the sixteen IC agencies fall under DoD, making it the largest presence in the IC.[135] DoD issues prepublication-review guidance applicable to all of these agencies.[136] Similar to CIA policy, it distinguishes between official and unofficial publications, requiring review of official publications in all cases and of unofficial publications when criteria outlined in a separate implementing instruction are met.[137] It also distinguishes between current and former employees,[138] but the scope of review does not seem to differ—the directive simply states, "[P]ublic release of official DoD information is limited only as necessary to safeguard information requiring protection in the interest of national security or other legitimate government inter-

"miniscule" changes after she resigned. Susan Snyder, Covering the Undercovers, Phila. Inquirer (Aug. 20, 2013), http://articles.philly.com/2013-08-20/news/41425761_1_cia-national-counterterrorism-center-sociology (on file with the *Columbia Law Review*).

133. See id. (describing employee's experiences and quoting CIA spokesman as saying current and former employees are subject to different rules); see also 2007 CIA Policy, supra note 101, at sec. 2(f)(2) (explaining work by former employee is to be reviewed "solely to determine whether it contains any classified information").

134. See infra Part II.C.2 (discussing authors' experiences with prepublication-review process).

135. See Members of the IC, Office of the Dir. of Nat'l Intelligence, http://www.dni.gov/index.php/intelligence-community/members-of-the-ic (on file with the *Columbia Law Review*) (last visited Oct. 18, 2014) (outlining IC membership).

136. Dep't of Def., DoD Directive No. 5230.09: Clearance of DoD Information for Public Release 1 (Aug. 22, 2008) [hereinafter DoD Directive], available at http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf (on file with the *Columbia Law Review*). In addition to the intelligence agencies of each military branch, the NSA, the National Geospatial-Intelligence Agency (NGA), the National Reconnaissance Office (NRO), and the DIA are components of DoD. See Dep't of Def., Organization of the Department of Defense (DoD) (Mar. 2012), available at http://odam.defense.gov/Portals/43/Documents/Functions/Organizational%20Portfolios/Organizations%20and%20Functions%20Guidebook/DoD_Organization_March_2012.pdf (on file with the *Columbia Law Review*) (providing organizational chart of DoD).

137. DoD Directive, supra note 136, at 2. For criteria requiring submission of unofficial works, see Dep't of Def., DoD Instruction Number 5230.29: Security and Policy Review of DoD Information for Public Release 6 (Aug. 13, 2014) [hereinafter DoD Instruction], available at http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf (on file with the *Columbia Law Review*) (requiring submission where information, inter alia, "[i]s or has the potential to become an item of national or international interest" or "[a]ffects national security policy, foreign relations, or ongoing negotiations").

138. DoD Directive, supra note 136, at 2 (requiring "[r]etired personnel, former DoD employees, and non-active duty members of the Reserve Components" to submit works).

est."[139] The Washington Headquarters Service is responsible for the system of review,[140] and within it, the Office of Security Review (OSR) conducts the actual review.[141]

In addition to these generally applicable directives and instructions, each DoD agency may promulgate its own policy. The NSA's prepublication-review policy[142]—which is publicly available—requires both current and former employees to submit their materials to a "Prepublication Review Authority" (PRA).[143] The distinctions between current and former employees and between official and unofficial works seem to mirror those of the CIA—official publications are checked for conformity to "NSA/CSS corporate messaging standards."[144] But unlike CIA employees, current NSA employees must obtain initial review before submission to the PRA—a Staff Security Officer must assess the potential operational-security threat from disclosing one's affiliation with NSA, and a local Classification Advisory Officer (CAO) makes an initial determination on whether the manuscript contains any classified information.[145] The policy says the PRA "will issue, as practicable, a final determination . . . within 25 business days of receipt"[146] but says nothing about the timeline for initial review by CAOs, creating the potential for delay. An employee may appeal the PRA's decision to the Associate Director for Public Relations, who may consult with the OGC and/or the "information owners" before making its final decision, which cannot be further appealed.[147]

The Defense Intelligence Agency's (DIA) basic approach is the same as those of the CIA and DoD at large.[148] The DIA does not publish its

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139. Id. at 2. A DoD FAQ on prepublication review states review is necessary "to ensure information damaging to the national security is not inadvertently disclosed." Dep't of Def., Frequently Asked Questions for Department of Defense Security and Policy Reviews 1, http://www.dtic.mil/whs/esd/osr/docs/OUSD%28I%29Pre-PubPamphletFAQs%282012%29.pdf (on file with the *Columbia Law Review*) (last visited Oct. 31, 2014).

140. DoD Instruction, supra note 137, at 4.

141. See Defense Office of Prepublication and Security Review, Wash. Headquarters Servs., http://www.dtic.mil/whs/esd/osr/ (on file with the *Columbia Law Review*) (last visited Oct. 18, 2014) ("The Office of Security Review conducts the security and policy review for clearance of official Department of Defense (DoD) information proposed for official public release by the DoD and its employees (military and civilian).").

142. The NSA is a component of DoD. See Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,946–47 (Dec. 4, 1981) (requiring Secretary of Defense to "[d]irect, operate, control and provide fiscal management for the National Security Agency").

143. NSA Policy, supra note 114, at 7 (establishing responsibilities for both current and former affiliates of NSA).

144. Id. at 4.

145. Id.

146. Id. at 5.

147. Id. at 6.

148. Both former and current employees are required to submit manuscripts, and official and unofficial publications are treated differently. See Def. Intelligence Agency, Instruction: Prepublication Review of Information Prepared for Public Release 7 (Aug. 18,

prepublication-review policies, but a 2006 version was made available through a FOIA request. The organizations responsible for each step of review are withheld under applicable FOIA exemptions, but the general process can be discerned from the document. To ensure adequate review, the primary office responsible for review coordinates with DoD's OSR, other IC elements with a stake in the information, and DIA elements with subject-matter expertise.[149]

3. *Other Agencies.* — Employees of ODNI[150]—which oversees the IC—are also subject to mandatory review.[151] With the exception of the State Department, the remaining IC agencies do not require prepublication review as a condition of employment—as discussed next, such an obligation arises only upon signing a nondisclosure agreement mandating it.

The State Department's Foreign Affairs Manual requires both current and former employees to submit their materials to either the "Bureau of Public Affairs [or the] Chief of Mission," depending upon the employee's location,[152] if such materials touch upon matters of "official concern," which appears to be defined quite broadly[153] but has been upheld by courts.[154] The review of works by *former* employees is described as "limited" and is conducted "in accordance with applicable post-employment regulations and agreements."[155] Interestingly, the regulation states that the duration of review is "not to exceed thirty days,"[156] creating a regulatory timeline that is more categorical than the regulations of other agencies[157] and that, if followed, may make it less likely that delay can be used to dissuade publication.[158]

2006) [hereinafter DIA Policy], available at http://www.dia.mil/Portals/27/Documents/FOIA/5%20USC%20%C2%A7%20552(A)(2)(C)%20Records/PREPUBLICATION%20REVIEW%20OF%20INFORMATION%20PREPARED%20FOR%20PUBLIC%20REL.pdf (on file with the *Columbia Law Review*) (outlining policy for nonofficial publications).

149. See id. at 3–4 (outlining responsibilities of redacted office).

150. See supra notes 107–109 and accompanying text (explaining ODNI's creation).

151. See ODNI, Instruction 80.04, supra note 112, at 1 (defining scope of applicability).

152. Dep't of State, 3 FAM 4170: Official Clearance of Speaking, Writing, and Teaching 3 (June 9, 2009) [hereinafter State Policy], available at http://www.state.gov/documents/organization/85123.pdf (on file with the *Columbia Law Review*).

153. See id. ("Materials are on matters of official concern if they relate to *any* policy, program, or operation of the employee's agency or to current U.S. foreign policies, or reasonably may be expected to affect the foreign relations of the United States." (emphasis added)).

154. See, e.g., Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1431–32 (D.C. Cir. 1996) (noting and accepting broad definition of "official concern").

155. State Policy, supra note 152, at 4.

156. Id. at 5.

157. Most other agencies add qualifying language to make the deadline less absolute. See, e.g., 2007 CIA Policy, supra note 101, at sec. 2(d)(4) ("Lengthy or complex submissions may require a longer period of time for review . . . ."); DoD Instruction, supra note 137, at 8 ("More time may be needed if . . . the material is complex or requires review

The FBI and the Drug Enforcement Agency (DEA) are, as Justice Department entities, governed by the same policy. Under it, prepublication review is required only to the extent it is expressly provided for in nondisclosure agreements; the "nature and the extent of material" that must be submitted for review is also determined by such agreements.[159] The FBI has a Prepublication Review Office, which reviews the submitted work and determines whether "further review is required and by whom."[160]

Other agencies similarly require prepublication review only upon signing nondisclosure forms requiring it. The Department of Homeland Security (DHS) has issued one directive addressing prepublication review, but it merely says that an employee must sign a particular form to gain access to SCI[161] and that doing so incurs a lifetime obligation.[162] It is thus unclear whether DHS requires even current employees to submit proposed publications for prepublication review—though it is likely, as most other IC agencies, including the CIA and DoD, do so.[163] The Department of Energy, for example, provides little insight into its prepublication-review policies but does explicitly require current employees with access to Restricted Data (RD) or Formerly Restricted Data (FRD) to submit to review.[164] The Treasury Department's Office of Terrorism and Financial Intelligence (TFI), however, lacks even that—the most relevant provision of the Code of Federal Regulations, part 2 ("National Security Information") of title 31 ("Money and Finance: Treasury"), is silent on the topic of prepublication review[165]—and none

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by agencies outside of the DoD."); NSA Policy, supra note 114, at 6 (requiring, "as practicable," return of decision within twenty-five days).

158. See infra Part II.C.2–3 (alleging undue delay as agency tactic to prevent publication).

159. 28 C.F.R. § 17.18(c)–(d) (2014).

160. Prepublication Review Office, FBI, http://www.fbi.gov/foia/prepublication-review-office (on file with the *Columbia Law Review*) (last visited Oct. 18, 2014).

161. See Dep't of Homeland Sec., Management Directive No. 11043: Sensitive Compartmented Information Program Management 8 (Sept. 17, 2004), available at https://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_11043_sensitive_compartmented_information_program_management.pdf (on file with the *Columbia Law Review*) ("As a condition of access to SCI, individuals must sign a DCI-authorized SCI Nondisclosure Agreement (NdA) (Form 4414), which includes a provision for prepublication review.").

162. See id. at 9 ("Persons who are currently, *or were previously*, employed by DHS and indoctrinated for SCI access, will submit proposed articles and publications for prepublication review." (emphasis added)).

163. See supra Part II.B.1–2 (discussing agency requirements for current employees of CIA and DoD).

164. 10 C.F.R. § 1045.44 (2014) ("Any person *with authorized access* to RD or FRD who generates a document intended for public release in an RD or FRD subject area shall ensure that it is reviewed for classification . . . ." (emphasis added)).

165. See 31 C.F.R. pt. 2 (2014) (providing guidance for mandatory declassification review and granting historical researchers and former officials access to classified information).

of the orders or directives issued by the department cover the topic of prepublication review (or even nondisclosure agreements).[166] The introduction to a memoir written by a former Treasury Department special agent suggests, however, that *some* form of prepublication-review policy exists for former employees.[167]

Thus, while the CIA, NSA, DIA, and ODNI require lifetime prepublication review as a condition of employment, other agencies appear to rely on various nondisclosure agreements, the conditions of which may or may not require prepublication review after separation from the agency.

C. *Issues and Problematic Patterns with Prepublication Review*

1. *Broad Discretion May Permit Opportunistic Post Hoc Classification Decisions.* — The lack of executive-branch-wide guidance allows agencies to develop not just their own official policies but also their own uncodified practices. Such discretion may lead agencies to exercise prepublication review in an inconsistent and even opportunistic manner, particularly with respect to former employees.

The experiences and opinions of CIA PRB officials fill in the interstices left by broadly worded (and heavily redacted) policy documents and highlight the scope of discretion granted to agencies. In a piece published in *Studies in Intelligence*, an internal magazine for the IC,[168] John Hollister Hedley discussed the purpose of prepublication review and his role as Chairman of PRB at the time.[169] It is important to note that this piece was published in 1998, well before the reforms that took place in 2007 and during a time when the PRB was reviewing only the works of former employees.[170] Hedley begins by asserting that the "*sole purpose* of prepublication review is to assist authors in avoiding inadvertent disclosure of classified information which, if disclosed, would be damaging to national security—just that and nothing more."[171] Hedley acknowledges that, "[n]otwithstanding a firm commitment to fairness and evenhandedness and with every intention of applying standard uniformly," the

166. See About: Treasury Orders and Directives, U.S. Dep't of Treasury, http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/default.aspx (on file with the *Columbia Law Review*) (last updated Sept. 15, 2013, 6:41 PM) (providing catalogue of all Treasury orders and directives).

167. See John A. Cassara, Hide & Seek: Intelligence, Law Enforcement, and the Stalled War on Terrorist Finance, at xiv (2006) ("Portions of this book were subject to prepublication review and edited by the CIA, Department of State, and the U.S. Secret Service. Postemployment publication policies by the Department of Homeland Security and the *Department of Treasury* were also followed." (emphasis added)).

168. The publication is classified, but unclassified extracts are available. See Center for the Study of Intelligence, CIA, https://www.cia.gov/library/center-for-the-study-of-intelligence (on file with the *Columbia Law Review*) (last updated July 17, 2014, 4:06 PM).

169. Hedley, supra note 113.

170. See supra Part II.B.1 (discussing past PRB practices).

171. Hedley, supra note 113, at 75.

Board's definitions of "damage" and of "national security" are "neither absolute nor constant."[172] He continues:

> The important thing is for us to be reasonable and professional about what we protect. It does not take a genius to know what information requires a hard look: for example, in an age of terrorism and for privacy act considerations, we have to protect identities not already in the public domain. Also taboo—because they impact adversely on our ability to conduct our business, most of it necessarily in secret—are cover arrangements, liaison relationships, covert facilities, and unique collection and analytic capabilities. These constitute the sources and methods that truly need protection . . . . In prepublication reviews, we have to show we know the difference between what truly is sensitive and what is not.[173]

While this provides insight into some factors the PRB might consider when reviewing a manuscript, it also seems problematic in light of assertions by Hedley—and official policy—that the work of former employees should *only* be reviewed for *already* classified (as opposed to "classifiable") material. His insistence that the PRB demonstrates it knows "the difference between what truly is sensitive and what is not" implies that the Board is not looking at whether the information has been classified, but whether it *should now* be.

A more recent piece in *Studies in Intelligence*, originally published in September 2011 and declassified in April 2013, gives an even more candid account of the review process and hints at the updated PRB regulations of 2011.[174] The author (whose name is redacted) is the Directorate of Intelligence's representative to the PRB and appears to have been there since 2007.[175] The author begins with an analogy used throughout the piece: The Board is to PRB regulations as Supreme Court Justices are to the Constitution.[176] Just as the Supreme Court "has interpreted the Constitution in a variety of different rulings, often modifying the rulings of previous justices" based on the "prevailing philosophy of the justices," the Board members interpret the PRB regulations "with the Agency's directors acting as a chief justice in setting the tone of interpretation."[177] The author then explains, as an example, that under Director Porter Goss, the Board "tended to interpret the instruction to err on the side of allowing very little to be published by CIA authors," while more recent directors, including George Tenet, Michael Hayden, and Leon Panetta,

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172. Id. at 79.

173. Id. at 82–83.

174. See supra note 116 and accompanying text (explaining unavailability of CIA's 2011 policies).

175. See CIA Prepublication Review in the Information Age, supra note 116, at 9 (describing "[author's] current stint as the first senior representative of the Directorate of Intelligence" to PRB as sufficient to make previous roles seem "quaintly bucolic").

176. Id. at 11.

177. Id.

"clearly favored a far looser interpretation to facilitate the publication of a significantly larger number of manuscripts."[178]

The PRB has taken this analogy a step further and established "case law precedents" in at least two contexts: fictional works and works written solely to fulfill an academic requirement.[179] For fictional works, the PRB has developed "the James Bond literary genre test," which applies a more lenient standard to manuscripts that fall under the "spy novel" genre while reserving the right of the Board to categorize the manuscript as nonfiction (and review it accordingly) should it determine that "the tradecraft, operational details, or technology presented is very close to reality."[180] For academic papers, the PRB distinguishes seminar and classroom-related papers from publishable theses and dissertations; the former is "likely to receive PRB approval with the proviso that attempts to publish it in any other forum would require a separate PRB review."[181] Notwithstanding such "case law precedents," the author indicates that the updated 2011 PRB regulations leave the Board free to deviate from any previous decisions and evaluate each submission on a case-by-case basis, considering "such things as the currency of the subject matter and its relationship to a topic of public concern."[182]

This quasi–case law approach may appear benign, particularly if one believes that IC agencies, in light of their expertise, should be given some deference in their interpretation of what will constitute damage to national security. Since IC agencies, like any government organization, have an interest in exercising control over their official messages, it is reasonable to defer to the agency itself in determining the potential adverse effects of disclosure by *current* employees.[183] In terms of publications by *former* employees, however, the review—in light of the First Amendment interests at stake—is meant to be less demanding and limited to scrutiny for classified information.[184] But the statements of CIA officials involved in prepublication review seem to indicate that much more is involved.[185] In their statements, it is often unclear whether they

178. Id. Porter Goss's emphasis on tightening scrutiny has been reported widely. See, e.g., Scott Shane & Mark Mazzetti, Moves Signal Tighter Secrecy Within C.I.A., N.Y. Times (Apr. 24, 2006), http://www.nytimes.com/2006/04/24/washington/24leak.html?pagewanted=print (on file with the *Columbia Law Review*) (quoting various named and unnamed employees agreeing prepublication-review enforcement was noticeably stricter under new director).

179. CIA Prepublication Review in the Information Age, supra note 116, at 17.

180. Id.

181. Id.

182. Id.

183. See supra note 130 and accompanying text (discussing CIA policies for current employees).

184. See supra notes 64–65 and accompanying text (analyzing relevant case law).

185. In addition to the statements above, see also Declaration of Ralph S. Dimaio, Information Review Officer, National Clandestine Service, Central Intelligence Agency at 10, Boening v. CIA, 579 F. Supp. 2d 166 (D.D.C. 2008) (No. 1:07CV00430 (EGS)),

are commenting on the review process for current or former employees, and this blurring seems to creep into the actual implementation of the review process.[186]

It is also clear that the preference of the director—a political appointee—has a discernible impact on the nature of review. Such influence is reflected strongly in the case of T.J. Waters, who sought to publish a memoir based on his experiences as part of the first class of CIA recruits after 9/11.[187] After receiving approval with minimal changes,[188] he sold the approved portions of the manuscript to a publisher and worked with the PRB to address the remaining areas.[189] After several months, the PRB returned with deletions that included "substantial portions of previously approved text that had undergone PRB/CIA review and had been determined to be unclassified."[190] In his suit, Waters argued that this sudden reversal was due to the recent appointment of a new director, Porter Goss,[191] whose desire to reinstate a stricter culture of secrecy has been widely reported.[192] There is a broader debate within administrative law about the role of politics in agency rulemaking,[193] and some may argue that it is only natural that a new director means new policy. But such an argument overlooks the First Amendment interests involved and ignores relevant court decisions, which say that review should be limited to scrutiny for classified information.[194]

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available at http://fas.org/sgp/jud/boening/cia-dimaio.pdf (on file with the *Columbia Law Review*) (opining review for classified material is "more art than science").

186. See infra Part II.C.2 (discussing authors' experiences with actual review process).

187. Memorandum in Support of Plaintiff's Motion for Permanent Injunction or, Alternatively, for Preliminary Injunction at 1–2, Waters v. CIA, No. 06-383 (RBW) (D.D.C. filed Mar. 7, 2006), available at http://fas.org/sgp/jud/waters-pimemo-030706.pdf (on file with the *Columbia Law Review*).

188. Id. at 5 ("Only four words in the entire manuscript were determined to be 'inappropriate for disclosure in the public domain and must be revised or deleted prior to publication.'").

189. Id. at 5–6.

190. Id. at 10.

191. See id. at 11–12 ("This new policy, which emanates from the CIA's Director Porter Goss, is intended to dissuade individuals to publish information, even if unclassified, about their activities with the CIA.").

192. See supra note 178 and accompanying text (describing Goss's emphasis on strict review of publications); see also Shane & Mazzetti, supra note 178 (reporting Goss sought to "re-emphasize a culture of secrecy that has included a marked tightening of the review process for books and articles by former agency employees").

193. See, e.g., Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243, 246 (1987) ("[T]he hypothesis we put forth is that much of administrative law . . . is written for the purpose of helping elected politicians retain control of policymaking."); Peter L. Strauss, Overseer or "The Decider"? The President in Administrative Law, 75 Geo. Wash. L. Rev. 696, 704–05 (2007) (arguing in administrative law, "President's role . . . is that of overseer and not decider").

194. See supra notes 64–65 and accompanying text (discussing Fourth and D.C. Circuits' opinions on scope of review).

Of course, agencies may classify information at any time,[195] but the fact that the CIA is conducting such "second looks" belies its insistence that works by former employees are reviewed *solely* for properly classified information. It is particularly problematic because authors undergoing prepublication review are explicitly excluded from the right to appeal a classification decision to the Interagency Security Classification Appeals Panel (ISCAP),[196] an interagency body that, among other things, considers challenges to classification decisions by authorized holders of the information[197] and has been praised as one of the few truly effective reform efforts.[198] Whatever the rationale in excluding authors from ISCAP review, the effect is to make publication more onerous by depriving authors of one potential avenue of appeal.

Judicial review, which the *Marchetti* court held must be made available to any writer dissatisfied with the results of prepublication review,[199] becomes all the more important under such conditions. If agencies are permitted to conduct a "second look" and classify information post hoc, the risk that they may do so to stifle dissent or prevent embarrassment is considerable. In *McGehee v. Casey*, the D.C. Circuit, in recognition of the "strong first amendment interest" of authors, held that reviewing courts should "conduct a *de novo* review of the classification decision, while giving deference to reasoned and detailed CIA explanations of that classification decision."[200] Importantly, the court declared that review should "go beyond the FOIA standard of review for cases reviewing CIA censorship pursuant to secrecy agreements."[201] Similar to FOIA litigation, however, courts have largely been unwilling to second-guess agencies' classification decisions.[202] Furthermore, the determination of whether information was properly classified is conducted in camera and ex parte, without the participation of the author's counsel,[203] denying authors the

195. See Exec. Order No. 13,526, 3 C.F.R. 298, 303 (2010) (permitting retroactive classification of material responsive to FOIA request).

196. Id. at 303.

197. See id. at 319–21 (establishing ISCAP and outlining its functions).

198. For a discussion of such praise, see infra note 262 and accompanying text.

199. See supra note 67 and accompanying text (discussing *Marchetti* court's requirement of judicial review). The Supreme Court has upheld this idea. See Snepp v. United States, 444 U.S. 507, 513 n.8 (1980) (per curiam) (recognizing review procedure mandated by Snepp's contract is subject to judicial review).

200. McGehee v. Casey, 718 F.2d 1137, 1148 (D.C. Cir. 1983).

201. Id.

202. The *Marchetti* opinion itself, though it predates *McGehee* and comes from a different circuit, reflects this unwillingness. See United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) ("The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.").

203. See Stillman v. CIA, 319 F.3d 546, 548–49 (D.C. Cir. 2003) (holding courts should, before deciding constitutional question of whether author has First Amendment right for his attorney to have access, inspect manuscript and any government pleadings to

adversarial process afforded to other plaintiffs. Therefore, the agencies' ability to classify post hoc, combined with the courts' unwillingness or inability (in light of the ex parte nature of the proceeding) to adequately scrutinize classification decisions, seems to create a considerable risk that agencies may deny publication of information for political or other reasons with only tenuous connections to national security. The experiences of prospective authors, discussed next, appear to confirm this danger.

2. *Experiences of Authors Suggest Discriminatory Enforcement.* — The experiences of authors undergoing prepublication review suggest that review decisions may depend on whether the author is critical or supportive of the agency. It is impossible to inquire into the minds of officials conducting review, and authors who have their works heavily redacted may naturally allege—whether in earnest belief or disingenuously—that some measure of bias was involved. But there is evidence that suggests reviewing officials are looking for more than just classified information. Tellingly, disputes over redactions in a work *favorable* to an agency are almost nonexistent.[204] There have been many memoirs praising the work of IC agencies—some by high-level officials, including former CIA director George Tenet and the former director of the CIA's National Clandestine Service (NCS), Jose A. Rodriguez.[205] But what distinguishes the treatment is not the seniority of the official writing the memoir, but the tone of the work. Indeed, former CIA director Stansfield Turner, who testified that Snepp's book had caused "irreparable harm" to national security,[206] later found himself subject to the very treatment Snepp had complained about—agency feedback Turner characterized as "irresponsible" and disputes over redactions that he described as ranging from "borderline issues to the ridiculous."[207] In an apparent reversal from his position during the Snepp dispute, Turner declared, "Clearly the Reagan administration does not understand that oversight of intelligence in our

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determine whether it can "resolve the classification issue without the assistance of plaintiff's counsel").

204. The only case involving a dispute over a work favorable to an agency—the memoir by T.J. Waters, see supra notes 187–192 and accompanying text (recounting review of memoir by Waters)—occurred during the early stages of Porter Goss's directorship. See Shane & Mazzetti, supra note 178 (quoting Waters's attorney describing book as "very positive" and one Waters thought "would be a great recruiting tool"). Goss was known for his attempts to tighten personnel security generally. Supra notes 178, 191–192 and accompanying text.

205. See infra notes 216–218 and accompanying text (discussing inconsistent levels of review applied to works by high-level officials such as Tenet and Rodriguez).

206. See supra note 78 and accompanying text (referencing Turner's testimony and reliance on it in court).

207. Charles R. Babcock, Spy Agency Infighting Hurt U.S., Turner Says, Wash. Post, May 13, 1985, at A3, available at http://www.maebrussell.com/Stansfield%20Turner/Stansfield%20Turner,%20Agency%20Infighting%20WP%205-13-85.html (on file with the *Columbia Law Review*).

society includes constructive criticisms from constructive outsiders like me."[208]

Even high-level officials who author memoirs that praise the agency and the IC may clash with prepublication-review boards. Former CIA director Leon Panetta recently published a memoir described as "almost unfailingly complimentary" toward the CIA,[209] but nonetheless "clashed with the [PRB] over [its] contents . . . and allowed his publisher to begin editing and making copies of the book before he had received final approval from the CIA.[210] Panetta became so frustrated with the process that he appealed directly to the current CIA director, John Brennan, and "threatened to proceed with publication without clearance from the agency."[211] Such informal appeals to higher-level officials outside of the PRB, combined with the fact that the CIA's final approval came well after review copies were distributed, reeks of precisely the sort of favorable treatment that gives credence to accusations that the prepublication-review system is biased and discriminatory in its enforcement.[212]

Another recent high-profile dispute involved former FBI agent Ali Soufan and the PRB over publication of Soufan's book, *The Black Banners*. In it, Soufan criticizes both the CIA's approach to interrogation of high-profile detainees in the period after 9/11 and its ineptitude prior to 9/11, claiming it withheld information that may have prevented the attacks.[213] Soufan submitted the book for prepublication review to both the FBI and the CIA; it was cleared by the FBI with minor changes, but the CIA demanded extensive cuts.[214] After discussions with CIA officials, Soufan decided not to litigate and instead published the book with the black redaction bars in place to give readers an idea of how much he was forced to withhold.[215] He claims that much of what was taken out was available publicly, including in the memoirs of other officials. For example, both the 9/11 Report and a memoir by former CIA Director George

208. Id.

209. Greg Miller, Panetta Clashed with CIA over Memoir, Tested Agency Review Process, Wash. Post (Oct. 21, 2014), http://www.washingtonpost.com/world/national-security/panetta-clashed-with-cia-over-memoir-tested-agency-review-process/2014/10/21/6e6a733a-5926-11e4-b812-38518ae74c67_story.html (on file with the *Columbia Law Review*).

210. Id.

211. Id.

212. See id. ("The CIA's dispute with its former director, and its apparent decision not to pursue the potential violation, could complicate the agency's ability to negotiate with other would-be authors and avoid accusations of favoritism.").

213. Ali H. Soufan, The Black Banners: The Inside Story of 9/11 and the War Against al-Qaeda 295–96 (2011).

214. Id. at xi.

215. See Greg Miller & Julie Tate, CIA Probes Publication Review Board over Allegations of Selective Censorship, Wash. Post (May 31, 2012), http://articles.washingtonpost.com/2012-05-31/world/35455152_1_publications-review-board-harsh-interrogation-cia-critics (on file with the *Columbia Law Review*) ("[The book] was so heavily redacted that he published [it] with black marks across many of its pages to show readers how much he was forced to withhold.").

Tenet stated that the CIA had possession of the passport photo of one of the 9/11 hijackers as early as January 2000.[216] Soufan also alleges that information included in a memoir by Jose A. Rodriguez, Jr., the former head of the NCS, was redacted from his own book.[217] Soufan claims that credible sources inside the CIA had informed him that the agency did not want the book published because it would prove embarrassing to the agency.[218]

Others have similarly alleged that agencies disapproved of their manuscripts solely because of their critical tones. Glenn Carle, a twenty-three-year veteran of the CIA who conducted interrogations after 9/11, published a memoir similarly criticizing the CIA's interrogation policies.[219] He submitted his work for review and, after more than a dozen rewrites, elected to publish his book with the redactions in place, albeit with the occasional caustic footnote.[220] Speaking about his experience working with the PRB, Carle stated, "Their goal was to intimidate me. That was quite clear."[221] Because Carle happened to know members of the board, he claimed they were exceptionally candid with him; one allegedly asked him, "Don't you realize that people could go to jail for this?" in reference to certain passages in his book depicting interrogation methods that Carle regarded as illegal.[222]

Another former CIA agent, writing under the pseudonym Ishmael Jones, wrote a book critical of the CIA's intelligence culture and submitted it for prepublication review.[223] After over a year of negotiations, during the last six months of which he heard nothing from PRB, Jones

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216. See Scott Shane, CIA Demands Cuts in Book About 9/11 and Terror Fight, N.Y. Times (Aug. 25, 2011), http://www.nytimes.com/2011/08/26/us/26agent.html (on file with the *Columbia Law Review*) (detailing redactions in Soufan's book).

217. See Miller & Tate, supra note 215 ("'Absolutely there are things that he was able to talk about that were redacted from my book,' Soufan said. 'I think it has more to do with trying to protect a narrative rather than protecting classified information.'").

218. Id.; see also Benjamin Wittes, Is CIA Pre-Publication Review Biased?, Lawfare (June 1, 2012, 7:09 AM), http://www.lawfareblog.com/2012/06/is-cia-pre-publication-review-biased/ (on file with the *Columbia Law Review*) (expressing "sympathy for those who suspect that one is allowed relative freedom to discuss the CIA [interrogation] program only if one is defending it").

219. See Glenn L. Carle, The Interrogator: An Education 291 (2011) (noting CIA attempts to hide "rounded edges of wrongdoing, and obscure the corruption of our institutions and of our systems of government caused by . . . coercive interrogation of terrorists or terrorist suspects").

220. See, e.g., id. at 60 n.1 ("Apparently the CIA fears that the redacted passage would either humiliate the organization for incompetence or expose its officers to ridicule; unless the Agency considers obtuse incompetence a secret intelligence method.").

221. Miller, supra note 38.

222. Id.

223. Complaint at 5, United States v. Jones, No. 1:10-cv-00765-GBL-TRJ (E.D. Va. Apr. 18, 2012), available at http://fas.org/sgp/jud/jones/complaint.pdf (on file with the *Columbia Law Review*).

elected to publish the book without approval.[224] He claimed, "The Book is highly critical of CIA management and outlines numerous instances of waste, fraud, and abuse by the CIA, but contains no classified information."[225] Jones's allegations appear credible enough that the CIA has initiated an internal investigation into its review practices,[226] the results of which have not yet been reported.

Jones's decision to publish without approval after months of delay may also hint at the possibility of another troublesome development: Would-be publishers, frustrated with their own experiences or having lost faith in the process based on the complaints of others, may elect to forgo the screening process altogether and publish unilaterally, effectively becoming leakers. Such uncontrolled release deprives the executive of *any* opportunity to review the materials and may lead to disclosures that cause even more serious damage. One might expect such risk to encourage reform, but a recent memo by Director John Brennan indicates that CIA review policies will only become more stringent.[227]

The use of such potentially abusive prepublication-review tactics is not a recent phenomenon. In his book, Snepp describes the court battles that led to the Supreme Court decision that bears his name,[228] which upheld the constitutionality of prepublication review.[229] One allegation among many stands out as particularly alarming: A named CIA lawyer admitted to Snepp in private that they would have "ripped [Snepp's] manuscript to shreds on any pretext."[230]

In a case predating Snepp's experiences and the standardization of nondisclosure agreements, the CIA sought to place a constructive trust on the proceeds from a book Philip Agee, a former employee, published without prepublication review and in violation of a secrecy agreement he had signed.[231] Agee freely admitted he violated the secrecy agreement and that he intended to continue doing so as an author and journalist.[232] As an affirmative defense, he argued that the CIA was practicing

224. Answer, Affirmative Defenses & Counterclaims of Defendant Ishmael Jones at 10–13, *Jones*, No. 1:10-cv-00765-GBL-TRJ, available at http://fas.org/sgp/jud/jones/021111answer.pdf (on file with the *Columbia Law Review*).

225. Id. at 13.

226. Miller & Tate, supra note 215 (reporting initiation of internal investigation by CIA).

227. See Kimberly Dozier, CIA Cracks Down on Its Own to Stop Leaks, AP: The Big Story (June 26, 2013, 6:44 PM), http://bigstory.ap.org/article/cia-cracks-down-its-own-stop-leaks (on file with the *Columbia Law Review*) (reporting review of security policies concluded "CIA also needs to be tougher with pre-publication review of articles or books by former employees").

228. Snepp v. United States, 444 U.S. 507 (1980) (per curiam).

229. See Snepp, Irreparable Harm, supra note 70, at 338–54 (describing events leading up to and surrounding *Snepp v. United States*).

230. Id. at 346.

231. Agee v. CIA, 500 F. Supp. 506, 507 (D.D.C. 1980).

232. Id. at 508.

discriminatory enforcement, choosing to bring suits only against authors of works that were critical of the CIA.[233] The court described this claim as "substantial" and denied the government's motion for summary judgment in light of evidence presented by Agee that "the CIA's past enforcement record bears a considerable correlation with the agency's perception of the extent to which the material is favorable to the agency."[234] To support claims of bias, Agee presented a list of five works that were "critical of the Agency"; of those five, "four . . . spawned suits by the Government to enforce the [prepublication-review] agreement," while no suits were filed against authors whose works the agency did not deem critical, despite those authors' admitted failure to submit their material for prepublication review.[235]

Former employees of other agencies have made similar allegations that prepublication decisions are discriminatory.[236] Such examples show how, in the absence of rigid executive-branch-wide standards, agencies' decisions can become biased.

3. *Risk of Intimidation and Delay Tactics*. — An analysis of authors' experiences with prepublication review reveals a disturbing pattern that borders on intimidation, but is at the very least an attempt to discourage publication. Although the *Marchetti* court held that, in light of the First Amendment rights at stake, agencies should respond to a review request within a reasonable period of time (suggesting thirty days),[237] agencies have not adhered to this guideline.[238] The opinion of Mark Zaid, an attorney with extensive experience in prepublication review, is worth quoting in its entirety:

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233. Id.

234. Id. at 508–09.

235. See id. (pointing out authors whose works were not critical did not submit manuscripts for review).

236. See, e.g., William J. Broad, Book Due Soon by Wen Ho Lee Is Causing Stir, N.Y. Times (Aug. 5, 2001), http://www.nytimes.com/2001/08/05/us/book-due-soon-by-wen-ho-lee-is-causing-stir.html (on file with the *Columbia Law Review*) (describing experiences of Wen Ho Lee and Danny Stillman, both former employees of Los Alamos who sought publication); Jesselyn Radack, The Man the State Dept. Wants Silenced, Salon (Apr. 12, 2012, 9:26 AM), http://www.salon.com/2012/04/12/the_man_the_state_dept_wants_silenced/ (on file with the *Columbia Law Review*) (alleging former State Department employee was required to preclear all social-media postings after publishing book critical of U.S. reconstruction efforts in Iraq, while policy was not enforced against employees authoring blogs "favorable" to Department); Leah Williams, FBI Attempts to Hold Sibel Edmond's Book Hostage, Whistle Blowers Protection Blog (Apr. 10, 2012), http://www.whistleblowersblog.org/2012/04/articles/government-whistleblowers/fbi-whistleblowers/fbi-attempts-to-hold-sibel-edmonds-book-hostage/ (on file with the *Columbia Law Review*) (describing excessive delay experienced by FBI whistleblower Sibel Edmonds in seeking publication of memoir).

237. See supra note 66 and accompanying text (discussing *Marchetti* opinion's thirty-day requirement).

238. See supra note 157 (listing qualifying language used by agencies to avoid imposition of hard deadline).

> Personally, I will openly concede that—notwithstanding the fact that the PRB sends conflicting messages to its current and former employees regarding whether a specific deadline exists for a response—a 30 day requirement is often unrealistic given the manner in which the current process has been structured for reviews. However, my experiences have revealed that delays that extend one to two years before a final response occurs have become a common routine pattern and practice with the CIA. The excessive delays have a significant impact on the submitter, especially since there is often a publication deadline involved or an important public interest underlying the contents.[239]

Thus it appears that, even if a thirty-day response time is not feasible, agencies are ignoring the precept of *Marchetti* and using undue delay as a means to frustrate authors.

This practice of delay appears particularly nefarious in light of another practice: As soon as a frustrated author brings suit under the Administrative Procedures Act,[240] the agency quickly issues a decision, rendering the claim moot.[241] Such cases appear to fall under a class of agency action described as "capable of repetition yet evad[ing] review," entitling authors to an exception to the mootness doctrine, but courts seem unwilling to find such an exception.[242] To discourage publication, an agency could thus withhold a final decision until an author makes the decision to invest time and money to litigate the issue. Once litigation commences, the APA claim is mooted by the agency's rendering a decision. Those authors who instead choose to publish without approval are sued to place a *Snepp*-style constructive trust on any profits derived from the book.[243]

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239. Rule 56(f) Declaration of Mark S. Zaid, Esq. at 2, Boening v. CIA, 579 F. Supp. 2d 166 (D.D.C. 2008) (No. 07-430), available at http://fas.org/sgp/jud/boening/zaid111207.pdf (on file with the *Columbia Law Review*).

240. 5 U.S.C. § 706(1) (2012) ("The reviewing court shall compel agency action unlawfully withheld or unreasonably delayed . . . .").

241. See, e.g., Berntsen v. CIA, 618 F. Supp. 2d 27, 29 n.2 (D.D.C. 2009) ("The Amended Complaint also alleges that the CIA failed to timely complete its review of the manuscript, and therefore, seeks an order to require the CIA to complete its review. This allegation was subsequently mooted when the CIA completed its review of the manuscript."); *Boening*, 579 F. Supp. 2d at 172 (finding plaintiff's claim moot, as PRB issued decision after suit was filed); Stillman v. CIA, 517 F. Supp. 2d 32, 36 (D.D.C. 2007) ("Stillman's APA claim is moot because there is no further relief that this Court can provide as to that claim. Stillman has already received the final classification decision that he sought from the defendant agencies.").

242. See *Boening*, 579 F. Supp. 2d at 172 ("The capable of repetition doctrine applies only in exceptional situations, and generally only where the named plaintiffs can make a reasonable showing that he or she will again be subjected to the alleged illegality. Plaintiff has made no such showing here." (citation omitted)).

243. See, e.g., United States v. Jones, No. 1:10-cv-00765-GBL-TRJ, slip op. at 1 (E.D. Va. Apr. 18, 2012), available at http://www.fas.org/sgp/jud/jones/041812-order.pdf (on file with the *Columbia Law Review*) (granting government motion for constructive trust as remedy for breach of nondisclosure agreement).

Another disturbing pattern is more suggestive of intimidation. When an agency finally renders an initial decision about required redactions, those redactions are often so numerous that the work cannot realistically be published.[244] After the author files suit, however, the number of redactions falls dramatically.[245] If the review board were truly scanning the publication solely for classified information, it is unclear why the information should suddenly become unclassified once a suit has been filed. One possibility is that the initial redactions were not made in good faith and were withdrawn only because the agency did not think it would withstand even a highly deferential level of judicial scrutiny. The redactions could thus be interpreted as an attempt to intimidate the author and discourage publication—an outsized number of redactions would render the work unpublishable and require the author to appeal the agency decision, causing even more delay.[246]

In the absence of transparent, executive-branch-wide guidance over prepublication-review policies, the risk of inconsistency, bias, and undue delay in agency review decisions is considerable. These risks boil down to one overarching concern: IC agencies are abusing the prepublication-review process to stifle dissent while facilitating the promulgation of works consistent with their own narrative. In light of the First Amendment rights at stake,[247] improvement is needed. It is important to recognize that the Constitution grants the executive branch primary authority to protect national security and conduct foreign affairs, but improvements can be made without violating this basic tenet.

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244. See, e.g., Reporter's Transcript, Motions Hearing at 10, United States v. Jones, No. 10-765 (E.D. Va. Apr. 18, 2012) [hereinafter *Jones*, Reporter's Transcript], available at http://www.fas.org/sgp/jud/jones/061511-hearing.pdf (on file with the *Columbia Law Review*) (alleging PRB denied plaintiff right to publish anything but footnotes).

245. See, e.g., *Berntsen*, 618 F. Supp. 2d at 29 ("During the course of the litigation . . . Berntsen provided the PRB with a classified submission identifying 97 items that he wanted to publish in his manuscript. . . . [T]he PRB completed its review of the 97 items and agreed to withdraw its objections as to all but 18 of the items . . . ."); *Stillman*, 517 F. Supp. 2d at 35 ("In October 2000, Stillman was informed that the DOE, DoD, and CIA did not want any part of his manuscript published. In June 2001, Stillman filed a lawsuit . . . challenging their classification decision. Soon after Stillman filed the lawsuit, the government released the majority of the manuscript for publication."); Plaintiff's Opposition to Defendants' Second Motion for Summary Judgment at 34, Shaffer v. Def. Intelligence Agency, 901 F. Supp. 2d 113 (D.D.C. 2013) (No. 10-2119(RMC)) [hereinafter *Shaffer*, Plaintiff's Opposition], available at http://fas.org/sgp/jud/shaffer/081213-opp.pdf (on file with the *Columbia Law Review*) ("The defendants acknowledge that in 2010 they identified 433 particular passages for redaction based on alleged classification. Not even three years later, nearly half of the redacted passages no longer merited classification." (citation omitted)).

246. Indeed, one author's attorney alleges, "In 2010, the DIA claimed that there were . . . covert names of four operatives in *Operation Dark Heart*; an assertion [the author] knew to be false . . . . '[W]hen [the author] confronted [the DIA reviewer] . . . on this issue . . . he admitted "yeah—we just made that up as an excuse to stop publication."'" *Shaffer*, Plaintiff's Opposition, supra note 245, at 35.

247. See supra Part I.B.1 (explaining First Amendment rights at stake).

III. SOLUTIONS

Part III discusses potential solutions to the issues identified in Part II. Part III.A proposes a congressional solution—legislation that would provide more specific, mandatory guidance for agencies conducting review. Part III.B urges the executive to initiate its own reforms, most importantly by establishing an independent, interagency review panel. Finally, Part III.C discusses the need for robust judicial review of agency decisions.

A. *Congressional Solutions*

In recognition of authors' First Amendment rights and the public interest in access to information about the IC's activities, Congress could overhaul the prepublication-review process while still respecting the executive's Article II powers. As it stands, the only statutory authority for prepublication review is the broadly worded mandate of the National Security Act of 1947 to protect intelligence sources and methods.[248] Congress could pass a law with mandatory guidelines for prepublication review, addressing some of the issues identified in Part II.

First, Congress could mandate robust judicial review of disputed classification decisions. Such review could be similar in scope to that in the proposed State Secrets Protection Act.[249] That bill would have made in camera inspection of classified information mandatory[250] and avoided ex parte proceedings by allowing attorneys to obtain security clearances and participate in the inspection of classified evidence.[251] The idea of having to justify—in the presence of opposing counsel—a classification decision before a less deferential judge may encourage agencies to be more judicious in their decisions to classify information,[252] particularly if the material is already in the public domain. It may even dissuade agencies from litigating the issue at all, in order to avoid attracting even more attention to any redactions.

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248. See supra notes 42–43 and accompanying text (analyzing text of statute).

249. S. 2533, 110th Cong. (2008).

250. See id. § 4052(b)(1)(A) ("[A]ll hearings under this chapter *shall* be conducted in camera." (emphasis added)).

251. See id. § 4052(b)(2) (permitting ex parte hearings only if, after in camera review of evidence, court determines "interests of justice and national security cannot adequately be protected").

252. Ex parte proceedings have been criticized in other contexts; for example, after the unauthorized disclosures by Edward Snowden, several proposals to reform the Foreign Intelligence Surveillance Court were circulated, all of which would make the process more adversarial. See, e.g., FISA Improvements Act of 2013, S. 1631, 113th Cong. § 4 (2013) (authorizing Foreign Intelligence Surveillance Court to "appoint amicus curiae to assist the court" in Foreign Intelligence Surveillance Act proceedings); FISA Court Reform Act of 2013, S. 1467, 113th Cong. (2013) (establishing "Office of the Special Advocate" to review applications and participate in proceedings before Foreign Intelligence Surveillance Court).

One could argue, however, that stronger judicial review would not really influence agency action because there is no real drawback—even if an agency's classification is invalidated by a judge, the agency is essentially in the same position it would have been in had it simply not classified the information. Because there is no penalty for an erroneous classification (other than the release of the information), there is no incentive to classify information more carefully. The natural solution, then, is to penalize agencies for erroneous classifications. Congress could adopt a fee-shifting provision that would allow prevailing authors to collect attorneys' fees and other reasonable costs. For classification decisions that suggest arbitrary or capricious action on the part of the agency, courts could appoint a special counsel to determine whether disciplinary action is warranted against the individuals involved. Such a mechanism may seem excessively intrusive on the executive, but FOIA permits just such penalties for agencies that wrongfully withhold information under the statute.[253] If such penalties are acceptable in the context of FOIA litigation, where no fundamental rights are involved, then their adoption in the context of prepublication review, where an individual's First Amendment rights are at stake, should not be any more contentious.

Second, Congress could specify that the works of former employees are to be reviewed only for *already*-classified information, as opposed to "classifiable" information. This would address concerns with post hoc classification of information for questionable purposes, assuming the information—were it truly damaging—would have been classified before the author's work came before the agency. Of course, agencies may legitimately need to classify information post hoc, whether because of a purely negligent failure to do so previously or because of a change in the national-security environment. Congress should recognize this need while preventing agency abuse of it. It can do so by mandating a presumption for lower courts: Where an agency decides to classify information that was unclassified at the time the author submitted a manuscript, courts must presume that the classification is illegitimate and shift the burden to the agency to show a legitimate national-security interest. Congress could go even further and mandate a higher burden of proof for post hoc classification—clear and convincing evidence, for example. The Federal Rules of Criminal Procedure similarly encourage attorneys to raise objections in a timely manner by mandating a prohibitively high standard of review for objections raised only on appeal.[254] This should incentivize agencies to classify the information in the first instance,

253. See 5 U.S.C. § 552(a)(4)(E) (2012) (permitting prevailing plaintiff to recover "reasonable attorney fees and other litigation costs reasonably incurred"); id. § 552(a)(4)(F) (requiring special counsel to determine whether disciplinary action is warranted where court questions whether agency personnel acted arbitrarily or capriciously in withholding information).

254. Fed. R. Crim. P. 52(b) (permitting consideration only of "plain error" if issue was not raised at trial).

rather than only after it has come before them under prepublication review. Any concerns about depriving agencies of their ability to classify information at any time[255] should be allayed by the fact that this framework only calls for heightened judicial review of such post hoc classification decisions, not an outright ban of them.

Of course, if post hoc classifications come under higher scrutiny, burden shifting may perversely incentivize agencies to simply classify everything ex ante, thereby exacerbating overclassification in an already overclassified intelligence community. This risk reiterates the importance of the aforementioned penalties for erroneous classification decisions.[256] In order to deter agencies from resorting to overly broad ex ante classification, the potential penalties—both individual and institutional—must be meaningful. There will certainly be close calls, where reasonable minds disagree over the need to classify certain information, and the special counsel should take that into account when determining the need for and extent of disciplinary proceedings. But the penalties must be substantial enough to deter abuse and go beyond mere fee shifting. From a policy perspective, such penalties would also help reduce classification—a reduction that the executive readily acknowledges is necessary.[257]

These two mechanisms combined—penalties for both erroneous or capricious classifications and a higher standard of proof for post hoc classifications—should encourage agency officials to object only to truly damaging national-security information during prepublication review while preventing them from overclassifying information ex ante. But both of these potential congressional solutions would ultimately rely on the courts to heed the call for more robust judicial review—naïvely optimistic in light of the judiciary's track record,[258] perhaps, but for which there is some precedent.[259]

B. *Executive-Branch Solutions*

In light of the wide discretion granted to it by Congress in the National Security Act of 1947,[260] the executive branch could, itself, standardize prepublication-review practices across agencies by establishing an interagency review panel. One example of such executive-branch-

255. See supra note 195 and accompanying text (explaining agencies may classify information at any time).

256. See supra note 253 and accompanying text (discussing penalties for wrongful withholding of information in response to FOIA request).

257. See, e.g., Reducing Over-Classification Act, Pub. L. No. 111-258, 124 Stat. 2648 (2010) (codified as amended in scattered sections of 6 and 50 U.S.C.) (requiring Department of Homeland Security to develop strategy to reduce overclassification).

258. See supra note 202 and accompanying text (describing courts' unwillingness to second-guess classification determinations).

259. See infra notes 279–289 and accompanying text (discussing case involving unusually robust scrutiny of government's classification claims).

260. See supra notes 42–43 and accompanying text (discussing text of statute).

wide oversight is ISCAP, the interagency panel that reviews challenges to classification decisions.[261] ISCAP has been praised as one of the few successful reform efforts and should serve as a model going forward.[262] Its success lies in its composition—it is made up of representatives from "the major national security agencies that are the most prolific classifiers," including the Departments of Defense, Justice, and State, as well as the CIA, the National Security Council, and the National Archives and Records Administration.[263] By placing declassification authority beyond the agency that classified the information originally and in ISCAP, bureaucratic and political self-interest is removed from the equation.[264]

As a successful example of interagency review of classification decisions, ISCAP review would seem to be a model for prepublication review. As mentioned above, however, ISCAP review is not available to those challenging a classification determination in the context of prepublication review.[265] The first and most modest step toward reform, then, seems simple enough: Permit dissatisfied authors to appeal their case to ISCAP, an interagency panel with less interest in preventing publication of works critical of one agency.

The executive branch should not stop there, however. Seizing on ISCAP as a model, it could create, by executive order, a similar interagency panel to conduct prepublication review in the first instance. Creating an ISCAP-like interagency prepublication-review panel would remove agency bias and address the "second look" concern articulated above,[266] as an interagency panel with no authority to classify information could not classify information post hoc. Providing review in the first instance, as opposed to providing appellate review, would address allegations that agencies are using delay tactics to discourage potential authors from publishing.[267] Even if review were to take longer than the thirty days recommended by *Marchetti*,[268] authors would have no reason to suspect that the delay was an attempt to discourage publication.

One potential criticism of such a panel is that agencies are in the best position to determine the nature of damage that would result from disclosure of information that they classify. Such concerns get to the

261. See supra notes 196–197 and accompanying text (describing ISCAP's role).

262. See Steven Aftergood, Reducing Government Secrecy: Finding What Works, 27 Yale L. & Pol'y Rev. 399, 407 (2009) (praising ISCAP as "unexpectedly effective").

263. Id.

264. Id. at 409.

265. See supra note 196 and accompanying text (identifying explicit exclusion of prepublication-review decision from ISCAP review).

266. See supra notes 195–196 and accompanying text (describing issues with agencies conducting "second looks" to determine whether information *should* be classified, as opposed to whether it already actually is).

267. See, e.g., *Jones*, Reporter's Transcript, supra note 244, at 10 (claiming eighteen months of review constituted effective breach of secrecy agreement by agency).

268. See supra note 66 and accompanying text (explaining *Marchetti* thirty-day deadline is not intended to be hard-and-fast requirement).

larger debate over centralization versus decentralization in the context of national security.[269] While the agency may be in the best position to assess the extent of the damage that would result, it is equally true that the U.S. classification system is meant to have executive-branch-wide application.[270] Furthermore, a primary goal in the creation of ODNI was to encourage collaboration and efficiency,[271] an area in which the prepublication-review process could certainly improve. Most importantly, an executive-branch-wide panel could better protect national security by ensuring consistency. For example, an interagency panel could have prevented the confusion surrounding publication of Shaffer's book, where DoD and DIA had differing opinions of what was sensitive information.[272] If the information divulged in the first edition of Shaffer's book truly was damaging to national security, the executive should be *encouraging* the creation of an interagency panel that could prevent such lapses.

Another potential issue is that of agency capture: Since the interagency panel would be made up of IC agencies, the review process would not be independent. Instead of scrutinizing the information to determine whether it is actually sensitive, officials may simply defer to the judgment of the agency whose information is being published with the understanding that other officials will return the favor when their agency's information is on the line. While such misplaced esprit de corps may indeed be difficult to prevent, the potential for bias should not be fatal to the idea of an interagency panel. There are plenty of executive-branch bodies that command respect for their independence. The Office of Legal Counsel, for example, has long been known for its strong, independent legal analysis.[273] If the executive could portray a stint as an agency representative on the interagency review panel as prestigious, the panel could attract talented, independent-minded employees and create an atmosphere conducive to impartial review. While such a reputation cannot be established overnight, the emphasis and prestige placed on "joint duty assignments" since 9/11 show it would not be impossible.[274]

269. See generally, e.g., Anne Joseph O'Connell, The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World, 94 Calif. L. Rev. 1655, 1657 (2006) (questioning "siren call" of unification of intelligence).

270. See supra notes 104–105 and accompanying text (describing executive-branch-wide role of ISOO in classification decisions).

271. See supra notes 107–109 and accompanying text (describing creation of ODNI).

272. See supra notes 1–2 and accompanying text (describing Shaffer's experience with review boards).

273. See, e.g., Trevor W. Morrison, Constitutional Alarmism, 124 Harv. L. Rev. 1688, 1708 (2011) (book review) ("OLC's advice can and does impose meaningful legal constraints on its clients, and both OLC and its clients have powerful incentives to maintain OLC's reputation for doing so.").

274. See IC Joint Duty, Office of the Dir. of Nat'l Intelligence, http://www.dni.gov/index.php/about/organization/ic-joint-duty (on file with the *Columbia Law Review*) (last visited Oct. 18, 2014) (quoting description of Joint Duty Program for IC professionals as "'key to improved national security' and 'innovative solution for improving cross-agency understanding'").

The success of ISCAP is also encouraging, insofar as it suggests that the culture of secrecy shared by the agencies does not necessarily create a bond that prohibits objective, collective assessment.[275] Furthermore, a truly independent interagency panel may exude more legitimacy than the prepublication offices of individual agencies. If so, authors would probably be more willing to submit themselves to the process, which would prevent them from becoming leakers and avoid all the extra damage concomitant with uncontrolled leaks.[276]

In broader terms, the proposal for an interagency panel is not very radical. Separation-of-powers concerns are particularly important in the context of national security,[277] but none would exist here. Even if the panel's existence were mandated by legislation, the panel would be made up of executive-branch agencies. It would not take power away from the executive, but would instead promote consistency and efficiency in national security. The executive branch should thus consider the establishment of a centralized, interagency panel responsible for conducting all prepublication review.

C. *Judicial Solutions*

The most important but perhaps least promising source of solutions for the problems with prepublication review remains: the judiciary. Congress has already granted the judiciary the power and the means—through in camera inspection and other tools—to question the executive's classification decisions in the context of FOIA, but courts seem simply unwilling to do so.[278] But there are some hints of promise. For example, the D.C. District Court recently ruled against the FBI and in favor of former agents attempting to publish, among other works, a memoir.[279] The court's opening line summarizes the case best:

> This is a sad and discouraging tale about the determined efforts of the FBI to censor various portions of a 500-page manuscript, written by a former long-time FBI agent, severely criticizing the FBI's conduct of the investigation of a money laundering scheme in which United States-based members of the Hamas terrorist organization were using non-profit

275. See supra notes 197–198, 262 and accompanying text (explaining ISCAP and its success).

276. See supra Part II.C.2 (arguing would-be authors, frustrated with their experiences, may elect to publish unilaterally, depriving government of *any* opportunity to review works and potentially leading to more damaging disclosures).

277. See, e.g., Morrison, supra note 273, at 1742–43 (criticizing Ackerman's proposal to create "Supreme Executive Tribunal" to settle disputes between Congress and executive branch on separation-of-powers grounds).

278. See supra note 202 and accompanying text (describing unwillingness of courts to scrutinize classification decisions).

279. Wright v. FBI, 613 F. Supp. 2d 13, 24, 31 (D.D.C. 2009) (holding government had not satisfied its burden for all but one censorship request).

> organizations in this country to recruit and train terrorists and fund terrorist activities both here and abroad.[280]

This opening did not bode well for the government, and the court proceeded to strike down all but one of the redactions proposed by the FBI.[281] But more remarkable is the way in which the court came to its decision. Instead of simply taking the government at its word, the court applied the *Pickering* balancing test[282] to determine whether the government's interest in censoring the material—which must be articulated with "reasonable specificity"—outweighed the author's First Amendment interest in publication.[283] It also adopted the approach of the D.C. Circuit,[284] stating that the court's review must be more searching than in the FOIA context.[285] In doing so, it granted some deference to the FBI, but largely adopted a de novo approach.

For example, it swept aside the FBI's argument that the freezing of bank accounts constitutes "sensitive law enforcement activities, methods, and capabilities" and declared it "common knowledge" that such techniques were used as part of the government's counterterrorism strategy.[286] Because it was "common knowledge," the government could not demonstrate that its interest in censoring that information outweighed the public's interest in disclosure; the government's objection therefore failed the *Pickering* test.[287] The court also rejected censorship of material that would otherwise have been protected by the internal-deliberative-process exemption of FOIA:[288] The government failed in its burden to "go beyond the FOIA standard" and present with "reasonable specificity 'reasonably convincing and detailed evidence of a serious risk that intelligence sources and methods would be compromised' by disclosure of the materials discussed" such that it would outweigh the plaintiff's First

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280. Id. at 15.

281. See id. at 24 ("The Government Has Satisfied Its Burden to Justify Censorship for Only One of Its Fourteen Objections to the *Fatal Betrayals* Manuscript.").

282. See supra note 51 and accompanying text (articulating *Pickering* test).

283. *Wright*, 613 F. Supp. 2d at 22–23 (quoting post-*Pickering* case McGehee v. Casey, 718 F.2d 1137, 1148 (D.C. Cir. 1983)) (internal quotation marks omitted).

284. See supra note 201 and accompanying text (discussing D.C. Circuit's understanding of appropriate scope of judicial review).

285. *Wright*, 613 F. Supp. 2d at 24 ("Consequently, censorship is prohibited under the First Amendment where it fails the *Pickering/NTEU* balancing test, even if the material falls within a FOIA Exemption.").

286. Id. at 25–26. The court rejected the government's contention that such techniques were covered by Exemption 7 of FOIA. Id.; see 5 U.S.C. § 552(b)(7) (2012) (exempting from disclosure "records or information compiled for law enforcement purposes" that would "disclose techniques and procedures for law enforcement investigations or prosecutions").

287. *Wright*, 613 F. Supp. 2d at 25–26.

288. See 5 U.S.C. § 552(b)(5) (exempting from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency").

Amendment interests.[289] Such unyielding judicial review provides a glimmer of hope, but it is still all too rare, despite recent decisions in the FOIA context that may justify some enthusiasm.[290]

Some might argue that such robust review is rare because it *should* be rare—both the courts and Congress have historically deferred to the executive in the area of national security,[291] and prepublication review is no different. While courts should be mindful not to overstep their authority—by reversing a classification decision on a purely policy-based rationale, for example—that argument ignores the First Amendment rights involved. Where fundamental rights are involved, courts have applied strict scrutiny even in the area of national security.[292] Congressional imprimatur—implied in FOIA and in this Note's proposals,[293] should they be adopted—further militates in favor of robust review in the context of prepublication review.

The judiciary must protect the First Amendment rights of former employees by acting as a meaningful check on the executive's assertions of secrecy. The *Wright* court showed that the judiciary has ample tools to do just that, and other courts should follow its lead. If the solutions outlined above—including executive-branch reform—are to work, the judiciary must heed the call of the other branches and perform its duties. Only then can the public be assured of a fair system of prepublication review that protects the First Amendment rights of authors and guarantees public access to their insights while simultaneously ensuring the public is kept safe by preventing the disclosure of truly sensitive national security information.

CONCLUSION

The highly secretive nature of the intelligence community makes it difficult for the public to assess its performance. In this context, memoirs and other publications by current and former employees provide crucial insight. More importantly (and unlike in the FOIA context), a fundamental constitutional right is at stake—the First Amendment right

289. *Wright*, 613 F. Supp. 2d at 29–30 (quoting McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983)).

290. See N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100, 124 (2d Cir. 2014) (requiring OLC to release internal memorandum explaining legal reasoning as to lawfulness of targeted killings of U.S. citizens by drone aircraft); ACLU v. CIA, 710 F.3d 422, 427–30 (D.C. Cir. 2013) (holding CIA could not refuse to confirm or deny existence of drone program in response to FOIA request in light of its public statements to contrary).

291. See supra notes 19–24 and accompanying text (discussing deference granted to executive in national-security matters).

292. See, e.g., Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to purported exercise of war powers even in time of national emergency).

293. See supra Part III.A (proposing Congressional solutions to prepublication review).

of current and former employees to share their experiences working in this highly secretive field. Considering the important interests at issue for both authors and the public, the current decentralized system of prepublication review has proven inadequate in protecting such publications. The lack of executive-branch-wide guidance permits too much discretion for individual agencies, creating the potential for abuse. In light of the IC's ever-expanding reach and influence and the disturbing trend of overclassification of national-security information, reasonable access to all feasible means of evaluating the executive's work in this area is essential to maintaining an informed electorate. All three branches of government must therefore take action to reform the prepublication-review system and ensure it is not abused in a way that could stifle dissent or otherwise deprive the public of information necessary for evaluating the IC's performance and—ultimately—for participating effectively in the democratic process.